

Bonus chapter to
***The Hidden History of the
Supreme Court and the
Betrayal of America***

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Overturing Child Labor in the United States

Grace Abbott was an activist from birth, and in 1917, as head of the Children's Bureau within the executive branch of the US government, she became responsible for enforcing the Keating-Owen Act, which regulated child labor. Born a decade after the Civil War, both Grace and her older sister, Edith, were activists for the cause of the rights of women and children. (Grace eventually helped write the children's protection provisions of the Social Security Act for the Franklin D. Roosevelt administration.)

The Keating-Owen Act was symbolically important, but functionally it didn't do much. Covering only 5 to 10 percent of child labor in the United States, it was relatively toothless, but it served as a political bone tossed to the growing anti-child-labor coalition of women and unions.

Grace went to Washington, DC, in 1917 to run the Children's Bureau (making her the highest-ranking woman in the US government at the time). She hoped to expand Keating-Owen to cover all children under 16 through an amendment to the Constitution, and she was there in 1918 when the US Supreme Court took up a complaint by Roland Dagenhart.¹

Dagenhart was the father of two young boys who helped support the family by working at a cotton mill in Charlotte, North Carolina. He sued for the right of his children to work, and the case went before the Supreme Court in early 1918.

Grace watched the case with enthusiasm. Even though there were only four Democrats on the Court at the time, she hoped the five Republicans—in the progressive tradition of

Republican Teddy Roosevelt—would uphold the law and thus even use it as a stage for a bigger, better, and more inclusive law.

Grace knew that child labor was nothing new in America and noted that even Alexander Hamilton “was advocating the employment of little children in the mills, whose establishment he was urging should be by a protective tariff.”²

She added that the machinery for the 18th- and early-19th-century mills that was imported from England “was especially built to accommodate little children.”

But that was 1791 and this was 1918.

When *Hammer v. Dagenhart* was decided, the majority opinion cited three previous Commerce Clause cases, saying that under the Constitution’s Commerce Clause, Congress lacked the authority to assert control over child labor. Specifically, they held that “[t]he making of goods and the mining of coal are not commerce” even when done by children. The Court struck down the law, upholding child labor.

Never one to be dissuaded from her mission, Grace visited President Woodrow Wilson and succeeded in getting an executive order prohibiting the government from purchasing any war material—which constituted a huge share of mined and manufactured goods during World War I—that was made or mined with child labor.³

Grace didn’t live to see it, but *Hammer v. Dagenhart* was finally overturned in 1941, after the Supreme Court’s about-face in 1937. The case overturning it was *United States v. Darby Lumber Co.*, which upheld Roosevelt’s Fair Labor Standards Act and the provision outlawing child labor.

The 1941 ruling that banned child labor in the United States is one more example of how the Supreme Court overruled its prior decisions to reflect changing public opinion.

Unions on the Defense: From Eisenhower to Nixon

Despite the Court's support of labor in 1937, the Court swung back toward the right during the Republican Eisenhower administration. And as we saw in part 1, Nixon put the Court on a trajectory to the hard right of American politics. The Court careened even further to the right during Ronald Reagan's presidency.

Here's a quick summary of the high and low points for labor during that time.

The Court supported labor in the 1937 *Virginian Railway v. System Federation* and *National Labor Relations Board v. Jones & Laughlin Steel* cases.⁴

It continued its support of organized labor in 1944 in the *J.I. Case Co. v. National Labor Relations Board* and *Order of Railroad Telegraphers v. Railway Express Agency* cases, saying that a company couldn't use individual contracts with employees to resist a union.⁵

The cracks in the Court's support for unionized labor first began to form in the 1944 Court decision on *Steele v. Louisville & Nashville Railroad Co.*⁶ In that ruling, the Court invented the idea that labor law required a union to give "fair representation" to union members, and that failure to do so could open a door for employers to attack a union.

And after Congress passed the viciously anti-union Taft-Hartley Act in 1949, the Court began reinterpreting labor law through the lens of that anti-union legislation (President Harry Truman vetoed Taft-Hartley but the Republican-controlled House overruled Truman's veto).

In the first tests of the law, *Algoma Plywood Co. v. Wisconsin Board* and *Lincoln Federal Labor Union v. Northwestern Iron & Metal*, the Court upheld the constitutionality of state-level anti-union provisions that echoed Taft-Hartley.⁷

In 1954, the Court began really chipping away at unions, ruling in *Radio Officers' Union v. National Labor Relations Board* that only a union shop could force dues payments and that a union agreement could *not* be used "for any purpose other than to compel payment of union dues and fees" (such as lobbying for legislation that might help labor).⁸

In 1956's *Railway Employees' Department v. Hanson*, the Court cited the Railway Labor Act and declared that railway employees could indeed have and join a union, but dues could be used only for "the work of the union in the realm of collective bargaining."⁹ They added that if dues were used "for purposes not germane to collective bargaining [like supporting candidates for political office who support unions], a different problem would be presented" by the workers' and employers' rights to free speech under the First Amendment. Thus, the Court carefully and intentionally set up later attacks on unions.

