



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 41 | Number 1

Article 5

12-1-1962

Concurrent State and Federal Judisdiction over Labor Disputes under the Lincoln Mills Principle

A. Frederick Harris

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

A. F. Harris, *Concurrent State and Federal Judisdiction over Labor Disputes under the Lincoln Mills Principle*, 41 N.C. L. REV. 1 (1962).
Available at: <http://scholarship.law.unc.edu/nclr/vol41/iss1/5>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

CONCURRENT STATE AND FEDERAL JUDISDICTION OVER LABOR DISPUTES UNDER THE LINCOLN MILLS PRINCIPLE*

A. FREDERICK HARRIS†

Problems arising under the *Lincoln Mills*¹ principle²—that federally-formulated rules of decision apply when collective bargaining agreements are litigated under section 301(a)³ of the Labor Management Relations Act⁴—are slowly reaching the Supreme Court. In its recent holding that state courts possess concurrent jurisdiction to entertain litigation brought under section 301(a) the Supreme Court resolved one of these problems which appears on its current docket.⁵ Another problem, yet to be resolved and more important, is the concurrent power of state law-making functionaries to prescribe separate rules of decision—possibly formulated from conceptions more locally-oriented—for collective bargaining agreements.⁶ Integrating each of these issues another way for purposes

* The author wishes to express his appreciation to Professor Paul J. Mishkin of the University of Pennsylvania Law School for his helpful suggestions during the preparation of this article. Responsibility for the views expressed, of course, belongs with the author.

† Assistant Professor of Law, Valparaiso University Law School.

¹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

² As distinguished from the *Lincoln Mills* holding. See note 23 *infra*; Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958).

³ 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

⁴ 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1958), as amended, 29 U.S.C. §§ 153, 158-60, 164, 186-87 (Supp. II, 1961), as amended, 29 U.S.C.A. §§ 154, 172, 178 (Supp. 1961) [cited hereinafter as the Taft-Hartley Act].

⁵ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), *affirming* 341 Mass. 337, 169 N.E.2d 885 (1960).

⁶ Compare *Fay v. American Cystoscope Makers, Inc.*, 98 F. Supp. 278 (S.D.N.Y. 1951), discussed in 65 HARV. L. REV. 1443 (1952), *Swift & Co. v. United Packerhouse Workers*, 177 F. Supp. 511 (D. Colo. 1959), and *International Union of Operating Eng'rs v. Dahlem Const. Co.*, 193 F.2d 470 (6th Cir. 1951) (dictum) (suggesting pre-emption of state substantive law), with *Associated Tel. Co. v. Communication Workers*, 114 F. Supp. 334 (S.D. Cal. 1953); see *Castle & Cooke Terminals v. Local 137, Int'l Longshoremen's Ass'n*, 110 F. Supp. 247, 249-50 (D. Hawaii 1953) (indicating survival of state substantive law).

of distinction in a 301 context, they are: now that state courts enjoy concurrent jurisdiction to administer the federal substantive law to be spun "out of the empty darkness of section 301,"⁷ does state substantive law governing collective bargaining agreements survive and retain a viable co-existence in state and federal courts?⁸

In sustaining the state court's concurrent jurisdiction, the Supreme Court relied in greater measure upon the Taft-Hartley Act's legislative history⁹ rather than upon arguments formulated from scrutinizing the face of the legislation itself, which had earlier yielded conflicting lower-court and scholarly conclusions.¹⁰ However, the Court also recognized the tradition favoring concurrent jurisdiction. This tradition can be traced to an observation of Alexander Hamilton,¹¹ and the Supreme Court had nourished it¹² to the point where commentators assert that "where exclusivity [of federal jurisdiction] is now intended, it must be found expressly stated . . . or implied . . . in the provisions granting [federal] jurisdiction."¹³

The Court recognized its own earlier misgiving in the field of labor relations that "a multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law,"¹⁴ but con-

⁷ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 466 (1957) (dissenting opinion).

⁸ It has been suggested that state law survives, either in federalized form, see note 16 *infra*, or as the basis from which the new federal substantive law will be formulated, see text accompanying note 16 *infra*.

⁹ See Wollett & Wellington, *Federalism and Breach of Labor Agreement*, 7 STAN. L. REV. 445, 454 (1955).

¹⁰ Compare *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 85, 178 (1958) (favoring concurrent jurisdiction), with Wollett & Wellington, *supra* note 9, at 453, and Association of Westinghouse Employees v. Westinghouse Elec. Corp., 210 F.2d 623, 629 n.16 (3d Cir. 1954) (4-3 decision) (dictum), *aff'd on other grounds*, 348 U.S. 437 (1955) (denying concurrent jurisdiction). See also *Minkoff v. Scranton Frocks, Inc.*, 172 F. Supp. 870 (S.D. N.Y. 1959).

¹¹ THE FEDERALIST No. 82, at 555 (Cooke ed. 1961) (Hamilton): "[T]he state courts will be divested of no part of their primitive jurisdiction . . . and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth."

¹² *Claffin v. Houseman*, 93 U.S. 130, 136-37 (1876).

¹³ HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 373 (1953) [cited hereinafter as HART & WECHSLER]; see also 71 HARV. L. REV. 1169 (1958).

¹⁴ *Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953). Note, however, that the *Garner* case held state labor relations law pre-empted by areas covered by the federal administrative machinery, and was not, according to the *Charles Dowd* opinion, authority for pre-emption of state judicial jurisdiction to enforce federal judicially-formulated law.

cluded that this fear must yield to clearly expressed congressional intent.

One early misgiving about conferring concurrent 301(a) jurisdiction upon the state courts was that "the absence of a detailed doctrine of federal labor contract obligations would relegate state forums from time to time to the predicament of not knowing what the controlling federal law is during the interim before federal courts have declared it"¹⁵ Although this fear was mitigated in part by the *Lincoln Mills* opinion which predicted that "state law, if compatible with the purpose of section 301, may be resorted to in order to find the rule that will best effectuate the federal policy,"¹⁶ which was reiterated by the *Charles Dowd* opinion, almost five years have passed since *Lincoln Mills* and still "the number of cases decided under section 301 is still too few to permit the statement of [even] broad principles of the emerging law."¹⁷ Those principles which have since emerged from the Supreme Court, itself, however, have shown no diffidence in derogating state judicial¹⁸ or statutory¹⁹ law.

¹⁵ Note, *Section 301(a) of the Taft-Hartley Act: A Constitutional Problem of Federal Jurisdiction*, 57 YALE L.J. 630, 636 n.23 (1948). The opposite problem vexes federal courts which must apply state law in diversity litigation. See HART & WECHSLER 628.

¹⁶ 353 U.S. at 457. It has been suggested that section 301(a) federalized state law by incorporating it by reference. *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 140 (D. Mass. 1953) (Wyzanski, J.). But see *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806 (2nd Cir. 1950), rejecting requirement of "bad faith" which state law made a condition precedent to action for work-stoppage damages. And lower federal courts which foresaw the *Lincoln Mills* holding had ignored, in section 301 actions, state law affecting the enforceability of arbitration agreements. Compare *Boston & Maine Transp. Co. v. Amalgamated Ass'n of Street Ry. Employees*, 106 F. Supp. 334 (D. Mass. 1952) (state law favored arbitration), with *Textile Workers Union v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950) (state law denied arbitration enforcement).

¹⁷ Comment, *The Emergent Federal Common Law of Labor Contracts: A Survey of the Law Under Section 301*, 28 U. CHI. L. REV. 707, 733 (1961).

¹⁸ See *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), holding that union welfare-fund trustees, third-party beneficiaries of a collective bargaining agreement, were not subject, in an action for payments against the obligor-company, to a set-off for damages suffered by a breach of contract on the part of the obligee-union. Compare Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 COLUM. L. REV. 276 & n.217 (1959), with Pirsig, *The Minnesota Uniform Arbitration Act and The Lincoln Mills Case*, 42 MINN. L. REV. 333, 374 (1958). The Supreme Court apparently resolved an issue, which had caused conflict, of whether non-signatories to a collective bargaining agreement could, at least in certain instances, sue upon it. Compare *Teamsters Union v. Morrison-Knudsen Co.*, 270 F.2d 530, 537 (9th Cir. 1959) (allowing individual employer non-signatories represented by employer association to sue), with *Ketcher v. Sheet Metal*

Meanwhile, the state courts in the interim enthusiastically had taken jurisdiction of suits brought under section 301(a),²⁰ had granted equitable relief to suitors,²¹ and have deemed themselves restrained in entertaining section 301(a) litigation only by state procedural limitations such as inability of the defendant union to be sued as a jural entity under state law²² and potentially by state law prohibiting specific performance of an agreement to arbitrate.²³

One remedial power which state courts have exercised after hearing section 301(a) is the injunction against a labor union's breach of a "no strike" clause in a collective bargaining agreement.²⁴ Commentators had debated the propriety of this action in the absence of certainty as to what federal courts would be permitted to do in like situations.²⁵ And although the Supreme Court recently held that

Workers Int'l Ass'n, 115 F. Supp. 802 (E.D. Ark. 1953). An allied question, which is inconclusive, is whether state or federal law determines the status of one claiming to be a third party beneficiary. Cf. *Isbrandtsen Co. v. Local 1291, Int'l Longshoremen's Ass'n*, 204 F.2d 495, 499 (3d Cir. 1953) (diversity also present).

