IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

TRANSCRIPT OF PROCEEDINGS

In the Matter of:

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,

Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL,

Appellees.

Case Numbers
27
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34

Date: November 9, 1948.

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LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL., Appellants, vs NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION, Appellees.	Case No. 47
GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL., Appellants, vs. STATE OF NORTH CAROLINA, Appellees.	Case No. 34

Washington, D. C.,

Tuesday, November 9th, 1948

The above entitled cause came on for oral argument, pursuant to recess, at 12:00 o'clock M.

BEFORE:

Associate Justice Black (presiding) and Associate Justices Reed, Frankfurter, Douglas, Jackson, Rutledge, and Burton.

APPEARANCES:

For the Appellants:

Herbert S. Thatcher,
George Pennell,
H. S. McCluskey.

For the Appellees:

Donald R. Richberg,
Irving Hill,
Edson Smith.

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P R O C E E D I N G S

Mr. Justice Black: We will proceed with the case on argument.

The Clerk: Counsel are present.

ORAL ARGUMENT OF HERBERT S. THATCHER
ON BEHALF OF APPELLANTS.
(Resumed)

Mr. Thatcher: If the Court please:

I think at the close of the arguments yesterday Justice Reed asked a question, the substance of which was whether each of these States prohibited an employer from refusing to employ a potential employee, or an employee, because of his union membership, as well as because of his non-union membership?

The answer is that Arizona does not; that is, Arizona, of all of the three States before the Court, in these cases, as well as all of the fifteen States that have passed anti-closed shop laws, alone states only that employers are forbidden to refuse to employ employees because of non-union membership, not because of union membership.

In other words, the employers are free to discriminate against employees because of union membership in that State.

Mr. McCluskey from Arizona will elaborate on that point later.

Now, continuing with the argument:

I had started to point out that in each of these three States, under each of these three laws, the prohibition against

any type of union security contract is absolute. There is no exception made whatsoever. The prohibition applies regardless of whether 100 per cent of the employees involved agree upon and desire a closed shop - that is the Nebbia case - regardless of whether the Union and the employer both desire the closed or union shop, and, in other words, all parties involved, the employees, the union, and the employer, all desire the closed shop relationship.

In other words, the State here, for the first time, has injected itself into an area of agreement. Usually, in these labor laws that have been passed, the State enters an area of conflict between employees and employers, or between employers and unions. Here, for the first time, there was entered into an area of agreement, and it has proscribed flatly, unconditionally, any agreement between the employer and the union, wherein a single employee is required to maintain his membership in the union as a condition of employment.

Mr. Justice Reed: Are you correct in saying that they have entered into an area of agreement? Had they not before?

Mr. Thatcher: Of course, the Taft-Hartley Law prohibits certain types of union security arrangements. It prohibits the out-and-out closed shop, and it permits the union shop. But I do not know whether there is any flat prohibition as to the customary traditional subject matter of collective bargaining.

Mr. Justice Reed: I had in mind a law with respect to contracts between employers and employees, which prohibits employees from belonging to unions.

Mr. Thatcher: The yellow dog contract?

Mr. Justice Reed: Yes.

Mr. Thatcher: That is not an area of agreement between unions and employers. That is an agreement between the employer and the individual employee, who, lacking bargaining power, was more or less forced to enter into these arrangements.

Mr. Justice Reed: Have there been no agreements of that kind made between companies and unions?

Mr. Thatcher: Again we have the element of company domination, which does not make for a true union, a true representative of the employees in a bargaining unit. That occurs in no case where there is a true bona fide union.

Mr. Justice Reed: Suppose there were a law which approved such agreements between employers and employees, that voluntarily entered into them. What would you say about that? Would you say that the State could interfere in that area, to protect the employee?

Mr. Thatcher: It would have to protect the employee against himself, as West Coast Hotel vs. Parrish and those cases show.

Mr. Justice Reed: As I understood it, you are now arguing that a State could not interfere, as to the agreement be-

tween the employer and the employees. Do you not finally get back to the question of whether they could interfere, so far as agreements of this kind are concerned?

Mr. Thatcher: It does come back to that, yes; agreements of this kind. But this is the first time when the traditional practices have been flatly interdicted.

Mr. Justice Rutledge: Before you go further: This may be inappropriate at this point, but as I understood you, my impression was that you said there is no question involved in these cases of conflict between the State Statute and the National Act.

Mr. Thatcher: There is not, your Honor.

Mr. Justice Rutledge: I do not understand how you get rid of the question, whatever its answer may be, relating to provisions of the Taft-Hartley Act, in reference to union shop, and a possible conflict as to that.

Mr. Thatcher: Well, a separate privision of the Taft-Hartley Act, Section 14, specifically provides that States shall have leeway to pass laws as they wish, concerning the closed shop relationship.

Mr. Justice Rutledge: Even though there may be a conflict with the Taft-Hartley Act?

Mr. Thatcher: Even though that may conflict with the Taft-Hartley Act provision permitting union shops. The provision reads as follows, in 14(b) of the Act:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

Mr. Justice Rutledge: Do you not raise problems of discrimination?

Mr. Thatcher: Yes, we do, later on in our arguments. But not under the Commerce Clause.

Mr. Justice Frankfurter: What is the exact provision of the Taft-Hartley Act as to the closed shop?

Mr. Thatcher: That is 8(a)(3), which says that there shall be no discrimination regarding hire and tenure, provided that nothing in this Act shall preclude an employer from making an agreement with a labor organization, not a company union, requiring as a condition of employment, membership, after the thirtieth day following the beginning of such employment.

Mr. Justice Frankfurter: Does that mean that the closed shop agreement cannot come into effect except thirty days after?

Mr. Thatcher: That is correct, your Honor. The employees are free to join or not to join, for the first thirty days of the employment. After that, they can all be obliged

to become and remain members of the union for the term of the contract.

Mr. Justice Frankfurter: The various State Laws are outright in their proscriptions?

Mr. Thatcher: Are outright. They do not make any condition for form or mode.

Further, in connection with this question of absolute prohibition, it should be pointed out that the prohibition applies, regardless of the manner in which unions may function internally. That is, they may be ever so free in their admissions or reasonable in their expulsions. Nevertheless, the prohibition applies. So that the point that they are trying to prevent unions from arbitrarily refusing admission under a closed shop relationship is lost, or arbitrarily discharged. That point is not available, because this point applies, regardless of the internal operation of the union.

Furthermore, it applies, regardless of the conditions in any particular industry, as, for instance, the extent to which industries have become organized, or are under union agreements.

Secondly, it should be pointed out that in none of the three States that are before the Court in these cases, have there been passed laws which are equivalent to the Railway Labor Act or the National Labor Relations Act, affording some

statutory scheme of protection to the right of self-organization and the right of collective bargaining, giving an exclusive collective bargaining status.

The significance of that is that in these three States, at least intrastate industries, labor organizations must rely now, as in the past, upon traditional methods for their maintenance and self-protection. They cannot rely or cannot depend upon any statutory protections similar to the Railway Labor Act, or the National Labor Relations Act. They must depend upon the traditional means of support; and the principal means, as I will show, is the union shop agreement.

Now, I do not think it needs any declamation whatsoever, to tell this Court what the union shop coverage means to the labor movement of this country. I think I can flatly state that it is the most vital, the most sacred, of the institutions of organized labor.

Mr. Justice Jackson stated, in his dissenting opinion in the Wallace case, Wallace vs. NLRB, that "the closed shop is the ultimate goal of most union endeavor."

That statement was quite a correct one. There was no elaboration there. It was not necessary. But some elaboration is necessary here, if this Court is to have a full comprehension of just what has been prohibited here, first, as a means of seeing whether the prohibition is reasonable, and secondly, as a means of seeing whether any constitutional

rights are involved.

Mr. Justice Reed: How do you use the term "closed shop?" That means that you must belong to a particular unit of a National Labor Union?

Mr. Thatcher: The Department of Labor has given what have become more or less official definitions of the terms "closed shop", "union shop", "maintenance of membership", and so on. Wehave filed an economic brief here, in which those definitions are set forth.

Also, leading commerce and labor writers have given these definitions.

A closed shop is where an employer goes to the union and obtains his employees through the union. They must be members at the time they are employed. That is the usual significance of a closed shop.

Mr. Justice Reed: A hiring hall?

Mr. Thatcher: A hiring hall would be a type of closed shop, yes, where they are drawn directly from the union.

Mr. Justice Reed. You use "closed shop" to mean that the union furnishes the employee?

Mr. Thatcher: Your Honor, in these cases, for our purposes, since the laws outlaw any type of closed shop, union shop, maintenance of membership, preferential shop, any of those types of contracts, I use the term "closed shop" or union

shop" interchangeably; in popular conception, the term "closed shop" has now grown to mean any contract whereunder an employee is obliged to become and remain a member of a union.

Mr. Justice Reed: "A" union, or "some" union?

Mr. Thatcher: The union which is either the certified bargaining agent or the representative of the employees in the plant.

Mr. Justice Reed: That is the way you use the term?

Mr. Thatcher: That is the way we use the term here, in this argument.

As I have said, we have filed an economic brief, along with our principal brief, and in this economic brief, and in our principal brief and in the record, both in allegations in the complaints in the Arizona and the Nebraska cases, and in the testimony of qualified witnesses in the North Carolina case, we have shown that union security agreements have traditionally been utilized by labor organizations for the following five purposes, and are indispensible to the accomplishment of these five purposes:

First, the union shop is a means of protecting the existence of a labor organization, once organization has been achieved; as a means of preventing supplanting of the union members by non-union members, whether that supplanting comes about by outright discrimination, as is possible in the intrastate industries, or whether it comes about by a gradual

turnover in the plant.

