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CONSTITUTIONAL RIGHTS AND THE INDUSTRIAL STRUGGLE

SIDNEY POST SIMPSON*

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."—MR. JUSTICE HOLMES.

During recent years there has been much discussion of the respective legal privileges of employers and employees in the industrial struggle. Various "rights" have been claimed and maintained, and there have been repeated assertions that certain of these rights are protected by the Constitution of the United States. Thus there has been talk of the "right of collective bargaining", of the "right to operate an open shop", of the "right to operate a closed shop". Furthermore, there has been much discussion of an alleged conflict between these various rights and particularly between the "right of collective bargaining" and the "right to operate an open shop".

The issues involved are of the utmost importance and have properly been so regarded by the various disputants. Numerous strikes and lock-outs, causing great financial loss to employers, great privation to employees and their families, and great hardship to the public, have resulted from misunderstanding as to these "rights". Accompanying these strikes or lock-outs there has been not a little bloodshed, and even actual loss of life, since the parties to the industrial struggle have not yet learned always to abide by the rules of the legal order.

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It is therefore of great importance that there be a clear understanding of what these "rights" are, and of the extent to which they are protected by the Constitution. If any progress is to be made toward industrial peace, it is fundamental that the rules governing the industrial struggle, as they are at present constituted, shall be obeyed and respected by all parties. It may be that some of these rules are unnecessary or obsolete, or even unfair, but, if that is so, the thing to do is to change those rules in the manner prescribed by law for such change, and not to violate them; and it is especially incumbent upon those who believe that the rules as at present laid down are not all they should be, to devote their attention to securing changes in the proper and orderly manner, and not to encourage violations. For this reason, it is especially important to have a clear idea of what those rules are, and of how far they are definitely established.

It is the purpose of this paper to attempt an inquiry into one phase of this question, to consider certain of these alleged rights, and to point out just which of them have been held to be constitutionally protected, and which of them have not been so held. It is further proposed to venture into the difficult realm of prophecy, and to weigh the probabilities as to future constitutional decision. In other words, the purpose of this paper is to see just what are to be considered the present rules governing the industrial struggle, and especially to ascertain which of these rules can be changed only by amending the Constitution of the United States.

A necessary preliminary to any such discussion is a careful definition of terms. Here, perhaps to a greater extent than in any other field of the law, we are dealing with slippery words. "Open shop", "closed shop", "collective bargaining"—each of these terms is a Pandora's Box of ambiguity, and contains within itself germs of dissension. It is therefore absolutely necessary, in the interests of precision of thought, to state clearly the sense in which the terms just referred to will be used in any particular discussion. For the purposes of this paper the following definitions will be used:

An open shop is an industrial unit or a department of such a unit, in which the employer hires men regardless of their membership or non-membership in any labor organization, and where his employees are free to join or refrain from joining such an organization. There are two principal forms of the open shop. One may be termed the union open shop, where the employer deals with a labor organization representing his employees, but where there.
is no discrimination against non-union men. The union open shop may involve the recognition of a labor organization not confined to a particular operating unit, or it may involve simply the recognition of a so-called "company union". The other form is the 
non-union open shop, where the employer does not deal with any labor organization but where there is no discrimination against union members.

The term "closed shop" is of little value, since it applies equally to the description of two radically different forms of labor relations—the sole common element being that certain consequences are attached by the employer to the membership or non-membership of his employees in a labor organization. In the closed non-union shop the employer hires only men who are not members of a labor organization, and the employees are not permitted to become members of such an organization while remaining in the employment. In the closed union shop, the employer hires only men who are members of a labor organization and the employees are required to remain members of such an organization so long as they continue in the employment.

The term "collective bargaining", like the term "closed shop", has been used in so many different ways as to have become practically meaningless. It has been used to cover at least three widely different situations. The first situation is where all or a considerable proportion of the employees of a particular industrial unit meet with the management to discuss questions of common interest through representatives of their own choosing who are themselves employees, and where the organization for such bargaining is confined to the operating unit. This is the so-called "company union" system. The second situation differs from the first in that the organization is not confined to the employees of a particular operating unit, but resembles it in that the employer deals only with his own employees. The third situation is where the employees deal with their employer, or where the employees of a number of operating units deal with their associated employers, through representatives chosen by the employees, who are not necessarily employees themselves. In order to avoid the confusion inevitable if the term "collective bargaining" is used, its use will be avoided and instead the actual situation involved in each particular case will be set forth.

With these definitions in mind it is possible to proceed to a consideration of the questions which this paper will attempt to answer. These questions are three in number: (1) To what extent does
the Constitution of the United States protect the right of employers and employees to contract together for the purpose of maintaining a closed non-union shop, and to what extent does it protect the continuance of that contractual relationship when entered into? (2) To what extent does the Constitution of the United States protect the right of employers and employees to contract together for the purpose of maintaining a closed union shop, and to what extent does it protect the continuance of that contractual relationship when entered into? (3) To what extent does the Constitution of the United States protect the right of employers and employees to contract together for the purpose of maintaining an open shop and to what extent does it protect the continuance of that contractual relationship when entered into?

I. CONSTITUTIONAL PRINCIPLES INVOLVED

The applicable provisions of the Constitution are the due process clause of the Fifth Amendment1 and the due process and equal protection clauses2 of the Fourteenth Amendment. The limitations imposed upon Congress by the due process clause of the Fifth Amendment are the same as those imposed upon the legislatures of the several states by the similar provision of the Fourteenth Amendment3; and it has been repeatedly held by the Supreme Court of the United States that these provisions protect liberty of contract4. The right freely to enter into contracts is regarded as partaking of the characteristics of both liberty and property. As is said by Mr. Justice Pitney in the case of Coppage v. Kansas5:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right

1 "... nor shall any person be deprived of life, liberty, or property, without due process of law." U. S. Const., Amendment V. This limitation applies only to the federal government. Barron v. Baltimore, 7 Pet. (U. S.) 243 (1832).
2 "... nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amendment XIV.
5 236 U. S. 1, 14 (1915).
to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense 7.

However, freedom of contract is not an absolute right, and the legislature may prohibit or regulate certain forms of contracts under the police power. As is stated in the case of *Lochner v. New York* 8:

"Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere . . . . In every case . . . . . that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family" 7.

In accordance with these principles, legislation has been upheld which prohibits contracts in restraint of trade. 8 Similarly, it has been held constitutional to regulate contracts of service so as to prevent undue hours of labor, likely to result in injury to the health of the workers, and limitations on liberty of contract have

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7. Compare *Minimum Wage Board v. Children's Hospital*, 261 U. S. 525, 546 (1923): "There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is the rule and restrain the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."


been upheld under the police power in many other cases. The question in each case is whether the particular limitation upon the freedom of the individual to enter into contracts is justified by the police power under the particular circumstances involved. In determining the question, general definitions of the scope of the police power are of little value. As the Supreme Court has said, the line of constitutionality is being gradually pricked out by a multitude of decisions, some on this side of the line and some on the other. It is necessary, therefore, to examine the decisions which have dealt with the various classes of labor relationship under consideration.

