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Abstract

Since its passage in 1947, the Supreme Court has understood Section 301(a) of the Labor-Management Relations Act as a Congressional mandate to create a body of federal common law regulating private sector labor management disputes arising out of collective bargaining agreements. In light of this established labor law jurisprudence and the 50th anniversary of the landmark Steel Workers Trilogy, this past Term Granite Rock v. International Brotherhood of Teamsters opted for stability, declining to recognize a federal tort claim arising under Section 301(a). The Court was anything but definitive, deeming it “premature” to consider the tort dimension. This article focuses especially on why the Court should have taken the opportunity to define whether Section 301(a)’s scope extended to tort claims.
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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 v. Int’l Bhd. of Teamsters\(^2\) will neither revolutionize arbitration nor will it change the way courts view Section 301(a) of the Labor-Management Relations Act\(^3\) -- at least not in the immediate future. But interestingly enough, Granite Rock may become best known for what it did not do: definitively pronounce whether tort claims may be brought within Section 301(a)’s


\(^2\) 561 U.S. __ (2010).

\(^3\) 29 U.S.C. § 185(a).
parameters. The rich history of Section 301(a) has afforded the Supreme Court ample opportunity to interpret its purpose and reach.\(^4\) Section 301(a)’s aim was to confer jurisdiction on federal courts in suits between employers and unions.\(^5\) But soon after its passage, the Court’s interpretation of the Act accentuated 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) did not merely “confer jurisdiction in the federal courts over labor organizations,” but also “expresse[d] a federal policy that federal courts should enforce these agreements [in order to achieve] industrial peace.”\(^6\) By interpreting the Act 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 the Act’s passage, contractual stability between unions and employers continued to be an underlying concern when the Court in *Teamsters v. Lucas Flour Co.* explained the necessity behind federal uniformity in collective bargaining disputes: “[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.”\(^8\) Different state and federal

\(^5\) Id.
\(^6\) 353 U.S. 448, 455 (1957).
\(^8\) 369 U.S. 95, 103 (1962).
interpretations could prolong disputes and act as a contracting disincentive.\(^9\) Throughout these decisions, the Court’s core commitment to stability within the collective bargaining process has guided its 301(a) jurisprudence.

Although the majority spent more time 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 it clear that “[t]he balance federal statutes strike between employer and union relations in the collective-bargaining arena is carefully calibrated.”\(^{10}\) Consequently, the Court found that “creating a federal common-law tort cause of action [under 301(a)] would require a host of policy choices that could easily upset this balance.”\(^{11}\) The majority went no further, seeing 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.\(^{12}\)

II. Factual Background/Procedure

Between March 1, 1999 and April 30, 2004, Granite Rock and Teamsters Local 287 were parties to a collective bargaining agreement. Preliminary negotiations for a new agreement began in March 2004, yet the parties were unable to reach a resolution by May 1. Local 287 began its strike on June 9, 2004. On July 2, 2004 at 4 a.m., a new 4-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”

\(^9\) Id. at 104.
\(^{11}\) Id.
\(^{12}\) Id.
covering the period from May 1, 2004-April 30, 2008. While the parties agree that this
did contain an arbitration clause, they could not reach a separate back-to-work agreement
holding Local union members harmless for any strike-related damages Granite Rock
incurred. Later that morning, Local 287 allegedly ratified the new CBA. 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. However, the Local denied
that union members ratified the agreement, contending that this ratification was a
condition to the agreement of a “back to work agreement.” Granite Rock countered that
there was an agreement to discuss the back to work agreement at a later date, and that this
back to work agreement was subject to the grievance procedure outlined in the new
agreement.

On July 5, 2004 Rome Aloise, an administrative assistant to the General
President of the International Brotherhood of Teamsters (“IBT”), and members of Local
287, told Union Local 287 members not to return to work. Granite Rock alleged that IBT
and Local 287 informed it that Union members would not return to work until Granite
Rock signed a back to work agreement. 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. Granite Rock refused to sign. Local 287 continued its strike. Granite Rock then
informed Local 287 that it viewed any future strike activity as a violation of the new
collective bargaining agreement’s no-strike provision.