At any rate, a prime purpose of the union shop is to prevent the supplanting of the majority status by the injection of non-union members and to preserve the existence of the organization, once organization has been achieved. That is the first function of the union shop.

Second, and more or less as a corrolary of the first, it is an indispensible means of achieving full equality of bargaining power, whereunder ever employee in the bargaining unit is a member of the bargaining agent, and participates in the affairs of that bargaining agent. It is the only means of assuring that all within the unit are members of the bargaining group or bargaining entity.

Third, the union shop has long been utilized to remove the cut-throat wage competition of non-union employers. Not only in the single shop or single plant, but in an industry.

As I will elaborate on later, the injection of even a single non-union member into a shop has a tendency towards undermining the established wage rates and established conditions.

Fourth, the union shop is the only means of insuring some equality in sacrifice, that is, of insuring that all who participate in the benefits of collective bargaining, the work hours, wages, and working conditions, shall contribute to the costs of achieving those benefits. The costs are

not inconsiderable.

It is to prevent the so-called "free rider" from tagging along in a shop or in a plant, accepting all the benefits, without making any contribution, either financial contribution, or contribution through participation in the affairs of the organization.

Fifth, it is utilized, and it has been utilized traditionally, for this very constructive purpose, of freeing the union energies from a constant striving to maintain status and to stay in the shop, and to free those energies for some constructive use, for some cooperation with employers, in conducting the affairs of the business, or the affairs of the industry.

As our economic brief shows, in industries where the union shop has long been in existence, in the Garment Industry, particularly, we find that there a remarkable degree of cooperation has been achieved between the employers and the unions; that it is only because of the freedom that the union shop gives to unions, to devote themselves to these constructive purposes, that the union shop is indispensible.

From this very brief exposition of the principal purposes of the closed shop or the union shop -- and we elaborate on this in our economic brief -- we think it is obvious that there is something more involved in a prohibition of the closed shop agreement than the mere making of a contract;

something much more involved than the making of a contract. We assert that it involves the exercise of a right which all experience has shown is indispensible to the right of self-organization or the right to join unions, in the first place.

Preliminarily, it must be shown that the right to form and maintain unions, the right of employees to form and maintain unions, is an exercise of a fundamental right. We assert specifically the right of assembly. It is not some natural right, although it does partake of a natural right. It is strictly a concommitant of the right of assembly, of working people to form unions and participate in their affairs.

Mr. Justice Frankfurter: How does this statute make inroads on that?

Mr. Thatcher: By prohibiting what we will show to be an indispensible concommitant of that right, without the exercise of which that right is ineffective.

Mr. Justice Frankfurter: But the right itself is not. You say that the momentum of the right carries consequences with it.

Mr. Thatcher: That is right, your Honor. That is right. It has been a long journey to establish that the organization of a union is a right protected under the First Amendment, but it has now been reached, we think, by the statement of this Court in Thomas vs. Collins, that constitutional rights are exercised by people in their everyday affairs; that it is the

small secular cause which is embraced under the First Amendment, and that economic rights, as well as political and religious rights, are embraced under the First Amendment.

Workingmen exercise the right of assembly in a very real and practical manner when they form unions and participate in their affairs.

Mr. Justice Reed. I do not quite grasp the Thomas vs. Collins argument.

Mr. Thatcher: In Thomas vs. Collins, this Court said in so many words that the right of assembly under the First Amendment does not merely embrace some great cause, the advocating of some great secular cause, it embraces small secular causes, it embraces the assemblage in economic affairs, as well as the assemblage in political affairs.

Mr. Justice Reed: The right to have a union?

Mr. Thatcher: The right to have a union, yes.

Mr. Justice Frankfurter: As I remember it, Mr. Thatcher, there was no opinion of the Court in Thomas vs. Collins. It was one of those unfortunate situations where five members of this Court did not agree, so there was no opinion of the Court in Thomas vs. Collins.

Mr. Thatcher: I did not note any dissent in any of the opinions, from the proposition that workingmen exercise a right of assembly in their forming and maintaining of unions. I did not note any dissent from that proposition, or that

Constitutional rights are applicable to small causes and in economic affairs, as well as political.

The true value of the right of the workingmen - and this is applicable to our whole approach here - is best seen when we realize that under the Constitution, the founding fathers created a society of free men. As long ago as Holden vs. Hardy, 169 U. S., 1895, this Court observed that an individual employee as a practical matter had no economic voice in his affairs. That was elaborated on in the Tri-City case, where it was noted particularly how individual employees were helpless in their deals with an employer, and that a union was essential to the maintenance of adequate wages and working conditions.

In Pollack vs. Williams, as the Court noted, through Justice Jackson, "When the master can compel and the laborers cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."

These facts, and the general nature of the labor organization as an assemblage of workingmen, each exercising individual rights, dictate that no Government, under the Constitution, can flatly proscribe the right of workingmen to form unions; that that is a right protected under the First Amendment.

Mr. Justice Reed: Is there any question that? Is there

any question of the right of unions to organize?

Mr. Thatcher: Your Honor, there has been no explicit pronunciation by this Court that the right of workingmen to form and join unions is a right protected under the First Amendment.

Mr. Justice Reed: I assume that this Court approves the right of union men to organize. Has anyone questioned it?

Mr. Thatcher: No one has questioned it in any of the briefs here so far.

As I said, all we have are expressions from this Court, such as in Jones & Laughlin, that the right of employees of organization is a fundamental right, and the expression in Thomas vs. Collins, - two Circuit Courts very recently have expressly stated that the right to form and join unions is protected, under the First Amendment. I do not think there is any quarrel with that proposition, so we will proceed from there.

The question, then, is whether union membership, as a condition of employment is, in the absence of some statutory protection such as we have in the National Labor Relations Act or the Railway Labor Act, a necessary and indispensible element of the right of self-organization. If it is, then we assert that that right is impaired under the principle that "You destroy my house when you destroy the prop that sustains my house."

Mr. Justice Rutledge: Let me ask you another question, which may be relevant at this point:

Do you contend it is a part of the right of free assembly, -- that is, including the right to form unions -- for union men not to work with non-union men? And that these statutes force them to violate that "right"?

Mr. Thatcher: That is precisely our point, your Honor: that unions cannot function. All history has shown that unions cannot function without this right to refuse to work with non-union employees; that that is the only way of maintaining standards and working conditions. I will go into that in somewhat more detail.

But that is out premise here, that absent some statutory protection -- and remember, these laws affect all operations in the State, so whether the Wagner Act or the Railway Labor Act is in existence is immaterial, so far as the constitutionality of these laws is concerned -- we say that the only protection, then, which labor has, to protect its fundamental right to organize, is the refusal to work with non-union members.

Mr. Justice Rutledge: Could you make a difference there between outlawing a contract, to serve that right, and a statute which would forbid striking?

Mr.Thatcher: Each of those three laws not only has to do with the right of contract, but also states that the right to work as a non-union member shall not be impaired.

Mr. Justice Rutledge: So this does not impair the right to work, even though there is not a contract, a formal agreement?

Mr. Thatcher: Now, the only types of cases that have arisen are the types of cases which we have here, where a contract has been breached, or where an employer has refused to hire a non-union employee for reasons of his own. We do not have a case where there is a prohibition against striking because of a closed shop. We have a case on certiorari here from Tennessee, where employes have been proscribed from picketing to maintain a closed shop arrangement, in protest of the hiring of non-union men, but that situation is not now before us. It is on certiorari and has been passed.

As Justice Rutledge has just noted, fundamentally the union shop or the closed shop is nothing more nor less than a group of employees who, having assembled together into a labor organization for their self-protection, refuse to work with any employee who is not a member of that association, and who refuses to comply with the rules of employment laid down by that association, either by the association itself, or by the association in agreement with the employer. That is all that a closed shop or union shop is: refusal by union workers, members of a union, to associate with, to work with, non-union members, who are not bound by the common rules of employment, and who refuse to be so bound.

Mr. Justice Frankfurter: This statute would not affect a voluntary withdrawal from employment where there are non-union people? A case where you would say "All right, if you do not want the union people, you go out and get your non-union people, we just will not work for you." Do you think these statutes cover that situation?

Mr. Thatcher: Yes. I think where it says that no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, that would hit that, if the employer, in acquiescence to that withdrawal, should decide that he has to discharge, or not hire the non-union employee.

Mr. Justice Frankfurter: No, but he does not discharge him. The union men walk out. They say, "You do what you please. We will get jobs elsewhere."

Mr. Thatcher: The employer wants to continue his business.

Mr. Justice Frankfurter: But suppose he stocks himself full of non-union people. Suppose all the union people walk out, and he then goes out and tries to recruit what is colloquially called "scabs". It would become a closed non-union shop as a result?

Mr. Thatcher: Then we have a breakdown, of course, of all collective bargaining, and we have an actual destruction of unions. That is our point. If that type of situation is

permitted, where the employer can freely hire only non-union employees, there is a breakdown of all collective bargaining.

Mr. Justice Frankfurter: That presupposes that the economic factor is such that that is the situation, and that that would happen.

Mr. Thatcher: As a practical matter, your Honor.

Mr. Justice Frankfurter: As a practical matter, they could all belong to the union.

Mr. Thatcher: Yes. If there is one dissenting member, as I will point out, that dissenting member may very well adversely affect the wage standards of the group.

Mr. Justice Frankfurter: Me may, or he may not. There may be no one dissenting member.

Mr. Thatcher: Then we have no problem.

Mr. Justice Frankfurter: Then we have no problem. That is my point.

So that all this is predicated on certain presuppositions, as inherent and unchanging in economic situations. Is that right?

