

REPAIRING THE AMERICAN EDUCATION SYSTEM THROUGH  
LABOR REFORM: HOW GERMAN AND FRENCH WORKS  
COUNCILS CAN PROVIDE A FRAMEWORK FOR  
EMPOWERING TEACHER’S UNIONS

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## I. INTRODUCTION

The United States' labor system is complex and ever evolving. It provides safety and support for our employees in countless ways, and exactly what is protected and how it is protected are frequently subject to change. That ability to change can provide solutions in one of the most important areas in the country: education.

The education system in the United States suffers from many problems, and there is no shortage of literature examining those issues and offering various solutions.<sup>1</sup> One potential solution that is not currently possible under U.S. labor law is works councils<sup>2</sup> for teachers. Works councils are not permitted in the United States due to labor law's statutory framework, but with a few changes, these labor organizations could be implemented in the United States. This would allow educators to not only directly voice their concerns to the governing bodies in the education system, but would also give educators the ability to directly influence and change education.

Educators are at the forefront of the U.S. education system and they know best what issues are pressing in the U.S. education system and how to solve them. Instead of administrators or legislators being the only people that have decision-making power in the education system, the advent of works councils for teachers would empower teachers to make the changes they deem necessary. This would allow teachers to further advocate for themselves, resulting in a stronger education system with better prepared students and fewer obstacles to academic success.

There are statutory obstacles to implementation of works councils within the United States. Although it is possible to overcome these obstacles, doing so requires political will, collective action, and the ability to see the benefit in

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<sup>1</sup> See, e.g., Kate Barrington, *The 15 Biggest Failures of the American Public Education System*, PUB. SCH. REV. (May 28, 2019), <https://www.publicschoolreview.com/blog/the-15-biggest-failures-of-the-american-public-education-system> (listing the biggest failures in American public education as deficits in school funding, declines in school safety, emphasis and standardized testing, decreased teacher salaries, and overcrowding of schools, among others); Matthew Lynch, *18 Reasons the U.S. Education System is Failing*, THE EDVOCATE (Apr. 3, 2017), <https://www.theedadvocate.org/10-reasons-the-u-s-education-system-is-failing>.

<sup>2</sup> MATTHEW W. FINKIN & TIMOTHY P. GLYNN, COX, BOK & GORMAN'S LABOR LAW: CASES AND MATERIALS 188 (Saul Levmore et al. eds., 17th ed. 2021) ("A works council is an elected body with extensive rights of consultation and co-determination with management. It would be a 'labor organization' within the meaning of § 2(5) of the Labor Act . . .").

a labor organization that so many other countries already realized and currently utilize.<sup>3</sup> The implementation of works councils in the United States labor system would not solve every labor problem, but their use could help employees—specifically teachers—voice their concerns directly to managers. This change allows people on the front lines of these issues create meaningful change as they deem necessary through their experience.

The United States can learn meaningful lessons from various other countries that have implemented works councils in their workforces.<sup>4</sup> Although no two countries face the same problems or can effectively use the same solutions, the United States can use works councils from other countries as a model. These works councils could be a valuable asset in many different areas of labor and labor relations, but they could also help to fix problems in the country that people often do not see as directly connected to labor, such as education.

## II. BACKGROUND

### A. Works Councils

Works councils are a type of labor organization, capable of advocating for employees as their own unique labor entity.<sup>5</sup> Works councils are not part of labor unions;<sup>6</sup> instead, these organizations work as an additional instrument

