Lessons for the US from Germany's Sectoral-Bargaining Experience

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Julian Morris & Kristian Stout*

Introduction

Over the past few years, several pundits and politicians have proposed introduction of German-style "sectoral bargaining" in the United States. In such a system, unions representing all employees in a sector bargain over the terms and conditions of employment for employees at all firms in that sector.

Several candidates in the 2020 U.S. Democratic Party presidential primaries included proposals for labor-market reforms that were based explicitly on such ideas.[1] Meanwhile, in California, Gov. Gavin Newsom recently signed the Fast Food Accountability and Standards Recovery Act (FAST Act), which creates a "fast food council" comprising a mix of government officials, fast-food franchisors and franchisees, and representatives of fast-food workers.[2] Among other duties, this council would be responsible for determining wages and working conditions in the fast-food industry.[3] If implemented, such government-mandated industry-level bargaining would be unique in the United States and, as we discuss in this issue brief, borrows important features from European sectoral-bargaining models, even as such models have been falling out of favor in Europe.

The premise of such proposals is that "sectoral bargaining" is better for workers and could even protect the economy from adversarial labor-market disputes. But would Americans really be better off under sectoral bargaining?

This brief, released in conjunction with a companion piece on the German experience with sectoral bargaining,[4] considers the evidence for and against the introduction of German-style sectoral bargaining in the United States. It begins with a brief explanation of the differences between U.S. and German collective-bargaining systems. Sections 2 and 3 outline the advantages and disadvantages of German-style sectoral bargaining. It should be stressed at the outset that Germany's experience is very much a function of that nation's history and constitution. But even in Germany,

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[1] Alexia Fernández Campbell, *The Boldest and Weakest Labor Platforms of the 2020 Democratic Primary*, VOX (Oct. 29, 2019), https://www.vox.com/2019/9/5/20847614/democratic-debate-candidatelabor-platforms.

[2] Assem. Bill 257, Food facilities and employment, ch. 246 (2021-2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB257.

[3] *Id.* at 1471(d)(1)(A). Notably, this is not a pure sectoral-bargaining scheme, where there would be true negotiations between industry representatives on one side and labor representatives on another. Instead, it represents a hybrid approach that, at least theoretically, allows the bargaining to happen within the auspices of this council.

[4] Matthias Jacobs and Matthias Münder, *A Worthy Import? Examining the Advantages and Disadvantages of Sectoral Collective Bargaining in Germany*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (Sep. 25, 2022), https://laweconcenter.org/resource/a-worthy-import-examining-the-advantages-and-disadvantages-of-sectoral-collective-bargaining-in-germany.

sectoral bargaining has been forced to adapt to the changing nature of employment over the past half-century.

Germany's unique experience is explored further in Section 5, which contrasts it with other jurisdictions that have implemented sectoral bargaining. This is followed, in Section 6, with a discussion of the prospects for implementing sectoral bargaining in the United States. The discussion focuses on both legal and practical issues that would affect the potential for successful implementation. Finally, Section 7 discusses the likely outcome of implementing U.S. sectoral bargaining.

I. Employee Representation in the US and Germany

In the United States, the vast majority of employees in most areas of economic activity are employed under at-will contracts negotiated directly between the employer and the employee.[5] Only about 16 million Americans, 11.6% of employees, currently have their employment contracts negotiated by a labor union.[6] Union membership as a proportion of U.S. employees peaked in 1954 at about 35%.[7]

By contrast, in Germany, the employment contracts of about 52% of the nation's employees are governed through agreements negotiated by labor unions.[8] Meanwhile, about 40% of German employees have representation in works councils.[9] (These groups likely overlap considerably.)

In the United States, negotiations between labor unions and employers typically occur either at the single-unit level (e.g., a manufacturing plant, warehouse, or other location-specific entity) or sometimes at the firm level. In practice, this means that workers at a particular jobsite or firm delegate responsibility to negotiate the terms and conditions of their employment to a representative or group of representatives, who then undertake such negotiations with the management of that jobsite or firm.

While there are state and national-level organizations representing unionized workers in various U.S. economic sectors (e.g., utilities, transportation, warehousing, movie production), unlike their German counterparts, such groups do not participate in negotiations with state or national employer groups over the terms and conditions of employment. In this context, their role is primarily political. For example, unions persuaded Congress to pass the National Labor Relations Act in 1935, which established certain statutory protections for employees, including the "right to strike," which amounts to a prohibition on employers from firing employees who refuse to work under certain

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[5] *At-Will Employment*, BETTERTEAM, https://www.betterteam.com/at-will-employment#:~:text=At%2Dwill%20employment%20means%20that,are%20considered%20at%2Dwill%20employees (last visited Sep. 23, 2022).

[6] *Union Members Summary*, USDL-22-0079, US DEP'T OF LABOR (Jan. 20, 2022), https://www.bls.gov/news.release/union2.nr0.htm.

[7] Drew Desilver, *American Unions Membership Declines as Public Support Fluctuates*, PEW RSCH. CTR. (Feb. 20, 2014), https://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support.

[8] Simon Jäger, Shakked Noy & Benjamin Schoefer, *The German Model of Industrial Relations: Balancing Flexibility and Collective Action* 10, NBER Working Paper No. 30377 (2022).

[9] *Id.* at 23.

circumstances.[10] For many years, state legislatures also empowered unions to require employers to garnish the wages of both unionized and non-unionized employees to cover union dues. In 2018, this was ruled unconstitutional by the U.S. Supreme Court.[11]

By contrast, negotiations between German labor unions and employers often occur at the sectoral level.[12] As a result, in many cases, both labor unions and firms have organized themselves into sector-based coalitions, at least for the purposes of negotiating the terms and conditions of employment. In other words, workers effectively delegate responsibility to negotiate the terms and conditions of employment to an organization that represents workers in various fields from various companies. Firms likewise delegate negotiating responsibility to industry groups that may include firms offering a range of products and services that use various technologies.

