The Contract Clause of Action Under the Taft-Hartley Act

Leon Harry Wallace
Indiana University School of Law - Bloomington

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THE CONTRACT CAUSE OF ACTION UNDER THE TAFT-HARTLEY ACT

I.

With masterful confusion, the Congress of the United States enacted in 1947 a law which provided, among other things, that suits for violation of contracts between an employer and a labor organization, representing employees in an industry affecting commerce, or between such labor organizations, might 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.¹ It was further provided that any such labor organization or employer shall be bound by the acts of its agents, and that any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States, and that any money judgment against such a labor organization shall be enforceable only against the organization as an entity and not against any individual or his assets.² For the purpose of determining whether any person is acting as an agent of another person, the act provided that the question of whether the specific act performed was actually authorized or subsequently ratified shall not be controlling.³

First, for the purpose of understanding, it is necessary to consider whether the Congress intended only to remedy a jurisdictional or procedural defect arising from the fact that in some state jurisdictions a union cannot sue or be sued because it is not recognized as a legal entity. If this is true, then the cause of action involved is a state cause of action arising out of the collective-bargaining agreement. If the

² Sec. 301 (b), The Act.
³ Sec. 301 (e), The Act.
particular state does not recognize that any legal relationships arise from a collective-bargaining agreement as between employer and union, then the furnishing of a federal forum, despite the lack of requirement of diversity and amount, would result only in bringing the union into the federal forum so that it might file a motion to dismiss on the merits. If the particular state, however, does recognize that legal relationships arise from a collective-bargaining agreement as between employer and union, the interpretation of those relationships (the substantive right) may not be the same from state to state. Thus, the same contract between the same employer and the same union, covering operations in many states, may give rise to materially different causes of action in different states as a result of the same conduct, which is alleged to constitute the breach.

Second, it is also necessary to consider whether the Congress intended to create a federal substantive right. If this is true, it is unnecessary to consider the problem of the propriety of the grant of jurisdiction, if the federally created right can be upheld, or the problem of whether there is any state substantive right, and, if so, what the nature of it is. It will be necessary, however, for the federal courts to determine the legal consequences of the federal contract right.

The Congressional intent is unclear.

II.

A brief review of the legislative history of the act reveals facts, which, taken alone, would sustain a finding of Congressional intent for either alternative.

One of the strong opponents of the legislation, Senator Murray, contended that the federal courts had always had jurisdiction to entertain suits for breach of collective-bargaining contracts, and had awarded money damages, where the requirements as to amount and diversity of citizenship exist; he contended that every district court would still be required to look to state substantive law to determine the question of violation, and that the contract section of the act did not create a new cause of action, but merely extended federal jurisdiction by removing the requirements of amount and diversity of citizenship.4

493 Cong. Rec. 4153 (April 25, 1947). It is obvious that Senator Murray considered the proposed contract clause to relate only to a jurisdictional or procedural matter. His interpretation was never questioned in subsequent debate, or in any of the Committee Reports.
One of the sponsors of the act, Senator Taft, asserted that the purpose of Title III is to give the employer and employee the right to go to the federal courts to bring suit to enforce the terms of a collective-bargaining agreement.\(^6\)

The language of the Report of the Committee on Education and Labor of the House of Representatives could be construed to support either alternative.\(^6\)

On the other hand, the distinction between the jurisdictional problem, and the substantive right problem was clearly recognized in the Report of the Committee on Labor and Public Welfare of the Senate, but whether the removal of a jurisdictional defect or the creation of a substantive right was intended by the proposed legislation is open to question.\(^7\)

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\(^6\) 93 Cong. Rec. 4265 (April 28, 1947). It is clear that Senator Taft intended that the Federal courts should have jurisdiction of actions based on collective-bargaining agreements, but his reported statements do not reveal whether he considered whether the substantive right involved was to be a state or federal right.

\(^6\) House Misc. Rep. No. 245, 80th Cong., 1st Sess., p. 46 (1947). It was stated in that part of the Report which referred to what was ultimately Section 301 of The Act that:

"It is provided that a labor organization whose activities affect commerce is to be bound by the acts of its agents, and may sue or be sued as an entity in the courts of the United States. . . .

"When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens. Labor organizations cannot justifiably ask to be treated as responsible contracting parties unless they are willing to assume the responsibilities of such contracts to the same extent as the other party must assume his. . . . For this reason, not only does the section (referring to what was ultimately Sec. 301 of The Act) make the labor organization equally suable . . . ."

It will be noted that the report of the House Committee uses language which goes beyond the question of jurisdiction, and refers to a generally applicable and uniform substantive right. Since it must be presumed that the House of Representatives was aware of the fact that the Congress could not create a state substantive right, it may be argued that it contemplated a federal substantive right, which would necessarily be defined and delineated by the federal courts.

