June 1986

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Link to publisher version (DOI)
https://doi.org/10.15779/Z38GS62

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American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895

Haggai Hurvitz†

This Article claims that in the era of rapid industrialization American courts developed labor law, not by incremental extensions of old conspiracy concepts, but by a sweeping reorientation of the juridical theory about private property. The author argues that, triggered mainly by peaceful labor boycotts, courts created in 1886-1895 a new doctrine of entrepreneurial property rights by which they contained labor's freedom to use concerted action. The Article traces the rise of this doctrine through conspiracy, tort, equity and constitutional law, and clarifies the patterns of reasoning that justified its acceptance. In his conclusion, the author examines the logical operations that enabled the judiciary to elevate employer economic liberties to protectable property rights and relegate union interests to a subordinate legal status.

INTRODUCTION

The birth of labor law as a distinct branch of American jurisprudence around 1890 raises several questions about how social conditions and legal thought affect one another. The grave escalation of labor strife
since the late 1870's surely shaped legal developments. When labor law emerged, it contained doctrinal elements from such diverse branches of law as criminal conspiracy, torts, equity and constitutional law. However, it is unclear precisely how industrial strife affected the legal mind. By what mechanisms—institutional, mental, conceptual—did social tensions modify legal thought? By what patterns were old concepts fused together to construct a new doctrine? And what, if any, were the central or organizing principles of the new body of labor law?

The present Article begins to answer these questions. Modern labor law began to crystallize as an autonomous doctrinal sphere in direct response to the sudden wave of large nonviolent labor boycotts in 1885-1889. In no more than a decade, leading state and federal courts quickly advanced several new and renewed judicial remedies intended to provide employers and nonunion workers with relief from effective union pressures. The application of these remedies raised several problems of reasoning which led the courts to develop new concepts vindicating the relief rendered. In 1895 the courts completed the development of a new doctrine of property rights that protected employers and unorganized workers. Although, until the New Deal, courts openly based their decisions on this doctrine, scholars have hardly discussed it or even identified it by a distinguishing name.

An apt name for this doctrine is “entrepreneurial property rights.” The doctrine’s essential innovation is clarified by comparing two landmark court opinions, one from 1880 before the doctrine appeared, the other from 1907 after it had fully unfolded. In the earlier case, Johnston Harvester Co. v. Meinhardt, a New York supreme court declared that strikers’ nonviolent actions designed to deter nonunion workers from crossing picket lines, which caused heavy employer losses, did not invade any of the employer’s property rights. Twenty-seven years later in Sailors’ Union v. Hammond Lumber Co., a federal circuit court upheld an injunction forbidding striking sailors from not only using force and intimidation against employees and customers who ignored the union’s strike and boycott, but, more generally, from interfering “in any wise” with the freedom of the plaintiff shipping company “to carry on its

1. See Roche, Entrepreneurial Liberty and the Fourteenth Amendment, 4 LAB. HIST. 3 (1963) (presents a revealing insight suggesting this name); Roche, Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction, and Casuistry in the Age of Enterprise, 30 U. CHI. L. REV. 680 (1963).
2. 9 Abb. N. Cas. 393 (1880), aff'd, 31 N.Y. Sup. Ct. 489 (1881).
3. Id. at 393-94.
4. 156 F. 450 (9th Cir. 1907). In Sailors’ Union an injunction against the union was upheld where union members had prevented the lumber company’s vessels from leaving port and imprisoned one of the company’s employees, threatening and intimidating others with such force that the company was unable to acquire crews or to book passengers or freight.
business as it saw fit." In upholding the injunction, the court asserted that the company's property:

is not only its vessels, but the business of carrying freight and passengers, without which the vessels would lose their value. The right to operate vessels, and to conduct business is as much property as are the vessels themselves. All the rights which are incident to the use, enjoyment, and disposition of tangible things are property. Hence, an employer had a protectable property right in the freedom to conduct, control and manage his enterprise.

In the period 1886-1895, the judiciary built around this extended concept of property rights to protect entrepreneurial freedoms a doctrine of labor relations law that made illegal several union tactics which had previously been approved, at least by some leading courts. The new doctrine prevailed, with few qualifications, until it was supplanted by New Deal labor legislation.

I

THE JUDICIAL PERCEPTION OF THE LABOR BOYCOTT

American courts embarked on developing the concept of entrepreneurial property rights in response to the large-scale labor boycotts in 1885-1889. Although shortlived, this wave of boycotts nonetheless left a dramatic impact on labor law and the courts. Probably because the boycott proved to be an auxiliary weapon of a limited value, secondary to the strike, historians paid but small attention and thus also overlooked the boycott's potent effects on the law. At the outset, however, the labor boycott seemed to contemporaries a mighty tactic, inciting great hopes among laborers and great fears among their adversaries. Between 1886 and 1889 the boycott became a primary object in the judicial contests between capital and labor. In those years, lawsuits over boycotts outnumbered those over strikes. Court opinions in boycott cases became the landmarks in the reorientation of the law.

A. The Reality of the Labor Boycotts

To understand the legal impact of the labor boycott of the late

5. Id. at 452. The argument of counsel for the union focused attention on the issue of which rights of the company the union had violated. Conceding some members' use of force and threats, counsel claimed, nonetheless, that the injunction was "in excess of the court's jurisdiction," because the rights invaded, if any, were not property rights. Id. The union's pressure upon strikebreakers and customers to cease dealing with the company caused no injury to boats or other assets. Since the company had property rights in its vessels, but not in the services of its employees or the patronage of its customers who, not bound by contract, could leave at will, the company was not entitled to injunctive relief against the union's actions. If the union was at all liable for the losses it had caused, recovery lay in a tort action.

6. Id. at 454 (emphasis added).

1880's, we must first briefly note its background, characteristics and impact on public opinion. Beginning in the late 1870's the nation witnessed a deep qualitative change in the scope and intensity of labor disputes. Waves of local, regional and national strikes followed one another in rapid succession. The number of industries, people and places involved, the use of violence and the extent of damage to persons and property continually increased. The change caught America by surprise with the sudden explosion of the "great railroad strike" of 1877. This wildcat strike swept the country from the east coast to west of Chicago, leaving in its wake not only death and destruction, but also class hatred, fear and frustration. Middle- and upper-class America was rudely awakened from the illusion that such labor strife could not happen here. Subsequent struggle, feeding the meteoric ascent of the Knights of Labor and the steadier growth of belligerent trade unions, drove home the conviction that an ominous nation-wide power was emerging. This conviction shaped the public image of the labor boycott.

When the Knights of Labor began to apply that long-known but little-used buyers' boycott as a weapon of industrial strife in 1885, they did so much more intensively and systematically than in the past. Realizing that the "primary" boycotts (where only those involved in a labor dispute ceased buying) were usually ineffective, the Knights of Labor organized "secondary" boycotts (where consumers and suppliers, not involved in the original dispute, were called to sever dealing with the targeted employer) in order to activate a much wider and stronger pressure group. Local branches of the Knights and other trade unions formed united fronts, calling on their members, sympathizers and the general public to boycott firms labeled "unfair" to labor. These alliances, commanding the purchasing power of many people, often stifled small and medium-sized employers, especially in competitive industries. Contemporaries realized that boycotts were relatively more successful than strikes. Their gains were also due to careful abstention from violence. The need to win public cooperation, a condition of singular importance for a boycott's success, led organizers to avoid acts that would antagonize the public and provide an excuse for police intervention.

Contemporaries could not foresee that the boycott was destined to remain marginal in labor disputes. At first the boycott appeared much more effective and dangerous than the strike. Strikers seemed more exposed to harm because they lost wages, whereas boycotters, whose income remained intact, could hold out much longer. If boycotters acted

10. Id. at 72, 78.
with discrimination, focused efforts against carefully selected targets, skillfully built up public solidarity with labor, and cleverly manipulated the competitors' lust for profit and businesses' fear of union reprisals, the boycotters could triumph over entire industries.

B. Underlying Judicial Attitudes

Against this background, courts, prosecutors and many others came to believe that the labor boycott created an enormously grave danger. First it was thought to pose a new kind of threat to individual liberty. Traditionally such threats came from efforts "by government to interfere with the rights of the citizen" or "by the rich and powerful to oppress the poor."\(^{11}\) This threat, however, came from "an attempt by a large body of workingmen to control, by means little if any better than force, the action of employers."\(^{12}\) Laborers, usually regarded as oppressed, appeared as oppressors. In the eyes of the judges, boycotters, rather than trying only "to dictate" specific terms, aimed in fact "to deprive the [employing] company of its liberty to carry on its business in its own way."\(^{13}\)

In response, judges displayed moral revulsion. Boycotters, they noted sardonically, were in effect telling employers:

You shall discharge the men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true, we have no interest in your business, we have no capital invested therein, we are in no wise responsible for its losses and failures . . . ; yet, we have a right to control its management and compel you to submit to our dictation.\(^{14}\)

The bench portrayed labor boycotters as violating basic rules of fairness and justice, seeking the benefits of management while refusing to face its risks and responsibilities. Some judges denounced boycotters' motives as "wicked," "insolent and truculent." Others described their behavior as "cruel, heartless and unrelenting," or showing "wantonness and malice" with the "grossest tyranny."\(^{15}\) Despite the oft-repeated principle that the courts' purview covered only violations of law but not of ethics, judges allowed their moral aversion to affect their decisions.

In the labor boycott, courts also saw a real threat to the foundation of the industrial order:

If the defendants have the right to which they claim, then all business enterprises are alike subject to their dictation. . . . [T]he exercise of the power, if conceded, will by no means be confined to the matter of employing help. Upon the same principle, and for the same reasons, the

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12. Id. at 72, 8 A. at 894.
13. Id.
14. Id.

See also Glidden, 55 Conn. at 75, 76, 8 A. at 895, 896.
right to determine what business others shall engage in, when and where it shall be carried on, etc., will be demanded, and must be conceded.16

Thus originated the image of the boycott as a path to effective control over the business policies of private industry.

Beyond that there seemed to loom an even broader danger to free trade. If the law would not punish unions for pressuring third parties to sever business relations with a boycotted firm, it would sanction infringement on the commercial liberties of the public at large. By bringing the combined purchasing power of large numbers of workers and their supporters under a unified command, union leaders could coerce innocent people and cut down their freedom of choice.17

From this point of view, the boycott's destructive powers seemed to reach beyond private business and affect the public realm. "The public [has] an interest in the way in which a person disposes of his industry and his capital...."18 Entrepreneurial freedom was essential to the prosperity of the country, and business owners relied on the courts and government to protect their rights. "This confidence is the corner-stone of all business...."19 If the exercise of these rights was at the mercy of labor unions, business incentives would vanish and the nation's welfare would be imperiled.

The threat to the public peace seemed equally dangerous. Even if courts acquiesced, labor boycotts would provoke business groups to counterattack. Employers would resort to the same tactics, claiming similar rights, and "brute force" would prevail. "That would be subversive not only of all business, but also of law and the government itself. The end would be anarchy, pure and simple."20

The courts believed that freedom to boycott entailed the danger of a social revolution in addition to chaos and civil disruptions. The boycotters sought to change the status of labor unions and strove to "force the conquest and submission of all resistance to their demands and self-constituted management." The victory would bring "a reign of terror, which, if not checked and punished in the beginning by the law, will speedily and inevitably run into violence... and mob tyranny."21

Although seemingly groundless in retrospect, these apprehensions represented undercurrents of deeper and dimmer fears. On occasion,

16. Glidden, 55 Conn. at 72, 8 A. at 894. See also State v. Stewart, 59 Vt. 273, 290, 9 A. 559, 569 (1887).
18. Crump v. Commonwealth, 84 Va. 927, 936, 6 S.E. 620, 625 (1888) (quoting Baron Bramwell in Regina v. Druitt, 10 Cox's Crim. Cas. 592 (1867)).
19. Glidden, 55 Conn. at 73, 8 A. at 894.
20. Id., 8 A. at 895.
21. Crump, 84 Va. at 939, 6 S.E. at 626.
these fears burst forth in metaphors charged with tension and anxiety. For example:

If [boycotts are to] . . . be tolerated as innocent, then . . . every manufacturer [will be] handicapped by a system that portends certain destruction to [its] industry. If our . . . manufacturing industries are sleeping upon the fires of a volcano, liable to eruption at any moment, it is high time our people knew it.\footnote{Stewart, 59 Vt. at 286, 9 A. at 567.}

Similarly:

The principle [of the boycott] if it once obtains a foothold, is aggressive, and is not easily checked. It thrives on what it feeds, and is insatiable in its demands. More requires more. . . . The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more.\footnote{Glidden, 55 Conn. at 72-73, 8 A. at 894.}

Analogies to volcanoes or to savage bloodthirsty beasts suggest the sense of insecurity brought about by what appeared to be an impending total catastrophe. It was only natural that the courts determined to suppress the labor boycott.

\section*{C. Legal Barriers to Outlawing the Boycott}

In 1886, however, legal suppression of the labor boycott was at odds with the prevailing trend of precedent and with basic concepts of American legal philosophy.

\subsection*{1. Precedents Upholding Business Boycotts}

Decisions sustaining business use of boycott-type tactics first appeared in the mid-nineteenth century. In \textit{Hunt v. Simonds}, for example, the Missouri Supreme Court dismissed the claim brought by a boat owner against a number of insurance companies that all agreed to deny coverage to his vessels, even though this action forced the boat owner out of business.\footnote{Hunt v. Simonds, 19 Mo. 583 (1854). \textit{See also} Orr v. Home Mut. Ins. Co., 12 La. Ann. 255 (1857).} Even if this joint refusal was malicious and designed only to injure the plaintiff without serving the legitimate interests of the insurance companies, the companies were not liable for the financial harm they caused as long as they breached no legal duty.\footnote{Hunt, 19 Mo. at 587-88.} Since every citizen has an "absolute" right to deal or refuse to deal, that right could be exercised under any conditions, and for any motive without incurring liability for the resultant losses.\footnote{Id. at 586.} The joint exercise of individual rights not to buy did not affect the legality of the actions. An act legal for one re-
mained legal when taken jointly. Under this rationale, the court approved the "primary" boycott.

Subsequent cases went further, approving "secondary" boycotts. In 1867, the Massachusetts Supreme Court maintained that an association of sailors' employment agents might order its members to stop dealing with an agent who defied the association's rates and rules ("primary" boycott), and with anyone else, not otherwise involved in the dispute, who traded with or worked for that agent ("secondary" boycott).\(^\text{27}\) The association members committed no offense by these acts because they had no legal obligation to deal with any particular third party. Nor did the association infringe the individual agent's rights by boycotting all trade relations. Losses and even bankruptcy caused by a concerted refusal to deal were similar to losses caused by business competition: they stemmed from legally permissible acts.

