NOTES

BLITZING *BRADY*: SHOULD SECTION 4(A) OF THE NORRIS-LAGUARDIA ACT SHIELD MANAGEMENT FROM INJUNCTIONS IN LABOR DISPUTES?

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With its decision in Brady v. NFL*, the Eighth Circuit interpreted section 4(a) of the Norris-LaGuardia Act to broadly shield management from injunctions in labor disputes. This decision adopted a position briefly supported by the Second and Sixth Circuits, but thoroughly criticized by the First, Seventh, and Ninth Circuits. This Note argues that the Eighth Circuit's decision potentially protects management to the detriment of workers in labor disputes, contrary to the text and stated purpose of the Norris-LaGuardia Act: Courts should instead interpret section 4(a)'s injunction prohibition in labor disputes to allow workers to enjoin management to halt adverse employment actions, such as employee lockouts, in appropriate situations.*

INTRODUCTION

Though adopted in 1932 to help the burgeoning labor movement overcome management hostility, the Norris-LaGuardia Act (NLGA) continues to play an integral role in modern labor conflicts.[1] Recently, the 2011 National Football League's (NFL) lockout of its players reached its legal resolution after attorneys argued competing interpretations of the NLGA before the Eighth Circuit in *Brady v. NFL*,[2] leaving the court to decide if a historically pro-labor statute should shield the NFL from injunctions.[3] In the face of mixed decisions on the issue amongst circuit courts, the Eighth Circuit interpreted the NLGA to protect NFL team owners—to the detriment of NFL players—by prohibiting injunctive re-

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1. Act of Mar. 23, 1932, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115). Various sections of the Act are discussed below, with citations to the codified statute. The Act is named after the two sponsors of the legislation: Sen. George W. Norris of Nebraska and Rep. Fiorello H. LaGuardia of New York.

2. 644 F.3d 661 (8th Cir. 2011).

3. An injunction is defined as: "A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an *irreparable injury will result* unless the relief is granted." Black's Law Dictionary 855 (9th ed. 2009) (emphasis added). The procedure for obtaining an injunction under the NLGA entails specific procedural safeguards. See infra note 55 (listing requirements). This differs from the typical procedure in federal court for obtaining an injunction. See Fed. R. Civ. P. 65.

lief against management in "labor disputes."[4]

Congress passed the NLGA to remedy a long history of employee abuse in federal court, specifically the judiciary's liberal grants of injunctive relief in favor of management in labor disputes to halt worker strikes.[5] Accordingly, NLGA section 4(a) embodies an anti-injunction principle "declaratory of the modern common law right to strike."[6] Section 4(a) reads: "No court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from . . . refusing to perform any work or to remain in any *relation of employment*."[7] Despite the stated objective of the NLGA to protect labor, courts remain divided on whether section 4(a) prohibits injunctions in labor disputes only when sought by management against labor, or also when sought by labor against management.[8] This judicial divergence stems from the ambiguity of the phrase "relation of employment," which can be read both to encompass and to circumscribe employers.[9]

Without a direct comment by the Supreme Court on section 4(a)'s capacity to bar injunctive relief against management,[10] circuit courts have interpreted the provision's scope in varying ways. The Second, Sixth, and now Eighth Circuits' readings of section 4(a) extend the same protection against injunctions (or, immunity to injunctions) to both management and labor.[11] However, the First, Seventh, and Ninth Circuits have inter-

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4. See infra note 54 and accompanying text (describing NLGA's broad definition of "labor disputes"). Throughout this Note, the term "labor" is interchanged with "employee(s)" and "worker(s)," and "management" with "employer(s)"; the same meaning is intended by each usage.

5. See infra Part I.A–C (describing NLGA history). A strike occurs when "employees withhold their services in a manner that interferes with their employer's production with the object of pressuring the employer into granting a work-related concession." Serv. Elec. Co., 281 N.L.R.B. 633, 636 (1986).

6. Felix Frankfurter & Nathan Greene, The Labor Injunction 217–18 (1930).

7. 29 U.S.C. § 104(a) (2006) (emphasis added).

8. Federal labor legislation fails to introduce a settled definition of a lockout, but a comprehensive definition is "the withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them." 2 The Developing Labor Law 1639–40 (John E. Higgins, Jr. ed., 5th ed. 2006). For an examination of the legally acceptable forms of employee lockouts, see generally David A. Maddux, Lockouts, Fresh Perspective on an Old Controversy, 22 Bus. Law. 1095 (1967); Samuel David Rosen, The Evolution of the Lockout, 4 Suffolk U. L. Rev. 267 (1970).

9. As reasoned in *Brady*, section 4(a) is the provision that would protect employer actions, such as lockouts, from injunctions since the employer is refusing to remain in a "relation of employment" with the employees by not allowing them to work. See infra notes 72–75 and accompanying text (describing three possible interpretations of section 4(a)).

10. See infra Part I.D.2 (discussing Supreme Court decisions accommodating NLGA).

11. See Brady v. NFL, 644 F.3d 661, 680–81 (8th Cir. 2011) ("[Section 4(a)] of the [NLGA] deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees."); Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1124 (6th Cir. 1981) (noting terms of NLGA's "broadest prohibitions

preted section 4(a) to protect only labor, and not management, from injunctive relief sought by the other side in a labor dispute.[12] This Note argues that federal courts should interpret section 4(a)'s injunction prohibition as a one-way street, generally barring management from enjoining labor strikes but allowing labor to enjoin management in appropriate situations, such as employee lockouts, to prevent irreparable harm.

The Supreme Court has stated that when a statutory text is ambiguous, as with NLGA section 4(a), courts should look to the statute's purpose,[13] and the Supreme Court has previously taken this approach when interpreting the NLGA.[14] Accordingly, a reading of section 4(a) to shield solely employees from injunctions—consistent with the First, Seventh, and Ninth Circuits, and Judge Bye's dissent in *Brady*—is preferable based on a holistic examination of the Act's text and animating purpose. In contrast, reading section 4(a) to guard both employees and employers from injunctions in labor disputes—as the Second, Sixth, and Eighth Circuits endorse—renders parts of section 4(a)'s text superfluous and produces legal results that would accommodate the protection of employers at the expense of employees, a result inconsistent with the NLGA's intent. For example, by barring employee injunctive relief, employees may suffer irreparable economic damage in situations such as illegal employee lockouts.[15] Furthermore, this approach to section 4(a) may alter established labor doctrine, such as employee reinstatement, through its broad employer injunction protection.[16] *Brady* is particularly important to the circuit split as it is the most recent, prominent, and thorough decision on the issue, thereby providing an interpretation of section 4(a) to which courts may defer in future labor disputes.

Part I of this Note provides a background for the circuit split, explaining the text of the NLGA, its historical context, and judicial ac-

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do not distinguish between injunctions against labor and injunctions against management"); Clune v. Publishers' Ass'n, 214 F. Supp. 520, 528–29 (S.D.N.Y.) (reasoning NLGA "appl[ies] to injunctions sought against employers"), aff'd per curiam mem., 314 F.2d 343 (2d Cir. 1963).

12. See Local 2750, Lumber & Sawmill Workers Union v. Cole, 663 F.2d 983, 986 (9th Cir. 1981) ("Section 4(a) was intended to protect the right of workers and labor unions to strike . . . ."); de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 291 (1st Cir. 1970) ("Our understanding of the legislative history behind section 4(a) leads us to conclude that that section was not intended as a protection for employers."); Bhd. of Locomotive Eng'rs v. Balt. & Ohio R.R. Co., 310 F.2d 513, 518 (7th Cir. 1962) ("We find nothing in the statement of policy to indicate any intention to deny jurisdiction to issue injunctions against employers.").

13. See infra note 189 and accompanying text (noting Supreme Court use of congressional intent in statutory interpretation in face of ambiguity).

14. See infra note 120 (noting Supreme Court's purposive approach in Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970)).

15. See infra notes 207–210 and accompanying text (discussing illegal lockouts).

16. See infra notes 214–216 and accompanying text (explaining potential Labor-Management Relations Act conflict).

commodations to the Act's anti-injunction principle. Part II lays out the contrasting circuit interpretations of section 4(a) prior to *Brady* and analyzes both the Eighth Circuit's *Brady* decision and the contrary approach advocated by Judge Bye. Part III argues that an analysis consistent with Judge Bye's dissent in *Brady* best accounts for the text and intent of the NLGA, while limiting the harms to labor and jurisprudential upheaval that could result from the *Brady* majority opinion.

I. LAW BY INJUNCTION AND THE HISTORY OF THE NLGA

This Part first describes the interplay of labor, management, and the judiciary in the nineteenth century. It then turns to a discussion of the Clayton Act, the purpose and structure of the NLGA, and judicial exceptions relevant to the NLGA's pro-labor intent and the circuit split at issue.

A. *Interactions of Labor and the Judiciary in Nineteenth-Century Labor Disputes*

In order to better understand the NLGA, it is helpful to review the Act's historical context and the events behind its enactment. The abuse of labor-related injunctions took root in early American judicial proceedings involving workers and management. The first labor case reported in the United States centered on a strike for higher wages and ended with the strikers convicted of criminal conspiracy.[17] Though the practice of criminally prosecuting strikers faded over the first half of the nineteenth century, management's use of civil suits rose in frequency.[18] However, management often viewed monetary damages as insufficient compensation for lengthy strikes; suing unions as entities entailed complicated procedural issues that resulted in protracted trials, often decided by juries sympathetic to workers.[19] Consequently, the injunction quickly became the favored tool of management to combat strikes.[20]

At this time, the availability of injunctive relief depended on the

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17. Commonwealth v. Pullis (Phila. Mayor's Ct. 1806), reprinted in 3 Commons & Gilmore, The Documentary History of American Industrial Society 59–248 (1910); see also James W. Wimberly, Jr., The Labor Injunction—Past, Present, and Future, 22 S.C. L. Rev. 689, 689 (1970) ("The case held the association of employees for the purpose of raising wages to be criminal conspiracy.").

18. See Note, Accommodation of the Norris-LaGuardia Act to Other Federal Statutes, 72 Harv. L. Rev. 354, 354 (1958) [hereinafter Accommodation of the NLGA] ("Employers . . . sought to enjoin union conduct on various tort theories such as nuisance, trespass, and interference with advantageous relationships.").

19. For a discussion of the reasons management preferred to use injunctions in labor disputes, see Ralph K. Winter, Jr., Comment, Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia, 70 Yale L.J. 70, 72 (1960) ("Damage suits had proved unsatisfactory to employers seeking relief against illegal union activities.").

20. See Edwin E. Witte, The Government in Labor Disputes 141–50 (1932) (discussing practical and procedural difficulties of civil suits against unions).

court's assessment of the strike's legitimacy based on an "objectives test."[21] Under this test, "if the union's objective [for striking] appeared to the judge to be lawful, only then would he refuse a temporary restraining order."[22] This typically required management to produce only scant evidentiary support as ex parte injunctions were often issued against workers before they had a chance to produce alternative evidence.[23] The "objectives test" also proved highly dependent on the sitting judge's economic and social views.[24] Unfortunately for workers, most judges of the era lacked sympathy for their efforts to improve their terms of employment,[25] and the "objectives test" allowed judges to grant a large number of injunctions in favor of management to frustrate strikes.[26] Additionally, judges would often issue a blanket injunction to constrain all activity surrounding a strike. These injunctions extended to persons with "names fictitious, real names unknown to the complainant, and all other persons unknown to the complainant and unknown to the court," thus broadly

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21. Accommodation of the NLGA, supra note 18, at 354 ("The opinion of Chief Justice Shaw in *Commonwealth v. Hunt*, decided in 1842, laid to rest the treatment of collective labor activity as a criminal conspiracy and also foreshadowed the legal attitude which considered 'objectives' and 'means' of union activity as the indicia of its legality." (footnote omitted)).

22. Wimberly, supra note 17, at 690; see also Randall L. Stamper, Note, Giving Strength to the No-Strike Clause: Accommodation to Allow Federal Injunctions, 46 Notre Dame L. Rev. 526, 526 (1971) ("Conduct which interfered with business relationships was felt to be unlawful, and since most union activity did interfere with business relationships it was subject to ex parte injunction by the employer.").

23. See Winter, supra note 19, at 73 (describing process for obtaining injunctions as "particularly subject to procedural inadequacies and substantive error" due to hasty and emotional atmosphere of trial, "amorphous character of the substantive law," and "inadequacy of evidence").

24. See Charles O. Gregory, Labor and the Law 95–104 (2d rev. ed. 1961) (noting that under "objectives test" judges acted on personal notions of fairness, leading "many courts to grant sweeping injunctions on the basis of personal or class dislike of organized labor's economic program instead of in accordance with settled standards of law"); see also William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 Wis. L. Rev. 767, 768 (discussing nineteenth-century judges' promotion of "free labor" and "independence of the workingman").

25. See Stamper, supra note 22, at 526–27 (explaining that judges "tended to decide cases according to their conservative social and political views . . . [and] were inclined to be more favorable to management, finding union activity to be a restraint of trade or a prima facie tort"). *Adair v. United States* provides a glimpse of judicial views of the time. 208 U.S. 161 (1908). In *Adair*, Justice Harlan stated that "the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." Id. at 175.

26. See Frankfurter & Greene, supra note 6, at 64 ("Of the one hundred and eighteen cases reported in the federal courts during the last twenty-seven years, not less than seventy ex parte restraining orders were granted without notice to the defendants or opportunity to be heard.").

threatening all worker coordination in labor disputes.[27]

Not only did judges consistently favor management when granting injunctions without substantial supporting evidence under the "objectives test," but even temporary injunctions had a devastating impact on the effectiveness of strikes during this time. After a court issued a temporary injunction, employees would quickly cease striking for fear of civil penalties and criminal contempt hearings.[28] In such hearings, individual strikers were often found guilty without a jury, usually appearing before the same (likely unsympathetic) judge who issued the original injunction.[29] This specter of legal retribution meant that a strike rarely resumed after a temporary injunction expired. In fact, management often did not pursue permanent injunctions after obtaining a temporary injunction, reflecting the effectiveness of a temporary injunction in ending strikes permanently.[30] Crucially, with the judiciary providing a quick and economically painless means to quell labor unrest, management simply continued the practices that had first inspired labor to organize.[31]

In sum, through a combination of subjective judicial standards, the low threshold of evidence required to secure injunctions, the power of temporary injunctions to end strikes permanently, and labor's reluctance to defy court orders, judicial grants of injunctions in favor of management in labor disputes throughout the nineteenth century prevented laborers from striking successfully to improve their terms of employ-

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27. See Jon R. Kerian, Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act, 37 N.D. L. Rev. 49, 52 (1961) (introducing "blanket injunctions" and explaining their "sweeping effect").