In addition to sectoral bargaining via unions, German employees have established local (plant) and/or firm-level representation through "works councils." These councils are independent of the unions and negotiate with individual firms to establish variations from national sectoral arrangements.[13] Furthermore, German companies with more than 500 employees, are in, general required to have employee representation on their supervisory boards (equivalent to boards of directors) as part of a process known as "co-determination."[14]

II. Advantages and Benefits of Sectoral Bargaining in the German Context

Advocates of sectoral bargaining argue that it has numerous advantages over plant or firm-level bargaining. As noted in the companion piece to this brief by Matthias Jacobs and Matthias Münder, the primary reasons for this are:

1. When a firm-specific agreement with a union comes to an end, the union can threaten strike actions against that firm in an attempt to force a new agreement. By contrast, where a sectoral-bargaining agreement has been in place, unions typically only strike against a few firms that are party to the agreement. [15] In other words, from the individual firm's perspective, the expected costs of industrial action are lower; there is safety in numbers.

[10] 29 U.S.C. § 151–169; see also: *The Right to Strike*, NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/strikes (last visited Sep. 23, 2022).

[11] *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 US 2448, (2018).

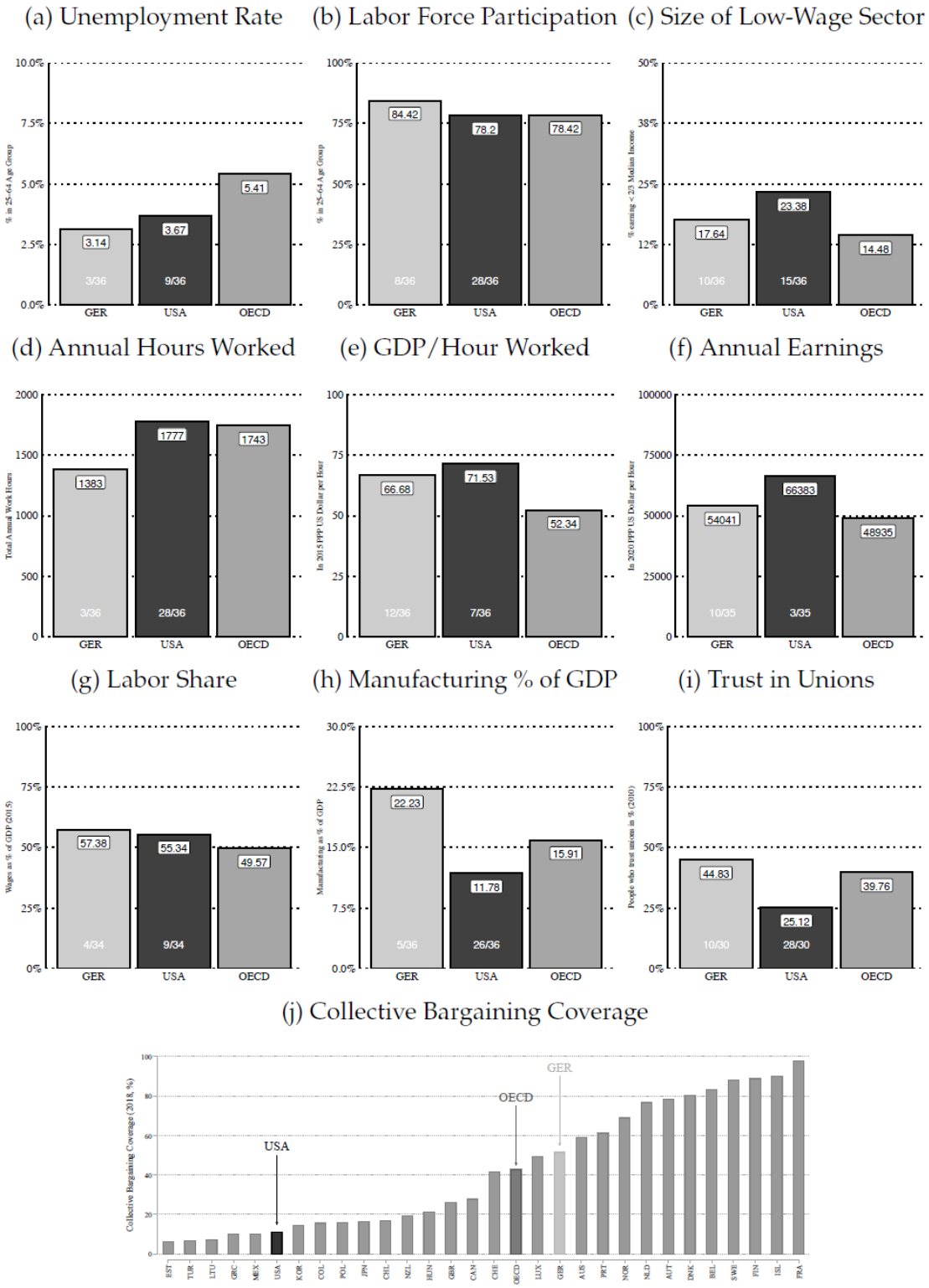
[12] See, generally, Jacobs & Münder, supra note 4 and Jäger, et al., *supra* note 8.

[13] Jäger et al. *supra* note 8, at 22.

[14] *Id.* at 20.

[15] Jacobs & Münder, *supra* note 12 .

FIGURE 1: Comparing German, US, and OECD Labor Markets



SOURCE: Simon Jäger, Shakked Noy & Benjamin Schoefer, *The German Model of Industrial Relations: Balancing Flexibility and Collective Action*, NBER WORKING PAPER 30377 (August 2022), at 3.