Another landmark business boycott case was *Payne v. Western & Atlantic Railroad*.\(^\text{28}\) In *Payne*, the court was asked whether the defendant, "a large and rich" corporation, could order its employees to stop buying from the plaintiff, a relatively small merchant, under threat of dismissal. This act was not commercially justified, since the merchant did not compete with the railroad. The merchant claimed the ban was illegal because it sought to, and succeeded, in ruining his lawful business out of wanton malice.\(^\text{29}\) The court found no legal wrong in the railroad's conduct. Even if the company behaved "maliciously and in pursuance of wicked design," its conduct was "still not actionable"\(^\text{30}\) because its motives and outcomes broke no law. In the absence of any labor contract, the railroad could dismiss employees for any reason or for no reason, even for purchasing goods from the plaintiff. Although the railroad may have acted immorally by depriving the merchant of trade, the merchant had no legal recourse.\(^\text{31}\)

The *Payne* decision had wide significance. Under *Payne* organizers of effective economic boycotts could not be sued for losses caused by the boycott. In *dictum*, the court applied this conclusion to labor combinations as well as to corporations. Workers might call for a boycott against a third party, for example, a supplier who refused to join their primary boycott, as well as against a direct adversary, such as an employer who hired "scabs." As a result the supplier might be compelled to close down or to cease dealing with the "obnoxious" employer. Neither the direct employer nor the supplier had a right of action against the boycotters. "Great losses may result, indeed have often resulted from such conduct;
but loss alone gives no right of action.”

Thus, only shortly before the boycotts of 1885-1886, American courts established a doctrine permitting the peaceful boycott as a legitimate weapon in economic conflicts under which resulting losses were defined as damages without legal injury.

2. The Boycott and the Prevalent Concepts of Liberty and Property

Before 1885, several courts interpreted the concept of “economic liberty” to allow workers to use economic bargaining power to attain lawful self-serving goals despite heavy losses to others. The law then regarded economic liberty as a weak “right” permitting everyone a freedom to take loss-causing action, but providing no one with legal protection against losses by market pressures. People could exercise their economic freedoms only so far as they had the power to do so, and could expect no court assistance. Hence, an employer’s liberty to trade imposed no legal duty on its workers to refrain from interfering by lawful means, nor a legal liability if they did interfere.

Similarly, the prevailing concept of “property rights” did not enjoin the orderly boycott. As a rule, boycotters committed no trespass to real property, damaged no machines or movables, and touched no money or valuables. When a boycotted business suffered losses, it was not because of actions defined by the law as confiscation of title or restrictions of possession. It was not deprived of the formal (or abstract) right to operate or idle its machines, of the privilege to buy, sell, borrow or undertake any other transaction, or of access to its shop or stores. De jure

32. Id. at 519 (emphasis added).

33. This distinction between “liberties” (permissible modes of conduct) and “rights” (legally protectable claims) is based generally on Hohfeld’s celebrated article, Fundamental Legal Conceptions, 23 YALE L.J. 16, 59 (1913), 26 YALE L.J. 710 (1916-17). For an early use of Hohfeld’s concepts to support the claim that the courts’ protection of employers’ rights lacked valid legal basis, see Cooke, Privileges of Labor Unions in the Struggle for Life, 27 YALE L.J. 779 (1917) (a painstaking textual examination of the majority opinion in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917)); for recent discussions, see L.C. BECKER, PROPERTY RIGHTS, ch. II (1977) (an elaboration of Hohfeld’s conceptual scheme); Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 BUFFALO L. REV. 325 (1980); Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. REV. 975, 986-94, 1056-59 (illuminating the historical evolution and analytical value of Hohfeld’s concepts) (includes a long note on the “Hohfeldian debate” at 989-90); Kelman, American Labor Law and Legal Formalism: How “Legal Logic” Shaped and Vitiated the Rights of American Workers, 58 ST. JOHN’S L. REV. 1 (1983); LaRue, Hohfeldian Rights and Fundamental Rights, 35 U. TORONTO L.J. 86 (1985).

34. Rights of property referred to tangible objects. But these included not only corporeal “things” (e.g., land, products, personal effects), but also incorporeal assets (e.g., money, bonds, stocks and other indications of obligations, expressed by a promise or contract). The “classic” works on this subject are: J.R. Communs, THE LEGAL FOUNDATIONS OF CAPITALISM 16-21, 225-82 passim (1924); J.R. Communs, INSTITUTIONAL ECONOMICS 4-5, 76, 167, 664-65 (1934). For a contemporaneous view see Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). For a broad review of the main changes in the concept of property from the late 18th century (Blackstone) to the early 20th century (Hohfeld), see Vandevelde, supra note 33.
property rights remained intact—and that was all that mattered to the bench. Indeed, it was precisely because union members acted on the assumption that the boycotted employer remained in full and exclusive possession of its enterprise, and control of its property, that workers tried to mobilize external market pressures to steer the employer to reach decisions from which they would benefit. They aimed at the employer's ability to earn income. That ability was but a personal liberty open to market risks, not a right of private property subject to judicial protection.

D. The Judicial Dilemmas

1. The Boycott and the Question of Judicial Remedies

Against this background, the labor boycott appeared to defy judicial intervention. Courts possessed the means to control labor activities involving the use of force, destruction of real property, rioting, fraudulent or libelous expressions, and inflammatory or subversive propaganda. In these cases the legal offenses were clear and the relief was readily available. But how could courts ban the peaceful boycott when it was not defined as an offense?

The absence of binding case law or statutory prohibition of economic boycotts, combined with recent decisions upholding business boycotts, tied the hands of judges facing labor boycotts in 1885-1886. For the moment it appeared that trade unions had discovered a legitimate way to undermine the business establishment. By maneuvering the purchasing power of workers and their supporters under a unified command, union leaders seemed able to beat employers at their own game.

2. Stare Decisis vs. Status Quo

When employers and prosecutors asked for judicial relief from the labor boycotts they unwittingly presented the courts with a dilemma between two basic principles of adjudication. One, *stare decisis*, requires courts to follow rules set down in earlier cases. The other, lacking a definite label but no less binding, was the commitment to protect the legal foundations of the social order. Until 1886, these two principles were in harmony because following precedents usually also preserved the *status quo*. The labor boycott cases, however, pitted these principles against each other. If the courts had abided by precedent and tolerated the peaceful labor boycotts, they would have permitted behavior generally believed dangerously subversive to the dominant social order and its legal premises. This tension differed from the conventional dichotomies of judicial traditionalism or self-restraint versus judicial innovation or activism. Rather, the tension reflected a novel contradiction within the politically conservative approach: to adhere to the formal rule of *stare
decisis (and hence uphold the labor boycott) seemed to undermine the substantive commitment to the economic status quo.

3. Free Enterprise vs. Private Property

Beneath the overt inconsistency between these two guidelines of adjudication, a more fundamental yet unexpected incongruity arose between the two jurisprudential principles of protection of economic freedom and sanctity of private property. American courts then believed that massive labor boycotts caused employers not only unwarranted financial losses, but, even more importantly, caused an unjustifiable loss of control over their businesses. With the rapid growth of large enterprises, control over business policies and decisions was increasingly perceived by both business owners and the courts to be a vital part of the employers’ dominion over their capital, and hence as an essential aspect of their property rights. Thus in labor boycott cases courts found themselves faced with an unforeseen contradiction: if they adhered to the principle of economic freedom, they jeopardized the employer’s ability to dominate and control its economic resources. Free enterprise and private property, the primary legal pillars of the existent economic order, suddenly appeared incompatible.

The American judiciary, therefore, faced a unique difficulty in 1886. On the one hand it felt the labor boycott had to be suppressed because it posed a fatal danger to legal underpinnings of the economic order. On the other hand courts lacked authoritative precedent and rationales to justify suppression. The judiciary had to work out a doctrine that would abandon the universal tolerance for lawful means to impoverish others and replace it with a policy that would be broad enough to ban all labor boycotts, even if peaceful and orderly, but not so broad that it would also eliminate desirable business operations.

American courts responded swiftly and resolutely to this dilemma. Viewing the protection of property rights as the highest priority, from 1886 to 1895 they initiated and implemented a thorough revision in the branches of law that dealt with labor affairs. The revision was accomplished in three phases: 1) in criminal conspiracy and tort law; 2) in equity; and 3) in constitutional law. In each phase the courts changed the law in a roughly similar pattern. Impelled by a sense of emergency, they first transformed what appeared to be intolerable wrongs into legal offenses and promptly provided remedies. Only later did the courts produce grounds for justifying the innovative remedies by creating new con-

35. I owe the identification of a contradiction between a policy protecting free enterprise and a policy securing the vested rights of private property to Professor Morton J. Horwitz of Harvard Law School.
cepts of protectable rights, of duties not to infringe on these rights, and of liabilities for infringement.

The generation of these legal concepts required changes in basic, often implicit, jurisprudential and philosophical assumptions about when the law could interfere to prevent moral evils; what constituted "economic duress;" and when courts could make public policy decisions. The revision was far-reaching, resulting in a doctrine of entrepreneurial property rights that governed labor law for the next four decades.

II

THE FIRST PHASE: REORIENTATION OF CRIMINAL CONSPIRACY AND TORT LAW, 1886-1889

In their rush to enjoin labor boycotts, the courts turned to the familiar arsenal of criminal conspiracy law for weapons. In 1886, however, it was far from clear that a peaceful labor boycott was criminal. One approach drew upon old English and early nineteenth century American cases to justify a legal ban of the labor boycott. From 1842, however, courts and legislatures in leading states as well as some prominent legal writers began developing an alternative view that tolerated labor's peaceful concerted actions. In 1886 the courts sustained in theory the more recent tolerant approach. With that, however, they created new protectable rights for entrepreneurs which severely restricted labor's legal freedom to struggle concertedly.

A. The Ambivalent Legacy of Criminal Conspiracy, 1842-1885

The two theories of labor conspiracy that evolved before 1885 differed primarily in the extent to which workers could freely inflict losses on adversaries in efforts to advance their own self-interests. The older "repressive" approach governed most early labor conspiracy cases between 1806 and 1840.36 These cases, decided mainly in New York and Pennsylvania, banned journeymen from organizing to raise wages or to create "closed shops."37
cases between 1842 and 1885. So in 1886, courts could have prohibited labor boycotts simply by declaring their goals unlawful, since most of them sought to establish closed shops. However, the assumptions of the "repressive school" were never fully accepted.

In 1842, the celebrated opinion of the Massachusetts Supreme Judicial Court in Commonwealth v. Hunt introduced a different approach. In Hunt, Chief Justice Lemuel Shaw permitted concerted action to impose a closed shop, provided the means were not illegal. Chief Justice Shaw based his view on an emerging tort principle applicable to business and labor combinations alike. Losses caused by the concerted and self-interested efforts of economic actors "to impoverish another" were damages without legal injury, so long as the actors did not violate any express legal duty. He equated economic pressure in labor disputes to those in business competition. The legality of both types depended only on the legality of the means employed. The implication was that a boycott, if peaceful, entailed no legal liability.

Some major industrial states followed this line of reasoning in statutes enacted before 1886. Following political pressures in 1869-1870 applied by the Workingmen's Assembly (a state federation of labor organizations), the New York legislature amended the statutory definition of "conspiracy" to prohibit courts from restricting "orderly and peaceable" concerted actions by labor organizations. In Pennsylvania as well, the legislature changed the old conspiracy law. Two acts protected trade unions' economic power by expressly declaring that peaceful economic pressures were not in themselves "unlawful coercion" even if they proved goal was higher wages. However, the prevalent rule was apparently that "journeymen confederating and refusing to work, unless for certain wages, may be indicted for a conspiracy." People v. Tremquier, 1 Wheeler's Crim. Cas. 142, 150 (N.Y. City Crim. Ct. 1823). See also Master Stevedores Ass'n v. Walsh, 2 Daly 1, 3-5, 7-9 (N.Y. City Ct. of C. P. 1867). At the same time, no early cases raised questions about the illegality of closed shops.

38. Among the best known of these cases were State v. Donaldson, 32 N.J.L. 151 (1867); Commonwealth v. Curren, 3 Pitts. 143 (Schuylkill Cty., Pa. Ct. of Q. Sess. 1869). In State v. Donaldson, a group of craftworkers employed to manufacture patent leather combined to leave their employer's service until certain other employees were dismissed. Though the act of quitting in unison only remotely injured their employer's business, and though the strikers were not charged with using threats, force or fraud, the court upheld the craftworkers' indictment for conspiracy on the ground that their purpose was unlawful—they sought to dictate to their employer whom to discharge or employ.

39. 45 Mass. (4 Met.) 111 (1842). In Hunt, an association of bootmakers prohibited any of its members from working for any employer who retained nonmember workers. Chief Justice Shaw declared the association was not formed for the accomplishment of any illegal end and thus reversed the decisions of the court below. See Thacher's Crim. Cas. 609 (Boston Mun. Ct. 1840).


41. The following discussion suffers from the fact that state labor legislation prior to the mid-1880's has been only scantily researched. The topic still awaits a thorough survey and analysis.

harmful to the business or income of others. Only joint use of force, or threats of force, could be regarded as an indictable conspiracy. Again, by implication, the labor boycott, if managed peacefully, was not illegal.

This new "tolerant" legislation did indeed reorient labor conspiracy law, provoking censorious judicial responses. Thus in Commonwealth ex rel. Vallette v. Sheriff, a Pennsylvania trial judge hailed the old superseded law under which any labor combination to injure an employer's business in order to wring concessions had been an indictable offense. Though the judge enforced the new legislation, he almost openly lamented what it had done:

[It] sweeps away in few words nearly all of the law which had been long established in England, and adopted in this country. That which had been held to be contrary to law is declared to be lawful, and that which before would have subjected workingmen to criminal prosecution may be done without incurring the risk of indictment.

He believed the new statutes did nothing less than to legalize combinations that may "prejudice the interests of the community, and may tend to injure individuals in their business."

In 1879 New Jersey trade unions began campaigning to exclude labor organizations from the criminal conspiracy law. In 1883 the legislature declared that combinations using "peacable means" for attaining lawful goals were not illegal conspiracies. By this act "the policy of the law . . . was revolutionized." In effect, it made nonviolent strikes and boycotts inoffensive.

In 1886, then, the old "repressive" school of criminal conspiracy suffered great setbacks. The Hunt decision governed Massachusetts. The statutory changes in New York and Pennsylvania, the two states where the great majority of the early labor conspiracy cases had been decided, undercut most American precedent. The New Jersey act of 1883 overruled that state's supreme court decision in State v. Donaldson, the most cogent "repressive" opinion in the post-Hunt era. These changes created a "tolerant" trend. The stage was set for the development of a rather lenient legal policy toward the peaceful labor boycott.

