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Charles O. Gregory
University of Virginia

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THE LAW OF THE COLLECTIVE AGREEMENT*

Charles O. Gregory†

THE Wagner Act contained no law governing collective agreements. Congress left their enforcement to the state and federal courts under the miserable body of common-law rules.¹ Under various theories the courts worried about consideration, mutuality of obligation, duress and public policy aspects as if they were dealing with conventional contracts.

Actually we do not have much of a body of law, as such, governing collective agreements. Our chief concern has been simply with their enforcement. We must assume that they are legal, although it may be rash to assume that they are real contracts. They have aptly been called treaties and gentlemen's agreements. Justice Jackson said they were analogous to railroad tariffs, standard insurance provisions, and utility rates, because they were automatically reflected in individual contracts of employment.² The Privy Council held a collective agreement to be enforceable only by a strike.³ In this country we have said that only employees

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†Professor of Law, University of Virginia.—Ed.

¹The classical discussion of the common-law rules is in Rice, "Collective Labor Agreements in American Law," 44 HARV. L. REV. 572 (1931). A fair idea of the utter hopelessness of these common-law rules appears in Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195 (1938). See also the discussions in GREGORY AND KATZ, LABOR LAW: CASES, MATERIALS AND COMMENTS 1152-1163 (1948) and in GREGORY, LABOR AND THE LAW, 2d rev. ed., 443 et seq. (1958). Two examples of faith in the evolutionary development of the old common-law system are Fuchs, "Collective Labor Agreements under Administrative Regulation of Employment," 35 COL. L. REV. 493 (1935), and Lenhoff, "The Present Status of Collective Contracts in the American Legal System," 39 MICH. L. REV. 1109 (1941)—both brilliant and penetrating essays.

For a refreshing realism in this field, see the various articles by Professor Archibald Cox of Harvard Law School: "Grievance Arbitration in the Federal Courts," 67 HARV. L. REV. 591 (1954); "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 (1956); "Current Problems in the Law of Grievance Arbitration," 30 ROCKY MT. L. REV. 247 (1958); and "The Legal Nature of Collective Bargaining Agreements," 57 MICH. L. REV. 1 (1958).

²J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

³Young v. Canadian N. Ry., [1931] A.C. 83.

can sue to enforce provisions of collective agreements as terms in their individual employment contracts. Occasionally, however, unions have enforced rights secured to them directly, such as union security or the check-off of union dues. But unions could not maintain actions on behalf of employees, either large groups or individuals.

The enforcement of provisions in collective agreements has always been most unsatisfactory. An employee bringing suit had to hire a lawyer, file pleadings, wait for trial, stand the chances of an appeal and pay all expenses himself. Before final judgment the agreement would have been replaced by others which might also have expired. Indeed the bargaining agency itself might no longer be the same. A master agreement might cover plants in several states. Hence its provisions might receive as many different interpretations as there were state courts to pass on them, with resulting chaos.

In the *Westinghouse* case,⁴ a divided majority of Supreme Court justices seemed to agree that section 301 of the Labor-Management Relations Act⁵ did not establish federal substantive law to govern enforcement of a collective bargaining agreement, at least as to the "uniquely personal rights"⁶ of employees to compensation. Therefore, there was no basis for federal jurisdiction over a union's suit to enforce the agreement in this respect, in the absence of diversity of citizenship. But two years later in the *Lincoln Mills* case⁷ a different majority of the Court held that section 301 did give the federal courts jurisdiction to enforce an agreement to arbitrate, upon a union's suit for specific performance. The basis for federal jurisdiction was in the federal law which was to govern the case, arising under section 301 itself.

⁴ *Assn. of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 (1955).

⁵ 61 Stat. 156 (1947), 29 U.S.C. (1952) §185. The complete text of §301(a) reads as follows: "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."

The second sentence of §301(b) reads as follows: "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."

⁶ See note 10 *infra*.

⁷ *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

When section 301 of Taft-Hartley was passed in 1947, nobody took it very seriously. The *Westinghouse* decision in 1955 certainly gave it little scope. But in the *Lincoln Mills* case it became of crucial importance. Section 301(a) is certainly innocent sounding. "Suits for violation of contracts . . . may be brought in any district court . . .," it says, not even using the term "collective agreement." As long as the industry involved affects commerce, the amount in controversy is immaterial and diversity of citizenship is unnecessary.

No wonder Justice Frankfurter believes (1) that it only provides a federal forum to pursue claims under state law and (2) that in view of Article III of the Constitution, it has not even such limited effect.⁸ If it had wanted to, he observed, Congress could have enacted rules governing the enforcement of collective agreements. He thought Congress realized that this delicate matter of enforcement was best left to be worked out by employers and unions themselves. Of course this was speculation. Congress presumably could read Article III of the Constitution. It is therefore possible that it did not intend what Justice Frankfurter indicated. Instead it may have created in section 301 a substantive federal law for the enforcement of collective agreements. Justice Frankfurter offers only one alternative: that section 301 merely gave procedural directions to federal courts concerning the appearance of unincorporated unions otherwise eligible to appear before them as parties and contained no substantive law of contracts.⁹

My own opinion is that Congress was not entirely sure what it meant in section 301 or what its constitutional powers were. Maybe it was just trying to get no-strike clauses enforced. Justice Frankfurter's guess is probably as good as anybody's and better than most. But in 1955 many good lawyers felt that the Court should have read section 301(a) as making every collective agreement in commerce enforceable at the instance of either party to it. That is what Justices Black and Douglas thought the law should be. And they were not concerned about any distinction be-

⁸ This is the net conclusion I draw from his dissent in the *Lincoln Mills* case, note 7 *supra*, at 460-485.

