

EMPLOYER ORGANIZATION AND THE LAW: AMERICAN EXCEPTIONALISM IN COMPARATIVE PERSPECTIVE

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I

INTRODUCTION

In the literature on political economy and historical sociology, American exceptionalism has typically been framed as a question of why American labor unions appeared so weak and so conservative compared to their European counterparts. The usual answers point to American political culture,¹ characteristics of the working class,² features of American political parties or the party system,³ or aspects of the American state.⁴ However, by posing the question as an inquiry into what is different about American labor, scholars have overlooked the possibility that what is exceptional about the United States may have more to do with the distinctive features of American employers rather than of its unions or its working class.

This Article attempts to fill that gap by bringing a comparative perspective to bear on an underexplored aspect of American exceptionalism: the peculiar features of American employers and the legal framework regulating firm competition in which they historically developed. A large literature on rich democracies demonstrates that the structure and organizational capacities of employers are critical to the operation of the political economy. The dominant literature on varieties of capitalism draws a broad distinction between the *liberal* market economies of Anglo-Saxon countries and the *coordinated* market economies of Europe, a difference rooted in the capacity of employers to coordinate amongst themselves (and with unions) to achieve joint economic gains

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1. See, e.g., LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 100–01 (1996).

2. See, e.g., WERNER SOMBART, *WARUM GIBT ES IN DEN VEREINIGTEN STAATEN KEINEN SOZIALISMUS?* (1906); KIM VOSS, *THE MAKING OF AMERICAN EXCEPTIONALISM* 1–2 (1993) (chronicling the labor movements started by craft workers and less skilled laborers).

3. See, e.g., BARRY EIDLIN, *LABOR AND THE CLASS IDEA IN THE UNITED STATES AND CANADA* 10–14 (2018).

4. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 1, 7–9 (1991); VICTORIA HATTAM, *LABOR VISIONS AND STATE POWER* 3 (1993).

through cooperation.⁵ While Europe's coordinated model is as successful in economic terms as the alternative liberal model, it has traditionally been associated with significantly lower levels of income inequality and greater social solidarity.⁶ A high level of employer organization is crucial to the success of this model: strong employer associations are critical partners in encompassing collective bargaining, which can set limits on cutthroat strategies based on wage competition.⁷ Employer organization also allows firms to cooperate on other issues such as training that support the kind of high wage, high quality, and high value-added strategies that are more characteristic of Europe's "socially embedded" variety of capitalism.⁸

In the comparative literature, the United States is seen as the paradigmatic liberal market economy.⁹ While U.S. employers have developed powerful lobbying organizations (for example, the Business Roundtable and the Chamber of Commerce), they lack the kind of strong, centralized trade and employer associations that allow employers in Europe to cooperate with each other and with unions in ways that support more egalitarian outcomes.¹⁰

The distinctiveness of American employer organization is best highlighted with reference to developments elsewhere. My analysis will focus on a comparison of the United States and Germany. Just as the United States has been seen as the quintessential liberal market economy, Germany has long been considered the paradigmatic coordinated model.¹¹ The United States is characterized by weak employer associations and low capacity for strategic coordination in the market. In contrast, Germany exemplifies the socially embedded variety of capitalism, featuring higher levels of employer coordination and more cooperative engagement with strong and centralized industrial unions who play an important role in the management of the economy and even of individual firms.

The purpose of this Article is to elucidate the role of the law in shaping the U.S. and German models of employer organization and their respective market economies. Specifically, I zero in on legislative and legal developments in the late

5. Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1, 8–9 (Peter A. Hall & David Soskice eds., 2001).

6. For some comparisons see, for example, Kathleen Thelen, *The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSP. ON POL. 5, 5 (2019).

7. *Id.* at 17–18, 23 n.68.

8. Wolfgang Streeck, *On the Institutional Conditions of Diversified Quality Production*, in BEYOND KEYNESIANISM: THE SOCIO-ECONOMICS OF PRODUCTION AND FULL EMPLOYMENT 21, 26–27 (Egon Matzner & Wolfgang Streeck eds., 1991).

9. See, e.g., Hall & Soskice, *supra* note 5, at 27–33 (using the United States to illustrate the distinctive features of liberal market economies generally).

10. See *id.* at 27 (discussing how U.S. employers rely on market mechanisms to coordinate rather than coordinating through institutions such as trade associations and employer organizations—as is more common in coordinated market economies).

11. See *id.* at 21–27 (using the German case to illustrate the defining features of coordinated economies generally).

nineteenth century to document the impact they had on the organization, goals, and strategies of American employers, and, with that, on the political-economic architecture of contemporary American capitalism as a whole. In Part II, I discuss in more depth the importance of a comparative historical perspective. Part III describes the impact of U.S. competition policy of the late nineteenth and early twentieth centuries on employer organization and strategies. Part IV provides, by contrast, the differing developments in Germany during the same period that contributed to its coordinated market economy. I conclude in Part V by exploring how these historical events shaped the modern market economies of these two countries.

II

THE UNITED STATES IN COMPARATIVE PERSPECTIVE

A crucial difference between developments in Europe and the United States—unexplored in the literature on the varieties of capitalism—concerns the impact of differences in the legal regimes governing competition policy in the late nineteenth century. The literature on competition policy in this period focuses heavily on the large trusts and cartels that emerged at that time. However, to understand the importance of these different competition regimes for labor politics, we need to direct our attention instead to their impact on the smaller, skill-intensive batch producers who were at the center of early industrialization and whose skilled workers formed the core of early union movements everywhere.

The legal framework in Europe's coordinated model allowed the strongest and most competitive of such firms to spearhead the construction of strong coordinating capacities, not so much to confront unions but to discipline marginal producers engaged in ruinous, cutthroat competition.¹² In the United States, by contrast, the very different rules governing competition allowed marginal firms to shape the terms of the emerging labor regime, as low-quality producers were able to turn to the courts to assist them in dismantling nascent forms of coordination that posed a threat to their survival.¹³ Where employers could defeat unions in court, they had little need to coordinate among themselves in the market, since the efforts of even small numbers of players—winning key judicial decisions—resonated widely and affected all actors subject to the prevailing regulatory regime. The kinds of marginal, lower-cost firms that prevailed in these contests could then rely on the discipline of the market to bring other firms in line.

Comparing the United States and Germany is fruitful and revealing because—contrary to many popular accounts—the two countries shared some

12. See, e.g., GARY HERRIGEL, *INDUSTRIAL CONSTRUCTIONS: THE SOURCES OF GERMAN INDUSTRIAL POWER* 60–61 (1996) (detailing how economic turbulence spurred the creation of collective governance mechanisms in Germany's southwestern states).

13. See *infra* notes 111 & 120.

strikingly similar characteristics at the end of the nineteenth century.¹⁴ For example, it is commonly asserted that American unions faced an unusually inhospitable political landscape, and it is certainly true that they confronted hostile employers as well as a highly complicit state.¹⁵ However, it is not clear that the United States stood out in this regard. Early unions in most other countries had to confront explicit anti-combination laws, and governments—often, as in Germany, authoritarian governments—did not hesitate to harass unions and intervene in industrial conflicts.¹⁶ At the end of the nineteenth century, unionization rates in Germany and the United States were nearly identical at about five percent.¹⁷

Other scholars emphasize the impact of Germany's late industrialization (and associated industrial and union concentration) versus the United States' early, more gradual and decentralized, industrialization.¹⁸ However, these differences, too, are frequently overblown. In fact, the United States and Germany both began to industrialize with small-scale and decentralized production in the early to mid-nineteenth century, and in both cases industrial growth later centered on key infrastructural industries like steel and electrical machinery, many of which were dominated by a small number of players.¹⁹ Industrial employment in the two countries in the early twentieth century was broadly similar, accounting for about a third of total employment, with employment in agriculture accounting for another third.²⁰

Moreover, while much has been made of differences in the sizes of the domestic markets, this observation also needs to be qualified. First of all, the size of the national market was not an issue for the leading firms in either country; these leading firms were in fact heavily involved, and indeed dominating forces, in key world markets—steel and electrical manufacturing, as well as chemicals for Germany and oil for the United States.²¹ More generally, Germany had consolidated its internal market well before the country's unification in 1870, while in the United States many obstacles to a truly uniform domestic market

14. See Colleen A. Dunlavy & Thomas Welskopp, *Myths and Peculiarities: Comparing U.S. and German Capitalism*, 41 GERMAN HIST. INST. BULL. 33, 35 (2007) (“When trends in the two countries are set side by side . . . the differences that these stories imply between the American and German styles of capitalism at the turn of the century turn out to be much smaller than imagined.”).