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<sup>3</sup> Katrin Oesingmann, *Workplace Representation in Europe: Works Councils and Their Economic Effects on Firms*, 13 CESIFO DICE REPORT 59, 59–64 (2015), <https://www.ifo.de/DocDL/dice-report-2015-4-oesingmann-december.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> FINKIN & GLYNN, *supra* note 2, at 188; see also Simon Jäger et al., *What Does Codetermination Do?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 29, 2021), <https://corpgov.law.harvard.edu/2021/06/29/what-does-codetermination-do> (“Under ‘board-level’ codetermination, workers elect representatives who fill a certain share (usually 20-40%) of the seats on their company’s board. Under ‘shop-floor’ codetermination, workers elect shop-floor representatives who have rights to information, consultation, and sometimes co-decision-making over decisions about working conditions.”); Jason Gordon, *What is Codetermination?*, BUS. PROFESSOR (Sept. 25, 2021), [https://thebusinessprofessor.com/en\\_US/business-governance/codetermination-definition](https://thebusinessprofessor.com/en_US/business-governance/codetermination-definition) (“Codetermination is an arrangement in which the management works together with the workers when making decisions relating to issues in their workplace and even voting for representatives. In developed democracies, there are laws that require workers to have a say in the voting of representatives. Codetermination laws apply in countries which have one-tier or two-tier board of directors. Codetermination laws only apply when a company has a set number of employees as defined by local law.”).

<sup>6</sup> *What is a Union?*, UNION PLUS, <https://www.unionplus.org/page/what-union> (last visited Dec. 29, 2022) (“A labor union or trade union is an organized group of workers who unite to make decisions about conditions affecting their work. Labor unions strive to bring economic justice to the workplace and social justice to our nation.”).

through which employees can collectively bargain and advocate for themselves within the workplace.<sup>7</sup> Works councils are common across the world—often mandated by legislation—but are unfortunately not present in the United States.<sup>8</sup> This is due to United States labor law and the way the National Labor Relations Act is interpreted and applied.<sup>9</sup>

*i. The German System*

Works councils are protected by law in Germany as an integral part of German labor law.<sup>10</sup> Although protected, the decision of whether to create a works council at a workplace belongs exclusively to the employees, as works councils are not mandatory.<sup>11</sup> The number of employees who are part of the works councils is calculated based on the total number of employees.<sup>12</sup> The number of works council members increases as the number of employees increases, standardizing the size of these organizations across the country.<sup>13</sup> The purpose of works councils in Germany is to “ensure that some of the key decisions at the workplace are not taken by the employer alone but involve representatives of the workforce.”<sup>14</sup>

German works councils are robust in their coverage of employees. The organizations do not discriminate based on part- or full-time status, and “[a]ll employees are covered by the works councils with the exception of senior

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<sup>7</sup> Daniel Little, *Works Councils and US Labor Relations*, UNDERSTANDING SOC'Y (Feb. 9, 2010), <https://understandingsociety.blogspot.com/2010/02/works-councils-and-us-labor-relations.html> (“Industry-wide unions establish wage levels; public policy stipulates the level of ‘social wage’; and works councils provide an institutionalized context in which management and employees work with each other, exchange workplace information, and work out firm-specific implementations of industry-wide agreements.”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (“The foundations of US labor law directly prohibit these forms of workplace representation, and the political will for implementing these policy changes is lacking on both sides.”); see also Eleanor Mueller & Holly Otterbein, *Unions Warn Senate Democrats: Pass the PRO Act, or Else*, POLITICO (Apr. 22, 2021, 2:11 PM), <https://www.politico.com/news/2021/04/22/unions-senate-democrats-pro-act-484280>. The PRO Act would not solve the issue presented in this Note; however, its passage or death is a good example of the difficulties the United States faces in creating meaningful labor reform, including the introduction of works councils. See National Labor Relations Act, 29 U.S.C. § 158.

<sup>10</sup> *Germany*, WORKER PARTICIPATION, <http://worker-participation.eu/national-industrial-relations/countries/germany> (last visited Dec. 29, 2022) (“Under the Works Constitution Act, (*Betriebsverfassungsgesetz*), a works council can be set up in all private sector workplaces with at least five employees.”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

management.”<sup>15</sup> This coverage gives works councils a large amount of influence within German workplaces, as these organizations can “conclude what are called ‘work agreements’ with the employer – enforceable, legally valid agreements that regulate working conditions in the company.”<sup>16</sup> In fact, employers whose companies have works councils are not allowed to make decisions regarding many issues without first conferring with the works council.<sup>17</sup> The result is a strong organization, consisting of employees, that exists for the sole purpose of furthering the interests of all the employees in a workplace.

