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## Labor Unions, Cartelization, and Arbitration: Replacing At-Will Employment With Arbitration of Employee Grievances

Stephen J. Ware

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LABOR UNIONS, CARTELIZATION, AND ARBITRATION:  
REPLACING AT-WILL EMPLOYMENT WITH ARBITRATION OF EMPLOYEE GRIEVANCES

*Stephen J. Ware*\*

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Labor rights and antitrust are back. Vast inequalities of the Gilded Age in the late 1800s prompted enactment of landmark labor and antitrust laws in the Progressive and New Deal eras of the late 19th and early 20th century.<sup>1</sup> Then both labor and antitrust activism faded later in the 20<sup>th</sup> century as more conservative and Law & Economics views increasingly prevailed on labor<sup>2</sup> and antitrust matters,<sup>3</sup> while progressive reformers turned to other areas, such as the civil rights, consumer, women’s, and environmental movements of the mid and late 1900s. Now however, with recent years’ renewed focus on inequalities of wealth, progressive energy—sometimes with

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<sup>1</sup> See Sections II.B and III.

<sup>2</sup> See, e.g., Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1390–91 (2020) (in 1947, “Congress passed the Taft-Hartley Act, which dramatically restricted the power of unions. Unions were interfering with the smooth functioning of the economy, opponents claimed, and they were acting as extortionate forces, exacting unreasonable rents from employers.”); *id.* (“federal labor law has stagnated or ‘ossified’”); Sanjukta Paul, *Antitrust As Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 388–89 (2020) (“the Chicago School movement . . . focused on attacking labor union power and, eventually, public coordination of markets. . . . [T]he intellectual arm of the midcentury attack on labor unions was formulated around the notion of labor monopoly as a distortion of ideal prices--wages—. . . [and] appeared as the counterpart in economics of the concurrent political assault on American unions.”); Michael M. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS., 89, 93–94 (2019) (“By the 1960s, labor was insular, out-of-step with movement politics, and content to coast on its then-historic size.”)

<sup>3</sup> See, e.g., Joshua D. Wright, *The Antitrust/consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2233–35 (2012) (the “economic incoherence” of earlier antitrust decisions “came to an end with the rise of the ‘Chicago School’ in antitrust economics” in the mid-20th century, as “these scholars demonstrated that most marketplace conduct was procompetitive and, indeed, pro-consumer.”); D. Daniel Sokol, *Antitrust’s “Curse of Bigness” Problem*, 118 MICH. L. REV. 1259, 1269–70 (2020) (from 1983 to 2006 “a Reagan Administration-led ‘Chicago’ revolution gave an intellectual basis for courts to loosen antitrust rules significantly.”)

support from populist conservatives—has returned to labor<sup>4</sup> and antitrust.<sup>5</sup> So, this is a good time to absorb lessons from the first big eras of labor and antitrust activism.

Accordingly, this Article re-examines labor history of the Progressive and New Deal eras, including its antitrust aspects, and shows how those eras produced the labor cartelization and labor arbitration that endure to this day. More specifically, this Article shows how employers usually defeated labor unions and maintained employment at will, until the Great Depression’s landmark labor laws weakened employers’ rights, and encouraged the cartelization of labor, which enabled labor unions to negotiate agreements replacing at-will employment with arbitration of employee grievances. In other words, labor grievance arbitration was a major victory for union organizers after over half a century of intense, often-violent, conflict between workers and employers.

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<sup>4</sup> See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5 (2016) (“Economic inequality is at its highest point since the Gilded Age, when unionization rates were similarly low”); *id.* at 7–8 (“Since 2012, over two dozen states and many more localities have raised their minimum wages[, several] to \$15 an hour”); *id.* (“Just a few years ago, increases of this scope and magnitude would have been unthinkable. The wage laws have been accompanied by new regulations providing scheduling protection, sick time, and other benefits.”)

At first glance, these seem to be ordinary state and local employment statutes, separate and apart from the law that governs collective activity by workers. But the sea change comes in response to a range of worker movements, especially the “Fight for \$15,” a campaign of low-wage workers organized by the Service Employees International Union (SEIU). The express goal of these campaigns is not just higher wages but also “a union.” And many of the new laws they have won are a product of bargaining.

From the efforts of these social movements, the outline of a new labor law is emerging.

*Id.* See also William A. Herbert & Alicia McNally, *Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?*, 54 U. LOUISVILLE L. REV. 381, 381 (2016) (“We live and work in an era with the moniker of the New Gilded Age to describe the growth in societal income inequality. The appropriateness of the designation is not limited to empirical evidence of the growing gap in wealth distribution. Another clear emblem of our age is the sharp rise in employment without security”); Sanjukta M. Paul, *Uber As for-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 237 (2017) (arguing that regardless of whether “Uber drivers, or other service providers, are employees or independent contractors . . . , they are entitled to collective action rights”); *id.* at 239–40 (in 2015, “the City of Seattle passed an ordinance that grants collective bargaining rights to drivers . . . who are classified as independent contractors rather than employees”; “In this ordinance parallels the basic function and structure of the National Labor Relations Act: it provides a mechanism for workers to collectively, rather than individually.”)

<sup>5</sup> This is “an exciting time for antitrust with new cries from both the left and right to reinvigorate antitrust as a control on the abuse of corporate power and its corrosive effect on democratic values.” Spencer Weber Waller, *Antitrust and Democracy*, 46 FLA. ST. U. L. REV. 807, 807–08 (2019). See also A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 269–270 (2020) (“Antitrust law is back in the news and, perhaps for the first time since 1912, in the presidential campaign. The Federal Trade Commission and various committees of Congress have held hearings on fundamental antitrust questions. . . . A confluence of four factors seems to have provoked this unrest. The first is a rising populism, on both the left and the right, that decries free markets, globalism, and increasing inequality within the developed countries.”)

The first section of this Article contrasts labor grievance arbitration—which was extremely rare until the 20<sup>th</sup> century, and remained uncommon until the 1930s—with commercial arbitration, which occurred throughout U.S. history. Section II of this Article describes how employers in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries kept labor grievance arbitration rare. In other words, Section II shows that pre-1930s employers generally succeeded in maintaining at-will employment by refusing to recognize labor unions, let alone agree to unions’ demands to replace at-will employment with arbitration of employee grievances. Pre-1930s employer successes in defeating unions, Section II explains, were aided by a range of legal doctrines from the law of master-servant and tort to the Sherman Antitrust Act and enforcement of workers’ promises not to join unions. More broadly, this section shows how 19<sup>th</sup> century classical liberalism extended in the law through the 1920s to impede unionization, and thus the replacement of employment at will with labor grievance arbitration.

Section III explains how the Great Depression combined with the early 20<sup>th</sup> century ideological shift from classical liberalism to progressivism to produce massive legal changes in the 1930s. The key legal change was legally-encouraged labor cartelization. This was the economic policy of the landmark Wagner Act of 1935, the core of what is now known as the National Labor Relations Act (NLRA).<sup>6</sup> Section III emphasizes that the NLRA’s legally-encouraged labor cartelization produced labor grievance arbitration by empowering unions to extract from employers the promises—like firing workers only “for cause”—that create the claims in labor grievance arbitration, as well as employers’ promises to resolve those claims in arbitration rather than litigation. Section IV briefly concludes.

A companion article, *Labor Grievance Arbitration’s Differences*,<sup>7</sup> discusses how the law and practice of labor grievance arbitration differs from other arbitration in the United States. *Labor Grievance Arbitration’s Differences* builds on this Article in showing how those differences arose from labor grievance arbitration’s roots in legally-encouraged cartelization.

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<sup>6</sup> National Labor Relations Act., 49 Stat. 449 (1935). The Wagner Act was “the first of three pieces of legislation commonly known as that National Labor Relations Act (NLRA).” Michael J. Zimmer & Susan Bisom-Rapp, *North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates*, 30 HOFSTRA LAB. & EMP. L.J., 1, 6 (2012).

The Wagner Act model was subsequently modified by two major pieces of legislation. The Taft-Hartley amendments of 1947 shifted the focus of the law from protecting the right of workers to organize to protecting the choice of workers whether or not to organize. See Taft-Hartley Act, Pub.L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (2006)). The Landrum-Griffin amendments in 1959 were primarily directed at the protection of members of unions vis-à-vis their unions, including a workers Bill of Rights. See Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (2006)). The Act is now known as the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

*Id.*

<sup>7</sup> *Labor Grievance Arbitration’s Differences* will be published in a symposium issue of the Cumberland Law Review, expected in 2021.

## I. MUCH LESS LABOR ARBITRATION THAN COMMERCIAL ARBITRATION BEFORE THE NEW DEAL

In contrast to commercial arbitration, which occurred throughout U.S. history, labor arbitration was extremely rare until the 20<sup>th</sup> century, and remained uncommon until the New Deal, and specifically 1937, when the Supreme Court upheld the constitutionality of the National Labor Relations Act (NLRA). While “arbitration” now in the U.S. typically means private (non-government) adjudication,<sup>8</sup> much of the so-called labor arbitration before the NLRA was not adjudication at all, but rather was negotiation or mediation. And some of the so-called labor arbitration before the NLRA that was adjudication was not *private* adjudication, but rather adjudication by government or quasi-governmental entities. Accordingly, such adjudication was not labor *arbitration* as we understand it but rather early labor *regulation*, in which government intervened in some workplaces, typically in a crisis to prevent or resolve strikes. However, a little labor arbitration, in the modern sense of private adjudication, did appear in the U.S. before the New Deal, particularly in more progressive industries and regions of the country.

### A. Commercial Arbitration

In the 18<sup>th</sup> and 19<sup>th</sup> centuries, courts in the United States enforced arbitration awards.<sup>9</sup> Until the 1920s, however, courts did not enforce executory arbitration agreements, that is, contractual promises to resolve disputes in arbitration rather than litigation. As Imre Szalai’s book on U.S. arbitration history puts it, “[p]rior to the 1920s, courts in the United States generally refused to enforce agreements to arbitrate, and such agreements were revocable,” “as long as an arbitrator had not issued an award.”<sup>10</sup> While a pre-1920s breach of an executory arbitration agreement might

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<sup>8</sup> See, e.g., STEPHEN J. WARE & ARIANA LEVINSON, *PRINCIPLES OF ARBITRATION LAW* 1 (2017) (citing authorities); Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 285 (2009) (“Arbitration is private adjudication or private judging.”); JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, *PROCESSES OF DISPUTE RESOLUTION* 500 (2d ed. 1996) (characterizing arbitration as “the process of private adjudication”); William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. LEGAL STUD. 235, 235 (1979) (“[E]ven today much adjudication is private (commercial arbitration being an important example).”); THOMAS J. STIPANOWICH, *PUBLISHER’S VIEW ON ‘THE COSTS OF ARBITRATION’*, *ALTERNATIVES TO HIGH COST LITIG.*, May 2003, at 103 (“The court system, of course, is almost entirely paid for by taxpayers; whether or not we ever use that public resource, we are subsidizing its use by others, including private individuals, government entities or corporations. The costs of alternative private adjudication must also be borne by someone”).

<sup>9</sup> This was sometimes done using arbitration bonds. See, e.g., James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 LAW & HIST. REV. 241, 244 (2013) (“A representative case from the late eighteenth century. . . [is] *Borretts v. Patterson*, [in which] The parties submitted the dispute to arbitration, and the arbitration bond recited the defendant’s agreement to be bound by the decision of named arbitrators, otherwise to forfeit the amount of the bond.”).

<sup>10</sup> IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 9 (2013). See also IAN MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992).

result in a court awarding nominal damages of one dollar or so,<sup>11</sup> courts did not enforce executory arbitration agreements with the meaningful remedy of court orders staying litigation and compelling arbitration.<sup>12</sup>

Even in the absence of meaningful judicial enforcement though, many parties (often merchants in the same trade association) agreed to arbitrate and then resolved disputes in arbitration. Commercial arbitration occurred at each stage of U.S. history, as evidenced by the title of William Jones' oft-cited 1956 article, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*.<sup>13</sup> Although most 18<sup>th</sup> and 19<sup>th</sup> century arbitration likely occurred without involvement of courts, Jones found in the courts of New York alone about 300 "reports of the decisions of courts in cases involving arbitration . . . in the period from 1800 to 1920."<sup>14</sup> These cases involved land boundary disputes, construction, sales of goods, "partnership and agency agreements with a few employment contracts," torts "from assault to slander," fire insurance, and miscellaneous other disputes.<sup>15</sup> Jones concludes "there was a significant amount of arbitration

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<sup>11</sup> See *Munson v. Straits of Dover S. S. Co.*, 102 F. 926 (2d Cir.1900) (holding that plaintiff, who sought damages in the form of lawyer's fees and costs incurred in defending a lawsuit for breach of agreement to arbitrate, was entitled to nominal damages only).

<sup>12</sup> See MACNEIL, SPEIDEL & STIPANOWICH, *FEDERAL ARBITRATION LAW* § 4.3.2.2 (explaining that in the period 1800–1920, agreements to arbitrate future disputes were not enforced with remedy of specific performance); WESLEY A. STURGES, *COMMERCIAL ARBITRATION AND AWARDS* § 87 (1930). See *Kulukundis Shipping Co. S/A v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942).

in the 19th century [U.S.] most courts . . . continued to use the 'ouster of jurisdiction' concept: An executory agreement to arbitrate would not be given specific performance or furnish the basis of a stay of proceedings on the original cause of action. Nor would it be given effect as a plea in bar, except in limited instances, i.e., in the case of an agreement expressly or impliedly making it a condition precedent to litigation that there be an award determining some preliminary question of subsidiary fact upon which any liability was to be contingent. In the case of broader executory agreements, no more than nominal damages would be given for a breach.

*Id.* at 984 (citations omitted). "Effective state arbitration statutes were enacted beginning with the New York Statute of 1920." *Id.* See also Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 *YALE L.J.* 147, 153 (1921) ("the remedy in damages must be an ineffective remedy in cases where the arbitration had not been actually entered into, for it would seem difficult to prove any damages other than nominal.")

<sup>13</sup> William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 *WASH. U. L.Q.* 193, 194 (1956).

<sup>14</sup> *Id.* at 193, 212-213 (analyzing reports of cases decided by the New York Supreme Court, the New York Court of Chancery, the New York Court of Appeals, and the Court of Common Pleas of the City and County of New York).

<sup>15</sup> *Id.* at n. 94:

"Land" cases principally involve boundary disputes; "construction" cases are those involving contracts to build various structures; "sales" cases involve the sale of goods; "personal contracts" are chiefly partnership and agency agreements with a few employment contracts; "torts" includes

throughout the entire period from 1800 to 1920” and “[i]t seems safe to assume . . . that the number of cases being arbitrated was far greater than the number of arbitrations reviewed or considered in the courts.”<sup>16</sup> Jones reaches this conclusion in part because “use of standard clauses providing for the arbitration of disputes that might arise under the contract was frequent in the case of leases, insurance policies, and construction contracts, as well as in the case of contracts for the sale of goods.”<sup>17</sup>

Another reason Jones concludes that from 1800 to 1920 far more arbitration in New York occurred than the 300 cases prompting courts’ decisions is that the “most of these [300] cases do not involve commercial disputes among merchants.”<sup>18</sup> Merchant-versus-merchant arbitration—likely the most common type of arbitration—typically occurred within trade associations, and such arbitrations are (in all eras) not likely to appear in courts’ decisions.

[P]arties to trade association arbitration agreements rarely need litigation to enforce such agreements or to confirm or vacate trade association arbitration awards because . . . self-interest and private pressures usually induce such parties to arbitrate and to comply with arbitrators’ decisions. In close-knit trade associations, . . . merchant parties to trade association arbitration agreements are often “repeat players” in the same industry and thus eager to remain members in good standing of their trade association. So they are vulnerable to private sanctions—culminating in expulsion from the association—if they challenge the arbitration agreement or award.<sup>19</sup>

Trade association arbitration “managed to function autonomously before” courts enforced executory arbitration agreements because trade associations controlled their members’ access to important customers and thus “were able to inflict sanctions (such as public criticism, fines, and suspension or termination of membership)”<sup>20</sup> for breach of arbitration agreements. Jones recounts how in 1800s New York,

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everything from assault to slander; “insurance” is chiefly fire insurance; “miscellaneous” is various, including claims owing to one who performed detective work for another and bastardy claims; “unknown” refers to those cases in which it is impossible to determine from the report of the case the subject matter of the dispute.

<sup>16</sup> *Id.* at 213.

<sup>17</sup> *Id.* at 214.

<sup>18</sup> *Id.* at 213.

<sup>19</sup> STEPHEN J. WARE & ALAN SCOTT RAU, *ARBITRATION* 33 (4<sup>th</sup> ed. 2020).

<sup>20</sup> C.J.W. Baaij, *Hiding in Plain Sight: The Power of Public Governance in International Arbitration*, 60 *HARV. INT’L L.J.* 135, 164–66 (2019).



merchants started to organize according to the commodity in which they dealt. In each of these organizations there was provision for the arbitration of disputes among its members.

The first of these was the New York Stock Exchange. . . . In its first constitution in 1817, . . . there was provision for arbitration of disputes among members. There has continued to be arbitration up to the present day. . . .

Another exchange which had arbitration from an early period was the New York Produce Exchange. . . .

Other exchanges were formed as the century wore on, such as the Cotton Exchange in 1871, the Mercantile Exchange in 1882, and the New York Coffee and Sugar Exchange in 1885. All had provisions for arbitration in their charters.

In addition to exchanges where merchants dealing in a particular commodity could deal with each other, merchants engaged in the same trade began, towards the end of the [19<sup>th</sup>] century, to organize into associations for the advancement of the interests of that trade. These associations made various efforts to regulate the particular trade, such as establishing standard grades and form contracts. Many of them also provided in their bylaws for the arbitration, sometimes compulsory, of disputes among members.

It is believed that this development of arbitration both within exchanges, and especially within trade associations, has continued to increase to the present day. Such, at any rate, is the conclusion towards which the research that the University of Chicago Law School is presently undertaking seems to be tending.<sup>21</sup>

The last sentence of that passage apparently references Soia Mentchikoff's long-influential 1961 article, *Commercial Arbitration*,<sup>22</sup> which details her "empirical study of trade association arbitration and her comparison of such industry-specific arbitration, with the more general commercial arbitration exemplified by the American Arbitration Association (AAA)."<sup>23</sup>

While commercial arbitration from 1800-1920 was especially prevalent in New York, many arbitration cases from around the country during those years are cited in Wesley Sturges'

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<sup>21</sup> Jones, *supra* note 13, at 217-18.

<sup>22</sup> Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

<sup>23</sup> Stephen J. Ware, *Private Ordering and Commercial Arbitration: Lasting Lessons from Mentschikoff*, 2019 J. OF DISP. RESOL. 1, 3 (2019).

1930 treatise, *Commercial Arbitration and Awards*.<sup>24</sup> In sum, despite pre-1920s courts' refusal to enforce executory arbitration agreements, commercial arbitration occurred with some frequency at each stage of U.S. history. This longstanding prevalence of commercial arbitration was largely due to commercial parties often preferring arbitration to litigation, and to private (often trade association) enforcement of arbitration agreements. These factors were, in contrast, largely absent in the labor context. The next subsection shows that labor grievance arbitration was extremely rare until the 20<sup>th</sup> century, and remained uncommon until the 1930s. And the rest of this Article shows why: employers nearly always resist recognizing labor unions, let alone agree to unions' demands to replace at-will employment with arbitration of employee grievances. Employers were largely successful in this resistance, until the New Deal's legally-encouraged labor cartelization pressured employers into labor grievance arbitration.

