

# Where are the employers?

American labor relations in comparative perspective

By [Kathleen Thelen](#) • October 7, 2020



## Unequal Power

---

Part of the [Unequal Power](#) project, an EPI initiative to reestablish the understanding in law, politics, economics, and philosophy, that equal bargaining power between workers and employers does not exist. Recognizing this inherent workplace inequality will bolster freedom, economic fairness, workplace protections and democracy.

# Executive summary

Though labor is the driving force in countries throughout the world in pressing for robust social protections and egalitarian wages, a large literature in comparative economics suggests that *durable* progress is likely to occur where unions are able to strike deals with strong employer associations that are organized on a broad industry-wide basis. Yet this opportunity is not available in the United States, the paradigmatic liberal market economy that is characterized by weak employer association and low capacity for strategic coordination in markets.

While U.S. employers have developed powerful lobbying organizations such as the Business Roundtable and the Chamber of Commerce, they lack the kind of strong, centralized trade and employer associations that in Europe allow employers to cooperate with each other and with unions in ways that support more egalitarian outcomes.

The distinctive features of the United States are best highlighted with reference to developments in other countries, particularly Germany. Just as the United States has been seen as the quintessential liberal market economy, Germany has long been considered the paradigmatic coordinated model—featuring higher levels of employer coordination and more cooperative engagement with strong and centralized industrial unions that play an important role in the management of the economy and even of individual firms. Indeed, Germany’s relatively high level of collective bargaining coverage (over 60% of workers are covered by union contracts) owes much more to high levels of organization among employers than it does to union membership (now below 20%).

When and why did this distinction arise? This paper argues that events of the late 19th and early 20th centuries—and specifically the way in which state policy and the courts in this period dealt with issues of competition and interfirm cooperation (antitrust)—played a key role in pushing German business toward a more coordinated variety of capitalism and American business away from collective

## SECTIONS

1. Executive summary • 1
2. Introduction • 3
3. I. Business organization in the United States in comparative perspective • 6
4. II. Markets and courts in the late 19th century • 8
5. III. Impact on firm coordination in product markets: the rise of trade associations • 12
6. IV. Employer coordination in industrial relations • 19
7. V. Conclusion • 26

---

Acknowledgments • 27

Endnotes • 27

References • 31

action and toward strategies organized around political influence and, especially, litigation.

The closing years of the 19th century were a period of considerable economic tumult in the United States and Europe alike. Advances in communication and transportation had upset previously stable local markets by exposing firms to intensified competition from producers in other parts of the country and from abroad. A major financial crisis in 1873 triggered a severe economic downturn that enveloped Europe and North America and ushered in two decades of economic stagnation. One of the responses in the United States was passage of the Sherman Antitrust Act, a vague law whose ambiguities, including the question of whether union activities fell within its purview, were left to the courts to clarify. Germany, by contrast, moved toward a managed market in which competition would be organized and moderated. It legalized cartels—“communities of interest” in which member firms maintained their individual identities while coordinating on prices or production—and extended the concept to include unions.

In each country, these emerging competition policies and their interpretation by the courts had distinct impacts on the development of trade associations and employer organizations.

**Trade associations.** In Germany, the permissive competition policy provided a comparatively congenial context for smaller firms to cooperate among themselves by forming trade associations to stabilize competition and avoid ruinous cutthroat practices. Unions in these areas shared with employers a strong interest in increasing and expanding the supply of skills on which regional economies depended. In the U.S., the Sherman Act and the courts’ strict interpretation of horizontal cooperation among firms rendered such associations illegal, and forms of employer associationalism designed to manage and enhance competition struggled in the context of the Supreme Court’s unforgiving and undifferentiated approach to antitrust.

**Employer organizations.** By the end of the 19th century in the United States trade agreements had been struck in a number of industrial sectors, allowing skilled unions to gain an unprecedented foothold in the labor market. Yet these agreements too fell victim to the Sherman Act as the American Anti-Boycott Association and the National Association of Manufacturers mobilized individual firms to turn to the courts and legislatures to ban coordinated union activity. The situation was very different in Germany, where prevailing competition law provided broad leeway for coordination among businesses but also among workers, including the express right (of both) to engage in activities such as boycotts and secondary strikes that in the United States were being enjoined under the Sherman Act. Indeed, the stance taken by the German courts robbed employers there of the most powerful legal weapon with which their American counterparts were armed—the injunction.

Beyond its impact on employer organization, the antitrust regime of the late 19th century shaped the strategies of American employer associations, encouraging them to focus on legislative and judicial activism as an alternative to the production issues more central to

their German counterparts. One can draw a direct line from the American Anti-Boycott Association through its successors and to the present strategies of the Chamber of Commerce's National Litigation Center and the National Right to Work Committee.

As long as U.S. employers are able to deploy the law to avoid unions, they have no incentive to develop the capacity for broad sectoral organization. In the 19th century the courts, by siding decisively with employers, relieved firms of the need to coordinate with each other to deal with labor collectively. Removing this crutch is thus critical to reversing the strong incentives firms now face to continue to rely on the easy avenue of the courts in lieu of more positive forms of coordination and negotiations with labor.

## Introduction

A strong and robust labor movement is essential to achieving high levels of economic equality and shared prosperity in post-industrial political economies. But what role, if any, do employers play in sustaining such outcomes? In the United States, where the relationship between labor and employers tends to be adversarial, this may seem like an odd question, but a large literature in comparative political economy suggests that employers play a significant role, emphasizing that the most egalitarian countries feature not just strong unions but also strong trade and employer associations. While labor is clearly the driving force in pressing for robust social protections and egalitarian wages, *durable* progress seems to be possible only where unions are able to strike deals with strong employer associations that are organized on a broad industry-wide basis and are capable of aggregating the interests of their diverse memberships, setting collective agendas, and enforcing a measure of discipline on firms. For example, sectoral bargaining, which we know supports higher levels of wage equality, is possible only when organized labor has a counterpart on the employer side with which to negotiate. Beyond this, coordination among firms can facilitate cooperation on other issues, such as training, that sustain the kind of high-quality, high-value-added (and high-wage) production strategies that are more characteristic of Europe's "socially embedded" variety of capitalism. Multifirm coordination in negotiations over wages and working conditions discourages competitive strategies based on local concession bargaining, while cooperation on issues such as research and development and training enables firms to pursue alternative strategies that emphasize quality, diversification, and innovation (Streeck 1991, 52).

The literature on the comparative political economy of the rich democracies characterizes countries in which employers possess these capacities as "coordinated" market economies (CMEs), and distinguishes them from the alternative "liberal" model of capitalism that prevails in the United States and other Anglo-Saxon countries. According to the influential varieties-of-capitalism literature, many of the social protections we associate with strong labor movements are not just (largely) accepted by employers in CMEs but are also functional to the production strategies they are pursuing. Strong trade associations and employer organizations in CMEs are part of a broader institutional ecosystem that supports competitive strategies based more on quality than price. Sectoral bargaining

takes wages partly out of competition, and the associated wage compression holds back the wages of skilled employees while supporting a high wage floor for low-skill workers. In such a context, employers face powerful incentives to organize production in ways that take advantage of skill and to boost the skills (therefore also the productivity) of their low-skill workers (e.g., Acemoglu and Pischke 1998; Acemoglu and Pischke 1999; Thelen 2004). Employers therefore have an interest in long-term employment to protect the investment they make in their workers' training, and they benefit from arrangements that reduce turnover and support industrial peace through worker voice. The bottom line in this research is that employer coordination facilitates the provision of crucial collective goods that enhance firm competitiveness *while also* supporting higher wages and more generous social policies.

In liberal market economies (LMEs) characteristic of Anglo-Saxon countries such as the United States and the United Kingdom, by contrast, where firms have low capacity to coordinate with each other and with unions, firms face few incentives to adopt this kind of long-term perspective. Production strategies tend to emphasize price competition, and in such a context labor is a cost to be minimized. Where collective bargaining occurs at the level of the firm rather than the sector, unionization puts individual companies at a competitive disadvantage relative to their nonunion competitors, and industrial relations are highly conflictual. LME-based firms also tend to underinvest in training because it is irrational for individual employers to invest in worker skills that can easily be poached by their competitors. In consequence, the average firm's attachment to its employees is minimal, so employment protections are low and firm-based social policies scant.

In the comparative literature, the United States is seen as the paradigmatic liberal market economy, one that is characterized by weak employer associations and low capacity for strategic coordination in the market (Hall and Soskice 2001, 27-33). While U.S. employers have developed powerful lobbying organizations such as the Business Roundtable and the Chamber of Commerce, they lack the kind of strong, centralized trade and employer associations that in Europe allow employers to cooperate with each other and with unions in ways that support more egalitarian outcomes. Indeed, American business is not just organized differently from its counterparts in European CMEs; it stands out even among its LME peers (see, e.g., Howell 2005; Hattam 1993).<sup>1</sup> This paper asks why.

I trace the origins of the distinctive features of business organizations in the United States to the role the U.S. judiciary played in regulating economic organization in the late 19th and early 20th centuries. The role of the courts in shaping the architecture of the political economy has long been a central theme in American political development.<sup>2</sup> Rapid industrial growth in the late 19th and early 20th centuries unfolded under the watchful eye of a powerful judiciary whose unabashedly pro-business orientation had an enduring impact on the relationship between the state and the market and on the character of economic interests. Forbath's path-breaking (1991) study explored the role of the judiciary in explaining the structure and strategies of the American labor movement. Here I extend the argument to suggest that the courts also had a profound impact on the organization, goals, and strategies of American employers—discouraging and indeed actively disarticulating forms of business organization that paralleled those that were emerging in

this period in Europe's coordinated market economies.

The distinctive features of the United States are best highlighted with reference to developments in other countries. While a full comparative analysis is beyond the scope of the current study, comparison to Germany can serve to underscore important points of contrast. The German case provides a useful foil. Just as the United States has been seen as the quintessential liberal market economy, Germany has long been considered the paradigmatic coordinated model—featuring higher levels of employer coordination and more cooperative engagement with strong and centralized industrial unions that play an important role in the management of the economy and even of individual firms (Hall and Soskice 2001, 21-27). As in the United States, many of the core features of Germany's political economy have their roots in the late 19th century, and in that case, too, courts played a central role.

Several key observations arise from this comparison of the U.S. and the German experience:

- Economic upheaval in both nations in the last quarter of the 19th century set off furious efforts by firms to band together, stabilize prices, and protect themselves from destructive competition. Germany took the step of legalizing cartels and expressly sanctioning other forms of collective self-help among independent firms. The U.S. moved in the other direction, implementing the Sherman Antitrust Act to curtail economic combinations.
- Germany's positive view of economic organization had profound implications for the evolution of industrial relations. In sharp contrast to the United States, for example, boycotts, sympathy strikes, and sympathy lockouts were not prohibited, as courts declined to repress activities that cartels themselves were allowed to practice in the name of collective self-defense.
- Through the development of trade associations, German producers protected themselves against the threat of destructive bidding wars, providing relief from a race to the bottom. Those firms that relied on skilled labor faced incentives to maintain cordial relations with emerging unions, laying the foundation for collective bargaining and reinforcing competitive strategies based on quality rather than cost. In the U.S., the Sherman Act rendered horizontal cooperation through trade associations illegal.
- The antitrust regime shaped the strategies of American employer associations, encouraging them to focus on legislative and judicial activism as an alternative to the production issues more central to their German counterparts.