15. See, e.g., FORBATH, *supra* note 4, at 59–97 (analyzing the use of the injunction in labor disputes).

16. See Klaus Schönhoven, *Gewerkschaftliches Organisationsverhalten im Wilhelminischen Deutschland*, in ARBEITER IM INDUSTRIALISIERUNGSPROZESS 403, 414–15 (Werner Conze & Ulrich Engelhardt eds., 1979).

17. Dunlavy & Welskopp, *supra* note 14, at 42.

18. See, e.g., ALEXANDER GERSCHENKRON, *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE: A BOOK OF ESSAYS* (1962).

19. The steel industry was dominated by U.S. Steel in the United States and Krupp in Germany while the electrical machinery industry was dominated by GE and Westinghouse in the United States and Siemens and AEG in Germany. Dunlavy & Welskopp, *supra* note 14, at 35–36.

20. *Id.* at 36–37.

21. *Id.* at 35–36.

persisted until the closing decades of the nineteenth century.²² One main obstacle in the United States was that state governments retained considerable power to establish independent economic policies and distinct corporate legal regimes.²³

While frequently exaggerating those differences, the literature has mostly overlooked a much more striking difference between the two countries: the way in which state policy in the late nineteenth century dealt with issues of competition and inter-firm cooperation. The literature on this subject that does exist focuses—understandably—on the big U.S. trusts and the large German cartels that emerged in this period.²⁴ Less well-covered is what was happening among small proprietary capitalists engaged in decentralized production and heavily reliant on skilled labor.²⁵ In Germany, the most competitive of such firms in the late nineteenth century were organizing among themselves to mitigate their own potential ruinous competition by developing governance institutions through which to socialize risk in the face of market volatility.²⁶ As elaborated below, similar arrangements emerged in the United States at this time. The difference is that these arrangements did not survive in the United States. I argue that state policy, as interpreted by the courts, played a key role in undermining nascent forms of coordination that flourished in Europe and that would later provide an associational infrastructure that proved more congenial to the emergence of a coordinated and social variety of capitalism.

A. The Context—Economic and Legal

The closing years of the nineteenth century were a period of considerable economic tumult in the United States and Europe alike. Advances in communication and transportation had upset previously stable local markets by exposing firms to intensified competition from producers in other parts of the country and from abroad. A major financial crisis in 1873 triggered a severe economic downturn that enveloped Europe and North America and ushered in two decades of economic stagnation known as the “Long Depression.”²⁷ These developments brought an abrupt end to the post-Civil War boom in the United States and shook the newly unified German state to its core.²⁸

In both countries, manufacturing was hit especially hard. Overcapacity across key markets caused wages and profits to plummet, setting in motion vicious

22. *Id.* at 47–49.

23. *Id.* at 46–49.

24. For a review of the literature on cartels, see, for example, Jeffrey Fear, *Cartels*, in OXFORD HANDBOOK OF BUSINESS HISTORY 268, 268–92 (Geoffrey Jones & Jonathan Zeitlin eds., 2008).

25. Gary Herrigel is an exception to this, and his work has deeply influenced my thinking. See HERRIGEL, *supra* note 12, at 33–71.

26. See generally *id.*

27. Thomas Klitgaard & James Narron, *Crisis Chronicles: The Long Depression and the Panic of 1873*, LIBERTY ST. ECON. (Feb. 5, 2016), <https://libertystreeteconomics.newyorkfed.org/2016/02/crisis-chronicles-the-long-depression-and-the-panic-of-1873.html> [<https://perma.cc/Q924-E4HN>].

28. See *id.*; Donald Sassoon, *To Understand This Crisis We Can Look to the Long Depression Too*, GUARDIAN (Apr. 29, 2012), <https://www.theguardian.com/commentisfree/2012/apr/29/long-depression-crashes-capitalism-history> [<https://perma.cc/NDB8-2K93>].

cutthroat competition amongst firms and provoking considerable industrial strife. In this context, firms in many industries sought to stabilize prices by banding together into arrangements to protect themselves against this destructive competition. This was the context that produced the great trusts in the United States and the cartels in Germany that tend to dominate the scholarly accounts of this period.²⁹ Firms in both countries—particularly those in capital-intensive industries that relied heavily on unskilled labor—forged new arrangements to seize control of large market shares in a period of extreme economic turbulence.³⁰ These trusts and large autarkic cartels could alleviate the competitive pressures they faced either through hierarchy (for example, U.S. trusts and mergers) or internal contracting (Germany’s “*Interessengemeinschaften*,” or “communities of interest”).³¹

Similar strategies were either not available or not attractive to smaller scale, decentralized manufacturers who engaged in more specialized batch production and relied heavily on skilled labor. For these producers, coordination—for example, through robust trade associations—could provide relief from market turbulence. However, purely voluntary cooperation is notoriously fragile, particularly in periods of intense and destructive competition when the incentives to engage in opportunistic behavior are almost irresistible. In these circumstances, leading firms often found it in their interest to accept—in some cases, actively enlist—the assistance of unions to help them enforce compliance.³² Thus, especially in skill-intensive industries dominated by small and medium-sized firms, alternative forms of coordination frequently emerged in which employers organized among themselves to stabilize competition and sometimes turned to unions to police these arrangements by punishing firms engaged in cutthroat competition based on wage chiseling.³³ In such cases, cooperation with organized labor “held out the promise of comfortable profits for employers and wages for employees—a peaceable kingdom erected on the industrywide collective bargaining agreement.”³⁴

29. See, e.g., J. SINGER, *DAS LAND DER MONOPOLE: AMERIKA ODER DEUTSCHLAND?* (1913).

30. Space does not permit a full discussion of the quite different forms these arrangements took in the two countries. Trusts were a distinctly American innovation, one that responded to the specific incentives and constraints of the American political economy and antitrust regime. German cartels were less hierarchically organized because they were based on contracts that were legally enforceable. See PAUL FELIX ASHROTT, *DIE AMERIKANISCHEN TRUSTS ALS WEITERBILDUNG DES UNTERNEHMERVERBÄNDE* 2 (1889).

31. *Id.*

32. See PETER SWENSON, *CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN* 122–24 (2002).

33. See *id.* at 63 (defining chiseling as “low-price competition made possible by imprudent and shabby practices”).

34. DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* 5 (1995).

B. Diverging Legal Regimes

In both Germany and the United States, proprietary capitalists engaged in labor- and skill-intensive manufacturing experimented with new organizational forms to confront the turbulent markets of the late nineteenth century. In the United States, such experiments devolved into an all-out war against organized labor.³⁵ In Germany, the cooperative arrangements that they organized formed the basis of powerful trade associations that stabilized Germany's vaunted industrial middle class.³⁶ This made it possible for the German trade associations to make peace with the skilled workers on whose contributions their production model relied. The different fates of these experiments and new organizational arrangements in the late nineteenth century turned on the responses of the state and courts.

The key antitrust legislation in the United States was the Sherman Act of 1890.³⁷ The context that produced this law was widespread public concern about the growing concentration of economic power in the American political economy. Americans watched with alarm as Standard Oil assumed control of much of the country's oil refining and as new trusts cropped up in other, more consumer-facing, industries, such as sugar and whisky.³⁸

Even as the public clamored for an antitrust statute, the legal and scholarly communities were divided on the issue.³⁹ The American Economic Association's first meeting, in 1885, took up the question gingerly.⁴⁰ While some delegates warned of the hazards of rampant competition and growing concentration in the hands of the powerful, most were loath to endorse state intervention of any sort, lest they be branded "socialist."⁴¹ The legal community—still steeped in British common law tradition—believed that many of the emerging market behaviors should be prohibited, but thought that the solution lay not in further legislation but rather in the vigorous enforcement of existing common law.⁴²

Elected politicians were apparently less conflicted, as the Sherman Act sailed through Congress nearly unanimously.⁴³ Though wildly popular in Congress, the resulting legislation was famously ambiguous, and it would largely fall to the courts to resolve those ambiguities.⁴⁴ The results of the early years of its

35. *See id.*

36. HERRIGEL, *supra* note 12, at 20.

37. WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 3 (1965).

38. *Id.* at 69–70.

39. *Id.* at 76–78.

40. *See id.* at 71–72 ("Following a long debate the [Association's] platform was finally revised, and the new version omitted the explicit denunciation [of the laissez-faire doctrine allowing trusts to form at will.]").

41. *Id.* at 72.

42. *See id.* at 77–85.

43. *Id.* at 95.

