The Collective Bargaining Chips are Down: How Wisconsin’s Collective Bargaining Restrictions Place the U.S. in Violation of International Labor Laws

Amanda Webster
Saul Ewing, LLP
THE COLLECTIVE BARGAINING CHIPS ARE DOWN: HOW WISCONSIN’S COLLECTIVE BARGAINING RESTRICTIONS PLACE THE U.S. IN VIOLATION OF INTERNATIONAL LABOR LAWS

AMANDA WEBSTER

ABSTRACT:
On the surface, the United States serves as an international advocate and supporter of the basic principles of the International Labor Organization, which are to promote social justice and human rights through globally humane working conditions. Yet, on a deeper level, there exists a strained and contradictory relationship between the U.S. and the ILO. Despite being the largest ILO member state and a principal policymaker, the U.S. continues to refrain from ratifying key international labor law treaties. This inaction enables U.S. state and federal bodies to enact and uphold legislation that directly violate existing international labor law obligations. U.S. laws like the 2011 Wisconsin Act 10 function to eliminate collective bargaining rights for U.S. workers in violation of international labor law principles. If allowed to continue, this could have a devastating impact on the U.S. economy and its global reputation.

This article discusses how the 2011 Wisconsin Act 10 directly violates established international labor law as set forth by the International Labor Organization, explores the economic and social ramifications of violating these basic principles, and proposes to resolve the conflict through the ratification and domestic implementation of ILO Convention Nos. 87 and 98, thereby restoring compliance with ILO principles and protecting American laborers’ rights.

AUTHOR:
Amanda Webster is a commercial litigator in the Baltimore office of Saul Ewing, LLP, where she helps clients in both the public and private sectors resolve contract and business disputes. Ms. Webster is a 2013 graduate of the University of Baltimore, School of Law.
# Table of Contents

I. Introduction .................................................................. 129

II. America’s legal Obligations to the
    International Labor Organization ................................. 132
    A. The Constitution of the ILO....................................... 135
    B. ILO Conventions on Freedom of Association
        and Collective Bargaining........................................ 136
    C. ILO Declaration on Fundamental Principles
        and Rights at Work .................................................. 138
    D. Measuring U.S. Compliance With
        ILO Core Principles................................................. 141

III. Ramifications for Violation .......................................... 145
    A. Domestic Economic Ramifications.............................. 145
    B. Ramifications Affecting American Influence and
        Reputation................................................................ 149

IV. Solution: Ratify and Domestically Implement
    Conventions 87 and 98 ................................................. 151

V. Conclusion.................................................................... 153
I. INTRODUCTION

In February 2011, Wisconsin Governor Scott Walker introduced the Scott Walker Budget Repair Bill (the Bill) to a committee of the Wisconsin State General Assembly.1 The provisions of the Bill limited the scope of collective bargaining of public employees.2 Public workers’ salaries could only be increased in proportion to inflation rates, and collectively bargaining for benefits of public employees would be made illegal.3 The Bill put restrictions on the scope of labor union elections, contracts, and dues.4 Further, many of the existing benefits in public workers’ employment contracts would be slashed, including amounts paid to employees’ health insurance and pension funds.5 These cuts amounted to an 8% average decrease in pay to state workers.6

The introduction of the Bill spurred public outcry throughout the state, the nation, and the world.7 A massive crowd, including many unionized Wisconsin teachers, gathered at the state house to protest.8 Union supporters protested for weeks, with crowds opposed to the Bill swelling to over 70,000 at times.9

2 Id. at 1.
3 Id.
4 Id.
5 Id. at 3.
9 Id.
In order to avoid the quorum necessary to vote on the Bill, fourteen Democratic state senators fled Wisconsin and went into hiding in Illinois for three weeks.\textsuperscript{10} Republican state lawmakers then took advantage of a procedural loophole to reduce voting quorum requirements.\textsuperscript{11} The Bill was put to a vote on March 10, before Democrats could return to the state house.\textsuperscript{12} While these elected representatives pounded on the locked doors of the state house and attempted to gain entry through windows, Republican state senators passed the Bill in just a few minutes time “without any debate and without a single Democrat in the room.”\textsuperscript{13} Governor Walker signed the Bill into law the next day.\textsuperscript{14}

The legality of the Bill, now known as the 2011 Wisconsin Act 10 (the Act), was immediately questioned.\textsuperscript{15} A state district court voided the Act based on illegal procedures used to rush the bill through the state legislation, but the Wisconsin Supreme Court later reversed this ruling via a sixty-eight page 4–3 decision rife with concurrences and dissents.\textsuperscript{16} The day after the Wisconsin Supreme Court’s decision