## B. *Labor Grievance Arbitration was Uncommon Before the New Deal*

### 1. Different Meanings of Labor "Arbitration" in the 1800s

While a significant amount of commercial arbitration occurred at each stage of U.S. history, labor arbitration was extremely rare until the 20<sup>th</sup> century. Although arbitration now typically means private (non-government) adjudication,<sup>25</sup> most so-called labor arbitration before 1900 was not adjudication at all, but rather was negotiation or mediation. And some of the so-called labor arbitration before 1900 that was adjudication was not *private* adjudication, but rather adjudication by government or quasi-governmental entities. Such adjudication was not labor *arbitration* but rather an early form of labor *regulation*, that is, a form of government intervention in some workplaces, often deployed by elected officials in a crisis to prevent or resolve strikes.

Although a founder of the American Arbitration Association<sup>26</sup> wrote that "[o]ne of the first disputes submitted to the earliest known American arbitration tribunal, organized in 1786 . . . , involved the wages of seamen,"<sup>27</sup> and another history says "the first mention of arbitration in labor

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<sup>24</sup> WESLEY A. STURGES, *COMMERCIAL ARBITRATION AND AWARDS* (1930). *See also* Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 248 (1928) ("In the United States in 1916 there were about 6,000 commercial, industrial, and trading organizations. . . . In the sixth edition of 'Commercial Industrial Organizations of the United States' we find approximately 9,000 organizations, covering national, international, state, and local areas. Of these probably 200, seeing the practicability of arbitration, made their own rules on arbitration and in many, if not most instances, proceeded independently of the state statutes. Especially was this true of the associations with a national or larger scope.").

<sup>25</sup> *See supra* note 8.

<sup>26</sup> Sandra K. Partridge, *Frances Kellor and the American Arbitration Association*, 67 DISP. RESOL. J., 1, 16, 17 (2012).

<sup>27</sup> FRANCES KELLOR, *AMERICAN ARBITRATION, ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 4 (1948). *See also* KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* 185 (1991) (arbitration proceedings "In colonial America . . . had been widely used to determine compensation in workmen's suites for back wages").

matters in this country occurred” as early as 1829,<sup>28</sup> such statements, devoid of context, can mislead. As legal historians have long cautioned, “it is difficult to trace the beginnings of labor arbitration in the United States because the term has been used to connote quite different things.”<sup>29</sup> While arbitration in the United States now typically means private (non-government) adjudication,<sup>30</sup> in the labor context of the 1800s, arbitration “[i]n its earliest stage . . . meant what we would now call ‘collective bargaining,’ and at subsequent stages it often meant what we would now call either ‘mediation’ or ‘conciliation.’”<sup>31</sup> So, although 19<sup>th</sup> century labor unions sought, as the Knights of Labor put it, “to persuade all employers to agree to arbitrate all differences which may arise between them and their employees, in order that . . . strikes may be rendered unnecessary, the ‘arbitration’ advocated was merely union recognition by employers to the extent of negotiations and agreements on conditions of employment.”<sup>32</sup> “For most of the nineteenth century, ‘arbitration’ was interchangeably described as negotiation undertaken in a conciliatory spirit, adjudication by a joint labor management body, and referral to a neutral third party.”<sup>33</sup>

Some of that “referral to a neutral third party” apparently was labor arbitration as we now understand it—private adjudication, albeit pursuant to a post-dispute (rather than pre-dispute) arbitration agreement. Dennis Nolan and Roger Abrams write:

One of the first recorded cases involving arbitration of collective bargaining disputes by neutral outsiders took place in 1871. The Pennsylvania anthracite coal mining industry and union selected Judge William Elwell to settle disputes concerning interference with the works and the firing of workers because of their union connections. Holding that both sides had erred, the arbitrator’s decision must have been satisfactory because they later let him decide the “bill of wages.”

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<sup>28</sup> In fact, “the first mention of arbitration in labor matters in this country occurred in the Constitution of the Journeymen Cabinet-Makers of the City of Philadelphia in 1829.” EDWIN E. WITTE, *HISTORICAL SURVEY OF LABOR ARBITRATION* (1953).

<sup>29</sup> R. W. Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245, 1247 (1963) (quoting Witte).

<sup>30</sup> See *supra* note 8.

<sup>31</sup> Fleming, *supra* note 29, at 1247; WITTE, *supra* note 28, at 4.

<sup>32</sup> WITTE, *supra* note 28, at 6. According to a 1983 assessment by labor arbitration scholars Dennis Nolan and Roger Abrams, “no definitive history of labor arbitration in the United States has yet been written,” but Witte’s monograph was “the standard work to which all students of the subject must refer.” Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 FLA. L. REV. 373, 374 (1983). Witte was “a University of Wisconsin economist steeped in that state’s progressive politics,” and called “the father of Social Security.” Patrick J. Kiger, *Edwin E. Witte*, AARP, <https://www.aarp.org/politics-society/history/champions-of-aging-photos/older-american-edwin-witte-father-social-security/> (last visited Dec. 1, 2020).

<sup>33</sup> Nolan & Abrams, *supra* note 32, at 375.

Three years later another judge was selected to arbitrate a wage rate dispute in the Ohio coal industry.<sup>34</sup>

If these were in fact examples of labor arbitration as we now understand it, (private adjudication), then these 19<sup>th</sup> century labor arbitrations were extremely rare exceptions in an era almost totally devoid of labor arbitration. In other words, labor grievance arbitration replacing at-will employment had not yet occurred in the 19<sup>th</sup> century because nearly all employers refused to recognize labor unions or to form enforceable agreements replacing at-will employment with arbitration of employee grievances. Such agreements would not come until the 1900s, and not in large numbers until 1930s legislation gave cartel powers to unions and thus pressured employers to contract with unions.

While labor grievance arbitration was virtually non-existent in the 1800s, what did occur in the late 1800s was the advent of state labor boards. While often called “boards of arbitration,”<sup>35</sup> most of what these state labor boards did was mediation, not adjudication.<sup>36</sup> And even when state labor boards adjudicated, (usually ineffectively,<sup>37</sup>) they were not providing *private* adjudication (arbitration, as we know understand it,) because they were generally appointed by governmental bodies, such as courts.<sup>38</sup> By contrast, commercial arbitration throughout the 1800s was truly private adjudication—generally conducted by private arbitrators selected ad hoc by the parties or provided, not by government, but by a private trade association.<sup>39</sup> So rather than think of 19<sup>th</sup> century state labor boards as early labor *arbitration*, we might better see them as early labor *regulation*, in which government intervened in some workplaces, often in a crisis to prevent or resolve strikes.<sup>40</sup>

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<sup>34</sup> *Id.* at 379.

<sup>35</sup> *Id.* at 380-81; WITTE, *supra* note 28, at 6.

<sup>36</sup> WITTE, *supra* note 28, at 6.

<sup>37</sup> State labor boards had a “general record of ineffectiveness,” according to Witte, *supra* note 28, at 12. Concurring, Nolan and Abrams write: “Other statutes established permanent arbitration boards, the majority of which never functioned. Of those that did, many quickly sank into obscurity.” Nolan & Abrams, *supra* note 32, at 381.

<sup>38</sup> WITTE, *supra* note 28, at 6.

<sup>39</sup> *See supra* Section I.A.

<sup>40</sup> Nineteenth century state labor boards’ ad hoc government intervention into particular workplaces may be contrasted with today’s more systemic government regulation by agency rulemaking and administrative adjudication. Such systemic government regulation of the workplace emanates from the National Labor Relations Board, Equal Employment Opportunity Commission, Occupational Safety and Health Administration, and other federal and state agencies. But federal workplace regulation continues to include an ad hoc component much like the 19<sup>th</sup> century state labor boards—the Federal Mediation and Conciliation Service. It refers to its mediators’ “critical ‘firefighter’ function, arriving at the last moment to assist the parties in resolving a contract dispute.” Federal Mediation & Conciliation Service, *Building Labor-Management Relationships*,

<https://www.fmcs.gov/services/building-labor-management-relationships/> (last visited Dec. 1, 2020).

The federal government similarly responded to strikes in important industries by encouraging “arbitration” to restore or maintain labor peace, and thus production, in those industries. “Reacting to a drastic increase in strikes, President Grover Cleveland recommended to Congress in 1886 the creation of a permanent board for voluntary arbitration of railroad labor disputes. Instead Congress passed the Arbitration Act of 1888, providing for ad hoc arbitration boards which parties could use if they so agreed.”<sup>41</sup> However, “the voluntary arbitration provisions of this act were not utilized even once during the ten years that it was in effect.”<sup>42</sup> After the Pullman strike “crippled the American railroad network in 1894,”<sup>43</sup> Congress enacted the Erdman Act of 1898. It obligated federal officials

on the request of at least one of the [railway] parties, to attempt to settle through mediation any existing or threatened labor dispute. The act further provided for arbitration, on agreement of both parties, by an ad hoc board composed of a representative of each side and a third person agreed upon by these representatives, or appointed, in the event of their failure to agree, by the two federal officials having primary responsibility for the administration of the Act.

Soon after the passage of the Erdman Act, the Railroad Trainmen invoked the law in connection with a dispute involving switching service in the Pittsburgh area. The [U.S. Government’s] Commissioner of Labor and the Chairman of the Interstate Commerce Commission promptly offered their services as mediators. These services were declined by the railroads with a statement that wages were such a vital matter to them that they could not accept outside intervention. Thereafter no further attempt to use the Erdman Act was made until late in 1906.<sup>44</sup>

From 1906 until 1913, seven “arbitrations” occurred under the Erdman Act, but as Nolan and Abrams explain, “[t]he two arbitrators selected by the parties seldom agreed as to the third. As a result, the task of choosing the third arbitrator generally devolved upon the Commissioner of Labor and the Chairman of the ICC.”<sup>45</sup> So these so-called “arbitrations” were, not *private* adjudication, as we define arbitration today, but crucially governmental.

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<sup>41</sup> Nolan & Abrams, *supra* note 32, at 382.

<sup>42</sup> WITTE, *supra* note 28, at 8–9.

<sup>43</sup> Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 950 (1988).

<sup>44</sup> WITTE, *supra* note 28, at 10. “Some demand was expressed in labor circles for legislation to compel employers to arbitrate. . . . But Samuel Gompers came out strongly against compulsory arbitration . . . [and] [h]is position was officially adopted by the American Federation of Labor . . . , [which] declared itself in favor of agreements with employers on conditions of employment and also of voluntary arbitration, but totally in opposition to compulsory arbitration—a position from which it has not deviated since.” *Id.*

<sup>45</sup> Nolan & Abrams, *supra* note 32, at 373, 384.

Similar to railroads, other industries around 1900 sent a few labor disputes to what was called “arbitration,” but even some of those few were not *private* adjudication because government officials served as, or appointed, the “arbitrators.” For instance, what Edwin Witte calls “the most famous of all arbitration cases” “was the settlement by arbitration of the anthracite coal strike of 1902.”<sup>46</sup> The coal companies “absolutely refused to deal with the union,”<sup>47</sup> and the strike “of more than five months’ duration aroused a vast amount of public concern.”<sup>48</sup> “After the strike had continued for some time with no prospect of settlement, President Theodore Roosevelt threatened to have the United States Army take over the mines and operate them as a receivership. The mine owners bowed to the pressure and asked the President to establish a strike commission.”<sup>49</sup>

J. Pierpont Morgan finally acceded to the suggestion that all issues be submitted for settlement to a board to be appointed by the President, all of whose members should represent the public. The Anthracite Coal Strike Commission, after months of hearings, came up with an award in which the union failed to win recognition but did secure its major economic demand, namely, a basic nine-hour day at the same pay as for the prior ten-hour day. The award also provided for the establishment of grievance machinery and for a permanent bipartisan Anthracite Conciliation Board to interpret the award in cases of dispute. . . .

. . .

In twenty-five cases in the first nine years of the functioning of the board, . . . a decision had to be made by an umpire. In all but one of these cases the umpire was the United States Commissioner of Labor.<sup>50</sup>

Decisions by the United States Commissioner of Labor are plainly governmental, rather than *private* adjudication, and thus not *arbitration* as we now understand it. Instead, the Anthracite Conciliation Board is—like the earlier-discussed state labor boards and the railroad interventions of the Commissioner of Labor and ICC Chair—better understood as early labor *regulation*, by which government intervened in some workplaces, often in a crisis to prevent or resolve strikes.

Such governmental regulation by the *federal* government coming earlier to railroads and coal than to other industries fits the importance—including importance to *interstate* commerce—

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<sup>46</sup> WITTE, *supra* note 28, at 21.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Nolan & Abrams, *supra* note 32, at 389.

<sup>50</sup> WITTE, *supra* note 28, at 22.

of railroads and coal in that era.<sup>51</sup> So reducing rail and coal strikes understandably concerned federal officials and the broader public. Federal government efforts to regulate these industries grew along with growing public “[s]entiment for restrictions upon the right to strike, at least on the railroads.”<sup>52</sup> Accordingly, in a renewed federal effort to prevent or resolve railroad strikes, the Newlands Act of 1913 established a Board of Mediation and Conciliation. Although Witte says the Board was “instrumental in bringing about settlements through arbitration in twenty-one cases,” this so-called “arbitration” was again not *private* adjudication, but rather, as Witte acknowledges, “an independent permanent government agency.”<sup>53</sup> Moreover, “the prestige of the agency waned after it had to appeal twice in the first three years of its existence to the President to prevent threatened strikes.”<sup>54</sup> In 1916, on the eve of a nationwide railroad strike, President Wilson

called in representatives of the parties and recommended the establishment of a basic eight hour day for train service employees. . . . When the carriers refused to go along, the President recommended that Congress pass a law to carry out his recommendations. . . . Congress promptly passed the Adamson Act, which served to avert the threatened nation-wide strike.<sup>55</sup>

In short, the so-called labor “arbitration” that was by World War I “very popular with the general public,” was not *private* adjudication, but government regulation—and sometimes even presidential intervention—“for the settlement of strikes or threatened strikes.”<sup>56</sup>

Similar government intervention occurred during the First World War and in the 1920s. Witte reports that “[r]elative to the number of industrial workers, the number of strikes and the man-days lost through strikes from 1916 to 1919 were the greatest in all our history.”<sup>57</sup> During these war years, the federal government established “[m]ore than a dozen new labor dispute adjustment agencies” to mediate labor disputes. “[W]hen mediation failed to bring about a settlement, the adjustment boards passed on the merits of the dispute and entered awards. When necessary, indirect methods of compulsion were resorted to by the Government to secure

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<sup>51</sup> Coal provided roughly 70% of the nation’s energy at the time. See Sean Patrick Adams, *The US Coal Industry in the Nineteenth Century*, ECONOMIC HISTORY ASSOCIATION, (January 2003), <https://eh.net/encyclopedia/the-us-coal-industry-in-the-nineteenth-century-2/>.

<sup>52</sup> WITTE, *supra* note 28, at 27.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 27.

<sup>56</sup> *Id.* at 28.

<sup>57</sup> *Id.* at 30.

compliance.”<sup>58</sup> President Wilson created a National War Labor Board with “authority to intervene in any labor dispute affecting war production and not within the jurisdiction of a special adjustment agency. Adjustment of such disputes was to be sought through mediation or by getting the parties to agree to arbitration or, failing in such efforts, to render a decision outlining a basis for settlement.”<sup>59</sup> Witte says, “Up to the Armistice, the National War Labor Board rendered eighty-three decisions, which resembled arbitration awards.”<sup>60</sup> Yet again, this so-called arbitration was not arbitration as we know it because it was government, rather than private, adjudication.

After World War I, strikes exploded. “1919 stands out as the worst year for strikes” in U.S. history.<sup>61</sup> According to Witte, “[p]ublic concern was high over the many serious strikes, and compulsory arbitration received more support than ever before.”<sup>62</sup> By “compulsory arbitration,” Witte means governmentally-mandated. Strong public sentiment against strikes, Witte says, meant “the Government necessarily had to bring great pressure upon the parties to settle by arbitration strikes seriously alarming to the public. Commissions named by President Wilson arbitrated the nationwide bituminous coal strike of 1919 and the threatened anthracite strike of 1920.”<sup>63</sup> So here again, as earlier, this so-called “arbitration” was not *private* adjudication but rather government intervention in an important industry—perhaps amounting to temporary government regulation of wages and working conditions in that industry—in a crisis to prevent or resolve strikes.

Strikes were such a widespread source of public concern that several states not only prohibited strikes but made striking a criminal offence. “The mildest of these was the Colorado Disputes Investigation Act” of 1915, which “rendered unlawful strikes in [some] industries, prior to investigation and reports by the state industrial commission. This legal restriction was often violated, and from 1919 to 1922 several prosecutions” occurred.<sup>64</sup> “Much more drastic was the Kansas Industrial Relations Court Act of 1920,” under which

Strikes were outlawed under criminal penalties and made subject to prohibition by injunction. Compulsory arbitration was provided for all labor disputes in the public utility, coal, food, and clothing industries. Enforcement of the law and the

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<sup>58</sup> *Id.* at 31.

<sup>59</sup> *Id.* at 32.

<sup>60</sup> *Id.* at 33.

<sup>61</sup> WITTE, *supra* note 28, at 30. *See also* Melvyn Dubofsky, *Labor Unrest in the United States, 1906-90*, 18 *REV.* 125, 126 (1995) <https://www.jstor.org/stable/40241326?seq=1> (strikes peaked in 1919 when almost 25% of all private-sector workers struck).

<sup>62</sup> WITTE, *supra* note 28, at 35.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 39.



settlement by binding decisions of all labor disputes in the specified industries was the function of the Court of Industrial Relations . . . .

The compulsory arbitration statute was in actual operation in Kansas for a little more than three very stormy years. The Act was strongly opposed by organized labor and openly defied by many unions . . . . Some employers also refused to abide by the decisions of the Court, and it was out of one of these cases that there came decisions in 1923 and 1924 by the United States Supreme Court holding the Kansas act to be unconstitutional.<sup>65</sup>

Kansas's attempt to ban strikes in some industries and instead mandate governmental arbitration was unconstitutional, the Supreme Court held, because government setting wages in meatpacking (or "food preparation") unconstitutionally "deprives [the employer] of its property and liberty of contract without due process of law."<sup>66</sup> In contrast, the Court distinguished industries, such as railroads, "where fear of monopoly prompted, and was held to justify, regulation of rates."<sup>67</sup>

In sum, labor arbitration as we know it—*private* adjudication—was extremely rare in the 19<sup>th</sup> century, and much of what was called "arbitration" was actually negotiation, mediation, or governmental adjudication. In the 1800s and early 1900s, much so-called labor arbitration was actually early labor regulation, that is, government intervention in important industries, often to prevent or resolve strikes.

## 2. Labor Grievance Arbitration Still Uncommon in the Early 1900s

While private adjudication of labor disputes, as noted above, may have occurred in a few extremely rare 19<sup>th</sup> century instances, the more recognizable beginnings of labor grievance arbitration as the private adjudication we know occurred in the early 1900s. This is when employers began to recognize unions, and to form arbitration agreements with them. Nolan and Abrams write that the "first major newspaper industry agreement incorporating an arbitration provision" was signed in 1901,<sup>68</sup> and "hailed by" David Weiss, a member of the International

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<sup>65</sup> *Id.* at 41 (discussing Kansas Industrial Relations Act (Laws 1920, c. 29)).