¹⁹ *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), *aff'd on rehearing*, 362 U.S. 605 (1960) (per curiam), holding respectively that Ohio anti-trust laws could not prevent enforcement of a contractual minimum truck rental by owner-drivers and owner-lessees. For a presentation of the issues raised by the decisions see Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: I*, 59 COLUM. L. REV. 6, 51-52 n.162 (1959). For a rationalization of the cases on the ground that state law went too far in interfering with the process, as contrasted with the terms of collective bargaining (cf. *Hill v. Florida*, 325 U.S. 538 (1945)), see Merrifield, *Federal-State Jurisdiction in Labor Relations Law*, 29 GEO. WASH. L. REV. 318, 345-46 & nn.138 & 139 (1960).

²⁰ *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); *Coleman Co. v. UAW*, 181 Kan. 969, 317 P.2d 831 (1957); *Harbison-Walker Refractories Co. v. United Brick & Clay Workers*, 339 S.W.2d 933 (Ky. 1960); *McLean Distrib. Co. v. Brewery & Beverage Drivers Union*, 254 Minn. 204, 94 N.W.2d 514, *cert. denied*, 360 U.S. 917 (1959); *Anchor Motor Freight N.Y. Corp. v. Teamsters Union*, 12 Misc. 2d 757, 171 N.Y.S.2d 506 (Sup. Ct.), *aff'd*, 171 N.Y.S.2d 511 (App. Div. 1958); *General Elec. Co. v. UAW*, 93 Ohio App. 139, 108 N.E.2d 211, *appeal dismissed*, 158 Ohio St. 555, 110 N.E.2d 424 (1953); *Springer v. Powder Power Tool Corp.*, 220 Ore. 102, 348 P.2d 1112 (1960); *General Bldg. Contractors' Ass'n v. Local 542*, 370 Pa. 73, 87 A.2d 250 (1952).

²¹ See Annot., 32 A.L.R.2d 829 (1953).

²² See *Bunch v. Launius*, 222 Ark. 760, 262 S.W.2d 461 (1953).

²³ *Byars v. Sealtest Foods Div., Nat'l Dairy Prod. Corp.*, 42 CCH Lab. Cas. ¶ 16858 (Ala. Cir. 4. 1961); see *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 85, 178 (1958). *But see Testa v. Katt*, 330 U.S. 386 (1947). Cf. *Mondou v. New York N.H. & H.R.R.*, 223 U.S. 1 (1912). That arbitration agreements are specifically enforceable as a doctrine of federal substantive labor law was the holding of *Lincoln Mills*.

²⁴ *McCarroll v. Los Angeles Co. Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957); Comment, 71 HARV. L. REV. 1172 (1958).

²⁵ Compare Winter, *Labor Injunctions and Judge-Made Labor Law: The*

federal courts are prohibited by section 4 of the Norris-LaGuardia Act²⁶ from granting like relief²⁷ even though they do award damages for such breach,²⁸ at least the dissenting opinion in that case con-

Contemporary Role of Norris-LaGuardia, 70 YALE L.J. 70, 100-02 (1960) (favoring separate state court injunctive power), with *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 85, 178 (1958) (disapproving separate state court injunctive power).

²⁶ 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958).

²⁷ *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962), affirming 290 F.2d 312 (7th Cir. 1961), abrogating *Teamsters Union v. Yellow Transit Freight Lines, Inc.*, 282 F.2d 345 (10th Cir. 1960) and approving, A.H. Bull S.S. Co. v. Seafarers' Int'l Union, 250 F.2d 326 (2nd Cir. 1957), cert. denied, 355 U.S. 932 (1958). Although the Court did not attempt to do so, these three cases may be distinguishable from the viewpoint of the union's motivation for the strike and alternative methods of redress. In the *Yellow Transit* case, the Tenth Circuit approved an injunction; the strike resulted from the refusal of organized employees to cross a picket line established for the purpose of organizing other non-union employees. In the *Sinclair Refining* case, the Seventh Circuit forbade injunction of a strike either motivated in part or continued because of a breakdown in arbitration procedure. The *Bull Steamship* case resulted in the Second Circuit refusing to enjoin a strike called because the union unsuccessfully attempted to renegotiate wages during the life of a collective bargaining agreement. The facts in the *Sinclair Refining* case suggest a qualitative solution: since the union had in that case alternative redress for its complaint via the grievance procedure, the Norris-LaGuardia Act should be held no bar and a strike injunction should issue since the effect would prod the union into pressing its alternative arbitration remedy. One problem arising from this approach is whether the district court's judgment in granting the injunction is res judicata before the arbitrator when the latter subsequently ponders his jurisdiction to arbitrate the dispute. See Note, 59 COLUM. L. REV. 153, 171-73 (1959). Another question occurs because the *Lincoln Mills* court decreed arbitration agreements specifically enforceable notwithstanding that the alternative remedy of an action for damages presumably was available to the petitioning party. It is true that the *Lincoln Mills* action-at-law alternative lacks the appeal to the Supreme Court that the alternative of arbitration holds. See, e.g., *United Steelworkers Union v. American Mfg. Co.*, 363 U.S. 564 (1960). But the *Sinclair Refining Company* likewise may have had alternative prospective relief. The National Labor Relations Board holds a strike in violation of a contractual "no strike" clause an unfair labor practice within the meaning of section 8(b)(3) of the Taft-Hartley Act. *NLRB v. UMW*, 117 N.L.R.B. 1095 (1957), enforcement denied on other grounds, 257 F.2d 211 (D.C. Cir. 1958) (2-1 decision) (NLRB may not infer a "no-strike" clause). *Contra*, *McCoid, Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law*, 44 MINN. L. REV. 205, 228 (1959), suggesting that the court of appeals decision rested on the ground that the strike was no Taft-Hartley Act violation. Compare *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962), holding that a strike where alternative arbitration procedure for redress exists violates collective bargaining agreement even in the absence of an express "no-strike" clause. The opinion relied upon five court of appeals decisions, among which was *Lewis v. Benedict Coal Co.*, 259 F.2d 346 (6th Cir. 1958) (Potter Stewart, C.J.), aff'd by an equally divided Court, 361 U.S. 459 (1960), which purported to be directly contra to the *NLRB v. UMW* case decided by the Court of Appeals for the District of Columbia.

²⁸ *Teamsters Union v. W. L. Mead, Inc.*, 230 F.2d 576 (1st Cir.), cert. denied, 352 U.S. 802 (1956), affirming 129 F. Supp. 313 (D. Mass. 1955),

sidered it an open question whether state courts could exercise their separate injunctive power.²⁹ The argument that the *Sinclair Refining* case does not preclude state courts from granting the injunction does not rest necessarily on the ground that Congress is powerless to restrict state courts in this regard but rather from an interpretation of the Norris-LaGuardia Act which reflects a congressional intention not to do so.³⁰

A question less exploited than concurrent state jurisdiction or remedies is that of the survival of co-existent state-authored substantive rules for decision in the litigation of collective bargaining agreements which are also subject to federal rules of decision by virtue of their susceptibility to being litigated under section 301. The potential awkwardness of such a survival has been suggested by "supposing that a complaint, making no reference to section 301 but purporting to be grounded upon state law, is filed in a state court."³¹

and 126 F. Supp. 466 (D. Mass. 1954). The *Mead* case is criticized in Note, 66 YALE L.J. 284 (1956). *But see* *Drake Bakeries, Inc. v. Local 50, American Bakery Workers*, 370 U.S. 254 (1962). When a complaint requested damages plus a strike injunction from a federal court which thought the Norris-LaGuardia Act forbade the latter relief, the court dismissed without prejudice that portion of the complaint seeking injunctive relief and took cognizance of the claim for damages, despite an argument that the Norris-LaGuardia Act tainted the entire proceeding. *National Dairy Prod. Corp. v. Heffernan*, 195 F. Supp. 155 (E.D.N.Y. 1961). *Accord*, *Swift & Co. v. United Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959), granting plaintiff's motion to remand as to that portion of the complaint seeking injunction for breach of "no-strike" contract clause.

²⁹ *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (dissenting opinion).

