

HARVARD LAW REVIEW

LEGISLATIVE PURPOSE AND THE JUDICIAL PROCESS: THE LINCOLN MILLS CASE

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Section 301 of the Taft-Hartley Act, contend the authors, confers upon the federal courts responsibilities which are beyond the normal institutional capacities of those courts. Thus the proper disposition of Textile Workers Union v. Lincoln Mills, decided last term, was to "remand" the case to Congress for further consideration of this broad delegation of power. The authors also criticize the Court for a tendency to fail to articulate rational grounds of decision.

IN 1942, a year of tranquillity in the midst of more sanguinary conflict, Mr. Max Lerner had occasion to recall the "great constitutional war" of New Deal days. "The number of amateur constitutional sages," he wrote, "never a small one in a nation which De Tocqueville had once described as being ruled by the lawyer's mentality, became [in 1934-37] a bumper harvest." Remarking further that the Supreme Court was, of course, the victor of the battle of 1937, and bemused perhaps by the stillness of the moment into mistaking armistice for peace, Mr. Lerner allowed that it was "difficult today for any conservative group to attack the Court as a whole, because the Court rests on the essential judicial foundation for which the conservatives themselves fought so bitterly. They won that fight, and they must content themselves with the fruits of their victory, even though the taste of the fruits is sometimes bitter in their mouths."¹

Of course, the word conservative needs to be used with great caution, if indeed it needs to be used at all; and it is in this instance certainly misleading, to the extent that it suggests that

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¹ Lerner, *The Great Constitutional War*, 18 VA. Q. REV. 530, 538, 545 (1942).

the victors of 1937 were a politically homogeneous group, or that they have remained one. But the word conservative does effectively evoke a type of politician and commentator arrayed in defense of the Supreme Court twenty years ago and now in full cry against it. Mr. Lerner's expectation was not fulfilled. The voices of amateur constitutional sages again rend the air. And the sound, often a vicious one, comes from the political right, which appears to have forgotten "the essential judicial foundation" it fought for.²

In the midst of the current wave of criticism, dating from May 17, 1954, the day the first opinion in the *Segregation Cases*³ came down, what is the responsibility of professional observers of the Court's work? Plainly, the profession should defend the Court against ill-intentioned nonsense which comes decked out in legal trappings looking like nothing so much as the male model in the cigarette advertisement with his medical coat and head-mirror.⁴ Nearly everything that is written today by way of objective appraisal is subject, however, and is often subjected to misrepresentation and misuse.⁵ Yet the business of the Court goes

² For example, the late Senator Walter F. George of Georgia said in a radio address on February 28, 1937: "Stripped to the waist, it is the obvious purpose of those who demand this procedure [President Roosevelt's proposal] to change the interpretation of the Constitution, the construction of the Constitution, hence the Constitution itself." (Emphasis added.) Mr. George went on to declare that it was a necessary consequence of government under a written constitution that the Supreme Court have the power to interpose the will of the people, represented by the Constitution, to the will of the legislature. The Court was there to protect the rights of minorities, "whether of sect, creed, or race, or of business." He pleaded for support of the Court. *81 CONG. REC. A362-63 (1937). A vastly different spirit pervades the *Southern Manifesto* of March 11, 1956, which Senator George signed. In it the Court is charged with the exercise of "naked judicial power," and a distinction is vigorously drawn between the Constitution and the Court's construction of it. See *New York Times*, March 12, 1956, p. 19, col. 2 (late city ed.).

A similar change in attitude is reflected in the comments of Senator Styles Bridges of New Hampshire. Compare 81 CONG. REC. A297 (1937) with *New York Times*, July 3, 1957, p. 6, col. 3 (late city ed.).

For the change in attitude of a leading columnist, compare Lawrence, *Judicial Reform or Sabotage?*, *The United States News*, Feb. 8, 1937, p. 20, with Lawrence, "Good Behavior" of Judges—*Who Defines It?*, *U.S. News & World Report*, July 5, 1957, p. 104.

³ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁴ See KILPATRICK, *THE SOVEREIGN STATES* (1957); cf. Black, Book Review, 46 *THE YALE REVIEW* 432 (1957).

⁵ Compare Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1 (1955), with Byrnes, "The Supreme Court Must Be Curbed," *U.S. News & World Report*, May 18, 1956, p. 50, at 52. See also Bickel, *Frank-*

on, and it would derogate from the role played by the profession as a whole in the conduct of that business — a modest role, to be sure, but, as members of the Court have themselves often said, not an insignificant one — if the melancholy prospect of misrepresentation were allowed to create a voluntary moratorium on criticism. The more so since one can detect in the recent output of the Court an unfortunate tendency which may itself be a reaction to that prospect.

The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.⁶ This is very possibly a feature, even if not always a deliberate one, of the Court's response to today's controversy. The controversy has undoubtedly and understandably increased the pressure for unity within the Court and placed a great premium on opinions that speak for as many of the Justices as possible. Hence we get opinions which have the vacuity characteristic of desperately negotiated documents.⁷ Moreover, the less an opinion says, the less there may be in it for critics of the Court to seize upon for their own purposes; and one wonders whether it is not for this reason also that opinions have, of late, often said very little and have carried an air of assertion, as opposed to one of deliberation and rational choice. "Great cases like hard cases," Holmes once remarked, in a different context, "make bad law."⁸ One "hydraulic pressure"⁹ which is exerted by such cases is toward unity, unanimity if at all possible; another is exercised by the certainty that the result, any result,

furter's Former Clerk Disputes Byrnes's Statement, U.S. News & World Report, June 15, 1956, p. 132.

⁶ On the per curiam practice, see Sacks, Foreword to *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 99-103 (1954); Note, 69 HARV. L. REV. 707 (1956). Of course, to deplore opinions that do not opine is not to condone opinions that opine too broadly or unnecessarily. Thus it is fair to say that the dicta rather than the holding of *Jencks v. United States*, 353 U.S. 657 (1957), have done most to provoke the controversy that has followed upon the decision of that case.

⁷ This may be true of opinions which have failed in the effort to gain unanimity or even unity within the majority, but which show the scars left by the effort. Compare *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957), with *id.* at 265 (Frankfurter, J., concurring).

⁸ *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (dissenting opinion).

⁹ *Id.* at 401 (dissenting opinion).

will create violent controversy, no matter what is said. This knowledge may produce the defensive tendency to withdraw from the arena in which lies the Court's real strength, the arena of reason and documentation, and to give battle with the weapon that is its opponents' choice: the bare assertion.

An early specimen — early in terms of the current cycle — of the assertive or declarative fashion in opinion-writing is the opinion of the Court in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰ the great *Steel Seizure Case* of 1952. Although it is on the whole quite a different document, the opinion of the unanimous Court in the *Segregation Cases* also touches lightly, and in the declarative manner only, on some matters, not least among them the history of the fourteenth amendment, to which extensive argument and reargument were addressed. More strikingly, since handing down its judgment in the *Segregation Cases*, the Court has declined to write further on the general subject, disposing by per curiam orders of a number of other cases which can only in the loosest way be held to be governed by the decision of May, 1954.¹¹ This is not to say that the per curiam orders were wrong. Nor is it to say that they could not be founded in reason, only that the Court made no effort to do so.

Several opinions from the 1956 Term manifest the retreat from the obligation the Court has traditionally and necessarily felt to explain its conclusions, to justify them and to relate them to its past holdings. A salient example is *Wilson v. Girard*,¹² which the Court heard and decided at a special sitting. This

¹⁰ 343 U.S. 579 (1952).

¹¹ *Gayle v. Browder*, 352 U.S. 903 (1956) (segregation on buses in Montgomery, Alabama); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (segregation on public golf course); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (segregation in public bathing facilities); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (exclusion of Negroes from municipal auditorium leased to private theatrical organization). In *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957), an educational institution was involved. But the contested issue was whether Girard College, operated under a private trust agreement and admitting only "poor white male orphans," acquired sufficient connection with the state by virtue of the fact that the City of Philadelphia was trustee, so that the College's policy could be deemed state action. See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957).

In the same fashion the Court has extended the doctrine of *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944) (union has duty to represent negro minority fairly). See *Syres v. Oil Workers Union*, 350 U.S. 892 (1955); *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 182 (1956).

¹² 354 U.S. 524 (1957).

was the habeas corpus action brought in behalf of the American soldier who, pursuant to the provisions of a protocol¹³ concluded under our security treaty with Japan, was about to be handed over to the Japanese government for trial on a charge of homicide. The petition was based on the claim that the charge grew out of the performance by the soldier of his military duties, and that under the circumstances the protocol could not constitutionally authorize his surrender for trial in a foreign court. The Supreme Court, in a per curiam opinion, set forth the facts in considerable detail and then pronounced judgment in the following paragraph, which is concise enough to be quoted in full precisely because it is concise enough to be a statement of the result and absolutely nothing more. It is as follows:

The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.¹⁴

Such a "decision" as this performs the Court's function in disposing of the case before it. And we do not mean to suggest that the disposition was anything less than the correct one. But such a decision does not attempt to gain reasoned acceptance for the result, and thus does not make law in the sense which the term "law" must have in a democratic society. It may be said that the *Girard* case required swift action and that time was lacking for the elaboration of reasons. However, just how swift adjudication needed to be is arguable, and in any event the Court has means, and has used them, for accommodating itself to such situations.¹⁵

¹³ Protocol To Amend Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, Sept. 29, 1953, 4 U.S. TREATIES & OTHER INT'L AGREEMENTS 1846, T.I.A.S. No. 2848.

¹⁴ 354 U.S. at 530.

¹⁵ The Court has, in cases of special urgency, handed down its decree and filed opinions later. See, e.g., *Rosenberg v. United States*, 346 U.S. 273 (1953); *Ex parte Quirin*, 317 U.S. 1 (1942). Even this practice is not to be commended. Disposition of cases in a matter of days is simply not compatible with the function of the Court. See *Rosenberg v. United States*, *supra* at 301 (Frankfurter, J., dissenting).