\(^7\) Senate Rep. No. 105, 80th Cong., 1st Sess. (1947), Senate Committee on Labor and Public Welfare, pp. 15-17. In referring to the proposed contract section, the Senate committee observed:

"We feel that the aggrieved party should also have a right of action in the Federal courts. . . .

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

"If unions can break agreements with relative impunity then such agreements do not tend to stabilize industrial relations. . . . Without some effective method of assuring
The Conference Report by the Committee on Conference notes that the jurisdictional test of the Senate amendment, rather than the test in the House bill, was contained in the Conference agreement. Whether this implies that the contract section, as finally agreed upon, was intended to remove a jurisdictional defect or to create a substantive right is left unanswered.

III.

If Section 301 of Title III of the Taft-Hartley Act (Labor-Management Relations Act, 1947) is regarded merely as a grant of jurisdic-
tion to the federal courts, to eliminate procedural defects inherent in state procedure, it is necessary to inquire whether this action is consistent with the provisions of the Federal Constitution concerning the powers and functions of the federal courts.

At least one constitutional basis, possibly the only basis, for upholding such a grant of jurisdiction is the provision under Article III extending federal judicial power to all cases arising under the Constitution and the laws of the United States. If the Congress cannot confer jurisdiction beyond the limits of Article III, the grant of jurisdiction to be good must be based upon the existence of a "federal question" in cases involving breaches of collective-bargaining contracts. It has been said that at least one element of the plaintiff's cause of action must be a right conferred by the Constitution and the laws of the United States. The jurisdictional basis then must rest, in one way or another, on the fact that section 301 deals with contracts between employers and labor organizations "in an industry affecting commerce."

by Committee on Conference. In discussing the contract section of the Act, the Committee on Conference observes:

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

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

Quere: Does this language import an intent by the Congress to remove a jurisdictional or procedural defect, or to create a Federal cause of action, which must necessarily be defined by the Federal courts?

9 U. S. Const., Art. III, § 2. "Sec. 2. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; . . ."

10 In Gully v. First National Bank in Meridian, 299 U. S. 109, 112 (1936), Mr. Justice Cardozo said that "a right or immunity created by the Constitution or the laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, or defeated if they receive another." While the Court has made distinctions between "a case" and one "arising under" as applied to the Constitution and to the same terminology used in a federal statute, the language of the Court does not indicate any distinction of meaning, although this language was applied to a statute.
More than a century ago, Chief Justice Marshall defined the scope of a case "arising under" as used in the Constitution. In a case involving the Bank of the United States, the propriety of federal jurisdiction was in issue. Marshall, writing the opinion for the court, held that because the bank had been chartered by the Congress, there was a sufficient basis for federal jurisdiction, regardless of the nature of the cause of action to which the bank was a party. Marshall observed that the creation of the bank by an act of Congress "is the first ingredient in the case—is its origin—is that from which every other part arises." The rule of the Bank of the United States case was reiterated in many other cases. However, the Supreme Court has recognized a distinction between the identical words used in the Constitution and in statutes, pointing out that certain cases were concerned with the general statutory grant to district courts of jurisdiction over federal questions, and were not concerned with the constitutional grant.

13 Mr. Justice Rutledge, in his opinion concurring with the judgment, but dissenting with the reasoning of another opinion in National Mut. Ins. Co. of District of Columbia v. Tidewater Transfer Co., Inc., 69 Sup. Ct. 1173 (1949) observed: As this Court has had occasion to observe, a "cause of action" may mean one thing for one purpose and something different for another. (Citing cases.) Similarly, as students of federal jurisdiction have taken pains to point out, the "substantial identity of the words" in the constitutional and statutory grants of federal-question jurisdiction, "does not, of course, require, on that score alone, an identical interpretation." Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 YALE L. J. 393, 405, n. 47 (1936). "Confusion of the two is a natural, but not an insurmountable, hazard. . . . It has never heretofore been doubted that the constitutional grant of power is broader than the federal-question jurisdiction which Congress has from time to time thought to confer on district courts by statute. . . . Indeed, were we to adopt the view that the Gully rule is a test applicable to the constitutional phrase, we would effectively repudiate Chief Justice Marshall's conclusion in Osborn v. Bank of the United States, 9 Wheat. 738, that Congress can allow a federally chartered corporation to bring all its litigation into federal courts for the reason that, solely by virtue of the corporation's federal origin, all suits to which the corporation is a party are suits 'arising under . . . the laws of the United States' within the meaning of Article III. . . ." See also Gold-Washing & Water Co. v. Keyes, 96 U. S. 199 (1877). For a comprehensive background analysis of the federal-question problem, and a collection of cases, see Forrester, The Nature of a "Federal Question," 16 TULANE L. REV. 362 (1942); Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. OF PA. L. REV. 659 (1942).
It has been suggested that Congress has created a legal entity, the labor union, for certain purposes only, to carry out its power under the commerce clause. The courts might find this a sufficient analogy to the bank and other federally chartered corporations to be able to hold that cases brought under section 301 were cases arising under the Constitution and the laws of the United States. It is difficult to commend this device, however, since neither Congress nor the courts have considered unions as federal entities, any more than they have considered corporations to be federal entities in cases arising under the Sherman Act.

