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The Validity Of Anti-Closed Shop Legislation

ticular states to a large extent in diversity cases. The reasons for urging the constitutionality of the amendment are not germane to an application of the laws, but to the finding of facts by jurors in the state courts where the citizen of the District is forced by these decisions to litigate, and where trial by jury has been stripped of many of its safeguards. Notable among these safeguards is the power of the judge as at common law to comment upon the evidence and to overcome bias by the jury by other means of control. It has been suggested that even greater reason exists for diversity jurisdiction in suits between a citizen of the District and a citizen of a state than in suits between citizens of different states, because of the possibility that jurors may tend, even unwittingly, to identify the District citizen as a bureaucratic opponent of state's rights.

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THE VALIDITY OF ANTI-CLOSED SHOP LEGISLATION

One of the most significant features of labor legislation in the past five years has been the widespread adoption of various statutes and constitutional amendments restricting or prohibiting the closed shop and other union security devices. These laws have ranged from the elaborate regulations set forth in the Taft-Hartley Act[1] to simple statutory prohibitions of the closed shop.[2] Despite the prevalent controversy concerning the merits of such enactments, there is a marked scarcity of judicial pronouncements passing directly on the validity of this legislation.[3] For this reason particular importance attaches to the

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(D. C. Md. 1947): "Since, under Erie R. Co. v. Tompkins, supra, the federal court, in diversity of citizenship cases, must apply the State law as declared by the highest State court, it is not seen how the resident of the District of Columbia will suffer any substantial disadvantage from having to sue in a State court."

[1]61 Stat. 140 (1947), 29 U. S. C. A. § 158 (a) (3) (Supp. 1947).

[2]For an analysis of current legislative restraints upon union security devices, see Sutherland, Reasons in Retrospect (1947) 33 Corn. L. Q. 1, 9-14; Note (1947) 42 Ill. L. Rev. 505, 505-7.

[3]Florida's constitutional amendment that the "right to work" should not be abridged because of membership or non-membership in a union was upheld in American Federation of Labor v. Watson, 60 F. Supp. 1010 (S. D. Fla. 1945), but this decision was reversed in 327 U. S. 582, 66 S. Ct. 761, 90 L. ed. 873 (1946), on the ground that the Florida amendment had not been authoritatively construed in the state courts. A subsequent effort to obtain such authoritative construction failed, because of combination of six causes of action in a bill for declaratory judgment. 31 S. (2d) 394 (Fla. 1947). An adjudication of the constitutionality of the Tennessee anti-closed shop statute was avoided and the case was determined on a procedural

fact that the Supreme Court of the United States has granted review to recent state court decisions in which the validity of anti-closed shop legislation is directly assailed.[4]

In *State v. Whitaker*,[5] the Supreme Court of North Carolina affirmed the conviction of George Whitaker, a building contractor, and various officials of local building trades unions, for contracting that Whitaker would employ only union members. The only question was that of the constitutionality of the anti-closed shop statute which was violated.[6] The Supreme Court of Arizona, in *American Federation of Labor v. American Sash & Door Co.*,[7] sustained the dismissal of an action for a declaratory judgment of the constitutionality of the "right to work" amendment to the state constitution.[8] These two cases will undoubtedly be decided upon virtually identical grounds by the Supreme Court of the United States, and upon their adjudication will hinge the validity of the more extreme restrictions of union security devices, currently so popular in the western and southern states.[9] Although the

point in Federal Firefighters of Oak Ridge v. Roane-Anderson Co., 206 S. W. (2d) 369 (Tenn. 1947). However, this statute was later upheld in Mascari v. International Brotherhood of Teamsters, reported as 209 S. W. (2d) 756 (Tenn. 1948) in the advance sheets, but withdrawn by order of the Court for unspecified reasons. 209 S. W. (2d) XII.

[4]No. 626, American Federation of Labor v. American Sash & Door Co., and No. 660, Whitaker v. State of North Carolina, 16 U. S. L. Week 3291 (March 30, 1948). A third decision, Lincoln Labor Union v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N. W. (2d) 477 (1948), sustaining Nebraska's constitutional amendment prohibiting the closed shop, was more recently granted review. No. 761, 16 U. S. L. Week 3347 (May 25, 1948). The state court's opinion in this case followed closely the reasoning of the Whitaker and American Sash & Door decisions, and added very little new material to the general question.