2. Individual firms are not responsible for the outcome of sectoral-bargaining agreements, which generally means that dissatisfied workers will not lay the blame for that dissatisfaction directly on the firm. This can create a less hostile work environment.[16]
3. Sectoral-bargaining agreements set wages across firms in a given industry, thereby reducing wage-based competition among other firms in the same industry. This has been termed "the trust effect."[17]
4. German firms that are party to collective-bargaining agreements typically apply the agreement to all employees in the firm, regardless of whether those employees are union members. Thus, although only about 15% of German employees are members of a union, about 52% of employees are covered by collective-bargaining agreements (of which, 43% of the 52% are covered by sectoral-bargaining agreements).[18] Moreover, a further 20% of employees work for firms that report an "orientation" toward a bargaining agreement; i.e., they implement the terms of an agreement informally without being legally bound by them.[19]
5. Paradoxically, sectoral bargaining may put downward pressure on wage demands in highly productive firms within a sector, as wage levels are traditionally based on the least productive one-third of participating companies.[20]
6. There may be transaction-cost advantages that result when negotiations over wages and conditions are outsourced to the industry body, with costs split among member firms.[21]
7. Member firms may also benefit from other side benefits, such as access to strike insurance, legal advice, and professional networking.[22]

Advocates argue that these advantages of sectoral bargaining have generated substantial economic benefits. In particular, they point to the following facts about the German economy:

a. Manufacturing still represents nearly a quarter of GDP in Germany, whereas in the United States, it is now only 12%.[23]
b. Between 1995 and 2014, Germany lost, on average, about one-sixth as many workdays to industrial action as the United States.[24]
c. Germany's unemployment rate is slightly below that of the United States .[25]
d. Germany's low-wage sector is 25% smaller than that of the United States.[26]

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[16] *Id.* at 7.

[17] *Id.*

[18] Jäger et al. *supra* note 8 at 11 and 12.

[19] *Id.* at 12

[20] Jacobs and Münder, *supra* note 4 at 8.

[21] Id. at 9.

[22] Jäger et al. *supra* note 8 at 11.

[23] *Id.* at 1.

[24] See, Hagen Lesch, *Changes in Industrial Action: A Comparison Between Germany and Other OECD Countries*, CESIFO FORUM 4, 68 (Dec. 2015) (From 1995-2014, an average of four days per 1,000 were lost to strikes in Germany; in the United States, the figure was 24 per 1,000 days).

[25] See Figure 1 above.

[26] *Id.*

e. Germany has avoided a net reduction in employment from the introduction of robots, despite of having a manufacturing-robot penetration rate that is nearly 50% higher than in the United States (especially in areas with high levels of unionization),[27] whereas the evidence suggests that, in the United States, robots have led to a net reduction in employment.[28]

f. Germany has a higher labor-force participation rate than the United States.[29]

g. Labor in Germany receives a (slightly) higher share of GDP in the form of wages than labor in the United States.[30]

h. Germans work fewer hours than Americans.[31]

III. Disadvantages and Costs of Sectoral Bargaining in the German Context

While sectoral bargaining and other features of Germany's system of employee representation may have certain advantages and related economic benefits, it also has disadvantages and associated economic costs. The main disadvantages, as noted in the companion piece, are:

1. One-size-fits-all sectoral-bargaining agreements effectively force many firms in a sector to pay above-market rates, making them uncompetitive. This is particularly problematic for firms that compete internationally. But it also harms firms located in parts of Germany that might otherwise enjoy lower wage costs due to their location. For example, firms in relatively rural areas—where the cost of housing is lower and there is less competition for skilled workers—might otherwise enjoy a competitive advantage from their ability to pay lower wages, but suffer a competitive disadvantage if they enter a sectoral-bargaining agreement. Correspondingly, if other firms pay less for labor than they would in the absence of a sectoral-bargaining agreement, the advantage (effectively, a subsidy) the agreement confers to those firms is likely to promote allocative inefficiencies and, indeed, costs to labor.
2. The German labor ministry can extend a collective-bargaining agreement to cover all firms in a relevant industry-region if such an extension is agreed to by a committee comprising representatives of employer groups and labor unions. Unsurprisingly, this provision has been used by high-wage employers to raise the costs of lower-wage rivals.[32]
3. Employers are bound by sectoral-bargaining agreements until the agreement comes to an end—even if they leave the industry group that negotiated the agreement. Some sectoral-bargaining agreements are open-ended, meaning that firms cannot leave once they join. Even when an agreement ends, its terms remain in force until a new agreement is reached. This creates a kind of purgatory for employers, who have no real power to determine the terms and conditions of employment and are thus subject to considerable uncertainty regarding whether it is feasible to make new hires until a new agreement is reached.

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[27] *Robot Density Nearly Doubled Globally*, INTERNATIONAL FEDERATION OF ROBOTICS (Dec. 14, 2021), https://ifr.org/ifr-press-releases/news/robot-density-nearly-doubled-globally; Wolfgang Dauth, Sebastian Findeisen, Jens Suedekum & Nicole Woessner, *The Adjustment of Labor Markets to Robots*, 19 J. EUR. ECON. ASS'N 3104 (2021).

[28] Daron Acemoglu & Pascual Restrepo, *Robots and Jobs: Evidence from US Labor Markets*, 128 J. POL. ECON. 2188 (2020).

[29] Figure 1, above.

[30] *Id.*

[31] Jäger et al. *supra* note 8, at 1.

[32] Jäger et al. *supra* note 8, at 11.

4. The rules of sectoral-bargaining agreements tend to be very complex and must be accepted as a bundle. As a result, they are relatively more costly to implement for smaller companies with fewer employees and smaller human-resources departments.
5. As with most collective-bargaining agreements, employees' wages are indexed to job descriptions and qualifications, rather than to productivity. This is more problematic with sectoral agreements because there is typically a wider dispersion of productivity, due to wider differences in firm characteristics and jobs, than is the case for individual firm- or plant-level agreements.

