

## ARTICLES

### JUDICIAL PURPOSE AND THE SCHOLARLY PROCESS: THE *LINCOLN MILLS* CASE

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Although the role of the federal judiciary in policing the collective bargaining agreement has been an established feature of our national labor policy since 1957, the existence of legislative support for that role has long been doubted. The seeds of doubt were sown by inadequacies in the Supreme Court's majority opinion in *Textile Workers Union v. Lincoln Mills*.<sup>1</sup> In holding that section 301 of the Labor Management Relations Act of 1947<sup>2</sup> authorized the federal courts to fashion a body of federal common law to govern the enforcement of labor contracts, Justice William O. Douglas offered little support from the language, structure, or history of the statute.<sup>3</sup> Moreover, by noting that his interpretation resolved doubts about the statute's constitutionality,<sup>4</sup> Douglas laid himself open to the claim that the Court itself, rather than the considered policy choice of Congress, was responsible for introducing substance into an otherwise jurisdictional statute.

Justice Felix Frankfurter, whose disagreements with Douglas in matters of style, temperament, and judicial philosophy increasingly divided the two former friends,<sup>5</sup> wasted little time in asserting the claim. In his

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1. 353 U.S. 448 (1957).

2. Act of June 23, 1947, ch. 120, § 301, 61 Stat. 156 (codified at 29 U.S.C. § 185 (1982)). For the text of the statute, see *infra* note 32.

3. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). Douglas appeared to base his decision largely on the weight of lower court authority. His opinion describes the legislative record as "cloudy and confusing," *id.* at 452, and his brief review of the legislative materials was incomplete and misleading. See *infra* text accompanying notes 111-17.

4. See *Lincoln Mills*, 353 U.S. at 457.

5. Many biographies trace the backgrounds of Frankfurter and Douglas, their formative experiences before they came to the Court, and the increasingly testy personal relations that characterized their later years as colleagues. See H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981); L. BAKER, *FELIX FRANKFURTER* (1969); L. BAKER, *BRANDEIS AND FRANKFURTER* (1984) [herein-

famous *Lincoln Mills* dissent, Frankfurter chastised the majority for having read into section 301 an intention on the part of Congress to confer lawmaking power on the federal courts.<sup>6</sup> Frankfurter's own review of the statute's legislative history had convinced him that although section 301 conferred jurisdiction upon the federal courts, it failed to make labor contracts binding as a matter of federal law.<sup>7</sup> As a consequence, Frankfurter argued that Congress had intended state law to control the substantive enforcement of labor contracts.<sup>8</sup> This conclusion led Frankfurter to consider the constitutional question that the majority's

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after BRANDEIS AND FRANKFURTER]; H. THOMAS, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* (1960); W. DOUGLAS, *THE COURT YEARS: 1939-1975* (1980) [hereinafter W. DOUGLAS, *THE COURT YEARS*]; W. DOUGLAS, *THE DOUGLAS LETTERS* (M. Urofsky ed. 1987) [hereinafter W. DOUGLAS, *THE DOUGLAS LETTERS*]; J. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* (1980); Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71. The biographers generally agree, however, that the two men commenced their work on the Court together as friends. Both shared an abiding respect for Justice Louis Brandeis, both had taught before their appointment to the Court, Frankfurter at Harvard, Douglas at Yale, and both came to Washington, D.C. as committed supporters of Roosevelt's New Deal. For accounts of the role of Frankfurter and Douglas in the New Deal, see BRANDEIS AND FRANKFURTER, *supra*, at 275-318; L. BAKER, *FELIX FRANKFURTER*, *supra*, at 145-210; W. DOUGLAS, *GO EAST, YOUNG MAN* 257-376 (1974). For accounts of Douglas's early respect for Frankfurter, see Urofsky, *supra*, at 73-76 and W. DOUGLAS, *GO EAST, YOUNG MAN* 329 (1974) (Frankfurter and Douglas were close friends in 1939). For his part, Frankfurter approved of Douglas's appointment to the bench, regarding him as a man "who is historic-minded about the law, but also knows that history is not a tale of dead things but part of a dynamic process." BRANDEIS AND FRANKFURTER, *supra*, at 420.

6. See *Lincoln Mills*, 353 U.S. at 460-62 (Frankfurter, J., dissenting). See also *infra* text accompanying notes 118-21.

7. Justice Frankfurter's only detailed review of the language and history of section 301 appeared in his plurality opinion in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), a discussion he later incorporated into his *Lincoln Mills* dissent. See *Lincoln Mills*, 353 U.S. at 462.

In *Westinghouse*, its first brush with section 301, the Court held, over Douglas's dissent, that the jurisdictional language of the statute did not embrace an action brought by a union to recover salaries allegedly owed to its members under a collective bargaining agreement. See *Westinghouse*, 348 U.S. at 459-460. Although Frankfurter based his decision on the assertion that the individual rights at issue in the case were not properly vindicated in an action brought under section 301, his opinion for three members of the Court warned of future difficulties by raising doubts as to the constitutionality of legislation that transferred litigation of claims governed by state law to a federal forum. *Id.* at 448-52. Those doubts were laid to rest in *Lincoln Mills*, in which the Court held that section 301 was intended to authorize the federal courts to fashion substantive law to govern labor contracts. *Westinghouse* was subsequently overruled. See *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 700 (1966). Rights established in a collective agreement may now be vindicated in an action brought either by the union or by an individual employee, see *Smith v. Evening News Ass'n*, 371 U.S. 195, 199 (1962), so long as the plaintiff first exhausts arbitral remedies if any under the agreement. See *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 (1965).

8. See *Lincoln Mills*, 353 U.S. at 462.

approach had avoided.<sup>9</sup> He concluded that, because it empowered the federal courts to hear actions that did not arise under the laws of the United States, section 301 exceeded the scope of judicial power under article III, section 2 of the Constitution.<sup>10</sup>

In a practical sense, the debate between Douglas and Frankfurter over the role of the federal courts in regulating compliance with labor contracts has lost much of its currency.<sup>11</sup> In the thirty-three years that have passed since *Lincoln Mills*, the Court has built up a vast body of federal common law that defines the duty to comply with collective bargaining agreements,<sup>12</sup> a body of law that was aptly described by one observer as a "remarkable exercise in judicial creativity."<sup>13</sup> Thus, the Court's own acceptance of its role as the arbiter of labor policy under section 301, coupled with legislative acquiescence in that role,<sup>14</sup> has meant that labor and management measure their contract obligations according to legal rules set down by the federal courts, in keeping with the lawmaking function that Douglas envisioned.

In a larger sense, however, the Douglas-Frankfurter debate continues. Doubts raised by Douglas's discursive opinion and Frankfurter's pointed attack continue to inform the attitudes of legal scholars toward the legitimacy of the Court's formulation of federal common law under section 301. Those who commented upon *Lincoln Mills* at the time it came down generally agreed with Frankfurter that the 80th Congress had

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9. *Id.* at 469.

10. *Id.* at 484.

11. As Justice Brennan explained in 1981, "[I]t is far too late in the day to deny that Congress intended the federal courts to enjoy wide-ranging authority to enforce labor contracts under § 301." *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 627 (1981).

12. Section 301 has spawned both an immense outpouring of opinions and a flood of commentary. For a careful review of the evolution of the Court's section 301 jurisprudence, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973). For comments on the Court's controversial decision in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), which held that the federal courts may enjoin strikes in breach of contract, see Vladeck, *Boys Markets and National Labor Policy*, 24 VAND. L. REV. 93 (1970); Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Markets Case*, 1970 SUP. CT. REV. 215; Klare, *The Public, Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1415 (1982).

13. See Feller, *supra* note 12, at 718.

14. Since section 301 was enacted in 1947, Congress has neither amended its provisions nor taken any substantial steps towards overruling any of the Court's section 301 decisions. Thus, the effort to overrule *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), had stalled long before the Court reversed itself—a fact Justice Black bitterly noted in dissent. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 259 (1970) (Black, J., dissenting). Of course, legislative acquiescence may reflect more a stalemate in Congress between labor and management than universal acclaim for the Court's decisions.

failed to specify that it meant the federal courts to apply federal law to the collective labor agreement.<sup>15</sup> The prevailing view of *Lincoln Mills* was best captured by a respected labor law scholar who opined that it was unlikely that "so much has ever been read into so little before by the Supreme Court."<sup>16</sup> In recent years, leading texts<sup>17</sup> and law review articles<sup>18</sup> have continued to treat the judicial role under section 301 as one that Douglas conferred upon the Court by fiat rather than one he discovered in the statute.<sup>19</sup>

This Article revisits the debate between Douglas and Frankfurter with a view towards assessing the merits of the two Justices' competing interpretations of section 301.<sup>20</sup> Part I traces the origins of the Taft-Hartley

15. In the leading critique of *Lincoln Mills*, Alexander Bickel and Harry Wellington described the opinion as having disposed of difficult questions of statutory construction, of federalism, and of judicial power "in [an] assertive fashion with little apparent consideration of their implications. The disposition was virtually without 'opinion,' if by opinion we mean rationally articulated grounds of decision." Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 6 (1957). See also Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 641 (1959) ("Justice Douglas did not offer much explanatory legal theory. He saw where he wanted to go and knew he would get there if he could get the votes of four of his colleagues.").

16. C. GREGORY, *LABOR AND THE LAW* 471 (2d ed. 1958). Professor Gregory's assessment of section 301 changed markedly over the years, apparently in response to Frankfurter's dissent in *Lincoln Mills*. For a more complete account, see *infra* note 277.

17. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 110 (4th ed. 1983) (section 301 grants jurisdiction over suits on labor contracts but does not set out any federal rules of decision; *Lincoln Mills* reads the statute as requiring the federal courts to fashion and apply federal common law); M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* 127 (1964) (in *Lincoln Mills*, the Court "established itself as the overseer . . . of a whole new body of law."); R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 823 (4th ed. 1987) (describing the decision as holding that the "purposes of the Taft-Hartley Act demanded a federal judge-made law respecting the enforcement of collective-bargaining agreements although the statute spoke only of jurisdiction").

18. Discussions of the power of federal courts to fashion federal common law frequently proceed on the assumption that the Court derived the lawmaking power recognized in *Lincoln Mills* from a grant of jurisdiction, rather than from direction by Congress. See, e.g., Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 412 (1964) ("by granting the federal courts jurisdiction over suits . . . , Congress gave a mandate to federal judges to fashion a body of contract law"); Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 941 (1986) (directive to fashion federal common law derived from a grant of jurisdiction and a bit of legislative history).

19. For a summary of the labor bar's reaction to *Lincoln Mills*, see *infra* notes 128-141.

20. Recently, the business of statutory interpretation has again become the subject of much debate. The 1980s witnessed the rise of a "new textualism"—a renewed call for primary reliance in the interpretive process on the language and structure of the statute. Identified most closely with Justice Antonin Scalia and Judge Frank Easterbrook, the new textualism has again raised time-honored questions about whether courts can effectively, or constitutionally, rely on debates and

Act and the likely attitudes of Douglas and Frankfurter towards legislation that was meant to curtail the power of trade unions by giving federal courts a larger role in policing industrial conflict.<sup>21</sup> I show that Frankfurter was deeply committed to the notion that federal courts were insti-

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committee reports in attempting to say what a statute means. See Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984); Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). For a critical summary of what he perceives as too rigid a return to statutory texts, see Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

At the same time conservative jurists have called for renewed emphasis on the text of statutes, critical scholars have increasingly argued that all legal texts, including those that make up federal statutes, lack a definitive meaning. Rather, the process of reading statutes requires the reader to interact with the text, and thus injects the reader's own language and system of values into the interpretive process. This focus on the interpretive process has produced an outpouring of writing on law and literature, much of which can be traced to the early work of Stanley Fish. See S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) (collecting Fish's earlier work). For a sampling, see *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (S. Levinson & S. Mailloux eds. 1988). Cf. R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988) (literature has but few lessons to teach a judiciary that must interpret statutes); Fiss, *Objectivity and Interpretation*, in *INTERPRETING LAW AND LITERATURE*, *supra*, at 229, 248-49 (arguing against what he perceives as the nihilism of interpretive indeterminacy as applied to legal texts).

Even if one adopts the view that most courts and most scholars will consult statutory texts and legislative history in most difficult cases, and thus places to one side the disagreement about whether the text of the statute provides the sole and definitive, or an inherently uncertain, guide to legislative meaning, much remains in dispute. At the center of the debate over statutory interpretation, one finds disagreement on the extent to which one or more "dynamic" theories of statutory interpretation may be utilized to fill in holes, or more aggressively update, legislative enactments. For a summary of views, see Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989). Most of these works address the implications of the widely accepted notion that courts are subordinate to legislatures, that they must give effect to the language of the statute that Congress drafted. Part of the debate centers on the issue of time: to what extent must the apparent intention of legislatures guide the courts when the passage of time presents society, and the courts, with a problem different from that the legislature faced.

Much of this important debate lacks immediate relevance to the problem presented by the *Lincoln Mills* case. Although they reached different results, Justices Douglas and Frankfurter both insulted the statute's language, structure, and history in deciding how to interpret section 301. In this Article, I follow the lead of the Justices; I assume that the precepts of, and limits on, interpretation are essentially those that Frankfurter set forth in his work on the subject. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947). I conclude that Frankfurter attributed a meaning to section 301 quite out of line with what he would otherwise have considered a disinterested review of the statute's history and did so for the purpose of forcing congressional reconsideration of the decision to vest contract enforcement duties in the federal courts. He thus violated his own admonition that judicial antipathy to the legislative design does not excuse the "evisceration" of statutes. *Id.* at 533.

21. See *infra* text accompanying notes 35-106.

tutionally unfit to play such a role.<sup>22</sup> Next, I review in greater detail the opinions in the *Lincoln Mills* case and their reception by labor law scholars, who largely accepted the central claim of Frankfurter's dissent: Congress intended section 301 to solve the procedural problems that employers experienced in attempting to enforce the collective bargain in state court and merely to confer jurisdiction on the federal courts to hear such claims.<sup>23</sup>

In Part II of the Article, I conduct a review of the language, structure, and history of the statute.<sup>24</sup> In sharp contrast to the conventional wisdom, such a review discloses an array of evidence supporting Douglas's conclusion that section 301 not only established a federal substantive right to contract enforcement, but also authorized the federal courts to fashion rules to govern actions to enforce collective bargaining agreements on a case-by-case basis. I begin by reviewing the state court enforcement difficulties that led to the statute's passage. I show that most state courts enforced the collective contract, if at all, by relying on the individual contract of hire between employees and the firm.<sup>25</sup> Section 301 addresses the resulting enforcement difficulties by transforming the contract enforcement action from a suit brought to vindicate individual rights into an action to enforce collective or group interests; the statute made both unions and employers responsible for their labor contracts on a collective or entity basis. These substantive changes in labor contract enforcement theory belie any claim that section 301 incorporated state law; indeed, the debates and committee reports assume that violations of labor contracts would present a federal question.<sup>26</sup> Such was the position of the principal sponsor and draftsman of the statute, Senator Robert Taft, who defended section 301 from the precise constitutional attack that Frankfurter later mounted on the statute by expressly rejecting the claim that section 301 contemplated reference to state substantive law.<sup>27</sup>

While this evidence suggests that the judicial power recognized in *Lincoln Mills* rests on more than the historical accident that Justice Douglas had five votes for his reading of section 301, it raises more complex questions. In view of the statute's substantive content, it appears difficult to

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22. See *infra* text accompanying notes 89-98.

23. See *infra* text accompanying notes 107-41.

24. See *infra* text accompanying notes 142-265.

25. See *infra* text accompanying notes 150-80.

26. See *infra* text accompanying notes 226-44.

27. See *infra* text accompanying notes 245-49.

understand why Douglas failed to offer more cogent support for his interpretation of the statute, why Frankfurter was moved to attack section 301's constitutionality, and why the legitimacy of the judicial role the statute envisioned has been so widely questioned. This Article addresses these questions in Part III.<sup>28</sup> It concludes that the conventional understanding of section 301 rests on a conviction, shared by Frankfurter and many students of industrial relations, that the courts should stay out of industrial relations.

## I. LINCOLN MILLS: THE BACKGROUND, THE BRETHERN, AND THE BAR'S REACTION

### A. *Lincoln Mills: The Problem*

*Lincoln Mills* came to the Supreme Court as a relatively straightforward dispute between labor and management over the enforcement of a collective bargaining agreement. After organizing a plant in Huntsville, Alabama, the Textile Workers Union of America, CIO, entered into a one-year agreement with Lincoln Mills that, like the vast majority of such contracts today,<sup>29</sup> prohibited strikes by the union during the life of the contract and established a grievance procedure for the resolution of disputes over the administration of the contract.<sup>30</sup> In keeping with the procedure, the union filed a number of work assignment grievances and demanded binding arbitration. When the employer refused, the union brought suit under section 301 to compel the employer to submit the grievances to arbitration. On its facts, therefore, *Lincoln Mills* required the Court to decide whether section 301 empowered the district court to order the employer to proceed to arbitration under a labor contract.<sup>31</sup>

The language of section 301 addresses the enforcement of arbitration agreements in general terms only. It provides that suits for violation of

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28. See *infra* text accompanying notes 266-89.

29. Approximately 98% of the collective bargaining agreements in force in 1989 provided for grievance arbitration. See COLLECTIVE BARGAINING, NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS IN UNION CONTRACTS 51:5 (BNA) (1989).

30. This account of the facts of *Lincoln Mills* was taken from the opinion of the lower court. See *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81, 82-83 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957).

31. See *Lincoln Mills*, 353 U.S. at 449. Apart from constitutional doubts that Frankfurter raised two years earlier in *Westinghouse*, see *supra* note 7, the issue was complicated by the common law's refusal to enforce executory arbitration agreements, by the uncertain reach of federal legislation that vitiated the common law rule, and by the possible application of Norris-LaGuardia's bar to injunctive relief. See *infra* notes 113-14.

contracts between employers and labor organizations may be brought in federal court without regard to the amount in controversy or the citizenship of the parties.<sup>32</sup> While this language is broad enough to vest the federal courts with jurisdiction to hear disputes over the employer's alleged breach of its labor contract, it does not specifically declare that the parties must comply with their collective bargaining agreements or their arbitration agreements. Moreover, the statute does not specify that federal courts may order the specific performance of such agreements. The answer to the question posed in *Lincoln Mills* thus drove Justice Douglas and Justice Frankfurter to interpret the language of the statute in light of its legislative history; it pushed them, in Frankfurter's words, to undertake the troublesome task of determining "the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text [of the statute] on the theory that they were part of it, written in ink discernible to the judicial eye."<sup>33</sup> In this Article, I focus on the manner in which Justices Douglas and Frankfurter discharged their interpretive task in *Lincoln Mills*. I proceed on the unremarkable assumption that the values of the two Justices may have "infiltrated the

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32. Section 301 reads as follows:

(a) Suits 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.

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

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

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

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

Act of June 23, 1947, ch. 120, § 301, 61 Stat. 156 (codified at 29 U.S.C. § 185 (1982)).

33. Frankfurter, *supra* note 20, at 529.

text” of section 301.<sup>34</sup> Before taking up the opinions in *Lincoln Mills*, their use of the legislative history, and their reception by the labor bar, I review the bitter post-war debate over the alleged abuse of trade union power that led to the passage of the Taft-Hartley Act of 1947. I also explore the likely attitudes of the two Justices to legislation that vested the federal courts with enlarged responsibility for the administration of laws that were evidently aimed at curtailing union power.

### B. *The Origins of Taft-Hartley*

As early as 1915, the noted labor economist John R. Commons predicted that governmental recognition of the right of employees to form unions and to bargain collectively with their employers would necessarily entail government regulation of the internal affairs of trade unions.<sup>35</sup> The passage of the Taft-Hartley Act in 1947<sup>36</sup> was the first step towards

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34. Since Holmes, lawyers have agreed that the experiences, biases, and predilections of judges inform the content of their legal decisions. Many go beyond Holmes in asserting that legal texts are essentially indeterminant legal vessels into which judges pour content. See *supra* note 20. Although Frankfurter, a great champion of judicial restraint, would not have accepted such a proposition as a normative matter, he certainly understood that statutory interpretation gives judges “considerable” room to maneuver. Frankfurter, *supra* note 20, at 533. Frankfurter believed, however, that institutional constraints placed on the judicial function in ascertaining the meaning of statutory language could prevent judges from transgressing the boundary between interpretation and legislation. *Id.*

35. A former union member, Commons founded the so-called Wisconsin School of Institutional Economics, which attributed the success of organized labor in this country to its emphasis on “voluntarism” or job-conscious unionism. See 4 J. COMMONS, D. SAPOSS, H. SUMNER, E. MITTLEMAN, H. HOAGLAND, J. ANDREWS & S. PERLMAN, *HISTORY OF LABOR IN THE UNITED STATES* 621-26 (1936). For critiques of the Wisconsin School’s denial of class consciousness among the working class, see J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 156-59 (1983); Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1119 n.17 (1989).

Commons has been credited with the comment referred to in the text, which appears in the final report of the Commission on Industrial Relations:

It doubtless has appealed to some people who consider the employer’s position more powerful than that of the union, that the employer should be compelled in some way to deal with unions, or at least to confer with their representatives. But if the State recognizes any particular union by requiring the employer to recognize it, the State must necessarily guarantee the union to the extent that it must strip it of any abuses it may practice.

Fleming, *The Significance of the Wagner Act*, in *LABOR AND THE NEW DEAL* 121, 138 (M. Derber & E. Young eds. 1957) (quoting U.S. Comm’n on Industrial Relations, Final Report 374 (1915)).

36. Act of June 23, 1947, Pub. L. No. 101, 80th Cong., 1st Sess. (1947), 61 Stat. 156 (codified as amended at 29 U.S.C. §§ 141-87 (1982)). On the origins of Taft-Hartley, see H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* (1950); C. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985); H. HARRIS, *THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940s* (1982); J. SEIDMAN, *AMERICAN LABOR FROM DEFENSE TO RECONVERSION* (1953). For useful summaries of the provisions of Taft-Hartley, see H. MILLIS & E.

the vindication of Commons' prediction.<sup>37</sup> Taft-Hartley reflected the view that, having established a national policy encouraging the institution of collective bargaining, the federal government was obliged to regulate the trade unions that carried the policy into effect. Thus, Taft-Hartley was both an outgrowth of, and a reaction to, the Wagner Act of 1935<sup>38</sup>—New Deal legislation that, for the first time, established a regime of compulsory collective bargaining in the private sector.<sup>39</sup>

More than the mere refinement of the existing regulatory scheme, Taft-Hartley was the culmination of a partisan<sup>40</sup> drive to reduce the

BROWN, *supra*, at 395-610; Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274 (1948).

37. The second step was taken with the passage of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (1982)) (LMRDA). Unlike Taft-Hartley, which focused on the relations between unions and employees, the LMRDA specifically regulates the relationship between unions and their members. While in practice the two categories often overlap—statutory employees under Taft-Hartley often join the union they have chosen as their bargaining representative, and thus become members for purposes of the LMRDA—the thrust of the two statutes differs. The LMRDA regulates the internal disciplinary process of unions, the election of union officers, and the imposition of trusteeships by parent unions on their subordinate local unions—matters that Taft-Hartley left to state law. *See generally* M. MALIN, *INDIVIDUAL RIGHTS WITHIN THE UNION* (1988); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960).

38. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141-97 (1982)).

39. Congress had taken a number of partial steps towards a policy of support for collective bargaining prior to the passage of the Wagner Act in 1935. The Railway Labor Act of 1926 imposed a statutory duty on both sides to make every "reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions." 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. § 152 (1982)). Likewise, the National Industrial Recovery Act, 48 Stat. 198 (1933), § 7(a), sought to persuade employers to recognize and bargain with unions of their employees' choosing. But the statute, which was declared unconstitutional in 1935, *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), lacked adequate enforcement procedures and was largely undermined by employer recalcitrance. *See generally* H. MILLIS & E. BROWN, *supra* note 36, at 22-26.

40. In the minds of the American public, organized labor and the Wagner Act were closely associated with the Democratic party, Franklin Roosevelt, and the New Deal. The decisive rejection of the Democrats in the mid-term congressional elections of 1946—the GOP captured both Houses of Congress for the first time in 14 years—was thus interpreted by many as a call for reform of the nation's labor laws, a "mandate for change." *See* R. LEE, *TRUMAN AND TAFT-HARTLEY; A QUESTION OF MANDATE* 15-18, 31-45 (1966); S. HARTMANN, *TRUMAN AND THE 80TH CONGRESS* 7-11 (1971). *See also* J. PATTERSON, *MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT* 352-353 (1972). The movement to adopt labor legislation in 1947 thus reflected partisan division, fueled in no small part by organized labor's well-known financial support for FDR and liberal New Deal Democrats. *See* C. TOMLINS, *supra* note 36, at 248. But the success of the Republican effort to reform the nation's labor laws also depended on attracting the support of conservative Democrats from the South and West. Twenty Democrats, 17 from the South, two from Maryland and one from New Mexico, joined 48 Republicans in the Senate's crucial vote to override Truman's veto of Taft-Hartley. *See* S. HARTMANN, *supra*, at 90.

power of organized labor under the Wagner Act.<sup>41</sup> After the Supreme Court rejected an initial challenge to the statute's constitutionality, conservative business groups lobbied Congress either to repeal the Wagner Act or, failing that, to add a series of provisions that would regulate unions directly and restore "balance" to what they viewed as the statute's pro-labor tilt.<sup>42</sup> While this effort made some headway during the war years,<sup>43</sup> it was aided considerably after the hostilities ended by a variety of factors that pushed public opinion on the labor question sharply to the right.<sup>44</sup> To begin with, organized labor conducted a record-breaking number of strikes during the reconversion years of 1946 and 1947 that

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41. Many commentators have noted features of the Taft-Hartley Act that were more obviously aimed at reducing the power of organized labor than at addressing the union abuses that Senator Robert Taft and others cited in arguing for reform legislation. See J. SEIDMAN, *supra* note 36, at 268; H. MILLIS & E. BROWN, *supra* note 36, at 274.

42. Many scholars have traced the increasing sophistication of conservative business lobbying groups, such as the Chamber of Commerce and the National Association of Manufacturers (NAM), and the significant, if not decisive, role they played in generating public support for Taft-Hartley. See H. MILLIS & E. BROWN, *supra* note 36, at 281-91; H. HARRIS, *supra* note 36, at 109-25. Those efforts began in the months following the passage of the Wagner Act, which NAM not only described as unconstitutional but encouraged its members to challenge in court. See Wilcock, *Industrial Management's Policies Toward Unionism*, in *LABOR AND THE NEW DEAL* 275, 292 (M. Derber & E. Young eds. 1957); H. HARRIS, *supra* note 36, at 23-25. Following the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which upheld the statute's constitutionality, NAM called for amendments to the "one-sided" Wagner Act. See H. MILLIS & E. BROWN, *supra* note 36, at 284; H. HARRIS, *supra* note 36, at 120-23. In arguing for balancing legislation, NAM emphasized that the Wagner Act prohibited employers from interfering with the right of employees to form, assist, and join labor organizations but failed to recognize an employee's right to refrain from union membership or to prohibit unions from interfering with such a right. *Id.* at 121. NAM declined to emphasize that these "one-sided" provisions had been included in the Wagner Act by design, essentially on the theory that pro-labor legislation was needed to achieve balance in the bargaining power of employers and workers. See, e.g., Fleming, *supra* note 35, at 138-41.

