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ARTICLES

LABOR CONTRACT FORMATION, TENUOUS TORTS, AND THE REALPOLITIK OF JUSTICE SOTOMAYOR ON THE 50TH ANNIVERSARY OF THE *STEELWORKERS TRILOGY*: *GRANITE ROCK V. TEAMSTERS*

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I. INTRODUCTION

Unlike the ringing endorsement of labor arbitration in the *Steelworkers Trilogy*,¹ the Supreme Court’s decision in *Granite Rock Co. v. International Brotherhood of Teamsters*² will neither revolutionize arbitration nor change the way courts view Section 301(a) of the Labor-Management Relations Act (“LMRA”)³—at least not in the immediate future. However, *Granite Rock* may become best known for what it did *not* do—definitively announce whether tort claims may be brought within the gamut of Section 301(a). The rich history of Section 301(a) has afforded

1. The *Steelworkers Trilogy* is comprised of the following three cases: *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). The *Steelworkers Trilogy* was an historic sea change—from the antipathy courts previously manifested toward arbitration, to a presumption enthusiastically in favor of arbitration over external litigation—as the preferred means of dispute resolution in the labor management context. Significant law review articles and keynote addresses regarding the Trilogy include: Judge Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988); David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); Peter Feuille et al., *Judicial Review of Arbitration Awards: Some Evidence*, 41 LAB. L.J. 477 (1990); William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1984); Michael H. LeRoy & Peter Feuille, *As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. L. & POL’Y REV. 191, 193-94 (2007); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993); Michael Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547 (2005); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137 (1977); W. Daniel Boone, Keynote Address at the National Academy of Arbitrators Annual Meeting: Back to the Basics: Arbitration as “Part of a System of Industrial Self-Government” (May 27, 2010); William B. Gould IV, Keynote Address at the National Academy of Arbitrators Annual Meeting: *Steelworkers Trilogy After a Half Century* (May 27, 2010); Andrew M. Kramer, Keynote Address at the National Academy of Arbitrators Annual Meeting: *Fifty Years After the Steelworkers Trilogy: Some New Questions and Old Answers* (May 27, 2010).

2. 130 S. Ct. 2847 (2010).

3. See Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (2006) (providing independent federal jurisdiction for contractual disputes between employers and labor organizations representing employees).

the Supreme Court ample opportunity to interpret its purpose and reach.⁴

Section 301(a) confers jurisdiction on federal courts in suits between employers and unions.⁵ Soon after its passage, however, the Court's interpretation of Section 301(a) emphasized an additional policy goal flowing from the statute: stability in the collective bargaining process. In *Textile Workers Union v. Lincoln Mills*, the Court found that Section 301(a) not only "confer[ed] jurisdiction in the federal courts over labor organizations," but also "expresse[d] a federal policy that federal courts should enforce [arbitration] agreements . . . [in order to achieve] industrial peace."⁶ By interpreting Section 301(a) as a "congressional mandate to the federal courts to fashion a body of federal law to . . . address disputes arising out of labor contracts[,]"⁷ the Court took it upon itself to stabilize relationships between employers and unions.

Fifteen years after Section 301(a)'s passage,⁸ contractual stability between unions and employers continued to be an underlying concern. In *Local 174, Teamsters v. Lucas Flour Co.*, the Court explained the necessity of federal uniformity in collective bargaining disputes to avoid "[t]he possibility that individual contract terms might have different meanings under state and federal law [which] would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."⁹ Different state and federal interpretations could prolong disputes, thereby dissuading contracting parties from including arbitration agreements in the first place.¹⁰ The Court's core commitment to stability within the collective bargaining process guided its Section 301(a) jurisprudence.

4. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (recognizing Section 301(a) as an independent grant of federal court jurisdiction regardless of amount in controversy or diversity of citizenship in order to fashion a federal common law to govern disputes of collective bargaining agreements); see also *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213–14 (1985) (holding state-law based claims solely created by a collective bargaining agreement are subject to Section 301(a) and preempted by federal law); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104–05 (1962) (mandating federal common law's supremacy over local and state laws in interpreting collective bargaining agreements subject to federal jurisdiction under Section 301(a)).

5. See § 301(a), § 185(a); see also *Lincoln Mills*, 353 U.S. at 455 (observing the congressional intent of Section 301(a) was more than merely a jurisdictional grant, but also to provide legal remedies to the parties of collective bargaining agreements).

6. *Lincoln Mills*, 353 U.S. at 455.

7. *Lueck*, 471 U.S. at 209.

8. See Labor Management Relations (Taft-Hartley) Act § 301(a), Pub. L. No. 80-101, 61 Stat. 156 (1947) (codified at 29 U.S.C. § 185(a) (2006)) (creating jurisdiction to allow for private suits to enforce the substance of collective bargaining agreements between employers and unions).

9. *Lucas Flour*, 369 U.S. at 103.

10. *Id.* at 104.

Although the Court's opinion in *Granite Rock* focused more on addressing the availability of options Granite Rock might still pursue—as opposed to explaining why the Court did not endorse the claim for tortious interference of contract—the Court made clear that “[t]he balance federal statutes strike between employer and union relations in the collective-bargaining arena is carefully calibrated.”¹¹ Consequently, the Court held that “creating a federal common-law tort cause of action [under Section 301(a)] would require a host of policy choices that could easily upset this balance[.]”¹² The majority went no further, finding no need to determine whether Section 301(a) represented a Congressional mandate to create a body of federal tort law regarding the enforcement of collective bargaining agreements.¹³

II. FACTUAL BACKGROUND/PROCEDURE

Granite Rock Co. and Teamsters Local 287 (“Local 287”) were parties to a collective bargaining agreement (“CBA”) for five years that expired on April 30, 2004.¹⁴ Preliminary negotiations for a new agreement began in March 2004, yet the parties were unable to reach a resolution by May 2004.¹⁵ After reaching impasse, Local 287 began its strike of Granite Rock on June 9, 2004.¹⁶ On July 2, 2004 at 4 a.m., a new four-year agreement was allegedly reached containing a broad arbitration clause for the settlement of “any disputes” arising under the agreement, as well as a “no-strike clause” covering the period from May 1, 2004–April 30, 2008.¹⁷ The parties were not, however, able to reach a separate back-to-work agreement that would indemnify Local union members from liability for any strike-related damages Granite Rock incurred.¹⁸ Later that morning, Local 287

11. See *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2864 (2010); see also *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639 (Local 639)*, 362 U.S. 274, 289–290 (1960) (acknowledging that the Taft-Hartley Act was “the result of conflict and compromise” to strike a balance between the power of management and labor).