These disadvantages of sectoral bargaining have contributed to Germany experiencing several economic costs relative to the United States. Most notably:

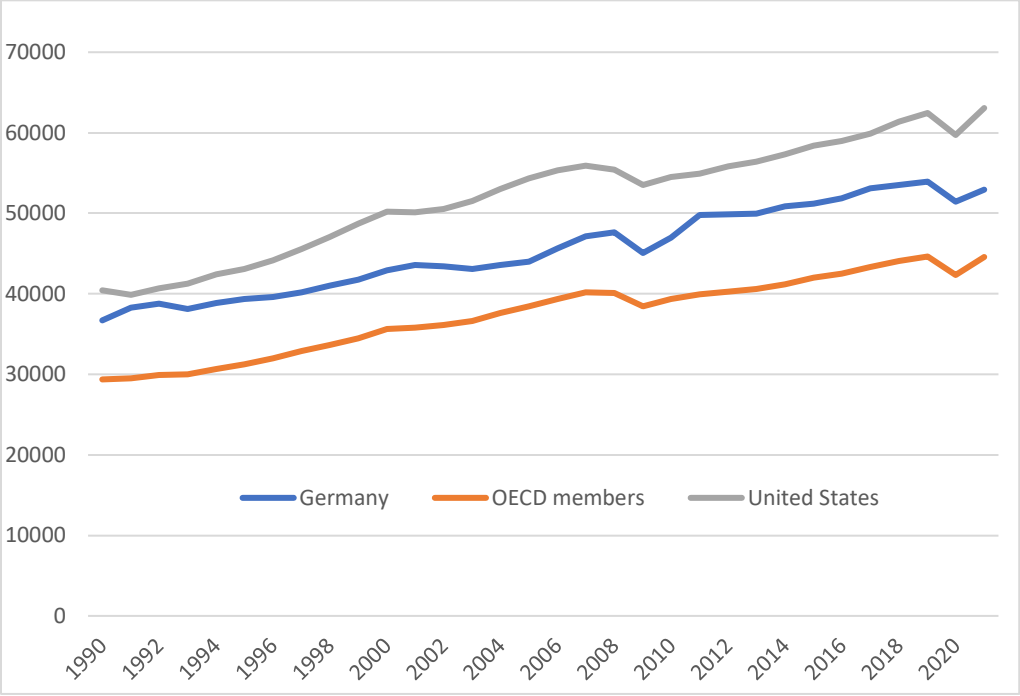
a. German workers are less productive per hour worked than American workers.[33]
b. Since German workers also work fewer hours, this translates into lower overall output per worker.
c. As a result, German workers earn less in total than American workers.
d. It also means that Germany's economy grows more slowly than does the U.S. economy. In the long term, this means Germans are becoming increasingly materially less well off than Americans. As can be seen from Figure 2, the gap in output per capita has increased from under $2,000 in 1991 to more than $10,000 in 2021 on a purchasing power parity (PPP) basis.

IV. How German Sectoral Bargaining Has Changed Over Time

Not all the benefits and costs described in Sections II and III can necessarily be ascribed to Germany's system of sectoral bargaining. Co-determination through works councils and employee membership of company boards likely also played significant roles, as have features of German culture. Unfortunately, it is difficult to parse the roles each of these mechanisms play at a macro level without looking at the micro-level detail, either through cross-sectional comparisons (see Section 5) or by looking at the effects of changes over time.

[33] See Figure 2 below.

FIGURE II: Comparing German, US, and OECD Output per Capita



SOURCE: World Bank. Figures are GDP per capita based on purchasing power parity (PPP) in constant 2017 international dollars.

A. The Introduction of Flexibilities and Other Changes

Germany's system of sectoral bargaining has undergone some substantial changes over the course of the past quarter-century. Since 1996, the proportion of German employees working under a sectoral-bargaining agreement has fallen by more than 35%.[34] The main drivers of this reduction have been the changing nature of work and increasing exposure of German markets to international competition. Employers have responded in four primary ways:

First, there has been a shift away from formal participation in collective-bargaining agreements and toward more informal "orientation" to such agreements. As noted above, about 20% of establishments report adopting this approach, which provides employers with considerably more flexibility, because the formal rules do not apply.

Second, employers are increasingly choosing to include specific flexibilities in their sectoral-bargaining agreements that allow them to reduce the wages they offer below the formally agreed-upon levels. There are two main types of such flexibility:

- "Hardship" clauses, which apply to firms that are in financial distress, enable firms to delay implementation of agreed-upon wage increases until their financial situation improves.
- "Opening" clauses, which are employer-specific, are intended to enable firms to offer wages permanently below those specified in the sectoral agreement in order improve the firm's

[34] Jacobs & Münder, *supra* note 4, at 1.

competitiveness—e.g., by enabling increased investment in innovation or to increase the number of employees.

Third, many larger firms now outsource work that previously was done by low-paid in-house workers. For example, a 2017 study found that the proportion of retailers employing in-house janitorial staff fell from 82% in 1975 to 20% in 2009.[35]

Fourth, there is a strong correlation between firm size and adoption of collective-bargaining agreements. Fewer than 20% of firms with less than 100 employees are covered by such agreements, while more than 50% of firms with more than 500 employees are covered.[36] This suggests that smaller, more dynamic firms in Germany's innovative Mittelstand (SME) sector, which accounts for more than 99% of companies in the country, are increasingly avoiding collective-bargaining agreements.[37]

B. Effects of Changes in the German Employment Landscape

With the decline in sectoral bargaining, the inclusion of hardship and opening clauses in new agreements, and the outsourcing of low-wage jobs, many of the putative advantages of the German system have been eroded. For example:

- From 1990 to 2015, real wages in the lowest-income decile declined and, while they have subsequently risen, they remain below their 2000 levels.[38]
- Labor's share of German GDP has been falling since the early 1970s.[39]

At the same time, the decline in rigidly enforced sectoral bargaining likely has helped Germany to avoid the problems experienced in jurisdictions with more rigid approaches, such as France and Italy, as Germany has experienced more robust economic growth over the past two decades (see Figure 3). It is also notable, however, that France (since 2008) and Italy (since 2011) likewise have begun to shift away from sectoral bargaining and toward firm-level bargaining.[40]

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[35] Deborah Goldscmidt & Johannes F. Schmieder, *The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure*, NBER Working Paper No. 21366 (2015), https://www.nber.org/papers/w21366.

[36] Jäger et al. *supra* note 8 at 12.