Another instance of the same kind of failure on the part of the Court at the last term is *Textile Workers Union v. Lincoln Mills*.¹⁶ The failure in this case is less obvious to the naked eye than in *Girard*. But it appears, upon analysis, in purer form in *Lincoln Mills* than in any of the other examples we have mentioned, and it is here least to be condoned. In *Lincoln Mills*, as we shall attempt to show, difficulties of statutory construction overlying issues of federalism and of the proper function of the federal courts were disposed of in assertive fashion with little apparent consideration of their implications. The disposition was virtually without "opinion," if by opinion we mean rationally articulated grounds of decision.¹⁷

Perhaps the Court must be indulged succumbing occasionally to the hydraulic pressures of intensely contested great cases such as *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁸ Perhaps the agitation that surrounded the *Girard* litigation also exerted such pressures. Finally, and most plausibly, perhaps it has been the wisest course to say nothing further, following not much to begin with, on the unique issue of segregation — ultimately, it can be maintained, an unarguable moral, not a prudential issue. But, as will appear, no considerations of any such order are relevant to *Lincoln Mills*, a case which can in this respect be explained only as the child of a habit acquired elsewhere. The case is remarkable also because it presented to the judicial process, as we see it, a statutory problem of a relatively rare though not unprecedented sort, which is not susceptible of solution by any of the usual canons of statutory construction and which has not been often remarked. The discussion that follows is directed toward an analysis of that problem and a critique of the Court's disposition of the *Lincoln Mills* case.

I. LINCOLN MILLS: FACTS AND BACKGROUND

Lincoln Mills controlled three cases.¹⁹ In each an employer who had signed a collective-bargaining agreement providing for arbitration of disputes with a union of his employees in an indus-

¹⁶ 353 U.S. 448 (1957).

¹⁷ See pp. 35-37 *infra*.

¹⁸ 343 U.S. 579 (1952).

¹⁹ *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957); *General Elec. Co. v. Local 205, United Elec. Workers*, 353 U.S. 547 (1957); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

try affecting commerce had then declined to submit a dispute to arbitration. The union in each case sought in a federal district court specific performance of the contract to arbitrate. Federal jurisdiction was invoked under section 301(a) of the Labor Management Relations Act, 1947 (Taft-Hartley Act),²⁰ which provides that

suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Equity jurisdiction was also invoked under section 301 and under the Arbitration Act.²¹

It is to be assumed that in the face of the rather compelling statutory language quoted above the first, and the very proper, impulse of a judge would be to take jurisdiction and pass to the question whether an equitable case for specific performance had been made out, that is, to proceed to the issue of remedy. That issue is not free of difficulties, which will be adverted to presently. These are, however, not the only difficulties. Before reaching them a judge may find it necessary to seek to identify what is not compelling on the face of the statute, namely the source of the substantive or primary right he is to enforce, if enforce it he will. On that identification may depend the existence of federal jurisdiction, for underneath the beguilingly plain command of the statute lurk the complexities of federalism, including the constitutional distribution of judicial powers between states and nation.

If the meaning of section 301 is that the federal courts are to apply federal law in suits for violation of the contracts in question then there is, of course, no constitutional problem. The power of Congress under the commerce clause to enact a federal law of labor contracts cannot now be doubted. Article III of the Constitution extends the federal judicial power to "all cases in law and in equity arising under this Constitution, the Laws of the United States and Treaties" If there is a federal law of labor contracts, there is a law for section 301 cases to arise under. Suppose, however, that Congress by section 301 meant to

²⁰ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1952).

²¹ 9 U.S.C. §§ 1-14 (1952), as amended, 9 U.S.C. § 4 (Supp. IV, 1957).

leave to state law, where it resided before passage of the Taft-Hartley Act, the function of defining all of the primary rights and liabilities falling outside the jurisdiction of the National Labor Relations Board which flow from collective-bargaining contracts.²² On the basis of this reading section 301 simply makes the federal courts available as a forum for the enforcement of state law. But if that be so, how is federal jurisdiction to be made out pursuant to the "arising under" clause of article III, as it must be in the absence of diversity of citizenship? Does article III permit Congress to lift itself by its own bootstraps and validly grant jurisdiction which arises under no law of the United States except the jurisdictional statute itself? Of course the question is thus put in its most troublesome form — it can be less provocatively asked — and even as so put it is not unanswerable. But it is troublesome and provocative enough to place a judge in a dilemma nicely framed by two canons of statutory construction.

One rule is that constitutional issues are to be avoided by adopting that construction of a statute which does not raise them,²³ in this instance the construction that the substantive law to be applied under section 301 is federal. The other canon is vaguely related to the now disreputable attitude of some early English and American judges that statutes are excrescences on the fair body of the common law and are preferably not to be construed in derogation of it.²⁴ But the relation is of the vaguest, and there is nothing disreputable about the modern American doctrine which refuses to impute to Congress the casual intention to make vast and far-reaching changes in existing statutory or common law, especially if the effect is an important alteration in the federal balance.²⁵ Such is most certainly the effect of section 301 if it is read to create a body of substantive federal law, for if it does so, it creates an exclusive one.²⁶ No competing state law

²² See Witmer, *Collective Labor Agreements in the Courts*, 48 *YALE L.J.* 195 (1938).

²³ See, e.g., *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *United States v. Delaware and Hudson Co.*, 213 U.S. 366 (1909).

²⁴ See POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 84-85 (1882); Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 396-403 (1908).

²⁵ See, e.g., *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940).

²⁶ State law would undercut federal uniformity. Furthermore, as is made plain in *Shirley-Herman Co. v. International Hod Carriers*, 182 F.2d 806 (2d Cir. 1950), the result would be to subject the primary activities of labor and management to inconsistent regulations. This cannot be tolerated in a federal system. See Wollett & Wellington, *Federalism and Breach of the Labor Agreement*, 7 *STAN. L. REV.*

could survive under the supremacy clause of the Constitution.

Facing the dilemma we have described, in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*,²⁷ the first case concerning section 301 to reach the Supreme Court, Justices Frankfurter, Burton, and Minton subjected the section to a forced, indeed it may be thought, to an emasculating reading which enabled them on the facts before them to hold it inapplicable.²⁸ The Justices obtained the concurrence of a majority of the Court for their interpretation of the statute, though not for the forthrightness with which their opinion recognized and avoided the dilemma the statute created.²⁹ Having held that the statute did not cover the case, *Westinghouse* applied, of course, neither federal nor state substantive law, though Justices Frankfurter, Burton, and Minton made it plain that, had it come to that, they would have held that state law was applicable.³⁰ The lower federal courts in their turn have dealt with section 301 in numerous cases. Either they have followed the rule commanding that they refrain if at all possible from reaching constitutional issues and have held that federal law governs under section 301,³¹ or they have resolved the constitutional issue in favor of the statute's validity, finding it unnecessary to decide whether federal or state substantive law applies³² or holding that state law does.³³

445, 452 (1955). See also *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 140 (D. Mass. 1953).

²⁷ 348 U.S. 437 (1955).

²⁸ The case involved a suit by the union for wages allegedly due employees and withheld in violation of the collective-bargaining agreement. The statute was construed so as not to apply to cases of "grievances based upon an employer's failure to comply with terms of a collective agreement relating to compensation, terms peculiar in the individual benefit which is their subject matter and which, when violated, give a cause of action to the individual employee." *Id.* at 460.

²⁹ The Chief Justice and Justice Clark joined in the result but not in the reasoning of Justice Frankfurter's opinion. They offered no reasons of their own, however, to support their construction of § 301. Justice Reed said that as a matter of contract law the cause of action did not belong to the union. Justice Douglas, joined by Justice Black, dissented.

³⁰ *Id.* at 441-49.

³¹ *E.g.*, *Signal-Stat Corp. v. Local 475, United Elec. Workers*, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); *Wilson & Co. v. United Packinghouse Workers*, 83 F. Supp. 162 (S.D.N.Y. 1949).

³² *E.g.*, *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, 230 F.2d 576 (1st Cir. 1956); *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953).

³³ *E.g.*, *United Steelworkers v. Galland-Henning Mfg. Co.*, 241 F.2d 323 (7th

Either conclusion leads, of course, to the question of remedy which carries its own set of complications. Paradoxically enough, much the same doctrine which went to create a dilemma in the choice of substantive law by impelling a judge toward election of the state law tends to exert its pull in favor of the applicability of federal law to determine the availability of the remedy and that regardless of whether a judge has concluded that section 301 refers him on substantive issues to state law, or that it establishes the supremacy of a body of federal law, or that he need not decide that it does either. For if state law governs on the question of remedy in the federal courts under section 301, then that statute has again, in casual because inexplicit fashion, ordained a major change in existing practice, including a shift in the distribution of functions between the states and the nation.³⁴ This is so because it has traditionally been settled that the law of the forum will determine whether the remedy of specific performance is available to enforce arbitration promises in any type of contract.³⁵ It would be particularly startling to find this rule abrogated with respect to collective-bargaining contracts. For, as Judge

Cir. 1957); *Mercury Oil Refining Co. v. Oil Workers Union*, 187 F.2d 980 (10th Cir. 1951).

³⁴ Obviously, maintenance of the federal balance will sometimes require the presumption that state authority was left undisturbed, and sometimes the presumption that federal power was exerted to the full extent of its reach. The *status quo*, which both presumptions seek to preserve against rash or casual encroachment, may be objectively determinable as it is on both the substantive and remedial issues in *Lincoln Mills*. But its definition may also reflect a judge's own estimate of what — everything else being equal — the proper division of power and responsibility should be in a federal system. Compare *United Automobile Workers v. Wisconsin Employment Bd.*, 351 U.S. 266 (1956), with *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). In the first case the Court held that a state may enjoin picketing it deems to be violent, although the applicable federal statute also makes provisions to deal with precisely the same situation. "The States," said the Court, "are the natural guardians of the public against violence. . . . We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect." 351 U.S. at 274-75. In the *Nelson* case the Court held that a state sedition act could not survive in view of the existence of parallel federal legislation. There was here in question, the Court said, quoting from an earlier case, "a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject." 350 U.S. at 504.

³⁵ See *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *Gregory & Orlikoff, The Enforcement of Labor Arbitration Agreements*, 17 U. CHL. L. REV. 233 (1950). The rule has been criticized. See, e.g., *Phillips, Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion*, 19 CORNELL L.Q. 197 (1934). Its merits, of course, are not here in question.