⁹ See *Assn. of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 at 443, 447, 449, and *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 at 461-462, 478 (1957).

tween union rights as such and the uniquely personal rights of employees.¹⁰

Just what "the law" governing collective agreements was after the *Westinghouse* case is not clear. If Justice Frankfurter was right, it was state law, either common or statute. And it could be applied in federal courts only under *Erie Railroad Co. v. Tompkins*,¹¹ with diversity jurisdiction. As he said, section 301 was not meant to shift to the federal courts a flood of grievances better left to state courts, unless there was diversity. Later, under *Lincoln Mills*, he dispelled any prior implication that a union might ever sue alone under section 301 to enforce even a collective right. But events proved that most of his colleagues felt otherwise, even if they had been uncertain in 1955.

Sparking off the second round, Judge Magruder said the *Westinghouse* case meant that a union could sue under section 301 for breach of a collective right secured to it by an agreement. That was in the *General Electric* case.¹² He found the required substantive law in the federal arbitration act. But Justice Frankfurter disowned this version of his *Westinghouse* opinion.¹³ And Justice Douglas also refused to endorse Magruder's position.¹⁴ He found that section 301 provided its own steam and that the arbitration act was not involved. Justice Frankfurter had said that the federal arbitration act by its own terms did not apply to "collective-bargaining agreements."¹⁵ This observation, as made, was plainly not correct; but whether or not the act so applied was a matter of controversy. Maybe that is what dissuaded Justice

¹⁰ Those justices in the *Westinghouse* case who either did not understand Justice Frankfurter's reasoning or refused to accept it, yet who agreed with him that the union must be denied recovery, conceived what I regard as the specious notion of "uniquely personal rights" of employees under a collective agreement in order to rationalize their concurrence. Their subsequent inconsistency in this regard, when they voted with the majority in the *Lincoln Mills* case, is neatly illustrated in Bunn, "Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements," 43 VA. L. REV. 1247 at 1248-1251 (1953).

¹¹ 304 U.S. 64 (1933).

¹² *Local 205 (UE) v. General Electric Co.*, (1st Cir. 1956) 233 F. (2d) 85.

¹³ *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 at 468-469 (1957).

¹⁴ *Id.* at 450-451, 456-457, 458.

¹⁵ In his dissent in the *Lincoln Mills* case, *id.* at 467-468, he said, in part, while sarcastically commenting on Justice Douglas' rationale: "I would add that the Court, in thus deriving power from the unrevealing words of the Taft-Hartley Act, has also found that Congress 'by implication' repealed its own statutory exemption of *collective-bargaining agreements* in the Arbitration Act, an exemption made as we have seen for well-defined reasons of policy." (Italics supplied.)

Douglas from using this statute. It seems more probable that he did not want to narrow the application of section 301 by confining it to the enforcement of agreements to arbitrate. Also, he may have disliked the strait-jacket of legislation, preferring to leave the courts free to experiment.

Justice Douglas wrote the dissent in *Westinghouse*; and he wrote the majority opinion in *Lincoln Mills*. But this does not mean that *Westinghouse* is overruled.¹⁶ Nevertheless, the law in this field is probably what Justice Douglas thinks it should be. He clearly believes that suits by unions under section 301 to enforce promises in these collective agreements are actions arising under the laws of the United States. Such "laws" apparently are (1) various parts of the LMRA of 1947, (2) section 301(a) itself, and (3) whatever common law the federal courts either appropriate or evolve. It is immaterial that such common law is adapted from other federal statutes, copied directly from state common law, or made up off the cuff. It will all be federal substantive law in the end. Section 301(a) is deemed to be constitutional, even if it is construed only as an order to the federal courts. That order is to fashion a law of collective agreements, using fragments of federal labor acts as the warp and state common law, together with "judicial inventiveness"¹⁷ as the weft.

Douglas assigned this task to the federal judiciary. But Justice Frankfurter is probably correct in saying that the whole matter is really the job of Congress. Congress had shaped the policies giving unions exclusive control over modern collective bargaining; and it had left the resulting agreements themselves in a sad state of ambiguity. Had Congress attempted to remedy this defect in section 301? My guess is "No." I think it was merely seeking a way to hold unions accountable under no-strike clauses. In 1947 a sophisticated set of rules was thought necessary for the enforcement of collective agreements. Assume that the members of Congress were then aware of the need for such rules. Would they confess their own ignorance and inability to supply these rules and pass section 301

¹⁶ *Id.* at 456, n. 6.

¹⁷ This concept—"judicial inventiveness"—seems to have been the chief ingredient of Justice Douglas' hope for the future through the use of §301. For a brief discussion of how Justice Douglas exposed himself to the scathing comments of Justice Frankfurter, see GREGORY, *LABOR AND THE LAW*, 2d rev. ed., 471-472 (1958).

empowering the federal courts to evolve them? We know that members of our highest court were familiar with the dreadful common law for enforcing collective agreements;¹⁸ and we can guess that they thought that Congress would never act. It seems easier to believe that they concluded it was up to them to use section 301(a) as an excuse to build up a few simple but effective rules enforcing promises made in collective agreements. Anyway, that is where we stand now. And the real question is: what kind of law of the collective agreement should the federal courts make?