28. Then-Secretary of War and future Chief Justice of the Supreme Court William Howard Taft explained why workers obeyed temporary injunctions despite knowing their general right to strike:

> [T]hey are not lawyers; their fears are aroused by the process with which they are not acquainted, and, although their purpose may have been entirely lawful, their common determination to carry through the strike is weakened by an order which they have never had an opportunity to question, and which is calculated to discourage their proceeding in their original purpose.

42 Cong. Rec. app. at 576 (1908) (statement of Rep. Henry D. Clayton) (quoting William Howard Taft); see also Witte, supra note 20, at 100 ("[A]ny violation of an injunction can be treated as either a civil or a criminal contempt . . . .").

29. Witte, supra note 20, at 100–01.

30. Winter, supra note 19, at 73 ("The finality of [temporary injunctions] was demonstrated by the relative infrequency with which employers sought permanent injunctions."); see also Frankfurter & Greene, supra note 6, at 79–80 (proposing possible reasons for "statistics . . . peculiar to labor disputes," including labor's fear of punishment by violating these injunctions); Wimberly, supra note 17, at 690 n.6 ("For example, there were 118 reported applications for injunction in the Federal courts between the years 1900 and 1927. Nine were denied, but there were only 33 appeals from the restraining orders. Of the 88 temporary injunctions reported from 1901–1928, only 32 reached the permanent injunction stage." (citation omitted)).

31. Archibald Cox, The Role of Law in Labor Disputes, 39 Cornell L.Q. 592, 595 (1954).

ment.[32] As the next section will show, injunctions continuously surfaced in labor disputes as an anti-labor device, a trend that intensified in the late nineteenth century and continued despite legislative attempts to end the use of injunctions by management prior to the NLGA's passage.

B. *The Rise and Fall of Worker Injunction Protection Under the Clayton Act*

In 1895, prior to the passage of the Clayton Act, the Supreme Court exacerbated the abuse of anti-labor injunctions with its decision in *In re Debs*, in which an employer challenged the legality of a strike under the Sherman Act.[33] The Sherman Act permitted courts to prohibit "a wide variety of economic pressures resorted to by unions as restraints of trade."[34] The Court granted the injunction against the striking workers, and in doing so, defined in broad terms the role of the federal judiciary to prevent strikes negatively affecting interstate commerce.[35] Since almost all work stoppages can be characterized as "restraining trade," the number of injunctions issued against workers in labor disputes increased substantially.[36] By 1908, both political parties took notice of worker abuse achieved through judicial involvement in labor disputes on behalf of management and adopted positions against the use of injunctions as strike-ending devices.[37] This political recognition resulted in the inclusion of anti-injunction language in the Clayton Act as part of an attempt

32. Striking is "one of labor's most potent economic weapons." Francis V. Lowden, Jr. & Thomas J. Flaherty, Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreements—An Analysis of *Buffalo Forge*, 45 Geo. Wash. L. Rev. 633, 635 (1977); see generally Richard B. Freeman & James L. Medoff, What Do Unions Do? 217–20 (1984) (discussing role of unions and labor strikes).

33. 158 U.S. 564 (1895).

34. Benjamin Aaron, Labor Injunction Reappraised, 10 UCLA L. Rev. 292, 296 (1962). The application of the Sherman Anti-Trust Act to unions greatly limited coordinated worker strikes as the unions that organized such strikes were often classified as illegal conspiracies restraining trade. See Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (2006) (stating that "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States" is a felony punishable by imprisonment and monetary penalties).

35. See *In re Debs*, 158 U.S. at 571 (phrasing scope of injunctions against labor activities and strikes in particularly broad terms, noting management's right to enjoin a union "from compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employees . . . in connection with the interstate business or commerce"); see also Archibald Cox et al., Labor Law: Cases and Materials 18–19 (15th ed. 2011) (discussing worker antitrust coverage).

36. See Kerian, supra note 27, at 49 ("The *Debs* injunction was issued under the Sherman Anti-Trust Act and opened the flood gates of injunctive relief."); see also Witte, supra note 20, at 84 (noting injunctions issued in labor disputes rose from twenty-eight in 1880s to 122 in 1890s post-*Debs*, 328 from 1900 to 1909, 446 from 1910 to 1919, and finally to 921 between 1920 and 1930).

37. See Frank W. McCulloch, New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction, 16 Sw. L.J. 82, 88 (1962) (reviewing relevant positions of Democrats and Republicans).

to end what had been termed the "Era of Law by Injunction."[38]

The Clayton Act, specifically section 20, barred federal courts from issuing injunctions "in any case . . . involving . . . a dispute concerning terms or conditions of employment," to prohibit "*any person*" from "ceasing to perform any work or labor" or "terminating any *relation of employment*."[39] The Clayton Act also aimed to remove labor activities from classification under antitrust laws.[40] Although the Act was initially hailed as labor's "Magna Carta,"[41] judicial interpretations of the Act soon gutted its protection of workers from injunctions.[42] Specifically, in *Duplex Printing Press Co. v. Deering*, the Supreme Court concluded section 20 of the Clayton Act only restated the law as it had existed before its passage.[43] This meant the Act did not provide protection from injunctions when unions departed from "legitimate objects,"[44] thereby reducing the Act to the functional equivalent of the "objectives test" that had defined the previous era.[45] In addition, the Court held that despite the Clayton Act, labor violated antitrust laws if its actions restrained goods in interstate commerce. Accordingly, *Duplex Printing* effectively placed strikes under the coverage of antitrust legislation, contrary to congressional intent.[46]

Not only did these results depart sharply from the expectations of

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38. See Wimberly, supra note 17, at 691 (citing S. Rep. No. 72-163, at 18 (1932)) (explaining this characterization arose from flourishing use of injunctions in labor disputes in both federal and state courts).

39. Antitrust (Clayton) Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.) (emphasis added).

40. Id.

41. Wimberly, supra note 17, at 692 (quoting Samuel Gompers, The Charter of Industrial Freedom: Labor Provisions of the Clayton Antitrust Law, 21 Am. Federationist 957, 971 (1914)).

42. See Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 203 (1921) (stating Act prevented injunctions that prohibited "recommending, advising or persuading others by peaceful means to cease employment and labor," allowing "peaceable persuasion by employees"); Foss v. Portland Terminal Co., 287 F. 33, 36 (1st Cir. 1923) (noting "relation of employment" is restricted to employees "leaving the service of their employer").

43. 254 U.S. 443, 470–71 (1921), superseded by statute, Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932), as recognized in Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429 (1987); see Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 256, 262 (1917) (granting injunction against strikers in labor dispute after deeming union's purpose not "lawful," without mention of Clayton Act); see also Kerian, supra note 27, at 50 (noting Court in *Duplex Printing* held section 20 of Clayton Act "merely declaratory of the law as it stood before").

44. *Duplex Printing*, 254 U.S. at 469.

45. Wimberly, supra note 17, at 693 ("[C]ourts still decided according to their views of social and economic policy . . . whether the employees' demands justified their combining [to injure] an employer.").

46. See Coronado Coal Co. v. UMW, 268 U.S. 295, 310 (1925) (noting coverage under antitrust laws).

both political parties regarding the Clayton Act's protections,[47] but some members of Congress believed "the federal judiciary had *deliberately* misconstrued the Clayton Act."[48] Congress therefore sought to effect the labor protections first contemplated in the Clayton Act by passing the NLGA.[49] As Justice Frankfurter explained, the NLGA responded to the Clayton Act's failure to achieve its primary goal: to protect labor from management's use of injunctions.[50]

C. *The Norris-LaGuardia Act*

On March 23, 1932, Congress adopted the NLGA.[51] By passing the NLGA, Congress addressed two key issues that had historically disadvantaged workers in labor disputes: (1) the "deep concern that, through the device of temporary injunctions, the courts were resolving labor disputes without the merits of the disputes ever being seriously addressed and without even a semblance of fairness in the process"; and (2) the notion that "federal courts were . . . unnecessarily unsympathetic to the labor movement, its objectives, and its methods."[52] To explain how the NLGA addresses these concerns, this section will provide an overview of the NLGA, including the policy guide to judicial interpretations in NLGA section 2, the specific injunction prohibitions contained in section 4, and the judicial exceptions to these prohibitions.

1. *Overview of the NLGA.* — Drafted in large part by future Supreme Court Justice Felix Frankfurter, the NLGA provides a detailed framework

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47. See infra note 49 (reviewing Republican and Democratic dismay regarding use of injunctions post-Clayton Act).

48. Michael C. Duff, Labor Injunctions in Bankruptcy: The Norris-LaGuardia Firewall, 2009 Mich. St. L. Rev. 669, 678 (emphasis added).

49. In 1928, both Democrats and Republicans noted the abuse of labor injunctions in their respective conventions, with Democrats stating "investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes" and Republicans noting "injunctions in labor disputes have . . . been abused and have given rise to a serious question for legislation." 75 Cong. Rec. 4502 (1932).

50. United States v. Hutcheson, 312 U.S. 219, 235–36 (1941) ("The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated . . . by unduly restrictive judicial construction."); see New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 562 (1938) (explaining Congress passed NLGA "to obviate the results of judicial construction of [the Clayton] Act" which had removed congressional protections intended for labor); see also William B. Gould, On Labor Injunctions Pending Arbitration: Recasting *Buffalo Forge*, 30 Stan. L. Rev. 533, 535 (1978) (noting NLGA "embodied a congressional reaction against the federal judiciary's" bias).

51. Act of Mar. 23, 1932, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2006)). The Act passed overwhelmingly by a vote of seventy-five to five in the Senate, 75 Cong. Rec. 5019, and 362 to fourteen in the House, 75 Cong. Rec. 5511.

52. George Schatzki, Some Observations About the Standards Applied to Labor Injunction Litigation Under Sections 10(j) and 10(*l*) of the National Labor Relations Act, 59 Ind. L.J. 565, 567 (1984).

for regulating federal courts' issuance of injunctions in labor disputes. Section 1 removes federal courts' jurisdiction "to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute," except in two situations: those injunctions that fall "in a strict conformity with the provisions" contained in section 4 and those that do not run "contrary to the public policy declared" in section 2.[53] The term "labor dispute" is defined broadly in section 13 to ensure coverage of almost all employee/employer conflicts.[54] Sections 7 and 8 provide extensive procedural requirements for a court to issue an injunction under the Act, consistent with the exceptions carved out in sections 2 and 4.[55]

The remainder of the NLGA focuses on management's use of inequitable tactics against workers in labor disputes. For example, section 3 declares void as a matter of public policy "yellow-dog" employment contracts,[56] which forbid employees from joining labor unions.[57] Moreover, the Act explicitly restricts the application of antitrust laws to strikes under the Sherman and Clayton Acts,[58] and it condemns the aforementioned "objectives test."[59] In total, the NLGA focuses on remedying issues negatively impacting workers in labor disputes, strongly indicating an asymmetrical treatment of concerns affecting management and workers.[60]

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53. 29 U.S.C. § 101 (2006).

54. 29 U.S.C. § 113(c) (defining "labor dispute" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee").

55. 29 U.S.C. § 107. "Section 7 requires a hearing in open court after due and personal notice and a finding of unlawful acts, substantial and irreparable injury, greater injury by denial than granting of injunctive relief, [and] no adequate remedy at law . . . before an injunction may be issued." Accommodation of the NLGA, supra note 18, at 356 n.18. Section 8 requires "every reasonable effort" to settle a dispute prior to injunction. 29 U.S.C. § 108.

56. 29 U.S.C. § 103.

57. Black's Law Dictionary, supra note 3, at 1755.

58. Regarding section 5 of the NLGA, the congressional record notes that "[t]his section is included principally because many of the objectionable injunctions have been issued under the provisions of the antitrust laws, a necessary prerequisite for invoking the jurisdiction of which is a finding of the existence of a conspiracy or combination and without which no injunction could have been issued." H.R. Rep. No. 72-669, at 8 (1932); see 29 U.S.C. § 105 ("No court of the United States shall have jurisdiction to issue a[n] . . . injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy . . . .").

59. See Wilson & Co. v. Birl, 27 F. Supp. 915, 917 (E.D. Pa. 1939) (noting NLGA ended "objectives test" in issuance of labor injunctions), aff'd, 105 F.2d 948 (3d Cir. 1939); supra notes 21–31 and accompanying text (discussing "objectives test" and its negative impact on strikers in labor disputes).

60. Sections 6 and 9 of the NLGA also narrowed union liability for unauthorized acts and stopped the use of "blanket injunctions," respectively. 29 U.S.C. §§ 106, 109; see also supra note 27 and accompanying text (explaining concept of blanket injunctions).

2. *Section 2 "Public Policy."* — Section 2 contains the public policy rationales and sentiments behind the NLGA. This policy guides the federal judiciary to interpret the NLGA for the benefit of labor in an attempt to avoid the judicial alterations that limited labor's protections under the Clayton Act.[61] Section 2 states:

> In the interpretation of this chapter . . . the public policy of the United States is declared as follows: Whereas under prevailing economic conditions . . . *the individual unorganized worker* is commonly helpless . . . to protect *his* freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . it is necessary that *he* have full freedom of association, self-organization . . . and . . . be free from the interference, restraint, or coercion of *employers of labor* . . . for the purpose of collective bargaining or other mutual aid or protection . . . .[62]

This policy statement highlights Congress's intent that interpretations of the NLGA emphasize the protection of workers *against* the economic power and adverse incentives of management.[63] Furthermore, Congress clarified that it is the duty of courts "to give effect to such policy and to carry it out in the enforcement of any law where such public policy has application."[64]

In addition, the legislative record reveals that Congress excluded the mutual protection of employers in section 2. An alternative proposal to the final language afforded "the same degree of consideration to the employer in his relations to his employee as it does to the employee in his relations with his employer."[65] However, Congress rejected this language, evincing an intent to phrase the NLGA, specifically its policy and interpretive guide, in terms of employee protection.[66]

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61. As a sponsor of the legislation, Senator Norris made clear that section 2 was to be utilized "as a guide to judicial interpretation that would 'relieve . . . many of the difficulties which have heretofore existed when a court has been called upon to interpret the law.'" James M. Altman, Antitrust: A New Tool for Organized Labor?, 131 U. Pa. L. Rev. 127, 151 (1982) (quoting 75 Cong. Rec. 4503 (1932) (statement of Sen. George Norris)).