Magruder has remarked in a notable opinion,³⁶ Congress has closely restricted the equitable remedial powers of a federal court in a labor controversy. It has done this principally through the Norris-LaGuardia Act,³⁷ which, for purposes here relevant, neither section 301 nor any other part of the Taft-Hartley Act repeals.³⁸ Indeed, a subsection of section 301 itself imposes restrictive procedural requirements.³⁹ Therefore, in the words of Judge Magruder, to look to state law "for the availability and forms of specific enforcement would complicate and hamper the [federal] district court's observance of the limits Congress has imposed. That is especially true because the enforceability of arbitration agreements varies considerably among the states."⁴⁰

To this line of argument may be interposed the recent deci-

³⁶ Local 205, *United Elec. Workers v. General Elec. Co.*, 233 F.2d 85 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957).

³⁷ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1952).

³⁸ *W. L. Mead, Inc. v. International Brotherhood of Teamsters*, 217 F.2d 6 (1st Cir. 1954). The strictures of the Norris-LaGuardia Act have been relaxed by the Taft-Hartley Act in two situations: (1) when the National Labor Relations Board seeks an injunction to remedy an unfair labor practice, National Labor Relations Act § 10(h), as amended, 61 Stat. 149 (1947), 29 U.S.C. § 160(h) (1952); (2) when, in a national emergency, the Attorney General petitions a district court for an injunction against a strike or lockout, Labor Management Relations Act, 1947, § 208(b), 61 Stat. 155, 29 U.S.C. § 178(b) (1952).

³⁹ Section 301(a) has been set out in text. See p. 7 *supra*. The remainder of the section provides:

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

⁴⁰ Local 205, *United Elec. Workers v. General Elec. Co.*, 233 F.2d 85, 95 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957).

sion of the Supreme Court in *Bernhardt v. Polygraphic Co. of America*.⁴¹ Despite the traditional rule, the Court in that case held that where jurisdiction is based upon diversity of citizenship the federal forum must, pursuant to *Erie R.R. v. Tompkins*,⁴² and its extensions, particularly *Guaranty Trust Co. v. York*,⁴³ follow state law in determining whether to grant a stay pending arbitration. Under *Bernhardt*, state law would no doubt be held to govern the availability in a diversity case of the remedy of specific performance of a promise to arbitrate.⁴⁴ But, whether or not *Erie* and *Guaranty Trust* compelled the outcome in *Bernhardt*, neither those decisions nor *Bernhardt* itself can, without more, impose like results in cases heard under a grant of federal-question jurisdiction conferred by section 301, for even if it is required to apply state substantive law, a court exercising federal-question jurisdiction is by hypothesis not just another court of the state in which it sits in the sense in which *Erie* is said to render it one in diversity cases.⁴⁵ By the same token the Court in *Bernhardt* put forward, as a persuasive reason for its holding, a constitutional issue posed by *Erie* itself: whether Congress has the power to supplant state law with federal.⁴⁶ This question could not arise under section 301, in which, as we have indicated, the constitutional question is not how much of the applicable law may be federal, but how little. The constitutional caveat, if it cuts at all, cuts the other way.

Thus *Bernhardt* leaves the issue of the remedy under section 301 where it found it, and a decision to apply federal remedial law under this section remains indicated. There remain two further difficulties, one of which is created by the Norris-LaGuardia Act. The choice of federal remedial law would have been made to some extent to comply better with the restrictions of that act. The effect of the restrictions in a particular case must be dealt with. A mandatory injunction calling for specific performance of a contract to arbitrate has been held not to be affected by section 4 of the act,⁴⁷ which prohibits the courts from enjoining a strike;

⁴¹ 350 U.S. 198 (1956).

⁴² 304 U.S. 64 (1938).

⁴³ 326 U.S. 99 (1945).

⁴⁴ This would seem to be the a fortiori case. See *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 138 (1956).

⁴⁵ Cf. *Levinson v. Deupree*, 345 U.S. 648 (1953).

⁴⁶ See note 110 *infra*.

⁴⁷ *E.g.*, *United Steelworkers v. Galland-Henning Mfg. Co.*, 241 F.2d 323 (7th

and this may well hold true even if a union's or an employer's refusal to arbitrate is accompanied by a strike.⁴⁸ All other cases growing out of a labor dispute—that is, all cases in which strikes are not involved—are governed, if at all, by section 7 of the act. Its procedural requirements are complicated and quite capable of making it impossible to enter a decree of specific performance of an arbitration promise. The question is whether they must be complied with for purposes of such a decree.⁴⁹

The other of the two difficulties is even more serious. A federal statute must be found authorizing the court to order specific performance, for at common law no such order could be had in these circumstances since a promise to arbitrate was revocable.⁵⁰ State and federal statutes have by and large relaxed this common-law rigor.⁵¹ Section 301 itself might be deemed such a statute,⁵² but it makes not the remotest mention of arbitration and statutes providing for specific performance of promises to arbitrate are usually specific and detailed and prescribe procedures to be followed.⁵³ The search is thus directed toward the United States Arbitration Act of 1925⁵⁴ which does meet the above criteria. However, that act applies by its terms only to “maritime transactions or a contract evidencing a transaction in-

Cir. 1957); *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953); see Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 602-04 (1954). *Contra*, e.g., *International Longshoremen's Union v. Libby, McNeill & Libby*, 114 F. Supp. 249 (D. Hawaii 1953), *aff'd per curiam*, 221 F.2d 225 (9th Cir. 1955).

⁴⁸ See Cox, *supra* note 47; Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167, 179-83 (1956).

⁴⁹ There was, in the lower-court cases, a sharp conflict of opinion as to the application of the Norris-LaGuardia Act in suits to enforce labor arbitration agreements. *Compare* *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953, *with* *Local 205, United Elec. Workers v. General Elec. Co.*, 129 F. Supp. 665 (D. Mass. 1955), *rev'd*, 233 F.2d 85 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957). See also Mendelsohn, *supra* note 48, at 179-83.

⁵⁰ See Gregory & Orlikoff, *supra* note 35, at 235-38; Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580, 581 n.2 (1952).

⁵¹ In some few cases the rigor has been relaxed without the aid of legislation. See Sturges & Murphy, *supra* note 50, at 582 n.5.

⁵² *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953). See also Cox, *supra* note 47; Mendelsohn, *supra* note 48.

⁵³ Labor arbitration under such statutes is examined in Gregory & Orlikoff, *supra* note 35. See also Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. REV. 160 (1934).

⁵⁴ 9 U.S.C. §§ 1-14 (1952).

volving commerce,"⁵⁵ and explicitly not to "contracts of employment of seamen, railway employees, or any other class of workers engaged in foreign or interstate commerce."⁵⁶ Do these limitations prevent recourse to the Arbitration Act?⁵⁷ It is to a discussion of these problems and their implications that we now turn.

II. THE PURPOSE OF CONGRESS AND THE FUNCTION OF THE COURT

In the previous section we have attempted to sort out the data, the given factors that framed the problem in the *Lincoln Mills* case as it reached the Supreme Court. Among these data are not only facts and constitutional and statutory commands but, as is always true in our legal system, previous adjudications and the consequences following from them, which may have been generalized into rules. These are themselves subject to re-examination to be sure; nevertheless they do form the setting of a case. No decision can, of course, be understood out of this context, for no decision made by a court of professional lawyers can fail entirely to be conditioned by it, not even one that is rendered by mere assertion of the result. A decision by assertion has greatly reduced significance as a part of the next problem's setting, and, given the value of articulation in the process of reasoning, is more likely to be ill-advised.

In endeavoring to describe the setting of *Lincoln Mills* we have for analytical convenience employed the arbitrary device of mounting blinkers on a hypothetical judge. We have directed his attention to the surrounding body of law into which section 301 of the Taft-Hartley Act was dropped, but we have not allowed him to look beyond the words of that statute and of the other relevant ones. Yet in the American practice he is free,⁵⁸ and indeed in the circumstances of *Lincoln Mills* he is obliged, to look

⁵⁵ 9 *id.* § 2.

⁵⁶ 9 *id.* § 1.

⁵⁷ The ambiguity of the Arbitration Act has caused the lower federal courts much difficulty in the field of labor arbitration. For some illustrations of this difficulty, compare *United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948), with *Mercury Oil Refining Co. v. Oil Workers Int'l Union*, 187 F.2d 980 (10th Cir. 1951), and *Tenney Engineering, Inc. v. United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953). The problems are searchingly analyzed in Cox, *supra* note 47.

⁵⁸ See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 540-44 (1947).

beyond. At what one may, without intending to deprecate it, call an elementary stage, the legislative history of a statute is searched simply for the meaning of words.⁵⁹ As almost everyone knows, words can signify more than one thing.⁶⁰ At another stage, the explicit statutory command itself, with all the certain meaning one can infuse into its words, may be of no help. One is faced with a specific situation which could be brought within the coverage of the statute without doing violence to its language but which cannot with any degree of realism or candor be said to have been foreseen and provided for by the legislature.⁶¹ Judge Learned Hand in characterizing the way of the judicial process out of this impasse has written:

When we ask what Congress intended usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result is the least fitted for the attempt.⁶²

The trick is to put Congress in the position of Robert Browning in a story Mr. Chafee told. Browning received a letter asking whether "one of his early obscure poems" meant what the writer

⁵⁹ It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. *Boston Sand and Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.).

⁶⁰ Underlying the Court's reasoning is the belief that the language of the 1947 amendment is so clear that it would require creative reconstruction . . . [to apply it in a certain fashion]. On more than one occasion, but evidently not frequently enough, Judge Learned Hand has warned against restricting the meaning of a statute to the meaning of its "plain" words. "There is no surer way to misread any document than to read it literally . . ." . . . Of course one begins with the words of a statute to ascertain its meaning, but one does not end with them. The notion that the plain meaning of the words of a statute defines the meaning of the statute reminds one of T. H. Huxley's gay observation that at times "a theory survives long after its brains are knocked out."

Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128, 138 (1956) (Frankfurter, J., dissenting).

⁶¹ See Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 400-01 (1941); Frankfurter, *supra* note 58, at 528.