Before passing to a consideration of these decisions, however, it must be noted that the legislatures of the states are subject to certain constitutional limitations not imposed upon Congress, since the Fourteenth Amendment contains a prohibition against depriving any person of the equal protection of the laws, while the Fifth Amendment contains no such provision. While it is possible that federal legislation might be so outrageously discriminatory that it would fail to be due process of law, yet it would seem to be entirely possible that legislation might be due process and so valid if passed by Congress, and yet that it might involve a discriminatory classification which would invalidate it if it were passed by a state legislature; and this distinction has recently been recognized by the Supreme Court of the United States.

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22 See notes 1 and 2, supra.

23 See United States v. New York, New Haven & Hartford R. Co., 165 Fed. 742, 745 (1908), per Putnam, J.: "It is necessary to observe the substantial distinction between the Fifth Amendment, which is obligatory only on the United States, and the Fourteenth Amendment, which is obligatory only on the states. The limitations in the former is 'without due process of law.' In the Fourteenth Amendment this limitation is accompanied with a prohibition of the denial of the 'equal protection of the laws.' Of course, the latter expression is broader than the former, although it must be conceded that the mere denial of the 'equal protection of the laws' might run into the other limitation. It is plain, nevertheless, that mere discrimination in certain particulars does not necessarily have this effect." See also Caldwell v. Texas, 137 U. S. 692, 697 (1891); Leeper v. Texas, 139 U. S. 462, 468 (1891); Maxwell v. Dow, 176 U. S. 581, 604, (1900).

With these general principles in mind, it is possible intelligently to consider the specific problems with which it is the purpose of this paper to deal. In dealing with each of them it will be necessary first to investigate the situation at common law, and then to consider the extent to which the common law rules are protected by the Constitution from statutory change.

II.

THE CLOSED NON-UNION SHOP

The common-law right of an employer to hire and fire as he pleases has never been questioned, and it is perfectly clear that, in the absence of statute, employment may be denied a man because of his membership in a labor organization. Is this common-law right protected by the Constitution so that a statute designed to prevent discharge or refusal of employment on account of membership in a labor organization will be invalid? On the basis of the decisions, the answer must be in the affirmative. It is now settled law that the due process clauses of the Fifth and Fourteenth Amendments protect the right of an employer to operate on a non-union basis. This doctrine was first laid down by the United States Supreme Court in the case of Adair v. United States, in which a federal statute, making it a criminal offense to discharge an employee of an interstate carrier on account of his membership in a labor organization, was held unconstitutional under the Fifth Amendment. It is true that the decision was rested partly on the ground that the legislation in question was not a legitimate regulation of commerce, and therefore was outside the scope of federal authority; but in the later case of Coppage v. Kansas, any doubt as to the authority of the Adair case on the broad proposition of due process was removed. In that case it was held that a statute of Kansas, which made it a misdemeanor for any person to exact from an employee an undertaking that he would not become or remain a member of a labor organization as a condition of securing or continuing in employment, was invalid.

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16 See Adair v. United States, 208 U. S. 161, 173 (1908), citing Cooley, Torts, 278: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice or malice. With his reasons neither the public nor third person have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress."

17 208 U. S. 161 (1908).


19 236 U. S. 1 (1915).
under the due process provision of the Fourteenth Amendment.\textsuperscript{19} No attempt was made to distinguish the \textit{Adair} case on the ground that it had been decided under the commerce clause, and the court followed the earlier decision as controlling. It was argued that the \textit{Adair} case was distinguishable, since the statute there involved prohibited \textit{discharge} on account of union membership and not the \textit{requiring} of an \textit{undertaking not to join or remain} in the union as a condition of securing or retaining employment; but this contention was rejected\textsuperscript{20}.

The Supreme Court is thus definitely committed to the proposition that any legislation designed to prevent an employer from operating his establishment on a closed non-union shop basis is invalid. As the proposition is stated by Mr. Justice Pitney in \textit{Hitchman Coal & Coke Company v. Mitchell}\textsuperscript{21}:

\begin{quote}
"This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."
\end{quote}

It is to be noted that Mr. Justice Pitney qualifies his statement that this right cannot be taken away by the phrase "unless through some proper exercise of the paramount police power". There are two conceivable grounds for the exercise of the police power in such cases. The first is based on the theory that employer and employee are on an unequal footing as to bargaining power, and that legislation designed to make them more equal in this regard is therefore within the scope of the police power\textsuperscript{22}. But this contention has been rejected in the Supreme Court. Thus Mr. Justice Pitney says, in \textit{Coppage v. Kansas}\textsuperscript{23}:

\begin{quote}


21 245 U. S. 229, 251 (1917).


23 236 U. S. 1, 17 (1915).
"As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of common knowledge that employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract purchase thereof. No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts and not merely to that between employer and employee. Indeed, a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the 14th Amendment, in declaring that a state shall not 'deprive any person of life, liberty, or property without due process of law', gives to each of these an equal sanction; it recognizes liberty and property as coexistent human rights, and debars the states from any unwarranted interference with either.

"And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of the exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty'.

The second conceivable ground for invoking the police power is an alleged social interest in the existence and functioning of labor unions. On this point the court has said, in *Coppage v. Kansas*:

"But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are

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25 236 U. S. 1, 16 (1915).
not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented."

Furthermore, it has recently been held that the securing of a minimum wage for women is not a legitimate object for the exercise of the police power, and that the public interest in an uninterrupted supply of food or of coal is not a sufficient justification for a compulsory wage arbitration law. These cases go far to show that the present court is very reluctant to extend the boundaries of the police power any further than has already been done. Hence it can confidently be asserted that the Constitution of the United States protects and guarantees to employers the right to operate a closed non-union shop.

The existence of the right of employers to operate on a non-union closed shop basis in no way conflicts with the constitutional right of employees to become members of labor organizations. Liberty to contract simply means liberty to enter into a contract provided another person can be found who is willing to enter into the particular sort of contract desired. This is brought out by the statement of Mr. Justice Pitney, in Coppage v. Kansas:

"Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization . . . . and the liberty of making contracts does not include the liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employee.

"To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, but not that he should be compelled to accept it."

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25 Minimum Wage Board v. Children's Hospital, 261 U. S. 525 (1923).
27 See the remarks of Holmes, J., in Pennsylvania Coal Co. v. Mahon, 260 U. S. 343, 416 (1922), and of Sutherland, J., in Minimum Wage Board v. Children's Hospital, 261 U. S. 525, 546, 552 (1923).
28 It has often been asserted that there is such a conflict. See, for example, Report of the Senate Committee on Education and Labor on the Situation in the West Virginia Coal Fields, 65th Congress, 2nd Session, 22 (1921); Report of the United States Coal Commission on Civil Liberties in the Coal Fields (mimeograph) 12-13 (1923); George Soule, "Unions and the Public," 155 ATLANTIC MONTHLY, 211, 219 (1924).
29 256 U. S. 1, 19-20 (1915).
just as the employer may decline to offer employment on any other; for 'it takes two to make a bargain'."

In other words, the privilege of refusing to contract is an integral part of freedom of contract, and neither party to a prospective agreement can maintain that his constitutional rights are being impaired when the other party refuses to enter into a contract with him on some particular basis which he desires, but which the other party does not desire.

