American Labor and American Law: Exceptionalism and its Politics in the Decline of the American Labor Movement

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Abstract
Since Werner Sombart visited the United States at the beginning of the 20th century, scholars and activists have debated whether the American labor movement is “exceptionally” weak and conservative, and why. While some have accepted Exceptionalism and attributed it to the conservative values of American workers, others have attributed it instead to the power of business and the repressive posture of the American government. This article argues that the American legal tradition contributed to “exceptionalism” by privileging individual rights over collective action, and by limiting the power of organizations, including governments as well as unions, over individual choice. While this individualist bias was modified in the 1930s, the Supreme Court quickly restored the individual bias in American labor law, leading to the collapse of unions in the later 20th century.

Keywords
Labor unions; individual rights; collective action; American Exceptionalism; Wagner Act

I. Werner Sombart and American Exceptionalism

While it is over a century since Werner Sombart came to the United States to uncover “why is there no socialism in the United States,” his question remains one of the central motifs in social science research. Sombart, himself, concluded that the typical American worker has an emotional stake “in capitalism: I believe that he loves it” and he linked

these feelings to American affluence and the opportunity to advance in a rapidly growing economy. Others since have looked for other explanations of why Americans favor capitalism, including aspects of American culture such as the lack of a feudal heritage. Labor historians and others sympathetic with the Left have focused on the views of American workers, writing as if the workers have determined the fate of American socialism by themselves.

If it is not American workers, then what? Scholars and activists who reject Sombart’s conclusion that American workers’ inherent conservatism is responsible for American Exceptionalism have been forced either to deny Exceptionalism or to find another explanation. While some have denied Exceptionalism, the persistent weakness of American unions and the lack of a strong political left have made it hard to argue seriously that there is no difference between the working-class experience in the United States than in other capitalist economies. Instead, critics of Sombart’s model have arrayed themselves under two broad banners: state and employer repression, or working-class racism.

Working-class racism has been a popular explanation for scholars inspired by the Civil Rights movement and disappointed by the opposition some trade unions have maintained over the years to campaigns for racial and gender equality. Without discounting racism and the way racial divisions have hindered working-class organization, there is also an extensive literature showing the readiness of white male protestant English-speaking workers to reach out to workers of other races and ethnicities.


“Whiteness” and racism, it seems, are not essential aspects of the American working class; on the contrary, they emerge at particular times and places, the product of historical events. To explain the underlying source of racism, and of American conservatism, we need to go elsewhere.

Thus the role of employers, state officials, repression, the law, and the events of history and politics. Throughout American history, employers and workers have contended over alternative visions of political economy, the legitimacy of capitalist authority against working-class demands for collective regulation of work. This fundamental conflict has shaped debates over welfare policy, over social insurance, over the legality and legitimacy of working-class collective action and employer action against unions. The incidents of these conflicts have shaped the development of the American labor movement; and the development of American law and society as a whole.

Recognizing the role of law in the shaping of the American labor movement is consistent with much of the traditional history of the American labor movement, and with the current politics of American labor. Judges, injunctions, and the Wagner Act are central to American labor history in such classic texts as John R. Commons’ History of Labor and Irving Bernstein’s history of labor in the New Deal era; they are seen as manipulating labor law to restrain strikers and union growth and changing the law was necessary for the explosion in unionization that came in the 1930s and 1940s. By emphasizing the Wagner Act and political action, a focus on labor law not only fits with liberal and social democratic views of the 1930s but it also guides current labor politics. Just as union revival in the 1930s depended on the enactment of favorable legislation, so many labor reformers today look to Congress for relief in the form of labor law reform such as the Employee Free Choice Act. The great increase in the political activity of American unions since the early 1990s reflects the widespread belief that legal changes are necessary to overcome American Exceptionalism.