⁶² *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952), *aff'd per curiam*, 345 U.S. 979 (1953); *cf.* Cox, *supra* note 47, at 606: "In construing a statute the judge's function is to project the general congressional will upon specific half-foreseen, half-understood occasions rather than to enforce his own much wiser judgments."

of the letter thought it meant. Browning replied: "I didn't mean that when I wrote it, but I mean it now."⁶³

The task of projection and imputation is often a formidable one of historical reconstruction. The atmosphere which gave birth to a statute, the needs and agitation which evoked it, must be sympathetically understood.⁶⁴ Its purpose, however dimly made out, must then be translated forward and related to contemporaneous or later relevant enactments and to other changes in the landscape such as the development of new constitutional doctrines.⁶⁵ The judge who, in Judge Learned Hand's phrase, flinches from this task is necessarily reduced, in the words of Judge Augustus Hand, to employing the "judicial hunch" and to acting as if it were proper for him to have "everything in his own hands."⁶⁶ The same is true of the judge who falters in the performance of the task and, afflicted with a poverty of patience or

⁶³ See Chafee, *supra* note 61, at 404.

⁶⁴ "[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. The difficulty is that the legislative ideas which laws embody are both explicit and immanent." Frankfurter, *supra* note 58, at 533; see *id.* at 537-38; Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 891-92 (1930).

⁶⁵ Translation forward can present very intricate problems when statutes of long standing, which have acquired a gloss, are in question. The Court may need to take account of such matters as general reliance on, or approval of, previous constructions. See FREUND, ON UNDERSTANDING THE SUPREME COURT 37-42 (1949); Lyon, *Old Statutes and New Constitution*, 44 COLUM. L. REV. 599 (1944). Compare *Toolson v. New York Yankees*, 346 U.S. 356 (1953), with *United States v. Shubert*, 348 U.S. 222 (1955), and *United States v. International Boxing Club*, 348 U.S. 236 (1955). See also note 66 *infra*.

⁶⁶ Letter from Augustus N. Hand to Louis D. Brandeis, Nov. 21, 1931, in Brandeis Papers, on file in Library of the University of Louisville School of Law.

The judicial function in the construction of statutes is a premise of the legislative process. The extent of the legislature's conscious reliance on the judiciary will vary of course from case to case. There will always be some. It is a matter of degree until the point is reached where, in Dean Landis' words, "society and the legislature both entrust themselves to the law-making powers of courts." Landis, *supra* note 64, at 893. But even at that point a judge's freedom should be limited by the general aim of the statute. And when all indication of purpose ends he should be guided by maxims of construction commanding harmony with surrounding principles of law, or referring him to other decisive considerations. It is never "in his own hands."

A most instructive instance of deference to "the law-making powers of courts" may be found in the history of the Civil Rights Act of 1957. The O'Mahoney amendment, the compromise that very probably made enactment of the statute possible, turned on two phrases of art: "civil contempt" and "criminal contempt." They were not susceptible of thorough definition, and the authors of the statute knew it. See 103 CONG. REC. 11378 (daily ed. July 24, 1957); 103 CONG. REC. 11618 (daily ed. July 26, 1957).

imagination or empathy loses sight of the distinction between a purpose which may reasonably be imputed to "those who uttered the words," and a purpose he himself now holds or would have held as a legislator. There is the danger in the summons to judicial projection and imputation that some judges will, whether deliberately or not, take it as an invitation simply and bluntly to enforce their own policies or hunches by attributing them to Congress. But the danger is unavoidable, and should be measured against the certainty that hunch and hunch alone will prevail if Judge Learned Hand's candid and wise admonition is not followed. It will not do to say that one way lies in judicial legislation, the other in respect for the proper responsibilities of Congress. One way or the other, whether it holds a statute applicable or not and no matter how it does it, a court decides, and either way Congress can have the last word if it chooses. There are times when as a practical matter Congress may be able to act if the court does one thing but not if it does another.⁶⁷ This is a fact of life to be considered but it will not affect the result in the generality of cases. And in referring to the ability of Congress to act we allude to conditions imposed by permanent institutional attributes, not by the passing political configurations of the day.

That the rule of statutory construction formulated by Learned Hand is capable of achieving some limited results in solving the cluster of problems raised by *Lincoln Mills* was demonstrated by Judge Magruder's opinion in *General Elec. Co. v. United Elec. Workers*.⁶⁸ This is the opinion by Judge Magruder from which we

⁶⁷ Compare *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), with *Cleveland v. United States*, 329 U.S. 14 (1946). In the first of these cases, the Court held that the insurance business was subject to the Sherman Antitrust Act, although at the time of passage of the act insurance was not thought to be interstate commerce. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). In the *Cleveland* case, the Court confirmed an earlier holding that the Mann Act forbade interstate transportation of women not only for purposes of prostitution but also of polygamy. In theory, neither holding concludes Congress. Actually, it may realistically be expected that Congress if it chooses will regulate the insurance business in some other fashion, or free it of regulation altogether, and thus overrule the *South-Eastern Underwriters* case. But can it be thought that any democratically elected institution in our society is free if it chooses to take action affirmatively to legalize polygamy? The purpose of the Congress which enacted the Mann Act being, to say the least, doubtful, was it not true in the *Cleveland* case that the only way to leave the last word to Congress was to hold the act inapplicable to polygamy, enabling Congress either to acquiesce or respond in a manner realistically open to it?

⁶⁸ 244 F.2d 85 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957). This case was one of the three controlled by the *Lincoln Mills* decision.

quoted earlier in this article. In dealing with the difficulties raised by the Norris-LaGuardia Act and the Arbitration Act, Judge Magruder followed the admonition to place himself in the position of the legislator. Would the framers of the Norris-LaGuardia Act have wanted section 7 of that statute to apply to a decree compelling arbitration in light of the plain purpose evinced by section 301 of the Taft-Hartley Act that the federal courts should as a general proposition have power to hold unions and employers to promises made in collective-bargaining agreements? A negative answer was deducible from the fact that the requirements of section 7 are simply not apt in the circumstances. Section 7 commands the court to make findings which do not fit the situation, negatively or affirmatively. Yet on no reading does the act explicitly prohibit a decree of specific performance, as it does forbid enjoining a strike in section 4. "We do not believe," Judge Magruder therefore concluded, "[that] Congress intended § 7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts,"⁶⁹ a conclusion which would necessarily follow from a holding that section 7 was applicable.

A like process of reasoning led Judge Magruder to hold the Arbitration Act applicable. That statute when enacted manifested an intention to exclude from its coverage at least certain classes of "contracts of employment." The quoted phrase is an inexact description, if it is a suitable description at all, of the modern collective-bargaining agreement.⁷⁰ In any event, the decisive question is whether coverage would have been extended to collective-bargaining agreements, which are commonly known to include arbitration clauses, in the light of the new policy expressed by section 301 to make such agreements enforceable in the federal courts.⁷¹ The likely answer is yes. Again, the Arbitration Act speaks of "transactions involving commerce." It does

⁶⁹ *Id.* at 92. Furthermore, precedent exists, and was cited in the opinion, for the proposition that the Norris-LaGuardia Act does not withdraw all injunctive relief. See *Syres v. Oil Workers Union*, 350 U.S. 892, *reversing* 223 F.2d 737 (1955); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949). See also *Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R.*, 353 U.S. 30 (1957).

⁷⁰ *Cf.* *J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-35 (1944).

⁷¹ "And so the significance of an enactment, . . . its relation to other enactments, all may be relevant to the construction Some words are confined to their history; some are starting points for history." Frankfurter, *supra* note 58, at 537.

not force language to place a collective-bargaining agreement in such a category, in view of the enlarged constitutional meaning of the word "commerce."⁷²

This far a disciplined insight into congressional purposes can carry one in *Lincoln Mills*. The problem of the remedy may be solved in this fashion. But on the basic issue of the substantive law to be employed under section 301, this method of construction will not point the way to a decision.⁷³ Evoke as one may the full context of the Taft-Hartley Act, study as best one can the legislative debates which attended its enactment, yet there is no significant indication of purpose beyond the will to make parties to a labor contract suable and to hold them to their obligations;⁷⁴ there is little if any guidance on the question of what law should define those obligations. This being so, the dilemma which was posed before examination of the legislative history remains unresolved. And the problem therefore calls for a balancing of the gravity of the constitutional issue raised by referring to state law against the damage to the fabric of federalism that would be caused by a holding that federal law applies. Since the prevailing and in our view sound opinion is that section 301 is constitutional, adoption of state law is, we think, in order.⁷⁵

This is not to suggest that any thoughtful student would make light of this issue or that it can reasonably be resolved in only one way. In the final analysis the question is this: In exercising its now vast powers under the commerce clause or indeed any of its established powers must Congress, before it is free to employ the federal-court system for the effectuation of its object, go the full length of displacing state substantive law?⁷⁶ To put it another way, instead of achieving uniformity by imposing its own

⁷² For an examination of the conflicting opinions in the courts on the application of the Arbitration Act to labor agreements, and an examination of the minuscule and ambiguous legislative history on this question, see *General Elec. Co. v. United Elec. Workers*, 233 F.2d 85, 97-100 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957); *Cox*, *supra* note 47.

⁷³ *Cf. Mendelsohn*, *supra* note 48, at 184.

⁷⁴ See H.R. REP. No. 245, 80th Cong., 1st Sess. 6, 45 (1947); Wollett & Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445, 472-75 (1955). The legislative history is collected in the appendix to Justice Frankfurter's dissent in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 485-546 (1957).

⁷⁵ Even if a holding of unconstitutionality became unavoidable, the extensive effect on federalism might lead us to the same conclusion.

⁷⁶ See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 224-25 (1948).

law may not Congress, hoping for harmony and orchestration though expecting and desiring some continuing diversity, hand the conductor's baton to the federal courts rather than giving them a set of cymbals with which to drown out all other sounds? The figure is complex and perhaps it has run away with the thought it is meant to express. The point is simply that providing a forum for the enforcement of state law in a field which Congress could occupy is itself a species of regulation, a way of seeking a degree of uniformity while leaving the maximum room for the exercise of initiative by the states. It is a way of striving for a measure of co-ordination by consent and persuasion — a way of setting up something like a clearing house of ideas — for in following state law the federal-court system, even if subjected almost to the stringencies that have been drawn from *Erie R.R. v. Tompkins*,⁷⁷ is bound to make some creative contribution despite the fact that state courts remain theoretically free to resist federal guidance.⁷⁸ Since the federal circuits do influence each other and operate under a single Supreme Court, this contribution in turn is bound to tend in the direction of harmonizing state policies. We are dealing by hypothesis with matters of at least potential federal concern and so the tendency to harmonize will be more pronounced than it has been in the diversity jurisdiction subsequent to *Erie*. It is likely to be particularly pronounced where, as in labor matters, the state substantive law exists only interstitially anyway and is not often brought to bear free of the influence of federal law on which the federal courts speak authoritatively.⁷⁹

It would be most regrettable if a federal constitution forbade the general government to exercise its regulatory powers in this forbearing, sanguine, and initially perhaps experimental manner which turns to account the genius of a federal system. It would

⁷⁷ 304 U.S. 64 (1938).

