THE JURISDICTION OF FEDERAL COURTS
IN LABOR DISPUTES

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I

The jurisdiction of the federal courts in labor disputes furnishes an interesting
opportunity for study of the role to which the courts are assigned by Congress in the
handling of a specific national problem. In this case, of course, the problem is an
unusually difficult and troublesome one. This jurisdiction is of further interest as a
case study of the consistency of present-day practices with original constitutional in-
tent concerning, and the historical development of, the role of the federal judiciary
in the national scene. State and federal relations are, of course, in issue.

Emotion, expediency, legislative improvisation, political maneuvering, conflicting
economic forces, governmental planning, and the role of the federal judiciary in such
planning are all involved in this laboratory specimen of the federal judiciary in
action.

Current legislation is of special interest in this connection.

II

For many years the policy of the national government was directed toward re-
moving the federal judicial system as a restraining influence on trade-union activity.
The policy was specifically expressed in 1914 when Congress declared that "nothing
contained in the antitrust laws shall be construed
forbid or restrain individual
members of [labor] organizations from lawfully carrying out the legitimate objects
thereof; . . ."1 It was reaffirmed in 1932 with the enactment of the Norris-LaGuardia
Act, restricting the jurisdiction of federal courts in the issuance of injunctions in
labor cases.2

This policy was followed, in general, by state governments as well.
Parallel with this development, both the state and the federal governments evi-
denced increasing willingness to refer labor disputes to special boards and agencies,
such as the National Labor Relations Board and comparable state boards and com-
missons. While the National Labor Relations Board was granted jurisdiction de-
signed to strengthen labor unions, it was not unusual for state agencies to exercise
restraining power as well.3

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3 Wisconsin, a pioneer in labor legislation, enacted such a law in the Wisconsin Employment Peace
Act of 1939. Wis. Stats. §§111.01-111.19. For a comparison with the Wagner Act, see Lampert, The
Wisconsin Employment Peace Act, 1940 Wis. L. Rev. 193.
This inclination to remove the courts as agencies for the regulation of union activity was justified by its exponents on several grounds. It was said that the judges were inclined to be overly generous in the use of the injunction in labor disputes. Labor consistently expressed a far greater fear of trial by judges than trial by battle; and with the growth of government sympathetic to labor, management has assumed corresponding apprehensions. Proposals for compulsory arbitration as a panacea for disastrous labor-management stalemates have consistently fallen, by mutual consent, before the eternal problem of finding the impartial arbitrator in the judicial system or elsewhere.¹

Opponents of judicial control contended, also, that the problems of labor and management were sui generis in the judicial sense, calling for judgments of policy and determinations of problems outside the experience and training of the average judge and beyond the customary boundaries of the judicial function. There was, in part, a suggestion that labor questions were political questions and therefore subject to political rather than judicial determination. And there was, in part, the growing prestige of expertise in the determination of special or technical problems, whereby jurisdiction was taken from the judicial jack-of-all-problems and given to the judicial specialist—with the name of commissioner or administrator. Furthermore, the constant fear of over-burdening the federal judiciary with the multiplying problems of a complex and growing society made itself felt.

It is interesting to note, however, that in the same period Congress, particularly on one occasion, indicated willingness to grant broad jurisdiction to the federal courts in aid of labor. In the Fair Labor Standards Act of 1938 it is provided that an employee may sue to recover unpaid minimum wages or unpaid overtime compensation “in any court of competent jurisdiction . . .”¹¹ This provision is read by the courts in conjunction with Section 41(8) of the Judicial Code⁸ to give the federal courts broad jurisdiction in such cases.⁷ A reference will be made later to the validity of this jurisdiction.

During the period which may be broadly described as that of World War II, Congress underwent a gradual but definite shift in its approach to labor and management relations. Turing from a program designed to favor and bolster the growth of trade unions, it indicated in one legislative enactment and then another⁸

¹¹This subsection provides that the federal district courts shall have original jurisdiction “of all suits and proceedings arising under any law regulating commerce.” 36 Stat. 1092 (1911), 38 Stat. 219 (1913), 28 U. S. C. §41(8) (1940). The use of the words “arising under” herein should be noted with reference to the discussion which is to follow.
a change in fundamental sympathy, until finally it became evident to even the most casual observer that Congress had shifted its fear from the danger of a strong management force oppressive of labor to a fear of union organization which it considered strong enough to constitute a threat to the public welfare.\(^9\)

This new congressional attitude attained its fullest expression in the Eightieth Congress. In June of 1947 the Taft-Hartley Act was passed.\(^10\) While it retained the provisions of the Wagner Act protecting the organization of trade unions, it established new rules and procedures designed to protect management and regulate labor. Of most significance in relation to this discussion, it broadened the participation of the federal judiciary in labor matters by providing not only for jurisdiction in aid of labor, as in the past, but also for jurisdiction over some provisions of the Act designed to restrict and police labor.

