FACULTY COMMENT

STATUTORY INTERPRETATION AND THE POLITICAL PROCESS: A COMMENT ON SINCLAIR v. ATKINSON

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Sinclair Refining Co. v. Atkinson[1] is a case well worth the attention of all students of the legal process. The case, involving the intersection of two important federal labor statutes, is likely to commend itself to the close attention of the labor law specialist.[2] Predictably, however, it will put off the casual reader, and perhaps trouble, but never fully engage, those persons who are more professionally committed to exploring the pages of the United States Reports. This comment has no more ambitious aim than to rescue *Sinclair* from so humble a destiny.

A collective bargaining contract between Sinclair and The Oil Workers Union included a provision requiring arbitration of employee grievances over wages, hours, or conditions of employment and a provision prohibiting strikes or work stoppages over grievances subject to arbitration. Alleging that the union had repeatedly violated the no-strike pledge, Sinclair asked a federal district court for an injunction. Jurisdiction over the suit was based upon Section 301(a) of the Labor Management Relations Act, which provides:

> Suits for violation of contracts between an employer and a labor organization . . . , 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.[3]

One might suppose that the district court would have the power to fashion a remedy appropriate to any case properly brought under section 301, at least if the remedy were one traditionally available in the district courts of the United States. And one might also suppose that if Sinclair could prove its case, an injunction against the strike activity would be the appropriate remedy. These suppositions, however, overlook the Norris-LaGuardia Act, an

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1. 370 U.S. 195 (1962).

2. For pre-*Sinclair* commentary on the substantive issue of labor law posed in the case, see Stewart, *No-Strike Clauses in the Federal Courts*, 59 MICH. L. REV. 673, 681-85 (1961); Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 252-56 (1958); Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 95-100 (1960). For post-*Sinclair* commentary, see Note, 111 U. PA. L. REV. 247 (1962).

3. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

earlier handiwork of Congress that the Oil Workers Union was pleased to call to the attention of the court. Section 4 of Norris-LaGuardia provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment. . . .[4]

The statute broadly defines a labor dispute as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[5]

Juxtaposing Norris-LaGuardia and section 301 and looking to language alone, it now might appear that an injunction is the one remedy the district court could not grant. The Norris-LaGuardia Act's definition of a labor dispute comfortably includes the controversy between Sinclair and the Oil Workers Union, and section 4 of that statute is an outright denial of jurisdiction to issue an injunction against a peaceful strike.

Supporting this conclusion from the plain meaning of Norris-LaGuardia is the legislative history of section 301, which makes it inescapably clear that Congress did not intend to repeal Norris-LaGuardia in providing for jurisdiction in the district courts over suits for breach of a collective bargaining contract. The history is well recounted in the opinion for the Court by Mr. Justice Black:

> When the inquiry is carried beyond the language of section 301 into its legislative history, whatever small doubts as to the congressional purpose could have survived consideration of the bare language of the section should be wholly dissipated. For the legislative history of section 301 shows that Congress actually considered the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned and deliberately chose not to do so. The section as eventually enacted was the product of a conference between Committees of the House and Senate, selected to resolve the differences between conflicting provisions of the respective bills each had passed. Prior to this conference, the House bill had provided for federal jurisdiction of suits for breach of collective bargaining contracts and had expressly declared that the Norris-LaGuardia Act's anti-injunction provisions would not apply to such suits. The bill passed by the Senate, like the House bill, granted federal courts jurisdiction over suits for breach of such agreements but it did not, like the House bill, make the Norris-LaGuardia Act's prohibition against injunctions inapplicable to such suits. Instead it made breach of a collective agreement an unfair labor practice. Under the Senate version, therefore, a breach of a collective bargaining agreement, like any unfair labor practice, could have been enjoined by a

4. 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).
5. 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958).

> suit brought by the National Labor Relations Board, but no provision of the Senate version would have permitted the issuance of an injunction in a labor dispute at the suit of a private party. At the conference the provision of the House bill expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act, as well as the provision of the bill passed by the Senate declaring the breach of a collective agreement to be an unfair labor practice, was dropped and never became law. Instead, the conferees, as indicated by the provision which came out of the conference and eventually became section 301, agreed that suits for breach of such agreements should remain wholly private and "be left to the usual processes of the law" and that, in view of the fact that these suits would be at the instance of private parties rather than at the instance of the Labor Board, no change in the existing anti-injunction provisions of the Norris-LaGuardia Act should be made. The House Conference Report expressly recognized that the House provision for repeal in contract actions of the anti-injunction prohibitions of the Norris-LaGuardia Act had been eliminated in Conference. . . .[6]

Plain meaning and legislative history were enough for the district court, the court of appeals, and a majority of the Justices of the Supreme Court. They all agreed that the Norris-LaGuardia Act precludes a federal district court from enjoining a peaceful strike in breach of a no-strike pledge, even if the strike is over an arbitrable grievance.

Plain meaning and legislative history, however, were not enough for three members of the Supreme Court. Mr. Justice Brennan, joined by Justices Douglas and Harlan, reasoned that the provisions of Norris-LaGuardia and section 301 were, as applied to the Sinclair dispute, in conflict and that the Court in such a situation had an obligation to harmonize such legislation even if Congress did not. This was to be accomplished by reconciling the two statutes in a manner that would best effectuate the central purposes of each. These principles of statutory interpretation are highly significant and fundamentally sound, and in most cases are fully adequate to resolve conflicts between statutes. But *Sinclair Refining Co. v. Atkinson* is not like most cases, and to our mind these principles fall short of resolving the problem in that case.

I.

In order to examine adequately the method of statutory interpretation employed in the *Sinclair* dissent and to suggest why it fails, it may be profitable to venture at this point some rather general observations about some ordinary principles of statutory interpretation.