12. *Granite Rock*, 130 S. Ct. at 2864.

13. See *id.* at 2864–65 (couching the Court’s denial to recognize a federal common law tort under Section 301(a) as premature, given the other remedies available to Granite Rock).

14. *Granite Rock Co. v. Int’l Bhd. of Teamsters, Local 287 (Local 287 IV)*, 546 F.3d 1169, 1171 (9th Cir. 2008), *aff’d in part, rev’d in part sub nom. Granite Rock Co. v. Int’l Bhd. Of Teamsters*, 130 S. Ct. 2847 (2010).

15. *Granite Rock Co. v. Int’l Bhd. of Teamsters, Local 287 (Local 287 I)*, 402 F. Supp. 2d 1120, 1122 (N.D. Cal. 2005).

16. *Granite Rock*, 130 S. Ct. at 2853.

17. *Local 287 IV*, 546 F.3d at 1171.

18. See *Local 287 I*, 402 F. Supp. 2d at 1122–23 (observing Local 287’s claim that the acceptance of the new collective bargaining agreement was subject to reaching an agreement on the “Back to Work Agreement”).

allegedly ratified the new CBA.¹⁹ Granite Rock then claimed that George Netto, Local 287's business representative, called Granite Rock to confirm that the Union had ratified the new agreement.²⁰ However, Local 287 denied that union members ratified the agreement, contending that this ratification was a condition to the agreement of a "back to work agreement."²¹ Granite Rock countered that there was an agreement to discuss the back to work agreement at a later date, and that the back to work agreement was subject to the grievance procedure outlined in the new agreement.²²

On July 5, 2004, Local 287's members received instructions from Rome Aloise, the administrative assistant to the General President of the International Brotherhood of Teamsters ("IBT"), and other members of Local 287 to refrain from returning to work.²³ Granite Rock alleged that on July 6th, 2004, Mr. Netto demanded a back-to-work agreement that would protect Local 287 and IBT from liability arising from the strike prior to returning to work.²⁴ When Granite Rock refused, the strike continued—which Granite Rock alleged violated the new collective bargaining agreement's no-strike provision.²⁵ The strike continued until September 13, 2004, and the parties executed their new collective bargaining agreement in December 2004 ("December CBA").²⁶

The parties agreed that the December CBA was a valid contract and that it was retroactive to May,²⁷ but they disagreed as to the scope of the retroactivity. The oral arguments to the Supreme Court are illustrative:

MR. MATHIASON [counsel for Granite Rock]: Your Honor, what's really central is the fact that when we signed in December, we signed the agreement of July 2nd. That is critical. If there had been no ratification on July 2nd, there would be no contract. And when the union signed, they take the position that they signed a contract ratified on August 22nd. Those are radically different events²⁸

19. *Id.* The basis of the disagreement between Local 287 and Granite Rock concerns whether the Local 287 did, in fact, ratify the agreement on July 2, 2004. Local 287 asserted that acceptance of the agreement was conditioned on Granite Rock's acceptance of a "Back to Work Agreement."

20. *Local 287 IV*, 546 F.3d at 1171–72.

21. *Id.* at 1172.

22. *Local 287 I*, 402 F. Supp. 2d at 1122–23.

23. *Id.* at 1171–72.

24. *Local 287 IV*, 546 F.3d at 1172.

25. *Id.*

26. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2861 (2010).

27. *Id.* at 2867.

28. Transcript of Oral Argument at 17–18, *Granite Rock v. Int'l Bhd. of Teamsters*,

JUSTICE ALITO: Am I correct that neither you, neither Granite Rock nor the Local, thinks that the December collective bargaining agreement really was fully retroactive? They don't think it was--

MR. MATHIASON: That's correct.²⁹

CHIEF JUSTICE ROBERTS: So -- so you don't think [the December CBA] included the no-strike clause--³⁰

MR. BONSALE [counsel for Local 287]: We contend that it would not³¹

The subject of the disagreement was whether the December CBA executed the CBA retroactively to the July 2nd ratification vote or the August 22nd ratification vote by Local 287. This dispute left open the question of whether both parties agreed to arbitrate the July strike—a dispute requiring judicial resolution.³²

III. LOWER COURT DECISIONS

A. The District Court

On July 9, 2004, Granite Rock filed a complaint in United States District Court for the Northern District of California against Local 287, alleging that Local 287 had participated in an unlawful strike and invoking federal jurisdiction under Section 301(a) of the LMRA.³³ Granite Rock amended its complaint to include a request for injunctive relief through a temporary restraining order.³⁴ The court denied injunctive relief and found that the new agreement had not been ratified.³⁵ Granite Rock filed another motion for a new trial based on new evidence.³⁶ Local 287 responded with a

130 S. Ct. 2847 (2010) (No. 08-1214), 2010 WL 171664.

29. *Id.* at 18 (alteration in original).

30. *Id.* at 25 (alteration in original).

31. *Id.*

32. *See, e.g.,* *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“[W]hether parties have submitted a particular dispute to arbitration . . . is an issue for judicial determination[.]” (citing *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 649 (1986))).

33. *Local 287 I*, 402 F. Supp. 2d 1120, 1123 (N.D. Cal. 2005).

34. *Id.*

35. *Id.*

36. *See generally* Plaintiff's Motion for New Trial or, in the Alternative, Motion to Vacate Dismissal of the First Amended Complaint, *Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287 (Local 287 I)*, 402 F. Supp. 2d 1120 (N.D. Cal. 2005) (No. 04-CV-02767), 2004 WL 5571934 (arguing that Granite Rock is entitled to a new trial

request for judgment on the pleadings.³⁷ The court denied the Local 287's motion.³⁸

In the first of a series of orders, the District Court granted Local 287's motion to limit the trial court's review to whether a collective bargaining agreement was in effect when defendant's alleged violation took place, and if so, reserved questions of whether an actual violation of the agreement occurred and the amount of damages for arbitration.³⁹ The court denied defendant's motion to strike Granite Rock's jury demand, and found Granite Rock's request to be timely.⁴⁰

In its second order, the District Court denied Local 287's motion for summary judgment on issue preclusion.⁴¹ Local 287 moved for summary judgment after the National Labor Relations Board's determination that the July 2nd collective bargaining agreement did not exist at the time of Local 287's strike.⁴² However, the court found that Granite Rock had expressly "reserved the ratification issue for litigation in [District Court]."⁴³

On February 14, in its third order, the District Court granted Granite Rock's motion to add the International Brotherhood of Teamsters as a defendant.⁴⁴ The court pointed to documents indicating that Rome Aloise, the Administrative Assistant to the General President of IBT, had, among

because of newly discovered evidence and the court's judgment must be amended or altered to vacate the dismissal of the complaint).