III

The enactment of the Taft-Hartley Act may well mark the beginning of a new role for the federal courts in the field of labor-management relations—a role for which they were earlier considered unsuited.

Particularly noteworthy in this regard are the provisions of Section 301 of Title III of the Act.

This section provides that in suits for violation of labor contracts, the jurisdiction of the subject matter in the federal courts may be predicated upon the fact that the case involves “an employer and a labor organization representing employees in an industry affecting commerce.”\(^11\)

The evident breadth of this grant of jurisdiction has already evoked challenges of its constitutionality from several sources.\(^12\)

The section further seeks to widen the doors of the federal courts by its generous provisions concerning jurisdictional amount,\(^13\) venue,\(^14\) service of process,\(^15\) and agency.\(^16\) Provisions in other portions of the Act also serve to increase the powers of the federal courts in the regulation of labor.\(^17\)

The purpose of Congress in establishing this new role for the federal judiciary in

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\(^{9}\) It is, of course, not the purpose of this paper to consider whether this position was justified or not.


\(^{11}\) Section 301(a), 29 U. S. C. A. §185(a) (Supp. 1947).


\(^{13}\) Section 301(a), cited supra note 11.

\(^{14}\) Section 301(c), 29 U. S. C. A. §185(c) (Supp. 1947).

\(^{15}\) Section 301(d), 29 U. S. C. A. §185(d) (Supp. 1947).

\(^{16}\) Section 301(e), 29 U. S. C. A. §185(e) (Supp. 1947).

labor matters is best indicated by the statements of the members of Congress directly involved in the passage of the law.

The report of the Senate Committee on Labor and Public Welfare says:

In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts.

The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union. This is an almost impossible process.

If unions can break agreements with relative impunity then such agreements do not tend to stabilize industrial relations. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.

The initial obstacle in enforcing the terms of a collective agreement against a union which has breached its provisions is the difficulty of subjecting the union to process. The great majority of labor unions are unincorporated associations. At common law voluntary associations are not suable as such. As a consequence the rule in most jurisdictions, in the absence of statute, is that unincorporated labor unions cannot be sued in their common name. Accordingly, the difficulty or impossibility of enforcing the terms of a collective agreement in a suit at law against a union arises from the fact that each individual member of the union must be named and made a party to the suit.

Some States have enacted statutes which subject unincorporated associations to the jurisdiction of law courts. These statutes are by no means uniform; some pertain to fraternal societies, welfare organizations, associations doing business, etc., and in some States the courts have excluded labor unions from their application.

In the Federal courts, whether an unincorporated union can be sued depends upon the procedural rules of the State in which the action is brought.

The Norris-LaGuardia Act has insulated labor unions, in the field of injunctions, against liability for breach of contract. It has been held by a Federal court that strikes, picketing, or boycotting, when carried on in breach of a collective agreement, involve a "labor dispute" under the act so as to make the activity not enjoinable without a showing of the requirements which condition the issuance of an injunction under the act.

A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act.

There are no Federal laws giving either an employer or even the Government itself

18 The requirement that the "agreements" or the "disputes" affect commerce was not retained in the final legislation, as will appear in reading Section 301, 29 U. S. C. A. §185 (Supp. 1947).
any right of action against a union for any breach of contract. Thus there is no "sub-
stantive right" to enforce, in order to make the union suable as such in Federal courts.

Even where unions are suable, the union funds may not be reached for payment of
damages and any judgments or decrees rendered against an association as an entity may
be unenforceable. . . .

It is apparent that until all jurisdictions, and particularly the Federal Government,
authorize actions against labor unions as legal entities, there will not be the mutual
responsibility necessary to vitalize collective-bargaining agreements.10

The proponents of the Act in the Senate suggest the necessity for the adoption of
Section 301 on the ground that the state courts are inadequate to meet the needs of
enforcing labor contracts because of the existence of rules of procedure in the state
laws which are deemed unsound. Therefore, they conclude, the federal courts
should enter this field of jurisdiction, previously the preserve of state courts, so that
rules of procedure which the Federal Government prefers may take effect in this
type of contract litigation. Thus the federal courts are made the instruments for
the correction of state procedural limitations.

If this is a proper interpretation of the intent of Congress in enacting Section 301,
it is relevant to ask the additional question, whether such an intent is consistent
with the purposes of the framers of the Constitution in establishing and defining the
functions of the federal courts.

