UNION AUTONOMY AND FEDERAL INTRUSION

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Union autonomy, a critical aspect of the health and growth of unions and employee power broadly, is weakened by (1) the Department of Justice's (DOJ) attempts to target organized crime through civil Racketeer Influenced and Corrupt Organizations Act (RICO) litigation against unions and (2) the creation of federal trusteeships in settlement, both of which can be analyzed through litigation between the DOJ and the International Brotherhood of Teamsters (Teamsters or IBT) at the end of the 20th century. The field of compliance offers a solution to prevent these breaches of union autonomy. Relying on the Federal Sentencing Guidelines and the Environmental Protection Agency's (EPA) Audit Program, this Note recommends a new program to the National Labor Relations Board (NLRB). The NLRB should incentivize unions to implement internal compliance programs drawing inspiration from corporate America, as these businesses have historically faced far less federal intrusion than unions.

* J.D. Candidate, 2024, University of Colorado Law School. I dedicate this Note to my loved ones, perpetually engaged with their solidarity using tools stronger than their words. I owe special thanks to Professor Ahmed White, who taught me to identify injustices hiding in plain sight and Professor Benjamin Levin, who lent me books that I really need to return. I also want to thank all the *University of Colorado Law Review* members who dedicated their diligence, time, and intelligence to this Note.

INTRODUCTION

Union autonomy is a critical aspect of the health and growth of unions and employee power broadly. The National Labor Relations Act of 1935 (NLRA) provides unions with the autonomy to elect their leaders democratically and empowers these leaders with the autonomy to organize their unions within the boundaries of the law. This union autonomy is weakened by (1) the DOJ's attempts to target organized crime through civil Racketeer Influenced and Corrupt Organizations (RICO) cases against unions and (2) the creation of federal trusteeships in litigation between the Department of Justice (DOJ) and the Teamsters.[1] These civil RICO cases have played a role in distorting unions to the public solely as corrupted institutions that need government intervention.[2] One approach to mitigating the harm from civil RICO and federal intrusion is found in the field of compliance. The National Labor Relations Board (NLRB) should incentivize unions to implement internal compliance programs, specifically by drawing inspiration from corporate America since such institutions have historically faced far less federal intrusion than unions.

At the outset, it is crucial to understand the importance of union power in current times and why harm to unions is a detriment to the greater public good. When there is a rise in union power, there tends to be a rise in wage growth for all employees whether they are union members or not.[3] Widespread collective bargaining has a spillover effect on nonunion wages—it increases and equalizes wages for all workers.[4] This spillover effect occurs when employers in commonly unionized industries

1. *See, e.g.*, U.S. v. Internal Brotherhood of Teamsters, 988 F. Supp. 759, 761, 763–65 (S.D.N.Y. 1997) (discussing one of the Teamsters' court-appointed trustees and the broad deference the Court provides her).

2. Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 623 (2012) ("But beyond the economic issues, the proliferation of the civil RICO suit has sociopolitical significance and is a way of understanding the stature of the union and contextualizing and situating the future of the American labor movement.").

3. *The Union Advantage*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/olms/empowering-workers [https://perma.cc/FBE6-KPGV].

4. Lawrence Mishel, *The Enormous Impact of Eroded Collective Bargaining on Wages,* ECON. POL'Y INST. (Apr. 8, 2021), https://www.epi.org/publication/eroded-collective-bargaining [https://perma.cc/Q6YB-3A4J].

offer higher wages to nonunion workers as a means of forestalling unionization in their own workplace.[5] When union membership declines, or, in other words, collective bargaining power weakens, these beneficial spillover effects do not occur. Instead, wages for nonunion employees, on average, remain static or drop in value.[6]

Additionally, unions played a critical role in the creation and consistent enforcement of workplace-safety laws. Unions create safer workplaces for their workers because they have the bargaining power to internally enforce Occupational Safety and Health Administration (OSHA) regulations.[7] Employers of unionized workforces are more likely to receive safety and health inspections, face greater scrutiny during these inspections, and pay higher penalties for their violations in comparison to their nonunion competitors.[8] Nonunion workforces benefit from spillover effects with workplace safety just as they do with wage increases.[9] Thus, when collective bargaining power weakens, these beneficial spillover effects may not occur, and enforcement of workplace-safety laws in nonunion workforces may weaken.[10]

Finally, unions have historically been champions for marginalized workers.[11] This phenomenon occurs for many reasons, but one defining factor is that these workers have jobs that are more often unionized or receive the benefits of spillover

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5. Lawrence Mishel & Matthew Walters, *How Unions Help All Workers,* ECON. POL'Y INST. (Aug. 26, 2003), https://www.epi.org/publication/briefingpapers_bp143 [https://perma.cc/4SCE-LXKW]. For example: Factory A's employees unionize and bargain for higher wages. The employees in Factory B in a neighboring town consider doing the same. Factory B's employer raises wages to chill its employees' interest in unionizing.

6. Mishel, *supra* note 4 ("The erosion of collective bargaining lowered the median hourly wage by $1.56, a 7.9% decline (0.2% annually), from 1979 to 2017.") ("Deunionization widened the 90/50 wage gap (the gap between earners at the 90th percentile of the wage distribution and the 50th percentile, measured in logs) by 7.7 points.").

7. Leah Ford & Jeffrey Freund, *The Connection Between Unions and Worker Safety*, U.S. DEP'T OF LAB. BLOG (Feb. 11, 2023, 11:14 AM), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/your-right-to-form-a-union [https://perma.cc/N2WL-VEX9] (discussing negotiated safety protocols, union representatives policing safety violations, and grievance procedures challenging and correcting unsafe working conditions) ("Overall, while unions represent 14% of the construction industry employees, their employers account for only 5% of the industry's OSHA violations.").

8. David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. RELATIONS 20, 20 (1991).

9. *See* Mishel & Walters, *supra* note 5.

10. *See* Mishel, *supra* note 4.

11. *Id.* at 2.

effects.[12] For example, workers must have a majority vote to form a union,[13] and these elections are more likely to succeed in diverse or majority-minority workplaces.[14] In the past, civil rights groups collaborated with workers on the cusp of their union elections to support these organizing campaigns.[15] To this day, civil rights groups and unions still "work together to . . . influence [political] elections[ ] and lobby on a broad spectrum of issues ranging from labor and employment discrimination law reform to consumer protection."[16] The ties between the labor and civil rights movements have been strong for decades. As such, when the labor movement weakens, the civil rights movement loses a powerful ally. Considering the role that unions play to empower marginalized workers, federal government actions that intrude on union autonomy and diminish their effectiveness should be stopped.

In the 2020s, workers have been on the front lines of what may be a labor renaissance by striking and organizing drives across the country. These attempts to revive an interest in unions have occurred at highly influential companies like Starbucks, Amazon, and major universities from New York to California.[17] While union membership has only declined since the start of the new millennium,[18] public approval of unions is higher than it has ever been since 1965.[19]

This Note first provides the required historical, theoretical, and legal contexts of federal intrusion of union autonomy and how these intrusions perpetuate power imbalances between

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12. *See* Mishel & Walters, *supra* note 5.

13. Nat'l Lab. Rel. Bd., *Your Right to Form a Union*, ABOUT NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/your-right-to-form-a-union [https://perma.cc/99CD-UJN5].

14. Charlotte Garden & Nancy Leong, "*So Closely Intertwined": Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1138 (2013).

15. *Id.*

16. *Id.*

17. Mitchell Hartman & Richard Cunningham, *Gen Z is the Most Pro-union Generation*, MARKETPLACE (Jan. 3, 2023), https://www.marketplace.org/2023/01/03/gen-z-is-the-most-pro-union-generation [https://perma.cc/9SAQ-39NQ].

18. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS – 2022 13 (2023); Madison Hoff, *This Chart Shows How Union Membership Has Declined Over the Years*, BUS. INSIDER (Sept. 5, 2022, 1:53 PM), https://www.businessinsider.com/chart-union-membership-changes-decline-over-the-years-2022-9 [https://perma.cc/3HXH-SGR5].

19. Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/J9RF-GZMN].

employers and employees. Second, an analysis on how the DOJ's civil RICO claims harm union autonomy is presented. Third, this Note then analyzes how courts intrude on both union and corporate autonomy and highlights the stark differences and imbalances between how the government treats these institutions. Finally, this Note presents a method of mitigation to the NLRB and unions more broadly: compliance programs, or self-governed programs that will reduce the harm caused by federal intrusion.

I. BACKGROUND OF RELEVANT THEORIES, HISTORIES, AND LAWS OF AMERICAN LABOR

The analyses and conclusions within this Note arise from the context of specific theories, histories, and laws. These contexts highlight a power imbalance between employers and employees perpetuated by the federal government. Readers connected to the plight of the working class may already perceive the world around them through these contexts on a day-to-day basis. Other readers may need some convincing. This Part introduces and contextualizes a requisite background of history, theory, and law in turn below.

A. Historical and Theoretical Contexts Highlight a Perpetuated Power Imbalance Between Employers and Employees

The following histories and theories provide the requisite context to understanding why court-appointed union trustees are part of the greater narrative of a perpetual power imbalance between employers and employees. Both contexts are discussed below.