In its interpretation of section 301(a) the Supreme Court has run true to form. Before 1937 it kept federal power and jurisdiction narrow; but it tolerated a fairly broad conception of a federal common law in diversity cases. Then in 1937 it drastically increased congressional power under the commerce clause. With pre-emption by implication, this left precious little to the states where Congress acted at all. As if to ease its conscience, the Court next required that federal judges apply the controlling state law in diversity cases.¹⁹ Now it appears that under section 301 this trend is somewhat reversed. This new move is not an expansion of congressional power. Indeed, the Court actually calls it an exercise by Congress of existing power. Nor is it really a reversal of *Erie Railroad Co. v. Tompkins*.²⁰ For it has no relation to diversity jurisdiction; and it does not even pretend to be a venture into a federal common law. The Court treats section 301 virtually as a delegation by Congress to the federal courts of its legislative power to develop a detailed body of law governing collective agreements made in commerce. To me such judge-made law seems like common law. But why worry about what it is called? Evolving under the protective scrutiny of a majority of the Supreme Court, it will still be *the* law—and constitutional, at that!

¹⁸ See Justice Jackson's opinion in *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). His discussion intimates that the Court must have been somewhat aware of the state of the common law. Occasional observations in the *Westinghouse* and *Lincoln Mills* cases also indicate that members of the Court knew enough about these common-law rules to have a pretty dismal view of them.

¹⁹ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁰ But for an exceedingly interesting expression of opinion on this, see Hanslowe, "Section 301 of Taft-Hartley and the Brooding Omnipresence of William Winslow Crosskey," 35 *UNIV. DETROIT L. J.* 201 (1957). Compare the article of Chief Judge Charles E. Clark, "Professor Crosskey and the Brooding Omnipresence of *Erie v. Tompkins*," 21 *UNIV. CHI. L. REV.* 24 (1953).

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, regardless of what slogans they used. But however dubious we may think his technique, we cannot shrug off scholars like Professor Bunn who believe that Congress really intended in section 301(a) what the Court has read into it.²¹ After all, we must remember Zechariah Chafee's magnificent story about Browning, as told by Professors Bickel and Wellington.²² When taxed with a plausible version of one of his early obscure works, the poet said: "I didn't mean that when I wrote it, but I mean it now."

Justice Frankfurter may have been right about Congress and section 301 in 1947.²³ But that is water over the dam. With the 1958 version of section 301, the future of the law of collective agreements seems very bright.²⁴ We might have had a patchwork of state law or a political compromise by Congress, perhaps full of rigid provisions. Now we can proceed with the experimental evolutionary process between employers and unions as the basis of the law. Not that the Supreme Court plans to let the parties write their own ticket altogether. But it will treat them as informal friends of the court in shaping the new code of rules. Had Congress simply amended the federal arbitration act to cover collective agreements or adopted the new uniform arbitration act, the job of enforcement might thus have been left to labor arbitrators. But the Court apparently thought the likelihood of Congress doing this was too much of a gamble. As it is, federal judges lacking expertise in the field may produce some weird law. But the Supreme Court will presumably always be there to straighten things out.

Several Supreme Court justices indicate that neither the union

²¹ See Bunn, "Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements," 43 VA. L. REV. 1247 (1953).

²² "Legislative Purpose and the Judicial Process: The Lincoln Mills Case," 71 HARV. L. REV. 1 at 15-16 (1957).

²³ Personally I think he was correct about the scope and meaning of §301(a) and (b). As to the constitutional issue involved, however, I have no very strong feelings except to note that the "learning" in this area seems confused and full of meaningless words and concepts.

²⁴ This opinion is by no means unanimous. See the pessimistic view expressed in Feinsinger, "Enforcement of Labor Agreements—A New Era in Collective Bargaining," 43 VA. L. REV. 126 (1957).

nor any individual employee may maintain an action under section 301 to enforce any provision establishing a term or condition of work automatically incorporated into individual employment contracts. They deem enforceable, against employers, only promises made for the benefit of the union—specifically, in *Lincoln Mills*, a promise to arbitrate an unsettled grievance arising under the contract. But this is confusing. Most arbitrated grievances concern the so-called “uniquely personal rights”²⁵ of employees arising under provisions of the agreement that deal with terms and conditions of employment. Thus the Court has allowed indirectly in *Lincoln Mills* what it denied in *Westinghouse*.²⁶ If it has in effect overruled the older case, we should be told about it!

Now that the federal courts must resort to judicial inventiveness,²⁷ we can all come forth with suggestions. In a situation like *Westinghouse*, where there is no arbitration clause, I hope the federal judges make it plain that *all* of the provisions of a collective agreement in commerce will be enforced, whether or not they establish individual terms and conditions of employment. In such a case I suppose we should argue that suit may be brought either by one or more employees or by the union in their behalf. Section 301(b) and the federal rules suggest the latter as possible.²⁸ While I thought otherwise last year,²⁹ I now believe that nothing in section 301 prevents individual employees from suing.^{29a} But at this point I think the federal judges should firmly assert their new law-making power. I think they should flatly refuse to allow actions under section 301 by individual employees against employ-

²⁵ See note 10 *supra*.