The paper proceeds as follows. Part I sketches out key differences in the contemporary landscape of business organization in the United States and Germany. Part II highlights similarities in the economic context in the late 19th century and describes the widely divergent responses of the courts in the two countries. Part III focuses on the impact of competition policy on the evolution of *trade associations*, while Part IV turns to the impact of judicial interventions on *employer associations*. A final section discusses the implications of developments in this period for the contemporary organization of American

business and considers the public policy implications for future labor law reforms.

## I. Business organization in the United States in comparative perspective

The landscape of business organization in Germany looks very different from that in the United States. German companies are organized into three types of strong and encompassing—and functionally differentiated—national business associations. First, every firm is a member of one of 79 *national chambers of industry and commerce*. The chambers are public statutory bodies with recognized responsibilities in some areas of the economy, for example, overseeing and administering the country's national system for vocational education that offers standardized training in (currently) 325 certified occupations. Second, most companies also belong to industry-specific *trade associations*. These voluntary associations are organized on a broad sectoral basis (e.g., one such association covers the entire machine tool industry, another encompasses the entire electrical machinery industry), each with a national headquarters and regional branches. These trade associations represent the interests of member firms toward policy makers and often perform quasi-public functions (e.g., standard setting for the industry). They also provide member firms with a wide range of services, from marketing assistance to shared research and development to trade promotion. Finally, many though by no means all German employers are members of overarching *employers' associations*, organized on a broad industrial basis, with regional branches that engage in coordinated collective bargaining with organized labor.

The landscape of organized business interests in the United States differs dramatically in both its organization and its strategic orientation. First, many though not all companies belong to one of the 10,000-plus local and regional *chambers of commerce*, organized to promote the interests of business in a particular locality. Each chamber is wholly independent of the others (i.e., there is no overarching hierarchy or coordinating structure), and individual chambers are typically entirely parochial in orientation, for example, providing opportunities for networking among local businesspeople and advocating for local investment and development.<sup>3</sup>

Second, American *trade associations* are weak and far more fragmented than their German counterparts.<sup>4</sup> There are currently just under 4,500 national-level business and professional associations (Spillman 2012, 14). Unlike those in Germany, trade associations in the U.S. are organized around very narrowly defined sectors; for example: the Closure Manufacturers Association, the Envelope Manufacturers Association, the Mulch and Soil Council, the Pellet Fuels Institute, the Aluminum Anodizers Council, among many others even more obscure.<sup>5</sup> While these associations range widely in size, most are tiny compared to their German counterparts. Median membership for associations composed of firms is 152, and for those associations that report having any staff at all the median number of staff is four, with a mode of two. Fewer than a quarter of associations employ more than 12 staff members (Spillman 2012, 85). Moreover, in sharp contrast to Germany,

American business associations are mostly not organized around directly supporting the market or production strategies of their members (e.g., contributing to the improvement of goods and services) but rather are involved in what Spillman calls “information production” (e.g., through newsletters) and “cultural” functions (e.g., providing opportunities for social networking and the like). While often surprisingly long-lived, most are “small and weakly organized” and not “policy capable” (Spillman 2012, 270-71).<sup>6</sup>

Finally, there are no overarching *employer associations* in the United States that bargain collectively with labor unions. Instead, bargaining over wages and working conditions is conducted at the level of individual firms—or more often still, at the level of individual facilities or workplaces.<sup>7</sup> Encompassing employer associations, as noted above, are a central feature supporting Europe’s coordinated market economies. Indeed, Germany’s relatively high level of collective bargaining coverage (over 60% of workers are covered by union contracts) owes much more to high levels of organization among employers than it does to union membership (now below 20%) (Behrens 2013, 475). By contrast, the basic rule in the United States is that, in order for workers to gain representation by a union, the union has to win a majority vote in a particular bargaining unit, typically a particular workplace.<sup>8</sup> Here too, the difference between the United States and Germany (and indeed most other countries) is not a difference in degree, but in kind.<sup>9</sup>

What American employers *do* have—and what most CMEs lack—is a set of powerful and well-funded “general purpose” organizations with strong capacity to mobilize politically and, especially, to marshal legal resources on behalf of business interests. Associations such as the U.S. Chamber of Commerce and the National Federation of Independent Business are not focused on internal industry issues such as facilitating innovation or collective training. Instead, they are oriented toward influencing actors outside the industry, in particular, government (at all levels) and the courts. Indeed, these organizations are enlisted to mount campaigns against public policies or to sponsor litigation on behalf of firms and sectors that themselves are seeking to avoid negative publicity or scrutiny. The bottom line is that these associations are political actors whose main mission is to wage legislative and judicial battles oriented toward maximizing the discretion of individual employers rather than to facilitate collaboration on the production of collective goods such as training or research and development within individual sectors.

Germany also has a National Confederation of Industry (BDI) that, like the U.S. Chamber, engages in political lobbying, but the U.S. Chamber is far more involved in elections than its German counterpart, due partly to its orientation as well as differences in campaign financing. More importantly for present purposes, the U.S. Chamber is heavily involved in elections and appointments to the judiciary through its Institute for Legal Reform, as well as in direct litigation on behalf of business interests through its Litigation Center (Rahman and Thelen 2021). American firms also belong to other national associations that have no parallel in Europe. These include the National Right to Work Committee, which is entirely devoted to promoting anti-union legislation and to assisting firms in avoiding unionization in their own firms, and the American Legislative Exchange Council, which brings together state legislators and employers to mobilize for pro-business legislative reforms at the state level (see especially Hertel-Fernandez 2019).



While the varieties-of-capitalism literature typically characterizes U.S. employers as simply *less able* to coordinate their activities, these observations about the German and U.S. experiences suggest that we need to reformulate the way the question is posed. The question is not: are business interests capable of coordinating among themselves? But instead: *how* are American employers organized, and, above all, *what are they organized to do*? The purpose of this paper, accordingly, is to understand what is distinctive about American employers, asking what kinds of collective action they are engaged in and what kinds of strategies and capacities they have developed in pursuit of their goals.

Here I argue that events of the late 19th and early 20th centuries—and specifically the way in which state policy and the courts in this period dealt with issues of competition and interfirm cooperation (antitrust)—played a key role in pushing American business organizations away from collective action in product and labor markets and toward strategies organized around political influence and, especially, litigation. I argue that state policy in the United States, as interpreted by the courts, played a key role in undermining nascent forms of coordination that flourished in Europe and that would later provide an associational infrastructure that proved more congenial to the emergence of a coordinated (also ultimately more “social”) variety of capitalism. The next section identifies a crucial turning point as the courts in the United States and Germany responded in radically different ways to economic turmoil in the late 19th century and to the emergence of new forms of business organization to confront this crisis.

## II. Markets and courts in the late 19th century

The closing years of the 19th century were a period of considerable economic tumult in the United States and Europe alike. Advances in communication and transportation had upset previously stable local markets by exposing firms to intensified competition from producers in other parts of the country and from abroad. A major financial crisis in 1873 triggered a severe economic downturn that enveloped Europe and North America and ushered in two decades of economic stagnation (the “Long Depression”). These developments brought an abrupt end to the post-Civil War boom in the United States, and they shook the newly unified German state to its core.

In both Germany and the United States, manufacturing was hit especially hard. Overcapacity in a wide range of markets caused wages and profits to plummet, setting in motion vicious cutthroat competition and provoking considerable industrial strife. In this context, firms in many industries sought to stabilize prices by banding together into arrangements to protect themselves against this destructive competition. This was the context that produced the great trusts (United States) and cartels (Germany), as large firms in both countries (particularly those in capital-intensive industries) forged new arrangements to gain control of their markets in a period of economic turbulence. Similar strategies were by and large not available to smaller-scale, decentralized manufacturers (e.g., in the vast machine and metalworking industries) who engaged in more specialized

batch production and who relied heavily on skilled labor. In these cases, alternative forms of coordination frequently emerged in which employers organized among themselves to stabilize competition and sometimes turned to unions to police these arrangements and punish firms engaged in cutthroat competition based on wage “chiseling.”

## The experience in the United States

The fate of these arrangements was heavily shaped by the legal context. The key legislation in the United States was of course the Sherman Act—what Letwin characterizes as “a peculiarly American institution...expressing a policy that has nowhere been followed so long and consistently as in the United States” (Letwin 1965, 3). The context that produced this law was widespread public concern about the growing concentration of economic power in the American political economy. The Grangers led the initial agitation for antitrust legislation in the 1870s, but calls for action intensified in the 1880s as Standard Oil assumed control of much of the country’s oil refining and as new trusts cropped up in other (more consumer-facing) industries such as sugar and whisky.

Even as the public clamored for a law, the legal and scholarly communities were divided on the issue and responded timidly.<sup>10</sup> The American Economic Association’s first meeting, in 1885, took up the question gingerly. While some delegates warned of the hazards of rampant competition and growing concentration in the hands of the powerful, most were loath to endorse state intervention of any sort, lest they be branded “socialist.” The legal community—still steeped in British common law tradition—believed that many of the emerging market behaviors should be prohibited, but it thought that the solution lay not in further legislation but simply in the vigorous enforcement of existing common law.

Elected politicians were apparently less conflicted, and the law sailed through Congress nearly unanimously. Though wildly popular, the resulting legislation was famously ambiguous, and it would fall to the courts to resolve those ambiguities. The results of the early years of its enforcement were thus highly uneven. “Loose” combinations—arrangements between independent firms—were held to be per se illegal, despite common law precedents that had clearly long distinguished between “reasonable” (permissible) and “unreasonable” (enjoinable) restraints in trade (see Paul 2020; Paul, forthcoming; Roy 1997; Sklar 1988, 96-106; Thorelli 1955; Peppin 1940). By contrast, “tight combinations”—i.e., those formed by trust or merger—posed more difficult problems. The courts came to consider these cases differently; for such incorporated combinations, it required proof “that the ‘evident purpose’ of the combination was to restrain trade” (Lamoreaux 1985, 174). Posner’s analysis documents the resulting pattern. It shows that in the first two decades after the Sherman Act was passed, 50 of the 61 antitrust cases brought by the Department of Justice involved horizontal combinations or conspiracies (Posner 1970, 365, table 1, and 396, table 22).

The question of whether union activities fell under the purview of the new law was also unclear. Unions had long enjoyed legal status as lawful combinations, and since *Commonwealth v. Hunt* (1842) peaceful strikes in pursuit of higher wages were also

considered legal. While the Sherman Act left these conditions intact, the status of other union activities was left ambiguous (Letwin 1965, 155). Although the record of the congressional debates on the bill makes clear that the legislators' intent was to exempt unions from the law, this was not made explicit in the bill itself (Letwin 1965, 98). Thus, these questions too were left to the courts to resolve. Over time, the courts proceeded to embrace an increasingly restrictive view of practices aimed at broad class-based forms of mutual aid such as boycotts and secondary strikes. As Forbath (1989, 1150) puts it: "Before the 1890s, courts had barely considered the legal status of many kinds of boycotting activities. By the early 20th century, common law and antitrust doctrine condemned in needlepoint detail virtually the entire spectrum of peaceful secondary actions aimed at 'unfair' (non-union) goods and materials."

## The experience in Germany

Germany went in a markedly different direction in the late 19th century, legalizing cartels and also expressly sanctioning other forms of collective self-help among independent firms. Although Germany came to be known as the "land of the cartels," in fact this period represented a dramatic turn in the country's development. Before 1870, the policies of many German states took Britain as the model for economic growth (Lehmbruch 2001). However, the Manchester consensus was shaken in the so-called *Gründerkrise*, the economic crisis that rocked the country in the first years of its existence after 1870. The financial crisis of these years brought intense competition across a range of nascent industries in Germany.