Going back to the 1956 *Hanson* decision, the Court ruled in 1961 in *Machinists v. Street* that unions could not use the dues money for political purposes when those dues came

from members who objected to the union's political activities.¹⁰ The Court-invented term "political activities" was very broad and not defined, and the Court required that members who objected could get a refund of their union dues. This set up decades of lawsuits and attacks on unions paid for by corporate- and billionaire-funded nonprofit foundations that continue to this day.

By 1963, the Court was again in its pre-FDR mode of hating unions and doing everything possible to cripple them. In *Railway Clerks v. Allen*, *National Labor Relations Board v. General Motors*, and *Retail Clerks Local 1625 v. Schermerhorn* the Court further narrowed the powers and rights of unions, limiting them by saying, in *GM*, that a union shop must be "whittled down to its financial core"; in *Allen* that unions had to prove to "objecting members" exactly how the union determined expenses that could be charged for purely collective bargaining (as opposed to political) purposes; and in *Schermerhorn* that individual state courts—in addition to the National Labor Relations Board (NLRB)—could enforce state "right to work" laws.¹¹

Right-Wingers Push the Court to Kill Labor

To advance, support, and speed up the Court's hostility to unions, in 1968 the National Right to Work Committee (NRTWC) was formed in a manner that allowed them to reach out directly to conservative union members, taking their concerns into court as their lawyers. Their mission is explicitly to "eliminate coercive union power and compulsory unionism

abuses through strategic litigation, public information, and education programs.”¹²

The NRTWC’s 501(c)(3) arm, the National Right to Work Legal Defense Foundation (NRTWLDF), which today averages an annual budget of \$5 million to \$7 million, has been heavily funded by the Walton Family Foundation (Walmart), the Bradley Foundation, the Castle Rock Foundation, and the Olin Foundation, among others.¹³

Jane Mayer, in her book *Dark Money*, wrote,

*[Fred Koch, father of the Koch brothers] was an early and active member of the Wichita-based [Cecil B.] DeMille Foundation for Political Freedom, an anti-labor group that was a forerunner of the National Right to Work Legal Defense Foundation. In a revealing private letter, one of its staff members explained the group’s “Astroturf” strategy. In reality, [the staffer] said, big-business industrialists would run the group, serving as its “anonymous quarterbacks,” and “call the turns.” But he said they needed to sell the “yarn” that the group was “composed of housewives, farmers, small businessmen, professional people, wage earners—not big business industrialists.”*¹⁴

PR Watch noted in June 2014,

The NRTWC has deep connections within the national right-wing network led by the Koch brothers. Reed Larson, who led the NRTW groups for over three decades, hails from Wichita, Kansas, the hometown of Charles and David Koch. Larson became an early leader of the radical right-wing John Birch Society in Kansas, which Fred Koch (the father of Charles and David) helped found. . . .

The groups remain tied to the Kochs. In 2012, the Kochs' Freedom Partners group funneled \$1 million to the National Right to Work Committee, while the Charles G. Koch Charitable Foundation gave a \$15,000 grant to the NRTWLDF, which has also received significant funding from the Koch-connected DonorsTrust and Donors Capital Fund. Today, at least three former Koch associates work as attorneys for the NRTWLDF.¹⁵

The creation of the foundation led to an explosion of cases before the Supreme Court ostensibly brought by disgruntled union members. Many of the cases that follow were brought and litigated by the foundation's lawyers.

Unions on the Ropes: From Reagan to Today

Perhaps anticipating Reagan's aggressive stance against public sector unions, the Court ruled in 1976 in *City of Charlotte v. Firefighters Local 660* that public employers (government agencies) were not, under the Constitution, required to provide to unions or union members the convenience of automatic deduction of union dues from paychecks.¹⁶ This set up an enormous conflict between unions and their members (when automatic deductions are done, the money is rarely missed; when unions bill their members, people scream).

Newly empowered by a raft of cases being brought to them by the NRTWC, in 1977 the Court again asserted, in *Abood v. Detroit Board of Education*, that union dues were legal only as long as they were used to pay for collective bargaining and administration.¹⁷

The Court added that “a union cannot constitutionally spend funds [of anti-union “objectors”] for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.”

While corporations (including those funding anti-union cases being brought to the Supreme Court) enjoy First Amendment “rights” to “free speech” (decided in 1977 in the *First National Bank of Boston v. Bellotti* case), unions, the Court said in *Abood*, do not have such rights.