\begin{footnotes}
\footnote{10} \textit{Wis. Assembly Cuts Public Worker Bargaining Rights}, supra note 6. \\
\footnote{11} \textit{Id.} Wisconsin Senate Rule 15 requires a majority of senators to be present to establish a voting quorum for most matters. Budget matters, however, require a two-thirds quorum. The Scott Walker Budget Repair Bill included budgetary matters, thus required the higher quorum threshold. \textit{Wis. Assembly Cuts Public Worker Bargaining Rights}, supra note 6. In order to reduce these quorum requirements, Republican lawmakers stripped the bill of its budget provisions and created a second bill that included only budgetary matters. \textit{Id.} The union bill then only required a simple majority, which was fulfilled without participation from democratic legislators. \textit{Id.} \\
\footnote{12} \textit{Wis. Assembly Cuts Public Worker Bargaining Rights}, supra note 6. \\
\footnote{13} \textit{Id.} \\
\footnote{16} Jeff Mayers, \textit{Wisconsin Supreme Court Upholds Anti-Union Law}, REUTERS (Jun. 14, 2011), http://www.reuters.com/article/2011/06/14/us-wisconsin-unions-idUSTRE75D6O520110614; \textit{State v. Fitzgerald}, 798 N.W.2d 436 (Wis. 2011). The Wisconsin Supreme Court held that keeping the doors of the Senate chamber locked did not violate the Wisconsin Open
was announced, a coalition of state and federal unions filed a federal lawsuit claiming that the Act violated the U.S. Constitution. 17 Specifically, the suit claims that public workers’ First Amendment rights were violated by restrictions on the right to freely assemble and collectively bargain. 18 A similar suit was filed by the AFL-CIO in July. 19 These cases are still pending in federal district court.20

The ramifications of 2011 Wisconsin Act 10 extend beyond state and federal legal limitations. The Act is also a violation of the United States’ international legal obligations.21 This comment explores how 2011 Wisconsin Act 10 violates the United States’ legal commitments to the International Labour Organization. Part II establishes the United States’ legal obligations to this specialized UN agency charged with monitoring international labor standards. Part III considers the ramifications of violating international labor law, including detrimental effects on the U.S. economy and reputation. Part IV posits a solution for these violations – that the U.S. government should ratify and domestically implement two international treaties that ensure protections for unionization and collective bargaining rights.

Meetings Law, which states that “[t]he doors of each house shall be kept open except when the public welfare shall require secrecy,” because the chamber press parlor remained open, giving the public the opportunity to observe the proceedings. Wis. STAT. ANN. § 19.81 (West).

II. AMERICA’S LEGAL OBLIGATIONS TO THE INTERNATIONAL LABOR ORGANIZATION

The International Labour Organization (ILO) was established through the 1919 Treaty of Versailles. The founders of the ILO desired to establish globally humane working conditions, thereby promoting social justice and human rights, culling political unrest to achieve world peace, and equalizing production costs between economic competitors to avoid a “race to the bottom” scenario in the world labor field. In 1946, following the creation of the United Nations (UN), the ILO became the UN organ responsible for overseeing international labor standards. As of January 1, 2012, 183 of the 193 UN member countries are also members of the ILO. The objective of the ILO continues to be to promote opportunities to obtain decent and productive work, in conditions of freedom, equity, security, and human dignity.

The United States was involved in the founding of the ILO in 1919, and formally joined the organization in 1934. In 1977, during

---

23 Id.
24 See Ajit Singh & Ann Zammit, Labour Standards and the ‘Race to the Bottom’: Rethinking Globalization and Workers’ Rights From Developmental And Solidaristic Perspectives, 20 (OXFORD REV. ECON. POL’Y 85, 87 & 89, Working Paper No. 279, 2004). The race to the bottom theory posits that in a global economy, without across-the-board regulation there will be a competitive erosion of labour standards everywhere. Id.
28 See The ILO and the United States: Brief History and Timeline, INTERNATIONAL LABOUR ORGANIZATION,
the height of the Cold War, the U.S. withdrew its membership because of conflicts with the ILO’s handling of the Soviet Union and recognition of Palestine as having observer status. The U.S. rejoined the ILO in 1980 and is now the largest ILO member state. It provides 22% of the ILO’s regular budget and is the largest donor of extra-budgetary projects. As a state of “chief industrial importance,” the U.S. holds a permanent seat on the Governing Body, the ILO’s executive committee and principal policymaker.

The ILO is structured based on a unique tripartite representative system. Each member country is represented by three unique delegates: a government representative, a representative for businesses and employers, and a representative for workers and trade unions. This tripartite system ensures that the important, and
sometimes opposing, views of government, labor, and industry are given an equal international voice.35

The ILO relies heavily on cooperation and dialogue, rather than sanctions, to realize its goals.36 Much of the ILO’s enforcement measures utilize peer pressure and shaming through exposure of a country’s breaches of international labor standards.37 The organization monitors and reports on state compliance of treaties, policy recommendations, and advisory opinions.38 The ILO does not have the capacity to engage in blacklisting or to impose monetary sanctions when a country fails to comply with such standards.39 However, countries exposed for violating ILO standards may face economic and political backlash from other countries, international organizations, and consumers committed to upholding these labor principles.40

The ILO’s chief procedure to enforce international labor standards is through conventions, which are legally binding international treaties.41 It is a fundamental principle of international law that, in order to uphold the sovereignty of nations, a country is only bound by those treaty obligations to which it consents.42 Therefore, the