1. *The Plain Meaning Rule*

The plain meaning or literal interpretation of statutes, while adding what is often an illusion of certainty to judging, can result in decisions that lack any conscious, substantive policy content. When a judge relies upon the plain

6. 370 U.S. 195, 205-07 (1962). (Footnotes omitted.)

meaning of a statute, he may do so because he believes that the plain meaning is the best evidence of legislative purpose available to him. In any particular case, however, this assumption may be fallacious, the fallacy stemming perhaps from an innocent notion that words can have a single meaning,[7] but more likely from a misunderstanding of how legislatures must work.[8] The case before the court may very well involve questions unforeseen or unforeseeable by the legislature. In such a situation, is it not unrealistic to assume that the legislature decided these questions and embodied its decision in the language of its enactment? If, under these circumstances, a court decides a case because of a statute's plain meaning, its decision will be one that rests upon abstract doctrine of statutory interpretation that bears no necessary relationship to legislative purpose. Reliance on a plain meaning rule, therefore, may result in a decision where neither court nor legislature grapples with the substantive problem at issue.

2. *The Rule of Legislative Purpose*

Judicial legislation is a necessary condition of the legal system because legislatures deal with problems prospectively, cannot foresee all they deal with, and cannot resolve all they do foresee. Most students of the legal process, however, would probably agree that courts have an obligation in construing

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7. One need not work through Ogden and Richard's numerous meanings of meaning to appreciate the ambiguities inherent in language. Litigation turning on a disputed interpretation of a statute would be a rare occurrence if statutes had a "plain meaning" upon which most men would agree. Indeed such litigation usually does not begin unless the "plain meaning" is susceptible of more than one interpretation.

> "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 Co. v. United States, 352 U.S. 128, 138 (1956) (Frankfurter, J., dissenting).

See generally Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381 (1941).

8. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

> A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts. With one of his flashes of insight, Mr. Justice Johnson called the science of government "the science of experiment."

For an amusing example of the limits on human prescience without the complicating factors involved in the legislative process, see Professor Chafee's story of Hugh and Patricia. Upon their divorce, Hugh simply provided in an irrevocable trust that his wife was to receive the income from an estate until her death or until she remarried. Patricia remarried her former husband Hugh, which phenomenon, while bringing bliss to Hugh and Patricia, caused the trustee considerable difficulty in deciding whether the life estate was terminated. Chafee, *supra* note 7, at 381-82.

statutes to make law that effectuates legislative purpose. Judge Learned Hand has well expressed this view and the difficulties and hazards of the undertaking:

> 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.[9]

Where the legislative purpose is extremely vague or the delegation of law-making power to the courts broad, the duty of a court to effectuate legislative purpose becomes identical with a general obligation of the courts to formulate a consistent and coherent body of law.[10]

3. *The Problem of "Interlacing Statutes"*

Reliance on the plain meaning rule seems especially misplaced where two or more statutes, passed at different times and often the product of different political forces, bear upon an issue before the court. To assume that accommodation or reconciliation of apparently conflicting statutes is work only for the legislature is to ignore the dynamics of the legislative process. The problem, as it comes to the court, may have been unforeseeable at the time of legislative deliberation. It may have been overlooked. It may have been thought too unimportant to occupy the time of very busy men. Judicial accommodation can be accomplished only by ascertaining the purpose of each statute through an examination of the language, history and judicial gloss that has been placed upon each.[11]

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9. United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952), *aff'd by an equally divided Court*, 345 U.S. 979 (1953).

10. There will and must remain that group of cases—smaller than is generally supposed—where no meaning, aim, or purpose of the legislature is at all capable of apperception. Here and here alone does talk of the intent of the legislature become meaningless and barbaric. And here society and the legislature both entrust themselves to the law-making powers of courts.

Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 893 (1930).

11. For some examples where the Court reconciled various provisions of Norris-La Guardia with subsequent labor legislation in the absence of congressional direction, see Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) and Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R. (Chicago River), 353 U.S. 30 (1957). In *Lincoln Mills* the Court sustained a district court order compelling employer performance of an agreement to arbitrate, holding that this injunction (issued in a suit brought under § 301) need not comply with the procedural requirements of § 7 of Norris-LaGuardia. Also see Judge Magruder's opinion in Local 205, United Elec. Workers v. General Elec. Co., 233 F.2d 85, 93-94 (1st Cir. 1956), for a discussion of the reasoning underlying this accommodation. In *Chicago River*, a case brought under the Railway Labor Act, the Court allowed injunction of a strike despite the prohibitions of § 4 of Norris-LaGuardia, reasoning that the compulsory arbitration provisions of the RLA warranted the conclusion that § 4 had

4. *The Problem of Legislative Silence or Inaction*

The obligation of courts to produce a rational body of law, while respecting the differentiation of function between court and legislature, is implicit in the general propositions developed above. This obligation usually persists even in situations where the legislature has consciously failed to act. Such refusals to act may take the form of rejection of a proposal that would bear on the situation before the court, or of a proposal which would modify a previous judicial interpretation of a statute. The reasons for legislative inaction are numerous and may have nothing whatever to do with a preference for one result or another in the particular case before a court.[12]

II.

In ruminating about the application to *Sinclair* of these ordinary principles of statutory interpretation, it should be noted that difficulty arises only where there are two or more plausible interpretations upon which the outcome of a case may turn. In other words, it is to be expected in the difficult case that the task of projection and imputation contemplated by the rule of statutory purpose often will not lead to one indisputable or certain result. Nevertheless an examination of the central purposes of section 4 of Norris-LaGuardia and section 301 of the Labor Management Relations Act supports the conclusion of the dissenting Justices of the Supreme Court. Preclusion of injunctive relief for a strike over an arbitrable grievance would work greater damage to the core policies of section 301, especially in light of the gloss that statute has acquired since 1958, than allowance of such relief would work on the policies of Norris-LaGuardia.

The argument for allowing a district court to enjoin a strike over an issue subject to arbitration under the terms of a collective bargaining contract might best proceed along the following lines.

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been superseded in the situation before the Court by the RLA. These cases were distinguished in *Sinclair*.

For an interesting example of reinterpretation of a statute in light of subsequent legislation, see United States v. Hutcheson, 312 U.S. 219 (1941) (Clayton Act).

12. Thus, for example, legislative silence or inaction is as consistent with an intent to leave the situation fluid as with a desire for any particular result.