<sup>66</sup> *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 544 (1923). "The power to regulate a business affected with a public interest extends to fixing wages and terms of employment to secure continuity of operation." *Id.* at 535. "But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases [relied on by the state] where fear of monopoly prompted, and was held to justify, regulation of rates." *Id.* at 538.

<sup>67</sup> *Id.* at 538 (citing *Wilson v. New*, 243 U.S. 332 (1917), which held that Congress *could* prescribe wages temporarily for railroads).

<sup>68</sup> Nolan & Abrams, *supra* note 32, at 390.

Typographical Union, “as ‘the genesis of industrial arbitration agreements in the United States.’”<sup>69</sup> In the 1910s, strike settlements in the clothing industries led many employers to recognize unions and agree to arbitrate employee grievances. For instance, “a great strike in the New York cloak and suit industry in 1910” was settled “very largely through the efforts of” progressive icon and future Supreme Court Justice Louis Brandeis, who “for four years . . . served as the unpaid, part-time chairman of the arbitration board under this agreement.”<sup>70</sup> Labor arbitration agreements in various parts of the clothing industries spread to other major cities over the next few years.<sup>71</sup> In addition, “the American Association of Street Railway Employees included arbitration clauses in its collective agreements early in the [20<sup>th</sup>] century,” and “[i]n 1917, the Actor’s Equity Association negotiated an arbitration clause in its first contract.”<sup>72</sup>

“In short, little activity before World War I could be characterized as modern grievance arbitration, but the groundwork had been laid.”<sup>73</sup> The American Federation of Labor grew tenfold from 1898 to 1919.<sup>74</sup> In 1913, the U.S. Department of Labor came into existence.<sup>75</sup> However, after World War I, unionism and the AFL’s membership declined.<sup>76</sup> During the post-World War I “red scare,” coinciding with the Bolshevik revolution in Russia, many U.S. “labor radicals, pacifists, socialists, and other left-wingers [were] jailed or deported.”<sup>77</sup> Deportation is quite relevant as “[b]y

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<sup>69</sup> *Id.* (quoting David Weiss, *History of Arbitration in American Newspaper Publishing Industry*, 17 MONTHLY LAB. REV. 19, 19 (1923)).

<sup>70</sup> WITTE, *supra* note 28, at 24.

<sup>71</sup> *Id.* at 23–26. “During the 1910’s and 1920’s, the [Amalgamated Clothing Workers and the International Ladies’ Garment Workers’ Union] went further than any other of the nation’s unions in forging the kind of collective bargaining arrangements that would come to characterize ‘modern’ labor-management relations under the 1935 National Labor Relations (Wagner) Act.” William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1195 (1989).

<sup>72</sup> Nolan & Abrams, *supra* note 32, at 400. *See also* V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 82 (2017) (“by 1919, 100% of the workforce was unionized”).

<sup>73</sup> Nolan & Abrams, *supra* note 32, at 400.

<sup>74</sup> ROBERT H. ZIEGER & GILBERT J. GALL, *AMERICAN WORKERS, AMERICAN UNIONS: THE TWENTIETH CENTURY* 19 (3d ed. 2002) (the American Federation of Labor grew from under 300,000 members in 1898 to over four million by 1919).

<sup>75</sup> WITTE, *supra* note 28, at 31-32.

<sup>76</sup> WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT*, 98 (1991) (“Wartime government policy from 1917 to 1919 opened the door to unions in places and industries hitherto closed. By the mid 1920s, however, open-shop drives, supported by unprecedented numbers of anti-strike decrees, had robbed the [AFL] of over 25 percent of its total 1919 membership and half of its wartime gains.”)

<sup>77</sup> David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis As A Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2047 (2014).

1910, twenty-two percent of the U.S. labor force was foreign-born,”<sup>78</sup> and many labor activists were immigrants.<sup>79</sup>

While the newspaper, clothing, construction, and railroad industries moved toward unionization and arbitration in the early 20<sup>th</sup> century, most other industries did not, and overall union membership declined in the conservative 1920s. As Witte recounts:

Before the great depression, labor-management agreements existed in nearly all unionized industries. On the railroads, in the building trades, in clothing manufacture, in printing, and in a few smaller industries, union contracts were common. [In contrast, t]he mass-production industries, in fact nearly all manufacturing as well as substantially all service industries, distribution, retailing, and office employments, were almost completely unorganized. In coal and metal mining, unionism earlier had been very strong, but was greatly weakened in the nineteen-twenties. Street railway transportation was often unionized, but trucking and taxi and bus service were organized only in some of the larger cities.<sup>80</sup>

Witte concludes that “[f]rom above five million in 1919, union membership decreased to less than three million in 1933.”<sup>81</sup> During the business-oriented era of the three Republican presidencies from 1920 through 1933, the number of strikes plummeted.<sup>82</sup> These were such lean years for labor unions that Professor Irving Bernstein’s book is entitled, *The Lean Years: A History of the American Worker 1920-1933*.<sup>83</sup>

Nevertheless, “[f]rom the end of World War I to the coming of the New Deal,” R.W. Fleming writes, “there appears to have been a modest, but unspectacular, growth in grievance

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<sup>78</sup> David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 179 (2009).

<sup>79</sup> Steven R. Morrison, *Membership Crime vs. The Right to Assemble*, 48 J. MARSHALL L. REV. 729, 735 (2015) (immigrants “created institutions like the Knights of Labor, political labor parties, and trade unions”); José A. Bracamonte, *The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor*, 21 SAN. DIEGO L. REV. 29, 32 (1983) (“immigrants were assailed for organizing unions which were considered inimical to the American ‘way of life.’”).

<sup>80</sup> WITTE, *supra* note 28, at 46.

<sup>81</sup> *Id.*

<sup>82</sup> Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 WIS. L. REV. 1065, 1081 (2018) (“the annual number of strikes, which had reached well over 3000 a year in the 1910s, plummeted, ranging from about 600 to 1000 a year in the second part of the 1920s and the early years of the 1930s.”).

<sup>83</sup> See IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933* (Houghton Mifflin Co. 1960).

arbitration.”<sup>84</sup> However, some of this growth came from the government-mandated arbitration of the Railway Labor Act of 1926 (RLA). Although, as discussed above, Kansas’s attempt to ban strikes in some industries and instead mandate arbitration was held unconstitutional after just a few controversial years,<sup>85</sup> the RLA is an analogous federal statute from that era, and it has now endured nearly a century. The RLA bans strikes in some transportation industries and instead mandates arbitration.<sup>86</sup> “The RLA creates a National Railroad Adjustment Board consisting of representatives selected by the employers and representatives selected by the employees’ labor unions. The RLA requires employers and unions to submit certain disputes to the Adjustment Board for decision.”<sup>87</sup>

## II. HOW PRE-1930S EMPLOYERS LARGELY DEFEATED LABOR UNIONS’ EFFORTS TO REPLACE AT-WILL EMPLOYMENT WITH ARBITRATION OF EMPLOYEE GRIEVANCES

Section I of this Article showed that labor arbitration was virtually non-existent before 1900 and that labor grievance arbitration remained uncommon through the 1920s. In other words, employment at will was not often replaced by arbitration of employee grievances before the 1930s. This Section shows that pre-1930s employers generally succeeded in maintaining at-will employment by refusing to recognize labor unions, let alone agree to unions’ demands to replace at-will employment with arbitration of employee grievances. Pre-1930s employer successes in defeating unions, this Section explains, were aided by a range of legal doctrines from the law of master-servant and tort to the Sherman Antitrust Act and enforcement of workers’ promises not to join unions. More broadly, this Section shows how 19<sup>th</sup> century classical liberalism extended in the law through the 1920s to impede unionization, and thus the replacement of employment at will with labor grievance arbitration.

### A. *Master-Servant and Torts*

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<sup>84</sup> Fleming, *supra* note 29, at 1248. *See also* Nolan & Abrams, *supra* note 32, at, 400 (noting “although one study estimated that fifty-five percent of the collective agreements negotiated between 1875 and 1920 contained arbitration clauses this figure must be qualified because few labor agreements existed then, the percentage of the work force covered by arbitration clauses was quite small.”).

<sup>85</sup> *See supra* note 65 (discussing Kansas Industrial Relations Court Act of 1920).

<sup>86</sup> “The most significant change made by the Railway Labor Act in handling grievances is that strikes over certain grievance disputes are banned. The Supreme Court interpreted this provision as prohibiting strikes over ‘minor’ disputes, and permitting enforcement by injunction when necessary.” Nolan & Abrams, *supra* note 32, at 387-88.

<sup>87</sup> STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 263 (3d ed. 2016) (citing 45 U.S.C. § 153(a), (i)). Judicial “review of the awards is very limited.” *See* WARE & LEVINSON, *supra* note 8, at 204 (citing ELKOURI & ELKOURI, HOW ARBITRATION WORKS at 4–32 (8th ed. Kenneth May ed. 2016); 45 U.S.C. § 153).

While few contemporary employees are legally-obligated to remain with their employers for a period of time,<sup>88</sup> before and into the 19<sup>th</sup> century many workers were “servants” more tied to their “masters.” Some of these jobs “were often quite personal and intimate,” such as “the employment relations between masters and their domestic servants.”<sup>89</sup> The “status relations” of master-servant “were governed by a well-developed set of legal rules. For example, a master was obliged to provide food, shelter, and security for his servant, while the servant in return was expected to provide personal service. Servants were legally identified with their masters, and so possessed little individuality and personal independence.”<sup>90</sup>

If such an employee (“servant”) quit that employer (“master”), before completing the agreed period of employment, to take a different job then the master might well have a successful tort action against the person(s) who enticed the servant to leave.<sup>91</sup>

The law strengthened a master’s control over his servants by preventing others from interfering with the relationship during the term of service. An action for enticement was available against a third party who persuaded a servant to leave his employment before the expiration of his term, while an action for harboring could be lodged against any person who continued to employ a runaway servant after receiving notice of his premature departure from another servitude. These suits sought to deny servants any opportunity for alternative employment during the term of their service. Unable to feed themselves or their families if they left their masters, servants had little choice but to obey them for the duration of the agreement.<sup>92</sup>

The 1853 English case of *Lumley v. Gye*<sup>93</sup> expanded this tort beyond household servants to a famous opera singer. “Miss Wagner, an opera singer of some distinction, had agreed with the

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<sup>88</sup> Stuart Lichten and Eric M. Fink, “*Just When I Thought I Was Out . . .*”: *Post-Employment Repayment Obligations*, 25 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 51, 52 (2018) (“The common law doctrine of ‘employment at will’ has dominated U.S. employment law for over a century. Pursuant to this concept, an employer may discharge an employee at any time for any reason . . . An employee may similarly resign at any time for any reason . . .”); Richard A. Lord, *The At-Will Relationship in the 21<sup>st</sup> Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 773–74 (2006) (“The traditional rule that the at-will employment relationship may be terminated by either the employer or the employee, at any time, for any reason or for no reason, with or without notice, continues to be the rule in almost all American jurisdictions.”).

<sup>89</sup> John T. Nockleby, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1513 (1980).

<sup>90</sup> *Id.* at 1514-15.

<sup>91</sup> MELVILLE M. BIGELOW, *ELEMENTS OF THE LAW OF TORTS FOR THE USE OF STUDENTS* 139 (2d ed. 1882) (“A owes to B the duty to forbear to procure or cause C to deprive B of his or her (C’s) service . . . . The law of enticement and seduction gives a right of redress . . . for wrongfully interrupting the relation of master and servant . . .”).

<sup>92</sup> Nockleby, *supra* note 89, at 1514.

<sup>93</sup> 2 El. & BI. 216, 118 Eng. Rep. 749 (Q.B. 1853).

plaintiff to sing in his theatre for a definite term and during that term not to sing elsewhere,' but the defendant, 'intending to injure plaintiff,' before the expiration of the term, enticed and procured Miss Wagner to refuse to perform, as a result of which Miss Wagner failed to sing for the plaintiff."<sup>94</sup> In *Lumley v. Gye*'s companion case, *Lumley v. Wagner*, the court enjoined Wagner from "singing at any competing music hall for the term of the contract."<sup>95</sup> *Lumley*'s expansion of "the action of enticement" beyond "employment relationships that were domestic, personal, and paternalistic," occurred as industrialization shifted employment from "the paternalistic master-servant relation of the eighteenth century [to] the depersonalized industrial employment contract of the late nineteenth century."<sup>96</sup>

From England, the tort of enticement emigrated to the United States,<sup>97</sup> and law in most states followed *Lumley*, so "the distinction between domestic servants and other employees gradually disappeared from the law of third-party inducement; the enticement action became available to all employers whose employees were persuaded to leave their service."<sup>98</sup> This meant employers could use the enticement action against third parties "enticing industrial employees and other workers" to leave their jobs.<sup>99</sup> Thus, John Nockleby explains, in 1871 "the Massachusetts Supreme Judicial Court extended the enticement action to workers engaged in the manufacture of boots" and "the Georgia Supreme Court applied the action to sharecroppers."<sup>100</sup>

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<sup>94</sup> Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 667 (1923) (citing *Lumley v. Gye*, 2 EI, and Bl. 216, 231 (1853)).

<sup>95</sup> Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L. J. 775, 775 (1992) ("In the familiar case of *Lumley v. Wagner*, the English Court of Equity held that although opera singer Johanna Wagner could not be ordered to perform her contract, she would be enjoined from singing at any competing music hall for the term of the contract.").

<sup>96</sup> Nockleby, *supra* note 89, at 1520.

<sup>97</sup> Sayre, *supra* note 94, at 671 ("From England the doctrine has emigrated to the United States; and although some states squarely reject it, the majority accept it as binding law.") The 1882 edition of Melville M. Bigelow's *Elements of the Law of Torts* states that to sustain an employment enticement action, the plaintiff must prove that the defendant had notice of the existence of an existing master and servant relationship, the defendant interrupted that relationship (without consent of the master), and that interruption caused the servant to violate a duty owed to the master. BIGELOW, *supra* note 91, at 140.

<sup>98</sup> Nockleby, *supra* note 89, at 1523. In addition to common-law tort actions, southern states used anti-enticement statutes during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries to control newly freed black laborers. Shirley Lung, *Criminalizing Work and Non-Work: The Disciplining of Immigrant and African American Workers*, 14 U. MASS. L. REV. 290, 324–25 (2019). These included statutes that "prohibited an employer from 'enticing' away another employer's laborers and statutes that restricted agents who recruited black workers across state lines," making it a crime to "hire away, or induce to leave the service of another, any laborer by offering higher wages or in any other way whatsoever." *Id.* at 331–33.

<sup>99</sup> Nockleby, *supra* note 89, at 1523.

<sup>100</sup> *Id.* at 1523.

However, some courts held liable for enticement only defendants who induced breach of a contract for “exclusive personal services for a specified period of time.”<sup>101</sup> These courts held “that no action for enticement can be brought where the service was at will”<sup>102</sup> because such an employee does not breach an employment contract by quitting. For instance, the Supreme Judicial Court of Massachusetts said in *Beekman v. Marsters* in 1907:

If a defendant by an offer of higher wages induces a laborer who is not under contract to enter his (the defendant’s) employ in place of the plaintiff’s, the plaintiff is not injured in his legal rights. But it is quite a different thing if the laborer was under a contract with the plaintiff for a period which had not expired, and the defendant, knowing that, intentionally induced the laborer to leave the plaintiff’s employ by an offer of higher wages, to get his (the laborer’s) services for his (the defendant’s) benefit.<sup>103</sup>

Much industrial employment was at-will in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries,<sup>104</sup> so employers could not—in jurisdictions that found no breach by an employee leaving at-will employment—use the enticement tort to enjoin union organizers attempting to recruit such employees to leave their employers, even if just temporarily, by striking.

Unfortunately for labor union organizers, however, courts broadened the tort from “enticement” to “malicious interference.” John Nockleby writes that in the 1881 English Court of Appeals held “that ‘malicious interference,’ not ‘enticement,’ provided the foundation for the tort,”<sup>105</sup> and courts in the United States followed. Significantly for employers’ actions against union organizers, “unlike the action of enticement, ‘malicious’ interference did not presuppose that the defendant had appropriated the fruits of the contract to himself. Thus, ‘interference’ encompassed a broader range of forbidden behavior that conceivably included any intentional act that devalued the worth of a plaintiff’s contractual interest regardless of whether the defendant personally obtained the benefits the plaintiff lost.”<sup>106</sup>

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<sup>101</sup> Sayre, *supra* note 94, at 668–69 (citing *Lumley v. Gye*, 2 El, and Bl. 216, 231 (1853)).

<sup>102</sup> Sayre, *supra* note 94, at 701.

<sup>103</sup> *Beekman v. Marsters*, 195 Mass. 205, 211, 80 N. E. 817, 819 (1907).

<sup>104</sup> Joel I. Seidman, *The Yellow-Dog Contract*, 46 Q. J. OF ECON. 348, 351 (1932) (in the era before *Hitchman Coal & Coke Co.*, 245 U.S. 229 (1917), “employment was almost invariably at will”).

<sup>105</sup> Nockleby, *supra* note 89, 1527–28.

<sup>106</sup> *Id.*

For instance, in the 1896 case of *Vegeahn v. Guntner*,<sup>107</sup> the Massachusetts Supreme Judicial Court enjoined union organizers from maintaining a picket line outside the plaintiff-employer's business.<sup>108</sup> The *Vegeahn* court said the picket or "patrol":

was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself.<sup>109</sup>

This passage from *Vegeahn* shows the court's understanding of the union's picket as a tool designed to prevent the employer from hiring workers not represented by the union. In other words, successful picketing pressures the employer, as elaborated below, to buy labor only from workers represented by the union. And *Vegeahn* exemplifies how pre-1930s employers used the law of tort—rooted in the older law of master and servant—to enjoin picketing and thus preserve employers' freedom to buy labor from workers not represented by the union. Consequently, in cases like *Vegeahn*, "between 1890 and 1920, the tort of interference with contractual relations became an intellectual battleground corresponding to the daily reality of struggle between labor unions and capitalist employers."<sup>110</sup> "In the end," Nockleby notes, it was the New Deal's Wagner Act "and the creation of the National Labor Relations Board that put an end to much of the

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<sup>107</sup> *Vegeahn v. Guntner*, 167 Mass. 92, 97, 44 N.E. 1077, 1077 (1896).

<sup>108</sup> Nockleby, *supra* note 89, at 1533 ("While combinations of businessmen that destroyed the livelihood of nonmembers were tolerated, unions that inflicted similar harm as a means to increase bargaining power rather than as an end were found to have engaged in intimidation and duress. Therefore, in *Vegeahn v. Guntner*, union members were enjoined from establishing a peaceful two-person picket in front of their employer's business. No contracts were breached, but present and prospective employees were allegedly intimidated.").

<sup>109</sup> *Vegeahn v. Guntner*, 167 Mass. at 97.