43. Labor's success in staving off amendments to the Wagner Act owed much to the work of the La Follette Committee on Industrial Espionage, which discovered widespread evidence that employer groups had used spies and propaganda to discredit organized labor. See H. MILLIS & E. BROWN, *supra* note 36, at 100-01, 283-85.

Two significant legislative developments occurred during World War II. First, Congress passed the Smith-Connally War Labor Disputes Act over President Roosevelt's veto—a statute that regulated labor's use of the strike weapon for the duration of the hostilities. See H. MILLIS & E. BROWN, *supra* note 36, at 354-56. Second, Congress passed a series of appropriations bills that reflected the legislature's increasing disenchantment with the alleged bias of the National Labor Relations Board. *Id.* at 51.

44. The clearest evidence of this rightward swing was the passage by both chambers of the Case bill in 1946, legislation that died when Congress failed to override Truman's veto. See H. MILLIS & E. BROWN, *supra* note 36, at 36-62. In addition, restrictive labor legislation made a good deal of progress in state legislatures during the right-to-work drive of the 1940s. See *id.* at 322-32.

inconvenienced many consumers and contributed to the perception that labor not only possessed monopoly power but used it irresponsibly.<sup>45</sup> Labor did little to combat this perception;<sup>46</sup> indeed, its failure to take voluntary steps to resolve jurisdictional disputes and other internal problems lent support to the claim that union abuses required a legislative solution.<sup>47</sup> Coupled with the Republican victories in the 1946 elections,

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45. The reconversion strikes undoubtedly contributed to the public's demand for restrictive labor legislation. Although organized labor had largely honored its no-strike pledge during World War II, the end of hostilities and the demise of wage-price controls triggered inflationary pressures that reduced the real purchasing power of wages. See J. SEIDMAN, *supra* note 36, at 232-48; H. MILLIS & E. BROWN, *supra* note 36, at 298-306. To combat this erosion, labor again resorted to the strike weapon. Whether measured in terms of working days lost (116 million), number of workers involved (4,600,000) or actual number (4,985), 1946 was a record-breaking year for strikes. See H. MILLIS & E. BROWN, *supra* note 36, at 300-02; J. SEIDMAN, *supra* note 36, at 244. Partly as a result of President Truman's restrictive efforts to end the strike in the railroad industry and partly because of the highhanded tactics of John Lewis in the coal fields, see J. SEIDMAN, *supra* note 36, at 235-38, 241-44, the public largely blamed unions for these strikes, rather than the intransigence of employers. Business groups, needless to say, encouraged the allocation of blame to unions. See *supra* note 42.

46. Unions certainly recognized the anti-union elements of the proposed law and argued vigorously against the legislation on that basis. See J. SEIDMAN, *supra* note 36, at 268 (quoting AFL's assertion that the legislation was "conceived in vindictiveness against unions, rejection of collective bargaining and the principle of equality between employer and union"); C. TOMLINS, *supra* note 36, at 250 (quoting CIO president Philip Murray's characterization of Taft-Hartley as the "creature of the reactionary arm of big business"). But the unions were curiously ineffective in marshalling public support for their position. They essentially sat out the 1946 elections, see S. HARTMANN, *supra* note 40, at 6, and they flatly refused to accept any legislation that would limit jurisdictional disputes and secondary boycotts, despite the wide range of support in Congress for such reforms. Frustration with the unions' unbending opposition to reform undoubtedly contributed to the drive for legislation. See J. SEIDMAN, *supra* note 36, at 254-55.

47. By early 1947, there was widespread support for the passage of legislation to end certain union "abuses," chief among them jurisdictional, rival union, and work-assignment disputes. Such disputes, which inevitably arise as competing unions seek to represent a single group of employees or to perform a particular task, had become increasingly common following the rift between the American Federation of Labor and the Congress of Industrial Organizations. See W. GALENSON, *THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT, 1935-41* (1960). Such disputes were widely viewed as unfairly exposing the employer, and the public, to competing union demands that could not be resolved; President Truman, for example, listed jurisdictional disputes as the first item on the rather limited agenda for labor reform legislation that he proposed in his State of the Union address, see 92 CONG. REC. 136 (1947), and the liberal Republican Senator from Oregon, Wayne Morse, who supported some reform legislation but ultimately opposed Taft-Hartley as anti-union, introduced legislation to address jurisdictional disputes. See 93 CONG. REC. 1890 (1947), reprinted in 2 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 951-52* (1959) (compiling statistics on rival union disputes from 1935-46) (hereinafter LEGIS. HIST.).

Despite bipartisan support for legislation to cure the jurisdictional dispute, organized labor was completely inflexible in its opposition to any change in the law. Thus, while the presidents of both federations agreed in their testimony before Congress that such disputes were unfortunate, they

which established a GOP majority in both houses of Congress for the first time since the New Deal,<sup>48</sup> these factors made reform of the nation's labor law the leading item on the legislative agenda when the 80th Congress convened in January 1947.<sup>49</sup>

The prevailing attitude in Congress was articulated by Robert Alphonso Taft,<sup>50</sup> the Republican Senator from Ohio and the man largely responsible for the final content of the legislation that bears his name.<sup>51</sup> Although Taft was philosophically opposed to much of the New Deal and probably to the Wagner Act's support for collective bargaining,<sup>52</sup> he

failed to identify any effective internal means for their resolution. See C. TOMLINS, *supra* note 36, at 308-09. The House committee report on the proposed legislation commented trenchantly on this failure: "Union leaders themselves acknowledge the evils of most of these practices . . . but they have failed to provide effective remedies. . . . This the bill does." H. REP. NO. 245 ON H.R. 3020, 80th Cong., 1st Sess. 24, reprinted in 1 LEGIS. HIST., *supra*, at 315.

For a discussion of the public's increasing impatience with other union practices, such as racial discrimination, the charging of excessive dues, and racketeering, see H. MILLIS & E. BROWN, *supra* note 36, at 279-80.

48. See *supra* note 40.

49. For the first six months of 1947, the labor question dominated debate in Congress and the country. On the first day of the session, some seventeen bills dealing with labor policy were introduced in the House; within two weeks, the number exceeded 100. See J. SEIDMAN, *supra* note 36, at 262.

50. Elected to his first term in 1938 after a distinguished career as a student at Harvard Law School and a stint in state politics in Ohio, Taft was eager for the task. He had been a consistent opponent of big government whose calls to roll back New Deal reforms had long gone unheeded. J. PATTERSON, *supra* note 40, at 44-45, 90-105, 335-37. Harboring presidential aspirations that he announced officially in October, Taft understood that the opportunity to shape labor reform legislation would provide him with nationwide press coverage and a chance to demonstrate presidential leadership skills. Taft therefore convinced the ranking Republican member of the Senate labor committee to step aside, took over the chairmanship of the committee, and promptly convened hearings on an array of bills to reform the Wagner Act. See S. HARTMANN, *supra* note 40, at 15-16.

51. Most scholars agree that Senator Taft played a decisive role in controlling the final content of Taft-Hartley. See C. TOMLINS, *supra* note 36, at 275-79; S. HARTMANN, *supra* note 40, at 85-86. He was certainly well placed to do so. In addition to his chairmanship of the Senate Labor Committee, Taft was head of the Republican policy committee and the de facto Senate majority leader. See J. PATTERSON, *supra* note 40, at 335.

Despite these obvious advantages, Taft did not completely control the Senate labor committee's deliberative process. On a number of issues, liberal Republican Senators Ives and Morse joined Democrats in rejecting proposals to limit the power of trade unions. But Taft eventually prevailed. After appending a minority report that articulated his views and those of other hard-line Republicans, see SUPPLEMENTAL VIEWS ON S. 1126, S. REP. NO. 105, 80th Cong., 1st Sess. 50-56, reprinted in 1 LEGIS. HIST., *supra* note 47, at 456-62, Taft led the floor fight that resulted in the Senate's adopting many of the provisions rejected by the committee. See H. MILLIS & E. BROWN, *supra* note 36, at 378-79; S. HARTMANN, *supra* note 40, at 84-85. The final Senate bill and the conference agreement thus bore Taft's more restrictive imprint.

52. Taft's instinctive support for the rights of individuals, his concern for the plight of small business, and his adamant opposition to government regulation suggest that he would have preferred

did not openly display antipathy to trade unions or to collective bargaining in connection with his work on Taft-Hartley. Rather, he portrayed the proposed legislation as a corrective measure that would retain the Wagner Act's sound commitment to collective bargaining<sup>53</sup> and would preserve the right of union members to strike for better wages.<sup>54</sup> What was needed, according to Taft, were provisions that would make unions responsible partners in the collective bargaining process.<sup>55</sup> The current legislative scheme frustrated such equality of responsibility, both because of the failure of the "one-sided" Wagner Act to regulate unions directly,<sup>56</sup> and because the Labor Board had adopted biased interpretations

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repeal of the Wagner Act to the extension of government involvement in industrial relations. See J. PATTERSON, *supra* note 40, at 329-34; C. TOMLINS, *supra* note 36, at 276-78. A good many conservatives also supported repeal and criticized Taft for promoting amendatory legislation that accepted the Wagner Act model of collective bargaining. See *id.* at 280 (quoting critics who attacked Taft-Hartley for its acceptance of "what was centrally unsound in the original law"). But as Tomlins has shown in his important study of the Taft-Hartley changes, the basic pattern of federal collective bargaining policy was too ingrained by 1947 to yield to wholesale revision. *Id.* at 281.

53. Taft's support for free collective bargaining was emphasized in the Senate labor committee's report on the proposed bill, see S. REP. NO. 105, 80th Cong., 1st Sess. 2, reprinted in 1 LEGIS. HIST., *supra* note 47, at 408, as well as in statements he made during the debates.

54. Taft's support for the right of employees to strike was apparently quite deeply and consistently held. Taft had opposed legislation, proposed by President Truman, that would have granted the federal government sweeping emergency powers to deal with strikes in important industries. See J. SEIDMAN, *supra* note 36, at 235-37. In this respect, Taft's views paralleled those of his father, William Howard Taft, who was no friend of organized labor but defended labor's right to combine and to persuade others to honor its picket lines. See *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209-10 (1921) (Taft, C.J.).

55. Taft's argument for greater union responsibility within the existing framework of collective bargaining comes through quite clearly in the report of the Senate labor committee that he chaired in 1947. Thus, the report expresses the view that a fair and equitable labor policy "can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining." S. REP. NO. 105, 80th Cong., 1st Sess. 2, reprinted in 1 LEGIS. HIST., *supra* note 47, at 408. Such equalizing was necessary, according to the Senate report, as a result of legal developments that placed union activities beyond the reach of federal laws, "no matter how destructive to the rights of the individual workers and employers who are conforming to the [Wagner Act]." *Id.*

56. The critique of the "one-sided" Wagner Act by no means originated with Taft, see *supra* note 42, but Taft picked up that theme in the Senate report and translated it into concrete statutory provisions. See S. REP. NO. 105, 80th Cong., 1st Sess. 2, reprinted in 1 LEGIS. HIST., *supra* note 47, at 408 (attributing excessive power of unions to the "one-sided character of the [Wagner] act itself"). Thus, a variety of provisions were added to the Wagner Act that were explained as balancing amendments designed to establish equal rights and responsibilities between labor and management. In addition to its new guarantee of employees' right to refrain from union activities, see 29 U.S.C. § 157 (1982), Taft-Hartley added unfair labor practice provisions that forbade unions from restraining employees in the exercise of such rights and imposed on unions a duty to bargain in good faith. Each provision resembled existing employer unfair labor practices.

of the Act.<sup>57</sup>

Although Taft's call for greater union responsibility within the existing statutory framework enjoyed the support of Republicans and conservative Democrats,<sup>58</sup> the proposed reforms attracted the vehement and unanimous opposition of organized labor.<sup>59</sup> When the bill became law, labor immediately denounced Taft-Hartley as "slave-labor" legislation<sup>60</sup> and launched a vigorous political campaign to obtain its repeal that cost many legislators their jobs.<sup>61</sup> Labor's hostility reflected the fact that, de-

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57. Senator Taft and the other supporters of labor reform in Congress repeatedly attacked the Labor Board for what they considered its biased interpretation of the Wagner Act. Thus, Taft's Senate committee report chides the Board for its "reputation for partisanship," and proposes an array of procedural reforms, eventually adopted, that reorganized the Board to separate its prosecutorial from its judicial function. See S. REP. NO. 105, 80th Cong., 1st Sess. 2, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 408 ("reputation for partisanship"); *id.* at 8-10, 1 LEGIS. HIST., *supra* note 47, at 414-16 (reorganization of the Labor Board). In addition, Taft-Hartley was at pains to reverse Labor Board decisions that had extended the protections of the Act to low-level supervisors and eroded management's so-called free speech rights. See H. MILLIS & E. BROWN, *supra* note 36, at 399-400, 422-25.

Again, this critique of the Labor Board was not original with Taft but had grown throughout the 1940s. See *id.* at 49-53, 66-75. While the conservative attack produced changes in the Board's administration of the Act, before Taft-Hartley was enacted, see J. SEIDMAN, *supra* note 36, at 262-63, these did little to mollify congressional critics. See C. TOMLINS, *supra* note 36, at 271-75.

58. Taft controlled the center of the debate over trade union power and won support from many legislators, who agreed that changes in the law were necessary to end "abusive" union practices but were reluctant to reverse the national policy of support for collective bargaining. Taft's success was in good measure the result of Truman's decision to surrender the field to him. See S. HARTMANN, *supra* note 40, at 80-82.

59. In testimony before the House and Senate labor committees, Philip Murray and William Green, the presidents of the CIO and the AFL, flatly condemned as anti-union virtually every change in the nation's labor law that had been proposed. See *3 Amendments to the National Labor Relations Act: Hearings Before the House Committee on Labor and Education*, 80th Cong., 1st Sess. 1630-1738 (1947) (statement of William Green in opposition to proposed restrictions on union security, secondary boycotts, jurisdictional disputes and to such limits on the right to strike as cooling-off periods and compulsory arbitration); C. TOMLINS, *supra* note 36, at 250 (quoting Murray's description of the legislation as the creature of the reactionary arm of big business). When it became clear that restrictive legislation was nonetheless destined to emerge from Congress, organized labor sought to bring political pressure to bear to block its passage. See J. SEIDMAN, *supra* note 36, at 264-65.

60. Labor frequently used the rhetoric of involuntary servitude to attack proposed legislation that imposed limits on the right to strike. In labelling Taft-Hartley a slave-labor bill, the AFL repeated the attack it had made on the Case bill a year earlier. See J. SEIDMAN, *supra* note 36, at 257, 268.

61. Embattled following the passage of Taft-Hartley, unions were exceedingly active in the 1948 elections and relatively successful. See H. MILLIS & E. BROWN, *supra* note 36, at 653. In an election in which the Democratic party made the new law a leading issue by pledging its repeal, voters sent Democratic majorities to both chambers of Congress and chose Truman over Dewey for the presidency. *Id.* at 610. While the promised repeal never materialized, organized labor had demonstrated an ability to reward its friends and punish its enemies at the polls; among the most

spite the statute's continuing, albeit qualified, commitment to the institution of collective bargaining, Taft-Hartley contains a variety of provisions that can be better explained as an attack on the political and economic power of trade unions than as an attempt to foster responsible collective bargaining.<sup>62</sup> There was, in short, some justification for organized labor's contention that the call for greater union responsibility was but a thin disguise for legislation of a fundamentally anti-union character.<sup>63</sup>

Like much of Taft-Hartley, section 301 sought to ensure union responsibility in the collective bargaining process.<sup>64</sup> After studying the question

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noteworthy legislative casualties was Senator Joseph Ball of Minnesota, a vigorous supporter of restrictive legislation whose seat was taken by Hubert Humphrey.

62. The most dramatic restriction on the political activity of trade unions appeared in § 304, (codified as amended at 2 U.S.C. § 441(b) (1982)), which prohibited union contributions to, as well as expenditures on, political campaigns involving elections to Congress or the presidency. This provision, which both continued and extended the prohibition on union expenditures that had been contained in the 1943 Smith-Connally War Labor Disputes Act, 57 Stat. 163 (1943), was added by the conference committee after its defeat in the Senate. After reviewing the provision, former Labor Board member Harry Millis asked "whether these matters have any proper place in a law having to do with industrial relations and labor policy, unless the provision is simply an indication of an effort to weaken unions and their influence in public life?" H. MILLIS & E. BROWN, *supra* note 36, at 598.

The economic power of unions was restricted in a variety of provisions, perhaps most noteworthy of which was the absolute ban on secondary boycotts that appeared in § 8(b)(4) and in § 303(a) (codified as amended at 29 U.S.C. §§ 158(b)(4), 187(a) (1982)). Such a prohibition ignored President Truman's argument that many secondary boycotts and sympathy strikes had lawful primary objectives, see 93 CONG. REC. 136 (1947), and drew criticism on that basis. See H. MILLIS & E. BROWN, *supra* note 36, at 459-71. See also *id.* at 481 ("Not just union abuses, but the bargaining position of unions in general, was weakened by many of these provisions."). For a more recent critique of the breadth of the secondary boycott restrictions, see P. WEILER, *GOVERNING THE WORKPLACE* (1990).

63. The attitude of organized labor towards the legislation was not helped by the tactics adopted by its sponsors in the drafting stage. On the House side, the labor committee conducted its hearings in a witch-hunt atmosphere and then retreated to executive session to work up the bill. On the Senate side, the labor committee hired as counsel two prominent supporters of Wagner Act reform who drew objections from organized labor for their bias against trade unions. See H. MILLIS & E. BROWN, *supra* note 36, at 365-77.

64. The demand for greater union responsibility, which culminated in the passage of the Taft-Hartley Act and § 301, began in the early years of the century, before the federal government played any substantial role in regulating industrial conflict. Conservative business groups repeatedly complained that unions were irresponsible and that their structure as voluntary associations made them unduly difficult to sue. These groups, joined by such liberal reformers as Louis Brandeis, called for laws mandating the incorporation of trade unions. Incorporation, it was thought, would enable the firms that signed contracts with trade unions to enforce those agreements freely against the assets of the union and would induce unions, in turn, to ensure ongoing production during the life of the contract, free from work stoppages and other interruptions. For a discussion of the drive for incorporation, see J. SEIDMAN, *UNION RIGHTS AND UNION DUTIES* 163-79 (1943); C. TOMLINS, *supra*

in committees, Congress joined Senator Taft in concluding that trade unions were too often able to use their status as voluntary associations to avoid responsibility in state court for breach of their collective bargaining agreements.<sup>65</sup> The solution, which Taft developed and proposed, was to transfer enforcement of labor contracts to federal court and to enact supplemental rules that would subject unions to liability for breach of contract "as if they were corporations."<sup>66</sup> Although the statute formally provided for the enforcement of labor contracts by both labor and management, it was principally intended to compel unions to comply with the no-strike clause.<sup>67</sup>

Organized labor unanimously opposed the provision as anti-union,<sup>68</sup> just as it had opposed previous proposals that made unions liable for breach of labor contracts.<sup>69</sup> As it had with other provisions of Taft-Hart-

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note 36, at 84-88; H. MILLIS & R. MONTGOMERY, *ORGANIZED LABOR* 657-61 (1945); Hovenkamp, *Labor Conspiracies in American Law 1880-1930*, 66 *TEX. L. REV.* 919, 958-62 (1988).

The drive for federal legislation was given additional impetus by decisions of the Labor Board holding that employers could not insist upon alternative means to secure union compliance with collective bargaining agreements. The Board held that it was a refusal to bargain, in violation of the Act, for employers to demand that the union incorporate under state law or post a bond to secure the employer against breach of the contract. See Jasper Blackburn Prods., 21 *N.L.R.B.* 1240, 1253-54 (1940); *Scripto Mfg.*, 36 *N.L.R.B.* 411, 422 (1941).

65. See *infra* notes 150-54 and accompanying text.

66. See *infra* note 204.

67. The concern with enforcement of no-strike clauses is implicit in the reports and debates of Congress. See, e.g., S. REP. NO. 105, 80th Cong., 1st Sess. 17-18, reprinted in 1 *LEGIS. HIST.*, *supra* note 47, at 424 (responding to criticism that unions would decline to make no-strike promises if section 301 were enacted). See also H. MILLIS & E. BROWN, *supra* note 36, at 510-13 (discussing the impact of § 301's passage on the incidence of no-strike clauses in major collective bargaining agreements).

68. See *infra* note 242.

69. Although organized labor had briefly flirted with incorporation during the Gilded Age, and even went so far as to convince Congress in 1886 to pass a federal statute that enabled unions to incorporate voluntarily, see Act of June 29, 1886, ch. 567, 24 Stat. 86 (1886), labor has been adamantly opposed to union incorporation and other methods of assuring "union responsibility" for much of this century. See C. TOMLINS, *supra* note 36, at 86-87 (quoting Samuel Gompers, president of the AFL). Union hostility stemmed in part from fears that incorporation would open union treasuries to large damage awards, a fear given impetus by an English decision in 1901 that upheld a large judgment against a registered trade union. See J. SEIDMAN, *supra* note 64, at 165-68 (citing English decision in *Taff Vale* as decisive factor in trade union hostility towards incorporation). In addition, unions feared that, once incorporated, their internal structure and affairs would be subject to control by state legislatures. See *id.* at 176-77; Hovenkamp, *supra* note 64, at 961-62. Congress repealed the Federal Union Incorporation Act in 1932, after learning that its provisions, while largely ignored by unions, had been exploited by benefit societies to escape state insurance regulation. See J. SEIDMAN, *supra* note 64, at 165.

Unions also bitterly opposed a series of state laws, urged by the League for Industrial Rights as part of the open-shop movement of the 1920s, that were designed to make unions, and other volun-

ley, however, labor mustered little support in Congress for its position. Even President Truman, whose veto of Taft-Hartley was promptly overridden, had expressed support for legislation that would require unions to adhere faithfully to their written agreements.<sup>70</sup> Those who opposed the statute in Congress did so on the ground that labor contracts were already freely enforceable in state court;<sup>71</sup> little opposition existed in Congress to Taft's argument that unions, like employers, should comply with their promises or to his assumption that the task of remedying violations of the collective bargaining agreement was a matter appropriate for judicial cognizance.<sup>72</sup>

Despite the consensus in Congress, many students of industrial relations expressed misgivings about the federal courts' new role in policing the collective bargaining agreement.<sup>73</sup> These concerns arose in part from

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tary associations, subject to suit in state court. For a summary of such laws, and the efforts of unions to block their passage, see H. MILLIS & R. MONTGOMERY, *supra* note 64, at 659-60. Another wave of union responsibility laws were proposed in state legislatures following the passage of the Wagner Act. See H. MILLIS & E. BROWN, *supra* note 36, at 316-32. As one contemporary commentator pointed out, these initiatives were regarded by organized labor as a "legislative declaration of war against labor unions." Dodd, *Some State Legislatures Go To War — on Labor Unions*, 29 IOWA L. REV. 148, 174 (1944).

70. See 93 CONG. REC. 136 (1947) ("Collective bargaining agreements, like other contracts, should be faithfully adhered to by both parties.")

71. Testimony by Secretary of Labor Lewis Schwellenbach indicated that collective bargaining agreements were enforceable against unincorporated labor unions in the great majority of states. See *infra* note 242. The minority members of the Senate labor committee cited this testimony in arguing that § 301 was unnecessary. See SENATE MINORITY REPORT ON S. 1126, S. REP. NO. 105, 80th Cong., 1st Sess. 13-15, reprinted in 1 LEGIS. HIST., *supra* note 47, at 474-77. The minority also echoed Schwellenbach's claim that, by requiring federal judges to apply state law, the provision conferred jurisdiction on the federal courts of doubtful constitutionality—the argument later picked up by Justice Frankfurter. See *id.* at 14, reprinted in 1 LEGIS. HIST., *supra* note 47, at 476. Finally, the minority argued that provisions for Labor Board enforcement of labor contracts, later dropped in conference, see *infra* note 257, would encourage the parties to ignore available machinery for arbitration and conciliation of disputes. See *id.* at 12, reprinted in 1 LEGIS. HIST., *supra* note 47, at 474.

72. As noted earlier, the opposition to § 301 in Congress focused on the availability of state court remedies for violations of labor contracts. See *supra* note 71. Thus, the question was not whether judges were to enforce labor contracts but whether the judges were to be state or federal.

73. Many students of industrial relations in the post-war era believed that national labor policy should encourage labor and management to work out the details of industrial governance, free from the involvement of the federal government. Such a view of industrial policy has been most closely associated with the industrial pluralists, who viewed unions, freely chosen by the workers in Board-sponsored elections, as the instruments of an industrial democracy. On the tenets of pluralist thought, see Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). For a critique of Stone's claim that pluralist ideology controlled the evolution of labor policy, see Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23, 54-84 (1984).

Pluralists generally attacked Taft-Hartley for its bias in favor of employers. See C. TOMLINS,

the fear that employers and unions would submit disputes over contract interpretation to courts directly, rather than resolving those disputes themselves through mutual discussions and grievance arbitration.<sup>74</sup> Apart from concern that litigation would undermine negotiation and arbitration—a method of industrial dispute resolution that had emerged during the war and was to grow increasingly popular in the post-war period<sup>75</sup>—industrial relations scholars feared that the courts would sim-

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*supra* note 36, at 278 (collecting views of William Lieserson, E. Wight Bakke, and Edwin Witte, among others); H. MILLIS & E. BROWN, *supra* note 36, at 459-71 (criticizing Taft-Hartley's unbalanced restrictions of organized labor). Many of the same scholars criticized § 301 for its tendency to "force labor relations more and more into the political arena and into the hands of lawyers and the courts." C. TOMLINS, *supra* note 36, at 278 (quoting George Taylor, labor historian at Cornell). See also F. WITNEY, GOVERNMENT AND COLLECTIVE BARGAINING 393 (1951) ("No feature of Taft-Hartley is more inimical to the effective operation of the collective bargaining process than its encouragement of court proceedings as the means for the enforcement of collective bargaining agreements."); H. MILLIS & E. BROWN, *supra* note 36, at 504-08 (expressing concern that the statute failed to make provision for exhaustion of arbitral remedies).

