

RETHINKING U.S. LABOR LAW: A COMPARISON OF PROPERTY INTERESTS AND ETHICS IN GERMAN LABOR LAW

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INTRODUCTION

As famed American jurist and Justice of the Supreme Court of the United States, Oliver Wendell Holmes, Jr. noted, “The life of law has not been logic; it has been experience.”¹ The conflict between workers and their employers is indeed reflected in the life of labor laws in the United States and elsewhere around the world.

It is no secret that the union membership rate, or union density, for the private sector in the United States has plummeted in the last several decades.² Union density in Germany has also plummeted over the last several decades, from nearly thirty-five percent in the 1960s to around sixteen percent today.³ Union density in the United States, at around ten percent, is one of the lowest rates for members of the Organization for Economic Cooperation and Development.⁴ Despite the low union

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1881).

2. Irina Ivanova, *Union Membership in the U.S. Hit Record Low in 2018*, CBS NEWS (Jan. 21, 2019), <https://www.cbsnews.com/news/union-membership-declined-in-2018/>.

3. See *Trade Union Density*, ORG. FOR ECON. CO-OPERATION & DEV., <https://stats.oecd.org> (last visited Oct. 7, 2020) (Click on “Labour” from dropdown; then click on “Trade Unions and Collective Bargaining”; then follow “Trade Union” hyperlink; then click “Customize”; then click “Selection”; then click “Year”, then run query for date range years 1960–1998; and then run one from 1998 to present).

4. See *id.* (Click on “Labour” from dropdown; then click on “Trade Unions and Collective Bargaining”; then follow “Trade Union” hyperlink; this should autopopulate with latest available data which is year of 2018; if not, click “Customize”; then click “Selection”; then click “Year”; then run query for latest available data which is 2018).

density level in Germany, the unions are considered quite strong.⁵ This is not so in the United States.⁶

Global union density numbers today reflect an overall downward trend of union membership.⁷ However, looking beyond these numbers to United States labor law as a whole compared to Germany and other countries, it is clear that the United States is the most anti-union country in the G-20 and one of the most anti-union countries in the world.⁸ The reasons behind union strength in Germany must logically then be due to factors other than union density numbers. According to the International Trade Union Confederation ("ITUC") Global Rights Index, on a scale of 1–5+, with a ranking of 1 indicating "sporadic violations of rights" to 5+ indicating "no guarantee of rights due to the breakdown of the law," the United States has a rating of 4, indicating "systemic violations of rights."⁹ The United States joins the likes of Mexico, Venezuela, Congo, Argentina, Bosnia and Herzegovina, and Pakistan that all have 4 ratings.¹⁰ In contrast, Germany scores a 1, and other countries in Europe also score significantly higher than the United States on the scale,¹¹ including France.¹²

In a report submitted to the Human Rights Council in 2016, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, on his mission to the United States, gave his assessment against the backdrop of the United States being a long-standing democracy that holds itself and other states to high democratic ideals.¹³ With the understanding that

5. *Id.*; see INT'L TRADE UNION CONFEDERATION, 2019 IUTC GLOBAL RIGHTS INDEX 11 (2019) (providing ratings of union strength in countries based on violations of workers' rights).

6. INT'L TRADE UNION CONFEDERATION, *supra* note 5, at 10.

7. Niall McCarthy, *Which Counties Have the Highest Levels of Labor Union Membership?*, FORBES (June 20, 2017, 8:14 AM).

8. NORMAN E. BOWIE, BUSINESS ETHICS: A KANTIAN PERSPECTIVE 75 (2d ed. 2017); see McCarthy, *supra* note 7 (showing union membership of the world by various countries).

9. INT'L TRADE UNION CONFEDERATION, *supra* note 5, at 10.

10. *Id.*

11. *Id.* at 11.

12. *Id.*

13. Maina Kiai, *Rep. of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association on His Follow-up Mission to the United States of America*, ¶ 12, HUMAN RIGHTS COUNCIL, U.N. Doc. A/HRC/35/28/Add. 2 (Jun. 12, 2017) [hereinafter *Report of the Special Rapporteur*].

democracy is never truly complete and is a continuous process, he situated his assessment within the context of the pervasive racism and misplaced justice that plagues the free-market fundamentalist approach in the United States.¹⁴ The Special Rapporteur noted specifically that the approach to labor rights in the United States “overwhelmingly favours the well-being of employers over workers.”¹⁵ The Special Rapporteur was especially “appalled” by the “so-called right to work laws” enacted in twenty-eight states.¹⁶ Additionally, the Special Rapporteur found that right to work laws are marketed as protecting workers’ rights but are really “deliberately crafted to weaken unions” and erode workers’ rights.¹⁷ The Special Rapporteur also found the National Labor Relations Act (“NLRA,” or “Wagner Act”) inadequate to protect workers’ rights, and found the National Labor Relations Board (“NLRB”) was underfunded, limited in how they can implement decisions, and prone to partisan interests.¹⁸

While it is doubtful that Board Members would view themselves as promoting fundamental human rights, in the context of the brutal history of the U.S. labor movement, some scholars view the NLRA (Wagner Act) as, at its core, a “historic human rights statute.”¹⁹ The NLRA “also reflected an understanding of the necessary interrelatedness of political and economic rights.”²⁰ For the first time in American history, the NLRA explicitly ensured that the government would work to prevent employers from using their economic power to interfere with the economic rights of workers to organize and bargain collectively.²¹

Beyond offering the general protections provided by government, the Wagner Act left the specific right determinations

14. *Id.* ¶¶ 12–21.

15. *Id.* ¶ 22.

16. *Id.*

17. *Id.*

18. *Id.* ¶¶ 45–53.

19. JAMES GROSS, RIGHTS NOT INTERESTS: RESOLVING VALUE CLASHES UNDER THE NATIONAL LABOR RELATIONS ACT 3, 40 (2017); Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. INT’L L. 450, 463 (2009).

20. GROSS, *supra* note 19, at 17.

21. *Id.*

up to the collective bargaining process,²² for better or for worse. Consequently, union leadership often has a much different agenda (though they might publicly say otherwise) than its members, and the agenda of the employer is much different from that of the union or its members. As will be described in Section I, historically, employers have gone to great lengths to protect their assets while impinging the rights of their employees.

In 2011, the Occupy Wall Street protest movement attempted to shine a spotlight on the vast income inequality in the United States.²³ Despite the widespread movement, wealth inequality is continuing to rise. As of 2019, there are 2,604 billionaires in the world.²⁴ Of those, 705 live in the United States, with a total wealth of over \$3 trillion.²⁵ In the same country, as of 2017, nearly 40 million people lived below the poverty line, and of those, 12.8 million were children.²⁶ The number of people living in poverty compared to the number of billionaires is not the only startling measure that points to the large wealth gap in the United States. According to the Brookings Institute, before 2010, the middle class actually owned more wealth than the top one percent.²⁷ However, as of 2016, the top one percent alone now holds more wealth than the entire middle class, and the top ten percent holds more than three-quarters of total U.S. wealth.²⁸

22. *Id.*

23. Ray Sanchez, *Occupy Wall Street: 5 Years Later*, CNN (Sep. 16, 2016, 3:50 PM), <https://www.cnn.com/2016/09/16/us/occupy-wall-street-protest-movements/index.html>.

24. Alicia Adamczyk, *The US Is Home to More Billionaires Than China, Germany and Russia Combined*, CNBC (May 9, 2019, 1:05 PM), <https://www.cnbc.com/2019/05/09/the-countries-with-the-largest-number-of-billionaires.html>.

25. *Id.*

26. *Poverty Facts*, U. MICH., <https://poverty.umich.edu/about/poverty-facts/> (last visited Oct. 7, 2020). The poverty guideline for individuals is \$12,760, \$17,240 for a family of two, \$21,720 for a family of three, etc. *HHS Poverty Guidelines for 2020*, U.S. DEPT. OF HEALTH & HUM. SERVS., <https://aspe.hhs.gov/poverty-guidelines> (last visited Oct. 7, 2020).

27. Isabel V. Sawhill & Christopher Pulliam, *Six Facts About Wealth in the United States*, BROOKINGS INST. (June 25, 2019), <https://www.brookings.edu/blog/up-front/2019/06/25/six-facts-about-wealth-in-the-united-states/>.

28. *Id.*; see also Ana Kent et al., *What Wealth Inequality in American Looks Like: Key Facts & Figures*, FED. RES. BANK OF ST. LOUIS (Aug. 14, 2019), <https://www.stlouisfed.org/open-vault/2019/august/wealth-inequality-in-america-facts-figures>.

Those in the top one to ten percent are not factory workers, teachers, or service industry workers.²⁹ Rather, many are Chief Executive Officers (“CEOs”) of large institutions that underpay and under-employ many of their employees, while earning exorbitant wages themselves.³⁰ The Economic Policy Institute found that since 1978, CEO compensation has grown 940%, yet wages for workers during the same period have risen only twelve percent.³¹ The ratio of CEO-to-typical worker compensation was 20-to-1 in 1965, 58-to-1 in 1989, and 278-to-1 in 2019.³² While it is true that CEOs represent more value to the organization than a single rank-and-file worker, the exorbitant over-valuation of executives is indicative of the role that accumulating and holding onto wealth has played in the legal and social history of the United States.³³

Wealth and asset protection at the expense of workers is evidenced with a long history in the United States.³⁴ Indeed, from the very beginning, when crafting the foundation of a nation free from the control of the King of England, the Founding Fathers, mostly wealthy landowners themselves, argued for the protection

29. *But see* Howard Gold, *Never Mind the 1 Percent. Let's Talk About the .01 Percent.*, CHI. BOOTH REV., <https://review.chicagobooth.edu/economics/2017/article/never-mind-1-percent-lets-talk-about-001-percent> (last visited Oct. 7, 2020) (the roles in the top one percent all involve ownership interest such as CEO or business owner, precluding the inclusion of blue collar or service workers).

30. Dean Baker et al., *Reigning in CEO Compensation and Curbing the Rise of Inequality*, ECON. POL'Y INST. 2–3 (June 4, 2019), <https://www.epi.org/pub/reining-in-ceo-compensation-and-curbing-the-rise-of-inequality/>.pdf.

31. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019), <https://www.epi.org/publication/ceo-compensation-2018/>.

32. *Id.*

33. *See* Jessica Gordon Nembhard & Anthony A. Blasingame, *Wealth, Civic Engagement, & Democratic Practice*, in 12 WEALTH ACCUMULATION & CMTYS. OF COLOR IN THE U.S.: CURRENT ISSUES 294, 298–299 (Jessica Gordon Nembhard & Ngina Cheteji eds., U. Mich. Press 2006) (detailing the pay gap between CEOs and standard workers, as well as the history of wealth inequality in the United States).

34. Chris Edwards & Ryan Bourne, *Exploring Wealth Inequality*, CATO INST. (Nov. 5, 2019), <https://www.cato.org/publications/policy-analysis/exploring-wealth-inequality>. Courts in the nineteenth century used the Sherman Antitrust Act of 1890 to convict employees that were attempting to cause damage to businesses by striking. MICHAEL R. CARRELL & CHRISTINA HEAVRIN, *LABOR RELATIONS AND COLLECTIVE BARGAINING* 57 (Sally Yagan et al. eds., 10th ed. 2013).

of “Life, Liberty, and the Pursuit of Happiness.”³⁵ Though the exact origins of this famous phrase remain up for debate, scholars have identified a number of sources for the phrase that indicate the importance of property ownership during the colonial and American Revolutionary periods.³⁶ John Locke, who had a strong influence on the thoughts of many of the Founding Fathers, for example, argued in 1690 that government existed for the sake of protecting property, defined as a person’s “Life, Liberty, and Estate.”³⁷ The Virginia Declaration of Rights, adopted in 1776 and referenced by Thomas Jefferson for the preamble of the Declaration of Independence, protects “the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”³⁸ The Federal Constitution of 1787 also protects property from unreasonable searches and seizures, as well as seizure of real property from the government without just compensation.³⁹ Similar mottos exist that play important roles in other countries around the world: “Liberté, Egalité, Fraternité” (liberty, equality, fraternity), a legacy of the Age of Enlightenment, is found in the French Constitution,⁴⁰ and “Einigkeit und Recht und Freiheit” (unity, rights and freedom) a verse of the National Anthem of Germany, “Deutschlandlied,” is considered the unofficial motto of Germany.⁴¹

35. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Madison Hoff, *Many of the Founding Fathers Were Incredibly Wealthy. Here’s a Look at Some of Their Fortunes*, BUS. INSIDER (July 4, 2020, 7:40 AM), <https://www.businessinsider.com/comparing-wealth-of-each-founding-father-2020-6>.

36. *Foundations of American Government*, INDEP. HALL ASS’N, <https://www.ushistory.org/gov/2.asp> (last visited Oct. 7, 2020) (detailing various philosophers who influenced the founders of American government).

37. *See id.*; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 87 (Peter Laslett ed. 1988).

38. VIRGINIA DECLARATION OF RIGHTS sec. 1 (Va. 1776); *see also* Thomas Jefferson *Declaration of Independence: Right to Constitute a New Government*, LIBR. OF CONG., <https://www.loc.gov/exhibits/jefferson/jeffdec.html> (last visited Oct. 16, 2020).

39. U.S. CONST. amends. IV, V.

40. *Liberty, Equality, Fraternity*, MINISTRY OF EUR. & FOREIGN AFFS., <https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/symbols-of-the-republic/article/liberty-equality-fraternity> (last visited Oct. 7, 2020).

41. *Deutschlandlied*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Deutschlandlied> (last visited Oct. 7, 2020).

Despite the similarity of the phrases used in these countries, the historical experience of Germany with respect to property and labor rights differs greatly from that of the United States.⁴² But those historical experiences offer interesting insights as to how the United States can better protect rank-and-file workers from increasing income inequality and human rights abuses.

This paper will attempt to argue that anti-unionization efforts aided by weak U.S. labor laws run counter to fundamental human rights and that these laws as they stand are not able to overcome the deep roots of property protection in the United States. Section I will contextualize the labor movement's long and bloody struggle to achieve some semblance of fair rights in the workplace by discussing some seminal historical events. Section II will discuss the historical development and current inadequacies of U.S. labor law. Section III will discuss the development of labor law and the labor courts in Germany. Section IV will conclude with recommendations, in light of the German approach to labor law, as to how U.S. labor law can be improved.