37. *Local 287 I*, 402 F. Supp. 2d at 1123.

38. *See id.* (observing denial of a motion for judgment under FED. R. CIV. PRO. 12(c) was appropriate because of the underlying factual dispute concerning the ratification date of the December CBA by Local 287).

39. *See id.* at 1126–27 (holding that Local 287 was neither estopped from, nor had waived its ability of, invoking the arbitration provision of the December CBA since Local 287's alternative argument to the existence of the CBA at the time of the dispute had always been that if such an agreement was found, the matter should be referred to arbitration).

40. *See id.* at 1127 (observing that Granite Rock's request for a jury trial was made within ten days of Local 287's last filing which comports with FED. R. CIV. P. 38(b)).

41. *Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287 (Local 287 II)*, 2006 U.S. Dist. LEXIS 36048, at *18 (N.D. Cal. Feb. 6, 2006).

42. *See id.* at *2, *5–6 (observing that Local 287's argument was based on the fact that the NLRB's adjudication of Granite Rock's unfair labor practice charge was binding on Granite Rock).

43. *See id.* at *15. *Cf.* *Teamsters Local 287, Int'l Bhd. of Teamsters (Granite Rock Co.)*, 347 N.L.R.B. 339, 339 n.2 (2006) (affirming the Administrative Law Judge's decision not to reach the issue of whether Local 287 held a ratification vote on July 2, 2004, as doing so was alleged in the complaint and the NLRB's General Counsel's theory of the case controls the issues at trial, not the Charging Party's).

44. *See Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287 (Local 287 III)*, 2006 U.S. Dist. LEXIS 25606, at *2 (N.D. Cal. Feb. 14, 2006) (applying DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) to allow Granite Rock to liberally amend its complaint "when justice so requires." (citing FED. R. CIV. P. 15(a))).

other things, encouraged Local 287 to continue to strike.⁴⁵

Ultimately, the District Court found that the ratification date issue was one for the court, not the arbitrator, to decide.⁴⁶ After a federal jury found that Local 287 ratified the December CBA on July 2, 2004, the District Court referred the issues of breach of contract and damages to arbitration and dismissed Granite Rock's tortious interference of contract claim against IBT.⁴⁷

B. The Ninth Circuit

The Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in part.⁴⁸ Judge Gould found that the District Court properly dismissed Granite Rock's tortious interference of contract claim for failing to state a claim.⁴⁹ However, the Ninth Circuit held that the District Court erred in denying Local 287's motion to compel arbitration and remanded "the entire dispute" for arbitration, finding it unnecessary to address the contract formation issue.⁵⁰

1. Denial of Granite Rock's Tortious Interference Claim Under Section 301(a)

Judge Gould, writing for a unanimous Ninth Circuit panel, based the court's opinion on *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Committee, Inc.*,⁵¹ a Ninth Circuit decision from 1983 outlining the requirements for jurisdiction under Section 301(a).⁵² First, a claim must be "based on an alleged breach of contract between an employer and a labor organization."⁵³ Second, "the resolution of the lawsuit [must] be focused upon and governed by the terms of the contract."⁵⁴ The Ninth Circuit found that the District Court's dismissal of Granite Rock's claim against IBT for tortious interference was correct because the claim did not "arise under" the new collective bargaining agreement between

45. See *id.* at *3–4 (couching its decision to allow IBT to be added as a defendant on the great amount of assistance that IBT allegedly provided to Local 287 through Aloise during and prior to the strike).

46. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2855 (2010).

47. *Id.*

48. *Local 287 IV*, 546 F.3d 1169, 1171 (9th Cir. 2008), *aff'd in part, rev'd in part sub nom. Granite Rock*, 130 S. Ct. 2847 (2010).

49. See *id.* (upholding the District Court's ruling that FED. R. CIV. P. 12(b)(6) precluded Granite Rock's claim of tortious interference).

50. *Id.*

51. 707 F.2d 1067 (9th Cir. 1983).

52. *Local 287 IV*, 546 F.3d at 1172.

53. *Id.* (internal quotations omitted).

54. *Id.* (internal quotations omitted).

Granite Rock and Local 287 reached on July 2, 2004.⁵⁵ The court further noted that other circuit courts also declined to extend a Section 301(a) cause of action to “parties not governed by the relevant agreement.”⁵⁶

The Ninth Circuit also dismissed Granite Rock’s assertion that a federal tort claim was cognizable under Section 301(a).⁵⁷ The Court of Appeals stated that it was bound by Supreme Court precedent interpreting Section 301(a) as “a mandate to create a federal common law of labor contract interpretation, not an independent body of tort law.”⁵⁸ As to satisfying the second element of Section 301(a), Granite Rock argued that “because breach of the underlying contract is a necessary element of the tortious interference claim, the resolution of the tort claim is ‘focused upon’ and ‘governed by’ the contract.”⁵⁹ In addition, Granite Rock pointed to the “close relationship” between Local 287 and IBT to highlight the benefit that IBT gained by the Local’s breach.⁶⁰ The court noted the argument’s “emotive force,” but held that Granite Rock’s argument lacked precedential support.⁶¹

Unable to persuade the Ninth Circuit on plain language grounds, Granite Rock turned to legislative intent, arguing that Congress intended Section 301(a) to extend to parties such as IBT out of concerns for “fundamental fairness.”⁶² But Granite Rock’s reliance on legislative history to establish a tortious interference claim under Section 301(a) also proved unpersuasive. The court felt bound by the statute’s language and that “[a]ny ‘gap’ that might exist in Congress’s labor law design is for Congress and not for [the courts] to fill.”⁶³

55. *Id.* at 1173.

56. *Id.* at 1174 (citing *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 572 (2d Cir. 1995); *Int’l Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992); *United Food & Commercial Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992); *Serv., Hosp., Nursing Home & Pub. Emps. Union, Local No. 47 v. Commercial Prop. Servs., Inc.*, 755 F.2d 499, 509 (6th Cir. 1985); *Loss v. Blankenship*, 673 F.2d 942, 948 (7th Cir. 1982); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 501 (5th Cir. 1982)). *But see id.* at 1174–75 (discussing the Third Circuit’s adoption of tortious interference claims under Section 301(a) (citing *Wilkes-Barre Publ’g Co. v. Newspaper Guild, Local 120*, 647 F.2d 372 (3d Cir. 1981))).

