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.

Date: November 9, 1948.

VOLUME 2

ALDERSON REPORTING COMPANY
OFFICIAL REPORTERS
306 NINTH ST., N. W. WASHINGTON, D. C.
NA - 1120 - 1121

Volume 2

I N D E X (Continued)

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ORAL ARGUMENT OF GEORGE PENNELL (Continued)

Mr. Pennell: May it please the Court, in the Arizona case, the employer is the State Federation of Labor. They operate a printing press which publishes the organ for the State Federation of Labor in that State, and they customarily operated it solely and exclusively as a union plant. They are concerned with the factual situation here, as well as the application of the law in that State, as to whether or not the State Federation of Labor can make a contract and employ their own members to support and operate the Labor Union to get out that paper for them.

We most earnestly contend that if the statute applies in a case of this kind, it arbitrarily, completely would take away from any organization the right to select whom to work for it.

For example, it would say to Baptists in North Carolina, to Catholics in North Carolina or Arizona, operating a school, "You cannot employ your own membership to do the very work for which you are created" and that is where we are on this Act. It is not just a labor union matter, but it puts any employer, of any type and kind, in a position where he has just lost control of the right to exercise his judgment.

Now, in both of these contracts, and in the North Carolina contract, which is in the record, the employer, after executing the contract, has the right to hire, to fire, to discharge for

incompetency, indifference, for intoxication, or for any satisfactory reason.

We say that this is just going beyond the allowable judgment of the Legislature of any State, to say to an employer, "You cannot hire this person, you cannot make any restrictions in any way, shape, fashion or form. If you do, you are liable in damages, or, in those cases where there are criminal statutes, you are liable to imprisonment or fine."

Mr. Justice Jackson: Does the Act prohibit you from hiring them, or does it prohibit you from making a contract?

Mr. Pennell: It prohibits both, your Honor.

Mr. Justice Jackson: If the employer, from time to time, hires people, and they are all union people, is that prohibited

Mr. Pennell: That is prohibited under this North Carolina Act, your Honor. It just completely and arbitrarily takes a man running a little grocery store, or engaged in business otherwise, and removes his every right as to the matter. It just throws it open, and that is why we say that it is absolutely arbitrary, to the point that it violates the protection which the Constitution gives.

Mr. Justice Black: Which section of the Act does that?

Mr. Pennell: If your Honor please, that comes under 3 and 4 and 5 of the North Carolina Statutes.

Mr. Justice Jackson: What does it provide?

Mr. Pennell: First, may it please your Honor, the North

Carolina Act applies to any agreement or combination between any employer or labor union whereby any persons not members of such organization shall be denied the right to work, or whereby such condition is made a condition of employment.

This relates to the requirement upon the employee to become a member or remain a member. However, we have a companion case, in which an employer required a member to pay his dues, and in that particular instance, our Court held, in The State vs. Bishop, decided on the same day, that because of the fact that he made an inquiry as to whether the man belonged to the union or did not belong to the union, he violated this Act, and that was a Common Law misdemeanor. That is not put in this particular statute, but our Court said that if they declared it a public policy and you violated that public policy it carried with it the misdemeanor.

Mr. Justice Rutledge: That is not up yet?

Mr. Pennell: No, that is not up yet. That was decided the same day, but that is not up yet.

Mr. Justice Jackson: Decided on briefs?

Mr. Pennell: No; if your Honor please, Mr.Thatcher tells me it is not cited. But it is 228 North Carolina, at page 277.

Mr. Justice Frankfurter: And what is its holding?

Mr. Pennell: It holds, if your Honor please, that where an employer told an employee that he had to pay up his dues

in the union or he would have to get another job, he violated this Act under which these defendants have been indicted. Our Court held as they did, without going into the Constitutional questions, that they had decided in this case.

Now, there are several features of the Arizona Act which Mr. McCluskey will present to the Court.

ORAL ARGUMENT OF H. S. McCLUSKEY

ON BEHALF OF APPELLANTS.

Mr. McCluskey: If the Court please:

The fifteen minutes allotted to me is wholly inadequate, but I will try to undertake to present to this Court the gaudy tapestry that is back of this Legislation in Arizona and the cases that have been in this court that have relation thereto; among which were the Employers' Liability cases, Truax vs. Corgan, Truax vs. Raich, Wheeler vs. State.

Wheeler was the Sheriff who maneuvered the Bisbee deportation -- the Arizona train limit cases, and Phelps-Dodge vs. NLRB, which seems to be the crucial case under discussion here today.

To understand the background of this controversy in Arizona, it is necessary to consider Bisbee, where this Phelps-Dodge vs. NLRB originated, around Tombstone Canyon, and all the passions that have aroused the feelings of men for the past forty years.

Mr. Justice Frankfurter: A regular Bret Harte country, is it not?

Mr. McCluskey: A little more so.

We are told here today that the purpose of this legislation is to prevent monopoly. In the Raich case we had up here the proposition of requiring an employer to employ four citizens out of five. This Court said it could not be done.

In the Corrigan case we had up here the question that forbade a Court to issue an injunction in a labor dispute. And this court said it could not be done.

Now we have squared the circle. The pendulum has swung and we are told that we are confronted with monopoly.

Let me say to the Court that Arizona is one of the fastest growing States in the union. We do not have enough men to perform the labor necessary to be done to house our people. I was in Tucson last week and I was told that 16,000 of them were living in trailers; and if that be true, four times that many are living in trailers in Phoenix.

We have no sewers in many of our subdivisions. We have inadequate electrical installations. We lack all of the things in many of the communities that are necessary for the advancement of civilization.

This law was not passed to help the poor devil that does not want to belong to a union. This law was passed and financed and advocated by men who want to accomplish a purpose that a leading engineer of our State, who subsequently became a lecturer at one of our colleges, stated to me: "McCluskey, why are you for the employment of American citizens? We don't need them. All we need is men with the backs of burros and the intelligence to do what we tell them to." And that is the issue here today. The people back of this legislation do not want Phelps-Dodge vs. NLRB or the Jones & Laughlin case.

They want to do as they please, how they please, and employ men as they please, and house them as they please. You do not have to go any further back of last week.

And this is outside the record, but it is in the public domain: We have been importing Mexicans into Arizona for twenty years, or thirty years, by the trainload. We have gone to Europe and brought them over by theshipload from European countries, and last week they went down to Texas and, with the connivance and support of the Immigration Authorities of this country, had over 6,000 Mexicans cross the River; and then they loaded them on to trucks, and brought them into Texas, New Mexico, and Arizona. And what are they going to do with them? They are going to house them on the ditch banks, in such shelters as they themselves may provide; and when they feel the call of nature, they can hunt a place in the rows of cotton to service themselves. That is the thing that we are confronted with. That is the purpose and intent of this legislation. And it is not to help the poor devil who doesn't want to belong to a union.

Two years ago, when they initiated this measure, they called it a "Veterans' Right to Work measure." No single Veterans' Organization in the State of Arizona endorsed it. Every labor organization in the State of Arizona went out of its way to protect the veteran, to admit him to membership, and, if he was a member, to pay his dues, to pay his insur-

ance, and to afford him protection. They were not concerned with the veteran. They lied in their teeth when they said tney were.

Now, we are confronted here with a declaration of the State of Arizona. And it has adopted the most unique provision of any of the fifteen States that have adopted this sumptuary legislation; that reads:

> "No person shall be denied the opportunity to retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual" --

and I emphasize the word "individual."

> "-- or association of any kind, enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

Now, the Attorney General of the State is here, and he has said that he asserts that criminal proceedings may be brought by the defendants, on behalf of the State, the available civil remedies being suits in equity to enjoin violations or attempted violations, suits at law to recover damages on behalf of aggrieved persons, and suits at law by way of pro warranto, or otherwise, to revoke corporate charters or licenses of corporations to do business within the State, when such corporations have violated said amendment, and

the available criminal remedy being a proceeding under Section 43, A. C. 1939, against employers or unions or union officers who conspire together to violate the amendment.

Our Supreme Court, in considering that amendment, has said:

> "The considered and deliberate action of the People of Arizona has determined in the affirmative that this legislation has a rational basis and could, on any reasonable theory, contribute to the public welfare; that it is not necessary for the People of Arizona, to have encompassed in one Constitutional Amendment a corrective for all evils which may or did arise in the field of employer-employee relationships. In the final analysis, it should be the prerogative of the People to determine and experiment with their social and economic legislation, and for the Courts to see that they do not get out of bounds, and that they remain within the framework of our Government by staying within the limits of the Constitution; that the electors of Arizona, by a vote of 61,807 votes "Yes" to 49,557 "No", determined that in the public interest, the weapons which labor might use in attaining its ends, required further restriction; that the last clause of the amendment prevents future contracts, while the former clause grants immediately to persons concerned, the protection the amendment affords. There can be

no valid agreement made that such legislation is discriminatory, and that its effect on existing contracts should be limited."