Recently, an opinion in the Supreme Court of the United States has suggested that Congress might confer jurisdiction on the federal courts in the exercise of Article I powers. In a case, holding that Congress could confer jurisdiction on district courts to hear cases brought by residents of the District of Columbia, Mr. Justice Jackson wrote an opinion, concurred in by Justices Black and Burton, holding that the Congressional power under Article I “to exercise exclusive legislation in all cases whatsoever, over such district . . .” and “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . and all other powers vested by this Constitution in the government of the United States . . .” was sufficient to sustain the Congressional grant of jurisdiction. This opinion clearly upholds the Congressional grant of jurisdiction under the Article I power, separate and apart from the power (or limitation of power) to

14 In Pullman S. C. M. Co. v. Local Union No. 2928, United Steelworkers, 152 F. 2d 493, 498 (C. C. A. 7th 1945), Judge Sparks observed: "It may also be urged that Congress gave legal entity to this Union for certain purposes only and that such status will not extend beyond those purposes and their accomplishment . . . The Act gave the Union as an entity a plenitude of power to accomplish the purposes honestly and it required the employer to honestly deal with the Union as an entity in the accomplishment of the same purposes. The Union was given the right in its own name to bargain, and contract, and as an entity to enforce such contract in courts of law. To say that either Congress or the Labor Union intended that the employer could not likewise seek relief in a court of law against the same entity for fraudulently accomplishing the purposes of the Act, would be to attribute to them a characteristic which, to say the least, would not be charitable." While this was dictum as far as our question is concerned, it indicates, nevertheless, a possible form of judicial reasoning.

17 U. S. CONST., ART. I, § 8, cl. 17.
18 U. S. CONST., ART. I, § 8, cl. 18.
grant jurisdiction under section 2 of Article III. If this is true, the same considerations should apply to the Article I power of Congress to regulate commerce among the several states which is the basic power underlying section 301. Consequently, it would afford an easy answer to assert that Congress had the power to confer jurisdiction on the district courts in cases between employers and unions involving collective-bargaining contracts as a part of its general power to regulate commerce, and despite any limitation of power in Article III. However, the easy answer is presently denied us. Mr. Justice Rutledge wrote an opinion, concurred in by Mr. Justice Murphy, concurring in the result of the opinion by Mr. Justice Jackson, but vigorously dis-

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19 In the opinion of Mr. Justice Jackson, in the District of Columbia case, it is said, "It is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on courts existing under Art. III for it has been done with this Court's approval. (Citation)

"Congress is given power by Art. I to pay debts of the United States. That involves as an incident the determination of disputed claims. We have held unanimously that congressional authority under Art. I, not the Art. III jurisdiction over suits to which the United States is a party, is the sole source of power to establish the Court of Claims and of the judicial power which that court exercises. (Citation)

"Congress also is given power in Art. I to make uniform laws on the subject of bankruptcies. That this, and not the judicial power under Art. III, is the source of our system of reorganizations and bankruptcy is obvious. (Citation.) But not only may the district courts be required to handle these proceedings but Congress may add to their jurisdiction cases between the trustee and others that, but for the bankruptcy powers, would be beyond their jurisdiction because of lack of diversity required by Art. III. (Citation) . . ." Thus the Court held that Congress had power to authorize an Art. III court to entertain a non-Art. III suit because such judicial power was conferred under Art. I. Indeed the present Court has assumed, without even discussion, that Congress has such power. In Williams v. Austrian, 331 U. S. 642, the Chief Justice, speaking for the Court, said that "... Congress intended by the elimination of sec. 23 (from Chapter X of the Bankruptcy Act) to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking. (Emphasis supplied.)

"... The fact that the congressional power over bankruptcy granted by Art. I could open the court to the trustee does not mean that such suits arise under the laws of the United States; but it does mean that Art. I can supply a source of judicial power for their adjudication. The distinction is important and it is decisive on this issue." (Editor's Note. Mr. Justice Frankfurter contends that the bankruptcy cases are federal-question cases and that the jurisdiction power emanates from Article III.)

"We conclude that where Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship.

"We could not of course countenance any exercise of this plenary power ... if it were such as to draw into congressional control subjects over which there has been no delegation of power to the Federal Government. ..."

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senting from the reasoning. In this opinion, citizens of the District were found to be citizens of a "state" for jurisdictional purposes so that the Congressional grant of jurisdiction rested comfortably within the expressed confines of Article III. Mr. Justice Frankfurter, with whom Mr. Justice Reed concurred, and Mr. Chief Justice Vinson, with whom Mr. Justice Douglas joined, wrote dissenting opinions.