The parties agreed that the December CBA is a valid contract and that it is
retroactive to May, 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 2\textsuperscript{nd}. That is critical. If there had been no ratification on July 2\textsuperscript{nd}, there would be no contract. And when the union signed, they take the position that they signed a contract ratified on August 22\textsuperscript{nd}. Those are radically different events . . . .”\(^{13}\)

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”\(^{14}\)

Mr. Mathiason: “That’s correct.”\(^{15}\)

Chief Justice Roberts: “So – so you don’t think [the December CBA] included the no-strike clause”\(^{16}\)

Mr. Bonsall: “We contend that it would not . . . .”\(^{17}\)

There was a disagreement whether the December CBA ratified the terms of the July 2\textsuperscript{nd} CBA or the August CBA. Since there is a question as to the December CBA’s retroactive effect, whether Granite Rock effectively signed the July CBA when they

\(^{13}\) Oral Arg. P. 17-18

\(^{14}\) Id. at 19

\(^{15}\) Id.

\(^{16}\) Id. at 26

\(^{17}\) Id.
signed the December CBA, the question remained whether both parties agreed to arbitrate the July strike. “Whether parties have agreed to arbitrate a particular dispute is typically an issue for judicial determination.”

III. Lower Court Decisions

A. The District Court

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

In the first of a series of orders, the District Court granted IBT and 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. The court also denied defendant’s motion to strike Granite Rock’s jury demand, finding the request to be timely.

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20 Id. at 1127.
In its second order, the District Court denied Local 287’s motion for summary judgment on issue preclusion. Local 287 moved for summary judgment after the NLRB’s determination that the July 2 collective bargaining agreement did not exist at the time of Local 287’s strike. However, the court found that Granite Rock had expressly “reserved the ratification issue for litigation in this Court.”

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. The court pointed to documents indicating that Rome Aloise, the Administrative Assistant to the General President of IBT, had, among other things, encouraged Local 287 to continue to strike.

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

B. The Ninth Circuit

The Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in part. Judge Gould found that the district court properly dismissed Granite Rock’s tortious interference of contract claim under Federal Rule 12(b)(6) for failure to

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22 Id. at *2.
23 Id. at *15.
25 Id. at *3-4.
27 Id.
state a claim. In addition, the Ninth Circuit found that the district court erred in denying Local 287’s motion to compel arbitration, remanding “the entire dispute” for arbitration and finding it unnecessary to address the contract formation issue.\(^28\)

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

Judge Gould began his opinion by citing *Painting & Decorating Contractors Ass’n v. Painters & Decorators Joint Comm., Inc.*,\(^29\) a Ninth Circuit decision from 1983 outlining the requirements for jurisdiction under section 301(a) of the LMRA.\(^30\) First, a claim must be “based on an alleged breach of contract between an employer and a labor organization,”\(^31\) and second, “that the resolution of the lawsuit be focused upon and governed by the terms of the contract.”\(^32\) 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 Granite Rock and Local 287 reached on July 2, 2004.\(^33\) The court further noted that other circuits also failed to extend a 301(a) cause of action to “parties not governed by the relevant agreement.”\(^34\)

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\(^28\) Granite Rock Co. v. Int’l Bhd. of Teamsters, 546 F.3d 1169, 1171 (9th Cir. 2008).

\(^29\) 707 F.2d 1067 (9th Cir. 1983) (addressing the qualifications for jurisdiction under section 301(a) of the Labor Management Relations Act).

\(^30\) 29 U.S.C. § 185(a).

\(^31\) *Painting & Decorating Contractors Ass’n v. Painters & Decorators Joint Comm., Inc.*, 707 F.2d 1067 (9th Cir. 1983).

\(^32\) *Id.*

\(^33\) Granite Rock Co. v. Int’l Bhd. of Teamsters, 546 F.3d 1169, 1173 (9th Cir. 2008).

\(^34\) *Id.* at 1174 (citing to the 2nd, 4th, 5th, 6th, and 10th circuits).
The Ninth Circuit also dismissed Granite Rock’s assertion that a federal tort claim was cognizable under Section 301(a). 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.” 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.” 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. The court noted the argument’s “emotive force,” but found that Granite Rock’s argument lacked precedential support.