For an instance where the Court refused to apply the presumption that re-enactment of a statute that had acquired a judicial gloss indicates congressional acquiescence in the previous interpretation, see Girouard v. United States, 328 U.S. 61 (1946), which overturned three previous Supreme Court interpretations of the loyalty provisions of the Naturalization Act.

> It seems to me plain that Congress was very happy to leave the whole agitation precisely where it lay, in the Court's lap, with the responsibility for doing anything about it on the Court. The obvious, if not the only, way Congress could achieve this was just what Congress did, do nothing, and, if the whole naturalization law was to be revised in other respects, take care to repeat the same language in this respect.

CURTIS, LIONS UNDER THE THRONE 242 (1947).

1. *The Policy Behind the Norris-LaGuardia Act*

It is true that a literal reading of Norris-LaGuardia precludes an injunction in the *Sinclair* case. However, Norris-LaGuardia is a statute that neither has been,[13] nor can be, read in a literal fashion.

This act, dating back to 1932, was the product of a reaction to a massive and ill-advised judicial intervention into labor-management relations. During the first thirty years or so of this century the federal courts played an extremely important role in the struggle between organized labor and management.[14] In this struggle labor employed its standard self-help techniques for organizing and bargaining. These included strikes, picketing, and boycotts (both primary and secondary). Management had its own self-help weapons: the lock-out, the yellow dog contract, strike breakers, and Pinkerton agents, to mention the most notorious. Management also had another weapon: injunctive relief against concerted union pressure.

And the courts rendered it a potent weapon.[15] Repeatedly they enjoined the union from engaging in concerted action. It may be that the judges of this time were anti-union and pro-management, but whether this helps explain judicial behavior or not, it is clear that as institutions the courts in these cases were acting far beyond their range of competency.[16] In this labor-management struggle, courts adjudicated without standards, without guidelines, and without restraint.

At issue in almost every case were the competing interests of the employer who wanted to manage as he chose; the employees who wished to bargain

13. *E.g.*, Syres v. Oil Workers Int'l Union, 233 F.2d 739 (5th Cir.), *rev'd*, 350 U.S. 892 (1955); Graham v. Brotherhood of Firemen, 338 U.S. 232 (1949) and cases cited in note 11 *supra*.

14. For a full discussion of the jurisdiction of the federal courts over labor disputes during this period, see FRANKFURTER & GREENE, THE LABOR INJUNCTION 1-46 (1930) [hereinafter cited as FRANKFURTER & GREENE] and WITTE, THE GOVERNMENT IN LABOR DISPUTES 12-45 (1932) [hereinafter cited as WITTE].

15. A sampling of cases might include Atchison, T. & S. F. Ry. v. Gee, 139 F. 582 (S.D. Iowa, 1905); King v. Ohio & M. Ry., 14 Fed. Cas. 539 (No. 7,800) (C.C.D. Ind. 1877); *In re* Debs, 158 U.S. 564 (1895); Hitchman Coal & Coke v. Mitchell, 245 U.S. 229 (1917); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37 (1927).

> In truth, the extraordinary remedy of injunction has been the ordinary legal remedy, almost the sole remedy. Controversy over its exercise long has "overshadowed in bitterness the question of the relative substantive rights of the parties." In the administration of justice between employer and employee, it has become the central lever. . . . The injunction is America's distinctive contribution in the application of law to industrial strife.

FRANKFURTER & GREENE at 52.

16. See, *e.g.*, Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896); *compare* Atchison T. & S.F. Ry. v. Gee, 139 F. 582, 584 (S.D. Iowa 1905) ("There is and can be no such thing as peaceful picketing"), *with* American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 207 (1921) ("The purpose [of judicial control] should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow

together in a union; the dissenting employees, who did not want to participate in the union movement; other organized and unorganized segments of the economy, many of which just wanted to be let alone. Ultimately at issue perhaps was the economic and political growth of the nation. How were judges to resolve these competing claims? What lines were they to draw? Plainly the judges were at large. They drew lines on the basis of hunch and prejudice and accordingly they brought chaos to the bargaining process and disrepute to the judicial process.[17]

Unlike these substantive problems, however, there was no inherent reason why the procedure the courts devised for injunction cases should have been as bad as it was. And it was very bad. Injunctions were issued by trial courts in *ex parte* proceedings.[18] They were issued on the basis of affidavits. No real opportunity was given to the union.[19] Decrees were extremely broad and sweeping in scope.[20] The punishment for violation of a decree was contempt; the trial summary and without benefit of jury.[21] And it was the trial court's temporary or interlocutory injunction that usually disposed of a case, for at

missionaries."). See generally WITTE, 12-45 (1932) and SHULMAN, LABOR AND THE ANTI-TRUST LAWS 769 at 777-78 (1940).

> No rational principle of labor policy—except possibly the policy that labor unions must "not be strong"—can harmonize the many decisions of the federal courts in labor cases under the anti-trust laws.

Id. at 277.

17. Concern over the loss of respect for the federal judiciary provided an impetus for the passage of Norris-LaGuardia. The Senate Report observed: "It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute." S. REP. No. 163, 72d Cong., 1st Sess. 18 (1932). "This judge-made law has developed in the past 40 years. The judges have themselves made the law and have themselves enforced the penalties for the violation of the laws made by them. . . . It is because of this development of law made on the bench that our Federal courts have lost a great deal of respect." 75 CONG. REC. 5463 (1932) (remarks of Representative O'Connor).

Indeed some viewed the Act as one to govern the courts rather than labor-management relations.

> We are trying to reestablish a system of laws for the government of the courts. We are writing a law binding the courts to a definite course of action with reference to injunctions. We are not disturbing the government of laws but we are taking away from the courts their right to act as if they were a government of men.

75 CONG. REC. 5481 (1932) (Representative Oliver).

> The public policy laid down in the bill, I think, is essential, because there should be some standard by which the courts may know, at a time when they are in such confusion, what it is proper to do. I think the most fitting and, in reality, the only proper tribunal to express such a policy is the Congress. . . .

Id. at 5470 (Representative Browning).

18. Of the 118 labor injunction cases reported in the federal courts from 1901-1928, 70 *ex parte* orders were issued. FRANKFURTER & GREENE at 64.

