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THE SUPREME COURT, CONGRESS, AND STATE
JURISDICTION OVER LABOR RELATIONS: II†

BERNARD D. MELTZER*

X. SECTION 301 AND THE ENFORCEMENT OF COLLECTIVE
BARGAINING AND INTERUNION AGREEMENTS

The dominant congressional objective behind the enactment of Section 301 of the LMRA appears to have been a relatively simple one, namely, to eliminate certain technical obstacles to suits for breach of collective bargaining agreements.¹⁸⁸ Such obstacles had been particularly formidable in actions at law because of the common law requirement that all members of a union be joined as parties defendant or parties plaintiff¹⁸⁹ and because of the failure in actions at law to shape the class suit into a device for satisfying or avoiding restrictive common law requirements. Congress, whose primary purpose was to facilitate actions against unions, neglected federal-state relationships as well as the relationship between judicial and administrative competence. As a result, the congressional effort at simplification has paradoxically increased the complexities surrounding the enforcement of collective bargaining agreements.

Subsection 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , or between any such labor organizations, 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.

Although the quoted language appears to be only a grant of jurisdiction, it should be noted that the standards for vicarious responsibility embodied in

† Part I of this article, which is a revision of a paper prepared for the August 1958 meeting of the Council of State Chief Justices, appeared in the January issue. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I*, 59 COLUM. L. REV. 6 (1959). The revision incorporates selected developments subsequent to that meeting.

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188. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 452 (1957), the Court found the legislative history inconclusive. Commentators have differed on the meaning of that history as well as on the wisdom of the decision. *E.g.*, compare Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957), with Bunn, *Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247 (1957), and Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261, 1270-71 (1957). Although the disagreement within and outside of the Court cautions against dogmatism, the extracts from the legislative history set forth in the opinion of Mr. Justice Frankfurter, dissenting in *Lincoln Mills*, 353 U.S. at 530, 541-44, are, in my opinion, persuasive support for a dominantly jurisdictional interpretation of § 301.

189. See Comment, *Unions as Juridical Persons*, 66 YALE L.J. 712, 714 (1957).

subsection 301(b)¹⁹⁰ constituted substantive regulation—the only unequivocally substantive regulation in the section.

Section 301 raised seven major problems:

(1) Did it merely confer jurisdiction on the federal courts, which (*respondeat superior* problems aside) were to apply state law to determine liability in actions for breach of collective bargaining agreements? If so, was section 301 invalid as beyond the judicial power granted by article III of the federal constitution?

(2) Did section 301 provide for the development by the federal courts of a new federal law of collective bargaining agreements, thereby avoiding any constitutional problem under article III?

(3) If so, was state law displaced in state as well as in federal courts?

(4) If state law was displaced, what was to be the source of the new federal substantive law?

(5) Was state jurisdiction also pre-empted?

(6) If state law was displaced but state jurisdiction survived, a set of problems, which may be conveniently described as the converse of the problems raised by *Erie R.R. v. Tompkins*,¹⁹¹ would result. Three considerations promised to make such problems especially troublesome in this context: (a) the injunction is of great importance as a weapon and as a symbol in labor disputes; (b) some states lacked restrictions on state injunctive procedures comparable to those imposed on the federal courts by the Norris-LaGuardia Act;¹⁹² and (c) the legislative history of section 301 implied that state remedies, including, apparently, injunctive relief, were to be supplemented rather than superseded.¹⁹³

(7) Suits for breach of contract would sometimes involve (a) conduct which could plausibly be claimed to be prohibited or protected under the LMRA and (b) questions concerning the rights of unions to represent par-

190. Subsection 301(b) provides:

Any labor organization which represents employees in an industry affecting commerce . . . and any employer whose activities affect commerce . . . 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.

It is, of course, arguable that both the provisions conferring a juridical status on unions and those dealing with the enforceability of judgments are "substantive."

191. 304 U.S. 64 (1938).

192. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1952).

193. The conference report, in explaining the deletion of a provision which would have made the failure to abide by an arbitration agreement an unfair labor practice, stated: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. REP. NO. 510, 80th Cong., 1st Sess. 42 (1947), quoted in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 452 (1957). See also 353 U.S. at 530, 541-44 (dissenting opinion).

ticular employees. Since such questions are for some purposes within the exclusive jurisdiction of the NLRB, complex adjustments between judicial power and that of the Board would become necessary.¹⁹⁴

A. The Supreme Court and Section 301

1. *Westinghouse*. In *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*,¹⁹⁵ the first case requiring the Court to determine the reach of section 301, the article III question was deferred by a remarkable exercise in "statutory construction" and by a three-three-two division within the Court. *Westinghouse* involved a suit by a union for wages allegedly due to about 4,000 employees under the provisions of a collective bargaining agreement. There were four separate opinions, none of which secured a majority. Mr. Justice Frankfurter announced the Court's judgment that section 301 did not authorize suits by unions to enforce employees' "personal" claims for wages. His opinion, concurred in by Justices Burton and Minton, emphasized that section 301 was designed only to provide a federal forum for the enforcement of state law. To avoid the grave constitutional question posed by such an interpretation, the section was given a narrow construction, *viz.*, that it did not extend to the *Westinghouse* case.

The Chief Justice and Justices Clark and Reed concurred in the holding, but they rejected the suggestion of a constitutional infirmity in section 301.¹⁹⁶ Mr. Justice Douglas in a dissenting opinion, concurred in by Mr. Justice Black, urged that the union had standing to sue and summarily disposed of the article III question by asserting that Congress had authorized the federal courts to develop federal rules for the interpretation of collective bargaining agreements.

Mr. Justice Frankfurter's avoidance of the constitutional issue seemed to involve a disregard of a reasonable if not compelling construction of subsection 301(b). That subsection provided explicitly that a labor organization, where commerce was affected, "may sue or be sued as an entity *and in behalf of the employees whom it represents* in the courts of the United States." (Emphasis added.) This language, which surprisingly was not invoked by the dissenters, could have reasonably been construed as authorizing unions to enforce rights which in one sense are "personal" to individual employees.¹⁹⁷ Furthermore, a literal construction of the quoted language was supported by

194. The only one of the problems listed in the text which was raised during the legislative history was the constitutionality of a grant of jurisdiction to federal courts to enforce state law in non-diversity actions. See S. REP. NO. 105, 80th Cong., 1st Sess. 13-14 (minority report) (1947); 93 CONG. REC. 4768, 4906 (1947).

195. 348 U.S. 437 (1955).

196. Mr. Chief Justice Warren wrote an opinion concurred in by Mr. Justice Clark; Mr. Justice Reed concurred separately.

197. Compare FED. R. CIV. P. 17(a), discussed in Bunn, *supra* note 188, at 1258.

several practical considerations. First, there is a close relationship between the union's enforcement of so-called personal rights by the grievance-arbitration procedure and by court action, where necessary. Secondly, there are substantial difficulties in separating "individual" and collective interests.¹⁹⁸ Thus, some familiar contract clauses, *e.g.*, a provision that employees must be paid for time spent on union activities or a provision against discrimination for such activities, plainly involve a coalescence of individual and collective interests. Indeed, the union, as the individual's representative for the negotiation and administration of the agreement, has an interest in the proper application of every contract clause. This interest was recognized in other provisions of the statute even though they were primarily directed at protecting the interests of the individual employee.¹⁹⁹ Finally, although court action by individual employees, where permitted by the collective agreement,²⁰⁰ had not, as Mr. Justice Frankfurter noted, been blocked by the procedural obstacles to actions involving unions, there were other practical obstructions to such suits. Thus, where restrictive doctrine precluded the use of the class suit as a device for enforcing small claims, the stake of each potential plaintiff might be so small in relation to litigation expenses as to lead to the abandonment of the claim. In view of the foregoing considerations, the line drawn by the Frankfurter opinion seemed a dubious one whether tested by the language of the statute or by the functional problems involved.

That line, moreover, in no way changed the character of the constitutional issue which ultimately would be raised by a case involving a union's "collective interests." If in such a case the constitutionality of section 301 were sustained, doubt as to the continued vitality of the *Westinghouse* decision would necessarily result. *Westinghouse*, insofar as it was based on constitutional considerations, was thus a delaying action. Since the decision involved distinctions dubious in the light of the pertinent functional considerations as well as the possibility of early obsolescence, it is doubtful that the delaying game was worth the candle.²⁰¹

198. Mr. Justice Frankfurter forcefully developed these two considerations, see 348 U.S. at 456-59 (dissenting opinion), but disregarded them in order to avoid constitutional questions. Compare *Kosley v. Goldblatt Bros.*, 251 F.2d 558 (7th Cir.), *cert. denied*, 357 U.S. 904 (1958).

199. See the provisos to § 9(a) of the LMRA.

200. For a discussion of the individual's right to bring an action under a collective bargaining agreement, see Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 LAB. L.J. 850 (1957).

201. When the Court reaches these questions, it may well overrule *Westinghouse*. Cf. COMMITTEE ON LABOR ARBITRATION OF THE LABOR RELATIONS SECTION OF THE ABA, REPORT (1957), reprinted in 28 Lab. Arb. 913, 917 (1957). The underlying labor-management disputes in *Westinghouse* and in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (as well as its two companion cases), each involved monetary claims of individual employees. See Bunn, *supra* note 188, at 1248-49. Given the elimination of the constitutional questions raised by § 301, there is no apparent justification for recognizing federal question jurisdiction under § 301 to enforce union demands for arbitration of disputes concerning the individual rights of employees, while denying such jurisdiction over direct enforcement of such rights. See Note, 59 COLUM. L. REV. 153,

2. *Lincoln Mills*. In *Textile Workers v. Lincoln Mills*,²⁰² the Court disposed of the constitutional problem tabled in *Westinghouse*. Its reasoning provoked thoughtful complaints that it had not candidly faced the difficulties involved, had dealt cavalierly with evidence of legislative purpose, and had substituted dogmatic assertion for reasoned discussion.²⁰³

Lincoln Mills and its two companion cases²⁰⁴ each embraced a controversy about payments due to individual employees under a collective bargaining agreement prescribing arbitration as the terminal step for settling specified disputes. In each case the employer, after processing the dispute through the preliminary stages, declined to submit it to arbitration. In each case the unions thereupon brought an action in a federal district court for specific performance of the agreement to arbitrate. They invoked subsection 301(a) as the source of federal jurisdiction and relied on that section and the United States Arbitration Act²⁰⁵ as a source of equity jurisdiction.

The Court's opinion was announced by Mr. Justice Douglas, who spoke for a majority of five. The Court held that section 301 requires federal courts to give specific enforcement to agreements to arbitrate grievance disputes. It relied largely on the legislative history of section 301. This history, although

154-56 (1959). On the contrary, such disparate treatment would be anomalous. It would, for example, raise a question as to whether § 301 conferred jurisdiction to enforce arbitration awards calling for money payments and other action, such as reinstatement, benefiting individual employees. Such awards define "individual" rights of employees in the same way as did the contract provisions in *Westinghouse*.

Federal courts have reached conflicting results as to their jurisdiction under § 301 to enforce "individual" arbitration awards where arbitration has occurred without prior judicial compulsion. Compare *Textile Workers v. Cone Mills Corp.*, 166 F. Supp. 654 (M.D.N.C. 1958), with *A. L. Kornman Co. v. Amalgamated Clothing Workers*, 43 L.R.R.M. 2581 (6th Cir. Feb. 25, 1959). Where such an award has followed judicial enforcement of an arbitration clause, jurisdiction to enforce the award has been recognized as an incident of the court's jurisdiction to enforce obedience to its initial direction to arbitrate. *United Steelworkers Union v. Enterprise Wheel & Car Corp.*, 168 F. Supp. 308 (S.D.W. Va. 1958). This position, which prevents frustration, for practical purposes, of the court's initial decree of specific performance, seems eminently sound. But no statutory or functional consideration warrants a different jurisdictional result where arbitration was "voluntary," rather than judicially compelled. On the contrary, judicial refusal to enforce awards resulting from "voluntary" arbitration might have the unfortunate result of encouraging immediate recourse to actions for specific performance, instead of persuasion, whenever an adversary questioned arbitrability. Accordingly, the recent decision of the Sixth Circuit recognizing jurisdiction, under § 301, to enforce an award of vacation pay issued in a voluntary arbitration proceeding is desirable even though that decision may involve a technical conflict with the logic of *Westinghouse*. *A. L. Kornman Co. v. Amalgamated Clothing Workers*, *supra*. As indicated above, such conflict is not avoided where arbitration is compelled by judicial decree.