Moreover, changes in the patterns of market activities and in the

44. Id. at 394-95.
45. Id.
46. Id. at 395.
47. Id. at 398.
49. Id. at 25-27 (citing Laws of 1883, ch. 28, at 36).
50. Mayer v. Journeymen Stonemasons' Ass'n, 47 N.J. Eq. 519, 531, 20 A. 492, 496 (1890).
See infra note 126 (discussion of Mayer).
52. 32 N.J.L. 151, 154 (1867). See supra note 38.
nature of business competition gave rise in the 1870's to an additional argument for greater legal tolerance of labor unions' activity. The growth of diverse kinds of partnerships and corporations, trade and professional associations, and a variety of investors' combinations, made jurists worry lest restrictions on peaceful economic pressure by labor organizations "spill over" to the detriment of business combinations.

This view was forcefully expressed by the authoritative textbook writer Francis Wharton. In 1874 he had already warned against any further extension of the concept of conspiracy beyond the limited number of offenses then defined by statute or precedent. The modern age, Wharton argued, differed from previous eras in that "great social and commercial enterprises [could] no longer be undertaken by individuals, but must be undertaken by combinations alone."53 Hence, if courts restored the authority of the early conspiracy decisions only a "few joint operations for money making... could escape indictment."54 The regulation of industry would be left, not to private enterprise... but to the criminal courts."55 As a result, a "distressing uncertainty will oppress the law."56 In subsequent editions of his book Wharton became even more explicit. The days of the old conspiracy law had passed not only because it "unduly impair[ed] the liberty of the laborer" but because it also "rudely interfered with... business relations" and, because "[w]e cannot indict employees who combine, without indicting capitalists who combine."57

Thus in 1886, when labor boycotts began to rise, the great weight of case law and statutes, reinforced by some legal treatises, tended to regard the peaceful boycott as a lawful activity. The courts, however, abandoned this view within a short while.

B. Criminalization of the Labor Boycott—The First Step, 1886

The first judicial decisions to ban the labor boycott were People v. Wilzig58 and People v. Kostka,59 both handed down by Judge Barrett of

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53. F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 632-33, 666 (7th ed. 1874).
54. Id. at 666.
55. Id.
56. Id.
57. Id. at 235 (8th ed. 1880); id. at 216 (9th ed. 1885).
58. 4 N.Y. Crim. 403 (1886). This case, better known as "the Theiss case" (due to its role in Henry George's mayoral election contest in 1886) turned on a charge of extortion, and is to that extent irrelevant to our discussion. We shall deal only with sections of the judge's opinion that regard general issues of boycotts and labor disputes. See generally N.J. WARE, THE LABOR MOVEMENT IN THE UNITED STATES 1860-95, at 343 ff. (Vintage ed. 1964).
59. 4 N.Y. Crim. 429 (1886). In Kostka, a local union conducted a vocal picket for three days, apparently without violence, as a part of a boycott against a small bakery, and succeeded in driving patrons away. Cf. also People ex rel. Gill v. Smith, 5 N.Y. Crim. 509 (1887); People v. Lenhardt, 4 N.Y. Crim. 317 (1886).
New York. Although only trial court decisions, these opinions were soon hailed as "an illustration . . . of the work of our courts of first instance that . . . formulate the law on a novel point so well that it is not only accepted by higher courts of the same state, but followed also all over the country." To grasp the significance of Barrett's opinions we must understand the disputes he decided.

Wilzig and Kostka involved indictments of local union leaders who, by means of boycotts, caused heavy losses to small, economically weak employers. To induce patrons not to buy, the unionists used pressure tactics like vocal pickets, angry street gatherings and vigorous publicity of grievances by appeals to passers-by and in the press. To impel suppliers not to sell, they threatened to boycott the seller as well. The evidence, however, is inconclusive as to whether they threatened to use force or cause physical damage.

In his rulings Judge Barrett aimed above all to establish unequivocally that the labor boycott could be punished as a crime of conspiracy. Aware that his decisions were the "first . . . of [this] kind," he sought to remove uncertainty and settle the law on the applicability of the remedy. His approach was not to redefine the crime more stringently than in the past, but to reclassify the facts of the cases before him. Pressure tactics that courts had previously regarded as inculpable were subsumed under the categories of intimidation and threats. Thus boycotts were made legally coercive and hence unlawful.

To reach this conclusion, Judge Barrett changed the meanings of intimidation and coercion. In Hunt and several cases courts emphasized that coercion in the legal sense covered only limited and clearly defined actions like assaults, violence, detention by force, or explicit threats to use such means, but excluded intemperate or abusive words and public charges or condemnations in strong language. Judge Barrett on the other hand, considered it "an error" to assume that no legal coercion occurred as long as no blow was struck, nor any direct threat pronounced. People who raised neither a finger nor a voice, could still evoke, by their conduct, numbers and style of propaganda, a sense of strong menace, and thus imposed their will on the weak, the timid and the gentle.

More specifically, "all bodies of men who parade in front of people's

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60. Parker v. Bricklayers' Union, 10 Ohio Dec. Reprint 458 (1889) (an editorial note quoting the N.Y. Daily Reg. (date unspecified)).
61. Kostka, 4 N.Y. Crim. at 441.
63. Wilzig, 4 N.Y. Crim. at 414-15, 419; Kostka, 4 N.Y. Crim. at 436-37.
64. Wilzig, 4 N.Y. Crim. at 414-15, 419.
shops distributing offensive circulars,” describing “supposed grievances” in “more or less emphatic language” in order “to prevent public patronage, clearly present to our juries an attitude of intimidation and are, therefore, conspirators who should and will be punished.”

Judge Barrett’s ruling deserves special attention because it foretold a manner of reasoning that later became a central judicial tool in restricting unions’ use of concerted activity. Though phrased in general terms (“all bodies of men . . .”), this ruling selectively defined the crime of conspiracy, criminalizing in fact only labor boycotts. From the entire repertoire of nonviolent boycotting methods, Judge Barrett singled out for condemnation only those used by labor unions. Judge Barrett excluded the means characteristic of boycotters organized by business or professional groups, who had no use for pickets, street demonstrations or press notices, since these groups spread the word by more discreet private means. But quieter methods of communication did not make a business boycott any less “intimidating” or “coercive” since it, too, provided leverage to wrench demands from competitors.

This position did not adopt the old “repressive” approach. Employees were free to jointly agree to quit work and to avoid certain stores as means to strengthen demands for higher wages. They could also “beseech” nonunion workers to refrain from filling strikers’ jobs and ask the public to respect their boycotts. But that was the limit. The moment workers crossed the line of individual persuasion they broke the law. They were permitted to exert no pressure beyond “argument, reasoning and entreaty.” Hence, any attempt to “injure” the business of a recalcitrant employer, even indirectly through pressure on others to boycott it, and any attempt to “punish” strikebreakers or boycott defiers, were indictable criminal conspiracies.

Thus began the long-term judicial policy of fortifying the economic liberties of groups that could suffer from trade union pressure: anti-union employers, nonunion workers, and more rarely, consumers or merchants who happened to be caught in a boycott dispute. These early opinions, however, primarily addressed the issues of remedies and dealt only with union tactics such as agitated crowds at the doors of the boycotted shops. They did not discuss remedies for “pure” financial pressures, based on fear of loss but devoid of intimidation caused by physical presence of large crowds. More importantly, Judge Barrett failed to consider underlying legal questions raised by his own remedies: the nature of the rights violated by the boycotters and the nature of their offense. Thus, Judge Barrett only laid a foundation for the doctrine of en-

65. Id. at 426; Kostka, 4 N.Y. Crim. at 437. See also Wilzig, 4 N.Y. Crim. at 414, 419; Kostka, 4 N.Y. Crim. at 435-37, 440.

66. Wilzig, 4 N.Y. Crim. at 414, 417-19; Kostka, 4 N.Y. Crim. at 434-35, 437.
entrepreneurial property rights. It remained for his successors to construct the doctrine.

C. Criminalization of the Labor Boycott—The Final Step, 1887-1888

From 1887 leadership in the judicial drive to outlaw the labor boycott shifted to state supreme courts. Three cases stand out as particularly influential: State v. Glidden,67 State v. Stewart68 and Crump v. Commonwealth.69

I. Judicial Authority to Extend Conspiracy

Before defining the offense of the labor boycott, the courts had to settle a preliminary issue of jurisdiction: under what authority could they determine public policy on this matter? Did they not, in so doing, usurp legislative powers? This issue was especially difficult in the light of the decided cases and statutes that diminished the scope of criminal conspiracy, and the fact that in the three mentioned cases the unions were not charged with disorderly threatening conduct.

In response to this issue the courts used analogies to show that they were sometimes entitled to intervene even without express statutes or precedents. When actions were either so absolutely repulsive to moral and religious commandments, or so manifestly opposed to the rule of law, there could be no doubt about the courts’ right and even duty to act.

For example, the Stewart court cited Smith v. People70 to show that it could properly hear the case against Stewart.71 The Smith court considered whether a combination to seduce a minor female was a crime even though the act of seduction was not a criminal offense at common law.72 Since the act was so “destructive of the happiness of individuals and of the well-being of society” and its purpose so “nefarious,” a court could prescribe punishment even if the act per se had not been declared

67. 55 Conn. 46, 8 A. 890 (1887). In Glidden, members of a typographical union were charged with conducting a customers’ and suppliers’ boycott against a publishing corporation in order to compel it to lay off nonmembers and hire unionists.
68. 59 Vt. 273, 9 A. 559 (1887). In Stewart, the Supreme Court of Vermont upheld the indictment for criminal conspiracy of members of the National Stonecutters’ Union where those members were found to have belittled, threatened to disgrace (by publishing their names as scabs) and eventually drive away nonunion workers at a granite works. Id. at 286-90, 9 A. at 567-69.
69. 84 Va. 927, 6 S.E. 620 (1888). In Crump, members of a typographical union distributed circulars to many customers informing them of the boycotts against a newspaper publisher who refused to institute a closed shop. The union also publicly blacklisted those who persisted in patronizing, dealing or trading with the publisher after notification of the boycott. The Supreme Court of Virginia found the union members guilty of maliciously conspiring to threaten and intimidate the publisher and thus affirmed their convictions.
70. 25 Ill. 9 (1860).
71. Stewart, 59 Vt. at 288, 9 A. at 568.
illegal by legislative act. The role of the judiciary was not only to apply existing laws, but to protect society from grave dangers legislatures could not foresee. If defendants were exculpated only because the nefarious acts they committed had not specifically been declared unlawful, then "the courts, instead of being the guardians of the peace and happiness and well-being of society, would lend their sanction to its worst enemies." 

Similarly, the Glidden court analogized the courts' powers to criminalize the labor boycott to the powers courts had assumed in two decided cases, one of a prisoner's escape from jail, and the other of solicitation to commit adultery. In both cases the actions, though not forbidden by statute, were declared by courts to be offenses at common law only after they had been committed. Such discretion, claimed Glidden, courts clearly had in judging crimes of conspiracy. Conspiracy statutes do not "define in advance the acts which [would] constitute an offense. It [was] left for the court to determine in each particular case whether it [was] or [was] not an offense." 

This rationale provided the authority for bringing the labor boycott under the charge of criminal conspiracy.

2. Judicial Criteria to Define Conspiracy

In addition to widening courts' authority to define what acts were criminal conspiracy, the judges were also ready to convict combinations by less formal standards and to apply nonlegal criteria in such decisions. Organized pressure by labor, contemplated or implemented, though otherwise not unlawful, was classified as conspiracy because it was "morally wrong" or "detrimental to the public weal." In State v. Stewart, the Supreme Court of Vermont declared that labor combinations could be illegal not only when they "promote[d] objects or adopt[ed] means that [were] per se indictable," but also when they sought ends or used methods "that [were] per se oppressive, immoral or wrongfully prejudicial to the rights of others." Courts could outlaw combinations for actions inconsistent with a "principle of justice that permeate[d] the law," or that tended to destroy "the material prosperity of the country" and thus injure "the whole public." The propensity to judge labor boycotts by standards of morality or public policy reached its height with the as-

73. Id.
74. Id. at 15.
75. Id.
76. 55 Conn. at 71, 8 A. at 893.
77. Id.
78. Id. at 71, 74, 8 A. at 894, 895.
79. 59 Vt. at 287, 9 A. at 567.
80. Id. at 286-87, 9 A. at 567. See also id. at 289, 290, 9 A. at 568-69.
sertion by the Glidden court that it was "a criminal offense for two or more persons corruptly or maliciously to confederate and agree together to deprive another of his liberty or property." 81

This definition of conspiracy and the pliable standards for its application gave state courts almost unlimited authority to counteract union pressures. The power to outlaw actions because they encompassed "evil purposes" or "reprehensible means" 82 based on vague criteria such as immorality, oppressiveness or detriment to the public good, meant that a combination might be proclaimed criminal although its actions did not violate even the most trifling of civil laws. 83

3. The Labor Boycott as a Criminal Conspiracy

With such wide-open discretion the courts could devise their own ways to tackle the two main problems: defining the nature of the boycotters' offense even when they used no menacing behavior, and determining what rights were infringed by boycotts. In order to make criminal orderly boycotts the courts broadened the concept of conspiracy in two complementary directions: one further diluted the legal meaning of economic coercion so that it could be applied to undeniably peaceful tactics; the other made illegal not merely the means but also the ends of any labor boycott.

Following Judge Barrett's lead and relying on English opinions, the courts decreed that illegal coercion included pressures that blocked the liberty of "mind and will," in addition to threats of harm to a person's body or property. 84 Use of "force" and "intimidation" could therefore refer to demands imposed under fear of "loss, . . . obloquy [sic] or suffering," 85 and even under public denunciations that might bring a person into "hatred . . . and contempt." 86 By blurring the distinction between physical force and economic (or moral) pressures, between forcible action and offensive expression, almost any concerted action that caused

81. 55 Conn. at 71, 8 A. at 894.
82. Id. at 74, 75, 8 A. at 895-96.
83. See, e.g., id. at 71, 74, 75, 78, 8 A. at 894-97; Stewart, 59 Vt. at 287, 289-91, 9 A. at 567-69; Crump, 84 Va. at 938, 941-42, 6 S.E. at 624, 626-28; Moores v. Bricklayers' Union, 10 Ohio Dec. Reprint 665, 667-68 (1889) (all expressing the view that the goal of causing losses to union adversaries is per se illegal).

This doctrine amounted to "nothing more nor less than a device to convict defendants who concededly have violated no pre-established law whenever individual judges deem[ed] it for the interest of society so to do,—a return to justice without law." Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 416 (1921-22).

84. Crump, 84 Va. 927, 936, 6 S.E. at 620, 625 (1888) (quoting with approval Baron Bramwell in Regina v. Druitt, 10 Cox's Crim. Cas. 592 (1867)).
85. Id. at 944, 6 S.E. at 629.
86. Stewart, 59 Vt. at 286, 9 A. at 567.
losses or annoyed its targets could be outlawed by branding it coercive.87

Courts also banned the goals and results of the labor boycott. In a
telling passage the Crump court declared:

It matters little what are the means adopted by combinations formed to
intimidate employers, or to coerce other [i.e., nonunion] journeymen, if
the design or the effect of them is to interfere with the rights, or to con-
trol the free action of others. . . . Every attempt by . . . intimidation, to
deter or control an employer in the determination of whom he will em-
ploy, or what wages he will pay, is an act of wrong and oppression; and
any . . . combination for such a purpose is an unlawful conspiracy. The
law will protect the victim and punish the movers. . . .