I. HISTORY OF AMERICAN LABOR: VIOLENCE AND PROPERTY

Deadly clashes between labor and management in the late eighteenth and early nineteenth centuries give modern unionists and management a glimpse into the struggle many workers endured just to maintain their dignity in the workplace. In the fight for better working conditions, legal protections have ebbed and flowed, with the pendulum swinging back and forth, towards and away from workers. The era of union opposition lasting from 1790 to 1919 included efforts of early unions and federations, yet featured many deadly clashes and an unsympathetic court

42. *Compare Today in Labor History: Nazis Destroy Unions*, PEOPLE'S WORLD (May 2, 2014, 2:47 PM), <https://www.peoplesworld.org/article/today-in-labor-history-nazis-destroy-unions/> (detailing German history regarding the decline in unions in Germany during World War II), with *The Rise and Fall of Labor Unions in the U.S.*, WHO RULES AM., https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html (last visited Oct. 17, 2020) (providing a history of labor unions and property rights in the United States).

system.⁴³ Courts applied the Sherman Antitrust Act of 1890 (designed to break up monopolies) against employees seeking to combine, claiming their conduct negatively affected commerce.⁴⁴ The pendulum began to swing back towards workers in the era of union support from 1914 to 1945, with a series of Congressional acts that incrementally evened the balance of power between workers and their employers.⁴⁵ As legal protections strengthened, so too did the numbers of union membership, ushering in the era of relative union stabilization from 1947 to present.⁴⁶ In the last four decades, though union membership in the private sector has declined significantly,⁴⁷ the pendulum between labor and management has been relatively stable. However, as will be discussed in Section II, the recent Supreme Court ruling in *Janus v. American Federation of State, County, and Municipal Employees* may very well signify the beginning of the swing back towards favoring management rights and further weakening of unions.⁴⁸

A. *Early Strikes and Riots*

In the seventeenth and eighteenth centuries, when the earliest craft unions were formed, craftsmen sought to improve their conditions through a refusal to work.⁴⁹ This practice continued with the advent of trade, and later, with industrial

43. See CARRELL & HEAVRIN, *supra* note 34, at 58–59 (providing a chronology of the most significant and violent events in United States labor relations).

44. *Id.* at 57.

45. *Id.* at 59.

46. See *id.* at 59–60 (providing a chronology of union membership and union structure in the United States).

47. Eli Rosenberg, *Workers Are Fired Up. But Union Participation Is Still on the Decline, New Statistics Show*, THE WASH. POST (Jan. 23, 2020), <https://www.washingtonpost.com/business/2020/01/22/workers-are-fired-up-union-participation-is-still-decline-new-statistics-show/>.

48. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2460–63 (2018) (holding that public-sector agency-shop arrangements violate the First Amendment and *Abood* erred in concluding otherwise); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 224–37 (1977) (holding that the agency shop arrangement authorized by Michigan law did not violate the First and Fourteenth Amendments of the U.S. Constitution).

49. CARRELL & HEAVRIN, *supra* note 34, at 41.

unions.⁵⁰ When employees of powerful companies (and trusts) felt compelled to strike, the consequences were often severe.⁵¹ The Railway Strike of 1877 lasted less than twenty days, but more than 100 workers were killed and several hundred badly wounded.⁵² The Haymarket Square Riot took place in Chicago in 1886, when a peaceful protest turned deadly after a bomb exploded in a group of policemen, killing one, and caused the police to open fire into the crowd, resulting in at least eight deaths.⁵³

April 20, 1914 is a day in Colorado history that has been described as a day of infamy.⁵⁴ Known as the “Ludlow Massacre,” Colorado National Guardsmen set fire to a colony of striking miners.⁵⁵ Those who attempted to escape the burning camp were gunned down by the guardsmen.⁵⁶ At least sixty-six men, women, and children were killed in the attack and the riots that followed.⁵⁷ In the fall of 1919, another massacre took place in Elaine, Arkansas, this time centered on racial tensions.⁵⁸ It began on September 30 when a group of oppressed black sharecropper families gathered in a church to discuss union membership.⁵⁹ A band of white men shot into the church, and men inside the church returned fire, killing a white man.⁶⁰ Word spread that

50. See *id.* at 41–43 (detailing the history of U.S. unions).

51. See *id.* at 44–46 (describing the violent consequences of union strikes including over a hundred casualties between the Railway Strike of 1877 and the strike at Homestead, Pennsylvania).

52. *Id.* at 43–44.

53. *Haymarket Riot*, HIST. (Dec. 16, 2009), <https://www.history.com/topics/19th-century/haymarket-riot> (last updated May 1, 2020) (explaining seven officers and one civilian died in the gunfire exchange following a dynamite explosion).

54. Karin Larkin, *Uncovering Families: Historical Archeology and the Women and Children of the Southern Colorado Coal Camps*, COLO. HERITAGE, Mar.–Apr. 2014, at 22, 22.

55. Ben Mauk, *The Ludlow Massacre Still Matters*, THE NEW YORKER (Apr. 18, 2014), <https://www.newyorker.com/business/currency/the-ludlow-massacre-still-matters>.

56. *Id.*

57. *Id.*

58. Nan Elizabeth Woodruff, *The Forgotten History of America's Worst Racial Massacre*, N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/opinion/elaine-massacre-1919-arkansas.html>.

59. *Id.*

60. *Id.*

“blacks were attacking whites,” and the violence quickly escalated when federal troops and vigilantes hunted so-called “black insurgents.”⁶¹ Historians estimate 200 African Americans were killed during the week of violence.⁶²

Deadly incidents still occurred in the 1920s and 1930s, but, thankfully, the number of violent occurrences in the second half of the twentieth century declined dramatically.⁶³ That most certainly did not mean that employers, private and public, embraced unions. The dignity of many workers would continue to be trampled upon well into the twentieth century, often fueled by racial bigotry.⁶⁴ Perhaps the most poignant example occurred in Memphis, Tennessee.

During the Memphis Sanitation Worker Strike of 1968, garbage collectors carried signs simply stating, “I am a man!”⁶⁵ This reflected the sentiment of 1,300 black employees frustrated by the failure of Memphis to adequately respond to a long pattern of neglect and abuse.⁶⁶ The Mayor of Memphis refused to take dilapidated trucks out of service and pay overtime when some of the men were forced to work late-night shifts.⁶⁷ In February 1968, two garbage collectors were crushed to death when a garbage truck malfunctioned.⁶⁸ In response, supported by the American

61. *Id.*

62. *Id.*

63. See *Labor Wars in the U.S.*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/> (last visited Oct. 6, 2020) (showing twenty-five major violent incidents in the first half of the twentieth century and only five in the second half of the twentieth century through a listing of violent incidents related to labor disputes from 1874 to 1989).

64. See James Gilbert Cassedy, *African Americans and the American Labor Movement*, 29 PROLOGUE MAG., Summer 1997, <https://www.archives.gov/publications/prologue/1997/summer/american-labor-movement.html>. Racial bigotry was also certainly perpetrated by union members, as is evidenced in part by the fact that despite a shared interest in trade union organization with white workers, those unions organized by white workers generally excluded black workers, thus forcing black workers to organize their own trade unions. *Id.*

65. Steve Estes, “*I Am a Man!*”: *Race, Masculinity, and the 1968 Memphis Sanitation Strike*, 41 LAB. HIST., 153, 153 (May 2000).

66. *Memphis Sanitation Workers’ Strike*, THE MARTIN LUTHER KING, JR. RES. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/memphis-sanitation-workers-strike> (last visited Sept. 27, 2020).

67. *Id.*

68. *Id.*

Federation of State, County, and Municipal Employees ("AFSCME"), more than 700 men unanimously decided to strike.⁶⁹ The strike became a civil rights issue when Rev. Martin Luther King, Jr. joined in on the marches and demonstrations.⁷⁰ On April 3, 1968, as the strike continued, Rev. King delivered his famous "I've been to the mountaintop" speech in support of the striking sanitation workers:

The issue is injustice. The issue is the refusal of Memphis to be fair and honest in its dealings with its public servants, who happen to be sanitation workers. . . .

. . . .

. . . We've got some difficult days ahead. But it doesn't matter with me now. Because I've been to the mountaintop. And I don't mind. Like anybody, I would like to live a long life. Longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over. And I've seen the promised land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the promised land. And I'm happy, tonight. I'm not worried about anything. I'm not fearing any man. Mine eyes have seen the glory of the coming of the Lord.⁷¹

Rev. Martin Luther King was shot the next day in Memphis, Tennessee.⁷² The strike ended eight days later with a settlement between the city and the union that included recognition of the

69. See *id.* (noting that AFSCME chartered the union four years prior and more immediate support came from the NAACP, passing a resolution supporting the strike).

70. See *id.* (discussing the largest indoor gathering a civil rights movement had ever seen in the context of the strike "demonstrating that we can stick together," and encouraging a city-wide work stoppage in support of the sanitation strike).

71. CARRELL & HEAVRIN, *supra* note 34, at 81. See Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968), in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF MARTIN LUTHER KING, JR. 207, 210, 222 (Clayborne Carson & Kris Shepard eds., 2001).

72. *Assassination of Martin Luther King, Jr.*, THE MARTIN LUTHER KING, JR. RES. & EDUC. INST., <https://kinginstitute.stanGM.edu/encyclopedia/assassination-martin-luther-king-jr> (last visited Sept. 27, 2020).

AFSCME and a wage increase.⁷³ These events transcend academics, and Rev. Martin Luther King, Jr.'s assassination in particular, left an indelible mark on history that must not be forgotten when thinking about labor in the present and in the future.

B. *Criminal Corruption*

Though unions are not businesses, they, as organizations, also must act ethically, especially when shifting social expectations and financial conservatism threaten their future.⁷⁴ Purveyors of union history can find little to doubt about the role unions played in fulfilling a social function of great importance by providing an outlet for workers to band together in the struggle over capitalist greed.⁷⁵ However, perceptions of unions have changed as their necessity, power, and standing have dwindled for the last several decades.⁷⁶ Perhaps due in part to employer messaging and actions towards unions, private sector union membership is at an all-time low of 6.2%, down from 16.8% in 1983.⁷⁷ The lone bright spot for unions is that membership in the public sector has remained fairly steady since the 1980s and currently sits at 33.6%.⁷⁸

As in any large organization, corruption is a problem that can significantly impact public opinion, and unions are no exception.⁷⁹

73. CARRELL & HEAVRIN, *supra* note 34, at 81.

74. Gregory Unruh, *What Labor Unions Can Learn from Corporate CSR*, FORBES (Mar. 2, 2011, 4:11 PM), <https://www.forbes.com/sites/csr/2011/03/02/what-labor-unions-can-learn-from-corporate-csr/#7d013a1c1990> (comparing labor unions with corporations and responsible citizenship).

75. *Id.*

76. *See id.* (discussing the relevance of modern unions as unclear for many people in society today, because the unions do not articulate the benefits provided to the society whose support they need to gain).

77. Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU OF LAB. STAT. (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf>; *Union Members Summary*, U.S. BUREAU OF LAB. STAT. (Jan. 18, 2019, 10:00 AM), <https://www.bls.gov/news.release/union2.nr0.html>.

78. Dunn & Walker, *supra* note 77 (graphing public sector union membership rates from 1983 to 2015); *Union Members Summary*, *supra* note 77.

79. *See James R. "Jimmy" Hoffa*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/rfk-james-r-jimmy-hoffa/> (last

Union corruption has plagued unions for decades.⁸⁰ Jimmy Hoffa of the International Brotherhood of Teamsters is perhaps the most famous corrupt union boss of them all.⁸¹ His ties with the mafia became public in the 1950s in a clash with then Senate Attorney Robert Kennedy during a series of Senate committee hearings, known as the McClellan Hearings.⁸² Those amounted to little more than headlines, at least with respect to Hoffa.⁸³ The hearings in 1957 set the stage for Congress passing the Landrum-Griffin Act to regulate the internal affairs of unions, “address[ing] gaps in both the Wagner Act and the Taft-Hartley Act.”⁸⁴ Hoffa avoided prison until 1967 when he was found guilty and sentenced to thirteen years for jury tampering, fraud, and conspiracy.⁸⁵ Hoffa disappeared in 1975 after a supposed meeting with a pair of mobsters.⁸⁶ Though many have speculated about his whereabouts, no trace of Hoffa has been ever found.⁸⁷

More recently, other union officials have been found to have engaged in criminal activities.⁸⁸ As part of a wide union

visited Sept. 28, 2020) (discussing the story of Hoffa’s corruption charges and subsequent investigations “open[ing] the eyes of many Americans” and producing extensive press coverage).

80. See *id.* (discussing the story of “Jimmy” Hoffa, a story dating back over six decades that begins in the 1950s and “ends” in 1975).

81. See *id.* (mentioning Hoffa as “one of the most controversial characters in the history of organized labor”).

82. See *id.* (connecting Kennedy’s hunt for labor bosses doing business with criminal organizations to Hoffa’s long-rumored association with organized crime figures, the Mafia being the only criminal organization listed, around 1955); see also Gordon Skene, *March 27, 1957 – The McClellan Hearings – RFK vs. The Teamsters*, PAST DAILY (Mar. 27, 2020), <https://pastdaily.com/2020/03/27/march-27-1957-the-mcclellan-hearings-rfk-vs-the-teamsters/> (indicating the series of hearings involving the investigation into Teamsters Union corruption are known as “The McClellan Hearings”).

83. James R. “Jimmy” Hoffa, *supra* note 79.

84. See *1959 Landrum-Griffin Act*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1959-landrum-griffin-act> (last visited May 21, 2021).

85. James R. “Jimmy” Hoffa, *supra* note 79.

86. Don Gonyea, *#TBT: 40 Years After Jimmy Hoffa’s Disappearance, His Legend Lives On*, NPR (July 30, 2015, 3:02 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/30/427773947-tbt-union-man-jimmy-hoffa-is-still-gone-but-the-legend-lives-on>.

87. *Id.*

88. See generally Associated Press, *11th Person Charged in UAW Corruption Investigation*, MICH. RADIO (Sept. 20, 2019), <https://www.michiganradio.org/post/11th-person-charged-uaw-corruption-investigation>.

corruption probe, which broke open in 2017, federal prosecutors have charged eleven former United Auto Workers (“UAW”) officials.⁸⁹ The most recent official charged, Jeff Pietrzyk, served as a senior union official who worked closely with the now-retired UAW vice president.⁹⁰ Pietrzyk is charged with conspiracy, accused of accepting \$70,000 from a chiropractor who was paid millions of dollars to make watches for GM employees.⁹¹ UAW Regional Director Vance Pearson was also charged for embezzling union money, wire fraud, and money laundering.⁹² These charges and the widespread investigation came at a bad time for the UAW as a whole when new contract negotiations had either already happened or were imminent.⁹³ On October 22, 2019, as UAW members were considering acceptance or rejection of the new negotiated contract with General Motors (“GM”), Jeff Pietrzyk pled guilty to conspiracy to commit wire fraud and laundering of money instruments.⁹⁴ Amid the corruption probe, the UAW president decided to take a leave of absence.⁹⁵

C. *Modern Strikes and Ethics*

Most Americans, including businesspeople, agree that “a bedrock moral principle is the Golden Rule: ‘Do unto others as you will have them do unto you.’”⁹⁶ This can also mean “that so long as you let [people] treat you in an immoral way,” then according to the rule, “you are allowed to treat them [in an immoral way] as

89. *Id.*; Eric Lawrence & Jamie LaReau, *UAW Official Who Is Charged in Corruption Probe Placed on Leave*, USA TODAY (Oct. 5, 2019, 8:57 PM), <https://www.usatoday.com/story/money/cars/2019/10/05/vance-pearson-uaw-official-charged-corruption-probe-put-leave/3886271002/>.