74. The classic statement of opposition to the recognition of a judicial role in policing the collective bargaining agreement was predicated on the fear that courts would upset the arbitral process. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955) (arguing that when the arbitral process works well, it does not need the sanction of law and when it breaks down, courts cannot repair the damage). See also F. WITNEY, *supra* note 73, at 394 (expressing the concern that the availability of judicial remedies would detract from the settlement of disputes through mutual negotiation and grievance arbitration). For a more recent restatement of the argument that the courts should stay out, see H. WELLINGTON, LABOR AND THE LEGAL PROCESS 121-25 (1968).

Much the same argument was made during the 1950s by supporters of labor arbitration who claimed that the courts, both state and federal, were interfering with the arbitral process by narrowly construing the scope of the arbitration clause or by reviewing too closely the arbitrator's award. See Rosenfarb, *The Court and Arbitration*, in PROCEEDINGS OF N.Y.U. SIXTH ANNUAL CONFERENCE ON LABOR LAW 161 (E. Stein ed. 1953); Kharas, *Labor Arbitration—The Arbitrable Issue*, in PROCEEDINGS OF N.Y.U. FIFTH ANNUAL CONFERENCE ON LABOR LAW 633 (E. Stein ed. 1952); Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. CHI. L. REV. 233 (1950).

It was judicial intrusion into the arbitrator's realm that Professor Cox argued against in a series of articles that presaged the Court's decisions in the *Steelworkers' Trilogy*. See *infra* note 289. In arguing for appropriate judicial deference, however, Cox parted company with Shulman, who argued that the courts should neither compel arbitration nor review the merits of the resulting award.

75. Although labor and management had some experience with the arbitration of industrial disputes before World War II, government policy during the war did much to encourage reliance on arbitration. See F. WITNEY, *supra* note 73, at 561-69; N. LICHTENSTEIN, LABOR'S WAR AT HOME 178-82 (1982); H. HARRIS, *supra* note 36, at 49-50. Grievance arbitration was given an additional boost by President Truman's National Labor-Management Conference of 1945, which agreed on little save the wisdom of voluntary arbitration. See H. MILLIS & E. BROWN, *supra* note 36, at 306-10. In any case, the incidence of arbitration provisions in collective bargaining agreements increased dramatically in the post-war era: the figure increased from roughly 73% of the agreements in 1944 to 83% in 1949 and to 91% in 1952. See E. MOORE & J. NIX, ARBITRATION PROVISIONS IN COLLECTIVE AGREEMENTS 1952, at 10-11 (Bureau of Labor Statistics Bulletin No. 1142, 1952).

ply resolve disputes unfairly, either by adopting ill-conceived general rules or by approaching their task with little understanding of the union's role in industrial relations.<sup>76</sup> Thus, the view that federal courts were institutionally incapable of resolving labor contract disputes reflected a distrust of the judiciary reminiscent of that expressed in the Norris-LaGuardia Act.<sup>77</sup> It was this distrust of the federal courts that Justice Frankfurter was to express in his *Lincoln Mills* dissent.

### C. *Lincoln Mills: The Brethren*

Although Justices Douglas and Frankfurter began their tenure on the Court as relatively good friends, their relationship had soured long before they divided on the constitutionality of section 301 in *Lincoln Mills*.<sup>78</sup> Differences in style and temperament certainly played a part,<sup>79</sup> but their mutual disdain was in good measure attributable to their differing conceptions of the judicial role.<sup>80</sup> Following in what he regarded as the

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76. Again, Harry Shulman was the leading exponent of the view that the court simply lacked sufficient experience with industrial conflict to work out sensible rules to govern the collective bargaining agreement. See Shulman, *supra* note 74, at 1024. See also F. WITNEY, *supra* note 73, at 394 (judges are fitted "neither by training nor by temperament for the task of resolving contract violations"). Harry Wellington pushes the argument a step further in attempting to show that the Court's contract enforcement decisions themselves reveal the judiciary's inability to compose industrial conflict. See H. WELLINGTON, *supra* note 74, at 100-25.

77. See Act of March 23, 1932, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-15 (1988)). For discussion of the origins and content of Norris-LaGuardia, see *infra* notes 93-94.

78. See *supra* note 5.

79. Both intellectual disagreement and personal animosity fueled the split between Frankfurter and Douglas. In a letter to Justice Jackson, Frankfurter described Douglas as "the most cynical, shamelessly immoral character I've ever known. With him, I have no more relation than the necessities of court work require." H. HIRSCH, *supra* note 5, at 182. Frankfurter was particularly incensed by Douglas's willingness to seek public office as a sitting member of the Court. Frankfurter was convinced that Douglas had asked him to talk down the possibility of a Douglas draft for the 1940 vice-presidential nomination in an effort to fuel speculation about the Douglas candidacy. See BRANDEIS AND FRANKFURTER, *supra* note 5, at 420. See also H. HIRSCH, *supra* note 5, at 177-78. Another episode involved Justice Douglas's order staying the execution of the Rosenbergs, which Frankfurter viewed as a last minute "grandstand play" designed to curry favor with the liberal community. *Id.* at 456-60. For a review of the *Rosenberg* case, see White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 49-65 (1988).

Douglas returned the disdain measure for measure. In a memorandum written in 1954, Douglas took Frankfurter to task for his insolent refusal to answer a question Douglas had raised in conference; he went on to note the "great burden" of "your long discourses." W. DOUGLAS, THE DOUGLAS LETTERS, *supra* note 5, at 85. See also W. DOUGLAS, THE COURT YEARS, *supra* note 5, at 22. Matters eventually grew so tense that Douglas considered refusing to participate in conferences with Frankfurter. W. DOUGLAS, THE DOUGLAS LETTERS, *supra* note 5, at 90.

80. Professor Urofsky's recent study of the division between Douglas and Frankfurter notes the

Holmes-Brandeis tradition,<sup>81</sup> Frankfurter thought the Court should interpret the Constitution to permit the elected representatives of government wide latitude in resolving conflicts of social policy.<sup>82</sup> Although Frankfurter's theory of judicial restraint produced agreement with Douglas in the area of economic regulation,<sup>83</sup> it created deep divisions in cases involving individual liberties, where Douglas, Black, and others thought the Court was obliged to play a more active role.<sup>84</sup> The division between

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personal animosity that developed in their relationship but attributes the division to philosophical differences in their approach to judging. See Urofsky, *supra* note 5, at 71.

81. Frankfurter was a friend, confidant and ardent admirer of both Holmes and Brandeis. See BRANDEIS AND FRANKFURTER, *supra* note 5, at 425, 429-31, 433; H. HIRSCH, *supra* note 5, at 128-32; W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 115-17 (1961); H. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 368-71 (1960). In describing them as judicial "statesmen," Frankfurter paid them his highest compliment. See F. FRANKFURTER, *Mr. Justice Holmes's Constitutional Opinions*, in FELIX FRANKFURTER ON THE SUPREME COURT 112, 122 (P. Kurland ed. 1970); F. FRANKFURTER, *Mr. Justice Brandeis and the Constitution*, in FELIX FRANKFURTER ON THE SUPREME COURT 247, 251 (P. Kurland ed. 1970).

82. Justice Frankfurter's attitude towards legislation in the industrial arena certainly reflected his view that the Court must accord the legislature wide latitude in attempting to strike an appropriate balance "between the uncontrolled power of management and labor to further their respective interests." *Local 1976, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93, 99-100 (1958). Thus, Frankfurter often voted to uphold restrictive labor legislation, just as he had urged the Supreme Court in the 1920s to uphold more progressive reforms. See H. THOMAS, *supra* note 5, at 82-87.

83. Frankfurter was to tolerate a much wider range of governmental involvement in economic matters than that permitted by the Supreme Court that struck down twelve Acts of Congress in Roosevelt's first term as President and precipitated FDR's well known court-packing plan. See BRANDEIS AND FRANKFURTER, *supra* note 5, at 319-36. Douglas also favored a broad role for the federal government in dealing with the economic crisis of the 1930s. He had served as a commissioner and later chairman of the Securities and Exchange Commission during the 1930s; he joined the Court in 1939 and consistently voted with majorities to uphold federal regulatory authority. See C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-47*, 71-90 (1948).

84. Many scholars have commented upon the intense commitment to judicial restraint that led Frankfurter to adopt a stance of deference to government activities that Douglas and Black regarded as unconstitutional restrictions on the exercise of first amendment rights. No better example can be cited than Frankfurter's approach to the flag-salute cases. In *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), Frankfurter noted that a local school board could lawfully require public school students to salute the flag, even if such salutes violated their deeply held religious beliefs. Justices Black and Douglas joined him initially, but reversed their views a few years later. See *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 646 (1943). Frankfurter dissented in *Barnette* and privately complained that Douglas and Black had let public opinion control their views. For comments that describe the impact of the *Gobitis* and *Barnette* opinions on Frankfurter's evolving sense of judicial restraint, his deteriorating relations with Black and Douglas, and that point out perceptively the differences between Frankfurter and his mentors, Holmes and Brandeis, on civil liberties, see J. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 68-73 (1975) (to assert that the Court had no larger function in the protection of civil liberties than of property rights was a fateful refinement of Frankfurter's position); BRANDEIS AND FRANKFURTER, *supra* note 5, at 399-409; H. HIRSCH, *supra* note 5, at 147-53, 171-76 (Frankfurter takes fateful step in describing himself as an

the two Justices was also evident in matters of statutory construction.<sup>85</sup> Douglas believed that remedial statutes were owed a relatively generous interpretation;<sup>86</sup> Frankfurter's narrower view reflected his respect for the compromise that produced the legislation<sup>87</sup> and his concern for preserving the role of the states in the federal system.<sup>88</sup>

Frankfurter's commitment to his particular vision of judicial restraint

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associate of Holmes in refusing to recognize favored constitutional values). Douglas himself describes *Barnette* as the decision that triggered the split with Frankfurter. See J. SIMON, *supra* note 5, at 11-12.

85. The differing approaches of Justices Frankfurter and Douglas to the task of statutory interpretation was well illustrated by their interpretation of federal workplace injury statutes such as the Federal Employers Liability Act, 35 Stat. 65 (1908) (codified at 45 U.S.C. §§ 51-59 (1982)), and the Jones Act, 38 Stat. 1185 (1915) (codified at 46 U.S.C. § 688 (1982)). In these statutes, Congress permitted recovery to employees working in the rail and maritime industries upon a showing of negligence. In a series of decisions, Justices Douglas and Black widened the definition of negligence to a degree that made recovery available essentially without any showing of fault. In addition, Douglas and Black limited the power of state court judges to set aside jury verdicts for insufficient evidence and thus assured that the sympathies of the jury would produce verdicts for injured workers in most cases. Finally, Douglas and Black freely exercised the certiorari power to bring cases to the Court that were later reversed in short one-sentence per curiam decisions.

That Douglas and Black engaged in the process of judicially updating an obsolete system of compensation has now been widely accepted, although the success of the effort has received mixed reviews. Compare G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 32-35, 153-55 (1982) (Douglas and Black brought the compensation system more in line with the prevailing legal topography) with W. MENDELSON, *supra* note 81, at 22-30 (criticizing Black for amending the statute through judicial decree rather than awaiting the action of Congress). In any case, Frankfurter stoutly resisted the process as a matter for Congress, rather than the Court. See, e.g., *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 538-40 (1957) (dissenting opinion); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-61 (1959) (dissenting opinion).

86. Douglas's willingness to construe broadly remedial statutes was evident in his agreement with Black in the *FELA* and *Jones Act* cases, see *supra* note 85, as well as others. For a collection of cases, see V. COUNTRYMAN, *THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS* 320-22 (1974).

87. Frankfurter's approach to the task of statutory interpretation reflected his understanding that competing groups within legislatures must compromise to produce a consensus on the reach of a statute. See, e.g., *Helvering v. Griffiths*, 318 U.S. 371 (1943) (adopting more limited view of the reach of amendment to revenue laws than that proposed in dissent by Douglas). In respecting the legislative compromise, Frankfurter believed that he was upholding the supremacy of legislatures as lawmaking bodies, just as he did in insisting on adherence to the doctrine of *stare decisis*. See W. MENDELSON, *supra* note 81, at 30-33.

88. Frankfurter's concern for preserving the state's role in the federal system is well documented in opinions that argue for a broad interpretation of the *Erie* doctrine, see *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), for a narrow conception of the power of Congress to compel states to hear federal claims, see *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring), and for limits on the extent to which federal courts may, in the course of fashioning federal common law, ignore the content of existing state law. See *Bank of America v. Parnell*, 352 U.S. 29 (1956). For an explicit argument that the preservation of the state's role was a relevant factor in statutory interpretation, see Frankfurter, *supra* note 20, at 539-40.

had been shaped, in no small part, by his work in the field of industrial relations.<sup>89</sup> As a professor of law at Harvard in the 1920s, Frankfurter demonstrated that the Supreme Court's anti-union decisions owed more to the political beliefs of conservative justices than to the explicit command of the constitutional and statutory provisions at issue in the cases.<sup>90</sup> He adopted much the same theme in attacking the labor injunction as an instrument with which the federal courts regulated, and largely nullified, the use by organized labor of such economic weapons as the strike and the boycott.<sup>91</sup> Frankfurter was thus convinced that the federal courts were institutionally unsuited to the task of developing a

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89. As a labor mediator during World War I, Frankfurter attracted the hostility of many conservatives by his firm but by no means radical support for the legitimate grievances of workers. See M. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 83-117* (1982). Frankfurter remained a progressive in labor matters following his return to the Harvard faculty in 1919—a fact reflected both in his continual criticism of the Supreme Court's labor jurisprudence and in his defense of Sacco and Vanzetti. *Id.* at 150-96; L. BAKER, *supra* note 5, at 90-130.

90. In a series of articles and unsigned editorials that appeared in *The New Republic*, Frankfurter sounded now familiar themes in attacking the Court's developing labor jurisprudence. For one thing, Frankfurter expressed the view that the Court should refrain from nullifying labor legislation on constitutional grounds. For Frankfurter, the availability of injunctive relief in labor disputes was fundamentally a political question to which legislatures were entitled to speak decisively. Frankfurter thus argued that in decisions such as *Truax v. Corrigan*, 257 U.S. 312 (1921), which struck down a state law prohibiting injunctive relief in labor disputes, the Court's conservative justices improperly transformed their personal views into constitutional protection for business interests. See F. FRANKFURTER, *Taft and the Supreme Court*, in *FELIX FRANKFURTER ON THE SUPREME COURT* 49, 60 (P. Kurland ed. 1970). In the process, Frankfurter believed, the Court frustrated the power of the states to manage local affairs. *Id.* at 66.

Frankfurter also believed that, once the legislature had spoken, the Court was duty bound to respect its decision. Frankfurter thus criticized *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), a decision eviscerating legislation that Congress had enacted to immunize organized labor from judicial interference. For Frankfurter, the *Duplex* case violated the fundamental principle that the Court must carry into effect the will of Congress rather than adopting a strained construction that nullifies the legislative purpose. See F. FRANKFURTER, *The "Law" and Labor*, in *FELIX FRANKFURTER ON THE SUPREME COURT* 68, 72-73 (P. Kurland ed. 1970).

91. Frankfurter was an early, committed, and persuasive critic of the labor injunction. In 1922, shortly after the Attorney General of the United States obtained an extraordinarily broad injunction in a railway dispute in Chicago, Frankfurter attacked the whole history of the labor injunction in industrial conflict: "It does not work. It neither mines coal, nor moves trains, nor makes clothing. As an adjuster of industrial conflict, the injunction has been an utter failure." F. FRANKFURTER, *Labor Injunctions Must Go*, in *FELIX FRANKFURTER ON THE SUPREME COURT* 104, 107 (P. Kurland ed. 1970). He followed this broadside with more complete studies of the use of injunctions in labor disputes. See Frankfurter & Greene, *Labor Injunctions and Federal Legislation*, 42 HARV. L. REV. 766 (1929); F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930). In that classic text, Frankfurter demonstrated that labor injunctions were often granted on an ex parte basis and enforced in contempt proceedings to which the right to trial by jury did not attach. In addition to these procedural flaws, Frankfurter showed that, in deciding whether to enjoin particular strikes and boycotts, federal judges permitted their own anti-union attitudes to inform their assessment of the

workable body of rules to govern industrial conflict between labor and management.<sup>92</sup>

It was a conviction upon which he acted, both on and off the Court. While still a professor, Frankfurter served as the principal draftsman of the Norris-LaGuardia Act of 1932<sup>93</sup>—legislation designed to remove the federal courts from the business of regulating industrial relations by denying them jurisdiction to enter injunctions in peaceful labor disputes.<sup>94</sup> Shortly after he joined the Court, Frankfurter's opinion for the majority in *United States v. Hutcheson*,<sup>95</sup> immunized many union-sponsored, sec-

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lawfulness of both the ends that labor sought to achieve and the means by which it sought to accomplish them.

92. Frankfurter was thus opposed not to the proposition that unions must conduct their affairs in accordance with law but to what he perceived as the hostile regulation of industrial conflict through the labor injunction. Thus, Frankfurter agreed with what he regarded as the Court's essentially procedural conclusion that unions were subject as entities to claims for damages under the antitrust laws. See F. FRANKFURTER, *The Coronado Case*, in FELIX FRANKFURTER ON THE SUPREME COURT 97, 101 (P. Kurland ed. 1970) (commenting on the Court's decision in *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922)). The central question, according to Frankfurter, was how society should define the substantive rules that would govern industrial conflict. *Id.* at 101-02. It was in the definition of such substantive rules that Frankfurter sought to preserve the primacy of the legislative voice.

93. For an account of Frankfurter's role in drafting Norris-LaGuardia, see L. BAKER, *supra* note 5, at 134-36.

94. The Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-15 (1982)), attempted to cure the specific problems with the labor injunction that Frankfurter had identified. Thus, the statute deprived the federal courts of jurisdiction to issue injunctions in labor disputes, *see* 29 U.S.C. § 101 (1982), a term the statute broadly and specifically defined to avoid the possibility of judicial nullification. *Id.* at § 113. A listing of specific union activities that were beyond the courts' power to enjoin supported this definition. The list included strikes, boycotts, picketing, and publicity, so long as fraud and violence were not involved. *Id.* at § 104. Although the Act permitted the courts to enjoin the commission of "unlawful acts," it imposed a variety of procedural safeguards that were intended to ensure that findings of unlawful conduct were made on the basis of facts adduced from testimony in open court following notice to those against whom relief was sought. *Id.* at § 107.

The statute was thus structured entirely as a limitation on the power of the federal courts to enjoin the actions of unions; it does not affirmatively protect the tactics of organized labor either from regulation by the states or from the self-help measures of employers. Nor does it purport to define the substantive content of federal labor policy in criminal proceedings or in actions to recover damages under other federal laws. For useful discussions of Norris-LaGuardia, emphasizing these limitations, see C. GREGORY, *LABOR AND THE LAW* 186 (2d ed. Supp. 1961); H. WELLINGTON, *supra* note 74, at 39-41.

95. 312 U.S. 219 (1941). *Hutcheson* arose from a jurisdictional dispute between the carpenters and the machinists over the right to perform work at a brewery in St. Louis. When the employer awarded the work to the machinists, the carpenters struck the plant and organized a boycott of the company's beer. The Antitrust Division of the Justice Department commenced a criminal prosecution of William Hutcheson, the president of the carpenters union, in keeping with its then recently announced intention to prosecute restrictive union practices under the Sherman Act.

ondary boycotts from judicial scrutiny under the Sherman Act.<sup>96</sup> In *Hutcheson*, Frankfurter applied Norris-LaGuardia<sup>97</sup> in a relatively unrestrained way to accomplish the larger goal of restraining the federal courts from shaping labor policy.<sup>98</sup>

96. The prosecution's theory was quite sound as a matter of law, despite the fact that it rested on some of the Court's most blatantly anti-union precedents from earlier years. The Court had held as early as 1908 that union participation in a secondary boycott of the kind the carpenters initiated against the beer company was a violation of the Sherman Act. See *Loewe v. Lawlor*, 208 U.S. 274 (1908). Although the Clayton Act had contained language that appeared to reverse that decision, the Court ruled otherwise in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). Thus, at least some basis existed for contending, as the government did, that by leading a secondary boycott union officers engaged in a criminal restraint of trade. The Court gave additional plausibility to the government's theory only one year before the *Hutcheson* prosecution, in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), when it distinguished, rather than overruled, the *Duplex* decision in the course of holding that a sit-down strike in Philadelphia was immune from antitrust scrutiny.

97. According to Frankfurter's opinion in *Hutcheson*, the Norris-LaGuardia Act's declaration of public policy had implicitly rejected the Court's decision in *Duplex* and thus restored the Clayton Act to its original breadth. See *Hutcheson*, 312 U.S. at 231. Freed from the restrictive interpretation in *Duplex*, § 20 of the Clayton Act served to immunize organized labor's self-help activities from scrutiny under the Sherman Act, "[s]o long as a union acts in its self-interest and does not combine with non-labor groups. . . ." *Id.* at 232. Thus, the *Duplex* decision that the Court distinguished a year earlier in *Apex*, see *supra* note 96, had been dead since 1932.

The difficulty with Frankfurter's interpretation lay in its willingness to ascribe to Norris-LaGuardia an intention to refine the definition of union liability under the antitrust laws. While Norris-LaGuardia had deprived the courts of the power to remedy union antitrust violations by injunction, it neither amended substantive antitrust law nor prohibited the federal courts from entertaining criminal and civil enforcement proceedings. It was on this basis that Justice Roberts, in dissent, attacked Frankfurter's interpretation as a usurpation of the function of Congress, *Hutcheson*, 312 U.S. at 246 (Roberts, J., dissenting)—a view with which many commentators have agreed. See C. PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES* 283 (1948) (Frankfurter's decision in *Hutcheson* was "perhaps the most flagrant example of judicial legislating" during the previous ten years).

98. Frankfurter's opinion in *Hutcheson* thus adopts an approach to the antitrust laws remarkably similar to that he later developed in connection with § 301 of the Taft-Hartley Act. Frankfurter could have overruled *Duplex* and its outmoded, essentially anti-union ban on secondary boycotts. From Frankfurter's perspective, however, such an approach would implicitly confirm the power of the federal courts to judge the legitimacy of labor's economic weapons, a task for which Frankfurter was convinced the courts were unsuited. Rather than participate in a new era of judicial legislation under the Sherman Act, Frankfurter adopted a creative interpretation of Norris-LaGuardia that immunized a wide range of union conduct from judicial scrutiny. In the perceptive words of one observer, Frankfurter "legislat[ed] a little to avoid legislating a lot" and, in the process, returned the task of defining labor policy to Congress. W. MENDELSON, *supra* note 81, at 36.

Frankfurter used much the same strategy to accomplish precisely the same goal in *Lincoln Mills*. Frankfurter's conclusion that § 301 transgressed the limits of judicial power in article III was predicated on an exceedingly strained interpretation of the history of the legislation. It was, moreover, adopted to prevent the federal courts from undertaking to fashion a body of judge-made law to govern the enforcement of collective bargaining agreements—a result that would force more explicit congressional action.

Although he joined the Court's opinion in *Hutcheson* and probably shared Frankfurter's suspicion of the motives that led to the passage of Taft-Hartley, Douglas was much less dogmatically committed to the notion that the federal courts were unsuited to the task of making labor law. For one thing, Douglas had an abiding faith in the capacity of the federal courts to remedy injustices of every description,<sup>99</sup> a faith that carried with it great confidence in the lawmaking powers of the federal courts.<sup>100</sup> Thus, it seems doubtful that Douglas viewed any subject as unfit for the exercise of judicial creativity, whether by virtue of its complexity<sup>101</sup> or its tendency to excite the passions and biases of the judici-

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99. More perhaps than any other member of the avowedly activist Warren Court, Douglas was willing to use the power of the Supreme Court to remedy what he perceived as injustice—a fact for which he makes no apology in his autobiography: "My view always has been that anyone whose life, liberty or property was threatened or impaired by any branch of government . . . could properly repair to a judicial tribunal for vindication of his rights." W. DOUGLAS, *THE COURT YEARS*, *supra* note 5, at 55. Douglas thus joined, and often wrote, opinions for the Warren Court that struck down school desegregation, compelled legislative reapportionment, revolutionized criminal procedure, and protected procreative rights. For critical reviews of these developments, see *infra* note 104.

In keeping with his general position on judicial power, Douglas almost uniformly adopted a more hospitable conception of the power of judicial review than did Frankfurter, who believed that Congress possessed plenary control over the extent of reviewability and could curtail such review quite sharply. See, e.g., *Stark v. Wickard*, 321 U.S. 288 (1944) (Frankfurter, J., dissenting). This was particularly true in cases in which Douglas believed that the regulatory scheme provided insufficient protection to individuals. Thus, while Douglas argued for deference to agency regulation of business enterprise in federal rate-making cases, see *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), he was quite creative in constructing mechanisms to secure judicial review of actions that curtailed the rights of individuals. See C. PRITCHETT, *supra* note 97, at 185-89.

100. Douglas was frequently the author of opinions that conferred on the federal courts a broad role in regulating the details of the nation's economic life. In *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), Douglas held that the federal courts were free to disregard state law in fashioning uniform rules to govern the rights and duties of the United States in commercial paper. Douglas also essentially rewrote the rules governing divorce and alimony in the United States; his opinions in *Williams v. North Carolina*, 317 U.S. 287 (1942), and *Estin v. Estin*, 334 U.S. 541 (1948), hold that although state courts may exercise jurisdiction to grant a divorce on the basis of jurisdiction over a single party to the marriage, they may not determine questions of support without jurisdiction over both parties. Finally, Douglas developed the "one-man, one-vote" formula on which the court based its reapportionment decisions. See A. BICKEL, *POLITICS AND THE WARREN COURT* 196 (1965).

His faith in the federal courts may have reflected nothing more profound than a supreme confidence in himself and his colleagues on the Court; Douglas was certainly willing to use the Court's certiorari power to correct errors in the lower courts that many observers, including Frankfurter, thought were unworthy of Supreme Court attention. Compare *Wilkerson v. McCarthy*, 336 U.S. 53, 68-69 (1949) (Douglas, J., concurring) with *id.* at 76 (Jackson, J., dissenting) and with *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-61 (1959) (Frankfurter, J., dissenting).

101. Douglas refused to permit the complexity of the subject matter to excuse judicial inaction. He was thus quite active in fashioning antitrust law and was among the justices responsible for the increasing use of economic analysis in that field. See Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 336 (1968) (describing Black

ary.<sup>102</sup> Consequently, Douglas earned a reputation, at Harvard and elsewhere,<sup>103</sup> for practicing a particularly unrestrained brand of judicial activism that frequently was said to injure the Court's prestige.<sup>104</sup> In any

and Douglas as the leading exponents of the Warren Court's antitrust policy and the growing cynicism that policy fostered among members of the antitrust bar).

102. In rejecting a judicial role in labor disputes, Frankfurter expressed the view that industrial conflict was simply too divisive to admit of neutral decisionmaking by judges. The possibility of such bias generally would not have troubled Douglas, either in himself or others. Douglas thought his task as a judge necessarily entailed rendering an essentially personal judgment on deeply divisive matters of public concern; he was far less concerned than Frankfurter with the task of building a majority or in the manner in which other justices did their work. See White, *supra* note 79, at 79-81; Urofsky, *supra* note 5, at 113.