Social scientists and the legal community were crucial in steering the country away from the then-prevailing liberal developmental discourse toward an alternative "organized" market ideology. Economic policy in this period was shaped especially by the influential *Verein für Socialpolitik*, an organization of economists and legal scholars that enjoyed privileged access to the German bureaucracy by virtue of its influential research on pressing contemporary social and economic issues. Formed in 1872, the *Verein* provided an institutional bridge between political economy and legal science in support of a "third way" alternative to both liberals and socialists (Nörr 1995, 5-9). The organization's guiding principle was that of a "managed market," one in which competition would be organized and moderated. Given this orientation, the *Verein* viewed emerging efforts at employer coordination in an overall sanguine light. Indeed, the first German-language study of the impact of cartels, by the economist Friedrich Kleinwächter (1879), held Manchester liberalism responsible for the economic crisis and characterized cartels approvingly as a defense against unbridled (*zügellos*) competition (see also Richter 2007, 55; Polysius 1921, 6).

Kleinwächter was not alone: A chorus of economists viewed cartels as representing a more advanced state of economic development (Richter 2007, 98). The economic sociologist Albert Schäffle (who, though a German national, served briefly as Austrian minister of commerce in 1871) penned an influential essay in 1898 entitled "On Cartels and Cartel Policy" (*Zum Kartellwesen und zur Kartellpolitik*) that painted a "bleak picture" of the

free market as “a wild war of all against all,” waged with the most deceitful tools and resulting in “evil consequences” (Richter 2007, 188).<sup>11</sup>

In sharp contrast to the confusion and wrangling within the U.S. legal profession as to the proper bounds of the Sherman Act in this period,<sup>12</sup> there was a high degree of consensus in the German legal community on this matter. The influential *Juristentag* (a national association of legal scholars and practitioners) explicitly endorsed cartels and the role of the courts in sanctioning these organizational forms and contributing to their stabilization (Nörr 1995, 5). The overwhelmingly dominant view at the association’s 1902 and 1904 congresses opposed legislation that would suppress cartels (Richter 2007, 201-07). Delegates certainly discussed the possible negative impact of cartels (e.g., on prices), and their need to be monitored and regulated. However, rather than ban them, the prevailing view was that the state should recognize them to facilitate such oversight. Insofar as cartels were viewed as a national response to destructive competition, supporting (and monitoring) them was the best defense against such abuse.

In these debates, speakers invoked the United States as a negative model. Thus, for example, at the 1905 convention of the *Verein für Socialpolitik*, economist and legal scholar Gustav Schmoller characterized the American case as a cautionary tale. Schmoller, who as co-founder and later long-serving chairman of the *Verein* had exercised outsized influence in the German political economy since the 1870s, delivered an extended defense of German cartels that bordered on rapturous (Richter 2007, 207-10; Nörr 1995, 78). Cooperative cartels of the sort that had been cropping up all across Germany were not only benign, they were ethical because they looked out for the collective interests of both their members and their workers. As such, they guarded against the short-sighted “Yankee” opportunism that was rampant in the United States (Richter 2007, 208). Schmoller argued that the trusts were founded by egoistic money grubbers out for private gain, while the founders of cartels are “educators who want to ensure the victory of the collective interest of a branch of trade over the egoistic interests of the individual” (Richter 2007, 208).

This positive view of economic organization also had profound implications for the evolution of industrial relations. Once unions and the right to strike were legally recognized—in 1869, through §152 of the Trade Regulations Law, or *Gewerbeordnungsgesetz (GewO)*—Germany’s highest civil court (*Zivilsenat des Reichsgerichts*) viewed associations of workers in the same broad light as it did associations of firms (Schröder 1988, 244, 250-52). The moniker of “labor cartel” with which unions were persecuted in the United States took on a wholly different meaning in Germany, where cartels were legal. Acts of collective economic self-defense (*genossenschaftliche Selbsthilfe*) were seen as lawful—whether deployed by cartels or by unions—so long as the activities undertaken did not exceed customary rules of “proportionality” (Schröder 1988, 251-52, 264, 274-77).<sup>13</sup> This applied not just to strikes (and lockouts) but also to boycotts, which were deployed by cartels to exert pressure on outsiders but also by labor in the context of industrial disputes (Schröder 1988, 252, 260, 265-69, 284).

In sharp contrast to the United States, therefore, the tool of the boycott (along with the sympathy strike and sympathy lockout) was not prohibited in Germany (Kittner 2018, G11; Schröder 1988, 266). Clearly, the overall political context still weighed heavily on organized labor. For example, some lower courts harassed unions by deviating from the stance taken by the Imperial Civil Court—though as Schröder notes, the latter also often overturned such rulings (Schröder 1988, 278-79; see also Kittner 2018). Criminal courts could also prosecute unions under the terms of §153 of the *GewO*, which had rendered the use of force, intimidation, and defamation punishable by up to three months in prison (Kittner 2018, G9). Here too, however, there was great variation in outcomes across the lower courts, and as Kittner (2018, G11) notes, over the period 1903-1914 employers lost almost as frequently as they won (48% of cases brought against workers or unions resulted in acquittals).<sup>14</sup> In 1906 the *Zivilsenat* handed down a decision that confirmed longstanding doctrine with singular clarity in the context of a journeymen boycott against a baker who did not agree to their terms (Schröder 1988, 267-69). The baker had contested the action, but the court upheld the boycott under the principle of “parity in conflict” (*Kampfparität*) (Schröder 1988, 269). Under intense pressure from the legal community, the Imperial Criminal Court then felt compelled to clarify its position as well. It issued a rather convoluted, “face-saving” set of arguments to make explicit that the threat of strike or boycott was itself not generally subject to prosecution under §153 of the *GewO* (Kittner 2018, G11).

In sum, German courts took a very different position from their American counterparts on emerging forms of economic organization among firms and workers in the late 19th century. Germany not only made no effort to suppress cartels and emerging horizontal combinations among firms, it actively supported them. In the same year the Sherman Act was passed, Germany’s high court ruled that businesses were allowed to regulate markets by engaging in “self-help on a cooperative basis” in order to prevent disruptive hypercompetition (Nörr 1995, 7). In a crucial test case in 1897, the court held that cartel agreements only stepped outside the bounds of the law when their purpose was either to create a monopoly or to exploit consumers (Nörr 1995, 7). Cooperative arrangements including explicit price-fixing among firms—already growing before the court’s decision—expanded rapidly after their legal status was clarified. Although the exact number of cartels is uncertain, figures reported by the Interior Ministry suggest that there were 385 by 1902 and over 500 by 1918 (Polysius 1921, 20).

Moreover, even though the country’s authoritarian government suppressed unwanted political organizations of workers until 1890 (in the anti-socialist laws), its top civil court took a remarkably forbearing position on organized labor as an economic actor. The criminal courts (along with some lower civil courts) were harder on labor unions even after the socialist ban was lifted, but the Imperial Civil Court steadfastly declined to repress activities (such as boycotts) that cartels themselves were allowed to practice in the name of collective self-defense.

### III. Impact on firm coordination in

# product markets: the rise of trade associations

The different legal environments governing competition policy in the two countries strongly conditioned the organizational response of business to the turbulent markets of the late 19th century. In both Germany and the United States, large firms that were engaged in capital-intensive production with high fixed costs addressed the competitive pressures of the late 19th century by internalizing coordination. They did so, however, in different ways because of the differences in legal context. In Germany's more permissive competition regime, firms coordinated openly through contracting. German cartels were "communities of interest" ("Interessengemeinschaften," or IGs) in which member firms maintained their individual identities while coordinating on prices or production by dividing up markets so as to avoid head-to-head competition in particular segments. The result was a complex blend of coordination and diversification across different firms—all held together by open and indeed legally enforceable contracts.

In the United States, by contrast, such agreements were unlawful under the Sherman Act. Large firms avoided antitrust suits by merging with their former rivals and swallowing up smaller competitors who could not survive in the era's ultra-competitive markets. In this way, competition policy in the United States strongly promoted a dramatic increase in industrial concentration. To give just one example, Du Pont formed a holding company with a large rival firm and together they proceeded to absorb smaller competitors (Spillman 2012, 50). The "great merger movement" of this period resulted in growing concentration in many American industries as thousands of smaller firms vanished into large corporations (see especially Lamoreaux 1985). As Sanders (1986, 159) points out, in 1899 alone over 1,000 companies had disappeared in mergers, and just a few years later over 100 industrial fields were dominated by a single firm.

## The origins of Germany's trade associations

The impact of the different legal regimes on smaller, skill-dependent firms in Germany and the United States was, if anything, more consequential for the evolution of trade associations. In Germany, the permissive competition policy provided a comparatively congenial context for these smaller firms to cooperate among themselves to stabilize competition and avoid ruinous cutthroat practices. The arrangements they developed in the late 19th and early 20th centuries drew on older traditions in which small regionally based producers solved their collective-action problems through cross-firm governance arrangements, managed by trade associations and sometimes policed by unions.<sup>15</sup> The hub of much of this activity was the decentralized industrial districts of the southwest (Württemberg), Saxony, and the Bergisches Land south of the Ruhr. Faced with intense market volatility, these firms banded together to socialize risks and reduce uncertainty by coordinating—on wages, on production strategies, on technology, and on training—not to eliminate but to manage competition among themselves in the market.

Depending on the character of the industry, these firms organized different types of cooperative arrangements to address the particular kinds of competitive challenges they faced, either on a formal or, very often, more informal basis (Herrigel 1996, 60-65). Thus, for example, in industries in which the main production cost was labor (cotton textile finishing and cutlery, for example), *price cartels* operated to dampen cutthroat competition in downturns (see also Domansky-Davidsohn 1914, 78-79). In other sectors (e.g., the textile trades), *term-fixing cartels* established shared guidelines for payment and delivery schedules, thus preventing firms from “destroying one another by attempting to gain orders by offering to perform services on increasingly unreasonable terms” (Herrigel 1996, 62). In the machinery and other capital-goods-producing industries, *specialization cartels* (also known as finishing associations) involved arrangements in which member firms “agreed to specialize in one or several lines of a product (e.g., particular machine tool types, such as lathes) while ceding other lines to other members of the association” (Herrigel 1996, 63).<sup>16</sup>

Through such arrangements, these producers sought to protect themselves against customers (including state contractors) who sought to engage them in destructive bidding wars.<sup>17</sup> For example, potential buyers sometimes imposed harsh terms of delivery or payment, to which firms would have to agree in order to win the contract. In other cases, clients would award the contract to the lowest bidder but then ask the firm to perform the work according to the plan that had been put forth by some other firm (for a higher bid). Furthermore, since company bids for contracts often included detailed production plans, firms were constantly exposed to the threat of intellectual property theft. Individual firms on their own were powerless to fight these practices. Such problems, as Polysius emphasized (1921, 64), could only be overcome through collective organization.