<sup>110</sup> Nockleby, *supra* note 89, at 1529. See also Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 996 (2016) ("The tort of enticement dominated the courts' regulation of workers' collective action, and demonstrates the ancient nature of the judicial regulation of labor well into the nineteenth century: that action had remained more or less constant for the six centuries prior. The basic reasoning was that someone who "enticed" workers (servants) away from their work (or "induce[d] him to leave his master"), in this case for the purpose of holding out for higher wages, was liable for damages to the master. Enticement was often the basis for a charge or complaint of conspiracy, and was on occasion used to prosecute concerted work stoppages").



controversy over the tort in the employment context.”<sup>111</sup> The Wagner Act reduced the relevance of this tort of interference because, as discussed in Section III, the Wagner Act encouraged the formation of unions and pressured employers to buy labor from workers represented by unions. Thus, the Wagner Act greatly reduced the ability of employers to do what the *Vegetahn* employer did—buy labor from workers not represented by the union.

## B. Antitrust Law Prohibiting Cartels, Including Labor Cartels

### 1. The Sherman Act and the Growth of Labor Injunctions

Efforts to form effective labor unions were impeded not only by master-servant and tort law, but also by antitrust law, which applied to both capital and labor. The “dramatic expansion of industrial and commercial enterprise” in the late 1800s “witnessed the intensive concentration of industrial capital. Goliath enterprises came to dominate entire industries.”<sup>112</sup> In addition to concerns about the concentration of wealth and power in the hands of a few “robber barons,”<sup>113</sup> the growth of industries with only a few producers led by the end of the 19<sup>th</sup> century to concerns that a monopolist or—through a price-fixing agreement—cartel can profit by raising its price above that which sellers in a competitive market would charge.<sup>114</sup> (This general view of monopoly pricing above competitive pricing remains standard economics.<sup>115</sup>)

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<sup>111</sup> Nockleby, *supra* note 89, at 1537.

<sup>112</sup> Nirej S. Sekhon, *Punitive Injunctions*, 17 U. PA. J.L. & SOC. CHANGE 175, 207 (2014).

<sup>113</sup> Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 693–94, 700 (2018) (“The late nineteenth century was the era of ‘robber barons’ or ‘titans’—men like J.P. Morgan or Andrew Carnegie . . . Wealth concentration at the turn of the twentieth century was extreme: according to a study conducted by G.K. Holmes in 1893, nine percent of American families possessed seventy-one percent of the wealth of the country.”); M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The “Other Tradition”*, 47 U. KAN. L. REV. 793, 814–15 (1999) (“The last quarter of the nineteenth century was a period in American history marked by the rise of the first great corporate amalgamations in railroads, in oil, and in steel. . . And it was the period of the first great ‘robber barons’ who, through their force of will, ingenuity, and lack of morals, were able to build vast corporate conglomerates through the manipulation of markets and the laws pertaining to them.”); Rebecca Roiphe, *Redefining Professionalism*, 26 U. FLA. J.L. & PUB. POL’Y 193, 211 (2015) (“Every era has its villains. In the late nineteenth century, or the Gilded Age, it was the robber barons . . . [I]ndustrial capitalism had raced into the modern age after the Civil War and the robber barons were quick to take advantage of a regulatory framework that had not yet caught up. They paid their workers poorly and kept them in notoriously dangerous conditions. They artificially suppressed prices until they could buy out their competitors and create monopoly rates for their wares, at which point they would raise the prices and reap the rewards.”).

<sup>114</sup> “In 1890, Alfred Marshall’s *Principles of Economics* was the first economics treatise to incorporate terms like elasticity of demand and marginal revenue in a way that permitted technical descriptions of price and output under competition and monopoly. After that, the classical model of ‘perfect competition’ developed fairly quickly, maturing in the 1920s.” Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 936 (1988).

<sup>115</sup> See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 28-32 (6<sup>th</sup> ed. 2012); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 9.1 (9<sup>th</sup> ed. 2014).

While during most of the 19<sup>th</sup> century, “[t]he common law’s general rule . . . was that agreements to fix prices were in restraint of trade, and consequently a court would not enforce them,”<sup>116</sup> such agreements “were not unlawful in the sense of being criminal or tortious.”<sup>117</sup> This changed in 1890 when Congress enacted the Sherman Act, which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”<sup>118</sup> The Sherman Act “granted the federal government the right to seek injunctions against business cartels and even to levy fines or prison sentences against cartel participants.”<sup>119</sup> Courts “began condemning simple price-fixing agreements” in 1897.<sup>120</sup>

“During the late nineteenth century, political economists . . . explained how concerted activity could be harmful simply because it was carried out by a group that collectively dominated some market.”<sup>121</sup> They applied this theory first to business cartels and then to labor combinations.<sup>122</sup> Law treatise writers and courts, Herbert Hovenkamp explains, often followed a similar path. “Perhaps the most striking aspect of the labor law literature of the late nineteenth century is the similar way in which treatise writers approached combinations of laborers and combinations of producers or sellers.”<sup>123</sup> At the turn of the 20<sup>th</sup> century, Hovenkamp goes so far to say, “the consumer welfare principle of protecting consumers from higher prices was not merely the predominant labor law policy, it was the only policy.”<sup>124</sup> Hovenkamp explains that “Beginning gradually around 1890, courts began to adopt the theory that labor is a commodity, and that the ‘labor and skill of the workman’ and the ‘plant of the manufacturer’ are equally property, to which the same set of legal rules should apply.”<sup>125</sup>

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<sup>116</sup> Hovenkamp, *supra* note 114, at 932.

<sup>117</sup> *Id.* at 924 (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899)). The “well known Addyston Pipe decision” was authored by not-yet “Justice William Howard Taft, the greatest contemporary scholar of the relationship between the Sherman Act and the common law of trade restraints.” *Id.* at 933 and 951.

<sup>118</sup> 15 U.S.C. § 1.

<sup>119</sup> Hovenkamp, *supra* note 114, at 962.

<sup>120</sup> *Id.* at 949.

<sup>121</sup> *Id.* at 924.

<sup>122</sup> *Id.* at 924.

<sup>123</sup> *Id.* at 925.

<sup>124</sup> *Id.* at 928.

<sup>125</sup> *Id.* at 926.

This view of labor “as a commodity to be bought and sold like any other”<sup>126</sup> “implied a problematic role for unions. If workers were commodity sellers, then unions were cartels of commodity sellers, or ‘labor trusts.’”<sup>127</sup> Courts held “that labor combinations could be ‘in restraint of trade’ under the antitrust laws.”<sup>128</sup> The Sherman Act’s application to labor cartels significantly increased courts’ use of injunctions, which could “bind thousands of workers,”<sup>129</sup> against strikes and other union activity. Between 1890, when the Sherman Act was passed, and 1897, lower courts found antitrust violations in thirteen reported decisions; one involved a manufacturers’ conspiracy, while twelve involved labor union conspiracies.<sup>130</sup> In short, “all interested parties immediately perceived the [Sherman Act] as a powerful union-busting device.”<sup>131</sup>

Before the Sherman Act, Hovenkamp writes, “workers had the right to refuse to work, either singly or in combination, as long as they neither coerced other employees to join them nor forced other businesses to refuse to deal with the struck employer.”<sup>132</sup> Hovenkamp found that “no American case before the 1890s condemned laborers for the simple act of combining in order to increase wages.”<sup>133</sup> By contrast, “[a] principal effect of applying the Sherman Act to labor combinations” was that courts began “scrutinizing strikes very closely for evidence of the coercion of unwilling participants. Moreover, conduct not generally considered coercive in the 1870s and 1880s, such as simple picketing, became so after the turn of the century.”<sup>134</sup>

In contrast to cartels of businesses, cartels of unskilled labor may be harder to maintain, particularly when employers can, as they often did around 1900, replace “striking unskilled laborers” with “carloads of ‘scabs’ [replacement workers] within a day or two after a strike

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<sup>126</sup> James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 984–86 (1997) (“From the 1890s to the 1930s, most courts joined employers in assimilating industrial relations to the narrative model of the commercial transaction: rationally self-interested workers would seek to maximize their wages and working conditions by exercising their freedom to contract in the labor market. Continuing a middle-class abolitionist tradition, labor was viewed as a commodity to be bought and sold like any other.”)

<sup>127</sup> *Id.* at 984–86.

<sup>128</sup> *Id.*

<sup>129</sup> “Federal courts first used such injunctions in the 1870s, but it was the passage of the Sherman Act in 1890 that fanned the practice.” Sekhon, *supra* note 112, at 207.

<sup>130</sup> Hovenkamp, *supra* note 114, at 950.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 945.

<sup>133</sup> *Id.* at 922-23.

<sup>134</sup> *Id.* at 945-46.

began.”<sup>135</sup> Consequently, many unions’ strike goals included the “closed shop,” a workplace where union membership is a condition of employment. However, this “closed shop campaign tended to confirm . . . that the labor movement threatened to monopolize the labor market . . . in a certain plant by denying nonunion workers an opportunity to sell their services there.”<sup>136</sup> With closed shops out of labor’s reach and unskilled laborers on strike easily replaced by other workers, strikes’ effectiveness “often required secondary activities that a court might find coercive.”<sup>137</sup>

For the unions, various kinds of secondary activities were necessary. One example is simple picketing, which is intended to intimidate customers and nonparticipating employees of the struck employer. These activities also may involve more forceful acts—boycotts of those unsympathetic with the strike, such as retailers who sell struck goods, and even violence directed at workers who refuse to participate. An important but often overlooked fact about some great early labor conspiracy cases . . . is that the complainants were not employers seeking to discipline unions, but were fellow employees whom union members had attempted to exclude from the labor market because of their willingness to work at too low a wage.<sup>138</sup>

Hovenkamp writes that “Violence was of course criminal without regard to any underlying conspiracy among laborers and their unions. Nevertheless, striking laborers were inclined to think that they had a right, whether moral or legal, to take action against those who would undermine their strike.”<sup>139</sup> “Most early Sherman Act labor cases involved secondary activities that were sufficiently coercive to warrant condemnation even under a common-law standard. These activities included union violence or intimidation against others and seizure or physical destruction of an employer’s property.”<sup>140</sup> “Some courts eventually held that even a simple agreement to strike was illegal and enjoined under the antitrust laws.”<sup>141</sup>

In sum, the Sherman Act “crippled organized labor’s use of its chief economic weapons—strikes and secondary boycotts.”<sup>142</sup> “The federal labor injunction proved to be the courts’ ideal

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<sup>135</sup> *Id.* at 946. On the derogatory word “scab,” see *infra* note 206 and accompanying text.

<sup>136</sup> *Id.* at 955.

<sup>137</sup> *Id.* at 948.

<sup>138</sup> *Id.* at 947.

<sup>139</sup> *Id.* at 947.

<sup>140</sup> *Id.* at 956-57.

<sup>141</sup> *Id.* at 945-46.

<sup>142</sup> James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127, 127 (1982).

weapon for subduing labor activities.”<sup>143</sup> “Of the many weapons employed in industrial warfare, none has aroused more controversy than the labor injunction. Commencing about 1886, and continuing through the 1920’s, injunctions had an important and frequently a decisive effect on the outcome of disputes between employers and unions.”<sup>144</sup> Opposition to “government by injunction” was central to early 20<sup>th</sup> century progressives and New Dealers, including future Supreme Court Justice Felix Frankfurter.<sup>145</sup>

## 2. The Clayton Act’s Limited Impact

The 1912 Democratic Party platform promised to exempt labor from the Sherman Act.<sup>146</sup> Democrats won the presidency and both houses of Congress that year. The new, progressive Congress designed the Clayton Act of 1914 to exempt labor organizing from the federal antitrust laws.<sup>147</sup> Section 6 of the Clayton Act declares:

The labor of human beings is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under antitrust laws.<sup>148</sup>

Section 20 of the Clayton Act forbade labor injunctions “in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning

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<sup>143</sup> Hovenkamp, *supra* note 114, at 953.

<sup>144</sup> Benjamin Aaron, *The Labor Injunction Reappraised*, 10 UCLA L. REV. 292, 292 (1963).

<sup>145</sup> Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969 (2016). *See also* Felix Frankfurter & Nathan Greene, *Use of the Injunction in American Labor Controversies*, 44 L. Q. REV. 164 (1928); Felix Frankfurter & Nathan Greene, *Legislation Affecting Labor Injunctions*, 38 YALE L.J. 879, 881 (1929); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 2 (1930).

<sup>146</sup> The American Presidency Project, *Democratic Party Platforms: Democratic Party Platform of 1912*, <http://www.presidency.ucsb.edu/ws/index.php?pid=29590> (last visited July 26, 2020) (“The expanding organization of industry makes it essential that there should be no abridgement of the right of the wage earners and producers to organize for the protection of wages and the improvement of labor conditions, to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade.”); Felix Frankfurter & Nathan Greene, *Legislation Affecting Labor Injunctions*, 38 YALE L.J. 879, 885 (1929).

<sup>147</sup> Hovenkamp, *supra* note 114, at 963-64.

<sup>148</sup> 15 U.S.C. § 17. 1914 also saw enactment of the Federal Trade Commission Act. *See, e.g.*, Sanjukta Paul, *Antitrust As Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 385 (2020) (“As the pre-New Deal judiciary increasingly used the Sherman Act instead to aid firms in consolidating their power over workers, while doing little to check corporate consolidation itself, Congress ultimately responded, in part, by again-reaffirming its express commitment to fairness as a goal of antitrust policy in passing the Federal Trade Commission Act.”)

terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right.”<sup>149</sup> However, the Supreme Court narrowly interpreted this language to protect only “acts growing out of labor disputes between employees and their immediate employer,” so “although labor organizations themselves were not illegal and in some cases strikes also were not, secondary boycotts and, in many circumstances, strikes and picketing, remained subject to antitrust liability.”<sup>150</sup>

Consequently, labor injunctions based on antitrust claims continued through the 1920s.<sup>151</sup> An example was the big national strike of railroad workers in 1922. “At the behest of President Warren Harding, Attorney General Harry Daugherty sought an injunction against the strike, a court granted it, and 2,200 new federal marshals were hired to enforce it. The injunction crushed the strike as workers were not only barred from striking but also picketing and assembling near rail lines.”<sup>152</sup> In the 1927 Supreme Court case of *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n of North America*, an employer’s use of non-union labor led the stone cutters union to declare a nationwide boycott on the handling of the employer’s “unfair” (non-union) stone.<sup>153</sup> The employer sought an injunction against the union’s officers to prevent them from ordering their members to refrain from working on the non-union stone and from persuading customers and other workers to refrain from using the non-union stone.<sup>154</sup> While the Seventh Circuit affirmed the district court’s refusal to issue the injunction,<sup>155</sup> the Supreme Court held the employers “[were] entitled to relief by injunction under section 16 of the Clayton Act”<sup>156</sup> because “the acts and conduct of respondents [union officers] fall within the terms of the [Sherman] Anti-Trust Act.”<sup>157</sup>

By the 1920s several states had enacted statutes limiting courts’ labor injunctions. For example, Arizona prohibited injunctions “involving or growing out of a dispute concerning the terms or conditions of employment, unless necessary to prevent irreparable injury to property or

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<sup>149</sup> 29 U.S.C. § 52.

<sup>150</sup> Altman, *supra* note 142, at 143; *See also* Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 33 (1963).

<sup>151</sup> Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor: II*, 40 TEX. L. REV. 473, 500 n.143 (1962) (“United States v. Railway Employees, AFL, 283 Fed. 479, 492 (N.D. Ill. 1922) (An injunction suit by the government under its general equity powers and also under the Sherman Act’s § 4.)”).

<sup>152</sup> Nino C. Monea, *Bulwark of Equality: The Jury in America*, 122 W. VA. L. REV. 513, 556 (2019).

<sup>153</sup> *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n of North America*, 274 U.S. 37, 42–46 (1927).

<sup>154</sup> *Id.* at 42–44.

<sup>155</sup> *Id.* at 41–42.

<sup>156</sup> *Id.* at 55.

<sup>157</sup> *Id.*

to a property right of the party making the application.”<sup>158</sup> This Arizona statute also prohibited injunctions against persuading others, “by peaceful means,” to terminate their employment or to refrain from patronizing a party, typically the employer, to the litigation.<sup>159</sup> However, the Supreme Court held this statute unconstitutional in the 1921 case of *Truax v. Corrigan*.<sup>160</sup> In sum, a conservative Supreme Court combined with many other federal judges willing to issue labor injunctions, even when state courts and local officials sided with unionists, to maintain antitrust law as a powerful tool against union organizing through the 1920s.

### C. *Anti-Union Contracts*

Many people use the phrase “yellow-dog contract” to describe a contract in which an employee promises not to join or help a labor union.<sup>161</sup> This phrase is derogatory, rather than neutral,<sup>162</sup> so this Article uses the more neutral phrase “anti-union contract.”<sup>163</sup>

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<sup>158</sup> *Truax v. Corrigan*, 257 U.S. 312, 322 (1921) (citing Ariz. Rev. Stat. § 1464 (1913)).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 341–42.

<sup>161</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1634 (2018) (Ginsburg, J., dissenting) (“Employers, in turn, engaged in a variety of tactics to hinder workers’ efforts to act in concert for their mutual benefit. Notable among such devices was the ‘yellow-dog contract.’ Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions.”) (internal citations omitted); *Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525, 534 (1949) (“Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave these required agreements the name of ‘yellow dog contracts.’”)

<sup>162</sup> As Marion Crain & John Inazu write:

The term “yellow dog” appeared in early 1921 in the labor press. As the editor of the *United Mine Workers’ Journal* explained it: “This agreement has been well-named. . . . It reduces to the level of a yellow dog any man that signs it, for he signs away every right he possesses under the Constitution and laws of the land and makes himself the truckling, helpless slave of the employer.” Joel I. Seidman, *The Yellow Dog Contract* 31 (1932). The yellow dog was a phrase used in political rhetoric that became popular during the 1928 elections, e.g., “yellow dog Democrat.” It signified unthinking allegiance to the Democratic platform, as in “x would vote along Democratic lines even if a yellow dog was running for office.”

Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1846 (2015).

<sup>163</sup> Some have also called them “non-union agreements.” Edwin E. Witte, *Yellow Dog Contracts*, 6 WIS. L. REV. 21, 22 (1930) (“A few individual non-union agreements were in use in the late eighties, when they were called ‘iron clad’ contracts; but not until the decision of the United States Supreme Court in 1917 in *Hitchman Coal & Coke Co. v. Mitchell*, did they assume much importance. Since then, their use has extended to many industries”).

The 1898 Erdman Act prohibited interstate railroads from using anti-union contracts,<sup>164</sup> but the Supreme Court’s 1908 decision in *Adair v. United States*,<sup>165</sup> “struck down the law as a violation of freedom of contract.”<sup>166</sup> *Adair* “rel[ie]d heavily on”<sup>167</sup> 1905’s *Lochner v. New York*,<sup>168</sup> in which the Supreme Court had similarly held unconstitutional a New York statute capping the number of hours bakers could lawfully work. Before 1917, anti-union contracts were apparently used only occasionally,<sup>169</sup> perhaps because most employers did not much value winning a money judgment against a former employee with little property or income.<sup>170</sup> But the Supreme Court’s 1917 decision in *Hitchman Coal & Coke Co. v. Mitchell*,<sup>171</sup> fueled the growth of anti-union contracts by enforcing them, not or not just with money judgments against individual employees, but also with injunctions against those attempting to unionize to employees.<sup>172</sup> As Matthew Finkin writes, the Hitchman Company required its miners “to sign a contract that provided that the employee would not join the union or make any effort to unionize. Because the miners held their jobs on an at-will basis they could be discharged for joining or supporting a union or for seeking collective address to their grievances.”<sup>173</sup> The United Mine Workers nevertheless tried to organize the workers, which prompted the employer’s case in equity—against certain members of the union

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<sup>164</sup> (Erdman) Act of June 1, 1898, ch. 370, § 10, 30 Stat. 424, 428 (1898); see John P. Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 LAB. HIST. 3, 11 (1963) (discussing congressional battle over Erdman Act and bill’s final passage).