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.” 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.”

2. The Effect of the Arbitration Clause

35 Id. 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.”).
36 Id. (citing Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)).
37 Id. at 1173.
38 Id. at 1174.
39 Id. at 1175.
40 Id. at 1174.
The Ninth Circuit then addressed the effect of the arbitration clause found in the July 2, 2004 collective bargaining agreement. It began by pointing out the distinction drawn by the Supreme Court between challenges to arbitration clauses and those directed at an entire contract.\(^{41}\) It noted that all challenges to the validity of the contract are to be considered by the arbitrator, while only courts may consider challenges to the arbitration clause.\(^{42}\) Following this precedent, the Ninth Circuit found that because Granite Rock failed to make an independent challenge to the arbitration clause, Granite Rock could not challenge its validity through a general breach of contract action.\(^{43}\) Granite Rock 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.\(^{44}\) However, the court found that it had already rejected similar arguments made in *Teldyne, Inc. v. Kone Corp.*,\(^{45}\) 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.\(^{46}\) Ultimately, the court found that both parties consented to arbitration—Granite Rock doing so “implicitly by bringing suit under the contract containing the clause” and Local 287 “explicitly by asserting the arbitration clause.”\(^{47}\)

\(^{41}\) *Id.* at 1176

\(^{42}\) *Buckeye Check Cashing, Inc. v. Cardengna*, 546 U.S. 440, 445-46 (2006) (“[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.”).

\(^{43}\) *Granite Rock Co.*, 546 F.3d at 1177.

\(^{44}\) *Id.* at 1177-78.

\(^{45}\) 892 F.2d 1404, 1410, (9th Cir. 1989) (involving a breach of contract action where the Ninth Circuit dismissed the plaintiff’s claim in order to avoid the absurd result of finding for the validity of a control while ignoring its arbitration provision).

\(^{46}\) *Granite Rock Co.*, 546 F.3d at 1178.

\(^{47}\) *Id.* at 1178.
IV. The Supreme Court Decision

A. The Majority

In a 7-2 decision authored by Justice Thomas, the Court reversed in part and affirmed in part the Ninth Circuit’s decision. The two issues before the Court were: 1) whether the parties’ dispute over the CBA’s ratification date was for the district court or for an arbitrator to decide; and 2) whether the Ninth Circuit incorrectly declined Granite Rock’s request to recognize a new federal cause of action under 301(a) of the Labor Management Relations Act48 for tortious interference of contract.49 As to the first issue, the Court held that the ratification dispute was for the district court to decide. 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.50

1. The Labor Contract Formation Issue

The Court first addressed 51 whether Granite Rock and Local 287 agreed to arbitrate the question of when the contract was formed.52 As an initial matter, Justice Thomas notes that both parties agreed that there was a valid contract in place and that the contract included an arbitration clause that stated “all disputes arising under this agreement” shall be submitted to arbitration.53

50 Id. at ___.
51 2010 U.S. Lexis 5255, at 11
52 Id. at 18
53 Id. at 19-20
The initial question in arbitration disputes is whether the parties have agreed to arbitrate a particular issue, often implicating the question of contract formation. Justice Thomas explained that if the question was not whether “when” the contract was formed but “if” the contract was formed, this case would be easily decided.\textsuperscript{54} In cases determining “if” a contract is formed, that issue would go to a court to decide, because it would be absurd for a defendant to be forced to arbitrate rights and liabilities of a contract to which he was not bound. However, the court distinguishes the issue as atypical, in that this dispute centered on “when,” not whether, Local 287 ratified the CBA. The issue is important because Granite Rock asserts that the contract, which contained a no-strike clause, was formed before Local 287 went on strike, and therefore, rendering Local 287 in breach of the contract. Local 287 asserts that the same contract was not formed before the strike, but afterwards; therefore, Local 287 should not be held liable for breach of contract when it went on strike.

Compelling arbitration of a particular issue is appropriate in situations when both parties agree to arbitration.\textsuperscript{55} When the parties agree to arbitrate a certain issue, they are doing so with the assumption that the arbitrator will decide the case within the framework of the valid contract. Therefore, the parties assume that the provisions of the valid contract will be used, that the rights and responsibilities of the parties to the contract will be determined by the contract, including when those rights and responsibilities come into existence. These determinations cannot be answered without first answering when the rights and responsibilities came into existence, i.e. when the contract is formed. Justice

\textsuperscript{54} Id.