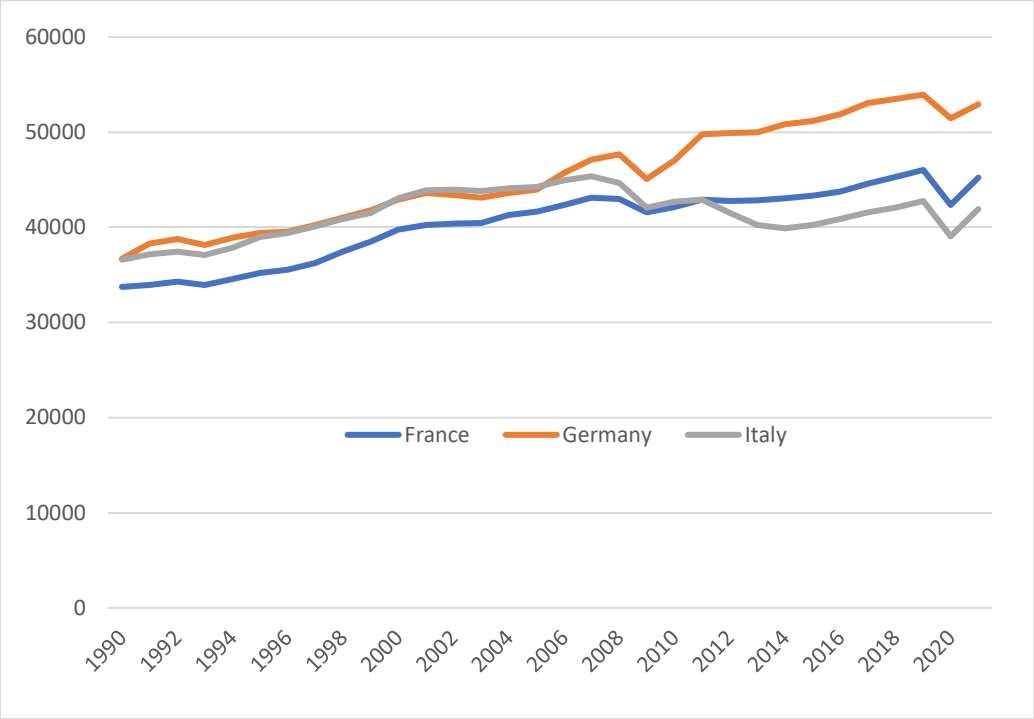
[37] Morad Elhafed, *Stuck in the Middle No More: How German Mittelstand Companies Can Break Out and Go Global*, FORBES (Feb. 24, 2022), https://www.forbes.com/sites/forbesbusinesscouncil/2022/02/24/stuck-in-the-middle-no-more-how-german-mittelstand-companies-can-break-out-and-go-global.

[38] Markus Grabka, *Income Inequality in Germany Stagnating Over the Long Term, but Decreasing Slightly During the Coronavirus Pandemic*, DIW (2021), https://d-nb.info/1238598374/34; Karl Brenke, *Real Wages in Germany: Numerous Years of Decline*, 5 GERMAN INST. ECON. RSCH. 1 (2009).

[39] *Id.*

[40] *Collective Bargaining*, WORKER-PARTICIPATION.EU, https://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Collective-Bargaining (last visited Aug. 23, 2022); *Collective Bargaining*, WORKER-PARTICIPATION.EU, https://www.worker-participation.eu/National-Industrial-Relations/Countries/Italy/Collective-Bargaining (last visited Aug. 23, 2022).

FIGURE III: Output per Capita in Germany, France, and Italy



SOURCE: World Bank. Figures are GDP per capita based on purchasing power parity (PPP) in constant 2017 international dollars.

Nonetheless, some attempts to make the German system more flexible have been thwarted. For example, a recent proposal by the Confederation of German Employers Associations to break down complex agreements into modular elements—which would have enabled employers to adopt only those elements that are most relevant to their firms, plants, and employees—was rejected by IG Metall, Germany's largest labor union.[41]

V. Could the United States Introduce Sectoral Bargaining?

As noted in the introduction, there has been a recent push to introduce sectoral bargaining in the United States. This section examines whether German-style sectoral bargaining could be introduced here, with particular attention to the legal constraints.

German sectoral bargaining relies, in part, on the existence of national-level bodies to represent employees, on one side, and employers, on the other. Without such national-level representation, there would be incentives for regional organizations to agree to terms and conditions of employment that favored firms and employees in that region. Competition among regional groups would be expected to drive down wage levels and other employment benefits, as each regional group would seek terms and conditions that are likely to attract business locally. With national representation,

[41] Jacobs & Münder supra note 4, at 15.

labor unions and employer groups can negotiate region-specific terms and conditions that limit such competition.

The functioning of such national-level bodies and associated agreements are facilitated by German federal law; specifically the Collective Agreements Act, which is explained in the companion piece to this brief.[42] In the United States, some federal protections—including the First Amendment—guarantee the rights of individuals to associate, and hence to join unions. The National Labor Relations Act (NLRA) established a federal right to strike and reasserts the right of individuals "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."[43] As such, employees could delegate their rights to bargain over terms and conditions of employment to sectoral unions at state, regional, or national levels.

Notwithstanding these rights to associate, however, there is a strong possibility that agreements made by sectoral unions with groups of firms that otherwise compete on the market would run afoul of U.S. antitrust law.

A. Applicable US Antitrust Statutes

U.S. antitrust law, broadly speaking, prohibits competitors from coordinating their behaviors in ways that set prices or that otherwise manipulate the competitive landscape in ways that cause anticompetitive harm to consumers.[44] The early history of the U.S. labor movement illustrates the basic problem. For decades, U.S. labor activists ran up against "antitrust law and its common law precursors, which established a baseline presumption in favor of competition within labor markets."[45]

The result was a consistent onslaught of criminal and civil charges, usually resulting in injunctions that prevented workers from organizing in order to "restrain trade or competition within the labor market" through collective bargaining.[46] The U.S. Supreme Court even held that the terms of the Sherman Antitrust Act—nominally focused on business trusts—covered any combination in restraint of trade, including labor-union activities.[47] With passage of the Clayton Act, Congress created an explicit exception to the antitrust laws for the organizing activities of labor unions.[48] This protection

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[42] *Id.*

[43] 29 U.S.C. §§ 151-169, Section 7.