The next question is as to what legal protection is available to an employer who desires to exercise his constitutional right to operate a non-union closed shop. It is clear that intimidation and violence, whether directed against the employer who is running his plant on a non-union basis or against his non-union employees, is interdicted; and that the circulating of false statements as to the employer or his non-union employees, or as to the facts of a particular controversy, is unlawful. It is further settled, at least in the federal courts, that so-called "peaceful picketing", if carried out under such circumstances that it will naturally result in intimidation or violence, or "moral coercion", is unlawful and may be enjoined.

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23 See Truax v. Corrigan, 257 U. S. 302, 327 (1921), referring to the character of the picketing involved there; "It was not lawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the strike and a request to withhold patronage. It was compelling every customer to the gauntlet of most uncomfortable and aggressive and annoying importunity, libellous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community. No wonder that a business of $50,000 was reduced to only one-fourth of its former extent. Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy." (Italics supplied.)

24 American Steel Foundries v. Tri-Cities Trades Council, 257 U. S. 334 (1921). The exact scope of the decision is in doubt, although it certainly supports the proposition stated in the text. In Truax v. Corrigan, 257 U. S. 312, 340 (1921), Taft, C. J., said: "We held that . . . picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute sedulously avoided, but that, subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by peaceful intimidation, annoyance, importunity or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance of the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees of employers to join them in it." Compare Brandies, J., dissenting, in the same case, 257 U. S. 312, 371: " . . . This court has recently held that peaceful picketing is not unlawful. The lower federal courts hold picketing unlawful when it is shown to have an intimidating effect in fact. American Steel & Wire Co. v. Wire Drawers & Die Makers' Unions Nos. 1 and 3, 90 Fed. 608 (1898); Atchison, etc. R. Co. v. Ges, 139 Fed. 582 (1905); Stephens v. Ohio State Tel. Co., 240 Fed. 759 (1917). Some state courts hold picketing to be unlawful per se: Lyons & Henly v. Plume Workers Union, 269 Ill. 176, 124 N. E. 443 (1919); Re Langell, 178 Mich. 305, 144 N. W. 451 (1914); Volfalln v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896); Bascon v. Cooke's Union, 37 Wash. 376, 169 Pac. 845 (1918). Others, however, hold that peaceful picketing is lawful. Jones v. Van Winkle Machine Works, 151 Ga. 336, 62 S. E. 336 (1909); White Mountain Freezer Co. v. Murphy, 78 N. H. 398, 101 Atl. 357 (1917); Everett Waddy Co. v. Richmond Typographical Union, 105 Va.
Can such action be rendered lawful by statute? In the case of *Truax v. Corrigan*\(^3^\), there was involved a statute of the State of Arizona in terms denying the remedy of injunction to one whose business was injured in the course of a dispute between him and his employees or former employees\(^4^\). The plaintiff's bill alleged that the defendants, his former employees, were engaged in picketing plaintiff's restaurant, that they were circulating false statements about plaintiff and his present employees, and that they were using threatening and abusive language to prospective patrons\(^5^\).

37. 53 S. E. 273 (1906). A statute declaring picketing illegal is constitutional. Hardie-Tynes Mfg. Co. v. Cruise, 189 Ala. 66, 66 So. 657 (1914). And municipal ordinances to the same effect have been held reasonable. Re Williams, 188 Cal. 550, 111 Pac. 1035 (1910); Ex parte Stout, 82 Tex. Cr. 183, 168 S. W. 967 (1917). The question would seem to be that, while peaceful picketing is not per se illegal, the court will be astute to see that it really is peaceful, and will recognize that there may be intimidation by mere numbers. It is believed that this is the proper test of the restraint to be used in American Steel Foundries v. Tri-Cities Trades Council, supra. If the sort of picketing in fact carried out is unlawful, it "may properly be enjoined by the specific term because its meaning is clearly understood in the sphere of controversy by those who are parties to it." American Steel Foundries v. Tri-Cities Trades Council, supra, 205.

It should be noted that the federal courts are not bound by state law in labor cases. Loewe v. California Federation of Labor, 339 Fed. 716 (1911). Hence the doctrine of American Foundries Co. v. Tri-Cities Trades Council, supra, is binding on the lower federal courts regardless of the local state law.

\(^{3}\) See *Truax v. Corrigan*, supra, 325-327 (1921); "The complaint and its exhibits make this case:

"The defendants conspired to injure and destroy plaintiff's business by inducing their heretofore willing patrons and would-be patrons not to patronize them and they influenced these to withdraw or withhold their patronage;

"(1) By having the agents of the union walk forward and back constantly during all the business hours in front of plaintiff's restaurant and within five feet thereof, displaying a banner announcing in large letters that the restaurant was unfair to cooks and waiters and their union.

"(2) By having agents attend at or near the entrance of the restaurant during all business hours and continuously announce in a loud voice, audible for a great distance, that the restaurant was unfair to the labor unions to whom it was customers.

"(3) By characterizing the employees of the plaintiffs as scab Mexican labor, and using opprobrious epithets concerning them in hand-bills continuously distributed in front of restaurant to be sold to the public.

"(4) By applying in such handbills abusive epithets to Truax, the senior member of the plaintiff's firm, and making libelous charges against him, to the effect that he had "by force, fraud, and deception, and with an autographic knife, that he broke his contract and repudiated his pledged word; that he had made attempts to force cooks and waiters to return to work by attacks on men and women, that a friend of plaintiff assaulted a woman and pleaded guilty; that plaintiff was known by his friends, and that Truax's treatment of his employees was explained by his friend's assault; that he was a 'bad actor.'

"(5) By seeking to disparage plaintiff's restaurant, charging that the prices were higher in any other restaurant, and that assaults and sluggings were a regular part of the bill of fare, with police indifference.

"(6) By attacking the character of those who did patronize, saying that their prices were lower and the food worse than at any other restaurant, and that assaults and sluggings were a regular part of the bill of fare, with police indifferent."
The case came up on demurrer to the bill, so that these allegations were admitted. It is uncertain whether the statute, as construed by the Arizona Supreme Court, operated to legalize the acts complained of or whether it was regarded as simply withdrawing the remedy of injunction in labor cases. The Supreme Court of the United States on writ of error reversed the judgment, holding, in a five-to-four decision, that if the statute purported to legalize the acts complained of it was unconstitutional as a deprivation of property without due process of law, and that if it simply purported to withdraw the remedy of injunction, it involved a denial of the equal protection of the laws. The decision has been sharply criti-

mental calibre and moral fibre fell far below the American average, and enquiring of the would-be patrons—"Can you patronize such a place and look the world in the face?"

(7) By threats of similar injury to the would-be patrons—by such expressions as 'All the wretches shall be behind.' 'Don't be a traitor to your country;' by offering a reward for any of the ex-members of the union caught eating in the restaurant; by saying in the handbills: 'We are also aware that handbills and banners are thrown from a building on the main street give the traffic a pause, but they are permanent institutions until William Truax agrees to the eight-hour day.'

(8) By warning any person wishing to purchase the business from the Truax firm that a donation would be necessary, amount to be fixed by the District Trades Assembly, before the picketing and boycotting would be given up.