That is the essence of the decision of our Court; and that the Amendment is immediately effective.

Now, the Court made some reference -- and it is also found in these briefs -- that we have had on our statutes since 1912, the time of Statehood, two provisions, Section 43-1608 and Section 56-120, Arizona Code, which may be denominated as anti-Tellow Dog provisions.

The Court says that we, the plaintiffs, admit that the Arizona statutes have never been tested, but suggests by implication that if tested they would, on the basis of the old line of decisions, be found invalid.

Well, we were up here with Truax vs. Raich, and Truax vs. Corrigan, and many other cases, and got no encouragement. And in every State in which they were tested -- Kansas, Nevada, California, Massachusetts, all the States where the question was ever presented -- and in this Court, in Coppage vs. Kansas and the Adair cases, they were all held to be invalid.

Now, prior to the enactment of the Wagner Act, the general and universal rule was to the effect that whether an employee works as a union or a non-union man is usually a matter of private privilege to the invididual and not of itself a matter of public concern; and that the discharge of

employees, or their expulsion from a union does not violate constitutional guarantees of due process.

This Court, in the Coppage case, said:

"There is no evidence showing that membership in labor organizations contributes to industrial peace."

Subsequently, after the Wagner Act was passed, this Court, in the Phelps-Dodge case, said:

"The ultimate concern of Congress, as well as the course of its power, was to eliminate the causes of certain substantial obstructions to the free flow of commerce by encouraging the practice and procedure of collective bargaining, by protecting the exercise of the workers of full freedom of association."

Full freedom of association!

In the same case, speaking of the Board created by the Wagner Act, the Court said:

"It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board, we have held very recently, does not exist for the adjudication of private rights. It acts in a public capacity, to give effect to the declared public policy of the Act, to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining."

The Court, if I understood it, in the Phelps-Dodge, and

Jones & Laughlin cases, affirmed the principle laid down in the Adair and Coppage cases, that an employer had an unquestioned right to employ whomever he pleased, provided only that he did not try to prevent his employees from organizing unions and bargaining collectively.

It seems a paradox to me to impose such legislation upon the right of freedom of contract under the interstate commerce clause, and then give approval to legislation adopted by a State to encompass the defeat of this purpose, by giving encouragement to an employee to refrain from joining with his fellow-workers in conducting such collective bargaining, after Congress and the Courts have found that an individual is helpless, or practically helpless, in modern industry, in trying to bargain for himself.

If the foundation of a destruction of labor unions promotes a public policy, then the Arizona law should be upheld.

Now, then, if the Court, please, if I am permitted, I should like to discuss briefly the status of Gallagher and Curtis.

You will recall them, in the Phelps-Dodge vs. NLRB case.

Gallagher and Curtis, God rest their belligerant hearts, were union men before they applied for a job, and they were refused employment because they were union men. And this Court said that the Company must put them to work, despite that fact, and pay them for loss of wages while they were idle.

If this Court can say that the promotion of interstate commerce is of such importance, I pose this question:

If Mr. Curtis and Mr. Gallagher are confronted with a non-union man who occupies, in their mind, no different status than an informer would in the Irish Republican Army, or that a member of the Stern Gang would in the Arab Army, there is presented to them a situation to work with, in which every minute they are there, their lives are in jropardy, and I ask you how you can feel, or how anybody can feel, that they can justify requiring Mr. Curtis not to say to Mr. Gallagher, "Mr. Gallagher, this fellow is no good; let's quit." And under this Act, as supplemented by another Act approved by the People last Tuesday, that is something which constitutes a conspiracy, subjecting those men to prosecution.

I say that there are certain fundamentsl rights in this country, protecting Mr. Gallagher and Mr. Curtis and other union men under the First Amendment and under the right of assembly, which say they do not have to associate with those men; and that no State, or no People, either through the Legislature or by the initiative, can impose such conditions upon them, under penalty of going to jail or having their property confiscated as fines.

I thank the Court.

ORAL ARGUMENT OF DONALD R. RICHBERG

ON BEHALF OF APPELLEES

Mr. Richberg: May it please the Court:

I feel that before my time has expired, I must answer various statements and arguments which have been made heretofore, particularly by Mr. Thatcher, but I also feel that it is due to the Appellees in this case to begin with an affirmative statement of their position, and not merely take a negative position, and in presenting this opening argument in behalf of Appellees, I want to make it clear that I shall deal with the fundamental issue of constitutional law, which is decisive in all these three cases, and I might also say that I shall not draw upon my imagination for facts, in order to argue that question.

But if the Court will permit, I shall confine my discussion, as far as the particular law is concerned, to the Arizona Amendment, and leave the discussion of the other State laws to counsel for those States.

Now, the decisive issue of law here presented -- allow me to state it again, because it at times seems to have been lost in the previous arguments -- the decisive issue of law is: has the State constitutional power to enact a law forbiddin employers to deny employment to persons, because they are <u>not</u> members, or because they <u>are</u> members of a labor organization?

The Nebraska and North Carolina laws, which are attacked,

specifically prohibits discrimination because of either membership or non-membership in a union.

There can be no contention that there is the slightest inequality in those forbiddings.

The Arizona Amendment of 1946 only prohibits discrimination against workers because they are not members of a labor union, but earlier Arizona laws, still in effect, prohibit what are commonly called Yellow Dog contracts, which discriminate against the workers who wish to become or who are members of labor unions.

In other words, many years ago, Arizona passed a law protecting union labor, leaving non-union labor without similar protection. We heard no complaint then, and we heard no complaint over the years, as to that sort of inequality, but now when Arizona moves to pass a law also to protect non-union workers, we hear that that is unconstitutional.

Therefore, I would like to have it understood at the start that all these three States have enacted laws which are intended to exercise the police power, in order to prevent discrimination against workers, and denials to them of opportunities of employment, either because they are or because they are not members of labor unions.

Of course, it has been judicially established for a long time that discrimination against workers because of membership in labor unions can be prohibited by both State and Federal

governments. We do not need to reargue that question. But, in order to see the basis of that holding, I want to quote two sentences from a recent decision of this Court, a recent opinion, because I want the basis of it to be clearly before the Court: These are the two sentences: "Discrimination and collusion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority." And the other sentence: "We said" -- this is the Court speaking --"that such collective action would be a mockery if representation were made futile by inteference with freedom of choice."

Now, those are from the Jones & Laughlin case.

It is so obvious as to be a truism to say that if an employee must join and retain membership in a particular union that holds an exclusive contract in order to be employed, he is not only denied the right to decline to associate with that one union, but he is denied the right to associate with any other union.

When they talk about freedom of assembly and argue that a law protecting a fundamental freedom to associate or not to associate is unconstitutional, I find the argument exceedingly difficult to follow logically.

Now, consider: If the contracting union is controlled by Communists, he is made helpless to form or join a bona fide

union, free from foreign influence.

If an industrial union holds the contract, then he is denied to form or organize a craft union.

Under these circumstances, why, of course, in the language of the Court, freedom of choice is made a mockery. He has no more freedom of choice under that type of contract than he had under the old Yellow Dog contract, by which he was supposed to be compelled to join a company union or not to join a union at all.

This Court for years has sustained the constitutionality of Federal laws which forbid any form of employer coercion -- and I say that deliberately and carefully -- "any form of employer coercion" -- to compel men to join or not to join labor unions. The constitutionality of those laws has been upheld in this Court for years. Yet now it is held as so unconstitutional, so arbitrary and unreasonable, that it cannot possibly be sustained.

The Railway Labor Act of 1926, the constitutionality of which was upheld in this Court, forbade any form of employer coercion, and under that Act closed-shop contracts were made impossible, and they have not been utilized at all, -- and I want to come back to that in just a moment.

But, let me follow that up. That is one of the Federal laws. The Norris-LaGuardia Act declared as the public policy of the United States the freedom of an employee to decline

Association with his fellows. They ask you to overrule that public policy of the United States, declared by an Act of Congress years and years ago, as to the constitutionality of which I think there is no doubt.

In passing, I can add that the Bankruptcy Law of the United States forbids a trustee in bankruptcy from making a closed-shop contract.

