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LABOR LAW-CONSTITUTIONAL LAW-STATE ANTI-CLOSED SHOP LEGISLATION UPHELD

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LABOR LAW—CONSTITUTIONAL LAW—STATE ANTI-CLOSED SHOP LEGISLATION UPHELD—Appellant, a local union of the American Federation of Labor, sought a declaratory judgment and equitable relief in the Nebraska courts as a result of appellee's refusal to discharge certain employees who had failed to maintain membership in the union. The employer relied on an anti-closed shop amendment to the Nebraska Constitution[1] forbidding discrimination in employment on the basis of affiliation with a union and prohibiting contracts for this purpose. Appellant's assertions of invalidity of the amendment under the Federal Constitution were rejected by the state courts.[2] Upon appeal to the United States Supreme Court, *held*, affirmed, all justices concurring. *Lincoln Federal Labor Union No. 19129, A.F.of L., v. Northwestern Iron and Metal Co.*, (U.S.1949) 69 S.Ct. 251.[3]

The primary legal ground advanced by the union as a basis for invalidating the state laws was the "freedom of contract" argument resting on the due process clause of the Fourteenth Amendment.[4] Since history records the frequent use of this argument as a means of striking down legislative attempts to ameliorate poor working conditions,[5] it seems anomalous that labor's spokesmen should find the same argument on their tongues. The Court recognizes that the "contract" theory has lost its original potency,[6] and notes that since the state law validly regulates the "right to discriminate," the prohibition of closed shop contracts is a proper means of effectuating this policy.[7] The union's main contention, however, was an economic one. It was maintained that the right to bargain for closed shops is indispensable to survival of unionism and, therefore, that a prohibition of such bargaining impairs the workers' freedom of speech and association[8] by under-

[1] Neb. Const., art. 15, § 13 (1946).

[2] 149 Neb. 507, 31 N.W. (2d) 477 (1948).

[3] Consolidated for hearing and decision with this case was North Carolina v. Whitaker, 228 N.C. 352, 45 S.E. (2d) 860 (1947), involving precisely the same issues as those raised by the principal case. A similar case, A.F. of L. v. Amerian Sash & Door Co., 335 U.S. 538, 69 S.Ct. 258 (1948) [67 Ariz. 20, 189 P. (2d) 912 (1948)], involving an anti-closed shop amendment to the Arizona Constitution [Ariz. Laws (1947) p. 399], was considered by the Court the same day and upheld in a separate opinion by Justice Black. Separate concurring opinions of Justices Frankfurter and Rutledge applied to all cases. Justice Murphy agreed with Justice Rutledge's opinion in the Lincoln and Whitaker cases but dissented without opinion in the Sash & Door case.

[4] Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427 (1897).

[5] See, e.g., Adair v. United States, 208 U.S. 161, 28 S.Ct. 277 (1908); Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240 (1915); Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539 (1905); Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394 (1923).

[6] See Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934); United States v. Darby, 312 U.S. 100, 61 S.Ct. 451 (1941); Olsen v. Nebraska, 313 U.S. 236 at 244-5, 61 S.Ct. 862 (1941).

[7] Impairment of obligations of contracts was suggested by the union as a possible ground for invalidating the enactments, but the Court rejected the point without discussion, citing Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 at 436 to 439, 54 S.Ct. 231 (1934), a case establishing the proposition that the state police power is generally paramount to private contracts when "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."

[8] The union invoked the familiar doctrine that the due process clause of the Fourteenth Amendment embraces the freedoms guaranteed in the First Amendment. See West Virginia State Board of Education v. Barnette, 319 U.S. 624 at 639, 63 S.Ct. 1178 (1943); Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925).

mining and ultimately destroying unionism.[9] The Court has little difficulty in distinguishing the constitutional right to organize and plan collectively from the rather qualified right to carry collective plans into effect. In addition to expressing his opposition to suppression of social experimentation by the states, Justice Frankfurter, in his concurring opinion, finds that the legislative action in question could not be called "wilfully destructive of cherished rights." In the *American Sash and Door* case, considered by the Court in conjunction with the principal case,[10] denial of equal protection of laws under the Fourteenth Amendment was strongly urged by the union. This contention is rejected by the Court in the *Lincoln* and *Whitaker*[11] cases on the ground that the laws there considered forbade discrimination because of unionism or non-unionism. The Arizona constitutional amendment in question in the *Sash and Door* case prohibited discrimination in employment only because of non-unionism, but the Court points to the prohibition of "yellow-dog" contracts in the Arizona code[12] as indicative of good legislative motives, even though no action for injunction and damages was granted by the latter law, as it was in the anti-closed shop enactment.[13] It is apparently at this point that Justice Murphy, who dissents without opinion in the *Sash and Door* case while concurring in the other two, disagrees with the Court. Justice Rutledge's opinion, concurring in the results in all three cases, nevertheless expresses great concern that the opinions might be taken to mean that refusal to work with non-union employees could be prohibited on an "unlawful strike" rationale. He expresses a desire for a full hearing on the Thirteenth Amendment question before the Court acquiesces in any such proposition.[14] The decisions in these cases relegate unions to their political remedy in the legislative arena, both state and federal.[15] It is submitted that this result should not be altogether discouraging to partisans of unionism, since too great reliance on the courts to vindicate their positions is undesirable.

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[9] In resisting anti-closed shop propaganda and laws, unions have insisted that such restrictions are incited by employers who can thereby gain a bargaining advantage.

[10] See note 3, supra.

[11] See note 3, supra.

[12] Ariz. Code Ann. (1939) § 56-120.

[13] Ariz. Sess. Laws (1947) c. 81, p. 173. The Court cited the language in N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 46, 57 S.Ct. 615 (1937): ". . . legislative authority, exerted within its proper field, need not embrace all the evils within its reach."

[14] Judging from past cases, many state courts would not hesitate to enjoin a strike on such facts. See 41 MICH. L. REV. 1143 (1943). Moreover, the Fourteenth Amendment must be considered on the question of picketing; see, e.g., In re Blaney, 30 Cal. (2d) 643, 184 P. (2d) 892 (1947); noted in 46 MICH. L. REV. 435 (1948). In regard to the further question of whether the right to strike is a constitutionally protected right, see Alabama State Fed. of Labor v. McAdory, 246 Ala. 1, 21, 18 S. (2d) 810 (1944), affd., 325 U.S. 450, 65 S.Ct. 1384 (1945); Stapleton v. Mitchell, (D.C. Kan. 1945) 60 F. Supp. 51, 61. Since there has been no authoritative decision on this question by the Supreme Court, the caution of Justices Rutledge and Murphy seems appropriate.

[15] No question of supersedure was raised in the principal case because section 13(b) of the Taft-Hartley Act, 29 U.S.C.A. (Supp. 1946) § 158 et seq., specifically permits, as far as the commerce clause is concerned, state prohibition of union security agreements.