See The ILO and the United States: Brief History and Timeline, supra note 28.
35 See How the ILO Works, supra note 34.
37 Id.
38 See Lawrence R. Helfer, Monitoring Compliance with Unratified Treaties: The ILO Experience, 71 LAW & CONTEMP. PROBS. 193, 194 (2008). The ILO monitors state compliance of both ratified and unratified treaties. Id. Thus, states are pressured to comport with norms and standards that they have not accepted as legally binding. Id.
39 De Wet, supra note 36, at 1430.
40 See id.
42 Vienna Convention on the Law of Treaties, pmbl. & art. 34, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. Once a member nation has ratified a treaty, it is obligated to bring its national policies in compliance with the Convention. See Id. at art. 34.
U.S. is only bound by those ILO conventions that it has consented to through ratification.\textsuperscript{43} Despite the U.S.’s leading role in the ILO, it has only ratified 14 of 188 ILO conventions, including only 2 of the 8 conventions the ILO considers to be “core labor standards.”\textsuperscript{44}

\section*{A. The Constitution of the ILO}

The ILO’s constitutive document was co-authored by the United States in 1919,\textsuperscript{45} and supplemented in 1944 via the Philadelphia Declaration.\textsuperscript{46} These two documents together compose the Constitution of the ILO.\textsuperscript{47} All ILO member states, including the United States, are bound by the provisions of the constitution.\textsuperscript{48}

The 1919 ILO Constitution recognizes the principle of freedom of association.\textsuperscript{49} Further, the Philadelphia Declaration states that the principle of freedom of association is fundamental and essential to sustained progress.\textsuperscript{50} Although these two binding documents


\textsuperscript{44} The US: A Leading Role in the ILO, supra note 31.

\textsuperscript{45} ILO and the United States: Brief History and Timeline, supra note 28. The US was part of a nine-country commission to draft the ILO Constitution. \textit{Id.}


\textsuperscript{47} \textit{ILO and the United States: Brief History and Timeline}, supra note 28.


\textsuperscript{49} International Labour Organization Constitution, \textit{supra} note 46, at pmbl. (“[A]n improvement of [labor] conditions is urgently required; as, for example, by the . . . recognition of the principle of freedom of association . . .”).

\textsuperscript{50} Id. at Annex § 1 ¶ b (“The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that . . . freedom of expression and of association are essential to sustained progress . . .”).
recognize that workers have the right to unionize and collectively bargain, they do not create any affirmative obligation regarding freedom of association that states must uphold.\textsuperscript{51} Therefore, the U.S. has no enforceable legal obligation under the ILO Constitution to ensure the rights of workers to effectively unionize.

**B. ILO Conventions on Freedom of Association and Collective Bargaining**

ILO Convention No. 87, The Freedom of Association and Protection of the Right to Organize Convention, was adopted by the ILO in 1948 in San Francisco, California.\textsuperscript{52} The convention states that “[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation [sic],”\textsuperscript{53} and that “[t]he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”\textsuperscript{54} Member states that ratify Convention No. 87 are required to “take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.”\textsuperscript{55} The protections afforded to workers via Convention No. 87 extend to those in the public arena, with the exception of police and military employees.\textsuperscript{56} Provisions prohibiting freedom of association for public servants have been held to be incompatible with Convention No. 87.\textsuperscript{57}

One hundred fifty of the one hundred eighty-three ILO member-states have ratified Convention No. 87.\textsuperscript{58} In 1998, Indonesia

\textsuperscript{51} Ziaja, supra note 48, at 17.
\textsuperscript{52} Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, supra note 43, at pmbl.
\textsuperscript{53} Id. at art. 2.
\textsuperscript{54} Id. at art. 3 § 2.
\textsuperscript{55} Id. at art. 11.
\textsuperscript{56} Id. at art. 9.
\textsuperscript{57} COMM. ON MONITORING INT’L LABOR STANDARDS, NAT’L RESEARCH COUNCIL, MONITORING INTERNATIONAL LABOR STANDARDS: TECHNIQUES AND SOURCES OF INFORMATION 110 n.4 (2004).
\textsuperscript{58} Ratifications of CO87 – Freedom of Association and Protection of the Right to Organise Covnention, 1948 (No. 87), INTERNATIONAL LABOUR ORGANIZATION,
ratified it after being urged to do so by the U.S. government. President Harry Truman presented Convention No. 87 to the U.S. Senate for advice and consent in 1949. However, Congress has never even debated the convention—it is the Senate’s longest-pending treaty. Convention No. 87 remains unratified by the U.S.

Convention No. 98, the Right to Organize and Collective Bargaining Convention, was adopted by the ILO in 1949. The Convention requires that “[w]orkers shall enjoy protection against acts of anti-union discrimination” and that “[w]orkers’ and employers’ organisations shall enjoy adequate protection against any acts of interference.” States are required to establish provisions “to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers . . . and workers’ organisations. . .” The protections afforded to workers via Convention No. 98 extend to those in the public arena, with the exception of police and military employees. Though 160 of the 183 ILO member states have ratified Convention No. 98, the U.S. has not done so.