"The result of this campaign was to reduce the business of the plaintiff from more than $50,000 a year to one of $12,000."

58 See Truax v. Corrigan, supra, 324.
59 20 Ariz. 7, 176 Pac. 570 (1918). See also Truax v. Bisbee Local No. 380, 13 Ariz. 379, 171 Pac. 121 (1918). Hence the United States Supreme Court had to consider the statute as if its terms required the denial of an injunction under the circumstances alleged in the bill. Ward & Gow v. Krinsky, 259 U. S., 503, 510 (1922); Cudahy Packing Co. v. Farramore, 263 U. S. 418 (1923).
60 The majority of the United States Supreme Court apparently thought that the statute, as construed by the Supreme Court of Arizona, legalized the acts complained of. See Truax v. Corrigan, supra, 329: "The opinion of the State Supreme Court in this case if taken alone seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their act lawful." Ibid. 330: "If, however, contrary to the construction which we put on the opinion of the Supreme Court of Arizona, it does not withdraw from the plaintiffs all remedy for deprivations by the equitable relief of the only type." Pitney and Clarke, JJ., seem to have regarded the statute as simply withdrawing the remedy of injunction. See Truax v. Corrigan, supra, 349: "Paragraph 1464 does not modify any substantive rule of law, but only restricts the processes of the courts of equity." Brandels, J., seems to have taken the same view. See Truax v. Corrigan, supra, 356: "The questions submitted are whether this statutory prohibition of the remedy by injunction is in itself arbitrary and so unreasonable, as to deprive the employer of liberty or property without due process of law—and whether limitation of this prohibition to controversies involving employment denies him equal protection of the laws." But see ibid., 376. Holmes, J., the other dissentent, did not clearly indicate his interpretation. See Truax v. Corrigan, supra, 342-343. See also note 44, infra.

The construction put by the majority of the United States Supreme Court on the action of the Arizona Supreme Court would seem to be supported by several statements in the opinion of that court. See Truax v. Corrigan, 20 Ariz. 7, 11, 176 Pac. 570, 571 (1918); "The purpose of the statute in question is to recognize the right of workmen on strike to use peaceable means to accomplish the lawful ends for which the strike is called. . . . The last contention is that the statute, having attempted to legalize picketing when peaceably carried on for any purpose, deprives plaintiffs of its property without due process of law, and denies to plaintiffs the equal protection of the law." (Italics supplied.)

It should be noted that the Arizona court regarded the statute as legalizing peaceful picketing, and apparently held the particular act of picketing involved to be peaceful, while the Supreme Court of the United States held that the picketing was not a legal act of picketing as alleged in the bill. It was invalid. It can hardly be contended that the Arizona court was right in holding that the acts alleged in the bill constituted "peaceful" picketing. See note 34, supra. See, however, 20 Ariz. 7, 22, 176 Pac. 570, 572 (1918).

Hence all the case can be taken as deciding is (1) that a statute attempting to
ized\(^{41}\), and it would certainly seem that Mr. Chief Justice Taft's view on the point as to equal protection of the laws is open to question\(^{42}\). To say that while a classification based on the relation of employer and employee is a reasonable one\(^{43}\), a classification based on the relation of employer and ex-employee on strike is beyond the bounds of reason, would seem to involve a doctrinaire insistence on a purely legal conception which does not take into account the actual facts of the situation. As an original question it would seem very doubtful as to whether a classification of this sort was not a reasonable one\(^{44}\). But the Supreme Court has decided otherwise, and there is no good reason to believe that the decision will

legalize completely the kind of picketing alleged in the bill to have been carried out by the defendants in this particular case is not due process; (2) that a statute withdrawing such rights or consequences in such case as the Arizona statute did in the bill, it violated the due process provision of the Fourteenth Amendment. Their dissent was predicated on the theory that the statute simply withdrew the remedy of injunction. See note 40, supra. Hence, the only question of due process considered by them was the propriety of such a limitation of the equity jurisdiction. Their conclusion that such a limitation was due process was not in disagreement with the majority, which rested the decision on this branch of the case simply on the equal protection clause. Brandeis, J., did disagree with the majority on all the points involved. See Truax v. Corrigan, supra, 376. The view of Holmes, J., is not entirely clear. See note 40, supra. Thus the decision is really five-to-four on the equal protection point only.

\(^{41}\) See 10 Col. L. Rev. 237 (1923); 7 CORN. L. QUA. 251 (1922); 22 Col. L. Rev. 252 (1922); 20 Mich. L. Rev. 657 (1922); 23 W. Va. L. Q. 144 (1922); 3 Idaho L. J. 408 (1922). But see 3 Am. Bar Assn. Journ. 506 and 8 Va. L. Rev. 374, supporting the case.

\(^{42}\) It should be noted that Pitney and Clark, J. J., did not disagree with the majority having regard of the Arizona statute legalized the wrong complained of in the bill, it violated the due process provision of the Fourteenth Amendment. Their dissent was predicated on the theory that the statute simply withdrew the remedy of injunction. See note 40, supra. Hence, the only question of due process considered by them was the propriety of such a limitation of the equity jurisdiction. Their conclusion that such a limitation was due process was not in disagreement with the majority, which rested the decision on this branch of the case simply on the equal protection clause. Brandeis, J., did disagree with the majority on all the points involved. See Truax v. Corrigan, supra, 376. The view of Holmes, J., is not entirely clear. See note 40, supra. Thus the decision is really five-to-four on the equal protection point only.


\(^{44}\) And especially I think that without legalizing the conduct complained of by such ex-employees on the business and property right of the employer. It is really a little difficult to say if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults and leaving the assaulted persons to suits for damages at common law? See 10 Col. L. Rev. 237 (1923); 7 CORN. L. QUA. 251 (1922); 22 Col. L. Rev. 252 (1922); 20 Mich. L. Rev. 657 (1922); 23 W. Va. L. Q. 144 (1922); 3 Idaho L. J. 408 (1922). But see 3 Am. Bar Assn. Journ. 506 and 8 Va. L. Rev. 374, supporting the case.

\(^{350}\) "It is said that because, under other provisions of the Arizona statute law, plaintiffs would have been entitled to an injunction against such a campaign as that conducted by defendants, had it been in a controversy other than a dispute between employer and former employees—for instance, had competing restaurant-keepers been the offenders—refusal of relief in the particular case by force of Paragraph 1454 is undue favoritism to the class of

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not be followed, especially since it is supported by at least one state decision on the identical point\(^4\). It would therefore seem that an attempt of a state legislature to withdraw the remedy of injunction in labor cases is unconstitutional, and that any attempt to legalize picketing of an intimidating or deceitful sort, whether made by a state legislature or by Congress, is unconstitutional.