Mr. Thatcher: Not as inherent; as has developed over the years, ever since unions have been in existence.

Mr. Justice Frankfurter. Maybe the position of unions has changed in the course of the years. Maybe their influence and their attractive power, their magnetic influence in getting people to join without any compulsions, as you have suggested,

should be considered.

Mr. Thatcher: Well, we have not found that true in the agricultural states, or in the South, your Honor, at all. We have found that it is absolutely necessary to utilize our traditional methods of embracing all employees in the bargaining units in compliance with the age-old economic principle that it is necessary to extend organization.

Mr. Justice Frankfurter: That has not always been true in the history of unionism, Mr. Thatcher, as you very well know. You suggest that the closed shop has been the picture of unionization in the English-speaking world, but that is not true, is it?

Mr. Thatcher: The closed shop relationship has been very much in the picture in the English-speaking world.

Mr. Justice Frankfurter: I did not say that it has not been in the picture, but it has not been the picture.

Mr. Thatcher: It has been paramount in the picture; as our economic brief shows, and as the history of collective bargaining shows, traditionally all craft organizations had a rule requiring their members not to work with non-union employees. That is the closed shop. That rule was enforced.

Mr. Justice Frankfurter: Is that the history of all labor organizations?

Mr. Thatcher: That is the history of all labor organizations.

Mr.Justice Frankfurter: Of all of them?

Mr. Thacher: With few exceptions. But by and large, yes.

Mr. Justice Frankfurter: Then the question is: How much the "by and large" is, and what judgment should be exercised with reference to the "by and large".

Mr. Thatcher: I think when a large body of men that traditionally exercised this right, needed it and utilized it to protect their organization, that history is very significant, and it has not been sporadic at all, on the contrary, in almost all cases, that has been the rule, where it has been necessary to utilize unions to protect the right of self-organization. And there have been very few exceptions to that rule. It has been true in England and it has been true here. It has been true in Scandinavia.

Mr. Justice Frankfurter: But the size of the membership has not been a static quality in the history of the trade union movement, has it?

Mr. Thatcher: No, it has not.

Mr. Justice Frankfurter: So that you are dealing with situations which have placed different authority, or weight, behind union efforts. Does it follow of necessity that that which was true in a stage of weak union conditions, must equally be true for_ever and ever in a state of strong union con-

ditions?

Mr. Thatcher: The records show, for instance, that only eight per cent of the employees employed in industrial occupations in the State of North Carolina, for instance, are under unions. The stage of union development there is very slight. In the South, union development is not very extensive -- in Arizona it is not very extensive. And these are the very States that have passed these laws, these States where union organization has not reached any mature stage.

It is significant that it is only in these agricultural States, where industrial workers are in a very great minority, that these laws are passed; and that is the very place where we need our protections the most.

Mr. Justice Frankfurter: But do you not have to break it down still further? In Arizona, does it make any difference how extensive, for example, the copper industry is? What about the relation of the copper industry?

Mr. Thatcher: This statute does not take that point into consideration. I would say those are the situations which cannot justify generalized statutes. If the statute had some reference to conditions in an industry, that might be different, but these have not.

Sidney and Beatrice Webb, in their great book -- they are probably the foremost scholars of trade union history in the English-speaking world -- stated flatly that:

"Any student of trade union annals knows that refusal to work with non-union members is coeval with trade unionism itself."

and then they go on, in that work -- we have referred to it in our economic brief - to show how virtually all unions in English-speaking countries - and they refer primarily to Britain there, with some reference to America - did necessarily adopt this rule of refusing to work with non-union members.

Mr. Justice Frankfurter: How can that be true, if you have such a small percentage of unionization in industry? There must have been a vast number of industries where you had both union and non-union members working together.

Mr. Thatcher: Of course, organization started first with the smaller unions and the smaller units, with the craft employees. It extended later, of course, to the mass production industries.

But historically, traditionally, the unions were first craft unions; and each of those craft unions had this rule of refusing to work with non-union members.

Mr. Justice Frankfurter: I am not suggestion that there was not refusal. I am suggesting that it is not a fact that there were not both union members and non-union employees workin in the same enterprise -- as a matter of fact.

Mr. Thatcher: Well, as a matter of fact, yes. But not in any extensive capacity.

Mr.Justice Frankfurter: I should think it would be in an extensive capacity, at a time when unionization, as a matter of percentage, was relatively on a small quantitative basis.

Mr. Thatcher: Then unions were not secure. Collective bargaining was not effective.

Mr.Justice Frankfurter: I am addressing myself at the moment to what the fact was.

Mr. Thatcher: That may have been the fact; but the fact also was that collective bargaining was in effect, as was organization.

This Court has noted, in the Apex case, and in the Tri-City case before that, that in order to render a labor regulation at all effective, it must eliminate the competition from non-union-made goods. That is the economic basis for the refusal of union members to work with non-union members.

The presence of even one non-union member in the shop -- unions found this out by bitter and long experience -- may, and often did, lead to first a breakdown of discipline and inability to enforce the common rule of employment, and a descending spiral of wage rates. That is why union members were traditionally so insistent on working only with union members, as a mean of enforcing those common rules of employment, laid down by the Association, or the Association and the Employer. Interjection of non-union elements would break down the wage standards. Universally that was true.

First, this relationship was carried out without formal contracts. The employees gathered together in unions and would merely notify the employer that "We have a rule that we will not work with non-union members."

The employer would accept that and would not employ non-union members. Later, as a meansof maintaining some stability in the relationship, formal contracts were entered into, so that it was not necessary to have periodic quittings of employment every time a non-union member might be employed.

That is the function of the contract: to stabilize the relationship. But the heart of the arrangement is the refusal to work with non-union members. The contract was merely an incidental element.

On this question of refusal to work, I do not see very well how union members could constitutionally be prevented from leaving employment peacefully in a refusal to work with a non-union employee. If that is so, I further do not see how it is possible to avoid a conclusion that a making of a contract formalizing that arrangement is bad - for this reason:

It seems to me that each time the employees might exercise what is their right, to quit employment in protest over the employment of a non-union employee, and the employer then discharges or refuses to hire the non-union employee, a contract is in effect or in substance entered into. In other words, I think a fundamental question in this case, which I

have not seen answered in the briefs of appellees, is how you can have a right - and it has not been denied here- to quit employment in accordance with the rule of your Association not to work with non-members, and still not let that be formalized by an arrangement with the employer, as a means of stabilizing employment relationships, so that there will not be periodic quittings of employment each time a non-union employee is employed. That is a question which will have to be answered somewhere along the line here, and I have not seen it answered yet.

I think a further historical proof of the indispensibility of the union shop arrangement to effective organization, is that the fight against unions has always centered on this element of the open shop.

Traditionally, whenever, in periods of depression or in periods of crises after a war - a prime example is the great open-shop drive of the 20's - the fight against unions is commenced, the opposition to unions has centered always on the union shop. It has been condemned as un-American, and all the rest. I think that is the history, and it has been true in every period of intense employer resistence to unionization, that that fight has centered on the institution of the union shop. That is a practical proof, I think, of the inseparability of the union shop relationship, and effective unionization.

Mr. Justice Frankfurter: Mr. Thatcher, what are the agreements between Governmental Agencies and unions, where there are effectual agreements? Are they closed-shop agreements?

Mr. Thatcher: Sometimes, yes, your Honor. They are, quite often.

Mr. Justice Frankfurter: Is there any material on that in your brief?

Mr. Thatcher: No, there is not.

Mr. Justice Frankfurter: Does it vary?

Mr. Thatcher: It varies. I think different concepts are applicable, where the Government is concerned --

Mr. Justice Frankfurter: I meant to indicate or imply no conclusion from that. I was just curious to know what the situation was.

Mr. Thatcher: There are in a number ofcases such agreements, between Governmental bodies, cities, states, municipalities, and organizations of municipal employees.

Mr. Justice Frankfurter: Is that the norm, do you think?

Mr. Thatcher: Oh, I would not say itnis the norm.

There is this further economic element involved: Our economic brief sets forth at length the correlation between the union shop relationship and an adequate wage rate. It is shown that universally "union shop" means high wages and security for workers. "Open shop" means low wages and inse-

curity. That is a prime economic fact of our industrial history, which cannot be overlooked.

Now, we say that experience is a great proof of necessity; that in the light of all this vast body of experience, the implication of the union shop, its effect in making strong effective unions and an ability to achieve adequate wage rates and adequate working conditions, indicates very strongly that it is a very necessary concomitant of the right of self-organization itself, absent statutory protections. It has traditionally, historically, age-old, been used for that purpose, and it has actually served that purpose, and all history, all economics, show that.

The fact that this great body of trade union members have adhered to this practice in the exercise of their constitutional right of self-organization, does give some constitutional weight to that practice -- we think -- on the same theory that in Murdock vs. Pennsylvania, this Court found that it was an age-old religious practice to distribute religious leaflets from door to door, and therefore an indispensible part of the exercise of the freedom of religion itself, not of free press, but of religion itself - that historically, traditionally, for ages, religion has been spread by that door-to-door distribution of pamphlets, and therefore that it was an indispensible element.

In the Heinze case, H. J. Heinze vs. NLRB, this Court

relied on the history of the trade union movement and of collective bargaining to show that a signed contract was indispensible to good faith collective bargaining. In other words, it is the fact that this practice has been indulged in and engaged in historically by unions throughout the world -- and it is not only in this country, but in Britain, New Zealed, Australia, and throughout the English-speaking world - the fact that the closed shop or union shop, or the union shop principle, has been utilized to maintain organizations, and as an effective and indispensible means of obtaining an adequate share in the joint product of capital and labor. That tradition and that practice simply cannot be overlooked in this case, as the States have blandly overlooked it.