II. Individualism and Collectivism in American Labor Law

There is a commonly held misperception of early American labor law that workers were persecuted for uniting together to try to gain higher wages until Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court’s ruling in the case of *Commonwealth v. Hunt* in 1842 declared such unions to be legal. There is a grain of truth in this story. There were a large number of cases before *Commonwealth* where strikers were persecuted for their activities; and Shaw did hold “that there was no sufficient averment of any unlawful purpose or means” in “the defendants, being journeymen boot-makers” having “confederated and formed themselves into a club, and agreed together not to work for any master boot-maker or other person, who should employ any journeyman, or other workman, who should not be a member of said club, after notice given to such master or other person to discharge such workman.”9 Coming from one of the most prominent jurists in America, this judgment that collective action to seek higher wages is legal was a notable finding, one that virtually ended this form of persecution of unions.

There is less in *Commonwealth* than has been said by those who see it as a *magna carta* for the American labor movement. First, even at the time few jurists disagreed with the central conclusion that peaceful collective action to gain higher wages was legal. Few of the persecutions of unions and strikers before *Commonwealth* were for the mere act of collectively seeking higher wages. Even before *Commonwealth*, Edwin Witte found “few expressions of hostility to the newly founded labor unions by judges and prosecutors.” He concluded that it was “never the law in the United States that labor unions are illegal per se, or that all strikes are unlawful.” On the contrary, any English precedent against working-men combining to raise wages had little support in the United States, “never attained the status of generally accepted law” and was a minor element in most of the early conspiracy cases against unions and worker collective action.

More important, *Commonwealth* was limited because it was decided on the grounds of individual liberty and the rights of individuals. “A conspiracy to raise wages would not be indictable in England,” Shaw wrote, “if it were not unlawful for an individual to attempt to raise his wages” Shaw ruled. “And the indictment, in the case at bar, is bad, because each of the defendants had a right to do that which is charged against them jointly.”10 *Commonwealth* did not provide any legal basis for collective action beyond the rights of individuals and, therefore, denied the collectivity any right to intrude on the liberty of individuals. The case, therefore, was a Trojan horse for American labor; while appearing as a gift, it founded American labor law on a foundation fundamentally hostile to the means that collective organizations must employ.

By evaluating collective action according to the mean employed, and whether those means respect individual liberty, *Commonwealth* was well within the emerging liberal tradition of American law. Rather than a blanket condemnation of unions for the goal of raising wages, Witte finds that the early conspiracy cases against unions

10. Shaw, p. 119.
turned “on the methods which they employed to gain their ends.” As Shaw concluded in *Commonwealth*:

associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy.

Shaw here enunciated principles that have been accepted in American labor law almost without exception ever since 1844, principles that even when used to support unions are fundamentally hostile to working-class collective action. As defined by Shaw, workers have a right to act collectively to advance their own interests even at the expense of their employer’s financial interests; acting peacefully to demand higher wages is allowed under the same legal principle that allows people to open businesses to compete with an established business or to advertise to the detriment of a competitor. The issue is not the fact of a collective action to achieve a legitimate purpose but the means employed. Unions (or strikes) become criminal conspiracies when they use coercive means to impose the group’s will whether on other workers or on employers.

The problem for unions with this formulation is that as collective movements unions, virtually always need coercion against free riders to overcome the resistance of powerful employers.

It is here in our legal culture, not in the popular culture or in the attitudes of workers, that we see the impact of America’s liberal origins, the absence of a feudal heritage, and the impact of individualist values. Like governments, virtually all unions are too large to achieve their ends through voluntary means even when everyone agrees on the value of the union goals because individuals can always do better for themselves by “free riding,” enjoying the benefits of the collective action without contributing themselves. Shaw envisions collective actions organized to achieve goals like providing charity, promoting temperance, or opening a bakery in competition with a monopolist. Even these cases with relatively little dispute over goals, there remains a fundamental problem of mobilizing individuals to contribute to collective action. Overcoming free riding is even more of a problem when the collective action is against an opponent, employers who have a strong interest in punishing participants and rewarding those who remain outside the collective movement.