1. The History of the Federally Perpetuated Power Imbalance Between Employers and Employees

Historically, the federal government has perpetuated a power imbalance between employers and employees. Reviewing the history of the government's violence against labor unions puts this power imbalance on display. Americans who lived during the decades between the 1860s and the 1940s experienced the most violent and bloody labor conflicts of any

Western industrialized nation.[20] One relevant example is the Ludlow Massacre, where Colorado National Guardsmen set fire to a colony of striking miners in 1914.[21] "Those who attempted to escape the burning camp were gunned down by the guardsmen . . . [and] [a]t least sixty-six men, women, and children were killed in the attack and the riots that followed."[22] Another example of government violence against unions during this era is the repression of the Industrial Workers of the World, also known as Wobblies.[23] "With shocking regularity, Wobblies were beaten, run through gauntlets, tarred and feathered, chased out of town or across state lines, or simply murdered" by institutional actors, including U.S. soldiers.[24]

Additionally, the federal government's surveillance over unions and labor leaders has been so pervasive and well documented that labor historians rely on these records for their own research.[25] A prime example of this surveillance is the long history of the Federal Bureau of Investigation's (FBI) surveillance over César Chávez, the co-founder of the National Farm Workers Association.[26] Under the leadership of J. Edgar Hoover, the FBI dramatically increased intelligence gathering and compiled daily reports when Chávez organized La Peregrinación, or The Pilgrimage: a march of farmworkers and their supporters over three hundred miles.[27]

More recently, in 2011, more than one hundred Walmart associates came together in front of Walmart's headquarters in Bentonville, Arkansas, creating the Organization United for Respect at Walmart (the "Organization").[28] Walmart terminated

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20. Paul F. Liphold, *"Striking Deaths" at Their Roots: Assaying the Social Determinants of Extreme Labor-Management Violence in US Labor History—1877–1947*, 38 SOC. SCI. HIST. 541, 541 (2015).

21. *See* Tyler J. Smith, *Rethinking U.S. Labor Law: A Comparison of Property Interests and Ethics in German Labor Law,* 43 HOUS. J. INT'L L. 247, 256 (2021).

22. *Id.*

23. *See* AHMED WHITE, UNDER THE IRON HEEL: THE WOBBLIES AND THE CAPITALIST WAR ON RADICAL WORKERS (2022).

24. *Id.* at 3.

25. Steven Rosswurm & Toni Gilpin, *The FBI and the Farm Equipment Workers: FBI Surveillance Records as a Source for CIO Union History*, 27 LAB. HIST. 485, 493 (discussing the FBI's history of surveilling labor unions, finding "the FBI to be a superb conservator of leaflets, shop papers, and internal union records.").

26. *See* Richard S. Street, *The FBI's Secret File on César Chávez*, 78 S.CAL. Q. 347 (1996).

27. *Id.* at 357–58.

28. *Whose Walmart? Our Walmart.*, UNITED FOR RESPECT, https://united4respect.org/campaigns/Walmart [https://perma.cc/L2U6-MK2A].

a handful of these employees in response to this protest. The Organization filed an unfair labor complaint against the mega-retailer.[29] After the Organization filed this complaint, Walmart called the FBI for help: "When Walmart heard that members of the Occupy movement might join the protests at corporate headquarters, they began working with the FBI Joint Terrorism Task Forces."[30] This history highlights the reality that corporations perceived the FBI, the federal government's arm of surveillance and intelligence gathering, as an ally in their efforts in weakening workers' power as late as 2011.

One possible explanation for this history of distrust and violence is that powerful employers in the nation have captured government institutions. Corporate capture occurs when powerful companies undermine rights, including labor rights, by "exerting inappropriate influence over . . . decision-makers and public institutions."[31] Powerful companies have a strong interest in profit maximization. One method to maximize profits is by reducing costs, and for many powerful companies, the most expensive cost is labor.[32] Some researchers and companies believe that "unions reduce profitability . . . because their productivity effects, though substantive, are nevertheless insufficient to offset increases in wage costs and greater capital intensity."[33] Accordingly, large employers desire to exert inappropriate influence over U.S. lawmakers to weaken unions, and in their logic, to maximize profits.

A second possible explanation for this history of distrust and violence is that federal decision-makers' interests may have more in common with an employer's interests than a worker's interests. For example, early U.S. Congressmen and Supreme Court justices were land speculators, or people who purchase

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29. Chip Gibbons, *Government Surveillance of Activists and Labor Organizers Is Alive and Well*, JACOBIN (June 10, 2020), https://jacobin.com/2020/06/government-surveillance-activists-labor-organizers-pinkertons [https://perma.cc/57D7-VEUR].

30. *Id.*

31. Investor Alliance for Human Rights, *Corporate Capture*, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, https://investorsforhumanrights.org/corporate-capture [https://perma.cc/8FRM-NSFQ].

32. DELOITTE, LABORWISE 1 (2017) ("For a typical Fortune 500 company, payroll is $1 to $2 billion per year, which averages between 50% to 60% of company spending.").

33. John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 100 (1989).

land for future sale, hoping the value will increase over time.[34] Accordingly, these men had a vested interest in making decisions that supported their investments, leading to cases such as *Johnson v. M'Intosh*, 21 U.S. 543 (1823).[35] This reality still exists in modern times. For example, 231 of the 435 members of the 114th Congress' House of Representatives had previous occupations that fell under the "business or banking" category.[36] When these representatives are compared to a hypothetical sample of 435 unionized truck drivers, and another hypothetical sample of 435 CEOs, the representatives are likely to have far more in common with the CEOs than the truck drivers. Just over half of these representatives have had similar jobs to these CEOs.[37] Perhaps they've had similar salaries, offices, and workplace decision-making power. The same could not be said for the truck drivers.

2. The Theory of the Federally Perpetuated Power Imbalance Between Employers and Employees

This perpetuated power imbalance is theorized to stem from the federal government's interest in protecting the legitimacy of both itself and capitalism.[38] A pillar of capitalism is the two-class system: in a nutshell, a small group of people who own capital and a large group of people who labor.[39] The power imbalance between employers and employees puts this class system on display. And this power imbalance exists in the

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34. *See, e.g.*, Edward Redmond, *Washington as Land Speculator*, LIBRARY OF CONGRESS: GEORGE WASHINGTON PAPERS, https://www.loc.gov/collections/george-washington-papers/articles-and-essays/george-washington-survey-and-mapmaker/washington-as-land-speculator [https://perma.cc/AK26-LJUW] (discussing George Washington's accumulation of land: 52,194 acres were accounted for in his will, executed in 1800).

35. *See, e.g.*, *id.*; Johnson v. M'Intosh, 21 U.S. 543 (1823) (holding Native Americans did not have the right to sell land to private citizens, thus, leaving enormous amounts of land to be bought and sold by wealthy, white, American men).

36. Curtlyn Kramer, *Vital Stats: The Growing Influence of Businesspeople in Congress*, BROOKINGS INST. (Feb. 17, 2017), https://www.brookings.edu/articles/vital-stats-businesspeople-in-congress [https://perma.cc/LJW7-Z984].

37. *See id.*

38. *See* Thomas W. Joo, *Legislation and Legitimation: Congress and Insider Trading in the 1980s*, 82 IND. L.J. 575, 583 (2007) ("[G]overnment has an interest in maintaining the legitimacy of capitalism and government's symbiotic relationship with capitalism.").

39. *See* Karl Marx & Frederick Engels, *Bourgeois and Proletarians*, *in* THE COMMUNIST MANIFESTO, 12–32 (Charles H. Kerr & Company, 1906) (edited and annotated by Frederick Engels).

United States because it operates under the economic system of capitalism.

Capitalism has been a legitimate economic system supported by government intervention in the United States for centuries.[40] It would not exist without the federal government because it is merely a "product of a very complicated set of laws and enforcement and provisions."[41] Capitalism is a government program.[42] "Any institution must justify its existence and the power it wields,"[43] and the federal government justifies its own existence by justifying capitalism. In other words, the federal government and capitalism share a relationship where the existence of either institution demands the other's exitance.[44]

The federal government wields extreme power because the country operates under the economic theory of capitalism. For example, capitalism requires a military and intelligence agency to protect property interests both domestically and abroad. Interest rates, money supplies, and financial markets must be maintained by the federal government under capitalism. Americans must earn their basic needs through selling their labor, so the federal government must, at times, supply Medicare/Medicaid, housing vouchers, and hunger relief. Just as capitalism would not exist without federal intervention, these government institutions would be different without capitalism. The federal government maintains the legitimacy of capitalism, and capitalism maintains the legitimacy of the federal government. Thus, if one member of this partnership faces a risk, the other member may benefit from mitigating the other's risk. And, as discussed below, unions are a challenge to the legitimacy of capitalism.

While capitalism embraces individualism, unions challenge it.[45] Individualism encapsulates several of capitalism's self-proclaimed pillars, or benefits, including private property, self-

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40. *See* Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES, Aug. 14, 2019 (analyzing a history of the U.S. government's approval of financial institutions that bend the federal rules that regulate it in order to maximize capital and profit).

41. Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" As Faulty Metaphor*, 89 TUL. L. REV. 383, 415 (2014).

42. *Id.*

43. Joo, *supra* note 38, at 577.

44. *See id.* at 583.

45. *See* Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379, 1417 (1988) ("[I]nput supplier strives to maximize its profits, and the goal of the labor union is more ambiguous.").

interest, and freedom of choice.[46] Under capitalism, uncoordinated individuals are free to pursue and protect their interests however they see fit within the confines of the law,[47] even if their pursuits are a detriment to themselves or others. Unions do not rely on any one individual worker to pursue or protect their own interests or choices alone. Rather, an individual worker is a member of a greater collective that protects the greater interests of the entire group. Individual workers may have a vote or time to speak their mind, but ultimately, a union is a collective that may reach a conclusion different than that of an individual.

Thus, capitalism's pillar of individualism and a union's pillar of collectiveness are at odds. These two values are, in part, two different solutions to workplace governance or the distribution of power in the workplace. And because workplace governance controls the flow of material goods, money, and the marketplace at large, this difference in values cannot go unnoticed by supporters of capitalism. Additionally, the people who control workplace governance have power that spreads far beyond the workplace's walls. They control the standard of living and day-to-day lives of millions of Americans. They control what consumers can and cannot buy. They even control the outflow of pollution and mitigation of climate change.[48]

The federal government has a motive to weaken union power because, in an effort to legitimize capitalism, the power of workplace governance must stay in the hands of the class who owns, not the class who labors. The government has a greater interest in protecting the legitimacy of capitalism[49] than an interest in protecting workers' wages, safety, or lawful collectiveness.[50]

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46. Sarwat Jahan & Ahmed Saber Mahmud, *What is Capitalism?*, 52 FIN. & DEV. 44, 44 (2015).