103. Frankfurter encouraged his friends and law clerks to adopt his sneering view of the "liberals" — Justices Douglas and Black—to whom he referred as the "children of light" or the "non-judicial twain of Justices." H. HIRSCH, *supra* note 5, at 180, 182. Whether as a result of his efforts or otherwise, Frankfurter's view of the liberals achieved a measure of currency at Harvard and elsewhere. Thus, one Frankfurter clerk from the 1950s remarked that "[i]f you came from Harvard Law School, you thought Black and Douglas were clowns." BRANDEIS AND FRANKFURTER, *supra* note 5, at 419.

Frankfurter also explicitly encouraged his former law clerks to attack the Court for unprincipled decisionmaking. In a letter to Alexander Bickel, a former clerk and then professor of law, Frankfurter writes: "I can assure you that explicit analysis and criticism of the way the Court is doing its business really gets under their skin. . . . You law professors should really sharpen your pens so that there is no mistaking as to what the trouble is and where the blame lies." H. HIRSCH, *supra* note 5, at 183 (quoting letter from Frankfurter to Bickel).

Frankfurter was undoubtedly correct that critical notices in the law reviews got under the "skin" of Justice Douglas. Douglas's letters express resentment of Frankfurter's "stooges," W. DOUGLAS, THE DOUGLAS LETTERS, *supra* note 5, at 96, and his autobiography makes repeated reference to the pernicious influence of those in the "Harvard cabal" who described Douglas as an "activist," to the Frankfurter "disciples" who disagreed with Douglas's interpretation of the 14th amendment, and to the "flying squadrons" of law clerks that Frankfurter dispatched to influence the views of the clerks of other justices. W. DOUGLAS, THE COURT YEARS, *supra* note 5, at 55, 53, 173.

104. Throughout his career on the Court, Justice Douglas was the subject of repeated attacks for unprincipled decisionmaking. For a sample of such views, see Kurland, *The Supreme Court 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 145 (1964) (generally criticizing the absence, in the Warren Court opinions, of "workmanlike product" and scornfully dismissing Douglas's "slambang" opinions); Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 95-96 (1966) (Douglas opinion in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) "expressly or impliedly repudiates every conventional guide to legal judgment"); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 97 (1970); A. COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 125-26 (1968); M. SHAPIRO, *supra* note 17. Such assertions became so common that Judge Skelly Wright was moved to ask, "What else is new?" Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 770 (1971).

Retrospective assessments have been no less unkind. See Bork, Foreword to G. McDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY at vii (1985) (Douglas's result in *Harper* was not justified "in terms of the historic Constitution or in terms of any other proffered basis for constitutional decisionmaking"); White, *supra* note 79, at 17, 70 (Douglas re-

case, Douglas regarded the struggle between labor and management essentially as a clash of economic interests,<sup>105</sup> the mediation of which required the government, its agencies, and its courts to exercise a relatively broad range of regulatory control.<sup>106</sup>

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sponded to the absence of doctrinal support for his reproductive rights decisions by "simply creating constitutional doctrine on the spot"). See also B. WOLFMAN, J. SILVER & M. SILVER, *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES 43-60* (1975) (discussing Douglas's unjustified support for the taxpayer in cases involving the Internal Revenue Service).

105. Douglas had grown up in the Pacific Northwest and counted members of the Industrial Workers of the World or Wobblies among his friends and acquaintances. See W. DOUGLAS, *THE COURT YEARS*, *supra* note 5, at 75-85. But while Douglas instinctively sympathized with the workers themselves, he had less appreciation for organized labor, particularly in the period following World War II. It was during this period, according to Douglas, that the newly merged AFL-CIO abandoned its progressive social agenda and focused solely on narrow economic gain. Thus, Douglas regarded organized labor as allied with either the forces of reaction and the status quo, or the forces of corruption. *Id.* at 422-23. In this respect, Douglas's view resembled that of C. Wright Mills, who described unions in 1956 as lacking the political or economic direction to play an important role in controlling the shape of public policy. See C. WRIGHT MILLS, *THE POWER ELITE* 265 (1956).

106. Justice Douglas held a broad conception of the constitutional power of the legislature to regulate the workplace and frequently voted to adopt a more liberal view of the Labor Board's power to interpret and apply the substantive provisions of the Wagner Act than the majority was willing to sustain. See V. COUNTRYMAN, *supra* note 86, at 323. While many of these opinions would have been supported by unions, Douglas was equally willing to uphold laws that regulated organized labor. Thus, Douglas voted to uphold the power of the states to pass right-to-work laws and joined decisions that forbade unions from spending funds collected under union-shop collective bargaining agreements on political causes to which individual, dues-paying employees object. *Id.* at 326-27. Moreover, Douglas also joined opinions that imposed on unions the obligation to represent fairly all members of the bargaining units in which they have established representational rights. *Id.* at 327 n.27. Finally, Douglas dissented from the Court's decision to uphold the Labor Board's application of the Wagner Act to supervisory personnel, arguing that the Act contemplated some separation between labor and management. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493-94 (1947) (Douglas, J., dissenting).

To the extent Douglas's opinions share a common thread, therefore, they tend to uphold the power of the government to regulate both labor and management. See B. WOLFMAN, J. SILVER & M. SILVER, *supra* note 104, at 105 (neither union nor management preference dominates Douglas's approach to labor cases). As Douglas explained in his autobiography, "[b]ig unions grew in the shadow of big business," and were subject to government regulation on that basis. W. DOUGLAS, *THE COURT YEARS*, *supra* note 5, at 166.

At the same time he permitted agencies to regulate labor and management, however, Douglas consistently expressed solicitude for the rights of individual employees. Thus, while Douglas joined opinions under the Railway Labor Act that affirmed the primacy of the National Joint Adjustment Board in resolving contract disputes between unions and employers, see *Slocum v. Delaware, L. & W. R.*, 339 U.S. 239 (1950); *Order of Ry. Conductors v. Southern Ry.*, 339 U.S. 255 (1950), he also joined a majority that confirmed the right of individual employees to seek judicial review of their claims under such contracts. See *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946). For subsequent developments in this line of cases, see *Feller*, *supra* note 12, at 683-86, 692-700.

To summarize, Justice Frankfurter was convinced that the federal courts were institutionally incapable of regulating industrial disputes. Furthermore, Frankfurter quite willingly, at least in *Hutcheson*, ignored conventional norms of judicial restraint in the reading of statutes to achieve the larger goal of restricting the judicial role in industrial conflict. Douglas shared neither Frankfurter's obsessive concern with judicial restraint, nor his hostility towards judge-made labor law. While it was perhaps inevitable that the *Lincoln Mills* case would divide the two Justices, it is worth asking whether the division owed more to Frankfurter's hostility to judicial lawmaking than to Douglas's unrestrained reading of the legislative materials.

#### D. *Lincoln Mills: The Opinions*

Any discussion of the *Lincoln Mills* decision must acknowledge that Justice Douglas's opinion for the Court was something less than a model of judicial craftsmanship. In an opinion that controlled the outcome of three cases,<sup>107</sup> Douglas held that section 301 empowers the federal courts to enter an order compelling an employer to honor its agreement to submit disputes arising under a collective bargaining agreement to binding arbitration.<sup>108</sup> In the course of upholding the federal courts' power to enforce arbitration agreements in particular, Douglas supplied answers to three questions that had produced a "contrariety of views" among the lower federal courts.<sup>109</sup> The briskness with which Douglas announced these conclusions—his opinion runs only twelve pages in length—undoubtedly contributed to the perception that he was merely announcing a result rather than conducting a reasoned elaboration of the statute.<sup>110</sup>

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107. The Court relied on the opinion in *Lincoln Mills* to decide two companion cases. In *General Electric Co. v. Local 205, United Elec. Workers*, 353 U.S. 547, 548 (1957), the Court affirmed the First Circuit's decision upholding the power of the district court to compel arbitration. But the Court expressly disavowed the lower court's reliance on the United States Arbitration Act, stating that it was following a different path to reach the same result. *Id.* at 548. Likewise, in *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550, 551-52 (1957), the Court affirmed an order compelling arbitration and added a note to indicate its view that such an order was final for purposes of appellate review.

108. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

109. *Id.* at 449, 450-51 nn.1 & 2 (collecting conflicting lower court authority).

110. It was, of course, well within Douglas's capabilities as a lawyer to undertake a detailed analysis of the language and structure of statutes or the origins and evolution of constitutional doctrine in the course of writing for the Court. See, e.g., *Williams v. North Carolina*, 317 U.S. 287 (1942) (undertaking detailed doctrinal analysis in the course of adopting new test for jurisdiction in divorce cases). But as others have noted, Douglas frequently eschewed traditional doctrinal analysis, particularly in his later years on the bench. See *infra* note 267.

Douglas first found that section 301 was more than jurisdictional, ruling that it also authorized federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements.<sup>111</sup> He next held that the congressional decision to make such contracts binding and enforceable embraced both the union's no-strike promise and its *quid pro quo*—the employer's agreement to submit disputes arising under the agreement to arbitration.<sup>112</sup> Finally, he found evidence that Congress intended to make arbitration agreements specifically enforceable,<sup>113</sup> an

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111. *Lincoln Mills*, 353 U.S. at 451. As a doctrinal matter, Douglas's opinion offers little analysis of § 301. After quoting the statute, he notes the differing views of the lower courts and announces that the Court agrees with the overwhelming weight of lower court authority to the effect that § 301 was more than jurisdictional. *Id.* at 449-51. Although some inkling of Douglas's interpretation of the statute may be gleaned from his description of Judge Wyzanski's opinion as the leading representation of the approved point of view, *id.* at 451 (citing *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953)), Douglas does not incorporate the Wyzanski analysis by reference or refer back to his own rather brief dissenting opinion in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 465 (1955) (Douglas, J., dissenting).

Douglas does quote certain salient comments from the Senate report, including language that suggests that Congress meant to make collective bargaining agreements "valid, binding and enforceable." *Id.* at 454 (quoting S. REP. NO. 105, 80th Cong., 1st Sess. 17, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 423). Yet his treatment of other aspects of the legislative records seems almost cavalier. Thus, he solemnly quotes a colloquy on the House floor for the proposition that the statute was meant to authorize the courts to fashion equitable remedies for breach of labor contracts. *Id.* at 455-56 (quoting 93 CONG. REC. 3656-57 (1947)). He fails to note, however, that the House version of the statute under consideration at the time explicitly made the provisions of Norris-LaGuardia inapplicable to labor contract enforcement actions, a provision that was dropped during conference. *See infra* note 113.

112. *Lincoln Mills*, 353 U.S. at 455. In supporting this conclusion, Douglas relied upon the decision of the conference committee to transfer authority from the Labor Board to the federal courts to make rules for the enforcement of labor contracts in accordance with the "usual processes of law." *Id.* at 452. This aspect of the legislative history offers far stronger support for the power of the federal courts to make common law than for the proposition that Congress intended to make arbitration agreements enforceable. *See infra* notes 253-65.

113. *Lincoln Mills*, 353 U.S. at 456. Although section 301 was undoubtedly intended to make an award of damages available in federal court for breach of the collective bargaining agreement, more than a little ambiguity surrounds the question whether § 301 also authorized federal courts to decree compliance with such contracts. In *Sinclair Refining Co. v. Atkinson*, 370 U.S. 238 (1962), Justice Black canvassed the history of the statute in some detail in the course of his decision that Congress had not intended § 301 to override the bar to injunctive relief established in *Norris-LaGuardia* and therefore did not contemplate specific enforcement of the labor contract. Black relied upon two crucial pieces of history. He first noted that the House bill had specifically made the *Norris-LaGuardia* Act inapplicable to actions to enforce labor contracts, while the Senate bill contained no such exception. Because the Senate's approach prevailed in conference and the exception was deleted from the statute, Black concluded that Congress had refrained from empowering the federal courts to grant injunctive relief against strikes in breach of contract. Black's interpretation was later overturned in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). For comments on the decisions, see Wellington & Albert, *Statutory Interpretation and the Political Process: A Com-*

intention declared with sufficient clarity to make the Norris-LaGuardia Act inapplicable to union actions to compel arbitration.<sup>114</sup> During the course of his opinion, Douglas casually described the process by which the courts were to fashion federal law under section 301, explaining that the nature of the problem would determine the "range of judicial inventiveness."<sup>115</sup>

Douglas's vision of section 301 was, in short, rather broad in its compass and rather curt in its expression. Congress had directed the federal courts to enforce labor contracts, and Douglas was willing to follow that directive without pausing to consider such niceties as the availability of

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*ment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963); Atleson, *The Circle of Boys Markets: A Comment on Judicial Inventiveness*, 7 INDUS. REL. L.J. 88 (1985).

114. *Lincoln Mills*, 353 U.S. at 457-59. Douglas also failed to marshal what support was available for his claim that Congress intended arbitration agreements to be enforced. The decision of the conference committee to drop the unfair labor practice provisions from the Senate bill that would have made such arbitration agreements enforceable in proceedings before the Labor Board offers compelling support for this conclusion. At the same time the unfair labor practice provisions were dropped, Congress broadened § 301 by deleting its reference to contracts "concluded as a result of collective bargaining." Evidently, then, Congress meant to make the arbitration agreement enforceable, and meant for the courts to enforce them. *See infra* note 258.

This evidence of legislative intent does much to solve the problem of equitable enforcement of arbitration agreements that Douglas faced in *Lincoln Mills*. As Bickel and Wellington show in their discussion of *Lincoln Mills*, the United States Arbitration Act of 1925 declared as a general matter of policy that executory arbitration agreements were enforceable in federal court and thus reversed *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924). Although the Act created an exception for "contracts of employment," Bickel and Wellington argue that the Taft-Hartley Act could be interpreted as making the Arbitration Act's policy of full enforcement applicable to arbitration agreements in the employment arena as well. Having overcome the common law rule of unenforceability, Bickel and Wellington suggest that an adequate basis existed on which to conclude that the Norris-LaGuardia Act was inapplicable to the specific enforcement of arbitration agreements. *See Bickel & Wellington, supra* note 15, at 10-19.

The union's lawyers offered an alternative solution to the difficulties posed by the anti-arbitration decision in *Red Cross Line* and the limited scope of its legislative reversal. They argued, quite simply, that *Red Cross Line* was addressed to judicial enforcement of commercial arbitration agreements and had no application to labor arbitration under collective bargaining agreements. Brief for Petitioner at 27-39, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). For an argument that relies on this distinction between labor and commercial arbitration in a different context, see Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 517-40 (1989).

115. *Lincoln Mills*, 353 U.S. at 457. This explicit approval of judicial inventiveness was perhaps the most controversial aspect of the opinion. Douglas suggested that federal labor statutes would furnish some substantive law and that the remainder was to be fashioned either by examining the policy of federal law or by absorbing compatible state law. For expressions of concern about the consequences of such inventiveness, see Isaacson, *Lincoln Mills Revisited: Caution, Judges Inventing*, in PROCEEDINGS OF N.Y.U. TWELFTH ANNUAL CONFERENCE ON LABOR 191 (E. Stein ed. 1959).

equitable remedies and the common law bar to the enforcement of executory promises to arbitrate. His dissenting opinion in *Westinghouse* two years earlier had accused the majority of "making mountains out of molehills" in denying standing to a union that sought to enforce the salary claims of individual members under a collective bargaining agreement.<sup>116</sup> His opinion in *Lincoln Mills* was plainly meant to reduce such molehills to what he viewed as their proper size,<sup>117</sup> but it did so more by ignoring doctrinal difficulties rather than by addressing them forthrightly.

In his dissenting opinion, Frankfurter took full rhetorical advantage of Douglas's refusal to engage in traditional doctrinal analysis. He began by restating his conclusion that section 301 dealt solely with matters of procedure and failed to establish federal substantive rights.<sup>118</sup> Frankfurter had reached this conclusion two years earlier, after closely reviewing the statute's legislative history in the *Westinghouse* case,<sup>119</sup> and Douglas's abdication had left his analysis virtually unscathed.<sup>120</sup> Consequently, Frankfurter described the majority's finding that section 301 embodied a substantive directive to enforce labor contracts as an act of judicial "alchemy" engaged in for the purpose of avoiding difficult constitutional problems.<sup>121</sup>

Much of the remainder of Frankfurter's opinion was devoted to a similar attack on the unrestrained character of the majority's analysis.<sup>122</sup> Perhaps its most revealing section, however, was its discussion of the

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116. See *Westinghouse*, 348 U.S. at 465 (Douglas, J., dissenting).

117. It was this reference that Frankfurter mocked in his dissenting opinion, accusing the majority of making section 301 "a mountain instead of a molehill." *Lincoln Mills*, 353 U.S. at 460, 465 (Frankfurter, J., dissenting).

118. See *id.* at 460-62 (Frankfurter, J., dissenting).

119. *Westinghouse*, 348 U.S. at 441-49, 452-59.

120. Nonetheless, Frankfurter felt obliged to append what he described as the statute's complete legislative history to his opinion, see *Lincoln Mills*, 353 U.S. at 485-546 (appendix to opinion of Frankfurter, J., dissenting), to support his conclusion that section 301 was "plainly procedural." *Id.* at 461. Some commentators have been convinced by the appendix that Frankfurter's interpretation of section 301 was correct. See Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: Part I*, 59 COLUM. L. REV. 6, 269 n.188 (1959); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 641 n.23 (1959).

121. *Lincoln Mills*, 353 U.S. at 460, 462.

122. Thus, Frankfurter portrayed Douglas's decision that Norris-LaGuardia did not bar the specific enforcement of arbitration agreements as one designed to confer on the union an "ad hoc benefit in a particular case," *id.* at 462; he scornfully derided Douglas's willingness to cast upon the federal courts the task of developing an industrial code through the exercise of judicial inventiveness, *id.* at 465; and he challenged both Douglas's superficial dismissal of the common law rule denying enforce-

proper role of the federal courts in disputes over the enforcement of labor arbitration agreements. Frankfurter made no secret of his view that such disputes were "ill-suited to judicial intervention."<sup>123</sup> After quoting Harry Shulman's argument that the courts should stay out of the arbitral process altogether,<sup>124</sup> Frankfurter argued that the delay necessarily attendant to litigation would preclude the courts from working out solutions to labor strife.<sup>125</sup> The courts' inability to deal with such problems effectively, coupled with their traditional reluctance to undertake tasks of a non-judicial character, argued for a narrow construction of the scope of section 301.<sup>126</sup>

Finally, Frankfurter's conclusion that section 301 does not make federal substantive law applicable to labor contracts "forced" him to reach and resolve the question of constitutionality.<sup>127</sup> Because he viewed Congress as having made state law applicable to section 301,<sup>128</sup> Frankfurter concluded that actions to enforce labor contracts did not arise under the laws of the United States within the meaning of article III, section 2 of

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ability to executory arbitration agreements and his "glaring ignor[ance]" of the Arbitration Act. *Id.* at 466-67.

Douglas refused to rise to the bait. Although he referred to *Red Cross Line*, see *supra* note 114, he avoided the thrust of that opinion by concluding that section 301 was meant to alter that rule by implication. See *Lincoln Mills*, 353 U.S. at 456 & n.7. Douglas also refrained from citing the United States Arbitration Act, despite the fact that, in a companion case to *Lincoln Mills*, the First Circuit had relied upon the Act in upholding the specific enforceability of arbitration agreements. See *Local 205, United Elec. Workers v. General Elec. Co.*, 233 F.2d 85, 96-97 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547, 548 (1957). It thus appears that Douglas chose to deal with these matters superficially and deliberately ignored a range of possible analytical replies to Frankfurter's attack.

123. *Lincoln Mills*, 353 U.S. at 463.

124. *Id.* at 463 (quoting Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955)).

125. *Id.* at 463-64.

126. *Id.* at 464-65.

127. *Id.* at 469. It seems evident that Frankfurter's analysis of the statute compelled him to reach the constitutional question. Under Frankfurter's approach, section 301 required the federal courts to apply state law. At the time, Alabama regarded executory agreements to arbitrate as unenforceable, in keeping with the common law rule. See *Lincoln Mills v. Textile Workers' Union*, 230 F.2d 81, 84 (5th Cir. 1956) (collecting authority), *rev'd*, 353 U.S. 448 (1957). Although Frankfurter's view of section 301 would lead him to conclude that the complaint was legally insufficient, he could not reach the content of state law without passing on the constitutionality of its incorporation into the federal statute.

128. *Lincoln Mills*, 353 U.S. at 469. In this conclusion, Frankfurter was widely supported; most commentators thought state law would apply to actions under section 301. See, e.g., Bickel & Wellington, *supra* note 15, at 19; Wollett & Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445, 470-71 (1955). Although some lower federal courts agreed, most of the lower federal courts viewed section 301 as conferring a federal right to contract enforcement. See *Lincoln Mills*, 353 U.S. at 451 n.2 (collecting cases).

the Constitution.<sup>129</sup> Moreover, he concluded that the doctrine of protective jurisdiction could not save the provision from constitutional infirmity.<sup>130</sup>

### E. *Lincoln Mills: The Conventional Wisdom*

Although the passage of time and the accretion of law has rendered it virtually irrelevant to the day-to-day administration of labor contracts, the Douglas-Frankfurter debate remains very much alive. At the time *Lincoln Mills* came down, labor law scholars agreed almost unanimously with Frankfurter's assessment of the legislative history and his conclusion that section 301 failed to establish a federal substantive right to contract enforcement.<sup>131</sup> Alexander Bickel and Harry Wellington took precisely this view in their influential discussion of the case.<sup>132</sup> Echoing

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129. *Id.* at 469-84.

130. *Id.* at 473-81. In rejecting "protective" jurisdiction as a basis for upholding the constitutionality of section 301, Justice Frankfurter parted company with most of the commentators who had considered the question. See, e.g., Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 189 (1953); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 224-25 (1948); Wollett & Wellington, *supra* note 128, at 475-79; Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 305 (1948).

Although *Lincoln Mills* avoided the protective jurisdiction controversy as it applies to section 301, the same question of federal jurisdiction may arise in connection with the recently enacted Emergency Medical Treatment and Active Labor Act of 1986. One provision of the Act authorizes federal courts to hear suits against hospitals by individuals who claim injury resulting from a violation of the Act and expressly incorporates the "law of the state where the hospital is located" as the body of applicable substantive law. See 42 U.S.C. § 1395dd(d) (Supp. 1986).

131. In a discussion of the provision published shortly after section 301 became law, Professor Cox anticipated by ten years the dispute in *Lincoln Mills*. Cox recognized that one could argue that the statute made labor contracts enforceable as a matter of federal substantive law; nonetheless, he concluded that it was "probable" that the "sole effect of these provisions is to recognize labor unions as juristic personalities." See Cox, *supra* note 130, at 283. Cox based this view on his conclusion that the legislative history evinced congressional concern with making unions liable in damages for breach of their contracts and removing the procedural defects that had plagued contract enforcement suits in state courts. *Id.* at 304. While Cox thought section 301 might survive constitutional scrutiny as a grant of protective jurisdiction, he was less concerned with the choice of state or federal law in actions arising under section 301, and the constitutional implications of that choice, than with the content of the law to be applied. See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956) (noting that Professor Dunlop, his collaborator, was exploring the choice of law question); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958).

132. See Bickel & Wellington, *supra* note 15. The article, a classic text of labor law and legal process scholarship, expresses the view that the Court has the power, in appropriate cases, to "remand" to Congress statutes that, if pressed, the Court would uphold against constitutional challenge. Section 301 presented just such a case, the authors argue, because Congress focused entirely on making labor contracts enforceable and did not consider the institutional capability of federal courts to fashion the necessary body of law. *Id.* at 22-35. To force legislative reconsideration of this

the conclusion that Wellington had reached two years earlier,<sup>133</sup> the two scholars described Douglas's decision that section 301 contains substantive content as a conclusion that "finds no support in the language of the statute and insignificant support in the legislative history."<sup>134</sup> Professor Meltzer<sup>135</sup> and an array of commentators who addressed the meaning of section 301 in the wake of *Lincoln Mills* reached similar conclusions.<sup>136</sup> The leading dissent, and it was only partial, advanced the view that the Court could legitimately apply federal law in the absence of definitive evidence that Congress had chosen state law.<sup>137</sup>

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question of institutional fitness, Bickel and Wellington argued for some form of jurisdictional dismissal, coupled with a candid exposition of the reasons for the "remand." *Id.* at 35.

133. In the wake of the Supreme Court's fragmented opinion in *Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), Wellington and Donald Wollett undertook an exhaustive review of the legislative history of section 301. *See* Wollett & Wellington, *supra* note 128, at 445. They concluded that section 301(a) "merely provides a forum in which actions for breach may conveniently be brought by parties who might otherwise be hamstrung by procedural obstacles" *Id.* at 473-74. They also thought the other provisions of section 301 "plainly deal with matters of procedure." *Id.* at 473. To their credit, however, Wollett and Wellington worked out in some detail the implications of a contrary finding that section 301 was intended to create federal substantive law. *Id.* at 450-70. The conflict between state and federal courts that would result from such a finding was said to support their conclusion that section 301 should be read as a directive to apply state law. *Id.* at 479.

134. Bickel & Wellington, *supra* note 15, at 35-36.

135. Like Cox, Professor Meltzer largely eschewed what he described as the temptation to explore the rival positions in *Lincoln Mills*, and focused instead on working out the questions of overlapping jurisdiction and lawmaking power that the decision presented. *See* Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 COLUM. L. REV. 269, 276 (1959). Nevertheless, Meltzer described the dominant objective behind section 301 as the elimination of certain technical obstacles to suits for breach of the labor contract. *Id.* at 269. In his view, the legislative history, collected in Frankfurter's dissent, was "persuasive support for a dominantly jurisdictional interpretation of section 301." *Id.* at 269 n.188.

136. Early commentary on section 301(a) of the Taft-Hartley Act generally agreed that Congress had failed to specify the source of applicable law. *See* Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261, 1270 (1957) ("The hearings, debates and reports, by and large, did not reach such a sophisticated level."); Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167, 184 (1956) (Although the "subject of what Congress intended under section 301 has been argued ad infinitum, . . . disagreement, doubt and speculation are the only apparent results."); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 637 (1959) ("Congress was not entirely sure what it meant in section 301 or what its constitutional powers were."). *Cf.* Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROBS. 114, 119 (1948) (arguing that Congress meant to solve procedural problems that had plagued state court enforcement suits without addressing the choice of law question). *See also* Olverson, *Collective Bargaining and the Taft-Hartley Labor Act*, 33 VA. L. REV. 549 (1947); Note, *Section 301(a) of the Taft-Hartley Act: A Constitutional Problem of Federal Jurisdiction*, 57 YALE L.J. 630 (1948).