57. *See Local 287 IV*, 546 F.3d at 1175 (“Granite Rock’s assertion that we should create a federal common law to reach IBT misinterprets our instructions from Congress and the Supreme Court.”).

58. *Id.* (citing *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985)).

59. *Id.* at 1173.

60. *Id.* at 1173–74.

61. *Id.* at 1174.

62. *Id.* at 1175.

63. *Id.*

2. *The Effect of the Arbitration Clause*

The Ninth Circuit then addressed the effect of the arbitration clause found in the December CBA.⁶⁴ The court began by pointing out the distinction drawn by the Supreme Court between challenges to arbitration clauses and those directed at the validity of the entire contract.⁶⁵ It noted that the arbitrator should consider all challenges to the validity of the contract, while only courts may consider challenges to the arbitration clause.⁶⁶ Following this precedent, the Ninth Circuit found that, because Granite Rock failed to make an independent challenge to the arbitration clause, it could not challenge the clause's validity through a general breach of contract action.⁶⁷ Granite Rock again argued that Local 287 should be estopped from asserting the arbitration clause in the first place because Local 287 disputed that a contract between the parties had ever been formed.⁶⁸ However, the court found that it had already rejected similar arguments in *Teledyne, Inc. v. Kone Corp.*,⁶⁹ where the Ninth Circuit dismissed the plaintiff's claim in order to avoid the "absurd result" of finding for the validity of a contract while ignoring its arbitration provision.⁷⁰ Ultimately, the court found that both parties consented to arbitration—Granite Rock doing so "implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause" as an affirmative defense.⁷¹

64. *Id.* at 1176.

65. *Id.*

66. *See id.* ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." (alteration in original) (internal quotations omitted) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006))).

67. *See id.* at 1177 (asserting the December CBA's arbitration clause was broad enough to cover a dispute of contract formation because the clause covered "[a]ll disputes arising under this agreement" (alteration in original) (internal quotations omitted) (citing *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1142 (9th Cir. 1991))).

68. *See id.* at 1177–78.

69. 892 F.2d 1404 (9th Cir. 1989).

70. *Local 287 IV*, 546 F.3d at 1178 (citing *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989)).

71. *See id.* (conceding that either Granite Rock or Local 287 might have retained their right to have a court resolve the date on which the contract was formed had they not implicitly asserted the contract's validity by relying on the arbitration clause).

IV. THE SUPREME COURT DECISION

A. The Majority

In a seven to two decision authored by Justice Thomas, the Court reversed in part and affirmed in part the Ninth Circuit's decision.⁷² The Court addressed two issues: 1) whether an arbitrator or the District Court should decide the parties' dispute over the CBA's ratification date; and 2) whether the Ninth Circuit incorrectly declined Granite Rock's "request to recognize a new federal cause of action under [Section] 301(a) of the Labor Management Relations Act" for tortious interference of contract.⁷³ As to the first issue, the Court held that the ratification dispute was for the District Court to decide.⁷⁴ As to the second, it concluded that Granite Rock could not bring a tortious interference of contract claim under Section 301(a) of the LMRA.⁷⁵

1. The Labor Contract Formation Issue

The Court first addressed if a dispute as to whether the parties' agreement to submit their dispute to arbitration was a matter for an arbitrator or a judge to decide.⁷⁶ The specific issue was whether Granite Rock and Local 287 agreed to arbitrate the question of when the contract was ratified and thereby formed.⁷⁷ As an initial matter, Justice Thomas noted that both parties agreed that the arbitration clause in the contract was valid and that certain issues should be arbitrated pursuant to the clause.⁷⁸ The initial question in arbitration disputes is whether the parties have agreed to arbitrate a particular issue, which often implicates the question of contract formation.⁷⁹ When the question is *if* a contract has been formed,

72. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2853 (2010) (holding that the Ninth Circuit erred by referring resolution of the ratification date of the December CBA to arbitration because it should be done judicially, but finding no error in the Ninth Circuit's refusal to create a new tortious interference with contract cause of action under Section 301(a)).

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.* at 2855 (explaining that courts typically determine whether parties have agreed to "submit a particular dispute to arbitration" (internal quotation marks omitted) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002))).

77. *See id.* at 2855–56 ("[A dispute on] contract formation . . . is generally for courts to decide.").

78. *See id.* at 2856–57 (noting that Granite Rock had "conceded both the formation and the validity of the . . . arbitration clause.").

79. *See id.* at 2856 ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." (emphasis

that issue goes to a court to decide, because a court cannot require a defendant to arbitrate rights and liabilities of a contract to which she is not bound. But the Court distinguished *Granite Rock* as concerning *when*, not *if* Local 287 had ratified the CBA.⁸⁰ Granite Rock asserted that the contract, which contained a no-strike clause, became binding before Local 287 went on strike, which in turn rendered Local 287 in breach of the contract.⁸¹ Local 287 asserted that the contract was not formed before the strike, but afterwards—therefore, Local 287 argued it should not be held liable for breach of contract when it went on strike.⁸²

Compelling arbitration of a particular issue is appropriate in situations in which both parties have already agreed to arbitrate the issue.⁸³ When the parties agree to arbitrate a certain issue, they do so with the assumption that the arbitrator will decide the case within the framework of the parties' contract.⁸⁴ The parties assume that an arbitrator will use the provisions of their contract to determine the rights and responsibilities of the parties, including when those rights and responsibilities come into existence. Before an arbitrator can construe the terms of a contract, however, the rights and responsibilities must have already come into existence, that is, when the contract is formed. Justice Thomas emphasized that “[f]or purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed.”⁸⁵

Justice Thomas also addressed the Ninth Circuit's assertion that the all-inclusive arbitration clause in the CBA covered the issue of when the contract was formed. He noted that the Ninth Circuit “overlooked the fact that this theory of the ratification dispute's arbitrability fails if the CBA was not formed at the time the unions engaged in the acts that gave rise to Granite Rock's strike claims.”⁸⁶ In this way, the majority rejected the Ninth Circuit's attempt to tie the arbitrability of the December CBA's ratification

in original)).

80. See *id.* at 2856 n.4 (noting that although the union's ratification vote is not usually a requirement for proper formation of a CBA, it was in the instant case because both Local 287 and Granite Rock agreed that a ratification vote was a prerequisite).

81. See *id.* at 2854 (explaining that Granite Rock first asked the District Court to remedy the breach by enjoining the strike).