\textsuperscript{55} Id. at 28
Thomas emphasizes: “[f]or purposes of determining arbitrability, when a contract is formed can be as critical as whether it was formed.”\(^{56}\)

Justice Thomas 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 that this theory of the ratification-date dispute’s arbitrability fails if, as the Local asserts, the new CBA was not formed until August 22, because in that case there was no CBA for the July no-strike dispute to "arise under."\(^{57}\) 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” as would a specific clause or provision of the agreement that otherwise shall be submitted to arbitration. Because the Court framed the issue as one of contract formation, the Court found the Ninth Circuit’s rationale unpersuasive because “the CBA was not formed at the time the unions engaged in the acts that gave rise to Granite Rock’s strike claim.”\(^{58}\) Finally, he notes that the Ninth Circuit should have probably read the CBA in its entirety, because in the agreement it states that all issues must be submitted to mediation before claims are filed.\(^{59}\)

\(^{56}\) Id. at 31-32

\(^{57}\) Id. at 6-7

\(^{58}\) Id.

\(^{59}\) Id. at 7-8
Justice Thomas concludes that consent to arbitration cannot be found by Granite Rock merely because it sued under a contract that contained an arbitration clause.\(^{60}\)

As to the tortious interference claim that Granite Rock pursued against the International Union, Justice Thomas first notes that the essence of the federal labor statutes is to strike a balance between the rights of the employer and the rights of the union.\(^{61}\) Recognizing a new federal claim of tortious interference in a Section 301 context would disturb that balance.\(^{62}\)

Justice Thomas states that even assuming Section 301 did authorize the federal courts to create a common law claim for tortious interference, deciding to do this now would be premature, in that Granite Rock has not shown that other remedies are unavailable.\(^{63}\) For instance, Granite Rock has failed to show that state claims are insufficient to provide a remedy.\(^{64}\) Granite has also failed to show that the alter-ego or agency claims against the International Union would be unsuccessful on remand.\(^{65}\)

\(^{60}\) Id. at 40-41

\(^{61}\) 46

\(^{62}\) 46

\(^{63}\) 48

\(^{64}\) 49

\(^{65}\) 50 Justice Thomas notes that the agency or alter-ego claim against the International Union might be “easier to prove than usual” because the NRLB’s decision suggests that the “International [Union] and Local [287] were affiliated in 2004 in a way relevant to Granite Rock’s claim.”
The Court distinguished the issue as atypical, in that this dispute centered on when (not whether) Local 287 ratified the new collective bargaining agreement.\(^6^6\) It then dispelled the Local’s and the Ninth Circuit’s reliance upon two principles the Court had previously set forth on arbitrability.\(^6^7\) Instead, the Court focused on consent, or rather, in this case, the lack thereof. Because Local 287 disputed the formation of the CBA, and thus the arbitration agreement, “the ‘court’ must resolve the disagreement.”\(^6^8\) In short, the Court found that “we have never held that [the presumption in favor of arbitrability] overrides the principle that a court may submit to arbitration ‘only those disputes . . . that parties have agreed to submit.’”\(^6^9\) Policy, the Court noted, had never been held “as a substitute for party agreement.”\(^7^0\)

The majority also rejected the Ninth Circuit’s attempt to tie the arbitrability of the CBA’s ratification date with the arbitrability of the strike claims.\(^7^1\) While there was no dispute that the CBA’s arbitration clause covered disputes “arising under” the CBA, the Court found that issues of formation did not so obviously fall under the definition of “arising under” as would a specific clause or provision of the agreement.\(^7^2\) Because the Court framed the issue as one of formation, the Court found the Ninth Circuit’s rationale

\(^{6^6}\) *Id.* at __.
\(^{6^7}\) The first principle relied upon is that “any doubt[ ] concerning the scope of arbitral issues should be resolved in favor of arbitration.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc., 473 U.S. 614, 626 (1985). The second principle is 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 __.
\(^{6^8}\) *Id.* at __.
\(^{6^9}\) *Id.* at __.
\(^{7^0}\) *Id.* at __.
\(^{7^1}\) *Id.* at __.
\(^{7^2}\) *Id.* at __.
unpersuasive because “the CBA was not formed at the time the unions engaged in the acts that gave rise to Granite Rock’s strike claims.”