62. 29 U.S.C. § 102 (emphasis added).

63. See Duff, supra note 48, at 674 (explaining "Congress intended that courts interpret the Act liberally" for protection of workers).

64. 75 Cong. Rec. 4503 (statement of Sen. George Norris). The senator also explained that "[t]his is the first time in the history of the United States that any attempt has been made to declare . . . the public policy of the United States in relation to the issuing of injunctions." Id.

65. Id. at 4678 (statement of Sen. Felix Hebert). This alternative stated "[t]hat both the employer *and* the employee shall have full freedom of association . . . to negotiate the terms of employment free from any interference, restraint, or coercion in their efforts toward mutual aid or protection." Id. at 4677 (emphasis added).

66. Altman, supra note 61, at 153 n.145 (explaining this congressional intent by noting a forty-seven to eighteen vote against the alternative proposal (citing 75 Cong. Rec. 4766)).

3. *Section 4 Injunction Prohibitions.* — Section 4 contains the NLGA's specific injunction prohibitions. The section proscribes courts from enjoining nine categories of employee conduct during labor disputes, thereby creating an injunction-free zone.[67] Section 4 states:

> No court of the United States shall have jurisdiction *to issue any restraining order or temporary or permanent injunction* in any case involving or growing out of any labor dispute to prohibit any person or persons participating and interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: (a) *Ceasing or refusing to perform any work or to remain in any relation of employment;* (b) Becoming or remaining a member of any labor organization or of any employer organization . . . .[68]

As Justice Frankfurter and Nathan Greene explained, the above phrasing is "a paraphrase of like language in the Clayton Act" defending labor's general "right to strike."[69]

To be sure, the NLGA does not prohibit injunctions in all labor disputes.[70] Rather, it differentiates between activities in the "no injunction zone" created by section 4 and permissible injunctions—consistent with the policy detailed in section 2—that satisfy the Act's demanding procedural requirements.[71] Accordingly, the scope of each injunction prohibition within section 4 crucially determines the Act's ultimate reach and labor's capacity to strike.

As a plain reading of section 4(a)'s language—"ceasing or refusing to perform any work or to remain in any relation of employment"—could either include or exclude employer protection from injunctions in labor disputes, with potential application to both strikes and lockouts, a valid interpretation of the section requires further textual analysis.[72] The

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67. Section 4 is titled "Enumeration of specific acts not subject to restraining orders or injunctions." 29 U.S.C. § 104.

68. Id. (emphasis added). The remaining restrictions on injunctions under section 4 include a number of other activities associated with striking and labor organization. See id.

69. Frankfurter & Greene, supra note 6, at 217–18; see Carcieri v. Salazar, 555 U.S. 379, 390 n.5 (2009) (describing drafters of legislation as "an unusually persuasive source as to the meaning of the relevant statutory language").

70. See Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp., 230 F.3d 569, 580 (2d Cir. 2000) (holding federal courts may "issue an injunction in a labor dispute against conduct not specifically enumerated in § 4 or otherwise related to the abuses that motivated the [Act]"); Grace Co. v. Williams, 96 F.2d 478, 480 (8th Cir. 1938) (explaining NLGA "does not forbid the granting of injunctions in all cases of labor disputes; in fact, it clearly contemplates that injunctions may be granted").

71. See Tejidos de Coamo, Inc. v. Int'l Ladies' Garment Workers' Union, 22 F.3d 8, 14 (1st Cir. 1994) (explaining distinction).

72. For contrasting Supreme Court interpretations of the Act's congressional record and intent, compare Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 772 (1961) ("The [NLGA] . . . expresses a basic policy against the injunction of activities of labor unions."), with Marine Cooks & Stewards v. Panama Steamship Co., 362 U.S. 365, 369 n.7 (1960) (finding that NLGA withdraws "federal courts from a type of controversy for which many

section describes two distinct activities (or sets of conduct) receiving injunction protection: (1) "ceasing or refusing to perform any work," and (2) "[ceasing or refusing] to remain in any relation of employment."[73] The first clause applies only to employees, as employers do not "work,"[74] while the latter clause could conceivably cover both employees and employers, as both parties are in an employment relationship. Accordingly, a court interpreting section 4(a) to include employer injunction protection must base this determination on the section's second clause, while also reconciling this determination with the first clause's exclusive application to employees. This starting point leads logically to three possible interpretations of the section's scope: (1) Since the Act references employers in sections other than section 4(a), the section's omission of an explicit reference to employers indicates that the section, including its latter clause, does not apply to employers; (2) section 4(a) applies only to employees, with the first clause referencing the temporary work stoppages of employees (striking), and the second referring to the permanent termination of the employment relation (quitting); and (3) the second clause of section 4(a) protects employers but with internal inconsistency, as employees can utilize the broader second clause in addition to the first clause, rendering the first clause superfluous (with the word "any" expansively modifying "work" in the first clause and "relation of employment" in the second to cover both employees and employers). These divergent interpretations of section 4(a)'s second clause, some including and some excluding employer injunction protection at the conclusion of an employment "relation," give rise to the circuit split at issue in this Note.[75]

D. *The LMRA and NLGA Section 4*

Since its passage, the NLGA has largely succeeded at empowering labor by removing the threat of injunctions in labor disputes, allowing unionization and collective bargaining to thrive.[76] However, the subse-

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believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer").

73. 29 U.S.C. § 104.

74. See Brady v. NFL, 644 F.3d 661, 677 (8th Cir. 2011) ("Employees may refuse to perform work under the first clause, and they may refuse to remain in a relation of employment under the second . . . . The employer, by contrast, does not perform work, so it may invoke only the second clause.").

75. See infra Part II (reviewing contrasting circuit positions on section 4(a)).

76. See Philip P.W. Yates, Comment, Labor Law—*Buffalo Forge Co. v. United Steelworkers*: The End to the Erosion of the Norris-LaGuardia Act, 55 N.C. L. Rev. 1247, 1247 n.3 (1977) ("Bureau of Labor Statistics figures show that the number of strikes doubled from 841 per year in 1932 to 1,695 in 1933 . . . . By 1944–1946, the average number of strikes per year was over 4,500."). For a critical view of the NLGA, see Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357, 1357 (1983) (suggesting replacement of NLGA with tort- and contract-law-based regulatory regime). But see Julius G. Getman & Thomas C. Kohler,

quent passage of legislation incongruous with the Act's anti-injunction principle, as well as judicial accommodations of this legislation, have altered the NLGA's injunction prohibitions. As a result, two relevant exceptions currently exist to NLGA section 4: (1) The Labor-Management Relations Act (LMRA) grants federal courts injunction jurisdiction in certain labor disputes,[77] and (2) federal courts may, in specific circumstances, issue injunctions to prevent labor and management from breaching collective bargaining agreements under the so-called *Boys Markets* exception.[78] These exceptions are pertinent to understanding the current Supreme Court interpretations of section 4(a), especially the continued validity of its injunction protections, while providing additional background on the pro-labor intent of the NLGA against the shifting landscape of American labor policy.[79]

1. *The Labor-Management Relations Act.* — Passed in 1947, the LMRA amended the National Labor Relations Act (NLRA).[80] The NLRA "guaranteed workers' right to self-organization and mutual aid [and] barred employers from discriminating against union adherents."[81] However, the NLRA did not explicitly restrain questionable strikes by labor and more aggressive union tactics.[82] Combined with the NLGA's injunction shield, the protections afforded to labor "proved excessive," and in 1946 the United States experienced record productivity losses due to strikes.[83]

The Common Law, Labor Law, and Reality: A Response to Professor Epstein, 92 Yale L.J. 1415, 1416 (1983) (critiquing Epstein's reasoning).

77. Contrary to the *Boys Markets* judicial exception to the NLGA's anti-injunction principle, Congress intended for courts to issue injunctions in limited and clearly defined situations under the LMRA. See 29 U.S.C. § 158(b)(4).

78. Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 250–55 (1970) (holding NLGA did not preclude federal court from enjoining strike in breach of no-strike obligation under collective bargaining agreement requiring binding arbitration).

79. See Accommodation of the NLGA, supra note 18, at 356–57.

> After 1932, however, Congress became more disposed toward regulation of employer-union relations. The [NLRA], the [LMRA], and the 1934 amendments to the Railway Labor Act, all of which impose affirmative duties on employers and employees, injected a new and contradictory legislative philosophy—that law does have a positive role to play in labor relations.

Id.

80. The LMRA is also known as the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197). The LMRA amended the NLRA, which is also known as the Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

81. Seth Kupferberg, Political Strikes, Labor Law, and Democratic Rights, 71 Va. L. Rev. 685, 698 (1985) (footnote omitted).

82. See Lowden & Flaherty, supra note 32, at 638 (reviewing intent to limit labor's striking power).

83. See Archibald Cox, Law and the National Labor Policy 12 (1960) (explaining number of organized laborers grew from four million to fourteen million from 1935 to 1947); Mark A. Rothstein & Lance Liebman, Employment Law: Cases and Materials 37

In response to these widespread work stoppages, Congress passed the LMRA. The LMRA aimed to make collective bargaining agreements enforceable and to promote the peaceful resolution of labor disputes by prohibiting certain questionable striking activities permitted under the NLRA.[84] Section 301(a) of the LMRA codifies this policy, granting federal courts jurisdiction in "[s]uits for violation of contracts between an employer and a labor organization."[85] In passing the Act, Congress neglected to reconcile the LMRA's jurisdictional grant with the anti-injunction principle embedded in the NLGA. Without clarity on how the LMRA squared with the NLGA, federal courts were left to define both the scope of the jurisdictional grant of section 301(a) as well as the availability of equitable relief for management in order to determine whether courts had jurisdiction to issue injunctions in labor disputes to enforce collective bargaining agreements.[86]

2. *Supreme Court Interpretation of the NLGA and the* Boys Markets *Exception*. — The tension between the LMRA and NLGA led to a series of Supreme Court cases considering the interplay of the two statutes. In *Textile Workers Union v. Lincoln Mills*, the Supreme Court encountered this interplay when reviewing an injunction brought by a union that required management to comply with a collective bargaining agreement.[87] Drawing on the LMRA's pro-arbitration policy, the Court concluded that section 301(a) granted jurisdiction to federal courts to issue injunctions against employers refusing to honor a prior agreement to arbitrate.[88] The

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(7th ed. 2011) ("After World War II unions were much more powerful and largely unchecked by law. Asserting a need to return a 'balance' to labor-management relations, Congress passed the [LMRA]."); Michael A. Berenson, Comment, Labor Injunctions Pending Arbitration: A Proposal to Amend Norris-LaGuardia, 63 Tul. L. Rev. 1681, 1683 (1989) (noting that prior to 1947, "unions were perceived by some as being the most powerful organizations the community had ever seen"); Paula L. McDonald, Note, Judicial Interpretation of Collective Bargaining Agreements: The Danger Inherent in the Determination of Arbitrability, 1983 Duke L.J. 848, 852 ("By 1947, Congress became concerned that unions were gaining strength disproportionately and perceived a need to protect both employers and employees from unfair labor tactics by unions.").

84. See Yates, supra note 76, at 1252–53 ("The rise of organized labor created a shift in Congressional emphasis away from the protection of labor to the encouragement of the peaceful settlement of labor disputes and the protection of contractual rights under collective bargaining agreements."); see also Lowden & Flaherty, supra note 32, at 642 (noting LMRA's limits on union activity and enforcement of collective bargaining agreements "necessitated accommodation with . . . the earlier [NLGA] and Wagner Acts," which Congress did not address definitely in passing the statute).

85. 29 U.S.C. § 185(a) (2006).

86. Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 205–08 (1962), overruled by Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

87. 353 U.S. 448, 449 (1957); see Stamper, supra note 22, at 529 (explaining *Textile Workers* Court noted "the substantive law to apply in suits under § 301(a) is federal law, which the court must fashion from the policy of our national labor laws" (quoting *Textile Workers*, 353 U.S. at 456)).

88. *Textile Workers*, 353 U.S. at 457–58. The Court explained this decision by noting that Congress wished to encourage the use of arbitration and no-strike provisions in col-

Court noted that Congress did not pass the NLGA to protect management from judicial abuse and, accordingly, held that an injunction against management to enforce a collective bargaining was in accord with both the LMRA and NLGA.[89]

The Supreme Court next considered the intersection of the LMRA and NLGA with an *employer* seeking an injunction against its employees to enforce a collective bargaining agreement. In *Sinclair Refining Co. v. Atkinson*, the Court held that a court may not issue an injunction requested by an employer to require a union to honor a no-strike agreement under the LMRA.[90] The Court looked to the policy behind NLGA section 4 and concluded that injunctions against strikes were strictly prohibited.[91] Employees could enjoin management to uphold a commitment to arbitrate but "employees could not be ordered back to work."[92]

Less than a decade later, deferring to the LMRA's pro-arbitration policy, the Supreme Court reversed course and overruled *Sinclair* in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*.[93] The Court concluded that a court can enforce by injunction a collective bargaining agreement mandating arbitration of disputes between labor and management to prevent

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lective bargaining agreements. Id.; see Fred A. Hartley, Jr. et al., Labor-Management Relations Act, H.R. Rep. No. 80-510, at 42 (1947) (Conf. Rep.) ("Once parties have made a collective bargaining agreement the enforcement of that contract should be left to the usual processes of law . . . ."). The Court also considered whether section 301 created a substantial right of enforcement in labor disputes (power to enjoin), more than merely a grant of jurisdiction. The Court settled this issue in the affirmative in 1960 in what is known as the *Steelworkers Trilogy*. See generally United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960). These cases created a "presumption of arbitrability for all disputes arising out of collective bargaining agreements." The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 250 (1976) [hereinafter Injunctions Against Sympathy Strikes].

89. *Textile Workers*, 353 U.S. at 458 ("The failure to arbitrate was not a part . . . of the abuses against which the Act was aimed.").

90. 370 U.S. at 214.