In 1979, the Court again took a bite out of public-employee unions. The decision in *Smith v. Arkansas State Highway Employees* laid it out: “[The] First Amendment does not impose any affirmative obligation on the government . . . to recognize [a union] association and bargain with it.”¹⁸

The 1984 *Ellis v. Railway Clerks* case further tightened the screws on unions by ruling that even union publications such as magazines and newsletters for members and union member organizing activities, if they included mention of political causes, were not part of the union functions that all members must pay for.¹⁹ “Dissenting” members not only were able to avoid contributions that funded political activities (as in earlier decisions) but also didn’t have to pay for union organizing or publishing activities.

The Reagan administration put its post-PATCO (Professional Air Traffic Controllers Organization) attacks on unions (and particularly on public-employee unions) into high gear, and the Court enthusiastically went along. In the 1986 *Chicago Teachers Union v. Hudson* case, the Court tightened

restrictions on unions' use of workers' fees.²⁰ The Court ruled that if a worker "objected" to the union's activities, the union must provide "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." This saddled unions with even more expensive and time-consuming legal and accounting burdens.

Then, in the 1988 *Communications Workers of America v. Beck* case, the Court extended those limitations beyond public sector unions, so that unions in the private sector were saddled with the same expensive and time-consuming legal and accounting burdens.²¹ No more "free speech" for unions, public or otherwise, under any circumstances. Such rights are still held by corporations and right-wing nonprofits.

Having already restricted unions from using certain fees and dues for political and organizing activities, the Court further ruled that unions aren't allowed to charge for legal fees related to litigation unless the litigation is "germane to collective bargaining activity." Unions would have to figure out a new way to pay for their own routine legal, lobbying, and PR expenses, the justices ruled in 1991's *Lehnert v. Ferris Faculty Association*, further hobbling unions.²²

In 1998, the Court ruled that corporations are allowed to force arbitration, but not unions. The case was *Air Line Pilots Association v. Miller*, and the Court said that when an employee tries to sue a corporation with whom she has an arbitration agreement, the corporation can legally force her to follow the arbitration process through to its completion before there's

any sort of conclusion, be it in her favor or not.²³ In this decision, the Court also ruled that the union could not set up a similar system to deal with union members who didn't want to pay their union's fees.

Just to make sure that "dissenting" union members knew all about it, the NLRB determined that unions must, at their own expense, inform their members that they don't have to pay for anything except for collective bargaining activities. The Court, in 1998, agreed in *Marquez v. Screen Actors Guild*.²⁴

While no corporation has ever had to get permission from its stockholders or directors to spend money on politics, the Court ruled in 2007 in *Davenport v. Washington Education Association* that unions don't have First Amendment rights like corporations, and therefore it is not a First Amendment violation for states to force unions to get written permission (even from nonmembers) before spending any fees for things like political activities.²⁵

In the Court's onslaught against labor, Republican-appointed justices even overruled state laws, eschewing conservative "states' rights" arguments. In the 2008 case *Chamber of Commerce v. Brown* the Court ruled that its decisions and the anti-union 1947 Taft-Hartley law preempt state labor laws.²⁶ But the Court affirmed the First Amendment right of union busters to call "attention to the right of employees to refuse to join unions." The ruling also prevents progressive states from using their own funds to fight union busting (states are still allowed to use state funds to promote any sort of corporate activity).

In 2012, the Court ruled in *Knox v. Service Employees International Union, Local 1000* that “when a public-sector union imposes a special assessment or dues increase, the union must provide [notice] and may not exact any funds from nonmembers without their affirmative consent.”²⁷ Again, no free speech rights for unions. The notoriously anti-union Sam Alito wrote the opinion for the 5–4 decision, joined by the four other Republican appointees on the Court.²⁸

One year later, in 2013’s *Unite Here Local 355 v. Mulhall*, the Court ruled that it’s illegal for an employer to help unions because the process of “neutrality and card-check agreements” is, according to the Court, a “thing of value” and thus illegal for a corporation to give to a union.²⁹

In the 2014 *Harris v. Quinn* case, the Court declared that it is unconstitutional for a union to require home health care workers to pay fees to the union for representation.³⁰ In the process, the Court also took a couple of shots at the pro-union parts of the 1977 *Abood* decision. In this case, the Court invented (without the help of any legislature) a whole new category of employees that it called “quasi-public employees.” That category of second-class citizens can now be used to further limit public workers’ rights.

Finally, in 2018, the Court fulfilled Sam Alito’s dream of obliterating the union rights defined in *Abood*.

In a 5–4 all-Republican majority, they used the possibility opened in their own 2014 *Harris v. Quinn* decision by ruling that public sector employees represented by a union don’t have to pay any fees, even those associated with collective bargain-

ing expenses. They hung this logic on the First Amendment, over strong and loud objections by the four Democratic-appointed justices.

Clearly, the Supreme Court is nearly always *not* the friend of workers or organized labor.

NOTES

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5. *J.I. Case Co. v. National Labor Relations Board*, 321 U.S. 332 (1944); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944).
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