These cooperative arrangements served to stabilize competition in the face of turbulence, and they also provided a space within which it was safe for member firms to contribute to building and maintaining complementary institutions of collective self-help that would benefit all of them. Thus, these regions developed institutions designed to support cooperation in other areas as well (Herrigel 1996, Chapter 2). These included vocational schools to promote ongoing skill formation and to cultivate and expand the skill base of the local workforce (i.e., the opposite of the deskilling strategies taking hold in the United States at this time as companies competing on price sought to reduce labor costs through the adoption of mass production techniques that relied on unskilled labor), technical institutes (often with support from state governments) to facilitate the dissemination of the latest know-how and to promote ongoing adaptation to the latest technological developments, cooperative financial arrangements to assist firms in securing investment capital for growth and innovation, and arrangements for shared standard-setting and help to firms in bringing their diverse products to broader (also world) markets.<sup>18</sup>

The political-economic ecosystem in these regions allowed small firms to avoid destructive price wars while also encouraging them to collectively move up-market into higher value-added market segments. The powerful German Mechanical Engineering Association (VDMA) grew out of one such regional association that had originally been founded in 1890 to improve delivery and payment conditions, resist unreasonable demands of

customers, and establish reasonable prices (Polysius 1921, 65-74). The association saw as its main task the elimination of abuses that caused “unhealthy” competition. To that end, it sought to promote accurate and uniform cost accounting among firms, to establish unitary delivery and payment conditions, and to develop collective strategies to protect proprietary drawings and ideas (Polysius 1921, 75-77).<sup>19</sup> Dipl. Ing. Friedrich Fröhlich, who took over as managing director of VDMA in 1910, highlighted the association’s emphasis on quality over price; in his words, “Lieber teuer und gut, als billig und schlecht” (“Better expensive and good than cheap and bad”) (Polysius 1921, 74).

Germany’s largest companies (especially in heavy industry) fought against unions furiously (and usually very successfully), but these smaller manufacturing firms in skill-intensive specialized production found it necessary to maintain cordial relations with the skilled workers on whom they relied.<sup>20</sup> Indeed, if anything their dependence on skilled labor grew as competition came to center on product quality rather than price. Thus, these regions formed the heart of the German union movement in the late 19th century, where they organized and bargained for a far larger share of the workforce than in the centers of heavy industry in the Ruhr Valley. As Schönhoven notes, in 1913 fully three-quarters of all German workers who were covered by collective agreements were employed in small and medium-sized firms with 50 or fewer employees (1979, 416).

Unions in these areas were overwhelmingly organized along craft lines, but unlike in the United States, where employers and unions were at war over skills, craft unions in Germany’s decentralized industrial districts shared with employers a strong interest in increasing and expanding the supply of skills on which the regional economy depended (Thelen 2004, 39-91). Regional training institutions actively supported the ongoing upgrading of worker skills and adaptation to the latest technical developments. Because these arrangements were organized collectively, they also promoted skill portability across the regional labor market, facilitating the movement of workers across firms and related industries. In this way, the arrangements supported multifirm bargaining and encouraged the development of encompassing labor organizations.<sup>21</sup> In this context, multiemployer collective bargaining served as a further framework for socializing risk both for firms (by standardizing wages) and for workers (by promoting skill portability). Unions in Germany’s decentralized industrial order were thus part of a broader ecosystem of coordination; member firms experienced it not as constraining but instead as deeply enabling.

## Constraints on American trade associations

These forms of associationalism met a very different fate in the United States. As in Germany, horizontal interfirm coordination was commonplace in the United States in the 19th century (e.g., Roy 1997), and the first American trade associations were established in the 1860s in response to increasing industrialization and the nationalization of markets. By the 1880s, trade associations such as the Writing Paper Manufacturers Association, the American Iron and Steel Association, and the National Association of Wool Manufacturers had “became part of the normal way of doing business in most American industries” (Chandler, quoted in Spillman 2012, 42) Like their German counterparts, these associations



drew on older forms of (local) associationalism (see, especially, Spillman 2012, 44-45). They, too, sought to mitigate market volatility in the late 19th century through efforts at stabilizing competition through information sharing and, in the case of manufacturing, price and production agreements (Spillman 2012, 41-47; for an example, see Galambos 1966, 35, 37).

The Sherman Act of 1890 and the courts' strict interpretation of horizontal cooperation among firms rendered the latter illegal. American trade associations did continue to operate but they could no longer coordinate their competitive strategies openly: "association announcements about price and production agreements at meetings disappeared after 1890" (Spillman 2012, 50). While their German counterparts could coordinate legally, American trade associations had to rely on informal voluntary cooperation. But such forms of coordination are inherently fragile, particularly in periods of intense and destructive competition when the incentives to engage in opportunistic behavior are almost irresistible. Many of these smaller producers were swept up by larger firms in the merger movement discussed above.

The plight of small producers and growing popular discontent with the growth of oligopolies and monopolies kept antitrust on the agenda long after the Sherman Act was passed. The early years of antitrust enforcement made it eminently clear that the Supreme Court's rulings had only encouraged corporate consolidation while declaring all loose associations among independent proprietors unlawful because these organizational forms "did not fit neatly into the Court's binary framework of corporate hierarchy versus market competition" (Phillips Sawyer 2018, 8). Critics pointed to the resulting inequities, as the "Supreme Court's strict interpretation of market competition...forbade *any* contractual agreements [among small independent proprietors] as a violation of the Sherman Act *per se*," even as it applied a far more lenient "rule of reason" standard to business activities that were clearly driving the growth of monopoly (Phillips Sawyer 2018, 17-18).

It was in this context that the American fair trade movement was born.<sup>22</sup> As Phillips Sawyer notes, this movement had its roots in efforts at the turn of the century by small specialty producers to defend themselves through resale price maintenance agreements (RPMs) with the large retailers that sold their products.<sup>23</sup> But the courts expressly outlawed RPMs with reference to prevailing antitrust rules (the key case was *Dr. Miles Medical Co. v. John D. Park and Sons* (1911)). Opponents of the ruling coined the more positive term "fair trade" and demanded that the court assume a more nuanced stand with respect to associations of small independent producers, similar to the "rule of reason" it was applying to large vertical combinations. Influential legal scholars, including notably Louis Brandeis, were keenly aware of the plight of small business and heartily endorsed the fair trade codes and advocated for the extension of the rule-of-reason doctrine to trade association rulemaking as well (Phillips Sawyer 2018, 18-19). In 1911, an American Fair Trade League (AFTL) thus "brought together a group of artisanal producers and specialty proprietors in pharmaceuticals, watch making, electronics and printing" seeking to "create trade networks strong enough to compete with the growing market power of large-scale manufacturers and discount retailers [and] to convince policymakers, jurists and consumers that codes of fair competition ensured quality brand names, encouraged

entrepreneurial innovation, and protected consumer welfare” (Phillips Sawyer 2018, 18).

The movement gained a more secure footing after the establishment in 1914 of the Federal Trade Commission (FTC), whose early leaders were sympathetic to the plight of small employers and sought to assist them in order to “enhance and organize” competition rather than suppress it (Berk 1994; 1996). The U.S. Chamber of Commerce—called into existence in 1912 by Secretary of Commerce Herbert Hoover as a way to forge a link between the nascent administrative state and the business community—formed a crucial organizational link to the trade associations. Brandeis played a key role in importing ideas resembling what he had seen in Germany to promote the establishment of what Berk calls “developmental associations.” In these, small firms would be educated in cost accounting and would engage in information sharing and monitoring to steer competition away from volume and price and toward innovation, improvement, and competition based on quality (see especially Berk 1994).

The FTC’s early leaders were wholly on board with this agenda. The agency’s first commissioner, Edward Hurley, had become “an evangelist for cost accounting” (Berk 1996, 383), which he saw as crucial in deterring underbidding caused by faulty calculations and which he believed would spur innovation among producers who compared unfavorably to their competitors. The underlying idea was that price instability and unhealthy competition were fueled in part by the inability of small producers to accurately assess market conditions and by the propensity to systematically underestimate the cost of their own manufacturing and marketing—thus fueling a race to the bottom. Manuals produced by the AFTL provided basic instruction in uniform cost accounting so that firms could get a clear picture of the strengths and weaknesses in their own production processes.

These efforts at bolstering the role of trade associations got a boost in World War I (during which more trade associations were also founded) as part of the government’s wartime production controls (e.g., Galambos 1966, 66). After the war, trade associations cooperated with the FTC to initiate “trade practice conferences”—forums for members of an industry “together to set competitive and accounting standards and then to foster cost-based pricing before the vicious circle of price fixing and prosecution occurred” (Berk 1996, 383). As then-FTC chair Nelson Gaskill put it, the trade conference “implies a transition from the accepted conventions of free competition...a willingness to surrender somewhat of individual liberty for the benefit of the whole. *It recognizes the individual self-interest as bound up in a community of interest*” (quoted in Berk 1996, 384; italics in original).

However, the FTC and the courts were at odds with one another from the outset. As Gerstle (2015) has pointed out, the early administrative state that was being constructed in this period did not displace the courts but instead grew up around and on top of the pre-existing court-based policy-making regime. The situation was full of tension, as the judiciary viewed the emerging administrative state with deep suspicion and sought to defend its own privileged position in the governance of economic activity. The courts gave the trade associations a pass during World War I because of the key role they were playing in managing wartime production. However, as soon as the hostilities ended, the Supreme Court renewed its prosecution of practices cultivated by the trade associations and the

AFTL under FTC auspices.

In 1921, the Department of Justice (DOJ) and the Supreme Court made an example of one such trade organization, the American Hardwood Association, with a decision that held that even the exchange of cost and production statistics was illegal under prevailing antitrust rules (Sanders 1986; Spillman 2012; see also Berk 1994).<sup>24</sup> The decision was interpreted as a prohibition of all open-price association agreements through which producers sought to mitigate ruinous competition among themselves through transparency in how they had arrived at their pricing. This decision, and the stance of the courts generally, produced a “panicky feeling” among thousands of members of trade organizations, according to the head of the American Trade Association Executives. Business associations “that engage in statistical work of any character are greatly disturbed and uncertain as to the legal limits now imposed upon them” (quoted in Himmelberg 1976, 20).<sup>25</sup>

Trade conferences and other forms of coordination limped along in a context of high legal uncertainty and periodic harassment by the courts. As Berk notes: “Unresolved struggles of antitrust reemerged in a battle over the accountability of trade practice conferences and developmental associations” (1994, 31). The Clayton Act of 1914 had supposedly clarified the distinction between “constructive” and “destructive” competition, but the boundaries were unclear and transgressions severely penalized. Indeed, the ink had barely dried on the Clayton Act when the Supreme Court essentially told the FTC to stay in its lane with a ruling against even well-intended price setting (Spillman 2012, 63).

The court took a similarly dim view of the FTC’s trade practices. “No sooner had the commission routinized trade practice conferences than the Supreme Court gutted them” (Berk 1996, 391).<sup>26</sup> The core problem was that although the Clayton Act called for a distinction between healthy and unhealthy forms of competition, “neither the Court nor the Department of Justice could make sense of economic governance structures *between* markets and corporate hierarchies” (Berk 1996, 392). Trade associations thus repeatedly found themselves in the cross hairs of the DOJ and courts, which were operating on the basis of a very strong distinction between pure competition and monopoly, one that left no room for “regulated competition.” So, while U.S. trade associations survived, they beat a retreat from the core economic functions increasingly pursued by their counterparts in Europe.

In sum, in the United States, forms of employer associationalism designed to manage and enhance competition that were flourishing in Germany struggled in the context of the Supreme Court’s unforgiving and undifferentiated approach to antitrust. But what about employers’ associations that organized collectively in response to the emergence of labor unions? In this case, the impact of the courts was subtler and less direct, but no less profound. Whereas the courts directly inhibited forms of employer association organized around coordination in product markets, the court’s interventions in labor relations operated more indirectly, to relieve employers of the need to form stable encompassing industrial organizations to confront labor. To understand how this unfolded, we need to return to the turn of the century, with a focus again on small independent proprietors who

relied heavily on skilled labor. This is the subject of the next section.