<sup>165</sup> *Adair v. United States*, 208 U.S. 161 (1908).

<sup>166</sup> David E. Bernstein, *Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 102–09 (1993).

<sup>167</sup> *Id.*

<sup>168</sup> 198 U.S.C. § 45.

<sup>169</sup> Joel I. Seidman, *The Yellow-Dog Contract*, 46 Q. J. OF ECON. 348, 351 (1932).

<sup>170</sup> As Witte put it, anti-union contracts “are for practical purposes [sic] unenforcible against the signers.” Witte, *supra* note 163, at 22.

<sup>171</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 232 (1917).

<sup>172</sup> Seidman, *supra* note 169, at 351; Witte, *supra* note 163, at 22 (“This possibility dates from the *Hitchman Coal & Coke Co.* decision, the case around which all discussions of the legal aspects of yellow dog contracts must center.”).

<sup>173</sup> Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 NEB. L. REV. 6, 11–12 (2014).



as individuals and against one as an officer of the union<sup>174</sup>—seeking to enjoin the defendants from “all attempts to organize the employees while employed under non-union contracts.”<sup>175</sup>

The Supreme Court upheld, with some modifications, the district court’s order enjoining the defendants<sup>176</sup> from trying to unionize the mine by “knowingly and willfully bringing about the breaking by plaintiff’s employees of contracts of service.”<sup>177</sup> The Court also enjoined the defendants from “enticing plaintiff’s employees, present or future, to leave plaintiff’s service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a non-union mine.”<sup>178</sup> Finally, the Supreme Court enjoined the defendants from “interfering . . . with plaintiff’s employees so as knowingly and willfully to bring about the breaking by plaintiff’s employees, present and future, of their contracts of service.”<sup>179</sup>

*Hitchman* showed that anti-union contracts “could be used by employers to secure injunctions prohibiting unions from attempting to organize their employees or inducing them to join in strikes. With this development, yellow dog contracts became valuable to anti-union employers.”<sup>180</sup> After *Hitchman*, employers’ movement toward wider adoption of anti-union

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<sup>174</sup> *Hitchman*, 245 U.S. at 232 (“Those who were served and who answered the bill were T. L. Lewis, Vice President of the U.M.W.A. and of the International Union U.M.W.A.; William Green, D. H. Sullivan, and “George” W. Savage, (his correct Christian name is Gwilym), respectively President, Vice President, and Secretary-Treasurer of District No. 6, U.M.W.A.; and A. R. Watkins, John Zelenka, and Lee Rankin, respectively President, Vice President and Secretary-Treasurer of Sub-district No. 5 of District No. 6.” These are the individuals who were sued and subsequently enjoined.)

<sup>175</sup> Witte, *supra* note 163, at 22 (“The *Hitchman* case was an action begun in 1907 by a non-union coal operator of West Virginia to enjoin the United Mine Workers from attempting to organize his employees.”); *see also* *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 232 (1917) (“This was a suit in equity . . . against certain citizens of the state of Ohio, sued individually and also as officers of the United Mine Workers of America.”).

<sup>176</sup> *Hitchman*, 245 U.S. at 232 (enjoining the “Vice President of the U.M.W.A. . . . [the] President, Vice President, and Secretary Treasurer of District No. 6, U.M.W.A. . . . [and the] President, Vice President, and Secretary-Treasurer of Sub-district No. 5 of District 6.”).

<sup>177</sup> *Hitchman*, 245 U.S. at 261–62. *See also*, Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 826 (2008) (“A 1917 case upheld an injunction requested by a coal mine operator against officials of the United Mine Workers. The order forbade the UMW from organizing nonunion miners who had signed yellow-dog contracts.”).

<sup>178</sup> *Hitchman*, 245 U.S. at 261–62. *See also* Forbath, *supra* note 71, at 1193 (“When UMW organizers sought to enlist the restive southern miners, federal and state courts would enjoin all organizing efforts as infringements on the operators’ right in the non-union status of their employees.”).

<sup>179</sup> *Hitchman*, 245 U.S. at 261–62; *See also* Michael H. LeRoy and John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63, 81 (2001) (“When a *Hitchman* manager learned of this [planned strike], he obtained an injunction prohibiting the union from interfering with the personal service contracts of his workers.”).

<sup>180</sup> Witte, *supra* note 163, at 24.

contracts accelerated.<sup>181</sup> One example is the 1927 Fourth Circuit case, *International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co.*<sup>182</sup> In *Red Jacket*, the Fourth Circuit enjoined the United Mine Workers of America from “inciting, inducing, or persuading the employees of the plaintiff to break their contract of employment with the plaintiffs,”<sup>183</sup> and from helping former employees stay in the homes that their employers provided them in a company town.<sup>184</sup> William Forbath says “In *Hitchman*’s wake, scores of yellow-dog injunctions against the UMW blanketed West Virginia’s coal counties, and blocked all attempts to organize the state’s miners.”<sup>185</sup> “One could not work in a West Virginia mine or in the non-union mines of southwestern Pennsylvania without signing such a contract.”<sup>186</sup> More broadly in the 1920s, Forbath writes that “courts issued over 2100 anti-strike decrees and the proportion of strikes met by injunctions to the total number of strikes reached an extraordinary 25%.”<sup>187</sup> Witte’s 1930 article, *Yellow Dog Contracts*, referred to “their present widespread use.”<sup>188</sup>

#### D. *Classical Liberalism Impeded Unionization*

Section II of this Article has, in its previous subsections, explained how unionization attempts in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries were largely impeded by employers’ strengths under three areas of law: (1) master-servant law’s evolution into the tort of malicious interference with contract; (2) the application of the Sherman Act to labor cartels; and (3) the enforcement of anti-union contracts. Other areas of law played a role as well. Perhaps most notably, constitutional

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<sup>181</sup> Seidman, *supra* note 169, at 351 (“The appearance of the [*Hitchman*] decision was the signal for the introduction by a few employers of similar contracts into their own plants. The movement, however, did not acquire much momentum until the collapse of the war prosperity in 1921.”).

<sup>182</sup> *Id.* at 353 (1932) (“In this more recent case twelve suits instituted by a total of 316 companies were consolidated into the well-known *Red Jacket* case, decided by the United States Circuit Court of Appeals of the Fourth Circuit in 1927.”).

<sup>183</sup> *Int’l Org., United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, 849–50 (4th Cir. 1927).

<sup>184</sup> *Id.* at 850; Lela Dawn Gourley, “*Mixed Up in the Coal Camp*”: *Interethnic, Family, and Community Exchanges in Matewan During the West Virginia Mine Wars, 1900-1922*, 12–13 (May 2019) (M.A. Thesis, Old Dominion University), [https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1026&context=history\\_etds](https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1026&context=history_etds) (discussing the removal of unionized workers at the Red Jacket Coal Camps, specifically describing Red Jacket as a “company town”); Peter Graham Fish, *Red Jacket Revisited: The Case that Unraveled John J. Parker’s Supreme Court Appointment*, *LAW AND HISTORY REVIEW* 54–55 (1987) (describing the coal camps at the time of the *Red Jacket* case as “company towns”).

<sup>185</sup> Forbath, *supra* note 71, at 1185.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 1227.

<sup>188</sup> Witte, *supra* note 163, at 24.

law during this “*Lochner* Era”<sup>189</sup> impeded unionization. As noted above of the 1921 *Truax v. Corrigan* decision,<sup>190</sup> “[f]ollowing *Lochner*, the Court invalidated . . . laws that prohibited employers from forbidding their employees to join labor unions. These rulings likely inhibited the growth of labor unions.”<sup>191</sup> The Court had earlier somewhat stepped back from *Lochner*, so “[b]y 1917, *Lochner* seemed to be dead and buried.”<sup>192</sup> However, *Lochner* “underwent a surprising renaissance in the 1920s when the more aggressively *Lochnerian* wing of the [Supreme] Court, bolstered by four appointments by President Warren Harding, took firm control. With a strong *Lochnerian* majority in place, led by Chief Justice (and former president) William Howard Taft, the Court . . . reviewed economic regulation much more aggressively than it had in the past.”<sup>193</sup> For instance, in the above-discussed case arising out of Kansas,<sup>194</sup> “*Chas. Wolff Packing Co. v. Court of Industrial Relations*, the Court unanimously held that states could not require industrial disputes to be settled by government-imposed mandatory arbitration.”<sup>195</sup> In this era, as David Bernstein writes, most Supreme Court justices:

in common with much of public opinion, saw labor unions as monopolistic organizations that threatened the freedom of both individual workers and their employers, just as monopolistic corporations threatened small businesses and consumers. The Justices also argued that upholding liberty of contract was crucial for the long-term prosperity of workers, because their ability to sell their labor in a free marketplace was their primary asset. In *Coppage v. Kansas*, [decided in 1915,<sup>196</sup>] for example, the Court invalidated a law that prohibited employers from firing workers who joined unions. Justice Pitney wrote for the Court:

The right [to liberty of contract] is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

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<sup>189</sup> See, e.g., Robin West, *Toward the Study of the Legislated Constitution*, 72 OHIO ST. L.J. 1343, 1348 (2011) (referring to “the *Lochner* Era’s Supreme Court jurisprudence disparaging legislative interventions into free markets”).

<sup>190</sup> See *supra* note 161.

<sup>191</sup> David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1505 (2005) (citing *Coppage v. Kansas*, 236 U.S. 1, 26 (1915); *Adair v. United States*, 208 U.S. 161, 180 (1908)).

<sup>192</sup> Bernstein, *supra* note 191, at 1506–07.

<sup>193</sup> *Id.*

<sup>194</sup> *Coppage v. Kansas*, 236 U.S. 1, 26 (1915).

<sup>195</sup> Bernstein, *supra* note 191, at 1506–07.

<sup>196</sup> *Coppage*, 236 U.S. at 35 (striking down a law that prohibited “yellow dog” contracts, in which employees agreed not to join a labor union) (overruled by *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941)).

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State.

In the Court's view, merely helping labor unions did not satisfy the police power because, as noted above, unions were seen as potentially self-serving monopolistic organizations.<sup>197</sup>

As this passage from *Coppage* exemplifies, much of the law discussed in the previous pages broadly flowed from the widespread emphasis in the late 19<sup>th</sup> and, at least among many judges, early 20<sup>th</sup> centuries on a classical liberal “freedom of contract” conception of the right to sell one's labor. Self-ownership of one's body and labor had been core tenets of liberalism since foundational liberals like John Locke and Adam Smith. Locke wrote that “everyman has a property in his own Person. This no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.”<sup>198</sup> Adam Smith said “[t]he property which everyman has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.”<sup>199</sup> This classical liberal emphasis on owning one's labor and trading it for “other property” was in the 19<sup>th</sup> century often called “free labor” and contrasted with slavery. This classical liberal “free labor” philosophy contributed greatly to important Republican policies—from the abolition of slavery to free-market (*laissez-faire*) economics—that shaped many late 19<sup>th</sup> and early 20<sup>th</sup> century judges. As William Forbath, summarizing historian Eric Foner, writes: “the abolitionist, talked about the freedom of the Northern worker in terms of self-ownership, that is, simply not being a slave, being free to sell his own labor.”<sup>200</sup> Forbath continues:

The middle class abolitionists' characteristic attitude toward labor, Foner writes, was exemplified in a pamphlet published by the New York abolitionist William Jay. In the course of a discussion of the benefits of immediate emancipation, Jay sought to answer the recurrent question, what would happen to the slave when free:

He is free, and his own master, and can ask for no more. He is, in fact, for a time, absolutely dependent on his late owner. He can look to no other person for food to eat, clothes to put on, or house to shelter him . . . He is required to work, but labor is no longer the

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<sup>197</sup> David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 40–41 (2003).

<sup>198</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690), at pp. 305–306 in Peter Laslett, 2nd ed. 1967.

<sup>199</sup> ADAM SMITH, THE WEALTH OF NATIONS, b.1, ch. 10, part 2.

<sup>200</sup> William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 783 (1985) (citing ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 16 (1982)).

badge of his servitude and the consummation of his misery, for it is voluntary. For the first time in his life he is party to a contract . . . In the course of time, the value of negro labor, like all other vendible commodities, will be regulated by the supply and demand.

What is noteworthy in this argument, as Foner points out, is, first, the abolitionist's ready acceptance of the condition which prompted (and would increasingly cause) so much complaint among the labor movement—the treatment of human labor as a 'vendible commodity;' and, second, the rather dubious use of the word 'voluntary' to describe the labor of an individual who owns nothing and is 'absolutely dependent' on his employer. 'To the labor movement, Jay's description of emancipation would qualify as a classic instance of 'wage slavery:' to Jay, it was an economic definition of freedom.' And it was the abolitionists' definition of freedom that would be enshrined by Gilded Age judges, some of them youthful colleagues of Jay's in the antislavery movement.<sup>201</sup>

In short, labor unions in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries faced a tough audience in the many judges long immersed in classical liberalism's emphasis on self-ownership and contractual freedom regarding the sale of labor.<sup>202</sup>

In contrast to these traditional judges, however, times were changing in the broader society. The late 1800s and early 1900s were a time of turbulent growth and rising inequalities in the United States.<sup>203</sup>

In 1890, 11 million of the nation's 12 million families earned less than \$1200 per year; of this group, the average annual income was \$380, well below the poverty line. Rural Americans and new immigrants crowded into urban areas. Tenements spread across city landscapes, teeming with crime and filth. Americans had sewing machines, phonographs, skyscrapers, and even electric lights, yet most people labored in the shadow of poverty.

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<sup>201</sup> *Id.* at 785–86.

<sup>202</sup> These views were shared by, for example, an African-American Republican state legislator from Ohio, who in 1928 said, "The group I represent has not got very much physical or tangible property" so "the biggest thing which they have" is "the right to earn a living." *Limiting Scope of Injunctions in Labor Disputes: Hearings on S. 1482 Before the Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 610 (1928) (statement of Harry E. Davis, Member, Ohio House of Representatives).

<sup>203</sup> Jeff Wallenfeldt, *Gilded Age*, BRITANICA, <https://www.britannica.com/event/Gilded-Age> (last visited Dec. 1, 2020) ("The great burst of industrial activity and corporate growth that characterized the Gilded Age was presided over by a collection of colourful and energetic entrepreneurs who became known alternatively as "captains of industry" and "robber barons." They grew rich through the monopolies they created in the steel, petroleum, and transportation industries. Among the best known of them were John D. Rockefeller, Andrew Carnegie, Cornelius Vanderbilt, Leland Stanford, and J.P. Morgan.").

Violent strikes and riots wracked the nation.<sup>204</sup>

These violent strikes and riots embodied the turbulence of the era, as David Bernstein writes:

Coincident with industrialization, nationalization, urbanization, and immigration were the 1880s rise of labor unions (craft and mass) and the 1890s consolidation of industry into pools and trusts. The concentration of labor and capital intensified the recurrent and sometimes violent labor conflict, for which names like Haymarket, Homestead, and Pullman still serve as synecdoches.<sup>205</sup>

Violent conflicts between labor and capital intersected with conflicts among racial and ethnic groups. For instance, many unions excluded Black workers from membership and when union members went out on strike, employers often hired African-Americans as replacement workers, whom the strikers derided as “scabs.”<sup>206</sup> Black workers formed an “Anti-Strikers Railroad Union”

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<sup>204</sup> PBS, *Andrew Carnegie: The Richest Man in the World, The Gilded Age*, <https://www.pbs.org/wgbh/americanexperience/features/carnegie-gilded/> (last visited Dec. 1, 2020).

<sup>205</sup> Bernstein & Leonard, *supra* note 78, at 179. *See also* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1176 (2010)(citing WINTHROP D. LANE, *CIVIL WAR IN WEST VIRGINIA* 17-19, 48-49 (2d ed. 1969)) (“West Virginia was a site of continuing labor violence from 1890 into the early 1920s.”). Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1733 (2018) (“Throughout the late nineteenth and early twentieth centuries, the largely unregulated labor relations were marked by a rash of strikes, widespread boycotts, and violence by unions and employers alike.”); Forbath, *supra* note 71, at 1140 (the 1903 and 1904 Colorado “miners’ uprising ‘to assert their rights’ was transformed by the mine operators into open warfare”).

<sup>206</sup> In the words of early 20th century African-American leader W.E.B. Du Bois, “white employers, North and South, literally gave the Negroes work when white men refused to work with him; when he ‘scabbed’ for bread and butter the employers defended him against mob violence of white laborers.” David E. Bernstein, *Thoughts on Hodges v. United States*, 85 B.U. L. REV. 811, 812–13 (2005) (quoting W.E.B. DuBois, *The Denial of Economic Justice to Negroes*, THE NEW LEADER, Feb. 9, 1929, at 43, 46.)).

This word “scab,” rather than “replacement worker,” is still used by modern union organizers. *See, e.g.*, *AK Steel Corp. v. United Steel Workers of Am.*, No. C-1-00-374, 2002 WL 1624290 (S.D. Ohio Mar. 30, 2002).

On November 20, 1999, the USWA [United Steelworkers], Local 169, and representatives of the AFL-CIO and other unions rallied against AK Steel, which had since taken over the Mansfield Plant. At the rally, representatives from numerous AFL-CIO affiliates donated money to Local 169. Speakers at the rally, including representatives of the AFL-CIO and USWA, derided AK Steel and its replacement workers, calling them “black booted goons,” “scabs,” “corporate greedy pigs,” and “low life scum.” They also exhorted the workers to find a way to frighten the replacement workers and disrupt AK Steel’s hiring of replacement workers. One speaker stated that “AK Steel is history!” Multiple speakers favorably used other labor actions, in which the USWA, Defendants Becker and Trumka, and the AFL-CIO were allegedly involved in illegal acts against employers, as positive examples to motivate the crowd. The rally concluded with a march through downtown Mansfield, during which union members chanted anti-AK Steel and anti-replacement worker slogans and made obscene gestures.

to help break the 1894 Pullman strike,<sup>207</sup> led by future Socialist Party presidential candidate Eugene Debs,<sup>208</sup> which “left forty people dead, and Chicago . . . resembling a war zone.”<sup>209</sup>

These turbulent decades coincided with broad ideological changes. The vast inequalities of the Gilded Age provoked late 1800s populism,<sup>210</sup> and then the Progressive Era of the early 1900s. Progressives advanced the increasingly popular view that industrialization warranted a transition from classical liberalism’s free markets (“laissez-faire”) toward more governmental effort to shift power from big businesses and the rich to the broader population.<sup>211</sup> This broad ideological and legal transition from Gilded Age classical liberalism toward progressive regulation and redistribution set the stage for the Great Depression and New Deal of the 1930s.<sup>212</sup> The landmark

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*Id.* at \*1 (citations omitted). In 1974, the Supreme Court overturned a state libel judgment against a union that had put several individuals’ names on a “List of Scabs,” because the First Amendment protects this four-letter word “scab,” which the Court described as a “lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.” *Old Dominion Branch No. 496, Nat. Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 286 (1974).

<sup>207</sup> Bernstein, *supra* note 166, at 102–09.