³⁰ See Meltzer, *supra* note 18 at 279-81; *Swift & Co. v. United Packinghouse Workers*, 177 F. Supp. 511 (D. Colo. 1959) (by implication). Another interesting issue is whether, should the *Sinclair Refining* case have gone contra or be legislatively overruled—and federal courts allowed to enjoin such strikes—state courts in jurisdictions having "little" Norris-LaGuardia acts could refuse to issue the injunction even though properly issued by a federal court. This problem resembles that of state courts refusing to consider labor unions as jural entities in the face of congressional action to the contrary, see footnote 47 *infra* and accompanying text. The doctrinal starting-points seem to be that while a state court having taken jurisdiction over a federal claim cannot disdain to grant a federal remedy because state law forbids, see note 23 *supra* and accompanying text, it does not follow that a state may not, in the absence of clearly contrary congressional intent not present here, withdraw jurisdiction from its courts to hear, among others, certain federal claims, see *Douglas v. New York, N.H., & H.R.R.*, 279 U.S. 377, 387-88 (1929) (dictum); Meltzer, *supra* note 18 at 280, n.236, provided that the jurisdiction is not withdrawn in such a manner as to establish a pattern of discrimination vis-à-vis federally-based claims while simultaneously abiding in favor of similar claims grounded in state law, *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934). The *Charles Dowd* opinion expressly disclaimed the issue, 368 U.S. at 514.

³¹ Wollett & Wellington, *Federalism and Breach of the Labor Agreement*,

But this example does not exhaust the problem which may occur in the event a litigant may choose between (1) compelling a federal judge to don his "federal question" robe by invoking section 301, or alternatively, (2) compelling him to act as "in effect, only another court of the State"³² by asking him to don his "diversity of citizenship" robe and to obey the concomitant admonition that "the source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States."³³

Before a litigant bent on the latter choice can succeed he must resolve certain procedural problems which unincorporated associations such as labor unions traditionally have created in the courts.³⁴ For example, in complying with the requirements of diversity of citizenship in order to gain access to a federal court³⁵ it has been the rule that the citizenship of an unincorporated labor union for purposes of diversity of citizenship is the citizenship of the individual members.³⁶ In order to fulfill federal venue requirements—that the action be brought "only in the judicial district where all plaintiffs or all defendants reside"³⁷—the court should look to wherever any substantial part of the unincorporated labor association's activities are substantially carried on in order to ascertain its residence.³⁸

7 STAN. L. REV. 445, 452 (1955). This remains a theoretical possibility notwithstanding the *Charles Dowd* opinion.

³² *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

³³ *Id.* at 112.

³⁴ See *Sturges, Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924); *Witmer, Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40 (1941); Comment, 68 YALE L.J. 1182 (1959).

³⁵ 28 U.S.C. § 1332(a) (1958).

³⁶ *E.g.*, *Levering & Garrigues Co. v. Morrin*, 61 F.2d 115, 118 (2d Cir. 1932), *aff'd on other grounds*, 289 U.S. 103 (1933); *Green v. Gravatt*, 34 F. Supp. 832 (W.D. Pa. 1940). Therefore, federal courts have applied the rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806)—that diversity of citizenship must be complete as between all the parties plaintiff, on one side, and all the parties defendant, on the other side—remorselessly to unincorporated labor unions to defeat diversity jurisdiction; see, *e.g.*, *Russell v. Central Labor Union*, 1 F.2d 412 (E.D. Ill. 1924); 3 MOORE, FEDERAL PRACTICE ¶¶ 18.07, 19, 20.04, 20.07 (2d ed. 1953).

³⁷ 28 U.S.C. § 1391(a) (1958).

³⁸ See *Portsmouth Baseball Corp. v. Frick*, 132 F. Supp. 922 (S.D.N.Y. 1955), *aff'd on other grounds*, 278 F.2d 395 (2d Cir.), *cert. denied*, 364 U.S. 831 (1960). Curiously, this is a relaxation of the rule which has not been altogether forthcoming in "federal question" litigation, where the stricter rule that the location of the association's principal office determines "residence" for venue purposes has found adherence. *McNutt v. United Gas Workers*, 108 F. Supp. 871 (W.D. Ark. 1952); *Griffin v. Illinois Cent. R.R.*, 88 F. Supp. 552 (N.D. Ill. 1949); *Salvant v. Louisville & N.R.R.*, 83 F. Supp. 391 (W.D. Ky. 1949); see *Brotherhood of Locomotive Firemen &*

The method utilized to circumvent these procedural problems has been the class action,³⁹ permissible by or against representatives of a class "if persons constituting a class are so numerous as to make it impracticable to bring them all before the court . . . when the character of the right sought to be enforced for or against the class is joint or common"⁴⁰

A majority of the lower federal courts which have considered the issue⁴¹ have concluded that class actions in behalf of and against unincorporated labor unions survive the enactment of, and co-exist with, section 301(b) of the Taft-Hartley Act, which provides that "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."⁴² The germinal case on the matter, although not a section 301(a) suit, pointed out that "the language used [in section 301(b)] is expressly permissive: 'may sue or be sued as an entity'⁴³

Enginemen v. Graham, 175 F.2d 802 (D.C. Cir. 1948), *rev'd on other grounds*, 338 U.S. 232 (1949). *Contra*, American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777 (S.D.N.Y. 1958); *see* Sperry Prods., Inc. v. Association of American R.R., 132 F.2d 408 (2d Cir. 1942). The courts have not expressed whether the basis of jurisdiction is a possible ground for distinction between them. Thus, the *Portsmouth Baseball Corp.* case expressly disapproved the *McNutt*, *Griffin*, and *Salvant* cases without suggesting the distinction; the *American Airlines* case expressly approved the *Portsmouth Baseball Corp.* case without mentioning the distinction.

³⁹ See 3 MOORE, *op. cit. supra* note 36, ¶ 23.02. Diversity of citizenship in class actions is determined by the citizenship of the named representatives of the unincorporated labor union. *Lowery v. International Bhd. of Boilermakers*, 259 F.2d 568 (5th Cir. 1958); *Webster v. Wilke*, 186 F. Supp. 199 (S.D. Ill. 1960); *Philadelphia Local 192 v. American Fed'n of Teachers*, 44 F. Supp. 345 (E.D. Pa. 1942). *Contra*, *Shelvey v. Barto*, 16 FED. RULES LAW 23a.61 (Case 1) (S.D.N.Y. 1952) (entire membership standard adhered to in determining citizenship in class action). Venue is determined by the residence, likewise, of the named representatives. *Underwood v. Delaney*, 170 F. Supp. 21 (D. Del. 1958), rejecting a claim that, when the unincorporated labor union is represented by a class, the proper venue criterion is any district in which substantial activities are substantially carried on by the association, just as though the association itself were the party of record; *Carolina Cas. Ins. Co. v. Teamsters Union*, 136 F. Supp. 941 (N.D. Ala. 1956), dismissing action as to a named class representative who was not an indispensable party in order to preserve proper venue.

⁴⁰ FED. R. CIV. P. 23(a)(1).

⁴¹ *Burgos v. Waterman S.S. Corp.*, 189 F. Supp. 683 (D. Puerto Rico 1960) (dismissing for want of diversity); *Ketcher v. Sheet Metal Workers Int'l Ass'n*, 115 F. Supp. 802 (E.D. Ark. 1953); *Tisa v. Potofsky*, 90 F. Supp. 175 (S.D.N.Y. 1950). *Contra*, *Shatte v. International Alliance of Theatrical Stage Employees*, 84 F. Supp. 669 (S.D. Cal. 1949) (dictum), *aff'd on other grounds*, 182 F.2d 158 (9th Cir.), *cert. denied*, 340 U.S. 827 (1950). The district court opinion is criticized in Note, 59 YALE L.J. 575 (1950).

⁴² 61 Stat. 136 (1947), 29 U.S.C. § 185(b) (1958).

⁴³ *Tisa v. Potofsky*, 90 F. Supp. 175, 180 (S.D.N.Y. 1950).

The court reached this conclusion while explicitly ignoring the issue of whether section 301(b) applies to all litigation in the federal courts, or is instead restricted to "suits for violation of contracts" instituted under section 301(a). The latter conclusion seems proper,⁴⁴ for to conclude that section 301(b) creates jural entities of labor unions for purposes of all federal court litigation would negate completely toward labor unions, instead of merely for purposes of section 301(a) litigation,⁴⁵ the rule that "capacity to sue or be sued shall be determined by the law of the state in which the district court is held,"⁴⁶ which the lower federal courts laboriously have puzzled out and applied to unincorporated labor associations on a state-law by state-law basis.⁴⁷ A contrary argument rests on the

⁴⁴ *But see* WOLLETT, LABOR RELATIONS AND FEDERAL LAW 120 (1949).

⁴⁵ See *Isbrandtsen Co. v. National Marine Engineers' Beneficial Ass'n*, 9 F.R.D. 541 (S.D.N.Y. 1949).