[5]228 N. C. 352, 45 S. E. (2d) 860 (1947).

[6]N. C. Sess. Laws (1947) c. 328: § 1: "It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union." § 2: Any agreement between employers and unions to make union membership a condition of employment "is declared to be against public policy and an illegal combination in restraint of trade." [A combination in restraint of trade is punishable as a misdemeanor. N. C. Gen. Stat. (Michie, 1943) Sec. 75-1] §§ 3, 4 and 5 prohibit the employer to require employees to join or abstain from joining labor unions or to pay dues or fees to labor unions, as a condition of employment. Other sections allow a worker to recover damages from an employer who denies him employment in violation of the statute.

[7]67 Ariz. 20, 189 P. (2d) 912 (1948).

[8]Ariz. Const. Amend. (1946): "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall ... any corporation, individual, or association of any kind enter into any agreement ... which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

[9]See Millis and Katz, A Decade of State Labor Legislation (1948) 15 U. of Chi. L. Rev. 282, 283-4.

Taft-Hartley Act expressly permits the several states to enact such measures,[10] the Supreme Court's determination of the constitutional status of these state regulations may conceivably decide the validity of the milder restrictions of the federal act itself.

It seems essential that the Court make some pronouncement as to the influence exerted upon the current anti-closed shop laws by the famous and controversial decisions of *Adair v. United States*[11] and *Coppage v. Kansas*,[12] in which federal and state statutes prohibiting an employer from discrimination against union members in hiring and discharging were held to be an unconstitutional interference with freedom of contract. In neither of the recent cases now under discussion was the problem of the lingering precedents of the *Adair* and *Coppage* cases given more than a passing mention. Judge Sewell of the North Carolina court, observed that "State laws... which outlaw 'yellow dog contracts' were first ruled unconstitutional, but are now regarded as valid,"[13] while Judge Udall of the Arizona court referred briefly to "outdated and overruled cases holding anti-yellow-dog contract legislation invalid."[14]

The rationale of the principal cases may be briefly stated thus: adopting the criterion of due process propounded in *Nebbia v. New York*,[15] and apparently acknowledging the self-restraint exercised by the Supreme Court in regard to state economic regulation since that time, the state courts recognize that here the police power of the state is paramount to the old sanctity afforded freedom of contract; the precedents of *Adair v. United States* and *Coppage v. Kansas*, supporting the concept of a greater freedom of contract, are regarded by these courts as finally overruled by *Phelps Dodge Corp. v. National Labor Relations Board*;[16] and consequently, if a legislature may now pro-

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[10]61 Stat. 151 (1947), 29 U. S. C. A. § 164 (b) (Supp. 1947).

[11]208 U. S. 161, 28 S. Ct. 277, 52 L. ed. 436 (1908).

[12]236 U. S. 1, 35 S. Ct. 240, 59 L. ed. 441 (1915).

[13]State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, 873 (1947).

[14]American Federation of Labor v. American Sash & Door Co., 67 Ariz. 20, 189 P. (2d) 912, 919 (1948).

[15]291 U. S. 502, 525, 54 S. Ct. 505, 510-11, 78 L. ed. 940, 950 (1934): "And the guaranty of due process... demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." See American Federation of Labor v. American Sash & Door Co., 67 Arix. 20, 189 P. (2d) 912, 917 (1948); State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, 866 (1947).

[16]313 U. S. 177, 61 S. Ct. 845, 85 L. ed. 1271 (1941). The Court held that refusal to hire certain workers solely because of union membership was an unfair labor practice under the Wagner Act. 49 Stat. 452-3 (1935), 29 U. S. C. A. § 158 (3) (1942). See note 43, infra.

hibit discrimination because of membership in a union, it may also prohibit discrimination because of non-membership in a union.[17] The crucial factor in this entire argument is the interpretation to be given to Justice Frankfurter's words in the *Phelps Dodge* case, decided in 1941: "The course of decisions in this Court since *Adair v. United States*... and *Coppage v. Kansas*... have *completely sapped these cases of their authority.*"[18] The question which now evolves is whether the present status of the *Adair* and *Coppage* doctrine is such that the courts of Arizona and North Carolina are justified in so easily disposing of these decisions.