Individuals have a clear interest in working to gain private goods for themselves because these benefits accrue only to those who contribute. But this does not help us

understand collective action because public goods, like unions, produce benefits available to all regardless of their contribution. If all employees receive a wage increase granted in a union contract and all benefit from shorter hours of work or better working conditions, then why would a selfish individual take the risk and the expense to help win this contract? Instead, selfish individuals should “free ride,” stand to the side and let others sacrifice while they share the benefits. Instead of contributing to produce public goods available to all, they will reason logically, as an unnamed French construction worker did in 1914, that “if the union’s movement fails, we will have risked nothing, and if it succeeds, we will share the benefits.”14 The only way to advance the interests that all share is by compelling all to contribute to the collective project from which all benefit. For workers, a voice in management is a public good that requires collective support. For labor, liberty has to be a social product; it cannot be gained through individual action. More, a legal system that based on individual rights undermines labor’s liberty by making it harder to mobilize for collective action.

Unions and strikers inevitably run afoul of judges who believed that group coercion was the major threat to individual liberty without regard for the impact of economic inequality and lack of opportunity for free self-expression. Judge Daniel Davenport, for example, linked “[t]he recovery of the right of people to run their own business” with “the right of the individual to work whether he belongs to a union” as together “the most serious social, economical and political problem which this country has been confronted with in all its history.” Regardless of how the arguments were misused, the broader legal point remains that unions by their nature as collective producers of public goods necessarily require coercive instruments that clash with the individualist premise of some liberal American jurisprudence.

In practice, of course, many jurists and legislators oppose unions because of their goals, redistributing wealth and power to workers, and, arguments about protecting individuals against group coercion slid into arguments about protecting owners against campaigns to force them to pay higher wages or to improve working conditions. This association of individual liberty with resistance to worker collective action became stronger in the later 19th century when the expansion in business scale and scope led to a more expansive vision of capitalist property including not only tangible, physical property in machinery and structures but also intangibles including good will, reputation, and the benefits of continuous operation.15


Collective action, including labor unions, may expand individual liberty by protecting individual workers from their employers’ economic power and by limiting the political power of concentrations of private property. While some American jurists appreciated these benefits and sought to balance the dangers of coercive collective action against them, a growing majority in the late 19th and early 20th centuries used an expansive concept of individual rights including property rights to restrict the labor movement’s collective action. Throughout the 91 years between Commonwealth and the Wagner Act, law tangled with the balance between the legitimate campaign by individuals for higher wages and the various forms of coercion used by unions and strikers against both non-strikers (free riders) and employers. Sometimes, as in the use of the military in 1877 or the police repression after the Haymarket bombing, legal repression was akin to a police action in defense of property threatened by rioters and terrorists. Increasingly through the late 19th century and into the 20th century, legal action hemmed in and restricted the actions of strikers and unions.

Fearing a rising tide of labor militancy and increasing strike activity, employers quickly learned to get around Commonwealth’s tolerance for peaceful collective action by seeking judicial relief against strike and union action on grounds that they were coercing individuals. The chosen vehicle for this was the judicial injunction against striking unions on grounds that they were employing violence or coercing employers. The first case here was in the 1877 strike where Circuit Court Judge Thomas Drummond granted a broad injunction against strikers in Secor v. Toledo, Peoria and Warsaw Railroad. The case could have been settled on narrow grounds; the railroad was in receivership and the court could have granted an injunction as part of its responsibility to protect the receiver in operation of the line. Drummond, however, went further than this to rule that while a man has a right to get from his employer the best price he could for his labor, he may not dictate terms to the employer nor may he prevent others from working.

Drummond’s argument was consistent with Commonwealth v. Hunt; he acknowledged the right to seek higher wages and nominally only disputed the use of coercive means. After the great strike of 1877, judges increasingly frowned on any collective action as inherently coercive. During strikes against the Southwest Railroad in 1885, Judge David Brewer held that dissatisfied employees are free to quit and even to use persuasion to induce others to do likewise. He granted an injunction against the strike, however, because he claimed that they were resorting to threats or violence, or else

sought to accomplish their coercive purpose “without actual violence by overawing others through preconcerted demonstrations of force.” Perhaps even more alarming was the decision by Texas Circuit Judge Don A. Pardee in 1886 that employees might quit their employment “peaceably and decently,” but when they combined to quit “with the object and intent of crippling the property or its operations,” they committed contempt by the use of unlawful coercion. By this reasoning, any strike activity that actually caused financial loss to the employer was ipso facto unlawful coercion.