The strength of works councils in Germany and some other parts of the world lies in their function as a direct bargaining tool for workers.<sup>18</sup> Trade unions are another tool for collective bargaining for German employees, but they, unlike works councils, do not allow employees to directly bargain with the employer in making employer decisions.<sup>19</sup> The beauty of works councils is that they work in tandem with labor unions to strengthen the voice of employees from within the workplace, as opposed to advocating for employees from outside the workplace (although that is incredibly important as well).<sup>20</sup> Works councils, as employee-led bodies, directly advocate for employees and collectively bargain to ensure that employee’s voices are heard by employers, unlike outside organizations like trade unions where union representatives voice the concerns of the employee body to the employer.<sup>21</sup> This arrangement has the practical effect of allowing employees to use their own experience and observations to foster a workplace better suited for them and, hopefully, for the employer as well.<sup>22</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *German Codetermination (“Mitbestimmung”)*, DGB – GERMAN TRADE UNION CONFEDERATION, <https://en.dgb.de/fields-of-work/german-codetermination> (last visited Dec. 29, 2022).

<sup>17</sup> *Id.* (these topics include termination, working hours, beginning and end times of shifts, leave plans, and employee performance monitoring).

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

<sup>19</sup> *Germany*, *supra* note 10 (“Instead it is collective bargaining at industry level between individual trade unions and employers’ organisations that remains the central arena for setting pay and conditions in Germany . . . [A]t [the] workplace level, individual employers and workplace employee representatives – the works councils . . . – can develop more cooperative relations.”).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

ii. *The French System*

French employees also have the ability to create works councils, but France has a different system than Germany.<sup>23</sup> The French labor law system allows for the formation of what are called *Comité Social et Économiques* (CSEs), or *Conseil d'entreprises* (CEs).<sup>24</sup> “Where a CSE has been set up, it is a joint body consisting of the employer, who chairs it and who may be accompanied by up to three colleagues, and elected representatives of the employees. The number of employee representatives is set out precisely in the legislation . . . .”<sup>25</sup> Similar to German works councils, French works council sizes are proportionally related to the size of the company in which the organization exists.<sup>26</sup>

These labor organizations, which require employers to negotiate, help employees bring matters to their employers’ attention quickly and with the power to make changes if necessary.<sup>27</sup> CSEs exercise substantial power in

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<sup>23</sup> *Trade Unions and Employers Associations*, L&E GLOBAL (July 28, 2022), <https://knowledge.leglobal.org/employers-associations-and-trade-unions-in-france> (noting that “[c]urrently, other types of employee representative bodies in France include” the Works Council, Workers’ Delegates, and Health and Safety Committee, which “are now combined into the Social and Economic Committee: the CSE”); see *France*, WORKER PARTICIPATION, <https://www.worker-participation.eu/national-industrial-relations/countries/France> (last visited Dec. 29, 2022) (“Employee representation at workplace level in France is provided through both the trade unions and structures directly elected by the whole of the workforce, although, where unions are present, the key figure will be the union delegate. The directly elected structures were fundamentally revised in the private sector in 2017, when three separate representative structures were merged into one, with the possibility of the tasks normally carried out by the separate union structure also being incorporated into new body in certain circumstances.”).

<sup>24</sup> *France*, *supra* note 23 (“Although the CSE will be the employee representative body in most companies, the Macron changes also provide for another possibility, the setting of a Company Council (Conseil d’entreprise – CE). This is where the unions agree, either through a company-level or an industry-level agreement that the normal functions of the CSE will be extended to include collective bargaining at company level, a task normally carried out by the union delegate.”).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (“In companies with between 11 and 49 employees, the employer should meet all the employee representatives on the CSE once a month and they can also ask for other meetings if matters are urgent. In larger companies, those with 50 employee [sic] or more, the frequency of meetings of the CSE is fixed in a company-level agreement, but, as a minimum, the CSE must meet once a month in companies with at least 300 employees and once every two months in smaller companies (those with between 50 and 299 employees). At least four of these meetings should deal with questions of health and safety, and there should also be a meeting after any accident or serious incident. External experts can attend meetings to provide support on issues relating to health and safety and working conditions.”).