19. See FRANKFURTER & GREENE 79-80, 200-02; WITTE 121.

20. See scope of the decree in Re Debs, 158 U.S. 564 (1895); WITTE 96.

21. *E.g.*, United States v. Taliaferro, 290 Fed. 906 (4th Cir. 1923) (criminal contempt); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (civil contempt).

this stage in history most concerted union activity was unable to survive an initial injunction.[22]

The Norris-LaGuardia Act was a clear cut political response to these substantive and procedural abuses. It is a statute that reflects a "government hands off" philosophy of labor relations, and at the time of its enactment, government meant judicial intrusion through injunctive decree.[23] This attitude toward labor-management relations, however, has been drastically modified in the years since Norris-LaGuardia.

Congress first legislated to prohibit certain employer anti-union self-help activities.[24] Subsequently, it placed prohibitions upon certain types of concerted union conduct.[25] The principal responsibility for the administration of this new federal labor policy was not given to the courts; rather it was delegated to an administrative tribunal. Nevertheless, it has in the intervening years become necessary for the Supreme Court to accommodate the Norris-LaGuardia Act to the demands of this changing labor policy.

For example, under the Railway Labor Act and the National Labor Relations Act the majority union represents all employees in the bargaining unit. This has been held to impose a duty of fair representation on the union. A breach in the seemingly absolute language of Norris-LaGuardia has been judicially imposed so as to allow a district court to rectify a violation of this duty by enjoining a union from discriminating against minority employees in the bargaining unit.[26]

Indeed, in cases involving the Railway Labor Act, the Court has gone very far to return the injunction to the district courts. *Brotherhood of Railroad Trainmen v. Chicago River Railroad*[27] is the high water mark of this tide. There the Court held that a district court may, indeed should, prohibit a peaceful strike in violation of a statutory duty to arbitrate.[28] Subsequent decisions

22. Only 32 of the 88 temporary injunctions reported from 1901-1928 reached the permanent injunction stage. FRANKFURTER & GREENE 79, 80.

23. See notes 17-21 *supra*. For a history of the Act in Congress see Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638 (1932).

24. National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

25. Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-52, 178 (1958) and as amended by 73 Stat. 537, 541, 542, 544, 29 U.S.C. §§ 153, 159-60, 164, 186, 528-31 (Supp. IV, 1959).

26. Graham v. Brotherhood of Firemen, 338 U.S. 232 (1949) (R.L.A.); Syres v. Local 23, Oil Workers International Union, 233 F.2d 739 (5th Cir.), *rev'd*, 350 U.S. 892 (1955) (N.L.R.A.). *Cf.* Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944). It should be noted that none of these cases involve activities specifically immunized by § 4 of Norris-LaGuardia. See Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1274-81 (1959).

27. 353 U.S. 30 (1957).

28. The court reasoned that Norris-LaGuardia and the RLA, forming a pattern of legislation, had to be accommodated "so that the obvious purpose in the enactment of each is preserved." *Id.* at 40. It found that the compulsory arbitration procedures established in the RLA were not only an adequate substitute for the free use of economic

have clarified the area in which a strike injunction is an allowable and appropriate remedy for effectuating the policy of the RLA.[29]

Judicial accommodation of Norris-LaGuardia and the NLRA has not had to be as extensive as it might have been, since Congress itself has explicitly modified Norris-LaGuardia in a number of situations where the earlier statute seemed to be deeply inconsistent with the purposes of the subsequent legislation. When a union engages in illegal secondary boycotts or illegal organizational picketing, the NLRB's General Counsel must request injunctive relief from a district court. He may seek such relief whenever a union commits an unfair labor practice.[30] District courts can also enjoin national emergency strikes if requested to do so by the Attorney General.[31]

To what extent then can it be said that the policy underlying the Norris-LaGuardia Act is at variance with the injunction of a strike over an arbitrable dispute that is in breach of a collective bargaining contract? Certainly there is no reason for serious concern about the use of proper procedures in the district courts. It may be that unless the Supreme Court were to be quite specific about procedure, some district courts would act imprudently. But guidelines exist in those cases where the labor injunction has been returned to the district courts, in the federal rules of civil procedure,[32] and in the Norris-LaGuardia Act itself.[33] The Supreme Court can easily build upon these precedents.

The substantive questions in an injunction case are often more subtle, but the task for the court is very different from what it was prior to the passage of the Norris-LaGuardia Act. Courts will not be dealing with legislatively undifferentiated union conduct, but rather with conduct made improper by statute. The competing interests of employer, union, employees, and the public have been weighed by Congress, which has found that it is wrong for a union to strike in breach of contract over an arbitrable grievance.[34] The stand-

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force contemplated by Norris-LaGuardia but also constituted a sufficiently important federal policy which would be rendered "nugatory" if injunctive relief was not available. Thus the non-interference policy of Norris-LaGuardia was held to be non-applicable. *Id.* at 40-42.

29. Brotherhood of Locomotive Engineers v. Louisville & N.R. Co., 373 U.S. 33 (1963). *Cf.* Union Pac. R. Co. v. Price, 360 U.S. 601, 611 n.10 (1959); *but cf.* Manion v. Kansas City Terminal Ry., 353 U.S. 927 (1957).

30. L.M.R.A. § 10(j)g(1), 61 Stat. 149 (1947), as amended, 72 Stat. 945 (1959), 29 U.S.C. § 160(j) (1958), 29 U.S.C.A. § 169(1) (Supp. 1959). Section 10(j) authorizes the Board to seek in its discretion an injunction against alleged unfair labor practices after issuance of a complaint by the General Counsel; 10(L) requires such relief to be sought as a prerequisite to issuance of a complaint against violations of §§ 8(b)(4)(A-C), -(b)(7), -(e).

31. 61 Stat. 155 (1947), 29 U.S.C. §§ 176-80 (1958).

Section 302, entailing employer payments to union representatives and the management of pension and welfare funds, allows a private party to seek injunctive relief. 73 Stat. 537 (1959), 29 U.S.C. § 186 (Supp. 1963).