Adair v. United States[19] held that a provision of the Erdman Act,[20] making unlawful the discharge by an interstate carrier of an employee solely because of membership in a labor organization, was invalid under the Fifth Amentment. The Court, speaking through Justice Harlan in 1908, declared: "... any legislation that disturbs the equality [of employer and employee] is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[21] The view was well substantiated by earlier state court decisions,[22] although Justice Holmes, dissenting, pointed out that there was "a very limited interference" with freedom of contract in prohibiting certain discriminations by "the more powerful party."[23]

The principle of the *Adair* case was accepted as decisive in the seven

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[17]This proposition that "sauce for the management goose" should necessarily be "sauce for the labor gander" could, in itself, be subjected to some criticism. It is apparently supported by no stronger authority than a dictum of Justice Rutledge: "Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." Thomas v. Collins, 323 U. S. 516, 538, 65 S. Ct. 315, 326, 89 L. ed. 430 (1945), quoted in State v. Whitaker, 45 S. E. (2d) 860, 873 (N. C. 1947).

[18]313 U. S. 177, 187, 61 S. Ct. 845, 849, 85 L. ed. 1271, 1279 (1941) [italics supplied].

[19]208 U. S. 161, 28 S. Ct. 277, 52 L. ed. 436 (1908).

[20]30 Stat. 424 (1898).

[21]208 U. S. 161, 175, 28 S. Ct. 277, 280, 52 L. ed. 436, 442-3 (1908).

[22]Gillespie v. People, 188 Ill. 176, 58 N. E. 1007 (1900); Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 Pac. 848 (1904); State v. Julow, 129 Mo. 163, 31 S. W. 781 (1895); State ex rel. Zilmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098 (1902). See United States v. Scott, 148 Fed. 431, 436-7 (W. D. Ky. 1906).

People v. Marcus, 185 N. Y. 257, 77 N. E. 1076 (1906) reached the same result, but is worthy of special mention for its holding that the employer's right to require an employee to abstain from union membership was a part of that same freedom of contract enabled the employer to place his employment wholly within union control, citing Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905), in which a closed shop contract with a trade union was upheld.

[23]Adair v. United States, 208 U. S. 161, 191, 28 S. Ct. 277, 287, 52 L. ed. 436, 449 (1908).

years which intervened[24] before the Supreme Court complemented that doctrine with the decision of *Coppage v. Kansas*.[25] Here a state statute rendering unlawful the requiring of an agreement to refrain from union membership as a condition of employment, was held unconstitutional under the Fourteenth Amendment. Holmes again dissented, on the ground that, if a worker might reasonably believe that only by union membership could he secure a free contract, this belief "may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins."[26]

The doctrine of virtually absolute freedom of contract in the employment relationship, as a direct barrier to removal of anti-union discrimination, continued to be of undiminished influence in the federal and state courts for over a score of years after the adjudication of *Adair v. United States*.[27] The theory of the *Adair* and *Coppage* cases was not directly limited, even after 1930,[28] but was restricted only

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[24]Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500 (C. C. D. Nev. 1908); State ex rel. Smith v. Daniels, 118 Minn. 155, 136 N. W. 584 (1912). "... the employer may contract with his employe to buy his labor upon terms other than the union ones, and, in order that the union ones may not be disturbing elements in the conduct of his business, may bind his employe not to become a member of the union...." Hitchman Coal & Coke Co. v. Mitchell, 172 Fed. 963, 967 (C. C. N. D. W. Va. 1909).

[25]236 U. S. 1, 35 S. Ct. 240, 59 L. ed. 441 (1915).

[26]236 U. S. 1, 27, 35 S. Ct. 240, 248, 59 L. ed. 441, 451 (1915). Justices Day and Hughes, dissenting, sought to distinguish this from the Adair case, in that the state statute was directed against an employer's coercing the employee, as a condition of hiring, to forego his legal right to organize. 236 U. S. 1, 38, 35 S. Ct. 240, 253, 59 L. ed. 451, 455 (1915).