90. Associated Press, *supra* note 88.

91. *Id.*

92. Lawrence & LaReau, *supra* note 89.

93. *Id.*

94. Gus Burns, *‘I Am Guilty,’ Retired UAW Official Tells Federal Judge in Corruption Case*, MLIVE (Oct. 22, 2019), <https://www.mlive.com/news/ann-arbor/2019/10/i-am-guilty-retired-uaw-official-tells-federal-judge-in-corruption-case.html>.

95. Amy Russo, *United Auto Workers President to Step Aside Amid Escalating Corruption Probe*, HUFFPOST (Nov. 2, 2019), <https://www.yahoo.com/news/united-auto-workers-president-gary-jones-leave-of-absence-corruption-probe.html>.

96. BOWIE, *supra* note 8, at 7.

well.”⁹⁷ While that is certainly not the intended purpose of the rule, modern humans do find ways to distort rules to exploit others when motivated by self-interests.

Based on 2017 sales figures, Walmart (\$374.80 billion), Kroger (\$115.89 billion), and Amazon (\$102.96 billion) are the largest retailers in the United States.⁹⁸ Of these retail giants, only Kroger has a majority of unionized employees, most of whom are represented by the United Food and Commercial Workers (“UCFW”) union.⁹⁹ Even though Kroger has recognized the union representation of some Kroger employees, within the framework of the NLRA, Kroger bargains in good faith with the union.¹⁰⁰ Bargaining in good faith with the union is essentially all the NLRA requires that employers do when a union is recognized.¹⁰¹ The NLRA does not require that employers meet the demands of the union nor do what is best for the union members, only that the employer negotiate with that union for one year.¹⁰² After the year, another union can attempt to win representation.¹⁰³

In May 2016, unionized Kroger employees in Virginia unanimously rejected a “last best offer” from Kroger and voted to

97. *Id.*

98. *Top 100 Retailers 2018*, NAT’L RETAIL FED’N, <https://nrf.com/resources/top-retailers/top-100-retailers/top-100-retailers-2018> (last visited Oct. 14, 2020).

99. *The Majority of America’s Favorite Grocery Chains Are (Mostly) Non-Union*, LAB. UNION REP. (Apr. 23, 2019), <https://laborunionreport.com/2019/04/23/eight-of-the-top-10-favorite-grocery-chain-are-non-union/>.

100. See Amanda Kenney, *Kroger Union Employees Reject Company’s Offer, Vote to Authorize Strike*, WDBJ (May 18, 2016, 8:52 AM), <https://www.wdbj7.com/content/news/Union-employees-with-Kroger-sign-temporary-extension-379943991.html#:~:text=Kroger%20union%20employees%20voted%20Wednesday,voted%20to%20authorize%20the%20strike> (meeting with the union shows Kroger recognizes the union representation of some of its employees); *Bargaining in Good Faith with Employees’ Union Representative*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative> (last visited Oct. 4, 2020).

101. *Bargaining in Good Faith with Employees’ Union Representative*, *supra* note 100.

102. CONG. RSCH. SERV., RL32930, THE NATIONAL LABOR RELATIONS ACT (NLRA): UNION REPRESENTATION PROCEDURES AND DISPUTE RESOLUTION 16 (2013), https://www.everycrsreport.com/files/20131211_RL32930_8afe6a7c4b28d164037032bed5fad4c14a6ce67f.pdf.

103. *Id.*

strike.¹⁰⁴ One member of the union's bargaining team saw Kroger's offer as a "slap in the face" because "Kroger is more successful than ever before. They just gave the CEO a seventeen percent raise. But they told us, the people who make that success possible in the first place, that all they could afford was a quarter."¹⁰⁵ Several weeks later, the union and Kroger reached an agreement to avoid the strike.¹⁰⁶ Numerous examples, such as Kroger and GM, illustrate that each side's wants in a collective bargaining negotiation can greatly differ.

1. *Historic GM Strike*

In September 2019, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") began a historically long strike after contract negotiations with General Motors ("GM") failed.¹⁰⁷ The UAW continuously pushed for GM to address issues with respect to the inability of "temporary" workers to be classified as full-time permanent.¹⁰⁸ Temporary workers, often with temporary status for years, earn forty percent less than their co-workers and get miniature versions of health insurance and paid vacations.¹⁰⁹ This has been a major sticking point for the union.¹¹⁰ Another major issue has been the union's push for GM to relocate production from some of its plants in Mexico to the shuttered

104. Kenney, *supra* note 100.

105. *Id.*

106. *Union Employees Accept Kroger's Contract, Avoid Strike*, WSLs 10 (June 8, 2016, 1:28 PM), <https://www.wsls.com/news/2016/06/08/union-employees-accept-krogers-contract-avoid-strike/>.

107. *UAW Workers Walk Off the Job at General Motors, National Strike Underway Against the Automaker*, WXYZ DET. (Sept. 16, 2019, 7:30 PM), <https://www.wxyz.com/news/uaw-moves-to-strike-following-months-long-contract-negotiations>.

108. Gabrielle Coppola, *GM Factory Hands Making 40% Less Than Their Co-Workers are Fed Up*, BLOOMBERG (Oct. 10, 2019, 6:00 AM), <https://www.bloomberg.com/news/articles/2019-10-10/gm-factory-hands-making-40-less-than-co-workers-are-fed-up>.

109. *Id.*

110. *Id.*

plants in Michigan and Ohio.¹¹¹ Since November 2018, GM has laid off more than 14,000 workers as part of its effort to make GM “lean and agile.”¹¹²

The strike began on September 16, 2019, and GM and the UAW reached a tentative agreement thirty days later.¹¹³ The strike continued until the UAW members voted to approve the agreement and ended up costing GM \$100 million in lost earnings before interest and taxes, per day, according to Bank of America estimates.¹¹⁴ Through the first four weeks of the strike, GM lost nearly \$2 billion, and workers were compensated \$250–275 per week by the UAW.¹¹⁵ The forty-day strike finally ended on October 25, when fifty-seven percent of the 41,000 (out of 48,000) UAW members employed with GM voted to ratify the agreement.¹¹⁶ The final agreement contained an economic package including \$11,000 signing bonuses, performance bonuses, two three percent annual raises, two four percent lump-

111. Chris Isidore & Vanessa Yurkevich, *GM's Mexican Factories – Why Ending the UAW Strike Will Be So Hard*, CNN BUS. (Oct. 9, 2019, 5:45 PM), <https://www.cnn.com/2019/10/09/business/uaw-gm-plant/index.html>.

112. Paul Eisenstein, *General Motors to Begin First Round of Layoffs on Monday, Airing 4,000 Workers*, NBC NEWS (Feb. 4, 2019, 9:33 AM), <https://www.nbcnews.com/business/autos/general-motors-begin-first-round-layoffs-monday-airing-4-000-n966571>.

113. Colin Dwyer & Barbara Campbell, *The Strike Is Over: UAW Members Ratify Deal with General Motors*, NPR (Oct. 25, 2019, 5:42 PM), <https://www.npr.org/2019/10/25/773427051/the-strike-is-over-uaw-members-ratify-deal-with-general-motors> (noting that the tentative deal between the UAW and GM was ratified forty days after the strike began); Kevin Dugan, *General Motors, UAW Reach Key Agreement on Temp Workers*, N.Y. POST (Oct. 15, 2019, 12:27 PM), <https://nypost.com/2019/10/15/general-motors-uaw-reach-key-agreement-on-temp-workers/> (noting that the UAW and GM reached a tentative deal thirty days after the strike began).

114. Michael Sheetz, *UAW Strike Has Now Cost \$2 billion, Could 'Bring GM to Its Knees,' Bank of America Says*, CNBC (Oct. 15, 2019, 7:38 AM), <https://www.cnbc.com/2019/10/15/bank-of-america-uaw-strike-cost-2-billion-could-bring-gm-to-its-knees.html>.

115. *Id.*; *FAQ On Strikes and UAW Strike Assistance*, UAW, <https://uaw.org/strike-faq/> (last visited Oct. 15, 2020).

116. Michael Wayland, *UAW Members Approve Labor Deal to End Strike With GM; Union Selects Ford Next*, CNBC (Oct. 25, 2019, 5:35 PM), <https://www.cnbc.com/2019/10/25/uaw-members-approve-new-labor-contract-with-gm-ending-40-day-strike.html>.

sum payments, and no change to the health care plan.¹¹⁷ In reaching that deal, the UAW capitulated to GM closing the three plants in Michigan and Ohio.¹¹⁸ The agreement reached between the UAW and GM acted as a template for the UAW's imminent negotiations with the other large automobile manufacturers, Ford and Chrysler.¹¹⁹

2. *Chicago Teacher's Union*

In October 2019, a strike by teachers of the nation's third-largest school district represented by the Chicago Teacher's Union ("CTU") resulted in canceled classes for several weeks.¹²⁰ The striking teachers protested en masse on classroom overcrowding, understaffing, reduction in class preparation time, and low pay.¹²¹ Under the last deal from 2012, teachers surrendered thirty minutes of class preparation time and sought to recover this preparation time under the new contract.¹²² Though the process of collective bargaining provides the ability to figure out what works and what does not, then change it or not, in the case of teachers' strikes, the inability of the City of Chicago and the CTU to agree before and during the collective bargaining process means that students ultimately suffer. Strikes among Chicago teachers are not uncommon.¹²³ Both the City of Chicago

117. Dwyer & Campbell, *supra* note 113.

118. *Id.*

119. Ian Thibodeau, *UAW-GM Tentative Agreement Lays Pattern for Ford, FCA*, THE DET. NEWS (Oct. 17, 2019, 5:09 PM), <https://www.detroitnews.com/story/business/autos/general-motors/2019/10/16/gm-strike-uaw-tentative-agreement-update-settlement-deal/3991088002/>.

120. Mitch Smith & Monica Davey, *Chicago Teacher's Strike, Longest in Decades, Ends*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/us/chicago-cps-teachers-strike.html>.

121. *Id.*

122. Jessica Villagomez et al., *CPS Strike: Chicago Teachers Union Delegates Have Tentative Agreement on Contract, but Strike Continues over Impasse with City on Makeup Days; Classes Canceled Thursday*, CHI. TRIB. (Oct. 30, 2019, 11:03 PM), <https://www.chicagotribune.com/news/breaking/ct-cps-strike-chicago-teachers-union-updates-20191030-3dr2htrfgfbk5l74nt3h4sgfhq-story.html>.

123. *See id.*

and the CTU fail the district's 300,000 students¹²⁴ when an impasse is reached.

3. "Save Money, Live Better"

Walmart is one of the largest retailers in the United States and is, as of 2020, the largest employer in the United States with 1.5 million employees.¹²⁵ Walmart President and CEO Doug McMillon echoes the notion cultivated by Corporate Social Responsibility that "it's important to run our business in a way that generates lasting value for our customers, our associates, our shareholders and for society more broadly."¹²⁶ According to their inaugural Environmental, Social & Governance Report that highlights the company's progress in climate change, sustainability, and economic opportunity for employees and communities, the average wage for full-time hourly workers is \$14.26 per hour.¹²⁷ While \$15 per hour is considered a living wage depending on the area of the country,¹²⁸ the nearly living wage as reported by Walmart is misleading. According to a report written by the Organization United for Respect and the Center for Popular Democracy, more than 500,000 of Walmart's employees are part-time, either voluntarily or involuntarily.¹²⁹ Since 2005, the percentage of part-time employees has increased by twenty percent, all the while claiming to invest in their "associates through wages along with better educational opportunities,

124. Smith & Davey, *supra* note 120.

125. Evie Fordham, *What Company Is the Largest Employer in the US?*, FOXBUSINESS (June 19, 2020), <https://www.foxbusiness.com/money/walmart-jobs-united-states-hiring>.

126. Kelly Tyko, *Walmart Managers Take Home an Average of \$175,000 a Year. How Much do Their Workers Make?*, USA TODAY (May 8, 2019, 10:40 PM), <https://www.usatoday.com/story/money/2019/05/08/walmart-wages-what-do-walmart-managers-and-hourly-workers-make/1147546001/>; James Chen, *Corporate Social Responsibility (CSR)*, INVESTOPEDIA (Sept. 17, 2020), <https://www.investopedia.com/terms/c/corp-social-responsibility.asp>.

127. Tyko, *supra* note 126.

128. Drew Desilver, *The Real Value of a \$15 Minimum Wage Depends on Where You Live*, PEW RSCH. CTR. (Oct. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/10/10/the-real-value-of-a-15-minimum-wage-depends-on-where-you-live/>.

129. NIKKI THANOS & MAGGIE CORSER, TRAPPED IN PART-TIME: WALMART'S PHANTOM LADDER OF OPPORTUNITY 1 (Eddie Iny et al. eds.).

benefits and training.”¹³⁰ Raising wages but cutting hours is a common practice among retail giants.¹³¹ Target pledged in 2017 to raise its minimum wage to \$15 per hour by the end of 2020.¹³² While doing so, some current and former employees have reported that Target scaled back hours as wages rose.¹³³ For Target, as is with most retail stores, employees who work under thirty hours per week are not eligible for health insurance,¹³⁴ thus offsetting any real benefit gained by the increase in hourly wages.

Over the years, Walmart employees have contacted various unions in attempts to win recognition, but those efforts have continuously been thwarted.¹³⁵ Walmart has been anti-union from the very beginning. Founder Sam Walton wrote in his 1962 autobiography: “Theoretically I understand the argument that unions try to make, that the associates need someone to represent them and so on. But historically, as unions have developed in this country, they have mostly just been divisive.”¹³⁶ Despite best interests in avoiding divisiveness, operating union-free is essential to their business of rock-bottom prices.¹³⁷ If the trusts

130. Tyko, *supra* note 126; see Nandita Bose, *Half of Walmart's Workforce Are Part-Time Workers: Labor Group*, REUTERS (May 25, 2018, 10:16 AM), <https://www.reuters.com/article/us-walmart-workers/half-of-walmarts-workforce-are-part-time-workers-labor-group-idUSKCN1IQ295> (showing that Walmart's percentage of part-time workers rose thirty percent from 2005; therefore, Walmart's percentage of full-time workers decreased by thirty percent from 2005).

131. Hillary George-Parkin, *Why a Higher Minimum Wage Doesn't Always Equal a Bigger Paycheck for Retail Workers*, FOOTWEAR NEWS (June 24, 2019, 2:02 PM), <https://footwearnews.com/2019/business/retail/retail-pay-raises-minimum-wage-layoffs-reduced-hours-1202795605/> (discussing recent Amazon and Wal-Mart wage increases that corresponded with cutting hours in many cases).

132. Nathaniel Meyersohn, *Target Raised Wages. But Some Workers Say Their Hours Were Cut, Leaving Them Struggling*, CNN (Oct. 14, 2019, 2:15 PM), <https://www.cnn.com/2019/10/14/business/target-cutting-hours-wage-increase/index.html>.