44. Among the matters left unclarified was whether labor was meant to be exempted. *See* LETWIN, *supra* note 37, at 97–98.

enforcement were thus highly uneven. “Loose” or horizontal combinations—arrangements between independent firms or individuals—were held to be per se illegal, for the common law had long prohibited such behaviors as constituting a restraint of trade.⁴⁵ By contrast, combinations formed by trust or merger were treated differently: the Court required proof “that the ‘evident purpose’ of the combination was to restrain trade.”⁴⁶ Richard Posner’s analysis documents that in the first two decades after the Sherman Act was passed, 50 of the 61 antitrust cases brought by the Department of Justice involved horizontal combinations or conspiracies.⁴⁷

Germany went in a markedly different direction in the late nineteenth century, legalizing cartels and also expressly sanctioning other forms of collective self-help among independent firms. Although Germany later came to be known as the “country of the cartels,”⁴⁸ in fact before the country’s unification in 1870, leading German states had embraced a more laissez-faire model of economic growth.⁴⁹ However, these views quickly fell out of favor in the so-called *Gründerkrise*, the economic crisis that rocked the country in the first years of its existence after 1870 and that inspired a search for alternatives to liberalism as developmental model.⁵⁰

Social scientists and the legal community were crucial in steering Germany toward an alternative, organized, market ideology.⁵¹ Economic policy in this period was shaped especially by the *Verein für Socialpolitik (Verein)*, an organization of economists and legal scholars that enjoyed privileged access to the German bureaucracy by virtue of its influential research on pressing contemporary social and economic issues.⁵² Formed in 1873, the *Verein* provided an institutional bridge between political economy and legal science in support of an alternative to liberals or socialists.⁵³ The organization’s guiding principle was that of a managed market—one in which competition would be organized and moderated. Given this orientation, the *Verein* viewed emerging efforts at

45. NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904*, at 174 (1985).

46. *Id.*

47. Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366 tbl.1, 396 tbl.22 (1970).

48. Knut Wolfgang Nörr, *Law and Market Organization: The Historical Experience in Germany from 1900 to the Law Against Restraints of Competition (1957)*, 151 J. INSTITUTIONAL & THEORETICAL ECON. 5 (1995).

49. Gerhard Lehbruch, *The Institutional Embedding of Market Economies: The German “Model” and Its Impact on Japan*, in *THE ORIGINS OF NONLIBERAL CAPITALISM: GERMANY AND JAPAN IN COMPARISON* 39, 48–49 (Wolfgang Streeck & Kozo Yamamura eds., 2001).

50. *Id.* at 50–51.

51. See Nörr, *supra* note 48, at 5 (“Both [political economy and legal science] were linked institutionally as well, particularly in the famous ‘Verein für Socialpolitik’ . . . which came to be the opinion leader of the Bismarck-Wilhelminian Empire and embodied, as it were, the nation’s social conscience in those decades.”).

52. *Id.*

53. See Lehbruch, *supra* note 49, at 55 (discussing the ideology of the *Verein*).

employer coordination in an overall sanguine light.⁵⁴ Indeed, the first German study of the impact of cartels, by the economist Friedrich Kleinwächter in 1879, held Manchester liberalism responsible for the economic crisis and characterized cartels approvingly as a defense against excessive competition.⁵⁵

Kleinwächter was not alone. A chorus of economists viewed cartels as representing a more advanced state of economic development.⁵⁶ Economic sociologist Albert Schäffle penned an influential essay in 1898 entitled “*Zum Kartellwesen und zur Kartellpolitik*” [“On the Nature of Cartels and Cartel Policy”] that painted a “bleak picture” of the free market as “a wild war of all against all,” waged with the most deceitful tools and resulting in “evil consequences.”⁵⁷

In sharp contrast to the confusion and wrangling within the U.S. legal profession as to the proper bounds of the Sherman Act in this period,⁵⁸ there was a rather high degree of consensus in the German legal community on this matter. The influential *Juristentag*, a national association of legal scholars and practitioners, explicitly endorsed cartels and the role of the courts in sanctioning these organizational forms and contributing to their stabilization.⁵⁹ The dominant view at the association’s 1902 and 1904 congresses opposed legislation that would suppress cartels.⁶⁰ Delegates certainly discussed the possible negative impact of cartels and their need to be monitored and regulated.⁶¹ However, rather than ban the cartels, the delegates’ prevailing view was that the state should recognize them in order to facilitate such oversight.⁶² Insofar as cartels were viewed as a national response to destructive competition, supporting and monitoring them was the best defense against such abuse.⁶³

In these debates, speakers invoked the United States as a negative model. Thus, for example, at the 1905 convention of the *Verein*, economist and legal scholar Gustav Schmoller characterized the American case as a cautionary tale.⁶⁴ Schmoller, who as Chairman of the *Verein* had exercised outsized influence in the German political economy since the 1870s, delivered an extended defense of German cartels that bordered on rapturous.⁶⁵ According to Schmoller,

54. KLAUS RICHTER, *DIE WIRKUNGSGESCHICHTE DES DEUTSCHEN KARTELLRECHTS VOR 1914*, at 105–06 (2007).

55. See generally FRIEDRICH KLEINWÄCHTER, *DIE KARTELLE: EIN BEITRAG ZUR FRAGE DER ORGANISATION DER VOLKSWIRTSCHAFT* (1879); see also RICHTER, *supra* note 54, at 55–56.

56. RICHTER, *supra* note 54, at 98.

57. *Id.* at 188.

58. See LETWIN, *supra* note 37, at 143–81 (detailing the legal wrangling that produced rulings that were almost equally split as to the bounds of the Sherman Act, and in which more than one opinion was submitted on both concurring and dissenting sides).

59. See Nörr, *supra* note 48, at 6–7.

60. See RICHTER, *supra* note 54, at 201–07.

61. *Id.* at 201.

62. *Id.* at 206.

63. *Id.* at 201–02.

64. *Id.* at 207–10.

65. *Id.*; Nörr, *supra* note 48, at 7–8.

cooperative cartels of the sort that had been cropping up all across Germany were not only benign, they were also ethical because they looked out for the collective interests of both their member firms and their workers.⁶⁶ As such, they guarded against the short-sighted opportunism that was rampant in the United States.⁶⁷ Schmoller argued that the U.S. trusts were founded by egoistic money grubbers out for private gain, while the founders of cartels were “educators who want[ed] to secure the victory of the collective interest of a branch of trade over the egoistic interests of individuals.”⁶⁸

The next Parts sketch out the key differences between the American and German approaches to competition and employer coordination, and the downstream consequences for employer organization, and ultimately for organized labor and the political economy as a whole.

III

THE CASE OF THE UNITED STATES

One of the most consequential legacies of judicial politics in the United States in the late nineteenth and early twentieth centuries was to actively disarticulate emerging efforts at employer coordination, especially among small and medium-sized firms, and to confound efforts to develop the kinds of capacities that were emerging at this time in Europe’s coordinated market economies.

Economic historian Naomi Lamoreaux’s pathbreaking study of the American merger movement captures the realities of the economic context that American manufacturers confronted in the late nineteenth century.⁶⁹ In the face of intense price competition, firms frequently sought to organize among themselves “to relieve downward pressure on prices by restricting output and to distribute the costs of this curtailment evenly across the industry.”⁷⁰ Such efforts, however, suffered repeated breakdowns, as members opportunistically broke rank to shore up their own position.⁷¹ These conditions, she argues, were what drove the “great merger movement,” as companies sought relief through mergers that provided refuge from the ravages of hyper competition and overproduction. Thousands of smaller producers vanished as they were subsumed by big corporations in this period.⁷²

Lamoreaux’s account provides an enormously important corrective to the conventional wisdom, which is, for example, classically articulated by Pulitzer Prize winning Professor of Business History Alfred Chandler.⁷³ Economic

66. RICHTER, *supra* note 54, at 208.

67. *Id.*

68. *Id.* at 208 (translating the original text).

69. *See generally* LAMOREAUX, *supra* note 45.

70. *Id.* at 15.

71. *Id.* at 14–16, 25.

72. *Id.* at 1–2.

73. *See* ALFRED D. CHANDLER JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 1 (1977) (arguing that “modern business enterprise” became the dominant force

distress, not the promise of greater efficiency, provided the main impetus for many of the mergers of this period.⁷⁴ For our purposes, however, Lamoreaux's otherwise masterful study suffers two shortcomings. The first is an overemphasis on the uniqueness of the American situation. She attributes the merger movement to "a particular conjunction of circumstances" in the United States in the 1890s that gave rise to "abnormally serious price wars" and that pushed huge numbers of firms toward horizontal mergers.⁷⁵ However, as noted at the outset, the situation faced by American manufacturers in this period was far from unique. Germany, Britain, and indeed most of Europe, were suffering similar woes, though with quite different consequences.