60 Id. The treaty-making power provision of the U.S. Constitution grants the President the power to make internationally-binding treaties so long as the ratification is backed by the advice and consent of two-thirds of the Senate. U.S. CONST. art. II, § 2, cl. 2.
61 Charnovitz, supra note 59, at 91.
64 Id. at art. 1, § 1.
65 Id. at art. 2, § 1.
66 Id. at art. 4.
67 Id. at art. 5.
Although the U.S. is not bound to uphold the rights protected in Convention Nos. 87 and 98 because it has not ratified those treaties, the U.S. does have some legal obligations surrounding unratified conventions. Upon the adoption of a convention by the ILO, each country’s ILO delegate is required to present the convention to the country’s domestic political branches for consideration of ratification. If the country refuses to ratify the treaty, it must submit a report to the ILO explaining whether domestic laws are in compliance with the unratified treaty and identifying impediments for future ratification. The ILO Governing Body may request subsequent reports regarding the status of ratification of the convention by the state. In this regard, the ILO set up the Committee for Freedom of Association (CFA) in 1951 for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified Convention Nos. 87 and 98. Therefore, the U.S. is required to answer to the ILO for its decisions to refrain from ratifying Convention Nos. 87 and 98 and for domestic actions that violate the fundamental principles contained within these conventions. These measures comport with the ILO’s reliance on public promotion and moral persuasion to induce states’ observance of labor principles.

C. ILO Declaration on Fundamental Principles and Rights at Work

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work (DFPRW). This declaration was

70 Helfer, supra note 38, at 197.
71 International Labour Organization Constitution, supra note 46, at art. 19, § 5, cl. b.
72 Id. at art. 19, § 5, cl. e.
73 Id.
75 Id.
76 De Wet, supra note 36, at 1430.
intended to adapt ILO policy to the worldwide changes at the end of the Cold War, the technology revolution, and globalization.\footnote{The Declaration: Background, INTERNATIONAL LABOR ORGANIZATION, http://www.ilo.org/declaration/thedeclaration/background/lang--en/index.htm (last visited Jan. 8, 2012).} The DFPRW reaffirms the principles included in the ILO Constitution and Philadelphia Declaration, including the fundamental rights of assembly and collective bargaining.\footnote{ILO Declaration on Fundamental Principles and Rights at Work [DFPRW], art. 2, June 18, 1998, 37 I.L.M. 1237.} However, the DFPRW goes further than these documents to create enforceable international labor standards by declaring that

all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.\footnote{Id.}

The DFPRW identifies four core labor principles codified in eight conventions, including the principle of “freedom of association and the effective recognition of the right to collective bargaining,”\footnote{Id. The other core principles identified in the declaration are the elimination of all forms of forced or compulsory labor (codified in ILO Convention Nos. 29 and 105), the effective abolition of child labor (codified in ILO Convention Nos. 138 and 182), and the elimination of discrimination in respect of employment and occupation (codified in ILO Convention Nos. 100 and 111). Id.} codified in Convention Nos. 87 and 98. The DFPRW makes it clear that these rights are universal, and commits member countries to respect and promote these rights whether or not they have ratified the relevant conventions.\footnote{The Declaration: Introduction, INTERNATIONAL LABOR ORGANIZATION, http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm (last visited Jan. 8, 2012).}

Of the eight core conventions, the U.S. has ratified only two—Convention No. 105 on forced labor and Convention No. 182 on the
worst forms of child labor.\textsuperscript{82} Only six other countries have a ratification rate equal to or lower than that of the U.S.\textsuperscript{83} Despite its low convention ratification rate, the U.S. championed the adoption of the Declaration on Fundamental Principles and Rights at Work.\textsuperscript{84} Upon its adoption, U.S. Labor Secretary Alexis Herman declared, “the ILO has underlined and clarified the importance of the fundamental rights of workers in an era of economic globalization . . . ILO members have accepted the need to be accountable.”\textsuperscript{85}

Because the U.S. has not ratified Convention Nos. 87 and 98, it is still not bound to the technical requirements the conventions establish.\textsuperscript{86} However, as a member of the ILO, the U.S. is required to promote and uphold the fundamental rights to unionize and collectively bargain recognized by the ILO Constitution and the Philadelphia Declaration, and reaffirmed in the Declaration on Fundamental Principles and Rights at Work.\textsuperscript{87} The U.S. has also granted the CFA jurisdiction to review complaints filed against it under Conventions 87 and 98.\textsuperscript{88}


\textsuperscript{83} \textit{Ratification of the Fundamental Human Rights Conventions by Country}, INTERNATIONAL LABOR ORGANIZATION, http://www.ilo.org/ilolex/english/docs/declworld.htm (last visited Mar. 9, 2012). Myanmar and Brunei Darussalam have ratified two, the Solomon Islands has ratified one, and the Maldives, Marshall Islands, and Tuvalu have ratified none of the eight fundamental labor treaties. \textit{Id.}


\textsuperscript{85} \textit{Id.}

\textsuperscript{86} USCIB, \textit{supra} note 82.

\textsuperscript{87} DFPRW, \textit{supra} note 78, at 2, § a.

\textsuperscript{88} Compa, \textit{supra} note 84, at 28.
The DFPRW included a “Follow-Up,” which was also adopted in 1998. While the provisions of the Declaration were enacted immediately, the procedures in the Follow-Up did not take effect until 2000. The Follow-Up requires member states that have not ratified fundamental conventions to submit annual reports detailing the efforts they have made to achieve and promote the core principles and rights specified in the DFPRW. This reporting requirement is more strenuous than that of the ILO Constitution, which only requires that states submit reports on unratified conventions when requested by the ILO Governing Body. Since 2000, the U.S. government has submitted annual follow-up reports, demonstrating that it respects, promotes, and realizes the fundamental principles and rights at work embodied in the ILO’s Constitution.