This passage reflects the search for an accurate description of the legal
wrong of boycotters' objectives. In their efforts to articulate such a new
concept, courts came to focus on "interference in others' business" as the
main element of the offense.89 It took some time to coin this phrase and
to bring it into common use. Judge Barrett, culling phrases from older
and from more recent opinions, presented "injury" to business as the gist
of the crime.90 Others described as "criminal" a "combination to injure
a person in his trade or occupation" or a combination "to injure indus-
tries."91 In later cases courts gradually shifted from "injury" to "inter-
ference." This shift was only one aspect of the tendency to make illegal
pressure tactics typical of unions. The term "injury" was too broad, cov-
ering not just unions trying to impose terms on others, but also corpora-
tions discharging union members to eliminate union activity. However,
the phrase "interference in others' business," while worded in a seem-
ingly impartial manner, easily lent itself to restraining unions without
touching their adversaries.

4. The Emergence of Entrepreneurs' Protectable Liberties

The same logic under which the courts centered on "interference"
as the gist of the offense also led to the creation of a new concept of
protectable rights for those targeted by the labor boycott. These rights
were often couched in terms of economic freedom to all. A careful per-
usal, however, shows that when the courts declared they would defend the
freedom of "every man" or of "the individual," they meant, in effect, to
protect chiefly union adversaries. Thus, the Glidden court emphasized
"the liberty of the individual" to "carry on his business as he pleases."92

87. See, e.g., Crump, 84 Va. 936-44, 6 S.E. at 625-29 (citing a number of recent American cases
interpreting economic pressures by labor organizations as coercive acts).
88. Id. at 941, 6 S.E. at 628 (emphasis in original).
89. See infra text accompanying notes 107-18.
90. People v. Wilzig, 4 N.Y. Crim. 403, 414, 421 (1886); People v. Kostka, 4 N.Y. Crim. 429,
436-37 (1886).
91. Crump, 84 Va. at 934, 6 S.E. at 624; Stewart, 59 Vt. at 287, 9 A. at 567.
92. 55 Conn. at 71, 8 A. at 894.
For the *Stewart* court the guiding principle was "the right" of "every man . . . to employ his talents, industry and capital . . . free from the dictation of others," which included "the most unqualified right [of laborers] to work for whom they please, and at such prices as they please." The *Crump* court stressed the employers' right to the control and conduct of their own independent business free from unprovoked interference.

The courts phrased the economic liberties they felt obliged to defend in terms of specific liberties in two categories: the individual anti-union employer, and the individual unorganized worker. The time honored freedoms of the owner to run his business as he chose were thus extended to encompass rights to judicial protection against peaceful union pressures intended to induce closed shops and collective bargaining. Similarly, the traditional freedom of every worker to negotiate his own terms of employment was extended into a right to be judicially protected against pressures to join a union. The crux of these decisions was not in the reiteration of old truths about individual liberties, but in the imposition of legal duties on union members to avoid nonviolent economic pressure, acceptable in other contexts of the market, that would narrow the freedom of their adversaries.

*D. Tort Law and the Labor Boycott*

Courts used tort law as an auxiliary weapon in their drive to stop the labor boycott. Actions in tort could not outlaw trade unions but provided an additional deterrent by enabling courts to impose both compensatory and punitive damages. The courts applied and expanded two definitions of unlawful acts borrowed from criminal cases. One developed the concept of civil conspiracy. The other made malicious interference in others' business or work an actionable civil offense.

1. *The Offense of Civil Conspiracy*

"Civil conspiracy" enabled courts to bring labor boycotts within the purview of tort law and thus overcome a difficulty raised by the *Hunt* decision. Implicit in *Hunt*, loss-causing conduct permissible by an indi-
individual could not be culpable only because it was done concertedly. This rule prevented courts from stopping nonviolent boycotts; since it was lawful for each person to individually avoid buying, several people might do so jointly as well. However, the Glidden, Stewart and Crump decisions (on criminal conspiracy) pointed to a different approach. Citing them approvingly, Judge Taft declared in Moores that it was erroneous to assume that all economic actions which were lawful when committed by one person would remain so when done concertedly. Since an innocuous act by an individual could become “dangerous and oppressive” when affected by a combination, the law could treat them differently and make them actionable as civil conspiracies recompensable in damages.

An even more emphatic and detailed endorsement of civil conspiracy in labor cases appeared in Old Dominion Steam-Ship Co. v. McKenna which outlawed several specific kinds of union activities. Though phrased in such indefinite terms as “acts,” “combinations,” and “persons,” the decision was directed, as in the criminal conspiracy cases, specifically against labor organizations.

All combinations . . . designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights,—are pro tanto illegal combinations.

Similarly, “all combinations . . . designed to coerce workmen to become members, or to interfere with, obstruct, vex, or annoy them in working,

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98. See supra text accompanying notes 24-32 for additional cases espousing this view.
99. 10 Ohio Dec. Reprint at 671-73. In Moores, union members refused to work with any material supplied by the Moore Lime Company when that company refused to accede to the union’s demands to terminate business with a boycotted building contractor. The Superior Court of Cincinnati upheld the damages judgment against the union for losses incurred by the Moore Lime Company as a result of the boycott.
100. Id. at 673.
101. 30 F. 48, 50 (C.C.S.D.N.Y. 1887). In Old Dominion, the Longshoremen’s Union induced its members to refuse to work for the steamship company and also sought to inhibit all dealings with the steamship company so long as the company continued to pay southern blacks lower wages than New York dockworkers. In an action brought to recover $20,000 in damages alleged to have been sustained by the steamship company as a result of an unlawful strike and boycott, the union members moved to vacate their order of arrest on the grounds that the complaint failed to state a prima facie case on which they could be charged. The circuit court held that not only could the action for damages be maintained against the union members, but also that these actions constituted common law misdemeanors and denied the motion to discharge their orders of arrest.
102. Id.
103. Id.
or in obtaining work, because they are not members, or in order to in-
duce them to become members" were deemed illegal. Finally, "all acts
done in furtherance of such intentions . . . and accompanied by damage,
are actionable," i.e., amenable as conspiracies in tort suits.

The kinds of combinations and acts deemed illegal described labor
unions and the typical economic pressure tactics they used for advancing
their members' lawful interests, although this connection was not ex-
pressly mentioned. Thus Old Dominion prohibited pressures to affect
"wages," not income in general; interference with the perfect freedom of
"employers," not of all economic actors; and coercion of "workmen,"
not of other persons, to join combinations—all terms referring explicitly
to goals sought exclusively by labor unions.°

2. The Offense of "Malicious Interference"

The discussion of "interference" in tort cases was of great doctrinal
significance because it gave rise to legal distinctions that later helped
courts differentiate business rivalries from labor disputes. Following the
celebrated English case Mogul Steamship Co. v. McGregor, Gow & Co.,
the Moores opinion drew a line between those actions that inflicted losses
by carrying lawful competition "to the bitter end" and those done out of
malice, merely to cause harm without reference to the defendants' own
lawful gain. The former could cause damage but not unlawful injury;
the latter was illegal interference. The former were part of the legitimate
struggles for mastery of the market where those who suffered losses had
no grounds for judicial redress. In contrast, the latter were actionable
and punishable wrongs because they stemmed from malicious intent.

The argument of malicious interference, though occasionally men-
tioned in criminal conspiracy cases, was first elaborated in Moores. In
the 1880's it was uncertain whether loss-causing conduct that breached
no legal duty could be made unlawful on grounds of "malice." At least
from mid-century some leading courts tended to narrow old common law
rules of liability in tort cases and thus expand the freedom of economic
actors to inflict losses on others. This trend peaked in 1884 in the Payne
decision discussed above. Its premise was that "no act generally law-
ful, can become unlawful or actionable by reason of the motive or intent

104. Id.
105. Id.
106. Id.
107. 21 Q.B.D. 544 (1888), aff'd, 23 Q.B.D. 598 (1889). For Judge Taft's reservations about
the majority decisions in the first two stages of the Mogul case, see Moores, 10 Ohio Dec. Reprint at
669-70.
109. Id. at 669-71.
110. See supra notes 24-32 and accompanying text. See also supra notes 39-40 and accompany-
ing text (for a similar approach in Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842)).
with which it was done."\textsuperscript{111}

A notable exception to this rule was another Massachusetts case, *Walker v. Cronin*.\textsuperscript{112} In *Walker* the court stated that if strikers intentionally inflicted a loss on the lawful business of their employer without justifiable reason (that is, the loss was not prompted by the strikers' self-interests) they were liable for damages even if they violated no contractual obligation to the employer.\textsuperscript{113} Until 1887 this case was an anomaly. Thereafter, however, *Walker* served as a major authority in the rush to contain labor boycotts. In *Moores*, Judge Taft adopted the *Walker* principle as law.

Judge Taft elaborated the argument of malicious interference apparently because he sought to reinforce and complement the somewhat problematic argument based on coercion cases in which unions overwhelmed weaker adversaries. First, coercion could equally apply to those cases where unions faced big corporations and strong employers' associations, an increasingly frequent phenomenon in labor disputes. Second, the economic coercion argument could easily undermine the legal premise that entrepreneurial freedom to advance one's own self-interest was superior to the duty to refrain from undercutting others' income. Therefore, courts which attached a very high priority to maximum entrepreneurial liberty, though using the coercion argument when the balance of power was clearly with labor, preferred to vindicate the restriction on union liberties by reasons less subversive to the freedom of private initiative. Judge Taft described the test for malice as follows:

"Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, was it done with or without just cause or excuse? If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would . . . exist. . . . But such legal justification would not exist when the act was done merely with the intention of causing temporal harm, without reference to defendant's own lawful enjoyment of his own rights."

Malice, then, is really intent to injure another without cause or excuse.\textsuperscript{114}

Consequently malice became a legal tool to secure entrepreneurial rights from loss-causing union actions. When Judge Taft approved acts "causing temporal harm" only if they were done "in the use of a man's

\textsuperscript{111} *Moores*, 10 Ohio Dec. Reprint at 668.

\textsuperscript{112} 107 Mass. 555 (1871). In *Walker*, the Supreme Judicial Court of Massachusetts held that an action in tort would lie where the defendants induced a large number of their fellow shoemakers to abandon their employment with a certain shoe manufacturer and to refuse to perform their contracts with a manufacturer. Thus, the manufacturer could sue for the loss in profits caused by the shoemakers' withheld services.

\textsuperscript{113} Id. at 564.

own property" or "in the exercise of...[his] own trade," he, in effect, provided a legal excuse not only for business competition but for economic pressure by employers imposing their terms on workers. By the same token, when Judge Taft banned all other loss-causing concerted actions, he impliedly categorized unions' effective economic pressures as lacking "legal justification."

In rebuttal, unions claimed that they sought to promote their own legitimate interests rather than maliciously ruin others. Judge Taft replied by introducing a distinction between the unions' proximate target (to inflict losses) and ultimate goal (to win better terms). A boycott to impose a closed shop was a drive to build union power. Since its immediate motive was to spur opponents to accept union demands under fear of economic disaster, the boycott was malicious and actionable. Judge Taft wrote, "The remote motive of wishing to better their condition by the power so acquired, will not...make any legal justification for [boycotters'] acts."

Thus, in the years 1886-1889 the state courts innovatively revived and inaugurated a number of views and concepts resulting in a notable change in conspiracy and tort law pertaining to labor disputes. Salient among these views were the expansion of the courts' authority to make public policy regarding industrial relations, the acceptance of moral criteria as pertinent to these decisions, the judgment of unions' concerted actions according to their goals, the distinction between immediate and ultimate union goals, extended concepts of the offense of criminal and civil conspiracy, economic coercion, and malicious interference in the business or occupation of others. Together these concepts provided the doctrinal tools needed to vindicate decisions that systematically protected entrepreneurial liberties and interests against all kinds of pressures by aggressive unions. In 1889, however, the courts still treated these freedoms as protectable personal liberties rather than as property rights, due to the prevalent notion that "property" referred mainly, though not solely, to tangible assets.

Decisions in equity and constitutional law would, however, extend the concept of "property rights" over employers' exclusive powers to control and manage all business policies of their enterprises, including labor relations.

115. Id.
116. Id. at 671-73.
117. Id. at 672. See also Glidden, 55 Conn. at 75, 8 A. at 896.
III

THE SECOND PHASE: REORIENTATION IN EQUITY LAW, 1888-1892

From 1888 to 1892 the courts' primary tool against the labor boycott shifted from remedies in conspiracy and tort law to the restraining order in equity.119 This was the formative period of the "labor injunction." Courts began to use this weapon on a growing scale only after it became clear that tort actions and criminal conspiracy prosecutions were inappropriate methods to contain the labor boycott. Such trials of law were often so long that boycotters were able to achieve their goals before legal proceedings ended. In addition, juries were often reluctant to find union members guilty without detailed evidence. Suits for damages were often useless remedies because the wrong was done by an indefinite number of persons.120 Hence employers and courts turned to the equitable injunction, a more powerful judicial tool, even though its application to union pressure tactics was without precedent. As with earlier legal developments in the judicial battle against labor boycotts, a novel use of a well-known remedy required a doctrinal change to justify the new policy.

A. Doctrinal Difficulties in Applying the Labor Injunction

1. The Scope and Nature of Equitable Remedies

By the 1880's, equity provided extraordinary relief only for special well-defined situations. In order to attain an equitable remedy, a complainant had to show that a clear legal property right was being invaded and that no adequate relief existed at law, as, for example in cases where redress at law required multiple acts. The rule that equity interfered only to protect property rights was officially recognized early in the nineteenth century.121 Before 1880, American equity courts adhered to this limitation with very few exceptions.122

Within these limitations, however, the remedies of equity were much stronger than those at law. The best known and most widely used equitable remedy was the injunction. Technically it was subdivided into three distinct remedial tools: the temporary restraining order, the preliminary injunction, and the permanent (or perpetual) injunction. All three could terminate or prevent any action the court regarded as causing damage.

121. Formulated obiter dicta by Lord Eldon in Gee v. Pritchard, 36 Eng. Rep. 670, 674 (Ch. 1818), this rule was subsequently accepted as binding.
The temporary restraining order was intended to stop an action or a plan to act immediately, until a hearing could be arranged. In theory this order was supposed to be "but a writ of the court to compel parties to maintain the matters in controversy in status quo" until a judicial deliberation took place. Most significantly, the court could grant a restraining order at its discretion without prior notice to the restrained party. If applied to a labor dispute, such an order could ruin a strike or a boycott at the critical moment of initiation. In contrast, a preliminary injunction was rarely issued without notice. Still, judges had wide discretion in interpreting the relevant facts. When granted, the injunction was effective until the trial. Trials could be set for a distant date; therefore, an actual industrial battle could be lost without even being fought due to the delay imposed by the "temporary" relief. A prohibition by a permanent injunction remained in force in perpetuity.