IV

The only clause in the judicial article of the Constitution which might sustain
the jurisdiction granted in Section 301 is the federal question clause20 Section
301(a) specifically excludes diversity of citizenship as a necessary condition of juris-
diction. Ordinarily, of course, diversity would constitute a basis for jurisdiction
over labor contract cases between citizens of different states if all requirements con-
cerning venue, jurisdictional amount, and process were complied with. The other
categories of jurisdiction contained in Section 2 of Article III clearly have no applica-
tion to, and confer no authority for, the jurisdiction conferred in Section 301.

The words of those who participated in the drafting of the Constitution and in
establishing the federal judiciary as a part of the new government indicate that the
federal question jurisdiction conferred in Article III, Section 2, was intended to
make the federal judicial power "coextensive" with the legislative.21 And Chief
Justice Marshall indicated that the federal question jurisdiction of the federal courts
was limited only by the extent of the delegated powers given to the legislature.22

21 "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,
the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."
23 "With respect to its cognizance in all cases arising under the Constitution and the laws of the
United States, he says that, the laws of the United States being paramount to the laws of the particular
That this was in the minds of the framers of the Constitution is indicated by the fears expressed concerning the application of such a sweeping and inclusive grant of judicial power to the national courts.\textsuperscript{23} James Madison, who appears to have been responsible for the “arising under” phrase,\textsuperscript{24} did not deny the generous import of the words; he referred to the judicial power as one which of necessity “should correspond with the legislative.”\textsuperscript{25}

The basic consideration in the minds of the Federalists, in 1787, was the recognition and the fear of the power of interpretation in the hands of unsympathetic and antagonistic state court judges.\textsuperscript{26} It was their purpose to insure that federal laws should be construed by federal judges with federal sympathies.\textsuperscript{27} The record of Chief Justice Marshall in the interpretation of federal laws over a period of three decades reflects the wisdom and good judgment of this purpose, from the standpoint of those favoring a strong central government.\textsuperscript{28} The need for uniformity in the

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states, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers?” Statement of John Marshall during the Virginia Convention on the Adoption of the Federal Constitution, 3 Elliott, Debates in the Several State Conventions on the Adoption of the Federal Constitution 553 (2d ed. 1836).

Governor Randolph said: “Notwithstanding the contempt gentlemen express for technical terms, I wish such were mentioned here. I would have thought it more safe, if it had been more clearly expressed. What do we mean by the words arising under the Constitution? What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word arising will be carried so far that it will be made use of to aid and extend the federal jurisdiction.” Id. at 572.

Mr. Grayson said: “My next objection to the federal judiciary is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude.

“arising under the Constitution? What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word arising will be carried so far that it will be made use of to aid and extend the federal jurisdiction.” Id. at 572.

Mr. George Mason said: “I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts. If there be any limits, they must be contained in one of the clauses of this section; and I believe, on a dispassionate discussion, it will be found that there is none of any check. All the laws of the United States are paramount to the laws and constitution of any single state. ‘The judicial power shall extend to all cases in law and equity arising under this Constitution.’ What objects will not this expression extend to? Such laws may be formed as will go to every object of private property. . . . To what disgraceful and dangerous length does the principle of this go! . . . To those who think that one national, consolidated government is best for America, this extensive judicial authority will be agreeable; . . .” Id. at 521-522.

On July 18, 1787, during the Constitutional Convention, Madison proposed: “That the jurisdiction shall extend to all cases arising under the Nat. Laws: And to such other questions as may involve the Nat. peace & harmony, which was agreed to nem con.” Hunt and Scott, Debates in the Federal Convention of 1787 279 (1920); see also Max Farrand, The Records of the Federal Convention of 1787 39 (1911).

Madison said: “The first class of cases to which its jurisdiction extends are those which may arise under the Constitution; . . . With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to.” 3 Elliott, op. cit. supra, note 22, at 532.

Bishop Hoadly expressed it in this manner: “. . . whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them.” Sermon (1717), quoted in J. C. Gray, The Nature and Sources of the Law 125 (2d ed. 1927).

The principles of Gestalt psychology are interesting and provocative in this connection.

For an excellent study of the Supreme Court, and particularly the record of Chief Justice Marshall, see Charles G. Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835 (1944). A chart reflecting the course of Marshall’s decisions is set forth on p. 611. It shows his record to be strongly nationalist.
interpretation and application of federal laws was also a consideration of substantial importance in giving the Federal Government its own judiciary. In matters where Congress has set up a broad legislative program and policy, within one of the legislative powers delegated in the Constitution, it may be argued that Congress is acting within the constitutional intent which has just been discussed in granting jurisdiction to the federal courts over all litigation connected with and forming a part of such a program. It may be said that this is true though the jurisdiction includes cases connected with the program which would otherwise be within the jurisdiction of the state courts only. It may be said that cases involving only questions of fact, rather than the actual interpretation of federal law, should be within the province of the federal courts on the ground that the federal program or policy may be thwarted just as effectively and completely in such litigation as in that involving questions of law. The result of such an approach—and this appears to be the approach reflected in the language of Section 301 of the Taft-Hartley Act—may profoundly disturb those who fear the advance of federal power. For here is an example of the potential blotting out of state judicial power on the same level as that which the country has experienced in relation to the liberal and free interpretation of the federal legislative powers in such fields as commerce, taxing and spending, and the war power.