Second, and more importantly, Lamoreaux's analysis misses important swathes of American manufacturing. Her analysis distinguishes very broadly between specialty producers of high-quality goods, on one hand, and mass producers of homogenous products, on the other.⁷⁶ Lamoreaux pays only fleeting attention to the former. They drop out of her analysis because she assumes that they were not vulnerable to price competition in the first place and because "production [could be] adjusted easily to fluctuations in market demand."⁷⁷ Her analysis then focuses almost entirely on large consolidations where at least five companies merged and draws many of its conclusions from the experiences of capital-intensive industries engaged in mass production.⁷⁸ This broad dichotomy, however, overlooks enormous parts of American industry, including sectors that would be crucial to the evolution of industrial relations—above all, batch producers, especially in the machine and metalworking industries, which relied heavily on skilled labor.⁷⁹

Such producers did suffer intense and destructive competition, but the response of these firms—many of them small and medium-sized family-owned firms—was not necessarily mergers, but instead often collective bargaining.⁸⁰ Thomas Klug's observation that "[t]he golden age of trade agreements between 1897 and 1904 coincided with the great merger movement in American business"

in the market, bringing with it "managerial capitalism," rather than the market being controlled by an "invisible hand of market forces").

74. LAMOREAUX, *supra* note 45, at 114.

75. *Id.* at 12.

76. *Id.* at 15.

77. *Id.*

78. *See id.* at 30–31, 46–86 (discussing the impact of capital intensity in fueling price wars and ultimately consolidation).

79. As one indicator, Lamoreaux's study does not include any references to unions or skill. *See id.*

80. *See, e.g.*, Thomas A. Klug, *The Roots of the Open Shop: Employers, Trade Unions, and Craft Labor Markets in Detroit, 1859–1907* at 392–97 (Feb. 25, 1993) (unpublished Ph.D. dissertation, Wayne State University) (on file with author). Some such producers did merge: for example, the Detroit railway car companies joined with producers elsewhere in 1899, forming the American Car and Foundry Company. *Id.* at 55. And some trusts continued to bargain with unions, for example the Glass Trust, which "deliberately unioniz[ed] all the establishments under its control." Mabel Atkinson, *Trusts and Trade Unions*, 19 POL. SCI. Q. 193, 197–98 (1904).

is no coincidence.⁸¹ This period saw a proliferation of employer associations of various sorts, including what Clarence Bonnett calls “negotiatory” associations that relied on unions to encourage employer organization and police firm behavior.⁸²

Most of these firms were not particularly capital intensive, relying instead on general purpose machinery operated by skilled workers. Thus, what united the firms that turned to collective bargaining in this period was a heavy reliance on skilled labor whose wages made up a large part of total production costs.⁸³ For example, machine tool producers in the East and Midwest were all engaged in such skill-intensive production and sought to confront market turbulence by fostering cooperation on wages with their workers and on pricing with each other—efforts that led to the 1902 founding of the National Machine Tool Builders Association (NMTBA).⁸⁴ By the end of the nineteenth century, trade agreements had been struck in a number of sectors, allowing skilled unions to gain an unprecedented foothold in the labor market in the 1890s.⁸⁵

Detroit, an important hub of machine production in the nineteenth century, provides an example of how unions became a key part of the labor market. Detroit’s machine and metalworking firms experienced repeated, devastating boom and bust cycles, and suffered problems of overcapacity and destructive price wars between 1871 and 1904.⁸⁶ The stove industry was especially vulnerable to these cycles, and therefore employers in this industry organized themselves into the Stove Founders National Defense Association (SFNDA) to stabilize competition through voluntary cooperation.⁸⁷ The SFNDA initially rejected negotiating with organized labor, but after repeated unsuccessful efforts to coordinate among themselves, they turned to the Iron Molders Union (IMU), striking a broad and encompassing collective bargaining agreement to standardize wages across firms.⁸⁸ The IMU could monitor wages and punish firms that broke out of the deal by depriving them of the skilled labor on which their production relied. Thus, starting in 1891 the IMU “was able to play a major role

81. Klug, *supra* note 80, at 547.

82. Bonnett contrasts these to the “belligerent” employers of the period, who have received the lion’s share of attention in the literature. See CLARENCE BONNETT, *EMPLOYERS’ ASSOCIATIONS IN THE UNITED STATES: A STUDY OF TYPICAL ASSOCIATIONS* 22–25 (1922).

83. See Atkinson, *supra* note 80, at 223 (“[I]n industries where the labor is unskilled and the wages are low, if the trust appears before the trade union, then combination among the capitalists makes organization among the workers more difficult and lessens their power of resisting unwise or unjust demands.”); see also *id.* at 214–15, 217.

84. Gary Herrigel, *Industry as a Form of Order: A Comparison of the Historical Development of the Machine Tool Industries in the United States and Germany*, in *GOVERNING CAPITALIST ECONOMIES: PERFORMANCE AND CONTROL OF ECONOMIC SECTORS* 97, 107 (J. Rogers Hollinsworth, Philippe C. Schmitter & Wolfgang Streeck eds., 1994).

85. Klug, *supra* note 80, at 243, 505.

86. See *id.* at 426–98 (describing the cycles of nineteenth and early twentieth century industry in Detroit and their effect on labor and labor disputes).

87. See *id.* at 7.

88. *Id.* at 471; see *id.* at 482 (“Unable to bring order and restore profitability to the stove industry by themselves, employers turned to the Iron Molders Union to do it for them.”).

in rescuing stove manufacturers from destructive competition and falling profits.”⁸⁹

John Bowman’s study of the bituminous coal industry provides a striking portrait of another such industry needing union support.⁹⁰ Beginning in the 1890s, producers of bituminous coal had entered into sweeping interstate wage contracts with miners “in the hope that the union would organize capitalist competition by preventing the self-destructive wage and price competition generated by competitive relations.”⁹¹ Bowman emphasized that such arrangements were by no means always foisted upon unwilling capitalists, but instead were “accepted . . . [by them] to protect themselves from the economic behavior of other capitalists.”⁹² Indeed, in some cases, employers actively supported the unionization campaign of the United Mine Workers.⁹³

Such arrangements were endorsed and vigorously promoted by an overarching National Civic Federation (NCF) composed of representatives of both unions and employers that was dedicated to promoting collective bargaining.⁹⁴ One of the architects of the NCF was Marcus Alonzo Hanna, a “supremely successful industrialist, shipper, and banker” from Ohio who was also chairman of the National Republican Committee from 1896 to 1904.⁹⁵ In his home state of Ohio, Hanna had spearheaded the creation of an association of coal operators in the 1870s that worked with unions to stabilize the “anarchically competitive industry,” and from his perch in the NCF he sought to disseminate that model.⁹⁶ Between 1895 and 1905, “19 employers’ associations and 16 unions had negotiated no fewer than 26 national or large district agreements,” and in almost every case, “[m]anufacturers’ desire for market control of chaotic price competition” brought them together with unions to enforce wage floors and in this way inhibited “the outbreak of disruptive price wars.”⁹⁷

The fate of these arrangements, however, was powerfully shaped by the prevailing legal regime, which allowed employers who were disadvantaged by such arrangements to seek relief in the courts. A key player in this was the American Anti-Boycott Association (AABA), a network of lawyers who specialized in assisting firms in fighting unions, including by disrupting existing arrangements that employers had negotiated with labor in efforts to attain market stability.⁹⁸ The AABA was decidedly not an employer or trade

89. *Id.* at 7.

90. John R. Bowman, *When Workers Organize Capitalists: The Case of the Bituminous Coal Industry*, 14 *POL. & SOC’Y* 289 (1985).

91. *Id.* at 290.

92. *Id.*

93. *Id.* at 296.

94. BONNETT, *supra* note 82, at 386, 389–91.

95. SWENSON, *supra* note 32, at 144.

96. *Id.*

97. *Id.* at 49.

98. See generally ERNST, *supra* note 34. In a 1989 Iowa Law Review article, Ernst characterized the AABA as “a legal defense fund sustained by the contributions of proprietors of small firms who faced

association, and required virtually nothing in the way of organization or coordination on the part of client firms. It set itself up as a general purpose organization, offering services to firms from all sectors. As such, it was an explicit alternative to employer and trade associations such as the NMTBA or the NSFDA, whose membership and services were industry- or region-specific.

The AABA's mission was more expansive than that of these other associations: its express purpose was to shape the authoritative interpretation of particular laws by seeking to secure court decisions whose precedent-setting impact would resonate far beyond individual sectors or regions.⁹⁹ Above all, the organization sought out cases that would establish that unions too were subject to antitrust provisions in the Sherman Act, and to establish that an individual's right to work was to be protected just as vigorously as a business person's right to run his own business.