Adherence to *Westinghouse* may also produce difficulties in state actions as well as federal diversity actions involving individual rights of employees. Such actions will raise the question whether state or federal substantive law governs. *Bridges v. F. H. McGraw & Co.*, 302 S.W.2d 109 (Ky. 1957), treats state substantive law as controlling. The *Bridges* approach could, however, produce inconsistent interpretations of the same agreement under federal and state law, respectively, and thus threaten the uniformity which was apparently the basic objective of the Court's ouster of state law in *Textile Workers v. Lincoln Mills*, *supra*. See 71 HARV. L. REV. 1169 (1958).

202. 353 U.S. 448 (1957).

203. See Bickel & Wellington, *supra* note 188.

204. *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).

205. 9 U.S.C. §§ 1-14 (1952).

characterized by the Court as "cloudy and confusing,"²⁰⁶ was read as reflecting a federal policy of promoting the inclusion of no-strike clauses in collective bargaining agreements and providing for the enforceability of such clauses. Arbitration agreements, the Court urged, are the *quid pro quo* for no-strike clauses. Accordingly, section 301 was not merely jurisdictional. "It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."²⁰⁷ This policy required specific enforcement of arbitration clauses.

The Court, having asserted earlier in the opinion that section 301 is a mandate to the federal courts to fashion a body of law for the enforcement of collective bargaining agreements, turned to this question again but merely reiterated its assertion. It thus surmounted any constitutional obstacle under article III by making it clear that litigation under section 301 would present a federal question. This phase of its opinion, in striking contrast to the first phase, did not refer to legislative history; its earlier references did not bear on this basic problem.

The Court's conclusion that section 301 itself must be read as providing for specific enforcement of arbitration clauses made it unnecessary to deal with problems raised by the United States Arbitration Act, which was not mentioned.²⁰⁸ The Court did, however, consider the broad restrictions on the jurisdiction of federal courts embodied in the Norris-LaGuardia Act. Although conceding that specific enforcement of arbitration clauses would be barred by a literal reading of that act,²⁰⁹ the Court found it inapplicable be-

206. 353 U.S. at 452.

207. *Id.* at 455.

208. *But cf.* General Elec. Co. v. Local 205, United Elec. Workers, 353 U.S. 547, 548 (1957), *affirming* 233 F.2d 85 (1st Cir. 1956), where the Court stated: "We follow in part a different path than the Court of Appeals, though we reach the same result." Since the First Circuit had relied on the Arbitration Act, the Supreme Court's language re-enforces the rejection of the applicability of that act implied by the failure to invoke it in *Lincoln Mills*. Compare *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting). The Court may, nevertheless, approve that act as a "guiding analogy" for judicial disposition of questions concerning the enforceability of arbitration clauses and awards. See *Textile Workers v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953). See also Note, 59 COLUM. L. REV. 153, 173-75 (1959).

In *Boston Printing Pressmen's Union v. Potter Press*, 241 F.2d 787 (1st Cir.), *cert. denied*, 355 U.S. 817 (1957), § 301 was held not to authorize specific enforcement of an agreement to submit to arbitration issues as to the terms to be included in a new contract, principally on the ground that such enforcement is not authorized by the United States Arbitration Act. The Supreme Court's failure to rely on that act in *Lincoln Mills* would appear to eliminate that ground for distinguishing in actions for specific enforcement between clauses providing, respectively, for "grievance" and "economic" arbitration. That distinction, which is not warranted by the language of § 301, has properly been questioned. See 70 HARV. L. REV. 365 (1956); 52 NW. U.L. REV. 284, 288-94 (1957). *But cf.* 105 U. PA. L. REV. 269 (1956). Compare *Boston Printing Pressmen's Union v. Potter Press*, *supra*, with *Amalgamated Ass'n of St. Elec. Ry. Employees v. Pittsburgh Rys.*, 393 Pa. 219, 142 A.2d 734, *cert. denied*, 358 U.S. 882 (1958) (enforcing under Pennsylvania Arbitration Act an agreement to arbitrate amendments to a retirement plan established by contract).

209. See § 7, 47 Stat. 71 (1932), 29 U.S.C. § 107 (1952).

cause such enforcement was not "part and parcel of the abuses against which the Act was aimed."²¹⁰ It found further justification in Section 8 of Norris-LaGuardia, which endorses the settlement of disputes through the use of arbitration by denying injunctive relief to any person who has not made "every reasonable effort" to settle a labor dispute by arbitration.²¹¹ Accordingly, the Court concluded, there was "no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of [the Norris-LaGuardia] . . . Act."²¹²

Mr. Justice Burton, joined by Mr. Justice Harlan, concurred separately. They found federal power to fashion an "appropriate federal remedy," *i.e.*, specific performance, in section 301 itself and in inherent equitable powers "nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce."²¹³ Their crucial difference with the majority lay in their conclusion that the federal courts should apply state substantive law and should look to federal law only in connection with remedial questions. They surmounted article III problems by approving a concept of "protective jurisdiction."²¹⁴

Mr. Justice Frankfurter wrote a lengthy and powerful dissent supplemented by an extensive appendix containing extracts from the legislative history. He urged that the Court's transformation of a plainly procedural or jurisdictional section into a mandate for the invention of a body of substantive federal law had ignored both the language of section 301 and its legislative history. He urged also that even if such a mandate were inferred, the relevant federal law, the United States Arbitration Act, excluded specific enforcement of arbitration clauses in collective bargaining agreements. Finally, he rejected the applicability of the protective jurisdiction concept to this case. He concluded that section 301, as an exclusively jurisdictional provision which was to operate in the absence of diversity of citizenship or a federal question, was beyond the federal judicial power conferred by article III of the Constitution.

210. 353 U.S. at 458.

211. See also § 203(d) of the LMRA, which also endorses the use of arbitration for the settlement of grievance disputes.

212. 353 U.S. at 458. (Footnote omitted.)

213. *Id.* at 460 (concurring opinion). (Footnote omitted.)

214. That concept has been invoked to sustain the jurisdiction of federal courts to apply state law in actions involving federally-created instrumentalities. See 353 U.S. at 473-77 (Frankfurter, J., dissenting). Such jurisdiction has been defended in the context of labor relations on the ground that it is necessary for the protection of an extensive body of federal labor regulation. See Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167, 191 (1956). Senator Taft during the hearings on the proposed legislation defended federal jurisdiction on grounds quite similar to this protective jurisdiction concept, although he did not invoke it by that name. See *Hearings on S. 55 and S.J. Res. 22 Before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess. 57 (1947).

B. *The Role of State Law and State Jurisdiction*

A comprehensive analysis of the rival positions advanced in *Lincoln Mills* would be a tempting exercise. But such an analysis, which has already been ably made,²¹⁵ would take us too far from our main concern, which is the unresolved problems regarding the role of state law and state jurisdiction in the enforcement of collective bargaining agreements.

The Court in *Lincoln Mills* declared:

... 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. . . . The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.²¹⁶

The Court spoke in the context of an action filed in a federal court pursuant to subsection 301(a). Nevertheless, its language suggests that federal law will also control actions which could have been filed in a federal court, but which were filed in a state forum. The federal law governing collective bargaining agreements plainly falls within the "laws of the United States" which are binding on state courts under the supremacy clause of the Constitution.²¹⁷ Furthermore, given the Court's general emphasis on the desirability of uniform regulation of labor relations and its particular emphasis in *Lincoln Mills* on the federal interest in the integrity of collective bargaining agreements, it is highly unlikely that the Court would sanction the development of two competing systems of substantive regulation applicable to actions on collective bargaining agreements.

215. See articles cited note 188 *supra*.

216. 353 U.S. at 456-57. This quotation contrasts with the Court's approach in *Transcontinental & W. Air, Inc. v. Koppal*, 345 U.S. 653 (1953), and in *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956). In *Koppal*, the Court held that state courts have jurisdiction over actions for wrongful discharge brought by employees subject to the Railway Labor Act and may in such actions apply state doctrines as to exhaustion of administrative remedies. In *Cutter*, the Court, with three Justices dissenting, dismissed as dicta broad statements by the California Supreme Court that an arbitration award reinstating a Communist on the ground that her discharge violated a "just cause" provision of a collective bargaining agreement was contrary to public policy. It found that no federal question was raised because the decision involved only "California's construction of a local contract under local law . . ." 351 U.S. at 299. It is an interesting commentary on the pace of development in the law of labor relations that Mr. Justice Douglas, who subsequently wrote for the Court in *Lincoln Mills*, did not in his *Cutter* dissent challenge that contention of the Court, but relied instead on the first and fourteenth amendments.

217. It has been suggested that in state actions state law will govern "collateral questions of substantive law," such as the general law of contract and general defenses (such as fraud, etc.). Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333, 374 (1958). Although that position is a familiar incident of federal question jurisdiction, the general law of contract and general defenses have so crucial an impact on the existence of a "federal right" under a collective bargaining agreement that it is unlikely that such matters will be controlled by state law.

The Court's opinion does not make it clear whether state jurisdiction over section 301 actions,²¹⁸ as well as state substantive law, is foreclosed. Such jurisdictional pre-emption has been urged by some commentators.²¹⁹ But whatever the merits of such a result as a matter of policy,²²⁰ section 301 does not provide that federal jurisdiction should be exclusive, and its legislative history suggests that state jurisdiction was to be supplemented rather than superseded. Thus, unless the Court is prepared to sanction what would seem to be a free-wheeling inroad on traditional state jurisdiction, it will recognize parallel state jurisdiction over section 301 actions.²²¹

The recognition of such jurisdiction, coupled with the controlling effect of a federal "substantive law," will involve complex adjustments between the state and federal systems. The converse of the difficulties which have surrounded the *Erie* doctrine in the federal courts will, as already indicated, be transplanted into the state system. What is the line between "substantive" and "procedural" law for this purpose? May states use the machinery prescribed by their arbitration acts to enforce an agreement to arbitrate or an arbitration award?²²² May state courts deny remedies, such as specific enforce-

218. Actions to enforce collective bargaining agreements brought in state courts are not strictly "section 301 actions"; they are actions brought under state jurisdictional authorizations and not pursuant to § 301. "Section 301 actions" will, however, be used here to include actions which could have been filed in a federal court pursuant to § 301 even though they are filed in a state court.

219. See, e.g., Mendelsohn, *supra* note 214, at 189.

220. For discussion of the competing considerations see Notes, 59 COLUM. L. REV. 153, 165 (1959), 57 COLUM. L. REV. 1123, 1132-34 (1957).

221. After *Lincoln Mills*, the California Supreme Court held that § 301 did not foreclose state jurisdiction. *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); *accord*, *Coleman Co. v. International Union, UAW*, 181 Kan. 969, 317 P.2d 831 (1957); *Steinberg v. Mendel Rosenzweig Fine Furs, Inc.*, 9 Misc. 2d 611, 167 N.Y.S.2d 685 (Sup. Ct. 1957); *Garment Mfrs. Ass'n v. Garment Workers*, 41 L.R.R.M. 2536 (Pa. C.P. 1957). For pre-*Lincoln Mills* decisions to the same effect see, e.g., *General Elec. Co. v. International Union, UAW*, 93 Ohio App. 139, 108 N.E.2d 211 (1952), *appeal dismissed*, 158 Ohio St. 555, 110 N.E.2d 424 (1953); *General Bldg. Contractors' Ass'n v. Local 542*, 370 Pa. 73, 87 A.2d 250 (1952).