<sup>208</sup> See American Federation of Labor Congress of Industrial Organization, *Eugene V. Debs*, <https://aflcio.org/about/history/labor-history-people/eugene-debs> (last visited Dec. 1, 2020).

<sup>209</sup> Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U. L. REV. 371, 384 (2014).

<sup>210</sup> Peter Dreier, *Organizing in the Obama Era: A Progressive Moment or A New Progressive Era?*, 42 J. MARSHALL L. REV. 685, 715–16 (2009) (“In the Gilded Age, during the late 1800s and early 1900s, it was agrarian Populism and urban Progressivism. Populist farmers sought to tame the power of the “robber barons”—the railroads, banks and other big corporations that dominated the economy and squeezed their livelihoods. Progressive reformers, including immigrants, union activists, middle-class reformers such as journalists, clergy, and social workers, and upper-class philanthropists ushered in the first wave of consumer, worker, and environmental protections.”); Brian Duignan, *Populist Movement*, BRITANNICA, <https://www.britannica.com/event/Populist-Movement> (last visited Dec. 1, 2020) (“Populists . . . demanded an increase in the circulating currency (to be achieved by the unlimited coinage of silver), a graduated income tax, government ownership of the railroads, a tariff for revenue only, the direct election of U.S. senators, and other measures designed to strengthen political democracy and give farmers economic parity with business and industry.”).

<sup>211</sup> See, e.g., Herbert Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947, 986 (2017) (“The Progressives believed in a more active state than their more laissez-faire predecessors and contemporaries. Most Progressive Era regulation was economic, resulting from changes in population demographics and economic theory that led them to place less faith in private markets.”); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1454 (2015) (“As the Gilded Age gave way to the Progressive Era, legislatures across the United States moved to curb the excesses of industry.”) See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF AMERICAN LEGAL ORTHODOXY, 1870-1960*, at 145-68, 213-46 (1992) (discussing regulation of property and business during the Progressive era); HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970*, at 7 (2015).

<sup>212</sup> Celebrating this transition, Joseph Fishkin and William Forbath write:

labor legislation of that decade largely removed obstacles to unionization and in fact encouraged the labor cartelization that empowered unions to reach agreements replacing employment at will with arbitration of employee grievances. Those changes are discussed in the following section.

### III. A NEW DEAL FOR LABOR UNIONS: LESS CONTRACT ENFORCEMENT, MORE CARTELIZATION

#### A. *The Great Depression*

The Great Depression began in 1929. “Unemployment went from 3.2% in 1929 to 25.2% in 1933 and stayed above 10% until 1941.”<sup>213</sup>

Bread lines, soup kitchens and rising numbers of homeless people became more and more common in America’s towns and cities. Farmers couldn’t afford to harvest their crops, and were forced to leave them rotting in the fields while people elsewhere starved. In 1930, severe droughts in the Southern Plains brought high winds and dust from Texas to Nebraska, killing people, livestock and crops. The “Dust Bowl” inspired a mass migration of people from farmland to cities in search of work.<sup>214</sup>

“Home foreclosures more than tripled from pre-Depression levels to 1932, and by 1933 one thousand homes per day were subject to foreclosure. Home lending evaporated and . . . this was partially due to a cascade of five thousand bank failures between 1929 and 1933, triggered by panic-stricken depositors.”<sup>215</sup>

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Gilded Age and Progressive Era reformers . . . crafted a new language of social and economic rights . . . in response to provocations from the nation’s courts, whose interpretation of the Constitution meant enjoining strikes and union organizing, imprisoning trade unionists, and nullifying labor and social insurance legislation in the name of property rights and freedom of contract. . . .

Labor law reformers and trade unionists contested the laissez-faire conception of constitutional freedom of contract and argued that real freedom of contract would be achieved through labor law reform, which would overcome grave inequalities of bargaining power . . . , although this achievement had to await the New Deal and World War II, which finally ushered the reformers’ narratives and political economy into the corridors of federal power.

Joseph Fishkin & William E. Forbath, *The Great Society and the Constitution of Opportunity*, 62 DRAKE L. REV. 1017, 1034–35 (2014).

<sup>213</sup> Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 524-25 (2003).

<sup>214</sup> Great Depression History, HISTORY, (October 29, 2009) <https://www.history.com/topics/great-depression/great-depression-history> (last visited Dec. 1, 2020).

<sup>215</sup> Ramirez, *supra* note 213, at 524-25.



The Great Depression combined with the decline of classical liberalism to expand popular and electoral support for shifting power from big businesses and the rich to the broader population, especially in labor matters. Accordingly, one might think of conservative 1920s federal judges as the last aging stones in the dam of classical liberalism holding back the massive waters of populist redistribution, until the torrential rains of the Great Depression finally generated enough force to break the dam. Or as Jeffrey Hirsch puts it, “[a]t times, social changes are so great that they are unable to fit tolerably within the current legal regime. When that happens, a threshold is breached, much like the widespread labor unrest and violence that, in combination with judicial hostility to workers’ rights, ultimately spurred the creation of federal labor law.”<sup>216</sup>

### B. *Replacing Anti-Union Contracts with Legally-Encouraged Labor Cartelization*

Major legal obstacles to unionization largely fell in the 1930s. For instance, anti-union contracts were prohibited by the 1932 Norris-LaGuardia Act.<sup>217</sup> It states that:

Any undertaking or promise, such as is described in this section, . . . is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise . . . constituting or contained in any contract or agreement of hiring or employment . . . whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.<sup>218</sup>

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<sup>216</sup> Jeffrey M. Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889, 891 (2020). See also Michael L. Wachter, *The Striking Success of the National Labor Relations Act* at 427 in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, Cynthia L. Estlund and Michael L. Wachter eds., (2013) (“Industrial strife in the late 19th and early 20th centuries went far deeper [than strikes], raising the question of whether the employees would accept the basic rules of the game. . . . Would the United States electorate tolerate a political economy that regularly needed to call on the National Guard or federal troops to be deployed in American cities to break strikes, often using lethal force in the process?”); *id.* at 430 (“A legal regime was needed to legitimize both unionization and strikes, but also to steer those activities into peaceful channels.”).

<sup>217</sup> Keith N. Hylton, *A Theory of Minimum Contract Terms, with Implications for Labor Law*, 74 TEX. L. REV. 1741, 1769 (1996).

<sup>218</sup> 29 U.S.C. § 103. See also National Labor Relations Act, 29 U.S.C. § 158(a)(3) (“It shall be an unfair labor practice for an employer . . . “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”).

The Norris-LaGuardia Act was “constructed to greatly curtail the use of injunctions against union organizing and collective bargaining,”<sup>219</sup> and says “[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute.”<sup>220</sup> Showing the extent to which the 1929 start of the Great Depression combined with the longer-term transition toward progressivism to shift many people’s views, the Norris-LaGuardia Act was sponsored by Republicans and passed a Congress that would not until the following year switch to both houses controlled by Democrats.

Democrats won the 1932 election in a landslide “with a mandate to combat the Great Depression.”<sup>221</sup> The Democratic candidate for president, Franklin Delano Roosevelt, defeated incumbent Republican Herbert Hoover by an electoral college margin of 472 to 59. From 1933 through 1946, Democrats controlled the presidency and both houses of Congress.

As discussed above, the Clayton Act of 1914 had moved toward exempting labor cartels (unions) from the federal antitrust laws, but was narrowly interpreted by the Supreme Court, so “boycotts and, in many circumstances, strikes and picketing, remained subject to antitrust liability.”<sup>222</sup> In contrast, New Deal legislation not only exempted labor cartels from the antitrust laws, but actively encouraged the formation of labor cartels. This was originally attempted by the 1933 National Industry Recovery Act, struck down by the Supreme Court,<sup>223</sup> but was then accomplished by the Wagner Act of 1935.<sup>224</sup> The “Wagner Act was ineffective until 1937, its functionality hamstrung by employers’ near universal contempt for its mandates and the courts’ similarly widespread view that it could not possibly survive constitutional review either.”<sup>225</sup> However, the Supreme Court upheld the Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*, a landmark decision, “which at once upheld the Wagner Act and legitimated the New Deal itself.”<sup>226</sup> The *Jones & Laughlin Steel* decision occurred shortly after the “switch in time that saved nine,” when two conservative justices switched their votes and “abandoned original understanding of the

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<sup>219</sup> William N. Cooke, *Evolution of the National Labor Relations Act* at 9 in WILLIAM N. COOKE, UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS (1985).

<sup>220</sup> 29 U.S.C. § 104.

<sup>221</sup> Michael A. Livermore, *Daniel Richardson, Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 5 (2019).

<sup>222</sup> See *supra* note 142 (quoting James M. Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127, 143 (1982)).

<sup>223</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>224</sup> Wachter, *supra* note 216, at 442 (“the economic model of the NLRA was to cartelize the labor market”).

<sup>225</sup> White, *supra*, note 82, at 1081–82.

<sup>226</sup> *Id.* at 1085.

Constitution to permit what would otherwise have been unconstitutional--the New Deal.”<sup>227</sup> The “*Lochner* Era” in constitutional law was definitely over by 1937.<sup>228</sup>

Section 1 of the Wagner Act, also known as the National Labor Relations Act (NLRA),<sup>229</sup> begins “[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife.”<sup>230</sup> Section 1 then refers to “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers,” before declaring:

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<sup>227</sup> Stephen J. Ware, *A Short Defense of Southland, Casarotto, and Other Long-Controversial Arbitration Decisions*, 30 LOY. CONSUMER L. REV. 303, 328 (2018).

In 1935 and 1936, the Court struck down several key pieces of New Deal legislation. President Franklin Delano Roosevelt thought “a recalcitrant Court was preventing the country from achieving necessary recovery and reform,” and he “chastise[d] the Justices for their ‘horse and buggy interpretation’ of the Commerce Clause.” After his landslide 1936 reelection, Roosevelt announced in February 1937 his plan to enlarge the Court’s membership from nine to fifteen, which would have allowed him to appoint enough justices to reverse the Court’s recent decisions, and thus uphold the New Deal. “[T]he 1936 elections had given the Democrats dominant supermajorities in both the House and the Senate,” which gave Roosevelt “good reason to hope” that his “court-packing” bill would be approved. “In April, however, before the bill came to a vote in Congress, two Supreme Court justices came over to the liberal side and by a narrow majority upheld as constitutional the National Labor Relations Act and the Social Security Act.”

This “switch in time that saved nine” “provided the basis for a profound shift from federalism to nationalism [that has] effectively given Congress a police power . . . to regulate any matter under the guise of the original Commerce Clause.” As Professors Eskridge and Ferejohn explain:

The Court’s switch in time averted a constitutional showdown between the Court and the political system, and between 1937 and 1943 Roosevelt remade the Court with nine nominees. The immediate agenda of the New Deal Court was to interpret the Commerce Clause broadly enough to embrace regulatory legislation with incidental (but demonstrable) effects on interstate commerce, and with this the coalition consolidated the new Commerce Clause jurisprudence with unanimous majorities by 1942.

*Id.* at 328-30.

<sup>228</sup> See, e.g., Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U.L. REV. 609, 640–41 (2011) (“In 1937, the Supreme Court decided *West Coast Hotel Co. v. Parrish*. . . . *West Coast Hotel* overruled another Supreme Court opinion from just fifteen years earlier, *Adkins v. Children’s Hospital*, which followed *Lochner*. . . . Shortly after the *West Coast Hotel* case was decided, the Supreme Court put the final nail in the *Lochner* coffin with the *Carolene Products* case”); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 50–51 (2003) (“the 1920s and the Taft Court represented the last gasp of classical liberal principles in American public life for decades to come”).

<sup>229</sup> See *supra* note 8.

<sup>230</sup> 29 U.S.C. § 151.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes . . . and by restoring equality of bargaining power between employers and employees.<sup>231</sup>

Accordingly, Section 1 of the NLRA declared “the policy of the United States to” be “encouraging the practice and procedure of collective bargaining.”<sup>232</sup> The NLRA created the National Labor Relations Board (NLRB) to enforce employee rights.<sup>233</sup>

The “centerpiece”<sup>234</sup> of the NLRA is Section 7, which says “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>235</sup> Section 8 says “[i]t shall be an unfair labor practice for an employer” to, among other things, “interfere with” employees’ section 7 rights or “to refuse to bargain collectively with the representatives of employees.”<sup>236</sup> The NLRA was a “great assault on the concept of at-will employment, since a worker could no longer be fired for reasons protected by Section 7 of the Act.”<sup>237</sup>

In short, the Norris-LaGuardia and Wagner Acts largely overrode the legal impediments to unionization discussed in Section II. The Norris-LaGuardia Act prohibited anti-union contracts and greatly reduced the labor injunctions that had been based in tort or antitrust law. The Wagner Act (NLRA) encouraged the formation of labor unions and pressured employers to buy labor from workers represented by the union, through a collective bargaining agreement (CBA), rather than

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> 49 Stat. 449, § 3 (to be codified at 29 U.S.C. § 153) (expressing intent and establishing the NLRB). National Labor Relations Board, *1935 passage of the Wagner Act*, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1935-passage-of-the-wagner-act> (last visited Dec. 1, 2020) (“The Wagner Bill proposed to create a new independent agency—the National Labor Relations Board, made up of three members appointed by the President and confirmed by the Senate—to enforce employee rights.”).

<sup>234</sup> SAMUEL ESTREICHER & MATTHEW BODIE, *LABOR LAW* 35 (2d ed. 2020).

<sup>235</sup> 29 U.S.C. § 158.

<sup>236</sup> *Id.* The NLRA established the National Labor Relations Board (NLRB) to enforce these provisions and “to hold elections pursuant to [NLRA section] 9 to determine whether the majority of workers in an appropriate unit wished to be represented by a labor organization for purposes of collective bargaining.” ESTREICHER & BODIE, *supra* note 234, at 36.

<sup>237</sup> Michael D. Yates, *Should We Return to the Policy of the Wagner Act?*, 4 U. PA. J. LAB. & EMP. L. 559, 561 (2002).

from other workers, some of whom might be willing to work for a lower wage.<sup>238</sup> In other words, the NLRA facilitates workers organizing into a collective (cartel) to bargain as one unit against the employer, rather than leaving individual workers to compete with each other for jobs. The NLRA, as Richard Posner writes, “is a kind of reverse Sherman Act, designed to encourage cartelization of labor markets.”<sup>239</sup>

Michael Wachter similarly explains that “the economic model of the NLRA was cartelization of the labor market.”<sup>240</sup> “Unions would have monopoly power in the labor market,” so “wages would be set by the dictates of the collective bargaining process and not the dictates of the marketplace.”<sup>241</sup> The NLRA aimed to raise wages and reduce “industrial strife” by permitting sellers of labor (workers) to form a cartel and by pressuring buyers of such labor (employers) to buy labor from workers represented by the cartel, rather than from other sellers (workers) who might accept a price (wage) lower than the cartel’s price.

The original NLRA (Wagner Act) was modified in 1947 by the Taft Hartley Act to prohibit the “closed shop,” so employers are no longer literally required to buy labor only from union members.<sup>242</sup> But prohibiting the closed shop did not typically free employers from negotiating with a cartel or leave individual workers competing with each other. That is because once a union wins an election to be the employees’ exclusive bargaining representative, the union represents all relevant workers (including both union members and non-members) in collective bargaining, so all relevant workers are governed by the same CBA, and thus all of them are paid the same union wage.

Employers are generally prohibited from paying lower wages or providing lesser benefits to non-union-members doing similar work (and with the same seniority) as union-member

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<sup>238</sup> The employer pays wages and benefits to employees, but at a price set by the CBA between the employer and union.

<sup>239</sup> POSNER, *supra* note 115, § 12.2.

<sup>240</sup> Wachter, *supra* note 216, at 442 (“the economic model of the NLRA was to cartelize the labor market”).

<sup>241</sup> *Id.* at 428.

<sup>242</sup> ESTREICHER & BODIE, *supra* note 234, at 38 (“Taft-Hartley outlawed the ‘closed shop’ (where union membership is a prerequisite for employment), and permitted states to enact so-called ‘right to work’ laws outlawing even the ‘union shop’ (where union membership or its financial equivalent is required only after an initial period of employment)”).; Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 174-81 (2015) (describing the NLRA allowing membership of a union as a pre-requisite to employment, but that allowance being removed by the Taft-Hartley Act); Denise Oas & Steven Lance Popejoy, *The Right-to-Work Battle Rages on at Both the Federal and State Levels*, 29 MIDWEST L.J. 71, 75-76 (2019) (“Historically, the closed shop (defined as a union security agreement which required union membership as a condition of employment) had been used by the NLRA during World War II . . . Following the war, the government exercised greater control over labor unions, and with the passage of Taft-Hartley, outlawed closed shops.”).

employees because both types of employees are likely to be in the same “bargaining unit,”<sup>243</sup> for which the union has won an NLRB-supervised election to be the “exclusive bargaining representative” for employees in that unit.<sup>244</sup> Exclusive representation by a union requires the employer and union to negotiate only one CBA, which must apply to and treat all employees within

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<sup>243</sup> 29 U.S.C. § 159(a) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment”); Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 837 (1992) (an exclusive representative’s “role is that of a bargaining agent, and its power derives primarily from the employer’s duty to bargain with the union and “to treat with no other.”); 29 U.S.C. § 159(b)(1935) (“The [N.L.R.B.] shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof”). *See also* N.L.R.B. v. Action Auto., Inc., 469 U.S. 490, 494 (1985) (“The Board’s discretion in this area is broad, reflecting Congress’ recognition of the need for flexibility in shaping the [bargaining] unit to the particular case. The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a community of interest.”)(internal quotations omitted); *Kindred Nursing Centers E., LLC v. N.L.R.B.*, 727 F.3d 552, 560 (6th Cir. 2013) (“The [community of interest] test includes the following five factors: (1) similarity in skills, interests, duties and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer’s organization and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees.”).

<sup>244</sup> ESTREICHER & BODIE, *supra* note 234, at 47 (the NLRA is “based on the principle of exclusive representation (only the representatives chosen by a majority of the employees in a unit may bargain with the employer over terms and conditions of employment, to the exclusion of individual employees or a members-only group); and a legally mandated duty to bargain (both the exclusive representative and the employer are legally obligated to bargain in ‘good faith’”); POSNER, *supra* note 115, § 12.2.

If an organizing campaign succeeds to the extent that at least 30 percent of the workers sign cards authorizing the union to be their collective bargaining representative, the National Labor Relations Board will conduct an election for collective bargaining representative. If the union wins a majority of the votes cast, it will become the workers’ exclusive bargaining representative. The employer will then be required to bargain with the union in good faith over the terms of an employment contract for all the workers in the collective bargaining unit; he will not be allowed to bargain separately with individual workers.

The representation election, the principle of exclusive representation, and the union shop together constitute an ingenious set of devices . . . for overcoming the free-rider problems that would otherwise plague the union as a large-numbers cartel. . . .

The design of the electoral unit in representation election—the bargaining unit as it is called—is critical. The Labor Board will certify any group of employees that is at once homogeneous with regard to conditions of employment (wages, fringe benefits, work duties, etc.) and distinct from other employees of the firm. A single plant or facility may contain several different bargaining units each of which will negotiate separately with the employer. Consistent with the law’s policy of facilitating worker cartels, the Board generally certifies the smallest rather than the largest possible unit. Transaction costs among workers are lower the fewer the workers and the more harmonious their interests.