137. *See* Mendelsohn, *supra* note 136. While Mendelsohn concluded that the matter was not free from doubt, he thought Frankfurter overstated his case in ascribing a "wholly jurisdictional"

The passage of time has not softened the academy's view. Eleven years after the *Lincoln Mills* decision, Professor Wellington described it as having resolved serious and divisive questions by "judicial fiat."<sup>138</sup> Wellington continued: "No serious attempt was made by that Court to bridge with reasoned elaboration the gap between question and conclusion. The majority opinion is simply an ipse dixit."<sup>139</sup> Others continue to share Wellington's assessment. For example, Professor Stone's lengthy critique of the Court's jurisprudence describes *Lincoln Mills* as having read into section 301 a substantive intent to make labor contracts enforceable "without any support in the legislative history."<sup>140</sup> Professor Atleson perhaps states the prevailing view when he describes the Supreme Court in *Lincoln Mills* as having "empowered itself to create section 301 law."<sup>141</sup>

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purpose to section 301. *Id.* at 183-84. Essentially, Mendelsohn made a practical argument: since the legislative history failed to yield any definitive insight into the question whether Congress meant state or federal law to apply in section 301 actions, the Court was free to make a choice of law without doing violence to the "obvious design of Congress." *Id.* at 184 (quoting *Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 454 (1955)). Mendelsohn then argued on practical terms for the application of federal law, either judge-made or statutory, that would supply a basis for the specific enforcement of agreements to arbitrate. *Id.* at 202.

Others agreed with Mendelsohn that Frankfurter had exaggerated his claim that the record was barren of any evidence that Congress meant the federal courts to apply federal substantive law. See *Cox supra* note 130, at 283; Feinsinger, *supra* note 136, at 1270-71.

Professors Charles Bunn and Charles Gregory advanced the strongest arguments for the substantive character of section 301. Bunn argued in the wake of *Lincoln Mills* that section 301(a) implied an intention to make the labor contract binding as a matter of federal law. See Bunn, *Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247, 1253-56 (1957). He based this argument on the extent of the federal regulation of the collective bargaining process, the recognition that sponsors of the statute had described it in terms of making the labor contract binding, and on the view that a statute permitting suits for violation "goes a long way toward saying 'Such contracts are obligatory.'" *Id.* at 1256. See also Olverson, *supra* note 136, at 575-78 (arguing that § 301 should be read as an implicit declaration that labor contracts were enforceable as a matter of federal law). Gregory's 1948 labor law casebook argued that section 301 worked a fundamental change in the substantive law of labor contract enforcement, but he apparently retracted that position in later work. See *infra* note 277.

138. H. WELLINGTON, *supra* note 74, at 100.

139. *Id.*

140. Stone, *supra* note 73, at 1528.

141. Atleson, *supra* note 113, at 99 (emphasis added). Atleson concludes that the decision in *Boys Markets* reveals the costs of judicial inventiveness unguarded by legislative enactments because it judicially modified the Norris-LaGuardia Act, a statute designed "precisely to restrict judicial policymaking." *Id.* at 108. See also St. Antoine, *Integrity and Circumspection: The Labor Law Vision of Bernard D. Meltzer*, 53 U. CHI. L. REV. 78, 98 (1986) (*Lincoln Mills* was a "tour de force" that upheld the constitutionality of section 301 despite the fact that the statute "in terms had merely granted jurisdiction to the federal district courts"). For the comments of those outside the labor field, see *supra* notes 17-18.

## II. THE SUBSTANTIVE CONTENT OF SECTION 301

### A. *The Interpretive Task*

*Lincoln Mills* posed a problem in the choice of applicable law.<sup>142</sup> Section 301(a) declares that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States," so long as the contract satisfies the commerce test of the statute.<sup>143</sup> One can certainly read the statute, as Frankfurter did, to mean that the federal courts merely enjoy jurisdiction over breach of labor contract claims and must define "violations" of labor contracts by reference to state law. But one can just as easily interpret this language to impose a federal obligation on the parties to comply with their labor contracts.<sup>144</sup> According to such a view, the federal courts would define the compliance obligation by elaborating the definition of the term "violation" on a case-by-case basis.

This section of the Article revisits the choice of law question by reviewing the structure and history of the statute, the committee reports, the debates, and other sources that shed light on the statute's meaning. Most scholars who have undertaken such a review have, *pace* Frankfurter, concluded that the legislative history demonstrates a dominantly procedural focus and, therefore, an expectation that the federal courts would define labor contract violations in accordance with state law.<sup>145</sup> I disagree with this conclusion.

Frankfurter's interpretation of section 301 as incorporating state law would render the statute ineffective and nullify the congressional design. Congressional dissatisfaction with conflicting state approaches led to the passage of the statute; if section 301 incorporates those conflicting approaches, then the statute simply transfers the conflict to the federal forum.<sup>146</sup> More fundamentally, the interpretation of section 301 as incorporating state law raises the article III problems that Frankfurter explored in his *Lincoln Mills* dissent.<sup>147</sup> The ordinary presumption

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142. In *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), Frankfurter states the question quite clearly as involving a choice between reading section 301 to authorize "the federal courts to fashion the judicial rules" to govern the collective agreement or reading it to furnish a "federal forum for enforcing the body of contract law which the States provide." *Id.* at 442.

143. For the text of section 301(a), see *supra* note 32.

144. See *infra* text accompanying notes 187-201.

145. See *infra* note 187.

146. See *infra* text accompanying notes 150-80.

147. See *supra* note 130.

against adopting an interpretation that poses constitutional difficulties at least suggests that the Frankfurter school must make a rather clear demonstration that the statute compels the application of state law.<sup>148</sup> In the case of section 301, however, the presumption takes on additional force because the problem of the statute's constitutionality was raised during hearings on the bill by Labor Secretary Lewis Schwellenbach. Senator Taft answered Schwellenbach's doubts by disavowing Frankfurter's state law incorporation theory and stating that federal law would control.<sup>149</sup>

In the sections that follow, this Article demonstrates that Taft's disavowal was not simply an off-the-cuff defense of language that he drafted and shepherded through Congress, but was consistent with the theory of the legislation from its origins as section 10 of the Case bill of 1946 to its passage as section 301 in 1947. This Article first traces the problems with state court labor contract enforcement proceedings that led to the passage of the statute. Next it shows that most state courts enforced labor contracts, if at all, on the theory that they were enforcing the employment contracts of individual employees. This Article then demonstrates that section 301 sought to address the problem by transforming the contract enforcement action from a suit brought to vindicate individual rights into an action to enforce collective or group interests; the statute made both unions and employers responsible as entities for complying with their labor contracts. These substantive changes in labor contract enforcement theory belie any claim that section 301 incorporated state law; indeed, the debates over the statute rested on the assumption that "violations" of labor contracts would present a federal question.

### *B. The Obstacles to Labor Contract Enforcement in State Court*

The Senate report recounts the "practical difficulties" with the enforcement of labor contracts that led to the passage of section 301.<sup>150</sup> The report explains that the Wagner Act had required employers to bargain with unions with a view towards reaching agreement and to reduce

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148. Frankfurter acknowledged as much in his *Lincoln Mills* dissent, admitting that the Court must read section 301 to "enable it to survive" constitutional scrutiny but concluding that the incorporation of state law was too clear for the Court to ignore. See *Lincoln Mills*, 353 U.S. at 477-78.

149. See *infra* text accompanying notes 245-49.

150. S. REP. NO. 105, 80th Cong., 1st Sess. 15, reprinted in 1 LEGIS. HIST., *supra* note 47, at 421. For the history of collective wage determination in the United States, see S. PERLMAN, A HISTORY OF TRADE UNIONISM IN THE UNITED STATES 4-7 (1929); J. RAYBACK, A HISTORY OF AMERICAN LABOR 54-58 (1959); Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829, 832 (1948).

any agreement to writing.<sup>151</sup> The Wagner Act, however, failed to provide machinery for the enforcement of such contracts;<sup>152</sup> actions to enforce a collective bargaining agreement went forward in state court under ordinary contract principles.<sup>153</sup> The problem with such proceedings, according to the Senate report, was that the laws of many states "make it difficult to sue effectively and to recover a judgment against an unincorporated labor union."<sup>154</sup> Most observers, including Frankfurter, have interpreted the Senate's expression of concern with the "practical" obstacles to effective contract enforcement as support for the claim that Congress intended section 301 to solve procedural problems stemming from the union's status as a voluntary association.<sup>155</sup> While this interpretation correctly identifies the union's associational status as the source of the problems that concerned Congress, to label such enforcement difficulties as procedural fundamentally misstates the nature and the extent of

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151. See S. REP. NO. 105, 80th Cong., 1st Sess. 15 (1947), reprinted in 1 LEGIS. HIST., *supra* note 47, at 421. The employer's duty to bargain, see 29 U.S.C. § 158(a)(5) (1982) (making it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees), was made binding on unions as well, when Congress added section 8(b)(3) to the Labor Act as part of the Taft-Hartley amendments. See 29 U.S.C. § 158(b)(3) (1982). On the duty to reduce agreements to writing, see H.J. Heinz v. NLRB, 311 U.S. 514 (1941).

152. Although the Wagner Act did not by its terms impose an obligation on employers to comply with their collective bargaining agreements, the Supreme Court has recognized that certain unilateral changes in the terms and conditions of employment may violate the employer's duty to bargain in good faith. See, e.g., NLRB v. Katz, 369 U.S. 736 (1962). During the consideration of Taft-Hartley, no one suggested that such a bargaining obligation, standing alone, would adequately ensure compliance with labor contracts.

153. Congress understood both the obvious point that the Wagner Act had failed to make collective bargaining agreements enforceable as a matter of federal law and the corollary: actions to enforce such agreements went forward in state court. See S. REP. NO. 105, 80th Cong., 1st Sess. 15-18 (1947), reprinted in 1 LEGIS. HIST., *supra* note 47, at 421-24 (noting that no federal statute "makes unions legally responsible for carrying out their agreements" and cataloging the disparate state court approaches to the enforcement of collective bargaining agreements, see E. DANGEL & I. SHRIBER, THE LAW OF LABOR UNIONS §§ 305-333 (1941); 1 L. TELLER, THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING, §§ 157-60 (1940); Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829 (1948); Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941); Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1931); Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938); Note, *The Present Status of Collective Labor Agreements*, 51 HARV. L. REV. 520 (1938).

154. S. REP. NO. 105, 80th Cong., 1st Sess. 15 (1947), reprinted in 1 LEGIS. HIST., *supra* note 47, at 421.

155. For Frankfurter's view that Congress was concerned with procedural matters, see *Association of Salaried Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444-49 (1955). See also Wollett & Wellington, *supra* note 128, at 473; Miller & Ryza, *Suits By and Against Labor Organizations Under the N.L.R.A.* 1955 U. ILL. L.F. 101, 103.

the problems.<sup>156</sup> The union's associational status presented both procedural and substantive obstacles<sup>157</sup> to the effective state court enforcement of labor contracts, as a brief review demonstrates.

At common law, unincorporated labor unions were viewed as voluntary associations; such associations, in turn, were said to lack the capacity to sue or be sued in their common name.<sup>158</sup> This absence of what I will call "litigation capacity" was responsible for a host of difficulties in suing unions effectively.<sup>159</sup> In practice, an employer who sought damages from an unincorporated union was obliged to commence the action against the members of the union, serve the members with process, establish the members' liability for the breach in question, and satisfy the judgment from the members' assets.<sup>160</sup> At the time Congress considered section 301, it clearly recognized that these requirements posed difficult

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156. Frankfurter was far too accomplished a jurist to use the labels "substance" and "procedure" as a substitute for the functional analysis of legal problems. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). He was also aware that the business of defining a union's litigation capacity, though often described as a procedural matter, included substantive elements. See *Busby v. Electric Utils. Employees Union*, 323 U.S. 72, 77 (1944) (Frankfurter, J., concurring) (union's capacity could be regarded as substantive determination of status). That Frankfurter adopted a procedural characterization of the practical difficulties confronted by Congress was at least ironic; more likely, his procedural label was intended to obscure substantive elements of the statute.

157. This Article adopts the substance-procedure dichotomy with some trepidation for the terms may obscure as much as they illuminate. It's worth noting nonetheless that many aspects of section 301 address matters of substance, such as the rule of agency, the individual's liability, and the union's representative status. See *infra* text accompanying notes 207-17. See also *Cox*, *supra* note 130, at 283-84 (recognizing substantive elements in the statute); and *infra* note 277.

158. Early courts and commentators viewed incorporation as a privilege that the state was free to confer or withhold; under this conception, corporate personality was conferred, along with the corporate charter, as a matter of legislative grace. See *Laski, The Personality of Associations*, 29 HARV. L. REV. 404, 406 (1916). Having failed to obtain such a charter, voluntary associations were said to lack any legal status or personality apart from their members and were thus denied capacity to litigate in their common name. See *Grand Int'l Bhd. of Locomotive Eng's v. Green*, 206 Ala. 196, 89 So. 435 (1921); *Karges Furniture Co. v. Amalgamated Woodworkers*, 165 Ind. 421, 75 N.E. 877 (1905); *Wilson v. Airline Coal Co.*, 215 Iowa 855, 246 N.W. 753 (1932); *Citizens Co. v. Asheville Typographical Union*, 187 N.C. 42, 121 S.E. 31 (1924); *Oster v. Brotherhood of Locomotive Firemen*, 271 Pa. 419, 114 A. 377 (1921). See generally *Sturges, Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924).

159. Most of the difficulties surfaced in actions seeking legal relief, such as damages. Bills stating claims by or against unincorporated associations were proper in equity when the claim affected all the members in common, the members were too numerous to join individually, and the members named in the bill would adequately represent the interests of the entire membership. See *United Brotherhood of Maintenance v. Kennedy*, 13 Del. Ch. 106, 115 A. 587 (1922); *Guilfoil v. Arthur*, 158 Ill. 600, 41 N.E. 1009 (1895); *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753 (1906); *St. Germain v. Bakery & Confectionery Workers' Union*, 97 Wash. 282, 166 P. 665 (1917).

160. See generally *E. DANGEL & I. SHRIBER*, *supra* note 153, at §§ 455, 466, 470; 1 L. TELLER, *supra* note 153.

hurdles.<sup>161</sup> Some states had worked around the problem by passing common name statutes that authorized suits against the entity.<sup>162</sup> A few jurisdictions vitiated the common law rule by decision.<sup>163</sup> But many did

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161. The Senate report specifically highlighted problems with service of process, proof of liability, and recovery of judgments in its catalog of state court enforcement difficulties. See S. REP. NO. 105, 80th Cong., 1st Sess. 15-18 (1947), reprinted in 1 LEGIS. HIST., *supra* note 47, at 421-24. A number of labor lawyers had proposed legislation to cure the problems of state court labor contract enforcement. See, e.g., J. SEIDMAN, UNION RIGHTS AND UNION DUTIES 200-01 (1943) (proposing voluntary registration of enforceable agreements with appropriate agency); L. TELLER, A LABOR POLICY FOR AMERICA: A NATIONAL LABOR CODE 170-71 (1945) (proposing that breach of contracts be defined as unfair labor practices). Cf. H. METZ, LABOR POLICY OF FEDERAL GOVERNMENT 83 (1945) (noting problems with state court proceedings but suggesting that federal government was powerless to intervene in contract enforcement issues).

162. Section 301(a) was debated on the assumption that 35 of the 48 states had, either by statute or decision, vitiated the common law rule denying litigation capacity to unions. See *infra* note 242. Most of the early statutes authorized persons who were associated together and known by some distinguishing name to sue and be sued in the common name. For a representative sample of early decisions applying such statutes to trade unions, see *Armstrong v. Superior Court*, 173 Cal. 341, 159 P. 1176 (1916); *Vance v. McGinley*, 39 Mont. 46, 101 P. 247 (1909); *Mayer v. Journeymen Stonecutters' Ass'n*, 47 N.J. Eq. 519, 20 A. 492 (1890). Some of the early "common name" statutes were directed specifically at persons who associated together to transact business in a common name; courts occasionally held that such statutes were inapplicable to unions organized to promote the welfare of their members. See *St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351 102 N.W. 725 (1905). But see *Taylor v. Order of Ry. Conductors*, 89 Minn. 222, 94 N.W. 684 (1903) (union that had established a mutual benefit department to provide life insurance to members was engaged in business for purposes of suit in its common name).

163. Although the Supreme Court held as early as 1922 that unions were subject to suit as entities in federal court, at least as to matters on which federal law supplied the rule of decision, see *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 392 (1922), state courts by and large continued to deny litigation capacity to associations in the absence of a statute. See Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109, 1118 n.30 (1941) (collecting cases); Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40, 42 n.9 (1941). For the exceptional case, see *Busby v. Electrical Utils. Employees Union*, 147 F.2d 865 (D.C. Cir. 1945) (recognizing union's litigation capacity within the District of Columbia by judicial decision).

Even the Court's subsequent decisions limited the reach of *Coronado* to cases in which the association's existence was recognized in a federal statute. Compare *Moffat Tunnel League v. United States*, 289 U.S. 113 (1933) (associations have no capacity to sue unless so authorized by statute) with *Brown v. United States*, 276 U.S. 134 (1928) (implicit authority to sue an association found in the federal antitrust laws). See generally 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1564, at 462 (1990). This limited view of the *Coronado* decision was incorporated into the original version of Rule 17(b) of the Federal Rules of Civil Procedure, which took effect in 1938. Rule 17(b) provides that the capacity of unincorporated associations to sue and be sued "shall be determined by the law of the state in which the district court is held, except that . . . [an] unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." FED. R. CIV. P. 17(b). The advisory committee notes suggest that the rule simply follows existing law. See FED. R. CIV. P. 17(b) advisory

nothing.<sup>164</sup>

The common law view of unions as voluntary associations also affected the theory by which state courts enforced labor contracts. Voluntary associations were said to lack the capacity to enter into binding contracts.<sup>165</sup> This lack of what I will call "contractual capacity," to distinguish it from litigation capacity, meant that collective bargaining agreements were regarded in the early years of the century as "gentleman's agreements";<sup>166</sup> the parties might voluntarily agree to respect their terms but such contracts did not give rise to legally enforceable rights.<sup>167</sup> The only enforceable agreements in the workplace were the individual contracts of hire between the firm and the individual employees.<sup>168</sup>

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committee note ("[t]his rule follows existing law as to such associations, as declared in [*Coronado Coal*]").

164. The states that failed to act included Illinois and other important industrial states.

165. See, e.g., *Lamm v. Stoen*, 226 Iowa 622, 284 N.W. 485 (1939). That the common law denied voluntary associations the capacity to enter into contracts in their common name was occasionally noted in passing, see, e.g., *A.R. Barnes & Co. v. Berry*, 169 F. 225 (6th Cir. 1909), but one struggles to find decisions that state precisely that point in connection with suits to enforce terms contained in the collective bargaining agreement. The dearth of opinions undoubtedly stems from the fact that the association's well-known lack of contractual and litigation capacity prevented the union from seeking enforcement of contract terms directly. See *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493, 253 N.W. 694 (1934) (noting that because unions were not incorporated and thus lacked capacity to contract, collective bargaining agreements in the United States were not regarded as contracts and few attempts were made to enforce them). Instead, unions and their officers purported to act as agents in negotiating contracts that would govern the terms of employment of individual employees. Thus, early suits to enforce the terms in the collective agreement were brought by individual employees.

166. J. COMMONS & J. ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* 118 (1916) ("The so-called 'contract' which a trade union makes with an employer or employers' association is merely a 'gentlemen's agreement,' a mutual understanding, not enforceable against anybody. It is an understanding that, when the real labor contract is made between the individual employer and the individual employee, it shall be made according to the terms previously agreed upon. But there is no legal penalty if the individual contract is made differently. To enforce the collective contract would be to deny the individual's liberty to make his own contract.").

167. Many early courts held that the collective contract was simply irrelevant to the individual terms of employment. See *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, 79 S.W. 136 (1904). Such decisions rested on the view that allowing the union a role in negotiation would interfere with the individual's liberty of contract. See Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829, 829-31 (1948). See also *supra* note 166.

168. The relationship between the individual contract of hire and the collective bargaining agreement has continued to pose difficult problems of contract administration under the Labor Act. The Supreme Court held in *J.I. Case v. NLRB*, 321 U.S. 332 (1944), that an employer could not assert the existence of individual contracts of hire, which established terms of employment for a stated term, as a bar to its obligation to bargain collectively with its employees' chosen representative. But the *J.I. Case* decision does not absolutely preclude the enforcement of rights under an individual

As the century wore on and collective bargaining became more common, many states increasingly came to recognize the legal significance of the collective bargaining agreement in the enforcement of individual labor contracts.<sup>169</sup> Using a variety of theories, state courts held that individual contracts incorporated the terms of the collective agreement. Some treated the collective bargain as a custom or usage that was incorporated in the individual contract;<sup>170</sup> others regarded the employees as third-party beneficiaries of the union's contract;<sup>171</sup> still others viewed the union as the employees' contracting agent.<sup>172</sup> Eventually, some state courts, notably those in New York, simply held that the collective bargaining agreement established mutual obligations that were enforceable by and against the employer and the union in suits at law and in equity.<sup>173</sup>

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contract by members of a bargaining unit. Thus, in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), the Court held that the employer had wrongly removed to federal court an action in which an employee sought to assert state law rights under an individual contract of hire. The Court's opinion suggests that federal law may leave some room for the enforcement of such rights in state courts. See also *Berda v. CBS, Inc.*, 881 F.2d 20 (3d Cir. 1989) (no preemption of individual contract claim).

169. For a discussion of this evolutionary process, see *supra* note 153.

170. See, e.g., *Hudson v. Cincinnati Ry.*, 152 Ky. 711, 717, 154 S.W. 47, 49 (1913); *Langmade v. Olsen Brewing Co.*, 137 App. Div. 355, 121 N.Y.S. 388 (1910); *Cross Mountain Coal Co. v. Ault*, 157 Tenn. 461, 9 S.W.2d 692 (1928).

171. See *Gulla v. Barton*, 164 A.D. 293, 294, 149 N.Y.S. 952, 953 (N.Y. App. Div. 1924); *H. Blum & Co. v. Landau*, 23 Ohio App. 426, 427, 155 N.E. 154, 155 (1926); *Yazoo & M. V. Ry. v. Sideboard*, 161 Miss. 4, 14, 133 So. 669, 672 (1931). The advantage of this third party theory was that it permitted the courts to afford recovery to employees who worked in ignorance of the advantageous collective agreement; its drawback was that it failed to provide a basis on which the employer could hold individual employees responsible for breach of the collective agreement. See *Rice*, *supra* note 153, at 595-96. Moreover, it failed to admit the possibility that the union might agree to modify the collective agreement in a manner inconsistent with the theoretically vested rights of the individual beneficiaries. See *Piercy v. Louisville & Nashville Ry.*, 198 Ky. 477, 248 S.W. 1042 (1923). Eventually, courts came to accept the view that the union makes the contract for the employee and retains control over its terms. See *Donovan v. Travers*, 285 Mass. 167, 173, 188 N.E. 705, 707 (1934); *Hartley v. Brotherhood*, 283 Mich. 201, 206, 277 N.W. 885, 885 (1938).

172. See *A.R. Barnes & Co. v. Berry*, 169 F. 225, 229 (6th Cir. 1909); *Maisel v. Sigman*, 123 Misc. 714, 719, 205 N.Y.S. 807, 811 (1924).

173. New York generally recognized the employer's right to enjoin the union from breaching its contractual no-strike clause, see *Greater City Master Plumbers Ass'n v. Kahme*, 6 N.Y.S.2d 589, 592 (N.Y. Sup. Ct. 1937), as well as the union's right to enjoin the employer from breaching either its obligation to hire union members, see *Suttin v. Unity Button Works*, 144 Misc. 784, 786, 258 N.Y.S. 863, 864, *aff'd* 236 A.D. 792, 258 N.Y.S. 1049 (N.Y. App. Div. 1932), or its obligation to refrain from locking out its employees. See *Goldman v. Cohen*, 222 A.D. 631, 633, 227 N.Y.S. 311, 313 (N.Y. App. Div. 1928). In addition, New York recognized the right of both the union and the employee to recover damages for the employer's breach of contract. See *Barth v. Addie Co.*, 271 N.Y. 31, 2 N.E.2d 34 (1936) (permitting individual to sue on his own behalf for severance pay due

Despite these developments in New York and their modest influence on the law of other states,<sup>174</sup> the collective theory of labor contract enforcement was by no means universally accepted at the time Congress addressed the question of labor contract enforcement in 1946.<sup>175</sup> Some state court decisions from the 1930s and 1940s describe the collective bargaining agreement as "the joint and several contract of the members of the union, made by the officers of the union as their agents."<sup>176</sup> Other courts viewed the contract as binding, not on its own terms, but became binding when it was adopted as part of the individual contract of each employee.<sup>177</sup> As a consequence, many actions seeking to enforce con-

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under the contract, and permitting union to intervene to recover wages on behalf of employees whose wages were reduced below the level set forth in the collective bargain).

Even in New York, however, problems remained. In actions for damages, the New York courts continued to require evidence that established the substantive liability of all of the members of the association. *See, e.g., J. Friedman & Co. v. Amalgamated Clothing Workers*, 115 Misc. 44, 54, 188 N.Y.S. 879, 885 (1921). *See also Schouten v. Alpine*, 215 N.Y. 225, 232, 109 N.E. 244, 246 (1915) (requiring employer to show that each member authorized or ratified the breach of contract).

174. In *Harper v. International Bhd. of Elec. Workers*, 48 S.W.2d 1033 (Tex. Civ. App. 1932), the Texas intermediate appellate court relied extensively on New York decisions in affirming the issuance of an injunction directing an employer to comply with the closed shop agreement in the labor contract. *Id.* at 1040-41. Significantly, the court regarded its decision as having brought Texas within a limited number of jurisdictions that viewed the collective agreement as not only giving rise to individual rights in union members but also establishing a contract "between the organization or group *as such* and the employer." *Id.* at 1040 (emphasis added). *See also Weber v. Nasser*, 286 P. 1074 (Cal. App. 1930).

175. Courts that denied unions standing to enforce the rights of individuals generally divided up the terms of the collective agreement into provisions that were intended to benefit the members as a whole and were, therefore, enforceable at the union's behest, and those that created peculiarly individual rights, enforceable at the instance of the individual employees alone. Thus, unions were permitted to enforce the employer's promise to hire only union members, but were not permitted to bring suit on behalf of individuals who were wrongfully discharged in violation of the collective bargain. *See Christiansen v. Local 680, Milk Drivers & Dairy Employees*, 126 N.J. Eq. 508, 513-14, 10 A.2d 168, 171 (1940) (although the unjustifiable discharge of four employees may "give them a cause of action on the [collective] contract, it is a cause solely between them and [the employer] and not between the members of the Union collectively and [the employer]"). *See also Schwartz v. Cigar Makers' Int'l Union*, 219 Mich. 589, 189 N.W. 55 (1922). *But see Barth v. Addie Co.*, 271 N.Y. 31, 2 N.E.2d 34 (1936) (union permitted to recover difference between wages paid and amounts set forth in labor contract on behalf of affected members); *Textile Workers Union v. Textron, Inc.*, 99 N.H. 385, 111 A.2d 823 (1955) (recognizing union's standing to enforce individual rights).