[27]Montgomery v. Pacific Electric Ry. Co., 293 Fed. 680 (C. C. A. 9th, 1923); Cyrus Currier & Sons v. International Moulders' Union, 93 N. J. Eq. 61, 115 Atl. 66 (1921); Bemis v. State, 12 Okla. Crim. 114, 152 Pac. 456 (1915); Nashville Ry. & Light Co. v. Lawson, 144 Tenn. 78, 229 S. W. 741 (1921); McNatt v. Lawther, 223 S. W. 503 (Tex. Civ. App. 1920). See Owen v. Westwood Lumber Co., 22 F. (2d) 992 (D. C. Ore. 1927); Grassi Contracting Co. v. Bennett, 174 App. Div. 244, 249, 160 N. Y. Supp. 279 (1916); Michaels v. Hillman, 112 Misc. 395, 396-7, 183 N. Y. Supp. 195 (1920).

The only discordant note in the litigation of this period is found in Jackson v. Berger, 92 Ohio St. 130, 110 N. E. 732, 735 (1915), where the dissent anticipated the criticism of later years in referring to freedom of contract as a "severely overworked" concept, and suggested that holding such a statute unconstitutional was a denial of equal protection to the worker in depriving him of his right of organization.

[28]In re Opinion of the Justices, 271 Mass. 598, 171 N. E. 234 (1930); In re Opinion of the Justices, 275 Mass. 580, 176 N. E. 649 (1931); In re Opinion of the Justices, 86 N. H. 597, 166 Atl. 640 (1933). But see Howes Brothers Co. v. Massachusetts Unemployment Compensation Comm., 296 Mass. 275, 5 N. E. (2d) 720, 729 (1936).

indirectly by the interpretation of federal statutes designed to safeguard or stimulate the process of collective bargaining.[29]

This process of restriction was initiated in *Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*,[30] which marked the beginning of the trend away from the absolute rules of the *Adair* and *Coppage* cases. The Court upheld an injunction restraining the railroad from interference with its employees in their selection of collective bargaining representatives, as provided in the Railway Labor Act of 1926.[31] Chief Justice Hughes, speaking for a unanimous Court, sought to distinguish the *Adair* and *Coppage* cases on the ground that the Railway Labor Act did not interfere with the carrier's right to select or discharge its employees. "The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing."[32]

Subsequently, when a labor federation sued to compel its recognition by a carrier as the representative of certain employees,[33] the *Railway Clerks* case was cited for the proposition that there was no interference with the normal right of selection or discharge of employees. The Court proceeded to state that the provisions of the amended Railway Labor Act[34] "neither compel the employer to enter into any agreement, nor preclude it fom entering into any contract with individual employees."[35]

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[29]Governmental disapproval of contracts which impair the right of the employee to unionize may also be found in federal and state statutes which restrict the use of the injunction in labor disputes. Section 3 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. A. § 103 (1942), declared the "yellow dog" contract unenforceable in the federal courts and eliminated it as a basis for injunctive relief. This served to overthrow the extension of the Adair and Coppage decisions, made in Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 S. Ct. 65, 62 L. ed. 260 (1917), in which the union was enjoined from interfering with a "yellow dog" relationship. See Frankfurter and Greene, The Labor Injunction (1930) 146-9; Fraenkel, Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts (1936) 30 Ill. L. Rev. 854, 857.

However, anti-injunction statutes were recognized as fundamentally different from the statutes stricken down in the Adair and Coppage cases. "To attempt to impute criminality to an act that is sanctioned by the Constitution is obviously different from prescribing a special procedure to be followed to obtain injunctive relief in a special class of cases." Starr v. Laundry & Dry Cleaning Workers' Union, 155 Ore. 634, 63 P. (2d) 1104, 1105 (1936).

[30]281 U. S. 548, 50 S. Ct. 427, 74 L. ed. 1034 (1930).

[31]44 Stat. 577 (1926).

[32]281 U. S. 548, 571, 50 S. Ct. 427, 434, 74 L. ed. 1034, 1046 (1930).

[33]Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592, 81 L. ed. 789 (1937).