The question remains as to whether attempts to persuade non-union employees to strike or quit, unaccompanied by intimidation or violence, are unlawful. Unless such employees are under individual contract not to join a labor organization\(^5\), it is clear that such persuasion is proper.\(^6\) Where the employees have made individual contracts not to join a labor union, the case of Hitchman Coal & Coke Company v. Mitchell\(^7\), is an apparent authority to the effect that peaceful persuasion to join the union may be enjoined, on the theory that such persuasion involves the unlawful inducement of a breach of contract.\(^8\) The Hitchman case, however, is not as clear an authority on this point as it has sometimes

which defendants are members. But I submit with deference that this is not a matter of which plaintiffs are entitled to complain under the 'equal protection' clause. There is no reason to suppose that they have anything like the security of one accorded to them if they are members of a union and their contract is enforced. Whatever complaint the competing restaurant-keepers might have, it in the case supposed they were subject to be stopped by an injunction where former was not, it would not be a denial of equal protection to plaintiffs. Cases arising under this clause of the Fourteenth Amendment, preeminently, call for the application of the settled rule that before one may be heard to oppose state legislation upon the ground of its repugnance to the Federal Constitution he must bring himself within the class affected by the alleged unconstitutional feature." But see Bogni v. Perroti, 224 Mass. 152, 161, 112 N. E. 853, 858 (1916).


\(^5\) These contracts, termed by some union leaders "yellow-dog contracts," have frequently been resorted to by employers as a means of defense against intimidation and coercion at the hands of non-union employees. This has repeatedly been true in the coal industry of West Virginia, which has been repeatedly subjected to militant attacks by the United Mine Workers of America. See Brief on "The Unlawful Act of a Union," submitted to the United States, for the Bituminous Operators' Special Committee, passim (1923).


\(^7\) 246 U. S. 229 (1917).

\(^8\) The decision is based on the principle that it is a tort to induce a breach of contract. This doctrine had its origin in the case of Lumley v. Gye, 2 El. & Bl. 216 (1853). It is thoroughly established in England. Bowen v. Hall, 6 Q. B. D. 353 (1881); Tempertor v. Russell (1893) 1 Q. B. 715. It was at first applied there to cases of inducement to break labor contracts. South Wales Miners' Federation v. Glamorgan Coal Co. (1905) A. C. 239. But there is now a statutory exception in such cases. See Trades Disputes Act, 6 Edw. 7, c. 47, § 3 (1906).


It should be noted that the question discussed in the text does not arise in states which do not accept the doctrine of Lumley v. Gye. In Kentucky, the doctrine is rejected except as to enticing away apprentices or persons under contracts of service for fixed term. This last class of persons is further confined to farm laborers. Bourlier Bros. v. Macaulay, 91 Ky. 135, 14 S. W. 60 (1891). Hence in that state peaceful persuasion of employees not under fixed-term non-union contracts to join the union is allowed. See Diamond Block Coal Co. v. United Mine Workers, 188 Ky. 477, 222 S. W. 1079 (1920).
been regarded. It is true that the order in the case did enjoin peaceful persuasion, but the ground for the decision is not absolutely certain. Certainly one of the rationes decidendi was the fact that the means used by the union organizers were deceitful and unlawful, independent of the fact that they involved procuring a breach of contract. Thus, in American Foundries v. Tri-Cities Trades Council, Mr. Chief Justice Taft said: "The unlawful and deceitful means used were quite enough to sustain the decision of the court without more." Although it is probable that the case is an authority for the proposition that any attempt to persuade men to join the union in the face of a contract not to do so is unlawful, this cannot be taken as definitely settled.

There is a second question as to the scope of the decision in the Hitchman case which is not yet settled. In that case the contracts in question involved simply a hiring at will. The Circuit Court of Appeals for the Fourth Circuit had held that in view of this fact that there was no illegality in persuading the plaintiffs' employees to join the union. The Supreme Court reversed this holding and declared "that the employment was 'at will', and terminable by either party at any time, is of no consequence," citing its earlier decision in the case of Truax v. Raich. Does this mean that it is unlawful to persuade employees under individual non-union contracts to terminate those contracts and join the union, or does it simply mean that it is unlawful to induce such employees to join the union and to remain in the employment in violation of their contract? In the case of Gasaway v. Borderland Coal Corporation, the Circuit Court of Appeals for the Seventh Circuit has adopted the second interpretation, and has said that there is no illegality in "using lawful persuasion to induce any one of appellee's employees to join the union and thereupon immediately and openly to sever his relationship with the appellee, not in violation of, but in exact accordance with, his contract with the appellee." This interpretation somewhat limits the broad language used in the Hitchman case.

Although the exact scope of the decision in the Hitchman case

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257 U. S. 184, 211 (1921).
260 239 U. S. 33 (1915). This was not a case involving inducement of breach of contract, as such, but one in which state officials threatened proceedings under an unconstitutional statute unless the plaintiff's employer discharged plaintiff. This decision, however, is clearly in point. See Truax v. Rosch, Supra.
261 278 Fed. 56 (1923).
262 278 Fed. 56, 64 (1921).
is thus somewhat doubtful, there are several state decisions holding that it is unlawful peacefully to persuade employees working under individual non-union contracts to join the union and still remain in the employment, and that such persuasion may be enjoined, even though the employment is at will. Whether or not the qualification suggested in *Gasaway v. Borderland Coal Corporation* will prevail can hardly be predicted; but it would seem to be a reasonable one.

Assuming that the rule is established in a particular jurisdiction that peaceful persuasion of a man's employees to join the union and remain in the employment may be enjoined when those employees have contracted not to join the union, the further question arises as to whether that rule can be changed by statute. This result might conceivably be attained in three ways: (1) by prohibiting the making of individual contracts not to join the union; (2) by providing that persuasion to break such contracts should not give rise to any cause of action at all; or (3) by withdrawing the remedy of injunction in such cases.

It is clear that the first method, that of prohibiting by statute the requiring of individual contracts not to join the union, would be unconstitutional. It was just such a statute that was condemned in *Copper v. Kansas*.

Would it be possible to reach the same result by a statute of the second sort, doing away with the rule of *Lumley v. Gye*? It might seem, at first glance, that since there are some states which reject the doctrine of *Lumley v. Gye* entirely, those jurisdictions which have accepted it through their courts may later reject it through their legislatures without violating the Fourteenth Amendment. This view has been powerfully urged in other cases by Mr. Justice Holmes. There is a certain plausibility in the contention that a statute changing the law of one state so as to be in accord with the

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53 278 Fed. 50 (1921).
54 It may be added that it is clear that there is no liability for inducing breach of contract unless the third person knew of the contract. Pierson v. Schlesinger, 196 App. Div. 660, 188 N. Y. Suppl. 35 (1921).
56 2 El. & Bl. 216 (1853).
57 In *The Hamilton*, 207 U. S. 398, 404 (1907): "... as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the legislature." And in his dissenting opinion in *Trux v. Corrigan*, 257 U. S. 312, 343 (1921) "I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or the employers' interest by statute when the same result has been reached constitutionally without statute by courts with whom I agree."
common law in force in another state is not so arbitrary and unreasonable as to fail in due process of law. But it is well established that the extent of the reviewing power over erroneous decisions of state courts is not coextensive with that over arbitrary action of state legislatures; and hence the fact that the courts of one state have adopted a certain rule through judicial decision, does not mean that such rule, if adopted by the legislature of another state, would not be held, and properly, to involve a denial of due process of law.

