Striking! The Sources and Treatment Of
The Right to Strike in the United States and Europe

John Grunert
New York Law School
Class of 2012

This paper can be downloaded without charge from:
www.nyls.edu/capstones

Copyright 2012 by Author

THIS PROJECT IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT A
SUBSTITUTE FOR LEGAL ADVICE. BECAUSE THE LAW CHANGES QUICKLY,
WE CANNOT GUARANTEE THAT THE INFORMATION PROVIDED IN THIS
PROJECT WILL ALWAYS BE UP-TO-DATE OR CORRECT. IF YOU HAVE A
LEGAL PROBLEM, WE URGE YOU TO CONTACT AN ATTORNEY.
“The only thing workers have to bargain with is their skill or their labor. Denied the right to withhold it as a last resort, they become powerless. The strike is therefore not a breakdown of collective bargaining-it is the indispensable cornerstone of that process.” - Paul Clark, U.S. Labor Historian, 1989

“There is no right to strike against the public safety by anybody, anywhere, any time. ” - Calvin Coolidge, U.S. President, 1919

“The union miner cannot agree to the acceptance of a wage principle which will permit his annual earnings and his living standards to be determined by the hungriest unfortunates whom the non-union operators can employ.” - John L. Lewis, President Union Mine Workers of America, 1933

Le patron a besoin de toi, tu n'as pas besoin de lui. (The boss needs you, you don't need him.) - Graffiti from general strike in Paris, France, May, 1968

“The strike is inherently dangerous to the rich, and to the corporations who have brought this country to her knees, because it is the only defense the ordinary citizen has.” - Keith Olbermann, political commentator, 2011
I. **Overview** ................................................................. 3
   
   **Is There a Fundamental Human Right to Strike?** ............... 4
   
   **ILO Conventions** ................................................... 7
   
   **Sources of International Law** .................................. 13
   
   **Review of Historical Developments** .......................... 20
   
II. **History and Law of Striking in the United States** ........... 21
   
III. **The Right to Strike in Europe** ................................ 33
    
   **The Right to Strike in European National Law** .............. 35
   
   **History and Law of Striking in France** ........................ 36
   
   **The European Union and the Right to Strike** ............... 44
   
IV. **Proposals and Summation** ........................................ 49
    
   **Appendix: Quoted Treaty, Convention, Constitution, and Statute Provisions** 53
I. Overview

The act of striking is one of the most serious circumstances that an individual, company, union, or government can confront. As shown by the sample of quotes above, being the subject of strike action, encountering strikers in work or public, or going on strike oneself, often brings out the most powerful emotions in people, for or against such actions, and usually has powerful consequences for all involved. Why one decides to go on strike, how one reacts to being struck, and how a bystander responds to seeing such action, is usually the result of each party’s deep rooted economic interests, political beliefs, and own value system about how society should operate.

Of all involved, the decision to strike is most important for the individual worker who strikes his employer. Such a decision might risk a permanent loss of livelihood, ostracism by friends, family, co-workers, and the community, weeks or months of protesting and picketing outdoors, imposition of hardships upon one’s family, and even physical injury or death. For a company, being struck and the reactions thereto could risk long-term or permanent closure of the business, a decline in profitability, the loss of the workforce, fines and charges from government, the loss of customers, and a loss of positive public image. Likewise, Union leaders know they are risking the livelihoods of their members and members’ families, their own existence, and possible decertification, by endorsing a strike or calling a strike vote.

Two other actors who may not be directly involved, but who are arguably most instrumental in how a strike ends, are third party neutrals and the government, in all its various entities. Third parties who are at least initially neutral towards strike action can include similarly situated workers either unionized or not, consumers of the company’s product, and other companies, most often those in the struck company’s vertical supply chain. Similarly situated
workers may find that they are soon worse off themselves for having not supported the strikers, or that they themselves are terminated for showing such support even while the original strikers prevail. Customers might forego certain benefits and endure greater costs by not purchasing struck products and services. Customers could also face derision from family, friends, or the community by either honoring or crossing a picket line. Finally, elected politicians could lose or retain their offices based on how they respond to a strike, law enforcement could be criticized for failing to protect people, property, and civil rights on both sides, and mishandling of the strike could result in the government itself becoming the object of strikers and protestors.

This paper will seek to outline the hypotheticals and sets of interests discussed above, and how the various social actors identified contribute to the outcome of a strike, through action or inaction. The paper will begin by looking for sources to support a fundamental, or human, right to strike, at least in some circumstances, that goes beyond mere statutory or case law authority. The paper will then look at international treaty clauses on the right to strike and go through the history of striking and the legal regulation of it in the United States. Next, the paper will compare the American history and framework to that of France and then the European Union. The paper will conclude by proposing what factors should be included or excluded from the right to strike and possible future developments.

**Is There a Fundamental Human Right to Strike?**

The power of workers is rooted in their ability to supply, and more importantly deny, their labor to their employers. The ability of workers, through a union, to withhold their labor is the most powerful tool they have to obtain leverage over their employers. The ability of workers to wield such leverage enables them to make demands that redistribute power and wealth within
society. Because the act of striking is such a powerful tool, and sometimes the only tool available to workers, it is essential to their objectives that they be able to wield it against an employer without interference from politicians, courts, police, or other parties.

Although strike activity has decreased in frequency in the United States as union density has steadily declined, this is not the situation for much of the world.\(^1\) In some nations unionization is increasing rapidly and vigorous strike activity has been witnessed. One of the goals of this paper will be to compare these different trends and to demonstrate that labor unions are still a force, or even a growing force, in some parts of the world.\(^2\) Hopefully international successes for unions will eventually have some impact within the United States.

Possible sources of a right to strike are collective bargaining agreements, administrative regulations, case law, rulings of supreme courts, statutes, national constitutions, internationals treaties, International Labor Organization (ILO) conventions, and United Nations declarations or resolutions. These sources are listed roughly in order of the weakest to strongest source, and narrowest to broadest source, where such a right could be found. The source of the right to strike in a particular country often matters a great deal and usually corresponds to the power of organized labor and national sentiments about collective action. When the right to strike is from a contractual, regulatory, or statutory source, it is likely not to be framed as a right at all, but rather as a trade off or a privilege. In such cases the right, or privilege to strike, is not derived from any concept higher than the contract, regulation, or statute itself.

Conversely, in other national labor relations systems the right to strike has been awarded a higher status by being placed in a national constitution or in an international treaty. In such contexts, the right to strike is more likely to be stated as an affirmative right, rather than in terms

\(^1\) JOE BURNS, REVIVING THE STRIKE: HOW WORKING PEOPLE CAN REGAIN POWER AND TRANSFORM AMERICA 18 (2011).

of granting permission or a privilege to strike. Documents such as constitutions and international human rights covenants and treaties sometimes claim to derive power from a higher non-human authority or to assert fundamental truths about human beings and human society. In such cases, the rights inscribed within such documents are not purported to be created by the document or granted by its drafters, but instead to have been pre-existing and to have been discovered and clarified by the document and its drafters.

In establishing striking as a right, rather than a privilege in some circumstances, it is necessary to lay out the appropriate scope for that right and determine where it sits in the national labor law scheme. Scope refers to whether the right to strike covers only certain workers to the exclusion of others, such as private sector employees, public sector employees, agricultural workers, domestic employees, and part-time employees. Scope also refers to whether striking exists as a right only after a pre-condition triggers that right. Such a trigger could be a safety issue in the workplace, violence or illegal behavior by the employer, or the exhaustion of other remedies. Finally, scope refers to whether the right to strike covers only certain forms of work stoppages, while other forms remain banned. Forms of work stoppage include indefinite, durational, rotational, sick-out, intermittent, wild-cat, tools-down, go-slow, work-to-rule, sit-down, secondary, and general striking. In some nations certain forms of striking are constitutionally protected, while a slightly different form of striking, or the same action by a differently classified actor, or even the same action for a different reason, could result in termination and even arrest within the same nation.
ILO CONVENTIONS

The International Labour Organization (ILO) is a specialized agency within the United Nations that dates back to 1919. The ILO promulgates and monitors non-binding conventions and memoranda concerning international labor standards among its members, which is coextensive with UN membership. In its nearly 90 years the ILO has promulgated more than 180 conventions, some of which cover basic workers’ issues, such as forced labor, child labor, employment discrimination, and equal remuneration, while others cover more nuanced topics such as insurance for maritime workers and specific hours for coal miners. Among the ILO’s many conventions, ILO has identified eight as being ‘Core Conventions’ which it recommends all nations adopt, and which it considers binding on all nations even without ratification. The core eight deal with forced labor, freedom of association, the right to organize, the right to collective bargaining, equal remuneration, and child labor.