[34]48 Stat. 1185 (1934), 45 U. S. C. A. §§ 151-163 (1942).

[35]300 U. S. 515, 559, 57 S. Ct. 592, 605, 81 L. ed. 789, 806 (1937). The import of

When the constitutionality of the original National Labor Relations Act[36] was affirmed in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[37] the doctrine of *Adair* and *Coppage* was once again held "inapplicable"[38] to legislation in furtherance of collective bargaining. "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation...."[39] The authority of the National Labor Relations Board to order reinstatement of employees discharged for union activity[40] was sustained as a permissible sanction for the protection of the employees' right to organize.[41]

Anti-union discrimination in hiring, the familiar counterpart of anti-union discrimination in discharging, was conclusively determined to be an unfair labor practice[42] by the decision of *Phelps Dodge Corp. v. National Labor Relations Board.*[43] The extension of the Wagner

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the passage quoted was subsequently abrogated by the ruling that agreements with individual members of the bargaining unit must be subordinated to collective bargaining agreements. J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 338-9, 64 S. Ct. 576, 580-81, 88 L. ed. 762, 768 (1944).

[36]49 Stat. 449 (1935), 29 U. S. C. A. §§ 151-166 (1942).

[37]301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937).

[38]"This brief reference [in the Railway Clerks case, note 32, supra] to the case of Adair v. United States and Coppage v. United States [sic], makes it entirely clear that the court had no intention to depart from the principles involved in those cases, instead they are recognized but held inapplicable." National Labor Relations Board v. Mackey Radio & Tel Co., 87 F. (2d) 611, 619 (C. C. A. 9th, 1937).

[39]301 U. S. 1, 45-6, 57 S. Ct. 615, 628, 81 L. ed. 893, 916 (1937).

[40]49 Stat. 454 (1935), 29 U. S. C. A. § 160 (c) (1942).

[41]Prior to this decision, the application of the National Labor Relations Act so as to limit the right to bargain had been questioned as a denial of due process, by the authority of the Adair and Coppage cases. Pratt v. Stout, 85 F. (2d) 172 (C. C. A. 8th, 1936). Even after the Jones & Laughlin opinion, the relaxation of the old precedents in order to protect the employees in their self-organization was not universally recognized. Kitty Kelly Shoe Corp. v. United Retail Employees, 126 N. J. Eq. 374, 9 A. (2d) 295 (1939). See National Labor Relations Board v. Tidewater Express Lines, 90 F. (2d) 301 (C. C. A. 4th, 1937).

[42]49 Stat. 452-3 (1935) 29 U. S. C. A. § 158 (3) (1942).

[43]313 U. S. 177, 61 S. Ct. 845, 85 L. ed. 1271 (1941). In regard to the constitutionality of the prevention of discrimination in hiring, the Court placed reliance upon the concurring opinion of Judge Learned Hand in Phelps Dodge Corp. v. National Labor Relations Board, 113 F. (2d) 202, 207 (C. C. A. 2d, 1940). "Nor am I moved by the argument that the employer must be free to hire whom he will. The whole purpose is to limit his liberty so far as its exercise may invade the new rights created; and I can see no greater limitation in denying him the power to discriminate in hiring, then in discharging." See also the opinion of Judge Magruder in National Labor Relations Board v. Waumbec Mills, 114 F. (2d) 226 (C. C. A. 1st, 1940), quoted in note 55, infra.

Act to allow the Board to direct the hiring of workmen where no employment relationship had existed before was indeed a far cry from any concept of unrestrained freedom of contract. When Justice Frankfurter, as spokesman for the Court, pronounced *Adair v. United States* and *Coppage v. Kansas* "completely sapped of their authority,"[44] it seemed to indicate that the two old cases had become nothing more than dead letters.

The proponents of the closed shop, who now seek to use the reasoning employed in the *Adair* and *Coppage* decisions in their assault upon anti-closed shop laws must solve three closely related problems. First, they must show that the labor movement can rely upon the theory of freedom in the employment contract, without repudiating the series of decisions which have greatly limited that theory for the benefit of the unions. Second, they must prove that that theory, as propounded in the decisions of former years, was not completely discarded in *Phelps Dodge Corp. v. National Labor Relations Board.* Third, they must demonstrate that the surviving precedents of *Adair v. United States* and *Coppage v. Kansas* present an insuperable obstacle to prohibitions of the closed shop.