The identity of the companies that belonged to the AABA was confidential, but their dues financed the provision of the association's benefits and services—legal advice and sometimes direct legal representation and court costs.¹⁰⁰ The organization operated in a highly disciplined and strategic way, carefully choosing the cases to take up.¹⁰¹ Thus, the AABA declined to take up weak cases that they thought would not promote its agenda, and actively pursued cases that they saw as capable of establishing desirable new precedents.¹⁰² As founder Daniel Davenport emphasized, individual companies were not in a position to fight the legal battles necessary to secure favorable decisions.¹⁰³ Instead, as Ernst put it, “what was needed was an organization to spread the costs of suing trade unions and developing legal experience on the labor problem, and this was what the AABA would provide.”¹⁰⁴

The AABA was wildly successful, winning every one of the cases it took on in its first five years.¹⁰⁵ Perhaps the most prominent among these was the landmark Danbury Hatters case, *Loewe v. Lawlor*,¹⁰⁶ which extended the application of antitrust laws to labor unions—a decision that effectively

many of the nation's strongest unions.” Daniel R. Ernst, *The Labor Exemption, 1908–1914*, 74 IOWA L. REV. 1151, 1151 (1989). For more on the AABA (later renamed the League for Industrial Rights), see generally BONNETT, *supra* note 82, at 449–74.

99. Daniel R. Ernst, *The Lawyers and the Labor Trust: A History of the American Anti-Boycott Association, 1902–1919* at 68–69 (June 1989) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

100. *Id.* at 69–70, 75. Due to the AABA's confidentiality policy, exact membership figures do not exist, but it was estimated to have about 1,000 members in 1915, and up to 2,000 by 1921. See BONNETT, *supra* note 82, at 449.

101. Ernst, *supra* note 99, at 69.

102. *Id.*

103. ERNST, *supra* note 34, at 50.

104. *Id.*

105. Ernst, *supra* note 99, at 69. See also BONNETT, *supra* note 82, at 458–62 (providing an overview of the cases in which the AABA, later the League for Industrial Rights, participated).

106. 208 U.S. 274 (1908).

precluded the development of industrial unionism in the United States.¹⁰⁷ The conflict emerged in the context of a campaign by the United Hatters of North America, in an industry that was a typical case of regulatory unionism. The hat trade was dominated by small producers who collectively sought to contain the disruptive influence of low-quality, low-grade competitors.¹⁰⁸ After a failed attempt to form a holding company, employers had turned to the United Hatters Union to help them bring order to the market.¹⁰⁹

The Danbury Hatters case challenged the efforts of the Hatters to enforce the employment of unionized workers in the industry. The case was brought by D. E. Loewe & Company, a low-wage, marginal producer of “soft” hats, seeking to avoid the strictures of the industry bargain and escape union influence. The AABA saw great promise in pursuing the case and, in the proceedings, made clear that this was not a struggle between “a man and the working people,” an unpopular position with many juries, but instead between one manufacturer and an unholy alliance between his competitors conspiring with a powerful national union.¹¹⁰ Although the decision fell short of the AABA’s initial goal of outlawing the closed shop, the U.S. Supreme Court held that “combinations which are composed of laborers acting in the interest of laborers” can be combinations in restraint of trade under the Sherman Act.¹¹¹

The impact of the Danbury Hatters case resonated widely. Proprietary capitalists who before 1890 had not thought to turn to courts had come to realize how the judiciary could work for them.¹¹² Promoting the courts as a key arena for doing battle with unions, the AABA (later rebranded The League for Industrial Rights) began publishing a journal called *Law and Labor* to educate and inform employers of the latest legal developments.¹¹³ The organization thus established itself as a “clearing house on all legal and constitutional phases of the labor problem.”¹¹⁴ It is no coincidence that sectoral employer and trade associations such as the National Metal Trades Association (NMTA), the National Founders Association (NFA), and the National Erectors Association (NEA), which had been organized to facilitate collective bargaining, turned belligerent towards unions between 1901 and 1906.¹¹⁵

Shortly before Davenport’s appearance at the National Association of Manufacturers’ (NAM) national convention, NAM too had abandoned its earlier, more cooperative strategy in order to launch its famous “open shop”

107. ERNST, *supra* note 34, at 13–19.

108. *See id.* at 13 (describing the “unintelligent competition” of “lower, profitless grades” of hats).

109. *Id.* at 13–14.

110. Ernst, *supra* note 99, at 160.

111. *Loewe*, 208 U.S. at 302.

112. ERNST, *supra* note 34, at 55.

113. WALTER GORDON MERRITT, HISTORY OF THE LEAGUE FOR INDUSTRIAL RIGHTS 96–99 (1925).

114. BONNETT, *supra* note 82, at 449.

115. *See id.* at 63, 65, 69–71, 98, 101–05, 117–18, 131–33, 137–41 (describing the purpose and actions of each of these organizations during the early twentieth century).

campaign against labor.¹¹⁶ As NAM's president David Parry put it in his 1903 report to the membership:

It is true that the fight against organized labor is, in a measure, a departure from our former conservative policy respecting labor, but it is an inevitable departure if the Association hopes to continue to fill the full measure of its possible usefulness to the manufacturers and people of the country.¹¹⁷

In NAM's Declaration of Principles, courts and the judiciary now figured prominently as an important forum for advancing its objectives.

Throughout the open shop movement, NAM worked hand-in-glove with the AABA. The relationship between the two organizations was sealed in the context of another important court case, one that took direct aim at the cooperative arrangements between the SFNDA and the IMU in the stove industry discussed above. While “[m]ost of the leading stove manufacturers applauded [the cooperative agreements] for banishing ‘unfair’ competition,”¹¹⁸ one employer who chafed under the strictures of the deal was James van Cleave, President of Buck's Stove and Range Company, who became president of NAM in 1906.¹¹⁹ Spoiling for a fight to rally companies to the newly-embraced open shop cause, Van Cleave turned to the AABA to fight the case, which ultimately resulted in another major assault on unions in *Gompers v. Bucks Stove & Range Co.* in 1911 and solidified the partnership between NAM and the AABA.¹²⁰

This was not van Cleave's first attack against unions: in 1907 van Cleave oversaw the establishment of a National Council for Industrial Defense whose purpose was “to focus all manufacturing power, local and national, on behalf of mutual interests in general, but particularly with respect to legislation bearing upon the labor question.”¹²¹ NAM also worked with local employers' associations such as that in Detroit, which was an important center for the machine industry and which became an epicenter in conflicts over the open shop.¹²² Thus, the

116. William Phillip Saunders, Jr., *The Political Dimension of Labor-Management Relations: National Trends and State Level Developments in Massachusetts* 138–39 (June 24, 1964) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with author).

117. *Id.* at 139.

118. ERNST, *supra* note 34, at 126.

119. *Id.* at 125–26; Ashley Williams, *Who's Who... NAM President James Van Cleave*, HAGLEY (Nov. 20, 2017), <https://www.hagley.org/research/programs/nam-project-news/who's-who...nam-president-james-van-cleave%E2%80%8B> [<https://perma.cc/C3Y7-DHLJ>].

120. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 436, 449–52 (1911) (reviewing a lower court decision involving an injunction application against individuals boycotting Bucks' products, who were then held in contempt of court; the case was dismissed on procedural grounds); BONNETT, *supra* note 82, at 459–60 (“While the union leaders thus escaped punishment under the laws relating to boycotts and violation of injunctions, the laws remained unchanged, in fact, were strongly asserted in decisions rendered in the course of the case through the courts.”); ERNST, *supra* note 34, at 124–46 (detailing the individuals and rationales behind the case and its effects).

121. ROBERT A. BRADY, *BUSINESS AS A SYSTEM OF POWER* 201 (1943).

122. *See Klug, supra* note 80, at 788–837. *See* STEPHEN MEYER III, *THE FIVE DOLLAR DAY: LABOR MANAGEMENT AND SOCIAL CONTROL IN THE FORD MOTOR COMPANY, 1908–1921*, at 89 (1981) (“After 1902, Detroit was the ‘open shop’ city *par excellence*. At the time the Detroit Employers’ Association waged ‘a vigorous fight against the various unions in the metal industry’ and completely defeated the traditionally strong unions in the metal trades Until about 1912, the Employers’

Employers' Association of Detroit (EAD) worked with local firms to assist them in their battles with labor, and sometimes picked up the tab for their legal expenses.¹²³ Among the services the EAD provided to its members was aiding them in securing labor injunctions, which had become "the most important legal weapon of employers" since the Pullman strike of 1894.¹²⁴ Once an employer had secured an injunction, the EAD also helped them enforce it, rounding up affidavits from people who would testify to having witnessed threats and hiring undercover men with cameras to "amass evidence that could be used in court."¹²⁵ As the EAD's general counsel, George F. Monaghan, put it: "Your courts are your greatest protection."¹²⁶ The role of the injunction in defeating the efforts of early class-based unions is well-documented.