But it may be said, on the other hand, that while the Constitution may bear the construction which finds an intent to safeguard federal plans and legislative programs through a friendly federal judiciary, it is going beyond the fair purport of the Constitution to permit the federal judicial system to be used as a means of indirect reform and modification of the rules of procedure of the states. The ultimate answer may possibly be found by inquiring whether the fundamental object in Section 301 is to implement a federal plan for the regulation of labor-management relations under the commerce power or to reform state rules of procedure in a single field—contract litigation involving labor.

The intent, however, of the drafters of law is one thing; the actual interpretation and application of the words of the law by the courts may be another. This proposition is particularly cogent in relation to federal question jurisdiction. But before this point is applied to the subject under discussion it is necessary to review some legal fundamentals.

Consider first the elementary proposition that the federal courts are courts of limited jurisdiction in the same sense that the federal government is one of limited

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29 "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." Cohens v. Virginia, 6 Wheat. 264, 415-416, (U. S. 1821).

30 See Forrester, Federal Question Jurisdiction and Section 5, 18 Tulane L. Rev. 263, at 289 (1943).

31 The writer intends to offer no attitude one way or the other on this matter in this paper.
powers. This is so because the federal government and its courts are authorized to exercise only those powers conferred upon them in the Constitution. State governments and state courts, on the other hand, are of general and residual jurisdiction.

Consequently, in order to determine the powers of the federal courts one must look to the language of the judicial article of the Constitution, Article III. If the federal courts attempt to exercise a power which is not set forth therein the attempt is unconstitutional. Not only must the power be contained in Article III; in addition, Congress must pass a statute authorizing the courts to exercise the jurisdiction.\(^3\)

But if Congress passes a statute presuming to authorize the federal courts to handle cases which are not within the terms of Article III the statute is unconstitutional.

In relation to the jurisdiction of the federal courts in labor matters, Congress, in Section 301 of the Taft-Hartley Act, has authorized jurisdiction so broad that it must approach, if it does not exceed, the limits of Article III. For that reason, in addition to its current interest, the Act affords a good basis for the theoretical consideration of the scope of federal jurisdiction in the field of labor law.\(^3\)

Section 301(a) says:

Suites for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, 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.

Clearly, the constitutionality of this broad grant of jurisdiction is based upon the words ". . . in an industry affecting commerce . . ."

A reflection of the congressional intent in the use of these words is found in the following statement from the report of the Committee of Conference on the bill:

Section 302 of the House bill and section 301 of the Senate amendment contained provisions relating to suits by and against labor organizations in the courts of the United States. The conference agreement follows in general the provisions of the House bill with changes therein hereafter noted.

Section 302(a) of the House bill provided that any action for or proceeding involving a violation of a contract between an employer and a labor organization might be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such contract affected commerce, or the court otherwise had jurisdiction. Under the Senate amendment the jurisdictional test was whether the employer was in an industry affecting commerce or whether the labor organization represented employees in such an industry. This test contained in the Senate

\(^3\) The original jurisdiction of the Supreme Court, expressly referred to in Article III, is an exception to this rule.

\(^3\) Section 216(b) of the Fair Labor Standards Act, 52 Stat. 1069 (1938), 29 U. S. C. §216(b) (1940), also contains a generous provision for jurisdiction as it has been construed by the courts. See note 7, supra. The language of the Taft-Hartley Act appears broader, however, and thus affords a better basis for consideration of the fundamental problem. But the analysis of the cases in relation to the extent of federal question jurisdiction in labor disputes, set forth hereinafter, is applicable, in general, to the validity of the grant of jurisdiction in connection with Fair Labor Standards cases.
amendment is also contained in the conference agreement, rather than the test in the House bill which required that the “contract affect commerce.”

Thus, whereas the House bill confined jurisdiction to those cases in which the contract involved in the case actually affected commerce (or jurisdiction existed on other, regular grounds), the bill as enacted sets up a much broader test by leaving out the requirement that the particular contract affect commerce and by requiring only that the industry affect commerce. It should also be noted that the congressional intent, as reflected by the above report, is that the jurisdictional requirement of the statute is met if either (1) the industry in which the employer is engaged affects commerce, or (2) the labor organization represents employees in an industry which affects commerce.