32. FED. R. CIV. P. 65(a)(b)(c).

33. Section 7, 49 Stat. 71 (1932), 29 U.S.C. § 104 (1958).

34. The extent of statutory commitment to enforcement of collective bargaining agreements and to the settlement of grievances without resort to self-help may be gleaned from

ard exists; the difficulty lies in ascertaining whether particular conduct comes within the standard. Sometimes this may prove a difficult task. It is not always clear why a union strikes or what disputes are subject to arbitration.[35] In damage cases, however, the courts have this very task, and it would seem that they are as capable of making these judgments where the remedy is equitable rather than legal.

2. *The Policy Behind Section 301*

While the purpose underlying the Norris-LaGuardia Act suggests that that statute should not preclude a district court from enjoining a breach of contract strike over an arbitrable grievance, the purpose embodied in section 301 of the Labor Management Relations Act strongly suggests the desirability of the strike injunction. This judgment about section 301's purpose is particularly compelling given the gloss put upon the statute by the Supreme Court.

Lincoln Mills is the key decision.[36] In that case the Court in 1958 held that section 301 empowered a federal district court to order specific performance of a promise to arbitrate unresolved grievances. *Lincoln Mills* went a long way towards making arbitration the central institution in the administration of collective bargaining contracts. Subsequent decisions have elaborated the consequences of this recognition. Once the parties include an arbitration clause in their collective bargaining contract they are bound, as a matter of federal law, to submit the vast bulk of disputes that they are unable to resolve by negotiation to an arbitrator.[37] Neither the employer nor the union is free to disregard this obligation.

It is plainly contrary to the obligation for a union to strike over an arbitrable grievance. An employer may recover damages if a union does so strike.

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the following cases. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

35. For example the scope of the arbitration promise cannot be resolved through reference to principles of commercial contract law or rules of thumb. See Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). Query if the court would similarly imply a no-strike pledge coextensive with the promise to arbitrate in *Lucas* if a strike injunction was the relief sought by the employer in that case. Also *compare* Teamsters Union v. Yellow Transit Freight Lines, Inc., 282 F.2d 345 (10th Cir. 1960), *rev'd*, 370 U.S. 711 (1962), *with* A.H. Bull S.S. Co. v. Seafarers' Union, 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958).

The decision whether a particular dispute is arbitrable may in part depend on the consequences of such a holding. *Compare* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), *with* Drake Bakeries, Inc. v. Bakery Workers, 370 U.S. 254 (1962).

For the problem of determining the impetus for a strike in a closely related context, see Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

36. 353 U.S. 448 (1957).

37. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). In this case the Court found that all doubts as to whether a particular dispute is covered by an

A damage remedy alone, however, may be a less effective way of implementing the policy contained in *Lincoln Mills* and its progeny than the strike injunction. A suit for damages can drag on for a long time, well beyond the time it takes for an arbitrator to enter his award, and for a court to enforce it. Continuing litigation tends to undermine the salutory effect of the arbitration process, for it keeps the parties in a posture of conflict rather than in a state of repose. The injunction, on the other hand, is quick and clean and its radiations tend to be coextensive with the arbitration process. Moreover it may be true, as Mr. Justice Brennan suggests, that if "unions cannot be enjoined by a federal court from striking in open defiance of their undertakings to arbitrate, employers will pause long before committing themselves to obligations enforceable against them but not against their unions."[38]

An injunction thus proves to be the one remedy that best effectuates the purposes of section 301 as those purposes have been announced by the Supreme Court through a process of "litigating elucidation."

The legislative history of section 301, which shows that Congress refused to repeal the Norris-LaGuardia Act in contract litigation generally, is a history written without benefit of a full understanding of the ramifications of section 301. One should not draw as a negative inference from congressional failure to act the conclusion that Congress did not want the Court to deal rationally with section 301 and the Norris-LaGuardia Act where the two statutes intersect. Such a conclusion attributes more to Congress than its inaction properly can bear.[39] Moreover, a statute's history should not be read in a way that undercuts the very purpose of the statute itself. As Mr. Justice Brennan insisted in dissent:

> The legislative history of Section 301 . . . shows that Congress considered and rejected the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are

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arbitration provision are to be resolved in favor of coverage; the presumption of arbitration fails only where the parties "specifically exclude" the matter from the compass of the duty to arbitrate.

For the limited review of the arbitrator's decision, including the jurisdictional question, see United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *But cf.* Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). See generally Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U.L. REV. 471 (1962).

38. 370 U.S. at 227.

39. An outright repeal of Norris-LaGuardia would have had far different consequences than an attempt to reconcile the two statutes as they come to bear on a particular factual situation. See instant case at 225. Thus, all that deletion of the House proposal to repeal Norris-LaGuardia can properly stand for is that Congress did not intend to relieve the courts of the task of accommodating the two statutes in particular cases. *Cf.* NLRB v. Drivers' Union, 362 U.S. 274, 282 (1960). And see MISHKIN & MORRIS, ON LAW IN COURTS 309 (1961).

There was, to be sure, an isolated statement by Senator Taft indicating that section 301 only "conferred a right of action for damages. . . ." 93 CONG. REC. 6600 (1947). But such an isolated remark hardly sheds light on the intent of Congress. Indeed the statement was not viewed as controlling in *Lincoln Mills*, 353 U.S. 448 (1957).

> concerned. . . . But congressional rejection of outright repeal certainly does not imply hostility to an attempt by the courts to accommodate all statutes pertinent to the decision of cases before them.[40]

III.

If the law of the collective bargaining contract were to be developed according to the rule of statutory purpose, it seems fair to say that the Court should have accommodated section 4 of the Norris-LaGuardia Act to section 301 of the L.M.R.A. A proper accommodation—one that best serves the policy of section 301 without undermining the purposes of Norris-LaGuardia—seemingly would allow a district court to enjoin a breach of contract strike over an arbitrable grievance. Congress might itself have made the accommodation expressly and specifically, but it did not. Indeed, it did not realize quite what it was producing when it enacted section 301. It is, of course, not at all unusual for Congress, or any other legislative body, to fail squarely to confront a problem. When this happens, the rule of statutory purpose requires courts, "[f]linch as [they] may . . . to project [themselves] . . . into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion."