In sum, the successes of these organizations, and the strategic use of the law by some firms in the late nineteenth and early twentieth centuries, disrupted emerging strategies of collective self-help among firms and nascent multi-employer bargaining arrangements with labor. From a comparative perspective, the important point is that the strategies that these organizations developed and perfected for waging legal battles further reduced incentives to develop the kind of coordinating capacities that were being developed in Europe. The prevailing U.S. antitrust regime put all forms of coordination among independent firms on tenuous legal ground, and unions that worked with employers to mitigate destructive competition through bargaining over wages and skills found themselves on the receiving—and losing—end of antitrust suits.¹²⁷ In this period, budding forms of collective multi-firm coordination—both among employers and between labor and capital—withered as organizations such as the AABA encouraged them instead to mobilize the courts in battles that focused on the individual rights of firms and workers. Under these circumstances, there was little need or incentive for employers to construct strong associations, for, as one employer at the time remarked (with reference to the AABA), "we are getting more for our money out of this Association than any other."¹²⁸

Association's position towards organized labor prevailed, and Detroit had few successful strikes in its automobile shops and factories.").

123. Klug, *supra* note 80, at 727, 887.

124. *Id.* at 821. In Michigan, the case that set the precedent for the use of the injunction was *Beck v. Railway Teamsters Protective Union* in 1898, which held that the union's picketing amounted to unlawful intimidation. 118 Mich. 497, 529 (1898); Klug, *supra* note 80, at 821–23.

125. Klug, *supra* note 80, at 827–28.

126. *Id.* at 820–21.

127. As Crane pointed out, only one of the first thirteen successful antitrust cases involved a combination of capitalists; in all other cases it was labor combinations that were found in violation of antitrust law. Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 109, 115 (Naomi Lamoreaux & William J. Novak eds., 2017).

128. Ernst, *supra* note 99, at 83.

IV

THE GERMAN CASE

The legal status of cartels in Germany in the late nineteenth century was the mirror image of that in the United States. While the U.S. Supreme Court shaped competition policy through its interpretations of the Sherman Act, Germany's supreme court, the *Reichsgericht*, exercised direct influence through rulings it was called upon to make in the absence of similar legislation.¹²⁹ In the same year the Sherman Act was passed, the *Reichsgericht* ruled that businesses were allowed to regulate markets by engaging in "self-help on a cooperative basis" in order to prevent disruptive hyper-competition.¹³⁰

Eighty-seven wood pulp producers in Saxony acted in just such a manner when they organized themselves in 1893 as a price cartel to protect themselves against pernicious competition.¹³¹ The Saxony Wood Pulp Producers Association (*Sächsische Holzstoff-Fabrikanten-Verband*) established a common sales agency through which all members would sell at the same "reasonable" price.¹³² The courts were drawn in when a member went outside this arrangement in 1894 and 1895 and sought relief from the penalties imposed by the cartel.¹³³ The court found for the cartel, and indeed went further, by creating "a strong presumption" in favor of such arrangements as a justified measure in the interests of self-help.¹³⁴ Specifically, the court decision "assumed crisis protection to be the likely purpose of any cartel" and held that these agreements only stepped outside the bounds of the law when their purpose was either to create a monopoly or to exploit consumers, or where such monopoly or exploitation actually resulted from such cartels.¹³⁵ With that, German courts signaled that they would be willing to intervene only in extreme cases, declaring cartels and syndicates to be "especially

129. See RICHTER, *supra* note 54, at 60.

130. Nörr, *supra* note 48, at 7. Germans followed developments in the United States closely. An 1894 essay by Ernst Levy von Halle (presented at the 1895 convention of the *Verein*), entitled "Kartelle in Deutschland und im Auslande" described American antitrust law in detail and concluded that the American law was not effective in defeating the trusts and if anything had simply resulted in old trusts being converted to new forms (through merger and acquisition). According to Richter, the essay had a profound effect on the German discussion, promoting the idea that it would be more effective to allow—but then regulate—cartels. RICHTER, *supra* note 54, at 181.

131. *Id.* at 57.

132. *Id.* at 72.

133. The Wood Pulp association was formed as a syndicate, in which all members agreed to sell exclusively through a joint sales arrangement. The penalty for violations was thirty marks per dry ton of wood pulp. The case was brought by a pulp producer who sold outside the syndicate and refused to pay the fine, and argued that the cartel contract violated the principle of freedom of association (*Gewerbefreiheit*). *Id.* at 71–72.

134. William R. Cornish, *Legal Control over Cartels and Monopolization 1880–1914: A Comparison, in LAW AND THE FORMATION OF THE BIG ENTERPRISES IN THE 19TH AND EARLY 20TH CENTURIES* 280, 300 (Norbert Horn & Jürgen Kocka eds., 1979).

135. *Id.*

suited” to serve the economy by protecting against inefficient loss-generating overproduction and the associated “catastrophes.”¹³⁶

As in the United States, the economic turbulence of the 1870s and 1880s had prompted the formation of various sorts of cooperative arrangements, and the 1897 ruling by the German court in favor of cartels in the Wood Pulp Producers Association case was important for putting these arrangements on solid legal footing. Thus, cartels in Germany—already growing before the court’s decision—expanded rapidly after their legal status was clarified. Although the exact number of cartels is uncertain, figures reported by the German Interior Ministry suggest that there were 385 by 1902 and over 500 by 1918.¹³⁷

Despite the consensus in academic and legal circles, the growing influence of massive concentrations of economic power in key infrastructural industries generated discontent among firms that relied on these inputs, as well as unease in the population at large, who saw in these cartels an effort to fleece consumers in the name of higher profits.¹³⁸ When a sharp increase in coal prices in 1900 and 1901 heightened such concerns, the state reluctantly yielded to this pressure and appointed a commission to investigate the price-raising behavior and effects of the cartels. The *Verein* debated the issue vigorously at its 1905 convention, but the prevailing view remained that cartels could serve as a bulwark both against the growth of large U.S.-style trusts, while also protecting against the “ravages of hyper-individualism.”¹³⁹ Conference chair Karl Rathgen summarized the results of the *Verein*’s rather inconclusive twelve-hour debate by saying that though “cartels are a necessary part of economic development . . . in light of their proliferation . . . the state should do something. However, it is not possible to forge a unified position out of the diversity of proposals [that had emerged from the discussion].”¹⁴⁰

When the results of the government commission were finally revealed, the outcome was not the one anticipated by the critics.¹⁴¹ The commission’s report did not call for major changes, and instead reaffirmed that cartels served the collective interests of society.¹⁴² In the end, Germany did not pass a cartel law until much later, in 1923, and when it did, the “decree concerning abuses of economic power” did not prohibit cartels.¹⁴³ It did establish new oversight

136. JOCHEN MOHR, SICHERUNG DER VERTRAGSFREIHEIT DURCH WETTBEWERBS—UND REGULIERUNGSRECHT 151 (2015) (translating the original text).

137. OTTO POLYSIUS, VERBANDSBESTREBUNGEN IM DEUTSCHEN MASCHINENBAU 20 (1921).

138. *Id.* at 4.

139. RICHTER, *supra* note 54, at 207–10; Nörr, *supra* note 48, at 7.

140. RICHTER, *supra* note 54, at 209–10.

141. POLYSIUS, *supra* note 137, at 4.

142. *Id.*

143. Gregory Jackson, *The Origins of Nonliberal Corporate Governance in Germany and Japan*, in THE ORIGINS OF NONLIBERAL CAPITALISM: GERMANY AND JAPAN IN COMPARISON 121, 135 (Wolfgang Streeck & Kozo Yamamura eds., 2001); see also Wilfried Feldenkirchen, *Competition Policy in Germany*, 21 BUS. & ECON. HIST. 257, 259 (1992).

mechanisms, notably through the creation of a cartel court.¹⁴⁴ But the court's purpose was not to suppress cartels, and its functions mostly revolved around adjudicating disputes that arose among cartel members, or between cartel members and outsiders.¹⁴⁵

Like their American counterparts, small, skill-dependent firms in Germany had also responded to market turbulence through cooperative arrangements to stabilize the market, but they did so in this radically different legal context. The solutions they devised drew on older traditions in which small, regionally-based producers solved their collective action problems through governance arrangements among firms; these arrangements were managed by trade associations and sometimes policed by unions.¹⁴⁶ These firms and regions have received far less attention than the large autarkic firms and cartels of the late nineteenth century, but they were actually the early core of German industrialization and the site of a very different industrial order.¹⁴⁷