## IV. Employer coordination in industrial relations

Buffeted by the turbulent markets of the late 19th century and blocked by the Sherman Act from coordinating openly among themselves, independent proprietors who were heavily dependent on skilled labor sometimes sought to enlist unions to help them control ruinous competition among themselves. That “the golden age of trade agreements between 1897 and 1904 coincided with the great merger movement in American business,” as Thomas Klug observed (1993, 547), was no coincidence. This period saw a proliferation of employer associations of various sorts, including what Clarence Bonnett calls “negotiated” associations that relied on unions to encourage employer organization and police firm behavior (Bonnett 1922). Unions shared with their employers an interest in preventing cutthroat competition based on wage “chiseling.” Through their control of skills, unions were in a position to police firms’ behavior and punish defectors by depriving them of the skilled workers they needed for production. In such situations, cooperation with organized labor “held out the promise of comfortable profits for employers and wages for employees—a peaceable kingdom erected on the industry wide collective bargaining agreement” (Ernst 1995, 5).

Thomas Klug provides a detailed account of how this worked in practice using the example of Detroit, which was a center for machine production in the 19th century. Machine and metalworking firms there experienced the same repeated, devastating, boom and bust cycles as the more capital-intensive firms of which Lamoreaux (1985) writes. Between 1871 and 1904, they too suffered similar problems of overcapacity and destructive price wars. The stove industry was especially vulnerable to these cycles, and after repeated unsuccessful efforts to coordinate among themselves, the firms struck a broad and encompassing collective bargaining agreement with the union. As Klug put it, “unable to bring order and restore profitability to the stove industry by themselves, employers turned to the Iron Molders Union to do it for them” (Klug 1993, 482). Beginning in 1891 the union “was able to play a major role in rescuing stove manufacturers from destructive competition and falling profits” (Klug 1993, 7).<sup>27</sup>

Stove manufacturers were not alone. By the end of the 19th century trade agreements had been struck in a number of sectors, allowing skilled unions to gain an unprecedented foothold in the labor market in the 1890s (Klug 1993, 243, 505). Between 1895 and 1905, “19 employers’ associations and 16 unions had negotiated no fewer than 26 national or large district agreements,” and in almost every case, “manufacturers’ desire for market control of chaotic price competition” brought them together with unions to enforce wage floors and in this way inhibit “the outbreak of disruptive price wars” (Swenson 2002, 49).

The fate of these arrangements, too, however, was powerfully shaped by the prevailing legal regime, which allowed employers who were disadvantaged by such arrangements to

seek relief in the courts. A key player in this was the American Anti-Boycott Association (AABA), which specialized in assisting firms in fighting unions, including by breaking out of arrangements through which employers sought market stability by negotiating with labor.<sup>28</sup> The AABA was decidedly not an employer or trade association, and required virtually nothing in the way of organization or “coordination” on the part of client firms. It was instead basically a network of lawyers that set itself up as a “general purpose” organization, offering services to firms from all sectors.

Compared to employers’ associations organized on a regional or industry basis to negotiate with—or jointly oppose—unions, the mission of the AABA “was at once broader and more focused” (Ernst 1989b, 60). Rather than confront labor firm by firm, or industry by industry, or region by region, the AABA operated much like the Chamber of Commerce’s Litigation Center today, seeking to secure court decisions whose precedent-setting impact would resonate nationally. Likening the “labor trust” to corporate behemoths such as Standard Oil and American Tobacco, the AABA’s founders called for employers to fight unions through “the machinery of existing law” (Ernst 1995, 20). Their specific express goal at the time was “the destruction of the boycott through law and publicity” (Ernst 1989b, 60).

The identity of the companies that belonged to the AABA was kept confidential (Ernst 1989b, 74),<sup>29</sup> but their dues financed the provision of association benefits and services—legal advice and sometimes direct legal representation and court costs. The organization operated in a highly disciplined and strategic way, choosing carefully the cases it agreed to take up. Thus, the association declined to take up weak cases that its leaders thought would not serve the “common good,” while actively pursuing cases that they saw as capable of establishing desirable new precedents. Above all, the organization sought out cases that would establish that unions too were subject to antitrust provisions in the Sherman Act and that an individual’s right to work was to be protected just as vigorously as a business person’s right to run his own business.

The AABA was wildly successful, winning every one of the cases it took on in its first five years (Ernst 1989b, 69).<sup>30</sup> The most important of these was the landmark Danbury Hatters case (*Loewe v. Lawlor*), in which the Supreme Court explicitly extended the application of antitrust laws to labor unions, a decision that effectively precluded the development of broad sectoral bargaining in the United States. The conflict emerged in the context of a campaign by the United Hatters of North America, in an industry that was a typical case of regulatory unionism. As Ernst notes, the hat trade was dominated by small producers who together sought to contain the disruptive influence of low-quality, low-grade competitors—“unintelligent competition” of “lower, profitless grades” of hats (Ernst 1995, 13). After a failed attempt to form a holding company, they turned to the United Hatters union to help them bring order to the market. The hatters’ experiment in regulatory unionism had started in 1885, and the union played a key role in disciplining employers who defected from the prevailing rules. “In a competitively organized, labor-intensive, and geographically dispersed industry like hatting, employers and workers alike came to appreciate the promise collective bargaining held for stabilizing wages and blocking the entry of new, ‘cut-throat’ firms” (Ernst 1995, 14).

The Danbury Hatters case was brought by a low-wage, marginal producer of “soft” hats (D.E. Loewe & Company) seeking to escape union influence and facing a labor boycott. The AABA saw great promise in pursuing the case and in the trial made clear that this was not a struggle between “a man and the working people” (an unpopular position with many juries) but instead between one manufacturer and an unholy alliance between his competitors conspiring with a powerful national union (Ernst 1995, 160). Although the decision fell short of the AABA’s initial goal of outlawing the closed shop, it did result in a decision that declared labor’s boycott a conspiracy in restraint of trade, and authoritatively “confirmed what a majority of lower federal courts had held: that the Sherman Act applied to combinations of workers” (Forbath 1989, 1175).

The impact of the Danbury Hatters case resonated widely. Proprietary capitalists who before 1890 had not thought to turn to courts were suddenly schooled in how the judiciary could work for them (Ernst 1995, 55). While large employers had long possessed the financial clout to pursue expensive litigation against unions, the AABA now made such strategies available to smaller producers as well. As Ernst puts it, “what was needed was an organization to spread the costs of suing trade unions and developing legal experience on the labor problem, and this was what the AABA would provide” (Ernst 1995, 50).

Promoting the courts as a key arena for doing battle with unions, the AABA (later rebranded the League for Industrial Rights) began publishing a journal called *Law and Labor* to educate and inform employers of the latest legal developments (Merritt 1925, 96-99). The organization thus established itself as a “clearing house on all legal and constitutional phases of the labor problem” (Bonnett 1922, 449). It is no coincidence that sectoral employer and trade associations such as the National Metal Trades Association, the National Founders Association, and the National Erectors Association, which had been organized to facilitate collective bargaining, turned belligerent between 1901 and 1906 (Bonnett 1922, Chapters 3-5).

This context and these developments had a profound impact on the early evolution of the National Association of Manufacturers (NAM), which was without a doubt the most influential national-level employers’ organization in this period. Founded in 1895, NAM was originally primarily concerned with tariff protection at home and promoting markets abroad, and had adopted a rather tolerant approach to labor (Brady 1943, 193; see also Steigerwalt 1964). But in 1902 (the same year the AABA was founded and just as the Danbury Hatters case was being launched), incoming NAM president David Parry abandoned the association’s earlier, more cooperative strategy to launch an aggressive campaign against organized labor. As Parry put it in his 1903 report to the membership: “It is true that the fight against organized labor is, in a measure, a departure from our former conservative policy respecting labor, but it is an inevitable departure if the Association hopes to continue to fill the full measure of its possible usefulness to the manufacturers and people of the country” (quoted in Saunders 1964, 139). In the organization’s new Declaration of Principles, courts and the judiciary figured prominently as an important forum for advancing its objectives. NAM had struggled to win members in its early years, but once the organization turned its sights on labor, membership grew, and indeed quite spectacularly in 1903-1904.<sup>31</sup>

NAM worked hand-in-glove with the AABA in the first decade of the 20th century. Parry invited AABA's general counsel Daniel Davenport to address NAM's 1904 convention, at which Davenport emphasized the critical services his AABA could provide to NAM members. Without such support, he argued, individual companies were not in a position to fight the legal battles necessary to secure favorable decisions. Even as the AABA's case against the United Hatters union was winding its way through the courts (the case dragged on from 1903 to 1908), NAM provided critical backup, establishing a lobbying operation in Washington, D.C. aimed at blocking labor-sponsored legislation through which unions were seeking to secure an exemption for labor combinations from the constraints of the Sherman Act and to curb the injunctive powers of the federal courts in labor disputes (Steigerwalt 1964, 97-98).

NAM's lobbying efforts centered on vigorously defending the role of the courts in industrial relations, not least because injunctions had become critical tools for employers in fighting unions (see also Sklar 1988, 254). Their use in labor disputes grew out of conflicts in the railway industry in the 1880s, in which Supreme Court decisions rested on the Interstate Commerce Clause. However, the passage of the Sherman Act in 1890 had opened for employers all sorts of new possibilities for the broader application of the injunction in labor conflicts (Forbath 1989, 1158). Already in 1893 "a federal district court held the Sherman Act applicable to labor organizations, and all similar opinions which followed added authority to the original decision" (Steigerwalt 1964, 131).<sup>32</sup> Thus, although it was not until the Danbury Hatters case was actually decided (in 1908) that the Supreme Court explicitly upheld the applicability of the law to labor organizations, the use of the injunction in combination with the Sherman Act was longstanding practice and indeed a critical component of employers' strategies to forestall union organization.<sup>33</sup> Injunctions were employers' most potent legal weapons against labor, and their use had grown spectacularly after 1890; thousands were issued between the 1890s and the 1920s (Gerstle 2015, 223).<sup>34</sup>

The relationship between the AABA and NAM, forged under Parry, if anything grew closer under his successor James van Cleave (NAM president from 1906 through 1908). Indeed, the partnership was sealed in the context of another important court case, one in which the AABA represented van Cleave's own firm in a case that took aim at the cooperative arrangements between the stove industry and the Iron Molders Union discussed above. Van Cleave was president of Buck's Stove and Range Company, but unlike other leading stove manufacturers who "applauded [the agreements between the union and the employers' association] for banishing 'unfair' competition," van Cleave was ferociously anti-union (Ernst 1995, 126). When confronted by a union "we don't patronize" campaign, he turned to the AABA to fight his case, which ultimately resulted in another major blow against unions in *Gompers v. Bucks Stove & Range Company* (1911).<sup>35</sup>

As NAM president, van Cleave also oversaw the establishment in 1907 of a National Council for Industrial Defense, whose purpose was "to focus all manufacturing power, local and national, on behalf of mutual interests in general, but particularly with respect to legislation bearing upon the labor question" (Brady 1943, 201). The AABA was one of the 12 associations present at the meeting at which it was resolved that NAM's officers should

be allowed to form and finance this operation (Steigerwalt 1964, 124). Through this new council, NAM worked with local employers' associations such as that in Detroit, which became an epicenter in conflicts over the open shop (Klug 1993, Chapter 17; also Meyer 1981). Thus, the Employers' Association of Detroit (EAD) worked with local employers to assist them in their battles with labor, and sometimes picked up the tab for their legal expenses (Klug 1993, 727, 887). Among the services the EAD provided its members was to aid them in securing labor injunctions by rounding up affidavits from people who would testify to having witnessed threats and by hiring undercover men with cameras to "amass evidence that could be used in court" (Klug 1993, 827-28). As the EAD's chief counsel, George F. Monaghan, put it: "Your courts are your greatest protection" (Klug 1993, 821).