These characteristics explain why the injunctive remedy was so attractive to both employers and judges. It could not only halt concerted actions already in operation but also prevent them in advance. In that respect, the injunction was much more effective than indictments for criminal conspiracy. A judge acting independently of any jury could activate the injunction without long trial proceedings and paralyze unions before they were able to act.

2. Lack of Precedents

The first petitions for injunctions in labor disputes were rejected for lack of precedent and justification. As early as 1875 Judge Barrett, a New York trial judge, declined an employer's request for an injunction to restrain strikers from picketing, apparently because wrongs committed by strikers had to be redressed at law. In 1877, leaders of aggressive anti-union railroad corporations seem to have realized the potential benefit of labor injunctions, but we have no evidence of their success in the courts. Only in 1888 did trial courts begin to issue labor injunctions in response to private petitions when their trust in other remedies weakened. But, even after that date, prominent judges continued to assert that equity had only severely limited authority over injuries caused in labor disputes. As Vice Chancellor Green of New Jersey asserted:

[I]n the whole history of this long-continued struggle which has been going on between [labor] combinations on the one hand, and the employers on the other, there is but one reported and unreversed case where a court of equity has, by its writ of injunction, attempted to control the action of these associations, and then only to prevent a continuing tres-

123. Id. at 31 & n.21.
124. 2 CENT. L.J. 308 (1875).
125. See Nelles, A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction, 40 YALE L.J. 507, 533 (1931).
pass upon the lands of the complainant.\textsuperscript{126}

Vice Chancellor Green conceded that this historic struggle resulted from efforts by labor groups "to control employment and wages" in their respective trades.\textsuperscript{127} But, he added, authoritative British and American cases did not consider the union aim of control to be a sufficient basis to issue injunctions.\textsuperscript{128}

3. \textit{Lack of Jurisdiction}

A complementary argument, fraught with still more doctrinal repercussions, claimed that the loss caused by unions' peaceful pressures harmed no property rights. Consequently, courts had no power to issue the labor injunction. This view was clearly and authoritatively articulated in 1880, before the wave of boycotts, by a supreme court of New York in \textit{Johnston Harvester Co. v. Meinhardt},\textsuperscript{129} the first reported American case on a motion by a private employer for a labor injunction. The court denied the requested relief since the union neither used nor threatened "assault or violence" in a "persistent, continuous" manner, and held that a remedy lay only—if at all—in an action for damages.\textsuperscript{130} The union's act did not invade any clear right of property, nor did it result in irreparable injury to the plaintiff.\textsuperscript{131} However, less than ten years later a similar petition would be easily granted.

The nature of the rights violated by peaceful union pressures continued to disturb the judiciary after 1892. The issue was raised, for example, by the Supreme Judicial Court of Massachusetts in \textit{Vegelahn v. Guntner}.\textsuperscript{132} The case tested the validity of an injunction to enjoin a peaceful picket of two men in front of the plaintiff's factory. According to one dissenter, an injunction was improper because in the absence of any power given by statute, the jurisdiction of a court of equity having only the powers of the English High Court of Chancery, does not . . . extend to enjoining acts like those complained of in the case at bar, unless they amount to a destruction or threatened destruction of property, or an irreparable injury to it.\textsuperscript{133} Such a picket was not illegal. No intimidation or force was exerted. No

\textsuperscript{126} Mayer v. Journeymen Stonecutters' Ass'n, 47 N.J. Eq. 519, 530, 20 A. 492, 496 (1890). In \textit{Mayer}, two stonecutters were denied admission into the association under a self-imposed one year moratorium on new memberships, even though a shortage of skilled stonecutters existed. The two workers were forced to accept positions requiring less skill and which paid lower wages because employers feared losses that would ensue from the association's practice of striking and boycotting any employers with nonmember employees.

\textsuperscript{127} \textit{Id.} at 527-30, 20 A. at 495-96.

\textsuperscript{128} \textit{Id.} at 530, 20 A. at 496.

\textsuperscript{129} 9 Abb. N. Cas. 393 (1880), aff'd, 31 N.Y. Sup. Ct. 489 (1881). \textit{See supra} notes 2-3.

\textsuperscript{130} \textit{Id.} at 396-97, 402-03.

\textsuperscript{131} \textit{Id.} at 394, 396-400, 402-03.

\textsuperscript{132} 167 Mass. 92, 44 N.E. 1077 (1896).

\textsuperscript{133} \textit{Id.} at 102, 44 N.E. at 1079 (Field, J., dissenting).
wrong was committed by a peaceful "patrol" aimed at inducing nonstrikers to stay out of the employer's premises.\textsuperscript{134}

The judicial debate over the injunctive remedy soon had to come to grips with the issue of what rights were violated by a peaceful boycott or picket. Opponents of the labor injunction reiterated the traditional definition of property rights: title to and possession of tangible objects. Their refusal to extend the injunction to concerted union activity implied repudiation of the emerging doctrine that the courts should protect unhampere

B. The Judicial Commitment to the Labor Injunction

Despite the arguments in favor of limiting equity powers, the courts soon adapted the injunction to protect private employers from union pressure. By removing the doctrinal barriers that had blocked resort to injunctive relief, the courts opened the way for wide-scale use of the labor injunction. The main concern of the judges was the enormous loss unions could inflict on employers. Courts were much more sensitive to the harshness of the pecuniary injuries than to the need to provide an elaborate abstract definition of the violated rights. The wrong perpetrated captured their attention and seemed to call for a quick and efficient remedy without waiting for a formalized concept of protectable claims.

1. Cases at the Local and State Level

The first signs of the new approach were local and state court decisions. Thus in \textit{Bruschke v. Furniture Makers Union},\textsuperscript{135} probably the first reported injunction restraining picketing strikers, the Cook County Superior Court held that although the union could be indicted for conspiracy, the employer still had no adequate remedy at law because the union's acts caused "irreparable injury" to his property rights.\textsuperscript{136} The court sustained the bill for injunction despite several defects, because those deficiencies were "merely formalities," and because "in a bill like this, presenting a case of manifest merit and great wrong to the complainant, the court will not search for technicalities or fine spun theories upon which to support a refusal of relief."\textsuperscript{137} The court's disregard for procedural flaws attested to a sense of exigency, stemming from the conviction that otherwise "complete ruin to [the complainant's] business and serious

\textsuperscript{134}. \textit{Id.} at 103, 44 N.E. at 1079 (Field, J., dissenting).
\textsuperscript{135}. \textit{Reported in} 18 \textit{CHI. LEGAL NEWS} 614 (1885-86). \textit{See also id.} at 688 (reporting a decision sentencing strikers to jail for violating an injunction against interfering with the business of Calumet Iron and Steel Co.).
\textsuperscript{136}. \textit{Id.} at 614.
\textsuperscript{137}. \textit{Id.}
damage to his property must ensue."\textsuperscript{138}

Judicial eagerness to block what the courts regarded as unjustifiable ruin of a business also played a primary role in other early local decisions. \textit{Brace v. Evans},\textsuperscript{139} whose elaborate reasoning provided subsequent cases with the rationale for extending equity to cover labor disputes, illustrates the same approach. \textit{Brace} involved an injunction against a boycott and picket by several union locals that had caused great losses to the plaintiff, a laundry owner. Though the defendants publicized their cause in an energetic manner, they were not charged with trespass or with the use of force or violence. Moreover, the plaintiff had already pressed criminal charges and some defendants had been arrested but had posted bail. The boycott continued, however, with "increased vigor and activity."\textsuperscript{140} The court approved the injunction because it found the situation so pressing that it required a prompt and expedient judicial response. The remedy at law seemed inadequate; if the dispute proceeded to a regular trial, the plaintiff's business might be wholly ruined in the meantime. It was "a clear case," where "irreparable injury" was "likely to result to complainant unless the injunction is granted."\textsuperscript{141} To save the business, the court felt obliged to issue a preventive injunction.

2. \textit{Federal Cases}

Federal cases affirmed with similar vigor that the judicial commitment to protect the employers' business took precedence over the development of the precise concept of the right transgressed by labor unions. \textit{Casey v. Cincinnati Typographical Union}\textsuperscript{142} emerged as the seminal authority for a series of labor injunctions issued by federal courts. Drawing from decisions in criminal, civil and equity law, \textit{Casey} combined them into a single rationale sanctioning the new outreach of judicial power to constrain aggressive unions by injunctions.

\textit{Casey} dealt with a boycott by a typographers union against a nonunion publisher. The justification for enjoining this boycott was borrowed from another federal decision, \textit{Emack v. Kane},\textsuperscript{143} which \textit{Casey} hailed as "a clear and forcible statement of the law . . . in accord with the general current of authority."\textsuperscript{144} The court understood \textit{Emack} to stand for the proposition that a court of equity may intervene to restrain an act done with "a malicious intent to injure and destroy the complainant's busi-

\begin{enumerate}
\item Id.
\item Id. at 163 (1888).
\item Id. at 165.
\item Id. at 178 (quoting J. HIGH, \textit{INJUNCTIONS} § 21 (1880)).
\item 45 F. 135 (C.C.S.D. Ohio 1891).
\item 34 F. 46 (C.C.N.D. Ill. 1888).
\item 45 F. at 144.
\end{enumerate}
ness." Perhaps the most fascinating and significant aspect of *Emack*’s reasoning lay in that neither precedent nor principles of equity were cited as the grounds for this decision. Rather, *Emack* was founded on the judge’s personal sense of justice:

I cannot believe that a man is remediless against persistent and continued attacks upon his business, such as have been perpetrated by these defendants. . . . It shocks my sense of justice to say that a court of equity cannot restrain systematic . . . outrages like this by one man upon another’s property rights. If a court of equity cannot restrain an attack like this upon a man’s business, then the party is certainly remediless, because an action at law, in most cases, would do no good, and ruin would be accomplished before an adjudication would be reached.

The judge was induced by moral shock and indignation. He was torn between adherence to equity precedents, which barred interference, and a sense of judicial duty to stand by an oppressed complainant. The question of the precise nature of the offense and the violated rights, and of whether equity had jurisdiction, did not unduly concern the court, which acted out of the conviction that justice should be done and an outrageous wrong halted immediately.

Thus, when courts began to fear that the law of crimes and torts could not provide proper relief, they turned to equity, even before the doctrinal basis for the use of this hitherto exceptional weapon was laid. The commitment to the remedy preceded and generated the growth of the juridical definitions of the offense and of the violated and protectable rights.

**C. The Vindication of the Labor Injunction**

1. *The Concept of Economic Coercion*

As in the conspiracy cases, courts in equity began to justify their remedy by claiming that union pressures were tyrannically coercive, even without threats of force, and that the judiciary was therefore obliged to intervene. Leading equity decisions acceded to the widened meaning of “illegal duress.” Thus, in *Brace* the court claimed that the very use of the word “boycott” was in itself a threat, because in popular usage it symbolized “acts which tend to violence, and thereby coerce . . . through fear of resulting injury.” Similarly, in *Sherry v. Perkins* the Supreme Judicial Court of Massachusetts regarded the mere display of banners, calmly calling on workers not to break a strike, as “a means of threats and intimidation” because they were part of a scheme to deter workers from keeping or making engagements with the plaintiff.

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145. *Id.* (describing *Emack*).
146. *Id.* (quoting *Emack*, 34 F. at 50).
147. 5 Pa. C. at 171.
was "a standing menace" to all who wished to work for the employer. 149

The most forceful expression of the courts' position appeared in
Casey:

[Suppose that] armed robbers stop a coach. One of their number politely requests the passengers to step out and hand over their valuables, and they do so. To the charge of robbery the defense is made that there was no violence; there were no threats; there was only a polite request, which was complied with . . . [a]ny judge who would recognize such a defense deserves to be despised . . . 150

To the court, a boycott seemed comparable to demands made at gun point. In Casey the element that turned the boycott into such a "threat" was the effort to withdraw the vast purchasing power of "all the K[nights] of L[abor] assemblies, unions and workingmen" of Cincinnati. 151

The concept of "coercion," though sufficient to outlaw the boycott, was insufficient to sustain injunctions. For that purpose, the losses suffered by petitioning employers had to be defined as injuries to property rights irremediable at law. To achieve such a definition the courts used a number of legal constructs during the years 1888-1892.

2. The Equation of "Business" with "Property"

One method was to redefine key concepts. As in the criminal cases, the word "property" which previously referred only to tangibles, became increasingly synonymous, and hence interchangeable, with "business." The Bruschke case, for example, accepted as "well founded" the claim that picketing which caused losses to the employer's business was legally "an invasion of property rights." 152 Sherry defined a continuous peaceful picket designed to deter nonunion employees from working for the employer as an injury to "business and property," 153 as if injury to expected profits had the same legal status as injury to physical assets or contractual obligations. Sherry invoked the canonical formula for injunctive relief—injury to property without adequate remedy at law—but with an important change: the court read "business" instead of "property" into the phrase. 154

This extension of "property" to cover "business" was less a linguistic trick designed to legitimize an unfounded opinion than a reflection of the conceptual vagueness resulting from a change in judicial thought.

149. Id. at 214, 17 N.E. at 310.
150. 45 F. at 146 (citing United States v. Kane, 23 F. 748, 750 (1885)). The same analogy was invoked in New York, Lake Erie & W. R.R. v. Wenger, 9 Ohio Dec. Reprint 815, 823 (1887).
151. 45 F. at 145.
152. Reported in 18 CHI. LEGAL NEWS 614 (1885-86).
154. Id. at 214, 17 N.E. at 309.
The imprecise and alternating use of "business" and "property" indicated the emergence of a new concept. In the face of greatly increased industrial strife, the courts felt intuitively that an employer ought to be free to carry on production and trade without interference, in the same way that a landowner ought to be free to cultivate fields and sell crops. The law had to protect holders of both these freedoms against transgressors. However, to be enforceable, this implicit analogy had to be transformed from an intuitive assumption into an articulated and distinct judicial concept.