²⁶ See Bunn, “Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements,” 43 VA. L. REV. 1247 (1953).

²⁷ See note 17 *supra*. Surely federal judges, including members of the Supreme Court, have no monopoly on inventiveness. I do not see why arbitral, or even professorial, inventiveness cannot be given scope here, as long as the Supreme Court has the last word—which it always does, anyway, whatever happens or whoever invents!

²⁸ For the appropriate provision in §301(b), see note 5 *supra*. See also Rule 17(a) of the Federal Rules of Civil Procedure. And see Bunn, “Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements,” 43 VA. L. REV. 1247 at 1258 (1953).

²⁹ GREGORY, LABOR AND THE LAW, 2d rev. ed., 464 (1958).

^{29a} In a talk before the Cleveland Bar Association on February 28, 1959, I returned to the position that individual employees will probably not be allowed to sue under §301 because that measure provides for suits “for violation of contracts between an employer and a labor organization,” whereas individual workers sue only on their personal contracts of employment.

ers, whether or not there is an arbitration clause. Indeed, where arbitration is provided, the courts should refuse to enforce any provision at all that could be arbitrated. Here they should confine their attention to enforcement of the arbitration clause itself, except for their function in proceedings to enforce awards, to be discussed later. Where there is no arbitration clause, the union should decide whether or not suit should be brought on behalf of one or more employees. And the union should be left to maintain and finance such actions, with complete control of the litigation and its settlement throughout. This is consistent with the policy of the LMRA making the union exclusive bargaining agency in the first place.³⁰ And the *Burley* case³¹ showed what a mess accompanies the momentary relaxation of this majority rule principle.

As a corollary, individual employees should be denied *any* personal recourse against an employer on a claim arising from a collective agreement in interstate commerce. This may seem harsh. But it coincides with the policy originally enacted by Congress with respect to establishing terms and conditions of employment. I can still imagine actions by individual employees involving simple issues of fact—matters not involving contract interpretations, such as, “Did the timekeeper add correctly, or who worked how long on a certain day?” Maybe individual employees should be allowed to litigate any claims they might raise directly as grievances under the section 9(a) proviso.³² But I think this would be impractical.

The distinction made between the uniquely personal rights of

³⁰ That is, under §9(a) of the LMRA a union acting as bargaining representative for a bargaining unit is *exclusive* representative of *all* members of the unit, whether or not they belong to the union. This is sometimes called the “majority rule” principle. See Jackson, J., in *J. I. Case Co. v. NLRB*, 321 U.S. 332 at 339 (1944), where he said in passing: “The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the *majority rules*, and if it collectivizes the employment bargain, individual advantages or favor will generally in practice go in as a contribution to the collective result.” (Italics supplied.) See, also, Weyand, “Majority Rule in Collective Bargaining,” 45 *COL. L. REV.* 556 (1945).

³¹ *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), *affd.* and “modified” on rehearing 327 U.S. 661 (1946).

³² In the 1947 version, of course, the original proviso is expanded and another added. In effect, the individual employee is allowed to file and prosecute his own grievances directly, with the union standing by to see that the contract provisions are in no way jeopardized.

employees and the rights of unions, as such, although specious,³³ is not too disturbing. Indeed, if there is an arbitration clause, the practical *result* of this distinction is fine. That is, no provision of a collective agreement dealing with terms and conditions of employment shall be litigated in a federal court. Rather, these matters will be left for arbitrators to handle. Arbitrators are chosen by the parties; and they are presumably conversant with collective agreements and are experienced in comprehending them. They understand the industrial context in which such agreements are fashioned. Moreover, they are familiar with the concepts, phraseology and even ellipsis so common in documents drafted by men not accustomed to using words. They can make sense in applying fairly broad principles to a host of detailed situations which could be neither explicitly anticipated nor covered in the agreement.³⁴ Why trust a busy federal judge with this sort of thing any more than a skilled arbitrator with a district judge's job? Anyhow, federal judges would be swamped by this work.

Suppose either party to a collective agreement refuses to agree to an arbitration clause. The courts cannot *make* them arbitrate. I think this might possibly be held a refusal to bargain. But perhaps Congress should amend the labor act to require that all collective agreements in commerce must include grievance procedures with arbitration as the last step. If Congress or the Board did nothing about this, the federal courts might devise a negative sanction forcing parties to accept arbitration. Thus they could refuse to enforce their agreements judicially, leaving them exposed to mutual direct action such as strikes. However achieved, recourse only to arbitration would enable a uniform procedure for the enforcement of collective agreements. Those who think of arbitration as purely consensual might be shocked by some of these ideas. But such notions would leave it just as consensual as anything else in this area today.³⁵

³³ See note 10 *supra*.

³⁴ See Shulman, "Reason, Contract and Law in Labor Relations," 68 HARV. L. REV. 999 (1955).

³⁵ Reference is made to §8(5) and 8(a)(5) matters. It is pretty clear that many employers have to "bargain" about and include in contracts many items which they would vastly prefer to fight out.