133. *Id.*

134. *Id.*

135. See generally *Discounting Rights: Wal-Mart's Violation of U.S. Workers' Right to Freedom of Association*, HUM. RTS. WATCH (May 2007) [hereinafter *Discounting Rights*], at 114, <https://www.hrw.org/sites/default/files/reports/us0507webwcover.pdf> (describing Wal-Mart's long history of anti-union tactics).

136. Susan Berfield, *How Walmart Keeps an Eye on Its Massive Workforce*, BLOOMBERG (Nov. 24, 2015), <https://www.bloomberg.com/features/2015-walmart-union-surveillance/>.

137. *Id.*

and monopolies of the late nineteenth century are any indication, corporations do not typically grow to be the largest in their industry by being equitable to their employees.¹³⁸ Walmart's 2019 Environmental, Social & Governance Report reiterates their official position on the freedom of association of employees:

Consistent with applicable law and practice, Walmart respects the rights of associates to join, form or not to join an employee association or trade union of their choice without interference. Associates should exercise these rights in an informed manner, and with the benefit of thoughtful consideration and available information. In the exercise of these rights, we believe in the free exchange of ideas, opinions and information, provided there is no interference.¹³⁹

Walmart is certainly well within their rights to communicate its stance about unions and it has done so in numerous union-specific training documents and videos.¹⁴⁰ In 2015, an internal Walmart new hire training video was leaked on the Internet and showed they are one of the nation's most aggressive anti-union companies.¹⁴¹ The video shown to new hires in 2009, authenticated by Walmart, featured actors dressed as Walmart employees making numerous patently false claims and mischaracterizations, including, "There's no retail company that offers more advancement and job security than Walmart."¹⁴² Given that retail workers who are represented by a union cannot

138. See, e.g., Christopher Klein, *Andrew Carnegie Claimed to Support Unions, But Then Destroyed Them in His Steel Empire*, HIST. (July 29, 2019), <https://www.history.com/news/andrew-carnegie-unions-homestead-strike> (explaining Andrew Carnegie's rise to monopolistic power in the steel industry, which he achieved through controlling the labor force and keeping wages low).

139. WALMART, 2019 ENVIRONMENTAL, SOCIAL & GOVERNANCE REPORT 51 (2019), https://corporate.walmart.com/media-library/document/2019-environmental-social-governance-report/_proxyDocument?id=0000016a-9485-d766-abfb-fd8d84300000.

140. Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, THE ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/how-walmart-convines-its-employees-not-to-unionize/395051/>.

141. *Id.*

142. *Id.*

be fired or disciplined except “for cause” means that they in fact have more job security than Walmart employees who can be fired “at-will.”¹⁴³ Another actor in the training video says, “I was a union member at my last job. Everyone actually had to join the union . . . The thing I remember most about the union is that they took dues money out of my paycheck before I ever saw it, just like taxes.”¹⁴⁴ As will be described below, this type of propaganda is exactly what the International Labor Organization (“ILO”) prohibits,¹⁴⁵ while American labor law allows.¹⁴⁶ Whether or not the actor was correct in saying that he had to join the union and pay dues will be discussed further in Section II.

II. DEVELOPMENT AND SHORTCOMINGS OF U.S. LABOR LAW

During the infancy of the United States, agriculture served as the primary source of employment and economic prosperity.¹⁴⁷ Craftspeople produced goods in other trades, but these were relatively few, and masters of their trades produced the goods primarily for local use.¹⁴⁸ As the population grew along with the need for more goods that could be made faster and cheaper, a clearer distinction between employer and employee began to take shape.¹⁴⁹ The division between employer and employee grew significantly wider as the United States transformed into an industrial economy.¹⁵⁰ This era created a new comfortable middle class and wealthy entrepreneurs.¹⁵¹ Meanwhile, the bargaining

143. *Id.*

144. *Id.*

145. *Discounting Rights*, *supra* note 135, at 3.

146. *Id.*

147. CARRELL & HEVRIN, *supra* note 34, at 55.

148. *Id.*

149. *Id.*

150. *Id.* at 41–42.

151. *Childhood Lost: Child Labor During the Industrial Revolution*, E. ILL. U. 5 [hereinafter *Childhood Lost*], <https://www.eiu.edu/eiutps/Childhood%20Lost%20Resource%20Booklet.pdf> (last visited Oct. 14, 2020).

power of the individual became insufficient to match the power of their employers.¹⁵²

The newfound mechanized industries tapped into millions of unskilled immigrants and children who then made up the workforce of cheap labor at the mercy of cruel factory bosses that cared little about the working conditions.¹⁵³ These immigrant and rural families came to cities dreaming of a better life, but were greatly disappointed when the only jobs available paid very little and required working ten to fourteen hours per day, six to seven days a week.¹⁵⁴ As a result of their small stature, children could get into places at work that adults could not, which often led to injuries and death.¹⁵⁵ Children, some as young as three years old, endured some of the harshest conditions including exposure to fumes and toxins, resulting in chronic illness if not death.¹⁵⁶

Muckraking journalists like Upton Sinclair attempted to shine light on the plight of the immigrant workers and children.¹⁵⁷ In 1904, Sinclair traveled to Chicago with the support of the left-wing political newspaper, *Appeal to Reason*, intending to write a book about the workers of the “beef trust,” a group of large meat-packing companies that engaged in monopolistic and exploitive practices.¹⁵⁸ Sinclair spent seven months filling notebooks of his observations gathered from “wandering through the stockyards and slaughterhouses” and listening to workers’ stories in their homes.¹⁵⁹ *The Jungle* describes in great detail the deplorable working conditions, injuries suffered by the workers, squalid

152. Scott Michael Rank, *Industrial Revolution Working Conditions*, HIST. ON THE NET, <https://www.historyonthenet.com/industrial-revolution-working-conditions> (last visited Oct. 16, 2020).

153. See *id.* (describing the brutal and unsafe working conditions that workers faced, as well as managers’ lack of concern for their health and well-being); *Childhood Lost*, *supra* note 151.

154. *Childhood Lost*, *supra* note 151; Rank, *supra* note 152.

155. *Childhood Lost*, *supra* note 151.

156. *Id.*

157. Upton Sinclair’s *The Jungle: Muckraking the Meat-Packing Industry*, CONST. RTS. FOUND., Spring 2008, at 6, 6 [hereinafter *Upton Sinclair’s The Jungle*], https://www.crf-usa.org/images/pdf/members/bria24_1.pdf.

158. *Id.* at 7.

159. *I Aimed for the Public’s Heart, and...Hit in the Stomach*, CHI. TRIB. (May 21, 2006) [hereinafter *I Aimed*], <https://www.chicagotribune.com/news/ct-xpm-2006-05-21-0605210414-story.html>.

housing, political corruption, sexual harassment, and the ruthlessness of employers.¹⁶⁰ The book became a best seller.¹⁶¹ Despite the vivid descriptions of the plight of the immigrant workers that filled the book, American readers were more outraged by the sausage made from dead rats, rancid meat laced with chemicals and organ meat, goat meat sold as lamb, and a killed worker turned into lard.¹⁶²

After reading the book, President Theodore Roosevelt ordered two investigations to assess Sinclair's accuracy.¹⁶³ The investigations did confirm the accuracy of Sinclair's account.¹⁶⁴ Four months after the publication, Congress passed the Pure Food and Drugs Act and the Meat Inspection Act.¹⁶⁵ Rather than writing the book to improve the quality of meat, Sinclair wrote it help the workers.¹⁶⁶ He later lamented that, "I aimed for the public's heart and by accident hit it in the stomach."¹⁶⁷

The enormous impact of a single book in spurring social and legal change is a rarity. Social movements often take years or decades to make an impact.¹⁶⁸ The labor movement struggled for decades to obtain favorable federal legislation.¹⁶⁹ Similarly, the civil rights movement rose to national prominence in the mid-1950s and continued to fight discrimination and racial segregation well after the passage of the Civil Rights Act of 1964.¹⁷⁰

160. *Id.*

161. *Id.*

162. Upton Sinclair's *The Jungle*, *supra* note 157, at 8.

163. *I Aimed*, *supra* note 159.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Sarina Dayal, *How Change Happens: Why Some Social Movements Succeed While Others Don't*, PHILANTHROPY NEWS DIG. (July 24, 2018), <https://philanthropynewsdigest.org/off-the-shelf/how-change-happens-why-some-social-movements-succeed-while-others-don-t>.

169. *Timeline of the American Civil Rights Movement*, ENCYC. BRITANNICA, <https://www.britannica.com/list/timeline-of-the-american-civil-rights-movement> (last visited Oct. 15, 2020).

170. *Id.*

1. Early Judicial Action

Workers' efforts to combine and challenge their employers for better working conditions were met not only with fierce violent resistance, but also with a court system sympathetic to employers.¹⁷¹ The courts held that when two or more workers combined in an attempt to unionize, the workers committed an illegal act of conspiracy.¹⁷² The Cordwainers Conspiracy cases were a series of cases in which courts found legal precedents in common law for protecting employer property rights over the job rights of employees.¹⁷³ In *Commonwealth v. Pullis*, a Pennsylvania case decided in 1806, eight journeyman cordwainers were tried for the common law crime of "conspiracy to raise their wages."¹⁷⁴ The court believed that the law dictated a condemnation of any combinations in question as they were formed to raise wages in order to benefit themselves and to injure others who did not join them.¹⁷⁵ Three years later, in *People v. Melvin*, a New York court held that merely combining was not illegal, but denounced using a combination to strike since it deprived employers of their rights and property.¹⁷⁶ The apparent small victory for labor was short lived, however, when the economic depression caused by the War of 1812 and the threat of conspiracy charges for merely combining to improve working conditions practically destroyed the labor movement.¹⁷⁷ After prosperity returned, workers were in a better position to bargain and skilled workers began combining once again.¹⁷⁸ Then, in a series of cases throughout the 1820s, courts began questioning the means by which workers attempted to force employers to meet

171. CARRELL & HEAVRIN, *supra* note 34, at 55.

172. *Id.*

173. *Id.*

174. See Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 168 (1931); *Commonwealth v. Pullis* (Philadelphia Cordwainer's Case) (Phila. Mayor's Ct. 1806), 3 DOCUMENTARY HIST. AM. INDUS. SOC'Y 59 (Commons & Gilmore eds. 2d ed. 1910). Cordwainers are shoemakers that make new shoes out of new leather, as opposed to cobblers, that repair shoes. Ian M.G. Quimby, *The Cordwainer's Protest a Crisis in Labor Relations*, 3 WINTERTHUR PORTFOLIO 83, 83 (1967).

175. *Pullis*, *supra* note 174.

176. CARRELL & HEAVRIN, *supra* note 34, at 56.

177. *Id.*

178. *Id.*

their demands.¹⁷⁹ Once again, an economic downturn weakened the power of the labor movement before they were able to rally from the legal attacks.¹⁸⁰

With the advent of the American factory system and monopolies built on the ruthless exploitation of its workers by “robber barons” like Andrew Carnegie, Edward Harriman, John D. Rockefeller, and J.P. Morgan, public opinion of the labor movement somewhat softened at the plight of the average worker.¹⁸¹ Courts moved away from finding workers guilty of criminal conspiracy, and in the 1842 case of *Commonwealth v. Hunt*, the Supreme Judicial Court of Massachusetts further narrowed the conspiracy doctrine.¹⁸² The abandonment of criminal conspiracy by the courts did not signal acceptance of unions.¹⁸³ Instead, it signaled quite the opposite, as the courts’ attitudes became more hostile towards union organizations.¹⁸⁴

2. Early Legislative Acts

The concentration of economic power in certain entities prior to the Civil War was not considered a public problem that warranted federal legislation.¹⁸⁵ However, the Industrial Revolution period between the Civil War and 1890 saw extraordinary economic expansion in the form of trusts and pools, and towards the end of the nineteenth century, public opinion turned against the powerful and ruthless trusts.¹⁸⁶ Echoing that current state of corporations, President Grover Cleveland cautioned, “Corporations, which should be the carefully

179. *Id.*

180. *Id.*

181. Gus Lubin et al., *Meet the 24 Robber Barons Who Once Ruled America*, BUS. INSIDER (Mar. 20, 2012, 11:56 AM) <https://www.businessinsider.com/americas-robber-barons-2012-3>; CARRELL & HEVRIN, *supra* note 34, at 56.

182. *Commonwealth v. Hunt*, 45 Mass. 111 (Mass. 1842); CARRELL & HEVRIN, *supra* note 34, at 56.

183. CARRELL & HEVRIN, *supra* note 34, at 56.

184. *Id.*

185. Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor’s Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 152–153 (1988).

186. *Id.* at 153.

restrained creatures of the law and the servants of the people, are fast becoming the people's masters."¹⁸⁷

The passage of the Sherman Antitrust Act of 1890 ("Sherman Act") reflected the change of public sentiment by declaring "unlawful trusts and combinations in the restraint of trade and production."¹⁸⁸ While the legislative intent of the Sherman Act to curtail anticompetitive acts was clear, the application to labor unions was less clear, as the Act itself did not expressly exempt labor unions.¹⁸⁹ The legislative history suggests that Congress did not intend the Sherman Act to restrict legitimate union activities.¹⁹⁰ Nevertheless, courts applied the Sherman Act to restrain unions on the grounds that Congress rejected the inclusion of a union exemption in the Act.¹⁹¹ In case after case, courts concluded that union activity interfered with the commercial product market under the scope of the Sherman Act.¹⁹² In 1914, Congress passed the Clayton Act that sought to reverse the courts' application of the Sherman Act to unions.¹⁹³ Specifically, the Clayton Act contained two sections that expressly carved out a labor exemption.¹⁹⁴

As an alternative to the conspiracy doctrine, courts began using injunctions to end strikes.¹⁹⁵ In 1932, Senator George Norris wrote an analysis of injunctions in labor disputes that he prepared when Congress was considering an anti-injunction bill.¹⁹⁶ Injunctions were a harsh remedy that often resulted in injustice and were also the subject of discussion for a number of years.¹⁹⁷ Public sentiment against injunctions gradually crystalized into the demand for legislation.¹⁹⁸ The Norris-

187. *Id.*

188. *Id.* at 154.

189. *Id.* at 157.

190. *Id.* at 158.

191. *Id.* at 161-62.

192. *Id.* at 161 n.76, 162.

193. *Id.* at 165.

194. *Id.*

195. CARRELL & HEAVRIN, *supra* note 34, at 56-57.

196. See generally George W. Norris, *Injunctions in Labor Disputes*, 16 MARQ. L. REV. 157, 157 (1932).

197. *Id.*

198. *Id.*

LaGuardia Act marked the first time in United States history that Congress attempted to declare the public policy “in relation to the [issuance] of injunctions in labor controversies.”¹⁹⁹ The purpose was to prohibit courts from issuing injunctions as the resolution to labor disputes.²⁰⁰

Though the Norris-LaGuardia Act lacked enforcement powers, by clearly declaring courts could no longer issue injunctions intended to help employers end labor disputes, the Act became one of the first major federal laws supporting organized labor and is still viewed as a victory for the labor movement.²⁰¹

199. *Id.*; see also *Norris LaGuardia Act*, SOC’Y FOR HUM. RES. MGMT. (Apr. 28, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/norris-laguardia-act.aspx> (during the year 1932, Senator George William Norris and Congressman Fiorella H. LaGuardia passed the Norris-LaGuardia Act, marking a profound change in labor relations).