3. "Trespass" and the Extended Meaning of "Property"

In New York, Lake Erie & Western Railroad v. Wenger,\textsuperscript{155} an ambiguous usage of words revealed the germination of a new concept beneath the surface of conventional idiom. Here the concept of "trespass" served to limit union activity. Trespass was a particularly effective tool since it had recently been recognized as an appropriate subject for the exercise of equity jurisdiction. In the 1880's in non-labor cases, equity courts relaxed an earlier rule which prohibited injunctive relief for trespass to realty. If the trespass was continuous so that a remedy at law would require a multiplicity of suits, the entire series of wrongs could be prevented by an injunction.\textsuperscript{156} The Wenger court relied on this rule to enjoin strikers from entering the premises of the plaintiff railroad company, from interfering with the operation of the trains, from hindering nonstriking employees in their work, or even from persuading those employees to quit working.\textsuperscript{157}

The offense of continuous trespass that the court prevented by injunction did not refer to trespass upon real estate (the yards or buildings) or other traditional kinds of property (the machines or corporate securities), but to interference with the continued operation of the railroad. As the court admitted, the defendants, a committee representing the group of strikers:

> have not laid a finger upon any of the property of this company with a view of doing any harm thereto, or interrupting the business of this company beyond the fact of their presence upon the premises and some [talk about] the business. No violence has been done to property. . . .

> . . . Nevertheless they were there . . . to induce the . . . yard-master and others . . . to wholly stop the freight business in that yard.\textsuperscript{158}

The strikers, however, were not inducing the nonunion workers to break their contracts with the employer because the nonunion workers were "at

\textsuperscript{155} 9 Ohio Dec. Reprint 815 (1887).
\textsuperscript{156} See, e.g., id. at 817-18.
\textsuperscript{157} Id. at 819, 826.
\textsuperscript{158} Id. at 823, 825.
will" employees who could quit work for any or no reason. The court therefore emphasized that a speech by an individual striker, representing "all the force and effect" of a large number of strikers, was not "simply an innocent request." Rather, it had "all the elements . . . [of] intimidation . . . and . . . of a threat" because these quiet words were sufficient to accomplish the strikers' purpose. "It did stop the wheels. It did stop the business." Accordingly, people who entered a business intending to induce its workers to abandon their jobs and thus "injure the business and interfere with it" were "clearly trespassers."

"Trespass" subtly took on a wider meaning, embracing more than a simple invasion of real estate or of a right to tangible possessions. The extended definition included entry onto an employer's premises in order to persuade workers to leave their jobs. Trespass came to mean interference in the regular operation and continuous flow of income of a business, as well as intervention in the employer's control and management of its enterprises.

By broadening the notion of an offense that could be prevented by injunction, the court also adopted a wider view of protectable property. The court regarded "invaded property" as including the employer's interest in the uninterrupted work flow of its employees and in the unceasing operation of its business.

The court also added a concept of a union's legal duty to refrain from intervention. Strikers were forbidden by law from entering the company's yard, even if their only purpose was to "engage [nonstrikers] in conversation, [and] induce them to abandon the employment" by making no more than "a simple request." These notions of the strikers' duty stopped just short of precisely explicating which employer rights were protected by an injunction. The definition, however, lurked beneath the surface, requiring only a small step before concluding that a company had a property right in carrying on its business free from continuous union pressures, analogous to its right to have its lands free from ordinary trespassers. The need to justify the labor injunction led the court to extend the earlier conception of trespass. Previously, an injunction was granted to restrain continuous invasion of realty or incessant injury to corporeal possession. In showing how an injunction could also protect the inchoate right of an enterprise to continue the operation and management of its business without obstruction, Wenger aided in the establishment of the right itself.

159. Id. at 825.
160. Id.
161. Id.
162. Id.
163. Id.
4. Elevation of Entrepreneurial Liberties to Property Rights

The creation of "entrepreneurial property rights" as part of the effort to justify labor injunctions was completed in Coeur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner.\(^\text{164}\) In Coeur d'Alene, a federal court combined a number of specific personal freedoms of employers and nonunion workers under the rubric of "property rights," and gave equitable protection to these rights against union pressures.\(^\text{165}\) The dispute between a coal mining company and a local miners union arose out of a wage reduction and escalated when the company imported out-of-state workers guarded by private detectives.\(^\text{166}\) Union efforts to dissuade these workers from replacing them rapidly deteriorated into armed clashes. To stop the violence, the mine owners secured a restraining order against the union in the federal district court.\(^\text{167}\) The published opinion denied a motion to dissolve the restraining order.\(^\text{168}\)

In Coeur d'Alene, the court shifted its emphasis from criminal conspiracy to private injunctions in order to contain unions. Although the miners in this case could have been indicted criminally, the state of Idaho was content to allow the company to sue the union privately in equity, instead of pursuing a public prosecution for criminal conspiracy.\(^\text{169}\) The key technical question, therefore, was whether the court should respond in equity or require the plaintiff to seek redress at law. The court sustained an injunction on grounds upholding equity jurisdiction over labor disputes. The opinion hardly touched upon the violent tactics of the defendant union; instead, it focused on the nature of the union's demands and aims, and of trade unionism generally.

Reiterating the arguments of the 1886-1888 conspiracy cases, the court found that the union desired much more than better conditions for its members; it sought nothing less than the subordination of the employer. If allowed to act without restraint, the union might have implemented this design. If the union's plans were "carried to their logical conclusion, the owner of property would lose its control and management."\(^\text{170}\) The enterprise "would be worked by such laborers, during such hours, at such wages, and under such regulations, as the laborers themselves might direct. Under such rule . . . possession would become onerous. Enterprises employing labor would cease, and, instead of activ-

\(^{164}\) 51 F. 260 (C.C. Idaho 1892).
\(^{165}\) Id. at 263-67.
\(^{166}\) Id. at 261-63.
\(^{167}\) V. JENSEN, HERITAGE OF CONFLICT 32 (1950). See generally id. at 25-37 (for the background of the case).
\(^{168}\) 51 F. at 267.
\(^{169}\) Id. at 262-63.
\(^{170}\) Id.
ity and plenty, idleness and want would follow.”

The perceived danger lay in the threat to the employer's control of the labor force in the enterprise. This danger did not necessarily flow from the use of threat of violence, but was rooted in the union's goal of molding the workers into one disciplined body under its leadership in order to build bargaining power. This conventional goal (labeled "conservative" by many) transformed almost any effective union pressure, peaceful though it might be, into what courts regarded as an unlawful act. The illegality lay in the effort to usurp managerial powers belonging to the employer due to its right of ownership.

In *Coeur d'Alene*, the court admitted that this dispute involved "no title to reality" and that "no direct trespass upon reality" was committed.\(^{172}\) The union's acts only "indirectly" affected the employer's possession and other rights.\(^{173}\) In order to sustain the injunction the court, therefore, had to abandon the traditional view under which a property right was violated only if claims to title or direct dominion over tangible assets were invaded. Instead the court adopted the view that property rights might also be attacked if a union limited an employer's freedom to deal with candidates for future employment in the plant or with workers already employed. Accordingly, the free access of an employer to the supply of workers in the labor market ceased to be just a personal freedom on equal footing with the personal freedom of unionists to induce others not to work for that employer, and became instead a property right protectable against union influence. Similarly, the employer's liberty to "fire" his workers at will was also elevated from a personal economic freedom to a protectable right of private property, whereas the liberty of union members to use effective peaceful pressures in order to prevent such "firing" was outlawed. As a result, the courts endowed the employer with *de facto* far-reaching powers of control over its employees.

Like the tort and conspiracy cases, the court in *Coeur d'Alene* did not retreat completely to the old repressive approach. Though workers were free to organize "for the protection of their interests, and the amelioration of their conditions," the practical meaning of workers' freedom to use concerted action was drastically narrowed.\(^{174}\) Under the general formula allowing them to "advance their interests [solely] by lawful means," the court referred to nothing more than the time-honored virtues preached by Ben Franklin: "industry, sobriety and reasonable economy."\(^{175}\)

Finally, the *Coeur d'Alene* court explained that if union struggles

\(^{171}\) Id. at 263.
\(^{172}\) Id. at 264.
\(^{173}\) Id.
\(^{174}\) Id. at 263.
\(^{175}\) Id.
were not stopped, a grave danger would loom not only over particular enterprises, but over industry at large:

Whatever enthusiasts may hope for, in this country every owner of property may work it as he will, by whom he pleases, at such wages, and upon such terms as he can make; and every laborer may work or not, as he sees fit, for whom, and at such wages as, he pleases; and neither can dictate to the other how he shall use his own, whether of property, time, or skill. Any other system cannot be tolerated. 176

One can hardly find a stronger judicial expression of commitment not merely to the private property system but to the particular distribution of property then in existence.

IV
THE THIRD PHASE: REORIENTATION IN CONSTITUTIONAL LAW, 1885-1895

State courts rose to protect entrepreneurial liberty from invasion not only by labor unions but also by legislatures. Beginning in 1885, 177 a series of constitutional decisions annulled state laws intended to protect workers from various despotic employer practices. State courts handed down these decisions in the same years that they also reoriented other branches of the law, as described above. To grasp the full significance of the constitutional decisions on labor laws we must, however, take a new look at what we have learned. For, although scholars have studied constitutional history in much greater detail than other fields of law, they have overlooked two main aspects: that the changes in constitutional labor law around 1890 reflected the emerging concept of entrepreneurial property rights; and that these changes were but a part of a broader re-orientation encompassing several branches of the law.

A. Modern Labor Legislation and Courts

1. Types of Labor Legislation

Between 1840 and 1870, state legislatures had imposed restrictions on private labor contracts regulating labor hours of women and children. 178 Beginning in the 1870's, legislatures responded to the conditions

176. Id.
177. The first case to void a labor law was In re Jacobs, 98 N.Y. 98 (1885). Though frequently cited as authoritative in labor cases, it actually had little bearing on the question of labor relations since it annulled a health and safety law of the type that was ordinarily approved. See generally B. R. Twiss, Lawyers and the Constitution, ch. V (1942).
178. New Hampshire enacted the first 10-hour law for women in 1847. 1 Commons, supra note 8, at 541-42. By 1860 a number of other states had similar statutes. These laws were rendered practically inoperative by provisions enabling violators to escape penalty. From 1848 several states followed Pennsylvania in banning child labor below certain ages, some in particular trades, others in all mechanical occupations. Enforcement was very lax everywhere. In 1867 Massachusetts was the first state to designate a special inspector to see that these restrictions were obeyed. See J.R. Com-
created by modern industry and, following the British model, enacted laws regulating the labor contract. One category governed workplace health and safety, and required sanitary rules, factory safeguards, and accident reports. Decades passed before these laws were satisfactorily enforced, but their enactment marked a turn in legislative thinking about government’s role and responsibility in ensuring minimal health and safety standards.179

A second category of labor laws reached beyond these goals, seeking to insure workers a modicum of welfare and personal independence. Some aimed to set rudimentary rules limiting the traditionally unfettered freedom of the employer to manipulate wages. Notable among them were the laws prohibiting employers from paying wages in “scrip” (orders or notes redeemable only at specified company stores), and requiring that wages be paid only in lawful money.180 Modeled after the well-established English “Truck Acts,”181 American “scrip” laws were designed to secure workers a minimal freedom to spend their earnings as they chose. “Screen” laws regulated the computation of payments to coal miners who were paid according to rates of output, by requiring operators to furnish accurate scales to weigh the output and duly credit it to each miner before it was screened and loaded for storage or dispatch.182 Certain laws also forbade prolonged delays in wage payments while others regulated women’s workdays.

A third category of laws forbade employers from requiring “yellow dog” contracts, in which a laborer agreed not to join a union as a condition of employment.183 First emerging in 1892-1893, these statutes rose in importance around 1900. This latter category differed significantly from the first two. Whereas health, safety and welfare laws covered labor conditions, and were intended to prevent employers from oppressing workers as individuals, those outlawing the “yellow dog” agreements pertained to labor relations, and were designed to bar management from repressing worker organizations.

2. The Main Judicial Responses

Before 1885, few labor laws were tested in the courts. Those that were judicially scrutinized were generally upheld. As a rule, health and


180. 3 Commons, supra note 8, at 674.


182. 3 Commons, supra note 8, at 664.

safety enactments raised no opposition on constitutional grounds because they clearly fell under the states' police powers. The few welfare laws that were judicially reviewed before 1885 were usually sustained. Prominent among the earlier cases of this kind was a Massachusetts decision upholding a law limiting the length of women's workdays in factories. The court expressly rejected the claim that the law infringed on the freedom to contract.  

Another example was a Maryland decision sustaining a “scrip” law. This act was “manifestly intended to be in the interest of the employés” by protecting them “from future exactions, extortion or over-reaching” by corporations. Such goals fell within the scope of legislative police powers. The court was also able to sustain the law on the ground that the legislature acted within its reserved powers to alter corporate charters even though the law covered only certain kinds of corporations.

By 1885, however, a marked change took place. While courts continued to approve health and safety laws, a majority of state decisions refused effect to the labor welfare laws mentioned above. At the same time, a smaller number of decisions persisted in upholding legislative authority to provide for workers' welfare by intervention on behalf of the economically weak.

Scholars have often interpreted this change as if, in 1886-1900, the opponents of welfare labor laws captured a decisive majority of state courts, and imposed on them extreme “conservative” premises of “laissez-faire constitutionalism,” whereas the upholders of these laws constituted but a small minority and expressed a “liberal” support for statutory regulation and social reform. Some leading scholars have also claimed that, on the whole, “laissez-faire constitutionalism” reigned over labor law until the New Deal, when the “liberal” approach rose to dominance.

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185. Shaffer & Munn v. Union Mining Co., 55 Md. 74 (1880).
186. Id. at 79.
187. Id. at 80.
188. See supra note 177.
190. See, e.g., B.R. Twiss, supra note 189, at 137-38; C.E. Jacobs, supra note 189, at 76, 90, 92-97. Even Melvin Urofsky, who emphasizes that the “conservative” approach “was far from triumphant,” applies his thesis only to the Progressive era, when the courts, at both the state and federal levels, “reflected the mildly reformist view of the country at large.” He agrees, however, that after World War I there prevailed a “long era of conservative domination, which chilled numerous reform programs,” and which “did not end until 1937.” Urofsky, State Courts and Protective Legislation, 72 J. Am. Hist. 63, 89, 91 (1985).
This dichotomous classification is misleading. It overrates controversies on such formal issues as the scope and limits of the police power and underrates the issue of substantive rights. To understand the doctrinal growth in constitutional labor law, in the years 1885-1895, distinctions should be made between three approaches, based on the attitude taken toward entrepreneurial liberties vis-a-vis unions' liberties to use a wide range of concerted-action tactics.

One attitude expressed in a majority of state court decisions opposed any legislative regulation of labor contracts beyond minimal safety, health and child labor restrictions, and thus protected the most far-reaching managerial prerogatives. Since this attitude supports an owner's fullest control over its business, even allowing the employer an autocratic dominion over its employees, this approach can fittingly be named "autocratic."

A second approach, expressed in a large minority of state decisions, while fully endorsing the employer's right to control its business, denied, nonetheless, its freedom to tyrannize employees. Since these decisions upheld several kinds of laws protecting the welfare of individual workers, but not the freedom to use effective labor union tactics, their view can be appropriately called "benevolent."