⁷⁸ See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 628-30 (1953); Corbin, *The Laws of the Several States*, 50 *YALE L.J.* 762, 775-76 (1941).

⁷⁹ Section 8 enumerates unfair labor practices; these may in some instances become relevant to the validity or interpretation of a collective agreement. Certain procedural safeguards are placed about the collective bargaining agreement: an obligation to confer in good faith on questions arising under it; a duty to follow certain steps prior to terminating or modifying the agreement unilaterally. (§§ 8(d), 204(a)(2).) And a limited number of substantive rights conferred under the Act may incidentally involve the interpretation of the collective agreement. (*E.g.*, § 9(a).)

Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 443 n.2 (1955). See also *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, 230 F.2d 576, 581-82 (1st Cir. 1956).

be regrettable for Congress to be forced instead to exert its authority to the full in order to be able to employ it at all. Is this the effect of article III of our Constitution? The answer would be yes if it were true that to allow for federal-question jurisdiction in cases arising only under a jurisdictional statute is in effect to eliminate the "arising-under" clause of the Constitution as a limitation on federal jurisdiction. It is inadmissible to construe article III so as to provide generally for the sort of jurisdiction which the framers provided for in cases of diversity of citizenship only.⁸⁰ But there is no occasion here to obliterate the distinction between the diversity of citizenship and the "arising-under" clauses of article III. The "arising-under" clause, if our view is accepted, can still come into play only when one of the enumerated heads of legislative powers enables Congress to act. If a considerable slice of state law can thus be brought into federal forums regardless of the citizenship of the parties, although in the conditions of earlier times that would have been possible only in the diversity jurisdiction, the reason is simply the general expansion of the area of federal interest and competence. It is no more shocking to observe this development in article III than in the commerce clause and indeed, as we have suggested, permitting it to take place in article III conduces to an abatement of the inroads of this expansion's other manifestations on the federal system. It remains only to add that for purposes of upholding section 301 of the Taft-Hartley Act a more limited argument than the one we have put forward will also suffice. It rests on the exercise, since *Osborn v. Bank of the United States*,⁸¹ of what has come to be known as protective federal jurisdiction. This jurisdiction is supported by considerations similar to the ones we have arrayed without, perhaps, the need of carrying them as far as we have done.⁸² The precedents are not numerous but they are persuasive;

⁸⁰ It remains, in this view, article III which enables Congress to confer judicial powers on the federal courts, although the "arising-under" clause is to be read in conjunction with the definition in article I of an area of federal authority. No implication need arise that such a provision of article III as that limiting the exercise of judicial power to cases and controversies can be overridden. None of the underlying issues can be said to have been resolved, of course, by the divided Court in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

⁸¹ 22 U.S. (9 Wheat.) 738 (1824).

⁸² See *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, 230 F.2d 576 (1st Cir.), cert. dismissed, 352 U.S. 802 (1956); *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1933); HART & WECHSLER, *THE FEDERAL*

indeed, they are not easy to avoid.⁸³

We are thus led to what for us is the heart of the *Lincoln Mills* case. Suppose a judge concludes that he must not give a restrictive interpretation, of far-reaching consequences, to the "arising-under" clause of article III and that section 301 is therefore constitutional. Suppose that, with Judge Magruder, he holds that federal law is applicable on the issue of the remedy and finds no obstacles in the Norris-LaGuardia Act and in the Arbitration Act. Has he solved the *Lincoln Mills* case and must he then, conformably with the relevant state substantive law, order specific performance? In our view the answer is no. The analysis so far has served only to uncover the decisive issue, which concerns the nature of the task section 301 would impose on the federal courts.

Whether state or federal substantive law is, to use the phrase we have been employing up to now, applicable under section 301, very little of it will be found in statutory form and hardly any of that will give more than very general guidance.⁸⁴ Yet particular problems will, of course, continually arise. The draftsmen of collective-bargaining contracts are not supermen endowed with total foresight anymore than are the draftsmen of ordinary contracts and the typical case is not likely to involve a stubborn refusal to carry out admitted obligations but rather a dispute concerning what those obligations are.⁸⁵ What section 301 really demands of the federal courts, therefore, is not the application but the creation in case after case, with the scant assistance of bits and pieces of statutory commands, of a law of labor contracts the chief source of which is to be the common law of commercial contracts.⁸⁶ The plain fact is that the courts are enor-

COURTS AND THE FEDERAL SYSTEM 733-47 (1953); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 184-96 (1953).

⁸³ See *Williams v. Austrian*, 331 U.S. 642 (1947); *Schumacher v. Beeler*, 293 U.S. 367 (1934). These cases concern federal bankruptcy jurisdiction.

⁸⁴ See note 79 *supra*, for an adumbration of the fashion in which federal statutory law will be relevant. In some states, Wisconsin for example, breach of a collective-bargaining agreement is an unfair labor practice. Employment Peace Act, WIS. STAT. §§ 111.06(1)(f), (2)(c) (1955).

⁸⁵ Consider the problem in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), the first § 301 case in the Supreme Court. The dispute involved the interpretation of the agreement. The union, in good faith, asserted that the company owed its employees wages for a day when they had not worked. The company, equally in good faith, denied the allegation.

⁸⁶ Other sources—arbitration reports and labor board decisions—may occasionally be germane, and courts at times will resort to them. See *International Brotherhood of Teamsters v. W. L. Mead, Inc.*, 230 F.2d 576, 584 (1st Cir.),

mously unequal to the task⁸⁷ and its imposition on them is therefore capable of damaging their usefulness for the essential duties that they are suited to perform.

In supporting this statement we may start with what is perhaps the broadest and most debatable proposition, debatable although it has behind it the authority and unique experience of Dean Harry Shulman, and inferentially the support of Mr. Justice Frankfurter. In his Holmes Lecture, delivered shortly before his death, Dean Shulman contended, if we read him correctly, that under no circumstances can judicial intervention be helpful when labor arbitration has broken down. Mr. Justice Frankfurter's dissenting opinion in *Lincoln Mills* quotes a passage from Dean Shulman's lecture which makes the point:

The arbitration is an integral part of the system of [industrial] self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation

cert. dismissed, 352 U.S. 802 (1956); cf. note 84 *supra*. However, experience teaches that it is the common law of commercial contracts out of which a common law of labor contracts will develop.

And this is unfortunate. "In my judgment it is a mistake to attempt to force agreements between labor unions and employers into . . . familiar legal pigeonholes such as usage, third party beneficiary contracts, or contracts negotiated by the union as agent for the employees as principals." Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 604 (1956). At common law, the courts always have had difficulty with the collective-bargaining agreement. "Some courts have called it a mere gentlemen's agreement, unenforceable at law; and the treaty analogy is still made." Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U.L.Q. 3, 11. To cope with the collective agreement, an agency theory has been advanced, see, e.g., *Barnes & Co. v. Berry*, 169 Fed. 225 (6th Cir. 1909); and a third-party-beneficiary doctrine has been employed, see, e.g., *Blum & Co. v. Landau*, 23 Ohio App. 426, 155 N.E. 154 (1926). "A substantial body of case law, both in this country and abroad, has dealt with collective agreements according to the traditional pattern of contract litigation." LABOR RELATIONS AND THE LAW 308 (Mathews ed. 1953). See also Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1931); Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941); Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938).

⁸⁷ Consider the difficulty which Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), *aff'd*, 348 U.S. 437 (1955), caused the Third Circuit, the highest federal court to dispose of the case as a matter of labor-contract law. After theorizing about the nature of a collective-bargaining agreement (and floundering badly), the court held, in a 4-3 decision, that "the employer's duty to pay a certain rate arises out of the collective bargaining contract plus the sanctions of the labor relations Act. The duty to pay a particular employee wages in the sum resulting from such rate arises out of the individual contract of hire. The latter is the duty alleged here, and, therefore, Section 301(a) is not involved since there is no violation of a contract between an employer and a labor organization." *Id.* at 630.

in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award?⁸⁸

Justice Frankfurter reinforced this passage with the following observations:

Arbitration agreements are for specific terms, generally much shorter than the time required for adjudication of a contested lawsuit through the available stages of trial and appeal. Renegotiation of agreements cannot await the outcome of such litigation; nor can the parties' continuing relation await it. Cases under § 301 will probably present unusual rather than representative situations. A "rule" derived from them is more likely to discombobulate than to compose. A "uniform corpus" cannot be expected to evolve, certainly not within a time to serve its assumed function.⁸⁹

Courts, no matter how closely confined to the detailed provisions of a legislative code, and perhaps even courts reviewing in the normal fashion the actions of administrative agencies, would always fall under the strictures of the statements we have quoted. But the point need not be pressed quite so relentlessly in order to condemn section 301. For that statute enacts no code, relies on none, and interposes no body of experts. It gives carte blanche, making the courts arbiters-in-chief of collective-bargaining contracts. Yet a half-century of often painful and disagreeable experience cries aloud that labor problems emphasize most dramatically the limitations of the judicial process as an instrument for the formulation of social policy. It is not likely that the common law of contracts will prove a more fitting source of rules to bridle the forces of labor unrest than the common law of property or the common or Sherman Act law of unfair competition, on

⁸⁸ Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955). The passage was quoted in 353 U.S. at 463 (dissenting opinion).