176. *Christiansen*, 126 N.J. Eq. at 512, 10 A.2d at 171.

177. Many courts thus theorized that, in itself, the collective contract was incomplete in that it established no contract between the employer and individual employees. Since the employer remained free to hire and discharge and the employees remained free to work or quit, the collective bargain did not conclude the contract. Rather, in the words of one court, the collective contract was "a mutual general offer, to be closed by specific acceptance." *Rentschler v. Missouri P. Ry.*, 126 Neb. 493, 501, 253 N.W. 694, 698 (1934). *Accord Hall v. St. Louis-S.F. Ry.*, 224 Mo. App. 431, 28

tract rights and obligations were brought by<sup>178</sup> and against<sup>179</sup> the individual employee. Even in states that afforded unions the capacity to sue, courts frequently denied unions standing to enforce the rights of individual members.<sup>180</sup>

In sum, the union's status as a voluntary association presented a host of practical obstacles to effective state court enforcement of labor contracts. While certain of these difficulties can be described as procedural, the problems ran much deeper. With but a few exceptions, state courts failed to recognize the collective bargaining agreement as creating legal rights enforceable by and against the union as a collectivity. Instead, the states struggled to enforce the collective agreement by reference to the employment contracts between the firm and the individual employee.

*C. The Language, Structure, and History of Section 301:  
Implementing A Collective Theory of Labor Contract  
Enforcement*

Section 301 rejects the state model of labor contract enforcement, with its emphasis on individual contracts of hire, and adopts the modern view that labor contracts established rights enforceable by and against unions on a collective or corporate basis.<sup>181</sup> Senator Taft made no secret of this purpose in his discussions of the statute, explaining that the statute was designed to make unions responsible for their breaches of labor contracts on a collective basis.<sup>182</sup> Nor did Taft disguise the fact that federal law would govern the enforcement of labor contracts under section 301. Statements that appear in the Senate reports and Taft's comments during debates on the statute both reflect the understanding that an action to enforce collective bargaining agreements under section 301 would present a federal question.<sup>183</sup>

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S.W.2d 687 (1930); *Brisbin v. E.L. Oliver Lodge No. 335, Bro. of Ry. Clerks*, 134 Neb. 517, 529, 279 N.W. 277 (1938). See generally E. DANGEL & I. SHRIBER, *supra* note 153, § 305, at 334.

178. See, e.g., *Hall v. St. Louis-S.F. Ry.*, 224 Mo. App. 431, 28 S.W.2d 687 (1930) (action by individual for wrongful discharge); *Christiansen v. Local 680, Milk Drivers & Dairy Employees*, 126 N.J. Eq. 508, 10 A.2d 168 (1940) (action by individual seeking severance pay); *Rentschler v. Missouri P. Ry.*, 126 Neb. 493, 253 N.W. 694 (1934) (action by individual to recover wages due under the collective agreement).

179. See *Whiting Milk Cos. v. Grondin*, 282 Mass. 41, 184 N.E. 379 (1933) (action by employer against former employee to enforce non-compete clause in collective contract).

180. See *supra* note 175.

181. See *supra* note 153.

182. See *infra* note 204.

183. See *infra* text accompanying notes 235-49.

This section of the Article collects evidence from the language, structure, and history of the statute that corroborates Taft's claim that the statute was intended to establish federal rights. I begin with section 301(a), and attempt to show that the language of the statute, though admittedly ambiguous, can readily be interpreted as establishing a federal duty to comply with labor contracts. The remaining sections contain additional evidence that supports such a substantive interpretation of section 301(a). I begin with supplemental provisions of section 301 that were evidently designed to supercede conflicting provisions of state law by establishing federal substantive rules to govern labor contract claims. I next consider structural evidence that Congress drafted these internal provisions on the assumption that federal law would control under section 301(a). Finally, I collect statements from the committee reports and debates, all of which confirm the federal content of section 301.

### *1. Section 301(a): A Substantive Interpretation*

The linchpin of Justice Frankfurter's dissent in *Lincoln Mills* was his claim that although the language of section 301(a) confers jurisdiction on the federal courts to hear actions for breach of labor contracts, it fails to declare such contracts to be enforceable as a matter of federal law.<sup>184</sup> He thus concluded that the statute merely provides a federal forum in which to hear contract disputes, but leaves the federal courts to determine the question of enforceability in accordance with state law.<sup>185</sup> Much of the remainder of his legislative history analysis simply seeks to buttress his claim that Congress focused on matters of procedure rather than of substance.<sup>186</sup> Although many commentators have agreed with Frankfurter's

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184. See *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 443-44 (1955) (the language of the statute fails to suggest "general application of any defined or theretofore available federal substantive law" and thus supports a procedural interpretation).

185. To Frankfurter, both the language and history supported the interpretation of the statute as a "mere procedural provision." *Id.* at 444, 449. See also *Lincoln Mills*, 353 U.S. at 461 (Frankfurter, J., dissenting) ("plainly procedural"). It thus supplied a federal forum for suits on contracts based on state law. *Id.* at 448.

186. Frankfurter's only detailed review of the language and history of section 301 appeared in his plurality opinion in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), a discussion he later referred to in *Lincoln Mills*. After reviewing the language of section 301, which he described as suggesting a merely jurisdictional focus, Frankfurter undertook a lengthy analysis of the legislative history. *Id.* at 444-49. The burden of this analysis was to establish that section 301 had begun life in the House as a substantive provision but had been transformed into a merely jurisdictional provision on the Senate side. Frankfurter argued that Senator Taft viewed collective agreements as enforceable under state law and took steps to solve the

claim,<sup>187</sup> the language of the statute does not compel a merely jurisdictional interpretation. By its terms, section 301 declares that “[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court,” so long as the contract satisfies the commerce test of the statute.<sup>188</sup> One can certainly interpret this language to impose a federal obligation on the parties to comply with their labor contracts. After all, the statute makes a “violation” of labor contracts actionable in federal court.<sup>189</sup> It thus obliges the parties to comply with their contracts or face an action for breach.

Those who have accepted Justice Frankfurter’s interpretation of section 301(a) regard the statute as “wholly jurisdictional.” They reason that the statute both fails to declare in so many words that it shall be unlawful for the parties involved to violate their promises,<sup>190</sup> and fails to

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practical difficulties with their enforcement by making unions subject to suit as entities. *Id.* at 445-46. He also set forth the minority view of the statute as one providing a forum for the enforcement of state law and argued that Taft failed to dispute this interpretation or justify the statute as dependent on federal substantive law. *Id.* at 448-49.

187. Although many commentators have associated themselves with Frankfurter’s reading of section 301, relatively few have conducted detailed assessments of the language of the statute. For the most part, however, those assessments agree with that of Frankfurter. See Miller & Ryza, *supra* note 155, at 103; Wollett & Wellington, *supra* note 128, at 473-74. But see Bunn, *supra* note 137, at 1253-56 (arguing that permitting suits for violations of contracts was tantamount to a declaration of their binding character); Note, *Section 301(A) of the Taft-Hartley Act: A Constitutional Problem of Federal Jurisdiction*, 57 YALE L.J. 630 (1948) (arguing that section 301 could be read as making labor contracts enforceable as a matter of federal law).

188. See *supra* note 32 (quoting section 301(a)) (emphasis added).

189. The substantive flavor of section 301(a)’s reference to violations of labor contracts thus distinguishes the statute from other provisions of federal law that merely confer jurisdiction upon the federal courts. See, e.g., 28 U.S.C. § 1331 (jurisdiction of civil actions “arising under” the Constitution, law or treaties of the United States); 28 U.S.C. § 1333 (jurisdiction of any civil case of “admiralty or maritime jurisdiction”); 28 U.S.C. § 1338(a) (jurisdiction of civil actions arising under any “Act of Congress” relating to patents, copyrights and trade-marks).

190. Two labor practitioners, Edward Miller and Willis Ryza, noted the absence of any declaration of a federal substantive right to contract enforcement in the statute and proceeded to analyze the constitutional issues with some care. See Miller & Ryza, *supra* note 155. They noted, for example, that the Senate bill had defined breach of the labor contract as an unfair labor practice, and suggested that such a definition would suffice as establishing the missing rule of substantive law. *Id.* at 102-03. They suggested that it was the failure of Congress to include a similar provision in the statute that emerged from the conference that raised constitutional difficulties. *Id.*

To the extent that Miller and Ryza were arguing that Congress had inadvertently omitted the substantive declaration from the Act, their claim cannot be sustained. Section 301 had its genesis as section 10(a) of the Case bill, and its terms were substantially identical to those of the statute ultimately enacted. The 79th Congress clearly understood that the Case bill provisions had established federal substantive law; it had been debated on those terms. Moreover, the Case bill did not contain any provision making contract breaches an unfair labor practice. In short, Congress regarded the precursor to section 301(a) itself as an adequate declaration of the federal enforceability of labor

establish federal standards by which to determine whether a violation has occurred.<sup>191</sup> Professors Wollett and Wellington, for example, contrast the "jurisdictional" language of section 301(a) with what they describe as the "plainly substantive" language of section 303(a),<sup>192</sup> which declared that "[i]t shall be unlawful" for labor organizations to engage in secondary boycotts and other specified conduct that was also declared unlawful in unfair labor practice provisions in section 8(b) of the Act.<sup>193</sup> Wollett and Wellington thus attribute significance to the fact that, unlike section 301(a), section 303(a) contains both a declaration that makes certain union conduct illegal as a matter of federal law and establishes a federal standard by which to assess the legality of that conduct.

The failure of section 301(a) to declare specifically that a breach of contract violates federal law, however, does not render the provision "wholly jurisdictional." A separate declaration of illegality was simply unnecessary. The statute opens the federal forum only to parties that allege a violation of a labor contract; it thus accomplishes precisely the same result as would a hypothetical two-part statute that initially declared it unlawful to violate labor contracts and then provided a federal forum to hear such claims.<sup>194</sup> Under either approach, the statute would

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contracts. The addition, and subsequent deletion, of the provision for Labor Board enforcement of such contracts was a separate matter.

191. Professors Wollett and Wellington, for example, describe the provision as "merely provid[ing] a forum" because it fails to declare that violating one's collective bargaining agreements is unlawful. *See* Wollett & Wellington, *supra* note 128, at 474. *See also* Bickel & Wellington, *supra* note 15, at 36 (a substantive interpretation of section 301 "finds no support in the language of the statute and insignificant support in the legislative history"); Miller & Ryza, *supra* note 155, at 103 (the failure of Congress to declare violations of the labor contract unlawful raises interpretive questions).

192. *See* Wollett & Wellington, *supra* note 128, at 473-74; Miller & Ryza, *supra* note 155, at 104.

193. Section 303(a) declared as unlawful a long list of union practices such as secondary boycotts and jurisdictional disputes that were also made unfair labor practices in section 8(b) of the Labor Act. Section 303(b) affords those injured a right of action for damages in federal court. *See* § 303, Labor Management Relations Act of 1947, 61 Stat. 158, (codified as amended at 29 U.S.C. § 187 (1982)). After amendments to the statute that were enacted as part of the Labor Management Reporting and Disclosure Act 1959, Pub. L. No. 86-257, the statute simply incorporated by reference the declaration of illegality in section 8(b)(4). *See generally* 2 C. MORRIS, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1178-1187* (2d ed. 1983).

194. Consider a hypothetical statute drafted to include an express declaration and a jurisdictional provision:

(a) It shall be unlawful for either party to violate contracts between an employer and a labor organization that represents employees in an industry affecting commerce as defined in this Act.

(b) Suits for violation of subsection (a) may be brought in any district court of the

make violations of labor contracts that affect interstate commerce actionable in federal court.

Nor does the statute's failure to set forth standards for determining a "violation" of the labor contract render section 301(a) merely jurisdictional. Although section 303(a) contains *more* substantive content than section 301(a),<sup>195</sup> the contrast between the language of the two provisions ultimately proves nothing. Section 303 imposes federal tort liability on unions that engage in certain unlawful conduct and provides for recovery of damages by any person "injured in his business or property" by such misconduct.<sup>196</sup> It was essential to the federal scheme that the statute actually describe the unlawful conduct; otherwise, no text would define the scope and nature of this newly created, federal obligation of labor organizations. In the labor contract arena, however, Congress sought to accomplish nothing more than to impose a federal obligation on the parties to comply with the terms of their collective bargain. The scope and nature of the obligations of the parties were understood to be those set forth in the agreement, and the federal courts were simply expected to enforce the bargain.<sup>197</sup>

In other words, the cause of action created by section 301(a) was based, not on an independent description of conduct made illegal by federal law, but on the existence of a labor contract that was itself a creature of federal law.<sup>198</sup> The Wagner Act already required employers to negotiate in good faith with a view towards reaching a collective bargaining agreement and to reduce the resulting accord to writing.<sup>199</sup> The Taft-Hartley Act had added an unfair labor practice provision that imposed

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United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Such a statute would have supplied the substantive declaration that section 301(a) lacks according to the Frankfurter school. But surely one can fairly read § 301(a), which essentially boils this two-part statute down into a single provision, to accomplish the same end.

195. As initially enacted, *see supra* note 193, section 303(a) declared it to be unlawful for unions to engage in a strike or work stoppage for the purpose of forcing any person to recognize the union, to cease handling the products of or doing business with other firms, and to make particular assignments of work. It thus defined an array of unlawful union conduct.

196. *See supra* note 193.

197. For Senator Taft's description of the statute along these lines, *see infra* notes 248-249.

198. Justice Douglas made a similar argument in suggesting that the federal control over the collective bargaining process might establish sufficient substantive content to authorize enforcement of collective agreements as a matter of federal law, even without any explicit declaration to that effect. *See Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 465-67 (1955) (Douglas J., dissenting). *See also* Bunn, *supra* note 137, at 1254-56.

199. *See supra* note 151.

this bargaining duty on unions, as well as employers.<sup>200</sup> Once the agreement was reached, section 301(a) compelled the parties as a matter of federal law to comply with its terms.<sup>201</sup> It was entirely natural for Congress to express this compliance obligation in section 301(a) by simply stating that a "violation" of the labor contract by either party was actionable in federal court.

## 2. *The Supplemental Provisions of Section 301*

Section 301 did more than simply declare that federal courts may hear suits for violations of collective bargaining agreements; it also included a number of supplemental provisions designed to make this newly created federal claim effective. While some of these supplemental provisions addressed matters of procedure, such as the manner of serving the union with process and the proper venue of the action,<sup>202</sup> most of them established federal substantive rules that implemented a collective theory of labor contract enforcement and modified the model of labor contract enforcement then prevailing in many state courts.<sup>203</sup> As Senator Taft explained, the statute was intended to make unions liable for labor contracts "as if they were corporations."<sup>204</sup>

The statute accomplished this result by: declaring that violations of labor contracts were actionable in federal court;<sup>205</sup> declaring that the union could sue and be sued as an entity;<sup>206</sup> opening the union's treasury

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200. See Labor Management Relations Act, § 8(b)(3), 49 Stat. 452 (codified at 29 U.S.C. § 158(b)(3) (1982)).

201. See Section 301(b) (codified at 29 U.S.C. § 185(b) (1982)).

202. Section 301(c) makes venue of actions and proceedings by and against labor organizations proper in the district where the labor organization maintains its principal office and in any district where the organization, through agents, performs representational services for employees and members. See 29 U.S.C. § 185(c) (1982). Section 301(d) authorizes service of process on the labor organization by service on an officer or agent of the organization in his capacity as such. See *id.* at § 185(d).

203. See *supra* text accompanying notes 150-80.

204. See 93 CONG. REC. 3839 (1947) ("the pending bill provides [that unions] can be sued as if they were corporations"). Taft had made precisely the same point one year earlier during debate on the precursor to section 301. Taft explained that Senator Byrd had proposed to require all labor unions to incorporate, a proposal the committee members supporting the Taft approach had rejected as "awkward [and] unnecessary." 92 CONG. REC. 5705 (1946) (statement of Sen. Taft). He next explained that his approach was meant to make unions "in effect . . . sueable as if they were corporations." *Id.* On the drive for incorporation of labor unions, see *supra* note 69.

205. See § 301(a) (codified at 29 U.S.C. § 185(a) (1982)).

206. Section 301(b) provides that a labor organization may "sue and be sued as an entity and on behalf of the employees whom it represents." 29 U.S.C. § 185(b) (1982).

to claims for damages;<sup>207</sup> and holding the union responsible for the actions of its agents.<sup>208</sup> Perhaps most significant was the provision immunizing union members from actions to collect judgments against their union. Section 301(b) provides that any judgment against a labor organization shall be enforceable only against the organization as an entity and "shall not be enforceable against any individual member or his assets."<sup>209</sup> The immunity provision was intended to prevent a recurrence of the result in the *Danbury Hatters* case, in which individual union members lost their homes to satisfy a federal antitrust judgment.<sup>210</sup> In reversing the common law approach to union member liability, section 301(b)'s immunity rule reflects the view that the members' liability, like that of the shareholders of a corporation, should be limited to the assets that they committed to the joint enterprise.<sup>211</sup>

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207. Section 301(b) provides that a "money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity." *Id.* at § 185(b).

208. Section 301(b) declares that any "labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents." *Id.* at § 185(b). Section 301(e) makes clear that in determining "whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." *Id.* at § 185(e).

The agency provision incorporated the "ordinary doctrines of agency" into federal law and made them applicable to the union as a legal entity separate from its members. *United Mine Workers v. Gibbs*, 383 U.S. 715, 736 (1966). The statute thus accomplished two purposes. It vitiated the rule in section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 156 (1982), which immunized the union from liability for unlawful conduct in the absence of "clear proof of actual participation in, or actual authorization of, . . . or of ratification of" unlawful acts by agents or officers of the union. *See Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217 n.6 (1979). It also altered the rule, which some state courts followed in actions to enforce labor contracts, *see supra* note 207, that precluded enforcement of a judgment against the union in the absence of evidence that each member had authorized or ratified the breach of contract.

Plainly, the agency rules were consistent with Taft's corporate theory of union responsibility and he described them in those terms. *See* 93 CONG. REC. 4022 (1947) (there must be legal proof of agency in the case of unions "as in the case of corporations"). That the agency rules were intended to supplement a federal theory of contract enforcement, however, was not fully appreciated by the commentators. *See Miller & Ryza, supra* note 155, at 106 (rejecting argument that an agency provision that merely altered rules prevailing under the Norris-LaGuardia Act had created a "new substantive right"); *Cox, supra* note 130, at 305.

209. 29 U.S.C. § 185(b) (1982).

210. *See Savings Bank of Danbury v. Loewe*, 242 U.S. 357 (1917); *Lawlor v. Loewe*, 235 U.S. 522 (1915); *Loewe v. Lawlor*, 208 U.S. 274 (1908). The Supreme Court has consistently recognized this purpose of Congress in its interpretation of the scope of the immunity in section 301(b). *See Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 248 (1962); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 406-07 (1981).

211. Taft explicitly linked his corporate theory of union responsibility to the immunity rule of

In addition, the statute specifically addresses the capacity of the union to sue or be sued in federal court.<sup>212</sup> Although the passage of a such rule may initially appear to have been unnecessary in light of Rule 17(b) of the Federal Rules of Civil Procedure,<sup>213</sup> a careful review of the language of the provision discloses why Congress included a capacity rule specifically tailored to the enforcement of labor contracts. Section 301(b) went beyond a simple declaration that unions may be sued; it specifically provided that unions may sue or be sued as an entity "and in behalf of the employees whom it represents."<sup>214</sup> In other words, the capacity rule establishes a federal basis on which the union may bring actions to enforce the rights of individual employees under the collective bargaining agreement.<sup>215</sup> Section 301(b) thus makes clear that the union's role in enforce-

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section 301(b). See 92 CONG. REC. 5705 (1946) ("Therefore, we provide very simply that a labor union may be sued as if it were a corporation, and if it is sued, then the funds of the labor organization and its assets are responsible for the judgment, but the funds and the assets of the individual members are not liable on such a judgment.").

212. Virtually every commentator regarded the capacity provision as establishing a wholly procedural rule. See Wollett & Wellington, *supra* note 128, at 471; Miller & Ryza, *supra* note 155, at 106; Cox, *supra* note 130, at 305 (by implication). But see C. GREGORY & H. KATZ, LABOR LAW: CASES, MATERIALS AND COMMENTS 1179 (1948) (describing as substantive the statute's declaration that unions may sue on behalf of their employees). In doing so, they simply overlooked the fact that the statute does more than accord unions the capacity to litigate.

213. The creation of a federal right to contract enforcement in section 301(a) would appear to supply the federal substantive law that would trigger application of the federal capacity rule in Rule 17(b) of the Federal Rules of Civil Procedure. See *supra* note 163. On this view, which Miller and Ryza specifically adopted, see Miller & Ryza, *supra* note 155, at 106 & n.24, a federal capacity rule would appear superfluous. As the text makes clear, however, section 301(b) did more than grant unions the capacity they would enjoy under Rule 17(b).

214. See *supra* note 32.

215. Because the language of section 301(b) appeared expressly to recognize a union's federal right to enforce the labor contract on behalf of its members, it seems astonishing that neither Frankfurter's plurality opinion nor Douglas's dissent in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), referred to the provision. *Westinghouse*, after all, presented the question whether a union could recover on behalf of 4000 employees a day's wages that the employer allegedly withheld in violation of the contract. The lower court's decision, that section 301 failed to make a union's action to enforce uniquely personal rights of individual employees cognizable in federal court, adopted a view of the collective bargaining agreement very much in keeping with the approach of the state courts. See *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 210 F.2d 623, 627 (3d Cir. 1954) (wage provisions of collective agreement were not enforceable until they were incorporated into workers' individual contracts of employment). It was precisely this preoccupation with individual employment contracts that section 301 had been passed to alter. Indeed, when the Supreme Court finally overruled the holding in *Westinghouse* that federal courts lack power to entertain the union's suit to enforce individual rights, it specifically cited section 301(b) as support for its decision. See *United Auto. Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 700 (1966).

For early discussions recognizing the significance of the language of section 301(b) in resolving the

ing the labor contract was to be exactly the same as its role in bargaining with the employer over the terms of the contract: it was to act as an entity in representing the interests of employees in the bargaining unit.

The provisions of section 301 that implemented Taft's corporate theory of union responsibility represent a significant departure from the rules that governed the union's liability in state court enforcement actions. Unlike many states that refused to permit the union to enforce contract provisions that were viewed as creating individual employee rights,<sup>216</sup> the federal capacity provision of section 301(b) authorized the union to enforce individual rights under the collective bargain as the representative of the employees. Unlike the states, including New York, that based liability for breach of labor contracts on a showing that each individual member had authorized or ratified the breach,<sup>217</sup> the agency rules of section 301(b) and the provision for the collection of judgments from the union's treasury made the union responsible as an entity for compliance with the contract. In other words, section 301 ended the preoccupation in such enforcement suits with the individual employment contracts and focused on the contract's enforcement by and against the union as an entity. By effecting these important changes in the model of collective contract enforcement, section 301(b) refutes the argument that the statute contemplated that state law would continue to govern the enforcement of the collective bargaining agreement under section 301(a). On the contrary, it suggests that the federal statute would displace conflicting state laws with uniform federal rules, a view the committee reports and debates on the statute confirm.

### 3. *Structural Evidence of the Federal Substantive Scheme*

The internal structural consistency of the rules in section 301 lends additional support to the claim that Congress intended section 301(a) to establish a federal right to labor contract enforcement.<sup>218</sup> Certain of the supplemental rules in section 301(b) apply by their terms only to labor

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question presented in *Westinghouse*, see Bunn, *supra* note 137, at 1258; Gregory, *supra* note 212, at 642.

216. See *supra* note 215.

217. See *supra* note 173.

218. As finally enacted, section 301 creates two different categories of rules. One category, exemplified by the provision in section 301(a) that authorizes federal courts to hear suits for violation of labor contracts, applies only to labor organizations that "represent employees in an industry affecting commerce." The second category of rules applies to all labor organizations without regard to their affect on commerce.

organizations that represent employees in an industry affecting commerce, language that parallels the interstate commerce language of the contract enforcement provision in section 301(a).<sup>219</sup> The remaining provisions, which appear to be rules of general application, omit any reference to interstate commerce. Although the literature on section 301 has largely ignored the difference between the commerce-linked and the generally applicable rules,<sup>220</sup> a reference in the House-Senate conference report on the statute makes clear that Congress purposefully drew the distinction.<sup>221</sup>

One can make sense of the distinction between the two categories of rules by viewing the commerce-linked rules as applicable only to actions to enforce the collective bargaining agreement under section 301(a); on such an interpretation, the generally applicable rules govern all claims against unions, such as those under section 303,<sup>222</sup> as to which federal law supplies the rule of decision. The internal logic of the rules certainly supports this explanation. Thus, the provision that permits unions to sue and be sued includes commerce language that links the provision to actions under section 301(a) to enforce labor contracts. Such a limited capacity rule was all that Congress needed to enact in view of the fact that Rule 17(b) gave unions capacity in other actions governed by federal substantive law.<sup>223</sup> By contrast, Congress intended the provision that limits

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219. Each of the rules in section 301 that Congress meant to apply specifically to federal claims to enforce the labor contract included the limiting reference to labor organizations that "represent employees in an industry affecting commerce." Such language appeared in the agency rule, as well as the capacity rule in section 301(b). See 29 U.S.C. § 185(b) (1982).

220. The only considered discussion in the literature fails to offer a cogent account of the distinction between the commerce-linked rules in section 310 and those of general applicability. Former Labor Board General Counsel Gerald Van Arkel notes the distinction, see *infra* note 221, and suggests that the conferees' reference to rules of general applicability may have been meant to suggest that unions were to be subject to suit in tort as well as contract. See G. VAN ARKEL, AN ANALYSIS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 61 (1947). Van Arkel ultimately rejects that interpretation on the ground that it would improperly confer jurisdiction on the federal courts to hear state law tort claims, a conclusion with which I certainly agree but one that leaves the reference in the conference report unexplained.

221. The Conference Report explains that certain provisions of section 301(b) "and the succeeding subsections of section 301 . . . are general in their application, as distinguished from subsection (a)." HOUSE REPORT ON H.R. 3020, H.R. REP. NO. 510, 80th Cong., 1st Sess. 66, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 570.

222. See 29 U.S.C. § 187 (1982) (establishing union liability for secondary boycotts and other "abusive" practices). See *supra* note 193.