200. *Norris LaGuardia Act*, *supra* note 199. The relevant statutory text declares:

“No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this [Act]; nor shall any such restraining order or temporary . . . injunction be issued contrary to the public policy declared in this [Act].”

29 U.S.C. § 101.

The statute also declares the public policy:

“Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with this fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from in the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.”

29 U.S.C. § 102.

201. *Norris LaGuardia Act*, *supra* note 199.

3. National Labor Relations Act

When Congress passed the National Labor Relations Act (“NLRA”) in 1935, the labor movement achieved a great victory in the form of an independent agency designed to safeguard the rights of employees to organize and to remedy unfair labor practices committed by private sector employers.²⁰² Prior to the passage of the NLRA, the government had consistently subordinated and fully permitted the subordination of workers’ rights to the property rights and economic development of employers.²⁰³ After the NLRA’s passage, the government became obligated to protect the workers who were the most in need of protection and empowerment.²⁰⁴

The NLRA democratized workplaces by enabling a vast number of workers with the ability to participate in employment decisions that had the most impact on their lives.²⁰⁵ During the twelve years following the NLRA’s passage, unions won eighty percent of elections that secured union representation for employees, cementing, at least until subsequent legislation, the power of unions in protecting the rights and dignity of employees.²⁰⁶

Section 8(a)(3) of the NLRA is one of the most critical provisions of the Act. It provides that it is an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”²⁰⁷ Despite the clear intent of the provision to prevent discrimination when employees attempt to or succeed in or do actually unionize, and the long-standing presence of the NLRA, unlawful termination

202. *What We Do*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do> (last accessed Sept. 21, 2020); see also Labor Management Relations (Taft-Hartley) Act § 101, 29 U.S.C. §§ 151–166 (2018).

203. GROSS, *supra* note 19, at 15.

204. *Id.*

205. *Id.* at 1.

206. *1959 Landrum-Griffin Act*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1959-landrum-griffin-act> (last visited Sept. 21, 2020).

207. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) [hereinafter NLRA]; see also Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA, With a Solution*, 40 BERKELEY J. EMP. & LAB. L. 295, 296 (2019).

continues to be common, especially during first contract negotiations and organizational campaigns.²⁰⁸ In fact, allegations of discrimination in employment due to union activity are the most frequently filed unfair labor practice claims, despite being outlawed by Section 8(a)(3) of the NLRA.²⁰⁹

Even with so-called protections under the NLRA, in reality, speaking out about working conditions and attempting to organize can still be risky for workers.²¹⁰ William Selm, an award-winning hotel bellman at the Westin Hotel in Indianapolis, loved his job but believed that the conditions could be improved.²¹¹ In 2007, he joined the unionization effort and “[t]hings began to unravel pretty quickly after that.”²¹² A few months after receiving a petition for union recognition, the Westin terminated more than a dozen bellman positions, including Selm’s.²¹³ The Westin then allowed some of the fired workers to reapply for their jobs with a new subcontractor for less pay.²¹⁴ Though employers in the hospitality industry cannot outsource jobs because they cannot move the jobs overseas to a source of cheaper labor, employers can move their service jobs to subcontracting agencies.²¹⁵ This practice is on the rise in the hospitality industry.²¹⁶ After taking a job with a parking subcontractor, Selm continued his role as a bellman despite the Westin requiring him to surrender forty percent of his tips to the new company.²¹⁷ In early 2009, the Westin removed Selm from his duties at the hotel after learning that he had complained to a co-worker about the subcontracting trend.²¹⁸

208. Morris, *supra* note 207, at 296–97.

209. *Id.* at 297.

210. See generally FRAN QUIGLEY, IF WE CAN WIN HERE: THE NEW FRONT LINES OF THE LABOR MOVEMENT 74 (2015) (discussing examples of employees who face consequences for speaking out about their employment situation).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 74–75.

215. *Id.* at 75.

216. *Id.*

217. *Id.*

218. *Id.*

There have been thousands of successful prosecutions of unfair labor practice violations, and almost a million terminated employees have been offered backpay and reinstatement since the passage of the NLRA.²¹⁹ This should indicate that the actual enforcement of this provision is a total failure.²²⁰ If the goal is to prevent unfair labor practices with respect to union organizing activities, the fact that over the last several decades, the violation rate for Section 8(a)(3) has continually increased indicates that the remedies given for violations have had little deterrent effect on employers.²²¹ As with other business decisions, employers may simply justify any court-ordered remedies as the cost of doing business.

In the report to the Human Rights Council, the Special Rapporteur paid close attention to the NLRA, noting that “the legal framework legalizes practices that severely infringe workers’ rights to associate” and “it also provides few incentives for employers to respect workers’ rights. . . . largely due to the fact that enforcement is weak and underfunded, particularly when compared to the massive resources dedicated to other law enforcement functions in the United States.”²²² The Special Rapporteur went on to note how “shameful” this is when considering the forms of “wage theft” that cost American workers as much as \$50 billion annually.²²³ In 2018, with the assistance of the Communications Workers of America union, over 2,000 current and former contract workers at five call centers operated by General Dynamics Information Technology (“GDIT”) filed “wage theft” complaints alleging widespread misclassification

219. Morris, *supra* note 207, at 297.

220. *Id.*

221. *Id.*

222. *Report of the Special Rapporteur, supra* note 13, ¶ 45.

223. *Id.* See also *What is Wage Theft*, UCLA LAB. CTR. (May 6, 2015), <https://www.labor.ucla.edu/wage-theft/> (“[E]very week in Los Angeles low-wage workers lose \$26.2 million dollars in wage theft violations.”); Philip Mattera, *Grand Theft Paycheck: The Large Corporations Shortchanging Their Workers’ Wages*, GOOD JOBS FIRST (June 2018), <https://www.goodjobsfirst.org/wagetheft> (“[A] wide range of large corporations have paid out billions of dollars in wage theft settlements, verdicts and fines.”).

and underpayment with the U.S. Department of Labor's Wage and Hour Division.²²⁴

Right-to-work laws, perhaps "better described as 'union busting' or 'right to work for less pay' laws" were also a significant area of concern for the Special Rapporteur.²²⁵ The NLRA allows states to pass these so-called "right-to-work" laws under Section 14(b) of the NLRA, which provides, "Nothing in this Act [subchapter] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."²²⁶

Currently twenty-seven states and Guam have enacted right-to-work laws that appear to be deliberately crafted to weaken unions.²²⁷ These laws prevent compulsory payment of dues to unions.²²⁸ Proponents argue such laws promote "fairness" or "freedom," from being required to pay union dues or agency fees, despite the fact that Section 9(a) of NLRA requires unions to represent all employees in a bargaining unit regardless of union membership.²²⁹ Thus, right-to-work laws undermine the incentive for belonging to a union, eroding the dues-paying membership base of the unions in a time when union membership

224. Press Release, *Workers Call on Labor Department to Investigate General Dynamics as Wage Theft is Uncovered at Five More Call Centers*, Comm'n Workers of Am., (Apr. 23, 2018), <https://cwa-union.org/news/releases/workers-call-on-labor-department-investigate-general-dynamics-wage-theft-uncovered>. See also Jim Tankersley, *Complaint Accuses Contractor of Underpayment at Medicare Call Centers*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/us/politics/medicare-call-centers-wages.html>.

225. *Report of the Special Rapporteur*, *supra* note 13, ¶ 48.

226. NLRA § 14, 29 U.S.C. § 164(b).

227. *Report of the Special Rapporteur*, *supra* note 13, ¶ 48; *Right-To-Work Resources*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last visited May 20, 2021).

228. See *Union Dues*, NLRB (Oct. 2, 2020), <https://www.nlr.gov/about-nlrb/rights-we-protect/the-law/employees/union-dues>.

229. *Report of the Special Rapporteur*, *supra* note 13, ¶ 48. Section 9(a) of the NLRA provides that the employee representatives that have been "designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." NLRA § 9(a), 29 U.S.C. § 159(a).

continues to decline.²³⁰ The Special Rapporteur “deplores” the right-to-work terminology because the “language falsely suggests that the laws promote workers’ rights” rather than contributing to “unfair [labor] practices, poor working conditions and . . . retribution or unemployment” for workers’ rights advocates.²³¹

4. National Labor Relations Board

Through the first third of the twentieth century, even though public policy, court rulings, and legislation had shifted toward more tolerance of unions, no national body existed to provide oversight to collective bargaining or to ensure compliance with existing labor laws.²³² The pressure placed on employers is evidenced by the fact that more strikes occurred in 1933 than had occurred in any year since 1921.²³³ In response, President Franklin Roosevelt created a plan to usher in industrial peace.²³⁴ To encourage compliance with the National Industrial Recovery Act of 1933 (“NIRA”), President Roosevelt created the first government organization to mediate labor disputes, the National Labor Board (“NLB”).²³⁵ This board operated under the auspices of the National Recovery Administration that administered the NIRA and mainly sought labor-management cooperation through mediation of disputes with the primary purpose of helping employers and the unions reach strike settlements.²³⁶ The

230. *Report of the Special Rapporteur*, *supra* note 13, ¶ 48.

231. *Id.* ¶ 49.

232. See *Pre-Wagner Act Labor Relations*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/pre-wagner-act-labor-relations> (last visited Oct. 13, 2020) (providing the history of the United States labor relations prior to the establishment of the National Labor Board); *1933 The NLB and “The Old NLRB”*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1933-the-nlb-and-the-old-nlr> (last visited Oct. 13, 2020) (providing an account of the creation of the National Labor Board). See generally GROSS, *supra* note 19, at 11–18 (providing a brief historical account of the National Labor Relations Board’s origins).

233. GROSS, *supra* note 19, at 12.

234. *Id.*

235. *Id.* at 12 (“President Franklin Delano Roosevelt issued a plan for industrial peace and created the National Labor Board (NLB).”); see also *1933 The NLB and “The Old NLRB”*, *supra* note 232 (“President Franklin Roosevelt created a National Labor Board (NLB) to bring about compliance with Section 7(a) [of the NIRA] and to mediate labor disputes.”).

236. GROSS, *supra* note 19, at 12.

weakness of this board quickly became apparent as employers' challenges to the authority of the NLB became widespread.²³⁷ When employers found NLB decisions unacceptable, industries supported by trade groups organized campaigns of noncompliance.²³⁸ President Roosevelt abolished the NLB on June 29, 1934 by an executive order.²³⁹ The NLB's replacement, the National Labor Relations Board ("NLRB"), sought to improve from the experience of the NLB by deciding at the outset not to mediate and, instead, focus on interpretation of Section 7(a) of the NLRA.²⁴⁰

Shortly after its establishment, the NLRB brought charges against the Jones & Laughlin Steel Corporation, alleging that the company violated the NLRA by engaging in unfair labor practices affecting commerce.²⁴¹ Specifically, the NLRB alleged that the corporation discriminated against members of the union with respect to hiring and tenure of employment, and coerced and intimidated employees in order to interfere with their organization.²⁴² According to the Court, the first section of the NLRA involved findings with respect to the injury to commerce.²⁴³ This resulted from the infringement of employees' rights when they refused to accept the collective bargaining.²⁴⁴ The challenge to Congress' authority to pass the NLRA rested upon the Commerce Clause.²⁴⁵ The Court found that the NLRA could be construed to be under the sphere of constitutional authority under the Commerce Clause.²⁴⁶

Today, the NLRB is an independent government agency that acts as a quasi-judicial body by deciding cases with formal records

237. *Id.* See also 1933 *The NLB and "The Old NLRB"*, *supra* note 232 ("The NLB . . . lacked any real power.").

238. GROSS, *supra* note 19, at 12.

239. *Id.* at 13.

240. *Id.*

241. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22 (1937).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 25.

246. *Id.* at 43.

in administrative proceedings.²⁴⁷ The NLRB is inherently a political body, as the five Board Members are appointed by the President to five-year terms with consent of the Senate.²⁴⁸ The current Board consists of only four members.²⁴⁹ Two major problems plague the NLRA and the NLRB. First, the appointments of the board members by different administrations have created different interpretations of the NLRA that contrast sharply.²⁵⁰ The resulting “flip-flops,” known more formally as “policy oscillation,” over the meanings of “important provisions of the Act have often created confusing and inconsistent case law,” revealing significant “disagreements about the fundamental purpose of the law.”²⁵¹ Second, the NLRB has little power to actually deter employers from committing unfair labor practices.²⁵² The NLRA does not give the NLRB the power to enforce the NLRA through monetary fines.²⁵³

The jurisdiction of the board is found in Section 10(a), which provides, “The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce.”²⁵⁴ The term “affecting commerce” is defined in the NLRA to mean “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”²⁵⁵ Thus, the NLRA is clearly oriented

247. *Introduction to the NLRB*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/introduction-to-the-nlr> (last visited Oct. 2, 2020).

248. *Id.*

249. *The Board*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/the-board> (last visited Oct. 3, 2020).

250. GROSS, *supra* note 19, at 30.

251. *Id.* See also Samuel Feldman, *Liebman Knows Labor Law: The Future of the National Labor Relations Board*, 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. (SPECIAL PRESIDENTIAL INAUGURATION ISSUE: AN INTERVIEW WITH WILMA LIEBMAN) 195, 196 (2017) (contrasting the possible effects of a hypothetical Hillary Clinton administration against those of the Donald Trump administration).

252. See *Investigate Charges*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges> (last visited Oct. 13, 2020) (listing “make-whole” and “informational remedies” as the only available remedies).

253. *Id.* (“Under [the NLRA], the NLRB cannot assess penalties.”).

254. Labor Management Relations (Taft-Hartley) Act § 10(a), 29 U.S.C. § 160(a) (2018).

255. NLRA § 2(7), 29 U.S.C. § 152(7).

to commerce. The definition of an “unfair labor practice” described in Section 8²⁵⁶ is not so clear, however. The NLRA lists three broad categories of unfair labor practices: Section 8(a) governs unfair labor practices of employers,²⁵⁷ Section 8(b) governs labor organizations,²⁵⁸ and Section 8(c) addresses both labor organizations and employers.²⁵⁹ Specifically, Section 8(a) lists unfair labor practices of employers, including interfering with the rights granted by the NLRA, interfering with the formation of a labor organization, and discriminating against an employee to discourage them from joining a labor organization.²⁶⁰

The flip-flopping, inconsistent nature of the interpretation and application of some of the most important provisions, combined with the orientation of the NLRA towards commerce, indicates the weakness of the law that is supposed to be the fundamental labor relations law in the country. Additionally, the inability of the NLRB to impose civil penalties, as numerous other federal agencies have the authority to do, deprives the NLRB of “a powerful method for enforcing regulatory policies and deterring violations.”²⁶¹ The only actions the NLRB can take, issuing a cease and desist, and ordering compensation for lost wages and benefits,²⁶² amount to little more than a slap on the wrist.