47. *See id.*

48. Government pollution regulators set ceilings, not floors. We could live in a world where industries pollute less because workplace decision-makers decide to set their own ceilings.

49. *See* discussion *supra* Sections II.A.i, II.A.ii.

50. *See* discussion *supra* Part I.

B. The Federal Laws That Perpetuate Imbalances of Power Between Employers and Employees

The laws that empower the DOJ's civil litigation against unions perpetuate the power imbalance between employers and employees. The federal government historically raises two main types of claims against unions: (1) civil violations of the NLRA and (2) civil violations created by RICO. Both claims are discussed in turn below. Importantly, Congress, which passed the NLRA and the Taft-Hartley Act, is an arm of the federal government and empowered the NLRB to uphold the law influenced by federal interests.

1. The Taft-Hartley Act and the NLRA Perpetuate Imbalances of Power Between Employers and Employees

Where the NLRA empowered workers to unionize, the Taft-Hartley Act empowered employers to weaken unions.[51] The Taft-Hartley Act forces unions into more civil litigation from the federal government, especially from their governing agency, the NLRB.[52] Specifically, the Taft-Hartley Act demanded that the NLRB "prioritize, over all other cases, . . . cases involving illegal firings of union supporters, litigation against unions for engaging in so-called secondary activity."[53] Secondary activity is union conduct aimed at secondary employers or employees to exert pressure on its primary employer—the employer with which the union has an ongoing labor dispute.[54] The NLRB claims against unions for alleged secondary activity "grew from

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51. Bashar H. Malkawi, *Labor and Management Relationships in the Twenty-First Century: The Employee/ Supervisor Dichotomy*, 12 N.Y. CITY L. REV. 1, 5 (2008).

52. LAWRENCE MISHEL ET AL., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS: HOW CORPORATE PRACTICES AND LEGAL CHANGES HAVE UNDERCUT THE ABILITY OF WORKERS TO ORGANIZE AND BARGAIN 27–28 (2020), https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/ https:///[https://perma.cc/APM5-CWHVhttps:///] ("The resulting enforcement disparity was stark and immediate. The ratio of unfair labor practice charges against unions compared to charges against employers grew from one in four in 1948 to half in 1956."). The Taft-Hartley Act was passed in 1947.

53. *Id.*

54. Nat'l Lab. Rel. Bd., *Secondary boycotts (Section 8(b)(4))*, ABOUT NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/secondary-boycotts-section-8b4 [https://perma.cc/8NXH-7LNU].

17 in 1948 (the first year such injunctions were authorized) to 127 ten years later. Injunctions against unions grew further to 219 by 1960, an astonishing 1,188% increase from 1948."[55]

The legislative history of the NLRA reflects that Congress was motivated by the federal interest in protecting the legitimacy of capitalism. The NLRA's purpose is "[t]o promote the equality of bargaining power between employers and employees *to diminish the causes of labor disputes*."[56] It was in Congress's interest to lessen the likelihood of labor disputes "to maintain full production in its economy" knowing that "employees, employers, and labor organizations threatened to interfere with full production."[57] The NLRA itself states that "[it] is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions. . . ."[58] Congress expressly stated that the NLRA's goal is to protect production. This is a stark reminder that the NLRB is an arm of the federal government, and its interests lie more with maintaining production than with workers' rights, protections, or power in their workplaces.

There are two types of relationships between employers and employees to mitigate and eliminate obstructions to the free flow of commerce: cooperative and adversarial.[59] Cooperative relations are embraced when employees participate in all aspects of workplace decision making; therefore, they create an environment where management and labor's goals are compatible.[60] Workplaces that adopt adversarial relations do so through collective bargaining and create an inherent conflict of interest between the goals of management and labor.[61] Labor scholars conclude that the NLRA did not encourage

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55. MISHEL ET AL., *supra* note 52, at 28.

56. Kristine Price, *Tearing Down the Wall: The Need for Revision of NLRA § 8(a)(2) to Permit Management-Labor Participation Committees to Function in the Workplace*, 26 TEX. TECH L. REV. 1393, 1413 (1995) (emphasis added) (quoting S. 1958, 74th Cong., 1st Sess. (1935)).

57. Elizabeth A. Wiens, *§ 8.1 The National Labor Relations Act: An Overview*, *in* A PRACTICAL GUIDE TO EMPLOYMENT LAW IN RHODE ISLAND § 8.1 (Lynette Labinger & Mark A. Pogue eds.,1st ed. 2022).

58. 29 U.S.C. § 151.

59. Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J., 2021, 2021–22 (1987).

60. *Id.* at 2021–22, 2033.

61. *Id.* at 2033.

collaboration as a model; instead, the NLRA only encouraged an adversarial model.[62] Additionally, the Taft-Hartley Act's amendment confirmed the fate of labor relations under the NLRA: relations between management and labor would remain adversarial, and unions would become, and remain, more vulnerable than management.[63] Without a union, employees have far fewer methods of participating in workplace decision making. And unions became more vulnerable after the Taft-Hartley Act.

2. The DOJ is Empowered to File Civil RICO Claims Against Unions

Enacted in 1970, RICO is a section of the Organized Crime Control Act.[64] RICO created both a federal crime and a civil cause of action to target individuals who play a role in an illegal coordinated scheme or operation.[65] It took only a few years after RICO's creation for the DOJ to raise civil claims against unions with the first "test case" filed in 1982.[66] The government then proceeded to raise these civil RICO claims against unions, notwithstanding Congress's legislative intent.[67]

RICO was drafted with the intent of "protecting existing markets and market actors," which include unions.[68] G. Robert Blakey, the drafter of RICO, once said, "We don't want one set of rules for people whose collars are blue or whose names end in vowels, and another set for those whose collars are white and

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62. Price, *supra* note 56, at 1398 ("The NLRA is structured on an adversarial model of labor relations that views the interests of management and labor as mutually exclusive.").

63. *See* Malkawi, *supra* note 5151, at 5.

64. 18 U.S.C. §§ 1961–1968.

65. *Id.*

66. William A. Scrivener, *U.S. Sues Union in Test Case*, N.Y. TIMES (Apr. 18, 1982), https://www.nytimes.com/1982/04/18/nyregion/us-sues-union-in-test-case.html [https://perma.cc/K4FN-8ZFH] (In the complaint of this test case, the DOJ asked the court to take control away from the current leadership of Teamsters Newark Local 560, the Provenzanos and their associates, and to appoint trustees who will hold supervised balloting for new officers. One of the named defendants was the main suspect for the 1975 disappearance of James Hoffa, the former Teamster president.).

67. Alain L. Sanders & Priscilla Painton, *Showdown At Gucci Gulch: Designed as a Mob Buster, RICO Has Become a Powerful Catchall*, TIME, Aug. 21, 1989, at 48.

68. Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105, 145 (2013).

have Ivy League diplomas."[69] Congress enacted the RICO statute on a belief that "money and power are increasingly used to infiltrate and corrupt legitimate . . . labor unions."[70] Specifically, a civil RICO suit against a union "finds root in the concept that the concerted action of workers is somehow a violation of social and legal norms, a betrayal of the accepted terms of the [free-market] system and the manner of negotiating the employment relationship."[71] RICO enables the DOJ to target organizations of actors with similar goals that challenge the legitimacy of capitalism, and it offers an opportunity to normalize actors that instead conform to capitalism and ignore their existence.[72]

In a traditional civil RICO case, once the DOJ files its claim, the leading U.S. Attorney may demand a preliminary injunction to seize the defendant's assets.[73] When suing a union, this optional preliminary injunction risks an even more radical forfeiture than simply losing money—unions are at risk of losing their autonomy. If the DOJ's preliminary demand is granted, a trustee is court-appointed to oversee, investigate, and possibly discipline the union.[74] This trustee is a federally appointed outsider who serves to end corruption in unions but consequentially undermines the union's autonomy. For example, in *US v. IBT*, the DOJ demanded that the court appoint trustees, specifically, an elections officer to oversee union elections; this trustee was appointed in a consent decree.[75] While the DOJ's demands were not granted in the preliminary stages of the case, the court later awarded this injunction and more.[76] One year after the court denied this initial injunction demand, the court

69. Sanders & Painton, *supra* note 67, at 48.

70. *Id.* (citing Organized Crime Control Act of 1970, 84 Stat. 941 (1970)).

71. Levin, *supra* note 2, at 563; *see generally* Nat'l Lab. Rels. Bd., *Concerted Activity*, ABOUT NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/concerted-activity [https://perma.cc/RUK6-AA3E] ("Concerted action of workers" includes the activities of two or more workers that attempt to benefit their working conditions).

72. Levin, *supra* note 68, at 149–150.

73. ORGANIZED CRIME AND GANG SECTION U.S. DEP'T OF JUST., CRIMINAL RICO: A MANUAL FOR FEDERAL PROSECUTORS 277 (6th ed. 2016), https://www.justice.gov/archives/usam/file/870856/download [https://perma.cc/S9C8-PHHM].

74. *See* United States v. Int'l Bhd. of Teamsters, No. 88 Civ. 4486 (S.D.N.Y. 1989).

75. JAMES B. JACOBS & KERRY T. COOPERMAN, BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB 43 (2011).

76. *See id.* at 38, 43.

appointed *three* trustees that monitored the union's activity for over *thirty years*.[77]

The plaintiff in these civil RICO cases is the DOJ, an arm of the federal government. The presiding authority figure and factfinder of these civil RICO cases are federal judges, another arm of the federal government. And finally, the defendants of these civil RICO cases are unions. By relying on the historical, theoretical, and legal contexts previously discussed,[78] civil RICO cases filed against unions perpetuate the power imbalance between employers and employees.