In sum, the successes of these organizations, and their strategic use of the law in the late 19th and early 20th centuries, disrupted emerging strategies of collective self-help among firms and nascent multiemployer bargaining arrangements with labor. The prevailing antitrust regime put all forms of coordination among independent firms on tenuous legal ground, and unions that worked with employers to mitigate competition in bargaining over wages and skills found themselves on the receiving (and losing) end of antitrust suits.<sup>36</sup> As Forbath notes, "trade unionists spoke and wrote about how they had agitated for legislation against the trusts and monopolies only to have the Sherman Act invoked most successfully not against trusts but against strikes and boycotts" (Forbath 1989, 1178).

From a comparative perspective, the important point is that the strategies that these employer organizations developed and perfected for waging legal battles if anything *reduced* incentives to develop the kind of coordinating capacities that were being constructed in Europe. Nascent forms of collective multifirm coordination—both among employers and between labor and capital—withered as the AABA and NAM encouraged firms to mobilize the courts and the legislatures in their battles with organized labor. Under these circumstances, there was little need or incentive for employers to construct strong associations, for, as one employer at the time remarked (with reference to the AABA), "we are getting more for our money out of this Association than any other" (Ernst 1989b, 83)

## **German employer associations and the contrast to the United States**

The situation was very different in Germany, where prevailing competition law provided broad leeway for coordination among businesses but also among workers, including the express right (of both) to engage in activities such as boycotts and secondary strikes that in the United States were being enjoined under the Sherman Act. As discussed above, despite Germany's authoritarian government, the nation's highest civil court repeatedly sanctioned such union strategies, viewing the activities of associations of firms and of workers as analogous, and applying the same metrics to both (Schröder 1988, 252).<sup>37</sup> It was taken for granted in the German context that economic actors could combine to defend their interests and that, in these contests, pressure could be legitimately applied against opponents and that some damage to property interests was virtually inevitable (Schröder 1988, 251-52). Just as the courts upheld the rights of employers to cooperate,



Germany's Imperial Civil Court saw unions as organizations of collective self-help engaged in legitimate self-defense against the free play of market forces (Schröder 1988, 251-52).

Most importantly, the stance taken by the German courts robbed employers there of the most powerful legal weapon with which their American counterparts were armed, namely the injunction—what Frankfurter and Greene call “America’s distinctive contribution in the application of law to industrial strife” (1930, 53). This tool, so widely and devastatingly wielded in the open shop campaign in the United States, was simply unavailable to German employers. More than any other weapon, the injunction was crucial in the American context in shutting down union strategies that sought to organize workers on a multifirm basis. *Ex parte* injunctions allowed even a single employer who could round up a few affidavits to quash union actions on a broad basis (and with no opportunity for defendants to respond) (Hattam 1993, 191; Witte 1932, 85). Moreover, securing temporary restraining orders in the United States was often simple and unbureaucratic. Witte notes that in some cases complainants would have their attorney draft such an order and deliver it to the judge (sometimes to his home). The judge would then either make a few changes to the draft or, often, just sign the order “as prepared by complainant’s attorney” (Witte 1932, 90).

Blanket injunctions were especially devastating, because a single restraining order could enjoin thousands of workers or even all trade unionists in a particular city or town (Hattam 1993, 161). The most sweeping injunctions applied even more broadly, to “all persons whomsoever acting in aid of or in connection with [the union],” prohibiting them from “interfering in any way with the complainants, their agents, or employees in the legitimate conduct, management or operation of their business” (Witte 1932, 96, 98). Unlike with criminal proceedings, equity injunctions in the United States did not involve a jury; instead, the judge determined “all questions of fact as well as law” (Witte 1932, 92). Temporary injunctions took effect immediately, and by the time the judge’s decision came down, strikers had often given up the fight (Witte 1932, 107). As Frankfurter and Greene (1930, 80) put it, “the preliminary injunction in the main determines and terminates the controversy in court. The tentative truth results in making ultimate truth irrelevant.”

For all these reasons, injunctions were deadly to the efforts of American unions to organize on a regional or industrial basis. The ease and frequency with which they could be deployed relieved American employers of the need to build their own strong and encompassing organizations to confront unions collectively. It is no coincidence that the use of the injunction ticked up considerably at the turn of the century in the context of labor’s efforts to organize on a broad multifirm basis. As Forbath points out, this weapon figured especially prominently in strikes in which industrial unionism, amalgamation, or federation was at issue. Injunctions increased as union actions became less localized and more collective, and as strikes and boycotts sought to mobilize broader national organizations or entire working-class communities against employers (Forbath 1989, 1152-53). Indeed, the problem for employers in that period “sprang from the fact that unions were organized collectively, while businessmen were not” (1989, 1153).

Combined with the strictures of the Sherman Act, the injunction allowed American

employers to fight organized labor even as it also relieved them of the need to build their own encompassing organizations to confront unions collectively. The courts enjoined at least 15% of recorded sympathy strikes in the 1890s, and this figure rose to 25% in the next decade. By the 1920s 46% of all sympathy strikes were met with antistrike decrees (Forbath 1989, 1151-52). Here too, the Clayton Act of 1914, meant to provide relief to unions, was instead “eviscerated by the courts”; in fact, cases against labor under federal antitrust actually rose after the law was passed (Hattam 1993, 164; see also Witte 1932, 69). In the very same year the Supreme Court handed down the *Hardwood* decision discussed above, it also issued a ruling (*Duplex Printing Press Co. v. Deering* [1921]) that held that interstate boycotts of nonunion materials could be enjoined, whether or not the means employed by unions were themselves lawful (Witte 1932, 72).<sup>38</sup>

To be clear: German employers were by no means less hostile to labor than their American counterparts. Large firms, especially, opposed labor organization ferociously (and largely successfully), hiring strike breakers and harassing unions in various ways. However, German employers’ main legal weapon, criminal prosecution (e.g., for intimidation) under §153 of the Trade Regulations Act, became less useful over time due to the permissive stance taken by many state courts and the Civil Senate of the Imperial High Court itself. In the same period in which the use of injunctions was ramping up in the United States, criminal convictions under §153 of the *GewO* were falling continuously in Germany, from a high point of 9.5 convictions per 1,000 workers involved in strikes and lockouts in 1890-1894 to 2.7 per 1,000 in 1895-1899 and to just 1.8 per 1,000 in 1909-1913 (Kittner 2018, G11). All attempts to sharpen these criminal laws in Germany at this time also failed (Kittner 2018, G11). In the end, Kittner (2018, G12) concludes that, when it came to realizing the goal of suppressing strike activity, §153 of the *GewO* had proved to be “a complete failure.” Over time, even the law’s symbolic value had faded, so much so that its eventual repeal (in 1918) was met with a collective “shrug” (Kittner 2018, G9).

In short, compared to their German counterparts, American employers had a far more reliable partner in the courts, and one that proved willing, time and again, to intervene immediately to put down encompassing, class-based forms of union organization. The injunction “terrorize[d] innocent conduct” and applied “the most powerful resources of the law on one side of a bitter social struggle” (Frankfurter and Greene 1930, 81)—and it did so well into the 20th century.

Lacking the same powerful legal weapons deployed so effectively in the United States, German employers adopted a different strategy to defeat labor, banding together into employer associations to defend themselves collectively (Erdmann 1966, 57; Leckebusch 1966, 128, 131-32). In the face of strikes, they no longer turned to the state or the courts, but rather mobilized their employer associations (Erdmann 1966, 57; Leckebusch 1966, 131-32; Spencer 1984, 102). The incentives to join such associations were strong, for they provided a range of benefits and protections. These included, among others, access to association-run labor exchanges, information on individual workers, and strike relief to member firms during labor disputes.<sup>39</sup> Most importantly, perhaps, employer associations could mount powerful counteroffensives, answering strikes by organizing sweeping lockouts (Erdmann 1966, 58-59, 74, 82; Leckebusch 1966, 128).

These forms of reactionary coordination, or what Kuo (2010) calls repressive coordination, were sometimes able to forestall unionization, especially in large firms (for as we have seen, smaller skill-dependent firms had often already made their peace with labor). But in the present context, the operative word is coordination. In the late 19th and early 20th centuries, German employers built powerful employers' associations capable of a high degree of very effective coordination. In this way, German firms were able to hold unions at bay, but through organization rather than injunction and litigation. While employers and business associations in the United States were lawyering up, German employers were building organizing capacities that could later be converted to negotiation once the political context shifted (Kuo 2010).

## V. Conclusion

The developments of the late 19th and early 20th centuries analyzed here left an enduring imprint on the subsequent evolution of the U.S. and German political economies. In the United States, the courts' interpretation of the Sherman Antitrust Act in many ways bequeathed to the country the worst of both worlds, having actively promoted industrial concentration without supporting any of the more beneficial forms of employer market coordination that developed in Europe.<sup>40</sup> The result gave fuel to parochial, race-to-the-bottom corporate strategies that cleared the way for the powerful monopoly players in key markets today.<sup>41</sup> American courts would later come under the influence of Chicago school economics and reverse the intolerance they had shown toward retail price maintenance agreements in the pre-New Deal period to embrace an increasingly permissive stance on vertical price fixing. But by this time, the change simply redounded to the benefit of dominant corporate actors who are able to control smaller firms through up- and downstream contracting (e.g., Callaci 2018).

Beyond its impact on employer *organization*, the antitrust regime of the late 19th century shaped the *strategies* of American employer associations, encouraging them to focus on legislative and judicial activism as an alternative to the production issues more central to their German counterparts. Indeed, one can draw a direct line from the AABA through its successor, the League for Industrial Rights, to the National Lawyers Committee of the American Liberty League (that wrote the brief to challenge the Wagner Act in the 1930s), to the present strategies of the Chamber of Commerce's National Litigation Center. Likewise, the parallels between today's National Right to Work Committee and the National Council for Industrial Defense formed in 1907 are unmistakable.

These developments, in turn, profoundly shaped labor relations in the two countries. While German courts supported collective action in pursuit of economic self-defense on both sides of the class divide, U.S. courts repeatedly intervened to dismantle or discourage broader class-based forms of mutual aid. And because American employers were unable to coordinate stably among themselves, they had powerful incentives to prevent labor from doing so as well.<sup>42</sup> Although the Wagner Act of 1935 is frequently seen as an important turning point in the evolution of American labor relations, it hardly constituted a

reversal. In fact, it is better understood as the culmination of the dynamics described above. After the defeat of the efforts described above to establish industry-wide bargaining, American employers unified around the pursuit of a deregulatory agenda that continues to discourage coordination on both sides of the class divide by centering instead on individual freedom and choice. AABA founder and its counsel Daniel Davenport summarized the fruits of the AABA's legal strategies in the first decade of the 20th century in this way: "The great effort of the Society has been with the help of the Judiciary, to write into the fabric of American jurisprudence [the principle of individual liberty]" (Bonnett 1922, 454). This principle forms the central theme around which American employers continue to organize—and it runs like a red thread through the history of American labor relations, from the open shop movement of the turn of the previous century to the right-to-work movement today.