91. Id. at 204–05. In addition, the Court noted that Congress specifically considered repealing the NLGA in section 301 disputes but decided against this action. Id. at 210. Accordingly, management was prohibited from enjoining strike-related activities even if the union had committed to a no-strike agreement, as "[a]n injunction against work stoppages, peaceful picketing or the nonfraudulent encouraging of those activities would . . . prohibit the precise kinds of conduct which [section 4(a)] of the NLGA unequivocally say[s] cannot be prohibited." Id. at 212. The Court "made no attempt to reconcile [this decision] with its prior holdings in *Lincoln Mills* and the *Steelworkers Trilogy*," and it simply "ignored Taft-Hartley's grant of jurisdiction." McDonald, supra note 83, at 854.

92. Yates, supra note 76, at 1255 (noting loophole created by *Sinclair* concerning collective bargaining agreements).

93. 398 U.S. 235 (1970). For a critique of *Sinclair*, see generally Harry H. Wellington & Lee A. Albert, Statutory Interpretation and the Political Process: A Comment on *Sinclair v. Atkinson*, 72 Yale L.J. 1547 (1963).

a union from violating a no-strike provision.[94] The Court found that to trigger the injunction exception to the NLGA, "the collective bargaining agreement . . . must contain a '*mandatory* grievance adjustment or arbitration procedure.'"[95] As Congress intended the NLGA to assist "the growth and viability of labor organizations," the Court reasoned that holding unions to their agreements merely reinforced their freedom of contract.[96] This narrow LMRA-based exception to the NLGA served to enforce a "quid pro quo" exchange between labor and management: in service of industrial peace, employers committed to arbitration and employees committed not to strike, with the arrangement enforceable by injunction.[97] The Court thus reconciled the NLGA with the LMRA by upholding the section 4 injunction prohibitions while creating a narrow exception for union agreements to arbitrate labor disputes in line with the LMRA's pro-arbitration policy. The *Boys Markets* exception is accordingly a narrowly defined abrogation of the NLGA, not a broad statement on its scope that contemplates injunctions by employees against management, such as in employee lockouts.

The decision in *Boys Markets* marked the outer boundary of permissible injunctions against workers, with the Court making clear that the NLGA remained "vital[]" law.[98] Furthermore, the Supreme Court subsequently reconfirmed in *Buffalo Forge Co. v. United Steelworkers* that, in labor disputes, management can utilize injunctive relief in violation of section 4 only over an issue expressly committed to arbitration by a collective

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94. *Boys Mkts.*, 398 U.S. at 254 (holding NLGA does not bar granting injunctive relief when "the grievance in question was subject to . . . arbitration under [a] collective-bargaining agreement[,] . . . the petitioner was ready to proceed with arbitration" when the strike was enjoined, and when resulting from the "respondent's violations of its no-strike obligation, petitioner 'has suffered irreparable injury and will continue to suffer irreparable injury.'").

95. McDonald, supra note 83, at 856 (emphasis added) (quoting *Boys Mkts.*, 398 U.S. at 253).

96. *Boys Mkts.*, 398 U.S. at 252. Since this shift was "accomplished . . . without . . . revision of . . . the [NLGA] . . . it became the task of the courts to accommodate . . . the older statute[] with the more recent ones." Id. at 251; see also Injunctions Against Sympathy Strikes, supra note 88, at 251 (explaining NLGA's "core concern was injunctions that disrupted the ability of unions to organize and to negotiate collective bargaining agreements").

97. *Boys Mkts.*, 398 U.S. at 247–48 (noting "no-strike obligation" served as bargaining tool to ensure employers committed to arbitration and early resolution, and that incentive dissipated if injunctive relief in event of strike was unavailable).

98. Id. at 253. The application to the NLGA of a section 4(a) anti-injunction exception that protects both employers and employees is a separate issue from the general scope of section 4(a). See infra note 130 and accompanying text (explaining limited scope of exception to section 4(a)). *Boys Markets* produced a wealth of literature. For an in-depth treatment of this decision, see generally William J. Curtin, *Boys' Markets* and the No-Strike Injunction, 57 A.B.A. J. 863 (1971); Jane P. North, Labor Law—Section 4 of The Norris-LaGuardia Act and Section 301 of the Labor Management Relations Act—Enjoining Political Strikes, 50 Tenn. L. Rev. 919 (1983); Mark A. Shank, *Boys Markets* Injunctions: The Continuing Clash Between Norris-LaGuardia and Taft-Hartley, 35 Sw. L.J. 899 (1982).

bargaining agreement.[99] The Court's reiteration of this limit on section 4 demonstrated that the *Boys Markets* decision had not overridden the NLGA but, instead, had introduced a limited exception to the Act's prohibition on injunctions against labor.[100]

Against the backdrop of these judicial clarifications, the Supreme Court has consistently affirmed the NLGA's importance in labor disputes and the Act's animating purpose of preventing the abuse of injunctions against labor. The Supreme Court summarized the NLGA's precipitating events as follows:

> In the early part of this century, the federal courts generally were regarded as allies of *management* in its attempt to prevent the organization and strengthening of *labor unions*; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of *labor groups*. The result was a large number of sweeping decrees, often issued ex parte, drawn on an ad hoc basis without regard to any systematic elaboration of national labor policy.[101]

The Clayton Act had attempted, but failed, to remedy this stifling of strikes by injunction. The NLGA then sought to remedy what the Clayton Act had not: the use of injunctions against labor. It is with consideration of this anti-labor history and Congress's intent to protect labor from employer abuse that courts should approach the NLGA and, specifically, section 4(a).

II. CIRCUIT INTERPRETATIONS OF NLGA SECTION 4(A) AND *BRADY V. NFL*

Courts have interpreted section 4(a)'s second clause, "remain in any relation of employment," only rarely, and thus have avoided answering the threshold question of whether section 4(a) protects only employees

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99. 428 U.S. 397, 412–13 (1976).

100. Id. at 404 (holding strike non-enjoinable since union did not previously agree to arbitration). *Buffalo Forge* did not forward a general policy allowing injunctions in promotion of arbitration; it contained the *Boys Markets* exception to prior agreements to arbitrate disputes under no-strike clauses. See Duff, supra note 48, at 687 n.85 (explaining distinction). For a discussion of sympathy strikes post-*Buffalo Forge*, see generally Lowden & Flaherty, supra note 32.

101. *Boys Mkts.*, 398 U.S. at 250 (emphasis added); see also Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 443 (1987) ("The fact remains that Congress passed the [NLGA] to forestall judicial attempts to narrow labor's statutory protection."); Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 726 (1982) (noting NLGA "was enacted in response to federal-court intervention on behalf of employers through the use of injunctive power against unions and other associations of employees"); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 772 (1961) (observing NLGA "expresses a basic policy against the injunction of activities of labor unions"); Retail Clerks Union Local 1222 v. Alfred M. Lewis, Inc., 327 F.2d 442, 447 (9th Cir. 1964) (explaining NLGA attempted to end "widespread use of the labor injunction as a means of defeating the efforts of labor to organize and bargain collectively").

or both employees and employers from injunctions in labor disputes.[102] However, in *Brady,* the Eighth Circuit brought this issue to national attention, interpreting section 4(a) to protect employers from injunctions in labor disputes and introducing an analysis of the section's language that extends far beyond the prior circuit decisions reaching the same conclusion. Before *Brady*, the circuits that had engaged in the most comprehensive analysis of section 4(a)—the First, Seventh, and Ninth Circuits—reached the opposite result, reading the section to exclude employer protections.

Though confined to the Eighth Circuit, by tackling section 4(a) in such a prominent labor dispute, *Brady* sets a formidable precedent in national labor jurisprudence. Circuits may now defer to the *Brady* court's reasoning and decide to interpret section 4(a) to include employer protections.[103] Nonetheless, Judge Bye's dissent in *Brady* also provides a comprehensive analysis of section 4(a), but he reads the section to exclude employer injunction protection. This Part reviews previous circuit decisions regarding section 4(a) as well as the majority and dissenting opinions in *Brady* in order to examine the opposing arguments behind the circuit split.

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102. See Schatzki, supra note 52, at 567 (noting Congress's intent in "the passage of this Act is unclear" due to variables never resolved and "[o]ne of those variables is whether unions *and* management are protected by the [NLGA], or whether only unions are given the benefit of the statute"). In many cases under the NLGA, courts assume the injunction prohibition applies to employers without mention of section 4. See Dist. 29, United Mine Workers v. New Beckley Mining Corp., 895 F.2d 942, 946–47 (4th Cir. 1990) (discussing application of section 4(c) to employer refusing to hire employees on seniority list, implicitly applying section 4 to employers); Bodecker v. Local Union No. P-46, 640 F.2d 182, 185–86 (8th Cir. 1980) (preventing injunction against employer in action deemed "labor dispute"); Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc., 550 F.2d 1237, 1238 (9th Cir. 1977) (applying NLGA to employers without mention of section 4(a)); Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, 471 F.2d 872, 876–77 (6th Cir. 1972) (applying NLGA to protect employers from injunction without noting section 4(a)). This Part focuses on cases that actually address section 4(a) in interpreting employer injunctions. See also Brief of Amici Major League Baseball Players' Ass'n et al. in Support of Appellees at 13, Brady v. NFL, 641 F.3d 785 (8th Cir. 2011) (No. 11-1898), 2011 WL 2129898, at *13 (contending no decision prior to *Brady* "analyzed the Act's text and purpose in depth" with regard to section 4(a)).

103. See Bradley Lipton, Note, Accountability, Deference, and the *Skidmore* Doctrine, 119 Yale L.J. 2096, 2133–34 (2010). The Note explains that "[w]hen one court considers an issue previously decided by another circuit . . . the court respectfully reads that decision and has, as the Ninth Circuit has articulated, at least a 'presumption' of following it." Id. (citing Env't Protection Info. Ctr., Inc. v. Pac. Lumber Co., 257 F.3d 1071, 1077 (9th Cir. 2001)). Furthermore, "[t]he Seventh Circuit has explicitly deemed this an 'intermediate' obligation—somewhere between the decisions of the Supreme Court (binding) and the British House of Lords (not at all binding)—to 'follow them whenever we can.'" Id. at 2134 (quoting Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987)). For example, "the Eighth Circuit has described its practice on more than one occasion: 'Although we are not bound by [another circuit's] decision, "we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value."'" Id. (alteration in original) (quoting In re Owens v. Miller, 276 F.3d 424, 428–29 (8th Cir. 2002)).

Part II.A explains the First, Seventh, and Ninth Circuits' approach to section 4(a), which permits injunctive relief in labor disputes only to employees against employers. Part II.B explores the Second and Sixth Circuits' "literal" interpretation of section 4(a), which prohibits injunctive relief for either side. Part II.C reviews the majority opinion in *Brady* as well as Judge Bye's dissent. Taken together, these two opinions provide an in-depth analysis of section 4(a) while reaching contrasting conclusions regarding the section's scope.

A. *Pre-*Brady *NLGA Section 4(a) Interpretations Excluding Employer Protection*

In 1962, the Seventh Circuit first determined that NLGA section 4(a) excluded employer protection in labor disputes, forming a basis for future circuits to draw the same conclusion. Part II.A.1 describes this decision. Parts II.A.2 and II.A.3 review subsequent decisions by the First and Ninth Circuits that each analyzed section 4(a)'s phrasing in the context of employee reinstatement—a form of injunctive relief—and found the section to protect labor, and not management.

1. *Seventh Circuit.* — In *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, the Seventh Circuit considered an appeal from a temporary injunction granted in favor of a worker organization.[104] Management argued that section 4(a) of the NLGA protected not only labor, but also employers, from injunctions in labor disputes. The court began its section 4(a) analysis by focusing on "a thorough examination of the [NLGA] and its pertinent legislative history."[105] Accounting for the historical circumstances inspiring the NLGA, the court concluded that Congress intended to protect *only* employees, with no "intention to deny jurisdiction to issue injunctions against employers."[106] After this general induction, the court turned to a textual analysis of section 4(a). Noting

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104. 310 F.2d 513, 517–18 (7th Cir. 1962). The approach to section 4(a) in *Brotherhood of Locomotive Engineers* is not consistently articulated in subsequent Seventh Circuit opinions. In *Chicago Midtown Milk Distributors, Inc. v. Dean Foods Co.*, the Seventh Circuit heard an appeal from the district court's issuance of a temporary restraining order and held that "regardless of plaintiffs' complaint charging an antitrust violation and any factual merit to their claim, this is a case involving or growing out of a labor dispute within the meaning of the [NLGA]. Therefore, the federal district court is precluded by law from issuing 'any restraining order or temporary or permanent injunction.'" *Chi. Midtown Milk*, Nos. 18577 and 18578, 1970 WL 2761, at *1 (7th Cir. July 9, 1970) (per curiam) (citation omitted) (quoting 29 U.S.C. § 101). The court presumed that the NLGA banned injunctions in all labor disputes, not mentioning the prior substantive judicial exceptions to section 4 and failing to "mention the Circuit's earlier holding in *Brotherhood of Locomotive Engineers*." Brief of Amici Major League Baseball Players' Ass'n et al. in Support of Appellees, supra note 102, at 13. The Eighth Circuit did not use *Chicago Midtown Milk* to support its conclusion in *Brady*, noting that the Seventh Circuit "cited only § 1 of the Act. The court's reasoning is not well explained, and the opinion does not directly address § 4(a)." Brady, 644 F.3d at 681 n.8.

105. *Bhd. of Locomotive Eng'rs*, 310 F.2d at 517.

106. Id. at 517–18.

that sections 3 and 4(b) explicitly granted employers protection from injunctions, the court reasoned that those sections were "exceptional," and their exceptional character provided further support for its conclusion that employers could not invoke section 4(a) for their own protection, as it did not reference employers.[107]

The court confirmed its textual analysis by considering the policy articulated in NLGA section 2, which, according to the court, demonstrated no "intention to recognize any general reciprocity of rights of capital and labor . . . [and] is frankly a charter of the rights of labor against capital."[108] Relying on the Act's lack of "general reciprocity" between labor and management, the court reinforced its conclusion that the Act permitted employer protections only when it delineated them explicitly, which section 4(a) did not do. The court therefore upheld the injunction against management.

2. *First Circuit.* — The First Circuit considered the possibility of injunctive relief against employers in a labor dispute in *de Arroyo v. Sindicato de Trabajadores Packinghouse*.[109] The case involved the reinstatement of an employee (a form of injunctive relief) after an employer violated a collective bargaining agreement, thereby implicating the abovementioned jurisdictional clash of the LMRA and NLGA.[110] In reaching its decision on the reinstatement claim, the court noted that section 4(a) did not prohibit the use of injunctive relief against management since "the primary purpose behind the anti-injunction provisions[] [is] 'to protect working men . . . [and] to correct existing abuses of the injunctive remedy in labor disputes.'"[111] Furthermore, the court discerned from the NLGA's legislative history that Congress had not intended section 4(a) to protect employers.[112]

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107. Id. at 518. The court observed that, "in the absence of a constitutional attack," the clear intent of Congress governs terms of the NLGA, making it a matter "over which the courts have no control." Id.