The purpose of the conventions is to establish international norms and minimum standards for labor relations and decent conditions at work. The ILO has no ability or mandate from the UN to enforce any of the conventions it promulgates, but rather relies on nations to comply voluntarily. In some cases negative fact-finding reports by the ILO can shame nations or corporations into changing their practices by putting pressure on them from the public or other nations. Conventions and recommendations are enacted by the ILO through the annual International Labor Conference at the ILO headquarters in Geneva, Switzerland. Each member nation sends four delegates to participate in the conference, two representing government, and

---

5 Id. at 55-56.
one each representing associations of unions and employers. The Conference delegates vote on whether to adopt or reject proposed conventions or other actions by the ILO. This tripartite system of government, unions, and employer attempts to set achievable goals by representing the various interests groups of each nation. The tripartite system is likely responsible for the vague and non-binding nature of many of the conventions, but any other approach would probably be viewed as too pro-union and would be unlikely to gain the consent of the other parties.6

Two essential bodies within the ILO, apart from the delegates of the International Labor Conference, are the Committee of Experts on the Application of Conventions and Recommendations, and the Committee on Freedom of Association. Both committees prepare annual reports on different subject matter of selected member nations. Each committee does a report on approximately one-third of the members each year, so that every nation is reported on once every three years. The Committee of Experts analyzes the legislation of each member state to determine if it is in compliance with the conventions that nation has ratified and then provides technical legal advice on how to achieve compliance. The Committee on Freedom of Association reports on actual breaches that it has uncovered or that have been reported to it by employers. The Committee on Freedom keeps track of actual instances of workers being fired for union activity, interference in organizing, and violence towards and arrests of strikers, picketers, and union leaders, among other breaches.7

Two of the eight core conventions are relevant to the right to strike, Convention 87 (C-87), on freedom of association and protection of the right to organize, and Convention 98 (C-98),

6 Id. at 53-54.
on the right to organize and collective bargaining.\(^8\) C-87 and C-98 have been adopted by more than 150 nations and are frequently invoked in many domestic labor law regimes. The United States is a notable exception, in having not ratified either convention, alongside India, China, Somalia, North Korea, Iran, Saudi Arabia, Afghanistan, and a very few others. However, although C-87 and C-98 are quite broad, they do not explicitly concern striking or lay out explicit guidelines on a right to strike, nor does any ILO convention.

C-87 was enacted in 1948 and its key provision states that, “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.” C-87 thus provides for freedom of association with the words “to join organizations of their own choosing.” This convention on freedom of association thus inherently bans the prohibition of worker associations, bans company-dominated unions, bans government-dominated unions, and bans workers from being forced to join any association to which they do not consent to be a part. C-87 aims to provide workers with a right to democracy within their own unions, the ability to change their union membership, and the ability to form or dissolve a union. There is no explicit right to engage in strike action in the convention, but the ILO and various nations have construed C-87 to grant the ability to strike indirectly. If workers are free to choose their own employee associations then they cannot be forced to remain in an association that refuses to call, or insists on calling, a strike against their will. A freely chosen worker association is assumed to have procedures within it allowing workers a strike vote, or the ability

---

to delegate the decision to union leaders freely. Although imperfect and indirect in language, in order for C-87’s explicit goals to be achieved, an underlying right to strike must be assumed.9

C-98 was enacted in 1949 and its first key provision states that, “Workers shall enjoy adequate protection against acts of anti-union discrimination,” and that such protection shall apply against acts that are intended to “(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.” This first part articulates a right to organize as distinct from a freedom to associate. Freedom of association is the right to be free of unwanted association and concerns the worker-representative and worker-government relationships. The right to organize concerns the worker-employer relationship and provides protections against discrimination based on union activity and membership.

The second key provision affirms that, “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.” This portion of C-98 recognizes the right to collective bargaining with the words, “voluntary negotiation … by means of collective agreements,” and identifies it as the preferred method of worker-employer relations. Building upon the right to join an association of one’s choice and the right to be free of discrimination and harassment for doing so, the right of such associations to be recognized by employers and governments and to

---

engage in meaningful negotiations follows. Even if all other rights discussed thus far were assured, they would be hollow if, for example, all union proposals were sent to mandatory arbitration by a government panel, with no ability of the union and company to bargain face to face on all relevant issues.

As in C-87, C-98 does not explicitly mention a right to strike or even the word “strike” at all. However, the ILO and various nations have interpreted it to provide for a right to strike, and within the international law field it is generally regarded as doing so. One does not have to read too deeply beneath the actual text of the convention to find that the rights and mechanisms it explicitly describes would be meaningless if not backed up by the power to strike. The convention calls for the voluntary negotiation of collective agreements, which would not be possible unless there was give and take and quid pro quo between each, and if each side had something to offer and something to take away. It is difficult to imagine what workers could possibly take away from employers, other than their labor, and thus negotiations must be backed by an inherent ability of the union to deprive the company of labor.

Although the right to strike is inferred from C-87 and C-98, the ILO, and likely any other national court, have not interpreted it as an absolute right. In most circumstances the right to strike is interpreted as a highly qualified or highly compromised right. C-87 and C-98 themselves contain provisions stating that the rights conferred by the conventions do not apply to the armed forces, police, or public servants. ILO conventions are generally construed as consenting to and supporting any and all policies of national labor law, which are not explicitly condemned or explicitly contrary to one of the core rights. As defined by the ILO, the right to strike is most appropriately viewed as a right of workers to respond to employer or government

10 Id.
threats to their core interests. Thus, the right is really a right to be free from a complete prohibition against striking with an ability to strike under limited circumstances, rather than a complete affirmative right to strike with only limited circumstances in which striking would not be allowed.\textsuperscript{11}

The ILO acknowledges that the right to strike exists under certain circumstances, or that once certain events have transpired, workers have an absolute right to strike in order to defend their interests. Under this concept, prohibitions on striking are permitted and to be expected, but a prohibition is not allowed if it “unduly restricts the right.”\textsuperscript{12} This can be viewed as a test of proportionality; if reasonable procedures are available to workers and if the employer is willing to use them, then unqualified striking is likely not warranted. For example, if a union alleges that a worker has been fired without just cause then perhaps a one-hour strike would be the appropriate response.

The key point is that the firing of the worker by the company triggers the right of the union to respond with the one-hour stoppage; if the worker had not been fired then the right would not exist at that point in time. The concept of “undue restriction on the right” comes into play where the pre-conditions to striking are too high or if the level of permissible activity is too low. In the fired worker situation, if only a one-minute strike in response to the firing were legal, then that would clearly be an undue restriction, even if the stoppage were for a total of one-minute. Undue restrictions on the form of legal pre-conditions exist, for example, if the union is

\textsuperscript{11} Id. at 14, 25.
required to give six months notice before any work stoppage, if the subject matter of the strike could only be wages, or if only 50% of the workforce could strike at a time.\footnote{Bernard Gernigon, Alberto Odero & Horacio Guido, \textit{ILO Principles Concerning the Right to Strike}, 137 \textit{INT’L LAB. REV.} at 17 (2000) \textit{available at} \url{http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf}.} \footnote{\textit{Id.} at 33-34.}

The numerous qualifications attached to the right to strike, even by the ILO, which is a relatively pro-worker institution, are due to a host of public policy, pragmatic, and maybe even moral reasons. These qualifications are in sharp contrast to the position of the ILO and many of its member nations on the right to freedom of association, the right to organize, and the right to collective bargaining. These rights are regarded as being nearly absolute in nature and the ILO strictly criticizes any infringement of them. The reason these rights are regarded differently from the right to strike is mainly because joining a union or bargaining with a company primarily affects only the workers and employer. These parties affirmatively participated in the process and knew the risks when they applied for the job or opened the business.

Striking on the other hand has a great possibility of placing hardships upon third parties who may have little or no power to influence the causes of the strike or to bring an end to it. The many restrictions on striking are ostensibly put in place to protect the public or the welfare of the nation. In reality, the restrictions are likely to be based on a combination of legitimate concerns, and an institutional and class-based desire of governments and courts to protect corporate and property rights at the expense of the strikers.\footnote{Id. at 33-34.}
**Sources of International Law**

Looking beyond the ILO, the right to strike is found in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966.\(^\text{15}\) The ICESCR is a treaty adopted by the United Nations General Assembly and ratified by nearly every UN member nation. Like conventions 87 and 98, only a small number of nations have not ratified it, including the United States, South Africa, Saudi Arabia, and Burma. The ICESCR provides for a wide array of human rights such as the right of peoples to self-determination, a right to adequate food, clothing, and housing, and a right to participate in the civil society of a nation. The drafters of the covenant considered the right to strike to be so important that they placed it among these other extremely basic rights. The language on striking is found in Article 8 of the covenant, which states in part, “The States Parties to the present Covenant undertake to ensure: … (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.” Besides acknowledging that the right exists, the covenant does little to further the right because, the exception to it, that it be “exercised in conformity with the laws of the particular country,” is so vast as to make the right basically empty.