With universal grievance arbitration, the federal courts would no longer interpret and apply the provisions of collective agreements. Their main function would be to order compliance with agreements to arbitrate and later to pass on actions brought to enforce awards. We must, therefore, consider the effect of the Norris-LaGuardia Act in this field. I have for many years thought that it has nothing to do with the enforcement of contract provisions.³⁶ Breach of a collective agreement, as such, is clearly not a section 13 labor dispute. Nor is it section 4 conduct to which the anti-injunction strictures attach. Conduct constituting the breach of a no-strike clause, I admit, appears to fall within both sections 4 and 13.³⁷ But even here the Supreme Court should make it clear that no-strike provisions are specifically enforceable. Justice Douglas showed in the *Lincoln Mills* case that the equitable enforcement of collective agreements in general is beyond the reach of Norris-LaGuardia. Last year in the *Chicago River* case³⁸ the Court held that recourse to direct strike action by a union is enjoined where Congress had provided an alternative method for handling grievances. The Railway Labor Act has no special provision relaxing the anti-injunction law. I think a contract provision for arbitration, whether or not there is a no-strike clause, might be held as analogous to the congressional provision for handling grievances in that situation. There is a strong federal policy to promote the making of collective agreements and to require compliance with them. Pursuant to this policy, I think the courts should enjoin strikes to enforce grievances even in the absence of no-strike pledges.³⁹ The *Chicago River* case certainly suggests this result.

³⁶ See Gregory, "The Collective Bargaining Agreement: Its Nature and Scope," 1949 WASH. UNIV. L. REV. 3.

³⁷ This is a generous concession on my part, in view of the state of the law. See *A. H. Bull Steamship Co. v. Seafarers' Intl. Union*, (2d Cir. 1957) 250 F. (2d) 326, cert. den. 355 U.S. 932 (1958). But Professor Cox apparently takes the same view. See Cox, "The Law of Grievance Arbitration," 30 ROCKY MT. L. REV. 247 at 252-256 (1958).

³⁸ *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U.S. 30 (1957).

³⁹ Part of the instructions given in the *Lincoln Mills* case to the lower federal courts was to further the prevailing basic policies in our national labor laws. Surely one of the most basic of these policies is to promote the making of collective agreements and to inculcate a certain amount of respect for them, when made. I would also suppose that part of a federal judge's job under the *Lincoln Mills* doctrine is to keep abreast of what is happening in our times. After all, 1932 was a long time ago and conditions have

The same underlying policy in our labor laws might also be used to counteract Norris-LaGuardia even where unions call bargaining strikes in violation of no-strike pledges. As part of their new job, the federal courts might even declare the following: once an agreement is signed, the use of direct action in bargaining over new issues is foreclosed during the life of the contract. Can the enforcement of no-strike clauses be left to arbitrators under contracts? Many of us arbitrators have in a sense enforced no-strike pledges by sustaining discipline imposed by employers on employees who provoke such violations. Under a grievance brought by an employer, why couldn't an arbitrator effectively award that a union cease and desist from striking? Many question the power of an arbitrator to issue such orders under any circumstance. But the New York Court of Appeals recently recognized that it is possible.⁴⁰ After all, an arbitrator's powers are what the parties give him in the agreement.

In their new task the federal courts cannot afford to worry about such things as technical consideration or mutuality of obligation and the statute of frauds.⁴¹ Holding that promises to arbitrate future disputes are enforceable without legislation, the Supreme Court has already dealt with the most important matter.⁴² It might have been simpler here to use the federal arbitration act.⁴³

changed drastically. Judges who still confuse violations of collective agreements with §13 labor disputes and §4 conduct have, in my opinion, lost contact with reality. The passage of time has operated as a function of many other types of judicial output at the highest level. I do not see why it should not do so in this instance, as well.

⁴⁰ *Matter of Ruppert* (*Ruppert v. Egelhofer*), 2 Misc. (2d) 744, 152 N.Y.S. (2d) 327 (1956), *affd.* and *mod.* 2 App. Div. (2d) 670, 153 N.Y.S. (2d) 553 (1956), 3 N.Y. (2d) 576, 170 N.Y.S. (2d) 785, 148 N.E. (2d) 129 (1958).

⁴¹ A court that can brush aside the common-law rule against enforceability of agreements to arbitrate future disputes surely would not let these trivia be bothersome! Anyway, it is established policy (no doubt suitable for purposes of the Lincoln Mills doctrine) that agreements do not have to be signed to be enforceable—at least in §8 cases, if not always in §9 proceedings. And if it were not, then it is established policy that the Board and Court will compel the employer to sign. See *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

⁴² See note 41 *supra*. See also Magruder, C.J., in *Local 205 (UE) v. General Electric Co.*, (1st Cir. 1956) 233 F. (2d) 85 at 95-96. Also Gregory and Orlikoff, "The Enforcement of Labor Arbitration Agreements," 17 *UNIV. CHI. L. REV.* 233 (1950).

⁴³ That is what Chief Judge Magruder wanted to do in the *General Electric* case note 42 *supra*. He there worked out an exceedingly convincing argument with which several other federal judges have agreed in the past. But this way out of the dilemma now seems utterly academic.

But the Court's failure to do so may imply that it does not want to be bothered with the other provisions of that statute. This may also be a hint that the federal courts should not clutter up labor arbitration with a lot of formalities comparable to those in law suits.