French labor law because employers are statutorily required to consult them on a number of specific issues before the employer can take any action.<sup>28</sup> Although the CSE are not strictly works councils, they exercise the same power as the former works councils.<sup>29</sup> The difference between the two is that CSEs have expanded powers because they incorporate some of the powers from other French labor organization types, as well (specifically employee delegates and health and safety committees).<sup>30</sup>

Much like German works councils,<sup>31</sup> French works councils allow employees to directly influence their workplace in ways that make the workplace more amenable to employee needs and, hopefully, more efficient and productive overall.<sup>32</sup> The ability for workers to voice their concerns, questions, and demands directly to employers through employee representatives is a powerful tool that should not be underestimated.<sup>33</sup> Works councils give employees the ability to directly influence how the workplace should function, meaning employees can bring the most salient issues affecting them to their employers.<sup>34</sup>

### *B. The National Labor Relations Act*

The National Labor Relations Act (NLRA) was enacted in 1935, after the Great Depression, to “protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”<sup>35</sup> The NLRA provides the statutory power for employees to organize and collectively bargain for their labor rights and it

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<sup>28</sup> *Id.* (“There are now three broad areas over which the CSE must be informed and consulted on a regular basis. (The system was simplified in 2015, when 17 separate topics for information and consultation were combined into three key areas.) These are: the strategic direction of the company; the company’s economic and financial situation; and the company’s social policy as well as working conditions and employment.”).

<sup>29</sup> *Id.*

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

<sup>31</sup> *See Germany, supra* note 10.

<sup>32</sup> *See France, supra* note 23.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *National Labor Relations Act*, NAT’L LAB. RELS. BD. (July 8, 2012), <https://www.ilo.org/dyn/travail/docs/2367/NationalLaborRelationsAct.pdf>; *see generally National Labor Relations Board*, USA.GOV, <https://www.usa.gov/federal-agencies/national-labor-relations-board> (last visited Dec. 29, 2022) (“The National Labor Relations Board enforces the National Labor Relations Act by investigating allegations of wrongdoing brought by workers, unions, or employers, conducting elections, and deciding and resolving cases.”).

provides protections for employees against unfair labor practices of employers.<sup>36</sup> Ultimately, the NLRA is based on specifically defined policy, which is articulated in the Act as the following:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>37</sup>

The statute is based on the idea of unencumbered economic progress, which must be supported by the ability of workers to bargain on their own behalf.<sup>38</sup>

Despite the NLRA and other labor statutes<sup>39</sup> benefitting the United States in numerous ways by protecting the labor force,<sup>40</sup> the statutory regime of labor law in the United States is an obstacle to the formation of works councils.<sup>41</sup> Although works councils would be beneficial to U.S. employees, the statute is read to prohibit their creation.<sup>42</sup> The structure of the works councils themselves would involve employer involvement, and under the statute “inter-

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<sup>36</sup> National Labor Relations Act, 29 U.S.C. § 158.

<sup>37</sup> *Id.* § 151.

<sup>38</sup> *Id.* (“The inequality of bargaining power between employees . . . and employers . . . substantially burdens and affects the flow of commerce . . .”).

<sup>39</sup> See Norris-LaGuardia Act, 29 U.S.C. §§ 101–15; Railway Labor Act, 45 U.S.C. §§ 151–88; Labor Management Relations Act, 29 U.S.C. §§ 141–97.

<sup>40</sup> *Employee Rights Under the National Labor Relations Act*, U.S. DEP’T OF LAB., [https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/eo\\_posters/employee-right-spouter11x17\\_2019final.pdf](https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/eo_posters/employee-right-spouter11x17_2019final.pdf) (last visited Dec. 29, 2022); see *Employee Rights*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employee-rights> (last visited Dec. 29, 2022) (listing several employee rights, including forming a union at the workplace, joining a union whether the employer recognizes the union or not, and assisting the union in organizing your fellow employees, among others).

<sup>41</sup> See Little, *supra* note 7; National Labor Relations Act, 29 U.S.C. § 158(a)(2) (“It shall be an unfair labor practice for an employer – to dominate or interfere with the formation or administration of any labor organization or contribute to financial or other support to it . . . .”); see generally National Labor Relations Act, 29 U.S.C. § 152(5) (“The term ‘labor organization’ means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”).