222. Since such machinery would appear to be "procedural," an affirmative answer would seem to be clearly indicated. Compare Judge Wyzanski's suggestion that the United States Arbitration Act should serve as "a guiding analogy" in § 301 actions. *Textile Workers v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953). But the availability of such machinery would presumably be governed by the "federal law" concerning arbitrability or the arbitrator's jurisdiction. Similarly, the finality of an award would appear to be governed by the federal law as to the basis for attacking an award and the requirements of fair procedure in arbitration. Such matters go to the heart of the federally recognized right to enforcement of arbitration provisions and would accordingly appear to be matters of "substance" controlled by federal standards.

The Court of Appeals for the First Circuit, which has frequently been faced with questions of arbitrability in § 301 actions, in *Local 201, Int'l Union of Elec. Workers v. General Elec. Co.*, 262 F.2d 265, 267-68 (1st Cir. 1959), outlined a useful general approach to such questions, *viz.*: (1) The district court must determine the issue of arbitrability, *i.e.*, whether the respondent has violated an agreement to arbitrate the underlying dispute. Although this proposition referred to actions for specific enforcement, it is equally applicable to actions on the award. (2) Because arbitration deserves judicial encouragement, ambiguity should normally be resolved in favor of arbitrability. (3) Where the parties have committed a particular issue to arbitration, arbitrability should not be denied because it seems clear that the contract does not entitle the moving party to any relief. Compare *New Bedford Defense Prods. Div. v. Local 1113, UAW*, 258 F.2d 522, 526

ment of arbitration clauses, granted by the federal courts? May the state courts grant remedies, such as the specific enforcement of no-strike clauses, which may be denied in the federal system? Such problems, which will be discussed below, will be puzzling even after more content has been given to the federal law, which, in Mr. Justice Frankfurter's phrase, is still largely "in the bosom of the judiciary."²²³ But during the developmental period, which promises to be long, state courts will be bedeviled by questions concerning both the content and the authoritative sources of federal law. How, for example, does a decision by a federal district court sitting within or outside of a given state rank with a decision of the highest state court?²²⁴

In addition to these special problems, the state courts will have problems in common with the federal courts while the federal law is being developed. Under *Lincoln Mills*, federal law governing collective bargaining agreements is to be derived from the policy of our national labor laws. Federal labor laws and other federal laws which impinge on labor relations, such as anti-trust laws, are complex and often reflect policies not easy to accommodate.²²⁵ Furthermore, except for a narrow range of issues,²²⁶ neither the LMRA nor other national labor laws supply a meaningful guide for the development of a new body of jurisprudence to govern the enforcement of collective agreements. It thus seems likely that the new federal law will be distilled largely from state court doctrines, which in turn are derived largely from commercial law analogies reshaped to some extent to reflect the distinctive elements of the collective bargaining relationship. The large and growing body of published arbitration awards will presumably be another source of guidance. Whatever the ultimate content of the federal law, it seems likely that during its developmental stage state courts will identify their own precedents as "federal law" unless the precedents appear to be unsound or incompatible with purposes implied by the LMRA or other federal statutes.

Soon after the decision in *Lincoln Mills*, several of the major problems flowing from the Court's approach were presented to the California Supreme

(1st Cir. 1958), with *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dep't), *aff'd mem.*, 297 N.Y. 519, 74 N.E.2d 464 (1947). The decisions of the First Circuit bearing on the third point are, however, far from clear. See ABA SECTION OF LABOR RELATIONS LAW, 1958 PROCEEDINGS 85-89.

223. 353 U.S. at 465 (dissenting opinion).

224. See generally HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 628-30 (1953).

225. See, e.g., *United States v. Hutcheson*, 312 U.S. 219 (1941). The problem of accommodating § 301 and the Norris-LaGuardia Act will be especially acute. See text accompanying notes 237-41 *infra*.

226. Section 301 makes it clear (1) that the union may sue and be sued as an entity; (2) that unions and employers are to be responsible for the acts of their "agents," without, however, clarifying elastic standards of vicarious responsibility; and (3) that a collective bargaining agreement imposes legally enforceable duties whose breach may be remedied by a suit for damages. Other provisions of the LMRA will bear on the basic validity of the agreement involved or of particular clauses, such as those embodying union security arrangements.

Court in *McCarroll v. Los Angeles County Dist. Council of Carpenters*.²²⁷ In *McCarroll*, a labor union had entered into a collective bargaining agreement containing a no-strike clause and a conventional grievance and arbitration clause. The union, claiming that the employer had engaged in allegedly illegal labor contracting and had not conformed to safety standards, called a strike. The Supreme Court of California, with one judge dissenting, affirmed the grant of a preliminary injunction against the union's violation of its no-strike pledge. The court, in an opinion by Justice Traynor, concluded that the Norris-LaGuardia Act would have precluded injunctive relief by a federal court²²⁸—a conclusion which is, however, open to question under the rationale of *Lincoln Mills*.²²⁹ Although recognizing the controlling effect of federal substantive law, the court decided that a state is free to grant a remedy unavailable in a federal forum.

The problem of disparate state and federal equitable remedies for contract violation involves a dilemma which cannot be resolved in a manner compatible with both the implications of *Lincoln Mills* and the legislative history of section 301—a dilemma which annotates Mr. Justice Frankfurter's warning in *Lincoln Mills* that the Court's approach "is more likely to discombobulate than to compose."²³⁰ Although the Court in *Lincoln Mills* unfortunately did not set forth the policy considerations supporting the supersession of state substantive law, presumably it deemed the uniformity which might ultimately be achieved as justifying the labor pains which would surround the birth of federal substantive law.

The importance which the Court apparently attached to uniformity is a basis for a strong argument that the Norris-LaGuardia Act, although literally applicable only to federal courts, should also control state enforcement of collective bargaining agreements. The availability of a labor injunction has a crucial impact on the balance of power between the contending forces. Furthermore, the Supreme Court in the much debated *Hutcheson* case²³¹ gave far-reaching substantive effect to the Norris-LaGuardia Act in the federal system. Presumably, the uniformity which the Court seeks is not a wooden uniformity of "substantive" rather than "remedial" law, but a uniformity meaningful in the light of the interests at stake. Such meaningful uniformity would be frustrated by a doctrine permitting either forum shopping

227. 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958), 58 COLUM. L. REV. 278. See also *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 582, 148 N.E.2d 129, 131, 170 N.Y.S.2d 785, 788 (1958), discussed in note 233 *infra*.

228. This position was recently adopted in *A. H. Bull S.S. Co. v. Seafarers' Union*, 250 F.2d 326 (2d Cir. 1957), *cert. denied*, 355 U.S. 932 (1958). All of the opinions in *United States v. UMW*, 330 U.S. 258 (1947), decided prior to Taft-Hartley, assumed that Norris-LaGuardia generally barred an injunction against the breach of a no-strike clause.

229. See Comment, 25 U. CHI. L. REV. 496, 501 (1958); 71 HARV. L. REV. 1172, 1175 (1958).

230. 353 U.S. at 464 (dissenting opinion).

231. *United States v. Hutcheson*, 312 U.S. 219 (1941).

for the purpose of securing an injunction in labor disputes²³² or disparate results in the federal and state courts.²³³

In this connection, the Supreme Court's recent decision in *Bernhardt v. Polygraphic Co. of America*,²³⁴ is significant. In *Bernhardt*, the Court held that a federal court, required by *Erie R.R. v. Tompkins* to follow state "substantive" law in a diversity action, was barred from specifically enforcing an agreement to arbitrate when that remedy was not available under the applicable state law. It found the remedy "outcome-determinative" within the meaning of *Guaranty Trust Co. v. York*.²³⁵ Conversely, under section 301, the desire for uniformity, which apparently moved the Court to fashion a controlling federal law, would appear to require the states to deny injunctive relief if it is not available under federal law.²³⁶

Although the Supreme Court of California in *McCarroll* expressed doubts as to the authority of Congress to require state courts to withhold state remedies in section 301 litigation,²³⁷ such doubts seem unwarranted. Congress may lack authority to impose general regulations on state procedure, but the supremacy clause together with the commerce clause would support the complete ouster of state jurisdiction and would also appear to authorize a congressional mandate that strikes affecting commerce, although giving rise to damages, should be free from state, as well as federal, injunctive relief.

If, however, the implications of the policy of uniformity were followed, a paradoxical frustration of the purpose behind section 301 would result. The

232. In damage actions, the practical importance of the question is reduced by the plaintiff's right to sue in a federal court and by the defendant's power to remove state actions. 28 U.S.C. § 1441(a) (1952) provides that "any civil action brought in a State court of which the [federal] district courts . . . have original jurisdiction, may be removed by the defendant . . . to the district court of the United States . . ." But in injunction actions, the defendant's attempt to remove may be blocked by the argument that the action is not removable since the Norris-LaGuardia Act has deprived the federal courts of "jurisdiction" to enjoin strikes. Some federal courts have taken this position. *Parsons v. Sinclair Ref. Co.*, 18 CCH Lab. Cas. ¶ 65705 (E.D. Okla. 1950); *Associated Tel. Co. v. Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953) (alternative holding). See generally Wollett & Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445, 463 n.101 (1955); 20 U. CHI. L. REV. 304, 308-09 (1953).

233. If the desirability of federal-state uniformity is accepted, the compatibility of state injunctions with federal policy should not be affected by the fact that injunctive relief was originally awarded by an arbitrator rather than a court. *But cf.* *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958), 58 COLUM. L. REV. 908, sustaining judicial enforcement of an arbitrator's "injunction" against a slowdown, even though conceding that the New York anti-injunction law would deprive the courts of power to issue such an injunction independently of arbitration. The basic question presented by the *Ruppert* situation appears to be, not which tribunal had initially decreed injunctive relief, but whether the agreement to arbitrate would remove injunctive relief from the federal policy embodied in Norris-LaGuardia. See *id.* at 582, 148 N.E.2d at 131, 170 N.Y.S.2d at 788, 58 COLUM. L. REV. 908, 910-11 (1958).

234. 350 U.S. 198 (1956).

235. 326 U.S. 99 (1945).

236. It is not clear whether states which deny injunctive relief under "baby" Norris-LaGuardia acts could be compelled to grant such relief in § 301 cases if it were available in the federal courts. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954); 71 HARV. L. REV. 1172, 1174 (1958). If such relief were clearly available in the federal courts, the practical significance of this question would be lessened because of the plaintiff's privilege to sue in a federal court.

237. 49 Cal. 2d at 61-63, 315 P.2d at 331-32.

pertinent legislative history suggests that the primary objective of Congress was to secure increased union compliance with no-strike clauses by facilitating the recovery of damages for the breach of such clauses.²³⁸ Although Congress deliberately declined to lift the restrictions of the Norris-LaGuardia Act from the federal courts, neither section 301 nor its legislative history discloses a purpose to interfere with state procedures or state remedies. On the contrary, the legislative history suggests that reliance was to be placed on the normal processes of the courts,²³⁹ which included injunctive relief in those states which lacked "baby" Norris-LaGuardia acts or which had construed them as inapplicable to contract disputes.²⁴⁰ Furthermore, a damage suit is often a much less effective stimulus to union responsibility than injunctive relief. It would, as Justice Traynor suggested in *McCarroll*,²⁴¹ be an ironic twist to read section 301 as excluding state injunctions against breach of a no-strike clause.

The Supreme Court may escape from the dilemma illustrated by *McCarroll* and all of the converse-of-*Erie* problems by holding, contrary to *McCarroll*, that state jurisdiction over section 301 actions, as well as state law, is pre-empted. Complete federal pre-emption would be a logical sequel to *Lincoln Mills* and an escape from some of the problems it has spawned. But, as indicated above, it would, in the absence of new legislation, appear to involve an impairment of state power unwarranted by either the language or the history of section 301.