Instances are the form and substance of the submission agreement and other "pleadings," the manner of hearing and presentation of cases, rules of evidence, formalities governing awards and opinions, etc. Requirements of this sort would change the whole character of labor arbitration. They might stifle any chance it has of developing through the evolutionary process. This is why I believe the Supreme Court is side-stepping legislation of any kind.

Are the federal courts going to pass in advance on the arbitrability of issues raised? Will they decide ahead of time whether the arbitrator has jurisdiction or power to pass on certain matters? Should they conclude that on facts alleged by unions, nobody could possibly read the contract clause in question to mean what the union says it means? And conceding the union's case on the merits, will they declare that the union must nevertheless lose because of its non-compliance with certain contract limitation requirements such as time for filing, failure reasonably to pursue steps toward arbitration, etc.? Here is where the whole future of labor contract enforcement hangs in the balance.⁴⁴ In proceedings by a union to require arbitration, the Court of Appeals for the First Circuit has already held that it may read the contract to determine whether or not the grievance arose under it. Holding that it did not so arise, the court dismissed the union's case.⁴⁵ And recently the same court denied a union's request for enforcement of a promise to arbitrate because, in its opinion, an unreasonable time had elapsed between appointment of the partisan arbi-

⁴⁴ At this point reference is made to the splendid writing of Professor Cox, cited note 1 *supra*. Special attention is drawn to his discussion of the Cutler-Hammer doctrine [Local 402, Intl. Assn. of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S. (2d) 317 (1957), *affid.* 297 N.Y. 519, 74 N.E. (2d) 464 (1947)] and related matters in "Current Problems in the Law of Grievance Arbitration," 30 ROCKY MT. L. REV. 247 at 258 *et seq.* (1958).

⁴⁵ Local 149, AF of TE v. General Electric Co., (1st Cir. 1957) 250 F. (2d) 922. Chief Judge Magruder, after his brilliant opinion in the General Electric-Local 205 case [233 F. (2d) 85], which promised such enlightened leadership from him for the federal bench under the Lincoln Mills doctrine, now appears not to have understood Justice Douglas' signals in that case. At least, if he did, he is certainly fumbling the ball.

trators and recourse by the union to the American Arbitration Association.⁴⁶

I hope that the Supreme Court insists that such preliminary matters be left in the first instance (if not finally) for the arbitrator to decide. Of course, the parties may provide in their contract that arbitrability shall be subject to the preliminary ruling of a court, just as I suppose they may agree never to have a court pass on that matter. But if the courts pass on these issues at all, they should do so only when they are asked to enforce awards allowing grievances.⁴⁷ I assume no court would overrule an arbitrator who dismisses a grievance because he thinks that he has no jurisdiction or that the issue is not arbitrable, any more than if he dismisses it on the merits. A possible exception to this might well be when the arbitrator was proved to have been corrupt. And if an arbitrator dismisses a grievance on the merits, regardless of how stupid he may seem to have been, the court should hold that there is nothing for it to review.⁴⁸ Of course, if the arbitrator was shown to

⁴⁶ *Boston Mutual Life Ins. Co. v. Insurance Agents' International Union (AFL-CIO)*, (1st Cir. 1958) 258 F. (2d) 516, reversing (D.C. Mass. 1958) 161 F. Supp. 222. Here, Magruder's court, reversed District Judge Wyzanski. From the side-lines it would appear that Wyzanski would make a better quarterback on the Lincoln Mills team than Magruder would. At least, he seems willing to subordinate the role of the judge and to leave as much as possible to be done by arbitrators. With different rulings from other circuits on some of these points, perhaps the Supreme Court can be induced to promulgate some of the rules.

⁴⁷ Naturally I do not argue that courts no longer have any place at all in the enforcement of collective agreements. But I really believe it would be best if they had practically nothing to do with it. Obviously, when they are called upon to enforce agreements to arbitrate, they must ascertain whether such an agreement exists at all. But I strongly feel that the question of arbitrability of issues under a contract containing an agreement to arbitrate should be left completely to the arbitrator. Actually I would consider any reasonable compromise here, as long as courts passed on this issue only in proceedings for the enforcement of an award and did not then presume to interpret contract provisions dealing with terms and conditions of employment in their efforts to determine whether or not an issue was arbitrable.

At the presentation of this paper it was clear from the discussion of it by Mr. George B. Christensen of the Chicago Bar that he was shocked by my position. In spite of his remarks and though I acknowledge that he is exceedingly able and a brilliant lawyer in the field of labor relations, I am of the same opinion still. I cannot see why a federal judge's reading of a collective agreement, or any part of it, should be a whit better than the reading by an arbitrator selected by the parties—or anywhere nearly as good, if the arbitrator is worth his salt. If the arbitrator is incompetent, he can be dismissed; but we are stuck for life with incompetent federal judges. This argument, however, could go on endlessly. Obviously the difference between us is one of basic faith in one system or another in a particular context.

⁴⁸ This proposition is overstated deliberately; but I mean every word of it. It is amazing how much the parties can "take" and how much they can learn from the mistakes of an incompetent arbitrator.

have been bribed, a hearing before a new arbitrator would be appropriate.