D. Measuring U.S. Compliance With ILO Core Principles

In 2000, the U.S. government submitted to the ILO its first annual follow-up report under the DFPRW. In that report, the U.S. acknowledged that “there are aspects of this [US labor law] system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances,” and that “some provisions of U.S. law openly conflict with international norms and create formidable legal obstacles to the exercise of freedom of association.” The ILO’s review of the U.S. 2008 annual report noted that U.S. restrictions on the right to organize of certain categories, including public workers, “are

---

90 *Id.*
91 DFPRW, *supra* note 78, at annex.
95 *Id.* at 153.
96 *Id.*
not compatible with the realization of this principle and right.”

One such incompatible U.S. law of concern to the ILO was a highly contentious ban on public-sector unionization in North Carolina.

In 1959, North Carolina passed General Statute 95-98, which declared all employment contracts between government workers and labor unions to be illegal. North Carolina became the only state that statutorily outlawed all collective bargaining rights of public employees. Federal district courts have upheld the law as domestically constitutional because North Carolina public workers were still free to unionize, albeit ineffectively, and unionization is viewed as an act of assembly protected by the First Amendment, unlike collective bargaining. In 2005, after the ILO adopted the DFPRW, the United Electrical, Radio, and Machine Workers of America (UE) filed a complaint with the CFA claiming that the North Carolina statute breached U.S. international legal obligations to uphold collective bargaining rights.

The UE complaint alleged that the denial of the right to collectively bargain had led to poor working conditions, including widespread race and sex discrimination, for North Carolina public employees.

---

97 International Labour Organization, Review of Annual Reports Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (March, 2008).
As of 2011, Virginia and North Carolina are the only two states to enact a complete ban on public sector collective bargaining rights.
101 CFA Case No. 2460, supra note 93, at ¶ 940. The UE Local 150 is a North Carolina union that represents many who work in “some of the most difficult, low-wage public sector jobs in the State (janitors, refuse-disposal workers, housekeepers, groundskeepers, medical technicians, bus drivers, and other vital municipal and state employees).” Id.
employees, and left workers with no means of redress. The complaint asserted that the U.S.’s failure to ensure collective bargaining rights for public sector workers and to prevent North Carolina from denying these rights was a violation of the U.S.’s obligation to enforce core labor standards within its borders. Noting that the United States has an international obligation to “respect, promote, and realize” the fundamental rights of freedom of association and collective bargaining, the UE claimed that federal courts’ opinions in Atkins v. City of Charlotte and Winston-Salem/Forsyth County Unit, NCAE v. Phillips were, in fact, a federal seal of approval of state laws that violate international obligations, and that the U.S. was using the federalist system to shirk its international duties. Thus, the claim asserted, the U.S. government had failed to uphold its most basic obligations as a member of the ILO.

The U.S. government’s response stated that the U.S. was in full compliance with ILO provisions. The government claimed that North Carolina workers had the right to join unions, and could participate in the democratic process to ensure labor benefits. The U.S. asserted that state employees were provided a safety net of federal law that secured the protection of basic labor rights.

The CFA found that the North Carolina law violated workers’ fundamental rights of freedom of association and collective bargaining. It noted that these rights did not stem from unratified Convention Nos. 87 and 98, but from the U.S.’s commitment to the ILO itself through its acceptance of the fundamental principles of the ILO Constitution, affirmed in the DFPRW. The opinion noted that North Carolina’s law frustrated the very purpose of forming workers’ organizations, thus public employees were denied the full right of free

\[102\] Id. at ¶ 948.
\[103\] Id. at ¶ 947.
\[104\] Id. at ¶ 953-54.
\[105\] Id. at ¶ 956.
\[106\] Id. at ¶ 958.
\[107\] Id.
\[108\] Id.
\[109\] Id. at ¶ 980.
\[110\] Id. at ¶ 985.
association. The CFA stressed that public workers should be given the opportunity to address grievances with the state in its capacity as employer rather than executive, thus reliance on the democratic process is improper. Employment conflicts can be addressed directly through voluntary contract negotiations, and the problematic conditions described in the UE’s complaint could have been resolved through collective bargaining. The committee emphasized that:

the right to bargain freely with employers, including the government in its quality of employer . . . constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Based on these conclusions, the CFA recommended that the state of North Carolina repeal the anti-union law, and that the federal and local U.S. governments promote the establishment of a collective bargaining framework in the public sector. To date, North Carolina has declined to repeal the law, federal courts have not annulled it through judicial decisions, and Congress has not acted to bring state legislature into conformity with freedom of association principles.

The ILO’s North Carolina decision has implications for Wisconsin’s Scott Walker Budget Repair Act. The ILO has found the U.S. to be delinquent in upholding its citizens’ fundamental labor rights in North Carolina, and if the Wisconsin Act is reviewed under the same standards a similar outcome would likely result. Because the Wisconsin Act severely restricts the scope of collective bargaining rights public employees may negotiate for, the CFA would likely find

---

111 Id. at ¶ 979, 991. The CFA noted that article 3 of Convention 87 provides that trade unions shall have the right to exercise their activities and formulate their programs in full freedom. Id.
112 Id. at ¶ 992.
113 Id. at ¶ 981.
114 Id. at ¶ 981.
115 Id. at ¶ 995.
116 Compa, supra note 84, at 29.
that the Act violates collective bargaining and freedom of association rights in the same way that North Carolina law does. The continued and worsening violations of fundamental labor rights by U.S. states, and the federal government’s failure to reverse states’ violative actions, have major ramifications for the United States on both domestic and international platforms.