108. Id. at 517–18 (defining section 2 as "[t]he overall purpose of the Act").

109. 425 F.2d 281, 291 (1st Cir. 1970) ("We . . . hold that the remedy of reinstatement . . . is not barred by section 4(a) of the [NLGA]."). A possible First Circuit conflict to *de Arroyo* is Congreso de Uniones Industriales de P.R. v. V.C.S. Nat'l Packing Co., 953 F.2d 1 (1st Cir. 1991). In denying employees an injunction against management, the court held that "the [NLGA] prohibits federal courts from issuing injunctions in cases involving labor disputes." Id. at 2. The court made no mention of section 4, the procedural requirements contained in the Act, or circuit precedent. It broadly stated that "[a] narrow exception to the prohibition against injunctions does exist in cases where a party seeks injunctive relief in aid of arbitration," while making no reference to the narrow *Boys Markets* exception. Id. at 3. Due to the absence of any section 4 analysis and a questionable reading of *Boys Markets*, this Note will not factor in this contribution.

110. See supra Part I.D.1 (summarizing conflict between LMRA and NLGA).

111. *de Arroyo*, 425 F.2d at 291 (quoting Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R., 353 U.S. 30, 40 (1957)).

112. Id. ("Our understanding of the legislative history behind section 4(a) leads us to conclude that that section was not intended as a protection for employers.").

Rejecting "literal" interpretations of section 4(a) to the contrary, the court concluded that Congress intended section 4(a), through its two phrases, to protect employees from injunctions when either temporarily striking or permanently ending their employment relation, respectively.[113] The court summarized that, since injunctions against employers were not "one of the abuses sought to be eliminated by the [NLGA]," section 4(a) did not prohibit the injunctive relief of employee reinstatement.[114]

3. *Ninth Circuit.* — In *Local 2750, Lumber & Sawmill Workers Union v. Cole*, the Ninth Circuit also provided an interpretation of the scope of section 4(a) in the employee reinstatement context, reaching the same conclusion as the First Circuit.[115] The court explained that the history and intent behind the NLGA indicated that "section 4 does not bar injunctive relief . . . in all circumstances that might be covered by the literal language of section 4" and therefore section 4(a) should not prohibit injunctions against employers.[116] The court supported its reasoning by drawing deferentially on each argument that the First Circuit had advanced in *de Arroyo*.[117] The court went even further, explaining that Congress had lifted the phrasing of section 4(a)'s second clause—"any relation of employment"—directly from section 20 of the Clayton Act. On this basis, the court inferred that section 4(a) should be interpreted to convey the same meaning as its model provision in the Clayton Act, which had been previously interpreted to provide for the protection of "the employee rather than the employer."[118] With this analysis of the

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113. Id. at 291. ("The 'remain in any relation of employment' language in section 4(a) . . . was used . . . to make clear that employee strikes could not be enjoined either if the employees . . . ceased or refused to work temporarily or if they . . . completely ended their employment relation with their employer."). The court also noted that when the Act's drafters incorporated employer protections in a section of the NLGA, employers were specifically referenced, as in section 4(b). Id.

114. Id. The court cited *Textile Workers* for support, as it utilized the same logic in allowing employees to pursue an injunction against an employer to compel arbitration. See supra notes 87–89 and accompanying text (discussing *Textile Workers*).

115. 663 F.2d 983, 986 (9th Cir. 1981) ("Section 4(a) was intended to protect the right of workers and labor unions to strike . . . ."); see also Retail Clerks Union Local 1222 v. Alfred M. Lewis, Inc., 327 F.2d 442, 446 (9th Cir. 1964) (agreeing "with the view expressed by the [Seventh] Circuit . . . that the purpose of [the NLGA] was to protect only employees and unions, except for two isolated exceptions appearing in section 3(a, b), and in section 4(b)," but noting "it is not necessary [the court] in this case to go so far" (internal citations omitted)).

116. *Local 2750*, 663 F.2d at 984. The court referenced a number of decisions upholding the injunctive relief of reinstatement against management without violating the NLGA. See, e.g., Tatum v. Frisco Transp. Co., 626 F.2d 55, 60 (8th Cir. 1980); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 297 (1st Cir. 1978); Margetta v. Pam Pam Corp., 501 F.2d 179, 181 (9th Cir. 1974).

117. See supra notes 109–114 and accompanying text (reviewing arguments in *de Arroyo*).

118. *Local 2750*, 663 F.2d at 986. To support its interpretation, the court cites the same language used in both statutes—"any relation of employment"—and clarifies that

NLGA's text and history, the court concluded that section 4(a) protected only labor's right to strike and granted the requested relief against management.[119]

Through a combined analysis of the NLGA's text, history, structure, section 2 policy, and basis in the Clayton Act, the First, Seventh, and Ninth Circuits excluded management from injunction protection in labor disputes.

B. *Pre-*Brady *NLGA Section 4(a) Interpretations Including Employer Protection*

While a complete understanding of the NLGA requires consideration of its historical context and section 2 policy,[120] deference to these sources of interpretation varied among circuit courts prior to *Brady*, depending on their commitment to an exclusively "literal" reading of section 4(a). Specifically, the Second and Sixth Circuits looked to the language "relation of employment" in section 4(a) to find protection of employer action and, therefore, a bar to injunctions against employers in labor disputes.

1. *Second Circuit.* — In *Clune v. Publishers' Ass'n*, the Second Circuit affirmed, without comment, a decision by the Southern District of New York focusing on the text of section 4(a), along with the Act's legislative history, to reinforce its "plain" reading.[121] The case addressed an injunction sought by New York City newspaper workers against management's stoppage of newspaper production in response to a partial worker strike.[122] The district court began its analysis with the broad assertion that

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Congress drafted this language "'to guard the right of *workingmen* to act together in *terminating*, if *they* desire, *any relation of employment*, and to act together and in concert.'" Id. at 986 n.5 (emphasis added by *Local 2750*) (quoting S. Rep. No. 63-698, at 51 (1914)).

119. Id. at 986.

120. The Supreme Court explained in *Boys Markets* that interpretation of the NLGA must be consistent with its history and intent. See supra note 101 and accompanying text (discussing *Boys Markets* Court's emphasis on NLGA's animating purpose of preventing abuse of injunctions against labor); see also Schuck v. Gilmore Steel Corp., 784 F.2d 947, 949–50 (9th Cir. 1986) ("[T]he list of acts protected from injunction by section 104 should be interpreted with reference to the congressional purpose behind the Norris-LaGuardia Act.").

121. Clune v. Publishers' Ass'n, 214 F. Supp. 520, 528–29 (S.D.N.Y.), aff'd per curiam mem., 314 F.2d 343 (2d Cir. 1963). However, other Second Circuit decisions arguably disagree with *Clune*'s reasoning concerning the NLGA. See, e.g., Drywall Tapers & Pointers, Local 1974 v. Operative Plasterers' Int'l Ass'n, 537 F.2d 669, 674–75 (2d Cir. 1976) (allowing union to enjoin management action since "[t]he injunctive relief sought . . . [did] not infringe upon the workers' organizational or bargaining rights but [would] instead enforce a work assignment agreement negotiated by the unions themselves . . . [and] the conduct enjoined here does not fall within the specific provisions of the [NLGA]"); Nat'l Ass'n of Letter Carriers v. Sombrotto, 449 F.2d 915, 919 (2d Cir. 1971) ("Section 4 restricts the federal court's jurisdiction only in certain specified instances, particularly with regard to the enjoining of strikes, the joining of labor unions and the lawful aid to persons engaged in such activities.").

122. *Clune*, 214 F. Supp. at 521–22.

the NLGA "appl[ies] to injunctions sought against employers as well as to injunctions sought against employees."[123] The court supported this reading with a Senate report, which stated, in reference to NLGA section 6, that "[t]he same rule throughout the bill, *wherever it is applicable*, applies both to employers and employees."[124] After drawing this general conclusion about the NLGA's scope, the court reasoned that section 4(a) protected an employer's refusal to remain in an employment relation by locking out its workers. On the basis of this brief analysis, the court concluded it was "doubtful" that the plaintiff union could enjoin management in the labor dispute.[125]

2. *Sixth Circuit.* — In *Heheman v. E.W. Scripps Co.*, the Sixth Circuit considered an appeal by newspaper printers seeking specific performance of an employment contract, a remedy requiring injunctive relief against the newspaper's management.[126] To determine section 4(a)'s scope, the court first reviewed the NLGA's purpose, explaining that "[t]hough the Act was principally directed toward abuses of injunctions directed against union activities the terms of its broadest prohibitions do not distinguish between injunctions against labor and injunctions against management."[127] The court then reasoned that granting the employees' appeal would constitute a bar to management's refusal "to remain in [a] relation of employment," which a plain reading of section 4(a) prohibited.[128]

The court then provided a further review of the LMRA and NLGA, noting the shift in Congress's labor policy "from protection of labor unions to encouragement of collective bargaining."[129] Since the Supreme Court had not extended exceptions to the NLGA beyond those identified in *Boys Markets*, and since a "literal" reading of section 4(a) included employers in its coverage, an injunction against management would, according to the court, require the court to devise a novel judicial exception to the NLGA.[130] Since no previously established exception to the NLGA covered the facts of this case, the court barred the injunction against man-

123. Id. at 528.

124. S. Rep. No. 72-163, pt. 1, at 19 (1932) (emphasis added).

125. *Clune*, 214 F. Supp. at 529.

126. 661 F.2d 1115, 1123 (6th Cir. 1981).

127. Id. at 1124 (citations omitted). Furthermore, the court explained that it had "not moved beyond the specific areas arising in *Lincoln Mills* and *Boys Markets* in carving exceptions to the prohibitions of the [NLGA]." Id.

128. Id. at 1125 (alteration in original) (citing 29 U.S.C. § 104(a) (1976)). The Supreme Court has since implicitly recognized the injunctive relief of employee reinstatement in Clayton v. UAW, 451 U.S. 679, 690 n.15 (1981).

129. *Heheman*, 661 F.2d at 1124; see supra note 84 and accompanying text (discussing shift in American labor policy).

130. See supra note 128 and accompanying text (explaining court's reasoning in barring injunction and refusing to grant specific performance).

agement and refused to grant specific performance on the employment contract.[131]

Accordingly, both the Second and Sixth Circuits interpreted the NLGA as facially covering both employees and employers by reading section 4(a)'s wording "relation of employment" to protect employers from injunctions in labor disputes.

C. *The Eighth Circuit and* Brady v. NFL

As discussed above, due to the national attention on the NFL lockout, *Brady* is in all likelihood the most well-known decision dealing with section 4(a).[132] Since the case provides a recent and in-depth analysis of section 4(a)'s scope, courts may reasonably look to the Eighth Circuit's guidance when encountering the NLGA. This deference to the Eighth Circuit may impact the outcome of future national labor disputes through the inclusion of employer injunction protection in section 4(a).[133] Furthermore, since the case addressed new arguments for including employer injunction protection, a thorough review of the current arguments driving the circuit split also requires examination of Judge Bye's dissenting analysis of the majority's reasoning. The remainder of this Part will provide a brief background on the labor dispute leading to the NFL lockout, followed by a review of the Eighth Circuit's majority opinion and dissent in *Brady*, and a discussion of the decisions' potential impact on future labor disputes.

1. *Background.* — The labor dispute between the NFL Players Association and the NFL began when the parties' collective bargaining agreement expired. After the two parties could not reach a new agreement, the NFL locked out the players,[134] whereupon the players were granted an injunction to end the lockout.[135] The NFL then appealed this decision, producing the Eighth Circuit opinion at issue.[136] The key argu-

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131. The court referenced Columbia River Chapter, Pacific Log Scalers Ass'n v. Columbia River Log Scaling & Grading Bureau, No. 74-906, 1975 WL 1030, at *2 (D. Or. Feb. 7, 1975), where the court refused a plaintiff-worker reinstatement after he had been discharged in violation of a bargaining agreement, as the NLGA prevented "equitable relief."

132. The NFL lockout, and the Eighth Circuit's decision in *Brady*, received significant national media attention. See, e.g., Court Rules Lockout by N.F.L. Can Go On, N.Y. Times, July 9, 2011, at D5, available at http:// www. nytimes. com/2011/07/09/sports/football/appeals-court-rules-nfl-lockout-is-legal.html?scp=1&sq=&st=nyt (on file with the *Columbia Law Review*) (recapping Eighth Circuit's decision to permit NFL's lockout of its players).

133. See supra note 103 and accompanying text (discussing precedential value of case).

134. See Brady v. NFL, 779 F. Supp. 2d 992, 1003–04 (D. Minn. 2011) (reviewing background of labor dispute), vacated, 644 F.3d 661 (8th Cir. 2011).

135. Id. at 1042–43.

136. The district court did not definitively decide whether section 4(a) permitted injunctions against management as it held that the decertified Players Association was not involved in a "labor dispute" under the NLGA. Id. at 1026–28. In terms of section 4(a), the

ments concerning section 4(a) addressed its application to the NFL's lockout: The NFL contended "that by locking out [the players], it is '[r]efusing to . . . remain in any relation of employment,' and is thus doing one of the acts that cannot be enjoined according to § 4," while the players argued "that § 4(a) does not apply to employer injunctions at all."[137]

2. *Majority Section 4(a) Analysis.* — The *Brady* majority began its analysis of section 4(a) by examining the NLGA's history as well as prior circuit decisions.[138] Turning to section 4(a)'s text, the majority explained that "[t]he introductory clause of § 4 forbids a court to issue an injunction to prohibit '*any person or persons* participating or interested' in a labor dispute from doing any of the acts set forth below, including those in § 4(a)."[139] Since employers are "persons participating" in a labor dispute, the court concluded that employers are covered by every provision of section 4.[140] Next, the majority determined that the second clause in section 4(a)—"remain in any relation of employment"—applies to employers, as this same language is used in another section of the NLGA to refer to both parties "withdraw[ing] from an employment relation."[141] The

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district court noted that "the [NLGA] was enacted to protect labor from the injunctions that some federal courts were granting to employers despite Section 20 of the Clayton Act," and the court was "not convinced that the Act should be extended or interpreted to protect the NFL under its reading of Section [4(a)]." Id. at 1026.