From Judge Pardee’s ruling it was a short step to Judge James Jenkins’ ruling in 1894 against strikers on the Northern Pacific Railway. He forbade workers “from combining or conspiring to quit, with or without notice ... with the object and intent of crippling the property ... or embarrassing the operation of said railroad ... or to prevent or hinder the operation of said railroad ... and from combining or conspiring together ... or as officers of any so-called ‘labor organization’ with the design or purpose of causing a strike ...”

Called to justify his draconian decision which appears to have negated totally the right to strike established in Commonwealth v. Hunt, Jenkins asserted the “duty of the court to restrain those warring faction ... that society may not be disrupted, or its peace invaded, and that individual and corporate rights may not be infringed.” What he added was perhaps more revealing:

I doubt if in the light of the history of strikes, the child would be recognized by this baptismal name. One who has read the history of the strike at Homestead, with its cruel murders and barbarous torture; ... To my thinking, a much more exact definition of a strike is this: A combined effort among workmen to compel the master to the concession of a certain demand ... It is idle to talk of a peaceable strike. None such has ever occurred ... All combinations to interfere with perfect freedom in the proper management and control of one’s lawful business ... by means of threats or by interference with property or traffic or with the lawful employment of others are within the condemnation of the law ... The strike has become a serious evil, destructive to property ... to individual right ... and subversive of republican institutions ... it must ever remain the duty of the courts, in the protection of society and in the execution of the laws of the land, to condemn, prevent, and punish all such unlawful conspiracies and combinations.

Here we have the essential features of the conservative legal system before the New Deal: a radical assertion of individual rights which was extended not only against worker collective action but against state regulation of labor relations, seen as another form of coercion even when exercised by elected officials. Under the banner of individual liberty against coercive unions and strikers, judges freely dispensed injunctions against strikes

and virtually any actions taken to maintain strikes. Judges applied the same logic to state regulation of employment arguing that such regulations infringed on individual liberty including the right to make (bad) contracts. In *Godcharles v. Wigeman*, for example, the Pennsylvania Supreme Court overturned a state law requiring payment in lawful money as preventing “persons who are *sui juris* from making their own contracts” and therefore infringing “alike of the right of the employer and the employee.” The law was an insulting attempt to put the laborer under legislative tutelage ... He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that imposes to prevent him from doing is an infringement of his constitutional privileges, and consequently vicious and void.

Following the same logic, courts overturned state law against production of cigars in tenements because “it interferes with the profitable and free use of his property by the owner or lessee ... and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and some portion of his personal liberty.” Judge Earl added a warning that constitutional guarantees of property due process could be invaded without a physical taking: “Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude ... but the right of one to use his faculties in all lawful ways to live and work ... All laws, therefore, which impair or trammel these rights ... are infringements upon his fundamental rights of liberty.”

Later courts overturned legislation requiring weekly payment of wages, restricting women’s work hours, restricting bakers’ hours, and setting minimum wages. The last case, *Adkins v. Children’s Hospital*, provoked a memorable dispute between Oliver Wendell Holmes in dissent and Justice Sutherland. Where Sutherland insisted on the banality that: “Freedom of contract is, nevertheless, the general rule and restraint the exception,” Holmes suggested a flaw in the steady march away from public regulation of labor contracts:

Earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example

23. Forbath.
24. 13 Pa. 431 (1886). See also *State v. Goodwill* 33 W. Va. 188 (1889).
25. *In re Jacobs* 98 New York (1885).
27. Illinois Supreme Court in *Braceville Coal Co. v. People* 147 Ill. 66 (1893).
28. Illinois Supreme Court in *Ritchie v. People* 155 Ill. 98 (1895).
of what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.31

III. The New Deal

Popular protest during the Great Depression of the 1930s and the election of overwhelming Democratic majorities to Congress opened the door to a dramatic change in national government policy. Under the New Deal administration of President Franklin Roosevelt, the federal government enacted legislation establishing a national pension and welfare programs (Social Security), minimum wage and maximum weekly hours (Fair Labor Standards Act), and legislation to protect unions and the right to strike (the National Labor Relations Act or Wagner Act).