There is some further proof of the indispensibility of union membership as a condition of employment in legal doctrine.

I think a good starting point in looking at the cases is Commonwealth vs. Hunt, decided over one hundred years ago, in 1842, in Massachusetts.

Chief Justice Shaw wrote the decision. There we have exactly the same type of indictment as we have in the North Carolina case, one hundred and six years later. There was alleged an agreement to work only with non-union members, causing a monopoly of employment. As Chief Justice Shaw characterized the indictment:

"The defendants, and others, formed themselves into a society and agreed not to work for any person who should employ any journeyman or other person not a member of such society * * *"

that was back in 1842, mind you; again showing that the practice was a dominant one even then.

The Chief Justice first of all found it manifest that any union seeks to be all-inclusive. It seeks to draw into its ranks all of the employees as a means of eliminating the competition of the non-union employees. He further found that the Association, in its rule, making membership a condition of employment, or making members not work with non-union members, was legitimate and on established principles. He did not elaborate. He merely said it was legitimate on established principles; that at any rate the union members, the members of that Association, were serving legitimate self-interests of their own. The fact that enforcement of the rule resulted in discharge of the worker was found, back in those days, even, not to be unlawful compulsion at all.

Half a century later, Justice Holmes, dissenting in Vegelahn vs. Gunter, found occasion to expressly concur with this reasoning, and he elaborated on this in his dissent, stating that it was manifest that unions must defend themselves, as far as possible, and that this refusal to work was not, as it was thought, something wicked. He said, "I

believe intelligent economists have given up that concept."

He said, "Similarly, I think that the contention that it is wrong for union members to work with non-union members, will be given up."

And he goes on to show that that is in their legitimate self interest, in that sense.

Coming down to the more modern times, I think the J. I Case case, J. I. Case vs. NLRB, decided a few years ago by this Court, is of great significance in our whole approach to this problem.

That case shows that it is inherent in the nature of collective bargaining that common rules shall govern all individual employment; that all individual bargaining shall be superseded by collective bargaining.

There, as this Court recalls, a number of contracts between the employer and individual employees had been entered into. Subsequent to the making of these individual contracts with individual employees, a union wonan election and asked for a collective bargaining contract.

The employer objected, saying that he had got these individual contracts that he had made, and that he could not enter into any collective contracts, because he would destroy rights under the individual contracts.

This Court said that the individual contract must be superseded by the collective contract, if collective bargaining is

to have any meaning.

This Court did not put it on a question of contract. It was not a matter of contract, this Court said, but a matter of certainpeculiar features of modern or any type of trade union bargaining, that collective bargaining must necessarily embrace all within a bargaining unit, and that the rules under collective bargaining must necessarily supersede any rule established by individuals bargaining with employers, even though those individual contracts might in some instances be more advantageous.

Mr. Justice Reed: That is purely statutory?

Mr. Thatcher: Your Honor, it is true that in those cases, and in the Order of Railway Telegraphers vs. Railway Express Agency and Railway Motor Supply, all companion cases, the right was statutory.

But this is what is inportant. These acts, the Railway Labor Act, the National Labor Relations Act, did not create the right of self-organization or the right of collective bargaining. That is a fundamental right, as enunciated by this Court in the Jones & Laughlin case. That is a fundamental right, not created by Congress. Congress merely gave expression to the philosphy of the trade union movement, and those were constitutional rights, which the State could protect as against individual interference, but which, in themselves were constitutional rights.

Mr.Justice Reed: Why "constitutional"?

Mr. Thatcher: Well, as this Court pointed out, in Jones & Laughlin, the right of organization is a fundamental right.

Mr.Justice Reed: As to the freedom of the individual.

Mr Thatcher: Because, without that, the individual is helpless.

Mr. Justice Reed: Because of the freedom of the individual to combine with others.

Mr. Thatcher: Because of the freedom of the individual to combine with other employees, in bargaining with the employer to obtain adequate wages.

Mr. Justice Reed: How about the right of the individual not to join a labor organization?

Mr. Thatcher: That was not involved. That is a concept which I will come to very shortly. That is the heart of this case: whether the right not to join is a constitutional light coextensive with the right of joining a labor organization.

Mr. Justice Rutledge: How far did your argument go, Mr. Thatcher? Would it invalidate a State Staute, drawn against the lines of the Taft-Hartley provisions'

Mr. Thatcher: The Taft-Hartley Act? You mean in respect to the union shop relationship?

Mr. Justice Rutledge: I mean you are asserting now that this outlaws, in substance, the right to strike, if one non-

union man comes into the shop. Whether that is the effect of the statutes, I do not say, but that is about the place to which you have taken the argument. Now, then, does that mean legislation which would purport to regulate rather than prohibit the union shop, such as by requiring its establishment only through two-thirds or three-forths vote, or some less prohibitive thing than we have here, in your view?

Mr. Thatcher: Yes, your Honor.

Mr. Justice Rutledge: They would go out the window too?

Mr. Thatcher: No, your Honor. That type of statute we have not attacked.

Mr. Justice Rutledge: We do not have to, here, but I just want to know where your argument is to lead.

Mr. Thatcher: Regulation permits the exercise of the rights under conditions laid down by the State; as you suggest, a majority vote, or a two-thirds-vote. We still can have our protection afforded by the closed shop, but only under conditions laid down by the State.

Mr. Justice Rutledge: Some of those prohibitions might go so far as to make it substantially unlawful not to work with a single non-union employee.

Mr. Thatcher: That is a question of degree, your Honor. When it amounts to that, then it is unconstitutional, we assert. When it amounts to merely regulation, reasonable regulation, it is possible.

I should make some explanation of the situation in the railway industry. The appellees have dwelt at length on the proposition that, well, we claimthat union shop contracts are indispensible to the adequate functioning of unions, they say "Well, look at the railway industry. In that industry there are no closed shops by law. Still the railway industry unions are strong and flourishing."

That is an argument that we have to meet. The answer to that argument is as follows:

First of all, we have to look back to the history of the Railway Labor Act, and the conditions under which that Act was put into effect.

The Act was put into effect by agreement between unions and management, joint sponsorship, before Congress, in which a vast and a new statutory scheme of protection of the right of self-organization and the right of collective bargaining and the right of exclusive bargaining status was, for the first time in this country, laid down.

Now, the union shop was discarded there, for a very good reason.

At the time the Railway Labor Act was suggested, company unions were widespread in the railway industry. Those company unions, those company dominated unions, I should say, operated under closed shop contracts, thereby preventing legitimate bona fide organizations in vast sections of the industry.

The unions did not want to perpetuate that by enforcing the closed shop, the union shop, so they agreed to a removal of the union shop and in return, however, for full statutory protections of all of the rights of self-organization and bargaining.

Now, it is only because of these substitute protections that the union shop was withdrawn, and it is only because of those protections that unions were able to flourish and maintain themselves in the railway industry.

Mr.Justice Reed: Did I understand you to say that at one time in the railway industry there was a closed shop on some roads? Is that it?

Mr. Thatcher: In large portions of the railway industry, yes, your Honor. Our economic brief goes into that history, and I should have made reference to the testimony of Father Jerome Turner before the last Congress, the 80th Congress, in passing the Taft-Hartley Act. He goesinto this history of the railway labor situation also.

Mr. Justice Reed: To why the closed shop was given up?

Mt. Thatcher: In return for the right of self-organization, collective bargaining, and exclusive recognition. And the protections under the Railway Labor Act, I might remind this Court, are much more full than the protections under the Wagner Act, particularly at present.

Mr. Justice Black: Did I understand you to say that

these same arguments were presented to Congress as the reason why it should not pass the law?

Mr. Tatcher: No, your Honor. There were arguments presented to Congress, not constitutional, but economic arguments, presented to Congress by employers, and by impartial observers - Father Turner did not take any side - as to why Congress should not absolutely prohibit any closed shop. Although permitting a union shop, Congress was attempting to prevent a closed shop. There were arguments presented as to why that should not be done. We are not here attacking the Taft-Hartley Act, because various forms of union protection are left. The only thing that is outlawed is the full closed-shop.

After thirty days, under the Taft-Hartley Act, all employers can enter into contracts with unions, whereunder all employees must remain members of the union, as a condition of employment.

Mr. Justice Frankfurter: If, as an economic fact, unionization was all pervasive in the railroad industry, what was the reason for relaxing it for dealing with an abstract situation; namely, - why, if there was a closed shop on all the railroads, write an abstract statute like that, forbidding it?

Mr. Thatcher: As I said, those are closed shops, and this was as to the rights of company dominated unions. The right of self-organization was not realized.

Perhaps I did not make myself clear. At the time the

Railway Labor Act was passed, large sections of the Railway industry were under contract between employers and company dominated unions, thereby frustrating the right of self-organization in large segments of the industry, and rather than perpetuate that condition --

Mr.Justice Frankfurter: Now, as to the Brotherhoods, the regular Brotherhoods, were those all closed shop agreements? Were the agreements with the Brotherhoods closed shop agreements?

Mr. Thatcher: In some instances they were, and in some they were not.

As a matter of fact, as our economic brief goes on to say, even the protections of the Railway Labor Act have been found, through experience, not to be fully effective, and there is now a very strong movement on foot, - all fifteen of the Railroad Brotherhoods or organizations in the Railway In dustry, the four major Brotherhoods, plus the A F of L craft organizations in the Railway Industry, have petitioned for a closed shop relationship in that industry, as a means of giving full protection to their rights.