Now, this Court is confronted with the argument that State laws which are of precisely the same purpose, are unconstitutional, because, it is argued, that while it is constitutional to make it unlawful for employers to compel a man not to join a union, it is unconstitutional to make it unlawful for employers to compel a man to join a union.

This argument is so inconsistent and so irrational that I would like to quote one sentence quoted by the Supreme Court of Arizona from Professor Gregory, who was cited by the Court, as one of the Nation's foremost scholars, and champions of the labor movement, and was cited in Appellants' brief as "a leading labor law authority."

Professor Gregory wrote as follows:

> "....if a majority of (the voters) see fit to conclude that the closed shop or union shop be made unlawful in their State, that is their business. And it is hard to see on what grounds such legislation could possibly be overturned as unconstitutional."

That is an impartial opinion; from a man, however, noted for his partiality for the organized labor movement.

Well, now, confronted by existing law, which this Court is asked to completely overrule, establishing the constitutionality of legislation protecting the freedom of choice of the individual worker, the freedom to organize and select his own representatives, unrestrained by any employer coercion, the ingenuity of vary able counsel for Appellants has been really stretched to the breaking point: to find some constitutional objection to these laws, and, recognizing the difficulty, I want to pay tribute to the imaginative genius with which they have invented a constituttional right, one hitherto unknown, the right to establish a monopoly of the labor supply, to eliminate all competition between workers, and to subject all employees to what they first describe as "a common rule" -- that phrase is repeated perhaps fifty times in the briefs -- and then what they more candidly describe on page after page of the brief as the government of an economic society by unions, to which all persons seeking employment must be compelled to submit. That is certainly an extraordinary doctrine to be developed under the Constitution of the United States.

I see that in the argument they make counsel back away from the implications of their own brief; but the purpose and thought of the brief is perfectly clear, despite their desire to back away from this conception of a society governed

by private organizations, and enforcing its private laws on members involuntarily forced into that society.

But, before I touch on that point, I think I should bring out one further additional constitutional basis for this law -- even though it is not our obligation to establish the constitutionality, for it is assumed that the law of the Legislature is constitutional.

But there is an additional basis, which is very clearly demonstrated to be sound, by the briefs and arguments of Appellants in this case.

Now, there is no question - and I am sure I do not have to debate and argue it with this Court - as to the power of both the State and Federal governments to prohibit activities and contracts that are instrumentalities for monopolistic controls of commerce.

Outside of all the police power questions, there certainly can be no question as to that.

It would be just a waste of time to engage in any sterile discussion as to whether monopoly of the labor supply would be, in itself, a combination or conspiracy in restraint of trade. I say, let us assume, for purposes of this argument, that the unions are exempt from prosecution or from dissolution, as essentially illegal organizations, either under Federal or under State ant i-monopoly laws, or, if you please, even without such statutes. That could be assumed, for the purpose

of this argument: that by themselves and in themselves, they are not and would not be held to be illegal organizations, or combinations in restraint of trade. But it has been demonstrated in the opinions of this Court, time and time again--and I quote from the fairly recent opinion written by Mr. Justice Black -- that these "Congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do."

That is a statement of fact in the opinion of the Court, and a statement of fact based on a thorough knowledge of the situation in the case before the Court.

Apparently, in that case, the Allen-Bradley case, to which I have just referred, the entire Court agreed -- there was a majority opinion, but in that case the entire Court agreed that unions operated frequently and indeed commonly to restrain trade, but, while the majority held that the activiti under discussion were not subject to legal restraint because of Legislative exemption, a minority of the Justices expressed the opinion that the statutory exemption did not make lawful the monopolistic contracts involved in that case.

So we had entire agreement on the part of the Court that labor activities might be and often were restraint of trade.

In the present case, Appellants formally di_savow in thei complaint any monopolistic practices or purposes, and then proceed to demonstrate, by their complaint and arguments, that

the immediate and ultimate objectives of their unions are to establish local and national and, ultimately, universal monopolies of the labor supply, whereby eventually all workers will be voluntary or compulsory members of an economic society governed by unions.

And this society and this government, by fixing common standards of wages and production, will be able to end all competition between workers and all competition between union-made goods and non-union made goods. This necessarily means that the prices of goods and services will be largely determined by non-competitive costs, established by labor monopolies.

For anyone to contend that unions with such objectives are not operating as combinations in restraint of trade is to offer the assertion of an obvious untruth as a substitute for a demonstrated fact. The real question here presented by Appellants, is not as to whether such contracts can be forbidden constitutionally as instrumentalities of monopoly, but whether they should be forbidden; that is, whether, as a matter of public policy, labor unions should be permitted to use these instrumentalities, perhaps under certain public safeguards.

Obviously, that is a question for legislative determination and not for judicial decision. Whether labor unions should

be left free, to engage in conduct which restrains trade is, according to the expressed opinions of this entire Court, in the Allen-Bradley case, "a question for the determination of Congress." And, paraphrasing the majority opinion, the question as to whether our society shall be shifted "from a competitive to a monopolistic economy" may depend upon whether or not the legislative power completely abdicates its authority to restrict labor union activities, which are destructive of a competitive economy.

In opposition to these facts, so obvious, so overwhelming, any assertion that this legislation cannot be justified in part as anti-monopoly legislation -- well, it is simply blowing into a gale of facts that stifles that argument in the mouths of those who utter it. It simply cannot be sustained. These laws are directed against discriminatory practices by employers, and agreements by which employers coerce workers to submit to a monopolistic control of their livelihood, and by which monopolistic controls of commerce by combinations of workers and employers are made effective.

That was shown, for example, in the Allen-Bradley case. It is clearly within the Legislative power to forbid certain contracts that are instrumentalities of monopoly; and I do not think we can assume there is any possibility of any ruling by this Court holding that legislative condemnation of such dis-

criminatory monopolistic contracts is unconstitutional, unless Appellants can persuade the Court to overrule all its previous rulings, and to make a revolutionary construction of the First Amendment, and to hold that unionized labor, as a privileged class, has constitutional rights which are not possessed by any other class of citizens.

Indeed, the Court is asked very bluntly to find that the collective rights of this special class of men, organized i a union, are inherent constitutional rights, which are superior to the individual rights of all persons, which are explicitly stated and declared in the First Amendment.

The argument by which this position is to be sustained is a very ingenious one. It does require a certain amount of analysis to expose completely its fallacies.

The basis of the major argument is that the freedom of assembly guaranteed to all persons under the First Amendment necessarily includes the right to make all contracts which are not unlawful per se, and which are "indispensible" to accomplis the purposes of the assembled organization.

On this basis they contend that unions have a constitutional right to make closed-shop contracts, on the round that they are "indispensible".

Now, I want to get, right away, to the question of fact here; because that is not a historic fact, either all or in part. But, before I do, I should like to deal with the point

that that is not good law, either.

Mr. Justice Jackson: I gather that you agree, Mr. Richberg, that this is aimed at the closed shop, as an institution. In other words, your present argument is that the closed shop, absent abuses, is a subject of regulation?

Mr. Richberg: I will not go that far. Let me make it clear.

Monopoly is a question of degree. In the early days of the closed shop, the obtaining of closed-shop contracts here and there in large numbers, might not have had any really monopolistic effect. It would not have a necessarily monopolistic effect that a few employers made an agreement with a labor organization whereby they were to employ only their members. That would not have any necessarily monopolistic effect, but, as labor unions have grown, and as they have spread in their power and their control over industry, then you reach the point where you have monopolistic effects of the contracts; and if they are sufficiently important that the contracts themselves should be forbidden, that becomes a matter of legislative judgment.

In other words, it is just like, exactly like contracts of businessmen. Certain types of contracts may not be regarded as immediately monopolistic, but such types of contracts spreading throughout an industry might become seriously monopolistic.

Under the early doctrine of the Sherman law, it was not

every restraint of trade; it was only the unreasonable restraint of trade. And I think there is probably some vitality still in that doctrine: that at least it must be an appreciable restraint of trade, in order to come under the condemnation.

Now, in the same way, I am not saying that a closed-shop contract would necessarily be, in situationA, B, or C, a monopolistic contract, - not at all. But I say that when you take the situation we have in this country, of national unions, nationally organized and uniformly organized in an industry, to the point of complete coverage of the industry by such contracts - as, for example, we have had very clear examples in the bituminous coal industry - then you have a situation which, as an admitted and an accomplished monopoly, deserves and can receive appropriate legislative treatment in the way of either complete forbidding, or whatever regulation is necessary.