Accordingly, it would appear that neither the employer, the employees, nor the labor organization need affect, nor be engaged in, commerce to come within the grant of jurisdiction, so long as there is involved an industry which affects commerce. Furthermore, it could be argued under the wording of the statute and report that the particular employer and his employees need not be in an industry affecting commerce, if the labor organization represents employees in some other plant which is in an industry affecting commerce.

Additional questions are evident concerning the meaning and scope of the terms “labor organization” and “industry affecting commerce.”

Is such a broad grant of jurisdiction by Congress to the federal courts within the limitations of the federal question clause of Article III? Can it be said that the general reference to “an industry affecting commerce” may justify the conclusion that all litigation referred to in Section 301 concerning labor contracts involves suits “... arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; ...”? The answer to this question has been complicated by conflicting decisions of the United States Supreme Court. There are, however, only a few basic cases which are involved in the problem and which also form the basis for the confusion. Hundreds of other cases have been decided concerning the interpretation and meaning of the words “arising under,” but they simply repeat and frequently cite the basic decisions.

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87 U. S. Const., Art. III, §3(1).
88 For a study of these cases, see Chadbourne and Levin, Original Jurisdiction of Federal Questions, 90 U. of Pa. L. Rev. 639 (1942); Forrester, The Nature of a “Federal Question,” 16 Tulane L. Rev. 362 (1942); Forrester, Federal Question Jurisdiction and Section 5, 18 Tulane L. Rev. 263 (1943).
89 The case of Re Metropolitan Railway Receivership, 208 U. S. 90 (1908), has been cited in two instances to support the argument that §301(a) is unconstitutional. Olverson, Collective Bargaining and the Taft-Hartley Labor Act, 33 Va. L. Rev. 549, 578 (1947); H. R. Rep. No. 245, 80th Cong., 1st Sess. 109-110 (1947). This case follows and is based upon Gold-Washing & Water Co. v. Keyes, 96 U. S. 199 (1877), which is one of the basic cases referred to. The Metropolitan case cites the case of Defiance Water Co. v. Defiance, 191 U. S. 184 (1903) for its rule and the Defiance case cites and is
VI

The basic and leading case defining the scope of the "arising under" (federal question) clause in the Constitution is the Osborn case of 1824, in which Chief Justice Marshall wrote the opinion. It was an opinion in which Marshall played to the full his role as a Federalist judge interested in sustaining and enlarging the power of the Federal Government—in this instance, the federal judicial power.

While the decision is so lengthy that it exhausts the student who seriously attempts to analyze it, and has portions which appear to be contradictory—so contradictory, in fact, that they have been quoted separately in subsequent cases to reach contrary results—it holds, in effect, that if Congress has the constitutional power to pass a law creating legal rights, the federal courts can be given jurisdiction by Congress to handle all litigation arising by reason thereof.

The Osborn case not only constitutes the leading exposition of the meaning of the constitutional clause, but also serves to illustrate its application in an actual problem.

Congress enacted a law issuing a charter to the Bank of the United States and giving the federal courts jurisdiction of all suits involving the bank. No distinction was made between suits involving the meaning and interpretation of the law establishing the bank and suits involving issues of fact concerning only the customary and ordinary business of the bank. Marshall considered whether such a broad grant of jurisdiction was within the federal question clause of the Constitution.

First he observed that:

The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law.

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.

What he meant by the word "construing" and the later words, "a form that the judicial power is capable of acting on," is demonstrated by the remainder of the opinion.

He said that since the bank had been chartered by an act of Congress, it "can

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based upon the Gold-Washing case, which will be referred to specifically later herein. The language of the Metropolitan case which is referred to in support of the argument that §301(a) is unconstitutional is found at page 109 of the opinion: "A case under the Constitution or laws of the United States does not arise against a railroad engaged in interstate commerce from that mere fact. It only arises under the Constitution, or laws or treaties of the United States, when it substantially involves a controversy as to the effect or construction of the Constitution or on the determination of which the result depends." As will be noted later, this language referred to the words "arising under" as used in a statute, rather than as used in Article III of the Constitution.

41 Id. at 818.
42 Id. at 819.
acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. . . . Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?43

When a bank sues [he continued], the first question which presents itself, and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. . . .44 The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. . . . The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on.45

The clause in the patent law, authorizing suits in the circuit courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defense exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position, that the case does not arise under a law of the United States.46

Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law.47

Under the Osborn case, it would appear that if Congress, by legislative act, chartered an employer or a labor organization it would clearly have the constitutional authority to give the federal courts jurisdiction over all cases, including labor contract disputes, involving the employer or the labor organization.

But the jurisdiction granted in Section 301 is more inclusive. Employers and labor organizations existing entirely apart from any federal charter are covered.