Now, in the First Amendment, the right of assembly is involved evenvmore directly than by the argument that the union shop is an indispensible element of the right of self-organization. Any denial of the principle of union security is necessarily a denial of the right of self-organization it-

self. That is so for this reason:

Each of these laws, it must be noticed - and this is quite important - in each of these States attacks the results obtained under union shop relationships, and not the mere contract itself. The means, it is conceded, is a peaceful means; and as to the making of a contract, in itself, there is nothing unlawful or bad about that.

What is complained about in all of these cases, and in all of these States is the results obtained under a union shop; namely, that large segments of an industry are organized, that monopolies are created, that unions become too strong, that they make excessive demands, that featherbedding practices are engaged in, and all this is to be prevented by outlawing the union shop.

Obviously, any attack on such objectives must be an attack on the principle of self-organization itself; because it is the essential purpose of self-organization, the necessary purpose of self-organization, to extend itself beyond a single plant or a single shop to an entire industry.

As this Court pointed out in the Apex case and in the Tri-City case, it is necessary, indispensible to effective unionization of an organization for the right of organization to extend beyond a single shop, to be effective.

Mr. Justice Reed: Is there a constitutional difference between an industry and the employees in an industry?

Mr. Thatcher: If so, the statute would have to be predicated on that difference. If, for instance, we had a situation where a vast segment of our economy was under organization, where a strike in that vast segment might imperil national welfare, there might be some regulations laid out, but to prohibit the means of achieving that organization, without any reference to abuses at all - that is, going after the means, and not the abuses - is, we say, a deprivation of rights.

Mr. Justice Reed: These Acts seem to me to be restricted to employers' actions.

Mr. Thatcher: In the case of the unions in North Carolina, the union members, the union officers, and the unions, were indicted and fined and imprisoned.

Mr. Justice Reed: But it is a single entity in the industry.

Mr. Thatcher: As a matter of fact, in the North Carolina case there was just one contract. There were many contractors in the City, and the indictment specifically said that thereby a monopoly was created, involving that particular employer only. That was made a crime.

Now, if that is a crime, of course, the whole principle of self-organization is a crime.

Mr. Justice Reed: Let us suppose that you were working in cotton factory A. What about all the cotton factories in

a single county of North Carolina, or in the whole of North Carolina, or in the whole of the United States? You say you have a constitutional right to extend organization.

Mr. Thatcher: We have a necessary right to extend organization.

Mr. Justice Reed: And a constitutional right to have a closed shop in a single factory.

Mr. Thatcher: Or further. Yes, your Honor.

Mr. Justice Reed: Now, how much further do you have to go in your constitutional argument beyond the single factory?

Mr. Thatcher: We do not have to go any further. But this case involves only a single factory, a single employer.

Mr. Justice Reed: You do not have to go any further, to winthis case, or lose it. But do you have to, in order to establish your principle, say that you have a constitutional right to organize beyond the limits of a single factory?

Mr. Thatcher: We do not have to say that. All we have to say here is that we have a right to organize all the employees of a single employer. That is our North Carolina case exactly. That is all the indictment alleges, and that is all that is before you in this case.

The employees of the single employer have been organized and put under a union shop, by their own voluntary desire. That has been made the subject of indictment.

Mr. Justice Reed: Do you think it is a question of the degree of the coverage of the employer?

Mr. Thatcher: The degree is not relevant to these cases, no. However, I am raising the question of degree, because the appellees base their whole argument on the fact that monopolies are created, that abuses arise, that unions get too strong, and so on.

As I said, if that is a valid argument, if that is a valid justification for these laws, then equally would it be a justification for outlawing the entire principle of self-organization; because such organization, either in a single plant or in a series of plants, or in an industry, is indispensible.

I am merely answering the argument as to monopoly or as to unions getting too strong, by saying that the fact that unions get too strong cannot in itself afford a justification for these measures. It necessarily cannot, because then you are directly attacking the principle of organization if they are.

There is an argument, though, which is advanced, which might be peculiar only to the union shop relationship. And now we come to what I think is the heart of the case.

They assert that in addition to this creation of monopoly, in addition to any abuses that might be involved under a union shop relationship, the right to work is denied by a union shop arrangement.

The Nebraska and the Arizona statutes are predicated specifically on the protection of the alleged right to work; and the briefs of appellees, each of them, assert that as a primary justification for any law outlawing union security arrangements.

That argument, I think, is the heart of the case, and must be met.

In the first place, it should be noted that none of these statutes give any employee a right to work at any particular job for any particular employer; that there is not created or attempted to be created - nor do I think there could constitutionally be created - any right to work for a particular employer at a particular job. The right to work, in that sense, is necessarily a privilege. No one has an absolute right to work at any particular job for any particular employer, and that is not claimed under the statute.

Justice Brandeis stated in the Senn case:

> "A hoped-for job is not property guaranteed by the Constitution."

and these statutes do not attempt to protect that right either.

Second, it should be noted --

Mr. Justice Frankfurter: Would you mind repeating that?

Mr. Thatcher: The quotation is:

> "A hoped-for job is not property guaranteed by

the Constitution." -- Justice Brandies, in the Senn case.

Mr. Justice Frankfurter: Why is the non-union worker's relation to a job any different from that of the union worker?

Mr. Thatcher: All I am saying here is that no union member or non-union member has a right, an inherent right, to work at a particular job for any particular employer. That is a privilege, but not a right.

I cannot go in and demand to be employed by X employer as a right, whether I am a union member or not a union member.

I am merely pointing out that, in the first instance, this statute does not try to create or protect any such right, because there is no such right. It is merely a privilege.

Mr. Justice Frankfurter: For anyone.

Mr. Thatcher: For anyone, union or non-union employee. That is the first step only.

Second, it should be noted that even a complete closed shop contract, where you have to be a union member at the time of your employment, does not impinge on the right to work in the abstract, or in any absolute sense, If, as we must assume here, membership in that union is open to all employes under reasonable conditions. In other words, if the employee is confronted with a choice of joining the union or not working, and the union is willing to take him into membership, and he does not want to join, he cannot complain of being absolutely deprived of any right to work. He can work

if he wishes to join his fellow employees in a labor organization.

Mr. Justice Jackson: Can he assume that? Is that not about the heart of this thing? Can he assume that on reasonable terms and fair conditions, he is going to be admitted to membership?

Mr. Thatcher: Your Honor, I think we have to assume that here.

Mr. Justice Jackson: What do you say as to the Wallace case, where it was held to be an unfair labor practice for the employer not to enforce the exclusionary practices of the union?

In another case, a man was fired out of the union when he went into Court and claimed his rights under the Veterans' Act.

In other words, what is your answer as to the claimed abuses, as to whether they are inseparable from the closed shop proposition? We pretty well understand, I take it, the merits and advantages of the closed shop to working people. But are they beyond legislative reach? Must the legislature reach them in some particular fashion?

Mr. Thatcher: I say, as this Court has said, that this Court is, of course, free to regulate unions. It is free to go after any abuses that unions may indulge in. I mean, as to the States or the Federal Government, they are free to

regulate and reach abuses.

Mr. Justice Jackson: That, I think, they have been doing. They are trying to do it. That, I suppose, is the claim.

Mr.Thatcher: The proof in the North Carolina case and the allegations in the other two cases specifically states that unions in those States -- and it is the fact -- do freely admit applicants into membership and do not engage in arbitrary methods of expulsion.

But, assuming that that abuse is possible - and it is, of course, possible - we say that those abuses should be reached, just as the State of Massachusetts reached those abuses by this type of a statute.

In Massachusetts they say "Yes, you can have a union shop but any union operating under a union shop must admit applicants under reasonable conditions and must be not arbitrary in expulsions."

In other words, there are protections afforded both for admissions and against expulsions in Massachusetts, in any case where a union has a closed shop agreement.

That, we say, is a type of regulation which takes care ofa possible evil. Even though it is not an actual evil in these States, it takes care of a possible evil, and still does not subvert the basic constitutional rights.

We say it is just excessive and arbitrary to wipe out wholesale this traditional institution for the sake of reaching

what might be sporadic abuses. Those abuses can be reached.

Mr. Justice Jackson: You say this is an unreasonable abuse of State power?

Mr. Thatcher: We say that also, yes. That is our due process argument. We say that this case can be decided on due process grounds alone; namely, that the absolute prohibitions are excessive, where regulation could and has in other states, accomplished the desired results. We say that; yes, sir.

Now, the powers of the State to pass laws, of course, are different when the First Amendment is involved and when the Fourteenth Amendment is involved.

Mr. Justice Reed: You allege, I believe, that the union is open to all qualified persons, and that such organizations freely admit qualified applicants into membership and interpose no arbitrary or unreasonable requirements as a condition of membership.

Do you say that anyone who is a suitable person must be admitted to membership in the union?

Mr.Thatcher: Must be admitted to membership in the union, yes.

Mr. Justice Reed: And he could compel it by legal process?

Mr. Thatcher: Yes, sir. There are decisions, in fact, where Courts have compelled unions to admit members, in closed

shop contracts.

Mr.Justice Reed. Regardless of what work there is? So that if you had a union which had all the jobs in a particular factory, it can be compelled to open its doors and admit 5,000 extra men who want tocome in? They have then just as much right to work as the others?

Mr. Thatcher: They have as much right to belong to the union; but whether they have as much right to work as those who preceded them, I would not say.

Mr. Justice Reed: There may be limitations as to that, then. And the employer cannot fire except as to continuity of employment?

Mr. Thatcher: We do not advocate or uphold or attempt to defend the closed shop in that area. We say there that the States have the right to protect themselves, but that they should limit themselves to the possible abuses and not go to the age-old principle itself.

Mr.Justice Reed: And they cannot compel a closed shop?