The fact that a rule of law has not been universally

See Arrowsmith v. Harmoning, 118 U. S. 194, 195 (1886); In re Converse, 137 U. S. 624, 731 (1891); Central Land Co. v. Laidley, 159 U. S. 103, 112 (1895); Hawes v. Grammer, 120 U. S. 135 (1882); Howard v. Dickey, 127 U. S. 20, 49 (1887) per Holmes, J., dissenting. It is clear that an erroneous finding of fact by the state court is not a denial of due process of law. Wrench v. Richards, 151 U. S. 164, 168 (1893). An erroneous finding as to jurisdiction is a denial of due process of law. Pennoyer v. Neff, 95 U. S. 714 (1878); Old Waym Mutual Life Assn. v. McDonough, 204 U. S. 8 (1907). This is true where the decision is as to the jurisdiction of the court (i.e., as to its competence, to borrow a phrase from the civil law,) as well as to the jurisdiction of the court, as to the court itself. Thus, where a state probate court, in the absence of a statute authorizing it, grants administration of the estate of a person not in fact dead, such action is not valid in 154 U. S. 544 (1895); Lavin v. Emigrant Industrial Savings Bank, 18 Blatch. 1, 1 Fed. 641 (1880). But the legislature of a state may give the courts of that state such jurisdiction. Cunliss v. Howard, 100 U. S. 458 (1875). This makes it clear that the question is not one of substantive limitation. If it were, the action of the legislature would also be invalid. In addition to jurisdiction there must be a real judicial proceeding. Hence, if the court is dominated by mob violence so that there is not really a fair trial, there is denial of due process. Moore v. Dempsey, 261 U. S. 290 (1923). Cf. Frank v. Mangum, supra. And see 37 harv. L. Rev. 247 (1923). And unfair procedure in a state court may be a denial of due process. Saunders v. Shaw, 244 U. S. 517 (1917). But if there is a real judicial proceeding in a court having jurisdiction and if the procedure is fair, there is no denial of due process even though the decision of the court be erroneous. It has been suggested that if the state legislature is not so arbitrary, so unreasonable, but so arbitrary, that a statute enacting the same rule would be held invalid as denying due process of law, the decision of the state court may be reversed by the Supreme Court of the United States on constitutional grounds. See Schofield, Essays in Constitutional Law and Equity. 1-101 (1921). 33 Harv. L. Rev. 793 (1920). See also 36 Harv. L. Rev. 1042 (1923). There are some cases in the same effect in Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 228, 234, 241, 247 (1897), and in Bacchus v. Fort Scott & I. S. B. M. R. R. Co. 142 U. S. 357, 375 (1888). But if the state court has applied to state legislative action, the Fourteenth Amendment is a limitation on substance, and not on form. As applied to state judicial action, it is a limitation on form and not on substance. See Laurance Curtis, 2nd.: "Judicial Review of Commission Rate Regulation." 34 Harv. L. Rev. 826, 836-869 (1921). The sound principle is well stated by Curtis, op. cit. 858: "... under the due-process clause a federal question can be raised by challenging the substance of a legislative act (or perhaps) court procedure, but not by challenging the procedure of a legislative act or the substance of a judicial decision."

The dissenting opinions of Holmes, J., and Brandeis, J., in Truax v. Corrigan, 257 U. S. 310, 311-313 (1921), failed to recognize the reviewing power. They regarded the statute involved in that case as changing the law of Arizona to conform to the judicially declared law of certain other jurisdictions, and relied upon the view of the case as sustaining the constitutionality of the statute. This reasoning seems erroneous. In theory, at least, a court in deciding a case is declaring, not making law. See Robert Von Moschzisker, "State Decis In Courts of Last Resort." 37 Harv. L. Rev. 405, 410 (1924).

The due process clause of the Fourteenth Amendment prevents arbitrary law-making by legislatures, not arbitrary law-application by courts. See note 61 supra. This is not inconsistent with the rule that a state court construes a statute so as to make it operate in an arbitrary manner, a federal question is raised. In such case the construction is regarded as being part of the statute for the purposes of the particular case before the court. See Ward & Gow v. Krehmke, 259 U. S. 503, 510 (1922); Colenso v. Purrmore, 65 L. Ed. 348 (1927); Robert von Moschzisker, Op. cit. 422. See also St. Louis Iron Mountain & Southern Ry. Co. v. Wyane, 224 U. S. 324 (1912); Kansas City Southern Ry. Co. v. Anderson, 233 U. S. 325 (1914). Hence the situation is the same as if the statute had been passed to the particular cases to which it is applied. See note 39 supra. An analogous
adopted by the courts may be the persuasive evidence that a statute
abolishing the rule where it has been adopted is a reasonable statute
and so due process of law; but in view of the difference in scope
of the reviewing power, it cannot be conclusive evidence.

In the present case, such a statute, if enacted by a state
legislature, and if it applied to labor cases alone, would seem
clearly to fall within the rule enunciated in Truax v. Corrigan as
to the equal protection of the laws, and so would be invalid. Whether
it would be held to be due process of law is doubtful. It would
seem to be the logical result of the proposition as to due process
laid down in the same case that the statute would be invalid,
since the possible justification for such a change in the law is much
the same as that which was urged in favor of legalizing
picketing and so-called “moral coercion,” and which was there
held insufficient. It is true that the case is not so extreme, since
the employer would still have his remedy against the employee
who broke the contract. Nevertheless, in view of the present temper
of the court, particularly as emphasized in the Minimum Wage
Case, the prophecy may be ventured that such a legislative en-
actment, whether state or federal, would probably be declared un-
constitutional on the ground of due process, even though it applied
to inducing breach of contract generally, and not to labor cases
alone.

A state statute of the third sort, simply denying the remedy
of injunction, while leaving open the remedy of common-law
damages against the third person inducing the breach of contract,
would, if applied to labor cases only, be a denial of equal protection
of the laws under the Truax decision. If applied generally it would
seem to be valid, since there is certainly no vested right in the
unchanged continuance of the present equity jurisdiction. Surely
the legislature can alter the character of remedies even
though it is not to be allowed to extinguish rights.

It is to be noted, moreover, that the constitutional objections

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to the denial of the remedy of injunction, whether in the case of picketing or in cases of procurement of breach of contract, which apply in the case of state action, are not applicable in the case of action by Congress. The unconstitutionality of simply denying the remedy of injunction, as distinguished from complete legalization of the injury, is rested by the Supreme Court upon the provision of the Fourteenth Amendment as to the equal protection of the laws, and not upon the provision as to due process of law. Mr. Chief Justice Taft, in Truax v. Corrigan, has pointed out that: "... the equality clause of the Fourteenth Amendment does not apply to congressional but only to state action." Therefore, there would seem to be no constitutional objection to the denial of the remedy of injunction in cases arising under the judicial power of the United States, even though the statute denying the remedy applies only in labor controversies.

It should be noted that the labor provisions of the Clayton Act do not raise this question. Although on their face those provisions might seem to limit the remedy of injunction in the way condemned, so far as state legislation is concerned, in the Truax case, the construction placed upon them by the courts is otherwise. In the case of American Steel Foundries v. Tri-Cities Central Trades Council, Mr. Chief Justice Taft said, referring to the provisions of Section 20 of the Act: "It is merely declaratory of what was the best [equity] practice always." This tendency to regard the Act as purely declaratory has been manifested in other decisions. Hence, no question of discrimination has arisen.