The treaties of the Council of Europe are another trans-national source providing for the right to strike. The Council of Europe is an international organization originally formed by ten Western European nations pursuant to the Treaty of London in 1949. The Council of Europe now includes forty-seven nations and has expanded beyond Europe and across Eurasia to include Russia and Turkey among other nations. The Council of Europe was formed in post-war Europe in order to promote human rights, the development of democracy, and to avoid a repetition of the

crimes of World War II.\textsuperscript{16} The key component of the Council is the European Convention on Human Rights (ECHR), which prohibits torture and slavery and guarantees freedom of expression and association, among other prohibitions and guarantees. The European Court of Human Rights (ECtHR), based in Strasbourg, France, is tasked with enforcing the Convention.\textsuperscript{17} The Council of Europe and its apparatus of treaties, committees, and the ECtHR is an entirely separate system from the European Union (EU) and its principle court, the European Court of Justice (ECJ). The Council of Europe has been formed by a series of treaties since 1949 and is concerned almost exclusively with human rights. The European Union, formed by the Treaty of Rome in 1957 and subsequent treaties, is a much larger organization. The EU is primarily concerned with European economic integration and human rights issues are only one part of its proto-government structure. Membership in the Council of Europe and EU are independent conditions, and as noted the Council includes forty-seven nations, while the EU currently includes only twenty-seven.

The European Convention on Human Rights, signed in Rome in 1950, deals with the freedoms of assembly and association in Article 11. The Article states in part:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.\textsuperscript{18}

In two recent cases the ECtHR has broken new ground in its interpretation of Article 11 and has

\textsuperscript{17} General Information on the Court, EUROPEAN COURT OF HUMAN RIGHTS, http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/.
greatly strengthened the right of association, the right to collective bargaining, and the right to strike. In 2008 the Court released its decision in the case of Demir and Baykara v. Turkey.\footnote{Demir and Baykara v. Turkey, 1345 Eur. Ct. H.R. (2008), available at http://www.bailii.org/eu/cases/ECHR/2008/1345.html; Enerji Yapi-Yol Sen v. Turkey, 2251 Eur. Ct. H.R. (2009), available at http://www.bailii.org/eu/cases/ECHR/2009/2251.html.} Vemal Demir and Vı căn Baykara were a member and president respectively of a union of Turkish civil servants. In 1993 their union entered into a collective bargaining agreement with an administrative agency of the Turkish government, but that agency then failed to follow the provisions of the contract. The union brought suit in a Turkish court to have the contract enforced, but the court ruled that public employees did not have a right to collective bargaining and the contract was thus unenforceable. The union then appealed its case to the ECtHR in Strasbourg claiming that Turkey was violating Article 11 of the ECHR.

Reading Article 11, the Court held that the right to engage in collective bargaining was an essential element of the right to form and join a trade union and thus Turkey had violated the ECHR. At the time the public sector union was formed in Turkey in 1993, public employees had the right to join together in associations, but did not have the right to engage in collective bargaining afterwards. Collective bargaining for public employees was only a privilege at the time, and thus could be denied. The Court ruled that the restrictive language in Article 11 on the rights of association must be interpreted narrowly or strictly, and that Turkey had failed to explain why a blanket ban on the right of public employees to engage in collective bargaining was necessary. Additionally, the Court noted that Turkey had ratified ILO Convention 98 on the right to organize and bargain collectively, and that the public employees at issue were not in the group of essential service-providing public employees excluded from coverage by C-98. Although this case did not involve strike action factually or in the legal analysis, the significance is that the Court ruled that freedom of association to join a union could not exist without the
attendant right to collective bargaining. Thus, it was only a small intuitive leap for the court to find in its next relevant case that collective bargaining cannot occur unless the union is able to use collective industrial action, i.e. striking, to bring pressure to the bargaining table and to overcome impasse.

The Court made this leap in its 2009 decision, Enerji Yapi-Yol Sen v. Turkey. Enerji Yapi-Yol Sen is a union of public sector employees in the Turkish capital of Ankara. In 1996 a federation of Turkish unions announced that there would be a national one-day strike protesting how certain collective bargaining agreements would be implemented. Prior to the strike, notices were put up at the workplaces of public employees in Ankara informing them that they may not participate in the strike. Regardless, a number of public employees participated in the strike and were afterwards disciplined. The union brought suit in Turkey to protest the disciplines, but a Turkish court dismissed it, and the union appealed to the ECtHR.

In building upon Demir and Baykara v. Turkey, the Court held that the right to join a union under Article 11 should be interpreted broadly, and that the restrictions on the right within Article 11 should be interpreted narrowly. The Court found that a blanket ban on the right of all public sector employees to strike could not be justified, although certain public employees could be banned under certain conditions, presumably firefighters, police officers, and similar emergency responders. The Court stated that the disciplinary action was, “capable of discouraging trade union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members’ interests,” and therefore the discipline amounted to a threat against the rights guaranteed under Article 11. The

---

22 Id.
Court further explained that the ban on striking was not justified by a “pressing social need” and thus the Turkish government had failed to justify the need for such a restriction in an otherwise democratic society. The Court went on to state, “The terms of the Convention require that the law should allow trade unions, in any manner not contrary to article 11, to act in defense of their members’ interests … Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members’ interests.”

Going forward, it is clear that after the Demir and Baykara and Enerji Yapi-Yol Sen the ECtHR will scrutinize restrictions on the right to collective bargaining and the right to strike and that the burden to uphold such bans will be placed on the government. The Court has now made clear that the right to collective bargaining is inherent in the right to form and join labor unions, and that the right to strike is inherent in the right to collective bargaining. Regarding collective bargaining, it is not clear if the Court would ever permit a complete ban for a category of employees, whereas regarding striking the Court has stated there is no absolute right, but that infringements are to be narrow.

Thus far under the Council of Europe, Article 11 of the ECHR has been discussed, but this is not the only treaty created and ratified by the member nations of the Council. The ECHR of 1950 mainly concerned protecting individuals from intrusions by the state, but in subsequent treaties the Council became more ambitious and laid out a greater number of positive rights, i.e. protections and services that nations must provide to individual citizens. Therefore, various economic and political rights such as health, social security, and welfare, beyond basic human rights, were enshrined in the European Social Charter (ESC) of 1961, and expanded in a revision

in 1999. The European Social Charter states in Article 6 of the 1961 version that, “with a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake … to promote and recognize … (4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”

However, the Social Charter then goes on to include qualifying language in Article 31 and in the Appendix by stating that each nation may, “regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right be justified [by only those restrictions] … necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.” The European Social Charter was the first international treaty to explicitly recognize the right to strike. Although the ECHR preceded the Charter in 1950, the right to strike in the EHCR was only implicitly derived from the Charter in 2009.

Members of the Council of Europe submit periodic reports to the European Committee of Social Rights (ECSR), which determines if they are in compliance with the Social Charter and is a source of advisory legal opinions in addition to the ECtHR. The Council of Europe has never defined what constitutes a strike in relation to Article 6(4) of the Charter, despite being charged with protecting the right to engage in it. Instead the ECSR has rebuked nations for too greatly restricting strike activity and effectiveness by restricting the purposes for which a strike can be called, restricting the right to strike to trade unions, imposing overly restrictive procedural

---

requirements, and for adopting an excessively wide range of essential public sector occupations that may not strike.\textsuperscript{28} Instead of defining a strict line of what is an acceptable restriction of strike activity and telling nations where that line is, the ECSR seems instead only to inform nations when the line has been crossed. This flexible approach may be best because the factual situation of each strike, discipline imposed by employers, court and police response, and wording of each national statute, may be too varied to impose a single definition.

Various criticisms that the ECSR has leveled at member nations of the Council include those towards the United Kingdom, where a British law requiring unions to give notice to employers before holding a strike ballot was viewed as an excessive procedural mandate.\textsuperscript{29} In 2004 and 2006 the Committee criticized Germany for prohibiting all strikes for which the completing of a collective bargaining agreement is not the ultimate goal and for a policy that permits only unions to call strikes, thus forbidding workers who are not already unionized from striking.\textsuperscript{30} Meanwhile, reports on France from the 2000s found almost no breach of Article 6(4) by any French labor policy.\textsuperscript{31}

The Council of Europe’s recent expansive endorsements of the right to strike have possibly set it at odds with recent rulings from the European Union’s European Court of Justice. The ECtHR’s decisions have found that the right to strike can only be restrained by a “pressing social need,” a high burden, while the ECJ’s decisions have found that strike activity can be restrained if it interferes with the exercise of nearly any other right, such as property, transportation, work, or establishment. These developments and conflicting rulings will be viewed in greater detail in discussion of the European Union below.