Arbitrators are accustomed to pass on their own power or jurisdiction to act after it has been challenged. On the whole, I believe this works very well. I think it bad to have a judge pass in advance on the arbitrator's jurisdiction or power to act in a particular case or at any time on the arbitrability of an issue where his decision depends on interpreting a contract provision setting terms of employment.⁴⁹ This worries me almost as much as having a court review the merits of an award and reinterpret the contract or re-assess the testimony to see if the arbitrator's disposition was "sound." I think federal courts should never undertake to review the merits of an arbitration case, with respect either to the meaning of contract provisions or the weight of the evidence as a basis for findings of fact, regardless of the state of the record. Courts have already been doing these things. And they will continue to do so unless stopped. I suppose the courts would honor a contract provision leaving all questions of jurisdiction and power or arbitrability to the arbitrator alone.⁵⁰ Possibly that is what the parties have always meant when they say the arbitrator's decision shall be final and binding. Anyway, the least the federal courts can do is to leave all preliminary issues to the arbitrator and never intercede (aside from enforcing promises to arbitrate) except in proceedings to enforce an award.

If arbitration were imposed by the NLRB or Congress, due process might require some review of evidence and findings as with administrative boards.⁵¹ But even then the arbitrator's interpretation of contract provisions dealing with terms of employment should be final. What should happen where the parties consent to arbitrate but cannot agree on an arbitrator? Surely judicial inventiveness would warrant direct appointment of one by the judge or his delegation of such task to the Federal Mediation and Conciliation Service or the American Arbitration Association.⁵² It seems

⁴⁹ See note 47 *supra*.

⁵⁰ Professor Cox also holds this view. See Cox, "Current Problems in the Law of Grievance Arbitration," 30 *ROCKY MT. L. REV.* 247 at 259 (1958).

⁵¹ This concession is made only to avoid constitutional difficulties.

⁵² If judicial inventiveness can supply the power equitably to enforce agreements to arbitrate, in spite of the common-law ruling to the contrary, surely it could achieve this. Maybe we will all have to readjust our thinking about what federal judges can or cannot do, in light of the Lincoln Mills doctrine. Apparently, from now on, all the judges have

imperative that federal judges confine themselves to promoting and protecting the arbitration process itself, always deferring to the more liberal rules appearing in contract arbitration clauses. Thus arbitrators will be left free to interpret and apply contracts as the parties intended.⁵³

There are many existing rules governing arbitration—some in statutes—that the federal courts may adopt. But novel issues will arise. May an arbitrator issue cease and desist orders? Does it make any difference if the case touches upon federal laws, as with enforcement of a “no-discrimination” clause? May an arbitrator ever be allowed to interpret state or federal law in a case before him? Lots of us have done so and I can see nothing wrong about it. For instance, an arbitrator cannot dismiss a grievance in a discharge case just because the employer was guilty of illegal discrimination under the LMRA.

Where a contract provides arbitration as a last step in a grievance procedure, the federal courts should compel initial recourse to this process. They should enjoin actions at law to enforce agreements. This defers to the method legislated by the parties. And it acknowledges the majority rule principle underlying the whole bargaining process. This may be at war with the section 9(a) proviso. But that clause speaks only of “adjustment” by individuals and seems inconsistent with the act’s basic policies. Presumably unions will have complete discretion in prosecuting grievances to arbitration, whether or not to settle them at any time and on what terms, or to drop them altogether. And where an arbitrator has rendered a favorable award, only the union should be allowed to seek its enforcement, although North Carolina holds otherwise.⁵⁴ One court has held that an agreement to arbitrate a term of a new contract is different from an agreement to arbitrate future grievances under a contract and is not enforceable.⁵⁵ That

to do in order to surmount new difficulties is just to go ahead and surmount them! It is possible, of course, that I misunderstand the Lincoln Mills doctrine. It is equally possible that all this power derives directly from §301(a) instead of from judicial inventiveness.

⁵³ See Shulman, “Reason, Contract and Law in Labor Relations,” 68 HARV. L. REV. 999 (1955).

⁵⁴ *Lamonde v. Oleo Mfg. Co.*, 243 N.C. 749, 92 S.E. (2d) 143 (1956).

⁵⁵ *Boston Printing Pressmen’s Union No. 67 v. Potter Press*, (1st Cir. 1957) 241 F. (2d) 787.

unfortunate result seems inconsistent with the policy of our labor laws favoring the peaceful settlement of disputes.

I hope the courts will help this delicate arbitration process to develop as a means of implementing the collective agreement. I hope they will give scope to the homely and frequently non-professional notions of the parties who negotiate the agreements and will accept the aid of arbitrators selected by the parties. I trust that they will leave the parties free to write their own rules for living together, including the right to decide how such rules will be interpreted and applied.

There remains the problem of pre-emption. As with protected activities and unfair practices under the LMRA, federal pre-emption in this field circumscribes the freedom of state courts to act. But in this area things are a lot different from what is involved in the *Garner*⁵⁶ and *Weber*⁵⁷ cases. Here at first it was thought that state law and state courts would hold complete sway—that federal courts would act only in diversity cases. Now the turn-about has come full swing. In the name of section 301 the Supreme Court has put the federal courts in the saddle and federal law in control. Can the state courts now play any part at all? And if so, to what extent? Judge Traynor of California is probably correct in the *McCarroll* case⁵⁸ in saying: "Yes." The (to me) incomprehensible *Garner* and *Weber* cases at least indicate that state courts and agencies cannot impose local law in dealing with matters covered by the federal act.⁵⁹ They cannot apply even the federal law, except under cession agreements.