Returning, now, to this question of "indispensibility", as a matter of law, that cannot be true. Perhaps I do not need to argue this through, because it seems so obvious. Does freedom of assembly involve the right to make allxindispensivle contracts? Why, businessmen and investors have the same degree of the same constitutional right. I do not suppose they would be set apart from others. They have the same right to assemble, and what is their objective? To make as much money as possible, we will say; to earn a satisfactory

livelihood.

It is not very different in objective from the stated objective of the labor organizations. They assemble for the same purpose.

Now, businessmen can just as well claim - in fact, just as soundly claim - as labor organizations, that monopolistic contracts are indispensible to their success, because, as a matter of fact, competition is admittedly wasteful. Profits can be increased and losses prevented, and the stability of earning power, which we hear a great deal about, can be assured, by establishing monopolies.

The State may regard the protection of the wage earner's income as more important than protection of the income of employers and investors. I say that with no sarcasm. The State may take that position. And accordingly, the State may forbid all monopolistic practices on the part of businessmen and the State may tolerate some monopolisitc practices on the part of labor. But that does not mean that freedom of assembly has created any right in all persons to make indispensible contracts. That ruling, as a matter of fact, would invalidate all our anti-monopoly laws, and a host of other regulatory laws.

Of course, back of this is the argument which was only recently voiced in the tirade of Mr. McCluskey, and that is, that any combination of businessmen is malevolent and unlaw-

ful, per se, and a combination of workers, for the same purpose, is benevolent and lawful, per se. That is only true, however, as far as lawfulness goes, to the extent that legislation makes one combination lawful and another unlawful. And the ultimate objectives of businessmen and workers are fundamentally the same - the earning of a satisfactory livelihood. That is what men work for. If freedom of assembly includes the right to make all indispensible contracts, then that cannot be a right possessed by only one privileged class of persons - unionized workers. It is declared by the Constitution to be a right of allpersons.

However, let me ignore this fatal weakness in their legal argument, and take up the factual argument; which, of course, requires covering more ground - not all history, but just a little bit of history.

As a matter of fact, it is not true, and it is impossible to demonstrate, that closed shop contracts are indispensible to the success of organized labor, and that in order to succeed, unions must persuade employers to compel non-union workers to join. Of course, as I have said before, that means to deny completely the freedom of the non-union worker. His freedom of assembly is gone.

And I may say that if that were an indispensible necessity of organized labor, organized labor would put itself in the very dangerous position of being itself a combination

to deny to men their constitutional rights, the right of freedom of assembly of the individual. And if this is a conspiracy , according to their argument, between the union members and the employers, to deprive men of constitutional rights, then that becomes a criminal conspiracy under Section 51 of the Criminal Code. I do not think they had better go that far with their argument.

If I may for just a moment refer to the genesis of this argument on behalf of Appellants, it is most unfortunate, but it is an historic fact that these unions, in this claim of indispensibility of compulsory contracts, are repeating the oldest mistake in the long history of organizations that have grown in power. Always the rulers of a rising class of people become intolerant of competition, unwilling to brook opposition and unwilling to rely on persuasion and appeals to self-interest. And always they yield to the seductive power of coercion, coming more and more to rely on force to compel others to support their programs.

Now, that is just what is happening to the labor movement. Zealous leaders - like the labor union leader- sincerely devoted to the welfare of their fellows, are most easily afflicted with this power-madness. They feel assured that those who oppose them must be evil - because they know that they themselves are so good.

I want to say that every true liberal who has striven for

years to strengthen the power of labor organizations - as, if I may be permitted a personal note, the records of this Court show that I have striven - and every such man who has hated and fought the tyrannies of money power, must have been chilled and disheartened in recent years, as he watched labor leaders, whom he respected and admired, yield to the seduction of the power that they have acquired, and gradually turn away from the democracy of voluntary unionism and espouse the tyranny of compulsory unionism.

I think one of the justices of this Court expressed the opinion in a recent case, that organized labor had now "come full circle" in exercising the same tyrannical powers against which it fought when they were exercised by organized capital.

And, in order that I may not be seeming to exaggerate, allow me to read to you just these few sentences from the brief of Appellants, which should certainly not be overlboked by this Court-- and these are very long briefs.

I quote from their brief, on page 47:

> "The worker becomes a member of an economic society when he takes employment....the union is the organization or government of this society...."

and then, from page 58:

> "We can summarize the nature of union membership as a common condition of employment in an industrial society by again comparing it to citizenship in a polit-

ical society - both are compulsory upon individuals."

and then, later in the same brief:

> "The liberty of an individual is not the right to license, but participation in a social organization founded upon equal justice and law. The union is that organization for employees."

that last quotation is from page 59 of Appellants' brief.

I see that, looking over their words in cold type, and facing the impartial judgment of the Court, counsel for Appellants are inclined to back away from that argument. But that argument permeates the entire brief. Those are not isolated statements. That is the philosophy which is written into the entire brief. It is the naked reason for the demand that this Court nullify a law which hampers a union in establishing a private government within and independent of the public government of the United States.

Now, why is this <u>compulsory</u> membership? That involves a principle of law which needs no citation. Unless the labor unions cam make submission to this private government compulsory, regardless of individual constitutional liberty, they claim they cannot enforce their private laws. Why can they not enforce them? If they are able to compel all workers to join and to remain in their private organizations, then, under the laws, which have been sustained in the Courts, they can tax them, they can control their livelihood, they

can govern them, with utter disregard for individual liberties of American citizens that must be respected by any public government of the United States that operates under a Constitution proteding individual rights.

Those who are seeking this power apparently forget that the only legal basis -- the only legal basis -- upon which a private organization can govern the conduct of its members, and tax them and make contracts for them, and compel them to submit to its laws, is that the members have voluntarily joined and submitted themselves to this private law-making authority. "Voluntarily" is the word. That is the only basis for the establishment of a private government in this country, and the enforcement of private laws, by private organizations.

Aremembers who thus submit themselves at least free to resign? Having fulfilled the obligations they have voluntarily incurred, are they free from all future obligations? But no. This is the most utterly compulsory type of membership. You join, and you remain a member -- or you don't have a job.

I say that Appellants have apparently entirely forgotten that the moment a private organization attempts to coerce the conduct of a non-member, whatever the organization is, or use coercion to compel persons to become members, it abandons the legal basis of its authority, and it becomes a conspiracy to deprive men of their rights, without due process of law.

Our Constitutional law recognizes no lawful force in private government, unless it governs by the voluntary consent of the governed; and a voluntary consent is not an enforced consent.

Probably the most fundamental guaranty in the Constitution, which Appellants are seeking to rely on, is that no person shall be deprived of life, liberty or property without due process of law.

But I certainly do not need to argue to this Court that that means that no one shall be compelled to submit to any laws, except public laws, unless he voluntarily submits himself to private law-making and enforcement. There is no voluntary submission when a man is forced to join and remain in a union in order to make a living. Why is employer coercion necessary, if a man is willing to join? I won't go into the other possible answers.

It is not a sensible answer to say that he can look for work elsewhere than in a union shop. The whole claim of Appellants here is that they cannot make the union a success unless they can make it a monopoly, unless they can destroy competition. So how is he going to find work elsewhere? Nor is it an answer to assert that a man can fight for his ideas inside the union. The individual forced into an antagonistic union is just as helpless as the individual employee of an antagonistic employer, who was the object of proper solicitude

by this Court in the Tri-City case.

Finally, Appellants are forced to stand on their incredible, revolutionary doctrine that when a man takes any kind of employment, he becomes willy-nilly a member of a particular "economic society" governed by a labor union. He does not become a member if he works for himself, or if he is permitted to do work for others, as an independent contractor - provided he does not compete with union labor. But, if he takes employment where a union has a contract, then, Appellants claim, as a doctrine of law, that that one union has a constitutional right to govern him. Of course, that makes for a multiplicity of overlapping strange governments in this country; but that is their doctrine, and they will have to follow it out.

Of course, the union - it is so hard for me to argue this, because it seems so absurd - the union may be a good one, or it may be a bad one. It may be run by Democrats, or Communists, or Facists, by benevolent autocrats, or racketeers or outright criminals. That makes no difference in his obligation to obey this private government. He has no freedom of choice. He has no freedom of assembly. Appellants argue, in effect, that the individual right to freedom of assembly is exhausted when a union is organized and obtains a closed-shop contract. The collective right of the union to govern an economic society then becomes superior to any

individual constitutional right to live, to work, and to associate with others, as a free man. In that way you establish the private government of the union, and they now assert a constitutional right to abolish freedom of assembly for all future workers, who come into the realm which it governs.