III. RAMIFICATIONS FOR VIOLATION

A. Domestic Economic Ramifications

Though cutting union benefits from the Wisconsin state budget may provide economic gains in the short term, the long-term economic effects of these labor right restrictions could be devastating. The classic argument against unionization in the United States has been one of economy. It is widely assumed that the additional costs associated with the fair pay and comprehensive benefits that unions win for their members are harmful to the bottom lines of companies and governments. Thus, in a free-market society it is believed to be most prudent for these entities to limit employee overhead costs, including limiting the influence of organizations that fight to gain benefits for employees. Wisconsin’s restrictions on unionization stem directly from the belief that the state will benefit if state dollars are spent less on state employee labor costs. The state has chosen to forego the “luxury” of labor rights to promote economic gain. However, this theory is hotly contested, and recent studies show that it may be flawed at the core. The U.S. should not permit violations of international law based on a faulty rationale that may be harming the country’s economic recovery.

117 LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 269, 316, 367 (1949).
118 Id.
119 Id.
121 Id.
122 Infra note 127.
Economic philosophy in the globalized world has traditionally hinged on the “race-to-the-bottom” theory of competitive trade.\textsuperscript{123} This theory posits that if one nation gains a competitive edge by failing to enact or enforce adequate social policies and labor laws, other nations will be “forced” to lower their internal standards in order to retain current business and compete for new investments.\textsuperscript{124} Ultimately, as each nation “races to the bottom,” the economic edge to do so evaporates and countries are left with poor labor standards and no monetary benefit.\textsuperscript{125} This theory is meant to motivate countries to refrain from denying labor rights in hopes of an economic advantage.\textsuperscript{126} However, numerous recent studies have shown a stronger incentive to create and enforce robust labor policies - greater social justice actually leads to greater societal wealth.\textsuperscript{127}

Most basically, the economic health of a state is dependent on the economic health of its citizens. When the citizenry’s financial condition is strong, the state reaps benefits in the form of taxes.\textsuperscript{128} If citizens do not have money in their pocket to spend on the products and investments necessary to boost an economy, the state will suffer.\textsuperscript{129} Stripping labor benefits prevents citizens from engaging in their state’s economy in an influential way.

\textsuperscript{123} Brian A. Langille, Re-reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights, 42 COLUMBIA J. TRANSNAT’L L. 87, 91 (2003).
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{127} Langille, supra note 122, at 92-93 (citing studies by the Organization for Economic Cooperation and Development (OECD), Dani Rodrik, Robert Flanagan, David Kucera, Charles Oman, and the ILO).
Social justice and economic gain are not in opposition with each other.\textsuperscript{130} Instead, they are each other’s corollary: in order to achieve economic prosperity, a society requires proper labor rights.\textsuperscript{131} Certain aspects of this concept are no longer debated in American society. For instance, in the short term, hiring children to work in factories gives companies the competitive edge of cheap labor.\textsuperscript{132} However, society recognizes that it is in the long-term best interest of the child and the nation to educate children so that they might offer more than just menial labor in the future.\textsuperscript{133} For long-term economic gain to be achieved, appropriate social standards that limit child labor are necessary.\textsuperscript{134}

Another example is the 40-hour workweek. It was once believed that the more one toils, the more productive that person is, and this is true for short period of time.\textsuperscript{135} However, studies have proven that sustained 60-hour workweeks result in returns that diminish to below the rate of productivity of the 40-hour workweek within the first four weeks of labor.\textsuperscript{136} Thus, limiting the workweek to 40 hours for hourly-wage earners provides a better way of life for the American workforce and an economic benefit for American businesses.

Further, studies show that, rather than being repelled, investment is attracted by adherence to core labor standards.\textsuperscript{137} This is

\begin{thebibliography}{99}
\bibitem{130} Langille, \textit{supra} note 122, at 93.
\bibitem{131} Id.
\bibitem{133} Id.
\bibitem{134} Id.
\bibitem{136} Id.
\bibitem{137} Langille, \textit{supra} note 122, at 92-93; Dani Rodrik, \textit{Labor Standards in International Trade: Do They Matter and What Do We Do About Them}, in \textit{EMERGING AGENDA FOR GLOBAL TRADE: HIGH STAKES FOR DEVELOPING COUNTRIES} 35 (Robert Lawrence et. al. eds., 1996)
\end{thebibliography}
true in both low- and high-income countries. Indeed, strong freedom of association and collective bargaining rights have been shown to have a positive effect on attracting Foreign Direct Investments (FDI) while simultaneously increasing worker wages. Attracting FDI is regarded by both developed and lesser-developed countries as a key factor in generating economic growth and employment. Studies have also shown that U.S. states with higher unionization rates attract greater FDI than those that do not.