On analysis, the differences of opinion between the opinions of Mr. Justice Jackson and Mr. Justice Rutledge present problems which are not insuperable. The Jackson opinion does not admit of the possibility that under its reasoning, the case could be taken one step further and fitted into the confines of section 2 of Article III. It demands the acceptance of the proposition of the power to grant jurisdiction beyond the limitations of Article III. The Rutledge opinion admits of no flexibility in section 2 of Article III, except by his expanded definition of "state," and demands the acceptance of the legal propositions applied to factual situations entirely different from those presented by the problems of section 301, and assumes that a principle adopted for some purposes must be applied to all fact situations. Neither position is judicially imperative.

Instead of laboring with the question as one which necessarily involves the problem of a conflict between express power to confer jurisdiction conferred by absolute definition more than a century and a half ago, and implied power to confer jurisdiction never previously recognized, it might be a simpler solution to compromise the judicial absolutes presented and to find that, in particular circumstances, the conferring of jurisdiction on district courts for certain purposes was a proper and valid device in the exercise of Article I powers. For present purposes, the conferring of jurisdiction on the federal courts over contracts between employers and labor unions in an industry affecting commerce could be held a valid regulatory device to be used in the exercise of the commerce power expressly conferred on Congress. Having concluded this, one step only is necessary to find that any case involving such a contract is one arising under the Constitu-

21 Mr. Justice Rutledge said, " . . . federal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional federal-question jurisdiction. And no case cited in any of today's opinions remotely suggests the contrary." p. 1187. Mr. Justice Rutledge found no problem in defining the term "state," as used in Art. III, differently than its historical meaning. It may be questioned reasonably whether the Constitution-makers considered the non-existent citizens of a non-existent District of Columbia as citizens of a state or that they considered the proposed federal district as a state.
tion and the laws of the United States, and fits into the limited area imposed by section 2 of Article III.

This does not imply that the Congress could confer jurisdiction on the federal courts indiscriminately, to the point that the state courts would be ousted of jurisdiction of all cases. The suggestion applies only to the conferring of jurisdiction dealing with, or, if you please, arising under, the express powers which are conferred on Congress by the Constitution.

Assuming, for the purpose of this section, that the Congress intended only to confer jurisdiction over contracts between employers and unions in an industry affecting commerce, and did not intend to create a federal substantive right, there are two other problems which should be considered.

First, it is necessary to consider whether section 301 is an innovation in recognizing that the union as an unincorporated association may be sued as a legal entity in the federal courts. The answer to this, of course, must be in the negative.

A generation ago, this question was expressly raised and decided. Perhaps it is necessary to interpret the decision of the Supreme Court in the Coronado case as applying only to situations arising under the Sherman Act. Nevertheless, to that limited extent, labor unions were regarded as legal entities. The rule of the Coronado case has since been codified in the Federal Rules of Civil Procedure. This rule would cover suits brought in federal courts to enforce a federal substantive right, but if no such right is involved, and the jurisdiction depends on diversity, then the doctrine of Erie R. Co. v. Tompkins

22 United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922). Mr. Chief Justice Taft observed that "... it is after all in essence and principle merely a procedural matter." (p. 390.) It was assumed generally after the Coronado decision that unincorporated associations could sue and be sued in the federal courts. Later decisions demonstrated that the generalization was untrue. See Moffat Tunnel League v. United States, 289 U. S. 113 (1933). It can only be concluded that for certain purposes (such as for the purpose of effectuating the purposes of the Sherman Act) unincorporated associations were regarded as entities by the Court. For a comprehensive analysis and collection of cases, see, Witmer, Trade Union Liability: The Problem of the Unincorporated Corporation, 51 Yale L. J. 40 (1941).

23 48 Stat. 1064 (1934); 28 U. S. C. Rules of Civil Procedure for the District Courts of the United States. Rule 17 (b): "... In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other 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."

24 304 U. S. 64 (1938).
should apply and state law should govern. It was argued by Senator Murray that because federal courts already had jurisdiction on a diversity basis in actions involving collective-bargaining contracts, the proposed legislation only extended the jurisdiction. This overlooks the fact that such jurisdiction could only be exercised in states where the law of the state recognized such an action. A cause of action is apparently contemplated and provided under section 301 (a) regardless of diversity. It would be a futile gesture to provide jurisdiction for suability, if no cause of action existed, unless it was intended to create a federal substantive right to be interpreted by federal law as developed by the federal courts.

Since section 303 of the Act creates new causes of action for expressly defined (federal) torts, it seems reasonable to infer that Congress did not intend that section 301 (b), which provides that a union "shall be bound by the acts of its agents," should create thereby a liability for every tort which might be committed by one of its agents. If Congress did intend to create such rights under section 301 of the act, then the jurisdictional grant in section 303 is unnecessary and actually in conflict with that of section 301. However, since section 303 provides that suits brought thereunder shall be subject to the limitations and provisions of section 301, the responsibility of a union for its agents created by section 301 (b) should be equally applicable to contract violations and to torts defined by section 303.