C. Accommodation of Judicial and Administrative Competence

If state competence survives, state, as well as federal, courts will be faced with subtle and complex problems when contract actions raise issues which for some purposes are within the jurisdiction of the NLRB. Such issues may arise, for example, from contentions (1) that the alleged contractual violations were or might be deemed to be conduct prohibited by the LMRA; or (2) that the alleged violations were justified by the plaintiff's antecedent unfair labor practices and were consequently protected by the federal statute; or (3) that the validity of the underlying contract or of the particular contractual provision in question, or that the right to maintain a contract action, depends on statutory or administrative criteria which peculiarly involve the Board's expertise. Such issues require the state courts and the lower federal courts, initially, and the Supreme Court, ultimately, to make adjust-

238. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 454-55 (1957).

239. *Id.* at 452. Senator Taft indicated that § 301 would not displace state equitable remedies. *Hearings on H.R. 4908 Before a Subcommittee of the Senate Committee on Education and Labor*, 79th Cong., 2d Sess. 11 (1946).

240. For discussion of conflicting state cases see Rice, *A Paradox of Our National Labor Law*, 34 MARQ. L. REV. 233, 242-47 (1951); Note, 37 VA. L. REV. 739, 744-50 (1951).

241. 49 Cal. 2d at 63-64, 315 P.2d at 332.

ments between two putatively competent jurisdictions, that of the courts over contract actions and that of the Board over unfair labor practices, representation matters, and protected activities.

The Supreme Court has not yet spoken on these matters; the decisions of other courts are confusing²⁴² and conflicting;²⁴³ the commentators are also divided.²⁴⁴ A good deal of the difficulty results from a failure to recognize the different responsibilities of courts and arbitrators, on the one hand, and of the NLRB, on the other, with respect to both the enforcement of collective bargaining agreements and the policing of the bargaining process.

1. *Competence over disputes which involve an overlap between statutory and contractual prohibitions.* The enforcement of collective bargaining agreements, including the award of appropriate compensatory and preventive relief, devolves on courts and arbitrators and not on the Board. The Board is the proctor of the bargaining process and not of the bargain. Nevertheless, the Board, in discharging its statutory responsibility to insure good faith bargaining, will sometimes be faced with questions concerning the scope of the bargain. Thus, Section 8 of the LMRA provides that the duty to bargain bars the use of economic power to secure the modification of a current contract provision during the term of the contract. Similarly, the Board has held that a unilateral repudiation of the existing terms of an agreement, or an employer's unilateral change in the conditions of employment, constitutes

242. See *Textile Workers v. Arista Mills Co.*, 193 F.2d 529, 533 (4th Cir. 1951). But cf. *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956).

243. For illustrative cases affirming judicial competence notwithstanding an overlap between contractual and statutory prohibitions, see *Lodge 12, Dist. 37, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir.), cert. denied, 358 U.S. 880 (1958) (specifically enforcing arbitration clause); *United Elec. Workers v. Worthington Corp.*, 236 F.2d 364 (1st Cir. 1956) (district court has jurisdiction to enforce arbitration award); *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F.2d 401 (3d Cir. 1956) (district court has jurisdiction to enforce agreement to bargain). For cases denying judicial competence see *United Elec. Workers v. General Elec. Co.*, 231 F.2d 259 (D.C. Cir.), cert. denied, 352 U.S. 872 (1956) (union's complaint alleged that employer's unilateral adoption of new discharge rule constituted a violation of both the agreement and the duty to bargain); *United Ass'n of Journeymen v. Marchese*, 81 Ariz. 162, 302 P.2d 930 (1956), opinion supplemented and rehearing denied, 82 Ariz. 30, 307 P.2d 1038 (1957). Although *United Elec. Workers v. General Elec. Co.*, *supra*, was "distinguished" in *United Elec. Workers v. Worthington Corp.*, *supra* at 370, the only basis for distinction would appear to be that the plaintiff's complaint in *General Electric* explicitly charged an unfair labor practice whereas the charge was merely implied in *Worthington*. Despite the significance attached by the Supreme Court to the moving party's allegation of a federal unfair labor practice in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481 (1955), this essentially formal difference appears to be a dubious basis for disparate jurisdictional results under § 301. The judicial competence to deal with contract violations recognized by that section is not subordinated to the Board's jurisdiction over unfair labor practices. Such subordination would, in my view, be unfortunate. In any event, it seems clear that such subordination should be based on more substantial considerations than the form of the pleadings.

For extensive discussions of cases dealing with judicial competence in the overlap context, see Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52 (1957); Note, 69 HARV. L. REV. 725 (1956).

244. Compare Mendelsohn, *supra* note 214, at 186, with Dunau, *supra* note 243.

a violation of the duty to bargain.²⁴⁵ Charges of violations of that duty sometimes require the Board to determine the scope of any explicit or implied agreement sanctioning or excluding unilateral action.²⁴⁶ But such determinations reflect the Board's concern with the bargaining process rather than any plenary Board jurisdiction over breaches of the agreement as such.

Although the LMRA in general commits jurisdiction to remedy such breaches to the courts, collective bargaining agreements normally contain arbitration clauses; consequently, claims of breach of agreement are for the most part resolved by recourse to arbitration rather than the courts.²⁴⁷ Congress was familiar with, and endorsed, the use of the arbitration mechanism²⁴⁸—an endorsement which was generously implemented by the Court in *Lincoln Mills*.²⁴⁹

The destruction of judicial competence on the ground of contractual and statutory overlap would ignore the difference in the respective functions of the Board, the courts, and arbitration. It would also appear to frustrate the purpose of Congress—to commit actions for breach of contract to the courts or to arbitration when called for by the contract. Finally, such destruction of judicial competence would give rise to substantial practical disadvantages. It would complicate judicial enforcement by requiring courts to test their jurisdiction against a complex body of NLRB precedents not directly relevant to issues of contract administration. It would deprive litigants of a judicial remedy, which is often more expeditious and comprehensive, because of the possible existence of a Board remedy which might not be forthcoming and which, even if it were, might be inadequate. Thus, for example, although the Board may hold that some breaches of a no-strike pledge are violations of subsection 8(b)(3), it lacks power to grant damages to the employer—a vital point ignored in a recent California case because of undue

245. See, e.g., *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. No. 113 (Sept. 23, 1958); *General Motors Corp.*, 81 N.L.R.B. 779 (1949), *enforced per curiam*, 179 F.2d 221 (2d Cir. 1950). See generally Bowman, *An Employer's Unilateral Action—An Unfair Labor Practice?*, 9 VAND. L. REV. 487 (1956).

246. For an illustration of the overlap between questions as to the content of the bargain and questions concerning violations of the duty to bargain, see *United Elec. Workers v. General Elec. Co.*, 231 F.2d 259 (D.C. Cir.), *cert. denied*, 352 U.S. 872 (1956), discussed in Dunau, *supra* note 243, at 57, 78.

247. The most important exception involves disputes as to breach of no-strike clauses. For a collection of cases on the arbitrability of such disputes, which sometimes turns on the breadth of the arbitration clause, see *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 67 n.1, 315 P.2d 322, 334 n.1 (1957), *cert. denied*, 355 U.S. 932 (1958). See also *Armstrong-Norwalk Rubber Corp. v. Local 283, United Rubber Workers*, 167 F. Supp. 817 (D. Conn. 1958).

248. See note 211 *supra* and accompanying text.

249. The Court in another context has recognized that, in enforcing the duty to bargain, consideration should be given "to the philosophy of bargaining as worked out in the labor movement in the United States." *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 408 (1952), quoting from *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346 (1944). Recognition of that "philosophy," including the widespread reliance on arbitration in resolving issues of contract administration, would be equally appropriate in adjusting judicial and administrative jurisdiction.

preoccupation with the abstractions of pre-emption.²⁵⁰ Furthermore, the allegation of overlap urged to defeat judicial competence will, in Board proceedings, presumably be replaced by defenses designed to avoid the remedy whose availability was invoked to oust the courts. Thus, the possible existence of two theoretical remedies might in practice paradoxically result in the denial of any remedy. This anomaly would be automatic in cases within the no-man's land.

The difficulties are illustrated by *McCarroll*. There, the collective agreement provided, *inter alia*, that (1) the union would furnish "skilled and competent" workmen to the employer; (2) the employer would have the right to transfer workmen from the jurisdiction of one local to another; and (3) there would be no strikes during the life of the agreement, but all disputes over its interpretation or application would be settled by the grievance procedure and arbitration. The employer's complaint alleged that the union had violated the agreement by the following conduct: (1) it had supplied incompetent workers; (2) it had refused to permit transfers allowed by the contract; and (3) it had brought about a strike, which it sought to justify on the spurious (as shown by supporting affidavits) grounds that the employer was a labor contractor and was violating state safety regulations.

The California Supreme Court, seeking to avoid the problems raised by a possible overlap between contractual and statutory violations, concluded that the union's conduct could not "reasonably be deemed an unfair labor practice" ²⁵¹ This conclusion is, however, extremely doubtful since the union's disregard of its obligations with respect to the supplying and transfer of workmen, coupled with its strike, might well have constituted unilateral repudiation in violation of subsection 8(b)(3).²⁵² The uncer-

250. *Grunwald-Marx Inc. v. Los Angeles Joint Bd., Amalgamated Clothing Workers*, 331 P.2d 1030 (Cal. Dist. Ct. App. 1959). The trial court, after directing a union to abide by its arbitration agreement, confirmed the resultant arbitration award assessing money damages against the union. The appellate court reversed. It emphasized that the employer, prior to his action to enforce the agreement to arbitrate, had filed a charge of a § 8(b)(3) violation with the Board. It predicated pre-emption on the ground that that charge was well-founded, but also urged that if the Board rejected that charge and denied a remedy, the grant of a judicial remedy would involve a conflict with the Board's disposition. The court's approach was based on the mistaken assumption that a union's breach of agreement and the unfair labor practice defined by § 8(b)(3) are coextensive, rather than independent, sources of liability. Furthermore, despite the employer's initial recourse to the Board, his inability to recover money damages in a Board proceeding, together with the absence of any proof of detrimental reliance by the union, should have excluded the notion of "election of remedies," which notion may have been behind the court's emphasis on the employer's resort to the Board.

251. 49 Cal. 2d at 57, 315 P.2d at 328.

252. See authorities cited note 245 *supra*. Furthermore, the union's demand for cessation of "labor contracting" may well have related to a matter not subject to mandatory bargaining. Accordingly, the union's insistence on negotiating on that subject as a condition of any agreement would have constituted a violation of § 8(b)(3). Cf. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Finally, the union's apparent failure to specify its demands might also have constituted such a violation.

If, as the court urged, the union plainly did not unilaterally repudiate existing contract provisions, its conduct may have constituted a demand for the addition of new contractual terms, rather than the amendment of existing terms. So viewed, the union's

tainties in *McCarroll* and in similar situations²⁵³ concerning the availability in fact of the putative NLRB remedy suggest that denial of judicial competence because of a possible overlap between statutory and contractual violations might be followed by a denial of relief under the LMRA.

Despite the possibility of such a remedial vacuum and the general inadequacy of Board remedies, *Garner*²⁵⁴ has been urged as the basis for ousting judicial competence in the overlap situation.²⁵⁵ This suggestion overlooks, however, several critical differences between the contract context and the situations where *Garner* has been invoked to oust regulation duplicating or supplementing the LMRA. Where such regulation is involved, and where the Board has not acted, the pre-emption inquiry typically is whether peaceful labor-management activity affecting commerce is involved.²⁵⁶ If so, state regulation is excluded without any need for the courts to delineate precisely the prohibitions or protections flowing from the LMRA. But such an approach

strike, the no-strike pledge and *Borg-Warner* aside, might have constituted protected activity. See *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952); cf. 58 COLUM. L. REV. 278, 281 (1958). But if a strike, although permitted by § 8(d) absent a no-strike clause, violates such a clause, the existence of this contractual violation would (or should) divest the strike of any statutory protection and would (or should) permit the courts to grant the remedies appropriate under § 301.