II. HARM TO UNION AUTONOMY OUTWEIGHS THE THREAT OF ORGANIZED CRIME AND PERPETUATES IMBALANCES OF POWER BETWEEN EMPLOYERS AND EMPLOYEES

Now that these theories, histories, and laws have been contextualized, this Note analyzes the reasons why the DOJ raises civil RICO claims against unions and the specific harms unions face during these cases. This Section is a cost-benefit analysis of the desired outcomes of these civil RICO cases and their negative consequences. Used primarily at the end of the 20th century, civil RICO was a tool in the federal government's toolbox to weaken organized crime, specifically La Cosa Nostra. The federal government reached this desired outcome, in part, through civil RICO. However, the negative consequences of using this tool outweigh the desired outcome. Unions suffered from civil RICO because these cases set precedent that union autonomy can be bargained away in litigation and settlement. This cost outweighs the benefits.

A. The DOJ Historically Raised Civil RICO Cases Against Unions to Weaken Organized Crime

La Cosa Nostra is the longest-living organized crime family in U.S. history, reaching its pinnacle of size and power in the 1970s and 1980s.[79] In 1989, FBI Director William Webster

77. Andrew Wallender, *Teamsters Say Goodbye to U.S. Oversight 30 Years After Takeover*, BLOOMBERG LAW (Feb. 13, 2020, 5:46 AM), https://news.bloomberglaw.com/daily-labor-report/teamsters-say-goodbye-to-u-s-oversight-30-years-after-takeover [https://perma.cc/2TD9-6PU2].

78. *See* discussion *supra* Sections II.A., II.B.

79. James B. Jacobs, *The Rise and Fall of Organized Crime in the United States*, 49 CRIME & JUST. 17, 17 (2020).

testified before the President's Commission on Organized Crime ("PCOC") that there were approximately 1,700 made members of La Cosa Nostra and perhaps ten times that number of associates.[80] For context, made members are the lowest members of the crime family but still command respect in the organization and must take an oath of silence.[81] Associates are members of a crew run by a made member and are not required to take any oath.[82] La Cosa Nostra was always met with resistance from local, state, and federal governments and this resistance climaxed with the creation of the PCOC.

The PCOC reported on "a full and complete national and region-by-region analysis of the nation's organized crime problems" and focused on four international unions, one being the Teamsters. The Teamsters is a powerful international union of blue-collar and professional workers with over 1.4 million members that was founded in 1903.[83] The PCOC's report concluded that thirty-six Teamsters locals had an ongoing relationship with La Cosa Nostra and cited the Teamsters' election scheme as a point of vulnerability.[84] The PCOC arrived at this conclusion through an extreme use of resources and collaboration. The PCOC collaborated with many other arms of the state, "including the Federal Bureau of Investigation, the Department of Labor, the New York city and Chicago Police Departments, [and] the Internal Revenue Service. . . ."[85] Notably, the DOJ provided "extensive statistical information, conducted special analyses for evaluation by the [PCOC], and authorized the [PCOC] to have access to *court authorized electronic surveillance*."[86] The PCOC recommended directly to the DOJ to purge corruption and racketeering from the

80. James B. Jacobs & Lauryn P. Gouldin, *Cosa Nostra: The Final Chapter?*, 25 CRIME & JUST. 129, 135 (1999).

81. FBI, *New York's Five Families*, FILE REPOSITORY, https://www.fbi.gov/file-repository/mafia-family-tree.pdf [https://perma.cc/5A2K-TLH7].

82. *Id.*

83. George Washington Univ. Librs. & Acad. Innovation, *Teamsters History and Timeline*, THE GEORGE WASHINGTON UNIV., https://library.gwu.edu /teamsters-history-and-timeline [https://perma.cc/HH6W-39A4].

84. JAMES JACOBS, MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT, 43–44 (2006).

85. President's Commission on Organized Crime, The Edge: Organized Crime, Business, and Labor Unions 6 (1986).

86. *Id.* at 6; *see generally supra* Section II.A.i. (discussing surveillance of César Chávez and the National Farm Workers Association.).

Teamsters through civil RICO and federal trusteeships.[87]

Civil RICO litigation against labor unions quickly became a tool for the DOJ to target La Cosa Nostra. Of the first thirteen RICO civil suits filed by the federal government, six named a labor union as a defendant.[88] Seemingly, unions were a host for the parasite of La Cosa Nostra. And instead of targeting only the parasite, civil RICO presented the DOJ with an opportunity to weaken the host as well.[89] If unions legitimized capitalism, maybe the government's cost-benefit analysis of whether civil RICO does more harm than good would have concluded differently. *US v. IBT* is a DOJ-initiated civil RICO case against the Teamsters. This case started with a 118-page civil complaint filed in 1988 by Rudy Giuliani, then U.S. Attorney for the Southern District of New York.[90] This case lasted well over two decades, was overseen by two federal judges, and was argued by nine U.S. attorneys.[91] Giuliani painted the Teamsters Union as both a victim and a criminal: a victim of infiltration of members of La Cosa Nostra crime organization, and a perpetrator of fraud against its union members through violence and intimidation.[92]

B. Civil RICO Cases Brought by the DOJ Harm Unions' Autonomy, Finances, and Reputation

The sacrifice of union autonomy to address organized crime is the primary injustice of civil RICO suits. These cases present an opportunity to federal courts and the DOJ to remove union leadership and replace it with a state-sanctioned, unelected federal leadership.[93] This reorganization of union decision-making power is meant to reassure the public that workers' interests are being advanced.[94] Notably, civil RICO cases highlight the idea that federal courts and the DOJ are more

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87. JACOBS, *supra* note 84, at 44–45.

88. Victoria G.T. Bassetti, Note, *Weeding Rico Out of Garden Variety Labor Dispute*s, 92 COLUM. L. REV. 103, 119 (1992).

89. JACOBS, *supra* note 84, at 54–55 (seventeen of the twenty-three recommendations the PCOC made to the President put the onus on unions, the NLRB, or the Department of Labor. Three recommendations were made to the DOJ, two to state and local law enforcement, and only one to employers).

90. JACOBS & COOPERMAN, *supra* note 75, at 22 (citing Complaint, United States v. Int'l Bhd. of Teamsters, No. 88 Civ. 4486 (S.D.N.Y. 1989)).

91. *Id.* at xix–xxi.

92. *Id.* at 31–33.

93. *See* Levin, *supra* note 68, at 161.

94. *Id.*

motivated by private interests represented by the state than the private interests represented by the set of nonstate collective actors of unions.[95]

Union leadership is far better suited to act in the interest of its members than federal agents. When running properly and without external influence, union leadership is democratically elected by its members.[96] Elected leaders, especially at the local level, work for the same employer or type of employer as their members. The leader then categorizes their members' issues—which are critical, which can wait—and determines how their members may want to solve them. Elected leaders have empathy toward the life experiences, limitations, and strengths of the members they represent, especially at the local level.[97] These are the leaders that should be making decisions for union members—not federal agents.

Similarly, union autonomy is important because it creates purpose in the workers' employment. One expert found that unions provide an unexpected psychological benefit: unions shape how people experience their work.[98] There's a "positive association between perceiving your union as supportive and feeling that your work is meaningful."[99] Union autonomy is critical to union power and the pillar of collectiveness. Unions empower workers to have a say in how their workplace is governed. Workers' collective bargaining power is weakened when third parties influence union leadership because the union no longer is exclusively served by the members for the members. Both La Cosa Nostra and court-appointed trustees are third parties to unions.

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95. *Id.* at 161–62.

96. *See* 29 U.S.C. § 159 (similar to an electoral college).

97. *See, e.g.*, Int'l Ass'n of Machinists and Aerospace Workers, *Roles and Responsibilities of Union Leaders in HPWO Partnerships*, IAM (Oct. 19, 2009), https://www.goiam.org/uncategorized/roles-and-responsibilities-of-union-leaders-in-hpwo-partnerships [https://perma.cc/YF6Y-2R47] (providing the roles and responsibilities of International Association of Machinists and Aerospace Workers leaders, including working, communicating, and connecting with members to better understand their perspective in their job). Thus, these elected leaders have far more in common with the workers they represent than an external court-appointed trustee.

98. Phil Ciciora, *Perceived Union Support Buoys 'Meaningfulness of Work' Measures*, ILL. NEWS BUREAU (May 13, 2019, 9:00 AM), https://news.illinois.edu/view/6367/786425 [https://perma.cc/MYC5-JMLH] (an interview about the article *The Positive Impact of Perceived Union Support on Union Member Work Meaningfulness*).

99. *Id.*

Additionally, litigation is expensive, especially when the conflict lies between two sophisticated institutions like an international union and the DOJ. Even without empirical data on the finances of DOJ-initiated civil RICO suits, "it seems safe to assume that unions—and consequently their members—are forced to bear substantial financial costs." [100] Union dues are already a hot-button topic, and employers frequently use them to convince employees not to unionize.[101] Employers will take extreme measures to convince their employees that the cost of union dues does not amount to the benefit of collective bargaining.[102] But the benefits of unions are powerful, as dues are used for critical programs like salary stipends amid strikes, mutual aid for members in need, pensions, and quality healthcare.[103] These programs represent the benefits that arise from a union's pillar of collective action: the small dues of many individuals accumulate and create a significantly larger accumulation of funds. For example, an individual worker could not pay for their strike stipend, pension, and healthcare with just the cost of their monthly union dues.[104] More importantly, they could not purchase collective bargaining power to negotiate their employment contract with their employer with the cost of their monthly union due. But, when combined with the dues of all their coworkers, the amount becomes significant enough to pay for these benefits for all union members.

However, dues are not just used for these benefits: they are also used to pay for the union's legal representation. Litigation is an expected reality for larger institutions and a budget line for many businesses, organizations, and unions. While unions expect to litigate when required, civil RICO cases like *U.S. v.*

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100. Levin, *supra* note 2, at 623.