The hub of much of this activity was the decentralized industrial districts of the southwest in Württemberg, Saxony, and the Bergisches Land south of the Ruhr.¹⁴⁸ Faced with intense market volatility, these firms banded together to socialize risks and reduce uncertainty by coordinating—on wages, on production strategies, on technology, on training—not to eliminate but to manage competition among themselves in the market.¹⁴⁹ Their efforts at cooperative self-help were smiled upon by the national government, and were often also actively facilitated by their own local and regional governments.¹⁵⁰

Depending on the character of the industry, these firms organized different types of cooperative arrangements to address the particular kinds of competitive challenges they faced, either on a formal or, very often, more informal basis.¹⁵¹ Thus, for example, in industries like cotton textile finishing and cutlery in which the main production cost was labor, *price cartels* operated to dampen cutthroat competition in downturns.¹⁵² In other sectors, such as the textile trades, *term-fixing cartels* established shared guidelines for payment and delivery schedules, thus preventing firms from “destroying one another by attempting to gain orders by offering to perform services on increasingly unreasonable terms.”¹⁵³ In the machinery and other capital-goods producing industries, *specialization cartels*—

144. Jackson, *supra* note 143, at 135.

145. William C. Kessler, *German Cartel Regulation Under the Decree of 1923*, 50 Q.J. ECON. 680, 681–82 (1936).

146. See HERRIGEL, *supra* note 12, at 33–71.

147. *Id.*

148. *Id.* at 166.

149. *Id.* at 59–65.

150. See Hal Hansen, *Caps and Gowns: Historical Reflections on the Institutions that Shaped Learning for and at Work in Germany and the United States, 1800–1945*, at 194–95 (1997) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author) (discussing state promotion of such arrangements in Germany's southwestern states).

151. HERRIGEL, *supra* note 12, at 60–65.

152. *Id.* at 61–62.

153. *Id.* at 62.

also known as finishing associations—involved arrangements in which member firms “agreed to specialize in one or several lines of a product (for example, particular machine tool types, such as lathes) while ceding other lines to other members of the association.”¹⁵⁴

Through such arrangements, these producers sought to protect themselves against customers (including state contractors) who sought to engage them in destructive bidding wars.¹⁵⁵ For example, potential buyers sometimes imposed harsh terms of delivery or payment, to which firms would have to agree in order to win the contract. In other cases, clients would award the contract to the lowest bidder but then ask the firm to perform the work according to the plan that had been put forth by some other firm for a higher bid. Furthermore, since company bids for contracts often included detailed production plans, firms were constantly exposed to the threat of intellectual property theft. Individual firms on their own were powerless to fight these practices. Such problems, as Otto Polysius emphasized, could only be overcome through collective organization.¹⁵⁶

Whatever their form, these arrangements—many of which would have been illegal under the prevailing legal regime in the United States—served to stabilize competition in the face of turbulence.¹⁵⁷ More than this, these arrangements also provided a space within which it was safe for member firms to contribute to building and maintaining complementary institutions of collective self-help that would benefit all of them.¹⁵⁸ Thus, these regions developed or preserved institutions designed to support cooperation in other areas as well. These included vocational schools to promote ongoing skill formation and to cultivate and expand the skill base of the local work force—the opposite of the deskilling strategies taking hold in the United States at this time.¹⁵⁹ They also included technical institutes, often with support from the state government, to disseminate the latest know-how and to promote ongoing adaptation to the latest technological developments.¹⁶⁰ Finally, they included cooperative financial arrangements to assist firms in securing investment capital for growth and innovation, as well as arrangements for shared standard-setting and help to firms in bringing their diverse products to broader (also world) markets.¹⁶¹

The political-economic ecosystem in these regions allowed small firms to avoid destructive price wars and also encouraged them to collectively move up-market into higher value-added market segments. The powerful German

154. *Id.* at 63.

155. POLYSIUS, *supra* note 137, at 64.

156. *Id.*

157. HERRIGEL, *supra* note 12, at 59–65.

158. *Id.*

159. *See* Hansen, *supra* note 150, at 180–96 (“In the long run . . . Germans gradually built a comprehensive system of industrial, commercial, and craft education and training, while Americans turned increasingly to a combination of work rationalization strategies and on-the-job training in the workplace, supplemented by a culturally oriented academic curriculum in full-time schools.”).

160. *See id.*

161. *See id.*

Mechanical Engineering Association (VDMA) grew out of one such regional association that had originally been founded in 1890 to improve delivery and payment conditions, resist unreasonable demands of customers, and establish reasonable prices.¹⁶² The VDMA saw its main task as eliminating abuses that caused “unhealthy” competition.¹⁶³ To that end, it sought to promote accurate cost-accounting among firms, establish unitary delivery and payment conditions, and develop collective strategies to protect proprietary drawings and ideas.¹⁶⁴ When Friedrich Fröhlich took over as managing director of VDMA in 1910, he continued the VDMA’s emphasis on quality over price; in his words, “[b]etter expensive and good than cheap and bad.”¹⁶⁵

As in the United States, large cartels in Germany fought against unions furiously and very successfully, but these smaller manufacturing firms that were engaged in skill-intensive specialized production found it necessary to maintain cordial relations with the skilled workers on whom they relied.¹⁶⁶ Indeed, their dependence on skilled labor grew as competition came to center on product quality rather than price. Thus, the regions in which these cooperative arrangements among small independent proprietors flourished were more congenial to union organizing, and formed the heart of the German labor movement in the late nineteenth century. Unions in these areas organized and bargained for a far larger share of the workforce than in the centers of heavy industry in the Ruhr Valley. As Klaus Schönhoven noted, in 1913, fully three-quarters of all German workers who were covered by collective agreements were employed in small and medium-sized firms with fifty or fewer employees.¹⁶⁷

Like their American counterparts, the unions in these areas were overwhelmingly organized along craft lines, and represented different ideological leanings (Catholic, Marxian social democratic, or Lassallean-socialist, depending in part on the region).¹⁶⁸ However, while their counterparts in the United States would find themselves caught in the cross-fire between high- and low-end employers, skilled unions in Germany’s decentralized industrial districts *shared* with employers a strong interest in increasing and expanding the supply of skills

162. POLYSIUS, *supra* note 137, at 65–74.

163. *Id.* at 75.

164. *Id.* at 75–77. In one industry, competitors banded together to share licenses for production technologies among themselves, both to avoid the costs of litigation among themselves over patents and to collectively bear the legal costs of defending their patents against outsiders. *Id.* at 133.

165. *Id.* at 74 (translating the original text).

166. ELISABETH HARNISCH, *DIE KARTELLIERUNGSFÄHIGKEIT DER MASCHINENINDUSTRIE* 56 (1917) (noting that a 1917 survey by the VDMA found that an average of 25% of total value of their members’ production went into wages—in some industry segments up to 30% to 35%).

167. Schönhoven, *supra* note 16, at 416.

168. Early unions in Germany, as in the United States, were overwhelmingly composed of skilled workers with distinct occupational/craft identities. This was certainly true in the critical 1880s and 1890s but it continued through the pre-World War I period. Thus, for example, in 1913, fully 80% of the members of the first—and largest—industrial union of the day (the German Metalworkers’ Union) were skilled craftsmen who had served an apprenticeship. *Id.* at 411.

on which the regional economy depended.¹⁶⁹ Regional training institutions actively supported the ongoing upgrading of worker skills and adaptation to the latest technical developments.¹⁷⁰ Because these arrangements were organized collectively, they also promoted skill portability across the regional labor market, facilitating the movement of workers across firms and related industries.¹⁷¹ In this way, they supported multi-firm bargaining and encouraged the development of encompassing labor organizations.¹⁷² In this context, multi-employer collective bargaining served as a further framework for socializing risk across firms by standardizing wages, thus reducing costly competition among employers for skilled labor. Unions in Germany's decentralized industrial order were thus part of a broader ecosystem of coordination and one that was not experienced by member firms as constraining, but instead as deeply enabling.

The arrangements for cooperative self-help forged in this period survived the First World War, as well as the transition to democracy and the incorporation of labor under the first social democratic government of the Weimar Republic.¹⁷³ Indeed, as Nörr pointed out, the cartel idea if anything “received a boost” with the constitutional charter of 1919, which embraced the idea of a collectively governed economy as an alternative to both laissez-faire and direct state control.¹⁷⁴ With the transition to democracy, the views of influential social democrats, including the great Marxist theorist and Minister of Finance Rudolf Hilferding, shifted considerably.¹⁷⁵ Hilferding, who before the war had authored a scathing critique of economic concentration,¹⁷⁶ came to view a high level of employer organization as an important tool for the political management of capitalism.¹⁷⁷

169. See KATHLEEN THELEN, *HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY SKILLS IN GERMANY, BRITAIN, THE UNITED STATES, AND JAPAN* 39–42 (2004) (noting that unions were generally supportive of employers' training efforts, and that the machine industry in particular heavily relied on skilled labor and thus premier firms worked to create a system providing training).