253. Similar uncertainties are illustrated by differences between the Board and the reviewing courts with respect to union-sponsored strikes after union grievances have been denied in arbitration or prior to such arbitration. In *Westmoreland Coal Co.*, 117 N.L.R.B. 1072 (1957), the Board found a violation of § 8(b)(3) when a union whose grievance had been denied by an arbitrator struck without complying with the notice and other requirements prescribed by § 8(d). Its decision was, however, reversed. *Local 9735, UMW v. NLRB*, 258 F.2d 146 (D.C. Cir. 1958). The reversal seems sound because the master contract left the disputed issue to collective bargaining at the individual mines. Accordingly, the arbitration award held only that in the absence of a newly bargained standard the employer was free to take the action involved; it did not define the standard to be controlling during the term of the contract. Thus, the union was privileged to strike for the standard which it preferred.

In *Boone County Coal Corp.*, 117 N.L.R.B. 1095 (1957), the Board held that a union had violated § 8(b)(3) when it struck over grievances cognizable under the contractually-prescribed grievance arbitration procedure, without resorting to that procedure. Again, its decision was reversed, on the ground that the explicit rejection of a no-strike obligation in the contract made the provisions for grievance adjustment "a gentleman's agreement." *International Union, UMW v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958). But cf. *International Bhd. of Teamsters, AFL v. W. L. Mead, Inc.*, 230 F.2d 576 (1st Cir.), petition for cert. dismissed per stipulation, 352 U.S. 802 (1956).

The Board's intervention in cases like *Westmoreland* and *Boone* is open to criticism because it involves the Board in questions of contract administration which are beyond its responsibilities. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1438 (1958). But the Board's intervention in the *Boone* context seems at least as justifiable as its assumption of similar responsibilities, such as the prohibition of unilateral changes or repudiation, which involve it in policing the bargain under the guise of policing the bargaining process. The grievance and arbitration procedure, even though the obligation to use it is voluntarily assumed, is an integral and a usual part of the bargaining process. Cf. *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949 (6th Cir. 1947). Accordingly, the Board's conclusion that respect for such obligations must be enforced to protect the integrity of the bargaining process is defensible.

254. *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

255. See *United Elec. Workers v. General Elec. Co.*, 231 F.2d 259 (D.C. Cir.), cert. denied, 352 U.S. 872 (1956); *United Ass'n of Journeymen v. Marchese*, 81 Ariz. 162, 168, 302 P.2d 930, 934 (1956).

256. This formulation is based on the broad pre-emption implications of *Garner*. See Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I*, 59 COLUM. L. REV. 6, 16-17, 19 (1959).

applied to contract questions would undermine the basic purpose of section 301. Contract violations typically involve peaceful conduct which under the broad *Garner* formula would be beyond judicial competence. Consequently, courts cannot in the contract context adopt the approach suggested by *Garner* unless they are to abdicate the responsibilities apparently imposed on them by section 301. To avoid such abdication, courts, when faced with claims of preemption based on overlap, presumably would reject such claims or would consider whether the LMRA prohibited (or might reasonably prohibit) the alleged contractual breach. The latter approach would, however, multiply occasions requiring courts in the first instance to interpret the LMRA, and it was precisely such encroachments on the Board's duty of primary interpretation which *Garner* condemned. On the other hand, by disregarding overlap in the contract context, courts would—in accordance with *Garner*—be relieved of the necessity of applying the LMRA.

The foregoing suggestion could be dismissed as a *tour de force*, which excludes the need for scrutinizing the LMRA only because the "conflict" which *Garner* sought to avoid is to be tolerated in the contract context. But the relevant considerations suggest that in that context the "conflict" is either unreal or peripheral and that *Garner* is of doubtful applicability.

Garner involved not the enforcement of obligations voluntarily assumed by the parties but rather the enforcement of obligations imposed by the coercive power of the state.²⁵⁷ The failure of the LMRA to deal expressly with the exercise of such coercive power contrasts sharply with its explicit sanction of judicial competence over contract actions—a competence which the statute does not purport to qualify in situations involving overlapping remedies. Finally, judicial action, even if it reaches conduct prohibited by the statute, will involve only a different, and a legislatively sanctioned, method of vindicating the national policy. If, per contra, the defendant's conduct is not so prohibited, there is no room for the approach suggested by *Garner*, under which activity not prohibited by the federal act is to be free from supplementary governmental prohibitions. Section 301 means that supplementary prohibitions imposed by collective bargaining agreements are in general to be judicially enforced even though they may curtail activities which, in the absence of contractual restrictions, would be accorded statutory protection. In view of the essential differences between the problems involved in *Garner* and those raised by the exercise of the power conferred by section 301, overlap between contractual and statutory prohibitions does not appear to warrant curtailment of judicial power to enforce collective bargaining agreements.

257. See Dunau, *supra* note 243, at 53-54, for an able and extensive discussion of the differences between *Garner* and overlap in the context of § 301.

This conclusion is re-enforced by the decisions of the Court in other contexts. Thus, the Court has held that judicial enforcement of Section 303 of the LMRA is completely independent of Board enforcement of the parallel provisions of subsection 8(b)(4).²⁵⁸ Section 303 imposes liability in damages for violations of the complex provisions of subsection 8(b)(4), which, as to permanent preventive relief, are within the Board's exclusive jurisdiction. The case for independent judicial competence as to contract enforcement under section 301 is considerably stronger in view of the fact that the statute generally entrusts such questions to the courts rather than to the Board.

The overtones of *Gonzales*²⁵⁹ point in the same direction. It will be recalled that the Court there emphasized that the crux of the action was contractual and that a comprehensive remedy for breach of contract should not be displaced merely because of a possibility of overlap with a Board proceeding. The fact that the "contract" there involved (a union constitution) was not covered by section 301 does not weaken *Gonzales*' implications for the comparable problems raised under that section. The dominating consideration both as to section 301 agreements and the "contract" embodied in union constitutions is that both types of agreements are to be enforced by the courts. If overlap does not oust the courts of jurisdiction over the membership contract, it should not destroy judicial competence over the collective bargaining agreement. Indeed, in view of the explicit mandate of section 301, it is arguable that even greater recognition of judicial competence over section 301 actions would be appropriate.

All of the considerations which support judicial competence to enforce directly the substantive provisions of a contract despite their possible overlap with the LMRA apply where the aid of a court is invoked to support the arbitration process in an action to compel observance of either an agreement to arbitrate or an arbitration award. There are, moreover, additional reasons for sanctioning judicial competence to support the arbitration process notwithstanding overlap. The widespread use of the arbitration mechanism as "an instrument of self-government" is persuasive evidence of its utility. Arbitration has, moreover, been endorsed not only by the LMRA but also by the Board. Thus, the Board, which has been extremely jealous of its jurisdiction in non-contractual matters, has not sought to displace arbitral jurisdiction in cases of overlap. On the contrary, it has relinquished its own jurisdiction in deference to arbitration—a self-denial which is striking in view of the provisions of Subsection 10(a) of the LMRA. Although the Board's decisions involve uncertainties, they indicate generally that even though alleged contractual violations are or may be statutory violations, contractually prescribed arbitral

258. *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

259. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958).

procedures should be exhausted prior to recourse to the Board.²⁶⁰ And where an arbitrator has adjudicated an issue within the Board's jurisdiction, the Board will in general stay its hand unless intervention is necessary to remedy procedural unfairness in the arbitration process or to reverse a result repugnant to statutory policies.²⁶¹ The Board has thus recognized that the national policy entrusts the responsibility for securing performance of contractual obligations to other tribunals. It has, moreover, recognized the special values of the arbitration process. The Board's approach represents an appropriate adjustment between those values and the desirability of protecting the basic standards embodied in the national scheme. It gives the mechanism agreed to by the parties full scope and yet permits correction of procedural abuse or departures from the federal standards by the exercise of the Board's paramount power. Similar considerations justify the preservation of judicial competence to aid the arbitration process despite the fact that the underlying conduct to be arbitrated may involve statutory as well as contractual prohibitions.

It may be urged, however, that the values of arbitration depend essentially on the parties' willingness to use it after a particular controversy has arisen. This contention reflects the concern expressed by thoughtful students that judicial action compelling recourse to the contractually prescribed arbitral procedures threatens the values of arbitration as a self-operating instrument of self-government.²⁶² It is not necessary here to explore the merits of that position or to elaborate the interesting contrast between it and the long search for obligatory jurisdiction and the "rule of law" in the international sphere. It is sufficient to note that *Lincoln Mills* has declared that the national policy favors the use of judicial power to compel the parties to use arbitral machinery prescribed by the contract. The exclusion of judicial competence because of overlap not only would undercut that policy, but might also result in an artificial fragmentation of the arbitrator's jurisdiction and the intrusion of unnecessary technicalities into grievance adjustment.

A concrete situation will illustrate these difficulties. A typical contractual provision prohibiting employer discrimination against employees on account of their union activities duplicates the prohibition of subsection 8(a)(3) of the LMRA. Evidence which established or negated the violation of the contract provisions would (questions of burden of persuasion aside) presuppose the same result under the statute. But a collective bargaining agreement would typically contain another provision protecting employees against discharge

260. See *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 705-06 (1943), *enforced*, 141 F.2d 785, 788 (9th Cir. 1944); Address by Board Member Jenkins, entitled "The Peacemakers," Arbitration and Industrial Relations Conference, Fort Worth, Texas, Nov. 19, 1957, at 10-11, on file in University of Chicago Law School Library and available from Public Information Division of the NLRB.

261. *New Britain Mach. Co.*, 116 N.L.R.B. 645 (1956), *rev'd sub nom.* *International Ass'n of Machinists v. NLRB*, 247 F.2d 414 (2d Cir. 1957); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

262. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955).

without "just cause." The Board does not, however, police discharges lacking "just cause" unless they are connected with employee participation in or abstention from union (or related) activities.

Under the contract described above, if an employee's discharge were questioned, the issues before the arbitrator would not be the same as those before the Board in an unfair labor practice proceeding. It is true that both the Board and the arbitrator would have to decide whether discrimination had entered into the discharge. But for the Board, unlike the arbitrator, that would be the only issue in the case. Once the Board rejected the charge of discrimination, it would have no jurisdiction over the issue of employee misconduct and the appropriateness of discharge as a penalty. The arbitrator, after finding no discrimination, would, however, be faced with such issues.

The arbitral and administrative jurisdiction could be divided with the arbitrator empowered to pass only on the issue of "just cause" and with the Board retaining exclusive jurisdiction over issues of discrimination. Although the issues involved have been fragmented in this way to avoid the overlap issue,²⁶³ such fragmentation plainly involves an artificial separation between two interrelated questions. In any close arbitration case the existence of discrimination would manifestly affect the determination of "just cause" and would be there litigated even if the arbitrator theoretically lacked jurisdiction to resolve the discrimination issue. Neither the statute nor policy considerations warrant the artificial fragmentation of two related issues or a division of jurisdiction which would call for two proceedings before both issues could be resolved.²⁶⁴ Nor is there any justification for a rule which might require parties to draft grievances so as to make it clear that the issues of contract interpretation submitted to the grievance procedure do not overlap with questions of unfair labor practices. Such technical niceties are wholly inappropriate to the informality of the grievance process, but they would become important if arbitral jurisdiction, or judicial competence to direct arbitration, were ousted by overlap.