The third approach emerged before 1895 in only one decision that upheld an anti-yellow dog statute. While giving strong support to the employer's right to manage and run his shop at will, this approach also recognized workers' unhampered freedom to unionize. Anticipating the views that rose to ascendancy with the triumph of the New Deal, this approach is properly labelled "liberal." Thus, what is customarily perceived as a judicial minority in the years 1885-1895 is properly regarded as two separate currents in judicial thought. This distinction is analytically fruitful because it will help us to show that a benevolent approval of welfare labor laws was not necessarily liberal, but could be consistent with anti-unionist policy, and that the relation between the "autocratic" and "benevolent" views was not of contradiction but of ambivalence. Though apparently diametrically opposed, these two views, in effect, complemented each other in the creation of constitutional defenses of entrepreneurial property rights.

B. Opponents of Labor Legislation: "Laissez-Faire Constitutionalism" or an Extremist Defense of Entrepreneurial Liberties?

I. The Main Argument

The voiders of welfare labor laws have been studied in great detail

elsewhere, and will be described here only briefly. In this view, adult male and female workers were entitled, as independent free agents, to contract to sell their property on terms agreeable to them. Of course, labor was their principal property. Like any other owner, they had an inalienable right to sell their property for payments in "scrip," for long workdays, or for infrequent wage payments. Legislatures had no power to protect persons sui juris from the seemingly harmful effects of their own voluntary acts. Such protective laws were null and void because they violated the constitutional guarantee against deprivation of private property without due process of law. Protective legislation was also invalid because, by shielding only workers but not employers, or workers of certain trades but not others, the constitutional guarantee of equal protection of law was violated. If such statutes were tolerated, legislatures could use their powers to arbitrarily deprive persons of property and liberty as favoritism and caprice might dictate. Authority to prefer certain special interests at the expense of others palpably transcended the bounds of permissible legislation.

2. The Doctrinal Meaning of the Autocratic Position

Most researchers rightly assert that this judicial view sought to protect propertied interests and corporate wealth from egalitarian legislatures. The courts, fearful of legislative attacks on vested property rights, blocked not only labor welfare laws but also progressive income taxes, fixed railroad shipping rates, and other forms of business regulation. At the same time, however, many scholars erroneously conclude that the voiders of the welfare labor laws, in attempting to minimize the states' police powers, and maximize the freedom in labor contracts, stood, in effect, for laissez-faire. This orthodox interpretation is, however, in error.

Portraying the voiders' policy as laissez-faire blurs its essential traits. "Laissez-faire" serves as an accurate and meaningful concept only when used to describe a governmental policy based on the principle of total noninterference in the free play of all lawful market forces. Every economic actor is permitted the same far-reaching legal freedom of competition and cooperation with others for advancing his or her own self-interests. This, however, was not the guiding principle of the voiders from 1885-1895. They did not require that all lawmakers abstain from

192. See supra note 189.
194. See, e.g., C.E. JACOBS, supra note 189, at 92, 96.
195. See, e.g., A.M. PAUL, supra note 189, passim.
Entrepreneurial Property Rights

Interference in the market, but only that legislatures refrain from protecting workers against economic pressures by employers. At the same time, the courts did not hesitate to defend entrepreneurial liberties by creating new property rights in conspiracy, tort and equity. In essence, the policy of opponents to welfare labor legislation was not principled noninterference, but differential and selective interference, intended above all to shield entrepreneurs.

Moreover, these opponents of labor legislation defended contractual freedom as a means to safeguard entrepreneurial dominion over tangible property. One court, in explaining why it refused effect to a statute that imposed fines on railroad companies for delaying wage payments, asserted that if the legislature had its way, the power to regulate would inevitably become "by an easy gradation" a power to control. A power to dictate when wages were paid would expand into a power to determine what wages to pay, what "quality and kind" of workers to hire, and what people to appoint as managers of the workforce. The court concluded that such powers would lead to "government ownership of railways without the state's having a dollar's interest therein."

According to the labor legislation opponents' view the economically weak and vulnerable had to rely, not on the law but on their own individual ability for improvements in their lot. The state had neither the responsibility nor the authority to ameliorate their condition or to correct the causes of economic inequality. In private industry, "[t]he relation of master and servant must ever be purely voluntary, resting on contract of parties." Hence, as long as people labor to earn their living, "there must be, as there always has been, oppression of the working classes. Yet the law has never undertaken, except in a limited extent and upon principles of pure justice, to lift them above the plane of equality upon which all should stand alike before the law."

Though conceding modern corporations could require their employees to work in oppressive conditions under threat of discharge, the courts voiding labor laws nonetheless refused to recognize such pressure as legal coercion necessitating judicial protection. Unhampered entrepreneurial freedom took precedence over

196. See supra text accompanying notes 58-118, 135-76.
199. Id.
200. Id. at 570, 19 S.W. at 912.
201. Id. (citing C.G. Tideman, A Treatise on the Limitations of Power in the United States 571 (1886)).
workers’ well-being. They were committed not to a general doctrine of laissez-faire, but to an extreme protection of entrepreneurial property rights. Since this doctrine bestowed on management de jure as well as de facto powers of far-reaching dominion over employees, it fell within the extremist, or “autocratic” school of entrepreneurial property rights.

3. The Doctrinal Pitfalls of the Autocratic Position

This view suffered from a fatal flaw of legal reasoning. The premise that legislatures could not restrain employers from using their superior economic power to impose their preferred terms stood in stark contrast to the main nonconstitutional labor law decisions of 1886-1892. Those cases held that courts could indeed restrain trade unions from using their overriding power to dictate terms. If the law was capable of protecting defenseless entrepreneurs, why could it not do so for defenseless workers who chose to act concertedly? Why apply the concept of “economic duress” to one situation but not to another essentially similar situation? Obviously, labor law could not tolerate such an inconsistency for long. The autocratic position unwittingly jeopardized the lines that the courts built around entrepreneurial liberties through conspiracy law, torts and equity.

Moreover, the position opposing welfare labor legislation faced a difficulty even within the confines of constitutional law itself. American courts had long sustained usury laws for the protection of debtors from excessive interest rates agreed upon in private loan contracts. If a borrower was deprived of freedom to contract because of economic want and was therefore placed at the mercy of the lender, the law would ignore the agreement as it ignored contracts made by minors, by the aged, by the mentally defective, or by those under duress.\(^{202}\) The general principle sustaining usury laws was that where the excessive dependence of a weaker party destroyed the rough equality needed for a binding contract, the legislature could limit contractual freedom in order to protect those incapable of protecting themselves.

Another development that undermined the reasoning of those opposing labor legislation occurred in the two emerging branches of business law: antitrust and unfair competition. Both these branches accepted the view that the law could interfere in market relations in order to shield entrepreneurs from manipulative economic pressures by stronger adversaries. Thus, the same logic that intensified the growth of these two branches from around 1890 undercut the basic justification of extremist opposition to legislative regulation in the interests of the economically powerless.

\(^{202}\) Frorer v. People, 141 Ill. 171, 186, 31 N.E. 395, 399 (1892).
C. Upholders of Labor Legislation: "Legal Progressivism" or Moderate Defense of Entrepreneurial Liberties?

A large minority of opinions, upholding welfare labor laws, offered a way to reconcile these contradictions. Unfortunately, scholars have ignored this judicial current. A careful look at the judicial record shows that all the minority opinions of 1885-1895, upholding laws regulating labor conditions, were later adopted by the United States Supreme Court and became the law of the land.

1. The Main Arguments of the "Benevolent" Position

The benevolent courts sustained the labor welfare laws on the ground that legislatures, as representatives of the community, were empowered to protect the public peace from internal disruptions and to maintain minimal standards of fairness and justice by preventing arbitrary oppression of one sector of the population by another. The courts linked these two powers by arguing that recent disruptions of the peace arose mainly from labor discontent stemming from unjust rules imposed by oppressive employers. Hence, legislatures should have the power to ensure that "justice shall prevail" in industry, especially in mining company towns, where miners depended almost completely on the operators' will.

According to this view, social justice in labor disputes meant that when big business used its superior bargaining power in dealings with a "multitude of customers or dependent employees" who suffered "a disadvantage in their contractual relations," the legislature might regulate these relations to prevent not only fraud but also "oppression or undue advantage." Individual workers, helpless if dependent on ordinary legal remedies, were in need of special protection and legislative help. Precedents also supported this view. As in previous decades, statutory regulation had been constantly extended over different types of commercial contracts.

Underlying these arguments was a belief about government's role in the market. A legislature might put "a reasonable check" on the "theoretical freedom of contract" enjoyed by strong yet reckless persons who deprived weaker persons who lacked "real liberty of action." This power stemmed from the right of self-preservation which existed in the commonwealth no less than in the individuals.

204. Brief for the People at 297, Millett v. People, 117 Ill. 294 (1886).
206. Loomis, 115 Mo. at 329, 331, 335, 22 S.W. at 356-58 (Barclay, J., dissenting).
207. Peel Splint, 36 W. Va. at 811, 15 S.E. at 1002. This view applied with special force to laws regulating the coal industry. Charters bestowing extraordinary and unequal privileges on coal min-
This analysis was close to the "antitrust" juridical philosophy. Advocates partly based their views on the *Granger* cases\(^{208}\) and on clauses of state constitutions written under the influence of the Granger movement which declared, for example, that "the exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the state."\(^{209}\)

2. *The Doctrinal Meaning of the Benevolent Position*

The disagreement between the opponents and the upholders of welfare labor laws appears quite deep. The division was real as far as abstract principles were concerned. However, from the viewpoint of entrepreneurial property rights the controversy was actually much narrower. "Scrip" and "screen" laws or bans on delays in wage payments, vital as they were for the workers involved, dealt with but a few marginal abuses in methods of remuneration. These laws did not even touch on the main issue of how wages or piece rates should be determined. That remained beyond legislative reach, to be decided by private contracts in which imperious employers continued to dictate terms. Similarly, laws restricting long workdays for women also left the main issue to private contracts, regulation of work hours on grounds not of health but of welfare and social justice. Hence, though these laws narrowed contractual freedom and property rights, they invaded only the fringes of entrepreneurial liberties, merely to prevent a few kinds of exorbitant industrial tyranny.

On the crucial issues of nonviolent concerted activity and freedom to unionize, the judiciary was far more united than is apparent from the debates mentioned above. The fact that some judges upheld legislative authority to protect the economically vulnerable should not mislead us that they all also supported the laborers' freedom to form independent unions. While approving laws banning some of the most flagrant oppressive acts by management, several of these judges also emphatically endorsed the anti-union application of conspiracy laws to suppress peaceful

\(^{208}\) The term "*Granger* cases" refers to six cases in which the Supreme Court of the United States upheld regulatory legislation passed by several Midwestern states then under control of the farmers' movement called the National Grange. The most famous case upheld a statute regulating the charges of grain elevators. *Munn v. Illinois*, 94 U.S. 113 (1877). The other five upheld state laws regulating railroad rates. *See also* B.R. *Twiss*, *Lawyers and the Constitution* 36-41, 63-92 (1942). For general background and a stimulating reinterpretation see Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 *Persp. Am. Hist.* 329 (1971).

\(^{209}\) *Loomis*, 115 Mo. at 328, 22 S.W. at 356 (Barclay, J., dissenting) (quoting Mo. *Const.* of 1875, art. XII, § 5).
boycotts against overbearing employers and strikebreakers. For them, "scrip" and "screen" laws to protect workers, and conspiracy laws to protect entrepreneurs, were two complementary halves of a single comprehensive policy to shield society at large. The law could and should protect individual defenseless citizens from economic duress by all mighty combinations, either of capital or of labor.\footnote{See, e.g., Bunting v. Oregon, 243 U.S. 426 (1917) (approving a 10-hour maximum workday for all miners and mill or factory workers); Erie R.R. v. Williams, 233 U.S. 685 (1914) (upholding a law requiring employers to pay wages at stated intervals); McLean v. Arkansas, 211 U.S. 539 (1909) (sustaining a "screening" law); Muller v. Oregon, 208 U.S. 412 (1908) (approving a law prohibiting the employment of women in factories and laundries for more than 10 hours a day); Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901) (upholding a "scrip" law); St. Louis, I.M. & S.P. Ry. v. Paul, 173 U.S. 404 (1889) (sustaining a law requiring payment, on day of discharge, of all sums due to an employer's employees).}

3. The Doctrinal Advantages of the Benevolent Position

The great asset of this view was its ability to maintain doctrinal consistency without jeopardizing the protection of entrepreneurial liberties. Courts could use conspiracy laws or equity to shield a weak employer or unorganized workers against crushing economic pressure by a union. Legislatures could also defend weak individual workers against overwhelming economic pressure from employers. This view also had the virtue of setting definite boundaries for permissible legal interference. The law could not defend trade unionists from "yellow dog" contracts or from injunction, because that would protect a force which was oppressive to individuals. As a result, the minority position allowed legislatures to eliminate the employer's power to dictate a few extremely exploitative conditions, but not to invade control over labor relations, thus leaving to employers the unfettered power to determine whether employees would be free to unionize and bargain collectively. The crucial result of this position was that by forcing employers to give up some marginal liberties, it vindicated their far-reaching control over employees, thus fortifying the more significant aspects of entrepreneurial property rights.

The minority approach began to carry the day in courts from around 1900, when the first great wave of alarm from the rising tides of union activity, radical movements and social legislation began to subside. At the same time, enlightened businesspeople and public figures began to advocate benevolent managerial policies toward individual employees. They assumed that such policies would be more effective than autocratic repression in drying up sources of radical protest, in encouraging laborers' "vertical" allegiance to the corporation at the expense of "horizontal" trade solidarity, and in promoting higher productivity. Against this background, the United States Supreme Court gradually adopted the reasoning offered by the benevolent opinions between 1885-1895.\footnote{Peel Splint, 36 W. Va. at 820, 834-35, 15 S.E. at 1005-06, 1011.}
From the perspective of entrepreneurial liberties, the common ground between the benevolent and the autocratic positions was much more significant than their differences. Their shared commitment emerged in their joint opposition to laws regulating labor relations to defend workers' freedom to unionize. Both schools opposed attempts to outlaw the "yellow dog" contract because such action threatened the restrict employers' ability to dominate workers. But while the opponents of welfare labor laws permitted management to maintain autocratic control, the upholders constrained employers to a more benevolent role.

D. The Defeated "Liberal" Alternative and the Constitutional Preference of Entrepreneurial Liberties

1. The Doctrinal Meaning of the Fight over the "Yellow Dog" Contract

State legislatures enacted anti-"yellow dog" laws from about 1892-1893, apparently in response to the doctrine of the absolute right to contract which spread rapidly after 1885. Union supporters feared that if courts relied on this doctrine to enforce "yellow dog" contracts, especially by injunctions, even weak employers could amplify their power to impose terms and oust unions. Management might be able to not only block strikes, boycotts and further unionization, but also to undermine and ruin trade unionism itself. State legislatures responded by enacting statutes making unlawful the anti-union agreements. Judicial defenders of entrepreneurial liberties, however, counterattacked by voiding all such enactments.