Adherence to this canon of interpretation does not permit free, non-institutional consideration of the import or validity of the result arrived at through the process of projection and imputation. Indeed that process consists of attuning the mind to a vision comparable to that possessed by the legislature. But are there not special situations where the Supreme Court, for special institutional reasons, should decline in the absence of a clear congressional statement to reach the result indicated by adherence to the rule of statutory purpose? It seems to us that there are several situations with closely related considerations where this may be the case, and that *Sinclair* falls within one of these.

Before examining these situations, however, it should be observed that there are dangers in this suggested canon of statutory interpretation—the clear statement rule—which, in requiring Congress emphatically to decide certain issues, asks the Court to reject or ignore at least a portion of congressional intent as that intent is derived from legislative purpose.[41] However, the clear statement rule asks the Court to do so because of considerations that are founded upon institutional values which are not accounted for in the ordinary process of projection and imputation. And the dangers are minimized by the competency of the Court to assay these considerations and the extent to which they are present in any particular situation. Accordingly, although these considerations distort statutory purpose, they at the same time provide sufficient guidelines to the Court for determining whether departure from statutory purpose is warranted and, if so, the direction and extent of that departure.

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40. 370 U.S. at 220.

41. This is not very unlike the danger in the rule of projection and imputation; some judges may, whether deliberately or not, find in either rule an invitation to enforce their own policies or hunches. But the hazards seem inherent in the undertaking.

Moreover, reliance on the clear statement rule is not particularly novel, although it is rarely articulated as a discrete canon of interpretation which requires a departure from the results dictated by statutory purpose. The most familiar situation in which this canon is operative is where the Court is confronted with a federal statute that would raise serious constitutional questions if interpreted in the manner most consistent with its underlying purpose.[42] Where this is the case, it seems generally appropriate for the Court to construe the statute in a way that does not pose the constitutional issue, unless it is inescapably clear that Congress itself directly confronted the situation before the Court and spoke unequivocally. The elected branches of government should have a responsibility to the people to determine explicitly and for the record that constitutionally questionable action is, in their opinion, necessary action. Whether or not Congress has made such a determination of necessity should not be left to judicial surmise from the bits and pieces of legislative materials and other evidences which ordinarily suffice for the inference of statutory purpose. In such a situation the Court should neither exercise its ultimate power and declare legislation unconstitutional nor legitimate constitutionally question-

42. *E.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). See Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. COURT REV. 49. The doctrine has often been invoked where the constitutional issue raised appears to be an intractable one or where it borders on the area of political questions in which acceptable standards for a constitutional adjudication are not available. An apt illustration is United States v. Rumely, 345 U.S. 41 (1953), in which the Court, "in the candid service of avoiding a serious constitutional doubt," *id.* at 47, narrowly construed a congressional resolution authorizing an investigation of lobbying activities despite legislative history to the contrary, and held that the questions put to Rumely were beyond the authority of the committee. The Court added: "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." *Id.* at 46. Compare Watkins v. United States, 354 U.S. 178 (1957); Kent v. Dulles, 357 U.S. 116 (1958) (where the Court held that denial of a passport by the Secretary of State for security reasons was beyond his authority, despite considerable evidence that Congress had decided the issue, albeit back-handedly and off-handedly and less explicitly than might be desirable with an issue of such importance); Greene v. McElroy, 360 U.S. 474 (1959). For a fuller discussion of these cases, see BICKEL, THE LEAST DANGEROUS BRANCH 156-69 (1962).

Considerations similar to those underlying the clear statement rule may be seen in many of the void for vagueness cases, both state and federal, in which the Court employs a vagueness rationale to avoid a larger more momentous constitutional issue lurking in the background. *E.g.*, International Harvester Co. of America v. Kentucky, 234 U.S. 216 (1914). *Id.* at 589. Note Mr. Justice Holmes' sympathy with the confiscation and equal economic protection claims. Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932) (strong expropriation argument). Compare the first amendment vagueness cases, which are precisely what the name implies. Thornhill v. Alabama, 310 U.S. 88 (1940); Herndon v. Lowry, 301 U.S. 242 (1937); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 694-95 (1959) (Frankfurter, J., concurring). For a thorough discussion of the many uses of the void for vagueness doctrine, see Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

able action that has not been squarely confronted by Congress or the President by declaring the challengeable construction constitutional. Plainly the Court is well able to determine whether a proffered construction would present a substantial constitutional question and therefore is well able to identify the situations where this consideration is sufficiently present to justify a departure from the rule of statutory purpose. The *Sinclair* case clearly does not fall within this category of cases; there is no issue of constitutional dimensions lurking in the background of that case.

The second category in which this canon may be invoked is where the Court is asked to make law without sufficient standards or guides for decision. Here departure from the rule of statutory purpose owing to the pull of institutional considerations has been less explicit, and consequently such departure is less familiar.[43] For sundry reasons Congress may delegate to the courts lawmaking powers over large unchartered areas. The only thing that can realistically be called the legislative purpose underlying such delegations is that the courts are to fashion law in accordance with their own notions of sound policy. Where the delegation is unstructured and the areas are also unfamiliar to the courts, it is likely that their performance will leave much to be desired.[44] Thus such delegations, while perhaps not inconsistent with the judicial functions broadly defined in Article III, may require courts to undertake tasks beyond the scope of judicial expertness and thereby impede the courts' performance of other more judicially suitable functions. This aspect of institutional capacity is not one that Congress, with its vision fixed on immediate results, is likely to have considered. But it is a consideration which the Court is quite competent to assess. Because a construction in accordance with this consideration represents an attempt to ensure a proper allocation of functions within our institutions of government and because such a construction in no way checks legislative power, but rather asks Congress to reexamine its objectives in light of an additional consideration, departure from the rule of statutory purpose seems justified in these circumstances. To be sure, the immediate objectives of Con-

43. However, a perusal of the dissent of Justice Brandeis in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) shows that articulation of these considerations as the basis for favoring one interpretation of a statute over another is not completely absent in the opinions of the Court. *Cf.* International News Service v. Associated Press, 248 U.S. 215, 262-67 (1918) (Brandeis, J., dissenting). Also *compare* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), *with* United States v. Hutcheson, 312 U.S. 219 (1941).