137. *Brady*, 644 F.3d 661 (second alteration in original). To reach its decision in *Brady*, the court addressed a number of NLGA-related issues concerning union decertification, antitrust law, and the definition of "labor dispute" that are outside the scope of this Note.

138. Both the majority and dissent addressed the NLGA's history; however, the majority stated that "[t]he impetus for the NLGA was dissatisfaction with injunctions entered against workers in labor disputes, but the statute also requires that an injunction against an employer participating in a labor dispute must conform to the Act." Id. at 670. This conclusion does not directly impact interpretation of section 4(a). There is no doubt that employers receive the procedural protections contained in section 7 and protection of the NLGA when so specified, as in section 4(b). Both the majority and dissent reviewed prior circuit decisions concerning section 4(a). The majority relied on Local Union No. 884, United Rubber, Cork, Linoleum, & Plastic Workers v. Bridgestone/Firestone, Inc., 61 F.3d 1347 (8th Cir. 1995), a decision on section 4(c) of the NLGA, to disparage the reasoning in *de Arroyo* and *Local 2750*. The dissent distinguished this case, clarifying that a "careful reading of *Bridgestone/Firestone* reveals it has no bearing on the present question of whether § 4(a) protects employers . . . . [W]hether the *Boys Markets* exception applies to employers and employees alike is an entirely different question than whether § 4(c), much less § 4(a), touches even-handedly on employers and employees." *Brady*, 644 F.3d at 689 (Bye, J., dissenting).

139. *Brady*, 644 F.3d at 675 (majority opinion).

140. Id. The court explained that "the premise of *de Arroyo* . . . that employers are protected against injunction under § 4 only when specifically mentioned in § 4(b) is a non-starter under circuit precedent." Id.

141. Section 3(b) is the section noted. Id. at 676 (quoting 29 U.S.C. § 103(b) (2006)). The majority also refuted the claim that the phrase "any relation of employment" took on a specific meaning within the Clayton Act which the NLGA then incorporated. Id. at 680.

court also reasoned that Congress understood "any relation of employment" to include nonpermanent work stoppages, refuting the argument that section 4(a)'s second clause refers to permanent employee departures while its first clause refers to temporary strikes.[142] The court supported this analysis by interpreting the word "any" within section 4(a) to pertain broadly to "any *particular* relation of employment, whether or not the refusal is complete and permanent," rather than to denote simply "any relation of employment *whatsoever*, as with a permanent and complete work stoppage."[143]

The majority conceded that reading section 4(a)'s second clause as referring to both employers and employees renders the section internally inconsistent, with the section's second clause applying to both employers and employees, and the first clause applying incongruously only to employees.[144] However, the court countered that even if "the terms of § 4(a) afford employers less protection against injunctions than they afford employees . . . [it] does not mean that Congress gave employers no protection at all."[145]

To support its reading, the court addressed several sources of interpretation that might have suggested a conclusion contrary to its own. With respect to section 2's policy statements, the court explained that the NLGA's animating purpose was to prevent injunctions from "'upsetting the natural interplay of the competing economic forces of labor and capital.'"[146] Since a lockout, according to the court, does not interfere with labor's ability to exert economic power, section 2 did not alter the court's original textual analysis.[147] The court also addressed the NLGA's legislative history, concluding that it did not explicitly counsel against the court's reading.[148] Having disposed of these potential challenges, the

142. Id. at 677. This is based on the notion that some courts did not consider an employee as being in an employer/employee relation while striking: "[W]e believe a reasonable legislator in 1932 would have understood a strike or lockout of employees as a refusal to 'remain in [a] relation of employment.'" Id. (alteration in original).

143. Id. at 676.

144. Id. at 677; see also supra notes 72–75 and accompanying text (discussing interpretation of section 4(a)).

145. Id. at 678.

146. Id. at 678 (emphasis omitted) (quoting Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R., 353 U.S. 30, 40 (1957)).

147. See id. at 678 ("An employer's lockout is part of this interplay; it is not the equivalent of a judicial injunction that interferes with the ability of workers to exercise organized economic power.").

148. Id. at 679 (explaining legislative history does "not address the specific question whether § 4(a) also prohibits injunctions against employers" in labor disputes); see, e.g., 75 Cong. Rec. 4509 (1932) (statement of Sen. George Norris) ("[This bill] . . . asks for the laboring man nothing that it does not concede to the corporation."). However, the legislative history also supports the dissent's interpretation. See, e.g., id. at 5480 (statement of Rep. Fiorello LaGuardia) (noting injunctions were being used "[t]o break a strike; to take one side of an issue; to determine wages and standards of living by brute force of judicial power—instead of leaving it to a matter of adjustment by free American workers"); id. at

Eighth Circuit concluded that section 4(a) deprives a federal court jurisdiction to enjoin an employer from "implementing a lockout of its employees" in a labor dispute.[149]

In sum, the majority employed a textual analysis of section 4(a) to determine it protected *both* employers and labor from injunctions, and then discounted the Act's policy, precipitating events, and legislative history, as reasons to alter its textual interpretation.

3. *Judge Bye's Section 4(a) Analysis.* — Judge Bye began his statutory interpretation of section 4(a) by exploring how the majority's conclusions compel a contradiction between section 4(a)'s two clauses.[150] He noted that "under the majority's remarkably broad interpretation, a refusal to perform any work by employees would be tantamount to a refusal to remain in any relation of employment," making the first clause redundant in relation to the second.[151] Since this interpretation renders the first clause superfluous, Judge Bye rejected it and turned to the NLGA's history, legislative record, and section 2's policy to read section 4(a)'s two clauses as respectively referring only to *employee* temporary work stoppages and permanent termination.[152]

Having concluded that section 4(a) refers only to employees, Judge Bye looked to the language in section 20 of the Clayton Act, on which NLGA section 4(a) was modeled, to interpret section 4(a)'s second clause, "any relation of employment."[153] Judge Bye noted the Supreme Court's observation that this wording in the Clayton Act had resulted from Congress's intent to prevent the use of the judiciary's equitable

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5478 (statement of Rep. Fiorello LaGuardia) ("If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now."); id. at 4510 (statement of Sen. George Norris) ("It is because we have now on the bench some judges—and undoubtedly we will have others—who lack that judicial poise necessary in passing upon the disputes between labor and capital that . . . this bill is necessary.").

149. *Brady*, 644 F.3d at 680–81.

150. Judge Bye also introduced the history and purpose of the NLGA, along with prior circuit decisions, to draw opposing inferences from the majority, distinguishing Eighth Circuit precedent from the section 4(a) issue at hand. Id. at 687–93 (Bye, J., dissenting); see also supra note 138 (stating majority's differing interpretation of NLGA history, and comparing majority's and dissent's analyses of prior circuit precedent).

151. *Brady*, 644 F.3d at 690 (Bye, J., dissenting) ("'We avoid interpreting a statute in a manner that renders any section of the statute superfluous or fails to give effect to all of the words used by Congress.'") (quoting Morrison Enters. v. Dravo Corp., 638 F.3d 594, 609 (8th Cir. 2011)).

152. Id. at 693; see also supra text accompanying note 75 (explaining internally consistent interpretations of both section 4(a) clauses).

153. *Brady*, 644 F.3d at 691 (Bye, J., dissenting) ("'The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act.'" (quoting United States v. Hutcheson, 312 U.S. 219, 235–36 (1941))).

power against labor.[154] By incorporating this language from the Clayton Act, Judge Bye reasoned, the NLGA also adopted its underlying purpose: to protect employees, not employers, from injunctions in labor disputes.[155] Judge Bye further considered the NLGA's precipitating events as an indication of the Act's purpose. He explained that the abundance of injunctions by federal courts on behalf of management rather than employees had "'caused the federal judiciary to fall into disrepute.'"[156] As a result, the NLGA logically dealt with the problem at issue, that being the protection of labor, and not management, from injunctions.[157]

Next, Judge Bye addressed the majority's scant reliance on the NLGA's legislative history, arguing that contrary to the majority's assessment, the legislative record in fact offered guidance to read section 4(a) to exclude employer protection.[158] Legislative history also informed Judge Bye's reading of section 2, where "Congress conclusively resolved any ambiguity [in section 4] by building the purpose into the NLGA itself."[159] He thus concluded that, by "[i]nterpreting the text of § 4(a) in light of the legislative history and express policy of the NLGA, . . . § 4(a) does not protect employers."[160]

Unlike the majority, Judge Bye firmly rejected reliance on a "plain" reading of section 4(a) that would protect employers as the controlling interpretive guide. Instead, he criticized the majority's section 4(a) reading as internally inconsistent, and therefore invalid, by drawing on evidence such as the Clayton Act, the NLGA's legislative record, and NLGA section 2, thereby supporting his reading of section 4(a) to protect only employees, with both its clauses referencing separate *employee* protections.

4. *Impact of* Brady v. NFL. — By implementing a thorough analysis of NLGA section 4(a) to include employer injunction protection in a na-

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154. Id. at 691 (citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 203 (1921)).

155. Id. at 692 ("'*[W]orkingmen may lawfully combine* to further their material interests without limit or constraint . . . . It is the enjoyment and exercise of that right *and none other* that this bill forbids the courts to interfere with.'" (emphasis added) (quoting H.R. Rep. No. 63-627, at 32 (1914))).

156. Id. at 690 (quoting Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 715 (1982)). The court noted "the majority's interpretation fails to give effect to Congress's intent in passing the NLGA." Id.

157. Id.

158. Id. at 690–92.

159. Id. at 692 ("Although the majority attempts to minimize the congressional defeat of employer protections in the NLGA, there can be little doubt this legislative history provides yet more support for a reading of § 4(a) which protects only employees."); see also supra text accompanying note 62 (quoting section 2's language). Drawing from the legislative record, Judge Bye also noted that Congress had rejected alternate language for section 2 that would have provided equal consideration to employers. *Brady*, 644 F.3d at 692; see supra notes 65–66 and accompanying text (discussing rejected section 2 alternate language).

160. *Brady*, 644 F.3d at 693.

tional labor dispute with large public interest, *Brady* changed the prior circuit split by lending credence to arguments that had received only cursory support from the Second and Sixth Circuits. The *Brady* court's interpretation called into question the First, Seventh, and Ninth Circuits' reasoning to an extent not previously considered. Though Judge Bye challenged many of the majority's arguments, in order to temper future judicial reliance on the Eighth Circuit's decision without reflection on Judge Bye's dissenting remarks,[161] the following Part further considers the majority's arguments and discusses the potential jurisprudential confusion in cases of employee reinstatement and the negative consequences to labor resulting from the Eighth Circuit's symmetrical section 4(a) reading.

III. A RETURN TO INTENT: PROTECTING LABOR THROUGH SECTION 4(A)

This Note proposes that courts adopt, in general, a solely pro-labor reading of NLGA section 4(a): Employees may enjoin employers in labor disputes under section 4(a) in appropriate situations that would cause irreparable harm in the absence of injunctive relief.[162] This Part discusses the arguments supporting this conclusion as well as the anti-labor consequences inherent in the *Brady v. NFL* approach that run contrary to the NLGA's section 2 policy, including the potential for irreparable harm to labor and related parties. In light of these difficulties, courts should avoid implementing the Eighth Circuit's reading of section 4(a).

A. *Additional Analysis of Management Exclusion from Section 4(a)*

This section will discuss the support for a reading of section 4(a) to protect only employees from injunctions. Specifically, it will look to a textual analysis of section 4(a) and its introduction, the Clayton Act, the section 2 policy of the NLGA, and briefly to the NLGA's legislative record.

1. *Section 4(a) Textual Analysis.* — A reading based on the facial meaning of a statute's wording typically controls interpretation.[163] How-

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161. See supra note 103 (reviewing strong precedential value of sister circuit decisions).

162. A court will not grant an injunction if, in the absence of an injunction, irreparable harm will not befall the party seeking the injunction. See supra note 55 (listing requirements of 29 U.S.C. § 107 (2006)). If the party seeking the injunction would only suffer reparable harm, then a remedy at law (money damages) would be adequate, rendering an injunction unnecessary. See, e.g., Doug Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. Fla. L. Rev. 346, 346 (1981) ("American courts have repeatedly articulated a uniform standard for the granting of an injunction instead of money damages. To win injunctive relief, the plaintiff must show that his injury is irreparable with money or that money is an inadequate remedy.").

163. See Malat v. Riddell, 383 U.S. 569, 571–72 (1966) (explaining that statutes are given their natural and everyday meaning unless another intent is clear); see also Yule Kim, Cong. Research Serv., 97-589, Statutory Interpretation: General Principles and Recent Trends 2 (2008) ("The Supreme Court often recites the 'plain meaning rule,' that, if

ever, when reasonable disagreement arises over the "plain meaning" of a statute, other interpretive techniques are often considered.[164] Nonetheless, statutory interpretation must also holistically give effect to a statute's structure.[165] Construing section 4(a) to include employers renders the first clause—"[c]easing or refusing to perform any work"—redundant given the breadth of the second—"remain in any relation of employment"—as employees could utilize either clause to achieve the same protection, and employers could use only the latter. Under this interpretation the first clause's meaning becomes subsumed by the second clause's, rendering the first clause unnecessary to the statute.[166] This interpretation, therefore, runs contrary to established Supreme Court practice not to read statutes in a way that renders other statutory text superfluous.[167]

Furthermore, the Eighth Circuit's broad reading of "any" within the section to support its interpretation of "any relation of employment" to include employers is questionable. As previously discussed, the Eighth Circuit interpreted the word "any" within section 4(a)'s second clause to mean "any *particular* relation of employment, whether or not the refusal is complete and permanent," refuting the argument that the first and second clause referenced temporary work stoppages and permanent quits, respectively.[168] However, "any" could also mean "any *employee*"—regardless of working relationship (e.g., whether striking or quitting)—and not "any party" (employer or employee) in the "employment relation."[169] As a result, interpreting the ambiguous use of the word "any," within the second clause of section 4(a) to protect employers is not reasonable, as it renders unnecessary the entire first clause of the section,

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the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning.").

164. In fact, even when reasonable disagreement over a statute's literal meaning does not exist, it is still "dangerous . . . in any case of interpretive difficulty to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose." FCC v. NextWave Personal Commc'ns, Inc., 537 U.S. 293, 311 (2003).