<sup>42</sup> See National Labor Relations Act, 29 U.S.C. § 158(a)(2).



feren[ce]” or “dominat[ion]” on the part of the employer within the labor organization is prohibited.<sup>43</sup> Despite the statutory obstacle, there have been attempts made to create labor organizations that are similar or identical to works councils, but within the parameters of United States labor law.<sup>44</sup> Unfortunately, those efforts have never succeeded and the United States remains a country without the statutory ability to implement works councils within labor relations.<sup>45</sup>

The concern with works councils in the United States, and “company unions” more generally, stems from the concern that these organizations would not benefit employees. This was a real concern in the United States labor movement as companies wanted to find ways to get around having to deal with unions, especially if it meant the company could control the “collective bargaining” going on, allegedly for the benefit of the employees.<sup>46</sup> The National Labor Relations Board in *Electromation, Inc.* clarified the concern with these organizations by classifying what would and would not be a violation of § 8(a)(2) of the NLRA:

We do not hold that paying employee members of a committee for their meeting time and giving that committee space to meet and supplies is per se a violation of Sec. 8(a)(2). Here, however, the Respondent’s assistance was in furtherance of its unlawful domination of the Action Committees and cannot be separated from that domination. Because the Respondent’s conduct in supplying materials and furnishing space to the Action Committees

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<sup>43</sup> National Labor Relations Act, 29 U.S.C. § 158(a)(2); FINKIN & GLYNN, *supra* note 2, at 3 (“Section 8(2) was designed to outlaw company-formed ‘representation plans’ or ‘work councils’ which were carefully controlled so as to give employees the forms of organization without the substance and which were known as ‘company unions.’”).

<sup>44</sup> FINKIN & GLYNN, *supra* note 2, at 188–89 (“Volkswagen, which has a plant in Chattanooga, Tennessee, signed a neutrality agreement with the United Auto Workers (UAW). This was the product of extensive negotiations tied to VW’s desire to have a German-style works council in its U.S. operations, as it does elsewhere in the world. . . . The UAW and VW fashioned a framework agreement looking toward the establishment of a works council created by collective agreement were the UAW to become the employees’ collective bargaining representative.”).

<sup>45</sup> *Id.* at 188 (describing how officials in Tennessee issued objections to unionization which eventually led to a Board election for representation, which the union lost).

<sup>46</sup> *Electromation, Inc.*, 309 N.L.R.B. 990, 998 n.30 (1992) (“As Member Devaney notes in his concurrence, the ‘bargaining’ going on through the Action Committees was not between the employees and management. Rather, each committee contained supervisors or managers and the committee charged with compensation issues had its proposals evaluated by the Respondent’s controller before they were presented to the Respondent. Thus, the situation here put the Respondent in the position of sitting on both sides of the bargaining table with an ‘employee committee’ that it could dissolve as soon as its usefulness ended and to which it owed no duty to bargain in good faith.”).

occurred in the context of the Respondent's domination of these groups, this case is distinguishable from instances where an employer confers such benefits in the context of an amicable, arm's-length relationship with a legitimate representative organization.<sup>47</sup>

The concern over these types of organizations stems from those justified (at least previously) overriding fears that employers would interfere with employee abilities to organize and collectively bargain.<sup>48</sup> However, given what we know from other countries, these types of organizations, specifically works councils, can be established to allow meaningful representation by employees and for employees, without undue or troublesome interference on the part of employers.<sup>49</sup> However, as the law currently stands, works councils are not possible in the United States.<sup>50</sup>

### C. Problems in American Education

Teachers, like those in so many other professions, are protected in their labor rights by unions.<sup>51</sup> The origins of teacher unions go back over 150 years, and today there are two national teacher unions—the American Federation of Teachers and the National Education Association—along with many other state and local teacher unions.<sup>52</sup> Teacher unions represent an enormous number of educators, as teacher unions are one of the largest types of unions in the United States.<sup>53</sup>

Although teachers themselves are protected through relatively powerful teacher unions, the United States' education system is still encumbered by

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<sup>47</sup> *Id.* at 998 n.31.