In dicta, the Court explained that, regardless of whether the dispute was one of contract formation, the dispute fell “outside the scope of the parties’ arbitration clause” and was one that a “presumption [in favor of] arbitration cannot cure.” The Court found the question of whether ratification occurred in July or August did not arise under the CBA. Second, even if the CBA could be interpreted to cover this dispute, Section 301’s remaining provisions prevented such a reading because a dispute over when ratification occurred was outside the agreement’s scope.

The Court also addressed the Local’s retroactivity argument. 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 effective during the July strike period. However, because Local 287 did not raise this argument in the court of appeals, the majority found that the argument had been waived.

Concluding its discussion of the first issue, the Court refused to accept the Local’s contention and the finding of the lower court that Granite Rock impliedly consented to

73 Id. at __.
74 Id. at __.
75 Id.
76 Id. at __.
77 Id. at __.
78 Justice Sotomayor, joined by Justice Stevens, agreed that a tortious interference of contract claim was “not cognizable” under 301(a). She parted with the majority’s view that Local 287 had waived its retroactivity argument. The dispute, in her opinion, should be decided by an arbitrator. As to the waiver issue, Justice Sotomayor focused on the parties’ intent in that they “expressly chose to make the agreement effective from May 1, 2004.” 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 as of May. Thus, the dispute “arises under” the CBA, Id. at __.
arbitration by bring suit “to enforce the CBA’s no-strike and arbitrable grievance provisions.” The Court found that Granite Rock’s attempt to seek an injunction of the strike in order to arbitrate the grievance that caused it in the first place did not result in its consent to arbitrate when the CBA was actually formed. The Court separated Granite Rock’s attempts to arbitrate issues related to the strike from the CBA’s formation, an issue that Granite Rock had always maintained was beyond the reach of the CBA.

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. Granite Rock contended that the Court should reject the majority of circuits’ view on the issue because it contradicted the larger policy goal of “promoting industrial peace and economic stability through judicial enforcement of CBA’s as well as with [the Court’s] precedents holding that a federal common law of labor contracts is necessary to further this goal.” In addition, Granite Rock maintained that a federal tort claim under 301(a) is necessary because other remedies were “either unavailable or insufficient.”

The Court rejected both Granite Rock’s policy argument and its contention that failure to allow a federal tort claim under 301(a) would place it in a wholly untenable

79 Id.
80 Id.
81 Id.
82 Id. at __.
83 Id.
position. The Court viewed Granite Rock’s position in a more flexible light, pointing 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 this statute would create policy concerns that could upset the balance between unions and employers. The Court preferred to restrict Section 301(a) to common law contractual remedies, and not extend its reach to tort claims. However, the Court did not fully foreclose the possibility that 301(a) could allow a federal tort claim in a future litigation, emphasizing that it would be premature to do so at this time.

While the Court did not condone IBT’s alleged interference, the Court did emphasize the remedies already available to Granite Rock, and downplayed the desperate situation that Granite Rock portrayed. The Court noted that the question of whether Granite Rock had a state law remedy remained unresolved. In addition, the Court pointed out that Granite Rock had not fully explored breach of contract and administrative remedies. Ultimately, it was unwilling to extend Section 301(a)’s reach to include a federal tort remedy, given that such an extension might upset the delicate balance between unions and employers and that, in its opinion, Granite Rock had not fully explored other potential remedies against IBT.