At first glance, it appears an extreme paradox for the advocates of union labor to place reliance upon the decisions of forty years ago in an endeavor to brand current legislation an invalid impairment of freedom of contract. It may well be argued that this prima facie inconsistency explains the scant consideration which was accorded the *Adair* and *Coppage* problem by the Arizona and North Carolina courts.[45] This question merits a detailed reply, for a satisfactory answer to the issues involved will be of great aid in answering the other queries set forth above.

The old statutory prohibitions of anti-union employment practices were stricken down by the courts in adherence to a concept of freedom of contract as an attribute of our basic liberty. Only the most unquestioned exercises of the police power would permit governmental intervention in the employer-employee relationship to pass the barriers of the Fifth and Fourteenth Amendments. However, the growing intensity of economic crises in the past two decades has caused a multitude of legislative efforts to combat alleged evils in our industrial system. It is common knowledge that the constitutional ques-

[44]313 U. S. 177, 187, 61 S. Ct. 845, 849, 85 L. ed. 1271, 1279 (1941).

[45]American Federation of Labor v. American Sash & Door Co., 67 Ariz, 20, 189 P. (2d) 912, 919 (1948); State v. Whitaker, 228 N. C. 352, 45 S. E. (2d) 860, 873 (1947). See notes 13 and 14, supra.

tions thus raised were resolved in the courts by a general recession from the judicial precepts of the past. The former inflexible attitude toward freedom of contract was relaxed, though often with reluctance, by the judges who gradually recognized the perils of uncontrolled economic forces. In this recanting of the dogma of previous years, no one component in our society gained more than organized labor. The sustaining of the Wagner Act[46] and its subsequent enforcement represent an advance which would have seemed impossible earlier in this century. The course of opinions has been marked by the imposition of sweeping limitations upon the doctrine of *Adair v. United States* and *Coppage v. Kansas*. Employers have been prohibited from interfering with the selection of bargaining representatives[47] and compelled to recognize labor organizations as representatives,[48] while discriminations in hiring[49] or discharging[50] have been declared unfair labor practices.

A rationale of the theory of free contract which will leave unimpaired these limitations must be discovered, if this theory is to be used in an attack upon anti-closed shop legislation. Otherwise the adoption of the liberty of contract doctrine by the labor movement will imperil the victories won in imposing restrictions upon that doctrine.

The answer to the problem is to be found in the devolution of the free contract precedents which have been discussed here. The majority of the Court, in the *Adair* and *Coppage* opinions, fortified its position with a discussion of liberty of contract[51] which is of considerable persuasive power to those who are willing to overlook the same determinative factor which the majority of the Justices disregarded: that the or-

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[46]National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937).

[47]Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. ed. 1034 (1930). See note 30, supra.

[48]Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592, 81 L. ed. 789 (1937). See note 33, supra.

[49]National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937). See note 37, supra.

[50]Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 61 S. Ct. 845, 85 L. ed. 1271 (1941). See note 43, supra.

[51]E. g.: "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer, for whatever reason is the same as the right of the employer, for whatever reason, to dispense with the services of such employe." Adair v. United States, 208 U. S. 161, 174-5, 28 S. Ct. 277, 280, 52 L. ed. 436, 442 (1908), quoted in Coppage v. Kansas, 236 U. S. 1, 10-11, 35 S. Ct. 240, 242, 59 L. ed. 441, 444-5 (1915).

dinary worker's liberty to contract did not generally exist in fact.[52] Justice Holmes, dissenting in *Coppage v. Kansas*,[53] recognized that true freedom in the employment contract was an illusion so long as there remained so pronounced a disparity in the bargaining position of the parties. The gradual comprehension of this thesis by the supreme tribunal was coupled with the acceptance of the correlative proposition that only through self-organization of the employees could some equality of bargaining position be obtained.[54]

The Court professed to regard the employer's liberty of contract as basically unimpaired by the statutory protection of unionization. Freedom to hire or discharge was limited only insofar as it interfered with the right of the employees to associate in labor organizations.[55] In other words, the employer was restricted only when he exercised his rights so as to impair the rights of the employee. Liberty of contract is not a privilege to be denied the laboring class, but only through organization can this liberty be achieved. Thus it is by no means inconsistent to place reliance upon the theory of free contract and simultaneously to extol the decisions which protect the right to organize, for with the laborer the latter is an indispensable prerequisite to the former.