The whole argument is so fantastic that I think, if it were made upon the stage, any intelligent audience would roar with laughter.

Mr. Justice Rutledge: Mr. Richberg, I would like to put a hypothetical case, if I may.

Let is take the North Carolina Law. Let us assume that we had a show which has or had, as of yesterday, all union employees, not in violation of the law, but by original employment.

Last night, one of them died, and this morning two men apply for his place, equally qualified in every respect, except that one is a union man and one is not. The employer either knows that fact or finds out about it, by direct inquiry - let us assume the latter - of each.

"Do you belong to a union, or do you not?"

In those circumstances, he employs the union man, employs him because he is a union man, and does not employ the other man, because he is not a union man.

Has the law been violated?

Mr. Richberg: Well, I do not see, if I understand your case clearly, that the law has been violated; because I do not think he has discriminated.

Mr. Justice Rutledge: He has not discriminated? He has appointed a man to a job because he is a union man, and has refused to appoint someone else to the same jobbecause he is a non-union man. If that is not discrimination, I do not know how you would define it.

Mr. Richberg: But, as I say, he has to take one or the other.

Mr. Justice Rutledge: Oh, he could go out and hire somebody else.

Mr. Richberg: I mean, presumably, he has a fair choice, to take one or the other; and presumably the law forbids him to discriminate because of --

Mr. Justice Rutledge: Well, he has,"because of."

Mr. Richberg: But the point, if I may try to make it, is that the law forbids him to discriminate "because of", and there is no "because of" in this situation.

Mr. Justice Rutledge: The "because of" is all there is to this situation.

Mr. Richberg: He has to choose one man, and the other man, under the circumstances you claim --

Mr. Justice Rutledge: I am asking you whether this law does not actually, or may not actually, put an employer in an

impossible dilemma?

Mr. Richberg. No, because I think, under those circumstances, he can employ either man he wants, because he could not discriminate against one or the other just because of that fact. So he just simply employs the man he wants.

Mr. Justice Rutledge: Of course, the obvious practical answer would be that the selection was, perhaps, on some other basis. But it seems to me that this says thathe shall not be denied employment because he is not a union member.

Mr. Richberg: And it also says he shall not be denied employment because of his union membership.

Mr. Justice Rutledge: How about your Arizona laws?

Mr. Richberg: In the Arizona laws, you do not have precisely the same situation, though you have substantially the same situation, on account of the Yellow Dog contract. But when you make an agreement with a man, if yo u make it on the basis that he cannot join a union or remain a member of a union, you are discriminating against him, whether it is written or not. You make it on a verbal basis. I think the Arizona law provides a substantially reciprocal protection.

Mr. Justice Rutledge: All these laws, in effect, outlaw the closed shop, not only for situations such as you mention, where racketeers and so on may be running a union, but it, in effect, sets up the right of the non-union men -- in the cases where there are voluntary closed shops -- if they exist, and

they do, sometimes -- against the majority, against the whole group, and against the employer, as well.

Mr. Richberg: May I say that I think that that is a misconstruction? Because it does not set up a right of a man against somebody else, but it provides that an employer shall not use coercion to compel a man to join a union.

It does not say he cannot hire union men at all. There is no reason why he cannot go on hiring union men.

Mr.Justice Rutledge: It says that he cannot have a closed shop.

Mr. Richberg: I beg your pardon. It says he shall not have a closed-shop contract, but there is no reason why he should not have every man in his employ a union man, if he wants.

Mr. Justice Rutledge: Then you are disputing Mr.Thatcher's argument, and you say that if the employees in a closed shop were to go on strike when the employer brought in a non-union man, because they refused to work with him, and if they were to secure his discharge thereby, that that would not be a violation of these Acts? His thesis is that it would.

Mr. Richberg: Well, I say that you can have an entire shop-full of union men, and not a non-union man in the place; and just because a non-union man applies for employment, it does not give him any right --

Mr. Justice Rutledge: You say, all this prohibits is a

contract?

Mr. Richberg: The second part of the two phases of the law. The second part prohibits a contract. The first part prohibits making it a condition of employment.

Now, in the case that you have mentioned, where there is a non-union man and a union man applying, for example, under the Arizona law, the employer does not make it a condition of employment that you be a union man or that you be a non-union man. He simply says, "I employ A," or "I employ B", he does not make any condition of employment. He simply says "I am going to employ A or employ B."

Mr. Justice Rutledge: Once that man has been put on, if he were then discharged, would that be making it a condition?

Mr. Richberg: It would depend upon whether he was discharged because the others objected to him; that is true.

Now, we always think we have a comparatively brief time, and it probably seems like a long time to the Court. But in in the brief time I have ahead of me, I want to refer to two things.

In the first place, I want to go back to the only argument that Appellants really started on, here, that was not fantastic, and the one they made the least of, and that is, that it is unreasonable and arbitrary; that this law is not a proper exercise of the police power, because it is unreason-

able and arbitrary. That, at least, is an argument that is not fantastic. It does depend upon the question of fact, which is so overwhelmingly against them that they do not want it to rely on. Because, to show that this law is unreasonable and arbitrary is simply an impossibility.

When laws of the first type were enacted, laws prohibiting discrimination against union men, what was the situation?

Labor lawyers, like myself, demanded those laws to protect workers from employer coercion, to prevent them from becoming members of unions, and they finally got them. Then labor lawyers hurled tons of briefs and untold volumes of heated oratory at the Courts, insisting the laws were constitutional, because it was wrong to subject men to employer coercion. They had freedom of assembly and free right of self organization.

All right. That is the way we got up to the present situation. And these laws, many of them, were precisely of the same effect as the laws now under attack, some, such as the Railway Labor Act, providing against all forms of employer coercion, and some providing only against employer coercion against union men.

Now, a new day has dawned, and here we listen to new lawyers for the sameold organizations, telling this Court that laws prohibiting an employer from forcing men not to join a union are reasonable and constitutional, but that laws

prohibiting an employer from forcing men to join a union -- Oh, they are unreasonable and arbitrary, and the Court must hold them unconstitutional.

Let me point out what these laws do not do, just briefly. You have heard a lot about the evils of the closed shop.

Now, let us see what they do not do.

They do not restrain the individual liberties of the workers. These laws do not restrain the voluntary concerted activities of self-organized workers, their collective bargaining, their strikes, their submission to union laws and union discipline. They do not even attempt to prevent them, by themselves, from coercing workers by lawful, or even by unlawful, means, to join a union.

These laws only prevent them from using employer coercion the power to hire and fire, as a means of compelling men to join private organizations which they do not wish to join and which they would not voluntarily join.

Now, we may argue until Doomsday -- and I am not going to start the argument --as to whether voluntary unionism is a stronger and more enduring method of labor organization than compulsory unionism. Personally, I take my side very strongly with the late Justice Brandeis in that regard.

But that is not the question that is presented here; and it is not a question within the jurisdiction of this Court to decide, as the Court itself will say. The Legislative

power of our constitutional government has been exercised to decide a much simpler question; and that is, whether the evils that arise out of permitting employers to force their employees to join or not to join labor unions are so injurious to the public interest and to private interests, that all such employer coercion should be forbidden by law.

Now, that is the simple issue here.

The legislative authority, in some sixteen States, has enacted such laws, which are listed on page 9 of our brief, and in at least four of these States, by direct vote of the People.

The Congress has also enacted such laws.

I will just quote one sentence from the opinion of this Court in that regard: (This) "evidences a deep-seated conviction, both as to the presence of the evil and as to means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide."

that will be found at page 9 of our brief.

We submit that that is all that you have to decide in this case, and I want to refer to those sixteen States, and I would like to point out the abs urdity of the contention that sixteen States have legislated without adequate hearings, and considerations, of this matter, and have just passed some arbitrary laws, under pressure of some malevolent forces, pro-

ceeding, I suppose, from Wall Street, or elsewhere.

I will talk about Arizona. I will not go into the other States.

What happened in Arizona? The Arizona amendment was adopted by a popular vote of the People, 61,000 to 49,000, after a campaign that went up and down the entire State, in which every person apparently took part.

Then what happened?

The Legislature passed laws, implementing the amendment, and they were submitted to the People, referred to the People, in the last election.

And what happened then?

In the election of November 2nd, those laws referred to the People were sustained, again by popular vote.

I suppose it is claimed that the electors who, in the same election, voted by similar popular vote for Mr. Truman for President, were exercising a Constitutional right; and I do not suppose it would be denied that they were. But apparently they have not any Constitutional right to approve of these laws, although they did so at the same election, and after this tremendous up-and-down-the-State consideration of the whole matter.