Embracing the fundamental rights of freedom of association and collective bargaining in Wisconsin and throughout the United States can have a positive effect on economic investment and employment rates. In light of the current economic downturn it is vital that states encourage economic stimulation and workforce security. Wisconsin’s anti-union legislation threatens to undermine the state’s recovery and harm its already unstable economy. Further, numerous states across the country followed Wisconsin lead and introduced their own anti-union legislation in 2011. These attacks on American unions create a serious risk to the nation’s financial health. Without federal action to ensure that American collective bargaining rights are protected, U.S. states may engage in an internal race to the bottom, inflicting great harm to the country’s economic recovery in the process.

(finding that Foreign Direct Investments (FDI) tend to be greater in countries with stronger worker rights).

138 Brown, supra note 125, at 101-02.
141 Friedman, Gerlowski, & Silberman, What Attracts Foreign Multinational Corporations? Evidence from Branch Plant Location in the United States, 32 J. REGIONAL SCIENCE 403 (1992) (finding that FDI, particularly by Japanese multinationals, is significantly greater in US states with higher unionization rates).
B. Ramifications Affecting American Influence and Reputation

The United States has a long tradition of supporting human rights domestically and abroad. To that point, the U.S. strives to enforce global human rights standards through rhetorical disapproval, foreign aid, sanctions, trade policy and military intervention. Labor rights are included in American efforts to promote international social justice. Labor rights violations in the United States are particularly troubling when the U.S. pressures other countries to ensure respect for internationally recognized workers’ rights. The U.S.’s failure to defend Wisconsin citizens’ labor rights domestically undermines U.S. credibility in its efforts to promote respect for workers’ rights internationally.

The negative impact that failing to protect domestic labor rights has on American reputation abroad is acknowledged by U.S. officials. In 1998, then-U.S. Secretary of Labor Elizabeth Dole testified to the Senate Foreign Relations Committee that the U.S.’s failure to uphold ILO core labor standards “subjects us to criticism that we do not practice what we preach,” and “prohibits us from bringing complaints against other countries for failure to observe [ILO core labor] standards they have ratified.” In an effort to encourage U.S. ratification of ILO conventions, U.S. Senator Orrin Hatch noted that the paradox between U.S. domestic and international labor policies “undercuts our credibility at the ILO,” and has ramifications for “the growing tendency in Congress to refer to internationally recognized worker rights standards regarding freedom of association . . . in U.S. trade and aid legislation.” Senator Hatch also stated that “[e]ven some of our allies have charged that our defense of the ILO machinery

144 Id.
145 See The US: A Leading Role in the ILO, supra note 31.
146 Compa, supra note 84, at 52.
147 Charnovitz, supra note 59, at 95.
148 Id.
is ‘hypocritical.’”

In response to Ohio’s 2011 anti-union legislation, which mirrors that in Wisconsin, U.S. Senator Sherrod Brown stated on the Senate floor, “history teaches us that unions are a very positive force in society that creates a middle class and that protects our freedom, so don’t tell me you support unions internationally but you don’t support unions here. Don’t tell me you support collective bargaining in Poland but you oppose collective bargaining in Dayton, Ohio.” Former Secretary of State George Shultz has also expressed concern that America’s behavior regarding labor rights was sending an inconsistent message of “do as we say, not as we do.” The government’s failure to ratify and enforce ILO core value conventions undermines U.S. prestige in the ILO and its ability to bring other governments to task for violations of international standards and worker rights.

The United States has incorporated ILO fundamental principles into binding bilateral Free Trade Agreements (FTAs) with multiple countries. For instance, in 2006, the U.S. and Peru signed a bilateral FTA that eliminated duty tariffs and expanded trade between the countries. Article 17.2 of the agreement requires that “[e]ach Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998),” including freedom of association and the right to collective bargaining. The agreement also mandates that “[a] Party shall not fail to effectively enforce its labor laws, including those it

150 Id.


152 Schlossberg, supra note 29, at 76.

153 Id. (quoting AFL-CIO President Lane Kirkland).


155 Id. at art. 17.2.
adopts or maintains in accordance with Article 17.2.1, through a sustained or recurring course of action or inaction. . .”\textsuperscript{156} Similar requirements are included in FTAs between the U.S. and Australia, Bahrain, Central America, the Dominican Republic, Chile, Jordan, South Korea, Morocco, Oman, Panama, Singapore, and Colombia.\textsuperscript{157} The agreements with Peru (implemented in 2009) and Colombia (signed by both countries and pending implementation) provide for particularly stringent enforceability of labor standards through the same procedures as all other provisions in those treaties.\textsuperscript{158}

These labor commitments between the U.S. and other countries carry real consequences if a party is found to be in violation of ILO principles. Because the standard incorporated into these FTAs is monitored by the ILO, if the ILO examines U.S. policies and finds them to breach core labor principles these countries may claim the U.S. is violating bilateral FTAs as well. Therefore, Wisconsin’s law puts the United States at risk of violating not just ILO requirements, but also legally enforceable treaties with economic partners around the globe. Because the agreements with Peru and -Colombia, which carry the strictest compliance requirements, had entered into force after ILO’s North Carolina decision or are pending entry, a new decision by the ILO finding the U.S. violations could trigger trade ramifications against the U.S. that were not at issue when the North Carolina case was decided. Thus, it is imperative for the U.S. to take action now to prevent such an ILO decision.