\textsuperscript{28}Id.
\textsuperscript{29}Id. at 106-107.
\textsuperscript{30}Id. at 62-63.
\textsuperscript{31}Id. at 49-50.
**REVIEW OF HISTORICAL DEVELOPMENTS**

Despite the largely hortatory nature of the language in most international treaties and the lack of enforcement of the ILO conventions, the evolution of the right to strike in the longer term is largely positive. In the late nineteenth century strike activity received no protection in almost every country, and was considered criminally punishable by fines and imprisonment in nearly every country. Striking continued to be criminal in many countries until the middle of the twentieth century. Therefore, the fact that the ICESCR contains even aspirational language about the right and was ratified by more than 150 countries can be viewed as a major development and global policy shift towards protecting striking. Likewise, more than 120 countries have ratified C-87, C-98, or both, and many of these nations consider their language to be self-executing and have written them directly into domestic law.\(^{32}\)

Today, even the nations that have not ratified the conventions at least claim to follow their principles, and no nation claims that violation of the conventions is permissible or desirable. Even the committees and delegates of employer representatives at the ILO have admitted that a right to strike, “could perhaps be acknowledged as an integral part of international common law and, as such, it should not be totally banned or authorized only under excessively restrictive conditions.”\(^{33}\) In 1998 the Committee of Experts released observations on the progress of the 122 nations that had ratified C-87 at that time. Of those 122, the report concerned only 49 countries at all, and many of the countries that were named involved only minor aspects of non-

---


compliance. This indicates nearly a complete positive turnaround in statistics since C-87 and C-98 were first enacted in 1948 and 1949 respectively. Changes in legislation, however, are not necessarily reflected in how strikes are actually conducted, or how law enforcement and courts respond to such actions.

II. HISTORY AND LAW OF STRIKING IN THE UNITED STATES

The history of striking and the legal methods adopted to deal with it can be traced back to the last third of the nineteenth century in the United States. Before the 1860s and 1870s few strikes of any serious magnitude occurred in the United States, but then increased rapidly during industrialization in the years after the American Civil War. In the late 1800s labor law did not exist as a separate category of law at the federal level and was instead viewed in the contexts of contract, tort, criminal, and constitutional law. Common charges and tactics used by employers against strikers were suing them for the tort of intentional infliction of economic harm, or obtaining court injunctions against disturbing the peace, congregating near the employer’s property, or against blocking replacements, managers, or deliveries from reaching the property. Courts and employers rarely, if ever, recognized unions as legal entities and instead brought charges against workers individually or as part of a conspiracy.

While employers found some relief against strikers through lawsuits, they also sought a mechanism for preventing strikes in the first place. This opportunity was found in the Sherman Antitrust Act of 1890, which was misapplied to labor unions to deny them the right to strike under the Act’s prohibition against conspiracies in restraint of trade. Among other things, the Sherman Act introduced treble damages and empowered courts to issue injunctive relief. In one

34 Id. at 57-58.
of the first tests of the new Act, in 1908, the Supreme Court ruled in *Loewe v. Lawlor* that the Hatters’ Union had engaged in an illegal strike. 37 Specifically, it found that a secondary boycott in illegal restraint of trade was on against D. E. Loewe & Company after the company had declared itself an “open shop.” Finding a violation of the Sherman Act, the Court awarded the company $300,000 in treble damages from the workers.

Congress responded to the perceived over-reaching of the Sherman Act by enacting the Clayton Act in 1914, which limited the jurisdiction of federal courts to intervene on behalf of an employer that was the target of a union organizing campaign or involved in any other labor dispute. The Clayton Act was largely unsuccessful, however, especially following the Supreme Court’s 1921 ruling in *Duplex Printing Press*, which reaffirmed *Loewe*. 38 Justice Brandeis issued a vigorous dissent to the opinion, which authorized injunctions for aggressive union tactics designed to “obstruct and destroy” commerce. 39

Following World War I the railroad industry became one of the most highly unionized industries in the country and contained a number of militant unions. Because strikes in the railroad industry had an ability to disrupt so much of the economy, Congress sought to regulate disputes there, while still maintaining its traditional laissez-faire policy toward worker-employer relations in other industries. 40 The Railway Labor Act (RLA) was passed in 1926 and established mandatory steps of mediation and arbitration before a federal panel, instead of allowing either side to use economic weapons. 41 The RLA singles out railroads, and later airlines, for a different set of rights than those applying to other workers, on a somewhat arbitrary basis. While railroads and airlines may be seen as “vital sectors” of the economy,

39 *Id.* at 460.
trucks and buses, food production, and electric and water utilities are also “vital” in many ways, and yet have not been singled out by any act of legislation. Thus, the railroad workers may have been singled out simply for the early successes of their strikes, a distinction which may be of little importance decades later.

The Supreme Court noted the relationship between the RLA and a right to strike in *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.* The Court stated, “Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—“the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.”

As the stock market crashed in 1929 and the Great Depression deepened in the early 1930s, the time had come to attempt to build a comprehensive federal labor law system in the United States. Congress had an opportunity to develop an industrial and labor relations system on a mostly blank slate and thus the 1930s were a pivotal point during which American labor law could have gone in almost any direction. During this decade, many labor systems were adopted that largely remain in place today. The United States had a choice of adopting systems similar to those that exist today in Europe and Latin America, but instead chose a different path.

The first development came in 1932, when Congress passed the Norris-LaGuardia Act (NLA), named for its sponsors, Representative Fiorello LaGuardia of New York and Senator George Norris of Nebraska. The Norris-LaGuardia Act, also called the Anti-Injunction Act, expressly limited the circumstances under which a federal court could issue an injunction in connection with a labor dispute, limited the circumstances under which labor unions and their

---


43 *Id.* at 378-379.
officials could be held liable for the actions of others, and provided procedural protections for persons charged with contempt in connection with a labor dispute.\textsuperscript{44}

While the NLA addressed an acute problem—excessive injunctions—President Franklin D. Roosevelt and the large Democratic majority in Congress made the first effort to wholly regulate industrial relations with the National Industrial Recovery Act (NIRA) in 1933. Section 7(a) contained the core provisions concerning newly granted workers’ rights and the first federal endorsement of the right to unionization. It stated, in relevant part, “employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and that, “employers shall comply with the maximum hours of labor, minimum rates of pay, and, other conditions of employment, approved or prescribed by the President.” NIRA initially had only a minimal administrative body, but a National Labor Board (NLB) was soon established, although it had no enforcement powers without judicial or executive orders.\textsuperscript{45}

Those empowering and inspirational words of Section 7(a), that “employees shall have the right to organize … [and to] be free from interference … for the purpose of collective bargaining or other mutual aid or protection,” is what workers and the labor movement had strived towards for decades. The text of NIRA does not mention the word strike explicitly and gives no minimum or maximum bounds for striking. The rights the Act does provide, to organize, to be free from interference, and to bargain collectively, can lead to only one

\textsuperscript{44} NELSON LICHTENSTEIN, STATE OF THE UNION 64 (2002).
reasonable conclusion: that they are backed by a right to strike and as a practical matter cannot exist without striking or threat of striking.

Whether intended or not, the year following the NIRA’s passage, 1933 into 1934, saw possibly the largest unionization drive, and one of the largest strike waves in American history. The majority of these were “recognition strikes,” in which workers struck for formal recognition of their unions, and a large number of them were successful.\textsuperscript{46} During this time there was a general unawareness on all sides—union, employer, and government—of how much power they themselves wielded in law and reality. The course on which the NIRA might have taken labor, and body of labor law that might have developed under the NIRA, was cut down abruptly when the Supreme Court ruled the NIRA unconstitutional in \textit{Schechter Poultry Corp. v. United States} in 1935.\textsuperscript{47}

Less than two months after NIRA was struck down, President Roosevelt signed the National Labor Relations Act (NLRA), also known as the Wagner Act after New York Senator Robert F. Wagner, into law.\textsuperscript{48} The Act built on many of the ideas of NIRA, but improved it by creating a more concrete enforcement agency, the National Labor Relations Board (NLRB), with clearer duties and prosecution powers. The key rights are stated in Section 7, which reads in part, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” As in the NIRA, the right to strike conceptually underlines Section 7 and the words, “to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection,” can be read to encompass strike activity. Employers tried to have the NLRA struck down, but it was famously upheld in National Labor Relations Board v. Jones & Loughlin Steel Corporation in 1937.49

During World War II the country’s two labor federations, the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO), executed a tripartite pact with employers associations and the federal government to agree to no strikes for the duration of the war. In exchange the President Roosevelt established the War Labor Board (WLB), which would issue binding arbitrations on wages, hours, and other grievances brought to it by the unions or employers.50 Such an arrangement is likely consistent with ILO definitions of the right to strike under C-87 and C-98, although they were not yet in existence during World War II. The Committee on Freedom of Association concedes that a general prohibition on strikes can be justified “in the event of an acute national emergency.” The Committee of Experts’ position is that a prohibition is justified in times of genuine and serious conflict when the normal conditions for the functioning of society are absent.51

Immediately following the war, the United States was hit by the largest strike wave in its history in late 1945 and early 1946. In many cases these were spontaneous wildcat strikes that demanded higher wages, pensions, and other conditions that workers had not been able to achieve under the strike prohibition of the WLB. Events came to a dramatic head in the spring of 1946 as the automobile, steel, coal, and railroad industries faced nationwide strikes.52 When railroad workers rejected a proposed settlement, the federal government became involved at its

52 James Gray Pope, How American Workers Lost the Right to Strike, 103 MICH. L. REV. 518, 533-534 (2004); see also JEREMY BRECHER, STRIKE! 246-248 (1997).
own behest and that of the railroad companies. President Harry Truman first threatened to nationalize the railroads and direct the military to operate them to break the strike. When that deadline passed without success he vowed to nationalize the railroads and draft the strikers into the military and force them to operate the trains; the unions capitulated.\textsuperscript{53}

The post-war strike wave frightened employers and the public into believing that labor had become too powerful, and that strikes in particular were causing too much disruption in daily life, transportation, and national defense. Therefore, in 1947 a new Republican controlled Congress passed the Labor Management Relations Act (LMRA), or the Taft-Hartley Act, over President Truman’s veto.\textsuperscript{54} The main effects of LMRA were to add a section of unfair labor practices applying to unions, in addition to those applying to employers under the NLRA, and to implicitly or explicitly endorse Supreme Court decisions on labor up to that time. The LMRA remains the dominant source of labor legislation in the private sector today.