*Id.*

the bargaining unit similarly, regardless of an employee's union membership status.<sup>245</sup> Only in exceptional cases or non-exclusive ("members only") representative agreements,<sup>246</sup> may employers negotiate individualized deals with some, but not all, employees in a bargaining unit. Otherwise, an employer paying a non-union worker less than the union wage in the CBA would commit an unfair labor practice in violation of the NLRA.<sup>247</sup> So employers generally must pay union-represented employees the (higher) cartel price of labor whether or not a particular employee is technically a member of the union. In other words, the NLRA's legally-encouraged cartelization of labor raising wages above their competitive level persists by effectively including in the cartel all workers—union member or not—the employer may hire for the relevant jobs.

After the NLRA, labor "unions are legalized cartels attempting to monopolize labor markets in much the same manner that business firms attempt to monopolize a product market."<sup>248</sup> Much as a sole monopolist business can profit by raising its price above that which sellers in a

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<sup>245</sup> See *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2467 (2018) ("Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required . . . to listen to and to bargain in good faith with only that union.).

<sup>246</sup> ESTREICHER & BODIE, *supra* note 234, at 132.

In most settings, before any union enters the scene, employees have preexisting relationships with their employers which are governed by employer rules subject to the state common law of contracts. In *J.I. Case Co. v. NLRB*, the employer entered into written employment agreements with its employees and invoked those agreements as a bar to any collective bargaining with the exclusive representative selected by the employees. The Supreme Court held that the individual agreements provided no bar to the employer's duty to bargain with the employees' exclusive representative. "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." Because unions can negotiate or allow different arrangements, as in the sports and entertainment industries, *J.I. Case* is best seen as establishing a presumption that can only be overcome by clear evidence of the union's waiver of its right to insist on exclusive dealing. One reason for the rule is that individual contracts could dissipate the strength of the collective agent. As the Court noted, "advantages to individuals may prove as disruptive of industrial peace as disadvantages."

*Compare Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122 (May 7, 2019) (holding that vacation benefits given only to non-union workers was lawful under the NLRA because of the structure of the "members-only" union relationship).

<sup>247</sup> 29 U.S.C. § 158(a)(5) (It shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees"). See also Cynthia Estlund, *Are Unions A Constitutional Anomaly?*, 114 MICH. L. REV. 169, 178 (2015) (under the NLRA "once a majority of employees in an appropriate bargaining unit chooses to be represented by a union, the union becomes the exclusive representative of the whole bargaining unit, and the employer has a duty to bargain with the union over all employees' wages and working conditions.").

<sup>248</sup> HENRY N. BUTLER, ET AL., *ECONOMIC ANALYSIS FOR LAWYERS* 470 (3d ed. 2014); *id.* at 471 ("Unions increase wages above market wages by either (a) restricting entry of non-union workers into union controlled jobs and allowing the market to clear at a higher price or (b) negotiating higher wages with employers.") Each tends to have the same effects of reducing the supply of labor and raising its price. *Id.* at Figure VIII-11.

competitive market would charge,<sup>249</sup> a cartel’s members can similarly profit by uniformly raising their prices above that which sellers in a competitive market would charge. But higher prices tend to reduce the quantity of whatever goods or labor is sold because some buyers who would have been willing to pay the competitive market price are unwilling to pay the higher monopoly price.<sup>250</sup> So a cartel’s success typically depends on its members’ unity in limiting their total output (quantity sold) as well as maintaining price. Cartels often fail because some cartel members, or rival sellers from outside the cartel, attract buyers by selling at a price below the cartel price,<sup>251</sup> which tends to require the remaining “loyal” members of the cartel to lower their prices too, if they are to continue finding willing buyers.

Consequently, the “collective” part of “collective bargaining” is central to the cartelization of labor through which unions raise wages or benefits for their members. As the AFL-CIO puts it, “Collective bargaining is . . . the best means for raising wages”; “through collective bargaining, working people in unions have higher wages, better benefits and safer workplaces.”<sup>252</sup> Or, in the words of a textbook on the economic analysis of law, “[t]he main purpose of a union . . . is to limit the supply of labor so that the employer cannot use competition among workers to control the price of labor (wages).”<sup>253</sup> Suppressing competition from other workers (sellers of labor) is key to a union’s success because only if *all* sellers of (the relevant type of) labor *collectively* refuse to work for less than the “union wage,” must the employer must pay that wage to obtain that labor. But if this refusal—a strike—does not include all available sellers of such labor, then employers can hire workers outside the collective as replacements for the strikers, or employers can avoid paying the higher union wage by shifting production to lower wage, non-union shops.<sup>254</sup>

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<sup>249</sup> See *supra* notes 112-115 and accompanying text.

<sup>250</sup> BUTLER, ET AL., *supra* note 248, at 471 (“Unions increase wages above market wages by either (a) restricting entry of non-union workers into union controlled jobs and allowing the market to clear at a higher price or (b) negotiating higher wages with employers.”) Each tends to have the same effects of reducing the supply of labor and raising its price. *Id.* Figure VIII-11.

<sup>251</sup> COOTER & ULEN, *supra* note 115, at 364 (“The members or a cartel agree to keep prices up, which profits the members as a group. Each individual member, however, profits even more by undercutting the cartel’s price and luring buyers away from other members. To prevent such ‘cheating,’ the cartel must punish members who undercut the cartel’s price.”).

<sup>252</sup> Am. Fed’n of Labor & Cong. Of Indus. Orgs., *What Unions Do: Collective Bargaining*, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining> (last visited August 4, 2020).

<sup>253</sup> BUTLER, ET AL., *supra* note 248, at 427.

<sup>254</sup> Keith J. Gross, *Separate to Unite: Will Change to Win Strengthen Organized Labor in America?*, 24 *BUFF. PUB. INT. L.J.* 75, 79–81 (2006).

For example, in 1919 the AFL-affiliate Amalgamated Association of Iron, Steel and Tin Workers of America (“AA”) organized a steel strike of over 350,000 workers in hopes of convincing U.S. Steel to recognize the union and agree to collective bargaining. U.S. Steel refused to discuss the



For instance, a critic of the Supreme Court's 1917 *Hitchman* case enforcing anti-union contracts, Harvard Law Professor Francis Bowes Sayre, discussed the coal industry at the time:

Practically all coal mines in what was known as the Panhandle District of West Virginia were run upon this non-union basis, while the entire industry in Ohio, Indiana, and Illinois, known as the "Central Competitive Field," were operated under union conditions, all the employees being members of the United Mine Workers of America. The coal of each district came into direct competition with that of the other; and as long as coal could be produced in the unorganized Panhandle District at rockbottom wages and consequent low production costs, it not only became increasingly more difficult for the operators in the Central Competitive Field to maintain prices high enough to grant certain concessions demanded by the union, but it also enabled mine owners to break strikes called in the Central Competitive Field by supplying coal mined in the nonunion Panhandle District. In other words, if collective bargaining was to continue to function freely in Ohio, Indiana, and Illinois, it would be necessary to remove the competition of the unorganized Panhandle mines. The fact that the industry functioned upon a national scale required the unions similarly to operate upon a nation-wide scale. Accordingly, at the international convention of the United Mine Workers of America, held at Indianapolis in 1907, it was decided as a measure "absolutely necessary to protect us against the competition that comes from the unorganized fields east of us" to unionize the mines of the Panhandle District.<sup>255</sup>

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AA's demands, and simply responded by bringing in strikebreakers--both white and black--and suppressing the strikers with private guards and police. . . . At the same time, . . . unions . . . like the International Ladies Garment Workers' Union ("ILGWU"), were "torn asunder by competition from non-union shops" . . . .

As the 1919-20 steel strike demonstrates, employers in industries with semi-skilled or unskilled workers often can easily replace strikers, which is why unskilled workers have diminished bargaining power.

*Id.*

<sup>255</sup> Sayre, *supra* note 94, at 674. *See also* *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 240–41 (1917) ("The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the union in the Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the union.").

This passage, by an advocate of unionization,<sup>256</sup> is just one example of the standard economics that success by cartels in raising the price their members can charge requires suppressing competition from other sellers.<sup>257</sup>

For these reasons, Michael Wachter explains, the Wagner Act, “could only take wages out of competition if the entire industry, including all new entrants, were unionized and wages were bargained at the industry level. . . . But from the outset, staying non-union under the Wagner Act gave firms much lower labor costs, which provided a great inducement to stay non-union.”<sup>258</sup> Wachter adds that “higher union wages” could only under the NLRA “be paid for out of corporate profits since the employers could be forestalled from increasing prices by product market competition from non-union producers or those with weaker unions.”<sup>259</sup> In other words, investors

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<sup>256</sup> Sayre, *supra* note 94, at 694–695.

Were it not for trade unions, wages through the drive of relentless competition must be driven inevitably below the minimum cost of subsistence, and working conditions be forced to a point beyond average human endurance; the inescapable harvest could only be poorhouse relief, charitable doles, reduced vitality, increased sickness, an increased death rate, overcrowding, crime, and the long train of social ills which dance attendance upon a society which pays the worker less than it costs him and his family to live.

Furthermore, in its present form industry can not be stabilized except through organization methods, such as trade agreements, arbitration boards and similar devices, made possible through trade unionism. There is a very real social interest, then, in the existence of trade unions; and these can not continue to exist and function unless they are free to add to their membership by persuading through lawful means non-union men to join their ranks and by “organizing” non-union fields. When, therefore, in the Hitchman case, one comes to reckon up the interests concerned, one finds weighing against the plaintiff a social interest of prime importance in the free existence and legitimate functioning of trade unions.

*Id.* at 674.

<sup>257</sup> See, e.g., POSNER, *supra* note 115, § 10.1 (9<sup>th</sup> ed. 2014) (“any part of the market that is outside of the colluding circle limits the power of the colluding sellers to raise the market price.”) See generally COOTER & ULEN, *supra* note 115, at 364 (“The members or a cartel agree to keep prices up, which profits the members as a group. Each individual member, however, profits even more by undercutting the cartel’s price and luring buyers away from other members. To prevent such ‘cheating,’ the cartel must punish members who undercut the cartel’s price.”).

<sup>258</sup> Wachter, *supra* note 216, at 441. See also Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act.*, 71 TEX. L. REV. 921, 924 (1993) (“Unions typically seek to increase labor’s share of a firm’s revenues; the firm that is successfully unionized, and as a result pays higher wages and benefits, must continue to compete against non-union firms that generally pay lower wages. It may therefore be reasonable for firms to regard union activism itself, by its very nature, as economically threatening to the firm. Yet union activity is protected by federal law against employer discrimination and interference.”).

<sup>259</sup> Wachter, *supra* note 216, at 441. In contrast, the National Industrial Recovery Act (NIRA) of 1933, which was held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), authorized the creation of industry cartels to reduce competition. See Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 599-600 (2007).

seeking high rates of return (generated by corporate profits) could be expected to move capital, and thus job opportunities, from unionized firms with high labor costs to non-unionized firms with lower labor costs, including firms operating outside the U.S.<sup>260</sup> This opposition of interests between workers and owners, Wachter points out, made “[t]he cooperative spirit envisioned by Senator Wagner”—in which employers “[c]ompelled to live with unions . . . would learn to cooperate with them”—“an impossible dream from the beginning.”<sup>261</sup>

### C. *Legally-Encouraged Labor Cartelization Replaced At-Will Employment with Labor Grievance Arbitration*

The previous sections of this Article explained that employers understandably resist unionization because it raises labor costs, and that such resistance in the U.S. was generally successful in the 19<sup>th</sup> and early 20<sup>th</sup> centuries in staving off unionization, and thus the collective bargaining agreements that have since replaced at-will employment with arbitration of labor grievances. “Nineteenth century employers,” Nolan and Abrams emphasize, “recognized unions only under great pressure, and accepted arbitration even less willingly. No more than a handful of arbitration cases on wages and hours could have occurred before 1900.”<sup>262</sup> Witte concurs that the “great weakness of” late 19th century labor arbitration laws “was that the employers generally refused arbitration.”<sup>263</sup> Similarly in the first three decades of the 20th century, most employers—often with courts’ help—continued successfully to resist unionization, even amidst ongoing violence and Progressive Era legislation. So, even through the 1920s most employers refused to submit workplace disputes to arbitration. Pre-1930s employers could refuse to arbitrate workplace disputes because employers usually had the legal power (under the laws discussed in Section II) to resolve disputes through other means, including simply firing employees asserting grievances.

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<sup>260</sup> Andrias, *supra* note 4, at 26–27 (an “employer may avoid unionization by closing its operations, by subcontracting, by ‘doublebreasting’ through a nonunion company, or by moving production.”) Due to these factors and others, like competition from workers overseas, unions have declined in the private sector since the 1950s and now only represent about 7% of private-sector workers. “Following the upsurge in organizing during New Deal, union density--the percentage of workers in unions--rose to a peak of 35% in the mid-1950s. Density remained largely stable through the postwar period, until the 1970s and 1980s saw the labor movement’s precipitous decline.” Charles Du, *Securing Public Interest Law’s Commitment to Left Politics*, 128 *Yale L.J. Forum* 244, 249–50 (2018). “[B]y 2017, just 10.7% of all workers in the United States belonged to a union, including only 6.5% of private-sector workers.” *Id.*

<sup>261</sup> Wachter, *supra* note 216, at 440–41.

<sup>262</sup> Nolan & Abrams, *supra* note 32, at 380.

<sup>263</sup> WITTE, *supra* note 28, at 10. “Some demand was expressed in labor circles for legislation to compel employers to arbitrate. . . . But Samuel Gompers came out strongly against compulsory arbitration . . . [and] [h]is position was officially adopted by the American Federation of Labor . . . , [which] declared itself in favor of agreements with employers on conditions of employment and also of voluntary arbitration, but totally in opposition to compulsory arbitration—a position from which it has not deviated since.” *Id.*

So long as employers could fire and replace employees asserting grievances, employers had little incentive to submit employee grievances to binding arbitration.<sup>264</sup>

By contrast, the early 20<sup>th</sup> century ideological shift from classical liberalism to progressivism combined with the Great Depression to produce massive legal changes in the 1930s. The Norris-LaGuardia Act prohibited anti-union contracts and greatly reduced the labor injunctions that had been based in tort or antitrust law. The Wagner Act (NLRA) went further in encouraging the formation of labor cartels (unions) and then pressuring employers to buy labor from workers represented by the cartel, thus encouraging unions to do what cartels do—raise prices—in this case the prices of labor. Unions raise wages or benefits for their members through collective (cartel) bargaining rather than leaving individual workers to compete against each other for jobs, wages, and benefits.

The agreements arising out of collective bargaining typically implement the major change of replacing employers' freedom to fire workers at will with the constraint that employers can fire a worker only "for cause."<sup>265</sup> Why did employers—after decades of successfully resisting this huge limitation on their freedom—accept it in collective bargaining agreements (CBAs)? Mostly because the NLRA and other progressive legislation had greatly restricted employers' freedom to buy labor from workers not represented by the government-encouraged cartel (union) that had won an NLRB-supervised election to be the "exclusive bargaining representative" for workers doing the relevant jobs.<sup>266</sup> As the Supreme Court said in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, "[w]hen most parties enter into [a] contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement."<sup>267</sup> Employers are legally-compelled to contract with the union rather than other workers offering similar types of labor, and

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<sup>264</sup> WITTE, *supra* note 28, at 45–46. "Nearly always," Witte observes, "recognition of and dealing with the union precedes arbitration." "Arbitration concerning the interpretation and application of contract provisions—by far the most frequent type of arbitration in recent decades— can occur only when there is an agreement to interpret."

<sup>265</sup> POSNER, *supra* note 115, § 12.5 (9th ed. 2014) ("employment at will is the normal form of labor contract in the United States. The worker can quit when he wants; the employer can fire the employee when the employer wants."); *id.* § 12.4 ("Collective bargaining contracts generally establish a grievance machinery for arbitrating workers' complaints and also give workers job security—not absolute security, for they can be laid off if the firm's demand for labor declines, but security against being fired other than for good cause (determined by means of the grievance machinery).") See also MARK ROTHSTEIN, ET AL., EMPLOYMENT LAW § 1:29 (5th ed. 2014) ("Eventually, most collective bargaining agreements contained protection from discharge except for 'just cause,' with arbitration to resolve grievances."); ELKOURI & ELKOURI, HOW ARBITRATION WORKS 931–33 (Kenneth May ed., 8th ed. 2016)(union contracts almost always require cause for dismissal, and typically provide an arbitration mechanism as a method of review of employer decisions.); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994) (surveying history of employment-at-will rule and its exceptions).

<sup>266</sup> See *supra* notes 243-44 and accompanying text.

<sup>267</sup> 363 U.S. 574 (1960).

it is this compulsion that gives unions the power to extract from employers agreements to replace at-will employment with arbitration of employee grievances.

Once an employer accepts that it must buy its labor from workers exclusively represented by the union, the employer is typically willing to pay a high price for the union's promise not to strike.<sup>268</sup> So in exchange for that no-strike promise, unions are typically able to extract employers' promises not to fire workers except "for cause" and to submit to an arbitrator's decision on what counts as "cause" in a particular case.<sup>269</sup> Unions are also often able to extract other CBA restrictions on employers' freedom to discipline or re-assign duties of employees, and to submit grievances about those matters to arbitration, as well.<sup>270</sup> This "grievance procedure" culminating in arbitration, "rather than a strike, is the terminal point of a disagreement," between workers and their employer under the NLRA, *Warrior & Gulf* explained.<sup>271</sup> In other words, legally-encouraged labor cartelization was the primary driver replacing strikes with labor arbitration.

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<sup>268</sup> ESTREICHER & BODIE, *supra* note 234, at 157 ("The ability to withdraw the company's labor force en masse is a union's principal weapon. The NLRA itself provides specific protection for the strike."); *id.* ("Under the NLRA, a union is legally entitled to go on strike with relatively little hindrance"). POSNER, *supra* note 115, § 12.2 (9<sup>th</sup> ed. 2014).

[The NLRA] makes it hard for the employer to operate with replacement workers by forbidding him to pay them a higher wage than the striking workers whom they replace, by allowing the strikers to picket the plant, and by forbidding him to sever the employment relationship with the striking workers. He must therefore reinstate the strikers when the strike is over unless their jobs have been filled by permanent replacements, but in that event he must place the strikers at the head of the queue to fill vacancies as they occur. These three rules work together by allowing the strikers to identify the replacement workers, by reminding the latter that when the strike ends they may find themselves working side by side with the strikers—an uncomfortable, sometimes a dangerous, proximity that deters many people from hiring on as replacements—and by preventing the employer from paying a premium wage to compensate the replacements for this additional cost of work.

*Id.*

<sup>269</sup> WITTE, *supra* note 28, at 49. (1953) ("Grievance arbitration was extensively adopted as a corollary of the development of grievance procedures and of no-strike provisions in union contracts.") CBAs commonly permit employers to fire, or otherwise discipline, an employee only "for cause." ROTHSTEIN, ET AL, *supra* note 265, § 9:1 ("Eventually, most collective bargaining agreements contained protection from discharge except for 'just cause,' with arbitration to resolve grievances."); FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 15–4–15–6 (7<sup>th</sup> ed. 2012 & Supp. 2014) (union contracts almost always require cause for dismissal, and typically provide an arbitration mechanism as a method of review of employer decisions.).