IV. SOLUTION: RATIFY AND DOMESTICALLY IMPLEMENT CONVENTIONS 87 AND 98

Federal laws have proven insufficient in protecting workers’ rights. Without Congressional action, states may continue to create and

\textsuperscript{156} Id. at art. 17.3.
\textsuperscript{158} MARY JANE BOLLE, CONGRESSIONAL RESEARCH SERVICE, PROPOSED US-COLOMBIA FREE TRADE AGREEMENT: LABOR ISSUES CRS-8 (2011), available at http://fpc.state.gov/documents/organization/115960.pdf (claiming that the Colombia and Peru FTAs have “labor enforcement ‘teeth.’”).
enforce laws that violate international norms with impunity. In order to create domestically enforceable standards for international legal rights, Congress must integrate its foreign legal commitments with federal law. One solution to ensure compliance with ILO requirements and enforcement of American workers’ rights would be ratification and domestic implementation of ILO Conventions 87 and 98.

Article VI § 2 of the U.S. Constitution, the Supremacy Clause, states that the Constitution, federal laws, and “all treaties made, or which shall be made, under the Authority of the United States” are the “supreme law of the land.”\textsuperscript{159} This clause assures that the Constitution, federal laws, and treaties take precedence over state laws and bind all judges to adhere to that principle in their courts.\textsuperscript{160} State law must be compliant with the U.S.’s international legal commitments.\textsuperscript{161} The Supreme Court has determined that ratified ILO conventions create rights for individuals in the U.S.\textsuperscript{162} If the United States ratified ILO Conventions 87 and 98, these treaties would likely give U.S. citizens a cause of action in domestic courts for violations of their right to freely associate and collectively bargain.\textsuperscript{163} State laws in violation of ILO legal standards, including Wisconsin’s Budget Repair Act, would have to be found void in U.S. courts.

However, in order for ratification of ILO conventions to have domestic impact, the federal government likely must take steps to execute the provisions of the treaties domestically through legislation. Though treaty ratification binds the U.S. internationally (and the U.S. can be found to be in violation of international laws without domestic implementation), U.S. courts do not consider treaties to be binding domestic law without domestic execution,\textsuperscript{164} and it is domestic liability that has more “bite” to its ramifications.\textsuperscript{165} As held in the U.S. Supreme Court’s 2008 Medellin v. Texas decision, a treaty is considered binding domestic law only if the treaty expressly states that it is self-executing (which is uncommon) or U.S. Congress enacts

\textsuperscript{159} U.S. CONST. art. VI, § 2.
\textsuperscript{160} Id.
\textsuperscript{161} See Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).
\textsuperscript{163} Charnovitz, supra note 59, at 101.
\textsuperscript{164} Medellin v. Texas, 552 U.S. 491, 504-05 (2008).
\textsuperscript{165} See, e.g., de Wet, supra note 36 at 1430 (describing the ILO’s enforcement mechanisms to include cooperation and dialogue, rather than sanctions).
statutes which domestically implement the treaty.166 Thus, the federal government’s process to enforce ILO core labor standards domestically is two-fold. First, the President must ratify the conventions with the advise and consent of two-thirds of the Senate.167 Second, Congress must pass statutes that incorporate ILO core labor standards into binding domestic law.168 Considering the relentless gridlock Congress faces when making influential changes to American life, this challenge may seem insurmountable. However, the protection of the United States’ economic future and the fundamental labor rights of its citizens is an important cause worth coming together for.

V. CONCLUSION

The United States is the leader of the global economy, and the richest nation in the world.169 It is also a leader in the ILO, and has the power to help to improve conditions for workers all over the world.170 Yet, while the U.S. requires other countries to heighten their labor standards, it fails to ensure fundamental labor rights for its own citizens domestically.171

As a member of the ILO, the U.S. must ensure certain minimum labor standards for its citizens. These standards, defined in the ILO Constitution and re-affirmed in the Declaration on Fundamental Principles and Rights at Work, include freedom of association and the right to collectively bargain as fundamental rights that countries must uphold. Michigan’s restrictions on the collective bargaining power of public employees denies state workers their fundamental international labor rights. Without taking action to strike the Wisconsin law down, the U.S. is in violation of it’s international commitments to the ILO and other member states.

---

166 Medellin, 552 U.S. at 505. The language of ILO Conventions, like most multi-lateral treaties, does not include language regarding self-execution.
167 U.S. CONST. art. II, § 2, cl. 2.
168 See Medellin, 552 U.S. at 505.
170 See The US: A Leading Role in the ILO, supra note 31.
171 See Charnovitz, supra note 59, at 95.
In order to restore compliance with ILO core principles and protect American laborers’ rights at work, the President and Congress should ratify and domestically implement ILO Convention Nos. 87 and 98, which protect workers’ freedom of association and rights to collectively bargain, prospectively. If ratified and domestically implemented, these conventions would be adopted as part of U.S. domestic law. Wisconsin’s contrary law would then be invalid under the Supremacy Clause of the U.S. Constitution. Ratifying ILO Convention Nos. 87 and 98 would protect workers in Wisconsin, and across the United States, from being denied globally-recognized fundamental rights.