⁸⁹ 353 U.S. at 463-64 (dissenting opinion).

which the courts have drawn in the past.⁹⁰ The point is not that the courts will make what in political parlance would be called antilabor rules because courts tend to be conservative, or that they will now be antimanagement because so many of our federal judges were appointed by prolabor administrations. There will be some prolabor and some antilabor policies made and it is true that the political choice between the contending interests, which such policies represent, belongs with officials reachable at the polls, not with judges. But beyond that the point is that the courts will draw from a body of experience not germane to the problem they will face. Given their limited means of informing themselves and the episodic nature of their efforts to do so, they will only dimly perceive the situations on which they impose their order. Even if they do perceive, they will necessarily come too late with a pound of "remedy" where the smaller measure of prevention was needed. Their rules, tailored to the last bit of trouble, will never catch up with the next and different dispute. They will allow or forbid and be wrong in either event, because continuous, pragmatic, and flexible regulation alone can help. They will on most occasions naturally shy away from basing their judgments on what they are accustomed to regard as "political" factors incompatible with their disinterestedness, although these may form the only sensible context of questions before them. And they will thus find themselves resting judgment on trivia or irrelevancies. All this will not only, by its sheer volume, divert the energies of the courts from their proper sphere but will also tend to bring the judicial process into disrepute by exposing it as inadequate to a task with which it should never have been entrusted.⁹¹

⁹⁰ See *Truax v. Corrigan*, 257 U.S. 312, 368 (1921) (Brandeis, J., dissenting); COX, *CASES ON LABOR LAW* 8-84 (3d ed. 1954); FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 1-46 (1930).

⁹¹ The effect on the courts of broad mandates to make law has recently drawn comment from former Secretary of State Dean Acheson. Referring to part III of the Civil Rights Bill which was struck by Senate amendment from the Civil Rights Act of 1957, Mr. Acheson has written:

For Congress to have directed the executive branch to enforce these incomprehensible statutes would not have advanced civil rights. It would have produced endless litigation and given a perfect excuse to avoid any further legislation which experience may show to be necessary. Worse than this, it would have invited the court to legislate, as all sloppy and vague acts of Congress require it to do, and then, when it does state the law — as it must — bring down upon it the condemnation of large sections of the community. This sort of Congressional irresponsibility can do vast harm to the judicial branch and to confidence in it. The Senate amendments avoid all this.

Acheson, *A Word of Praise*, *The Reporter*, Sept. 5, 1957, p. 8; cf. Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 403-04 (1908).

We have endeavored to make the point as vigorously as we could. There are, of course, things to be said on the other side. State courts have engaged in this business. Thus there is some law to be found beyond that of commercial contracts. All courts already deal with other matters for which all or most of what we said also holds. They make antitrust law under statutes not very much more explicit for the conditions of this day than section 301. The suitability of the common law of contracts, for example, for governing major modern commercial transactions is subject to serious doubt. All this may be thought to argue no more than that section 301 would not create unprecedented troubles but would merely add to existing ones. In any event, we need to demonstrate for our purposes only that a reasonable man, though there are those who might think him wrong, could be disturbed by what he deemed the gravely unwise allocation of institutional functions made by section 301; that he could sensibly arrive at the conviction that the wrong task was given to the wrong institution, and that the consequences are likely to be serious all around. Our question is, if the reasonable man is a Justice of the Supreme Court and if the *Lincoln Mills* case is before him, can that conviction properly be decisive for him in the disposition of the case? And our answer is yes — that conviction and no other. It was the function of the Court in *Lincoln Mills* to come to grips with this issue and to form its conviction.

We should make clear at once that this institutional issue, as one might well term it, is quite distinct from the sort of question of policy Congress dealt with in passing section 301 and the rest of the Taft-Hartley Act.⁹² What is necessary and wise for our economy in regulating the relations of labor and management? Who is acquiring too much political power and should he be cut down to size? Who is getting too much or too little of a share out of the wealth we produce? Such is the cast of the problems Congress resolves and we would not for a moment contend that it is the function of judges to be concerned with them. Indeed, it is one of the unfortunate features of section 301 that it leaves many such problems unresolved and attempts to thrust them upon the attention of the courts. Congress must answer such questions, and when it does it is for the courts faithfully to enforce the

⁹² See generally Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 274 (1947-48).

answers, divining them when necessary by the rule of statutory construction formulated by Judge Learned Hand. But there are solutions the legislature may adopt for problems properly in its sphere which on analysis turn out to be enmeshed in other issues and to be fraught with consequences above and beyond those that Congress had in view. Of this truism, section 301 of the Taft-Hartley Act is a classic illustration. And its legislative history is a textbook demonstration of the further truism that Congress cannot normally be expected to have confronted such an institutional issue as we have outlined and to have formed a deliberate opinion about it.

Not only does the legislative history of section 301 fail to indicate with assurance if the courts are to draw on state or federal law as a source of substantive rules, but there is not the faintest trace of recognition of the complexity of the task delegated to the courts, or of concern with their suitability for it.⁹³ It is clear that Congress meant to redress the balance of power and benefits between labor and management, and in many instances the Taft-Hartley Act strikes very nice new balances.⁹⁴ But section 301 represents only the feeling that application of contract law by the courts would serve a like end. There was no awareness of anything else. There is unlikely to be such an awareness in a body constituted and occupied as Congress is, and responding quite properly to the pressures of those it is responsible to. The popular voice which expresses without inhibition what is wanted in the way of immediate, palpable results should be heard somewhere and Congress is that place. But Congress cannot normally be expected also to be aware that some of the means chosen to achieve immediate ends impinge in not easily apparent fashion on values of permanent significance. Were this not so the Constitution, which embodies such values (and not least among them principles of the recognition of institutional capabilities), could be left to the care of Congress alone. But the Supreme Court also guards it and draws from it what is enduring. We contend that, by the same token, other values not enshrined in the Constitution but existing in its penumbra and akin to constitutional ones (and like them not to be judged in terms of the choice of temporal policies that is for Congress alone to make) are also entrusted

⁹³ See authorities cited notes 73, 74 *supra*.

⁹⁴ See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 24-34, 274, 291-99 (1947-48).

to the guardianship of the Court. They are no doubt somewhat lower on the scale of timeless importance and the Court therefore does not have the power to decree without recourse that they must be vindicated at all costs or even to define their content with finality. But it is for the Court to bring them to the fore so that they may receive their due weight in Congress as they are otherwise most unlikely to do.

Whether or not we are justified in generalizing as we have, there is one such value that recommends itself most fittingly to the Supreme Court's attention, and it is the value threatened by section 301. What is involved here is the institutional capability of the Supreme Court and the system of federal courts over which it presides. As Mr. Justice Frankfurter points out in his dissent in *Lincoln Mills*, the principles of article III of the Constitution make rather special claim to the Court's guardianship. He states:

The earliest declaration of unconstitutionality of an act of Congress — by the Justices on circuit — involved a refusal by the Justices to perform a function imposed upon them by Congress because of the non-judicial nature of that function. . . . Since then, the Court has many times declared legislation unconstitutional because it imposed on the Court powers or functions that were regarded as outside the scope of the "judicial power" lodged in the Court by the Constitution. . . .

One may fairly generalize from these instances that the Court has deemed itself peculiarly qualified, with due regard to the contrary judgment of Congress, to determine what is meet and fit for the exercise of "judicial power" as authorized by the Constitution.⁹⁵

We have no doubt, as we have explained, that section 301 confers powers that are "meet and fit" by constitutional criteria. The issue we have raised is not of constitutional proportions, but it is nevertheless one the Court is "peculiarly qualified" to determine though not with the finality it would speak with on a constitutional matter. And we believe it can be shown that Justices of the Court and — though it tended to pour the heady wine into old bottles — the Court as a whole, have in the past thought themselves so qualified.

What, after all, was the ultimate basis of dissent by Justices who opposed the application of the Sherman Act to labor disputes and the application to those disputes of general jurisdictional

⁹⁵ 353 U.S. at 464-65 (dissenting opinion).

statutes, the common law of property and the like? It would preposterously mistake the judicial philosophy of a Brandeis, and ignore what he wrote in cases of this sort, to suppose that he was at one with the majority in a cheerful desire to make social and economic policy and differed only about the particular policy that should be made. Brandeis believed and said that it was not the business of judges to enunciate such policy. Again, it was not application of Judge Learned Hand's rule of statutory construction, of which he was a masterful practitioner, that was decisive for Brandeis. The decisive factor was Brandeis' view of the functions that could properly be allocated to courts,⁹⁶ for the imputation of purpose to the framers of the Sherman Act, and even of the Clayton Act, led to ambiguity and perhaps even to the same result as such an imputation of purpose to section 301.⁹⁷ In Brandeis' philosophy the labor cases were of a piece with such a case as *International News Serv. v. Associated Press*.⁹⁸ He resisted in that case the admittedly reasonable, indeed enlightened and proper, formulation of a common-law rule to prevent the pirating of news. He resisted not because he disagreed with the rule or thought it unauthorized but because he was convinced that in formulating it the Court was assuming a task it would prove unfit to discharge. He saw the problem of the protection of news as one that demanded the imposition of a rule of law, just as he believed that above the rights of labor combatants "rises duty to the community"⁹⁹ which should be defined by law. But in *Associated Press* as in the labor cases he saw the problem in its full and real dimensions and he recognized it as not "meet and fit" for solution by the judicial process.¹⁰⁰

Of course, it may be said that if there is one thing that is plain about section 301 it is the very thing that was cloudy about the Sherman Act: that is the specific intention of Congress to empower the courts to make labor law, to have them do what they can constitutionally be required to do though they may think it

⁹⁶ See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (dissenting opinion); cf. *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926).

⁹⁷ See GREGORY, *LABOR AND THE LAW* 170-72 (rev. ed. 1949).

⁹⁸ 248 U.S. 215 (1918); see *id.* at 262-67 (dissenting opinion).

⁹⁹ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (dissenting opinion).

¹⁰⁰ See *Pennsylvania v. West Virginia*, 262 U.S. 553, 618-24 (1923) (Brandeis, J., dissenting); Freund, *Mr. Justice Brandeis*, in *MR. JUSTICE* 97, 113-15 (Dunham & Kurland ed. 1956).

unsuitable. Here therefore we would ask a judge not just to incline, for the reasons we have set forth, toward one of two possible readings of the legislative will — even though it be the less likely one — but to flout that will when it is unmistakable. But we would not have the Court do anything that is incompatible with a decent respect for the English language. The result must be containable in the words of the statute. What is more important, the legislative history of section 301 does not, any more than does that of the Sherman Act, reveal any awareness of the institutional issue. That issue is decisive (in the Court's view, to be sure, not in the view Congress first took) and on that there is no flouting of any considered congressional purpose.