IV.

THE CLOSED UNION SHOP.

It has long been a rule of the common law that a contract which operates to a serious extent to deprive an individual or individuals of the opportunity of earning their livelihood at their trade or occupation is contrary to publie policy, and therefore unenforceable.

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69 257 U. S. 312, 340 (1911). See notes 13 and 14, supra.
73 See Mitchell v. Reynolds, 1 P. Wms. 181 (1711); Kellog v. Larkin, 3 Penn (Wis.) 153 (1851); Kales, Contracts and Combinations in Restraint of Trade, § 1, (1918); 3 WILLISTON, CONTRACTS, § 1652 (1920).
This question has generally come up as to contracts made by an individual himself, such as contracts not to compete or not to engage in a particular business, which are universally held invalid when they restrain the exercise of the individual’s trade for an unreasonable time or over an unreasonable territory. But it applies as well to contracts which unreasonably prevent third persons from earning a livelihood. In conformity with this principle it has been generally held that a union closed shop agreement which is effective over an entire industry, or over so much of an industry as operates in a particular locality, is unenforceable as contrary to public policy, because it operates to prevent all men who do not wish to become members of the union from earning a livelihood.

When an agreement applies simply to the establishment of a single employer, there is no general deprivation of the right of non-union men to work, and such agreements are universally held valid. Hence, if a non-union man is required by the employer to join the union or be discharged, he has no cause for complaint.

Furthermore, it is generally held that a strike to compel the unionization of a shop is legal although there are some courts that have come to a contrary conclusion. In most of the minority jurisdictions, however, the employer has no standing in court to enjoin a strike to unionize his shop, although a non-union

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71 Wiley v. Baumgardner, 97 Ind. 66 (1884); Bishop v. Palmer, 146 Mass. 469 (1888); Gamewell Fire Alarm Co. v. Crane, 160 Mass. 50 (1893); Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507 (1899); Berlin Machine Works v. Perry, 71 Wis. 439 (1898).


74 See cases cited in notes 79, 81 and 85, supra.

75 See cases cited in notes 79 and 85, infra.


78 Mayer v. Journeyman Stone Cutters Ass’n, 47 N. J. Eq. 519, 20 Atl. 492 (1890); Jersey Printing Co. v. Cassidy, 63 N. J. Eq. 796, 53 Atl. 230 (1902); State ex rel. Roberts Mitchell Furniture Co. v. Toole, 28 Mont. 22, 66 Pac. 490 (1901).
workman already employed may enjoin a strike to compel his discharge, or may recover damages if he is discharged as a result of such a strike.\(^2\) The most extreme position is taken by the courts of Massachusetts and Oregon, which hold that a strike to compel collective bargaining on a union closed shop basis may be enjoined by the employer.\(^3\) The rationale of this doctrine is best expressed by Mr. Justice Knowlton in the case of *Berry v. Donovan*,\(^4\) where the court said:

"The attempt to force all laborers to join in unions is against the policy of the law because it aims at monopoly."

Even in Massachusetts, however, a union closed shop agreement is not illegal *per se*; and when once made, it may be enforced either by the union or the employer without liability to non-union men who are discharged in consequence.\(^5\)

The Supreme Court of the United States has distinctly stated that the union closed shop is legal. Thus it is said in *Coppage v. Kansas*:\(^6\)

"Can it be doubted that a labor organization—a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union men? (In all cases we refer, of course, to agreements made voluntarily, and without coercion or duress as between the parties. And we have no reference to questions of monopoly, or interference with the rights of third parties or the general public. These involve other considerations, respecting which we intend to intimate no opinion.)"

Similarly, in *Hitchman Coal & Coke Company v. Mitchell*,\(^7\) it was said:

"The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ the man who owes any allegiance or obligation to the union."

\(^2\) Carter v. Oster, 154 Mo. App. 146, 112 S. W. 985 (1908); Reddy v. Plumbers', 79 N. J. L. 467, 75 Atl. 742 (1910). See also cases cited in note 80, supra.


\(^4\) 188 Mass. 253, 74 N. E. 605 (1905).


\(^6\) 236 U. S. 1, 20 (1915).

\(^7\) 245 U. S. 229, 250 (1917).
latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreements they may make.”

With these principles in mind, it is possible to approach the problem of the constitutionality of legislation making unlawful union closed shop agreements. Certainly legislation in furtherance of the common-law rule against unreasonable restraints of trade would be constitutional, even though it went somewhat further than the decided cases have gone. The only serious question is as to the constitutionality of a statute declaring that any closed shop agreement is unlawful “because it aims at monopoly.” The preceding quotations from Coppel v. Kansas, and Hitchman Coal & Coke Co. v. Mitchell, indicate a tendency to deny the validity of such legislation. It is well settled, however, that the prevention of monopoly is a purpose within the legitimate scope of the police power. Since the legislative prohibition of union closed shop agreements may be reasonably regarded as a means for accomplishing this purpose, it would follow that legislative action would be valid. It is dangerous to venture upon prophecy in the absence of any decisions whatever, but it seems probable that a statute prohibiting operation on the union closed shop basis would be held valid by the United States Supreme Court.

If there is no constitutional right to operate a closed union shop,

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88 It cannot be doubted that the states may under the police power extend the scope of existing rules of law to a reasonable extent. Thus the legislature may increase the class of public nuisances by statute within reasonable limits. Littleton v. Fritz, 65 Ill. 488, 22 N. W. 641 (1885); Chase v. Proprietors of Revere House, 232 Mass. 85, 122 N. E. 122 (1919). See Z. Chafee, Jr., “Progress of the Law—1919-1920—Equitable Relief Against Torts,” 34 Harv. L. Rev. 568, 399 (1921). The present case would seem to be an analogous one.

89 236 U. S. 1 (1915).

90 245 U. S. 229 (1917).

91 Note, however, the last part of the quotation from Coppel v. Kansas, 236 U. S. 1, 20 (1915): “In all cases we refer, of course, to agreements made voluntarily, and without coercion or duress as between the parties. And we have no reference to questions of monopoly, or interference with the rights of third parties or the general public. These involve other considerations, respecting which we intend to intimate no opinion.”

92 See cases cited in note 8, supra.

93 If the result sought by legislation is within the purlieus of the police power, and the statute has a reasonable tendency to reach that result, the statute is valid as being due process of law. Lawton v. Steele, 152 U. S. 133 (1894); Chicago v. Drainage Commissioners, 228 U. S. 563 (1905).