<sup>48</sup> Tara Mahoney & Allison Drutchas, *Could Your Employee Participation Program Be Illegal? Two Laws You Should Know*, SHRM (June 9, 2016), <https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/could-your-employee-participation-program-be-illegal.aspx>.

<sup>49</sup> *Germany*, *supra* note 10.

<sup>50</sup> Little, *supra* note 7 (“The foundations of US labor law directly prohibit these forms of workplace representation, and the political will for implementing these policy changes is lacking on both sides.”).

<sup>51</sup> See Grace Chen, *Are Teachers Unions a Help or Hindrance to Public Education?*, PUB. SCH. REV. (May 18, 2022), <https://www.publicschoolreview.com/blog/are-teacher-unions-a-help-or-hindrance-to-public-education>.

<sup>52</sup> *Id.*

<sup>53</sup> Mike Antonucci, *New Numbers: The National Education Association and the American Federation of Teachers Now Represent 1 in 4 U.S. Union Members*, THE 74 (Mar. 17, 2021), <https://www.the74million.org/article/aft-nea-1-in-4-us-union-members>.

numerous faults and shortcomings.<sup>54</sup> These shortcomings are glaring; much has been written about them over the years as education has become a prevalent issue on the world stage and is seen as a metric by which countries can compare themselves against one another.<sup>55</sup> Unfortunately, the education shortcomings of the United States are quite substantial in comparison to other countries.<sup>56</sup> One of the most glaring issues is the treatment of teachers in the United States; teachers are not treated with the respect they deserve or given the resources they need to succeed, preventing them from helping American students succeed.<sup>57</sup> The problem the U.S. education system faces is that poor

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<sup>54</sup> See Matthew Lynch, *10 Reasons the U.S. Education System is Failing*, EDUC. WK. (Aug. 27, 2015), <https://www.edweek.org/leadership/opinion-10-reasons-the-u-s-education-system-is-failing/2015/08> (listing lack of parent involvement, school closings, overcrowding in schools, technology problems, stagnant school spending, and other problems as the most pressing issues the United States education system faces).

<sup>55</sup> Gabrielle Levy, *Rethinking Education in America: America's Schools Are Being Left Behind, But It Doesn't Have to Be This Way*, U.S. NEWS & WORLD REP. (Jul. 27, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-07-27/americas-schools-arent-working-for-americas-kids> (“About 100 years ago, America made secondary education in high school compulsory. That was almost unprecedented, a massive leap forward, and it drove a lot of our economic boom over the past 100 years. The problem is we haven't moved past that and we haven't adjusted the model. Obviously, the world is radically different from that time, but unfortunately education isn't much different. And you see other nations out-educating, out-investing, out-innovating us.”).

<sup>56</sup> *Id.* (“At no level – early childhood, K-12, higher ed – are we even in the top 10 internationally.”); see also Drew Desilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RSCH. CTR. (Feb. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science>.

<sup>57</sup> Levy, *supra* note 55 (“I just don't think we value teaching enough. We don't train teachers as professionals, we don't respect them as professionals, we don't compensate them as professionals. Great teachers should make a heck of a lot more money. Teachers that work in the hardest communities – the toughest environments, whether that's inner city-urban or rural-remote – should receive extra support and compensation for taking on those toughest of assignments. And we don't do any of that.”); see also Lauren Camera, *International Survey: U.S. Teachers Are Overworked, Feel Underappreciated*, U.S. NEWS & WORLD REP. (June 19, 2019, 5:00 AM), <https://www.usnews.com/news/education-news/articles/2019-06-19/international-survey-us-teachers-are-overworked-feel-underappreciated> (“Teachers in the U.S. work longer hours and spend more time during the school day teaching than teachers in other parts of the world. And while the majority are satisfied with their jobs, only a fraction believes American society values their profession. The top-line findings of the Teaching and Learning International Survey, an international study published Wednesday by the National Center for Education Statistics, showcase the grievances at the heart of the wave of educator unrest that's prompted strikes, protests and walkouts in nearly a dozen states and school districts across the U.S.”).