Second, some consideration should be given to the nature of the substantive right growing out of collective-bargaining contracts. Whether it is a state substantive right or a federal substantive right, it does not follow necessarily that the same legal consequences will flow from it, as would flow from other types of contracts,—commercial construction, and the like. From anything which may be found in the Congressional history, it might be inferred that Congress assumed that there was a contract law, and that collective bargaining contracts, and the rights arising thereunder, would be the same as in the case of any other kind of agreement. Assuming that there was a valid grant of jurisdiction on federal courts, to hear cases arising under state substantive contract law, the contract right growing out of the alleged breach may vary from state to state. Industry-wide contracts might

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25 See footnote 4, supra.
20 See footnotes 4, 5, 6, 7 and 8, supra.
give rise to varying rights from state to state growing out of the same or similar alleged breaches. In fact, the "agency" definition of section 301 (e) might in itself conflict with the substantive law of the various states, if we assume that only state substantive rights are involved. In the states, referred to in the Report of the Senate Committee, where it is impossible to sue a union as an entity, it is impossible to decide with certainty whether the defect is only one of procedure. It might also be true that such states would not recognize that collective-bargaining agreements of themselves establish any relationships. Since such states would have no cases defining the status of the collective-bargaining agreements, even though the initial obstacle was jurisdictional, the federal courts would be left to guess what the state substantive contract right, if any, was. At best, the federal courts could only define and delineate what the collective-bargaining contract right of such states ought to be. The different Courts of Appeal might develop a common law for such states within their respective circuits, but it would not be the same necessarily from circuit to circuit. Such variations could not be resolved by the Supreme Court unless it adopted a uniform common law for such states, and adopted a presumption that if a state had not defined its contract right, federal courts would create an applicable uniform right for it. If the aim of the Labor-Management Relations Act is to establish uniformity of regulation through section 301, it will not have been achieved.

Without attempting an exhaustive analysis of state law as it relates to collective-bargaining agreements, it is possible to demonstrate the problem. More than a dozen states, by legislation, have recognized in one way or another a substantive right arising under collective bargaining contracts. Some of the acts are couched in jurisdictional language, others in terms of substantive right. Other states have

27 See footnote 7, supra.
30 Calif. Gen. Laws (Deering 1941) sec. 1126. "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity and a breach of such collective agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in this state." See also S. D. Laws (1947) ch. 94, secs. 2-3; Laws N. D. (1947) ch 242, sec 7. Cf. United Packinghouse Workers v. Wilson & Co., Inc., 80 F. Supp. 563 (N. D. Ill. 1948), in which it was held that the jurisdiction granted to a federal court under section 301 did not include the power to enjoin violations of a collective-bargaining agreement.
arrived at a definition by judicial decision. The substantive right in several states is determined, in part, by provisions in labor relations acts. The nature of the right varies from state to state. There is not complete agreement concerning the legal consequences of the collective-bargaining agreement.

31 Mueller v. Chicago & N. W. Ry. Co., 194 Minn. 83, 259 N. W. 798 (1935). The court said, "When, as to a collective contract, the judicial function is invoked, decision must stand upon the same rules of interpretation and enforcement that prevail in other cases of contract. We do not have, and judges cannot make, one law for one class of contracts and another and different law for another sort." Nevertheless, the court indulged a presumption that the union-contracted as an agent of the employees, which requires either authorization or ratification. This differs from the union's position under Sec. 301, since the action was maintained by one of the employees (principals). See also Harper v. Local Union No. 520, International Brotherhood of Electrical Workers, (Tex. 1932) Ct. of Civ. App., 48 S. W. 2d 1033. (specific performance).


33 For a comprehensive and cogent analysis of collective-bargaining contracts, see Lenhoff, The Present Status of Collective Contracts in the American Legal System, 39 Mich. L. Rev. 1109 (1941). Compare, however, the definition of Mr. Justice Jackson, for a possible hint whether collective contracts will be interpreted the same as other contracts in the federal system, in J. I. Case Co. v. N. L. R. B., 321 U. S. 332, 334, (1944), in which he said, for the Court: "Contracts in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representative of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit... The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules or rates and rules for service, which do not of themselves establish any relationships, (emphasis supplied) but which do govern the terms of the shipper, or insurer or customer relationship whenever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department, and, if approved, became a governmental regulation ruling employment in the unit."