⁴⁶ FED. R. CIV. P. 17(b). It should be noted that jural entity classification by virtue of state law does not ipso facto confer citizenship for purposes of diversity jurisdiction—citizenship of the individual members still controls. *Underwood v. Maloney*, 256 F.2d 334 (3d Cir.) (by implication), *cert. denied*, 358 U.S. 864 (1958), *criticized on other grounds*, 107 U. PA. L. REV. 559 (1959), Note, 68 YALE L.J. 1182 (1959); *Rizzo v. Ammond*, 182 F. Supp. 456 (D.N.J. 1960); *American Newspaper Guild v. MacKinnon*, 108 F. Supp. 312 (D. Utah 1952); *Murphy v. Hotel Employees Int'l Union*, 102 F. Supp. 488 (E.D. Mich. 1952). *But see* *American Fed'n of Musicians v. Stein*, 213 F.2d 679, 686 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954); 3 MOORE, *op. cit. supra* note 36, ¶17.25, at 1413; Comment, 66 YALE L.J. 712, 742 n. 174 (1957). This happenstance need not continue if section 301(b) is interpreted to constitute labor union jural entities for purposes of all federal court litigation. *But see* WOLLETT, *op. cit. supra* note 44, at 120. Nor does jural entityship by virtue of state law affect the venue criterion which has been eased at least for purposes of diversity of citizenship litigation alone.

⁴⁷ Federal courts have read the laws of the following states to permit unincorporated labor unions to sue and be sued as an entity: *District of Columbia*, *Busby v. Electric Util. Employees Union*, 147 F.2d 865 (D.C. Cir. 1945); *New Jersey*, *Rizzo v. Ammond*, 182 F. Supp. 456 (D.N.J. 1960); *Ohio*, *Williams v. United Bhd. of Carpenters*, 81 F. Supp. 150 (N.D. Ohio 1948), *aff'd*, 191 F.2d 860 (6th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); *Pennsylvania*, *Pennsylvania Greyhound Lines v. Amalgamated Ass'n of Street Elec. Ry. Employees*, 105 F. Supp. 537, 540 (W.D. Pa. 1952); *Tennessee*, *American Fed'n of Musicians v. Stein*, *supra* note 46; *Virginia*, *AFL v. Virginian Ry.*, 39 F. Supp. 354 (E.D. Va. 1941). Unincorporated labor unions have been held not suable according to the laws of the following states: *Arkansas*, *Elizabeth Hosp., Inc. v. Richardson*, 167 F. Supp. 155 (W.D. Ark. 1958), *aff'd*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Illinois*, *Pullman Standard Car Mfg. Co. v. Local 2928, United Steelworkers*, 152 F.2d 493 (7th Cir. 1945); *Kentucky*, *Lyons v. Saunders*, 120 F. Supp. 392 (W.D. Ky. 1954); *Missouri*, *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 186 (8th Cir. 1948); *New York*, *Isbrandtsen Co. v. National Marine Engineers' Beneficial Ass'n*, 9 F.R.D. 541 (S.D.N.Y. 1949) (by implication); *Oregon*, *Benz v. Compania Naviera Hidalgo*, 233 F.2d 62 (9th Cir. 1956), *aff'd on other grounds*, 353 U.S. 138 (1957); *Utah*, *American Newspaper Guild v. MacKinnon*, 108 F. Supp. 312 (D. Utah 1952). See

theory that since a "federal question" now arises under section 301(a) as a result of the *Lincoln Mills* decision, and since unincorporated labor unions already were constituted jural entities for purposes of "federal question" litigation,⁴⁸ it was unnecessary to enact section 301(b) unless its purported scope was broader than the federal question arising only under section 301(a).⁴⁹

One answer is that in holding that section 301(a) creates questions of substantive law, the *Lincoln Mills* majority opinion attributed to that section, insofar as Congress was concerned, "an occult content."⁵⁰ These procedural rigors, assuming it is held that section 301(b) does not make unincorporated labor unions jural entities for purposes of all federal court litigation, emphasize the significance of the doctrine that class actions survive the enactment of section 301(a).⁵¹

Once these procedural barriers are hurdled, one encounters the problem of selecting the appropriate substantive law to govern the outcome of the litigation. Assuming jurisdiction rests upon diversity of citizenship, under the doctrine of *Erie R.R. v. Tompkins*⁵² the federal court must apply the outcome-determinative law which would be applied by a court of the state in which the federal court sits.⁵³ This doctrine may have constitutional significance, for during Justice Brandeis' explanation of why the *Erie* court had to overrule the doctrine of the *Swift v. Tyson*⁵⁴ interpretation of section 34 of the Judiciary Act,⁵⁵ he exclaimed that "the unconstitutionality of the

generally WOLLETT, *op. cit. supra* note 44, at 119. 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, at 421, 477 (1948).

⁴⁸ FED. R. CIV. P. 17(b)(1), codifying *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922).

⁴⁹ *Cf.* Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 455 (1955) (opinion of Frankfurter, J.). For an analogous problem compare the service of process requirement of Fed. R. Civ. P. 4(d)(3), (7), with that of the Taft-Hartley Act § 301(d), 61 Stat. 156 (1947), 29 U.S.C. § 185(d) (1958). Clearly, process served in accordance with section 301(d) is perfected, by virtue of Rule 4(d)(7). *Wilson & Co. v. United Packinghouse Workers*, 83 F. Supp. 162 (S.D.N.Y. 1949). But does Rule 4(d)(7) provide a valid alternative procedure, or further, substitute section 301(d) as an exclusive procedure for perfecting service? Moreover, does section 301(d) provide a service-of-process rule for all federal court litigation, or for merely that instigated under section 301?

⁵⁰ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460-61 (1957) (dissenting opinion).

⁵¹ *But see* the qualification suggested by note 70 *infra* and accompanying text.

⁵² 304 U.S. 64 (1938).

⁵³ See notes 32 and 33 *supra* and accompanying text.

⁵⁴ 41 U.S. (16 Pet.) 1 (1842).

⁵⁵ 28 U.S.C. § 1652 (1958). The 1948 codification widened the original

course pursued [under *Swift v. Tyson*] has now been made clear and compels us to do so."⁵⁶ Whether one apologizes for the result because "Brandeis's standards of *stare decisis* could not easily be satisfied without putting the matter in terms of re-examining a constitutional question,"⁵⁷ or whether, because of the Court's subsequent failure to clarify Justice Brandeis' phraseology, one discounts the purported constitutional basis as "rather dubious dictum at best,"⁵⁸ both the basis for the doctrine and its scope are still unclear.⁵⁹

act's language to include equity cases; whether Congress merely gilded the lily by so doing is questionable. Compare *Mason v. United States*, 260 U.S. 545, 558-59 (1923), with *Russell v. Todd*, 309 U.S. 280, 287 (1940). *Swift v. Tyson* held that only state statutory law was included as rules of decision for the federal courts, and excepted state decisional law. *Erie R.R. v. Tompkins* removed the exception.

⁵⁶ 304 U.S. at 77-78.

⁵⁷ FREUND, ON UNDERSTANDING THE SUPREME COURT 73 (1949). See *Mapp v. Ohio*, 367 U.S. 643, 674-75 (1961) (dissenting opinion), "recognizing that *stare decisis* carries different (i.e., less) weight in Constitutional adjudication than it does in nonconstitutional decision. . . ."

⁵⁸ Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958). A diluted constitutional basis for *Erie*, that it expresses "a coherent and significant principle of federalism," has been suggested. See HART & WECHSLER 633.

⁵⁹ Presumably Justice Brandeis' constitutional basis was twofold: He asserted that "in applying the [*Swift v. Tyson*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states." 304 U.S. at 80. This argument paraphrases the tenth amendment and has historical support. See 9 WRITINGS OF JAMES MADISON 199-200 (Hunt ed. 1906): "Such being the plan of the Constitution, it cannot well be supposed that the Body which framed it with so much deliberation . . . would, if intending that the Common law should be a part of the national code, have omitted to express or distinctly indicate the intention" Also, in conferring choice of forum, and thereby choice of substantive law, upon the non-resident plaintiff, Justice Brandeis concluded that "the doctrine rendered impossible equal protection of the law." 304 U.S. at 75. It was this evil which stimulated the historical scholarship culminating in Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923). Justice Brandeis acknowledged this article as the basis for his re-interpretation of the Judiciary Act, 304 U.S. at 73 n.5 (1938). However, Warren's article reveals no suggestion the Congress, although it intended state decisional as well as state statutory law in the operation of the Judiciary Act, felt constitutionally compelled to do so. While the due process clause of the fifth amendment contains no mention of "equal protection" *in haec verba*, and it is that amendment which regulates unfair congressional legislation, e.g., *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), there has been recent scholarly appreciation of the "growing and overlapping role of the 'equal protection' and 'due process' clauses which were joined . . . in section 1 of the Fourteenth Amendment" BARRETT, BRUTON & HONNOLD, CONSTITUTIONAL LAW 594 (1958); and this concept has received Supreme Court approval as applied to the due process clause of the fifth amendment. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See generally BLAUSTEIN & FERGUSON, DESEGREGATION AND THE LAW 49-51 (1957). The extent to which this overlap occurs has vexed the lower federal courts subsequently. Cf. *Stagg, Mather & Hough v. Descartes*, 244 F.2d 578

Actions of an equitable nature present the most unsatisfactory area in which this unclarity persists. Justice Frankfurter, whose concepts of the *Erie* doctrine's significance have shifted,⁶⁰ once purported to define "the extent to which federal courts, in the exercise of the authority . . . to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies."⁶¹ But in fact he held nothing of the kind; he held merely that if entrance to a court of equity is barred by state law, it is likewise barred in a federal court. Nothing was held purporting to control the exercise of a federal chancellor's conscience once it was legitimately invoked, although he did republish, as dictum,⁶² language that "the enforcement in the Federal courts of new equitable rights created by States is subject to the qualification that such enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States."⁶³

Even the "carefully considered"⁶⁴ dictum in the more recent case of *Bernhardt v. Polygraphic Co.*⁶⁵ lends credence to the doctrine's blanket equitable application, but commentators disagree on whether the language of the majority⁶⁶ and concurring⁶⁷ opinions indicates

(1st Cir. 1957). One court has been presented with, but avoided ruling on, a contention that *any* federally-authorized action which constitutes *any* unequal protection per se violates due process. *NLRB v. Gene Compton's Corp.*, 262 F.2d 653 (9th Cir. 1959). A more moderate view is "that the arbitrariness of a classification, if it is bad enough, may be a violation of the due process clause of the Fifth Amendment even though that contains no equal protection clause." *Pacific Natural Gas Co. v. FPC*, 276 F.2d 350, 353 (9th Cir. 1960).