82. *Id.*

83. See *id.* at 2856–57 (“Arbitration is strictly ‘a matter of consent,’ . . . and thus ‘is a way to resolve those disputes—but *only those disputes*—that the parties have agreed to submit to arbitration[.]’” (emphasis in original) (citations omitted)).

84. See *id.* at 2859 & n.8 (analogizing the approach courts take in determining arbitrability in labor cases to the role of courts in cases governed by the Federal Arbitration Act—a court's role is to submit only those grievances “that the parties have agreed to submit.”).

85. *Id.* at 2860 (emphasis in original).

86. *Id.* at 2861.

date with the arbitrability of the strike claims.⁸⁷

Indeed, because the union began its strike on July 6th, but may not have ratified the agreement—and consequently had not formed a contract—until August 22nd, there was not necessarily a CBA for the July no-strike dispute to “arise under.”⁸⁸ While there was no dispute that the CBA’s arbitration clause covered “all disputes arising out of this agreement,” the Court found that issues of formation did not so obviously fall under the definition of “arising under.”⁸⁹

Because the Court framed the issue as one of contract formation, the Court found the Ninth Circuit’s rationale unpersuasive, because “the [December] CBA was not [necessarily] formed at the time the unions engaged in the acts that gave rise to Granite Rock’s strike claims.”⁹⁰ Finally, Justice Thomas noted that the Ninth Circuit should have read the “arising under” language of the arbitration provision to determine whether the clause covered the formation-date dispute, rather than merely focusing on whether the no-strike clause was covered by the CBA’s arbitration clause.⁹¹ In essence, the agreement itself did not contemplate that arbitration would answer all issues—instead, the arbitration clause, like the no-strike clause, were part of the contractual scheme. Justice Thomas concluded that Granite Rock did not consent to arbitration merely because it sued under the contract that contained the arbitration clause.⁹²

The Court distinguished the case’s timing issue as atypical, in that this dispute centered on when, not whether, Local 287 ratified the new collective bargaining agreement.⁹³ The Court dispelled Local 287 and the Ninth Circuit’s reliance upon two principles the Court had previously set forth in arbitrability cases.⁹⁴ Instead, the Court focused on consent—or

87. *See id.* at 2861 (criticizing the Ninth Circuit for failing to observe that if, as Local 287 contended, the December CBA was ratified in August rather than July, the no-strike clause of the December CBA would be inapplicable to the parties’ dispute and the matter would not be arbitrable).

88. *Id.*

89. *See id.* at 2862 (couching the Court’s conclusion on a “relatively narrow” reading of the December CBA’s “arising under this agreement” language as to exclude a dispute as to the ratification date of the same agreement).

90. *See id.* at 2861 (mentioning the additional procedural requirement for mediation prior to arbitration under the December CBA).

91. *Id.* at 2862.

92. *Id.* at 2862–63.

93. *See id.* at 2856.

94. The first principle relied upon was that “any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.” *Id.* at 2857 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). The second principle was that “in cases governed by the Federal Arbitration Act . . . courts must treat the arbitration clause as severable from the contract” unless a party challenges the validity of the arbitration clause or the formation of the contract. *Id.* at

rather, the lack thereof.⁹⁵ Indeed, Justice Thomas ultimately concluded that a court “must resolve the [formation-date] disagreement” because Local 287 disputed the formation of the December CBA, and thus the arbitration clause.⁹⁶ In short, the Court ruled the presumption in favor of arbitrability “overrides the principle that a court may submit to arbitration ‘only those disputes . . . that the parties have agreed to submit[.]’”⁹⁷ Policy concerns, the Court noted, had never been held “as a substitute for party agreement.”⁹⁸

In dicta, the Court explained, regardless of whether the dispute was one of contract formation, the dispute fell “outside the scope of the parties’ arbitration clause” that a “presumption favoring arbitration cannot cure” because the ratification date went to “the CBA’s very existence” during the July strike.⁹⁹ Second, even if the CBA could be interpreted to cover the formation dispute, the arbitration clause’s remaining provisions clearly indicated that use of the arbitration machinery was expressly limited to those disputes between Granite Rock and Local 287 that were affirmatively addressed in the other provisions of the CBA.¹⁰⁰

The Court also addressed Local 287’s retroactivity argument.¹⁰¹ Local 287 argued that because the parties executed a document in December 2004 that made the CBA effective as of the previous May; the CBA’s arbitration clause was therefore effective during the July strike period.¹⁰² However, because Local 287 did not raise this argument in the Court of Appeals, the majority found that the argument had been waived.¹⁰³

2857 (citations omitted).

95. *See id.* at 2856 & n.4, 2857 & n.6 (observing that the parties agreed that given the facts of their case, a valid formation of the contract required a union ratification vote).

96. *Id.* at 2858.

97. *Id.* at 2859 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)) (alteration in original).

98. *Id.*

99. *See id.* at 2862 (distinguishing that the arbitrability of Local 287’s July strike activity is linked to whether the December CBA had been ratified at the point in the time when the complained-of strike actually occurred).

100. *Id.*

101. *Id.* at 2861.

102. *See id.* (noting that Local 287 did not argue that the no-strike clause was retroactive, however Local 287 did propose the retroactivity of the arbitration clause was an “alternative ground on which the Court could or should affirm the [Ninth Circuit’s] judgment”).

103. *See id.* Justice Sotomayor, joined by Justice Stevens, agreed that a tortious interference of contract claim was “not cognizable” under Section 301(a). *Id.* at 2866 (Sotomayor, J., concurring in part, dissenting in part). She parted with the majority’s view that Local 287 had waived its retroactivity argument. *See id.* at 2868–69. The dispute, in her opinion, should be decided by an arbitrator. *Id.* at 2868. As to the waiver issue, Justice Sotomayor focused on the parties’ intent in that they “expressly chose to

Concluding its discussion of the first issue, the Court refused to accept Local 287's contention—and the finding of the lower court—that Granite Rock impliedly consented to arbitration by bringing suit “to enforce the CBA's *no-strike* provisions.”¹⁰⁴ The Court found that Granite Rock's attempt to seek an injunction of the strike in order to arbitrate the grievance did not result in its consent to arbitrate the date at which the CBA became effective.¹⁰⁵ The Court separated Granite Rock's attempts to arbitrate issues related to the strike from the December CBA's formation, an issue that Granite Rock had always maintained was beyond the reach of the CBA.¹⁰⁶