94 In Wright v. Hector, 95 Neb. 342, 145 N. W. 704 (1914) a statute requiring all work in certain public improvements to be done by union labor was held invalid, at the suit of a taxpayer, as tending to increase the cost of the work and so to defeat the taxpayer of property without due process of law. And there are numerous decisions holding that municipal ordinances of a similar tenor are invalid as unreasonable. Atlanta v. Stein, 111 Ga. 789, 36 S. E. 933 (1900); Adams v. Brennan, 177 Ill. 194, 52 N. E. 314 (1896); Fiske v. People, 188 Ill. 206, 58 N. E. 866 (1900); Miller v. Des Moines, 143 Ia. 409, 122 N. W. 226 (1909); Lewis v. Board of Education, 139 Mich. 306, 102 N. W. 756 (1905); Paterson Chronicle Co. v. Paterson, 66 N. J. L. 128, 48 Atl. 589 (1901); Davenport v. Walker, 57 App. Div. 221, 68 N. Y. S. 161 (1901); People v. John Single Paper Co., 112 App. Div. 604, 88 N. Y. S. 965 (1906); Marshall & Co. v. Nashville, 169 Tenn. 495, 61 S. W. 815 (1902); Cf. Atkin v. Kansas, 191 U. S. 207 (1903); Ellis v. United States, 288 U. S. 89 (1932). Although these decisions are not directly in point, they do tend to indicate the probable attitude of the courts in dealing with a statute prohibiting union closed shop contracts.
it is unnecessary to consider whether the methods of protecting that right are guaranteed by the Constitution. Any denial of remedy would be simply a *pro tanto* denial of the right, which has no constitutional protection. While the right exists the usual methods of securing it must doubtless also exist; but any one of such methods can be withdrawn by the legislature, provided, in the case of the several states, that the equal protection of the laws provisions of the Fourteenth Amendment is not transgressed by discriminatory legislation.

V.

THE OPEN SHOP.

There are apparently no decisions which either affirm or deny the existence of a constitutional right to operate on an open shop basis. The only way the point could be squarely raised would be by the passage of a statute forbidding open shop operation. No such statute has ever been passed, and it seems unlikely that any ever will be passed. However, it seems obvious that the same principle as to liberty of contract which protects the right to operate on the non-union closed shop basis would apply in the case of the open shop. On the other hand, the possibility of monopoly which might be invoked to justify prohibition of the union closed shop could not be invoked in the case of the open shop, since in the latter case there is no discrimination against either union or non-union men. It would seem to be immaterial whether the particular form of open shop did or did not include collective bargaining with the union.95

The remedies available to protect the constitutional right to operate on the open shop basis are the same as those available to protect the right to operate on a non-union closed shop basis, with the single exception that the question of the effect of individual contracts not to join a labor organization is not involved. Here, as there, intimidation, violence, "moral coercion," and the circulating of false statements are unlawful. Here, as there, they cannot be legalized by statute, since the rule enunciated in *Truax v. Corrigan*,96 must apply as well in cases of open shop operation as in cases of non-union operation. Nor can the remedy of injunction be withdrawn by a state legislature in such cases without violating the provision of the Fourteenth Amendment guaranteeing

95 The only possible bearing this question would have would be on the danger of monopoly. It might be argued that open union shops could be prohibited, as tending to become closed union shops, but this would seem to go too far.

the equal protection of the laws. However, it would seem that an open shop employer could not prevent peaceful persuasion of his employees to join the union, even though the purpose of such persuasion were the eventual complete unionization of the shop.\(^7\)

VI.

**SUMMARY**

The conclusions which have been reached in this article may be briefly summarized as follows:

*As to the closed non-union shop:*

(1) Under the existing law there is a right to operate on the non-union closed shop basis. This right cannot be taken away by legislation, either state or national.

(2) Under existing law this right will be protected by the award of damages or an injunction against persons seeking to interfere with its exercise by means of intimidation, violence, "moral coercion," or the circulation of false statements. In the absence of individual contracts by the employees not to join a labor organization, it will not be protected by an injunction against persuading employees so to join. If such contracts have been entered into, an injunction will issue even against peaceful persuasion, at least where it is of a deceitful sort, and where the persuasion is to *break* and not simply to *terminate* the individual contracts.

Intimidation, violence, "moral coercion" and the circulation of false statements cannot be legalized by legislation, either state or national; nor can the remedy of injunction be withdrawn by state legislatures. This remedy can probably be withdrawn by Congress, however, as to cases within the federal judicial power. Legislation legalizing the persuasion of employees to break individual contracts not to join the union would probably be held invalid, whether such legislation were state or national. Legislation withdrawing the remedy of injunction against such persuasion would be held invalid if passed by a state legislature, but not if passed by Congress.

*As to the closed union shop:*

(1) Under existing law there is a right to operate a closed union shop, so long as the agreement does not apply to all shops of an industry or all those shops of an industry in a considerable locality, though a minority of the states will not allow a strike to

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\(^7\) See note 85, *supra*. See also Gasaway *v. Borderland Coal Corp.*, 275 Fed. 56 (1921); Diamond Coal Co. *v. United Mine Workers*, 188 Ky. 477, 222 S. W. 1079 (1920). The employer could, of course, go over to the closed non-union shop, require individual non-union contracts, and so be protected even from peaceful persuasion; but he could not continue to operate open shop and prevent such persuasion.
compel an employer to operate a union shop. If the agreement
does cover an entire industry or a considerable part of an industry
it may be invalid as an unreasonable restraint of trade.

The right to operate on the closed union shop basis can probably
be taken away by legislation, although this question has never been
adjudicated.

(2) Under existing law, the right to operate a closed union
shop may be protected by the ordinary remedies of injunction
or damages.

Since the right itself is probably not guaranteed by the Constitu-
tion the remedies securing it may be taken away without constitu-
tional objection, except in so far as this is done in a discriminatory
manner. In the case of discrimination, state legislation taking
away such remedies would be invalid.

As to the open shop:

(1) Under existing law there is a right to operate on an open
shop basis. It is immaterial whether or not there is any sort of
collective dealing with employees.

This right cannot be taken away by legislation, either state or
national.

(2) Under existing law the right to operate on the open shop
basis may be protected by injunction or damages in case of intimi-
dation, violence, “moral coercion” or the circulation of false state-
ments.

Legislation attempting to legalize intimidation, violence, “moral
coercion,” or the circulation of false statements is invalid, whether
state or national. State legislation, withdrawing the remedy of
injunction in labor cases, is invalid as denying the equal protection
of the law. Federal legislation of a similar type is probably valid.

VII.

These are the principles which have been laid down by the
decisions or which may fairly be expected to be laid down. They
represent the present rules of the industrial struggle. It is possible
that they may be limited by future decisions of the Supreme Court
or changed by constitutional amendment; but until they are so
changed or limited, it is incumbent upon all the parties to the in-
dustrial struggle to abide by them.

Some of the forms of industrial relationship which are protected
by the Constitution from legislative change may not be desirable
ones. In the judgment of some the non-union closed shop and
the individual non-union contract may seem undesirable forms
of industrial relationship. To others the union closed shop may seem equally undesirable. Still others may dislike the open shop, whether union or non-union. There are arguments for and against all these forms of relationship, and employers, workers, and members of the public will be found who support each of them and who contend that the others should be abolished. It is the right of the supporters of each to endeavor to prove the superiority of their particular form, and it is the right of their opponents to point out the defects of that form. But paramount to all these questions of desirability is the fundamental principle of the legal order that changes in the law must be made in the manner prescribed by the law. It is not for the supporters of any particular form of industrial relationship to urge or attempt the destruction of other forms of relationship by extra-legal means. It is rather for them to respect the rights of those who hold different theories than their own, and to attempt to develop their own to the highest degree of social usefulness, in the confidence that the free competition of the various forms of labor relationship will result in the ultimate triumph of that form which best serves society as a whole.