⁶⁰ Compare Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 530 (1928): "Legislation should remove this doctrine . . .", with Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (concurring opinion by Frankfurter, J.): "The availability of federal tribunals for controversies concerning matters which in themselves are outside federal power and exclusively within state authority, is the essence of a jurisdiction solely resting on the fact that a plaintiff and a defendant are citizens of different States."

⁶¹ *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), quoting from *Russell v. Todd*, 309 U.S. 280, 294 (1940).

⁶² *Guaranty Trust Co. v. York*, *supra* note 61, at 107 n.4.

⁶³ *Henrietta Mills v. Rutherford County*, 281 U.S. 121, 127 (1930).

⁶⁴ Hill, *supra* note 58, at 431.

⁶⁵ 350 U.S. 198 (1956). *But see* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (concurring opinion).

⁶⁶ 350 U.S. at 202 (Douglas, J.): "If respondent's contention is correct, a constitutional question might be presented. *Erie R.R. Co. v. Tompkins* indicated that congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases."

⁶⁷ *Id.* at 208 (Frankfurter, J.): "[I]t would raise a serious question of constitutional law whether Congress could subject to arbitration litigation

a willingness to resubscribe to a constitutional basis underlying *Erie*.⁶⁸

The discussion retains a significance transcending the academic, for a constitutional basis underlying *Erie* paralyzes a federal court attempting to implement a national labor relations policy of substantive law governing collective bargaining agreements. This has led to suggestions, for example, that the Norris-LaGuardia Act could not constitutionally be applied in a diversity of citizenship case,⁶⁹ and that, assuming class suits are forbidden by state law against unincorporated labor unions, they may be likewise barred in a federal court by a constitutionally-mandated *Erie* doctrine.⁷⁰

It is true that the Court of late, with precedential support,⁷¹ has departed from the *Erie* doctrine in maintaining traditional federal standards of judge-jury fact-finding functions.⁷² This aberration has been rationalized on the ground that

the likelihood of different results being reached by a state judge and a federal jury deciding the same factual question was not so great as to require the federal practice of jury determination to yield to the state rule in the interest of uniformity of outcome.⁷³

But this analysis inadequately explains subsequent action in the lower federal courts triggered by the Court's decision: holdings, for example, that the amenability of a foreign corporation to process requires a federal standard;⁷⁴ that admissibility of crucial evidence

in the federal courts which is there solely because it is 'between Citizens of different States'"

⁶⁸ Compare Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 *YALE L.J.* 187, 191 (1957), with Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 *U. PA. L. REV.* 797, 799 n.9 (1957).

⁶⁹ See Mendelsohn, *Enforceability of Arbitration Agreements under Taft-Hartley Section 301*, 66 *YALE L.J.* 167, 185 n.78 (1956). *But cf.* Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945) (dictum); Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938).

⁷⁰ Comment, 68 *YALE L.J.* 1182, 1192 (1959).

⁷¹ *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931).

⁷² *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958).

⁷³ *The Supreme Court, 1957 Term*, 72 *HARV. L. REV.* 77, 150 (1958). *But see* Freidelbaum, *The Warren Court and American Federalism—A Preliminary Appraisal*, 28 *U. CHI. L. REV.* 53, 65 (1960).

⁷⁴ *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960). *But cf.* *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

would be unaffected by state rules purporting to govern.⁷⁶ These holdings, which would seem to make light of *Erie's* constitutional credentials, appear to defy categorization in terms of their potential effect upon the outcome of the litigation. Prior to these cases, application of the *Erie* doctrine in proportion to its likelihood of affecting the outcome had been submitted as a standard for its invocation.⁷⁶

Assuming, then, that a plaintiff can satisfy entrance requirements to both "federal question" and "diversity of citizenship" jurisdiction of a federal district court, he has become "master to decide what [substantive] law he will rely upon."⁷⁷ Indeed, under the doctrine of *Hurn v. Oursler*,⁷⁸ separate jurisdictional grounds to adjudicate a state claim need not be shown once federal question jurisdiction exists. Possibly plaintiff may join his section 301 action with a separately-conceived injury emanating from violation of state law.⁷⁹ Particularly is this true in a case where a tort action is joined with the section 301 suit because the rule that federal administrative redress does not pre-empt common law tort actions by employers⁸⁰ and employees⁸¹ against labor unions, given a context of violence or threats thereof,⁸² has been extended to hold that section 301 likewise does not pre-empt state common law tort actions.⁸³ Some restrictions do exist, for it has been held that a section 301 action against the union bars joinder of a common law class action against the

⁷⁶ *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960). This question involves the interplay between FED. R. CIV. P. 43(a), and the *Erie* doctrine; see Hill, *supra* note 58, at 433-34. The fifth circuit assumed, without deciding, that a state statute governing a statement's admissibility for impeachment purposes would have been applied by a state court, to exclude the statement, but nevertheless snubbed the statute. This technique is questionable in the light of *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960). *Accord*, *Hope v. Hearst Consol. Publications, Inc.*, 294 F.2d 681, 687 n.6 (2d Cir. 1961) (2-1 decision).

⁷⁷ See HART & WECHSLER 660.

⁷⁸ *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). The law may be the same, which makes the issue moot. See *Isbrandtsen Co. v. Local 1291, Int'l Longshoremen's Ass'n*, 204 F.2d 495 (3d Cir. 1953).

⁷⁹ 289 U.S. 238 (1933).

⁸⁰ See generally Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513 (1958).

⁸¹ *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

⁸² *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *International Union, UAW v. Russell*, 356 U.S. 634 (1958); see 69 YALE L.J. 309 (1958).

⁸³ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

⁸⁴ *Lucas Flour Co. v. Teamsters Union*, 57 Wash. 2d 95, 356 P.2d 1 (1960), *aff'd on other grounds*, 369 U.S. 95 (1962).

membership, in which the union leadership was denominated representatives of the class as well as individual defendants;⁸⁴ similarly, an employer may not join his section 301 action with one against the union leaders solely in their individual capacity.⁸⁵ However, the existence of a separate suit against the individual leaders pending in a state court could leave a concurrent section 301 suit against the entity in a federal court unaffected.⁸⁶

Should plaintiff decide to elect between, rather than join, his state and federal claims, the problem becomes one of determining which of these choices plaintiff has elected. Normally, "where it appears from the bill or statement of the plaintiff that the right to relief depends upon . . . the laws of the United States,"⁸⁷ a federal question is presented. Assuming this rule is applicable in a choice-of-law as well as a jurisdictional context, not only should the court usually ignore surrounding documents such as the defendant's answer or petition for removal in making this determination,⁸⁸ but may ignore the part of the complaint forming the prayer for relief.⁸⁹

This rule that the federal court looks solely at the plaintiff's well-pleaded complaint in determining the existence of a federal question is "deceptively simple,"⁹⁰ particularly when applied to section 301 state law choice-of-law determinations. Removal and original jurisdiction cases may be considered indiscriminately.⁹¹ The earlier cases held that if section 301 was not explicitly set forth in the complaint as the ground for relief relied upon,⁹² or if diversity of citizenship and

⁸⁴ *Wilson & Co. v. United Packinghouse Workers*, 181 F. Supp. 809 (N.D. Iowa 1960). Distinguish this situation of a section 301(a) suit joined with a class action from that where a class action is the alternative and substitute remedy for a section 301(a) suit. Cf. notes 42-44 *supra* and accompanying text.

⁸⁵ *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962). The motivation for the multiple litigation is provided by section 301(b): "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 members or his assets."

⁸⁶ *International Plainfield Motor Co. v. Local 343, Int'l Union, UAW*, 123 F. Supp. 683 (D.N.J. 1954).

⁸⁷ *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

⁸⁸ *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). *But see* *Fay v. American Cystoscope Makers, Inc.*, 98 F. Supp. 278 (S.D.N.Y. 1951).

⁸⁹ Cf. *Goldberg v. Stevens*, 184 F. Supp. 940 (E.D. Pa. 1960).