2. *Judicial competence over a defense based on the alleged commission of an unfair labor practice.* Somewhat greater difficulties in adjusting judicial and administrative competence are involved when a defense against an alleged breach of contract rests on the contention that the apparent breach was provoked, and thus rendered privileged, by the plaintiff's antecedent unfair labor practice. The problem suggested by *Mastro Plastics Corp. v. NLRB*²⁶⁵ illus-

263. See *McAmis v. Panhandle E. Pipe Line Co.*, 273 S.W.2d 789 (Mo. Ct. App. 1954).

264. Cf. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958).

265. 350 U.S. 270 (1956). Mr. Justice Frankfurter, with whom Justices Minton and Harlan concurred, dissented on the ground that the strike, although in response to employer unfair labor practices, was subject to the waiting period and other requirements prescribed by §8(d) and that that section precluded reinstatement of the striking employees.

trates the difficulties involved. In that case, the Supreme Court ruled that a no-strike clause which in general terms barred all strikes did not apply to a strike in response to the employer's serious unfair labor practices which jeopardized the union's status. The Court, accordingly, characterized the strikers' conduct as protected and sustained a Board order reinstating strikers who had been discharged.

Antecedent unfair labor practices, such as those involved in *Mastro Plastics*, might be invoked as a defense to an action against a union for damages or injunctive relief based on a breach of contract. The question would then arise as to whether the court itself should determine whether such unfair labor practices were committed or whether it should require the union to raise that issue by filing a charge with the Board, staying the contract action pending an administrative determination. The doctrine of "primary jurisdiction" appears at first glance to call for the reference of such specialized questions to the Board,²⁶⁶ at least where the statute of limitations has not run and the Board's jurisdictional yardsticks are satisfied. But further analysis suggests doubt as to such a result.

When a union urges that a general no-strike pledge does not bar a strike prompted by particular conduct, the basic issue is not the proper characterization of the employer's conduct under the LMRA. The issue is whether the employer's conduct is of such character as to justify a construction of the no-strike clause which renders it inapplicable to the strike in question. A no-strike clause may, of course, be inapplicable even though no employer unfair labor practice is involved; for example, when a strike occurs during the term of a contract after an impasse produced by negotiations concerning wages under a reopening clause. On the other hand, a no-strike clause may be applicable despite the presence of employer unfair practices; for example, where a no-strike clause specifically applies to strikes caused by unfair labor practices.²⁶⁷ Accordingly, what is decisive in the hypothetical contract action is not the characterization of the employer's or the employees' conduct under the LMRA, but an appraisal of the relationship of such conduct to the purposes which can reasonably be imputed to the parties.

266. This procedure is recommended in Note, 66 YALE L.J. 284, 291 n.40 (1956). For a thoughtful general discussion of "primary jurisdiction" see Jaffe, *Primary Jurisdiction Reconsidered: The Anti-trust Laws*, 102 U. PA. L. REV. 577 (1954).

267. It is true that the Court in *Mastro Plastics* obliquely questioned the validity of a clause barring strikes during the term of an agreement which were provoked by antecedent employer unfair practices. 350 U.S. at 283. But the difficulties of distinguishing between unfair labor practice strikes and economic strikes and the availability of the Board's machinery for the correction of unfair labor practices would appear to be ample grounds for sustaining the parties' agreement to forego all use of economic pressure during the contract term. The validation of such a broad no-strike clause would make clear that the basic issue before the courts would be interpretation of the contract rather than of the Board's doctrines as to protected activity.

This formulation of the issue appears to be supported by the limitation recently engrafted on the *Mastro Plastics* doctrine by the Board's decision in *Mid-West Metallic Prods., Inc.*, 121 N.L.R.B. No. 164 (Oct. 14, 1958). In that case, a strike protesting a discriminatory discharge was held to be unprotected because it was contrary to a con-

If, as the foregoing discussion suggests, the basic issue in a section 301 action turns on the application of contract doctrine, courts should be free to dispose of such actions without waiting for an NLRB characterization of employer or employee conduct under the LMRA. Indeed, the position urged above implies that courts in such actions should be free to ignore previous Board characterization of the particular conduct in issue. Such an approach, it is true, permits the same conduct to be subject to different and conflicting characterizations by the Board and the courts, respectively, and permits the courts to interfere with conduct previously characterized by the Board as protected.²⁶⁸ But such Board characterizations should not be binding on courts authorized by section 301 to make determinations concerning the reach of the contract. The resultant differences, like those involved in discordant Board and court determinations under subsection 8(b)(4) and section 303, respectively, could properly be dismissed as the inescapable result of authorizing different tribunals to adjudicate the same conduct for different purposes.²⁶⁹

Whatever the force of the foregoing analysis, or its applicability to other situations,²⁷⁰ other considerations of convenience and policy suggest the undesirability of fragmenting jurisdiction when unfair labor practices are urged as a defense in an action on a collective bargaining agreement. The Board's machinery has been subject to great delays, which may be increased by the recent expansion of the Board's jurisdiction. The fragmentation of jurisdiction would import such delays into contract actions. Thus, in all actions on no-strike pledges, defendant unions might attempt to postpone judicial relief by defenses (meritorious and frivolous) based on alleged unfair practices by the employer. Delay is particularly undesirable in connection with any action to enforce collective bargaining agreements because of the adverse impact of such actions on the parties' continuing relationship and on subsequent negotiations. In the case of actions for injunctive relief against strikes and lockouts, there are, of course, additional reasons for avoiding the pyramiding of delays. If the Supreme Court should sanction such injunctive relief notwithstanding the Norris-LaGuardia Act, its decision would reflect the judgment that the

tractual provision barring strikes until the exhaustion of the grievance procedure. The Board distinguished *Mastro Plastics* on the ground that a grievance could be processed in five days and that the antecedent unfair labor practice did not threaten the union's existence. Accordingly, it dispensed with the requirement, announced by both the Board and the Court in *Mastro Plastics*, of an "explicit waiver" of the right to strike against an unfair labor practice.

268. But cf. 58 COLUM. L. REV. 278, 279 (1958).

269. The recognition that § 301 jurisdiction is independent of NLRB jurisdiction will give rise to questions as to the effect to be given by one forum to prior determinations made in another forum. Compare Meltzer, *supra* note 256, at 35 n.112.

270. Thus the parties might attempt to invite Board determinations concerning rights under their agreement by embodying statutory standards therein. A no-strike clause might, for example, expressly be inapplicable to strikes provoked by antecedent employer unfair labor practices. Such a clause would appear to make liability under the no-strike clause dependent on whether the employer's conduct had violated the statutory provisions defining unfair labor practices. And it is arguable that such a

national labor policy calls for a prompt preventive remedy. To defeat such a remedy because of concern for the Board's primary jurisdiction would hardly yield a coherent policy.

3. *Competence over matters which peculiarly involve NLRB expertise.* The contract actions discussed above all involve situations in which the basic issue turns on the meaning or applicability of contractual provisions. More troublesome questions of accommodation between judicial and administrative competence are raised where the result in a contract action turns (a) on whether a particular contract clause violates the provisions of the LMRA, or (b) on questions of representation.

Such matters involve the specialized insights attributed to the Board rather than the more general insights about the institution of contract attributed to the courts. For example, an employer may defend against an action to restrain or to grant damages for his violation of a union shop clause coupled with a checkoff provision. The issue before the court is whether the union shop arrangement satisfies the statutory requirements, *i.e.*, whether the provision on its face or in its application constitutes an unfair labor practice. In such situations, a strong case can be made for the invocation of primary jurisdiction. On the other hand, section 303 again may be invoked as an indication that where judicial competence is recognized by the statute such competence is not to be fragmented in order to protect the Board's jurisdiction. There is no apparent reason for permitting the courts under section 303 to deal with the complex and vague proscriptions of secondary boycotts while denying their competence to pass on other provisions which may invalidate contract clauses invoked in an action under section 301.

There is no easy escape from the dilemma. The recognition of complete judicial competence to deal with all questions raised by section 301 actions will run the risk of results incompatible with, and subject to nullification by, Board determinations. The fragmentation of judicial competence by the invocation of primary jurisdiction will subject the plaintiff to delays in an area where stability in labor relations calls for a prompt remedy. Although the problem is scarcely an invitation to dogmatism, the importance of a prompt remedy, the implications of the Court's recognition of independent judicial

determination should be made by the NLRB rather than by the courts, at least in situations where the Board's jurisdictional standards, the LMRA's statute of limitation, and other requirements for the use of the Board's machinery could be satisfied. Despite the parties' incorporation of statutory standards in their agreement, the basic issue is one of the construction and application of the contract. If the LMRA is read as remitting such questions to the courts, it is doubtful that the parties' agreement should be permitted to change the legislative allocation of authority.

The argument that the basic issue involved is contractual is subject to the qualification that the contractual issue may turn on expectations flowing from the statute. *Lincoln Mills* implies, however, judicial competence to deal with such statutory issues enmeshed in contract actions.

competence under section 303, and the provision for an apparently similar competence under section 301, may justify the rejection of "primary jurisdiction" in actions involving the validity of a contract clause under the LMRA. In any event, this approach apparently has the persuasive support of Judge Magruder, speaking for the First Circuit.²⁷¹

The difficulties of accommodating administrative and judicial competence in section 301 actions are most acute when the validity of an agreement or its enforceability turns on a question of representation. For example, such questions would be decisive in the following situations: (1) A defendant (employer or union) may urge that the contracting but uncertified union lacked majority support in the appropriate unit when the agreement was executed and that the agreement was consequently invalid.²⁷² Such questions involve complex administrative standards governing unit determinations and the indicia of majority support—matters which peculiarly involve the Board's expertise. (2) During the term of a contract valid *ab initio*, the employees of the unit involved may shift their allegiance to a rival union. Such a shift may produce problems as to which union is entitled to administer the old contract. Furthermore, if the employer recognizes and contracts with the rival, there will be problems as to the effect of this action on the predecessor's rights under the old contract.

Where the successor union has been certified by the NLRB, the courts can generally resolve issues concerning the right to enforce the old contract or the right to enforce a later and inconsistent contract without invoking rules within the Board's special competence.²⁷³ Indeed, the Board has abstained from determining such contractual issues even when directing a representation election at a time prior to the expiration of an existing col-

271. *International Bhd. of Teamsters, AFL v. W. L. Mead, Inc.*, 230 F.2d 576, 581-82 (1st Cir.) (dictum), *petition for cert. dismissed per stipulation*, 352 U.S. 802 (1956). In *Ferguson Steere Motor Co. v. International Bhd. of Teamsters*, 223 F.2d 842 (5th Cir. 1955), the court held, however, that federal district courts lack jurisdiction to grant a declaratory judgment that a contract had been renewed by its terms. The grounds for decision were (1) jurisdiction was barred by *Westinghouse* and (2) the issue involved was peculiarly within the Board's jurisdiction under § 8(d), which together with § 301 had been invoked as a source of jurisdiction by the plaintiff. *Westinghouse* is a doubtful basis for denying jurisdiction where the issue is the existence of a contract rather than the union's capacity to enforce "personal" rights thereunder. The second ground for the decision is equally doubtful. Contrary to the court's assumption, the issue as to whether an automatic renewal clause is operative is distinct from the issue as to whether a union has violated § 8(b)(3) by noncompliance with § 8(d). See *International Union of Operating Eng'rs v. Dahlem Const. Co.*, 193 F.2d 470, 473-74 (6th Cir. 1951).

272. This position has been adopted by the Board. *Adam D. Goettl*, 104 N.L.R.B. 1076 (1953).

273. In *Modine Mfg. Co. v. Grand Lodge Int'l Ass'n of Machinists*, 216 F.2d 326 (6th Cir. 1954), a certified union had executed a contract containing union shop and checkoff provisions. Prior to the expiration of the contract, the NLRB certified another union as the representative of the bargaining unit. The Sixth Circuit upheld the district court's jurisdiction under § 301 to determine whether the displaced union was entitled to enforce the provisions described above even though the contractual issue depended on the provisions of the LMRA governing the employer's duty to bargain and other related duties vis-à-vis a newly certified union.

lective agreement.²⁷⁴ The recognition of judicial competence over such issues is accordingly necessary to avoid a vacuum.