165. See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (describing need to read statutory provisions harmoniously within larger statute to avoid internal contradiction).

166. See supra notes 72–75 and accompanying text (discussing three possible interpretations of the two clauses).

167. See, e.g., Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991) (explaining the same); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) (stating that statutory interpretation must "give effect, if possible, to every clause and word of a statute, avoiding . . . any construction which implies that the legislature was ignorant of the meaning of the language it employed").

168. See supra notes 143–144 and accompanying text (discussing *Brady* court's reasoning).

169. See Nixon v. Mo. Mun. League, 541 U.S. 125, 132 (2004) ("'[A]ny' can and does mean different things depending upon the setting.").

contrary to established principles of statutory interpretation.[170] Moreover, section 4(a) does not mention employers, while section 4(b) does, further suggesting that section 4(a) does not include protection for employers, as "it is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another."[171]

The Eighth Circuit's argument that section 3(b) provides a settled meaning of "relation of employment" to include employers within the NLGA, which then applies to section 4(a), does not refute this textual analysis.[172] Section 3(b) specifically mentions employers and employees in its discussion of the unenforceability by either party of agreements contrary to public policy.[173] Section 4(a) contains no mention of employers or reciprocity of protections, and section 3(b)'s statement that neither employers nor employees may violate public policy fails to support a convincingly symmetric reading of section 4(a) that offers injunction protection to both parties.[174]

Reading the two clauses of section 4(a) to reference the temporary work stoppages and permanent termination of employees, respectively, therefore protecting only labor and not management from injunctions, provides a coherent interpretation of the section to give both clauses meaning.[175] This reading also promotes the broad coverage of employment relationships to avoid the judicial narrowing of employee injunction protection, as seen in the wake of the Clayton Act.[176] Accordingly,

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170. See *Timbers of Inwood*, 484 U.S. at 371 ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ." (citations omitted)); see also supra note 169 and accompanying text (reviewing statutory interpretation).

171. Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); see also Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004) ("'There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.'" (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978))); Ariz. Elec. Power Coop., Inc. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987) ("When Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded.").

172. See supra note 141 and accompanying text (discussing *Brady* court's reasoning).

173. In regard to "yellow dog" contracts, 29 U.S.C. § 103(b) states that the agreement shall not be enforceable if "[e]ither party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization." 29 U.S.C. § 103(b) (2006). The stipulation that agreements contrary to public policy are not enforceable by either employers or employees does not settle the definition of the phrase "relation of employment" or the scope of the fundamental injunction principle of the NLGA in section 4(a).

174. Id. § 103(b).

175. See supra note 113 and accompanying text (explaining First Circuit argument for this interpretation).

176. See supra Part I.B (discussing Clayton Act's role in shaping NLGA).

this solely pro-employee interpretation of section 4(a) provides the more reasonable reading of the statute.

2. *Introduction to Section 4.* — The Eight Circuit's analysis is also flawed in its reliance on the introduction to section 4(a) to support its interpretation of section 4(a). The Eighth Circuit reasoned that since an employer is a "person . . . participating" in a labor dispute—as phrased in the introduction to section 4(a)[177]—management receives the protection of every provision of section 4.[178] It is more likely that the wording "person" refers to individual workers, as management is not typically considered a "person" but an entity against which workers bargain.[179] Furthermore, management is specifically referred to in NLGA section 2 as "employers of labor," not "persons."[180] Consequently, employers should receive protection under Section 4 only where specifically noted.[181] The additional text from section 4's introduction referring to "persons participating . . . whether singly or in concert" bolsters this conclusion.[182] "Concerted" is a term of art in labor legislation, appearing in statutes such as the LMRA and Clayton Act, consistently used in reference to *worker* coordination.[183] Accordingly, this introductory phrasing logically applies to injunction protection for workers, the "persons" engaged in "concerted activities" by unionizing and striking, and not employers.

3. *The Clayton Act as an Interpretive Guide.* — The Clayton Act is also a telling interpretive guide to section 4(a). The NLGA's purpose is illustrated by the legislative record, which shows that the motivation for the NLGA's enactment was to remedy the Clayton Act's failure to meet its stated aim: to preserve "the right of *workingmen* to act together in termi-

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177. 29 U.S.C. § 104.

178. See supra notes 139–140 and accompanying text (describing *Brady* court's reasoning).

179. See supra notes 62–66 and accompanying text (describing phrasing of section 2 in terms of individual worker protection); supra Part III.A.1 (arguing section 4(a) does not apply to employers). The fact that corporations may receive the same protection as "persons" under decisions like *Santa Clara County v. Southern Pacific Railroad Co.* does not mean companies are *actually* "persons." 118 U.S. 394 (1886) (finding Fourteenth Amendment, which "forbids a State to deny to any person within its jurisdiction the equal protection of the laws," applies to corporations). A "person" is defined as "[a] human being." Black's Law Dictionary, supra note 3, at 1257. But see definition of "artificial person," which includes "a corporation." Id. at 1258.

180. 29 U.S.C. § 102.

181. Congress could have stated that the section covered both individual "persons" *and* employers/management if it so intended. Furthermore, the Clayton Act also used the term "person" in reference to employees when stating its policy, with no intent to include employers. See Antitrust (Clayton) Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.); supra text accompanying note 39 (discussing Clayton Act's use of "any person").

182. 29 U.S.C. § 104.

183. See Labor Management Relation Act, 29 U.S.C. § 102 (recognizing difficulty for individual laborers thus supporting "concerted" worker coordination); Clayton Act, 29 U.S.C. § 52 (highlighting rights of workers acting in concert).

nating, if they desire, *any relation of employment*."[184] The Clayton Act's impact on the NLGA extends beyond the Act's purpose to its language, with NLGA section 4(a) using the Clayton Act's language "any relation of employment." In fact, the Clayton Act's use of this phrase in a context dealing explicitly with employee's rights, as denoted by the language "workingmen,"[185] and not with employer's rights, clarifies that this language, incorporated into section 4(a), refers only to employees in section 4(a) as well.[186] To be sure, the NLGA's language may not have the meaning it does in the Clayton Act. They are, after all, distinct statutes, and the NLGA improved upon the prior statute. But the Supreme Court has stated that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[187] Therefore, section 4(a)'s phrasing reasonably imports the same meaning from the Clayton Act: employee injunction protection only.[188]

4. *Intent and Policy of the NLGA.* — As discussed, there is no conclusive "plain" reading of section 4(a). Therefore, the Act's underlying intent and policy should guide the section's textual interpretation.[189] The

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184. S. Rep. No. 63-698, at 51 (1914) (emphasis added).

185. Id.

186. See H.R. Rep. No. 72-669, at 7–8 (1932) (stating section 4 of NLGA "is intended by more specific language to overcome the qualifying effects of the decisions of the courts" under Clayton Act). The Supreme Court construed the phrase "any relation of employment" in the Clayton Act to bar injunctions against "recommending, advising or persuading others by peaceful means to cease employment and labor" and thereby protecting employees "in promotion of their side of the dispute." Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 202–03 (1921) (quoting and construing § 20, 38 Stat. at 738).

187. Smith v. City of Jackson, 544 U.S. 228, 233 (2005). The argument that Congress intended the NLGA to incorporate a settled meaning of the Clayton Act's text contrary to its plain language (due to the Supreme Court's interpretation in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 470–71 (1921)) is a non-starter. See Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429 (1987) (recognizing *Duplex Printing* was superseded by the Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932)).

188. See Bragdon v. Abbott, 524 U.S. 624, 645 (1998) ("When judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate [the same] judicial interpretations as well."); cf. Carolene Products Co. v. United States, 323 U.S. 18, 26 (1944) ("[A]doption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording.").

189. See United States v. Great N. Ry., 287 U.S. 144 (1932) ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."); cf. Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). But see Rice v. Rehner, 463 U.S. 713, 732 (1983) (explaining even when faced with a conclusive plain, meaning courts can disregard this canon of construction "when application would be tantamount to a formalistic disregard of congressional intent"); Ortega-Marroquin v. Holder,

Supreme Court has stated congressional intent is particularly relevant to a proper interpretation of the NLGA,[190] and, as Justice Frankfurter explained, "the phrasing of such social legislation . . . seldom attains more than approximate precision of definition . . . . Of compelling consideration is the fact that words acquire scope and function *from the history of events which they summarize*."[191] The history behind the NLGA makes clear that Congress sought to prevent the abuse of employees in labor disputes, a purpose that should guide courts to not protect management at the direct expense of labor when interpreting the NLGA.[192]

Furthermore, the policy of the NLGA is conclusively stated in section 2, and that policy should guide all textual interpretations.[193] Section 2 instructs that "courts 'interpre[t]' the Act in a manner to protect *employees* from 'interference, restraint, or coercion' by employers."[194] This pol-

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640 F.3d 814, 818 (8th Cir. 2011) (stating courts must give effect to intent of Congress when clear).

190. See Order of R.R. Telegraphers v. Chi. & N.W. R.R., 362 U.S. 330, 335 (1960) ("There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted.").

191. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185–86, (1941) (emphasis added); see Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) ("[W]ords used . . . are the primary, and ordinarily the most reliable, source of [interpretation] . . . . But . . . a mature and developed jurisprudence [should not] make a fortress out of the dictionary; . . . statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.").

192. In attempting to remedy the shortcomings of the Clayton Act, Congress intended to remedy the abuse of injunctions by the courts against labor, not the use of injunctions *by* labor. See 75 Cong. Rec. 5461, 5478 (1932) (statement of Rep. Fiorello LaGuardia) ("[T]here is one reason why this legislation is before Congress, and that . . . is disobedience of the law . . . on the part of a few Federal judges. If the courts had . . . construe[d] the law as enacted by Congress, there would not be any need of legislation of this kind."); see also *Burlington N. R.R.*, 481 U.S. at 443 ("[T]he fact remains that Congress passed the [NLGA] to forestall judicial attempts to narrow labor's statutory protection."); Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 715 (1982) (explaining NLGA "was enacted in response to federal-court intervention on behalf of employers through the use of injunctive power against unions and other associations of employees"); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 772 (1961) (stating NLGA "expresses a basic policy against the injunction of activities of labor unions"); Retail Clerks Union Local 1222 v. Alfred M. Lewis, Inc., 327 F.2d 442, 447 (9th Cir. 1964) (noting Congress intended NLGA to end "widespread use of the labor injunction as a means of defeating the efforts of labor to organize and bargain collectively").

193. 75 Cong. Rec. 4503 (1932) (statement of Sen. George Norris) ("This is the first time . . . that any attempt has been made to declare . . . the public policy of the United States in relation to the issuing of injunctions in labor controversies."). Senator Norris further explained "when such public policy is declared, it becomes the duty of all the courts to give effect to such policy and to carry it out in the enforcement of any law where such public policy has application." Id.

194. Brief for Appellees at 43, Brady v. NFL, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898), 2011 WL 2179414, at *43 (alteration in original) (quoting 29 U.S.C. § 102 (2006)).

icy is not concerned with actions against employers.[195] Specifically, by using the phrase "mutual aid or protection" in section 2,[196] the Act's policy is "rooted in [the] working-class bondings and struggles" of collective labor, not in the "ideology of acquisitive individualism" embraced by employers.[197] The NLGA's animating purpose, employee-centric language, and rejection of employer protections in its policy statement confirm that Congress evinced no reciprocal intent in passing the Act.[198]

5. *Legislative Record.* — The congressional record speaks only minimally to the question of whether section 4(a) includes employer protections in addition to employee protections. Additionally, statements from the record used to support section 4(a)'s application to employers are susceptible to alternative interpretations or are non-dispositive comments made by individual congressmen.[199] These statements, therefore, are not a reasonable basis for departing from the NLGA's official section 2 policy.[200] Furthermore, some scholars have pointed to individual congress-

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195. This is evidenced by the exclusion of alternate language extending the NLGA's policy to employer protections. See supra notes 65–66 and accompanying text; see also Brady v. NFL, 779 F. Supp. 2d 992, 1023 (D. Minn. 2011), ("Congress took the 'extraordinary step' of withdrawing the jurisdiction of federal courts from issuing injunctions in nonviolent labor disputes . . . ." (quoting *Burlington N. R.R.*, 481 U.S. at 437)), vacated, 644 F.3d 661; cf. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 136–37 (1985) (explaining significance of rejected House language in relation to phrasing eventually adopted in context of Clean Water Act).

196. 29 U.S.C. § 102.

197. David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925, at 171 (1987). This same language—"mutual aid"—is used in the pro-labor NLRA. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157).

198. In *Brady*, the majority reasoned that section 2's broader purpose is "to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital," that a "lockout is part of this interplay," and therefore injunctions against employers are prohibited. 644 F.3d at 678 (emphasis omitted) (citation omitted). The official policy of the NLGA is stated in section 2 and does not include this reasoning. Through section 2, Congress made an unprecedented attempt to guide judicial interpretation of the NLGA; altering or reading a new language or purpose into this section, similar to judicial alterations to the Clayton Act, is contrary to plainly stated congressional intent. See supra note 61 and accompanying text (describing unique statement of policy as interpretive guide to NLGA).

199. See supra note 148 (listing contrasting statements made by legislators); see also Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) ("[A] statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" (second alteration in original) (citation omitted)); Schatzki, supra note 52, at 567 (arguing "[t]here can be no doubt that Congress meant . . . to protect unions," despite "some meager legislative threads which hint that employers might also be protected").

200. Addressing comments of individual congressmen concerning the NLGA's intent to promote a laissez-faire relationship between labor and capital and employer protections, the Supreme Court has stated, "we have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. . . . *[U]nenacted approvals, beliefs, and desires are not laws.*" P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988) (emphasis added).

men's statements to support the claim that Congress intended for the NLGA to effect either a complete withdrawal of the judiciary from labor disputes or a laissez-faire-type relationship between labor and workers.[201] These statements are inaccurate, as demonstrated by the NLGA's express pro-labor policy as well as its provisions, which provide for a judicial role in labor disputes.[202] If Congress's aim in passing the NLGA was truly to effect absolute neutrality between labor and management, thereby leaving management free to exert its economic force upon labor, section 2 would state this policy explicitly, or would at least be silent on the matter. However, section 2 unequivocally states that the Act's purpose is to secure employee protections, with no reference to employer protection.[203]

In light of these considerations, a reading of section 4(a) that, consistent with the First, Seventh, and Ninth Circuits, interprets the statute to protect only employees from injunctions is preferable. Such a reading respects not only the Act's intent and history, but also its text by introducing the only internally consistent interpretation of section 4(a)'s language to U.S. labor jurisprudence.