⁹⁰ See *Mishkin, The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 176 (1953).

⁹¹ See *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

⁹² *Abrams v. Hart Cotton Mills, Inc.*, 85 F. Supp. 664 (E.D.N.C. 1949); *H. N. Thayer Co. v. Binnall*, 82 F. Supp. 566 (D. Mass. 1949).

alleged section 301 jurisdiction were both set forth,⁹³ state law presumably governed. These holdings can be explained on the ground that they occurred before the formulation of the doctrine that a separate body of federal substantive labor law evolved from section 301. More recent decisions evidence a milder view: that litigants relying on federal law need not say so *in haec verba*, but need merely plead facts evidencing such reliance.⁹⁴ Thus the plaintiff who draws his complaint artfully enough may be able to force the issue of which substantive law will govern the outcome of the litigation, provided that the state substantive law of collective bargaining agreements has not been pre-empted by section 301.

At the outset, it must be noted that pre-emption is the exception to the following rule:

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product [including the Constitution] was extremely small. . . . Federal legislation, on the whole, has been . . . drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.⁹⁵

Occasionally, Congress spells out the operative state law background of its legislative product, as, for example, when it provides that governmental liability for its employees' negligence shall be "in accordance with the law of the place where the act or omission occurred."⁹⁶ But Congress never tells when its decrees are to sweep

⁹³ *International Woodworkers v. McCloud River Lumber Co.*, 119 F. Supp. 475 (N.D. Cal. 1953); *John Hancock Mut. Life Ins. Co. v. United Office & Professional Workers*, 93 F. Supp. 296 (D.N.J. 1950).

⁹⁴ *National Dairy Prod. Corp. v. Heffernan*, 195 F. Supp. 153 (E.D.N.Y. 1961); *cf. Produce Terminal Realty Corp. v. New York, N.H. & H.R.R.*, 116 F. Supp. 451 (D. Mass. 1953), holding that facts alleged, rather than law expressly relied upon, determines existence of federal question under the ICC Act.

⁹⁵ HART & WECHSLER 435.

⁹⁶ Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1958).

the field clear of other regulation,⁹⁷ and the Court has recognized that revelation of this congressional aim is a judicial function.⁹⁸

Less clear is this pre-existing background of relationships in the field of labor relations; it might almost be said that labor relations is the exception to the exception of pre-emption. Congressional promulgations such as "the labor of a human being is not a commodity or article of commerce,"⁹⁹ and "employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection"¹⁰⁰ are words worth hewing in rock. The twenty-year interval between them refutes the notion of *ad hoc* legislation in favor of a constant government reappraisal of the pattern emergent from the interweaving of various threads in the national economic fabric, and a periodic legislative re-adjustment of that pattern, for example in 1947 and 1959. Thus it has been submitted that at least "since the enactment [of the Wagner Act] in 1935, federal pre-emption of the labor-management relations field has proceeded without abatement."¹⁰¹ But the depth of congressional feeling, manifested in the doctrine of pre-emption, falls short of the whole story; equally significant is the breadth of the sweep of the congressional transit. For example, the collective bargaining provisions of the original Wagner Act, albeit the keystone of effort in "an area in which the national government has labored hard and long,"¹⁰² arguably intended to create the relationship only of mandatory collective bargaining; administrative apparatus was not established to supervise the content of collective bargaining agreements, nor, in fact, even to insure that agreement would be forthcoming from the negotiations, but merely to insure that the ceremony of collective bargaining in good faith took place without a hitch.¹⁰³

⁹⁷ See 108 U. PA. L. REV. 1224, 1225 n.6 (1960).

⁹⁸ *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

⁹⁹ Clayton Anti-Trust Act § 6; 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

¹⁰⁰ National Labor Relations Act § 7, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958).

¹⁰¹ Aaron, *The Labor-Management Reporting and Disclosure Act of 1959: II*, 73 HARV. L. REV. 1086, 1089 (1960); see Friedelbaum, *supra* note 73, at 58.

¹⁰² Mishkin, *supra* note 90, at 196.

¹⁰³ See *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-09 (1952) (dictum); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1325 (1954). The thrust of Professor (now Solicitor-General) Cox's article is the interplay between federal administrative law and state administrative and statutory law. Some of his considerations remain apropos when applied to an analysis of the relationship between federal and state decisional law as it develops in the labor relations field.

The actual process of negotiating a collective bargaining agreement is "in practice a highly variable process, shaped by the parties and by the conditions they face."¹⁰⁴

An extension of this analysis of the pattern of federal regulation leads to the conclusion that Congress in enacting section 301 meant not to substitute federal standards and suppress state standards of accountability for violation of collective bargaining agreements. Rather, the impression is gathered that accountability alone, regardless of its characteristics, was sought to be created. Carried to its conclusion this analysis reveals that state standards were intended to be the *sole* measure of accountability, a conclusion seemingly foreclosed by *Lincoln Mills* were it not for the juxtaposition in recent opinions of congressional purpose and congressional intent without an explanation of how the manifestation of congressional intent exemplified in the *Lincoln Mills* case implements the congressional purpose.¹⁰⁵ There is some heady legislative history on point created by both proponents and opponents of the measure.¹⁰⁶ This may be inadmissible evidence of the congressional intent insofar as the proponents are concerned because it is not included in the committee reports, which in the past have marked the boundary of a legitimate inquiry into legislative history;¹⁰⁷ insofar as statements by the opposition are concerned "it is the sponsors that we look to when the meaning of the statutory words is in doubt."¹⁰⁸

One must appreciate, assuming *arguendo* that the field of labor

¹⁰⁴ COMMITTEE FOR ECONOMIC DEVELOPMENT, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 31 (1961).

¹⁰⁵ Compare the language in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508-09 (1962): "The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations," with that in *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962): "[W]e cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." See Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 COLUM. L. REV. 269 (1959).

¹⁰⁶ Compare the remarks of Senator Taft, co-author of the bill, 93 CONG. REC. 7690 (1947), and those of Senator Ball, the bill's floor manager, 93 CONG. REC. 5014 (1947), with those of the bill's opposition, summarized in 57 YALE L.J. 630, 633 (1948).

¹⁰⁷ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (concurring opinion). However, the *Charles Dowd* opinion, itself, in support of its holding, resorted to statements on the floor of Congress. 368 U.S. at 512. See generally DOWLING, PATTERSON & POWELL, *MATERIALS FOR LEGAL METHOD* 325 n.2 (2d ed. 1952).

¹⁰⁸ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

relations lends itself to the application of traditional concepts of pre-emption, that in applying those traditional concepts "there can be no one crystal clear distinctly marked formula."¹⁰⁹ The last comprehensive Supreme Court definition of the criteria for pre-emption has set forth three such criteria¹¹⁰ although the relative weight which should be accorded each is as yet unclear.¹¹¹

The first criterion is the pervasiveness of the congressional regulatory enactment which is alleged to have pre-empted the field. Application of this standard argues against pre-emption on the ground that it took the *Lincoln Mills* litigation to manifest the existence of any congressionally-spelled-out regulatory pattern, let alone the pervasiveness of any such congressional design.

The second criterion is the dominant federal interest involved. Concededly, Congress has an interest in minimizing "industrial strife which interferes with the normal flow of commerce . . ." ¹¹² But the question is whether the mere ultimate uniformity of substantive rules of decision—which must inevitably climax pre-emption—serves, in the light of the possibility of some alternative rules for decision, a dominant federal interest. One argument favoring uniform regulation has noted that it will serve to check unbridled rivalry among the states tending to formulate a substantive law of collective bargaining agreements stressing a particular appeal to immigrant industry. This has, in fact, been the result¹¹³ of the "right-to-work" exemption of the Taft-Hartley Act,¹¹⁴ which permits state regulation of union-shop agreements¹¹⁵ and which has created problems of even an intra-state nature.¹¹⁶ Hence its repeal has been urged.¹¹⁷ However, is the possibility that unfair laws formulated by overly-enthusi-

¹⁰⁹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹¹⁰ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). See KAUPER, *CONSTITUTIONAL LAW* 504 (2d ed. 1954).

¹¹¹ See 108 U. PA. L. REV. 1224, 1228-29 n.31 (1960).

¹¹² Taft-Hartley Act § 1(b), 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1958).

¹¹³ Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1303 (1954).

¹¹⁴ 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

¹¹⁵ Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1303, 1397 (1954); Johannesen, *Recent Decisions Concerning the Agency Shop*, 40 N.C.L. REV. 603 (1962); see Note, *The Agency Shop, Federal Law, and the Right to Work States*, 71 YALE L.J. 330 (1961).

¹¹⁶ See Burke & Brum, *Local Right to Work Ordinances, A New Problem in Labor and Local Law*, 9 STAN. L. REV. 674 (1957); Finman, *Local "Right to Work" Ordinances: A Reply*, 10 STAN. L. REV. 53 (1957).