Legislation addressing the collective rights of federal employees, or lack thereof, finally came with the passage of the Civil Service Reform Act (CSRA) of 1978. Section 7116(b)(7) of the Act states that, “it shall be an unfair labor practice for a labor organization … to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations.”\textsuperscript{55} Instead of permitting either side to resort to the use of economic weapons, the CSRA imposes a system of mandatory mediation steps and binding arbitration on the parties once impasse has been reached. On the state and local level, public employees are governed by separate legislation in each state, but which almost always bans striking.

The ILO’s C-87 and C-98 carve out broad exceptions to the right to strike for public sector employees and for some categories of employees a total prohibition is permitted. Both conventions state that whether the rights therein, “shall apply to the armed forces and the police shall be determined by national laws or regulations.” C-87, guaranteeing freedom of association states that it applies to, “workers and employers, without distinction whatsoever.” Thus, the view of the ILO is that all workers, except police and military, can at least associate in organizations, even if they are severely restricted in actions after association. C-98, on the right to collective bargaining, states that it, “does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.” C-98 thus asserts that it remains silent on the issue of public sector striking, but that such silence should not be construed so as to permit a total prohibition on striking, except for police and military.

The Committee of Experts has subsequently stated that the definition of who is a public servant should be interpreted narrowly and limited to those who, “exercise authority in the name of the state.” The Committee also explicitly noted that the education sector and state-owned enterprises, perhaps inclusive of Amtrak in the United States, should never be counted as public servants exercising authority in the name of the state.56 Thus, total prohibition on collective bargaining and striking for many state level public servants in the United States, including the education sector, is clearly a violation of internationally recognized norms. The CSRA of 1978 is largely compatible with C-87 as it allows for association, and with C-98 to the degree that it encourages collective bargaining. However, always implicit in C-98 is an underlying right to

some form of work stoppage if mediation or arbitration is unavailable or incapable of providing the relief sought.

Now, a return must be made to the 1930s and 1940s, the formative years of American labor law, to assess the major definitions and doctrines regarding striking. The Taft-Hartley Act of 1947 defines a strike as follows: “The term ‘strike’ includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.” Section 13 of the Taft-Hartley Act states the following: “[Right to strike preserved] Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.” However, diminishing the right to strike is precisely what the Supreme Court has done and any real protections for the use of economic weapons against employers has been gutted by the Court and the Board.

The seminal United States Supreme Court ruling on the rights of strikers is the 1938 case, NLRB v. MacKay Radio & Telegraph Company. On October 5, 1935 the American Radio Telegraphists Association union (ARTA) decided to strike when negotiations over wages with the MacKay Company broke down. Support for the strike at the San Francisco plant was near one hundred percent, but in other cities the workers did not walk out, or did so only briefly. The company brought in non-striking workers from other cities to replace the strikers in San Francisco. By October 8, the strike had failed and the union offered to return to work unconditionally. However, the company refused to take back those employees who had been permanently replaced. The union filed a charge with the NLRB claiming that the most ardent

union supporters were the ones permanently replaced and thus an unfair labor practice had occurred. 60

The case was taken to the Ninth Circuit, which ruled against the NLRB, and then appealed to the Supreme Court. In a unanimous decision the Supreme Court held that the strikers were still employees under the Act, but that the employer had not committed an unfair labor practice by hiring strikebreakers. In explaining its position the Court wrote, “it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.” 61

However, the strikers at MacKay were ordered reinstated because the Court found that the company had committed an unfair labor practice by selecting not to reinstate only the strongest union supporters. Therefore, after MacKay and continuing to the present, employers are free to replace employees permanently who strike over economic conditions, even though such strikers are still defined as employees. Meanwhile, workers who strike in protest of unfair labor practices can only be temporarily replaced and must be reinstated at the conclusion of the labor dispute. Dangerously for strikers, it is often unclear at the beginning of a labor dispute if the NLRB and courts will determine the underlying nature of the strike to be economic or an unfair labor practice. 62

At the time of the Supreme Court’s decision, the Court drew upon nascent Board law, which was not necessarily more favorable to unions and had not classified the hiring of strikebreakers as an unfair labor practice. If the issue had remained at the Board level instead of

60 LABOR LAW STORIES 21-22 (Laura J. Cooper & Catherine L. Fisk eds., 2005),
62 LABOR LAW STORIES 21-22 (Laura J. Cooper & Catherine L. Fisk eds., 2005),
reaching the Supreme Court so soon after the creation of the NLRB it is possible that a different view would have prevailed. One of the original Board members, Edwin S. Smith, wrote a memorandum to his colleagues in 1936, pre-MacKay, on his view against the permanent replacement of economic strikers. Smith wrote, “When strikers have declared their willingness to return to work on the employer’s own terms, the utility of the strike breaker to the employer has ended. As a toll the strike breaker can be discarded- as an employee, dismissed.” The majority of the Board never adopted this position.

The next most troubling aspect of American strike law is Section 158(b)(4)(B) of the Act which bans secondary or solidarity strikes. It states that it is an unfair labor practice for a union:

[to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [with the object therefore to stop] … (B) … dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.]

This provision strips strikers of protection if they strike against any entity other than their direct employer and therefore seriously undermines the amount of economic pressure that unions can place on an employer. Thus employees who sympathize with the striking employees of another company, with whom their own employer does business, are unable to launch a protected strike in order to induce their own employer to break ties with the struck business. Unless struck employers also face a cutoff in their vertical supply chains, delivery, and transportation, they are often able to continue operations with minimal impact by replacing strikers with managers and strikebreakers. This provision of the Act raises serious concerns with C-87, C-98, and established norms in most European countries.

63 Id.
The draconian restrictions imposed on strikers in the United States has undermined any real collective bargaining, tempted employers to encourage strikes in hope of breaking the union, and has lead to the near extinction of the practice of striking. In 1952 there were 470 major strikes—those involving more than 1,000 workers each—involving 2,476,000 workers in total. In 2008 there were only 15 major work stoppages involving a mere 72,000 workers. Today, the duration of strikes is also much shorter—in 1952 49 million work days were lost to strikes, compared to a mere 2 million in 2008.65 The end of the successful strike means lower unionization, lower wages, and less generous collective bargaining agreements, but also an absence of democracy in both the workplace and civil society. However, the situation is not entirely bleak across the Atlantic.

III. THE RIGHT TO STRIKE IN EUROPE

In selecting a specific region of the world in which to examine the right to strike, besides at the global level and in the United States, the best case study is Europe. Europe, including both member nations of the European Union (EU) and non-member nations,66 consists almost entirely of highly industrialized capitalist democracies with labor movements and labor law frameworks dating back to the late 1800s. The discussion of striking in Europe will first cover the individual nation-states, with an emphasis on France as a foil to the United States, and will then turn to treatment of the right at the supra-national level of the European Union. The right to strike at the national level will be examined first, as the nations themselves and the legal evolution of the right to strike have generally preexisted the creation of the EU and its consideration of the right

66 Reference to Europe for the purpose of examining the right to strike is inclusive of the twenty-seven members of the Europe Union, as well as the non-member nations of Croatia, Iceland, Norway, and Switzerland.
to strike. All European nations have ratified conventions 87 and 98, the ICESCR, and the Council of Europe treaties.67

The degree to which pan-European themes or trends can be discerned from the legal treatment of strikers and the actual occurrence and success of strikes is limited. Industrialization and the rise of labor organizations and strikes first occurred in northwestern Europe in the late eighteenth and early nineteenth centuries and then spread east and south across the continent. Many nations did not achieve either independence or democracy until after World War I, only to lose them again during the Cold War, not to be regained until the 1990s. Meanwhile other nations experienced an almost unbroken period of independence and democracy from the start of industrialization in the 1800s until the present.

Despite the manifest differences at the national level, at least two overall themes are present in Europe as a whole regarding the legacy of striking that sets it apart from the United States. First, industrialization in Europe was largely pioneered by governments and nationalized companies or partly government owned companies. In the United States, industrialization and the accumulation of wealth and power were largely the result of actions by private companies. Second, the legacy of government direction of the economy has been that the state sought to regulate labor-employer relations at an earlier date and to a greater extent in Europe than in the United States. The assertive role government played in labor policies led to greater strike demands being made against governments and especially higher instances of general strikes, as opposed to the United States where strike demands are usually limited to a single plant, company, or industry.