5. Taft-Hartley Amendments

In 1947, major changes were made to the NLRA (the Wagner Act) through the Taft-Hartley Act, also known as the Labor-

256. *Id.* § 8, 29 U.S.C. § 158.

257. *Id.* § 158(a).

258. *Id.* § 158(b).

259. *See id.* § 158(c)–(d) (listing provisions that apply to one or both of labor organizations and employers).

260. *Id.* § 158(a).

261. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-519, CIVIL PENALTIES: CERTAIN FEDERAL AGENCIES NEED TO IMPROVE INFLATION ADJUSTMENT REPORTING 1 (2018), <https://www.gao.gov/assets/700/693/185.pdf>.

262. NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD 37 (1997) [hereinafter NLRB, BASIC GUIDE], <https://www.nlr.gov/sites/default/files/attachments/pages/node-184/basicguide.pdf>.

Management Relations Act.²⁶³ The Taft-Hartley Act maintained aspects of the Wagner Act, but prohibited some labor union practices with the intent to prevent unions from getting too powerful, as evidenced by the decrease in representation elections won by unions.²⁶⁴ In the first year after the passage of Taft-Hartley, unions won only around seventy percent of representation elections as opposed to over eighty percent during the period after passage of the Wagner Act.²⁶⁵

6. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act)

Throughout the 1950s, unions were under the intense scrutiny of Congress for corruption.²⁶⁶ The Congressional investigation of International Brotherhood of Teamsters President James Hoffa led Congress to pass the Labor-Management Reporting and Disclosure Act of 1959, known as the Landrum-Griffin Act.²⁶⁷ This Act represented the pendulum swinging back towards management in light of the perceived power of labor unions during the early to mid-twentieth century.

7. Proposed Congressional Acts

Some members of Congress who are interested in recognizing some of the pitfalls of U.S. labor law have, over the years, introduced numerous amendments to the NLRA.²⁶⁸ The

263. *1947 Taft-Hartley Substantive Provisions*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1947-taft-hartley-substantive-provisions> (last visited Sept. 22, 2020); CARRELL & HEAVRIN, *supra* note 34, at 66.

264. *1947 Taft-Hartley Substantive Provisions*, *supra* note 263; *1959 Landrum-Griffin Act*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1959-landrum-griffin-act> (last visited Sept. 22, 2020).

265. *1959 Landrum-Griffin Act*, *supra* note 264.

266. See CARRELL & HEAVRIN, *supra* note 34, at 67 (noting that the Senate “unearthed corruption in some major unions” during its investigations into wrongdoings during the 1957 McClellan hearings).

267. See *id.* (noting that the 1957 McClellan hearings, which were triggered by James Hoffa’s activities as President of the International Brotherhood of Teamsters, “set the stage” for the Labor-Management Reporting and Disclosure Act of 1959, known as the Landrum-Griffin Act); see generally Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401–531 (2020).

268. *E.g.*, H.R. REP. NO. 110-23, at 3–5 (2007) (noting that the Employee Free Choice Act was introduced multiple times by several senators and was ultimately re-introduced in 2007 with 234 cosponsors).

Employee Free Choice Act ("EFCA"), for example, was introduced in the House of Representatives in 2007 and contained three primary provisions that represented what would have been a dramatic change to U.S. labor law.²⁶⁹

First, under the EFCA, if a union simply collected signed authorization cards from over fifty percent (fifty plus one) of employees, the union is recognized without being subject to employer confirmation, a process known as "card-check recognition."²⁷⁰ This differed from the existing law, in which a union could petition for recognition if at least thirty percent of workers had signed authorization cards, but recognition would be subject to the results of a secret ballot election that an employer could request.²⁷¹ Secret ballot elections, though not required by the NLRA, would be overseen by the NLRB.²⁷² The union would have to win a majority of votes to then represent the members of the bargaining unit.²⁷³ In attempts to argue their respective positions on the issue of secret ballot elections, both sides cite coercion or pressure as reasons to support either card-check recognition or secret ballot elections.²⁷⁴ Unions argue that employers can (and do) coerce or pressure employees during secret ballot election campaigns, and employers argue that unions may pressure or coerce employees into signing authorization cards and may only hear the union's point of view.²⁷⁵ Research on comparing the effects of card checks versus secret ballot elections suggests that union recognition is greater under card checks than under secret ballots.²⁷⁶

Second, the EFCA proposed to change the requirement that unions and employers must only bargain in good faith to reach an agreement.²⁷⁷ The NLRB does not require that unions and

269. See CARRELL & HEVRIN, *supra* note 34, at 68–69.

270. *Id.* at 68.

271. GERALD MAYER, CONG. RSCH. SERV., RL32930, LABOR UNION RECOGNITION PROCEDURES: USE OF SECRET BALLOTS AND CARD CHECKS 8 (2007).

272. NLRB, BASIC GUIDE, *supra* note 262, at 1.

273. MAYER, *supra* note 271, at 8–9.

274. *Id.* at 18.

275. *Id.*

276. *Id.*

277. CARRELL & HEVRIN, *supra* note 34, at 69.

employers reach an agreement, and, in fact, between one-third to one-half of first contract negotiations fail to reach a contract agreement.²⁷⁸ The EFCA would allow for either side to request mediation for thirty days from the Federal Mediation and Conciliation Service if a contract is not reached within ninety days.²⁷⁹ If mediation is not successful, then an arbitrator's decision on how to resolve the dispute would be binding for two years.²⁸⁰

Third, the EFCA would provide stronger penalties for violations during an organizing campaign or first contract negotiations to include backpay and civil fines of up to \$20,000 per violation.²⁸¹ Recognized as a significant change to U.S. labor law, the EFCA encountered fierce opposition, and after passing the Democrat-controlled House, it failed to pass the Republican-controlled Senate.²⁸²

Another notable amendment to the NLRA was introduced in Congress in May of 2019.²⁸³ Known as the Protecting the Right to Organize Act of 2019, or the PRO Act, the bill amends the NLRA in significant ways.²⁸⁴ Specifically, it:

- revises the definition of “employee” and “supervisor” to prevent employers from classifying employees as exempt from labor law protections;
- expands unfair labor practices to include prohibitions against replacement of or discrimination against workers who participate in strikes;
- makes it an unfair labor practice to “require or coerce” employees to attend employer meetings designed to discourage union membership;
- permits workers to participate in collective or class action litigation;

278. *Id.*

279. *Id.* at 68–69

280. *Id.* at 69

281. *Id.*

282. *See id.*

283. H.R. REP. NO. 116-347, at 11 (2019).

284. Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. §§ 1–2 (2020).

- allows injunctions against employers engaging in unfair labor practices involving discharge or serious economic harm to an employee;
- expands penalties for labor law violations, including interference with the NLRB or causing serious economic harm to an employee; and
- allows any person to bring a civil action for harm caused by labor law violations or unfair labor practices.²⁸⁵

Even after a shift to a Democratic-controlled Senate, albeit 50-50 with a Democratic Vice President serving as the tiebreaker in certain circumstances,²⁸⁶ the Pro Act is likely to face the same fate as the EFCA.

A. *Current State of Labor-Management Relations*

The core conflict between unions and labor, since the division of labor cemented itself during the Industrial Revolution, revolves around grossly different interests. In modern times, both management and labor orient their interests towards property and economics.²⁸⁷ When the rhetoric put in Corporate Social Responsibility reports and press releases is stripped away, management wants to maximize profit, workers want the highest wages possible, and unions want members to pay dues to ensure their survival and relevance.²⁸⁸ Companies will go to great lengths to avoid having to deal with unions by pushing corporate-wide anti-unionization policies. Some go so far as to hire anti-union consulting firms to help guide the company's counter-union-organizing efforts.²⁸⁹ One such firm, Labor Relations Institute, Inc., declares itself the "nation's leading full service

285. *Id.* § 2.

286. Abigail Abrams, *What Really Happens When There's a 50-50 Split in the Senate?*, TIME (Jan. 12, 2021, 12:02 PM), <https://time.com/5926759/senate-split-50-50-democrats/>.

287. See CARRELL & HEAVRIN, *supra* note 34, at 8–9.

288. See *id.* at 23–24 (outlining common goals in labor-management relations, including examples of mutually beneficial outcomes for both parties).

289. See *id.* at 137, 140 (highlighting general union avoidance strategies by management, examples of management utilizing such strategies, and occupations solely dedicated to union avoidance).

labor and positive employee relations consulting firm,” with more than 10,000 anti-union campaigns to its credit.²⁹⁰ LRI provides, at a cost, of course, a wide variety of resources tailored specifically to its clients.²⁹¹

During a unionization campaign, management can seek guidance from human resource departments on what they can and cannot say to employees that are attempting to unionize.²⁹² During the 1990s, when Walmart faced hundreds of unfair labor practices from the UCFW and labor unions, Walmart tried to train low-level managers to walk the fine line between tactics that would cause an unfair labor practice charge by the NLRB and the historic militant (but legal) antiunionism Walmart relied upon for years.²⁹³ These dos and don'ts have been put into acronyms.²⁹⁴ For things that managers cannot do, they are told TIPS: T-Threaten, I-Interrogate, P-Promise, and S-Spy.²⁹⁵ For things that managers can do, they are told FORE: F-Facts, O-Opinions, R-Rules, and E-Experience.²⁹⁶

A core power and purpose for union membership is strength in numbers.²⁹⁷ An individual employee has very little bargaining power against his or her employer. But when joined by others, that person gains a much louder voice. In practice, this means that the employee agrees to relinquish what bargaining power they have to union leadership, usually a union steward.²⁹⁸ When an issue arises with discipline or benefits, the union member must go to the steward to have the issue resolved, rather than go

290. *Home*, LAB. RELS. INST., INC., <https://lrionline.com> (last visited Sept. 27, 2020); *About LRI*, LAB. RELS. INST., INC., <https://lrionline.com/about-lri/> (last visited Sept. 27, 2020).

291. *Home*, *supra* note 290.

292. *E.g.*, Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462, 1492, 1494–95 (2008) (detailing Wal-Mart's decision to send a “labor team” to defeat union-organizing activity by educating store management on how to communicate with union members).

293. *Id.* at 1491.

294. CARRELL & HEAVRIN, *supra* note 34, at 138.

295. *Id.*

296. *Id.*

297. *Id.* at 10.

298. *See id.* at 129–30, 399 (stating that employees may not contract individually but must instead be exclusively represented by a certified union, the responsibility of which is often delegated to a steward).

to the employer directly through human resources or management.²⁹⁹ Some union members may not have an issue with that, but some may, especially if they perceive the union steward as incompetent.³⁰⁰

With respect to collective bargaining, some of the most important collective bargaining provisions from the perspective of a union are the union security clause and the dues-checkoff provision.³⁰¹ Union security clauses directly protect and benefit the union, and their importance is highlighted by the fact that the NLRB considers union security clauses as mandatory to be discussed in collective bargaining.³⁰² The main purpose of union security clauses is to increase the union's bargaining power.³⁰³ This is done by generally compelling individuals to join a union or refrain from leaving the union as a condition of obtaining or retaining employment.³⁰⁴ The more members and more money the union has, the more power it can bring to the bargaining table.

The desire for pro-management forces to limit the power unions can gain is evidenced by right-to-work laws that ban union security clauses with the intent to weaken unions and strengthen the ability of management to bargain.³⁰⁵ Many of the specific rights management retains depends on what is written in the

299. *Id.*

300. *E.g.*, Local 307, Nat'l Postal Mail Handlers Union 338 N.L.R.B. 1154, 1157–1160 (2003) (detailing petitioner's complaints regarding ineffective and improper representation by union stewards); teccareg, Posting to *TE Returning as CCA*, FED. SOUP (July 24, 2014, 4:34 PM), <https://forum.federalsoup.com/default.aspx?g=posts&t=60181#post698696> (describing a negative union experience “due to an incompetent Union steward”).

301. CARRELL & HEAVRIN, *supra* note 34, at 227–29.

302. NLRB, BASIC GUIDE, *supra* note 262, at 20.

303. Raymond R. Farrell, *Regulation of Union Security Contracts*, 59 YALE L.J. 554, 554 (1950).

304. *Id.* at 554 n.2.

305. *See, e.g.*, Elizabeth Tandy Shermer, *The Right To Work Really Means The Right To Work For Less*, THE WASH. POST (April 24, 2018, 5:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2018/04/24/the-right-to-work-really-means-the-right-to-work-for-less/> (arguing that right-to-work laws transfer power away from employees, shifting the power towards management).

collective bargaining agreement and how the NLRB is interpreting and applying its precedent.³⁰⁶

Efforts to limit the power of unions also extend to how unions collect dues in dues checkoff provisions. The battle over dues check-offs reaches the heart of why people choose (or not) to join a union in the first place. The stagnation of wage growth in the United States, in contrast to the skyrocketing costs of nearly all everyday goods,³⁰⁷ further highlights the importance of wages to union workers. The average annual cost of union dues is \$400, and understandably, when money is tight, not every worker can afford to part with a \$20–40 paycheck.³⁰⁸ That money is especially hard to part with when they feel that the union is not adequately addressing their needs or political leanings. This was the issue the monumental overturning of forty years of precedent by the Supreme Court in *Janus v. AFSCME*.³⁰⁹ The Supreme Court used the First Amendment to justify the argument that a public sector employee dissatisfied the longstanding practice of subsidizing non-political activity of a union for which he did not belong, should not have to pay at all, despite potentially obtaining some benefit from the union representation of the bargaining unit.³¹⁰

306. See Mark Theodore, *NLRB Majority, Management Rights Clause Must Be Specific to Enable Employer to Make Unilateral Changes*, PROSKAUER (July 11, 2016), <https://www.laborrelationsupdate.com/nlr/nlr-majority-management-rights-clause-must-be-specific-to-enable-employer-to-make-unilateral-changes/> (stating how management can retain the rights to unilaterally make changes to terms and conditions of employment through the insertion of a management-rights clause on the collective bargaining agreement); see also James B. Zimarowski, *Interpreting Collective Bargaining Agreements: Silence, Ambiguity, and NLRA Section 8(d)*, 10 INDUS. REL. L.J. 465, 469 (1988) (explaining NLRB's role as an interpreter of the language of specific clauses in collective bargaining agreements).

307. See Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (Jan. 6, 2015), <https://www.epi.org/publication/charting-wage-stagnation/> (indicating that pay growth has slowed for the past generation); see also Samuel Stebbins & Charles Stockdale, *These 20 Common Grocery Store Items are Driving up the Cost of Your Bill the Most*, USA TODAY (Feb. 18, 2019, 6:00 AM), <https://www.usatoday.com/story/money/personalfinance/2019/02/28/average-grocery-store-bill-cost-is-driven-up-most-by-these-items/39094659/> (stating that Americans today pay over nineteen percent more on grocery items than they did ten years ago).