¹¹⁷ Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1320 (1954).

astic states will be redressed in time, for example, by new voting patterns or an emigration of disgruntled workers, so remote as to provoke prospective rather than corrective federal regulation? Has the experience with analogous state "right-to-work" legislation run a sufficient course of time so as to provide an affirmative answer with certainty? Assuming the likelihood of this eventual socio-political redress, and assuming that federal regulation is intended to be corrective only until it takes place, the latter will not fill the time-gap created by the former. Rather, the realization of the two reliefs will coincide, rather than follow each other in sequence.¹¹⁸ This is because of the peculiar unsuitability of the lower federal courts to accomplish the task of formulation and administration of a substantive labor law which the Court has said Congress set for them.¹¹⁹ One can, and the *Lincoln Mills* court did, appreciate congressional reluctance to place contractual violations in the hands of the National Labor Relations Board by denominating them unfair labor practices,¹²⁰ which was a justifiable legislative technique because the delay inherent in NLRB proceedings generally¹²¹ reaches appalling proportions in the case of unfair labor practice proceedings.¹²² Also, NLRB proceedings have unreliable precedential value¹²³ and exhibit a lack of clarity which tends to confuse those seeking an authoritative guide.¹²⁴ But it does not follow, for the reasons given, that the lower federal courts will do the task either better or more quickly. It appears that an assertion of "the paramount federal policy of uniformity"¹²⁵ not only cannot expeditiously

¹¹⁸ See note 17 *supra* and accompanying text; *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (dissenting opinion).

¹¹⁹ *Id.* at 456; see Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

¹²⁰ 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 545-46 (1948).

¹²¹ See Rothman, *The National Labor Relations Board and Administrative Law*, 29 GEO. WASH. L. REV. 301, 316-17 (1960); Note, 53 COLUM. L. REV. 258, 265 (1953).

¹²² See report of the special subcommittee of the House Labor Committee, excerpted in N. Y. Times, Sept. 27, 1961, p. 20, col. 4 (city ed.). One regional office has asserted that it is not responsible for delays. See statement of the central and northern New Jersey regional director quoted in the Newark Evening News, Jan. 15, 1961, p. 8, col. 7 (7-star ed.).

¹²³ Compare *General Motors Corp.*, 133 N.L.R.B. No. 21 (Sept. 29, 1961), with *General Motors Corp.*, 130 N.L.R.B. 481 (1961), both discussed in Johannesen, *supra* note 115.

¹²⁴ Compare *In the Nation*, N.Y. Times, Oct. 13, 1961, p. 34, col. 4, with *id.* Oct. 20, 1961, p. 32, col. 4 (late city ed.).

¹²⁵ Wollett & Wellington, *Federalism and Breach of Labor Agreement*, 7 STAN. L. REV. 445, 452 (1955). This pre-*Lincoln Mills* thesis concludes,

be brought about but, standing alone, exemplifies the major premise of unarticulated public policy.¹²⁶

A qualitative approach to exclusive federal control of collective bargaining already has been suggested, for example, for the area of national defense.¹²⁷ Perhaps the Supreme Court, should attempt, via the judicial process, to formulate similarly-qualitative solutions to the problem just as Congress, on both an *ad hoc* and a permanent basis, has provided through legislation. The *ad hoc* approach permits the President to arrange an 80-day, injunction-supported "cooling off period" whenever, in the President's court-confirmed estimate, a strike or lockout "will—imperil the national health or safety."¹²⁸ This has been upheld against constitutional attack on grounds of violation of separation of powers,¹²⁹ violation of freedom of speech, due process, or voluntary servitude,¹³⁰ or violation of the requirement that a "case or controversy" exist before a federal court may act.¹³¹ Exemplifying a permanent qualitative approach is the exemption of the construction and apparel industries¹³² from the "secondary-boycott"¹³³ and "hot-cargo"¹³⁴ prohibitions imposed by amendments to the Taft-Hartley Act.¹³⁵ These likewise have been

however, that notwithstanding the desirability of uniformity, section 301's failure to mandate federal substantive law explicitly should preclude the Supreme Court from doing so.

¹²⁶ HOLMES, *THE COMMON LAW* 35-36 (1881).

¹²⁷ Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1302-03 (1954).

¹²⁸ Taft-Hartley Act §§ 206-08, 61 Stat. 155 (1947), 29 U.S.C. §§ 176-78 (1958), as amended, 29 U.S.C.A. § 178 (Supp. 1961).

¹²⁹ *United States v. United Steelworkers*, 202 F.2d 132 (2d Cir.), *cert. denied*, 344 U.S. 915 (1953).

¹³⁰ *United States v. International Union, UMW*, 89 F. Supp. 187 (D.D.C. 1950), *appeal dismissed as moot*, 190 F.2d 865 (1951); *United States v. International Longshoremen's Union*, 78 F. Supp. 710 (N.D. Cal. 1948).

¹³¹ *United Steelworkers v. United States*, 361 U.S. 39 (1959) (per curiam).

¹³² Taft-Hartley Act (Landrum-Griffin Amendment) § 704(b), 73 Stat. 525 (1959), 29 U.S.C. § 158(e) (Supp. III, 1961).

¹³³ 73 Stat. 525 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. III, 1961).

¹³⁴ 73 Stat. 525 (1959), 29 U.S.C. § 158(e) (Supp. III, 1961); see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959: II*, 73 HARV. L. REV. 1086, 1112-21 (1960); Farmer, *The Status and Application of the Secondary Boycott and Hot-Cargo Provisions*, in *The Labor-Management Reporting and Disclosure Act of 1959: Interpretations and Implications*, 48 GEO. L.J. 205, 327-45 (1959); Fleming, *Title VII, The Taft-Hartley Amendments*, in *The Labor-Management Reporting and Disclosure Act of 1959: A Symposium*, 54 NW. U.L. REV. 659, 666, 685-94 (1960).

¹³⁵ See sources cited in note 134 *supra*; Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195 (1960).

upheld.¹³⁶ But no such qualitative approach appears vis-à-vis the litigation of alleged violations of collective bargaining agreements. Nor does it satisfy the requirements of a qualitative analysis that federal rules of conduct will apply only in interstate commerce, for "it is sometimes said, with only minimum exaggeration, that there is no business in which employment relations are not potentially subject to federal control."¹³⁷

The third pre-emption criterion—potential conflict of administration and law between state and federal agencies¹³⁸—represents the most valid ground for substituting federal for state rules of accountability; particularly has this manifested itself in the field of labor relations.¹³⁹ Whether one expresses the view that this conflict in law and administration merits pre-emption because conflict would be "intolerable,"¹⁴⁰ because conflict would resurrect an evil comparable to the at least quasi-constitutional one corrected by *Erie v. Tompkins*,¹⁴¹ or on the full-fledged constitutional ground that "no competing state law could survive under the supremacy clause of the Constitution,"¹⁴² pre-emption does seem ordained if only upon this possibility of conflict of law and administration.¹⁴³

¹³⁶ *Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp. 294 (N.D. Cal. 1960).

¹³⁷ Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1299 (1954). Professor Cox favored administrative pre-emption, *id.* at 1315-17, notwithstanding that "federal regulation has been extended too far, leaving too little to state control." *Id.* at 1305. However, he also favored pre-emption by federal substantive law, *id.* at 1338, but was considering the problem in a wholly hypothetical context, because he thought "it adds a good deal to the words (of § 301) to read in an instruction to the district courts to develop a body of substantive law. It adds immeasurably more to infer that the federal law should be exclusive . . ." *Id.* at 1338-39.

¹³⁸ The standard of potential conflict may represent a shift from the former standard of actual conflict. See 108 U. PA. L. REV. 1224, 1228-29 n.31 (1960).

¹³⁹ See, e.g., *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

¹⁴⁰ Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1338 (1954).

¹⁴¹ Wollett & Wellington, *supra* note 125, at 452; see Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 COLUM. L. REV. 269, 279-80 (1959).

¹⁴² Bickel & Wellington, *supra* note 119, at 9; see also Meltzer, *supra* note 141, at 276.

¹⁴³ At this point some clarification in terminology may prove useful. Problems of supremacy traditionally arise when, in a given case, state and federal rules dictate conflicting results. A valid federal rule will prevail. If the *Lincoln Mills* principle is construed narrowly so that federally-formulated rules apply only when jurisdiction is founded on § 301 (see FED. R. CRV. P. 8(a) (1), and text accompanying notes 90-94 *supra*) no direct conflict results if jurisdiction is founded upon diversity of citizenship. Given a broad interpretation of the *Lincoln Mills* principle, that is, federal law governs all collective bargaining agreement litigation in the federal courts, one must assume

The *Lincoln Mills* principle contemplates a potential vivid and far-reaching power shift from the state to the federal arena. This thought has already been expressed *ad nauseam*—it suffices to say that the *Lincoln Mills* court itself was alerted to a misgiving awareness of this.¹⁴⁴ But by hypothesis, a pre-emptive *Lincoln Mills* principle assures an aggravation of that shift, for which there is no demonstrable dominant federal purpose in justification. For this political reason, even more than because of the oddities of statutory synthesis and difficulties of judicial administration discussed earlier, the *Lincoln Mills* principle should either be overridden by the Congress or overruled by the Supreme Court.