I want to submit that this decision does not require any restraint of judicial authority or reluctant acquiescence in any unwise exercise of legislativeauthority; because I think

that impartial, forward-looking students of the labor movement who believe in the high mission and great service of organized labor, not only to the workers, but to the nation, realize that labor unions composed only of loyal, voluntary members, labor unions not dependent on employer-coercion and not weakened by unwilling, resentful, captive members, will be, in the long run, the strongest, most faithful, and most enlightened guardians of the welfare of the workers, and of the public welfare.

There are some statements which briefly I should refer to, that have been made in the argument, and which, having only been made in the argument, and not appearing in the briefs, really require correction. And there are just a few to which I think it worth while to point.

One was Mr. Thatcher's reference to the Taft-Hartley Act. I suppose I do not need to callyour attention to that, but since the law is not set forth in the briefs, I think I should call your attention to the fact that the Taft-Hartley provision does not simply provide that you can have a union shop - under the Act, you have a union shop, not a closed shop - after thirty days. That was stopping a little short of giving you a full view of the Taft-Hartley Act.

The Taft Hartley Act provides that nothing therein shall preclude the employees from having a contract to require membership as a condition of employment after the thirtieth day

following the beginning of employment, ifthe labor organization is representative of the employees, under the law, and if, following the most recent election held, as provided under the law, the Board shall have certified at least a majority of the employees as eligible to vote, who voted to authorize the labor organization to make such an agreement. And then it provides that no employer shall justify any discrimination by virtue of such a contract if he has reasonable grounds that membership is not open to all persons on the same terms and conditions, or if he has reasonable grounds for believing that membership is terminated for any cause except non-payment of dues. In other words, that was a very limited permission under very careful safeguards, which were provided in the Taft-Hartley Act.

The law, as a matter of fact, does not outlaw strikes, in any way whatsoever. It does not affect the right to strike, for lawful, or, so far as the law noe exists, for unlawful purposes. It merely applies to employer coercion, with or without contracts. And the consequences of violation of the law are too remote and difficult to follow.

Now, the claim is made that a refusal to work with non-union workers is essential. But that does not prevent persuading men not to seek work in a union shop. Certainly this "one worker" business we hear about is rather absurd. What man, in those circumstances, wants to work in a union shop,

when he can get work anywhere on earth. He is all alone, and they do not want him there unless he becomes a member of the union?

But that brings me to the Railway Labor Act, which has been seriously maltreated here.

I know that Mr. Thatcher is not familiar with the history of the railway unions, as I am, because he is very frank and very fair in his statements, and I know that he has not intentionally misrepresented. In fact, the genesis of the Railway Labor Act is exactly the opposite of what he stated.

We did not have closed shops in the railroads. The Brotherhoods, the strong organizations that had the large memberships, have not had closed shops, so far as I know, in recent years, and if that was the situation in remote history, it is forgotten history.

The A F of L, the shop crafts, and others, were not able to obtain contracts, with all their efforts to obtain a closed shop, and the genesis of the Act of 1926 was that these organizations, together with the Railroad Brotherhoods, went to Congress to get Congress to help them organize, and Congress provided for the labor organizations and protected them against employer coercion, and at the same time protected all workers against employer coercion, whether they were members of unions or not, - that is the factual situation, and it also bears strong witness to the absurdity of the claim that closed shops

are essential to the development of labor organizations. They have not been essential in case after case, in industry after industry, over the last thirty or forty years, in which the unions have developed strongly, without closed shops, and have obtained closed shops subsequently.

They have never been essential in the railroad industry, one of the strongest organized industries in the country, in which labor has had to play a strong part.

There is one matter in the reply brief to which I shall refer, because we had no opportunity for reply to the reply brief, inasmuch as it was only served on us when we came in here yesterday.

I want to point out the first point made in the reply brief, which is a complete upside-down reversal of the point we are making.

They saythat we argue and they agree that if the statutes in issue in this case are upheld, then it follows, under Shelley v. Kraemer, - the restrictive covenant case - that the laws of the 35 States which enforce union security contracts, are unconstitutional.

Now, that is a complete non sequitur, and an intellectual absurdity, and we certainly do not agree with it. They may agree with it if they wish. The reverse is absolutely true. The fact is that if the Legislature has power to enact or not to enact, according to the conditions and legislative judgment,

laws forbidding employer coercion, not to join or to join, then both these types of laws are constitutional at the same time. There can be no question about that. It is a question of legislative judgment as to whether one or both are necessary.

But, on their argument that you have to have a complete coverage, that you must have absolute, complete reciprocal rights on both sides, then, under that argument, this Court should have held the Wagner Act unconstitutional, and the Court should have held all the anti-Yellow-Dog-contract acts unconstitutional.

There is no protection reciprocally provided for employers or for non-union workers. So all I have to do in answer to that is to refer to the very well laid down doctrine of this Court in the Jones & Laughlin case, that the Constitution does not forbid a cautious advance, step by step.

Mr.Justice Frankfurter: Before you sit down, Mr. Richberg, may I ask whether the briefs, all the briefs, any of the briefs, set forth the data as to the net worth of the collective agreements, the history of them, their quantity and quality, that do and do not call for closed shop?

In connection with the statement earlier in your argument that it is not a fact that closed shops are necessary to the effective functioning of unions, are there in these briefs any kinds of quantitative discussions or references as to where

one can find the scope of collective agreements on the question of closed shops, either in the railroad industry or just ordinary industries?

Mr. Richberg: You will find a great deal of data on one side of the problem in the so-called economic brief which has been filed by the Appellants in this case. Some of that material, I think, refutes their own arguments, but we have not endeavored to make any comparable compilation. We have, however, referred to various matters which have been found in the opinions of the Courts, and elsewhere.

Mr.Justice Frankfurter: I was not concerned with the Courts. There was a monograph by the Bureau of Labor Statistics in the old days. But are there data as to the actual scop of closed shop as against non-closed shop agreements?

Mr. Richberg: There are references to that. I was thinking, for the moment, only of the Arizona brief. There are further references in the brief on behalf of North Carolina and Nebraska, to factual material; which we avoided very largely in our briefs, in order to devote ourselves exclusively to the legal questions.

Mr. Justice Reed: Must we assume here, Mr. Richberg, that these unions are open to anyone who wants to come into them?

Mr. Richberg: No.

Mr. Justice Reed: That fact was alleged in their com-

plaints.

Mr. Richberg: It is alleged.

Mr. Justice Reed: And as I understand it, that was dismissed, on motion.

Mr. Richberg: I will not argue, but will just answer your question. I referred to it in our brief when I analyzed their complaint; the facts that were admitted and the facts that were not admitted, as far as we understood them.

Mr. Justice Reed: How can you avoid admitting an allegation so nearly approaching the facts as to whether or not they are open to any person who applies? Shall we take judicial knowledge of that?

Mr. Richberg: I pointed out that some of those allegations mean absolutely nothing. The allegation that they are open to all qualified persons destroys itself. They set the qualifications, and that means that they are open to all the people they want to admit. So that does not mean anything at all.

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ORAL ARGUMENT OF IRVING HILL

ON BEHALF OF APPELLEES

Mr. Hill: If the Court please:

Despite the nature of the argument, what has gone before, I think it is important to keep in mind that the issue in this case is not whether labor unions are good or bad, or whether they should be encouraged or discouraged. The issue here is whether these statutes lie within the limits of the State's police power.

I will try to keep within that issue.

I think that in order to resolve that issue, we must give consideration to the nature of the police power, and the nature of the rights or activities of persons upon which these statute impinge.

I shall devote my time to the proposition that the police power extends to the regulation of the employer-employee relationship; the States having regulated, with the sanction of this Court, hours of wages, the amount of wages, their method of payment, working conditions, methods of settling labor disputes, and many other phases of the relationships between employer and employee.

I think it may, however, serve some purpose to review very briefly the regulations of labor union activities which have been upheld by the Courts under the police power.

The Court's opinion in Thomas vs. Collins contains the flat statement that labor unions are not immune from regulation

under the police power. Counsel here for the A F of L have s admitted today.

And, in a number of cases, such as the Allen-Bradley Loca case, the Court has sanctioned the regulation of picketing and other union activity in the course of industrial disputes.

In Allen-BradleyCompany vs Local Union No. 3, and some of the secondary boycott cases, the Courts held that certain union activities, conducive of monopoly, may be prohibited.