Section 301 bases its constitutionality on the commerce clause, rather than a federal charter.48 And so it raises a question which goes beyond the scope of the Osborn case—whether Congress can give the federal courts jurisdiction over litigation which is ordinarily within state court jurisdiction, merely on the ground that the employer or the labor organization involved in the litigation is in an industry which affects commerce. It has already been noted that the employer need not affect commerce, the labor organization need not affect commerce, the particular contract or dispute need not affect commerce. It is only required that the industry of either the employer or the labor organization affect commerce. While the suggestion that the commerce power is so pervasive may not be novel where the power of the legislature is concerned, its full implications concerning the scope of the federal judicial power are most interesting, to say the least.

43 *Id.* at 823. 44 *Id.* at 823-824. 45 *Id.* at 824. 46 *Id.* at 825. 47 *Id.* at 827. 48 In McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819), the Court held that the Federal Government had the power to establish a bank as an incidental power necessary and proper to carry into execution expressly delegated powers, such as the fiscal power and the taxing and spending powers.
Serious doubt was expressed in the House and the Senate concerning the constitutionality of such a broad grant of jurisdiction. Indeed, the original apprehensions expressed at the time of the adoption of the Constitution concerning the potential application of the words "arising under" seem to be justified by this new law. Nevertheless, those apprehensions to some degree sustain, rather than argue against, the constitutionality of Section 301(a). No positive denial is to be found in response to these fears concerning the breadth of the clause. Silence in rebuttal, evident in Madison's Notes covering the proceedings and debates in the Philadelphia convention, and in the Federalist papers and other sources, would seem to suggest that perhaps the clause does have such wide scope. If so, the potential extent of federal judicial power seems no more limited than the potential extent of the legislative power under the broad areas of the commerce clause, the war power, the power to tax and spend for the general welfare, and the other sweeping and growing sources of power in the Federal Government.

VII

But the words "arising under" have not always been given the broad meaning attributed to them in the Osborn case.

In the Act of March 3, 1875, Congress provided:

That the circuit courts of the United States shall have original cognizance . . . of all suits . . . arising under the Constitution or laws of the United States . . .

Except for the abortive Act of February 13, 1801, passed by the Federalists, which was repealed in the next year, Congress had not, prior to 1875, given the lower federal courts jurisdiction over federal question cases, except in special instances such as the grant of jurisdiction for the bank considered in the Osborn case.

The words of the Act of March 3, 1875, and the words of Article III are substantially identical. The words "arising under" are used in both to describe the grant of federal question jurisdiction. It would seem that the conclusion should be that Congress intended to bestow all the federal question jurisdiction of Article III on the federal trial courts. One would certainly be inclined to assume that the same words have the same meaning.

In fact, Senator Matthew H. Carpenter, the draftsman of the Act, said:

The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal court, and if they may withhold a part of it they

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See note 12 supra. See note 25 supra.

See note 23 supra. See note 23 supra.


2 Stat. 89, 92 (1801).

2 Stat. 132 (1802).

Cf. the article by Chadbourn and Levin, cited supra, note 38, in which they give §5 of the Act of March 3, 1875, a restrictive role in connection with the application of the "arising under" clause of the statute. A different view was taken by this writer in the articles referred to in the same note.

Carpenter was referring to Martin v. Hunter's Lessee, 1 Wheat. 304, 339 (U. S. 1816).
may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution.

The Act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does.

This bill gives precisely the power which the Constitution confers—nothing more, nothing less. 5

But in assuming that the repetition in the statute of the words of Article III would have the effect of giving "precisely the power which the Constitution confers," Senator Carpenter failed to reckon with the power of statutory interpretation possessed by the courts, whereby words come to mean what the courts want them to mean.57

For despite the identity of the language of the statute with that of the Constitution, as well as this emphatic expression of intent in Congress, the federal courts reached a result which substantially limited the meaning of "arising under," at least as used in the statute.58

In the first Supreme Court case which actually gave consideration to the new law the Court said:

In the language of Chief Justice Marshall, a case "may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either" (Cohens v. Virginia . . .); or when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction" (Osborn v. Bank of the United States . . .). A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.59

It is particularly interesting to note that the court cited the Osborn case—incorrectly and by lifting out of context a portion of the opinion which can only be understood by reading the entire opinion—as authority for an interpretation of the meaning of "arising under" which is much more narrow than the interpretation given the words by the Osborn decision, if the opinion is read as a whole.