The foregoing analysis highlights the central importance of reforming labor law to securing the future of the American labor movement, and it underscores as well the importance of broad sectoral organization. However, what the comparative literature shows is that the stability of such arrangements hinges not just on labor strength but also on the organizational capacities of employers.<sup>43</sup> As long as employers are able to deploy the law to avoid unions, they have no incentive to develop such capacities. In the 19th century the courts, by siding decisively with employers, relieved firms of the need to coordinate with each other to deal with labor collectively. Removing this crutch is thus critical to reversing the strong incentives firms now face to continue to rely on the easy avenue of the courts in lieu of more positive forms of coordination and negotiations with labor.

## Acknowledgments

Many thanks to Martin Chan and Angelo Krüger, who provided valuable research assistance, and to Alex Hertel-Fernandez, Chris Howell, Larry Mishel, and Sanjukta Paul for extremely helpful comments on an earlier version.

## Endnotes

1. For example, even the U.K. has a central business confederation (the Confederation of British Industry) that can represent British business interests in tripartite deliberations with government and representatives of the trade union confederation—most recently during the COVID-19 crisis.
2. See especially Skowronek (1982), Gerstle (2015), and Horowitz (1992) on the crucial role of the courts in regulating economic activity in the early industrial period.
3. Some of the main functions are laid out here: <https://secure.acce.org/about/chambers-of-commerce/>.
4. The best available analysis of contemporary American business associations is Spillman (2012).
5. These examples are drawn from Spillman's (2012, 15) representative sample.

6. As Spillman summarizes: “American business associations have flourished long term as stable, diverse, minimal, and multifunctional producers of cultural infrastructure—of cognitive categories, networking opportunities, fields, ‘industries,’ collective identities, normative and status orders, and camaraderie” (2012, 188).
7. Of course, there has been multiemployer bargaining in the United States in the past, for example, in the garment industry in the 1920s and in the auto and steel industries (pattern bargaining) in the 1960s and 1970s (see Cohen 2004 for further examples). But these arrangements have generally not proved robust and they never covered the same broad swathes of the economy as those in Europe’s coordinated market economies.
8. See Thelen (2019) for an extended comparative analysis.
9. Similar rules apply in Canada but with several crucial differences in that unions can demonstrate majority support much more easily (card check), employers are under more pressure to negotiate in good faith if the union does prevail (first contract arbitration), and employers have far fewer weapons to fight unions (no permanent replacements). U.S. employers also are allowed to wage much more aggressive counter-campaigns, often enlisting the services of lawyers or consultants who specialize in defeating union organizing drives. Enforcement is also an issue; wage theft is a major problem in many low-wage sectors (Galvin 2016).
10. This paragraph draws on Letwin (1965, 71-85).
11. Germans followed developments in the United States closely. An 1894 essay by Ernst Levy von Halle (presented at the 1895 convention of the *Verein für Socialpolitik*), entitled “Kartelle in Deutschland und im Auslande,” described American antitrust law in detail and concluded that the American law was not effective in defeating the trusts and if anything had simply resulted in trusts being converted to new forms (through merger and acquisition). According to Richter, the essay had a profound effect on the German discussion, promoting the idea that it would be more effective to allow—but then regulate—cartels (Richter 2007, 181).
12. Letwin details the legal wrangling that produced rulings that were almost equally split and in which more than one opinion was submitted on both concurring and dissenting sides. See Letwin (1965, esp. Chapter 5).
13. For example, boycotts that involved spreading falsehoods about one’s opponents or that attempted to drive a firm to ruin (as opposed to forcing specific actions, such as recognizing the union or reinstating fired workers) were seen as excessive and thus unlawful. This “proportionality” consideration applied to cartels as well as to unions (Schröder 1988, 264, 274-75, 281, 289), though as Kittner (2018, G10) points out, in practice the courts enforced the rules unevenly.
14. While certainly not minimizing the impact of the hostility of the German courts, Kittner’s empirical analysis reveals a more nuanced picture than some of the more classical accounts of “class justice” in Imperial Germany. Beyond the surprisingly high acquittal rate, he also notes that, even in the case of convictions, the sentences handed down overwhelmingly imposed penalties on the light rather than heavy side (in 40% of cases, the sentence called for less than four days in jail, and the maximum penalty of three months was handed down in fewer than 1% of cases) (Kittner 2018, G11).
15. See especially Herrigel (1996, Chapter 2), which provides a deep and rich account of these decentralized industrial orders.

16. Domansky-Davidsohn gives the example for gas motor producers dividing the market between those producing motors above and below 200 PS. She also describes “submission cartels” in which firms agreed to register all orders they received to a central office that would assign the job to the firm that could do it most efficiently, with the firm that was awarded the bid paying compensation to the other members of the cartel. See Domansky-Davidsohn (1914, 79-81).
17. The following examples are drawn from Polysius (1921, 64).
18. On regional institutions for technical training, see also Hansen (1997, 180-96).
19. In one industry, competitors banded together to share licenses for production technologies among themselves, both to avoid the costs of litigation among themselves over patents and to collectively bear the legal costs of defending their patents against outsiders.
20. Heavy industry in Germany was largely organized into Centralverband für Deutsche Industrie (CVDI), whereas manufacturing firms that depended on raw inputs from these firms formed an alternative peak association—Bund der Industriellen (BdI)—to defend their interests vis-à-vis the CVDI. The BdI, whose members were more concentrated in skill-intensive manufacturing, was considerably less anti-union than the Centralverband. The VDMA, though a member of the CVDI, shared the BdI’s greater tolerance for unions, partly because even the big machine producers in the VDMA were themselves organized decentrally as “congeries of workshops” that specialized in different things, and because they too depended heavily on skilled workers (Herrigel 1996, 103). Harnisch (1917, 56) notes that a 1917 survey by the VDMA found that an average of 25% of total value of production went into wages (in some industry segments up to 30-35%).
21. Germany’s industrial unions grew by absorbing organizations of skilled workers into overarching organizations *while also protecting* their distinct craft identities. The largest industrial union, the German Metalworkers Union, negotiated completely separate agreements for the various occupations in this period (Thelen 2004, 49-50).
22. On the American Fair Trade movement, see especially Phillips Sawyer (2018).
23. Some proprietary manufacturers of specialty products sought to escape intense price competition through careful cultivation of brands known for their high quality. To defend the brands against lower-quality, lower-cost competitors, they sometimes established cooperative price-fixing networks with retailers to set prices, guarantee services, and arrange to buy back unsold goods. Large volume-discount retailers undercut these arrangements and diluted the brands by using steep discounts on these well-recognized products to draw customers into their stores (see especially Phillips Sawyer 2018, 214-15).
24. *American Column & Lumber Co. v. United States* (1921). Brandeis, now on the Supreme Court, voted with the minority in dissent.
25. On the legal uncertainty surrounding business association activities, see also Galambos (1966, 92-93, 127-28).
26. The key case was *FTC v. Graz*, a 1920 decision in which Associate Justice Brandeis dissented.
27. As one employer in the industry put it: “the only fault I have to find with the labor organization is that they are not able to regulate matters so that the entire thing would be uniform....the only drawback is that they are not strong enough” (quoted in Atkinson 1904, 207).
28. The best account is in Ernst 1995. In a 1989 *Iowa Law Review* article, Ernst characterizes AABA

as “a legal defense fund sustained by the contributions of proprietors of small firms who faced many of the nation’s strongest unions” (see Ernst 1989a, 1151). On the AABA (later renamed the League for Industrial Rights), see also Bonnett (1922, 449-74).

29. Exact membership figures, therefore, do not exist but it was estimated to have about 1,000 members in 1915, up to 2,000 by 1921. See also Bonnett (1922, 449).
30. For an overview of the cases in which the AABA (later the League for Industrial Rights) was successful, see Bonnett (1922, 458-62).
31. Steigerwalt describes NAM’s initial membership drive in 1895-96 as “almost a complete failure” (1964, 36), but membership grew in these years under Parry, whom he credits with “rejuvenating” the association (p. 152).
32. This first application of the Sherman Act in the context of industrial strife was in a longshoreman’s strike in New Orleans in 1893 (Primm 1910).
33. For most of the 1870s and 1880s, employers had relied on the conspiracy doctrine in their battles with labor. But the use of injunctions quickly overtook conspiracy charges as employers’ go-to strategy after the 1890s. The injunction was a far more potent tool compared to conspiracy charges because an injunction offered immediate relief and, unlike criminal conspiracy charges, did not have to be tried before juries, which were often sympathetic to the cause of the workers, who were after all their neighbors (Hattam 1993, 161; Hurvitz 1986, 333).
34. The courts enjoined at least 15% of recorded sympathy strikes in the 1890s, and this figure rose to 25% in the next decade. By the 1920s 46% of all sympathy strikes were greeted by antistrike decrees (Forbath 1989, 1151).
35. For a detailed account of the case, see Ernst (1995, Chapter 7); also Bonnett (1922, 459-60).
36. As Crane (2017, 115) points out, only one of the first 13 successful antitrust cases involved a combination of capitalists; in all other cases it was labor combinations that were found in violation of the law.
37. Again, in both cases, within the bounds of customary rules of “proportionality.”
38. The decision was further reaffirmed later that year in a subsequent decision in *American Steel Foundries v. Tri-City Central Trades Council*. It was not until 1932, with the Norris-LaGuardia Act, that the courts placed meaningful restrictions on the use of court injunctions against union strikes, picketing, and boycotts. But by this time, unions had long since given up on secondary boycotts and broad sympathy strikes (Forbath 1989, 1178).
39. Access to employer-run labor exchanges came attached to an obligation to adhere to employment bans on blacklisted workers, and was enforced through threat of monetary penalties (Erdmann 1966, 58-59; Spencer 1984, 107-08). Later, employer associations represented firms in joint arbitration tribunals with unions in order to prevent strikes (Erdmann 1966, 77-78).
40. In Germany, the most notorious of the large-firm cartels that formed in this period were dismantled after World War II, but what survived was a vibrant associational landscape and the strong trade and employer associations.
41. In other work (e.g., Thelen 2018; Rahman and Thelen 2019), I have shown how business groups and trade associations in coordinated economies are often important allies in defending against would-be monopolies.

42. For the simple reason that if unions were organized and employers were not, unions could bring collective power to bear on individual firms.
43. This is borne out in the postwar history of U.S. labor as well. It is no coincidence that labor's moments of greatest strength have been those in which employers have also been willing and able to act collectively (e.g., Mizruchi and Hyman 2014).