treatment of teachers leads to disappointing results for education in the classroom.<sup>58</sup>

### III. ARGUMENT

#### A. *What is the Goal?*

Works councils for teachers and educators could help remedy some of the problems that exist in the United States. One of the obstacles the United States faces with the education system is teachers' lack of power to effect change.<sup>59</sup> Works councils exist to give employees a voice that goes beyond that offered at the union level. Works councils allow employees to influence and tailor the management of their jobs, including the benefits and protections they receive. With more leverage in their workplace, teachers could be better equipped to solve the problems that plague the U.S. education system by enacting the best remedies for those issues. After all, teachers should know more about those issues than anyone else, except for the students.<sup>60</sup>

#### B. *The Obstacles and the Solutions*

##### i. *Amending the NLRA*

As already discussed, works councils are not consistent with the current U.S. labor law.<sup>61</sup> That means that either the wording of the NLRA or judicial interpretation of the statute needs to change. Unfortunately, it is extremely difficult to enact meaningful change in American politics.<sup>62</sup> Labor and employment law are no exception.

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<sup>58</sup> Levy, *supra* note 55 (“Teaching was always a really difficult profession, but I think the demands on educators have unquestionably gotten more challenging.”).

<sup>59</sup> Will Richardson, *Power and Change in Schools*, MOD. LEARNERS, <https://modern-learners.com/power-and-change> (last visited Dec. 30, 2022).

<sup>60</sup> The Learning Network, *What Students Are Saying About How to Improve American Education*, N.Y. TIMES (Dec. 22, 2019), <https://www.nytimes.com/2019/12/19/learning/what-students-are-saying-about-how-to-improve-american-education.html> (“We asked students to weigh in on these findings and to tell us their suggestions for how they would improve the American education system. Our prompt received nearly 300 comments. This was clearly a subject that many teenagers were passionate about. They offered a variety of suggestions on how they felt schools could be improved to better teach and prepare students for life after graduation.”).

<sup>61</sup> See Little, *supra* note 7.

<sup>62</sup> Drew DeSilver, *Congress Is Off to a Slow Start in 2021, Much as It Has Been in Recent Years*, PEW RSCH. CTR. (Aug. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/08/13/congress-is-off-to-a-slow-start-in-2021-much-as-it-has-been-in-previous-years>. But see Aditya Shastri, *Our Society Keeps Changing. Does the Law Change*

The statutory language that prevents the creation of works councils refers to employers dominating labor organizations.<sup>63</sup> The statute proscribes interference from employers with “any” labor organization, not just traditional unions.<sup>64</sup> Although works councils are distinct entities from unions, they are still labor organizations within the meaning of the statute.<sup>65</sup> Given the unambiguous statutory language, the most viable option for introducing works councils into U.S. labor law is through an amendment.

Fortunately, a massive overhaul of statutory language is likely not required. Although the statutory language noted is a major bar to the introduction of works councils, it is one of the only bars to the introduction of said councils into the American workforce. Instead of removing the “any” language from the statute, lawmakers could add a provision that states that proper works councils are not included in the statute’s scope. To add that provision effectively, works councils would need to be well-defined, which would require a significant amount of work given the broad range of works councils that exist in other parts of the world.<sup>66</sup> In Europe, works councils can be divided into four general groups:

1. Single channel of representation, with works councils being the sole representational structure for employees;
2. Single channel of representation, with trade unions being the sole employee representation body;
3. Dual channel of representation featuring both types of employee representation, but with works councils playing a stronger role[;] and
4. Dual channel of representation with trade union shop stewards playing a prominent role.<sup>67</sup>

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*Too?*, MEDIUM (May 20, 2019), <https://medium.com/@adityashastri/our-society-keeps-changing-does-the-law-change-too-e12f4071d4>.

<sup>63</sup> National Labor Relations Act, 29 U.S.C. § 158(a)(2) (“It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .”).

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

<sup>65</sup> See Little, *supra* note 7 (“The foundations of US labor law directly prohibit these forms of workplace representation . . .”).