[44] See, e.g., 15 USC § 1 ("prohibiting any combination… in restraint of trade or commerce"). This language notwithstanding, the Sherman Act doesn't prohibit "any… restraint." Simple coordination may or may not be unlawful, for example, while horizontal agreements among competitors to fix prices or allocate markets is per se unlawful. See, e.g., *United States v. Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150, (1940). See also, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, (1982); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons Inc.,* 340 U. S. 211, (1951).

[45] Cynthia L. Estlund & Wilma Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 COMP. LAB. L. & POL'Y J. 371, 373 (2021).

[46] Id. at 373–74.

[47] *In re Debs*, 158 U.S. 564 (1895); *Loewe v. Lawlor*, 208 U.S. 274 (1908)

[48] 15 U.S.C. § 17.

was expanded with passage of the Norris-LaGuardia Act and the National Labor Relations Act, both of which clarified and expanded the statutory antitrust exemptions that applied to labor unions.[49]

B. Current FTC and DOJ Positions

Agreements between competitors—that is, the employer side of the sectoral-bargaining analysis—do not have any such explicit exemptions in U.S. law. Indeed, the current position of both the Federal Trade Commission (FTC) and the U.S. Justice Department (DOJ) is that such agreements likely violate the law.[50] Indeed, both federal antitrust agencies have brought cases on the basis of impermissible collusion among employers to set wages and other employment conditions.[51]

C. Court Rulings

The U.S. Supreme Court has recognized some non-statutory antitrust exceptions that could be extended to employers. Two examples of non-statutory exemptions are particularly relevant here. In *Brown v. Pro Football Inc*, the Supreme Court recognized an exception for employers that collectively bargain with a labor union.[52] *Brown* arose when the owners of National Football League teams were unable to reach an agreement with the football players' union over the creation of "development squads" that could provide substitute players to the teams.[53] The union wanted players on those squads to be able to negotiate their salaries, but the club owners wanted to set the weekly rate at $1,000.[54] When talks stalled, the club owners went ahead with the proposed plan.[55] The players' union sued, alleging that the agreement among employers to set the wage rate was a restraint of trade that violated the Sherman Act.[56] The Supreme Court disagreed with the union because the agreement:

> ...took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved

[49] 29 U.S.C. § 151–169; 29 U.S.C. § 104; *see also*, *United States v. Hutcheson*, 312 U.S. 219 (1941) (Reaffirming that legislation had created a strong antitrust exception for labor unions).

[50] *Antitrust Guidance for Human Resource Professionals*, DOJ ANTITRUST DIVISION (October 2016), https://www.justice.gov/atr/file/903511/download ("An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision- making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities.")

[51] See, e.g., *United States and Arizona v. Arizona Hospital and Healthcare Association and AxHHA Service Corp.*, Case No. CV07-1030-PHX, (2007) (DOJ sued the Arizona hospital association for attempting to bargain collectively for most hospitals in the state in order to set rate schedules for per-diem nurses.); *In the Matter of the Good Guys Inc.*, 115 F.T.C. 670 (1992) (FTC sued a group of nursing homes that had collectively agreed to not use the services of a particular nursing registry that had raised the prices it was charging for its per-diem nurse placement); *Council of Fashion Designers of America*, Federal Trade Commission (Jun. 9, 1995), https://www.ftc.gov/news-events/news/press-releases/1995/06/council-fashion-designers-america (FTC sued the council of fashion designers for colluding to reduce the prices of fashion models).

[52] *Brown v. Pro Football*, 518 U.S. 231, (1996).

[53] *Id.*

[54] *Id.*

[55] *Id.* at 234.

[56] *Id.* at 235.

> a matter that the parties were required to negotiate collectively. And it concerned only the parties to that collective-bargaining relationship.[57]

The facts of *Brown* counsel caution when trying to construe this precedent more broadly beyond professional sports, let alone at the level of an entire sector of the economy. First, as noted above, the Supreme Court construed the labor non-statutory exemption as extending to the group of employers that were already involved in the collective bargaining in question. That is, the nature of professional football is that there are member teams that are bound by the collective bargaining of the football players. Thus, the employers are already compelled to partake in the collective activity. Further, although not explicitly an aspect of that case, it is nonetheless true that the small collection of employers involved were all identical and similarly situated, and all generate the same output of "professional football."

Although it's possible to imagine stretching this exemption to cover an entire sector—where all unions in that sector simultaneously engage in a collective-bargaining negotiation and all firms in that sector have sufficiently similar interests that they also can collectively bargain—it appears very hard to square with U.S. antitrust law. Decades of antitrust precedent push against the notion that firms that are otherwise competitors can jointly negotiate on wage and related restrictions, rejecting even "special case" exemptions such as those for the "learned professions."[58] Particularly since a "sector" can encompass a wide variety of firms with differing working conditions, safety concerns, cost drivers, and customers. To easily fit into a similar exemption, a legally relevant "sector" would have to be highly constrained. There would also be a host of fraught questions that attend determining how to decide what a relevant "sector" is, what entity gets to make that decision, and what to do about firms that uncomfortably straddle different sectoral classifications.

The "state action" doctrine in U.S. antitrust law also provides a potential means to develop a sectoral-bargain scheme—though here, too, the path is not easy (to put it mildly). In *Parker v. Brown*, the Supreme Court held that a California state agriculture program that set certain agricultural prices:

> ...was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.[59]

The state action doctrine has been extended in some ways over the years since *Parker v. Brown*. Relevant here, under certain circumstances, is that it may permit not only anticompetitive conduct by the sovereign state itself—paradigmatically, acts of the legislature—but by lesser state authorities and state-authorized commissions and boards dominated by market participants, but acting under the color of delegated state authority.[60] Otherwise anticompetitive conduct of state-authorized boards can qualify for the state action exemption only if both prongs of the test articulated in

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[57] 518 U.S. at 250.