170. See *id.* at 45–46.

171. See *id.* at 19.

172. Germany's industrial unions grew by absorbing organizations of skilled workers into overarching organizations *while also protecting* their distinct craft identities. The largest industrial union, the German Metalworkers Union negotiated completely separate agreements for the various occupations in this period. See *id.* at 49–50.

173. Nörr, *supra* note 48, at 9.

174. *Id.*; see also WERNHARD MÖSCHEL, *RECHT DER WETTBEWERBSBESCHRÄNKUNGEN* 19 (1983) (highlighting that by the end of the Weimar period Germany had somewhere between two and four thousand cartels “of varying importance”).

175. The issue of the cartels was long contested in social democratic circles. Some party members were vehement critics of the overweening power of capital as it developed in the late nineteenth century. But there were others who considered industrial concentration to be the next stage of capitalist development that would hasten the transition to socialism, and they argued against “reactionary” efforts to forestall or hinder these developments. See Dietmar Petzina, *Gewerkschaften und Monopolfrage vor und während der Weimarer Republik*, 20 *ARCHIV FÜR SOZIALGESCHICHTE* 195, 197 (1980).

176. See generally RUDOLF HILFERDING, *DAS FINANZKAPITAL* (1910).

177. See Helen Callaghan & Martin Höpner, *Changing Ideas: Organised Capitalism and the German Left*, 35 *WEST EUR. POL.* 551, 558 (2012).

V

CONCLUSION

The developments of the late nineteenth and early twentieth centuries emphasized in this Article did not, of course, mark the end of the story. But they did leave an enduring imprint on the subsequent evolution of these two political economies. The U.S. antitrust regime of the late nineteenth century not only hastened the growth of large autarkic and mostly anti-labor firms in the great merger movement. It also played a significant role in disrupting alternative emerging forms of inter-firm cooperation among smaller, skill-dependent producers who attempted to defend themselves against the ravages of the market through collective self-help. The prevailing legal regime in the United States not only undermined such efforts, it provided a way for low-road producers to use the courts to disrupt efforts to enlist unions to police and enforce shared rules. In short, in the United States, what was weeded out—not by the market but by the courts—were the kinds of strong sectoral organizations and nascent multi-employer bargaining with unions that were taking hold elsewhere, including in Germany. It is an irony of history that one of the most lasting legacies of the Sherman Antitrust Act was to clear the way for large dominant producers even as it wiped out the seeds of these countervailing organizational forces that elsewhere now serve as a check on the behavior of disruptive new firms with monopolistic ambitions, an increasingly prevalent part of the American political economic landscape.¹⁷⁸

By contrast, Germany's very different legal framework facilitated and supported precisely those forms of coordination that were being dismantled in the United States. There, the period from the 1870s through the 1890s spawned a number of new types of economic organization. Beyond the well-known—and later notorious—large cartels, these also included increasingly vibrant trade associations. These trade associations were actively involved in managing skill formation and competition among smaller producers, often in cooperation with skilled unions organized on an industrial basis. The overall effect was to encourage the development of a much more elaborate system of mutual support that stabilized competition in the face of turbulence and preserved a place for the kind of high quality, high skill, high value-added production for which German industry came to be known.

The legacy of the late nineteenth century also weighs heavily on the labor regimes that emerged in the two countries. As we have seen, German

178. See, e.g., K. Sabeel Rahman & Kathleen Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-First-Century Capitalism* 47 POL. & SOC'Y 177, 177 (2019) (describing the “distinctive ways US political-economic institutions have facilitated” the emergence of the platform business model and the rise of many of the large firms associated with it); Kathleen Thelen, *Regulating Uber: The Politics of the Platform Economy in Europe and the United States*, 16 PERSP. ON POL. 938 (2018) (using the case of Uber and its arrival in United States, Germany, and Sweden to highlight differences in the capacity of disruptive new actors like Uber to escape regulation in different political-economic contexts).

competition policy actively supported collective organization and often prioritized the interests of the collective over that of the individual firm.¹⁷⁹ The same principle applied on the labor side as well.¹⁸⁰ Thus, the German labor regime came to rest on a separate body of law that is expressly organized around adjudicating *class-based* claims. While acknowledging the employer's right to manage and a worker's freedom to join unions, German labor law emphasizes the primacy of organized labor's collective rights.¹⁸¹ The basic premise is that because of the asymmetry in power between the individual worker and his employer, freedom of contract in the context of the employment relationship requires the protection of collective rights.¹⁸² This core principle has been enormously important in protecting the status and position of unions in Europe's coordinated market economies precisely because it sets limits on what in the United States would be considered an individual's contractual freedoms.¹⁸³ Collective labor law, as Däubler pointed out, is strengthened to the extent that individual rights can be limited in the interest of the collective.¹⁸⁴

Turning to the American case, it is also clear that the 1935 National Labor Relations Act¹⁸⁵ did not mark a great reversal in the evolution of labor relations in the United States, but if anything represents the culmination of the dynamics described above. As Forbath has emphasized, the battles over labor's rights in the United States were fought in the courts on the (for employers, more congenial) terrain and in the language of individual rights.¹⁸⁶ However, as Andrias noted, the resulting labor law "settlement" proved to be a very flimsy

179. RICHTER, *supra* note 54, at 102–04.

180. In the pre-Weimar period, the prevailing civil code viewed the activities of employers and unions in the same broad light. The balance of political power (Germany was still not a democracy) naturally tilted outcomes heavily toward employers but tactics—such as boycotts—that were ruled out of bounds for American unions were legally allowable in Germany. In much the same way that the courts upheld the rights of employers to cooperate (or collude), German courts saw unions as organizations of collective self-help engaged in legitimate defense against the free play of market forces. *Cf.* RAINER SCHRÖDER, *DIE ENTWICKLUNG DES KARTELLRECHTS UND DES KOLLEKTIVEN ARBEITSRECHTS DURCH DIE RECHTSPRECHUNG DES REICHSGERICHTS VOR 1914*, at 268–69 (1988).

181. Hugo Sinzheimer wrote what are widely considered the foundational texts. *See generally* HUGO SINZHEIMER, *EIN ARBEITSTARIFGESETZ: DIE IDEE DER SOZIALEN SELBSTBESTIMMUNG IM RECHT* (1916); HUGO SINZHEIMER, *DER KORPORATIVE ARBEITSNORMENVERTRAG* (1907); *see also* OTTO KAHN-FREUND, *LABOUR AND THE LAW* (1972).

182. Wolfgang Däubler, *The Individual and the Collective: No Problem for German Labor Law?*, 10 *COMP. LAB. L.J.* 505, 506–07 (1989); *see also* BRITTA REHDER, *RECHTSPRECHUNG ALS POLITIK* (2011). Many of these are arguments that John R. Commons was pressing in the American context in the 1920s but that did not prevail.

183. It is the foundation for "extension clauses" in many European countries that shore up union representation by allowing the government to apply the terms of union contracts to non-union firms and workers. It is also the basis for so-called "favorability clauses" in collective bargaining laws that explicitly forbid employers from engaging individual workers or plant labor representatives in concession bargaining—another huge state-sponsored support for collective labor representation.

184. *See* Däubler, *supra* note 182, at 508 ("[A]ssum[ing] that collectivism is successful[, t]he relevant inquiry then is whether the collective bargaining agreement . . . can limit individual rights.").

185. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2012)) (guaranteeing the right to unionize and engage in collective bargaining).

186. *See* FORBATH, *supra* note 4, at 7.

foundation for guaranteeing labor's collective rights.¹⁸⁷ After the defeat through disarticulation of the efforts described above to establish industry-wide bargaining, American employers unified around the pursuit of a deregulatory agenda that continues to discourage coordination on both sides of the class divide by centering instead on individual freedom and choice. AABA founder and its counsel Daniel Davenport summarized the fruits of the AABA's legal strategies in the first decade of the twentieth century thus: "The great effort of the Society has been with the help of the Judiciary, to write into the fabric of American jurisprudence [the principle of individual liberty]."¹⁸⁸ This principle forms the central theme around which American employers continue to organize—and it runs like a red thread through the history of American labor relations, from the open shop movement of the turn of the previous century to the right-to-work movement today.

187. Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1610 (2016).

188. BONNETT, *supra* note 82, at 454.