Consider, as embodying a notion of the judicial function very much like the one we set forth here, the traditional doctrine that Congress will not be deemed to have ordained a major change in the legal *status quo*, especially a change in the federal balance, unless it is inescapably clear that it has done so.¹⁰¹ Judge Learned Hand's method of imputation of purpose, which proceeds in terms of the policy choices Congress did make and the kind of concrete results it wanted and would have wanted, might often lead in most satisfactory fashion to a solution quite contrary to that reached by the above-mentioned doctrine.¹⁰² Yet it is that doctrine that prevails so long as it is reasonably apparent that Congress had its

¹⁰¹ See, e.g., *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940). See also note 34 *supra*.

¹⁰² “[I]n the interpretation of recent regulatory statutes, . . . the judicial task . . . is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, *cut across what might otherwise be the implied range of legislation.*” Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40 (1947). (Emphasis added.) A recent occasion when the Court put this lucidly stated principle into practice is *United Automobile Workers v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956); see note 34 *supra*. The Taft-Hartley Act made the behavior involved in that case a union unfair labor practice, and empowered the National Labor Relations Board to deal with it. It would have been natural, and in line with the Court's general doctrine in the field, to hold that state authority had thus been displaced — natural but for the fact that the state authority here asserted was part of “the historic functions of the individual states.” Cf. *United Constr. Workers v. Laburnam Constr. Corp.*, 347 U.S. 656 (1954). *But cf.* *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956).

Other, less recent cases can be cited in which it is evident that, had considerations of the federal balance not impinged, the federal regulatory statute in question would have received a generous construction, extending the general legislative pur-

eye — as it did in passing section 301 — on results and not on the havoc it might wreak in achieving them. It is for the Court in such cases to give pause, not to invoke constitutional prohibitions, but to give a chance for a better-informed second thought. That is what the doctrine means.

The rule that a statute is to be interpreted so as to avoid constitutional doubts is another commonly applied canon of statutory construction that serves in many cases as a screen behind which the Court in fact performs the function we are describing. When those doubts are seriously entertained and are of major proportions the rule rests on reasons of its own¹⁰³ which have little to do with what may inoffensively be described as the function of remanding legislation to Congress for a new look. The rule was very aptly applied in the opinion of Mr. Justice Frankfurter, for whom, as we shall see, section 301 posed a very real constitutional question, in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*¹⁰⁴ But not infrequently the doubts in a judge's mind are of a different sort. It is not that if he goes in one direction he must scale the mountain of the Constitution; it is only that he will reach the foothills. The constitutional foothills are the sort of issue we are talking about and the judge who

pose to unforeseen but apt situations, which are within the reach of its language. Not least among them is *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), the case that, at last, construed the Sherman Act as being directed chiefly at commercial practices tending toward monopolization and as not authorizing the judiciary to deal with incidental obstructions of commerce resulting from industrial strife. Chief Justice Hughes, in dissent, demonstrated rather convincingly how the normal — and normally enlightened — method of construction would lead to the opposite result. *Id.* at 514. But “the maintenance in our federal system,” said Justice Stone for the Court, “of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.” *Id.* at 513. It is particularly significant that Justice Stone wrote in the *Apex* case, for, as he noted, Congress had been asked, and had declined repeatedly, to reverse the Court's holdings in previous labor cases under the Sherman Act. *Id.* at 488. Normally, such silent acquiescence by Congress was decisive for Justice Stone. See *Girouard v. United States*, 328 U.S. 61, 70 (1946) (Stone, C. J., dissenting).

¹⁰³ [U]nless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which *grave and doubtful* constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

United States ex rel. Attorney General v. Delaware and Hudson Co., 213 U.S. 366, 408 (1909). (Emphasis added.)

¹⁰⁴ 348 U.S. 437 (1955).

allows them to govern his construction of a statute performs the function we are talking about. We hesitate to mention any specific considerations, beyond those raised by section 301, which might properly call forth exercise of this function because the function has its obvious dangers (as does the method of statutory construction by projection and imputation, and as does most strikingly the very power to declare legislation unconstitutional) and its extension should be undertaken with great care. Yet there is at least one recent example of the exercise by the Court in matters quite unlike section 301 of what must be the function we have put forward, albeit the words in which the performance took place were the words of avoidance of constitutional decision. (It should be added that the words were lightly and quickly intoned.)

The Court was dealing with the liberties of aliens — persons who are not represented in the political process and to whose rights the Court might well be particularly alert though one can scarcely maintain that it has always been so. Aliens do have certain constitutional rights but, in view of the vast powers over them that Congress possesses and in view of the adjudications of the past dozen years or so,¹⁰⁵ the right that was claimed in *United States v. Witkovich*¹⁰⁶ was at best shrubbery in the constitutional foothills. Congress had required aliens against whom deportation orders were outstanding to give under oath information about their “habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper.”¹⁰⁷ The Court, very commendably we think, held that only information which was relevant to the Government’s concern that the alien remain available for deportation could be elicited. Normal canons of construction of a statute obviously aimed at imposing severe and comprehensive controls would have led to the opposite and harsher result. And the Court was not able to argue convincingly that the construction the Government was contending for might lead to a holding of unconstitutionality. Was not the Court remanding to Congress

¹⁰⁵ *E.g.*, *Jay v. Boyd*, 351 U.S. 345 (1956); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952).

¹⁰⁶ 353 U.S. 194 (1957). One need not agree with the extreme constitutional holdings of the cases cited in the preceding footnote in order to take the view that the *Witkovich* case, though exhibiting a great deal of offensive congressional harshness, does not raise a serious constitutional issue.

¹⁰⁷ 66 Stat. 211 (1952), as amended, 8 U.S.C. § 1252(d) (Supp. IV, 1957).

what on paper might have looked like severities but in practice became barbarities and asking the Congress to reconsider the necessity of going quite so far in the exercise of its undoubted power to make the nation secure against dangerous or unwanted aliens? This was not, as in section 301, an institutional issue touching its own capabilities, which issue the Court is peculiarly fitted to deal with. Nor was the issue that was decisive for the Court here properly speaking a by-product of the result Congress aimed at. It was not a consequence of congressional action which Congress plainly did not have its eye on and could not be brought to care about unless the Court directed its attention to it. Both Congress and the Court would appear this time to have dealt with approximately the same range of considerations. Both balanced the needs of security, which by and large it is for Congress, not the Court, to assess, against regard for the individual's privacy. This decision is therefore, if we characterize it correctly (and we do so partly on the basis of surmise of course), an extension of what we have called the remanding function.¹⁰⁸ But it is

¹⁰⁸ Cf. *United States v. Minker*, 350 U.S. 179 (1956). This, a somewhat different case, involved the preliminaries to proceedings looking to denaturalization of a citizen. A restrictive construction of the statute had the concurrence in this case of a unanimous Court.

The *Witkovich* and *Minker* cases have honorable dissenting antecedents. These stand, it seems to us, in a relation to *Witkovich* and *Minker* which is the same as the relation of the dissent in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 479 (1921), to the view we take of *Lincoln Mills*. It was held in *United States v. Schwimmer*, 279 U.S. 644 (1929), that in requiring applicants for naturalization to be "attached to the principles of the Constitution," and to swear to "support and defend the Constitution . . . against all enemies, foreign and domestic," Congress meant to exclude from naturalization one who would not bear arms for reasons of conscience. Rebelling against the narrow-mindedness of this construction and invoking the spirit of our institutions—what we have, perhaps ungraciously, called the constitutional foothills—Justice Holmes, joined by Justice Brandeis, dissented. Justice Holmes did not contend that the Court's construction was not a possible one, and he did not suggest the presence of a constitutional issue. When a very similar holding, based on the same statutory language, was handed down in *United States v. Macintosh*, 283 U.S. 605 (1931), Chief Justice Hughes wrote for the dissenters, who now included also Justice Stone. The Chief Justice expressly set constitutional issues to the side. The "authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization" might, he said, "for the present purpose . . . be assumed." The question was one of construction. "I think," the Chief Justice wrote, "that the requirement [to bear arms] should not be implied, because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress If such a promise is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal terms." *Id.* at 627-28. The parallel seems to us unmistakable. The dissenters in *Schwimmer* and *Macintosh* went against

justifiable on two grounds: First, Congress did fix its attention, almost in a state of self-hypnosis, on the needs of security and it did so in dealing with people who have no political representation and who thus fall into a special category. Second, the Court saw the provision not abstractly but after it had been put in practice and could thus note aspects of it hidden to the eye of Congress. This second will generally be true but it is of greater force here in conjunction with the first-mentioned consideration.

If the articulation of penumbral constitutional questions which the Court would, if pressed, have to decide in favor of the legislation is a traditional way of performing the "remanding" function, why does this technique not suffice for all necessary purposes, for the issues calling for an exercise of the "remanding" function will always be close to, but not quite, constitutional ones? *Lincoln Mills* demonstrates the answer. The way to avoid the constitutional problem there is to hold that federal substantive law applies.¹⁰⁹ Yet that solution, which is the logical consequence of the articulation of the constitutional issue, does not solve the institutional problem we have posed. Or a judge may feel compelled to decide the constitutional issue. That course, if our view is correct, leaves the problem unsolved. Moreover, in any case the invocation of constitutional doubts is too drastic a way of forcibly calling something to the attention of Congress. The point after all is to ask Congress for sober reconsideration, leaving to Congress the last word. To raise constitutional doubts is to inhibit future legislative action. It is to achieve an unnecessarily unsettling effect by rattling the saber of the Court's ultimate authority.¹¹⁰ A candid avowal that a matter the implications of which Congress failed to see is being sent back for a second reading, so to speak, is much more compatible with due

a permissible, perhaps even the likely, construction, just as did Brandeis in opposing application of the Sherman Act to labor controversies. The Court in *Wittkovich*, for similar good and sufficient reason, went against a strongly indicated construction, indeed a necessary one, all but, though happily not quite, forced by the language of the statute. Just so, we contend, the Court should have done in *Lincoln Mills*, again for good reason.

¹⁰⁹ See cases cited note 31 *supra*.

¹¹⁰ For the constitutional issue raised in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), see FREUND, *ON UNDERSTANDING THE SUPREME COURT* 73 (1949). The constitutional issue has recently risen to obscure the Court's course to a result which, if correct, should have been reached on its own merits. See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

respect for the peculiar powers and competences of both institutions.