## References

- Acemoglu, Daron, and Jörn-Steffen Pischke. 1998. "Why Do Firms Train? Theory and Evidence." *Quarterly Journal of Economics* 113, no. 1: 79–119.
- Acemoglu, Daron, and Jörn-Steffen Pischke. 1999. "Beyond Becker: Training in Imperfect Labour Markets." *Economic Journal* 109: F112–42.
- Andrias, Kate. 2016. "Building Labor's Constitution." *Texas Law Review* 94, 1591-621.
- Atkinson, Mabel. 1904. "Trusts and Trade Unions." *Political Science Quarterly* 18, no. 193: 197–98.
- Behrens, Martin. 2013. Arbeitgeberverbände: Auf dem Weg in den Dualismus? *WSI Mitteilungen*, July, 473-81.
- Berk, Gerald. 1994. *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917*. Baltimore, Md.: Johns Hopkins University Press.
- Berk, Gerald. 1996. "Communities of Competitors: Open Price Associations and the American State, 1911-1929." *Social Science History* 20, no. 3: 375-400.
- Bonnett, Clarence E. 1922. *Employers' Associations in the United States: A Study of Typical Associations*. New York, N.Y.: Macmillan.
- Brady, Robert A. 1943. *Business as a System of Power*. New York, N.Y.: Columbia University Press.
- Callaci, Brian. 2018. "Control Without Responsibility: The Legal Creation of Franchising, 1960-1980." Working Paper. Washington, D.C.: Washington Center for Equitable Growth.
- Chandler, Alfred. 1962. *Strategy and Structure: Chapters in the History of the Industrial Enterprise*. Cambridge, Mass.: MIT Press.
- Cohen, Andrew Wender. 2004. *The Racketeer's Progress*. New York, N.Y.: Cambridge University Press.
- Crane, Daniel A. 2017. "The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal." In Naomi Lamoreaux and William J. Novak, eds., *Corporations and American Democracy*. Cambridge, Mass.: Harvard University Press.
- Domansky-Davidsohn, Elisabeth. 1914. *Arbeitskämpfe und Arbeitskämpfstrategien des Deutschen Metallarbeiterverbandes, 1891-1914*. Ph.D. dissertation, Department of History, Ruhr University Bochum.
- Dunlavy, Colleen, and Thomas Welskopp. 2007. "Myths and Peculiarities: Comparing U.S. and German Capitalism." *German Historical Institute Bulletin* 41.



- Edelman, Murray. 1957. "New Deal Sensitivity to Labor Interests." In Milton Derber and Edwin Young, eds., *Labor and the New Deal*. Madison: University of Wisconsin Press.
- Erdmann, Gerhard. 1966. *Die Deutschen Arbeitgeberverbände im Sozialgeschichtlichen Wandel der Zeit*. Berlin: Luchterhand.
- Ernst, Daniel R. 1989a. "The Labor Exemption, 1908-1914." *Iowa Law Review* 74, no. 5, 1151-74.
- Ernst, Daniel R. 1989b. *The Lawyers and the Labor Trust: A History of the American Anti-Boycott Association, 1902-1919*. Ph.D. dissertation, Department of History, Princeton University.
- Ernst, Daniel R. 1995. *Lawyers Against Labor: From Individual Rights to Corporate Liberalism*. Champaign: University of Illinois Press.
- Forbath, William E. 1989. "The Shaping of the American Labor Movement." *Harvard Law Review* 102, no 6: 1109-1256.
- Forbath, William E. 1991. *Law and the Shaping of the American Labor Movement*. Cambridge, Mass.: Harvard University Press.
- Frankfurter, Felix, and Nathan Greene. 1930. *The Labor Injunction*. New York, N.Y.: Macmillan.
- Galambos, Louis. 1966. *Competition and Cooperation: The Emergence of National Trade Association*. Baltimore, Md.: Johns Hopkins Press.
- Galvin, Daniel J. 2016. "Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance." *Perspectives on Politics* 14, no. 2: 324-50.
- Gerschenkron, Alexander. 1962. *Economic Backwardness in Historical Perspective*. Cambridge: Mass.: Belknap Press of Harvard University Press.
- Gerstle, Gary. 2015. *Liberty and Coercion: The Paradox of American Government from the Founding to the Present*. Princeton, N.J.: Princeton University Press.
- Hall, Peter A., and David Soskice. 2001. "Introduction." In P.A. Hall and D. Soskice, eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. New York, N.Y.: Oxford University Press.
- Hansen, Hal. 1997. *Caps and Gowns: Historical Reflections on the Institutions that Shaped Learning for and at Work in Germany and the United States, 1800-1945*. Ph.D. dissertation, University of Wisconsin-Madison.
- Harnisch, Elisabeth. 1917. *Die Kartellierungsfähigkeit der Maschinenindustrie*. Heidelberg.
- Hattam, Victoria C. 1993. *Labor Visions and State Power: The Origins of Business Unionism in the United States*. Princeton, N.J.: Princeton University Press.
- Herrigel, Gary. 1996. *Industrial Constructions: The Sources of German Industrial Power*. Cambridge, England: Cambridge University Press.
- Hertel-Fernandez, Alexander. 2019. *State Capture*. New York, N.Y.: Oxford University Press.
- Himmelberg, Robert. 1976. *The Origins of the National Recovery Administration: Business, Government and the Antitrust Question, 1921-1933*. 2nd Edition. New York, N.Y.: Fordham University Press.

- Horowitz, Morton. 1992. *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*. New York, N.Y.: Oxford University Press.
- Howell, Chris. 2005. *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000*. Princeton, N.J.: Princeton University Press.
- Hurvitz, Haggai. 1986. "American Labor Law and the Doctrine of Entrepreneurial Property Rights, Boycotts, Courts, and the Judicial Reorientation of 1886-1895." *Industrial Relations Law Journal* 8: 307-61.
- Kittner, Michael. 2018. "Vor 100 Jahren: 'Der §153 der Gewerbeordnung wird aufgehoben'." *Arbeit und Rechtsgeschichte*.
- Kleinwächter, Friedrich. 1879. *Die Kartelle: Ein Beitrag zur Frage der Organisation der Volkswirtschaft*. Innsbruck: Wagner.
- Klug, Thomas A. 1993. *The Roots of the Open Shop: Employers, Trade Unions, and Craft Labor Markets in Detroit, 1859–1907*. Unpublished Ph.D. dissertation, Wayne State University. (on file with author).
- Kuo, Alexander. 2010. *Political Origins of Firm Strategies*. Ph.D. dissertation, Department of Political Science, Stanford University.
- Lamoreaux, Naomi R. 1985. *The Great Merger Movement in American Business, 1895-1904*. Cambridge, England: Cambridge University Press.
- Leckebusch, Roswitha. 1966. *Entstehung und Wandel der Zielsetzungen, der Struktur und der Wirkung von Arbeitgeberverbänden*. Berlin: Duncker & Humblot.
- Lehmbruch, Gerhard. 2001. "The Institutional Embedding of Market Economies: The German 'Model' and Its Impact on Japan." In Wolfgang Streeck and Kozo Yamamura, eds., *The Origins of Nonliberal Capitalism*. Ithaca, N.Y.: Cornell University Press.
- Letwin, William. 1965. *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act*. New York, N.Y.: Random House.
- Merritt, Walter Gordon. 1925. *History of the League for Industrial Rights*. New York, N.Y.: League of Industrial Rights.
- Meyer, Stephen. 1981. *The Five Dollar Day: Labor Management and Social Control in the Ford Motor Company*. Albany: State University of New York Press.
- Mizruchi, Mark S., and Mikell Hyman. 2014. "Elite Fragmentation and the Decline of the United States." *Political Power and Social Theory* 26: 147-94.
- Nörr, Knut Wolfgang. 1995. "Law and Market Organization: The Historical Experience in Germany from 1900 to the Law Against Restraints of Competition (1957)." *Journal of Institutional and Theoretical Economics (JITE)* 151, no. 1: 5-20.
- Paul, Sanjukta. 2020. "Reconsidering Judicial Supremacy in Antitrust." *SSRN*, March 30.
- Paul, Sanjukta. Forthcoming. *Solidarity in the Shadow of Antitrust*. New York, N.Y.: Cambridge University Press.
- Peppin, John C. 1940. "Price-Fixing Agreements Under the Sherman Anti-Trust Law." *California Law*

Review 28, no. 6: 667-732.

Phillips Sawyer, Laura. 2018. *American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890-1940*. New York, N.Y.: Cambridge University Press.

Polysius, Otto. 1921. *Verbandsbestrebungen im Deutschen Maschinenbau*. Ph.D. dissertation, Phil., Dessau.

Posner, Richard A. 1970. "A Statistical Study of Antitrust Enforcement." *Journal of Law and Economics* 13, no. 2: 365-419.

Primm, C.J. 1910. "Labor Unions and the Anti-Trust Law: A Review of Decisions." *Journal of Political Economy* 18, no. 2: 129-38.

Rahman, K. Sabeel, and Kathleen Thelen. 2019. "The Rise of the Platform Business Model and the Transformation of Twenty-First Century Capitalism." *Politics & Society*. June.

Rahman, K. Sabeel, and Kathleen Thelen. 2021. "The Role of the Law in the American Political Economy." In Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson, and Kathleen Thelen, eds., *American Political Economy: Politics, Markets, and Power*. New York, N.Y.: Cambridge University Press.

Richter, Klaus. 2007. *Die Wirkungsgeschichte des deutschen Kartellrechts vor 1914*. Tübingen: Mohr Siebeck.

Roy, William G. 1997. *Socializing Capital: The Rise of the Large Industrial Corporation in America*. Princeton N.J.: Princeton University Press.

Sanders, Elizabeth. 1986. "Industrial Concentration, Sectional Competition, and Antitrust Politics in America, 1880-1980." *Studies in American Political Development* 1 (Spring): 142-214.

Saunders, William Phillips, Jr. 1964. *The Political Dimension of Labor-Management Relations: National Trends and State Level Developments in Massachusetts*. Ph.D. dissertation, Massachusetts Institute of Technology.

Schönhoven, Klaus. 1979. "Gewerkschaftliches Organisationsverhalten im Wilhelminischen Deutschland." In Werner Conze and Ulrich Engelhardt, eds., *Arbeiter im Industrialisierungsprozeß*. Stuttgart: Klett-Cotta.

Schröder, Rainer. 1988. *Die Entwicklung des Kartellrechts und des Kollektiven Arbeitsrechts durch die Rechtsprechung des Reichsgerichts vor 1914*. Ebelsbach am Main: Rolf Gremer.

Sklar, Martin. 1988. *The Corporate Reconstruction of U.S. Capitalism*. New York, N.Y.: Cambridge University Press.

Skowronek, Stephen. 1982. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. Cambridge, England: Cambridge University Press.

Spencer, Elaine Glovka. 1984. *Management and Labor in Imperial Germany*. New Brunswick, N.J.: Rutgers University Press.

Spillman, Lyn. 2012. *Solidarity in Strategy*. Chicago, Ill.: University of Chicago Press.

Steigerwalt, Albert K. 1964. *The National Association of Manufacturing: A Study in Business Leadership, 1895-1914*. Ann Arbor: Bureau of Business Research, Graduate School of Business

Administration, University of Michigan.

Streeck, Wolfgang. 1991. "On the Institutional Conditions of Diversified Quality Production." In Egan Matzner and Wolfgang Streeck, eds., *Beyond Keynesianism*. London: Elgar.

Swenson, Peter. 2002. *Capitalists Against Markets: The Making of Labor Markets and Welfare States in the United States and Sweden*. Oxford, England: Oxford University Press.

Thelen, Kathleen 2004. *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan*. New York, N.Y.: Cambridge University Press.

Thelen, Kathleen. 2018. "Regulating Uber: The Politics of the Platform Economy in Europe and the United States." *Perspectives on Politics* 16, no. 4.

Thelen, Kathleen. 2019. "The American Precariat: US Capitalism in Comparative Perspective." *Perspectives on Politics* 17, no. 1.

Thorelli, Hans B. 1955. *The Federal Antitrust Policy: Origination of an American Tradition*. Baltimore, Md.: Johns Hopkins Press.

Wilcock, Richard C. 1972. "Industrial Management's Policies Toward Unionism." In Milton Derber and Edwin Young, eds., *Labor and the New Deal*. New York, N.Y.: Dacapo Press.

Witte, Edwin E. 1932. *The Government in Labor Disputes*. New York, N.Y.: McGraw Hill.