This struggle confronted the lawmakers (both legislative and judicial) with the most significant dilemma they faced in the context of industrial strife: in conflicts between entrepreneurs' liberties to run their business as they saw fit and workers' liberties to organize and speak as they saw fit, which activity should the law protect? The "yellow dog" contract gave the employer not only enormous bargaining advantage over workers, but also enabled the employer to trample workers' civil liberties. Many an employer interpreted the "yellow dog" agreement as prohibiting workers not only from joining unions but also from advocating the union cause, from taking part in union meetings, and even from having contacts with union members. Thus these agreements restricted workers' freedoms of association, expression, petition, protest and peaceable assemblage. As a result, the courts had to choose between conflict-

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employee); Holden v. Hardy, 169 U.S. 366 (1898) (upholding an 8-hour maximum workday in mines and smelters).

212. See Brief for the State at 171, State v. Julow, 129 Mo. 163 (1895) (listing such laws from Ohio (1892), Massachusetts (1892), California (1893), Idaho (1893), Illinois (1893)).
ing constitutional rights: should right of property and contract be defended over personal liberty?

2. The Main Liberal Argument

Choosing laborers' liberty over employers' property, some state legislatures banned the anti-union contracts, though conceding the transgression of private property rights. These legislatures invoked the well-established principle that all property was held subject to regulation for the public welfare under the general police power of the state. This principle was extended to ban "yellow dog" contracts because the changing industrial reality increasingly belied the premises of traditional legal doctrines. Rapid corporate growth made business so powerful that it could impose favorable wage rates, regardless of the laws of supply and demand. Big corporations, moreover, were able to "coerce the [individual] employee into complying with any demand made, no matter how foreign to his employment" or duties of service. Under such conditions, a "yellow dog" contract reflected not a meeting of minds between roughly equal parties, but a command by a much stronger employer taking advantage of much weaker workers.

The advocates of anti-"yellow dog" laws claimed that such laws banned only oppression of personal liberties. They did not abridge the authority of the employer to lay off workers for inefficiency or for any other reason. These laws prohibited the employer only from making nonmembership in unions a prerequisite for getting or keeping a job. Such regulation lay within the state's police power. First, the employer was restricted only from exceeding its legitimate managerial powers; within its legal powers the employer maintained control as in the past. Second, anti-"yellow dog" laws enabled the isolated employees merely to strengthen their bargaining power by lawfully organizing for self defense. These laws did not impose organization, but simply protected workers who chose to legally exercise their constitutional freedoms.

3. The Primary Anti-Liberal Argument

The courts, however, rejected the liberal view as an invasion of the property rights of both the employer and the employee. In the leading case, State v. Julow, the Missouri Supreme Court declared that rights of private property included, as an essential attribute, the right to acquire property by labor contracts and that "every attribute necessary to make the principal right effectual and valuable in its most extensive sense" was

213. Id. at 170.
214. Id.
215. 129 Mo. 163, 31 S.W. 781 (1895).
as inalienable as the primary right. This position was not the mere assertion that entrepreneurial liberties were property rights. Its doctrinal contribution was that in the clash between property rights or freedom to contract and workers' civil liberties, property rights were constitutionally superior. Only with regard to property rights did the courts order protection of all the incidents necessary for their "complete and full, unrestrained enjoyment," even in the face of contrary legislative acts.

This preferential protection of owners' liberties, crystallized in the Julow decision of 1895, and the barriers thereby imposed on statutory protection of workers' liberties brought the development of entrepreneurial property rights to its peak.

CONCLUSION: JURIDICAL REORIENTATION OF LABOR LAW, 1886-1895

A. The Nature of Judicial Leadership

The changes discussed above constituted a single comprehensive and complex doctrinal shift under judicial leadership. The guiding role of the judiciary was not as clear-cut as, for example, that of the Warren Court in changing the law of race relations. In the 1880's state courts were virtually independent both of one another and of federal decisions on matters of labor law. However, abundant evidence indicates that most courts shared a common approach to the upswing in industrial strife in the late nineteenth century. Although no specific court or group of judges led the way, the American judiciary as a whole inaugurated and directed the change in labor law. Innovations flowed from the courts at all levels and in various branches of the law. But once handed down, pioneering opinions spread rapidly throughout the country, and were soon widely cited as authoritative. Judicial decisions, made in response to the unique circumstances of each case, were fused into one discernable tendency. The foremost aim was to shield entrepreneurial freedom from what seemed to be the tightening grip of labor organizations.

The courts exercised their leading role gropingly, one step at a time. In 1886 the courts had neither a program of action nor even a clear picture of the doctrinal results they were to reach in a decade. They operated not as a constructor who starts a project knowing its detailed design in advance, but as voyagers in an unfamiliar terrain who probe their way according to their goals, needs and circumstances. The end product of these endeavors, the doctrine of entrepreneurial property rights, unfolded as an anticipated consequence of several decisions, each intended to attain only particular objectives.

216. Id. at 172, 31 S.W. at 782 (emphasis added).
217. Id. at 173, 31 S.W. at 782.
B. The Pattern of Doctrinal Growth

In each phase, the dynamics of conceptual change were shaped by two factors. Initially courts responded to external dangers. Alarmed by labor boycotts, increasing union power, or egalitarian legislative intent, the courts rushed to erect barriers to block the apparent wrong from spreading and gaining legitimacy. As a first step, the courts developed concepts of remedies and offenses and of constitutional limitations on police power. Armed with these operative concepts, courts were able to effectively intervene in concrete situations of industrial strife.

However, these innovations were often at odds with several precepts prevalent in legal thought. To overcome the incongruity undermining the validity of the relief rendered, courts generated further adjustments, producing derivative doctrinal changes, responding not to external challenges but to the internal need for coherent legal reasoning.

The courts faced this need to remove dissonance in at least four areas of juridical discourse. First, courts sought to vindicate their own authority to recast the law by changing constitutional notions of the rules and powers of the judiciary, for example, by redefining conspiracy (both criminal and civil), equity jurisdiction and the scope of legislative power. Second, the forementioned operative definitions of union offenses required the creation of new legal concepts: specific substantive protectable rights of entrepreneurs, correlative legal duties of all others not to violate these rights, and liability for violating these duties.

Third, these new legal concepts called for deeper changes in philosophy and jurisprudence about the role of the law with regard to economic conflicts and moral wrongs. Before 1885, courts usually dismissed suits based solely on the charge of ruinous economic loss. The underlying assumption was that the law might intervene in market relations only where a clear-cut legal duty was breached. Since infliction of financial ruin was not _per se_ unlawful, the inflictors were not liable even if they acted out of sheer malice or committed other moral evils. These assumptions were obviously inconsistent with the post-1886 definitions of union offenses and entrepreneurial rights. To vindicate the new view, courts had to expand the legal meaning of unlawful "economic coercion" and "malicious interference in others' business."

The fourth and most significant derivative conceptual change stemmed from the need to square the defense of entrepreneurial liberties with the basic commitment to equal protection of the law. With the rise of powerful combinations of capital, could courts convincingly argue that severe limitations on peaceful concerted action of workers were in line with the basic commitment, when corporate employers suffered few restrictions on their freedom to inflict economic pressures on their employees? This question struck the foremost aim of the judicial policy,
pointing to a possibly fatal contradiction in the new conceptual construct the courts were endeavoring to build.

To reconcile the principle of equal protection with the preferential protection of entrepreneurial interests, courts could not predicate decisions solely on the traditional concept of economic liberty. This concept, central to legal thought before 1886, allowed all economic actors to inflict losses on others and therefore could not provide any justification for the new judicial approach. To vindicate the policy of restricting union freedom without undercutting entrepreneurial options, the courts groped their way toward a doctrine that conceded workers' theoretical liberty to act concertedly, but curtailed in fact specific freedoms to struggle. This doctrine emerged in two phases: one partitioned the traditional concept of economic liberty so that entrepreneurial liberties could be isolated and elevated to a higher legal status than the liberties of union members; the second transformed entrepreneurial liberties into inalienable property rights. 218

C. The "Propertization" of Entrepreneurial Liberties

1. The Partition of "Economic Liberty"

Courts split the old concept of economic liberty into three categories, each with a different legal status. One category covered certain market activities permitted by both entrepreneurs and unionists. Under the law, every citizen was free to advance his or her own welfare, to deal or not to deal with others of his or her preference, and to combine with others to promote common lawful interests. The courts maintained equality under the law by formulating symmetrical pairs of these freedoms. Workers might organize in trade unions, employers in business associations. Workers were allowed to strike, employers to lay off. Workers were free to avoid buying from designated businesses, employers to avoid hiring union members. Combinations of both groups could draw up bylaws and impose penalties on members who failed to comply.

In legal terms, these were liberties, as distinct from rights, because they lacked legal protection and carried no legal duties in others to refrain from interfering. This meant, as Justice Harlan authoritatively summed up in 1894, that workers might unionize for economic struggle to improve their wages, hours and conditions of labor, even if they

218. For a different view of how the judiciary resolved the tension between the imperative of equal treatment under the law and its policy in labor cases, see Kelman, American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers, 58 St. JOHN'S L. REV. 1 (1983). Kelman traces labor law from the 1870's to the 1940's in Massachusetts and Illinois. His conclusions seem to rest more on a value judgment of the judges than on an analysis of the logic behind their opinions. Concentrating on rhetorical techniques employed by judges, Kelman emphasizes "manipulations of the empty concept of freedom of contract" and the formation of legal rules "falsely legitimized as 'logic.'" Id. at 6.
caused losses and inconvenience to employers, unorganized workers and
the public by their nonviolent concerted action.\textsuperscript{219} However, the real
meaning of these liberties only became clear when the courts proceeded
to define what workers were not allowed to do.

The second category downgraded certain specific kinds of peaceful
market activities typical of unions from “permissible” to “illegal.” Post-
1886 decisions banned all labor boycotts, primary and secondary; all
pickets, even of only two quiet marchers; strikes for the discharge of
nonunionists and for the enforcement of collective bargaining or the
closed shop; and moral or social pressures, such as public condemnation
of “scabs” or “chiselers” (workers who agreed to work below union stan-
dards). What then were unionists allowed to do under the declared free-
dom to organize and struggle for improving conditions? Usually, this
abstract liberty meant only the freedom to quit work in unison. After
quitting they had quietly to wait for results, avoiding any additional con-
certed pressure except “entreaty.” As a result, union actions that had
previously been tolerated (or held of doubtful legality) became illegal.

The third category upgraded from “permissible” to “protectable”
entrepreneurial practices, immunizing them from union interference.
The general economic liberty of all citizens to do business with whom
they chose became a particular right of consumers and suppliers to pro-
tection against union reprisals for boycott violations. The general free-
dom to work under any lawful terms grew into a particular right of
unorganized workers to protection against retribution for undercutting
union positions. And the general freedom of businesses to run their en-
terprises at will rose to a privilege, protectable against specified union
tactics that could narrow employers’ perfect freedom in the management
and control of their business.

In effecting this partition and reconstruction of economic liberty,
the courts refrained from expressly favoring one group or class over an-
other. Yet, by extending this differential protection to selected kinds of
economic activities the courts succeeded, in effect, in discriminating be-
tween groups of economic actors, thus endowing the liberties of employ-
ers and nonunion workers a higher legal status than to those of union
members, and yet maintaining the rhetoric of equality before the law.

2. The Concept of Entrepreneurial Property Rights

While the courts were elevating entrepreneurial liberties from per-
missible to protectable rights, they also converted them into property
rights. The freedom of each patron to buy, of each laborer to work, and
of each employer to manage were declared to be rights, not only of per-
sonal liberty but also of private property. The courts stretched the con-

\textsuperscript{219} Arthur v. Oakes, 63 F. 310, 318-21 (7th Cir. 1894) (Harlan, Circuit Justice).
cept of property to cover the intangible economic liberties peculiar to entrepreneurs.

The more significant among these rights pertained to the employer. Prior to 1886, daily practice and legal theory recognized the employer’s discretion to manage its labor force as a liberty. Actual power to impose terms of employment was, however, limited by the bargaining power of employees who were theoretically free (though often incapable) to block employer demands by peaceful economic countermeasures. After 1886 that discretion became one element of the employer’s property rights. The employer (whether as a proprietor or as an owner’s proxy in management) could mobilize the courts to defend its exclusive power to make the final, binding decisions in the plant. This change still allowed workers the freedom to try to persuade the employer and to assert pressure by quitting work en masse. However, if they tried stronger measures, or if legislatures tried to restrain employer control, courts could and would stop such efforts in order to protect property rights.

A second element of the employer’s new property rights was the unobstructable freedom of access to the labor market. If the first element gave the employer a full managerial control over already engaged laborers, the second protected his exclusive control over decisions of whom to hire or fire, and safeguarded nonunionists’ rights to jobs despite union resistance. Before 1886, courts condemned pressure to discharge nonunionists or to establish a closed shop mainly as coercive acts that violated personal liberties. After 1886, the argument was broadened. An employer and an individual worker had to be free in their decisions about whom to employ or serve, not merely as a part of their liberty interest but as an essential aspect of their property rights. Accordingly, courts could outlaw efforts to block the access of employers to the labor supply or of the unorganized to labor demand without appearing as violators of unionists’ freedom to engage in economic self defense.

A third element was the freedom of access to the commodities market. This issue rose mainly in the context of consumer boycotts. The new extended concept of property rights enabled the courts to secure for every employer, patron and citizen the full freedom to deal with any party, protected from molestation by pickets and boycotters.

The extension of property rights to bolster specific entrepreneurial liberties stood in sharp contrast to the courts’ policy toward the freedom to strike. Striking retained the status of a personal license to act, but workers who went on strike could not ask for judicial protection either against strikebreakers or against discharge. The law only permitted them to withdraw from work. Beyond that it provided no defense of their status as employees or of their legal interests in the enterprise. Because the freedom to strike remained legally unprotected while the freedom to
lay off received legal protection, the two most potent economic weapons in labor disputes were not of equal status, despite the judicial claims to the contrary.

That American courts gave precedence to entrepreneurial interests over unions is, of course, an old story. Yet the rationale behind this policy and the specific manner of its creation have been rather obscure. The present Article attempted to uncover the growth and functions of judicial reasoning.

The concept of entrepreneurial property rights released courts from the charge of bias and discrimination. As long as liberties of union members, and of employers and unorganized workers were treated only as two sets of competing personal liberties, the courts lacked a clear and convincing justification for systematically protecting the nonunion parties. Such a policy would clash with the principle of equal protection of the law. However, by converting entrepreneurial liberties into inalienable property rights, and by making them constitutionally preferable over workers' rights to civil liberties, the courts found a firmer doctrinal basis for their policy and an apparently plausible defense against equal protection arguments. Decisions to curb union pressures or legislative acts could now be presented not as discrimination against organized labor, but as protection against attacks on property rights.