44. Section 707(a)(3) of the Naturalization Act, which requires that the applicant for citizenship be of "good moral character" for the five years preceding naturalization provides an example of such a delegation. And for an example of the unsuitability of the courts to administer such a standard, see Repouille v. United States, 165 F.2d 152 (2d Cir. 1947). Consider as another example of an unwise delegation the national emergency provisions of the N.L.R.A. which authorizes a court to enjoin a strike or lock-out upon finding that such a strike or lock-out "will imperil the national health or safety." The finding was perhaps made, but not without considerable difficulty, in United Steelworkers v. United States, 361 U.S. 39 (1959). *Cf.* Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403-04 (1908).

gress may be temporarily frustrated. But the protection to the integrity of judicial institutions which dictates such a result will often be of far more enduring significance.[45]

It has been argued that the whole of section 301 falls within this category.[46] That section delegated to the judiciary the job of fashioning a code of labor contract that it was to spin out of an industrial environment with which it had no experience. The task imposed upon the courts was not very unlike that which the courts took upon themselves in the first part of this century when they attempted to develop a general body of labor law without adequate standards for decision. *Sinclair* itself, however, does not fall within this category. *Lincoln Mills* and the cases following it poured content into section 301. That content may prove wise or unwise, but, as indicated above, it does provide standards and guides for decision in situations of the *Sinclair* variety.

The third category, while closely related to the considerations upon which the other two are founded, is more difficult to define and raises problems that are not posed by the others. Broadly stated, it consists of a delegation from Congress to the courts of an issue that is politically highly sensitive or charged; an issue that Congress is institutionally able to resolve, save for a legislative paralysis that is sometimes attributable to the pressures of conflicting interest groups; and an issue that Congress has failed to resolve, at least explicitly. On the one hand, the issue may have been so politically charged that Congress purposefully passed it off to the Court.[47] The rule of statutory purpose would here lead to a decision based upon what the Court thought was the best substantive policy. For the student of labor history, the Clayton Act[48] and the *Duplex* case will come quickly to mind as an example. (And the *Duplex* decision and its aftermath illustrates the unwisdom of following, in such a situation, the rule of statutory purpose.)[49] On the other hand, the issue may be one, and *Sinclair* seems to represent such a case, where Congress

45. For a more exhaustive treatment of this category, see Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

46. *Ibid.*

47. See ILBERT, THE MECHANICS OF LAW MAKING 19-23 (1914). *Cf.* CURTIS, LIONS UNDER THE THRONE 242-43 (1947).

48. The Act was well characterized in BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS:

> The Clayton Act appears to have been the product of mixed Congressional motives, which it reflected in its many ambiguities. It was studded, at decisive places, with words such as "lawful" and "legitimate" and it gave them no explicit new content. Other crucial terms were also lacking in precision, though Section 16, which was to prove a boon to employers, provided with all due clarity that private parties could—as they had not been previously authorized to do—seek injunctive relief under the Sherman Act.

Id. at 80-81 (1957).

49. *Compare* United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922), *with* Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925). Compare Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37 (1927). See note 15 *supra*.

was not fully cognizant of some of the sensitive problems that would emerge in the application of its enactment.

This third category resists precise definition. Because of the lack of a precise definition, and because the Court does not seem as peculiarly competent to assess politically sensitive issues as it is to appreciate constructions which raise constitutional doubts or delegations of tasks that courts are ill-suited to perform, reliance on the clear statement rule in this third category of cases should be undertaken with caution and restraint. Nevertheless there are clear instances where departure from legislative purpose in this category would seem to be warranted. The principal consideration here rests on the proposition that resolution of contested issues touching upon sensitive areas of our social and economic life should be made by the electorally based and therefore responsive political institutions. Although it is by no means wholly fictive to impute the result arrived at through the process of inference from statutory purpose to Congress, nevertheless application of this canon to some issues fails to assure with sufficient certainty that a considered, responsible decision has been made by the political institutions. It is surely not fictive to say that where something is done explicitly and the decision is reflected on the face of a statute, Congress and the President were more likely to have understood what was being authorized than where the legislative resolution must be gleaned from cloudy legislative history and other perhaps ambiguous evidences of statutory purpose.

This consideration is not unlike the one advanced above to justify the avoidance of a constitutional issue in spite of the construction indicated by the rule of statutory purpose. This canon as applied to issues that have far-reaching implications, such as where a particular construction would work a substantial reallocation of power in our federal system,[50] or issues that the political configurations of the times or legislative history demonstrates are hotly contested and significant to large numbers of people in our society, or issues involving sensitive areas of liberty, has the salutary effect of stiffening the lines of legislative responsibility and of making those lines perceptible to the people.

Many cases that fall within this third category will merge with those of institutional incapacity, since many of the issues adumbrated above will often prove to be peculiarly unsusceptible to judicial resolution. Whether they do or not is not especially significant, however, since the overriding consideration that certain decisions should be clearly made by the representative branches of government is not affected by the joinder or its absence.

50. An instance closely akin to this one, where the invocation of the clear statement rule would seem appropriate, is where one interpretation of a statute would work vast and far-reaching changes in an established body of jurisprudence, either statutory or common law. Such changes in a body of existing doctrine is not a factor Congress is likely to have considered in passing a statute, and the disruption worked by such a statute is a consideration worthy of legislative attention. This suggestion should not be confused with the doctrine that statutes are excrescences on the common law and are not to be construed in derogation of it. See Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 396-403 (1908). However, one may surmise that the above consideration sometimes underlaid application of this doctrine.