It is obvious that in 1944, the Supreme Court concept of the substantive rights which might flow from collective-bargaining contracts is materially different from the Congressional concept, which provides, in 1947, limits of liability of unions, and definitions of agency for the purpose of responsibility. The difference in interpretation of substantive right provisions inherent in collective-bargaining contracts may extend to some of the states.
Less than twenty-five years ago, there was general agreement that collective-bargaining agreements between employers and unions created no rights, powers, privileges or immunities, whatsoever. They were considered as mere written statements of purpose, or usage and custom, possibly creating "moral" obligations, but no "legal" obligations. To give some indirect legal effect, some courts eventually indulged in agency and third party beneficiary devices. A few jurisdictions found the union to be the principal. Today, it may be agreed that most state jurisdictions recognize that some legal consequences flow from such agreements, that some substantive rights are created by the execution of such contracts. A potential conflict exists between the state substantive right and the federal legislation. In some states, it is by no means clear whether this is true, because the jurisdictional non-suability of unions as unincorporated associations has precluded any determination of the nature, if any, of any substantive right which might be involved in a collective-bargaining agreement. It does not follow necessarily that the removal of the jurisdictional defect would

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34 See, Fuchs, Collective Labor Agreements in American Law, 10 St. Louis L. Rev. 1 (1925). See also, Yazoo & M. V. R. Co. v. Webb, 64 F. 2d 902 (C. C. A. 5th 1933), in which the Court said, "An agreement between the managers of an industry and its employees, whether made in an atmosphere of peace or under stress of strike or lockout resembles in many ways a treaty. . . . No one is bound thereby to serve, and the employer is not bound to hire any particular person. It is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. It is a mutual general offer to be closed by specific acceptances. . . ." See also, Anderson, Collective Bargaining Agreements, 15 Ore. L. Rev. 229, 236 (1936); Wilson v. Airline Coal Co., 215 Iowa 855, 246 N. W. 753 (1933). Cf. Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc., 265 F. 397 (D. C. E. D. La.) 1920; McGlohn v. Gulf & S. I. R. R. Co., 179 Miss. 396, 174 So. 250 (1937).

35 Mueller v. Chicago & N. W. Ry. Co., 194 Minn. 83, 259 N. W. 798 (1935). The theory of this case is that the union is the agent. This requires a presumption that the agent is authorized, or that the principal ratified the action. Except for the fact that the union member brought the action, there is no evidence of either requirement. Cf. Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 152 Ky. 711, 154 S. W. 47 (1913).


38 In the states referred to in the Report of the Senate Committee, footnote 7, supra, where it is impossible to sue a union as an entity, it is impossible to ascertain what is the nature of the substantive right, if any, arising from a collective-bargaining agreement.
automatically cause the recognition of a substantive right under such agreements. Even in those jurisdictions where evidence exists that there is such a substantive right, the content and attributes of the right vary because of expressed legislative and judicial difference and variation of state policy from state to state. Consequently, if section 301 merely removes the jurisdictional or procedural defect, this device for the regulation of commerce among the several states will create lack of uniformity among the several states in the enforcement of collective-bargaining agreements. If this is the intent of Congress, it will have been achieved.

IV.

In the preceding section, it was assumed that no federal substantive right was created by section 301. Whether such a right was created must be considered. If such a right was created, the nature of it is a problem inherent here, as much as it was a problem in considering the state right, although, of course, the federal substantive right, whatever it is, would be uniform among the states. However, it will be necessary to consider whether such a federal right is exclusive, or whether it can co-exist with a different state right.

Substantive rights and causes of action have been created before by the grant of jurisdiction to the federal courts. The federal courts have had no difficulty in upholding grants of jurisdiction arising from

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40 The original admiralty substantive rights were created by the grant of jurisdiction. U. S. Const., Art. III, sec. 2. The Judiciary Act of 1789 conferred upon District Courts "exclusive original cognizance of all civil causes of admiralty . . . ." In 1845, Congress enacted a statute (5 Stat. at Large, 726) entitled "An act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters . . . ." This purported to confer jurisdiction "in matters of contract and tort." This act became inoperative after the Supreme Court's interpretation of jurisdictional power in Genesee Chief, 12 How. 443 (U. S. 1851). Nevertheless, the admiralty causes of action had been created by the grant of jurisdiction and the substantive rights were worked out by the federal courts, and not worked out under the exercise of any Article I powers by Congress. See The Eagle, 75 U. S. 15 (1869).
the power of Congress to regulate commerce, where Congress has expressly created federal substantive rights.41 If the causes of action created by such Congressional acts as the Federal Employers Liability Act and the Fair Labor Standards Act do not present cases "arising under" the Constitution and the laws of the United States, then the attempted grants of jurisdiction to the federal courts in such acts are invalid. On the other hand, if such grants of jurisdiction are valid, then a federal substantive right arising under section 301 should have the same treatment. The mere fact that it would be found to have been created by implication, rather than by express Congressional definition should not be a valid basis for distinction. Since the legislative history shows that Congress was aware of the substantive right problem42 it may be inferred that Congress intended to leave it to the courts to work out the nature and detail of the substantive right by developing a "national law" or "federal common law" of collective-bargaining agreements. This would be a more charitable interpretation than to assume either that the Congressional draftsmen did not understand the implications of what they did, or that they were inept.