Although initiated by Congress in section 301, what the law governing collective agreements turns out to be is entirely in the hands of the federal courts. Judge Traynor aptly remarks that nothing in section 301 or any other federal law says or even implies that the state courts may not participate with the federal courts in the enforcement of collective agreements made in interstate com-

⁵⁶ *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

⁵⁷ *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 469 (1955).

⁵⁸ *McCarroll v. Los Angeles County District Council of Carpenters*, 49 Cal. (2d) 45, 315 P. (2d) 322 (1957).

⁵⁹ I really mean that the *Garner* case is incomprehensible to me. Furthermore, I think the members of the Court themselves are confused and do not understand just what they are doing in this field of federal pre-emption by implication. See GREGORY, *LABOR AND THE LAW*, 2d rev. ed., 530 et seq. (1958).

merce. He admits—as he should—that state courts will have to apply federal substantive law. But (as he observes) so far nobody knows what that law is or will be. Presumably it will resemble in spots the existing state law. Whatever it may be like, it should adhere to the majority rule principle. And in dealing with cases arising in interstate commerce, state courts will have to abandon their traditional dislike of enforcing collective agreements and the promises in them and will probably cease allowing actions by individual employees and permit unions to contract, sue and be sued.

Judge Traynor says it will make a difference whether or not the conduct amounting to breach of a collective agreement is at the same time protected activity or an unfair labor practice under federal law. I do not agree, although this aspect of pre-emption by implication has not yet arisen. I think the federal courts will enforce collective agreements where the conduct amounting to the breach is either protected or unfair under the labor act. And I feel sure that the Supreme Court will let the state courts do likewise. Of course, nobody yet knows for sure that the Supreme Court will recognize coordinate jurisdiction in state and federal courts. But it is free to rule either way; and nothing in section 301 can prevent the Court from letting the state courts share the job of contract enforcement purely on federal terms. It might resemble practice under the Federal Employers Liability Act, with ultimate appellate control in the Supreme Court.

This plan should work easily. But already an amusing refinement of this coordinate jurisdiction has occurred. California's Judge Traynor recognized the *Bull Line* case⁶⁰ as prevailing federal law. And in the *McCarroll* case⁶¹ he observed that there was no such restraint as the Norris-LaGuardia Act on judges in his state. Hence his court upheld an injunction enforcing a no-strike pledge. He said that this was not a difference of substantive law but, rather, of remedy. Now it is important that only one law and one scheme govern in the enforcement of collective agreements made in the federal arena. That is to prevent "forum shopping" by parties looking for a break under one set of rules or another. To

⁶⁰ (2d Cir. 1957) 250 F. (2d) 326, in the *McCarroll* case, 49 Cal. (2d) 45, 215 P. (2d) 322 (1957).

⁶¹ Note 60 supra.

promote this policy the law must achieve the same results in both sets of courts, whether we call it substantive or remedial.⁶²

Dean Pirsig of Minnesota wistfully hopes that Congress will adopt the uniform arbitration act with a provision that federal and state courts will exercise coordinate jurisdiction thereunder to enforce collective agreements made in commerce—analogueous to what goes on under the FELA.⁶³ This seems like a good idea. But Congress is not likely to pass such a statute. Meanwhile, the federal courts should lose no time in judicially legislating their own program, using section 301 as a jumping-off place. The Supreme Court may wish to forestall the possibility of legislation. It seems to prefer leaving the whole matter up to controlled experimentation between the parties to collective agreements and the courts. Dean Pirsig's analogy to the FELA will no doubt occur. But there will not be a federal *statute* governing the law of collective agreements and administration under them. Rather there will probably be a body of what we might call federal "common law" adjunct to section 301, which will supersede in the state courts all local state common or statute law.

This whole thing is a unique legal situation. We are dealing with a novel subject-matter—the collective agreement⁶⁴—which is supposed to be what the parties themselves make it. At the same time we are trying to foster a new kind of social structure—self-government in an industrial society. On top of this we recognize the need of some neutral procedure to enforce collective agreements and settle differences arising under them. But we do not want to restrict the parties at all in their experimentation. What

⁶² When this paper was read, Professor Wellington of Yale, one of the discussants, adversely criticized my position as it is stated here. He thought Judge Traynor was correct and that I was completely wrong. I remain absolutely unconvinced by my critics. Professor Wellington knows a great deal more than I do about federal jurisdiction and the intricacies of pre-emption, etc. But I still believe that coordinate jurisdiction of state and federal courts administering the same law will be impractical if you have two possible competing results. I cannot believe that there is any magic in the terms remedial and substantive.

⁶³ Pirsig, "The Minnesota Uniform Arbitration Act and the Lincoln Mills Case," 42 MINN. L. REV. 333 (1958).

⁶⁴ See Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195 (1938), and Cox, "The Legal Nature of Collective Bargaining Agreements," 57 MICH. L. REV. 1 (1958). At this point so much of what the late Harry Shulman said seems apropos. See his article, "Reason, Contract and Law in Labor Relations," 68 HARV. L. REV. 999 (1955).

better or more unique answer to this need could be imagined than the roving commission the Supreme Court has assumed for itself and the lower federal courts? In a fluid quasi-legislative fashion they may conduct experiments in this field and can produce something eventually that is bound to be revolutionary—and no doubt a triumph—in law-making.