As late as 1936, a majority on the Supreme Court continued to uphold the “liberty of contract” view of labor regulation; in Morehead v. New York the Court found unconstitutional a state minimum wage law that was indistinguishable from that rejected in Adkins.32 The judicial consensus behind the “liberty of contract” doctrine was weakening, however, and shortly after the election of 1936, a conservative judge changed his position and that, plus the appointment of new judges, brought a dramatic change in the Court’s attitude towards social regulation, whether by governments or through popular collective action.33 In 1937, the Court approved the National Labor Relations Act by a 5–4 vote. The Court ruling was based on an extension of the Commerce power, “Acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power, and this includes acts, having that effect, which grow out of labor disputes.” Even more important, the Court recognized a valid social purpose in this legislation: “Employees in industry have a fundamental right to organize and select representatives of their own choosing for collective bar gaining, and discrimination or coercion upon the part of their employer to prevent the free exercise of this right is a proper subject for condemnation by competent legislative authority.”34

33. The controversy over the “switch in time that saved nine” is discussed in Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution, New York, NY: Oxford University Press, 1998; also see Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence, Durham, NC: Duke University Press, 1993; Daniel Ho and Kevin Quinn have shown that Justice Robert moved dramatically to the left in the 1936 term, supporting the view that he was responding to political pressures; see Daniel E. Ho and Kevin M. Quinn, “Did a Switch in Time Save Nine?,” Journal of Legal Analysis, 2 (2010), 69–113 <doi:10.1093/jla/2.1.69>.
In the same year, the Court reversed its Adkins and Morehead rulings. In West Coast Hotel v. Parrish, a 5–4 majority concluded that state minimum wage laws were constitutional. In a ruling that went far beyond the points at issue, the Court majority effectively abandoned the “liberty to contract”:

Deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process.

In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

... that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.35

The protection of peace and good order and of fundamental rights to organize provided expansive grounds for legislation regulating labor relations. The Court, however, soon stepped back from this; while continuing to rule in defense of social reform and regulation; it made rulings on narrower grounds of individual liberty. The crucial case here was United States v. Carolene Products Co. (1938). The Court ruled that regulations of interstate milk products sales were “presumptively within the scope of the power to regulate interstate commerce and consistent with due process ... Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare.”36 More important, however, was the statement in Footnote 4 of the decision declaring that the Court was prepared to give greater weight to the civil liberties protected in the Bill of Rights than to liberty of contract and other economic “rights.”

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

Labor benefited from this embrace of individual rights. The long contentious issue of picketing was finally resolved in Thornhill v. Alabama where Justice Frank Murphy37 led

37. Known as the governor of Michigan who refused to use the state militia to clear striking workers out of the GM plants in Flint during the sit-down strikes of 1936–37.
an 8–1 Court majority in overturning an Alabama law banning picketing or loitering around businesses during labor disputes. While acknowledging that the “State may take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its people,” in the absence of “clear and present danger of destruction of life or property, or invasion of the right of privacy” it may not “impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern.”

In basing the right to picket on individual civil liberties rather than on the right of the workers to conduct an effective collective action Murphy and the other justices were acting consistently with the traditional focus of American law. Even the Wagner Act came to be interpreted in terms of individual rights rather than as a measure redistributing power between social groups. This outcome was by no means foreordained in 1935. As originally enacted, the Wagner Act was one of history’s most radical enactments, and it was seen as such by frightened employers who feared the prospect of a powerful labor movement backed by a government dominated by radicals. It was passed to promote union organization to serve the national interest in establishing orderly collective bargaining, maintaining purchasing power, and promoting industrial democracy. The law was explicitly intended to overcome the efforts of employers to deny “the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining.”