Consider as an example of this category some of the applications of the rule of statutory interpretation requiring that penal statutes be strictly construed. Sometimes the application of this rule can be justified in terms of fair warning to the accused.[51] Sometimes its application has no justification. Can its use ever be justified where it conflicts with the rule of statutory purpose? It seems that the answer is yes where the question of statutory interpretation is whether to bring within the ambit of the statute previously acceptable conduct which statutory purpose indicates is probably covered.[52] Or consider as another example some of the applications of the presumption against imputing to Congress the casual intention of changing existing law where the effect of such a change would be to work a significant alteration in the distribution of power between the state and federal governments. Mr. Justice Frankfurter, while writing in terms of legislative purpose, suggests such a presumption in his important article on the reading of statutes:

> In 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 habits and history, cut across what might otherwise be the implied range of legislation.[53]

As a society becomes increasingly complex, increasingly must formerly acceptable conduct be designated criminal and increasingly must power be centralized in the federal government. Either of these tasks often may be

51. Although the fair warning function requiring definiteness in criminal cases has often been debunked, there are cases in which it appears to be the decisive factor. *E.g.*, Lambert v. California, 355 U.S. 225 (1957). However, there are numerous cases in which a statute is found to lack sufficient definiteness where fair warning is not adequate to explain the result. See United States v. Reese, 92 U.S. 214 (1875). See Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 82-85 (1960) and cases cited therein.

52. The void for vagueness doctrine, now invoked as a constitutional proscription, has its roots in a canon of statutory interpretation. Where a criminal statute was susceptible of more than one meaning, the courts would simply refuse to enforce the statute, despite the fact that legislative purpose indicated the desired meaning. *E.g.*, United States v. Sharp, 27 Fed. Cas. 1041, 1043 (No. 16264) (C.C.D. Pa. 1815); Drake v. Drake, 15 N.C. 110, 115 (1833) ("if the terms be . . . so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative.").

More recent examples may be found of the Supreme Court's refusing to apply a federal statute whose terms it deemed too uncertain to apply without seeking in the Constitution authority for its refusal. See, *e.g.*, United States v. Brewer, 139 U.S. 278 (1891); United States v. Evans, 333 U.S. 483 (1948).

See generally Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923).

53. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539-40 (1947).

politically sensitive ones. The first involves a curtailment of freedom,[54] the second a gradual undermining of the viability of the states as political institutions.[55] Both tasks ultimately must be responsive to felt public need and responsible to public judgment. Should not the courts usually refuse leadership in these areas? Indeed, as a general proposition, should they not serve as a check on the representative branches, one which says: You may ask us to serve you in this regard, but we will refuse unless it is clear that it is on *your* initiative that we do so?

The *Sinclair* case belongs in this same category for different, but nevertheless, analogous reasons. Labor-management relations is an area that is politically charged. Its dynamics are economic struggle which, in this country, is translated from time to time into political struggle fought out in the Congress. One of the touchiest issues in labor-management relations, which has been once clearly resolved politically, is the strike injunction. It is an emotional and symbolic issue, out of proportion today to its importance. That it should be such an issue—particularly for the leaders of the union movement, most of whom remember vividly the pre-Norris-LaGuardia days—is understandable in view of the history of the American labor movement, and the role played by the strike injunction in that history.

And section 4 of Norris-LaGuardia well attests to the role played by the courts and the injunction in that history. While the policy of that statute may no longer be wholly relevant to contemporary regulation of labor relations, that statute nonetheless represents a clear cut political response to the use of injunctions against peaceful strike activity. Indeed that section and the definition of a labor dispute were drafted in broad terms in order to avoid the possibility of narrowing through judicial construction. Moreover, although congressional refusal to repeal Norris-LaGuardia should not be equated with a legislative resolution of the issue, it does indicate that the anti-injunction provisions of Norris-LaGuardia remain politically viable. Should the Supreme Court undertake, as the rule of statutory purpose would have it undertake, the task of

54. For a particularly dramatic instance where the clear statement rule was operative, see United States v. Witkovich, 353 U.S. 194 (1957).

This analysis would seem to explain why legislation creating "new" crimes, which does not tend generically to be unclear but is likely to represent intrusion into realms which were previously free, is particularly vulnerable to vagueness attacks. *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Connally v. General Constr. Co., 269 U.S. 385 (1926); see United States v. Harriss, 347 U.S. 612, 634-35 (1954) (Jackson, J., dissenting). The Court has noted the antiquity of statutes or their similarity to other more venerable criminal statutes as a reason for sustaining them. *E.g.*, United States v. Ragen, 314 U.S. 513, 524 (1942); see Beauharnais v. Illinois, 343 U.S. 250 (1952).

55. See Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), where Chief Justice Hughes, in dissent, persuasively demonstrated how the ordinary process of projection and imputation demanded an extension of federal authority to the activity in question. *Id.* at 514. The Court found, however, that "maintenance in our federal system 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.

re-introducing the strike injunction as a weapon available to the employer? Might it not be persuasively argued, because of the symbolic importance of the strike injunction in the politically sensitive area of labor-management relations, and because the strike injunction has been once explicitly rejected by the political process, that any change in its status should be made explicitly by Congress and the President; that, if there is to be change, Congress itself must confront the touchy question squarely and speak unequivocally?[56]

Issue can be taken with this position. The effect on the arbitral process, the newly discovered kingpin of federal labor policy, has to be considered. Moreover, it may be argued that characterizing this construction as a dialogue initiated by the Court with the political institutions is an oversimplification in light of the infrequent occasions on which Congress deals with major labor legislation. But neither of these arguments addresses itself to the range of considerations on which this application of the clear statement rule of statutory interpretation is bottomed. These considerations—that major decisions of policy once made by the political process should be unmade only by a high visibility decision of the institutions that have to account to the people periodically—does not turn on such factors as the intrinsic wisdom or unwisdom of the decisions that are made or not made. Thus the above arguments do not lessen, what is to our mind, the obligation of the Court to keep clear the channels of policy making and the lines of responsibility in a democratic society. This obligation can be fulfilled only if the judicial institutions confine their functions so as not to blur the distinction between interstitial lawmaking and dealing with the gristle of the body politic. Certain issues should be faced squarely by legislatures, and rules of statutory interpretation are, among other things, instruments for inducing such confrontation and instruments for the protection of the people from the courts and the courts from the people.

56. There is language of Mr. Justice Black's opinion for the Court in *Sinclair* indicating that these considerations were by no means wholly unrelated to the result in that case. "[Section] 301 was not intended to have any such partially repealing effect *upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-LaGuardia Act.*" 370 U.S. at 203. (Emphasis added.) However, the decision purports to rest on plain language and legislative purpose inferred from the history of section 301.