308. *What is the Cost of Unions?*, ADAMS NASH HASKELL & SHERIDAN, <https://anh.com/the-cost-of-unions/> (last visited Sept. 27, 2020).

309. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2459–60 (2018).

310. *Id.* at 2459–60.

B. *International Labor Law*

Long before the United States took serious action to recognize labor rights, in 1919 signatories to the Treaty of Versailles created the International Labour Organization (“ILO”).³¹¹ The ILO is a specialized agency of the United Nations and is “strategically important to the United States’ effort to strengthen competitiveness, extend democratic values worldwide and ensure global peace and prosperity.”³¹² The ILO founders recognized the need for a system of international labor standards due to the fact that “conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled.”³¹³ Since then, the standards created have developed into a comprehensive system with instruments covering work and social policies, in which a supervisory system addresses problems in the application of the instruments on the national level.³¹⁴ The international labor standards are either legally binding international treaties, conventions, or recommendations that are non-binding guidelines.³¹⁵ When a country ratifies a convention, that country commits to applying the Convention in its national law and practice.³¹⁶ The ratifying country must also report to the ILO on the application of the Convention at regular intervals.³¹⁷

Despite having a permanent seat on the ILO Governing Body, the United States has ratified only 14 of the 189 ILO Conventions, including two out of the ILO’s eight core labor standards: No. 105 on the Abolition of Forced Labor in 1991 and No. 182 on the

311. RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS, INT’L LAB. ORG. [ILO] 9 (rev. ed. 2014), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_318141.pdf.

312. *The US: A Leading Role in the ILO*, ILO, <https://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang—en/index.htm> (last visited Sept. 27, 2020).

313. RULES OF THE GAME, *supra* note 311, at 9.

314. *Id.* at 10.

315. *Id.* at 15.

316. *Id.*

317. *Id.*

Elimination of the Worst Forms of Child Labor in 1999.³¹⁸ The United States has not ratified either No. 98 on the Right to Organise and Collective Bargaining or No. 87 on the Freedom of Association and Protection of the Right to Organise.³¹⁹ The only two other nations to have ratified only one or two of the core conventions are Myanmar and Brunei Darussalam.³²⁰ The Marshall Islands, Palau, and Tuvalu have not ratified any of the conventions.³²¹

The United States has little problem in pointing out labor issues happening in other countries while declaring that United States laws and practices “meet or exceed many ILO conventions” that are typically not ratified.³²² There are numerous reasons to dispute the truth of that declaration.³²³ The most visible example is that the NLRA permits anti-union campaigns in violation of the ILO freedom of association and non-interference principles found

318. ILO, *The US: A Leading Role in the ILO*, *supra* note 312; see also David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842, 1843 n.3, 1845–46 (2014).

319. *Up-to-Date Conventions and Protocols Not Ratified by United States of America*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTR_Y_ID:102871 (last visited Oct. 7, 2020).

320. Weissbrodt & Mason, *supra* note 318, at 1842.

321. *Id.*

322. See *id.* at 1843. Whether the incorporation of international law standards is necessary depends on how the system of domestic law treats international sources. *How does International Law Apply in a Domestic Legal System?*, THE PEACE & JUST. INITIATIVE, <https://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist> (last visited Oct. 7, 2020). Monist systems, like France, view international standards to be superior to domestic legislation. Davor Jančić, *Recasting Monism and Dualism in European Parliamentary Law: The Lisbon Treaty in Britain and France*, <http://eprints.lse.ac.uk/51484/> (last visited Oct. 7, 2020). By contrast, the United States leans towards a dualist system, despite requirements under the Supremacy Clause that treaties made “under the Authority of the United States, shall be the supreme Law of the Land” has a stricter definition of treaties and process by which treaties become incorporated. U.S. CONST. art. VI, cl. 2; Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L., 455, 458, 461 (2010). In the 6-3 decision *Medellín v. Texas*, the Supreme Court reaffirmed the longstanding “distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.” *Medellín v. Texas*, 552 U.S. 491, 504 (2008).

323. Weissbrodt & Mason, *supra* note 318, at 1843.

in ILO Convention No. 87.³²⁴ Rarely seen by other ILO member states, aggressive anti-union tactics are authorized (and rarely punished) under the NLRA and the Railway Labor Act.³²⁵

The right to organize under the ILO is one that "member states must establish and protect, without interference or previous authorization from public authorities or administrative agencies."³²⁶ This contrasts with the NLRA, which is another example in which the United States falls short of the ILO standards. Through the two conventions, No. 87 and 98, the ILO provides greater protection than the right to organize provision in the NLRA.³²⁷ When reviewing the rights of workers to form, join, or assist labor organizations, this gap in protections becomes especially evident.³²⁸ The NLRA provides that only statutorily-defined employees have the right to organize.³²⁹ By contrast, the ILO Convention No. 87 provides that workers "without distinction whatsoever, shall have the right to establish and . . . join organisations of their own choosing without previous authorisation."³³⁰

III. GERMAN LABOR LAW

As a key partner and member state of the ILO since 1954, Germany has taken a leading role in demonstrating political commitment from the top on down, achieving the goals of the ILO by ratifying all eight Fundamental ILO Conventions and eighty-

324. *Id.* at 1852-53.

325. *Id.* at 1853-54.

326. *Id.* at 1847.

327. *Id.*

328. *Id.*

329. *Id.* The protections in the NLRA only apply to those that meet the definition of "employee" which explicitly excludes "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act." Labor Management Relations (Taft-Hartley) Act § 2(3), 29 U.S.C. § 152(3).

330. Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize art. 2, registered July 9, 1950, 68 U.N.T.S. 17 [hereinafter Convention No. 87].

three ILO Conventions in total.³³¹ Unlike the United States, the German government, to include the German Constitution (known as The Basic Law), is noticeably friendlier towards international law.³³²

At its core, The Basic Law is a document dedicated to human rights (as it should be, considering the devastation of World War II). The first sentence of Article 1 states unequivocally that “Human dignity shall be inviolable,” followed by a long list of prescribed basic rights.³³³ The implication of this strong human rights orientation is that German domestic law not only reflects the enforcement of these rights, but also takes seriously the rights and obligations set out by international standards the German government has agreed to ratify.³³⁴

German labor law is a complex system that consists of various legal sources, and it is traditionally divided into rules that cover individual labor law contracts and collective labor law agreements.³³⁵ This section will lay out the basics of the German

331. GERMANY AND THE ILO: AN OVERVIEW OF COOPERATION RESULTS, DEP'T OF P'SHIP AND DEV. COOPERATION (PARDEV), ILO, 4 https://www.ilo.org/wcmsp5/groups/public/-dgreports/-exrel/documents/genericdocument/wcms_214116.pdf (last visited Oct. 30, 2020).

332. Daniel Lovric, *A Constitution Friendly to International Law: Germany and its Völkerrechtsfreundlichkeit*, 25 AUSTL. Y.B. INT'L L. 75, 75 (2006); see also GRUNDGESETZ [GG] [BASIC LAW] art. 59, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf. Article 59 sets out the general rule for applying treaties to domestic German law. *Id.* Article 59 (2) provides:

Treaties that regulate political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply, *mutatis mutandis*.

Id.

333. GRUNDGESETZ [GG] [BASIC LAW] art. 1.

334. See FACTS ABOUT GERMANY, PROTECTION OF HUMAN RIGHTS 50–51 (updated 2018), <https://www.tatsachen-ueber-deutschland.de/en/chapter/foreign-policy/protection-human-rights> (explaining Germany's commitment to human rights protections through constitutional protections and international conventions' standards).

335. See *Labor and Employment Law in Germany: An Abstract on Main Issues*, VOELKER, https://www.voelker-gruppe.com/en/services/employment/german_labor_law/ (updated Mar. 21, 2017) (explaining the basic rules of employment in Germany and that the major sources of German employment law are federal statutes, collective bargaining agreements, working agreements, and case law of the labor courts).

legal system and labor law for which an adequate comparison to United States labor law may be drawn.

A. *Brief Historical Development of German Labor Law*

Though American workers felt the impact of industrialization, as described above, the United States as a nation did not immediately respond with laws and regulations to address workers' legitimate concerns.³³⁶ By contrast, when industrialization took hold in Germany, it became only the second nation, behind England, to pass specific labor laws, thus beginning a long history of addressing labor issues.³³⁷ In 1869, while the United States was still reconstructing from the devastation of the Civil War, the North German Confederation passed the Law on Freedom of Occupation (*Gewerbefreiheit*) and Freedom of Coalition (*Koalitionsfreiheit*).³³⁸ This law revoked laws that prohibited or punished workers "on account of their participation in agreements or associations aiming to secure favorable wage or working conditions, particularly those involving work stoppages or the dismissal of workers."³³⁹ Chancellor of the German Empire, Otto von Bismarck, continued the development of labor law by passing a series of laws designed to protect the working class, such as the Health Insurance Act,

336. See Freddie Wilkinson, *Industrialization, Labor, and Life*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/article/industrialization-labor-and-life/12th-grade/> (recounting that though the Industrial Revolution had its genesis in the eighteenth century, it was not until the late nineteenth and twentieth centuries that the United States began enacting reform laws to limit the negative effects of the Industrial Revolution).

337. ILONA ZENKER, *BASICS OF GERMAN LABOUR LAW: THE EMPLOYMENT RELATIONSHIP* 11 (2014).

338. *Law on Freedom of Occupation [Gewerbefreiheit] and Freedom of Coalition [Koalitionsfreiheit] (June 21, 1869)*, GER. HIST. IN DOCUMENTS AND IMAGES [hereinafter *Law on Freedom of Occupation & Coalition*], http://ghdi.ghi-dc.org/sub_document.cfm?document_id=1829 (last visited Sept. 29, 2020).

339. *Id.*

accident and disablement insurance, and provisions for old age.³⁴⁰ Bismarck is attributed with the creation of the first “welfare state” in the modern world.³⁴¹ Both laws were adopted on a national level in 1871 through the unification of several states to establish the German Empire, sometimes referred to as Imperial Germany.³⁴²

At the beginning of the nineteenth century, German employers sought the establishment of an institution to resolve labor disputes while accounting for their business practice requirements.³⁴³ As a result, independent factory and trade courts were established.³⁴⁴ By 1890, municipalities with more than 20,000 residents were legally required to develop trade courts, with panels comprising one elected judge and two lay members.³⁴⁵

Following its defeat in World War I, the German Empire dissolved.³⁴⁶ The Weimar National Assembly drafted the new Weimar Constitution, which was in force from 1919 until newly-sworn Chancellor Adolph Hitler indefinitely suspended it in

340. Reinhard Busse et al., *Statutory Health Insurance in Germany: A Health System Shaped by 135 years of Solidarity, Self-governance, and Competition*, 390 LANCET 882, 882 (2017) <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2817%2931280-1> (“Bismarck’s Health Insurance Act of 1883 established the first social health insurance system in the world.”); see also *Social Security History: Otto von Bismarck*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/ottob.html> (last visited Oct. 8, 2020) (“Germany became the first nation in the world to adopt an old-age social insurance program in 1889, designed by Germany’s Chancellor, Otto von Bismarck.”); Lorraine Boissoneault, *Bismarck Tried to End Socialism’s Grip—By Offering Government Healthcare*, SMITHSONIAN MAG. (July 14, 2017), <https://www.smithsonianmag.com/history/bismarck-tried-end-socialisms-grip-offering-government-healthcare-180964064/> (detailing the expansion of the Health Insurance Act to include accident and disability insurance).

341. JONATHAN STEINBERG, BISMARCK: A LIFE 417 (2011).

342. *Law on Freedom of Occupation & Coalition*, *supra* note 338; see also *Issues Relevant to U.S. Foreign Diplomacy: Unification of German States*, OFF. OF THE HISTORIAN, FOREIGN SERV. INST., <https://history.state.gov/countries/issues/german-unification> (last visited Sept. 28, 2020) (explaining the different efforts to unify the German States into a unified German nation in 1848, 1862, and 1870).

343. THE PRESIDENT OF THE FED. LAB. CT., THE FEDERAL LABOR COURT 5 (2014), https://www.bundesarbeitsgericht.de/englisch/englische_version.pdf (brochure explaining the jurisdiction, history and function of the Federal Labour Court).

344. *Id.*

345. *Id.* at 4–5.

346. *Constitutional History of Germany*, CONSTITUTIONNET, <http://constitutionnet.org/country/constitutional-history-germany> (last visited Oct. 7, 2020).

1933.³⁴⁷ Under Nazi rule, all trade unions were dissolved.³⁴⁸ Following its defeat in World War II, the new Federal Republic drafted and adopted the German Constitution in 1948, known as the Basic Law (*Grundgesetz*).³⁴⁹ With the Basic Law, the development of German labor law resumed.³⁵⁰

With strong influence from the Allies to include Communist-dominated East Germany, Germany sought to create constitutional democracy to return to federalism and protect human rights.³⁵¹ Compared to the United States Constitution, the Basic Law is unequivocally a document that is oriented towards human rights. As Article 1 Clause 1 indicates, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."³⁵² Clause 2 goes on to declare that "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."³⁵³ The Basic Law has its critics, mainly due to the significant number of amendments in a relatively short period.³⁵⁴ However, when compared to the United States Constitution, the Basic Law has endured providing relative stability and peace, despite its intent to be temporary.³⁵⁵

347. GRUNDGESETZ [GG] [BASIC LAW]; *Constitutional History of Germany*, *supra* note 346.

348. *Constitutional History of Germany*, *supra* note 346.

349. *See generally* GRUNDGESETZ [GG] [BASIC LAW]; *see also* *Constitutional History of Germany*, *supra* note 346.

350. *See* Liliane Jung, *National Labour Law Profile: Federal Republic of Germany*, ILO (Apr. 2001), https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158899/lang=en/index.htm (explaining the different guarantees and protections found under the Basic Law's labor framework).

351. *See id.* (explaining that by the Unification Treaty of 31 August 1990 and the Federal Statute of 23 September 1990, the Basic Law's reign was extended over East and West Germany); *see also* Edmund Spevack, *American Pressures on the German Constitutional Tradition: Basic Rights in the West German Constitution of 1949*, 10 INT'L J. POL., CULTURE, & SOC'Y 411, 423–24 (1997) (explaining the role that American political and economic influence played in the inclusion of individual rights into the Basic Law).

352. GRUNDGESETZ [GG] [BASIC LAW] art. 1.

353. *Id.*

354. Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. REV. 477, 491 (2000).

355. *See* Spevack, *supra* note 351, at 425 (exploring Allied, and especially American pressures in the formation of the Basic Law).