[58] *See, e.g., Maricopa, Goldfarb, Professional Engineers, FTC v. AMA.*

[59] *Parker v. Brown*, 317 U.S. 341, 350–51, (1943).

[60] *N. Carolina State Bd. Of Dental Examiners v. FTC*, 574 U.S. 494, (2015); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, (1980).

California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc are satisfied.[61] They are, respectively, that the challenged anticompetitive conduct must be "one clearly articulated and affirmatively expressed as state policy" and that the policy is "actively supervised" by the state itself.[62] The Court's unanimous opinion in *Phoebe Putney* further strengthened *Midcal's* clear articulation prong, which applies to both lesser state agencies and independent boards dominated by active market participants.[63]

More recently, however, the Supreme Court has suggested that the active supervision prong must be more than merely pro forma. In *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, the Court held that "[i]mmunity for state agencies… requires more than a mere facade of state involvement, for it is necessary in light of Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control."[64] Notably, the Court in *N.C. Dental* focused on the fact that a controlling number of decisionmakers on the board in question were active market participants.[65] It also described the problem before the Court as considering when "a State empowers a group of active market participants to decide who can participate in its market, and on what terms." This suggests that the active oversight requirement may apply more broadly.[66]

Thus, any attempt to bring sectoral bargaining to the United States would need either 1) an explicit statutory exemption from Congress or 2) to qualify for one of the existing non-statutory exemptions. Assuming that Congress is not going to enact such an exemption any time soon, the latter option would be required. California's recently enacted FAST Recovery Act, mentioned above, is one such attempt to thread this needle by qualifying for the state action exemption, and hence to immunize a council against federal antitrust scrutiny.

Section 1471(a)(1) of the California law establishes a "Fast Food Council" consisting of four individuals that own restaurants or franchises, four individuals that represent employees, one representative of the Governor's Office of Business and Economic Development, and one representative from the state Department of Industrial Relations.[67] The council would have the power to "promulgate minimum fast food restaurant employment standards, including, as appropriate, standards on wages, working conditions" as well as other worker-welfare goals.[68] The FAST Recovery Act requires the council to submit reports to relevant committees of the California Legislature regarding any standards or rules it proposes, in order to give lawmakers the opportunity to enact legislation that would put the proposed change into effect.[69]

But, as noted above, merely putting formal requirements into law will likely be insufficient to satisfy the "active supervision" requirement. For example, it will matter whether the council is regarded as

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[61] *California Retail Liquor Dealers Ass'n*, 445 U.S. at 105, (1980).

[62] *Id.*

[63] *FTC v. Phoebe Putney Health System Inc.*, 568 U.S. 216, (2013).

[64] *N. Carolina State Bd. of Dental Examiners*, 574 U.S. at 505.

[65] *Id.* at 511—12.

[66] *Id.*

[67] Assem. Bill 257, Food facilities and employment, ch. 246 § 1471(a)(1)(A)-(F) (2021-2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB257.

[68] *Id.* at (d)(1)(A)

[69] *Id.* at (d)(1)(B).

closely affiliated with the state government or if it is more like an independent organization populated largely by industry participants and only superficially overseen by the state.[70] Almost certainly, this law will draw legal attention, very possibly from the FTC or DOJ, and resolution of litigation will turn on very specific factual inquiries into the program's implementation and operation.

VI. Likely Effects of Introducing Sectoral Bargaining to the US

In the decades after World War II, the combination of sectoral bargaining and co-determination appear to have created a more commodious relationship between German employers and employees than was the case in the United States, resulting in fewer industrial disputes and fewer days lost to strikes. As international competition intensified, however, the German system was forced to adapt, with the addition of clauses permitting both temporary and permanent exceptions. Nonetheless, sectoral bargaining has been on the decline in Germany and is now limited primarily to a relatively small number of large firms. While 50-60% of firms with more than 500 employees participate in sectoral-bargaining agreements, less than 20% of firms with fewer than 100 employees do.

Given the waning fortunes of sectoral-bargaining agreements in Germany—and, indeed, throughout Europe—it is ironic that U.S. politicians would now contemplate such a model for American workers. Yet, with California's passage of the FAST Act, the issue is very much on the table.

A. Potential Consequences of the FAST Act

The FAST Act applies to establishments that are members of a "fast food chain," which is defined in the statute as "a set of restaurants consisting of 100 or more establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services."[71] By setting minimum wages and working conditions at such establishments, the act is intended to improve the prospects for workers. Unfortunately, it is likely—in many, if not all, cases—to have the opposite effect.

If the council setting wages and working conditions for fast-food chains follows the typical German sectoral-bargaining arrangement, wages and conditions will be set according to the standards of the least productive third of establishments. This would limit the negative impact of the act on franchisees and might even lead to an overall reduction in wages in the sector, especially if such a statutory arrangement is deemed to be a permissible exception to minimum-wage laws.[72]

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[70] This is particularly relevant considering *NC Dental*'s holding that focused on "the constant requirements of active supervision." (574 U.S. at 515). See also, *Brief for the United States as Amici Curiae*, No. 19-12227 (2019), https://www.ftc.gov/system/files/documents/amicus_briefs/smiledirectclub-llc-v-battle-et-al/smiledirectclub-v-battle_ca11_usa_ftc_amicus_brief_9-25-19.pdf (FTC citing *NC Dental* as requiring a state to undertake the "constant requirement[] of active supervision").

[71] California AB 257, at 5.

[72] *See Id.* at 10, s. (k)(1): "The minimum wages, maximum hours of work, and other working conditions fixed by the council in standards promulgated pursuant to subdivision (d) shall be the minimum wage, maximum hours of work, and the standard conditions of labor for fast food restaurant employees or a relevant subgroup of fast food restaurant employees for purposes of state law."