2. *The Federal Tort Claim Issue*

The Court rejected Granite Rock's argument that Section 301(a) permitted it to bring a federal tort claim for IBT's alleged interference with the CBA.¹⁰⁷ Granite Rock contended that the Court should reject the majority view of the Courts of Appeals on the issue, because to accept their reasoning would have contradicted the larger policy goal of “promoting industrial peace and economic stability through judicial enforcement of CBAs, [as well as] with [the] Court's precedents holding that a federal common law of labor contracts is necessary to further [that] goal.”¹⁰⁸ In addition, Granite Rock maintained that a federal tort claim under Section 301(a) was necessary, because other remedies were “either unavailable or insufficient.”¹⁰⁹

The Court rejected both Granite Rock's policy argument and its contention that failure to allow a federal tortious interference with contract claim against IBT under Section 301(a) would place Granite Rock in a wholly untenable position.¹¹⁰ The Court viewed Granite Rock's position in a more flexible light, and pointed out that, while Section 301(a) did create a body of federal law to deal with the enforcement of collective bargaining agreement issues, allowing Granite Rock to bring a federal tort claim under

make the agreement effective from May 1, 2004.” *Id.* at 2867. As a result, she argued that it did not matter whether the parties ratified the CBA in July or in August because it was already effective retroactively to May. Thus, in her view the dispute “arises under” the CBA. *Id.*

104. *Id.* at 2862 (majority opinion) (emphasis in original).

105. *Id.*

106. *Id.*

107. *See id.* at 2864 (resting this conclusion on the narrow question that the Court felt was before it—whether Granite Rock should have augmented remedial avenues besides those already available).

108. *Id.* at 2863–64.

109. *Id.* at 2864.

110. *See id.* (characterizing an extension of Section 301(a) to tortious interference claims as as “requir[ing] a host of policy choices”).

this statute would create policy concerns that could upset the balance struck between unions and employers under federal labor statutes.¹¹¹ The Court preferred to retain Section 301(a)'s current limit on common law contractual remedies and rather than extend its reach to tort claims.¹¹²

Justice Thomas concluded that even if Section 301(a) did authorize the federal courts to create a common law claim for tortious interference of contract, it would be premature for the Court to decide the issue because Granite Rock had not shown that other remedies were unavailable.¹¹³ For instance, Granite Rock failed to show that state claims were insufficient to provide a remedy.¹¹⁴ Granite Rock also failed to show that breach of contract or administrative claims, such as those falling under an alter-ego or agency theory, against the IBT would fail on remand.¹¹⁵

B. Justice Sotomayor's View:

The Realpolitik of an Experienced Trial Court Judge

Justice Sotomayor, joined by Justice Stevens, concurred with the majority that Granite Rock could not bring a federal tort claim under Section 301(a), but disagreed that the formation dispute was one for the courts, and not for an arbitrator, to resolve.¹¹⁶ While the majority framed the formation issue as based on when, not whether, the CBA became binding,¹¹⁷ Justice Sotomayor argued that the "express retroactivity" of the CBA neatly disposed of the formation dispute.¹¹⁸ In Justice Sotomayor's view, the CBA was retroactively effective at a date earlier than dates upon which both Granite Rock and Local 287 contended ratification occurred;

111. *See id.* ("The balance federal statutes strike between employer and union relations in the collective-bargaining arena is carefully calibrated[.]" (internal citations omitted)).

112. *See id.* (observing a "free-wheeling inquiry" for a judicially crafted "desirable rule" was never intended by the Court as it has developed federal common law to effectuate Section 301(a)).

113. *See id.* at 2865 ("Granite Rock's case for a new federal common-law cause of action is based on assumptions about the adequacy of the avenues of relief that are at least questionable . . .").

114. *Id.* (espousing the other remedies still available to Granite Rock on remand and those that Granite Rock had already availed itself of).

115. *Id.* Justice Thomas noted that the agency or alter-ego claim against the International Union might be "easier to prove than usual[.]" because the NLRB's decision suggested that the "IBT and Local [287] were affiliated in 2004 in a way relevant to Granite Rock's claims." *Id.* (citing Int'l Bhd. Of Teamsters, Local 287 (Granite Rock Co.) 347 N.L.R.B. 339, 340 n.6 (2006)).

116. *See id.* at 2866–67 (Sotomayor, J., concurring in part, dissenting in part) (observing that there was no such dispute as to formation because both Granite Rock and Local 287 had expressly made the December CBA retroactive to May 1, 2004).

117. *See id.* at 2860 (majority opinion).

118. *See id.* at 2868 (Sotomayor, J., concurring in part, dissenting in part).

she wrote that “we can scarcely pretend that the parties have a formation dispute.”¹¹⁹ Lastly, Justice Sotomayor downplayed the majority’s argument that Local 287 had waived its ability to raise the express retroactivity in the December CBA as an affirmative defense to the issue of the CBA’s formation date.¹²⁰ While she noted that it was “regrettable” that Local 287 had not raised the issue in either the district court or the court of appeals, she found the argument was “one [the Court] cannot ignore.”¹²¹

IV. ANALYSIS AND DISCUSSION

The Supreme Court missed an opportunity to settle the true scope of Section 301(a). Instead, the Court summarily pronounced any consideration of the possible tort dimension of Section 301(a) as “premature.” Justice Thomas wrote: “[w]e see no reason for a different result here because it would be premature to recognize the federal common law tort Granite Rock requests in this case even assuming that [Section] 301(a) authorizes us to do so.”¹²² While this Delphic statement will not change how the majority of circuit courts already view Section 301(a)’s scope,¹²³ it will lend

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 2864 (majority opinion).

123. *See Local 287 IV*, 546 F.3d 1169, 1174–75, 1175 n.2 (9th Cir. 2008) (referring to a string of opinions from the Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits that all refused to hold a federal tort claim as cognizable under Section 301(a)), *aff’d in part, rev’d in part sub nom.* *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010).