Mr. Thatcher: Not a closed shop. We have never sought any law compelling an employee to join a union. We merely say that if the union can induce the employer to the belief that it is to his best interests to have no turmoil in the plant, the employer and the union should enter into the agreement -- always saving the right of individuals, to join that union, if they want a job. We do not claim that the union

has a right to be arbitrary.

Mr. Justice Jackson: But if the union has the right or can assert the right, I should think it would want to fight to exclude from its membership those who are not suitable persons. You had that in the Wallace case, where one union said, "We are not going to admit these fellows. They are fighting us. They want to come in and take us over. We are not going to have anything to do with admitting them."

Mr. Thatcher: Then we get back to the majority principle.

Mr. Justice Jackson. Are there not requirements for admission to the union of prospective members?

Mr. Thatcher: Of course, your Honor, they must be qualified.

Mr. Justice Jackson: What do you mean by "qualified"?

Mr. Thatcher: Well, to take a particular case, there is the employee who is alien-minded. We say there that the majority concept, which has become, as Justice Rutledge said, a bulwark of our collective activity, must govern. That man, if he wants to work there and join the union, must be in sympathy with us. He cannot work against us. Otherwise, you again break down the collective bargaining process. It always goes back to that.

Mr. Justice Jackson: That is exactly what is involved here. The fellow who does not join your ideology cannot get

a job.

Mr. Thatcher: I would not say that it would extend so far as "joining the ideology". He cannot seek to tear down your ideology or disrupt your relationship, certainly. We say that the right of the majority in any unit is paramount to the rights of individuals; that these freedoms are freedoms in an organized society, and not freedoms in anarchy or dissension.

We say that if the majority so desires, the individual must accede to that majority under the plain concept of majority rule, which has become traditional.

Mr. Justice Frankfurter: But you are saying something more than that. Your argument is deeper than that. We are not called upon to sit in judgment upon the validity of the various considerations that are relevant to the problem of the individual, as against the group. That is not our problem here.

Mr. Thatcher: I think it is.

Mr.Justice Frankfurter: No. Our problem is: What is an allowable judgment of the legislature upon those problems?"

And what you are saying is that the States are forbidden from saying that unions should attract membership because people want to belong and not because they have to belong.

You are saying that that is to be ruled out as a matter of the American Constitution.

Mr. Thatcher: No, we merely assert that the right of individuals to work as non-union workers, shall not be utilized to subvert the majority group in a plant, or in a shop.

Mr. Justice Frankfurter: But in that statement you are assuming as a postulate that it would subvert, and that a Legislature cannot have a contrart judgment on that. That is what you are assuming.

Mr. Thatcher: Well, all our history, all our traditions, have been --

Mr. Justice Frankfurter: "All our history" covers an awful lot of territory, Mr. Thatcher. "All our history" is an awfully big phrase.

Mr.Thatcher: I appreciate that. But all his tory that I am familiar with, at any rate, and all his_tory that unions are familiar with, at any rate, shows that the influx of non-union members into an organized shop inevitably tears down the bargaining unit, the bargaining power, and, eventually, the wage standards.

Mr. Justice Frankfurter: Even assuming that you are right, it may merely show that the history of the conduct of the past shows that. It does not show that you may not have different conditions, or that there may not be a judgment as to different leadership, or different attractions, as to different public opinion, and that you may not get a different result.

Mr. Thatcher: I do not see how we can judge these constitutional concepts in the abstract. We have to get back to some practicalexperience.

Practical experience shows that our right of self-organization is a constitutional right, necessarily, and necessarily involves exclusion of non-members, as making that right effective.

Mr. Justice Frankfurter: Of course, if it is a constitutional right, then there is an end to the argument, but that is the whole inquiry here.

Mr. Thatcher: I thought it was agreed that there is a constitutional right of self-organization.

Mr. Justice Frankfurter: That means that you cannot forbid them to organize. It does not mean anything as to what consequently shall flow from that, as to people who do not want to be organized.

Mr. Thatcher: I think it means that you have an ability to maintain that organization effectively.

Mr. Justice Frankfurter: Then there is the question as to whether you can or cannot maintain it effectively, and under what conditions.

Mr. Thatcher: I do not know what we can go to, other than our practical experience along those lines. We cannot go to abstractions.

Mr. Justice Frankfurter: But these are not abstractions,

but judgments of the Legislature.

Mr. Thatcher: Based on what?

Mr.Justice Frankfurter: Mased in their judgments of economic and social facts. They are not superseding the constitutional right, but the question is whether you have the right which you contend for.

Mr. Thatcher: Once it is conceded that we have the right to self-organization, and once it is appreciated, as it must be appreciated, that the union security exclusion of non-union mebers is indispensible to an effective exercise of that right, I do not see how you can say that a Legislature can supersede that by some abstract judgment.

Mr. Justice Frankfurter: There was no man who knew more about labor unions, not even in the labor movement, or who did more to promote them, than Mr. Justice Brandeis. As you probably know, he was opposed to the closed shop.

Mr. Thatcher: Well, in part.

Mr. Justice Frankfurter: All you are saying is that this is not within the realm of argument, when you say "In part". He thought the closed shop was a very detrimental thing from the point of view of unions. It is not my job or my competence to say whether he was right or wrong. I am merely saying that he was not an abstract-minded man, and yet he entertained that view.

Mr. Thatcher: Yes, but when he professed those beliefs,

there was, at that time, no constitutional right of self-organization. It had not yet been established. That makes a great difference, because we are proceeding from that premise always. We are proceeding from that premise to the premise of majority rule.

Mr. Justice Frankfurter: Considering the fact that he helped establish it in the Senn case, we are not unaware of the thoughts he had on this subject.

Mr. Thatcher: No.

Well, getting back to the constitutional argument here, that there is no parity between the right of a person to work as a union member and the right of a person to work as a non-union member: The State asserts, and it has been asserted in the briefs here, that the right to work as a non-union member is a constitutional right which stands on a parity with the right to work as a union member.

Now, there is a verbal parallelism there which is helpful and has been helpful in getting this Legislation passed. But it lacks preciseness.

As Judge Wyzanski commented briefly in an article in the California Law Review, there is a great difference between the right to work as a union member and the right to work as a non-union member, and each must be considered separately in the light of what each connotes. It is only in the light of the reasons for and the scope of the right to work

as a union member that we can evaluate the supposed concomitant right of working as a non-union member.

Now, why has the right to work as a non-union member been held to have some constitutional protection or sanction? Because, as we have seen, if employers are free to deny employees the right to join unions and work as union members, thereby the employees will be unable to achieve an equality of bargaining power, thereby they will be unable to obtain adequate wages, working conditions, and thereby the employees might very possibly become wards of the State, working under substandard wages, unable to adequately maintain themselves and their families.

That is the precise reasoning inWest Coast Hotel vs. Parrish, the precise reasoning which supports a law outlawing yellow dog contracts, the precise reasoning which supports a law outlawing discrimination against employees because of their union membership.

That goes back to the plain due process concept, that a public good is effected by outlawing discrimination against union members; namely, preventing employees from combining so that they can obtain adequate wages for themselves, and not become wards of the State.

That, in very brief outline, is the constitutional basis and the justification for outlawing yellow dog contracts and giving the status of right to work as a union member.

In terms of the rights of the employer, this Court in the Jones & Laughlin case said that when an employer denies employment to a union member, he not only is interfering with a constitutional right of that employee, but is not protecting any legitimate interest of his own, when he refuses employment to a union member.

Now, such considerations simply are not applicable when we consider the right to work of a non-union member, or the right of an employer to say to a non-union member "I will not employ you because of your non-union status." There is no possibility that because of such refusal by the employer, that employee will be unable to maintain adequate wages in association with workingmen, as an alternative to becoming a ward of the State.

Mr. Justice Black: There is a chance, do you think, that he will not get any wages at all?

Mr. Thatcher: Not if he joins the union; if union membership is open to him and he joins the union.

Mr. Justice Black: Suppose he honestly and conscientiously believes, even as an essential religious belief, that it is wrong to belong to a union ?

Mr. Thatcher: That, your Honor, is a different case. That is a case which has arisen constantly in the trade union movement. There are areas in this country -- Pennsylvania is a notable one -- where certain religious sects have a creed

against joining unions. And in those States, the unions, as a matter of practice, do not require the members of that shop who belong to such a sect to belong to the union. That is a very minor case, which does not belong here at all. I say that a statute which would make such an exception would certainly be reasonable. No one could complain about such an exception.

Mr. Justice Black: Suppose he did not believe it on religious grounds, but was just one of these hard-headed fellows who did not like unions, who did not believe in them?

Mr.Thatcher: Has he the right to subvert the desires of the majority of the employees in the plant, who wish to maintain a union, to maintain wage rates, and does he have the right to go in and bargain on his own?

Mr. Justice Black: You say that under those circumstances even though he believed that, even though he was opposed to unions, no law could be passed which would protect him in his right to work?

Mr. Thatcher: Religious convictions aside, yes, your Honor; and assuming, of course, that membership in the union is open to him, and assuming further that the majority of the employees in the plant have chosen a union and desire to work under union conditions. Those two things must be assumed always, and we assume those throughoutnour argument here.

Mr. Justice Frankfurter: You therefore must assert

-- and your position is -- that the Legislature is not entitled to judgment. And it would make no difference how strong the union was?

Mr. Thatcher: I would say that if the right of this fellow in that connection had no impact on the majority in the shop, considerations of choice would have some weight. But where there is a direct effect, a necessary effect, of the influx of any group of non-union members in a union shop, a union plant, his rights must be subverted to the majority rights.

We live in an organized society, and in an economic unit we have an organized society. The union acts as a government, there, for the employees; duly chosen by the employees, it establishes their wages, which are applicable to all.

Mr. Justice Black: The union acts as a governmental organization?