B. *Potential Consequences of the* Brady v. NFL *Majority Interpretation*

Though the NLGA generally protects the right of workers to organize effectively without the threat of injunctions from employers, this contention may not necessarily mean that interpreting section 4(a) to also protect employers from injunctions runs contrary to section 2's pro-labor policy. However, this result does in fact violate the NLGA's section 2 pol-

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201. See supra notes 193–194 and accompanying text (noting explicit policy statement contained in NLGA). As Justice Moody succinctly explained, "[i]t is difficult to deal with a proposition of this kind except by saying that it is not true." Hunter v. City of Pittsburgh, 207 U.S. 161, 177 (1907); see also Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 503 (7th Cir. 1989) ("There is a big difference between what Congress enacts and what it supposes will ensue." (emphasis omitted)).

202. See Grace Co. v. Williams, 96 F.2d 478, 480 (8th Cir. 1938) (explaining NLGA "does not forbid the granting of injunctions in all cases of labor disputes; in fact, it clearly contemplates that injunctions may be granted in such cases" (citations omitted)); Kerian, supra note 27, at 64 (stating NLGA "was not passed to forbid the granting of injunctions, but rather it was passed to correct the abuse of injunctions"); supra notes 53–60 and accompanying text (describing provisions of NLGA). Prior Supreme Court cases have allowed injunctions not contrary to the policy and intent of the NLGA. See supra Part I.D.2 (discussing Supreme Court interpretation of NLGA in *Textile Workers*, *Sinclair*, *Boys Markets*, and *Buffalo Forge)*.

203. Interpretations of a statute cannot be "demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). In attempting to remedy the shortcomings of the Clayton Act, Congress intended to stop the abuse of injunctions against labor, not *by* labor: "The legislative history discloses that it was necessary to remedy the 'disobedience of the law,' not on the part of 'organized labor,' but 'on the part of a few Federal judges' who refused to administer 'even justice to both employers and employees.'" Brady v. NFL, 779 F. Supp. 2d 992, 1023 (D. Minn. 2011) (quoting Burlington N. R.R. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 437 (1987)), vacated, 644 F.3d 661 (8th Cir. 2011).

icy because such a broad interpretation of section 4(a)—as in *Brady*—would allow employers to utilize the NLGA as a tool against labor.[204] As explained, section 1 removes federal courts' jurisdiction "to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute," except in two situations: those injunctions that fall "in a strict conformity with the provisions" contained in section 4 and those that do not run "contrary to the public policy declared" in section 2.[205] Accordingly, an interpretation of section 4(a) departing from the Act's section 2 policy statement is untenable.[206] The remaining subsections demonstrate the negative practical consequences for labor under the Eighth Circuit's interpretation of NLGA section 4(a), including the potential for doctrinal disarray in labor jurisprudence to the benefit of management, results that are plainly contrary to the Act's section 2 policy and the NLGA's pro-labor intent.

1. *Inequitable Lockouts.* — A number of illegal employee lockouts exist that are inequitable to labor and collective bargaining.[207] These include lockouts that "interfere with employee freedom to join or not join a union," that are "in aid of unfair labor practices," or that are utilized to "avoid bargaining on a mandatory subject."[208] These actions comfortably fall within the NLGA's broad definition of "labor dispute."[209] Accordingly, *Brady* "may solidif[y] the notion . . . [that] lockouts cannot be enjoined, and as such, any lockout would remain in place until the merits

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204. *Brady*, 644 F.3d at 680 (stating expansively that "[Section] 4(a) of the [NLGA] deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees"). As the Supreme Court has previously explained, employer injunctive relief is a "strained and unnatural construction[s] of the words of the [NLGA]," in conflict with the Act's policy. See Virginian Ry. v. Sys. Fed'n No. 40, 300 U.S. 515, 563 (1937) ("[A]s its history and context show, [it] was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions . . . .").

205. 29 U.S.C. § 101 (2006); see also id. §§ 102 & 104(a).

206. See supra note 53 and accompanying text (indicating injunctions issued contrary to NLGA's section 2 policy violate NLGA section 1); see also United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1869) ("General terms should be so limited in their application as not to lead to . . . *an absurd consequence*." (emphasis added)). A pro-labor statute limiting employee protections by virtue of using the phrase "relation of employment" is such an absurd consequence. See Jackson v. NFL, 802 F. Supp. 226, 233 (D. Minn. 1992) ("It would be ironic if a statute that had been enacted to protect the rights of individual employees from improper actions by employers and the courts were turned against those employees . . . .").

207. See NLRB v. Brown, 380 U.S. 278, 282 (1965) (explaining in lockout context, "where the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends," no further inquiry into lockout's motivation is required to find it unlawful).

208. 2 The Developing Labor Law, supra note 8, at 1641–42.

209. See supra note 54 (providing NLGA definition of "labor dispute").

of the case are heard."[210] Under this interpretation of section 4(a), workers may be prohibited from utilizing injunctive relief to end inequitable lockouts before suffering irreparable economic damage. Such an interpretation of section 4(a) thereby reduces employee protection under the NLGA.

2. *Employer Combination.* — Furthermore, there are situations where employers could collude to "restrain competition in nonunionized employment markets by setting anticompetitive terms and conditions of employment and 'refusing to remain . . . in any relation of employment' with employees on other terms."[211] Injunctions are a necessary tactic to protect employees from irreparable harm stemming from this maneuver and similar collusive behavior in employment markets; the reading of section 4(a) in *Brady* could prevent injunctions in these situations, hindering labor's ability to obtain equitable remedies, to the benefit of management.[212] This concern is especially relevant given increased deunionization in the modern economy.[213]

3. *Employee Reinstatement.* — In the employee reinstatement context, a blanket prohibition on injunctions against employers may interfere

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210. Alexander M. Bard, Note, Strength in Numbers: The Question of Decertification of Sports Unions in 2011 and the Benefit of Administrative Oversight, 1 Am. U. Lab. & Emp. L. F. 347, 367 (2011).

211. Brief of Amici Major League Baseball Players' Ass'n et al. in Support of Appellees, supra note 102, at 12 (quoting 29 U.S.C. § 104(a) (2006)). These situations are possible, as the court in *Brady* extended the term "labor dispute" in the NLGA to cover disputes between non-unionized employees and employers. 644 F.3d at 673. But see id. at 681 (explaining "[t]he refusal of the League . . . to deal with free agents and rookies is not a refusal 'to remain in any relation of employment,' for there is no existing employment relationship in which 'to remain'"). Accordingly, the court could have, in theory, granted free agents and rookies an injunction to end the NFL lockout under its interpretation since free agents and rookies were not employed by the League at the time of the lockout. However, permitting an injunction by free agents and rookies against the NFL is meaningless since the resulting number of players would be insufficient to operate the League (assuming the players employed at the time of the lockout could not join the injunction). The same principle applies in labor disputes where unemployed parties who seek to work for the employer implementing the lockout gain an injunction against that employer, and the injunction does not yield sufficient numbers to continue regular operations. Also relevant is the fact that such an injunction would not actually benefit previously employed workers currently locked out, as the lockout for such employees would simply continue.

212. See 2 The Developing Labor Law, supra note 8, at 1651–54 (describing limitations on regulation of multi-employer lockouts); Bard, supra note 210, at 367 ("For example, the *Brady* case would not have been heard by a U.S. District Court until 2012, thus ensuring that without a negotiated deal, the NFL could have cancelled the upcoming season . . . ."); see also Note, Baseball Players and the Antitrust Laws, 53 Colum. L. Rev. 242, 249 n.71 (1953) ("Given the purpose of the [NLGA] it is improbable that an association of employers which deprives an 'individual unorganized worker' of his 'freedom of labor' comes within its [exemption from antitrust laws]." (quoting 29 U.S.C. § 102 (1946))).

213. See Bruce Western & Jake Rosenfeld, Workers of the World Divide: The Decline of Labor and the Future of the Middle Class, Foreign Aff., May/June 2012, at 88, 88 (noting decline in unionization from one-third to one-tenth of total U.S. labor force since 1950s).

with the LMRA's policy and the enforcement of collective bargaining agreements.[214] The Supreme Court has explicitly recognized the legitimacy of employee reinstatement—a form of injunctive relief—under the LMRA.[215] By construing the NLGA consistently with *Brady*, courts may effectuate results contrary to the Supreme Court's decision, an outcome seen when the Sixth Circuit blocked an employee's reinstatement that would have been in accord with a collective bargaining agreement under the NLGA.[216] The potential removal of employee reinstatement in labor disputes provides additional protection to firms that disregard collective bargaining agreements at the expense of employees, possibly generating not only jurisprudential confusion (around the LMRA and NLGA), but also a result contrary to Congress' pro-labor intent expressed in NLGA section 2.

4. *Employer/Employee Economic Divide.* — The economic divide between employees and employers challenges the argument advanced in *Brady* that lockouts are the effective equivalent of strikes and Congress thereby intended a broad coverage of both employment actions through section 4(a).[217] Individual employees typically lack the resources of their employers. In many cases employees cannot withstand prolonged periods without income during lockouts, whereas employers are better situated to weather strikes.[218] Furthermore, given the potential nonpayment of unemployment insurance during labor disputes, workers are particularly vulnerable to exploitation.[219] Workers may cave easily to employer demands, even in the face of inequitable employer tactics, to avoid pro-

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214. See supra notes 109–119 and accompanying text (discussing employee reinstatement under LMRA in *de Arroyo* and *Local 2750*).

215. See Clayton v. Int'l Union, 451 U.S. 679, 690–93 (1981) (ruling union's inability to grant employee's reinstatement meant employee had justiciable LMRA claim).

216. Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1124 (6th Cir. 1981) (noting in blocking LMRA section 301 reinstatement action, "the terms of [the NLGA's] broadest prohibitions do not distinguish between injunctions against labor and injunctions against management").

217. In *Brady* the majority argues that an employer lockout "is not the equivalent of a judicial injunction." 644 F.3d 661, 678 (8th Cir. 2011). However, based on the assumed economic inequality of the parties involved, a lockout poses a greater financial threat to employees. See Robert P. Duvin, The Bargaining Lockout: An Impatient Warrior, 40 Notre Dame Law. 137, 148 (1965) (explaining a "bargaining lockout is an extremely potent weapon, and if it can be employed with abandon every time a union refuses to accept an employer's terms, the long standing distribution of power between capital and labor will undergo a substantial readjustment").

218. For support for this general principle, see, e.g., 1 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 104 (William Playfair ed., W. Pickering 11th ed. 1995) (1776) ("[T]he masters can hold out much longer [in labor disputes] . . . though they did not employ a single workman [while] [m]any workmen could not subsist a week . . . . In the long run the workman may be as necessary to his master as his master is to him; *but the necessity is not so immediate.*") (emphasis added).

219. See generally Comment, Locked-Out Workers Denied Unemployment Benefits, 2 Stan. L. Rev. 427 (1950) (explaining workers in labor disputes, such as lockouts, may be denied unemployment benefits).

longed periods without wages. Recent shifts in the American economy have exacerbated this precarious situation, as the labor supply has risen while the demand for labor has decreased, increasing employer bargaining power in labor disputes.[220] Accordingly, lockouts differ sharply from strikes and should not receive section 4(a) coverage to disadvantage labor absent clear congressional intent. As discussed above, such an intent is not discernible from the NLGA's history or policy goals.[221]

5. *Labor-Related Third Party Harm.* — The potential harm to third parties who are dependent on workers in employment disputes is not properly weighed by broadly removing the ability to enjoin employers in labor conflicts. The public interest of those not party to the suit "should be given considerable weight" in considering a preliminary injunction,[222] and, as the Supreme Court emphasized, "courts of equity should pay particular regard for the public consequences" when deciding whether to grant an injunction.[223] By rendering these circumstances irrelevant, the Eighth Circuit's reading precludes injunctive relief in those labor disputes that have far-reaching public and irreparable third-party consequences, thereby not only restricting settled jurisprudential considerations regarding injunctions, but also harming labor and related parties dependent on the worker protections of the NLGA.

As Chief Justice William Howard Taft explained, "[i]njunctions in labor disputes are merely the emergency brakes for rare use and in case of sudden danger."[224] Courts should not prevent labor from utilizing this tool of last resort; an approach to section 4(a) consistent with the First, Seventh, and Ninth Circuits' reasoning avoids the potential harms to labor discussed above that would contravene the NLGA's intent.

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220. For a discussion on the declining working conditions and future of the American worker, see generally Steven Greenhouse, The Big Squeeze: Tough Times for the American Worker 3–5 (2008) ("One of the least examined but most important trends taking place in the United States today is the broad decline in the status and treatment of American workers . . . that began nearly three decades ago . . . and hit with full force soon after the turn of the century."). See also Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation—July 2012 (Aug. 3, 2012), available at http:// www. bls. gov/ news. release/archives/empsit_08032012.pdf (on file with the *Columbia Law Review*) (citing 8.3% U.S. unemployment rate in July 2012).

221. See supra notes 61–63 and accompanying text (describing policy orientation of NLGA as specifically protective of workers' rights).

222. 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2948.4, at 201, 205 (2d ed. 1995).

223. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). Similarly, Congress specifically addressed the precarious situation of one-industry towns in the Worker Adjustment and Retraining Notification (WARN) Act, which protects employees and economies centered on local industry. See 29 U.S.C. §§ 2101–2109 (2006).

224. Frankfurter & Greene, supra note 6, at 222 (quoting interview with William Howard Taft, Chief Justice, U.S. Supreme Court, in Phil. Pub. Inquirer, Nov. 20, 1919, at 8).

CONCLUSION

The Supreme Court has unequivocally stated that "Congress passed the [NLGA] to forestall judicial attempts to narrow *labor's* statutory protection."[225] Interpreting the NLGA to protect employers at the expense of labor—as in *Brady v. NFL*—promotes the opposite result. An approach to section 4(a) consistent with the First, Seventh, and Ninth Circuits and Judge Bye's dissent in *Brady* not only is true to the clear intent and animating purpose of the NLGA, but provides the only coherent reading of the section's text. Courts should not defer to the Eighth Circuit and should instead allow injunctions against management in appropriate labor disputes under NLGA section 4(a) to prevent lasting harm to employees.

225. Burlington N. R.R. v. Bhd. of Maint. of Way Emps., 481 U.S. 429, 443 (1987) (emphasis added).

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