A decision of the Court of Appeals for the Third Circuit Court in 1981, *Wilkes-Barre Publishing Co.*, is the only decision holding that a tortious interference of contract claim may arise under Section 301(a). *See Wilkes-Barre Publ’g Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 380–82 (3d Cir. 1981). *Wilkes-Barre Publishing Company* (“Wilkes-Barre”) first brought suit in district court alleging, in relevant part, that the International Guild, the newspaper trade unions, the Wilkes-Barre Council of Newspaper Unions, and eight other individual defendants had tortiously induced a breach of a collective bargaining agreement under Section 301(a). *Id.* at 374. *Wilkes-Barre* alleged that, in violation of the collective bargaining agreement, members of the Local Guild created a new publication called the *Citizens’ Voice* while on strike. *Id.* at 375. And, by encouraging union members to participate in the venture, “the unions and individuals involved in the *Citizens’ Voice* enterprise tortiously interfered with the [CBA].” *Id.* at 376 (emphasis in original). While the district court dismissed the federal tort cause of action for failure to state a claim, the Third Circuit reversed, holding that a claim for tortious interference of contract was cognizable under Section 301(a). *Id.* at 382. The court held Section 301(a) “reaches not only suits on labor contracts, but suits seeking remedies for violation of such contracts.” *Id.* at 380. Furthermore, the court found its conclusion consistent with the Supreme Court’s Section 301(a) jurisprudence. In his opinion, Judge Gibbons noted that Supreme Court precedent suggested Section 301(a) should be read broadly, as “[a]ll suits for violation of collective bargaining agreements are governed by federal law[.]” *Id.* More telling, however, was the court’s adherence to preserving uniformity within the collective bargaining arena. The *Wilkes-Barre* court was less concerned with whether the remedy

uncertainty to the issue given Third Circuit precedent¹²⁴ and the lack of Congressional action in clarifying the statute.

The Court, in its attempt to preserve the careful calibration that “federal statutes strike between employer and union relations in the collective-bargaining arena,”¹²⁵ may actually have unwittingly achieved the opposite effect. The Court should have followed Justice Sotomayor’s pragmatic approach to the arbitrability issue, an approach that highlighted her adherence to the landmark principles of the *Steelworkers Trilogy* and one that more elegantly dealt with the dispute by finding it to be a classic example of a “controvers[y] that labor arbitrators are called upon to resolve every day.”¹²⁶

The consistent theme in Supreme Court precedent addressing Section 301(a) is federal uniformity within the collective bargaining sphere. However convenient a ruling on this issue would have been, by failing to make a definitive decision about whether a federal tort claim is cognizable under Section 301(a), the Court strayed from its commitment to stability.

The Ninth Circuit was also hesitant to recognize such a claim, choosing not to intrude into the legislative domain regarding the scope of Section 301(a). That circuit maintained that it was not the duty of the courts, but of Congress to clarify Section 301(a)’s true reach.¹²⁷ Nonetheless, there is no evidence that Congress intends to clarify the Act, especially given the litany of pressing domestic¹²⁸ and international concerns.¹²⁹ The Ninth Circuit believed that it was ultimately Congress’ job to clarify Section 301(a)’s scope, and the Supreme Court sent the issue back to the circuits

was labeled as one of contract or one of tort; rather, it found that “[a] holding that tortious interference with a collective bargaining agreement is not a matter governed by federal law would leave open the possibility of lack of uniformity in scope of obligation which the [Supreme] Court in *Lucas Flour* sought to prevent.” *Id.* at 381. Lastly, the Third Circuit noted that the regulation of tortious interference claims “does not involve an area traditionally relegated to the states,” as the essence of the claim originates from federal common law governing labor agreements. *Id.*

124. See *Wilkes-Barre*, 647 F.2d at 381–82 (holding that a tortious interference of contract claim can arise under Section 301(a) of the LMRA).

125. *Granite Rock*, 130 S. Ct. at 2864.

126. *Granite Rock*, 130 S. Ct. at 2867 (Sotomayor, J., concurring in part, dissenting in part).

127. Although it gave other reasons to deny *Granite Rock*’s arguments to find that a federal tort claim could arise from Section 301(a), the Ninth Circuit wrote that “[a]ny ‘gap’ that might exist in Congress’s labor law design is for Congress and not for us to fill.” *Local 287 IV*, 546 F.3d 1169, 1175 (9th Cir. 2008), *aff’d in part, rev’d in part sub nom.* *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010).

128. As of this writing, domestic concerns facing Congress include how to deal with a struggling economy, healthcare, and the aftermath of the biggest oil spill in United States history.

129. Although there are always pressing international concerns, Congress has had its hands full with how to deal with the war on terror.

unresolved.

As 2010 marks the 50th anniversary of the *Steelworkers Trilogy*,¹³⁰ it seems hardly coincidental that Justice Sotomayor's dissent echoes principles similar to those set forth in 1960. Her language immediately brings to mind the principle of deference to arbitration. She invokes *United Steelworkers of America v. Warrior & Gulf Navigation Co.* early in her dissent to state "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."¹³¹ In addition, any discussion of an arbitration clause's scope, she contended, must have a presumption in favor of arbitrability.¹³²

Following the *Steelworkers Trilogy* in 1960, the judiciary's perception of, and deference to, arbitration became dramatically positive.¹³³ The principle of deference rang especially true with Justice Sotomayor. By finding that the ratification dispute arose under the arbitration clause of the CBA and deferring to the arbitrator, Justice Sotomayor sent a clear signal to the majority that the Court should reaffirm an expansive scope of arbitral authority, rather than pointlessly complicate an already convoluted subject area.

In addition, by arguing that an arbitrator should resolve the questions surrounding the July strike because they are precisely the sort of questions that arbitrators are called upon to resolve every day, Justice Sotomayor echoed another principle set forth in the *Trilogy*: the emphasis of stability in the collective bargaining process over drafting perfection. In *Warrior & Gulf*, Justice Douglas wrote that "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."¹³⁴ While Justice Douglas understood that a collective bargaining agreement could not hope to outline all disputes that may arise between parties, he argued that "[a CBA] is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen

130. See cases cited *supra* note 1.

131. *Granite Rock*, 130 S. Ct. at 2866 (Sotomayor, J., concurring in part, dissenting in part) (alteration in original) (internal quotations and citations omitted); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960).

132. *Id.*

133. William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 465–67 (1984) (“*Steelworkers Trilogy* established the proposition that substantial deference was to be given to arbitration awards—deference more considerable than that enjoyed by the Labor Board and by the trial courts themselves!”).

134. *Warrior & Gulf*, 363 U.S. at 578.

cannot wholly anticipate.”¹³⁵

Justice Sotomayor focused on the retroactive effect of the December CBA and avoided the majority’s wordplay of *when* as opposed to *whether* formation occurred.¹³⁶ She wrote that:

When it comes to answering the arbitrability question, it is entirely irrelevant whether Local 287 ratified the CBA in August . . . or in July In either case, the parties’ dispute—which postdates May 1—clearly ‘aris[es] under’ the CBA, which is all the arbitration provision requires to make a dispute referable to an arbitrator.¹³⁷

Justice Sotomayor’s dissent is both elegant and efficient. She would impose a “straightforward” solution. She avoids the majority’s struggles with parsing each party’s arguments over when contract formation occurred. However, her arguments regarding Local 287’s waiver of the retroactivity argument are somewhat porous, because such arguments may be deemed waived pursuant to the Court’s Rule 15.2, when parties do not raise them in a timely fashion.¹³⁸ Despite this flaw, she recognized that adherence to some of the salient principles of the *Trilogy* carry greater weight in this case than blind commitment to procedure.