Mr. Thatcher: No, your Honor. I merely make the analogy that in a smaller economic society, the union acts for all the employees, once it is duly chosen by a majority of the employees there, it acts for them in the limited matter of wages and hours. Now, since, in that society, majority rules, as in our political society, and since, as Justice Rutledge has stated in the CIO political action case recently, the majority rule has become the bulwark, indeed an indispensible element of our collective society, when speaking of trade unions, that

right of an individual must be subverted to the majority rights. Liberty is not liberty to be an anarchist. Liberty is liberty in an organized society, as this Court has said time and time again. Freedom or liberty must always be taken with the concept of how and where it is exercised; and where it is exercised in contradistinction to the majority group, the duly chosen majority group, that right must be subverted, particularly where the exercise of that right subverts the rights of the majority.

Mr. Justice Frankfurter: Is it fair to say that your argument gets down to this proposition: that this Court must hold that such a law makes impossible the effective functioning of unionization; that we must so decide that, as an incontestable fact; and that with such a statute, unions could not function effectively?

Mr. Thatcher: That is one of the elements as to the First Amendment.

Mr. Justice Frankfurter: That the Legislatures of Arizona or North Carolina or Nebraska, or the other States of the Union that have passed this statute -- never mind what I think about this statute when we are off the bench -- could not reasonably think that these statutes would not render ineffective the functioning of unions? That that is not an entertainable idea by people who think about this subject, with duty to legislate?

That is the proposition.

Mr. Thatcher: That goes to the First Amendment argument, yes.

Mr. Justice Frankfurter: That goes to all of these things.

Mr. Thatcher: It does not go to the due process amendment.

Mr. Justice Frankfurter: Certainly it does, because that is an entertainable thought, and the statute is not without due process.

Mr. Thatcher: We can argue that there are other ways of obtaining the legislative objects, by regulation.

Mr. Justice Frankfurter: But it is not for us to tell them which choice to make, if this is an allowable and entertainable thought.

Mr. Thatcher: Well, as I will point out later, this Court has said, and Justice Holmes has said, that where regulation can accomplish desired results, and the extent of the taking is very great, and the evils to be remedied are incommensurate, Legislatures are acting arbitrarily when they flatly prohibit, rather than regulate. That is a concept we have not reached yet.

Mr. Justice Frankfurter: He said that in all the cases, with one exception; there was a dissent where it struck down legislation, not where it sustained legislation.

Mr. Thatcher: Well, I will try to get into that in my police power argument shortly.

Now, time is running short --

Mr. Justice Reed: What about the right of the individual to bargain in collective bargaining.

Mr. Thatcher: Well, as the J. I. Case Company case shows, that right must necessarily be subverted tovthe collective right to bargain, if collective bargaining and self-organization are to have any meaning. Necessarily, when individuals can bargain with the employer, organization is destroyed.

Mr. Justice Reed: Have we said that individuals cannot bargain?

Mr.Thatcher: You did state that his right to bargain individually cannot conflict with the paramount right of the group to bargain collectively. Otherwise, collective bargaining is a nullity. You did say that'

Mr. Justice Jackson. We said that the majority prescribe the terms and conditions of the shop, the working conditions and the wages, and that sort of thing; that is a function of the majority, under collective bargaining, and it does not touch the closed shop issue. And I should think it fairly obvious that you cannot have collective bargaining if you also have every individual making a deal of his own on the side.

Mr.Thatcher: That is the very purpose of the union shop, your Honor.

Mr. Justice Jackson. But I thought it was stated that the majority can state the conditions of employment, the wages,

the things that go with collective bargaining, and then the individual can come in and work under those conditions, which were established by the majority. There is nothing in that case, so far as I can see, that touches the right of the majority to also say that a man who is willing to accept those conditions which are established in the shop, cannot be employed.

Mr. Thatcher: What if he is unwilling to accept them?

Mr. Justice Jackson: He cannot work if he is not willing to work at the wages and under the conditions set. But if you say that he has to be in sympathy with a majority of the union, then you are adding something to the case that was not there, and you are adding something that seems to be entirely at variance with what this Court said in the Wallace case; where they required, as I see it, some people utterly out of sympathy with the union, who fought it, to be taken in, or at least to be given jobs, under penalty of being guilty of an unfair labor practice, under the closed shop agreements.

Mr. Thatcher: In the Wallace case, as I recall, there was an element of conspiracy between an employer and a union to discriminate.

Mr. Justice Jackson: With respect to a closed shop contract. How do you reconcile that philosophy in the Wallace case, with this contention as to the rights of the

State with respect to a closed shop agreement?

Mr. Thatcher: That was, I think, strictly under the Wagner Act; where the employer and the union, in non-compliance with the Wagner Act, without majority choice, and strictly as a collusive matter --

Mr. Justice Jackson: The Labor Board required the employer to enter into a contract. The union refused to admit the member.

Mr.Thatcher: I must read that case. Then I could answer later.

Mr. Justice Jackson: If it is an unfair Labor Practice, on the part of the employer there, I do not see how you can reconcile that with your argument.

Mr. Thatcher: I have discussed already the inadequacy of the claimed justification of monopoly; that is, that if that is a valid excuse or reason for outlawing union security agreements, then it is also a valid reason for outlawing the entire principle of self-organization.

As a matter of fact, it has been observed time and time again by this Court, that that monopoly of the sort where all employees in an industry are union members, is not the sort of monopoly which is an evil. It is, as a matter of fact, a concomitant, a corrolary of free competition, to equalize the factors that determine bargaining power.

Justice Holmes, in Payne Lumber Company vs. Neal, in

speaking of an attempt by a carpenters' union to extend organization nationally, and in an argument that thatwwas monopolistic in character, stated that such attempt had "no tendency to produce monopoly of manufacture * * * since the more successful it is, the more competitors are introduced into the trade.

In Frankfurter & Greene, there is a similar statement, that "the right of combination by workers (for, inter alia, union security) is itself a corrolary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power, ***".

Just a word on due process.

Our central argument under due process I will just dwell on for a few minutes.

Our central argument under due process is this: that here we have an ancient traditional practice, a traditional subject matter of collective bargaining, an institution which is indispensible to adequate functioning of unions, and furthermore, which has many salutory effects in promoting healthy conditions in an industry and permitting cooperation between an employer and a union, and so on.

It is something which has existed for years, is an age-old practice, and is something which has not in any sense an inherently evil aspect in it.

The justifications for a complete prohibition must indeed

be strong, and we assert, under the Mahon case and under the Adams vs. Tanner case --

Mr. Justice Frankfurter: Are you really urging on us Adams vs. Tanner, Mr. Thatcher? I put it to you in all candor.

Mr. Thatcher: Yes, for this reason, your Honor:

In Adams vs. Tanner, Justices Brandeis and Holmes dissented, but in that case there was an attempt by the Legislature flatly to outlaw private employment agencies. It was the State of Oregon, or the State of Washington, I think -- I forget which it was. There was that attempt to outlaw private employment agencies.

The majority of the Court said there might be evils springing from that, but they should get after that evil and not outlaw something which was inherently all right.

Justice Brandeis dissented, but on the proposition that the evils were inirradicable and inherent and no other way of reaching the evils could be reached except by absolute prohibition.

Now, that is not our case at all. It is not asserted and it cannot be asserted that the alleged evils flowing from the closed shop are inirradicable or inherent in the union shop relationship, and so we assert that lacking that showing, or any attempt to make that showing, that complete flat prohibition of the principle is excessive, under any due process concept.

Otherwise, under a mere invocation of the police power and the possibility of some abuse, the State could outlaw any institution. There would simply be no end to it.

Now, labor is the first to appreciate the need for social experimentation by the State. Of course, as we know, there was an era when labor was the largest sufferer, because of a tendency of an earlier Court to strike down legislation on property concepts. But we say that there cannot be a wanton destruction of traditional rights; that there must be a limit; that otherwise traditional rights are at the mercy of an excited populace, to use the language of ex parte Milliken.

Mr. Justice Frankfurter: I suggest that we would be at the mercy of the New Deal if this Court would reaffirm Adams vs. Tanner, and decide it with approval.

Mr. Thatcher: As I say, in our brief, we agree with Justice Brandeis' dissent, and his reasoning in the dissent and his conclusion in the dissent; namely, that where it is necessary to eradicate an evil, to prohibit an institution or an activity, such prohibition is all right. Justice Brandeis never went further, and I do not think he would go further.

Otherwise, as I have said, as I am stating here, there is no institution, no occupation, which could not be prohibited flatly prohibitied, under a claim that there is some abuse possible.

Mr. Justice Frankfurter: He merely thought that the Legislature was entitled to think that was the way to deal with that problem. He did not have an independent economic view on these matters. He merely considered, in all these cases: what is it that those whose responsibility it is to legislate are entitled to believe about these things? Most of these matters lie in the domain of belief.

Mr. Thatcher: If I may dissent there, slightly, Mr. Justice Frankfurter:

Mr.Justice Brandeis did not put it merely on the grounds that the Legislature might think this. He put it on the grounds that it was a fact, that these evils were inherent. He went to great pains to dig into what the private employment agencies were, as an institution, and what the evils were, and how they were ineradicable as a fact.

Mr. Justice Frankfurter: The justification for the Legislature's judgment, - it is not the business of a member of this Court to be dogmatic about economic data.

Mr. Thatcher: No, but on the other hand, a mere assertion cannot bootstrap any police power law into a constitutional law.

Mr.Justice Frankfurter: It certainly cannot. That is why he marshalled all this evidence. It was not because he subscribed to it all. How could he?