223. Section 301(b) confers capacity on labor organizations to sue or be sued as an entity and on behalf of the employees they represent. See *supra* note 32. Congress certainly had no reason to define the capacity of unions in a rule of general applicability; Rule 17(b) and *Coronado Coal* had

the enforcement of money judgments to the union's assets and immunizes the assets of individual members from such enforcement proceedings to control not just in actions to enforce labor contracts but also in federal antitrust actions and other actions brought against unions on the basis of federal law.<sup>224</sup> In keeping with the interpretation proposed here, the provision relating to the enforcement of judgments does not contain any reference to commerce that would limit the rule's application to contract actions.

On this reading of the statute, section 301 assumes that actions to enforce labor contracts will present a federal question.<sup>225</sup> The commerce-linked rules in section 301 were specifically intended to govern such enforcement suits. While the rules of general application in section 301 were meant to apply to all federal question claims involving unions, they were clearly meant to control actions under section 301(a) to enforce labor contracts as well. By treating claims arising under section 301(a) like other federal claims against unions to which the supplemental rules of general applicability were meant to apply, the statute's structure suggests that contract actions present a federal question.

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previously established such capacity in all cases in which unions were alleged to have violated federal substantive law. See *supra* note 163. Moreover, it would have made little sense for Congress to have extended the union's right to bring representative suits on behalf of their employees to other federal remedial schemes, most of which operated to impose liability on unions for wrongful conduct rather than to confer enforceable rights on the union or its members.

224. Section 301(b) declares that money judgments against a labor organization may be enforced only against the assets of the union as an entity; the statute specifically forbids enforcement of such claims against the assets of individual union members. Congress enacted this rule of immunity for union members to foreclose the possibility of a recurrence of the result in the *Danbury Hatters* case, in which union members lost their homes to satisfy a federal antitrust judgment. See 92 CONG. REC. 5705 (1946) (statement of Sen. Taft); 93 CONG. REC. 3839 (1947) (same). See generally *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 406-07 & n.6 (1981) (collecting legislative history in support of view that Congress meant to immunize members from liability in all actions for violation of labor contracts; specifically recognizing that the immunity rule was meant to apply to other federal substantive claims against unions). Congress evidently intended that the rule of immunity would apply in every case in which unions faced federally created liability. Significantly, this would include suits for violation of the antitrust laws, suits for violation of section 303, and suits under section 301(a) for violation of the labor contract. The immunity rule was therefore couched in terms of general applicability; the limiting reference to unions that meet the commerce test was not included.

225. Taft not only made comments during the debates that reflected his understanding that labor contract enforcement actions would present federal questions made actionable by section 301, see *infra* note 241, he specifically stated this view during an exchange with Secretary of Labor Schwelmbach, who appeared before the Senate committee to question the wisdom of federalizing labor contracts. See *infra* note 248.

#### 4. *The Committee Reports and Debates*

Statements by the legislation's sponsor, Senator Taft, and the reports of the principal committees confirm that section 301 was designed to make collective bargaining agreements enforceable as a matter of federal law. Section 301 took shape during the Senate labor committee's consideration of the Case bill in 1946.<sup>226</sup> After studying the bill in committee,<sup>227</sup> Taft produced language essentially similar to the current version of section 301 that he proposed for adoption as section 10(a) of the Case bill.<sup>228</sup> Although the committee rejected section 10(a), Taft led a suc-

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226. During the 1940s, Congress considered a host of provisions to ensure compliance with collective bargaining agreements, *see* Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 444-45 & nn. 3-6 (1955) (collecting authority), but concern with labor contract enforcement crystallized during House consideration of the Case bill in 1946. The bill, which Representative Case introduced on the House floor, declared in section 10(a) that all collective bargaining agreements "shall be mutually and equally binding and enforceable either at law or in equity, any other law to the contrary notwithstanding." 92 CONG. REC. 765 (1946) (quoting language of § 10(a) of Case bill).

When the Senate labor committee later considered the House provision, it underwent substantial change. *See infra* note 228. The House accepted the Senate's modified version without requesting a conference. *See infra* note 230.

227. Representative Case appeared before the Senate Subcommittee on Labor and Education to answer questions about his bill. No one questioned the propriety of making labor contracts enforceable as a matter of federal law, but Senator Taft raised a host of questions about the effectiveness of the Case approach. Taft first asked Case whether he meant to give jurisdiction to the federal courts in purely local collective bargaining contracts not dealing with interstate commerce. While Case expressed the view that the field of intrastate commerce was vanishing under Supreme Court decisions, he agreed to exempt local contracts from the bill. *See Labor Disputes Act of 1946: Hearings Before a Subcomm. of the Senate Comm. on Education and Labor on H.R. 4908*, 79th Cong., 2d Sess. 8-10 (1946).

Taft's second question was more fundamental. He expressed concern that a simple declaration that labor contracts were binding and enforceable would fail to remove the obstacles to state court enforcement of collective agreements. *Id.* Taft thus articulated much the same position that he later presented in defense of section 301: That the union's status as an unincorporated association made state court enforcement proceedings ineffective.

228. Taft's minority supplement to the Senate Labor Committee's report on H.R. 4908 proposed the adoption of a statute providing for federal court suits to enforce the labor contract. The proposal read as follows:

Section (a) Suits for violation of a contract concluded as the result of collective bargaining between an employer and a labor organization if such contract affects commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties.

(b) Any labor organization whose activities affect commerce as defined in this Act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States: *Provided*, that any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

cessful floor fight that resulted in the Senate's adoption of the provision.<sup>229</sup> The House later accepted this provision<sup>230</sup> without illuminating discussion,<sup>231</sup> and it was included in the final version of the bill that Truman vetoed.<sup>232</sup> Much the same language was reintroduced in 1947 and was adopted as section 301.<sup>233</sup> Thus, the legislative history of section 301

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S. REP. NO. 1177, 79th Cong., 2d Sess. 10-11 (1946) (minority report). The proposed statute also contained provisions governing venue and service of process that resemble sections 301(c)-(d) of the Act as it was finally enacted.

229. See 92 CONG. REC. 5723 (1946).

230. The House accepted the Senate bill without demanding a conference. Thus, the bill submitted to President Truman was substantially identical to the Taft proposal.

231. The House debates certainly recognize that the bill was meant to establish federal law. See 92 CONG. REC. 5930 (1946) ("All this section on suability does is to carry out the same purpose we had in the House bill, when we provided for making contracts actually binding upon both parties to it. It has been found that while a few States permit suing on a labor contract, many states do not. Unless you have some such provision as this in Federal law, collective-bargaining contracts will not be good . . .") (comment of Rep. Case). Most speakers focused more generally on the bill's provision for the mutual enforcement of labor contracts. See 92 CONG. REC. 5942, 5944 (1946) (comments of Reps. Slaughter and Springer noting the purpose of the bill to make the labor contract binding on both parties). In general, it appears that the House was willing to defer to the Senate concerning the manner in which the bill would accomplish this result. See 92 CONG. REC. 5930 (1946) ("So the Senate very carefully and properly drafted this provision in the way they did, to insure that 'contracts,' again in the words of President Truman, 'once made must be lived up to' and 'changed only in the manner agreed upon by the parties.'") (comment of Rep. Case).

232. See H.R. DOC. NO. 651, 79th Cong., 2d Sess. (1946) (Truman's veto message).

233. Of the bills dealing with industrial relations in the House, only H.R. 725 included a provision for enforcement of labor contracts; it was virtually identical to the Case bill. See 1 *Amendments to the National Labor Relations Act: Hearings Before the House Comm. on Education and Labor on H.R. 8, 725, 880, 1095, and 1096*, 80th Cong., 1st Sess. (1947). On the Senate side, language similar to the Case bill appeared in S.55, which Senators Taft and Ball introduced, see *Hearings Before the Comm. on Labor and Public Welfare on S. 55 and S.J. Res. 22*, 80th Cong., 1st Sess. (1947), and in the bill as it passed the Senate. See S. REP. NO. 105, 80th Cong., 1st Sess. 121, reprinted in 1 LEGIS. HIST., *supra* note 47, at 279. A somewhat different formulation was included in the bill the House enacted. See S. REP. NO. 105, 80th Cong., 1st Sess. 64, reprinted in 1 LEGIS. HIST., *supra* note 47, at 221 ("Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may 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 agreement affects commerce, or the court otherwise has jurisdiction of the cause.") The conflicting drafts were submitted to a conference committee and the bill that emerged from conference, See H.R. REP. NO. 510, 80th Cong., 1st Sess. 23-24, reprinted in 1 LEGIS. HIST., *supra* note 47, at 527-28, was enacted over Truman's veto. See 93 CONG. REC. 7504 (1947), reprinted in 1 LEGIS. HIST., *supra* note 47, at 922 (recording June 20, 1947 vote in House to override Truman's veto); 93 CONG. REC. 7692 (1947), reprinted in 2 LEGIS. HIST., *supra* note 47, at 1656 (recording Senate's vote to override).

Sections 301(a) and 301(b), 29 U.S.C. §§ 185(a), (b) (1982), differ in only four respects from the language that Taft proposed in 1946. First, the limiting reference to contracts "concluded as a result of collective bargaining" was dropped from the statute in an apparent effort to make clear that the statute applied to other labor contracts between employers and unions. See *infra* note 258. Second,

begins with the 1946 deliberations on the Case bill.<sup>234</sup>

The 1946 deliberations clearly reflect a congressional understanding that the precursor of section 301(a) would make collective bargaining agreements equally binding and enforceable as a matter of federal law.<sup>235</sup> In the 1946 Senate minority report that recommended adoption of the statute, Taft reviewed the nature of the problem in some detail. (Indeed, much of the 1946 Senate minority report was incorporated into the better known 1947 majority report of the same committee.) In explaining why his statute was necessary, Taft's report on the proposal first explained that "neither the Wagner Act nor any other Federal statute makes labor unions legally responsible for carrying out their agreements."<sup>236</sup> After canvassing the obstacles to effective state court enforcement of such agreements, Taft's report declared that "statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step."<sup>237</sup>

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the affecting commerce test was altered during Senate hearings on the bill in 1947 to focus not on the question whether the contract "affects commerce," but on whether the labor organization represents employees in an industry that affects commerce. Third, Congress added a provision that made clear that the statute permitted suit in federal court without regard to the citizenship of the parties. Fourth, Congress added a provision conferring jurisdiction in suits for violation of contracts "between labor organizations." Minor changes were also made in the proviso to section 301(b) that immunized members from damages claims.

234. As a general matter, the Supreme Court has recognized the relevance of materials from prior sessions in cases in which the language of the statute "crystallized" at an earlier time. See *Transcontinental & Western Air, Inc. v. Civil Aeronautics Bd.*, 336 U.S. 601, 605-06 n.6 (1949) (where the "essence of the legislation remained constant"); *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980) (where the "operative language of the original bill was substantially carried forward into the Act"); *United States v. Enmons*, 410 U.S. 396, 404-05 n.14 (1973). These principles support the Court's consideration of Case bill materials from the 79th Congress in its interpretation of section 301. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962) (section 10 of the Case bill was the "direct antecedent" of section 301); *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444 (1955) (Frankfurter, J.) (same).

235. Justice Frankfurter argued that Senator Taft's new version of section 10(a) transformed a provision that declared contracts mutually binding into a statute that merely provided a federal forum. See *Westinghouse*, 348 U.S. at 444-47. But there is no suggestion in the 1946 deliberations that Taft's version of the statute was meant to strip the statute of substantive content. To the contrary, Taft's minority report describes his version of the statute as granting statutory recognition to the enforceability of labor contracts, and the House viewed Taft's version as comparable to its own. See *supra* note 231.

236. S. REP. NO. 1177, 79th Cong., 2d Sess. 11 (1946) (minority report).

237. *Id.* at 13. That Senator Taft obviously understood the implications of Rule 17(b) of the Federal Rules of Civil Procedure, see *supra* note 163, offers additional support for the proposition that section 301 was meant to establish federal substantive rights. Rule 17(b) and the decision in *Busby v. Electric Utils. Employees Union*, 323 U.S. 72 (1945), suggest that, so long as state law supplies the rule of decision in labor contract enforcement actions, state law will also govern the

The minority report thus described the proposed statute as if the provision making violations of labor contracts actionable in federal court would impose on unions a federal obligation to comply with the collective agreements. It was certainly debated on those terms. Senator Murray, speaking in opposition to Taft's proposed amendment to the Senate version of the Case bill, described the proposal as follows: "[T]he minority members . . . proposing this amendment would create a completely new Federal right in the United States courts."<sup>238</sup> Comments by Senator Magnuson in opposition were to the same effect.<sup>239</sup>

For his part, Senator Taft sought to minimize the importance of the creation of new federal substantive law, and therefore emphasized the "practical" character of the problem he proposed to address.<sup>240</sup> But Taft

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capacity of the union to sue and be sued in the federal courts. Taft was aware of Rule 17(b) and *Busby* incorporates the language of Rule 17(b) in his minority report on the Case bill specifically noting that existing federal law failed to establish a "substantive right" to labor contract enforcement and thus failed to make unions suable in federal court. S. REP. NO. 1177, 79th Cong., 2d Sess. 10-14 (1946) (minority report). Taft thus understood that, to achieve the goal of suability, Congress was obliged not only to give unions the capacity to sue but also to establish a federal substantive right to contract enforcement.

238. 92 CONG. REC. 5708 (1946). Senator Murray went on to attack the proposed creation of this new federal right on the ground that it singled out unions for special federal treatment. As Murray explained, the proposal "would not create this new right as against all unincorporated associations, but it would set up a new and special court right against unions." After describing the diversity jurisdiction of the federal courts under which contract enforcement actions would normally proceed, Murray explained that the proposal would "take labor agreements out of the category of normal State court operations, and would make them at all times and under all circumstances a matter for the Federal courts. The proposal would create a new and special Federal right to enforce in the Federal courts the terms in a labor agreement." *Id.*

239. Senator Magnuson described Taft's amendment as one to "create a right of action, under Federal statute, for breach of a collective bargaining agreement." 92 CONG. REC. 5412 (1946). Magnuson opposed the proposal in part because three-fourths of the states permit suits against unincorporated associations and in part because he saw no reason for the federal government to invade the realm of the states in making law to govern purely private contracts. *Id.* at 5414.

240. Taft had emphasized the "practical" difficulties in suing unions in his discussion with representative Case at the Senate hearing on the bill. See *Labor Disputes Act of 1946: Hearings Before a Subcomm. of the Senate Comm. on Education and Labor on H.R. 4908*, 79th Cong., 2d Sess. 10 (1946). He took the same position in his statement to the 80th Congress in support of section 301. See 93 CONG. REC. 3839 (1947) ("As a matter of law unions, of course, are liable in theory on their contracts today, but as a practical matter it is difficult to sue them. They are not incorporated; they have many members; in some States all the members must be served; it is difficult to know who is to be served.")

Frankfurter suggested that Taft's description of the problem as "practical" supports Frankfurter's claim that Congress was seeking only to solve procedural problems. See *supra* note 186. But the attempt to equate the terms does not withstand scrutiny. True, Taft recognized that collective agreements were, on one theory or another, binding in most of the states. But the purpose of the statute was to establish a uniform federal theory for the enforcement of the labor contract by and against its

was quite clear in stating that the new law would subject unions to suits in federal court and that federal law should govern their liability. During debate on the proposed amendment, Taft explained that if the collective agreement affected interstate commerce, the suit against a union could proceed in federal court because it necessarily "involves a Federal question."<sup>241</sup> Moreover, Taft never once took issue with the opposition's characterization of his amendment as proposing the creation of a federal substantive right to contract enforcement.

The deliberations of the 80th Congress one year later demonstrate that Congress was still troubled by the disparity in state approaches and still impressed with the need for a uniform federal rule.<sup>242</sup> Thus, the Senate report on section 301 parrots the statements of the minority report on the Case bill in emphasizing the importance of a uniform rule.<sup>243</sup> It also repeats the argument that statutory recognition of the collective bargaining agreement as a "valid, binding and enforceable contract is a logical and necessary step."<sup>244</sup> In short, the Senate report on Taft-Hartley reflects the view that Congress had expressed a year before during its consideration of the Case bill: the importance of ensuring mutual compliance with the collective bargaining agreement warranted the creation of a new federal substantive right to labor contract enforcement.

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two principals, the union and the employer, and to escape from the problems associated with the state courts' preoccupation with individual contracts of enforcement. Taft certainly understood that the statute created federal substantive law; his reference to the fact that most state courts enforce the collective agreement was meant to downplay the significance of § 301.

241. See 92 CONG. REC. 5705 (1946) ("All we provide in the amendment is that voluntary associations shall in effect be suable as if they were corporations, and suable in the Federal courts if the contract involves interstate commerce and therefore involves a Federal question.")

242. Perhaps the most illuminating exchange took place between Secretary of Labor Schwollenbach and the members of the House and Senate committees on labor. In prepared remarks to both committees, Schwollenbach pointed out that 35 of the 48 states had adopted rules that permitted suits against labor unions. Schwollenbach thus argued that the passage of federal law was unnecessary; under Rule 17 of the Federal Rules of Civil Procedure, most federal courts could freely enforce collective agreements by relying on the capacity rules of the states, assuming, of course, that the requirements of diversity jurisdiction were satisfied. See *Hearings Before the Comm. on Education and Labor on H.R. 725*, 80th Cong., 1st Sess. 3016-17; *Labor Relations Program: the Hearings Before the Comm. on Labor and Public Welfare on S. 55 and S.J. Res. 22*, 80th Cong., 1st Sess. 56-58.

Unions unanimously opposed federal enforcement of labor contracts; like Schwollenbach's, their submissions to the Senate committee emphasized that state law generally regarded collective bargaining agreements as enforceable. See *id.* at 1042, 1154, 1391, 1534, 1547, 2295. Congress was not persuaded.

243. See S. REP. NO. 105, 80th Cong., 1st Sess. 15-18, reprinted in 1 LEGIS. HIST., *supra* note 47, at 421-24.

244. *Id.* at 17, 1 LEGIS. HIST., *supra* note 47, at 423.

The most revealing exchange on the substantive content of section 301 took place during testimony by Labor Secretary Lewis Schwellenbach. Appearing before the Senate Labor Committee, Schwellenbach suggested that state law would govern the enforcement of labor contracts under section 301.<sup>245</sup> Then, raising precisely the argument that Frankfurter later espoused in his *Lincoln Mills* dissent, Schwellenbach expressed doubts as to whether such state law claims would arise under the laws of the United States for jurisdictional purposes.<sup>246</sup> The House minority report on the provision that became section 301 echoed Schwellenbach's constitutional doubts.<sup>247</sup>

Senator Taft responded to Schwellenbach's argument by expressly disagreeing with its assumption that state law would control in actions arising under section 301: "Mr. Secretary, of course, the basis for the jurisdiction is the Federal law."<sup>248</sup> Taft then explained that federal law controlled the obligation to negotiate collective bargaining agreements

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245. Early in his remarks, Schwellenbach had questioned whether it was appropriate to abandon state court enforcement of the collective agreement. See *supra* note 242. Next, Schwellenbach made clear his understanding that state law would control section 301 actions by questioning the wisdom of abandoning the diversity requirement for such claims. See *Labor Relations Program: Hearings Before the Comm. on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. 56 (1947)*.

246. Schwellenbach's statement was as follows:

In fact I doubt that the [diversity requirement] can be abandoned constitutionally. The Constitution, as you know, limits suits in the federal courts to cases arising under the Constitution and laws of the United States. I have grappled with the . . . meaning of "arising under the laws of the United States . . ." a good many times and I make no categorical statement as to whether or not under this proposal [sic] legislation the courts would hold that suits so started could arise under the laws of the United States. However, the general concept always has been in private litigation that a necessary prerequisite to federal jurisdiction is diversity of citizenship.

*Id.* at 56.

247. See MINORITY REPORT ON H.R. 3020, H.R. REP. NO. 245, 80th Cong., 1st Sess. 109-10, reprinted in 1 LEGIS. HIST., *supra* note 47, at 400-01.

248. The complete text of Taft's response was as follows:

Mr. Secretary, of course, the basis for the jurisdiction is the Federal law—in other words, we are saying that all matters of collective bargaining contracts shall be made in certain ways; that both parties shall be compelled to negotiate them, and they furnish the solution for a difficulty, which is an interstate commerce difficulty. I don't see why suits regarding such collective-bargaining contracts, when made, are not properly the subject of Federal law arising under the laws of the United States, therefore properly subject to the jurisdiction of the Federal courts. I don't understand how we can cover the whole subject, as we do, in Federal laws, and then say, when you come down to suing about it, that the Federal court has no jurisdiction.

*Labor Relations Program: Hearings Before the Comm. on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. 57 (1947)*. Taft's sophisticated explanation of the jurisdictional issue that later arose in *Lincoln Mills* explains why Cox later described him as having understood the difficult legal questions associated with the passage of Taft-Hartley "better than any other member of

and asked why "suits regarding such collective-bargaining contracts, when made, are not properly the subject of Federal law arising under the laws of the United States, therefore properly subject to the jurisdiction of the Federal courts."<sup>249</sup> Taft's rhetorical query defending the enforcement of labor contracts as a proper subject for the exercise of federal power, reflects his view that section 301 made federal law applicable to such enforcement claims, and lays to rest any doubts about the statute's constitutionality under article III.

The significance of Taft's reply was not lost on Justice Frankfurter, who dealt with it in a surprisingly disingenuous manner. In his plurality opinion in *Westinghouse*, Frankfurter misleadingly cites the Schwel-lenbach testimony to support the proposition that section 301 was understood to incorporate state law.<sup>250</sup> Frankfurter, however, declined to set forth the Taft rejoinder. Instead, Frankfurter asserted that no one denied the controlling force of state law and specifically claimed that Taft did not "justify section 301 as dependent on federal substantive law."<sup>251</sup> Frankfurter then quoted the general description of section 301 that Taft offered during subsequent debates on the statute, which emphasized practical problems with enforcement of labor contracts in state courts, as if it were the only response Taft offered to Schwel-lenbach.<sup>252</sup>

### 5. *The "Usual Processes of Law"*

In addition to evidence that section 301 established a federal substantive right to contract enforcement, the legislative history of section 301(a) makes it clear that Congress intended for the federal courts to work out the detailed rules that would govern the enforcement of labor contracts. This conclusion emerges from a careful review of the structural changes

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Congress." Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1315 n.76 (1954).

249. *Labor Relations Program: Hearings Before the Comm. on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. 57 (1947)*.

250. See *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 448 (1955).

251. *Id.* at 449.

252. *Id.* In setting forth a comment Taft made later in the debates, rather than Taft's actual reply to Schwel-lenbach, Frankfurter wrongly suggested that Taft, and the members of Congress who accepted his leadership on section 301, simply failed to understand the article III implications of the statute and blundered into making state law applicable. It thus appears that Frankfurter engaged in a strategic misrepresentation, rather than a reasoned elaboration, of Taft's understanding of the legislation.

to the Senate's labor contract enforcement scheme that the House-Senate conference committee adopted at the insistence of the House conferees.

The Senate bill had divided labor contract enforcement responsibilities between the Labor Board and the federal courts.<sup>253</sup> The House, in contrast, vested enforcement powers solely in the federal courts.<sup>254</sup> Although the House conferees agreed early in the conference to work from the Senate bill in order to preserve the votes necessary to override Truman's expected veto,<sup>255</sup> they pushed successfully for the consolidation of contract enforcement powers in the federal courts.<sup>256</sup> To effect this change, provisions in the Senate bill defining violations of the labor contract as unfair labor practices were dropped altogether,<sup>257</sup> and the

253. Sections 8(a)(6) and 8(b)(5) of the Senate bill made it an unfair labor practice for employers and unions to "violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration." See H.R. 3020, 80th Cong., 1st Sess. 81, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 239 (setting forth the Senate version of section 8(a)(6)); H.R. 3020, 80th Cong., 1st Sess. 83-84, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 241-42 (setting forth the Senate version of section 8(b)(5)). At the same time, the Senate bill gave the federal courts jurisdiction to hear suits for violation of the collective bargaining agreement. See *supra* note 233. The Senate report describes section 301 as applying to actions for breach of collective bargaining agreements and indicates that it "should be read in connection with the provisions of section 8 of title I also dealing with breach of contracts." S. REP. NO. 105, 80th Cong., 1st Sess. 30, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 436. The Senate thus contemplated that the Board and the federal courts would exercise overlapping jurisdiction over the collective agreement.

254. Section 302 of the House bill conferred jurisdiction on the federal courts to hear any action "involving a violation of an agreement between an employer and a labor organization." H.R. 3020, 80th Cong., 1st Sess. 64, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 221 (quoting section 302(a)). But the House bill gave the Labor Board no role in the enforcement of such labor agreements. See 93 CONG. REC. 6600 (1947), *reprinted in* 2 LEGIS. HIST., *supra* note 47, at 1539 (statement of Sen. Taft).

The failure of the House to authorize the Labor Board to enforce the collective bargain was no accident. The House was quite hostile towards the agency, believing that it had been captured by organized labor. Indeed, section 102 of the House bill called for the abolition of the agency and the creation of a successor board. See H.R. 3020, 80th Cong., 1st Sess. 51-53, *reprinted in* 1 LEGIS. HIST. 208-10.

255. See Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 298 (1960); H. MILLIS & E. BROWN, *supra* note 36, at 384.

256. During debate on the conference bill in the Senate, Senator Taft introduced a statement that has been accepted by courts and commentators as an important guide to the compromises made in conference. The Taft statement explains that the House conferees objected to sections 8(a)(6) and 8(b)(5) of the Senate bill on the ground that those provisions made the Board responsible for policing union and employer compliance with collective bargaining agreements; the House wanted to transfer this responsibility to the courts. Accordingly, as the Taft statement reports, the provision in section 301 for judicial enforcement of the collective agreement was retained in the conference agreement. See 93 CONG. REC. 6600 (1947), *reprinted in* 2 LEGIS. HIST., *supra* note 47, at 1539 (statement of Sen. Taft).

257. Compare S. REP. NO. 105, 80th Cong., 1st Sess. 35, *reprinted in* 1 LEGIS. HIST., *supra* note

language of section 301(a) was modified slightly.<sup>258</sup> The conference report highlights these changes in the Senate bill and notes the deletion of the unfair labor practice provisions. It explains the changes as the result of a compromise that was intended to leave the enforcement of the labor contract to the "usual processes of law and not to the [Board]."<sup>259</sup>

This transfer of enforcement power from the Labor Board to the federal courts makes clear that Congress intended the federal courts to fashion law to govern the collective agreement. Under the Senate bill, the Labor Board was meant to hear and resolve charges that alleged violation of the labor contract. Both the House and Senate conferees understood that in the course of hearing such claims, the Labor Board would develop a body of federal law defining the nature of the obligation of employers and unions to comply with their contracts.<sup>260</sup> After all, the

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47, at 441 (quoting Senate version of sections) with H.R. REP. NO. 510, 80th Cong., 1st Sess. 7, reprinted in 1 LEGIS. HIST., *supra* note 47, at 511 (showing absence of provisions).