More to the point of these cases, in the Corsi case, this Court held that the State may prohibit labor unions from discriminations in membership requirements, based upon race or color.

Now, if the State can protect the right of non-union labor to obtain membership from the union on an equal basis, without discrimination, does it not logically follow that the State may also protect non-union labor against discrimination in obtaining employment from the employer or the union, because of unwillingness to join the majority union?

The cases under the Railway Labor Act and under the NLRA have held that Congress may protect the right of labor to free association. And we have heard a great deal, during this argument, about the right of free association, the right to be free from coercion by the employer in the formation of a union, to be free from discrimination on account of having joined the union, in hiring or firing, and to be free in the choice of

a bargaining agency.

Now, if the State may protect the majority's right of free association in a labor union, without coercion and discrimination, it seems to me to follow logically that the State may protect the minority's rights of non-association. It seem to me that if there is to be any true freedom of association, there must be recognized the concomitant right of non-association.

If we start, then, with the premise that the State's police power extends to this employer-employee relationship, extends as well to the reasonable regulation of labor unions, we then have to examine the nature of the rights affected by these statutes, there being, of course, two different tests of constitutionality.

In the instant case, the A F of L have argued that the rights affected by this statute are encompassed within the first amendment. No one would deny to this Court that the formation and conduct of labor unions may involve the exercise of certain First Amendment rights. Thomas vs. Collins, the Thornhill case, some of the NLRB decisions, all indicate that the right of free speech and free assembly may be involved in union activity.

There are other decisions of the Court, to which counsel have referred, Jones & Laughlin and Texas and New Orleans vs. The Brotherhood, which deal with the freedom of association,

the right freely to organize into labor unions, and freely to choose a representative for collective bargaining purposes.

These last rights, the right of free association and free choice of a bargaining agent, have not yet, to my knowledge, been brought squarely within the protection of the First Amendment by the decisions of this Court, although some of the decisions have characterized them as basic and fundamental rights.

But the time may come - and I think we must all concede that - when this right of free association into unions and free choice of a bargaining agent, may be held to be so closely associated with freedom of speech and freedom of assembly as to be brought squarely within the protection of the First Amendment. But I say: Assume, for the sake of argument, that all of these rights I have mentioned, the right of free speech free assembly, free association, and free choice of a bargaining agent, are First Amendment rights. Still, there is nothing in these statutes which could be conceivably said to infringe or limit any one of these rights. These statutes in no way impair the free communication of information about a labor dispute or about the advantages of labor unions. They in no way injibit the free assembly of workingmen. They do not conceivably impair the right of workingmen to associate together and form labor organizations, or the right of the majority freely to choose a representative for collective

purposes, or the right of every one of the workers in a plant, if they are so inclined, to join the union.

I am really somewhat awed by the efforts of counsel to make out a case of First Amendment rights here. It seems to me almost like the performance of a magician. They start with an empty table. They wave 118 pages of socio-economic philosophy, and, abracadabra, presto, a new First Amendment right, which has not yet been recognized.

As best I can, I have tried very hard to understand the A F of L's argument on this point. As best I get it, the argument seems to be that since the formation and conduct of labor unions may involve the exercise of First Amendment rights, any interference or restriction upon labor unions or the type of agreements which they can enter into, is a prohibited infringement of such rights.

The fallacy of that argument, of course, is apparent in its very statement.

These statutes are directed solely at the right or liberty of contracts, the right of labor unions and employers to enter into and enforce certain types of collective bargaining agreements. They have been so construed. They have been construed as not violative of First Amendment rights, by every one of the Supreme Courts that have construed them in these cases.

It is clear, I think, that on the basis of the construc-

tions made - the only constructions which can be made of these statutes - the applicable test of constitutionality is the issue which has been referred to before, not the clear and present danger test, but the test of Nebbia and the minimum wages cases and the other cases, where property rights alone are affected; to wit, whether the legislation has some reasonable relationship to some proper legislative purposes of the State.

Now, anticipating that this Court would probably find that there are no First Amendment rights affected, that the only rights are rights of property or contract, the A F of L has spent a good deal of time in its brief, and some time here, in arguing freedom oof contracts. The pendulum has really swung full cycle, your Honors, when we see the attorneys for the Federation of Labor in this Court trying to breathe new life into Coppage & Adair, and the other cases of that character.

For several decades, the State Legislatures and Congress have increasingly recognized the public interest in wages and working conditions and industrial relations, and there has been a steady flow which has come into this Court of remedial legislation, in an effort to redress what was thought to be labor's previous inequality of bargaining position.

Every one of those statutes has been opposed here by the employers on the grounds of interference with the freedom of

contract, and labor's lawyers have been here arguing violently and long in this Court that there was not any freedom of contract superior to the State's policempower, properly exercised in the sphere of industrial relations, and all of us thought that they had the Court pretty well convinced.

Now, I hope, at this late date, that they are unable to unconvince the Court, and roll back the calendar as far as they would have it go, by this freedon of contract argument.

As I see these statutes, if the Court please, they are designed to cure three evils, or, conversely put, to recognize and protect at least three rights, any one of which is within the proper police power of the State.

The first and most important right protected here is the right of the unaffiliated minority to a job, without being required unwillingly to join the union established by the majority.

Now, it is not difficult for the Court to find that there have been abuses of the rights of the non-union minority under the protection of closed-shop contracts. In fact, the Court does not have to go any further than the records of its own decided cases to discover notable instances of such abuse.

The Court will recall the case of Hunt vs. Crumbach, the case of the contract carrier, the truck driver for A & P, in which the defendant union, having obtained a closed shop contract, refused to let the plaintiff and his employees join the

union, effectively depriving him and them of all opportunity of employment in the town in which they live.

It was held under that case, that it was not within the scope of the anti-trust law; but that was by no means a holding that the evil could not be reached, either by Congress, under appropriate legislation, or by the States.

Similarly, in the case adverted to by Mr. Justice Jackson earlier today, Wallace Corporation vs. the Labor Board, the labor union, winning an election, obtaining a closed shop contract, refused to let in the officers and employees of the competion union that they had just been in a scrap with.

There are other examples in the decided cases of this Court, of unfairness and discrimination in labor unions against the minority. Witness the Corsi case and the Steele case, where membership in the union was arbitrarily denied on the basis of color.

Now, the Court, I am sure, recognizes that although a union may represent an overwhelming majority of workers in any industry or plant, there may also be a minority who are not members, either because they do not wish to join, have some belief or conviction against joining, or because they persona non grata to the majority, and won't be admitted, can't be admitted.

Can this Court say that it is unreasonable for the States to protect the rights of that minority?

As I have said before, if the Court may recognize and protect the majority's right of free association, it seems to me logical that the State may also recognize and protect the minority's right of non-association. If the State can protect the right to employment, free from discrimination on account of union membership, surely the State may also recognize and protect the right to work free from discrimination, on account of non-membership.

Mr.Justice Frankfurter: The argument is that in order to protect the right of the majority to association, you cannot admit that right for the minority, for which you press, as I understand the argument.

Mr. Hill: Yes, sir; that is, as I understand it, as well. But I say, and I think experience points out, that the right to compel the minority's adherence is by no means indispensible or a concomitant of the majority's right to free association, and experience under the Labor Act and under these very statutes seems to demonstrate that conclusively.

We have been living under these statutes in some of these States for two years or more. Counsel have been unable to adduce any proof that these statutes have either prevented labor unions from effecting improvement in wages or working conditions, or impaired their ability to maintain and increase their membership.

Mr. Justice Reed: I suppose you would admit that a labor

union would be stronger if only its members could be employed?

Mr. Hill: I would, indeed. It would have an additional sanction, with which to get membership, and an additional argument or weapon to use in the industrial struggle. But I say that the freedom of association, the value and advantage of labor unions and their right to convince others to join with them, have not been and cannot be materially impaired by this anti-discrimination legislation.

Now, the second basis for this legislation that I see here, is the removal of one of the substantial causes of industrial disputes.

Counsel for the A F of L themselves, admit that the closed shop accounts for a substantial number of industrial disputes in recent years. There are some epic examples in the records of the decided cases of this Court.

The Apex Hosiery case, if the Court recalls, was one in which the closed shop issue resulted in great violence and other lawless acts.

The Petrillo case last year, the American Federation of Musicians case, in 1942, were other instances which came to this Court involving strikes over the closed shop issue alone.

Now, if the prevention of industrial disputes is a proper legislative function - and the Court has so recognized - and if the States may restrict the permissible limits of industrial conflicts, can this Court say that the elimination of the closed

shop issue bears no reasonable relation to this proper legislative object?