The leading modern case on the matter is Gully v. First National Bank,50 in which Mr. Justice Cardozo wrote the opinion. The case concerned the power of the State of Mississippi to tax the shares of a national bank. Federal jurisdiction

56 2 CONG. REC., Pt. 5, 4986-4987 (1874).
57 "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." LEWIS CARROLL, THROUGH THE LOOKING GLASS.
58 This result, in which the Supreme Court proved Bishop Hoadly as well as Humpty Dumpty to be right, was brought about, as a practical matter, by the desire of the federal courts to hold down the amount of litigation coming to them.
60 299 U. S. 109 (1936).
was sought on the ground that the case was one “arising under” federal law because a federal statute was allegedly involved which permitted states to tax national banks provided certain conditions were complied with. The Court held that there was no federal question in the case, and Cardozo said:

How and when a case arises “under the Constitution or laws of the United States” has been much considered in the books....

Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress. [Citing the Osborn case] ... “A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.”

Cardozo makes no effort here to distinguish between the constitutional phrase “arising under” and the statutory one. By his reference to the Osborn case, he challenges the validity of giving them different meanings and indicates that both have the narrow meaning which he describes. Note the statement that “the early cases were less exacting than the recent ones,” and his citation of the Osborn case as an illustration.

If the implication of Cardozo’s statements concerning the Osborn case is that the Supreme Court will no longer recognize a difference between the constitutional phrase and the statutory one, and that both of them have the narrow meaning set forth so clearly and without qualification in the Gully case, the simple conclusion is that Section 301 of the Taft-Hartley Act and similar grants of federal jurisdiction are unconstitutional.

This is true because labor contract cases do not ordinarily involve a dispute or controversy respecting the validity, construction, or effect of federal law upon the determination of which the result depends. And obviously the mere fact that “an industry affecting commerce” is connected, perhaps indirectly, with the case would not meet Cardozo’s test. For it is evident that the mere fact that the employer or the labor organization may be in an industry affecting commerce would not require a construction of federal law in a particular case upon which the result would depend. Usually such cases involve questions of fact or questions of contract interpretation without any disputed issue concerning interstate commerce or federal law.

It would seem that, in order to sustain the constitutionality of Section 301, the Supreme Court will be forced to qualify the language of Cardozo in the Gully case in so far as it relates to the Constitution and the rule of the Osborn case. The “early

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61 299 U. S. 109, 112-114 (1936).
62 It is interesting to note that the rule of the Gully case is taken from the Gold-Washing decision, which in turn cited the Osborn case for its authority, which in turn is criticized in the Gully opinion.
cases" must continue "less exacting"—particularly in the definition of "arising under" in the Constitution—or Section 301 is unconstitutional. And, of even more importance, the jurisdiction of the federal courts in such matters as patent, bankruptcy, and Fair Labor Standards Act cases is invalid as now interpreted.

The issue presented in connection with Section 301 may force the Supreme Court to perform the long delayed task of clarifying the contradiction between the definitions of the words "arising under" in the statute and in the Constitution.

In view of the identity of the words it is clear that the court cannot accomplish this result in any sensible manner upon the basis of previous decisions. A reconsideration of the entire federal question field would appear necessary if the court is to clarify the present judicial disorder. The solution proposed by Messrs. Chadbourn and Levin, based upon their interpretation of Section 5 of the Act of 1875, would be workable, but its validity on the basis of congressional intent has been questioned.

A far more satisfactory and proper solution, of course, would be reached if Congress should rewrite, knowingly and systematically, its statutes conferring federal question jurisdiction. This can be accomplished by enacting statutes expressly and intentionally limiting the number of cases coming into the federal courts by some orderly device, such as the one claimed for Section 5 by Messrs. Chadbourn and Levin, while recognizing the necessity for the broad meaning of the "arising under" clause in the Constitution, established by the Osborn decision.

VIII

Even under such a program, however, the constitutionality of a grant of jurisdiction such as that contained in Section 301 would be doubtful. Under either the definition of the Osborn case or that of the Gully case, the validity of the section is subject to question. If the narrow definition of "arising under" set forth in the Gully case should be applied by the Supreme Court to the constitutional phrase—and Cardozo made no distinction—Section 301 is unconstitutional for the reasons previously presented.

If, on the other hand, Cardozo's remarks casting doubt upon the breadth of the constitutional phrase as defined in the Osborn case are ignored—as the writer believes they should be—the ultimate question remains whether even the generous definition of the Osborn case is sufficiently broad to sustain the grant of jurisdiction contained in Section 301. For even under that definition, there is still the problem of whether it is constitutional to grant jurisdiction over ordinary contract cases involving labor, merely because one of the parties to the contract is in an "industry affecting commerce."

It is important to note again the following words in the Osborn opinion:

\[\ldots\text{it is said that the legislative, executive, and judicial powers of every well con-}\]

\[\ldots\text{The federal courts often handle litigation in these fields which involves only issues of fact with no dispute whatever concerning the law.}\]

\[\ldots\text{Forrester, Federal Question Jurisdiction and Section 5, 18 Tulane L. Rev. 263 (1943).}\]
constructed government are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. . . .