What then should have been the disposition of *Lincoln Mills*? The answer is any form of dismissal for lack of jurisdiction which does no violence to the statutory language. The Court of Appeals for the Fifth Circuit found one when it decided *Lincoln Mills*. It held that section 301 gave no jurisdiction in equity, only at law.¹¹¹ Justices Frankfurter, Burton, and Minton, avoiding the constitutional issue in the *Westinghouse* case, found one that was suitable on the facts before them there.¹¹² There will be other ways in other circumstances.¹¹³ It goes without saying that such dispositions of cases do not themselves perform the function that we have contended the Court should perform. They merely create the opportunity for its exercise. The function itself consists of a deliberate and candid exposition of the reasons that have led the Court to its result. Such an exposition should, of course, dwell on the institutional issue which emerges from section 301. Such an exposition, it may be said, could as well accompany acceptance of jurisdiction. But it would then plainly have little or no effectiveness, since it would fail to create any pressure for the desired congressional reconsideration.

III. LINCOLN MILLS: THE OPINIONS OF THE JUSTICES

The opinion of the Court in *Lincoln Mills* was delivered by Mr. Justice Douglas, speaking for a majority of five. The Court held that section 301 (without the aid of the Arbitration Act), authorized granting a decree of specific performance. The Court also decided that federal substantive law, to be created by the federal courts as best they can, is applicable under section 301.¹¹⁴ This latter conclusion, which intrudes upon state power, which

¹¹¹ *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957).

¹¹² See note 28 *supra*.

¹¹³ For example, if the breach of contract constitutes an unfair labor practice, a district court could decline jurisdiction upon the ground that exclusive primary jurisdiction resides in the National Labor Relations Board. See *Reinauer Transp. Cos. v. United Marine Div.*, 112 F. Supp. 940, 943 (S.D.N.Y. 1953).

¹¹⁴ This resulted in reversal of the judgment of the Fifth Circuit. See note 111 *supra*. The judgments of two cases were affirmed. *General Elec. Co. v. Local 205, United Elec. Workers*, 353 U.S. 547 (1957), *affirming* 233 F.2d 85 (1st Cir. 1956); *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957), *affirming* 233 F.2d 104 (1st Cir. 1956). However, Judge Magruder's conclusions respecting the application of the Arbitration Act were implicitly overruled.

finds no support in the language of the statute and insignificant support in the legislative history, received no explanation in the opinion.

The bits and snatches of legislative history which Mr. Justice Douglas summons to his aid may tend to demonstrate a specific concern on the part of Congress with equitable relief and arbitration. There are other bits and other snatches which tend to show the contrary.¹¹⁵ A determination that section 301 empowers a district court to compel arbitration cannot reasonably rest on statements in the legislative history; it must be reached by a subtler method of construction such as that employed by Judge Magruder. In any event, this determination has no bearing on whether the applicable substantive law is to be state or federal; nor does any part of the legislative history referred to in the Court's opinion bear upon this fundamental problem. The opinion of the Court indicates that it was quite clearly considered a distinct problem,¹¹⁶ for after holding that section 301 authorized

¹¹⁵ Representative Case: "The Taft-Hartley bill incorporates some other provisions which were in the Case bill of last year and which are pretty much accepted as proper subjects of legislation. For instance, the bill establishes suability for and by labor organizations as entities. The bill last year did that." 93 CONG. REC. 6283 (1947). The Case Bill referred to above originally provided that in the event of breach of a collective bargaining agreement, "a suit for damages . . . or for *injunctive relief in equity* may be maintained by the other party or parties in any United States district court having jurisdiction of the parties." 92 CONG. REC. 765 (1946). (Emphasis added.) The bill passed the House, however, without any reference to injunctive relief. This portion of the Case Bill, which evolved eventually, albeit in an extremely different form, into § 301 of the Taft-Hartley Act, never again in its ever-changing form contained any reference to "injunctive relief in equity."

¹¹⁶ At one point the Court's opinion does tend to fuse these separate questions, by stating that the overwhelming number of courts hold that § 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. Perhaps," the opinion continues, "the leading decision representing that point of view is the one rendered by Judge Wyzanski . . ." 353 U.S. at 451.

In *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953) the district court held only "the Congress which enacted § 301 would have preferred that *remedies* should be determined without reference to state law and should include specific enforcement of arbitration clauses in labor contracts." *Id.* at 141. (Emphasis in original.) Judge Wyzanski expressly declined to hold that federal law regulates substantive rights under § 301. "Since both suggested constructions of § 301 present difficulties, only when the Supreme Court of the United States speaks shall we know finally whether federal courts acting under § 301 are to apply federal or local law to determine the *rights* of the parties." *Ibid.* (Emphasis in original.)

specific performance the opinion turned to what was clearly conceived of as another issue, saying, "The question then is, what is the substantive law to be applied in suits under § 301 (a)?" In the next sentence the query was answered: "We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws." Several succeeding sentences outline in the most general way the sources and guides to which judges presumably will turn in the continuing task of fashioning federal law, and the first sentence of the next paragraph of the opinion suggests that "it is not uncommon for federal courts to fashion federal law where federal rights are concerned." After citing authority for this proposition, the opinion continues: "Congress has indicated by § 301 (a) the purpose to follow that course here." Without amplifying this assertion, the Court then makes a concluding statement upon this aspect of the case: "There is no constitutional difficulty. Article III, § 2, extends the judicial power to cases 'arising under . . . the Laws of the United States' The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain. . . . A case or controversy arising under § 301 (a) is, therefore, one within the purview of judicial power as defined in Article III."¹¹⁷ Thus was this determination of far-reaching consequences rendered without opinion.¹¹⁸

¹¹⁷ 353 U.S. at 456-57.

¹¹⁸ In *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), the only other Supreme Court discussion dealing with § 301, Justice Reed, in a short concurring opinion, discussed the source of the substantive right under § 301. "[T]he contracts sued upon . . . will have been entered into in accordance with federal law; and although federal law does not set forth explicitly just what constitutes a breach, § 301, by granting federal jurisdiction over actions between employers and unions on collective bargaining contracts, does make breaches of them by either of those parties actionable." *Id.* at 462. And, "it may be that in proper litigation under § 301 it will be necessary for federal courts to draw largely on state law for the solution of issues. In such instances state law is relied upon because its application is not contrary to federal policy, but supplements and fulfills it." *Id.* at 463. And finally, "whether the rules of substantive law applied by the federal courts are derived from federal or state sources is immaterial. The rules are truly federal, not state. The cause of action for breach of contract is thus a cause of action arising under federal law, the source of federal judicial power under Art. III of the Constitution." *Id.* at 463-64. These statements were advanced by the Justice to sustain his dictum that § 301 was constitutional.

The only other opinion in *Westinghouse* to suggest that substantive rights are regulated by federal law was that of Justice Douglas. His dissent, in which Jus-

Mr. Justice Burton, joined by Mr. Justice Harlan, concurred separately, agreeing that section 301 empowered the Court to grant specific performance. He concluded, however, that the section does not require federal courts to make federal substantive law. Coming in this fashion to confront the constitutional issue, he had joined Mr. Justice Frankfurter in avoiding in the *Westinghouse* case, Mr. Justice Burton held section 301 constitutional as an exercise of protective federal jurisdiction.¹¹⁹

Mr. Justice Frankfurter alone dissented in the *Lincoln Mills* case. It was he alone who faced and discussed the institutional issue which, in our view, is decisive. Mr. Justice Frankfurter concluded that there is danger for the courts in their assuming the task section 301 seeks to impose, a task which is not "meet or fit" for the judicial process. The Justice concluded also that the Arbitration Act could not apply in this case and that section 301 itself does not create the equitable remedy of a decree of specific performance. This portion of the Justice's opinion would, in our view, not only have disposed of the case but have disposed of it for exactly the right reasons: the performance of the Court's proper function vis-à-vis the Congress. The Justice, however, deemed it necessary to reach and decide the constitutional issue he had avoided in the *Westinghouse* case and this despite the fact that the Court itself, given its conclusions, did not arrive at this constitutional question. Mr. Justice Frankfurter held section 301 unconstitutional.¹²⁰

IV. CONCLUSION

In the wise distribution of governmental powers, this Court cannot do what a President sometimes does in returning a bill to Congress. We cannot return this provision [section 301] to Congress and respectfully request that body to face the responsibility placed upon it by the Constitution to define the jurisdiction of the

tice Black (who did not participate in *Lincoln Mills*) joined, contained one paragraph upon the source-of-law question. It is here reproduced in its entirety. "I agree with Mr. Justice Reed that Congress in the Taft-Hartley Act created federal sanctions for collective bargaining agreements, made the cases and controversies concerning them justiciable questions for the federal courts, and permitted those courts to fashion from the federal statute, from state law, or from other germane sources, federal rules for construction and interpretation of those collective bargaining agreements." *Id.* at 465.

¹¹⁹ 353 U.S. at 459 (concurring opinion).

¹²⁰ *Id.* at 460 (dissenting opinion).

lower courts with some particularity and not to leave these courts at large.¹²¹

So read the first two sentences of the concluding paragraph of Mr. Justice Frankfurter's dissent in *Lincoln Mills*. We have, in this paper, presented as legitimate a function which is very much indeed like the function Mr. Justice Frankfurter declines to assume in the passage just quoted. We have further posed the hypothesis that the Court and dissenting Justices have been known to perform just this function, either on the tacit assumption that it is legitimate or by employing traditional formulas as a screen. We defend the remanding function, as we have called it, only in context of an issue such as *Lincoln Mills* raised. Its extension should be undertaken only with great care. But in any event, if there is anything to our hypothesis we have contended simply that a function to which the Court is no stranger be discharged with candor, and that the side-effects which encumber its exercise when it takes the form of traditional maxims be eliminated. There are few occasions when the candid and deliberate confrontation of the truly decisive issue is not the most desirable course for the Court to take.¹²²

¹²¹ *Id.* at 484 (dissenting opinion).

¹²² We would not venture such a statement if "courts" rather than "the Court" were in question. We do not presume to disparage entirely the time-honored place of fictions in the law. Fictions can be useful, and a traditional approach may serve to contain the unsophisticated or the willful decision-maker.