<sup>66</sup> See Oesingmann, *supra* note 3, at 59 (“The threshold number of employees required to set up a works council differs from country to country. In Austria, Germany and Latvia the threshold is five employees, while other countries do not have a threshold at all (Czech Republic, Estonia, Portugal) or have a relatively high threshold of 100/101 employees (Norway, Belgium). In Italy, Luxembourg and Spain the threshold is between 10 and 20 employees, hence the majority of countries have set the threshold at 20/21 or 50/51 employees . . .”).

<sup>67</sup> See *id.* at 61.

Given the range of ways works councils are implemented throughout the world, U.S. legislators would likely need to compare U.S. labor law structures and functions with those of other countries to establish the best system of works councils for the United States. Legislators may even have to create a unique form of works councils for U.S. labor law, but the examples set by other countries could provide an invaluable and practical guide for how works councils could work in the United States.

*ii. Judicial Interpretation*

Although changing the statutory language is probably the easiest way to allow the creation of works councils in the United States, the judiciary could allow works councils through various interpretations of the statute as it currently stands. The statute prohibits employers from “dominat[ing] or interfer[ing] with the formation or administration” of labor organizations.<sup>68</sup> However, works councils and management have a symbiotic relationship, allowing employees to have a stronger voice regarding workplace matters and giving employers the opportunity to work directly with employees in formulating the specifics of employee jobs and bringing positive impacts to the company.<sup>69</sup> Courts could read the statutory language as not prohibiting works councils *per se*, instead just requiring that employers not dominate or interfere with the formation of the works councils in a way that impedes the employees’ abilities to fully exercise their rights through the works council.

Admittedly, the judicial re-interpretation approach requires a fair amount of judicial wizardry. It would be difficult to argue that employers do not “interfere” with works councils in either their formation or administration, given that the councils exist as an in-shop labor organization of employees who interact directly with management to effect collective bargaining goals.<sup>70</sup> However, this approach is not outside the realm of possibility, as there is a long history of judicial activism within the United States.<sup>71</sup> There are many views on the propriety of judicial activism within the United States, but it is difficult

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<sup>68</sup> National Labor Relations Act, 29 U.S.C. § 158(a)(2).

<sup>69</sup> See Oesingmann, *supra* note 3, at 62 (“[E]conomic theory suggests that works councils have positive economic effects on firms.”).

<sup>70</sup> See Little, *supra* note 7.

<sup>71</sup> See generally Elianna Spitzer, *What is Judicial Activism?*, THOUGHTCO. (June 22, 2020), <https://www.thoughtco.com/judicial-activism-definition-examples-4172436> (“Judicial activism describes how a judge approaches or is perceived to approach exercising judicial review. The term refers to scenarios in which a judge issues a ruling that overlooks legal precedents or past constitutional interpretations in favor of protecting individual rights and serving a broader social or political agenda.”).

not to concede that the practice has enabled the courts to send down some of the most influential and necessary opinions in U.S. jurisprudential history.<sup>72</sup>

Although not the preferred approach to implementing works councils in the United States, judicial re-interpretation of the NLRA to allow works councils, or other similar labor organizations, is possible. However, before any court would consider re-interpreting the NLRA to allow for works councils, the court would need to be fully convinced that works councils are beneficial to employees, able to exist without detrimental employer interference, and serve to create a better labor system.

#### IV. CONCLUSION

Works councils are a potential source of beneficial change in the American education system. To implement that change, the United States needs to examine how other countries utilize works councils and craft the best system for the United States. Further, U.S. labor law currently prohibits works councils, meaning any hope of works councils in the United States likely rests on statutory reform.

If the United States can implement works councils, these organizations could be key to solving many of the lingering problems in education. Works councils would also benefit other workplaces by giving more power and voice to the workers. Although works councils are not an immediate or quick solution to the many labor issues the United States currently faces, they are a possibility that could drastically change the American labor system for the better, at least in education.

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<sup>72</sup> *Id.* (“The Warren Court was the first Supreme Court bench to be called a judicial activist for its decisions. While Chief Justice Earl Warren presided over the court between 1953 and 1969, the court handed down some of the most famous legal decisions in U.S. history, including *Brown v. Board of Education*, . . . one of the most popular examples of judicial activism to come out of the Warren Court.”).