If, however, no such certification has occurred, determination of rights to enforce the first contract or the effect of a later contract between the employer and an alleged successor union depends on complex and shifting administrative standards regarding "schism," the lifting of "the contract bar," and the *Midwest Piping*²⁷⁵ doctrine.²⁷⁶ Although a full treatment of these matters is not appropriate here, several observations are in order: The controlling standards peculiarly involve the Board's expertise and give rise to problems which courts of general jurisdiction may find esoteric and troublesome.²⁷⁷ Furthermore, determinations concerning breach of contract which involve such issues could be nullified by the exercise of the Board's paramount power. Such considerations make a strong case for the invocation of primary jurisdiction.

²⁷⁴ *Hershey Chocolate Corp.*, 121 N.L.R.B. No. 124 (Sept. 18, 1958). See also *American Seating Co.*, 106 N.L.R.B. 250, 254 (1954).

²⁷⁵ *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945).

²⁷⁶ See generally Freidin, *The Board, The "Bar," and The Bargain*, 59 COLUM. L. REV. 61 (1959).

²⁷⁷ In *International Union, United Industrial Workers v. Star Prods. Co.*, 16 Ill. App. 2d 321, 148 N.E.2d 43 (1958), plaintiff union and defendant employer entered into a contract which contained a checkoff provision and apparently a union security provision. Before the contract expired, some members of plaintiff union joined a rival union. The employer and the rival, which had not been certified by the NLRB, entered into a contract inconsistent with the plaintiff's unexpired contract. Plaintiff petitioned the state court for a declaration that its contract was "valid from its inception" and for any further appropriate relief. The trial court dismissed for want of jurisdiction. The appellate court, sustaining the judgment, urged that (1) the original validity of the contract depended on questions as to majority status and the appropriate unit, which, it implied, were within the Board's exclusive competence; (2) the validity of the second and inconsistent contract depended on the application of § 8(a) (5) and the application of the "schism doctrine"; since the continued force of the first contract also involved these issues, which were appropriate for Board determination, the trial court lacked jurisdiction (*semble*); and (3) as a result of the Board's, *i.e.*, the regional director's, refusal to issue a complaint on the ground of "insufficient" evidence of statutory violations, the issues as to the validity of the first contract were *res judicata*.

It should be noted that the court's first ground would appear to destroy judicial competence under § 301 unless the contracting union had been certified within a year of the execution of the contract relied upon. *But see International Bhd. of Teamsters, AFL v. W. L. Mead, Inc.*, 230 F.2d 576, 581-82 (1st Cir.), *petition for cert. dismissed per stipulation*, 352 U.S. 802 (1956). Furthermore, in *Westinghouse Mr. Justice Frankfurter* declared that "in such actions [under § 301], the validity of the agreement may be challenged on federal grounds—that the labor organization negotiating it was not the representative of the employees involved, or that subsequent changes in the representative status of the union have affected the continued validity of the agreement." 348 U.S. at 451. The supporting citation was "*cf. La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18," which recognized the Board's exclusive jurisdiction over representation questions. Query whether "*cf.*" implies judicial competence over such questions in the context of § 301 actions?

The reliance on *res judicata* in the *Star Products* case appears to raise serious constitutional difficulties, which can only be mentioned briefly. The court's approach would permit plaintiff's alleged contract rights to be destroyed on the basis of an *ex parte* administrative investigation, in which neither the plaintiff nor anyone else is accorded the substance of a fair hearing. It is true that the plaintiff's interest in a statutory remedy may be destroyed by similar administrative determinations, but it does not follow that asserted contract rights, whose enforcement generally depends on the plaintiff's initiative, can constitutionally be destroyed in the same fashion. See *Graybar Elec. Co. v. Automotive Employees*, 365 Mo. 753, 771, 287 S.W.2d 794, 804 (1956) (dissenting opinion).

It is possible, however, to read section 301 as a somewhat oblique rejection of that doctrine. That section applies to "suits for violations of contracts between an employer and a labor organization *representing employees* in an industry affecting commerce." (Emphasis added.) This language is extremely puzzling: It does not make clear whether the union is required to have representation status (1) as of the time of suit, (2) at the time the agreement was executed, or (3) as of such time or times as are relevant in the light of the issues to be litigated. But the third-mentioned approach to this ambiguity seems to be consistent with the mandate of *Lincoln Mills*, that contract issues be resolved in the light of the policy of the national labor laws. Another ambiguity of the quoted language is more important in relation to primary jurisdiction: Does the inclusion of the reference to representation in a section creating judicial competence imply that the courts, rather than the Board, are to resolve representation issues relevant to contract litigation? That view has been advanced by Judge Magruder, speaking for the First Circuit.²⁷⁸ It is doubtful, however, that the puzzling language of section 301 would justify the rejection of primary jurisdiction if its application appears justified by an appraisal of the competing interests. Indeed, the language quoted above may be dismissed as disclosing nothing about the legislative purpose concerning a relatively sophisticated concept, primary jurisdiction; that language, after all, may be read as involving only an inartistically executed effort to limit section 301 to cases "involving commerce." Such a construction is supported by the fact that the quoted language may be read as not referring to majority status since a union lacking such status may nevertheless enter into a valid "members only" agreement.

The distinctions suggested above between issues of contract interpretation and genuine issues of primary jurisdiction in actions on collective bargaining agreements are complex. Perhaps they are unduly complex. Perhaps the complexities should be avoided by reading section 301 as a mandate to the courts to decide whatever unresolved issues must be decided to dispose of a claim for breach of contract. Such an expansive view of judicial power would involve the courts in difficult and specialized issues,²⁷⁹ but it would also reduce the possibility that undue preoccupation with so-called "expertise" and with "uniformity" would result in the denial of prompt and comprehensive relief and, in some cases, the denial of any relief.

4. *Judicial enforcement of no-raiding agreements.* In an attempt to resolve troublesome jurisdictional rivalries, organized labor has employed

278. *International Bhd. of Teamsters, AFL v. W. L. Mead, Inc.*, 230 F.2d 576, 581-82 (1st Cir.), *petition for cert. dismissed per stipulation*, 352 U.S. 802 (1956).

279. In exercising equity jurisdiction in § 301 actions, courts will presumably apply conventional doctrines under which relief may be withheld as a matter of discretion where an alternative and adequate remedy exists or where equitable relief may be nullified in another forum. Although similar considerations enter into the application of "primary jurisdiction," the canons of equity would appear to import considerably more flexibility.

no-raiding pacts, which purport to allocate representation and organizational rights and which provide for the settlement of conflicting representation claims by arbitration.²⁸⁰ Section 301 by its terms extends judicial power to such interunion agreements. But specific enforcement of such agreements by the courts gives rise to troublesome difficulties. Such enforcement may bar unions from recourse to the representation machinery of the Board despite the fact that the Board is of the view that that machinery should be open even to unions who invoke it in violation of their contractual obligations. The pertinent difficulties and potentialities for conflict between the courts and the Board are illustrated by the *Personal Products* litigation.

The Textile Workers Union of America (TWUA) filed with the Board a petition for an election among the employees of the company's Chicago plant, who had been represented by the United Textile Workers of America (UTW). Several months after a Board hearing on this petition, the impartial umpire under the AFL-CIO no-raiding agreement ruled that TWUA had violated that agreement by its organizational campaign and by its filing of an election petition with the Board.²⁸¹ Under that agreement, that ruling required TWUA to withdraw its petition and its recognition demand, but TWUA ignored that requirement. The Board, rejecting UTW's objections based on the no-raiding agreement and the umpire's award, directed an election.

Several days before the election, UTW secured a temporary order from a federal district court directing TWUA to withdraw its representation petition and to comply generally with the arbitration award.²⁸² On appeal, the Court of Appeals for the Seventh Circuit issued an interim ruling suspending that order. The Board, at the parties' request, thereupon indefinitely postponed an election. Subsequently, eleven months after the petition for election and four months after the direction of an election, the court of appeals, invoking section 301, as had the trial court, vacated its interim order and affirmed the judgment below.²⁸³ The court of appeals had declined to permit

280. For a useful discussion of these agreements see Aaron, *Interunion Representation Disputes and the NLRB*, 36 TEXAS L. REV. 846, 851-56 (1958).

281. *United Textile Workers v. Textile Workers*, 30 Lab. Arb. 244 (1958).

282. *United Textile Workers v. Textile Workers*, 42 L.R.R.M. 2066 (N.D. Ill. 1958).

283. *United Textile Workers v. Textile Workers*, 258 F.2d 743 (7th Cir. 1958), 59 COLUM. L. REV. 202 (1959). The court of appeals did not specifically refer to the Norris-LaGuardia Act but relied generally on *Lincoln Mills* as justifying its enforcement of arbitration clauses in interunion agreements. The point emphasized in *Lincoln Mills*, that arbitration clauses are the *quid pro quo* for no-strike clauses, is plainly inapplicable in the context of interunion agreements. But the failure to arbitrate interunion representation disputes, as much as the failure to arbitrate grievances under collective bargaining agreements, was "not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." 353 U.S. at 458. Furthermore, enforcement of interunion arbitration clauses is not incompatible with the specific prohibitions of § 4 of Norris-LaGuardia. Accordingly, the extension of *Lincoln Mills* to this context, although not free from doubt, seems appropriate.

the Board to intervene or to file a brief as *amicus curiae*, and had returned the brief tendered by the Board.²⁸⁴

Four months after that affirmance, the Board granted UTW's request to withdraw its petition, noting in a brief opinion that that request, which had not been supported by any reasons, presumably had been prompted by the court order.²⁸⁵ The Board explicitly declined to acquiesce in the position of the Seventh Circuit and added that in the future it would expect to be made a party to court actions brought to restrain a party from appearing on a ballot "as directed by the Board"; and that otherwise it would be disposed to deny requests for withdrawal of election petitions made pursuant to a court order.²⁸⁶ Two members of the Board disassociated themselves from these comments.

Personal Products highlights two distinct, but related, problems: (1) the respective powers of the courts and the Board with respect to private agreements which are designed to restrict access to the statutory representation machinery; and (2) the judicial and administrative methods which might appropriately be followed, as a matter of comity, for the purpose of reducing collisions between the courts and the Board when both tribunals are asserting independent jurisdiction of what is, in fact, if not in form, the same subject matter. It is to these questions which we now turn.

No-raiding pacts appear to be the principal kind of interunion agreements brought within judicial competence by section 301.²⁸⁷ Accordingly, the denial of judicial power to enforce such agreements would appear to involve a sub-

284. This information was supplied by Mozart Ratner, Esq., counsel for the UTW in the *Personal Products* litigation, together with the information that he had advised the court that he consented to the Board's appearing as *amicus*.

285. *Personal Prods. Corp.*, 122 N.L.R.B. No. 84 (Dec. 18, 1958).

286. Presumably, the Board did not insist on being made a party at the arbitration stage because the only function of the arbitrator is to apply the agreement and not to determine whether its application is compatible with the basic statutory policies.

287. The words "or between any such labor organizations" were added to § 301 in conference. See 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 279 (1948); 2 *id.* at 1543. The legislative history does not spell out the reasons for that addition.