Where legislation concerning labor law is fragmented, the Basic Law is the basis by which conflicts must be resolved.³⁵⁶ Thus, the Basic Law plays a dominant role in purely domestic German labor law.³⁵⁷ Recognizing the historical importance of the right to organize, Article 9 of the Basic Law prescribes "[t]he right to form associations to safeguard and improve working and economic conditions."³⁵⁸

Like the United States, Germany has not been immune from the erosion of union membership. Union density in Germany currently sits around sixteen percent.³⁵⁹ This is down significantly from a density of over forty percent, seen after a small increase after unification in 1990.³⁶⁰ Previous to that, union density was relatively stable from the 1960s to the mid 1980s when it decreased before unions capitalized on access to new members from East Germany.³⁶¹

B. German Labor Court System

When the German legislature seeks to delegate the power to regulate specific matters to administrative agencies, the Basic Law requires that the legislature precisely define the delegation to avoid giving the agencies undue legislative power.³⁶² As with most legal systems, courts play a central role in both interpreting general clauses of laws and filling in legislative gaps.³⁶³ According to the Labour Courts Act (*Arbeitsgerichtsgesetz*), the Federal Labour Court of Germany has the sole power to develop German labor law.³⁶⁴

356. Manfred Weiss, *Labor Law*, in INTRODUCTION TO GERMAN LAW 299, 300–01 (Reimann & Arbor eds., 2d ed. 2005).

357. *Id.* at 300.

358. GRUNDGESETZ [GG] [BASIC LAW] art. 9.

359. *Trade Union Density*, *supra* note 3.

360. Bernd Fitzenberger et al., *The Erosion of Union Membership in Germany: Determinants, Densities, Decompositions* 2–3 (Ctr. for Eur. Econ. Res., Discussion Paper No. 06-066, 2006), [ftp://ftp.zew.de/pub/zew-docs/dp/dp06066.pdf](http://ftp.zew.de/pub/zew-docs/dp/dp06066.pdf).

361. *Id.*

362. Weiss, *supra* note 356, at 301.

363. *Id.*

364. *Id.*

Thus, the Federal Labour Courts in Germany provide the main forum for resolving disputes arising from both individual and collective labor agreements.³⁶⁵ If the Labour Courts Act governs the dispute, then the question becomes which procedure is necessary to litigate the issue: *Urteil* or *Beschluss*.³⁶⁶ These two procedures differ based upon the nature and origins of the dispute and the kind of decision they reach. In *Urteil* procedures, the parties must provide the court with the necessary information to make decisions, but in *Beschluss* procedures, the court has the primary responsibility to establish the facts.³⁶⁷ An *Urteil* procedure is used in a dispute between an employee and employer arising from their relationship, covering all possible claims relating to the employment relationship such as compensation, benefits, leave, pensions, unfair dismissals, among other matters.³⁶⁸ This procedure is also used in disputes that arise from questions of the right to organize, the right of activity of an employer or employee, and inadmissible industrial actions.³⁶⁹

A *Beschluss* procedure is used when disputes arise from the Works Constitution Act or the Senior Management Representatives Committee Act.³⁷⁰ The Works Constitution Act governs the institutionalized representation of employees' interests at the company level.³⁷¹ This law set the legal groundwork for the establishment of works councils, which this paper will discuss in greater detail below. The Court uses the *Beschluss* procedure to resolve disputes concerning the scope of

365. *Id.* at 303.

366. *General Information*, BUNDESTARBEITSGERICHT – FED. LAB. CT., <https://www.bundesarbeitsgericht.de/englisch/general.html> (last visited Feb. 11, 2020).

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. See *German Works Council Constitution Act*, BUS. LOCATION CTR., <https://www.businesslocationcenter.de/en/labor-market/employment-law-and-collective-contracts-system/german-works-council-constitution-act/#:~:text=In%20Germany%2C%20the%20Works%20Council,social%2C%20personnel%20and%20economic%20matters> (last visited Oct. 6, 2020) (explaining that the Works Council Constitution grants employees a right of participation and co-determination in economic, social, and personnel matters).

the works council's participation and the responsibility of the employer to pay for the works council's activities.³⁷²

Independent from other civil matters, the Labour Court system consists of three tiers.³⁷³ First-instance Labour Courts are made up of a judge and two lay members: one representing the employer's side and the other representing the employee's side.³⁷⁴ To settle a case without a full court hearing in front of the entire panel, a preliminary conciliation hearing can be conducted before the judge.³⁷⁵ The procedures used by the Court are meant to ensure low costs.³⁷⁶ No court costs are paid at all in the Beschluss procedure.³⁷⁷

On appeal, the case is reheard on the facts and points of law by the second-instance Land Labour Court.³⁷⁸ This court can, when required and able to, rehear witnesses and review documents.³⁷⁹ If the parties choose to appeal the decision of the second-instance Land Labour Court, the case's points of law may be heard by the third-instance Federal Labour Court, where the court exclusively reviews questions of law.³⁸⁰

The Labour Court procedure seems to result in quick and efficient resolution of labor disputes. In 2012, more than eighty-five percent of the 403,550 applications to Labour Courts were resolved within six months, and only four percent of cases were appealed.³⁸¹ Additionally, according to the Court, only two percent of all employees go to court, and in ninety-two percent of all companies, no labor disputes exist.³⁸² When disputes do exist, the Labour Courts are the only method for resolving those disputes.³⁸³

372. *General Information*, *supra* note 366.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. THE FEDERAL LABOUR COURT, *supra* note 343, at 8.

380. *General Information*, *supra* note 366.

381. THE FEDERAL LABOUR COURT, *supra* note 343, at 13.

382. *Id.*

383. Weiss, *supra* note 356, at 303 (stating that labor courts are the primary forum for conflict resolution).

C. Strikes

Like the United States, Germany has had its share of political and social turmoil. Strikes and political protests have played a central role communicating displeasure with the status quo.³⁸⁴ Throughout 2019, widespread strikes by airport security staff and flight attendants disrupted the airline industry in Germany, causing Lufthansa to cancel thousands of flights.³⁸⁵ In January 2019, the German trade union *Vereinte Dienstleistungsgewerkschaft* (known as Verdi or Ver.di for short), representing 23,000 aviation security workers, ramped up the pressure by calling a strike when the employers failed to respond to a demand for an increase in wages.³⁸⁶

D. German Collective Bargaining

One of the major differences between German and United States labor law is found in collective bargaining. In the United States, collective bargaining often takes place at the plant level, in which the union represents the members in a specific bargaining unit.³⁸⁷ The presidents of union locals negotiate with members of the companies' negotiating teams, which may contain

384. See Brakkton Booker, *German Airline Lufthansa Grounds 1,300 Flights as Flight Attendants Strike*, NPR (Nov. 7, 2019 4:58 PM), <https://www.npr.org/2019/11/07/777251978/german-airline-lufthansa-ground-1-300-flights-as-flight-attendants-strike> (reporting that Lufthansa flight attendants went on strike over pay, pensions, and working conditions); *German Airport Security Strike Disrupts up to 220,000 Passengers*, USA TODAY (Jan. 15, 2019 7:43 AM) [hereinafter *German Airport Security Strike*], <https://www.usatoday.com/story/travel/flights/2019/01/15/germany-strike-thousands-flights-snarled-labor-action/2578290002/> (describing a strike by airport security staff at eight German airports).

385. Booker, *supra* note 384; *German Airport Security Strike*, *supra* note 384.

386. *German Airport Security Strike*, *supra* note 384; see also *Ver Di-Vereinte Dienstleistungsgewerkschaft*, BLOOMBERG, <https://www.bloomberg.com/profile/company/1006385D:GR> (last visited May 20, 2021). Of the nearly 7.4 million trade union members in Germany, the German Trade Union Confederation (DGB – Deutscher Gewerkschaftsbund) represents the interests of eight German trade unions, including Ver.di, totaling over 5.9 million workers. *DGB – German Trade Union Confederation*, DGB, <https://en.dgb.de> (last visited Oct. 16, 2020); *Trade Unions*, WORKER-PARTICIPATION.EU, <https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Trade-Unions> (last visited May 22, 2021).

387. Cara Waldman, *The Future of German Labor Relations: Lessons German Unions Can Learn from American Failures*, 19 CONN. J. INT'L L. 689, 691 (2004).

managers and lawyers.³⁸⁸ The NLRA gives management and the union little guidance on how they need to negotiate, only that they must bargain in “good faith” for a period of one year before the employees can try to find another union to negotiate on their behalf.³⁸⁹ The NLRA does not require that labor and management even reach a first, second, or third contract. In fact, even after employees win representation, employers may end up stalling the first union contract for years.³⁹⁰

In Germany, unions represent workers in entire industries across numerous job classifications.³⁹¹ Union membership is not compulsory.³⁹² In other words, collective bargaining in Germany occurs at a much higher level known as sectoral bargaining.³⁹³ The implication of sectoral bargaining is that one negotiation can have major implications for thousands or even millions of workers.³⁹⁴ However, in recognition that the conditions of workers in one sector may vary greatly, the works councils provide the ability to tailor the sector-wide contract to specific companies and bargaining units.³⁹⁵

388. Ruth Mayhew, *Labor Laws and Laws Relating to Negotiation*, CHRON, <https://smallbusiness.chron.com/labor-laws-laws-relating-negotiation-60221.html> (last visited Oct. 21, 2020).

389. 29 U.S.C. § 158(d) (2018); John Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. RELS. REV. 3, 5 (2008) (explaining that, after a union is elected as the representation of a bargaining unit, employers are required to bargain with the union in good faith for a year).

390. See Ross Eisenbrey, *Employers Can Stall First Union Contract for Years*, ECON. POL’Y INST. (May 20, 2009), https://www.epi.org/publication/snapshot_20090520/ (finding that between 1993 and 2001, many of the unions that won representation were unable to bargain at first contract).

391. Waldman, *supra* note 387, at 691–92. See also Laszlo Goerke et al., *Trade Union Membership and Paid Vacation in Germany*, 4 IZA J. LAB. ECON., at 4–5 (2015) (documenting that seventeen percent of dependent German employees belonged to a trade union in 2011, the majority of which are blue collar workers).

392. See *id.* at 5 (explaining that most employees covered by collective bargaining agreements do not belong to trade unions).

393. David Madland & Malkie Wall, *What is Sectoral Bargaining?*, CTR. FOR AM. PROGRESS ACTION FUND (Mar. 2, 2020, 9:01 AM), <https://www.americanprogressaction.org/issues/economy/news/2020/03/02/176857/what-is-sectoral-bargaining/>.

394. *Id.* (describing how sectoral bargaining covers most employees in a given profession, including those non-union members).

395. Goerke et al., *supra* note 391, at 5.

1. Works councils

The Works Constitution Act does not mandate works councils, but it allows the employees or the employer to begin the formation so long as the employer has at least five employees.³⁹⁶ If the employees initiate the process, the employer must permit and support the process.³⁹⁷ Hindering the works council election can constitute a criminal offense.³⁹⁸ Due to the voluntary nature of works councils, coverage is not comprehensive amongst employers, and they are legally independent from trade unions.³⁹⁹ However, works councils are often closely related to trade unions, and the presence of a works council in an employer can have an impact on the decision of the employees to become or remain members of a trade union.⁴⁰⁰ Works councils encourage employees and employers to resolve their differences in a positive way.⁴⁰¹ They are an important part of the model of co-determination, which is the idea that coworkers have a voice in how the decisionmakers in their company make the decisions that impact them the most.⁴⁰²

2. Codetermination (*Mitbestimmung*)

In addition to the European works councils, a unique feature of the German working society is the concept of codetermination. Most German workers are familiar with the works council and

396. WORKS COUNCIL ELECTIONS 2018: PRACTICAL GUIDELINES FOR COMPANIES 4–5 (Orrick 2018), <https://s3.amazonaws.com/cdn.orrick.com/files/Insights/Works-Council-Elections-2018.pdf>.

397. *Id.* at 5.

398. *Id.* at 2.

399. Laszlo Goerke & Markus Pannenberg, *Trade Union Membership and Works Councils in West Germany* 1 (Inst. for the Study of Lab., Discussion Paper No. 2635, 2007), <http://ftp.iza.org/dp2635.pdf>.

400. *Id.*

401. Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in WORKS COUNCIL: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 3, 4 (Joel Rogers & Wolfgang Streeck eds., 1995).

402. Bennet Berger & Elena Vaccarino, *Codetermination: Boosting Cooperation Between Management and Employees*, WORLD ECON. F. (Oct. 19, 2016), <https://www.weforum.org/agenda/2016/10/codetermination-boosting-cooperation-between-management-and-employees/> (explaining that the purpose of codetermination is to encourage equal participation of shareholders and employees in a company's decision making).

codetermination.⁴⁰³ Passed by an overwhelming majority of the legislature, The Codetermination Act of 1976 allows for workers in public and private companies with over 2,000 employees to select up to half of their company's supervisory advisory board of directors.⁴⁰⁴ This gives employees a powerful say in how their company is run.

The extent to which high-level worker influence accounts for the success of Germany's economy is debatable, but most research indicates that works councils and codetermination are positive.⁴⁰⁵ Germany's rating of 1, indicating "[s]poradic violations of rights" from the International Trade Union Confederation ("ITUC") Global Rights Index,⁴⁰⁶ would seem to reflect the positive impact of German labor laws on the true fulfillment and respect of German labor rights.

CONCLUSION

While there are no easy solutions to the problems described, stronger unions in the United States are needed to counteract corporations and public sector organizations that do not always act in the best interest of their workers and society. If companies were to take actions, fully protecting and implementing the rights of employees, unions arguably would not need to exist. However, labor history clearly indicates that companies have, in the past and present, failed to act ethically and legally with respect to the health and welfare of their employees. The path, despite its difficulty to improve labor-management relations, should be on more than one front.⁴⁰⁷ First, the establishment of a national

403. Arthur Sullivan, *Representing Workers, the German Way*, DW (Dec. 12, 2017), <https://www.dw.com/en/representing-workers-the-german-way/a-41751752>.

404. Hans-Joachim Mertens & Erich Schanze, *The German Codetermination Act of 1976*, 2 J. COMPAR. CORP. L. & SEC. REGUL. 75, 75 (1979). Other codetermination acts, such as the Coal, Iron, and Steel Codetermination Act and the One-Third Participation Act provide for codetermination in other industries and different sized employers. *German Codetermination*, DGB, <https://en.dgb.de/fields-of-work/german-codetermination> (last visited Oct. 16, 2020).

405. Sullivan, *supra* note 403.

406. INT'L TRADE UNION CONFEDERATION, *supra* note 5, at 11.

407. See Eric Morath, *Germany's Labor System Would be Difficult to Import to U.S.*, WALL ST. J., Oct. 20, 2019, at 1, ProQuest Doc. 2307036925 (emphasizing that the German

labor court system with features like that of Germany's Labour Court system could establish a more stable jurisprudence that does not fluctuate with each new administration.

At the same time, Congress should seriously consider amending the National Labor Relations Act to give the National Labor Relations Board the power to take actions that would have a real deterrent effect on employers committing unfair labor practices. Lastly, companies that work with unions should do so in a collegial way that remembers that workers are generally just trying to do their best to support their families. Basically, workers have always needed, and still need, protection in numbers to correct the imbalance in power. While greed, hubris, and stubbornness have negatively impacted both employers and employees throughout the course of American history, each side must realize that they both can live out the true ideals of democracy.

model gives workers a greater influence in company operations by incorporating economic, social, and cultural needs but is difficult to implement in other countries).