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. . . .

"The power of construing . . . any question respecting" federal law is applied in the Osborn case to mean that the courts may be given jurisdiction to handle any case, whether ordinarily within state court jurisdiction or not, and including contract cases comparable to those involved in Section 301, if an act of Congress—a valid federal law—creates an entity or organization which is a party to the case. Such an entity "can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States."

But does the jurisdiction granted in Section 301 come within this rule, for all its liberality?

Ordinarily, of course, neither an employer nor a labor organization would be created by federal law, as was the bank.

But can it be said that Congress, by creating, through a federal law, a federal plan of control of labor matters, has created an entity which may be compared, by analogy, with the bank?

An affirmative answer to this question would appear to be the crux of any argument seeking to sustain the constitutionality of Section 301.

One may argue in support of such a view that the federal plan—the entity—is based validly upon the commerce power of the federal legislature in the same manner and with the same force that the bank—the entity—was based validly upon the fiscal power of the federal legislature. Both, the proponent may claim, owe their existence to, and are authorized by, a law of the United States.

It may be argued that as a matter of constitutional policy there is no stronger reason for permitting Congress, in its discretion, to give jurisdiction to the federal courts over all cases involving a bank created by it than for permitting it to give jurisdiction over all litigation involving a federal plan or program which it has established. In both instances it may be said with justification that Congress should be possessed of the power to see that uniform and impartial judicial treatment is given the litigation (factual or legal) which may involve either. The observation has already been made that there is good reason, from the federal standpoint, for insisting upon the trial of issues of fact in a sympathetic and unified

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86 9 Wheat. 738, 818 (U. S. 1824). (Italics supplied.)
87 Id. at 819. (Italics supplied.)
87 Id. at 823. (Italics supplied.)
88 See note 48 supra. The implications of the McCulloch case in this connection are substantial and call for study beyond the scope of this paper. The writer can only suggest the relevance of this case herein.
judicial system just as there is good reason for insisting upon the trial of issues of law in such courts. Potentially, at least, state courts can abuse their jurisdiction and create lack of uniformity in the trial of issues of fact and simple issues of contract law in connection with a federal plan for the regulation of labor-management relations just as they could in matters involving a federal bank—a part of a federal plan for the regulation of fiscal affairs.

True enough, under such an interpretation Congress could, if it should take full advantage of it, completely swamp the federal judges with litigation—far more than their present number and the present structure of the federal judicial system would bear. But broad power must rest somewhere in every system of government, and the potential abuse of the necessary power of government is no argument against its existence. Perhaps we must trust, in this as in many other areas of governmental action, that the legislature will not abuse the power but will exercise it prudently within its discretion.

It is also worthy of note that, if the legislature goes too far, the courts may protect themselves through their power of statutory interpretation. The federal courts faced such a problem in connection with the Act of March 3, 1875, and solved it, even though in a clumsy way, by the *Gold-Washing* decision, which drastically reduced the number of cases Senator Carpenter intended they should receive. It is possible that the federal judiciary may give such a performance again in connection with Section 301, particularly if the practical effect of the section is to bring a flood of cases into the courts.

However, there is no certainty that the federal courts will object to being given this power over labor disputes, even though it may mean a substantial increase in their business. To the contrary, some federal judges have complained about the growth of the power of judging in administrative agencies. But it is significant that if the present grant of power over labor matters is held constitutional, the power will have been clearly established in Congress to grant broad jurisdiction over many other fields, unrelated to labor, which the federal courts might neither desire nor be able to handle within their present structure.

In opposition to the constitutionality of Section 301 one may insist upon an application of the words in the *Osborn* case in a manner more narrow than that indicated in support of the grant. Reduced to a matter of policy, as are so many questions of constitutionality where the courts play the role of Humpty Dumpty and make words mean what they want them to mean, the objections to Section 301 are substantial.

The effect of construing Article III to sustain the constitutionality of Section 301 would seem to be to make the judicial power completely coextensive with the

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60 "It is always a doubtful course to argue against the use or existence of a power, from the possibility of its abuse. . . . From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse." From the opinion of Mr. Justice Story in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 344-345 (U. S. 1816).
legislative power. Whereupon, one must recognize the possibility—even though it may be a remote one—that the federal government could move into and blot out much of state judicial power as it now exists. This will suggest hesitation at least to those who view with alarm the growth of federal legislative power from such broad sources as the commerce, taxing and spending, and war powers. Indeed, the very Congress which passed Section 301 has claimed for itself the protective role of preventing such expansion, at least in the field of legislation.

This contradiction suggests that all factions are willing to countenance the concentration of power in the federal government when it serves the objects they desire.