101. *See, e.g.*, Josh Fiallo, *Join a Union or Buy an Xbox? Delta's Anti-Union Campaign Inspires Twitter Backlash*, TAMPA BAY TIMES (May 11, 2019), https://www.tampabay.com/blogs/2019/05/11/join-a-union-or-buy-an-xbox-deltas-ant-union-campaign-inspires-a-twitter-backlash [https://perma.cc/DW9K-6LKZ] (where an employer placed flyers in its employee breakrooms persuading employees to buy gaming counsels or baseball tickets instead of paying union dues).

102. *See, e.g.*, U.S. DEP'T OF LAB., SHEDDING LIGHT ON EMPLOYERS' USE OF ANTI-UNION CONSULTANTS 1, https://www.dol.gov/sites/dolgov/files/general/labortaskforce/docs/508_union-fs-4.pdf [https://perma.cc/2KFF-5H2C] ("Anti-union consulting has developed into a major, $340 million-a-year industry.").

103. SEIU 503-ODFW Sub-Local 109 Union, *Union Dues Frequently Asked Questions*, LOCAL 109, https://local109.seiu503.org/union-dues-frequently-asked-questions [https://perma.cc/F6WT-HZPM].

104. Gender-neutral language used to discuss a hypothetical individual, not a hypothetical collective.

IBT are examples of avoidable litigation. The federal government's alleged goal in these civil cases is to weaken organized crime, but a consequence of these cases includes unions using more funds for litigation and less for the benefits of collective action. Union dues should be reserved for the programs the union members want to invest in as is their autonomous right. But when the DOJ uses civil RICO cases against unions for a goal of their own, unions are forced to allocate dues to defend litigation, thus, weakening their financial autonomy. Therefore, the DOJ should not raise civil RICO suits to address organized crime because union members ultimately pay for the litigation. Given that the DOJ has other, more effective methods,[105] it should not use civil RICO suits that harm unions and their members as a consequence to addressing organized crime.

Finally, civil RICO cases place unions' reputations in jeopardy. When a union loses a civil suit against the government, such cases "can serve as an effective countermeasure against a union corporate campaign."[106] This litigation serves as bad press for unions and may convince the public that the sole purpose of labor unions is to serve as a vessel for organized crime.[107] As previously discussed, unions offer a benefit to the greater public. Unions create a spillover effect that benefit the wages and workplace safety of nonunion workers.[108] Also, they are historically an ally to civil rights movements fighting for equality.[109] These civil RICO cases have played a role in distorting unions in the public's eyes as corrupted institutions that need government intervention.[110] Therefore,

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105. *See, e.g.*, JACOBS, *supra* note 84, at 54–55 (17 of the 23 recommendations the PCOC made to the President put the onus on unions, the NLRB, or the Department of Labor. Three recommendations were made to the DOJ, two to state and local law enforcement, and only one to employers.)

106. Levin, *supra* note 2, at 623.

107. *See generally* James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 30 CRIME & JUST. 229, 233–35 (2003) (discussing how union members and the public perceived "that most of the unions in New York were saturated with rackets" during the mid-1900s).

108. *See* discussion *supra* Part I, p. 2–3.

109. *See* discussion *supra* Part I, p. 3.

110. Levin, *supra* note 2, at 623 ("But beyond the economic issues, the proliferation of the civil RICO suit has sociopolitical significance and is a way of understanding the stature of the union and contextualizing and situating the future of the American labor movement.").

civil RICO cases against unions initiated by the DOJ to target organized crime harm labor unions.

III. HARM TO UNION AUTONOMY OUTWEIGHS THE BENEFIT OF JUDICIAL CREATIVITY AND PERPETUATES POWER IMBALANCES BETWEEN EMPLOYERS AND EMPLOYEES

While both unions and corporations have faced government intrusion from civil settlement negotiations with the DOJ, unions are more at risk of losing their autonomy than corporations by the hands of this judicial creativity. Comparing two cases can prove this argument: one with a union defendant in *US v. IBT* and one with a corporate defendant in *United States v. Apple, Inc.*, No. 12-cv-2826, 2012 WL 1193205 (S.D.N.Y. 2012).

Union autonomy frequently suffers in settlements, as demonstrated by the federal trusteeships in *US v. IBT*. Because defendant-unions *do not* further the goal of legitimizing capitalism, and the DOJ does, federal courts are more willing to sacrifice union autonomy so that the DOJ can reach its goals in civil RICO cases.

In comparison, defendant-corporations in civil suits face a lower risk of losing their autonomy when settling civil as demonstrated by *US v. Apple*. Even companies with large influence on the economy and consumer well-being rarely risk negotiating away their autonomy. Court-appointed monitors may be tasked to watch over companies but only in extreme cases and in niche fields of corporate regulation.[111] Because defendant-corporations *do* further the goal of legitimizing capitalism alongside the DOJ, federal courts are less willing to sacrifice corporate autonomy.

A. Judicial Creativity in a Case with a Defendant-Union: US v. IBT

One year after the initial complaint in *US v. IBT* was filed, Judge David Norton Edelstein approved a consent decree agreed upon by the lead negotiators who represented the DOJ and the

111. *See, e.g.*, U.S. Dep't of Just., *List of Independent Compliance Monitors for Active and Previous Fraud Section Monitorships*, CORPORATE ENFORCEMENT, COMPLIANCE, AND POLICY UNIT, https://www.justice.gov/criminal-fraud/monitorships [https://perma.cc/P3KA-MQBJ].

Teamsters.[112] The decree demanded several amendments to the Teamsters' constitution concerning union elections and liability of union leaders.[113] To enforce these changes, the decree mandated that three trustees be appointed by Judge Edelstein from a list of nominations presented by the DOJ and the Teamsters: one Elections Officer and two Disciplinary Officers.[114] The court ordered the Teamsters to employ these full-time trustees for three years.[115] The court empowered these three trustees to hire consultants, investigators, and administrative personnel, all funded by the Teamsters' budget.[116] These trustees themselves would be on the union payroll.[117] The Teamsters had to pay $3 million per year to fund these trustees and their decisions.[118] The trustees' job was to oversee elections, investigate fraud, and discipline *any* other violations of the newly amended union constitution.[119]

Importantly, this decree did *not* include a provision stipulating when the Teamsters could be free from these three trustees.[120] The decree vaguely stated that the trusteeships would end "upon satisfactory completion and implementation of the terms and conditions of this order," without providing concrete standards for either.[121] Four years into the trusteeship, Judge Edelstein commented on this vagueness, noting that, "there is no timetable for the completion of the [trustees' tasks]."[122] In the end, the Teamsters hosted and paid for the expenses of an Independent Review Board and a part-time Elections Officer for over *thirty years*.[123]

Judge Edelstein was tasked with appointing each trustee and member of the Independent Review Board until his death in 2000, at which point Judge Loretta Preska took over.[124]

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112. U.S. v. Int'l Bhd. of Teamsters, No. 988 Civ. 4486 (S.D.N.Y. 1989).
113. *See id.*
114. JACOBS & COOPERMAN, *supra* note 75, at 41.
115. *Id.* at 42–44.
116. *Id.* at 41.
117. *Id.*
118. *Id.* at 45.
119. *Id.* at 42–44.
120. *Id.* at 44.
121. *Id.*
122. *Id.*
123. *See* Wallender, *supra* note 77 (Former Teamsters President James P. Hoffa commented on this timeline, stating that, "We should have done it ourselves. . . . Whatever had to be done with regard to our union certainly didn't need to take 30 years.").
124. JACOBS & COOPERMAN, *supra* note 7675, at xxiii.

Frederick Lacey and Charles Carberry served as Disciplinary Officers from their 1989 appointment until 1992.[125] It is worth mentioning that all three men—Lacey, Carberry, and Judge Edelstein—started their prestigious careers at the DOJ, the plaintiff in *US v. IBT*.[126]

US v. IBT "represents one of the United States government's most concerted efforts to root out corruption from a national union."[127] But union autonomy faced the consequences of federal judicial and executive branches' aggressive tactics in reaching these goals. For over thirty years, the federal courts required that unions allow a court-appointed trustee to surveille the union's actions all while on the Teamsters' payroll. The *US v. IBT* court was in no rush to reinstate the Teamsters' financial and decision-making autonomy. When compared to the outcome of a defendant-corporation's settlements discussed below, this outcome is extraordinary because the settlement offered no clarity explaining when and how the union could satisfy any requirements to end this trusteeship.

B. Judicial Creativity in Cases with a Defendant-Corporation: US v. Apple

In April of 2012, the DOJ filed a civil suit against Apple, Inc. (Apple) and five other e-book publishing companies who conspired to raise and fix the price of e-books in violation of the Sherman Antitrust Act.[128] The DOJ claimed that, as Apple worked to release their first iPad, the company conspired with the five largest publishers to fix e-book prices so the iPad could

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125. *Id.* at xxiv.

126. Ted Sherman, *Frederick B. Lacey, Former U.S. Attorney Who Took on the Mob, Dead at 96*, N.J. ADVANCE MEDIA (Apr. 4, 2017, 9:20 PM), https://www.nj.com/news/2017/04/frederick_b_lacey_former_us_attorney_who_took_on_t.html [https://perma.cc/RY7Y-YZ86]; *Edelstein, David Norton*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/node/1380366 [https://perma.cc/4YDU-JRZ8].