________

67 The 27 EU member states are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, Sweden, and the United Kingdom. Reference to Europe hereafter refers to the 31 nations named herein, other European nations are excluded for lack of data.
THE RIGHT TO STRIKE IN EUROPEAN NATIONAL LAW

As has been examined, the right to strike can be derived from a number of sources, including constitutions, statutes, case law, or collective bargaining agreements. In the twenty-seven member nations of the EU the right to strike is overwhelmingly derived from national constitutions. Twenty-one European nations explicitly confer the right to strike in their constitutions, while in two more nations, Finland and Germany, courts have interpreted a constitutional right to strike from a constitutionally guaranteed freedom of association. Only eight of the thirty-one nations examined—Austria, Belgium, the Czech Republic, Ireland, Luxembourg, Malta, the Netherlands, and the United Kingdom—have neither a direct nor indirect constitutional right to strike. In most European nations, regardless of the constitutional right to strike, a statutory right to strike exists, at least for private sector employees. Only four nations—Austria, Belgium, Luxembourg, and the Netherlands—have neither a constitutional nor a statutory right to strike; the remaining twenty-seven derive the right constitutionally or by statute.

The right to strike, as it is written into various different constitutions and statutes, is worded very differently in each instance and has a wide range of meanings across the European countries. Legislatures and courts have clarified and interpreted the usually limited constitutional texts, which are far from comprehensive, through statutes and case law, to create

68 The right to strike is explicitly constitutionally guaranteed in Bulgaria, Croatia, Cyprus, Denmark, Estonia, France, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, and Sweden.


far more comprehensive guidelines. These supplements, to whichever original document confers the right to strike, be it constitution or statute, typically place obvious restrictions on the right, which is never interpreted to be absolute. The most common supplementing texts limit the right to specific types of employees, permit striking only as a last resort after other remedies are exhausted, confer the right upon individuals or only upon labor unions, impose procedural or cause of action perquisites, and limit striking and picketing to only certain types of physical actions. In most nations the courts can declare certain strikes illegal after they begin or even after they have ended if the underlying cause of action is deemed improper, if the strikers used excessive methods, or if striking, picketing, or boycotting was directed at parties the courts have deemed neutral. Thus, when engaging in strike action, workers and unions generally need to concern themselves with four levels of law to make sure the strike is permissible and protected: constitutional doctrine; statutory law; court orders; and contract law with the struck employer.

**HISTORY AND LAW OF STRIKING IN FRANCE**

The right to strike has been constitutionalized in France and applies to all individuals rather than just labor unions. The current French constitution, the Constitution of France of 1958, reads in its preamble, “The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946.” In turn, the Constitution of 1946 reads:

> The people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic. They further proclaim, as being especially necessary to

---

72 1958 Const. Preamble (France).
our times, the political, economic and social principles enumerated below: … All men may defend their rights and interests through union action and may belong to the union of their choice. The right to strike shall be exercised within the framework of the laws governing it.\footnote{1946 CONST. Preamble (France).}

The constitutionalization of the right to strike has resulted in comparatively little legislation or regulation on the subject, the French Parliament and administrative agencies being unable to do so without amending the constitution. Instead, most guidance is found in case law. The Court of Cassation, France’s court of last resort, and the Constitutional Council, a French court hearing constitutional claims, have determined that the right to strike cannot be restricted by private agreements or by judicial order.\footnote{THE INST. OF EMP’T RIGHTS, The Right to Strike: A Comparative Perspective 33-35 (Arabella Stewart & Mark Bell eds., 2008), \url{http://www.ier.org.uk/system/files/The+Right+to+Strike+A+Comparative+Perspective.pdf}.} Thus, a “no-strike clause” cannot be negotiated into a collective bargaining agreement. However, these holdings do not apply to public sector employees or to all actions that may objectively be viewed as strike activity in the private sector.

The right to strike is strong in France overall, but two principles have been used to limit the right. First, the right to strike must be balanced against other rights found in the constitution. If strike activity is infringing on constitutional property rights, the right to work, or rights to social services, then courts will balance the rights against each other based on the factual situation and greater needs of the parties. Second, the constitution guarantees the right to strike, but does not explicitly define what strike. Thus, if certain individual or collective actions are classified as actions other than striking, then they are not protected. In certain instances, actions that employees may view as strikes or work stoppages of some form, could instead be viewed as being late for work or being away without leave—AWOL—by employers. Even with these current limitations, the rights of French workers have greatly improved over the decades.
Striking was banned as a criminal offense until 1864 and unions or workers’ coalitions were banned until 1884. Individuals and employers were seen as equal partners entering into employment agreements and attempts to alter that balance through striking or collective action was seen as contrary to the law of contracts. Even though striking was no longer criminally punished after 1864, it was not treated as a right and remained a tort, by which employers could bring civil claims against strikers. Not until France formed a new constitution under the Fourth Republic after World War II in 1946 was striking treated as a positive right. As quoted above, the current French Constitution of 1958 reached back and incorporated the right from the previous constitution into its preamble.

These developments in French labor law must be placed against the backdrop of industrialization in France from roughly 1850 onwards, and against the rise of labor movements of varying ideologies. One of the earliest and most violent incidents of strike activity was the Paris Commune Uprising of 1871. In the summer of 1871 the working class briefly took control of the city in the name of the workers until being crushed by the military resulting in tens of thousands of casualties. The event cannot properly be classified as a labor strike, as it involved not just the demands of workers against employers but involved much broader concerns of the lower classes, democracy, and poverty and took on a revolutionary or even civil war type nature. Nevertheless, the event cast an enormous shadow on history into the twentieth century and was certainly on the minds of American strikers and politicians in 1877 and well remembered at Haymarket in Chicago in 1886. In the remaining years of the nineteenth century and prior to

---

75 Id.; see also THE FORCE OF LABOUR 228 (Stefan Berger & David Broughton eds., 1995).
77 Id. at 27-28.
78 Id. at 28-29.
World War I, the French government occasionally sanctioned the use of the military on strikers and even opening fire into groups of strikers. Troops opened fired on miners in central France in 1901 and outside Paris in 1908.  

French workers achieved some of their earliest and most lasting gains immediately after World War I. Between 1919 and 1920 France was hit by waves of strikes that convulsed the entire Western world. These strikes were directed against both employers and government policy and succeeded in winning workers an eight-hour day, pension systems, and forms of collective bargaining. In the remainder of the 1920s and early 1930s, reforms for workers slowed or even halted as left wing political parties failed to obtain majorities in Parliament or capture the seat of Prime Minister. This occurred despite the large urban working class in France at the time, especially in Paris, the encircling suburbs dubbed the ‘Red Belt’ because they were so heavily Communist, Lyon, and in the northeastern coal regions. Leftist forces would likely have strengthened workers’ rights had they come into power, but were divided between Socialist and Communist factions and thus prevented each other from overcoming conservative opposition to greater unionization.

In 1936, in fear of the growing popularity of fascism in France, and neighboring Germany, the Socialists and Communists united to form the Popular Front and succeeded in electing Léon Blum, a Socialist, as Prime Minister. The knowledge of a friendly government in power, one that would not put down strikes with police or military, led to the largest strike wave in France up to that time in the summer of 1936. The Blum government entered into negotiations with the strikers and, perhaps fearing that a Communist revolution was imminent, agreed to vast concessions without employers’ associations participating in or even being present.

---

80 The Force of Labour 230 (Stefan Berger & David Broughton eds.,1995).
81 Id. at 226-227.
82 Id. at 229-231.
at the talks. These negotiations were formalized in the Matignon Agreement, which legalized the right to strike, removed all formal obstacles to unionization, created the forty-hour work week in addition to the existing eight-hour day, guaranteed two weeks paid vacation, and secured wage increases in the double digit percentiles.\footnote{Id.}

Once the strike wave passed, employers immediately sought to push back the Matignon Agreements and in 1937 Blum halted additional reforms to avoid further antagonizing employers. All these gains came to an end with German occupation in the north and the collaborationist fascist Vichy government in the south in 1940. The right to strike was suspended, the major labor unions were outlawed, and Socialist and Communist labor leaders were arrested or driven underground.\footnote{Id.} With liberation in 1944 and 1945 came the restoration of the Matignon Agreement and then the writing of a new constitution in 1946 to replace the old Third Republic, 1870-1940. The current right to strike is rooted in the constitutional preamble of 1946, as quoted above, and the case law that has developed since.