<sup>270</sup> WARE & LEVINSON, *supra* note 8, at 222 (unions may "arbitrate cases involving any alleged breach of a CBA provision. These cases might involve any number of issues such as an allegation that an employer has sub-contracted work in violation of a work-preservation provision, a dispute over whether a certain scheduling system is permissible, a request to accommodate a disabled employee, or allegations that pay or break provisions are not being properly followed.").

<sup>271</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

Through this process of legally-compelling employers to buy labor from a cartel, unions and labor grievance arbitration grew from the 1930s to the 1950s.<sup>272</sup> As the previous paragraph suggested, a promise not to strike is typically a union's main bargaining chip in negotiating a CBA because the right to strike—"to withdraw the company's labor force en masse"—"is a union's principal weapon."<sup>273</sup> So in the late 1930s the newly-created National Labor Relations Board worked to maximize the strength of that weapon (the strike) and thus the value of that bargaining chip (a promise not to strike). "Under the leadership of a group of leftist lawyers between 1935 and 1939, the NLRB aggressively defended the right to strike. With an obvious sense that an effective right to strike was crucial to the entire regime of labor law, the agency's staff went to considerable lengths to protect strikers from reprisals by employers and government officials."<sup>274</sup>

The year 1936, when the constitutionality of the NLRA and NLRB were still in doubt,<sup>275</sup> was a particularly intense year of industrial warfare, often in the form of the sit-down strike, in which workers occupied their employers' buildings to stop production until employers recognized the union.<sup>276</sup> Sit-down striker-trespassers sometimes successfully fought off attempts by police and private security forces to remove the trespassers and permit production to resume with replacement workers. Ahmed White describes the landmark sit-down strike of General Motors plants in Flint, Michigan, that began on December 30, 1936.

[C]onsistent with the union's overall plans but in a spontaneous way, workers seized Fisher Body Plants Nos. 1 and 2. The seizure was orderly. Strikers immediately ushered out foremen and managers and set about securing the sprawling facilities against attack and otherwise preparing for an occupation that would last an extraordinary forty-four days. During this time, the strikers successfully repelled a major assault by the police--an ignominious rout that unionists tauntingly dubbed the "Battle of the Running Bulls." The strikers also defied two court injunctions ordering them to evacuate the plants, in part by bringing to light the issuing judges' ownership of GM stock. . . . [S]hortages created by the strike bottlenecked production and crippled GM's operations nationwide.

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<sup>272</sup> Charles Du, *Securing Public Interest Law's Commitment to Left Politics*, 128 YALE L.J. FORUM 244, 249–50 (2018) ("Following the upsurge in organizing during the New Deal, union density—the percentage of workers in unions—rose to a peak of 35% in the mid-1950s.").

<sup>273</sup> ESTREICHER & BODIE, *supra* note 234, at 157.

<sup>274</sup> White, *supra* note 82, at 1084.

<sup>275</sup> The NLRA "was widely disregarded until it was held to be constitutional in 1937." Fleming, *supra* note 29, at 1246.

<sup>276</sup> Ahmed A. White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 NEV. L.J. 561, 582 (2011) ("In 1936 alone, however, there were forty-eight sit-down strikes of at least one day's duration. Between 1936 and 1939, there would be almost six hundred major sit-down strikes, most conducted by CIO unionists. In most cases, these strikes were used by workers to press organizational aims in the face of employers' use of illegal means to resist union recognition and, of course, maintain production.").

Indeed, the strike spread to around a dozen other GM facilities, eventually idling about 150,000 production workers.

As the strike wore on, GM gradually ran out of options. After the defeat of the local police, the company was unable either to cajole or threaten Michigan's liberal governor, Frank Murphy, into using the National Guard to oust the strikers; it was also unable to convince President Roosevelt to back down the CIO leadership. In the meantime, the strike succeeded in negating GM's erstwhile capacity for labor repression: its hundreds of police and spies were rendered useless, and its capacity for propaganda was, for the time at least, trumped by the workers' sensational gambit. . . . [T]he company was forced into a preliminary agreement that provided for the company's eventual recognition of the UAW as the exclusive agent of the company's production workers.

The political significance of the strike extended beyond GM. Needless to say, the strike had been thrilling, front-page news nationwide. Aside from the remarkable spectacle of impoverished workers defiantly holding the property of the world's largest company, the UAW victory was by far the single most significant victory over an open shop employer in American history. Few would have expected the UAW ever to prevail, given GM's vast resources and the strength of its opposition to unionism. Workers of all kinds drew inspiration from the strikers' victory. Autoworkers, in particular, responded with a new confidence in industrial unions and in the sit-down strike as a means of achieving this. In the weeks immediately following the end of the Flint strike, the UAW pulled at least eighteen sit-down strikes at other GM facilities before the company and the union finally agreed to a company-wide contract in mid-March 1937.<sup>277</sup>

This story exemplifies the labor movement's subordination of the "law in the books" (what statutes and courts said) to the "law in action"<sup>278</sup> imposed by striker-trespassers numerous enough to hold

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<sup>277</sup> Id. at 583–84.

<sup>278</sup> On the distinction between the books and the action, see Roscoe Pound, *The Law in the Books and the Law in Action*, 44 AM. L. REV. 12 (1910).

In formalistic thinking, there is an assumption that the statement and application of a norm will produce changes in reality, and that "law in the books" corresponds to "law in action." . . . The counterclaim is that law in action is different from law in the books and that legal writing has, at best, only an indirect connection to social change. The origin of this critique goes back to the sociological jurisprudence movement developed by Roscoe Pound, which criticized legal studies for their emphasis on legal rules and decision-making, while ignoring the social context and implications of those decisions.

Michal Alberstein et. al., *Between Formalism and Discretion: Measuring Trends in Supreme Court Rhetoric*, 47 HOFSTRA L. REV. 1103, 1111–12 (2019).

an employer's property against law-enforcement efforts to evict them,<sup>279</sup> and popular enough to deter progressive Democrats in the White House and governor's office from enforcing the law in the books against those striker-trespassers.<sup>280</sup>

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<sup>279</sup> White, *supra* note 82, at 1118-19 (2018) ("Dean Dinwoodey, law professor and editor of U.S. Law Week, spoke for most legal scholars when he declared in the New York Times that 'under well settled principles of property law, the employer has a legally protected right to the exclusive possession of his factory or plant, just as the householder has to the exclusive possession of his home.' In this sense, Dinwoodey said, the strikers were really nothing but trespassers."). The NLRA permits some conduct that would otherwise be trespass. See Deborah Jacobson, *Union Trespass: Sears v. Carpenters and Labor Law Preemption*, 40 U. PITT. L. REV. 779, 783 (1979) ("The protections of [NLRA] section 7 are thus quite broad: they extend to organizational activities, to activities in support of other employees, and to the preservation of area standards. Moreover, these protections apply to some extent even when the activity constitutes a trespass: in such cases, a proper accommodation between the respective rights is to be made by the NLRB."); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 543 (2004) (discussing balancing the state common law property trespass rights and federal statutory rights).

<sup>280</sup> White, *supra* note 82, at 1097-98 (2018) ("The GM strike succeeded in part because neither the Roosevelt Administration nor state forces under the control of Michigan Governor Frank Murphy intervened forcefully to oust the strikers.") See also Vivian M. Baulch and Patricia Zacharias, *The historic 1936-37 Flint auto plant strikes*, THE DETROIT NEWS, June 23, 1997.

As the nation was emerging from the Great Depression, the striking workers enjoyed the sympathy of most of the people, including Michigan governor Frank Murphy and popular New Deal President Franklin Delano Roosevelt. Roosevelt had promised in his inaugural speech to drive out the "economic royalists," a pointed reference to the General Motors officials."

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The union called for supporters to gather at Cadillac Square in Detroit as a show of strength. The overflowing crowd of 150,000 supporters surprised even the union sympathizers and gave the union the self-confidence they needed to show its power and solidarity over its management "oppressors." Other union workers joined in sympathy strikes, closing plants in other states.

Among the plants closed by a sit-down strike was Fisher No. 2, also in Flint. The company responded by turning off the heat, and the cold winter caused the strikers there to compare themselves to George Washington and his men at Valley Forge.

Then, on Jan. 11, 1937, the police tried to stop food delivery [to the strikers by their families]. A riot ensued.

"The rioting at Flint resulted in injury to 16 strikers and spectators and 11 officers," The Detroit News reported. . . . "Most of the strikers were injured by buckshot fired from riot guns by the Flint police. The officers were injured principally by missiles thrown from the plant by the stay-in strikers."

"A pitched battle raged at the gates of the plant for 20 minutes, with 30 to 40 policemen opposing several hundred enraged strikers. The strikers pelted the officers with iron nuts, bolts and milk bottles and spurted thick streams of water on them from fire hoses. The police retaliated with tear gas and riot guns."



Moreover, these striker-trespassers and their progressive Democratic allies may have intimidated the Supreme Court into expanding its interpretation of the U.S. Constitution's Commerce Clause to permit what would otherwise have been unconstitutional—the Wagner Act and broader New Deal.<sup>281</sup> Ahmed White argues that the Flint sit-down strike “played the key role in influencing the Supreme Court to follow through in upholding the constitutionality of Wagner Act (and thus the entire New Deal) later that spring, in the landmark *Jones & Laughlin Steel* decision.”<sup>282</sup>

[T]he Supreme Court's decision in the *Jones & Laughlin* case cannot be understood apart from the Justices' apprehensions about where this remarkable upsurge of labor militancy might lead if the Wagner Act were not upheld, which looms as important in this regard as the President's court-packing scheme and the magnitude of his and other New Deal candidates' landslide victories in the 1936 election.<sup>283</sup>

By the time the Supreme Court held the NLRA constitutional in 1937, “a strong drive to organize the mass-production industries was under way.”<sup>284</sup> Helped “by the missionary enthusiasm of the many new unionists, but also by favorable court decisions and a friendly national administration, union membership grew apace.”<sup>285</sup> “One by one the large corporations in the great mass-production industries of steel, automobiles, rubber, and meat packing recognized unions representing a majority of their employees and concluded their first labor-management agreements. Almost equally great gains were made in many smaller establishments. Unions won contracts literally by the thousands.”<sup>286</sup>

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Twice the attacking police were repulsed. The winds had shifted and sent the tear gas back on the officers, who were then pelted with metal hinges thrown by the strikers. A crowd of sympathizers protected the strikers and the police retreated.

“The battle ended with the strikers in complete control of the gates,”

. . .

[D]espite his mobilizing 4,000 National Guardsmen, [Gov.] Murphy refused to use them against the workers. The besieged sit-downers held. They continued to warm themselves with barrels of burning coke. Wives and others sympathizers brought food and news to the windows.

*Id.*

<sup>281</sup> See *supra* note 227.

<sup>282</sup> White, *supra* note 82, at 1096.

<sup>283</sup> White, *supra* note 82, at 1088.

<sup>284</sup> WITTE, *supra* note 28, at 46.

<sup>285</sup> *Id.* at 47.

<sup>286</sup> *Id.*

As Melvyn Dubofsky writes, 1937 was “exceptional” because the labor “strikes were massive and nationwide as well as innovative in their tactics (this was the year par excellence for the sit-down strike).”<sup>287</sup> Second, Dubofsky stresses that the 1937 “strike results produced a major transformation in the dominant pattern of labor-capital relations in [manufacturing, as] trade unionism had come to stay in that sector of the economy and capital began to bargain with labor’s representatives.”<sup>288</sup> Ahmed White agrees that 1937 “is probably the single most critical year in American labor history,” with “4740 strikes involving over seven percent of the working population.”<sup>289</sup>

The late 1930s saw “a dramatic rise in the number of unionized employees, and thus of collective bargaining agreements.”<sup>290</sup> This continued during World War II,<sup>291</sup> and greatly increased the number of collective bargaining agreements and thus of employers no longer free to fire and re-assign workers at will, but instead constrained by CBAs and arbitrators’ interpretations of those CBAs.<sup>292</sup> In R.W. Fleming’s words, the timing of

[t]he tremendous growth of grievance arbitration . . . is not surprising. Grievance arbitration presupposes the existence of collective bargaining agreements. Collective bargaining agreements, in turn, presuppose union organization. The great growth in the labor movement, especially in the mass production industries, occurred in the years following passage of the Wagner Act in 1935.<sup>293</sup>

As Edwin Witte wrote in 1953, “It is only in the last fifteen years,” (or since 1938) that the number of labor arbitrations “has run into the thousands annually.”<sup>294</sup> The most important reasons for this growth of labor arbitration, Witte wrote, “are the increase in the number of collective-bargaining agreements and the inclusion in the great majority of these contracts of provisions for arbitration

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<sup>287</sup> Melvyn Dubofsky, *Labor Unrest in the United States, 1906-90*, 18 REV. (FERNAND BRAUDEL CENTER) 125, 126 (1995), available at <https://www.jstor.org/stable/40241326?seq=1>.

<sup>288</sup> *Id.*

<sup>289</sup> White, *supra* note 82, at 1085–86.

<sup>290</sup> Nolan & Abrams, *supra* note 32, at 417-18. “Since the percentage of collective agreements containing arbitration clauses was also rising, the net effect was to increase the number of arbitrations in the last years before the Second World War.” *Id.*

<sup>291</sup> WITTE, *supra* note 28, at 47.

<sup>292</sup> Morton Gitelman, *The Evolution of Labor Arbitration*, 9 DEPAUL L. REV. 181, 182 (1960) (“With the growth of unionism and collective bargaining after the depression, arbitration took on new meaning. . . . Arbitration was emerging as a method of interpreting and applying the agreement. This period, between the depression and World War II, was the real beginning of grievance arbitration.”).

<sup>293</sup> Fleming, *supra* note 29, at 1246.

<sup>294</sup> WITTE, *supra* note 28, at 3.

as the last step in the settlement of grievances involving the interpretation and application of the contract.”<sup>295</sup> Nolan and Abrams agree that “American labor arbitration had come of age by 1941.”<sup>296</sup>

During the Second World War, the basic trade of CBAs—labor’s no-strike promise in exchange for arbitration of grievances—was informally brokered by the War Labor Board.<sup>297</sup> “Besides exercising functions during the War akin to, although not technically arbitration, the National War Labor Board did a great deal to foster voluntary arbitration.”<sup>298</sup> And to this day the federal government supports labor arbitration, with the Federal Mediation & Conciliation Service maintaining a roster of arbitrators for labor disputes,<sup>299</sup> while no analogous federal agency provides a similar service for other arbitration.

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<sup>295</sup> WITTE, *supra* note 28, at 45. See WARE & LEVINSON, *supra* note 8, at 206.

Many grievance processes resemble each other and use a stepped procedure progressively elevating a grievance to higher levels of decision makers. For instance, the first step of the process may be that the employee informally brings the grievance to the attention of a supervisor. If the supervisor is unable to remedy the grievance, then the second step may require that the union shop steward file a written grievance with a manager, and that the steward and manager meet within a set short time to discuss the grievance and their interpretations of the CBA. If the manager is unable to remedy the grievance, then the third step may require that the union president and company president or director of labor relations meet. At each step, there may be an informal exchange of documents between the parties. If that third step fails to resolve the grievance, then at the fourth step, the union files for arbitration. Some CBAs include time limitations at each step whereas others do not, but may require prompt movement from step to step. The period in which to file at each step is often short, varying between three to 60 days. In most instances, the union, rather than the grievant, controls the process, so the union decides whether to move the grievance to each successive step and whether to invoke arbitration.

*Id.* at 206.

<sup>296</sup> Nolan & Abrams, *supra* note 32, at 421. See also Gitelman, *supra* note 292, at 183 (1960) (“By 1941, some 62 percent of the 1,2000 collective bargaining agreements on file with the United States Conciliation Service contained arbitration provisions. The onset of a defense economy and the tremendous increase in defense production in 1940 focused public and governmental attention on the mounting strike rate in ‘defense’ industries.”).

<sup>297</sup> Witte, *supra* note 163, at 57 (“The ‘no-strike’ pledge was an informal promise by unions and employers’ associations and their leaders, not only that they would refrain from strikes and lockouts for the duration, but that they would abide by decisions of the National War Labor Board in settlement of all unresolved labor disputes.”).

<sup>298</sup> *Id.* at 58. See also Fleming, *supra* note 29, at 1246 (“During the balance of the war years grievance arbitration clauses were included in thousands of agreements, either by direct order of the War Labor Board or because of its indirect influence. Although grievance arbitration clauses were included in a great many contracts during the war period by government fiat, labor and management grew to accept the practice.”).

<sup>299</sup> Fed. Mediation and Conciliation Serv., *Arbitration and the Arbitrator Roster*, <https://www.fmcs.gov/services/arbitration/> (last visited Aug. 4, 2020).

#### IV. CONCLUSION

“The history of labor arbitration is inextricably entwined with that of collective bargaining and the broader history of labor.”<sup>300</sup> This Article has shown that while a significant amount of commercial arbitration occurred at each stage of U.S. history, labor arbitration was extremely rare until the 20<sup>th</sup> century, and remained uncommon until the New Deal of the 1930s. In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries—amidst vast inequalities of wealth and violent labor disputes—employers generally succeeded in maintaining at-will employment by refusing to recognize labor unions, let alone agree to unions’ demands to replace at-will employment with arbitration of employee grievances. Pre-1930s employer successes in defeating unions were aided by a range of legal doctrines from the law of master-servant and tort, to the Sherman Antitrust Act and enforcement of workers’ promises not to join unions, to *Lochner* era constitutional law. And all these doctrines were undergirded by a classical liberal emphasis on freedom of contract with respect to the sale of labor.

By contrast, the Great Depression combined with the early 20<sup>th</sup> century ideological shift from classical liberalism to progressivism to produce massive legal changes in the 1930s. The key legal change was legally-encouraged labor cartelization, the economic policy of the landmark Wagner Act of 1935, now known as the National Labor Relations Act (NLRA). The NLRA’s legally-encouraged labor cartelization produced labor grievance arbitration by empowering unions to extract from employers the promises—like firing workers only “for cause”—that create the claims (grievances) in labor arbitration, as well as employers’ promises to resolve those claims in arbitration rather than litigation. And labor grievance arbitration’s roots in legally-encouraged labor cartelization largely explain many of labor arbitration’s important differences from other arbitration, as discussed in *Labor Grievance Arbitration’s Differences*.<sup>301</sup>

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Voluntary arbitration and fact-finding are widely used in labor-management relations. The FMCS Office of Arbitration provides valuable services for parties seeking arbitration through its roster of approximately 1,000 arbitrators. It also oversees the roster to assure compliance with FMCS policies and procedures and with the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

Upon request, FMCS provides panels of arbitrators experienced in labor relations issues, from which the parties can select as provided in their collective bargaining agreement or other mutual agreement. Requests can be tailored to accommodate a variety of requirements, including for expertise, fees, and geography, provided both parties agree. Other kinds of customization are available.

*Id.*

<sup>300</sup> Nolan & Abrams, *supra* note 32, at 375.

<sup>301</sup> *See supra* note 7.

While private-sector unions, and thus labor arbitration, declined in the late 20<sup>th</sup> century, progressive energy has now returned to labor matters, including their antitrust aspects.<sup>302</sup> This then, is a good time to absorb lessons from the first big eras of labor and antitrust activism, and hopefully this Article has contributed to that end.

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<sup>302</sup> See *supra* notes 4-5 and accompanying text.