258. The Senate version of section 301 initially permitted federal courts to hear suits for breach of agreements concluded as a result of collective bargaining. See S. REP. NO. 105, 80th Cong., 1st Sess. 30, reprinted in 1 LEGIS. HIST., *supra* note 47, at 436. The National Labor Relations Board (NLRB) had jurisdiction over agreements reached through collective bargaining and over agreements to submit disputes to arbitration under sections 8(a)(6) and 8(b)(5). The conference agreement eliminated the NLRB's role at the same time it broadened section 301 to reach suits for violations of all contracts by striking the Senate's qualifying reference to collective bargaining. See H.R. CON. REP. NO. 510, 80th Cong., 1st Sess. 23, reprinted in 1 LEGIS. HIST., *supra* note 47, at 527 (quoting section 301 of the Act). It thus appears that the conferees intended the federal courts to assert jurisdiction over both collective bargaining agreements and agreements to arbitrate labor disputes. Cf. Reilly, *supra* note 255, at 299 (House was also opposed to permitting the Labor Board to police arbitration agreements).

259. H.R. CON. REP. NO. 510, 80th Cong., 1st Sess. 42, reprinted in 1 LEGIS. HIST., *supra* note 47, at 46.

260. The Senate's bifurcated enforcement scheme for labor contracts was quite similar to the enforcement approach the Senate proposed and Congress adopted in regulating such union unfair labor practices as secondary boycotts and jurisdictional disputes. In provisions eventually adopted by the conference, section 8(b)(4) of the Senate bill had defined the unions' use of such economic weapons as unfair labor practices. See S. REP. NO. 105, 80th Cong., 1st Sess. 22-23, 35, reprinted in 1 LEGIS. HIST., *supra* note 47, at 428-29, 441 (describing the effect, and quoting the language, of section 8(b)(4)); H.R. CON. REP. NO. 510 ON H.R. 3020, 80th Cong., 1st Sess. 44, reprinted in 1 LEGIS. HIST., *supra* note 47, at 548 (reflecting conference committee's adoption of Senate provision with minor alterations). Moreover, sections 10(j) and 10(l) of the Senate bill authorized the Board in appropriate cases to ask federal courts to enjoin such practices preliminarily, and thus created an explicit exception to the Norris-LaGuardia Act's bar to injunctions in labor disputes. See S. REP. NO. 105, 80th Cong., 1st Sess. 27, 40, reprinted in 1 LEGIS. HIST., *supra* note 47, at 433, 446 (describing the effect, and quoting the language, of sections 10(j)-(l), which conferred such authority on the Board). While the Board was given control over equitable remedies, it had no general authority to fashion damages remedies for such unfair practices. Instead, claims for damages were made the subject of federal court suits under the rubric of section 303. This provision for federal court claims had been proposed in supplemental views appended to the Senate report, see S. REP. NO. 105,

Board followed the practice of working out the detailed meaning of the statute's general language, not by engaging in formal rulemaking proceedings, but by fashioning rules case by case through the adjudication of unfair labor practice claims.<sup>261</sup> During consideration of the Taft-Hartley amendments in 1947, both chambers of Congress were acutely aware of the Board's case-by-case methodology and the content of the specific rules it had adopted.<sup>262</sup> Although Congress did not disturb the Labor

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80th Cong., 1st Sess. 54-56, reprinted in 1 LEGIS. HIST., *supra* note 47, at 460-62, and was adopted on the floor of the Senate, albeit without any provision for issuance of injunctive relief. See 93 CONG. REC. 5076 (1947), reprinted in 2 LEGIS. HIST., *supra* note 47 at 1399-1400.

Under this bifurcated enforcement scheme, the Labor Board has played a wide-ranging role in the definition of secondary boycotts and other unlawful union practices under section 8(b)(4). See generally 2 C. MORRIS, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1136-1178* (2d ed. 1983). While injured parties may bring damage claims in court under section 303 without first obtaining the Board's ruling on the disputed conduct, see *International Longshoremens' Union & Warehousemen v. Juneau Spruce Corp.*, 342 U.S. 237 (1952), the courts generally apply Board-developed 8(b)(4) principles in determining liability under section 303 and accord res judicata effect to prior Board proceedings. See 2 C. MORRIS, *supra*, at 1182 n.279 (collecting cases).

The Senate undoubtedly intended to create a similar bifurcated enforcement scheme to govern enforcement of the collective bargaining agreement. Thus, sections 8(a)(6) and 8(b)(5) of the Senate bill defined breaches of contract by both the employer and the union as unfair labor practices that would trigger the Board's cease and desist enforcement authority. Section 301(a), like the parallel provisions in section 303, created a federal claim for damages for breach of the collective agreement. The Senate thus contemplated that the Board would play a role in defining the parties' federal obligation to respect their labor contracts similar to that it has played in defining secondary boycotts and jurisdictional strikes under section 8(b)(4).

261. Whatever its merits, the Board's preference for announcing substantive rules by adjudication, rather than rulemaking, was firmly established as of the date Congress considered the Taft-Hartley amendments. In *Matter of Peyton Packing Co.*, 49 NLRB 828, 844 (1943), the Board held that although an employer was presumptively free to impose restrictions on its employees' union solicitation activities during working time, rules that conditioned solicitation outside working hours were presumptively invalid in the absence of "special circumstances." The Supreme Court upheld the Board's application of its *Peyton Packing* rule in subsequent cases despite the employer's objection that the Board's orders rest "on a policy formulated without due administrative procedure." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). The Court viewed the Board's development of presumptive rules for application to concrete cases without formal rulemaking procedures as fully consistent with the Wagner Act's decision to leave "to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violations of its terms." *Id.* at 798.

Adhering to the practice that the Court approved in *Republic Aviation*, the Board has continued to develop its substantive rules through adjudication rather than rulemaking—a practice that has been widely acknowledged and vigorously criticized in the literature. See generally Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Peck, *The Atrophied Rule Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

262. It was precisely the content of the rules that the Labor Board had evolved in its case-by-case elucidation of the Wagner Act that led to the adoption of many of the Taft-Hartley changes. To

Board's case-by-case approach,<sup>263</sup> the specific power to define an actionable violation of a labor contract was consolidated in the federal courts.<sup>264</sup>

Congress thus vested the federal courts with the responsibility that the Labor Board would have exercised under the Senate bill for the case-by-case development of federal contract enforcement rules. The reference in the conference report to the enforcement of labor contracts in accordance with the "usual processes of law" refers to and approves the exercise of this lawmaking power by the federal courts.<sup>265</sup>

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cite but one well-known example, the Labor Board had concluded that the employer's obligation to refrain from interfering with its employees' section 7 rights to join or form labor organizations precluded it from expressing opposition to unionization. *See* A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 140-41 (10th ed. 1986). Congress added section 8(c) to protect the employer's right to speak freely, and thus rejected the Board's interpretation.

For other instances in which Congress reversed the Labor Board's development of interpretive rules by statutory changes to the Wagner Act, see S. REP. NO. 105, 80th Cong., 1st Sess. 24, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 430 (describing section 9(a)'s proviso as intended to clarify the right of individual employees to present grievances to their employer without the presence of the bargaining representative; observing that the Board "has not given full effect to this right as defined in the present statute"); H.R. CON. REP. NO. 510 on H.R. 3020, 80th Cong., 1st Sess. 34, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 538 (commenting that the new definition of the duty to bargain collectively in section 8(d) of the Act was meant to reject the Board's requirement that, to satisfy its obligation under the Act to bargain in good faith, an employer must make reasonable counter-offers or concessions).

263. As noted above, the House bill would have abolished the existing Labor Board and transferred its judicial function in deciding cases to a successor agency. The conference agreement retained the Labor Board, but vested the final authority to investigate charges and issue complaints in a general counsel appointed by the President with the advice and consent of the Senate. This established some separation between the Board's judicial function and the general counsel's prosecutorial function, but left the members of the Board with the power to fashion rules to govern industrial relations on a case-by-case basis. *See* H.R. CON. REP. NO. 510, 80th Cong., 1st Sess. 36-37, *reprinted in* 1 LEGIS. HIST., *supra* note 47, at 540-41.

Section 6 of the Wagner Act authorized the Board to make, amend, and rescind rules and regulations to carry out the provisions of the Act. *See* Act of 1935, ch. 372, § 6, 49 Stat. 452. The Taft-Hartley Act modified this provision slightly, incorporating by reference the requirements of the Administrative Procedure Act in any such rulemaking. *See* Pub. L. No. 101, 80th Cong, 1st Sess., § 6, 61 Stat. 140 (1947) (codified at 29 U.S.C. § 156 (1982)). Nothing in Taft-Hartley, however, required the Board as a general matter to proceed by rulemaking rather than adjudication. Accordingly, despite some restrictive language in earlier decisions, the Supreme Court has indicated that the "choice between rulemaking and adjudication lies in the first instance within the Board's jurisdiction." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

264. Although Professor Gregory described the judicial power established in the *Lincoln Mills* decision as "reminiscent of the extraordinarily varied administrative powers turned over by Congress to the NLRB in the original Wagner Act," C. GREGORY, *LABOR AND THE LAW* 471 (2d rev. ed. 1958), it did not occur to him that Congress had meant to confer such powers on the courts.

265. Wollett and Wellington suggest that this reference to the "usual processes of the law" may have been meant to authorize common law rulemaking by either state or federal courts and thus fails unambiguously to contemplate the creation of federal common law. *See* Wollett & Wellington, *supra*

In short, the language, structure, and history of section 301 offer strong support for the conclusion that Congress intended to impose a federal obligation on labor and management to comply with the collective bargaining agreement. The legislative record reveals a dissatisfaction with the disparate approaches of the state courts and the need for a uniform federal rule. The rule adopted, making labor contracts enforceable against unions as if they were corporations, departed markedly from the existing state models and underscored the congressional intention to supercede conflicting state law. Members of Congress, moreover, debated the statute as if it would make the enforcement of labor contracts a federal question, and Senator Taft explicitly defended such a federal approach against the constitutional attack Frankfurter later mounted in *Lincoln Mills*. Finally, Congress evidenced its understanding that the task of filling out the details of its contract enforcement scheme was a matter for the federal judiciary to undertake in accordance with the usual processes of law.

### III. LINCOLN MILLS RECONSIDERED

Against the backdrop of this detailed review of the language, structure, and history of section 301, the opinions in *Lincoln Mills* deserve careful reconsideration. Given the evidently substantive focus of section 301 and the explicit nod of approval Congress gave to the creation of federal common law, ample support existed for the conclusion Justice Douglas reached in *Lincoln Mills*. But what accounts for Douglas's failure to marshal much of this evidence in support of his reading of the statute? Many critiques of *Lincoln Mills* imply that Douglas upheld the enforceability of arbitral agreements, without regard to the history of section 301, because he preferred that result for ideological reasons.<sup>266</sup> As others have shown, however, Justice Douglas produced glib, poorly reasoned

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note 128, at 454-55. It is certainly true that section 301(a) does not preclude state courts from hearing disputes over the labor contract; subsequent Supreme Court decisions make clear that state courts enjoy concurrent jurisdiction over such actions. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Moreover, while state courts must normally apply federal law in labor contract suits, see *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), they remain theoretically free under the statute to apply their own rules of decision in cases where the labor contract fails to meet the test for an effect on interstate commerce. But conference committee's discussion focused entirely on the choice between federal court enforcement and federal agency enforcement of the labor contract. Understood in context, therefore, the reference to the enforcement of contracts in keeping with the "usual processes of the law" undoubtedly refers to federal proceedings.

266. Frankfurter suggested that Douglas manipulated the statute's meaning to confer a benefit on organized labor. See *supra* note 122. See also *Stone, supra* note 140, at 1528 (attributing an

opinions in support of outcomes that he had reached for reasons other than the purely ideological.<sup>267</sup> In any case, one has difficulty identifying any particular ideological axe that Justice Douglas could grind effectively by upholding section 301.<sup>268</sup> He was quite willing to push the law to protect the rights of individuals, but the contest between labor and management did not move him deeply.<sup>269</sup> Even if it had, Douglas could not have predicted with any confidence whether the legal enforcement of labor contracts under section 301 would advance or undercut any interests he wished covertly to serve.<sup>270</sup> More likely, Douglas regarded *Lincoln Mills* as an easy case,<sup>271</sup> one that did not deserve his full attention as a lawyer.

The evidently substantive thrust of section 301 raises far more interesting questions about the approach taken in Justice Frankfurter's opinions.

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ideological purpose to Douglas opinions that make arbitration the preferred means of dispute resolution).

267. In his recent assessment of Justice Douglas's philosophy of judging, Professor White makes a persuasive case for the proposition that although Douglas did not entirely reject traditional doctrinal analysis, his treatment of authoritative texts in his opinions was "sufficiently cavalier . . . to convey the implicit message that he did not care very much about them." White, *supra* note 79, at 79. See also Griswold, Foreword to B. WOLFMAN, J. SILVER & M. SILVER, *supra* note 104, at xi-xii (describing Douglas's opinions in tax cases as hastily written and unburdened with legal analysis; suggesting that their content may reflect his lack of intellectual interest in tax cases as well as his antipathy to the IRS). Cf. V. COUNTRYMAN, *supra* note 86, at 300 (former clerk describes Douglas opinions as "com[ing] quickly to the point, and dispos[ing] of the case in language that is frequently blunt and bold").

268. Of course, the obvious explanation is that Douglas simply reached out to decide a case that served the interests of organized labor. But Douglas was not a committed supporter of what he referred to in his autobiography as "big labor," particularly in the years following the merger of the AFL-CIO. See *supra* note 105. Moreover, Douglas's subsequent section 301 opinions are difficult to square with a pro-union bias. See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (Douglas joins in opinion reaching the arguably anti-union conclusion that arbitration provisions give rise to implied no-strike promises); *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) (Douglas dissents from Court's refusal to recognize the federal courts' power under section 301 to enjoin strikes in breach of a labor contract), *overruled*, *Boys Markets, Inc. v. Retail Clerks Int'l Ass'n*, *Local 770*, 398 U.S. 235 (1970).

269. See *supra* note 106.

270. In the years immediately following the statute's passage, employers seeking damages for breach of contract brought most section 301 cases. See H. MILLIS & E. BROWN, *supra* note 36, at 512-13. Had Douglas sought to foster the interests of unions, therefore, he might have been tempted to join Frankfurter in eviscerating the statute.

271. As he pointed out in his opinion, the vast majority of lower courts had interpreted section 301 as establishing a federal right to contract enforcement. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 n.2 (1957). Douglas thus dismissed Frankfurter's concern with the niceties of labor contract enforcement as making "mountains out of molehills." See *supra* note 116 and accompanying text.

Frankfurter manipulated the legislative history of section 301 in at least two principal respects to support his challenge to the statute's constitutionality. First, Frankfurter described Taft's concern with the union's associational status as procedural to support his claim that the "merely jurisdictional" statute incorporated state substantive law.<sup>272</sup> Second, Frankfurter strategically misrepresented Taft's response to Schwel-lenbach's inquiry, and thus failed to acknowledge that Taft had defended section 301 as an exercise of federal lawmaking power and had expressly denied that the statute incorporated state substantive law.<sup>273</sup> In sum, Frankfurter's finding that the statute violated article III rested on an interpretation of the statute that its principal sponsor had decisively rejected.

It is, therefore, difficult to escape the conclusion that Frankfurter read section 301 with an eye hostile to Congress's fundamental purpose in conferring contract enforcement responsibilities on the federal courts. The basis for such hostility seems quite evident. Frankfurter was, after all, firmly convinced that the federal courts lacked the institutional capacity to police the collective agreement effectively. His own work on labor injunctions had convinced him that the federal courts should stay out of the field of industrial relations, and he had drafted the Norris-LaGuardia Act for the Congress that implemented that policy choice.<sup>274</sup> Indeed, Frankfurter's opinion in *Lincoln Mills* makes no secret of the fact that he felt the federal courts were institutionally unsuited to the task of enforcing labor agreements.<sup>275</sup>

The puzzling question, therefore, is not why Justice Douglas concluded that section 301 authorizes the federal courts to fashion law to govern the collective bargaining agreement, but why Justice Frankfurter's contrary conclusion has been so widely accepted. The answer seems rather complex. Surely part of the explanation lies in Douglas's slapdash approach to writing opinions. Reviewing the opinions in *Lincoln Mills*, it is difficult to avoid the conclusion that Frankfurter had the better of the argument. The text of the opinions makes it appear, in other words, that Douglas was creating federal lawmaking power out of whole cloth, rather than conscientiously attempting to discern the intent

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272. See *supra* notes 155-56.

273. See *supra* notes 250-52 and accompanying text.

274. See *supra* notes 89-98 and accompanying text.

275. See *supra* notes 123-26 and accompanying text.

of Congress.<sup>276</sup>

The acceptance of Frankfurter's interpretation by the commentators surely reflects more than the fact that he outlawyered Douglas. The passage of Taft-Hartley deeply concerned students of industrial relations. They feared that section 301 would fundamentally upset the balance of labor relations, not only by substituting the federal courts for the arbitral process in the resolution of labor disputes, but by imposing rigidly uniform rules that would undermine private adjustment of industrial conflict.<sup>277</sup> Frankfurter's approach to the statute, by raising doubts about the constitutionality of the judicial role under section 301, offered a solution to the perceived problem of judicial interference. If accepted, Frankfurter's approach would force Congress to take a second look at the problem of labor contract enforcement; in a more dispassionate setting, perhaps Congress would recognize the importance of private dispute resolution or vest authority for contract enforcement in the more experienced Labor Board.<sup>278</sup>

It was precisely the propriety of forcing a congressional second look that the leading critics of the *Lincoln Mills* opinion defended in their

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276. Frankfurter's opinions unquestionably influenced the attitudes of many students of industrial relations. In addition to views of his former clerks, Bickel and Wellington, *see infra* notes 279-84 and accompanying text, Frankfurter also persuaded Professor Meltzer of the dominantly jurisdictional focus of the statute. *See supra* note 135. Frankfurter influenced no one's work more dramatically than that of Professor Charles Gregory, however. In his 1948 labor law casebook, Professor Gregory described section 301 as having effected a "fundamental change in the substantive law governing the nature and enforcement of collective agreements; for it seems impossible to maintain, on the grounds that this innovation is merely one of form having to do simply with parties and association entity, that it has not rendered obsolete most of the judicial common law bearing on the enforceability of collective agreements." C. GREGORY & H. KATZ, *LABOR LAW: CASES, MATERIALS AND COMMENTS* 1178 (1948). Ten years later, Gregory sounded a different note, describing *Lincoln Mills* as having taken the "extraordinary" position that Congress meant to empower the courts "to make up a patchwork of law themselves." C. GREGORY, *LABOR AND THE LAW* 471 (2d rev. ed. 1958). To underscore his disagreement with this view, Gregory concluded that it was "unlikely that so much has ever been read into so little before by the Supreme Court." *Id.* Gregory summarizes his view of section 301 in his 1959 article on *Lincoln Mills*: Gregory describes the Douglas opinion as an example of "dubious technique," one that merely achieved a result for which Douglas had garnered the requisite votes. *See Gregory, The Law of Collective Agreement*, 57 *MICH. L. REV.* 635 (1959). Moreover, Gregory expresses his own personal view that Frankfurter's interpretation of the statute was correct. *See id.* at 641 & n.23.

277. *See supra* notes 73-77 and accompanying text.

278. Many labor practitioners thus joined their reviews of *Lincoln Mills* with a call for additional legislation. *See, e.g., Kramer, Arbitration Under the Taft-Hartley Act* in *PROCEEDINGS OF THE N.Y.U. ELEVENTH ANNUAL CONFERENCE ON LABOR* 255, 280-85 (E. Stein ed. 1958).

classic work on the subject.<sup>279</sup> Alexander Bickel and Harry Wellington followed the lead of the man for whom they both clerked in concluding that section 301 made state rules of decision binding in federal court. Although they disagreed with Frankfurter's assessment of the constitutional implications of such a conclusion,<sup>280</sup> they nonetheless argued that the Court should have dismissed the action on some plausible basis in order to force Congress to revisit its decision to delegate labor contract enforcement responsibilities to the federal courts.<sup>281</sup> Wellington made the point more explicitly in his later work.<sup>282</sup> "Congress," he explained, "sometimes must be saved from itself."<sup>283</sup> Bickel and Wellington did not disguise the fact that they premised their argument for a congressional second look on their view that courts were "enormously unequal to the task" of fashioning a workable body of federal labor contract law.<sup>284</sup>

Although the claim that the federal courts lack competence to fashion labor contract law has had an enduring appeal for labor scholars who have commented on *Lincoln Mills* and its progeny,<sup>285</sup> subsequent developments offer little support for the claim.<sup>286</sup> Bickel and Wellington based their argument in part on Shulman's influential claim that judicial intervention would undermine the arbitral process and in part on their fear that courts would naturally borrow precedents from the commercial law of contracts in working out the details of federal law.<sup>287</sup> Both con-

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279. See Bickel & Wellington, *supra* note 15, at 35. For a review of the second-look doctrine, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 26-30 (1982).

280. See Bickel & Wellington, *supra* note 15, at 35 (arguing that section 301 was a constitutional grant of protective jurisdiction).

281. Bickel and Wellington coupled their argument for the propriety of forcing "sober reconsideration" from Congress with the claim that the Court should candidly discuss the reasons for its remand to Congress. *Id.*

282. Wellington's subsequent work on federal labor policy was largely an elaboration of the thesis he had articulated in commenting on *Lincoln Mills*—that courts are institutionally unsuited to resolving labor disputes. See H. WELLINGTON, *supra* note 74.

283. *Id.* at 125.

284. See Bickel & Wellington, *supra* note 15, at 22-23.

285. See *supra* note 140-41.

286. Others have frankly disagreed with the suggestion that federal courts lack competence to fashion labor contract law. Professor Cox has recently argued that the manifold issues raised in *Lincoln Mills* were better suited for resolution by the "reasoned elaboration" of the judicial process than by a "battle of legislative lobbyists." Cox, Book Review, 70 CALIF. L. REV. 1463, 1471 n.16 (1982) (reviewing G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)). See also Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1, 34-37 (1983) (noting that courts enjoy an advantage over legislatures in fashioning labor contract rules on a case-by-case basis, particularly where each development could be subjected to scrutiny in the professional literature).

287. See Bickel & Wellington, *supra* note 15, at 23 & n.88.

cerns were confounded by the work of Professor Cox, who argued that commercial law contract rules were inapplicable to labor contract enforcement and that arbitral dispute resolution in the industrial setting deserved judicial encouragement and deference.<sup>288</sup> The simple fact that, in the overwhelming majority of the collective bargaining agreements negotiated in recent years, the parties have chosen arbitration as their method of dispute resolution offers some support for a benign assessment of the impact of thirty years of federal court involvement.<sup>289</sup>

More importantly, the claim of incompetence ignores the fact that the parties remain free to revise unwieldy judicial interpretations by adopting language in their next round of negotiations that better accommodates their specific industrial interests.<sup>290</sup> The judicial power that Congress au-

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288. On the inapplicability of commercial contract rules, see Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 604 (1956). On judicial deference to arbitration, see Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959). The Court formally adopted Cox's approach in the famous *Steelworkers' Trilogy*. *United Steelworkers v. American Mfg. Co.* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *quoted in* *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 579 (1960). For comments that attribute much of the Court's developing body of section 301 common law to the work of Cox, with greater and lesser degrees of approbation, see Feller, *supra* note 12, at 719 (any attempt to create a theory of the collective agreement must begin with the "seminal" work of Cox); Stone, *supra* note 73, at 1528 (criticizing the Court's acceptance of Cox's argument for making arbitration the centerpiece of labor policy). *Cf.* Morris, *Twenty Years of Trilogy: A Celebration*, in PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY ARBITRATORS 331 (J. Stern & B. Dennis eds. 1981).

289. *See supra* note 67.

290. For this reason, Wellington appears to overstate his attack on the Court's subsequent decision to read an implied no-strike clause into collective bargaining agreements with broad arbitration provisions. Wellington singled out the Court's decision in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), as proof of the Court's institutional incompetence. *See* H. WELLINGTON, *supra* note 74, at 112-20. In *Lucas Flour*, the Court held that language broadly requiring the submission of any dispute to binding arbitration gave rise to an implied promise on the part of the union to refrain from striking over arbitrable disputes. *Lucas Flour*, 369 U.S. at 105. Wellington called for the overruling of *Lucas Flour* on the ground that the decision interfered with freedom of contract by judicially prohibiting strikes over arbitrable grievances. *See* H. WELLINGTON, *supra* note 74, at 119, 122. By drafting language that explicitly contemplates the exercise of economic force to resolve workplace grievances, the parties can avoid the implication of a no-strike clause. *Cf.* *Groves v. Ring Screw Works*, 111 S. Ct. 498, 502-03 (1990) (although the Taft-Hartley Act does not favor such an agreement, "the parties may expressly agree to resort to economic warfare rather than to mediation, arbitration, or judicial review" to settle grievance disputes). In sum, *Lucas Flour* and other decisions that interpret collective agreements under section 301 may simply provide the "contractual gap fillers of 'off-the-rack' terms" that apply in the absence of clear statement to the contrary. *See* D. LESLIE, *CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY* 369 (2d ed. 1984). Under familiar law-and-economics principles, such terms have no distributive effect in cases where the parties have good information and face low transaction costs. *Id.* at 371.

thorized with the passage of section 301 thus differs markedly from the power the federal courts had previously exercised in regulating industrial conflicts through the labor injunction. Rather than authorizing the federal courts to make essentially *ad hoc* determinations about the wisdom or necessity of particular union self-help measures that Frankfurter attacked so effectively in his work on the labor injunction cases,<sup>291</sup> section 301 called for the enforcement of contracts. Congress assumed that the parties themselves would negotiate the standards by which their conduct was governed<sup>292</sup> and that the federal courts would simply enforce compliance with such standards. While congressional leaders may have understated its significance, the federal common law they authorized in 1947 was different in kind from that which had rightly earned Frankfurter's earlier condemnation.

In sum, although labor law scholars have correctly found much to criticize in *Lincoln Mills*, they have largely ignored the fact that the language, structure, and history of section 301 provide strong support for Justice Douglas's principal conclusions. They have done so, it appears, both because they shared Justice Frankfurter's deeply held but debatable view that federal courts should attempt to avoid any entanglement with labor contract enforcement and because they wrongly assumed that Frankfurter had fairly parsed the legislative record. In this Article, I have reviewed the materials that Douglas and Frankfurter considered in their interpretation of section 301 and I have concluded that Frankfurter's was much the more strained reading of the statute. I have also concluded that, like much conventional wisdom, the attack on *Lincoln Mills* as a lawless assertion of judicial power cannot be sustained.

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291. See *supra* note 91.

292. In passing section 301, Congress was chiefly concerned with compelling unions to honor their no-strike promises. See *supra* note 67. But Congress recognized that no-strike pledges would remain a matter for negotiation between the parties. *Id.*