84 Id. at __.
85 Id.
86 Id.
87 Id.
88 Id. at __.
89 Id.
B. Justice Sotomayor’s Dissent – 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 court and not for the arbitrator to resolve.\textsuperscript{90} While the majority framed the formation issue as “based on when (not whether) the CBA [containing] the arbitration clause was ratified,” Justice Sotomayor argued that the “express retroactivity” of the December 2004 CBA—making the CBA applicable from May 1, 2004—neatly disposed of the formation dispute. Because the CBA was effective at a date earlier than dates upon which both Granite Rock and Local 287 contend ratification occurred, “we can scarcely pretend that the parties have a formation dispute.”\textsuperscript{91} Lastly, Sotomayor downplayed the majority’s waiver argument.\textsuperscript{92} 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 we cannot ignore.”\textsuperscript{93}

IV. Analysis and Discussion

The Supreme Court missed an opportunity to definitively 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

\textsuperscript{91} Id. at __.
\textsuperscript{92} Id. at __.
\textsuperscript{93} Id. at __.
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 § 301(a) authorizes us to do so." 94 While this statement will not change how the majority of circuit courts already view Section 301(a)’s scope, 95 it will continue to lend some

94 Id. at __.
95 See Granite Rock Co. v. Int’l Bhd. of Teamsters, 546 F.3d 1169, 1174 (9th Cir. 2008) (citing a string of opinions from the Second, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, all finding that a federal tort claim was not cognizable under 301(a)). A decision the Court of Appeals for the Third Circuit Court in 1981, Wilkes-Barre is the only circuit holding that a tortious interference of contract claim may arise under 301(a). 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 301(a). 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. 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].” 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 301(a). The court found that 301(a) “reaches not only suits on labor contracts, but suits seeking remedies for violation of such contracts.” Furthermore, the court found its conclusion consistent with the Supreme Court’s 301(a) jurisprudence. In his opinion, Judge Gibbons noted that Supreme Court precedent suggested that 301(a) should be read broadly, as “[a]ll suits for violation of collective bargaining agreements are governed by federal law.” More telling, however, was the court’s adherence to preserving uniformity within the collective bargaining arena. The court was less concerned whether the remedy 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 Court in Lucas Flour sought to prevent . . . .” Lastly, the court of appeals 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.
uncertainty to the issue given Third Circuit precedent\textsuperscript{96} and the complete lack of Congressional interest in clarifying the statute.

The Court, in its attempt to preserve the careful calibration “federal statutes strike between employer and union relations in the collective-bargaining arena,” may actually have unwittingly achieved the opposite effect. The Court should have followed Justice Sotomayor’s pragmatic approach to the arbitrability issue, highlighting her adherence to the landmark principles of the \textit{Steelworkers Trilogy}.”

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 301(a), the Court in \textit{Granite Rock} strayed from its commitment to stability.

It is ironic that Justice Thomas used the word “premature” to characterize why the time was not right to recognize a “federal common law tort.”\textsuperscript{97} The time was right either to recognize this claim or entirely foreclose the possibility of parties invoking it in the future. Yet in the name of preserving stability, the Court sounds tentative. In this case, the Ninth Circuit was hesitant to trespass on Congress’ turf regarding the scope of Section 301(a). That court maintained that it was not the duty of the courts, but of

\textsuperscript{96} Wilkes-Barre Publishing Co. v. Newspaper Build Local 120, 647 F.2d 372, 381 (3d Cir. 1981) (holding that a tortious interference on contract claim can arise under 301(a) of the LMRA).

\textsuperscript{97} Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. __, __ (2010).
Congress, to clarify 301(a)’s true reach. At the same time, there is no evidence to suggest that Congress has any interest whatsoever to clarify the Act, especially given the litany of pressing domestic and international concerns. So at the end of the day, we end up with a game of hot potato: the Ninth Circuit believed that it was ultimately Congress’ job to clarify 301(a)’s scope, and the Supreme Court sent the issue back to the circuits unresolved. Stability achieved? Hardly.

As 2010 marks the 50th anniversary of the Steelworkers Trilogy, it seems hardly coincidental that Justice Sotomayor’s dissent echoes principles similar to those set forth in 1960. First, her language immediately brings to mind the principle of deference to arbitration, as she invokes United Steelworkers of America v. Warrior & Gulf Navigation Co. early in her dissent: “[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.” In addition, any discussion of an arbitration clause’s scope, she contended, must have a presumption in favor of arbitrability.