127. Victoria G.T. Bassetti, *Weeding Rico Out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103, 136–37 (1992).

128. U.S. v. Apple, Inc., No. 12-cv-2826, 2012 WL 1193205, at *1 (S.D.N.Y. 2012) (where the DOJ raised claims that Apple violated § 1 of the Sherman Antitrust Act, which prohibits agreements between businesses unreasonably restrict trade. The act prevents monopolies, protects free trade, and prevents unfair business practices.).

compete with Amazon's Kindle.[129] One year later, Judge Denise Cote ordered her final judgment on the case.[130] She agreed with the DOJ and awarded the agency its request for a temporary judge-appointed antitrust monitor.[131]

The monitor's job was unambiguous: the section of Judge Cote's order regarding the monitor's scope of power is written almost like a detailed employment contract.[132] The provisions are well written and detailed, leaving little room for vagueness. The court ordered scheduled communication between itself, the monitor, Apple, and the DOJ. Every six months, the monitor was required to offer an assessment[133] of Apple's internal compliance with antitrust policies and, if appropriate, make recommendations on how to improve them.[134] Notably, the monitor's timeline was also unambiguous. Judge Cote specified that this monitor would have exactly *two years* to watch over Apple with an option for the DOJ to move for a one-year extension.[135]

Both Apple and the DOJ presented candidates for the monitor.[136] Judge Cote ultimately selected DOJ candidate Michael Bromwich, a career DOJ attorney with a strong résumé working as a temporary monitor in hot-button cases.[137] Bromwich served as a monitor for two allegedly corrupt police departments, several FBI controversies, and most famously, the British Petroleum Deepwater Horizon Oil Spill.[138] This résumé prepared Bromwich to strike a balance between working for and against federal interests.

Throughout the two-year monitorship, DOJ attorneys accused Apple of openly obstructing Bromwich's work and "of

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129. *Id.* at *4.
130. *Id.* at *1.
131. *Id.* at *5–7.
132. *Id.*
133. These assessments are available to the public on the DOJ's website at https://www.justice.gov/atr/case/us-v-apple-inc-et-al [https://perma.cc/9QY3-CS38].
134. *Apple, Inc.*, 2013 WL 4774755, at *6.
135. *Id.* at *5.
136. *Id.*
137. Joseph Ax, *Prominent Attorney Named as Monitor in Apple E-books Case*, REUTERS (Oct. 16, 2013, 2:23 PM), https://www.reuters.com/article/us-apple-ebooks-monitor/prominent-attorney-named-as-monitor-in-apple-e-books-case-idUSBRE99F11W20131016 [https://perma.cc/7E8T-4379].
138. Press Release, The White House Off. of the Press Sec'y, President Obama Announces Bromwich to Fix Oil Indus. Oversight (June 15, 2010) https://obamawhitehouse.archives.gov/the-press-office/president-obama-announces-bromwich-fix-oil-industry-oversight [https://perma.cc/A6QP-8AA5].

waging a campaign of character assassination against [him]."[139] Apple's behavior displayed to the court and the DOJ that "[it] simply [did] not want any monitor whatsoever."[140] The multibillion-dollar company even complained about the cost of hosting Bromwich.[141] Despite Apple's attitude, at the end of the two-year monitorship, the DOJ and Apple agreed that the optional one-year extension was not necessary, despite stiff resistance from the monitor.[142] Judge Cote acknowledged that Bromwich faced a "challenging relationship with Apple," but nonetheless concluded Apple had implemented "the vast majority" of his recommendations.[143]

The federal government has an interest in protecting major players in the marketplace, or in other words, institutions that uphold the pillars of capitalism.[144] The federal government also has an interest in upholding the legitimacy of federal laws and courts.[145] These institutions Bromwich was tasked to monitor were in sync with the federal interest of protecting the pillars of capitalism but had crossed a line with the law.

As discussed below, there are several differences between *US v. IBT* and *US v. Apple*, and these differences display the power imbalances unions face in the court of law. Some of these differences include clarity on the court-appointed timeline and goals, the courts' language in naming the appointment as a monitorship or trusteeship, and the DOJ's deference to the defendants. And, of course, one major difference between these two cases is that Apple is an employer and the Teamsters is comprised of employees.

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139. Andrew Richard Albanese, *Apple's Antitrust Monitorship is Over*, PUBLISHERS WEEKLY (Oct. 14, 2015), https://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/68358-apple-s-antitrust-monitorship-is-over.html [https://perma.cc/TLZ5-BWKR].

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* discussion *supra* Sections II.A.i, II.A.ii.

145. *See* Joo *supra* note 38, at 583 ("[G]overnment has an interest in maintaining the legitimacy of capitalism and government's symbiotic relationship with capitalism.").

C. Comparison of Cases with a Defendant-Union and Defendant-Corporation Displays Power Imbalances Between Employers and Employees

US v. IBT and *US v. Apple* highlight the differences between union and corporate defendants in DOJ-initiated civil suits that settle with a judge-appointed external administrator.

First, judicial transparency regarding the length of time the administrator was tasked to watch over the Teamsters and Apple varied greatly. In *US v. IBT*, Judge Edelstein offered no guidance regarding the length of the Teamsters' trusteeships.[146] While two positions only lasted three years, a federally appointed elections trustee board was in power over the Teamsters' election compliance for over *thirty years*.[147] This trusteeship continued after the death of Judge Edelstein,[148] empowering a judge who was entirely new to the case to determine when the trusteeship should end. The Teamsters Union's goalposts were vague and, therefore, failed to empower the union to make any actionable changes itself. Instead, a federal agent was tasked with surveilling the union and making the changes on the union's behalf.

In comparison, the length of time Apple's monitor was tasked to watch over the company was clear from the start. Apple knew it had two years to comply with antitrust laws, and if the company failed, it may have to host its monitor for one more year.[149] And even though the monitor publicly declared that the company was not ready to end its monitorship, the court ordered it to end at the two-year mark.[150] Additionally, communications between the court and the monitor were structured and sustained with the intention of helping the company.[151] Unlike the Teamsters' experience, Apple's goalposts were unambiguous. And even when the company didn't hit its target, outwardly complained about the monitor, and made the monitor's job more difficult, the court awarded Apple back its autonomy after only two years.[152]

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146. JACOBS & COOPERMAN, *supra* note 75, at 44 ("there is no timetable . . . .").
147. *See* Wallender, *supra* note 77 ("Whatever had to be done with regard to our union certainly didn't need to take 30 years.").
148. JAMES B. JACOBS & KERRY T. COOPERMAN, *supra* note 75, at xxiii.
149. U.S. v. Apple, Inc., No. 12-cv-2826, 2012 WL 1193205, at *5 (S.D.N.Y. 2012)
150. Albanese, *supra* note 139.
151. *Apple, Inc.*, 2013 WL 4774755, at *6.
152. Albanese, *supra* note 139.

Second, the job of the monitor in *US v. Apple* was far less ambiguous than the trustees in *US v. IBT*. The final judgment in *US v. Apple* resembles an employment contract for the monitor, as it explains the monitor's tasks, tools, and timeline point by point.[153] In contrast, the scope of power for the trustees in *US v. IBT* was broad and vague, leaving room for the DOJ to argue, and the court to make, grand interpretations, consequentially leading to a thirty-year-long elections trusteeship.[154]

Third, even the defined term for the administrators highlights differences between the union defendant and the corporate defendant. A monitor invokes the idea of an observer: a third party not involved in decision-making, but rather a watcher.[155] A monitor is on equal footing with its subject until that subject breaks the rules. *US v. Apple* put this definition into action when Bromwich was instructed merely to assess Apple's internal compliance with antitrust policies and, if appropriate, make recommendations on how to improve them.[156]

In contrast, a trustee invokes the idea of delegated power: a third party given the power to make certain decisions on behalf of the entity usually in charge of making decisions.[157] Trustees make broad, sweeping changes from the top of hierarchies. The trustees in *US v. IBT* acted within this definition because their broadly defined assignment was not just to oversee elections, but also to *investigate* fraud, and *discipline* any violations of the newly amended union constitution.[158]

Finally, the DOJ and the courts perceive unions and corporations differently because of the federal interest in protecting the legitimacy of capitalism. As discussed, unions challenge the pillars that uphold capitalism, including individualism and the prioritization of profit maximization.[159] The plaintiff and fact finder in *US v. IBT* both had a motive to weaken the defendant's power. In *US v. Apple*, on the other

153. *Apple, Inc.*, 2013 WL 4774755, at *5–7.

154. *See* JACOBS & COOPERMAN, *supra* note 75, at 44.

155. *See Monitor*, MERRIAM-WEBSTER (2023) (defining the verb as "to watch, keep track of, or check usually for a special purpose").

156. *Apple, Inc.*, 2013 WL 4774755, at *6.

157. *See Trustee*, MERRIAM-WEBSTER (2023) (defining the noun as "a natural or legal person to whom property is legally committed to be administered for the benefit of a beneficiary").

158. JACOBS & COOPERMAN, *supra* note 75, at 42–44.

159. *See* Gifford, *supra* note 45, at 1417; Discussion *supra* Sections II.A.i, II.A.ii.

hand, the plaintiff and fact finder wanted the defendant not only to comply with the law, but also to get back up on its feet as soon as possible. In the months before the DOJ filed its antitrust claim, Apple gave a significant boost to the stock market index the S&P 500, helped create 210,000 jobs by launching its App Store and iOS, and ensured the United States would be a leader in technological advances in the 21st century.[160] Therefore, through its significant contributions to the economy, Apple furthered the legitimization of capitalism.

These different perceptions of corporations and unions can be simplified down to one broad difference: fraternalism versus paternalism. Fraternalism is a horizonal relationship between equals, whereas paternalism is a vertical or hierarchical relationship between an authority and a subordinate. Federal courts and the DOJ perceive influential companies as institutions outside of the federal government. But ultimately, courts, the DOJ, and influential companies share a similar goal of legitimizing capitalism.[161] And when companies bend the rules to a breaking point or bend the wrong rule, they are quickly corralled back into line. Courts have an interest in putting the public's trust back into a corporate-defendant, and therefore, back into the boundaries of capitalism. Because these actors aim to legitimize capitalism, the relationship between the branches of federal government and influential companies more closely resembles fraternalism rather than paternalism.