The *Lincoln Mills* principle's main attraction is a technical one: it may serve to protect section 301's constitutionality. The argument has been made that if state law applies of its own force under section 301, the section as enacted is incompatible with the limits of the judicial power of the United States imposed by article 3 of the Constitution.¹⁴⁵ Indeed, the *Lincoln Mills* majority was accused of

in this context a non-constitutional *Erie* doctrine, for a constitutional *Erie* doctrine as applied here forbids such a wide application of the *Lincoln Mills* principle. In order to preclude a chaotic regulatory scheme in cases where there is no present direct conflict, and to prevent these problems from arising upon the capricious niceties of pleading, a pre-emptive law of federally-fashioned rules for litigating obligations under collective bargaining agreements would operate prospectively by sweeping away state law purporting to operate of its own force instead of waiting for each case to arise which might engender direct conflict, such as where a broad application of the *Lincoln Mills* principle conflicts with state law in the context of a non-constitutional *Erie* doctrine. Note that the court would be pre-empting state law not to advance a congressional regulatory scheme, but its own. Congress to the rescue might provide, for example, that for purposes of diversity-of-citizenship jurisdiction to litigate a collective bargaining agreement a labor union in an industry affecting commerce shall not be considered a citizen of any state.

¹⁴⁴ 353 U.S. at 464, 484 (dissenting opinion).

¹⁴⁵ *Id.* at 469-94 (dissenting opinion). *But see id.* at 460 (concurring opinion). The concurring opinion (per Burton and Harlan, JJ.) raises interesting questions. While purportedly subscribing to the theory that Congress can invest the federal courts with "protective jurisdiction," over collective bargaining agreement litigation, the opinion neglected to state upon which ground such "protective jurisdiction" could be reconciled with the constitutional limitations of article 3. There are at least four such purported reconciliations: (1) that Congress, in the valid exercise of its article 1 powers, may confer jurisdiction upon federal courts beyond the limits of article 3. *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (plurality opinion); (2) that, since the judicial power of article 3 is at least co-extensive with the legislative, in any situation, such as the litigation of collective bargaining agreements, where Congress could provide the substantive rule for decision but chose not to, Congress may alternatively enact a mere jurisdictional statute while eschewing its substantive power. See HART & WECHLSER 371. This approach would interpret the words of ar-

formulating the *Lincoln Mills* principle in order to preclude just such an attack on section 301's constitutionality.¹⁴⁶ Assuming, arguendo, the validity of this constitutional attack, this alternative solution to the problem is proposed: Congress, in the exercise of its wide powers under the commerce clause,¹⁴⁷ should enact legislation which would create, of labor unions "representing employees in an industry affecting commerce," jural entities capable of suing or being sued on collective bargaining agreements in the courts of the several states.¹⁴⁸ This solution differs from other approaches to the problem—for

title 3 "arising under . . . the Laws of the United States" to read "which could arise under the laws of the United States"; (3) "that cases arising under the laws of the United States, within the meaning of Article III, include not only those which are governed on the merits, in whole or in part, by validly established federal rules of decision, statutory or otherwise, but also those brought pursuant to a valid federal statute enacted to prevent the possibility of discrimination against federally-protectible interests." HART & WECHSLER 372. Under this theory, a bald grant of jurisdiction would be elevated to the status of such "a valid federal statute enacted to prevent the possibility of discrimination against federally-protectible interests"; (4) that if Congress has already legislated substantively in an area, Congress should be permitted to surround adjacent litigation not governed by substantive federal law with protective jurisdiction in order that under the laws of the United States the entire congressional policy in the area may benefit from the institutional characteristics of the federal courts. See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 184-96 (1953). This theory assumes exploitation of the institutional characteristics of the lower federal courts for the benefit of collective bargaining agreement litigation was an end sought by Congress in enacting section 301. A differing appraisal of the problem which prompted the enactment of section 301, see note 105 *supra* and accompanying text, would conclude that the federal courts were brought into play not for their institutional differences but rather as an alternative and possibly runner-up choice of forum because of the inability of unions to litigate as jural entities in the state courts. The dissent of Justice Frankfurter appraised and rejected all four theories.

A second aspect of the concurring opinion is that "protective jurisdiction" presumes the application of state substantive law. The *Lincoln Mills* court held that collective bargaining agreements to arbitrate are specifically enforceable. But, under relevant state law, that is, Alabama, such agreements are unenforceable. See note 23 *supra* and accompanying text. The concurrence nevertheless approved the result on the ground that "having jurisdiction over the suit, the court was not powerless to fashion an appropriate federal remedy. The power to decree specific performance of a collective bargaining agreement to arbitrate finds its source in § 301 itself, and in a Federal District Court's inherent equitable powers . . ." Presumably, then, this analysis provides an exception to blanket application of state remedial law in cases of protective jurisdiction which is the converse of that existing vis-à-vis application of the *Erie* doctrine. See note 62 *supra* and accompanying text.

¹⁴⁶ 353 U.S. at 460-61 (dissenting opinion).

¹⁴⁷ See generally Stern, *The Scope of the Phrase Interstate Commerce*, 41 A.B.A.J. 823 (1955).

¹⁴⁸ See *Hearings on H.R. 4908 Before a Subcommittee of the Senate Committee on Education and Labor*, 79th Cong., 2d Sess. 8-11 (1947), the Case Bill which was vetoed by President Truman,

example, compulsory incorporation of labor unions as federal corporations—in that it is calculated to have no effect beyond solving the problem of securing union accountability for and providing union enforceability of the terms of their collective bargaining agreements. By contrast, federally-incorporated labor unions, while barred from litigating in federal court causes of action arising under state law, absent independent grounds of federal jurisdiction,¹⁴⁹ would be constituted jural entities for purposes of all causes of action arising under state law and enforceable in state courts. A glance at section 301's face reveals that this development would outstrip the congressional purpose: that causes of action arising out of the terms of a collective bargaining agreement were the only causes of action which enjoyed congressional pre-occupation.

Simultaneously with this creation of labor unions as jural entities for purposes of collective bargaining agreement litigation in the state courts, entry into a federal forum of that portion of collective bargaining litigation compliant with the prevailing statutory grant of jurisdiction in force up to the limits of article 3 could remain undisturbed. It is true that the power of Congress, which under the commerce clause is potentially plenary in withdrawing litigational or remedial jurisdiction among the state courts,¹⁵⁰ may be somewhat less than plenary in compelling state courts to take jurisdiction prohibited by state law.¹⁵¹ It follows that this proposal may be vul-

¹⁴⁹ See 28 U.S.C. § 1349 (1958).

¹⁵⁰ So long as accomplished with constitutional limits. See HART & WECHSLER 339-40.

¹⁵¹ Compare note 30 *supra* and accompanying text, with Justice Holmes' dictum in *Douglas v. New York, N.J. & H. Ry.*, 279 U.S. 377, 387-88 (1929), where he said: "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, *being otherwise competent*, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such courts as against an otherwise valid excuse." (Emphasis added.) The problem may turn on the scope of the phrase "being otherwise competent." If by this one means, for example, "otherwise competent as a court of general jurisdiction," then the proposed legislation would prevail over state action aimed solely at excluding unincorporated labor unions as jural entities in the state courts. If, by contrast, the quoted phrase were interpreted to mean, in this context, "otherwise competent to entertain suits against unincorporated labor unions as entities," then state courts would be permitted to refuse the suit since they would not be scrutinizing the scope of the restraining state law but would be deaf to such suits against unions as jural entities across the board. Read narrowly, Justice Holmes' language thus becomes merely a precursor of the doctrine that state courts may not discriminate against claims founded in federal law. See note 30 *supra* and accompanying text.

nerable to hostile state legislatures which decide to withdraw jurisdiction from their courts to hear suits by and against labor unions which have been constituted jural entities.

But there is insufficient warrant for a presumption of this hostility. It is arguable that the traditional inability of an unincorporated labor union to sue or be sued as an entity stemmed, not from procedural statutes enacted by state legislatures, but rather from a lethargic failure on the part of the judiciary of the several states to renovate their notions of permissible procedural law to compensate for shifts in our social and economic structure.¹⁵² This solution would advance the true "dominant federal purpose" of accountability, no matter, within reason, the terms upon which it takes place.

Even if it should come to pass that an overriding, all-pervasive federal common law of collective bargaining contractual obligations is required, "congressional solutions . . . reflect a healthy tradition under which basic political decisions are made and changed by avowedly political agencies."¹⁵³ The Supreme Court disagrees; it concludes the *Charles Dowd* opinion: "It is implicit in the choice Congress made that 'diversities and conflicts' may occur To resolve and accommodate such diversities and conflicts is one of the traditional functions of this court."¹⁵⁴ The Supreme Court should be presented with opportunities to exercise this "traditional function" very shortly.

¹⁵² See Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40, 42 n.9 (1941).

¹⁵³ See Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 50 COLUM. L. REV. 269, 302 (1959).

¹⁵⁴ 368 U.S. at 514.