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98 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.” Granite Rock Co. v. Int’l Bhd. of Teamsters, 546 F.3d 1169, 1174 (9th Cir. 2008).
99 Current domestic concerns facing Congress include how to deal with a still struggling economy, healthcare, and the biggest oil spill in United States history.
100 Although there are always pressing international concerns, Congress has had its hands full with how to deal with the war on terror.
101 See note 1, supra.
102 363 U.S. 574, 583-83 (1960).
103 Granite Rock Co., 561 U.S. at __.
Following the Trilogy in 1960, the judiciary’s perception of, and deference to, arbitration become dramatically positive. The principle of deference rang especially true with Justice Sotomayor. By finding that the ratification dispute arose under the arbitration clause of the CBA, 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 pointless complicate an already convoluted subject area.

Second, by arguing that an arbitrator should resolve the questions surrounding the July strike as precisely the sort of question 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, 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.” While he understood that a collective bargaining agreement could not hope to outline all disputes that may arise between parties, “[i]t is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.”

Justice Sotomayor focused on the retroactive effect of the December agreement, avoiding the majority’s wordplay of “when” as opposed to “whether” formation.

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104 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, 465-66 (1989) (‘[The] 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!’).
105 363 U.S. at 578.
106 Id.
occurred. She wrote that “[w]hen 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.”

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 formation occurred. However, her arguments regarding Local 287’s waiver of the retroactivity argument are somewhat porous, as arguments are deemed waived pursuant to the Court’s Rule 15.2 when not raised in timely fashion. Despite this flaw, she did recognize 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 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,” the Court, ironically, made this balance more difficult to maintain.

107 Granite Rock Co., 561 U.S. at __.
108 Id. at __.
109 Id. at __.
110 Id.
The landmark *Steelworkers Trilogy* decisions provide 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 arbitration clause covers a particular dispute in favor of arbitrability. Another principle is for courts to recognize that drafters of collective bargaining agreements often cannot anticipate every situation that might lend itself to arbitration. 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 v. International Board of Teamsters* 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,”\footnote{2010 U.S. LEXIS 5255, at 47 (2010).} and that Third Circuit precedent strays from the other courts in that it recognizes tortious interference for this type of conduct, it 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* provided the foundations for it to do so, the Court left the federal courts with uncertainty.

At the same moment, the Court failed to recognize that CBAs are more than just contracts. They are generalized codes to govern a myriad of cases which draftsmen cannot wholly anticipate. 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. But because her opinion is of the minority, the core values of the *Steelworkers Trilogy* are ignored, and judicial uncertainty remains.

**CONCLUSION**

Over the past twenty-three years, both the Ninth Circuit,^{112} explicitly, and the Eleventh Circuit,^{113} impliedly, have fallen in line with the majority of their sister circuits and away from the sole contrary Third Circuit *Wilkes-Barre* decision. With the congruence of all of the other circuits denying tort claims in the 301(a) context, the Supreme Court’s decision not to seriously consider whether to recognize a federal tort claim in the 301 context at this time, was not unexpected.

But such quick treatment is also puzzling—puzzling not because the Court declined to recognize an expansion of 301(a), but more so because it used such casual

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^{112} Granite Rock Co. v. Int’l Bhd. of Teamsters, 546 F.3d 1169 (9th Cir. 2008).

language in doing so. After making references to the “host of policy choices” that could upset the balance 301(a) has strived to maintain between unions and employers, the Court went no further, apparently finding that the parties’ briefs did a good enough job explaining those “important” balance disrupters. Furthermore, the Court used the word “premature” to label Granite Rock’s request to expand 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 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. An in depth discussion of whether a tortious interference of contract claim is cognizable under 301(a) must be reserved for another day.\footnote{Similar to the paucity of courts favoring a federal tort claim, the number of articles in support of this expansion of 301(a) is also lacking. After an extensive search on Lexis, we were unable to find one article proposing a tortious interference of contract claim to be cognizable under 301(a). One article appeared to support that claim given its title, but after further review, it opposed expanding 301(a) to “provide a federal tort claim against interfering third parties.” Elizabeth Z. Ysrael, \textit{Federal Common Law of Labor Contracts: Recognizing A Federal Claim of Tortious Interference}, 86 Colum. L. Rev. 1051, 1051 (Granite Gregory final draft 8 24 2010)}