On the other hand, the federal government and unions do not share the same interests. Whereas the government has an interest in upholding capitalism's pillar of individualism, unions have an interest in upholding its pillar of collective action.[162] Thus, federal courts and the DOJ are motivated to perceive unions as something to be controlled or weakened so they can better fit within a capitalist economic structure. In turn, branches of the federal government are motivated to take union autonomy and decision-making power from the union and put it into the hands of those who legitimize capitalism. A government that deposes union leadership and replaces it with state-sanctioned, unelected federal leadership is done, in part, to

160. Ben Bajarin, *Why America Needs Apple*, TIMES (Apr. 2, 2012), https://techland.time.com/2012/04/02/why-america-needs-apple [https://perma.cc/R5RV-27F5].

161. *See* discussion *supra* Sections II.A.i, II.A.ii.

162. *See* discussion *supra* Section II.A.ii.

reassure Americans that workers' interests are better advanced without using collective action.[163] Notably, civil RICO cases show that the actions of federal courts and the DOJ are motivated by a belief that private interests represented by the state are more desirable than the private interests of unions.[164] The relationship between the branches of federal government and unions more closely resembles paternalism than fraternalism.

Therefore, unions are vulnerable to DOJ-initiated civil RICO suits that weaken union autonomy, reputation, and finances. These cases are settled by bargaining away union autonomy, which is far less common in civil actions filed against corporate defendants. The stark difference between how the DOJ and federal courts settle with corporations and unions can be explained by the federal interest in protecting the legitimacy of capitalism. This difference creates disadvantages for unions: an abatement of their autonomy, a requirement to spend more resources on litigation, and harm to their reputation with the public.

IV. THE NLRB SHOULD INCENTIVIZE INTERNAL UNION COMPLIANCE PROGRAMS TO AVOID FUTURE HARMS TO UNION AUTONOMY

A solution to the disadvantages unions face from federal intrusion is found within the field of compliance. The NLRB should incentivize unions to create and maintain union compliance programs. Inspiration should be drawn from the United States Sentencing Commission's "seven traits of an effective compliance program" and the three benefits corporations receive from the Environmental Protection Agency's (EPA) Clean Water Act (CWA) for having an effective compliance program. Not only does this recommendation provide a path for unions to avoid federal intrusion, but it could prevent external forces from creating a scenario where the DOJ would ever raise another civil RICO case against a union again.

163. Levin, *supra* note 68, at 161.
164. *Id.* at 161–62.

A. Effective Compliance Programs and Their Benefits

Since the 2000s, corporations have created and implemented compliance programs to autonomously self-regulate and self-police.[165] Federal agencies that prosecute or litigate against corporations will often look to see if the business has a compliance program. If the defendant has a program, especially a well-funded, robust program, the prosecution or plaintiff will often lessen the punishment in settlement.[166]

In settlement negotiations, the United States Sentencing Commission recognizes "the good corporate citizen" and rewards "the efforts the good corporate citizen has made in establishing and maintaining [an] effective compliance program."[167] The way the Sentencing Commission rewards the good corporate citizen is by recommending "lesser fines being called for under the guidelines for the organization."[168] Between 1992 and 2022, eleven corporate criminal offenders "have received a reduction for having an effective compliance and ethics program."[169] Countless corporations have also used their compliance programs as a bargaining chip in civil litigation settlement negotiations.

The Sentencing Commission published the traits of an effective compliance program in 1991 to guide criminal sentencers regarding corporate probations and sanctions.[170] The

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165. Peter S. Spivack & Isabel Costa Carvalho, *The Evolution of Compliance: How Did We Get Here?*, LEXOLOGY (Apr. 30, 2020), https://latinlawyer.com/guide/the-guide-corporate-compliance/second-edition/article/1-the-evolution-of-compliance-how-did-we-get-here [https://perma.cc/85K2-F5G2].

166. U.S. Sent'g Comm'n, *Corporate Crime in America: Strengthening the "Good Citizen" Corporation*, 2 SYMP. ON CRIME & PUNISHMENT IN THE U.S. (1995), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/19950907-symposium/WCSYMPO_opt.pdf [https://perma.cc/5RQZ-LYEG].

167. *Id.* at 14.

168. *Id.*

169. U.S. SENT'G COMM'N, THE ORGANIZATIONAL SENTENCING GUIDELINES 33 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf [https://perma.cc/Y6GQ-DG7F].

170. Kathleen Cooper Grilli, *Foundational Materials and Program Infrastructure: The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs*, COSMOS (2023), https://compliancecosmos.org/history-organizational-sentencing-guidelines-and-emergence-effective-compliance-and-ethics-0#footnotes [https://perma.cc/C7K5-P2M2].

Commission's seven traits of an effective compliance program require organizations to have:

1) Written standards and procedures to prevent and detect internal misconduct;
2) A high-level internal compliance officer;
3) No employment of personnel with authority who it knows, or should know, has previously engaged in illegal or noncompliant behavior;
4) Effective internal compliance training and communication throughout the organization;
5) Effective monitoring, auditing, and reporting mechanisms to ensure effective compliance;
6) Disciplinary and incentivizing methods to encourage personnel to follow the compliance program; and
7) Appropriate and effective responses to remediate internal wrongdoing.[171]

Ideally, any institution with a well-funded, robust compliance program would not knowingly violate the laws regulating it. However, in a profit-driven world, an institution may implement its compliance program with the sole intent of receiving the benefits offered by its regulators.[172] The beauty of a compliance program is that, given sufficient resources and authority, it should fundamentally change the way the institution operates.[173] The goals of the business will naturally conform to more ethical ends. The methods the institution uses to reach these goals will naturally conform to more ethical means.[174] Internal monitoring, auditing, and reporting

171. *See* U.S. SENT'G GUIDELINES MANUAL § 8(B)2.1 (U.S. SENT'G COMM'N 2021) (discussing effective compliance and ethics programs).

172. *See* Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar. – Apr. 2018, at 116–25 (analyzing how companies spend millions of dollars annually on robust compliance programs, yet malfeasance remains entrenched in the corporate world. The authors concluded that too many companies treat compliance as a to-do list, making employees sit through training and attest that they understand the rules but failing to assess the effectiveness of their compliance programs or doing so with faulty metrics.).

173. *See* DELOITTE, BUILDING WORLD-CLASS ETHICS AND COMPLIANCE PROGRAMS 27 (2015) ("[Repetition of internal monitoring and enforcement] allows organizations to learn from the past and leverage people, process, and technology with an eye toward the future for continuous improvement of their ethics and compliance program's maturity.").

174. *See* Richard P. Kusserow, *Culture of Compliance Begins with the Tone at the Top*, STRATEGIC MGMT. SERVICES (Nov. 2022), https://www.compliance.com/resources/culture-of-compliance-begins-with-the-tone-at-the-top [https://perma.cc

mechanisms to ensure effective compliance will become more robust with more experience and tradition.[175] Compliance training and communications throughout the organization will help guide all future personnel.

B. Case Study: The EPA's Audit Program

The EPA is a prime example of a federal agency tasked with enforcing civil laws and regulations that offers guidance to institutions it regulates on the benefits of implementing an adequate compliance program. The 1972 CWA monumentally overhauled the regulation of water pollution. Chemical manufacturers and several other industries were forced to choose between adapting their business practices to the CWA or violating these regulations knowingly. Companies that followed these regulations would lose profits, but companies that violated these regulations were at risk of paying high fines.[176] A company may be tempted to knowingly violate the CWA if it were to crunch the numbers and realize it would ultimately save money. Thus, the EPA initially faced problems of high rates of noncompliance from the polluters it regulates.[177]

In the 2000s, the EPA implemented a solution to this noncompliance problem. The agency's enforcement program now offered strong incentives for companies to implement their own internal compliance programs.[178] This program, called the Audit Policy, established nine conditions companies' compliance programs must satisfy to receive any incentives:

1) systemic discovery;
2) voluntary disclosure;
3) prompt disclosure;
4) independent discovery and disclosure;

/3HA5-7UBF] (analyzing one of the key methods of compliance called The Tone at the Top, which encourages c-suite executives to provide an ethical example for their subordinate employees, stating that "employees who believe their leaders operate with integrity, respect and in compliance, are more likely to develop attitudes and beliefs that support compliance and ethical behavior.").

175. DELOITTE, *supra* note 173, at 27 ("The value of both compliance testing and monitoring is compounded when it is repeated over time.").

176. *See* Dylan G. Rassier & Dietrich Earnhart, *Clean Water Regulation and Profitability*, 36 UNIV. OF WIS. PRESS 329, 341 (2010).

177. See CYNTHIA GILES, *Noncompliance With Environmental Rules is Worse Than You Think*, *in* NEXT GENERATION COMPLIANCE (2022).

178. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19618, 19621–23 (Apr. 11, 2000).

5) correction and remediation;
6) prevention of reoccurrence;
7) no repeat violations;
8) no excluded violations; and
9) cooperation.[179]

If the EPA discovers a company violated the CWA, but the company can prove its compliance program satisfies these nine requirements, the company can expect to receive three generous benefits. First, a company with an adequate compliance program can expect to receive zero gravity-based penalties, meaning that no punitive damages reflective of the egregiousness of the violator's behavior will be included in the penalty.[180] Consequently, only economic damages will be included in the penalty, equal to the amount of money the company saved by violating the CWA.[181] Second, the EPA will not recommend to the DOJ a criminal prosecution against the company for their violations.[182] Third, the EPA will not request audit reports from the violating company, thus saving the company from a costly and timely internal investigation and from the requirement to share with the EPA even more of its violations, which could otherwise lead to a higher penalty.[183]

Both the Sentencing Commission and the EPA have used the modern field of compliance to incentivize companies to self-regulate and self-police. The traits of an effective compliance program are rigid and require companies to sacrifice some autonomy. For example, maybe a company doesn't want to hire and pay for a high-level internal compliance officer to satisfy the Sentencing Commission's second trait of an effective compliance program. But compliance is still an autonomous process because this company can still use its self-selected hiring methods, pay whatever salary it chooses, and structure the role however it sees fit. And a company under scrutiny from a court or a regulating agency that receives the benefits of having an effective compliance program will retain far more autonomy than a company that doesn't receive the benefits. The benefits protect companies' autonomy because punishment restricts

179. *Id*. Each element is defined further, leaving little room for ambiguity.
180. GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 400 (2d. ed., 2017).
181. *Id.*
182. Incentives for Self-Policing, *supra* note 178, at 19625.
183. MILLER, *supra* note 180, at 401.

autonomy—a more lenient punishment will lead to less autonomy lost. Therefore, to protect union autonomy, the NLRB should offer an incentive to unions that maintain compliance programs.