Unless the Court can make this kind of a finding, of course, the legislation must stand.

The third major evil which is being corrected by these statutes, is the use of the closed shop contract by labor to achieve a monopoly, or its use as a means to achieve monopoly.

Again I want to advert to some of the decided cases here.

The Court will recall the Allen-Bradley vs. Local Union No. 3 case, where closed shop contracts were used as a means of keeping out of the City of New York all the products manufactured outside that city; or the Petrillo case, where closed shop contracts were used as a means of requiring featherbedding use of more labor than was needed.

The prevention of monopoly and restraints of trade have been recognized as clearly within the States' legislative power and it may be persuasively argued, I think, that the closed shop contract itself, creates a monopoly as against the employe and as against the non-union worker.

But, apart from this, it is clear from these cases which I have adverted to, that the closed shop contract is an instrumentality which has been used for the creation of monopolies and restraints of trade in several respects. Prevention of monopoly being within the police power, can this Court say that

this statute bears no reasonable relationship to the effectuation of that proper legislative purpose? If the Court does not so find, of course, the legislation must stand. Now, to conclude, if the Court please: There has been a lot of argument here to the effect that this was unwise legislation.

I do not have the omniscience to know whether these statutes will prove out well and accomplish their objectives or not. It may be that these statutes will create some bitterness in industrial relations, such as to outweigh the good they will do.

It may be that in the light of experience, we will come to recognize that the right of labor unions to enter closed shop contracts, may weigh more heavily in the scale of social values than the other rights which the statutes were designed to protect. I do not know. I, myself, do not believe that. I do not believe the Legislatures have made a mistake in judgment here.

As I see it, this is a statute designed to protect the stature and dignity and rights of the individual in our complex industrial society, and I think these statutes are an important step in recognizing the right of the minority in an industrial society to earn a living without becoming a component part of the majority group.

Moreover, I do not think, in the light of experience, that these statutes will prove harmful to labor unions. I

think, to the contrary, they will probably have a beneficial effect. They would tend to make unions more democratic, more responsive to the will of their members. Membership will be maintained, under these statutes, and increased, by persuasion, by virtue of the union being able to persuade the unaffiliated minority that it is in their self-interest to join, not by dragooning the minority into joining by virtue of the proposed closed shop and keeping them there under threat of losing their jobs.

But, as I said bef ore, these predictions may be wrong. I claim no omniscience.

The Legislatures may have made a mistake in judgment here, but those considerations are not for this Court. The advantage of a democracy is that mistakes in judgment can be corrected at the ballot box. I am told that in last week's election, at least one State declined to enact this type of legislation, and another one repeaed it when it had previously been on the books.

These basic decisions as to the merits and wisdom of the legislation are for the voters. The test and the obligation of this Court is only to determine, in the words of the Nebbia case and a dozen others, whether the legislation bears some reasonable relationship to some proper legislative purposes of the State.

And I submit, your Honors, that on this test, there is

not any warrant or basis for striking down this type of legislation.

ORAL ARGUMENT OF EDSON SMITH

ON BEHALF OF APPELLEES.

Mr. Smith: May it please the Court:

There are three counsel representing Nebraska Appellees, who are appearing, dividing the time equally between us.

I represent the Nebraska Small Businessmen's Association the Association which was instrumental in putting the Nebraska Constitutional Amendment on the ballot, and influential in presenting the case for the Amendment to the voters, who adopt it by a vote of 242,000 to 212,000.

Mr. Justice Frankfurter: May I ask whether in your case it is necessary to have the proponents and opponents submit official pleas?

Mr. Smith: No, your Honor, they do not submit additional statements.

Mr. Justice Frankfurter. They do not?

Mr. Smith: No, they do not. We do not have the same practice here that they have in Arizona in that respect.

The matter, of course, was thoroughly debated, however, before the public, in a great many meetings throughout the political campaign.

Now, I have a little different experience with this case than the two counsel who have addressed the Court for Appellees so far.

They have appeared for the first time in this Court. I

followed this litigation from the beginning, and have had the privilege of noticing the arguments of the Appellants and they have been formulated and changed with the litigation.

When the litigation was filed originally, the Taft-Hartle Act had not yet been passed.

Apparently the principal argument relied on by the plaintiffs, now Appellees, was the theory that Congress in the Wagner Act, had occupied the field, and that therefore States were not permitted to enact such laws as these right-to-work amendments. That argument went out with the enactment of the Taft-Hartley Act.

Then there was the argument which was presented originally and is still insisted upon here, of the indispensibility of compulsory unionism to the functioning, the effective functioning, of labor unions. And that argument has been supported in various stages, and is still, to some extent, by quotations fro authorities, back in what is now ancient history, so far as labor history is concerned, statements made before the adoption of the Wagner Act, when employers were free to use the blacklist, when employers were free to use the Yellow Dog contracts, when they were free to discriminate as they might choose, again union members, and the contention at that time was that union security contracts were necessary to the preservation of the unions.

Times have since changed, and the argument of the appellee

as this case has proceeded, has changed; so that now, in lieu of the arguments that had been made, Mr. Thatcher in his brief, and in his argument here, says: "We only really contend now that compulsory unionism is indispensible where there is no State legislation which is the equivalent of the Wagner Act that is, where there is no legislation in the States which guarantees to a union having a majority of the employees in a bargaining unit, the right to represent those employees, and where there is no similar or other protection for the union man."

In view of the decisions of this Court as to the extent of the Wagner Act, saying that the National Labor Relations Act is as broad as any Act can be made, and may be applied to any case where commerce is affected in any degree, unless the Court would apply the rule of de minimis -- in view of those statements, and the recent statement of General Counsel for the NLRB, that it is a rare case where a business is not subject to the National Labor Relations Act at the present time -- the only situation where Appellees themselves claim indispensibility is the case of de minimis, and even in that kind of a case, even when you can conceive of a case where the protection of the Wagner Act is not given to unions, the pattern, the present-day pattern for labor relations, has been established by the Wagner Act, and it is rare nowadays when you find an employer attempting to act outside that pattern.

Now, I have talked about the indispensibility, briefly. I think it is beside the point. I think it is obviously beside the point, because, in this argument as to the First Amendment, protecting the right to have compulsory labor union membership contracts, they have assumed that the right of free assembly, of peaceable assembly, and free speech, extends way beyond what the language of the Constitution is. They have invented a doctrine of concomitance to the right of peace able assembly, and they say, "We have a right to have a labor union; we have a right, therefore, to make it effective."

Well, this Court, in the very cases which have been cited in the Appelants' arguments, particularly in the case of Thomas vs. Collins, which has been mentioned here a few times, has limited the right of free speech to cases of speech itself, and has said that even if it is a case of speech, the Constitutional protection for that speech disappears when the speech becomes characterized by coercion.

If the right to free speech stops when coercion begins, certainly no concomitance to the right of free speech or the right of free assembly can be granted, which involves and which is actually the very essence of coercion.

Mr. Justice Jackson: I thought perhaps you would tell us of the special interests of the group that you represent, as to this matter, and how they are affected by it.

Mr. Smith: The right-to-work amendment has several objec tives.

The primary objective is to protect the right of the individual workingman to earn his living in any of the ordinar occupations of the community, which, this Court has said in Truax vs. Raich, is at the very essence of the liberty protect ed by the Fourteenth Amendment.

There are secondary objectives which businessmen are especially interested in; which is notnto say that they are not interested in the primary objectives, too.

For instance, I am going to get into the question here of regulation of labor unions.

While their counsel here says, "We want reasonable regula tion" and calls the Court's attention to the provisions in the Taft-Hartley Act regulating the closed and union shops, calls the Court's attention to provisions in certain other State statutes regulating those relationships, actually, the unions are fighting those regulations just as strenuously as they are fighting what they call the absolute prohibition of the Right-to-work Amendments, and they are fighting them be- cause even those regulations deprive the unions of the arbi- trary power, which your Honor has very well stated, in the dissenting opinion in the Crumbach case, in this statement:

"This Court permits to employees the same arbitrary

dominance over the economic sphere which they control, which labor, so long, so bitterly, and so rightly assert should belong to no man."

Now, my clients, an Association of businessmen, do not want labor unions, by means of these compulsory union membership contracts, to have arbitrary power over businessmen or over the individual workingman, either one.

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(Whereupon, at 4:30 p. m. a recess was taken, to reconvene at 12 noon on Wednesday, November 10th, 1948.)

End CL

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