The greatest strike in French, or perhaps European or world history, was the general strike of May 1968. In the early spring of 1968 several leftist students were arrested and expelled from public universities and fellow students protested for their release. The government responded by closing several universities in and around Paris. Protests to reopen the universities mounted, and then in early May, eleven million workers struck, including sit-in striking, and stayed out of work for two weeks, nominally in support of the students but the real motivations remain unclear. Fearing revolution, President Charles de Gaulle fled the country, but then returned and the Grenelle Agreements were negotiated. The workers received massive

\footnote{Id.}
concessions from the government and employers, the minimum wage was raised 40%, all wages were raised 10%, and the retirement age was lowered.\textsuperscript{85}

In many regards the events of May 1968 do not offer an easy explanation. Unlike many other mass strikes in Europe and North America, which occurred in periods of depression or against unpopular government policies, it occurred in a developed democracy at the height of the Thirty Glorious Years of economic growth following World War II. From the events of 1968 one can conclude that French strike law, labor law, and democratic institutions were too restrictive for workers to properly express themselves, which resulted in massive violence, destruction of property, and police intervention. When denied effective legal outlets, people will eventually turn to extralegal methods. Conversely, one could also argue that the success of the 1936 strikes and the subsequent constitutionalization and protection of striking emboldened workers to use striking as a way to seek reform, instead of first utilizing collective bargaining or legislation. Striking may have been seen as a right of passage for a new post-war generation. Whatever the reason, the spirit of large-scale strikes, and general strikes in particular, have remained a cornerstone of worker and union activity in France. Perhaps the strongest conclusion that can be drawn is that creating a legal framework to regulate strikes and work stoppages is useless if enough people are willing to violate the law. Or perhaps, that too tight a regulation is itself illegal.

Despite the steady or even increasing use of general strikes, there has been a decrease in the overall number, size, and duration of strikes since the 1970s.\textsuperscript{86} Although what encourages an individual worker to strike is often unique, the underlying factors are likely the same as those that have decreased strike activity in almost the entire Western world: deindustrialization; the

\textsuperscript{85} Id. at 236-238.
\textsuperscript{86} THE FORCE OF LABOUR 211-212 (Stefan Berger & David Broughton eds., 1995).
development of a service economy; threats of plant closure and movement overseas; and a decrease in average plant size from thousands to hundreds to tens.\textsuperscript{87}

As noted earlier one source of exceptions or limitations on the right to strike, as guaranteed by the constitutions of 1946 and 1958, is when the exercise of that right interferes with the exercise of another constitutional right by another person. Therefore, sit-in strikes are not protected by the constitution and the courts are free to ban them, as they have. A sit-in strike prevents an employer from entering his building and using his equipment, thus interfering with his constitutional right to property. Likewise, a sit-in strike prevents an employer from assigning managers to do the struck work during the strike and also prevents other employees who do not wish to strike from working, thus interfering with the constitutional right to work of those individuals. The Court of Cassation held in 1984 that sit-in strikes are a, “manifestly illicit disturbance in particular when [they] seriously [impede] the freedom of work.”\textsuperscript{88} However, symbolic and momentary sit-ins are permitted where the absolute right to property and to work is not disrupted, such as just occupying a side hallway or only briefly at the start of the day or start of lunch. Similarly, picket lines are not protected if they damage goods or property or totally block access to managers, to those employees who do not wish to strike, or to third parties.

The other principle by which the right to strike has not been rendered total is through the judiciary’s control of defining the word “strike.” There is no definition of striking in the constitution or in any statute, instead an action is or is not a strike depending on whether it meets certain elements developed in case law. The Court of Cassation has defined striking through the use of both requirements and prohibitions. In order to be a strike the participants are required to be wage earners, that is, employees working for pay. Therefore, those who are self-employed,

\textsuperscript{87} \textit{The Force of Labour} 213 (Stefan Berger & David Broughton eds., 1995).
\textsuperscript{88} \textit{The Inst. of Emp’t Rights, The Right to Strike: A Comparative Perspective} 34 (Arabella Stewart & Mark Bell eds., 2008), \url{http://www.ier.org.uk/system/files/The+Right+to+Strike+A+Comparative+Perspective.pdf}. 
students, and independent contractors, are incapable of striking and are not afforded the constitutional protections. These groups can stop working and will receive no civil or criminal penalty from the state, but any such action would be legally classified as a demonstration, protest, resignation, or unpermitted absence rather than a labor strike.

For those who are wage earners and capable of legally striking, three elements must be established for the strike to be protected, or to be called a strike in the eyes of the French judiciary. First, the work stoppage must be total, but it can be for any period of time. For example, a complete stoppage, even if only for five minutes, or an intermittent or rotational strike, would be permitted. But, working slowly, providing poor service, turning out lower quality products, or working to rule are not protected as a strike because works continues. Second, the work stoppage must be collective. A single employee cannot strike and will be disciplined for doing so unless he is the only employee in the relevant unit or a union orders a strike but only one person walks out. Third, the work stoppage must be concerted. That is, at the time the workers walk out they must have the knowledge and intention that they are striking in order to coerce the employer into meeting a set of demands.  

Behind these elements, which are relatively easy to satisfy if there is genuine support for a strike, there are few requirements, either procedural or substantive. A strike can be initiated by either a union or an individual employee including non-unionized employees. Wildcat strikes are permissible and no official union strike ballot or instruction from union officials is necessary. Strikes can even be initiated over issues with which the employer does not have control if the demands of the workers are related to conditions of employment, “professional

---

89 Id. at 37-38.
90 Id.
demands” in France, such as pending legislation regarding pension schemes or the minimum wage.91

As has been conveyed in this brief analysis of French labor history and strike law, France has one of the most liberal cultural attitudes and legal stances towards striking of any country in the world. France has enshrined the right to strike in its constitution, has no concept of an illegal strike, and experiences national strikes on a not irregular basis. Whether or not striking objectively benefits French workers more often than not is unclear, but it has no doubt provided a public sense of empowerment and a reluctance to concede without a fight. Unlike in the United States, striking is not regarded as a rare and odd symbolic occurrence, but remains a real economic weapon and social force.

THE EUROPEAN UNION AND THE RIGHT TO STRIKE

The current European Union has its origins in the Treaty of Rome of 1957, since renamed the Treaty on the Functioning of the European Union (TFEU), which created the European Economic Community (EEC). The Treaty of Rome remained the dominant organ of the EEC until 1993, when the Maastricht Treaty, or Treaty on European Union (TEU), replaced it and when the EEC became just the EU. The Treaties of Amsterdam in 1997, Nice in 2001, and Lisbon in 2007, have subsequently amended the Maastricht Treaty. Article 153 of the TFEU specifically states that the European Union does not have competence, i.e. jurisdiction, to legislate on the right to strike.92 Article 153 reads, “the provisions of this Article [granting competencies to the EU on working and social matters] shall not apply to pay, the right of

91 Id. at 40–41.
association, the right to strike or the right to impose lockouts.”93 Through the TFEU and the TEU the twenty-seven member nations of the EU have transferred powers, or competencies, over various subject matters to the supranational legislature of the EU. Article 153 thus makes clear that jurisdiction over the right to strike is not among those transferred competencies. However, this only means that the legislature of the European Union, comprised of the European Parliament and the Council of the European Union, cannot pass any directives concerning the issue, the European Court of Justice still has jurisdiction to hear cases regarding the issue.94

Although Article 153 blocks EU competence on legislating on the right to strike, attempts to insert either binding or persuasive language into the EU recognizing a right to strike had persisted for many years. In 1989 at a summit in Strasbourg members of the EU proposed the Community Charter of the Fundamental Social Rights of Workers to be incorporated into EU law. The Community Charter included articles on the rights of freedom of association and collective bargaining, but the Charter never became legally binding because the United Kingdom would not allow it into any EU treaty.95 The proposed Charter provided, “the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.” As in the other sources, the right is established, but the specific conditions under which it can be invoked and limited, are again relegated to national law.96

94 Distinct from the Council of Europe, the Council of the European Union is the upper chamber of the bicameral legislature of the EU.
The United Kingdom later dropped its opposition when a new Labour Party government came to power in 1997. The Charter was later revised and renamed as the Charter of Fundamental Rights of the European Union and entered into force with the Lisbon Treaty in 2007, where the right to strike is now found in Article 28. However, even before 2007, European treaties, commissions, and courts frequently referenced the Charter as persuasive authority and as espousing the ideals of the European social model. Despite the limiting language from Article 153 of the TFEU, ECJ jurisdiction on the right of workers in the EU to strike exists because Article 28 of the Charter of Fundamental Rights of the EU guarantees it. The Charter of Fundamental Rights is not in conflict with Article 153 of the TFEU because the Charter has been directly ratified by the member nations and sets a minimum standard of rights. The TFEU restricts the EU from legislating standards on the right to strike above, below, or in any greater detail than found in the Charter. Article 28 states, “Workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.” The Charter is looked to, and has been looked to preceding even the Treaty of Lisbon, by the European Court of Justice as a source of fundamental rights, including the right to take collective action.