On the other hand, if the council setting wages and conditions decides to set wages significantly above current market rates, the consequences for franchisees and their employees could be disastrous. Faced with unsustainable wage outlays, franchisees would face a difficult choice: sell off, switch to become a franchise of a smaller chain, or automate.

It is notable that the first attempt to implement sectoral bargaining in the United States is proposed in a sector that is not subject directly to international—or even interstate—competition. But it is subject to technological competition. Already, some fast-food restaurants have begun to automate.[73] In part, this is happening to increase the speed, quality, and consistency of service. But it is also being driven by costs: as labor costs rise, the incentive to switch to more capital-intensive modes of production will increase.

It is, of course, possible that the council will prohibit such automation in an effort to maintain jobs. But doing so would merely make it more difficult for covered fast-food restaurants to compete with smaller chains that are not covered by the FAST Act. Beyond that competitive distortion, such action by the council would entail a covert tradeoff that further diminishes consumer welfare. Faced with other inflationary pressures, competitive threats from smaller chains not subject to the FAST Act, and ordinary cost increases, larger chains will be forced to raise prices. In the short term, this might shift surplus toward workers. Over the medium to long term, however, it would suppress demand, harming consumers by providing them with fewer goods and services than they would otherwise demand, and harming workers by shrinking the industry overall.

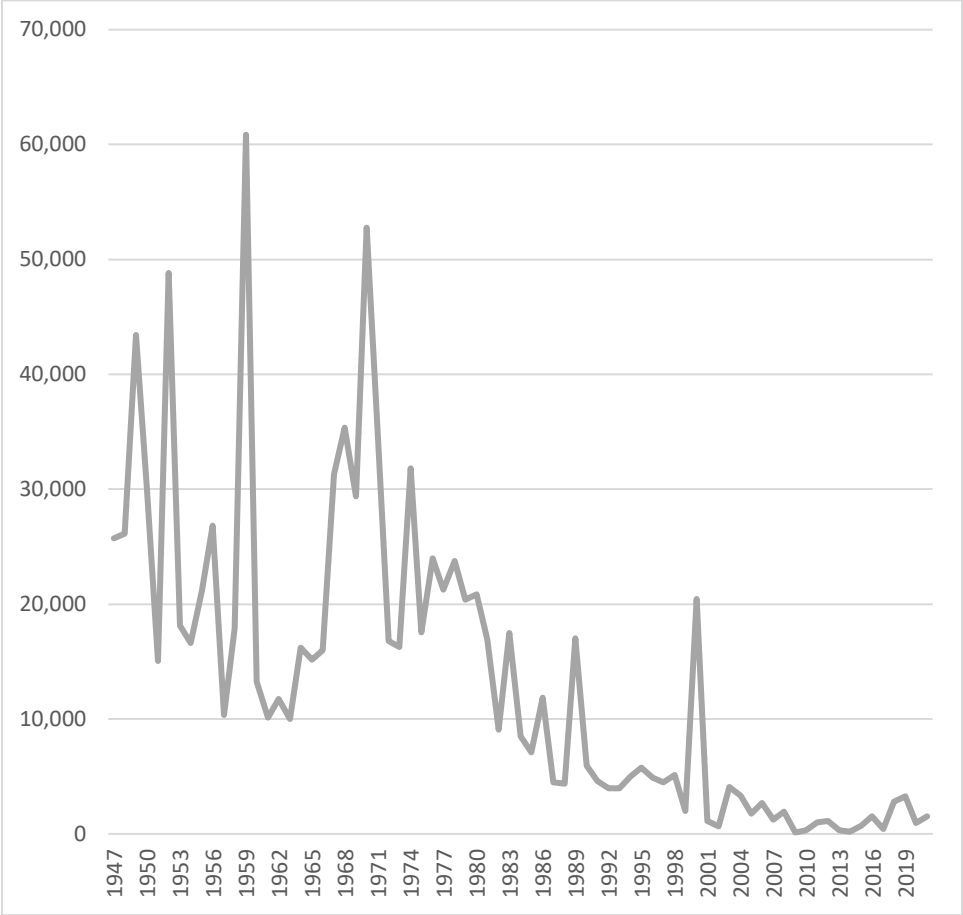
VII. Conclusion

If the FAST Act is, indeed, a harbinger of the future of employer-employee bargaining in the United States, then the prospects for the U.S. economy look even bleaker than many portend. To see why, one need only refer back to Figure 3. Does the United States really want to shift toward a low-growth trajectory like those of France or Italy? Moreover, it bears repeating that, in an environment of international competition, Germany's model required all manner of tweaks in order to make it "work." Even then, Germany's rate of economic growth has been considerably lower than that of the United States, as can be seen in Figure 2.

To address the other main argument made for a switch to sectoral bargaining: reduced numbers of days lost to industrial action. As demonstrated in Figure 4, the United States has already achieved that.

[73] Felix Behr, *The Big Ways Robots Are Quietly Taking Over Fast Food*, MASHED (Feb. 14, 2022), https://www.mashed.com/433837/the-big-ways-robots-are-quietly-taking-over-fast-food.

FIGURE IV: Annual U.S. Worker-Days Lost to Strikes, 1947-2021



SOURCE: *Work Stoppages*, U.S BUREAU OF LABOR STATISTICS, https://www.bls.gov/web/wkstp/annual-listing.htm (last visited Aug. 23, 2022)

In short, if the United States were to import the German model of sectoral bargaining at this stage, it is unlikely to benefit from any of the advantages that the model offered to Germany early in its adoption. It would instead suffer the disadvantages and associated costs that Germany now seeks to avoid by unwinding this model at the margins. As the United States heads further into unstable economic times, it would be unwise to adopt a bargaining model that would make its labor market less flexible and more subject to the disruptive effects of competition from overseas and from new technology.

No system is perfect, but U.S. labor markets have consistently outperformed those in Germany in terms of output per worker. The wider consequence of shifting to a German sectoral-bargaining model would be to push the United States behind much nimbler competitors, ultimately hurting both consumers and the workers that such otherwise well-intentioned reforms are intended to help.