If the *Phelps Dodge* decision is viewed as an isolated phenomenon, it may seem that the reference therein made to *Adair v. United States* and *Coppage v. Kansas* implies that these cases were overruled in fact, if not in name. However, if the 1941 decision is regarded in its proper position at the conclusion of a series of opinions, a different interpre-

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[52]Cf. Brotherhood of Ry. Clerks v. Texas & N. O. R. Co., 24 F. (2d) 426, 429 (S. D. Tex. 1928): "...in Adair v. U. S...., a majority of the Supreme Court of the United States had not been able to see that the custom of balancing the concentrated power of the employer, on the one hand, by the concentrated power of the employee, on the other, in negotiating wage and working agreements,...had so established itself as to become justiciable."

[53]236 U. S. 1, 27, 35 S. Ct. 240, 248, 59 L. ed. 441, 451 (1915). See note 26, supra.

[54]National Labor Relations Board v. Washington, Virginia & Maryland Coach Co., 85 F. (2d) 990, 994 (C. C. A. 4th, 1936): "...it is noteworthy that the argument of the Court [in the Railway Clerks case] was based, as were the dissents in Adair v. United States, upon the power of Congress...to safeguard the recognized right of the employees to organize and bargain collectively...."

[55]Jefferson Electric Co. v. National Labor Relations Board, 102 F. (2d) 949, 957 (C. C. A. 7th, 1939): "At the common law, the right of the employer to discharge was unconditional and absolute....Under the National Labor Relations Act, the right to hire and discharge remains inviolate, when exercised for ordinary ends." National Labor Relations Board v. Waumbec Mills, 114 F. (2d) 226, 236 (C. C. A. 1st, 1940): "This normal right of selection or discharge may still be exercised for any reason deemed sufficient by the employer, except for the restriction that it may not be exercised for the purpose of interfering with the self-organization of employees."

tation evolves. It has been indicated in some detail how the original doctrine of liberty of contract, as expounded in the early decisions, was restricted to protect the self-organization of the workers. The *Phelps Dodge* holding that anti-union discrimination in hiring was an unfair labor practice was the culmination of the restrictive process to which the free contract concept was submitted. In the *Railway Clerks, Virginian Railway* and *Jones & Laughlin* decisions, cited by Justice Frankfurter as sapping the authority of the *Adair* and *Coppage* cases, the Court carefully indicated that *Adair* and *Coppage* were merely "inapplicable." Viewing the *Phelps Dodge* opinion as the projection of the more recent line of decisions, it does not seem plausible that the Supreme Court intended to overrule completely its earlier pronouncements. Frankfurter's description of the old cases as "sapped... of their authority" may be more rationally explained: merely that the doctrine of inviolability of the employer's freedom to contract has been eroded so far as necessary to safeguard self-organization of the employees.

Not only is there a lingering vitality in the precedents of *Adair* and *Coppage*, on which the labor movement may rely without imperilling the effect of the decisions since 1930, but the precedents, in their present limited form, are in fundamental conflict with a legislative ban of union security devices. It seems beyond doubt that, under an unrestricted doctrine of freedom of contract, an employer and a labor organization would be entirely free to agree that only union men would be employed, and that a flat prohibition of the closed shop would unwarrantedly interfere with this freedom. The theory of freedom of contract still applies to the employment relationship, subject only to the limitation that the employer shall not use the power of his superior bargaining position to restrain the employees' right to organize. This limitation, placed solely to protect the right to self-organization, cannot conceivably be extended to condone anti-closed shop legislation. Neither the theory of *Adair* and *Coppage* nor the subsequent restrictions placed thereon will permit the present enactments to endure. If anti-closed shop laws are to be sustained, then *Adair v. United States* and *Coppage v. Kansas* must be unequivocally overruled.

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