Mr. Justice Black: Do I understand your argument to

state that he decided that he did not want any employment agencies; that it was bad for the community? That such laws could never be put into effect unless we decided it was a good thing?

Mr. Thatcher: No, not that it was a good thing; it was a matter of what reasonable men could reasonably determine from available economic evidence, from an examination of the facts and circumstances.

Now, where there are hearings and findings -- again, that is not our case.

Mr. Justice Black: Do they have to have hearings each time?

Mr. Thatcher: Well, absent that --

Mr. Justice Black: -- no law could be passed by the Congress or the Legislature?

Mr. Thatcher: Of course, laws can be passed absent hearings and findings, but if there are no such hearings and findings, I think we are entitled to show, as we have not had an opportunity to show, just what is involved in a prohibition; and that these evils are not ineradicable from the union security principle, and that the principle can be maintained and all possible evils taken care of by appropriate regulation, as States have done, by regulating the mode, the type of contract, or the internal operation of the union.

Mr.Justice Black: Did we also consider as a possibility that there might be a chance, through the electorc of the State, people who vote, that a new Legislature would deal with the law? That is possible?

Mr. Thatcher: That is right. But again, that is a judgment of the People, and the judgment must be predicated upon some reasonable grounds.

Mr. Justice Black: What do you understand by "reasonable" in that illustration?

Mr. Thatcher: That reasonable men cannot disagree that such is so.

Now, if there are individual liberties in this country which are to be protected under the Constitution, freedom to engage in an ordinary occupation, freedom to carry on traditional practices, they cannot ordinarily be struck down by a Legislature. There must be some test somewhere, some starting point somewhere.

We say the starting point here is in an examination of all facts, and in a judgment by this Court that reasonable men could not conclude, on the basis of all available evidence, that outright prohibition was necessary to reach the evils which the Legislature had a right to try to reach.

Mr. Justice Black: You are, in effect, arguing, are you not, that we ought to determine whether the economic affairs of the country and the economic practices of the country should

continue as they have been, or whether the State Legislatures should be permitted to change them? There is a difference, is there not, between economic affairs?

Mr. Thatcher: Yes.

Mr. Justice Black: I understood you to say that you placed them all on the same basis.

Mr. Thatcher: No.

Mr. Justice Black: There is a difference, is there not, between those protections that are absolutely guaranteed, those things that are absolutely guaranteed, and the practice of trade and commerce, in connection with whether they will have employment agencies, and how many they will have?

Mr. Thatcher: That is right.

Mr. Justice Black: Are you basing this part of the case on the ground that the Court must project the traditional pattern of business in the State, and the Legislature cannot do away with it?

Mr. Thatcher: In the absence of some reasonable circumstances, justifying the doing away with it.

Mr. Justice Black: I thought we had held that one State had gone very far towards abolishing any profitable business at all. Was there not some case in South Dakota or North Dakota? Green vs. Frazer?

Mr. Thatcher: I am not familiar with it. That again, though, is a matter of degree. We still have the function

of this Court to protect against arbitrary interferences. I do not know on what basis you want to put it, but certainly there is not an absolute and arbitrary power on the part of Legislatures, to prohibit as they will.

If they are traditional practices, there must be some reasonable circumstances justifying the abolition. Otherwise, we have no liberties left, no liberties or freedoms left. The very purpose of the Constitution is to preserve certain liberties to individuals.

Mr. Justice Black: Is it to preserve individual freedoms, or --

Mr.Thatcher: Both. The Fourteenth Amendment has to do with liberties and rights of a less fundamental nature, but nevertheless those rights are protected.

Mr. Justice Black: What do you mean by "fundamental rights?"

Mr. Thatcher: Rights of liberty, speech, assembly.

Mr.Justice Black: What others are fundamental?

Mr.Thatcher: Well, those rights protected under the First Amendment.

Mr. Justice Black: What others?

Mr. Thatcher: I say those are the only fundamental rights. But there are rights existing under the Fourteenth Amendment.

Mr. Justice Black: You do not think an employment agency

has a fundamental right in that respect?

Mr. Thatcher: It is not a fundamental right at all, but it is a right which cannot be destroyed.

Mr. Justice Frankfurter: My State of Massachusetts just rejected by heavy referendum vote a law like this. It can be done.

Mr. Thatcher: I know that. But where it has not been done --

Mr. Justice Frankfurter: If it has not been done, it could be done. Some of these laws are passed by referendums. What referendum can give, referendum can take away.

Mr. Thatcher: In the meantime, are we to suffer, if there is no basis for it?

If fundamental rights are transgressed, are we to suffer?

Mr. Justice Frankfurter: This is not a Court for the relief of all suffering.

Mr. Thatcher: It is certainly the court for the protection of rights.

Mr. Justice Frankfurter: That is right; Constitutional rights.

Mr. Thatcher: Constitutional rights, Fourteenth Amendments or First Amendment.

Mr. Justice Frankfurter: On that we have agreed.

Mr. Thatcher: There is one thing more, an element of confiscation, which is involved here. Under the Steele and

Tunstall cases, this Court has said that unions must serve all within the bargaining unit equally; that is, they cannot establish wage rates and give them to union members, and not to non-union members.

Now, this statute would foreclose us from requiring that those who accept those benefits contribute to the costs. It is exactly analagous to a situation in which a public utility or a common carrier was required to give certain benefits or certain services to some customers for nothing, and to other customers for the usual rates. In other words, since, under the Steele and Tunstall cases, we are more or less in the status of a carrier or a utility in so far as being required to serve all equally within our bargaining unit is concerned, we say that then equally we should have a right to require all those within that unit to contribute to the costs of procuring those benefits. And naturally, a deprivation of that right amounts to confiscation; just as in the case of utilities, this Court has held that where utilities have been required to serve a certain class of customers for a lesser rate or for nothing, that amounts to confiscation.

Mr. Justice Reed: Do you think it would be unconstitutional to give U. S. Steel a better rate than their competitors?

Mr. Thatcher: Not if they voluntarily did it; but if it was required by a Legislature, which is what we say is being done here, that is a different story. And in that type of

case, this Court has held that there is confiscation involved.

Thank you.

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ORAL ARGUMENT OF GEORGE PENNELL, ON
BEHALF OF APPELLANTS.

Mr. Pennell: May it please the Court:

There are always two sides to every question. I want to argue the position of the defendant Whitaker in the North Carolina case, and also in the Arizona case, the position of the employer.

In the North Carolina case, the defendant Whitaker is an employer, and for thirty years has been engaged in the contracting business in that State, in the City of Asheville; and during thirty years of time, before any labor laws - and in North Carolina we have never had but two labor union cases before our Supreme Court - he elected and chose to operate a contracting business in which he only employed union workmen.

Then our General Assembly comes along and enacts this statute, which has no criminal provision in it; but our Courts, in the companion case, said that when the Legislature of North Carolina declared it the public policy of our State, anyone who violated that statute was subject to a misdemeanor, either a fine of $2,000 or imprisonment for two years, but a minimum fine on the corporation of $1,000, for violating this Act.

Defendant Whitaker was, along in 1947, doing the same thing he had done for thirty years. He contracted and agreed with the various labor organizations that they were to carry

out the contract as in the past, and that he was to employ his workmen through the business agents of these various labor unions in the City of Asheville.

Upon the making of this contract, and without proof of any kind that he had done any work, he was indicted for merely signing a contract that he would select union people, brick-masons, carpenters, electricians, and what not, to carry on his building activities there.

So, we have in this North Carolina statute, a criminal prohibition as to any person making a contract with or employing workmen of any kind who belong to a union.

This case went to our Supreme Court; They held it was a valid exercise of the police power and in no wise violated any of the Constitutional inhibitions.

This record shows, as to the conditions down in North Carolina, that we only have about seven per cent of the population who are in unions.

As to Mr. Whitaker, the record shows, so far as the territ that he is in is concerned, that eight per cent of his competitors employ only union labor, and he finds himself in the position that the State of North Carolina has taken away from him a privilege of hiring whomever he pleases. If he prefers or chooses to employ through the various business agents of these unions, then he violates the law, and can go to the chain gang for exercising that privilege.

So, as a matter of fact, under this record, we certainly have no monopoly in the State of North Carolina, in a man deciding what type of employees he might get.

This record, may it please the Court, furthermore shows that union security agreements have resulted in stability of employment relationships in our State. It has promoted harmony and cooperation between the employer and the employee, and it has eliminated strife and bitterness, both within the plant, and as between rival labor organizations, to give an employer of labor the right to go out on the market, and have the right to hire union workmen, if he wants to exercise that right; and, of course, if he does not want to do it, he does not have to.

This record furthermore shows that as a result of Mr. Whitaker's method and proposal, to hire only union labor, he gets the type of workmen that he particularly wants, because of the training and the experience that the members of these unions get, through an apprenticeship system, rather than the picking up of any type and kind of labor that might come along.

This record shows, furthermore, from the standpoint of the employer, that the making of these contracts brings about stabilization, by the predetermination of actual wage conditions.

An employer in the construction business, knowing and

realizing that here is a contract that is going to cost so much to get material out of Proctor, Vermont, knows the columns that go into this building, and other things, and he also knows that for a certain period of time he can get labor at a fixed, established price.

So, the result of it has been, from this employer's standpoint, that it means a great increase in production.

Now, let us take the situation on the other hand.

This Act comes along in North Carolina, and says that a man cannot make any inquiry as to whether a workman is a member of a union or not, whether he does or does not belong, and when you look at it from the employer's standpoint, this Act has the result for him that he cannot make this inquiry, and he cannot make a contract to exercise the right to hire whomsoever he pleases, when it comes to the hiring of his labor.

(At this point a recess was taken for thirty minutes, after which the oral argument was resumed.)

End CL