The Supreme Court never accepted the real intent of the Wagner Act to promote unionization; instead, it treated it as establishing formal procedures for union organization. The Court explicitly denied any public interest in outcomes, the choice of a union or not, so long as valid procedures are followed that respect individual rights narrowly construed as freedom from group coercion rather than seen as opportunities for self-expression perhaps promoted by collective action. Right at the start, in the Jones and Laughlin decision, the Court carved out an area of employer autonomy, clearly establishing that the act was not intended to change relations between capital, labor, and the state. The act, the Court said, did not “impose collective bargaining.” Instead, the Court concluded in terms that emphasize individual liberty while equating the situation of employees and the employers:

[T]he statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.


That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.\(^{41}\)

### IV. Abandoning the Promise of the Wagner Act

Here was the limit of the Wagner Act and American political economy emerging from the radicalism of the 1930s. By emphasizing the Wagner Act’s procedures over its outcomes, the Court walked away from the law’s intention of promoting labor organization.\(^{42}\) From there, the law has moved steadily away from the Wagner Act’s intent to promote unions as a balance against employer power. From the beginning, the Court used the Act itself to restrain spontaneous worker unrest. In *NLRB v. Sands* the Court condemned workers for participation in a wildcat strike.\(^{43}\) In *NLRB v. Fansteel*, it allowed discharge for participation in a sit-down strike because:

> The National Labor Relations Act is not to be construed as compelling employers to retain persons in their employ regardless of their unlawful conduct. In recognizing the right to strike, it contemplates a lawful strike, and where a strike, even though actuated by unfair labor practices of the employer, is initiated and conducted in lawlessness by the seizure and retention of the employer’s property, and the strikers are discharged because of their lawlessness, they do not remain “employees” within the meaning of § 2(3), and are not within the authority to reinstate “employees” reposed in the Board by § 10(c).\(^ {44}\)

Perhaps most damaging for unions was a decision that nominally favored them. In *Phelps Dodge v. NLRB*, the Court found that employees who refused to hire a worker because of his or her union involvement were guilty of an unfair labor practice and subject to a fine of back pay minus whatever earnings the worker may have had from alternative employments.\(^ {45}\) Barely a slap on the wrist, this decriminalizes a violation of the Wagner Act, setting a low civil penalty for illegal practices.

Other Court rulings sacrificed real interests in promoting organization to the formal maintenance of individual rights of employers. The 1938 decision in *NLRB v. Mackay Radio & Telegraph Co*, for example, concluded that workers on strike remained employees but allows employers to hire strike breakers and to retain them after a strike. In *NLRB v. Gissel Packing Co., Inc.* the Court established “[a]n employer’s free speech right to

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42. Klare, 265; Tomlins.
communicate with his employees.” It found that such speech is protected under the First Amendment “so long as such expression contains no threat of reprisal or force or promise of benefit.” In language that however formally correct gives employers enormous scope to use their power and authority against unions, the Court found that

An employer may communicate to his employees any of his general views on unionism and his specific views about a particular union, as long as there is no “threat of reprisal or force or promise of benefit.” He may predict the precise effects he believes unionization will have on his company if the prediction is based on objective fact to convey his belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

Add to employer free speech the restrictions on union practices in the Taft-Hartley Act and we have virtually abandoned the promise of the Wagner Act, the commitment by the Federal government to promote unions and collective bargaining. Almost with impunity, employers interfere with the employee choice of a union, discharging union activists, threatening workers, replacing strikers, and refusing to bargain with certified unions. Declining union density in the United States reflects the power of this anti-union employer action. A report to Human Rights Watch in 2000 identified a gap between “Policy and Reality” in American labor law. “Workers in the United States secured a measure of legal protection for the right to organize, to bargain collectively, and to strike.” The reality, however, “of NLRA enforcement falls far short of its goals. Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association.”

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49. Note the contrasting treatment of worker collective political action which seven Supreme Court judges allowed only if individuals gave their affirmative consent. Note that this majority included two of the Court’s so-called liberal judges; Knox et al. v. Service Employees International Union, Local 1000, 2012 <http://www.supremecourt.gov/opinions/11pdf/10-1121c4d6.pdf>.