If there is a federal substantive right created under section 301, to be worked out in detail by the courts, the problem still exists whether the courts will consider the right as one to be worked out to conform to the rights arising out of other types of contract, or will consider collective agreements as unique and requiring different interpretation and definition of the rights involved.

Assuming the existence of the federal right, it is necessary to realize that many states have a substantive right arising out of collective contracts. Assuming also such a state cause of action, if the case is filed in the state court on the state right, and diversity of citizenship and requisite amount exist, upon transfer of the case to the federal district court, the federal court would seem to be required to define and interpret the contract according to state law.43 On the other hand, if the case is brought in the federal court on the substantive right created by section 301, the developing federal contract law might require a different interpretation and definition of the right

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42 See footnote 7, supra.
43 See Erie R. Co. v. Tompkins, 304 U. S. 64 (1938).
arising from the same collective-bargaining contract and involving the same facts. This possibility would not make for any uniformity of regulation in carrying out the expressed purposes of the act.\(^44\)

Since section 303 expressly conferred jurisdiction on state as well as federal courts to hear cases involving the federal torts therein defined, and since no mention of state courts was made in section 301, it might be urged that Congress intended that all cases arising under collective-bargaining contracts in an industry affecting commerce should be tried in federal courts as federal causes of action. If such a result was intended, the Committee reports are silent on the matter.\(^45\)

Of course, the federal courts would not be bound to follow state law in cases brought under section 301, because the jurisdiction is based on a federal question (or a federal right arising out of the exercise of Article I powers).\(^46\) A comparable problem has arisen when there was a conflict over priorities of creditors between a state law and the bankruptcy laws.\(^47\) It is possible that Congress has occupied the field of collective-bargaining contracts, as has been found to be the case in other situations.\(^48\) However, if the courts find that

\(^{44}\) Act of June 23, 1947, c. 120, P. L. 101, sec. 1 (b) 80th Cong.; 29 U. S. C. § 151. Section 1(b) provides in part: "... It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce... ."

\(^{45}\) See footnotes 6, 7 and 8, supra.

\(^{46}\) Clearfield Trust Co. v. United States, 318 U. S. 363 (1943); D'Oench, Duhme & Co. v. F. D. I. C., 315 U. S. 447 (1942). In the latter case, the Supreme Court said that the liability on a note given to F. D. I. C., a federal agency, was to be determined without regard to state law.

\(^{47}\) American Surety Co. v. Sampsell, 327 U. S. 269 (1946). Mr. Justice Black, speaking for the Court said, "True, we stated ... that the federal law governing distribution of a bankrupt's estate should be applied with 'appropriate regard for rights acquired under rules of state law.' But the extent to which state law is to be considered is in the last analysis a matter of federal law." (emphasis supplied).

\(^{48}\) In O'Brien v. Western Union Telegraph Company, 113 F. 2d 539 (C. C. A. 1st 1940), the Court said, "Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules. ... Notwithstanding Erie Railroad Company v. Tompkins there still exist certain fields—and this is one—where legal relations are governed by a 'federal common law,' a body of decisional law developed by the federal courts untrammeled by state court decisions."

In Philco Corp. v. Phillips Mfg. Co., 133 F. 2d 665 (C. C. A. 7th 1943), the court expressed the concept: "But to say that Congress has occupied the field ... is only another way of stating that federal courts may go beyond mere interpretation of the expressed words used in a statute, to decide interstitial and cognate issues so as to effect the evident policy of the Act, either expressed or implied. ..."
the Congressional intent was not to make the federal collective-bargaining contract law supreme and exclusive, there would be two conflicting bodies of contract law applying to the same contract, the federal law, and the state law, decisions under which could not be appealed to the Supreme Court of the United States, because on the matter of interpretation of the state right, no federal question would exist.

The courts may also have to determine whether the substantive contract right may be waived by an express clause in the collective-bargaining agreement, wherein the employer and labor organization agree not to sue on any such cause of action which would arise on breach of the contract. It is questionable whether the parties will be permitted to create such rights and immunities by means of the contract.⁴⁹

V.