In failing to rule definitively on the tort dimension, the Court not only lost an opportunity to clarify a circuit split, albeit a lopsided one, but also continued to muddy the water surrounding the precise scope of Section 301(a). As a result, by trying to preserve the “balance [that] federal statutes strike between employer and union relations in the collective bargaining arena[.]”¹³⁹ the Court, ironically, made this balance more difficult to maintain.

The *Steelworkers Trilogy* provided the federal judiciary with principles that became the bedrock of labor arbitration jurisprudence. One of these principles is for courts to resolve any doubts as to whether an arbitration clause covers a particular dispute in favor of arbitrability.¹⁴⁰ Another principle is for courts to recognize that drafters of collective bargaining agreements often cannot anticipate every situation that might lend itself to

135. *Id.*

136. *See Granite Rock*, 130 S. Ct. at 2867 (Sotomayor, J., concurring in part, dissenting in part) (opining that the dispute was “straightforward” given the December CBA’s retroactivity language).

137. *Id.* (alteration in original).

138. *Id.* at 2868.

139. *Id.* at 2864.

140. *See Warrior & Gulf*, 363 U.S. at 582–83 (providing that a matter should not be denied arbitration “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”).

arbitration.¹⁴¹ There is an underlying theme in these principles: unions, employers, and the federal courts should all be participants in a culture that promotes arbitration of disputes. And as an ultimate goal, the principles promote federal uniformity and certainty within the collective bargaining sphere.

The Supreme Court in *Granite Rock* strayed from its ultimate goal. Though the Court concedes both that IBT's actions "strike at the heart of the collective-bargaining process federal labor laws were designed to protect"¹⁴² and that Third Circuit precedent strays from the other courts in that it recognizes tortious interference for this type of conduct,¹⁴³ the Court left the tortious interference question unanswered for the sake of judicial restraint. Because the Court found it premature to clarify a sixty-three year old law, fifty years after the *Steelworkers Trilogy*, the Court has left the federal courts with uncertainty.

At the same moment, the Court failed to recognize that CBAs are more than just contracts. CBAs are "generalized code[s] to govern a myriad of cases which . . . draftsmen cannot wholly anticipate."¹⁴⁴ Parties to a CBA thus do not merely contract between themselves; they agree to be participants in a system that promotes arbitration.

Unlike the majority, Justice Sotomayor takes a more traditional approach. In her opinion, when both parties signed the CBA, which essentially predated the July strike, they both agreed to arbitrate any issues that might arise out of their agreement—no matter how convoluted the facts may be. In doing so, she retains the values that the *Steelworkers Trilogy* presents: that no draftsman could have anticipated this dispute and that any doubts to arbitration should be resolved in favor of arbitrability. Because her opinion is a minority position, the core values of the *Steelworkers Trilogy* do not prevail, and judicial uncertainty remains.

V. CONCLUSION

Over the past twenty-three years, both the Ninth Circuit,¹⁴⁵ explicitly,

141. *Cf.* *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.").

142. *Granite Rock*, 130 S. Ct. at 2865.

143. *Cf. id.* at 2863 ("The [Ninth Circuit] joined virtually all other Circuits in holding that it would not recognize such a claim under Section 301(a).").

144. *Warrior & Gulf*, 363 U.S. at 578.

145. *See Local 287 IV*, 546 F.3d 1169, 1175 (9th Cir. 2008) (finding that assertions by Granite Rock that the precedent from other circuit courts refusing to hold a federal common law of torts under Section 301(a) is distinguishable based on the close relationship of Local 287 and IBT is "unsupported by precedent"), *aff'd in part, rev'd in part sub nom.* *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010).

and the Eleventh Circuit,¹⁴⁶ impliedly, have fallen in line with the majority of their sister circuits and away from the sole contrary Third Circuit *Wilkes-Barre Publishing* decision. With the congruence of all of the other circuits denying tort claims in the Section 301(a) context, the Supreme Court's decision not to seriously consider whether to recognize a federal tort claim in the Section 301(a) context at this time was not unexpected.

Such quick treatment is also puzzling, not because the Court declined to recognize an expansion of Section 301(a) but because it used such casual language in doing so. After making references to the "host of policy choices" that could upset the balance Section 301(a) has maintained between unions and employers, the Court went no further—apparently finding that the parties' briefs did a good enough job of explaining those "important" balance disrupters. Furthermore, the Court used the word "premature" to label Granite Rock's request to expand Section 301(a)'s scope. While the Court may have found it premature given the direction and general agreement among the circuits, concluding its discussion on the issue in this way left Section 301(a)'s scope more open than the Court may have wanted.

This issue of whether a tortious interference of contract claim has a place in federal common law will continue to arise in collective bargaining disputes similar to the one that occurred between Granite Rock and IBT, as a parent union's participation in a dispute involving a local branch is not uncommon. Thus, this was an issue ripe for the Court's clarification. Nonetheless, an in depth discussion of whether a tortious interference of contract claim is cognizable under Section 301(a) will be reserved for another day.¹⁴⁷

146. *Cf. Xaros v. U.S. Fid. & Guar. Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987) (holding that, for purposes of Section 301(a), where the cause of action is "merely related" to a collective bargaining agreement, that cause of action does not arise under the agreement for the purposes of a Section 301(a) action in federal court).

147. Similar to the paucity of courts favoring a federal tort claim, the number of articles in support of this expansion of Section 301(a) is also lacking. An extensive search on Lexis found one article proposing a tortious interference of contract claim to be cognizable under Section 301(a). One article appeared to support that claim given its title, but after further review, it opposed expanding Section 301(a) to "provide a federal tort claim against interfering third parties." *Cf. Elizabeth Z. Ysrael, Note, Federal Common Law of Labor Contracts: Recognizing A Federal Claim of Tortious Interference*, 86 COLUM. L. REV. 1051, 1051–52 (1986) (arguing that the text and legislative history of Section 301(a) indicate that Congress only envisioned enforcement of collective bargaining agreements between the parties to the agreement, rather than the creation of rights against non-parties).