The precise content to be given to "labor organizations" as used in § 301 is far from clear; nor does the statute or its history provide a standard for resolving this ambiguity. The phrase could be extended to suits involving an international and a constituent local or a former local which has sought to disaffiliate from the international, on the ground that each is a distinct labor organization. Cf. *NLRB v. Highland Park Mfg. Co.*, 341 U. S. 322 (1951), which dealt, however, with a different problem. But lower federal courts have tended to reject such an expansive reading of the statute and have generally held it inapplicable to disputes over property arising from disaffiliation controversies. See cases cited in 59 COLUM. L. REV. 202, 203 nn.14-19 (1959). Such holdings have sometimes ignored the fact that the controversy embraced issues concerning the impact of a collective bargaining agreement. See *Sun Shipbuilding & Dry-Dock Co. v. Industrial Union of Marine Workers*, 95 F. Supp. 50, 53 (E.D. Pa. 1950). But see *Local 1104, United Elec. Workers v. Wagner Elec. Corp.*, 109 F. Supp. 675, 683-84 (E.D. Mo. 1952). In view of the uncertainties concerning the applicability of § 301 to contractual disputes which could be said to be intra-union, its main coverage would seem to be agreements between two internationals (or two locals of different internationals) concerning representation and work-assignment claims.

stantial frustration of the purpose behind the language providing for judicial competence over interunion agreements. But difficulties would also result from recognition of such power since judicial enforcement would control access to the statutory machinery and would limit the Board in balancing competing statutory objectives in an area which has been considered to fall peculiarly within its expertise.²⁸⁸

It is arguable that the apparent collision between judicial and administrative competence is unreal because the courts' determination of the contractual issues need not bind the Board in its administration of the representation machinery. Accordingly, each tribunal would be master in its own area of competence, as defined by or implied by the statute. But such an argument ignores a vital consideration, *viz.*, that litigation in this context is designed to block access to the Board's machinery or to nullify the consequences of Board action. Consequently, judicial barriers to resort to the Board could, in effect, destroy *pro tanto* the Board's competence. Furthermore, if the courts, by enforcing no-raiding pacts, may block resort to the Board, presumably they could also nullify representation rights confirmed by a Board certification resulting from contractually proscribed union action. Thus, for example, in *Personal Products*, if the Board had denied the offending union's motion for withdrawal of its election petition and had ultimately certified it, certification would plainly have frustrated the purpose of the judicial decree. Under such circumstances, if judicial competence were independent of the Board action, the court would presumably have had (and would have exercised) the corollary power to protect the integrity of its processes by enjoining the offending union from exercising the representation authority confirmed by the Board's certification. Board nullification of judicial action would, moreover, undoubtedly move the courts to expand the scope of their preventive relief in the first instance, so as to bar the exercise of any representation powers in contravention of the pertinent no-raiding pact. Such relief before or after certification could also serve to prevent or nullify avoidance or evasion of no-raiding pacts through election petitions filed by employees rather than unions.

Thus, in the representation, as opposed to the unfair labor practice, context, separate spheres of judicial and administrative competence cannot be neatly delineated because—it is worth repeating—the basic purpose and effect of judicial action is to preclude resort to the Board's machinery or to nullify the representation rights confirmed by its use. Accordingly, either the Board or the courts must be recognized as having paramount authority in this context.

The language of the LMRA does not settle the problem of which tribunal is master. Subsection 301(a) is a general grant of power, to be exercised in

288. Cf. Meltzer, *supra* note 256, at 9 n.20.

accordance with the policies of the federal labor laws. Since one such policy has been the Board's exclusive power over representation matters, judicial action could be subordinated to the Board's policies and would, if in conflict, be invalidated. Appealing as this result is, it would, as already indicated, drain section 301, insofar as it is applicable to interunion agreements, of much of its vitality. Furthermore, it would run counter to the heavy reliance which the statute places on voluntary mechanisms in connection with the settlement of work-assignment disputes, which are closely related to representation disputes.²⁸⁹

As to the Board, nothing in the statute specifies how its powers under section 9 should be dovetailed with judicial action under section 301. Subsection 10(a), which grants it plenary powers with respect to unfair labor practices, does not expressly apply to representation matters. An *inclusio unius* argument, in this complex context, would, however, be a barren exercise in word chopping. No reason appears for granting the Board plenary power to override arbitration and judicial decrees impinging on unfair labor practices while denying such power in the representation context. On the contrary, representation matters would appear to present an especially appealing case for recognizing the Board's plenary power.

Policing of the representation machinery has been committed largely to the Board. The controlling policies have evolved largely from the exercise of the broad discretion accorded to it by the courts and the Taft-Hartley Congress. Its determinations are, moreover, largely insulated against direct judicial review.²⁹⁰ Finally, its facilities are superior to those of the courts for determining the effect and the value of no-raiding pacts and integrating them with the statutory machinery. Under these circumstances, indirect judicial control over the Board's machinery, by way of equitable enforcement of no-raiding pacts, would involve an incongruous and disrupting departure from the basic pattern of the statute. It would either bring the Board and the courts into direct conflict in which courts, by virtue of their broad equity powers, would prevail, or it would subordinate Board action to judicial determinations in an area which demands all of the special insights and expertise imputed to the Board.

Such results could be avoided either by denying judicial power specifically to enforce no-raiding pacts, or by a rigorous limitation of that power in order

289. See § 10(k) of the LMRA; *Wood Lathers Int'l Union*, 119 N.L.R.B. 1345, 1352-53 (1958); NLRB, Rules and Regulations and Statement of Procedure, 29 C.F.R. §§ 102.79-83 (Supp. 1959).

290. Cf. *Leedom v. Kyne*, 358 U.S. 184 (1958). Nevertheless, a union aggrieved by the Board's disregard of a no-raiding pact and its consequent certification of a rival could secure judicial review indirectly by taking action leading to a Board determination that the union had violated § 8(b)(4)(c). Cf. *NLRB v. National Plastic Prods. Co.*, 175 F.2d 755 (4th Cir. 1949).

to prevent its exercise from interfering with the Board's representation machinery. Under the second alternative, courts, although competent to compel arbitration pursuant to no-raiding pacts, would be disabled from enforcing arbitration awards by blocking access to the Board's machinery or by nullifying its results. Arbitration in this context would thus depend on its moral impact plus such informal influence as organized labor could bring to bear on unions offending against no-raiding pacts.

Although the difficulties involved present no occasion for dogmatism, the second alternative seems the preferable one. It would utilize the arbitration mechanism in the settlement of representation disputes while leaving the Board free to integrate arbitration awards with its total representation policy.²⁹¹ It is true that the adoption of this approach and the consequent unenforceability, under section 301, of these arbitral awards might result in disparagement of the arbitration process and would involve the risk of judicial action beyond the limits suggested above. But these risks seem to be justified by the contribution which might flow from arbitration and by the desirability of giving some force to the provisions of section 301 with respect to interunion agreements.

The difficulties and uncertainties surrounding Board and judicial power with respect to no-raiding pacts made it particularly desirable in *Personal Products* for both tribunals to be sensitive to the demands of comity. The performance of both tribunals on this score left something to be desired. The court of appeals rejected the Board's request to act as amicus curiae as well as its request to intervene. The Board's failure to request intervention until the case was on appeal warranted the denial of that request.²⁹² But the disposition of the amicus request was questionable given the consent by counsel for the UTW to the Board's acting as amicus, the rationale of *Lincoln Mills*, the involvement of the Board's responsibilities, and the light the Board might have shed on new and difficult problems. The court's brusque rejection of the Board's views had, on the surface, a quality of churlishness especially inappropriate in an area requiring novel and delicate jurisdictional adjustments.

As for the Board, in *Personal Products* it did not, in my opinion, adequately support its disregard of the arbitration process. Even though its paramount power is conceded, its approach would plainly undermine the effort of the union movement, through private agreement, to curb jurisdic-

291. Cf. notes 260-61 *supra* and accompanying text. It is true that the Board could be said to have followed such an approach in *Personal Products*. But its reliance on an abstract and unqualified concept of "free choice" has been properly and effectively criticized as ignoring the limitations on such choice resulting from the history of particular unions and from the need to protect competing interests. See Aaron, *supra* note 280, at 858-61. If reliance on such abstractions were abandoned, the Board could usefully shift its emphasis to more concrete considerations, such as the failure of the union which had prevailed in arbitration to discharge its duty of fair representation or to observe the statutory union shop restrictions.

292. See 4 MOORE, FEDERAL PRACTICE ¶ 24.13 (2d ed. 1950).

tional rivalries, which have been an unruly and long-standing source of difficulties for organized labor, neutral employees, and the public. The problem of integrating such agreements with the statutory scheme called for a careful assessment of the effects of the private machinery on the facts of industrial life. The Board presented no such assessment in the judicial or administrative phases of *Personal Products*. It relied instead on a broad and abstract concept of free choice for employees in the choice of their bargaining representative; it passed over the fact that in other contexts it has limited such choice to promote other interests; and it offered no enlightenment as to why contractual mechanisms should be respected in connection with work-assignment disputes but ignored with respect to representation disputes.²⁹³ Its approach has been the subject of comprehensive and wise criticism elsewhere.²⁹⁴ Here it is sufficient to add only that the Board's failure to assess the institutional impact of no-raiding pacts was wholly inappropriate for an agency invoking its own expertise as the basis for denying or claiming the right to override judicial power, which section 301 purports to recognize.

XI. CONCLUSION

Those whose patience has brought them this far may feel a sense of despair about the complexities and the paradoxes involved in the accommodations between federal and state power over labor relations (or involved at least in this article). In a period bristling with primitive denunciation of the Supreme Court, it is worth repeating that these problems are not the Court's invention. They result in part from the complexities of a federal system, which are magnified in a "field" such as labor relations, which intersects with so many activities and involves such diverse forms of regulation. They result also from the default of Congress with respect to fundamental issues whose solution determines how and by whom a modern economy should be governed and, indeed, in some situations, whether it is to be governed at all.

In the context of labor relations, the judicial process is a doubtful instrument for filling the policy and power vacuum left by Congress. The problems involved are highly charged and political in every legitimate sense. Under the current statute, the Court, no matter how it decides, cannot escape the charge that it is preferring one powerful interest over another, or one of two competing faiths about the contemporary role of state as opposed to federal power. Labor relations issues do not, moreover, lend themselves to solution by comprehensive formulas which the Court tends to lay down

293. In this connection, it should be noted that in some cases the settlement of a work-assignment dispute may, for practical purposes, dispose of any representation question.

294. See Aaron, *supra* note 280, at 858-61.

to reduce case-by-case tests of pre-emption and to rationalize policy judgments in terms of the legislative will. Thus, for example, the role of the states with respect to strikes for higher wages might well be different from their role as to strikes to impose geographical trade barriers or to prevent technological innovation. But the Court's formulas and the Court's processes are generally not adequate to the task of making such functional adjustments.²⁹⁵ Even when the pressures of particular situations produce such adjustments, they frequently appear to fracture the emerging logic of the Court's precedents. Whatever their *ad hoc* merit, they invite familiar outcries: The Court is sacrificing the traditions of humility and craftsmanship, which subordinate results to method; it is assuming the prerogative of a third chamber; it is converting litigation into a game of chance.

Such difficulties are, of course, part of the burden of adjudication, particularly federalist adjudication. But their current multiplication, through congressional default, has in the context of labor relations created avoidable and costly internal and external strains on the Court, and has produced results, such as *Guss*, which no rational legislature, and no rational Court, free from the compulsions discovered in its precedents and in a murky statute, would decree.

It may be that, despite the defects of the judicial process, the issues of federalism in labor relations must be left to the Court because they are too complex and controversial for legislative determination. Certainly, the lack of federalist sophistication in the Taft-Hartley Congress and the subsequent legislative paralysis support such a judgment. But a decade of litigation and debate have at least identified many of the principal issues. They now seem ripe for congressional determination, and they also suggest the areas in which the Court should be afforded basic guides for federalist accommodation.

An old and vital tradition cautions against an approach to such accommodation which acquiesces in perpetual abdication by the responsible organ of government. Perhaps the competing assumption that Congress can and will responsibly turn to the task involved is an act of faith. But such action appears to be the only possible escape from either continuing disorder in adjudication or almost total displacement of state power by the Court; and either choice will further damage the Court's position. Although congressional solutions may turn out to be "unwise" or inept, they would at least be wise in the sense that they would reflect a healthy tradition under which basic political decisions are made and changed by avowedly political agencies.

295. See Hays, *Federalism and Labor Relations in the United States*, 102 U. PA. L. REV. 959, 978-79 (1954).