Two years after the passage of the act, the evidence of judicial answer to the problems inherent in section 301 is almost as meager as the original evidence of Congressional intent. Very few cases have been brought on the contract action arising under section 301. Most of those did not consider whether a state or federal right was involved, but were decided on other considerations.⁵⁰ Two cases have recognized that a substantive right problem exists, but both, while


⁵⁰ Metal Polishers . . . International Union, Local 90, A. F. of L. v. Rubin, 17 Lab. Cas. 65, 326, C. C. H. (E. D. Pa., 1949). (Court did not consider the nature of the action); Daily Review Corp. v. International T. U., No. 913, 17 Lab. Cas. 65, 292, C. C. H. (E. D. N. Y., 1949). (Court decided only question of service of process); United Steel Workers v. Shakespeare Co., 84 F. Supp. 267 (W. D. Mich., 1949). (Court did not consider the nature of the action); United Shoe Workers v. Le Danne Footwear, Inc., 83 F. Supp. 714 (D. C. Mass., 1949). (Court decided that oral agreement entered into subsequent to written agreement is a valid contract on which action may be maintained under section 301. One state case is cited to support a proposition of substantive contract law, and several federal cases are cited to support others; it is unclear whether court considered state or federal law controlling); United Packinghouse Workers v. Wilson & Co., Inc., 80 F. Supp. 563 (N. D. Ill., 1948). (Court held that federal courts lacked authority to enjoin violation of collective-bargaining contract under section 301); Baker and Confectionery Workers, Local 492 v. National Biscuit Co., 78 F. Supp. 517 (E. D. Pa., 1948). (Court held that real issue was not a violation of contract, but whether employer was obliged to bargain with union over terms of retirement plan, and that this was a matter for N. L. R. B.)
recognition of a substantive right, use language to support section 301 as a mere grant of jurisdiction.\textsuperscript{61}

In construing section 301, it has been indicated that the federal courts, and eventually the Supreme Court, will have several choices.

First, the section may be declared unconstitutional as an attempt to grant jurisdiction where no federal question exists. If this happens, the situation will be the same as before the passage of the act.

Second, the section may be construed as a proper grant of jurisdiction to hear cases the cause of action in which is a state substantive right. If this result occurs, in some states it may be found that there is no cause of action. In those states where labor organizations have not been suable, it will be necessary to guess whether a state substantive right exists, and the federal court will necessarily be compelled to define the state law without evidence of what it is. In the remaining states, the cause of action on the collective-bargaining agreement will vary materially from state to state because of different judicial interpretation and legislative determinations of policy. There will also be actual conflict between the substantive right and section 301 because of the agency definition in section 301, which is different from the agency definition applied to collective-bargaining contracts in some states.

Third, the section may be construed to have created a federal substantive right, which will be defined by the development of a federal common law. However, the court could find that this right could

\textsuperscript{61} Colonial Hardwood Floor Co. v. Int. Union, 76 Supp. 493 (D. C. Md., 1948). (This case was brought on two counts, one under section 301, the other under section 303. A question of contractual construction arose when it was urged that the suit be stayed pending arbitration under the Federal Arbitration Act of Feb. 12, 1925, c. 213, sec. 3, 9 U. S. C. A., sec. 3. However, the question was raised that this cause did not "arise under" the Constitution and laws of the United States. The Court said, "But I think this contention untenable here. Osborn v. Bank, 9 Wheat. 733... The Labor-Management Act creates important substantive rights between employer and employees engaged in interstate commerce (sic) and section 301 expressly authorizes suits of this character in district courts of the United States." It will be noted that the Court speaks both in terms of a mere grant of jurisdiction and also of the creation of a substantive right, although in that connection the Court refers to "employees" rather than to unions, and limits the application to employers and employees engaged in interstate commerce rather than to employers and labor organizations in an industry affecting commerce). Wilson & Co., Inc. v. United Packinghouse Workers, 83 F. Supp. 162 (S. D. N. Y. 1949). (The Court held that section 301 created substantive rights, and in support thereof, quotes the above quoted statement from the Colonial Hardwood Floor Co. case. The Court also rejected the contention that section 301 infringed on the rights reserved to the States under the Tenth Amendment of the United States Constitution. The Court said that it is a valid federal right involved).
co-exist with state substantive contract rights, common law or legislative. Such a result would inevitably result in different interpretations of the same contract under the same facts. It might even require a federal court to define the contract one way if the action arose under section 301 in the federal court, and another way if it came into the federal court by removal from the state court, where diversity of citizenship and amount were present. This would not result in a uniform mode of regulation within the state.

Fourth, it may be decided that Congress has occupied the field, and that contracts between employers and labor organizations representing employees in an industry affecting commerce give rise only to a federal substantive right which must be defined and delineated by federal law. If this result is reached, it is not clear that Congress intended that such cases could be tried only in the federal courts. The legislative history might be construed as showing more of an intent to furnish some forum, rather than to designate an exclusive forum.\(^2\)

In the absence of a change in the legislation, the federal courts will be required to find the answers as the cases arise, and make the policy determinations inherent in the problems raised which were left unstated in the obscurity of Congressional language.

Leon H. Wallace

Indiana University.

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\(^2\) Quare: Is there a possibility that the state might be required to furnish a forum for the federal cause of action? See, Testa v. Katt, 330 U. S. 386 (1947). Mr. Justice Black, speaking for the Court, observed: "The suggestion that the Act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress in the exertion of the power conferred to it by the Constitution adopted that act, it spoke for all the people of all the states, and thereby established a policy for all. That policy is as much a policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."