C. Recommendation to the NLRB

The NLRB and DOJ should offer incentives for unions to create and implement, what this Note coins, an Effective Union Compliance Program[184] as an alternative to federal intrusion. The traits of an Effective Union Compliance Program will resemble the Sentencing Commission's seven traits with some differences discussed below. The primary goal of this incentive would be for unions to avoid federal trusteeships entirely and to maintain union autonomy in all decision-making regarding compliance, elections, and leadership. An additional goal of this incentive would be to mitigate future violations of the NLRA and RICO. These goals would benefit unions by reducing their litigation costs and maintaining a positive reputation with their members. These goals would also benefit the DOJ, NLRB, and federal courts as they would save time and resources by litigating or overseeing fewer cases.

One consideration to acknowledge when implementing this incentivize is that not all unions are the same. Accordingly, not every union should have a compliance program. Specifically, the differences between local and national unions should be considered when determining whether they should be incentivized to have compliance programs. Because "[n]ational unions are composed of the various local unions that they have chartered," national unions have sweeping, big-picture goals while local unions have an intimate relationship with workers' conditions and lives.[185] Conversely, while compliance with the laws that regulate unions would be highly prioritized if each union local adopted a compliance program, unions can be as small as two people.[186]

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184. *See* U.S. SENT'G GUIDELINES MANUAL § 8(B)2.1 (U.S. SENT'G COMM'N 2021) (coining the term "effective compliance and ethics program" to describe a program sufficiently adequate to lessen punishment in settlement).

185. *Labor Unions*, INC., https://www.inc.com/encyclopedia/labor-unions.html [https://perma.cc/R42B-K3QX].

186. *What is a Union*, U.S. DEPT. OF LAB., https://www.workcenter.gov/what-is-a-union [https://perma.cc/CL6J-Q6QU].

A formal compliance program for a local of two members would be excessive and likely ineffective because compliance programs are often created for larger organizations. But other locals are colossal with some reaching upwards of 450,000 members.[187] However, if the NLRB only incentivized national unions to adopt compliance programs, the benefits may not always reach members. Union hierarchy can be complex and rigid with many levels of leadership between a national union's president and a local's member.[188] Consequently, it may be most effective to compromise between these two options. Therefore, the NLRB should incentivize each national labor union to adopt compliance programs, and each national labor union should recommend to their largest locals to also adopt their own compliance programs. With this split, the NLRB should offer the benefits proposed below to any union, national or local, that has implemented an Effective Union Compliance Program.

A second consideration is that not all seven of the Federal Sentencing Guidelines' traits fit within union culture. The NLRB should adopt each of the Federal Sentencing Guidelines' seven traits of an effective compliance program, with one minor modification, as inspiration for its definition of an Effective Union Compliance Program. The Sentencing Commission drafted its seven traits for corporate defendants with drastically different culture, structure, and goals than unions. Yet, these seven traits accurately flesh out a robust yet realistic compliance program. There is only one trait that requires modification to accurately fit within a national or local union's structure.

The third trait states that an organization must not employ personnel with authority who it knows, or should know, has previously engaged in illegal or noncompliant behavior.[189] This trait should not be implemented in the NLRB's recommendation to unions as is. Discrimination against workers with a criminal record does not comport with the labor movement's goals of solidarity and worker growth. Therefore, the NLRB must modify

187. Trip Brennan, *The Big 4: The SEIU's Most Powerful Locals*, BLUE TENT (Jan. 13, 2021), https://bluetent.us/articles/unions/the-big-4-seiu-most-powerful-locals [https://perma.cc/275L-DH29].

188. Off. of Lab.-Mgmt. Standards, *Labor Union Mergers and Affiliations*, U.S. DEPT. OF LAB.: COMPLIANCE TIPS (Oct. 20, 2019), https://www.dol.gov/agencies/olms/compliance-assistance/tips/union-mergers-and-affiliations [https://perma.cc/N2UY-E4F5].

189. *See* U.S. SENT'G GUIDELINES MANUAL § 8(B)2.1 (U.S. SENT'G COMM'N 2021).

this third trait to state that elected national and local union leaders must not have previously violated any written laws that regulate the union.

Compliance programs should benefit unions in numerous ways. The first benefit a union should receive if it has an Effective Union Compliance Program is that it will not be subject to court-appointed trusteeships. The union's compliance program functions as its own trustee. Forcing a second, external trustee onto a union would be duplicative. This benefit protects union autonomy.

A second benefit a union should receive is a joint statement written and published by the NLRB and the union. This public statement should detail how the NLRB and the union plan to move forward after the violation and settlement and whether any changes to the union's compliance program will be implemented. Ideally, the audience for this statement would be the members of the union and possibly the public at large. The purpose of this benefit would be to repair a union's reputation after a violation and settlement.

The third benefit a union should receive is a significant reduction in economic damages. This benefit differs from the EPA's economic benefit because violations of the NLRA are only punished with economic damages while violations of the CWA may be punished by economic and punitive damages.[190] Therefore, a monetary benefit of having a compliance program should be a percentage reduction. This benefit would protect unions from suffering too high of a financial cost in litigation.

As discussed in the Background section, there are two main types of claims the federal government historically raises against unions: (1) the NLRB litigating for civil violations of the NLRA and (2) the DOJ litigating for civil violations of RICO. The NLRB has broad discretion when settling with unions in litigation arising from violations of the Taft-Hartley Act. The NLRB has the power to offer lenient settlements during litigation against unions in these types of cases. Therefore, this Note recommends that the NLRB offer these three benefits during litigation settlement if the defendant-union can prove that it has satisfied the traits of an Effective Union Compliance Program.

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190. 29 U.S.C. § 187(b).

An effective program will help a union stay in constant compliance with the law, including the anti-racketeering laws of civil RICO claims. Union compliance officers would be hard at work to make sure no external, illegal forces could influence union decision-making as La Cosa Nostra did in the 20th century. Training and communications would be sent to all union members concerning external forces: how members could avoid them and what to do if such forces already influence the member. Compliance officers would implement incentives to encourage members to steer clear of external forces. And in instances where external forces still manage to reach members, compliance officers would then implement disciplinary measures. These measures could include reprimands, individual fines, or even removal from union. Therefore, a union compliance program would be hard at work to mitigate any future racketeering issues.

This mitigation is crucial for unions because it is doubtful that the DOJ would award the same benefits in civil RICO settlements that the NLRB would offer in NLRA violation settlements. The DOJ does not intimately regulate labor unions. Additionally, the DOJ has only responded positively to corporate defendants with compliance programs and only in niche fields of the law, like Foreign Corrupt Practices[191] and Foreign Assets Control.[192] Furthermore, the DOJ is motivated by the federal interest in protecting the pillars of capitalism. Offering incentives to unions to maintain a compliance program would go against this interest because union compliance programs would only strengthen the American labor movement.

Evidence of an implemented compliance program will also help a labor union facing civil RICO litigation. A compliance program displays good faith efforts and an investment in addressing systemic compliance issues. A court should be persuaded by a union with a compliance program and ultimately order in its favor or award lesser damages to the DOJ. These

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191. CRIMINAL DIVISION OF THE DOJ AND THE ENFORCEMENT DIVISION OF THE SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2nd ed., 2020) https://www.justice.gov/criminal-fraud/file/1292051/download [https://perma.cc/6YQD-SZTE] ("DOJ and SEC also consider the adequacy and effectiveness of a company's compliance program at the time of the misconduct and at the time of the resolution when deciding what, if any, action to take.").

192. U.S. v. Barclays Bank PLC, No. 1:10-cr-00218-EGS (D.D.C. Aug. 16, 2010) (where the DOJ offered the corporate defendant a deferred prosecution agreement because it had a compliance program).

programs should prevent external forces from creating a scenario in which the DOJ would ever raise another civil RICO case against a union again.

CONCLUSION

Union autonomy is a critical aspect of the health and growth of unions and worker power broadly. But union autonomy is weakened by: (1) the DOJ's attempts to target organized crime through civil RICO cases against unions and (2) the creation of federal trusteeships, as seen in *US v. IBT*. While judicial creativity empowers the federal government to intrude upon the autonomy of both corporations and unions, there are glaring differences between how courts perpetuate power imbalance between employers and employees. These imbalances can inspire anger and defeat; they can also inspire solutions. One approach to mitigating the harm from federal intrusion is found in the field of compliance, a field made for and by corporate America. This Note recommends that the NLRB should incentivize unions to implement internal compliance programs because corporations have historically faced far less federal intrusion than unions, as seen in *US v. Apple*.

Federal intrusion is prevalent among unions because of their conflicting goals. The federal government has a goal of protecting the pillars of capitalism, like individualism, which conflicts with unions' goals of collective action.[193] Nonetheless, this conflict cannot outweigh the federal right to unionize and to bargain collectively as a union.[194] The flame within unionism is dim, but not out. Recent attempts to unionize workers have occurred at highly influential companies like Starbucks, Amazon, and major universities.[195] While union membership has declined since the start of the new millennium,[196] public approval of unions is higher than it has been since 1965.[197] This Note's proposed solution aims to protect this recent union growth and to play a role, however small, in an American labor renaissance.

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193. *See* discussion *supra* Sections II.A.i, II.A.ii.
194. National Labor Relations Act § 7, 29 U.S.C. § 157.
195. Hartman & Cunningham, *supra* note 17.
196. Bureau of Lab. Stat. for the Dep't of Lab., *supra* note 18; Hoff, *supra* note 18.
197. McCarthy, *supra* note 19.