In recent years labor unions have invoked Article 28 of the Charter of Fundamental Rights of the EU before the ECJ in suits against employers and challenging government

---

retaliation against strike action. In 2008, the fundamental rights of workers in the European Union to take industrial action came directly before the European Court of Justice in *International Transport Workers Federation v. Viking Line ABP (Rosella).* A Finnish company, Viking Lines, operated a passenger ferry called the Rossella on a route across the Baltic Sea from Helsinki, Finland to Tallinn, Estonia. The crew of the Rossella were members of the Finnish Seamen's Union. In an attempt to reduce labor costs the company announced that it planned to reflag the vessel as Estonian, rather than Finnish, so that lower-wage Estonian laws and collective bargaining agreements would apply. The Finnish union objected to the change and appealed for help to the larger union confederation to which it belonged, International Transport Workers Federation (ITWF) based in London. The Finnish workers struck and set up pickets at Vikings’ operations in Finland and the ITWF instructed its affiliate unions Europe-wide not to negotiate with Viking and to hinder its business. Viking then brought suit in British court against the ITWF seeking an injunction to have it stop hindering its business elsewhere. The British court said that it could not issue the injunction because doing so would violate the workers’ right to collective action under EU law. Viking then appealed the case to the ECJ in Luxembourg.

The ECJ held that the right to strike was a fundamental right as stated in the Charter of Fundamental Rights of the EU, but that the exercise of the right to strike needs to be balanced against other fundamental rights in the Charter, TFEU, and TEU. The exercise of one right must not infringe on the exercise of another right. Unfortunately for the union and the Finnish workers, when the Court finished its balancing the right to strike seemed to be balanced into a nullity. The Court looked at the freedom of establishment within the EU and determined that it

---

outweighed the right to strike and therefore the unions, the United Kingdom, and Finland were violating Viking’s right to free establishment by allowing the strike to continue.

The freedom of establishment is the right of a EU company or EU individual to receive the same treatment in any of the twenty-seven EU nations as the company or individual would receive in its home nation. The founding principle of the European Union was to create a single integrated European economy and thus Viking should be permitted to base its operations in any EU nation without hindrance. The unions lost because they were attempting to isolate the Finnish labor market from the rest of Europe and to direct in which EU nations Viking should do business. The Court looked deeply into what it thought was the real motive of the unions, and thought it saw that they were not only trying to protect wages and employment conditions—legitimate goals—but that they were attempting to inhibit the free flow of business between two EU nations, an illegitimate goal. The Court concluded by outlining that the exact injunctive relief to be provided was up to the national courts of each country, but that the right to strike found in Article 28 of the Charter of Fundamental Rights of the EU does not protect strikers if their actions block a company’s exercise of the freedom of establishment.102 Unions across Europe were dismayed by the ECJ’s holding, believing that exceptions to the right of establishment should have been carved out to permit the exercise of political and social rights, namely collective actions and striking.

The ECJ’s subordination of the right to strike, as derived from Article 28 of the Charter of Fundamental Rights of the EU, to the right of establishment is in stark contrast to the ECtHR’s elevation of the right to strike as derived from Article 6(4) of the European Social Charter. As all twenty-seven nations of the European Union have subscribed through treaty ratification to the jurisdiction of both the ECJ in Luxembourg and the ECtHR in Strasbourg it is possible that a

102 Id. at 1058-1059.
nation will be faced with having to implement two different holdings. It remains to be seen if the differing tests developed by the two courts will ever come into direct conflict, but the results of *Demik and Baykara* and *Enerji Yapi-Yol Sen* on one hand, and *Viking* on the other, may already encourage forum shopping.

**IV. PROPOSALS AND SUMMATION**

Having examined United Nations, International Treaty, Council of Europe, United States, French, and European law treatments of the right to strike, this paper will now suggest what mechanisms and protections strikers should have at their disposal. If the proposals outlined below were to be adopted, the hope is that they would provide workers with the abilities to inflict real economic harm on their employers and to adequately express themselves against employers and governments in a democratic society. It is hoped that the following proposals are capable of ensuring workers’ rights and that they are reasonable enough to be accepted, or at least tolerated, by all primary social actors on the national stage: workers; unions; employer federations; political parties; and the judiciary, police, and military.

1) The right to strike should be constitutionally protected. Such protections should be explicit in the constitution, or interpreted from it by the highest court or reinforced through statute. Solely statutory or judicially divined protections are insufficient.

2) The act of striking, absent violence, destruction of property, or an independent tort, should not carry criminal or civil penalties.

3) All employees private and public should be granted equal protection by default. However, legislation may restrict the exercise of the right by military personnel, police officers, fire fighters, and similar providers of essential public services. The definition of essential services should be strictly construed. The sine qua non for restricting the absolute right of essential public service employees to strike is final and binding arbitration in a collective bargaining agreement to any employee demands by an independent arbitration panel. Any restriction placed on essential public service employees must be limited to the type of physical strike action that
may be staged. Legislation may not restrict the range of acceptable motives behind a strike to any less than that permitted by private sector employees.

4) Indefinite, durational, rotational, intermittent, symbolic, warning, work-to-rule, wildcat, secondary, and one day general strikes are permissible strike actions.

5) Slow-downs and sit-down strikes are impermissible strike actions.

6) The right to strike is not limited to unionized employees. Either a labor union or unorganized individual employees may initiate a strike.

7) Employers must be notified of potential strike and demands of workers twenty-four hours before initiation of strike. Workers do not need to receive a refusal of demands from employers in order to initiate a strike. Twenty-four hour strike notice is not required if the strike is in response to egregious safety violation, employer violence, or blatant contract violation. Twenty-four hour notice is required for all economic, politically motivated strikes, and strikes over minor contract violations.

8) “Legitimate basis for strike action” includes issues relating to wages, hours, pensions, safety, employer endorsement of political position, contract violation, unfair labor practice, illegal company activity, interference in union affairs, employer cooperation with struck company, other terms and conditions of employment, and opposition to governmental actions or proposals relating to labor and employment conditions, even though the ability to remedy is beyond struck employer.

9) Striking unionized employees of a legitimate collective bargaining representative may not be temporarily or permanently replaced unless the union as an entity, not individual workers, engages in illegal activity. Striking non-unionized employees engaging in an economic strike may be temporarily replaced until such time as they unconditionally offer to return to work. Striking non-unionized employees engaging in an unfair labor practice strike may not be temporarily or permanently replaced.

10) The right to strike over manifest safety concerns, employer discrimination, or unfair labor practices may not be waived in a collective bargaining agreement. The right to strike over economic, political, and all other issues may be waived in a collective bargaining agreement.

The ten points outlined above are meant to serve as a rough outline of a reasonable framework for strike conduct. The proposals are dramatically different from current United States law in many regards, but not alien to current French and other national European laws.
The most striking obvious differences with United States law is that in the proposed framework unionized strikers could not be permanently replaced in most situations, non-essential service public employees are entitled to equal protection as private employees, intermittent striking is permitted, and secondary strikes are permitted if the employer is cooperating in supplying or handling goods from an employer that is itself the object of a legitimate strike.

In comparison with international and European laws and ideals, the right to strike basically does not exist in the United States as an economic or political force. The most common strikes still occurring in the United States, those conducted by unionized employees at the expiration of a collective bargaining agreement, are symbolic tokenism to members, the industry, or political opponents at best. American workers and unions should reassert their right to strike in the legislature, in the courts, and on the streets. In doing so they should emphasize international legal norms and ideals and decry the unconstitutionality and one-sidedness of the current system.
APPENDIX

QUOTED TREATY, CONVENTION, CONSTITUTION, AND STATUTE PROVISIONS

1. International Covenant on Economic, Social, and Cultural Rights (ICESCR), 1966:
“The States Parties to the present Covenant undertake to ensure: … (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country, [except that it be] exercised in conformity with the laws of the particular country.”

2. International Labor Organization (ILO), Convention 87 (C-87), 1948:
“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.”

3. International Labor Organization (ILO), Convention 98 (C-98), 1949:
“Workers shall enjoy adequate protection against acts of anti-union discrimination [and that such protection shall apply against acts that are intended to] (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.”

4. Council of Europe Treaty of Rome, 1950, Article 11:
“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”

5. European Social Charter, Council of Europe, 1961, Article 6(4):
“with a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake … to promote and recognize … (4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”

6. National Labor Relations Act (NLRA), United States, 1935, Section 7:
“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”
7. Labor Management Relations Act (LMRA), United States, 1947:
“The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees … [Right to strike preserved] Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.”

“The people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic. They further proclaim, as being especially necessary to our times, the political, economic and social principles enumerated below: … All men may defend their rights and interests through union action and may belong to the union of their choice. The right to strike shall be exercised within the framework of the laws governing it.”

9. Treaty on the Functioning of the European Union (TFEU), 1957, Article 153:
“the provisions of this Article [granting competencies to the EU on working and social matters] shall not apply to pay, the right of association, the right to strike or the right to impose lockouts.”

10. Charter of Fundamental Social Rights of Workers, 1989, EU:
“the right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.”

11. Charter of Fundamental Rights of the European Union, 2000, EU, Article 28:
“Workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”