The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law

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Beginning with the observation that the industrial relations system of a country is a subsystem, alongside political, economic and cultural subsystems, the author asserts that the American industrial relations law subsystem is not in harmony with its companion subsystems in American life. This disjunction is so severe, he claims, that the system of American industrial relations is doomed. While conventional wisdom and empirical studies point to unrelenting opposition to unionism on the part of employers, as well as worker indifference, as the chief reasons for the decline of unions, the author regards these phenomena as symptoms of deeply rooted factors of much greater magnitude. To bolster his argument that American labor law does not suit the United States, he points to Americans’ traditional distrust of government intervention, suspicion of concerted activity and collectivism in general, and hostility to compulsory membership in organizations. Finally, he maintains that within American culture there is an unspoken, though powerful, contempt for collective labor relations that expresses itself in three ways: in exemptions from labor law for certain classes of employees, in the definition of bargaining units by the National Labor Relations Board and the courts, and in restricting access to the legal system by unionized workers who wish to pursue grievances apart from the union. In each case, the author writes, not only are workers not trusted to decide these issues, but the restrictions in themselves, by their “un-American” character, discourage workers from joining in the first place.

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I

INTRODUCTION

"Comparison in labor law presents nearly insuperable problems because it ultimately reaches into comparison of social structures and attitudes," Clyde Summers once wrote.¹ Elaborating on this theme in an article comparing central facets of labor and industrial relations law in Sweden and the United States, Summers added:

It is obviously impossible for one who has not lived and worked within an industrial relations system to have a full understanding of the complexities and nuances of that system. Because of incomplete knowledge, relevant considerations may be overlooked or misconstrued. More important, the deep-running social attitudes, political values, or historical traditions may not be fully or accurately sensed.2

The present article is concerned precisely with “the deep-running social attitudes, political values, or historical traditions” of one country, the United States. Its thesis is that U.S. labor and industrial relations legislation is in stark disaccord with these principles.

When undertaking comparative research, Summers has often stated that his purpose is limited to “obtaining a different perspective and better understanding of our own system.”3 But, in fact, he has not confined himself to such a relatively humble task. His articles contain analyses that slice through the social fabric of the foreign country under investigation. After emphasizing the daunting difficulties and uncertainties involved in presenting something worthwhile about a foreign nation to its own people, he once went on to say: “The comparative study itself sharpens our awareness . . . . As one realizes how much he has failed to understand his own system, he must fear that he has failed to understand the other. But the value of comparisons remains, for comparison provides a framework and focus outside either system for viewing both.”4 It is on that note that I dare proceed.

II

Purpose

This article attempts to uncover certain characteristics of American attitudes and regulation of the labor and industrial relations field. Its purpose is to try to present viewpoints not commonly advanced in order to explore the demise of collective bargaining in the United States. The theme is an overarching one. To discuss properly “the demise of collective bargaining in the U.S.” is a monumental task. It may seem preposterous to examine the topic in a short article, particularly if one is a foreigner. What follows, then, is not a full-fledged discussion, merely a bouquet of very brief—and somewhat baffled—observations. I have tried not to emulate articles on “the distinctive character of American labour law,” either in form or in substance.5

4. Summers, Worker Participation, supra note 2, at 177.
5. See Derek C. Bok, Reflections on the Distinctive Character of American Labor Law, 84 Harv. L. Rev. 1394 (1971). Everyone familiar with Bok’s article will immediately notice that the present article—despite an unintentional similarity in title—in no way draws on that piece. Readers of this article will also notice that I have not referred to, much less relied upon, other articles presenting
Collective bargaining in the United States follows in the path of unions. Unions, in turn, exist where employees decide to form and/or join them. As is well known, the unionization rate in the U.S. is low, about fifteen per cent of the working population in the private sector. Thus, another way of stating the purpose of this article is to discuss why union membership in the U.S. is so low.

To put the theme yet another way: The industrial relations system of any country is a subsystem within that country, along with other subsystems such as the political system, the economic system, the human relations system, and systems concerning human values (culture). A subsystem that is not in harmony with other subsystems will either change those other systems so that harmony is established, or disappear. In the U.S., the system of labor and industrial relations law is not in harmony with other subsystems. Indeed, it seems to me that the American labor and industrial relations legal system is in disaccord with fundamental features of American society to such an extent that it is—and has been ever since its enactment in 1935—by and large doomed.

Before proceeding I wish to make one thing absolutely clear. This article is based on the firm notion that classifications like “right-wrong,” “good-bad” or “good-better-best” have no meaning per se when discussing legal institutions and arrangements in industrial relations. There simply are no value-neutral yardsticks. This means that institutions and arrangements that are well-suited to one country may be inappropriate for another. For example, a high degree of government intervention (or participation) in the relationship between management and labor may suit one country, but be anathema to another. To try to assess the value per se of government intervention does not make any sense. It is imperative to keep in mind the fundamentally value-neutral character of arrangements and institutions in industrial relations when reading this article. The thesis that U.S. labor law is un-American might lead to the conclusion that U.S. arrangements and institutions in the labor and industrial relations field are bad or wrong per overall analyses of American labor law. There are two reasons: space and difference in perspective. Other American overall analyses include Paul C. Weiler, Governing the Workplace ch. 3 (1990); Benjamin Aaron, Labor Relations in the United States from a Comparative Perspective, 39 Wash. & Lee L. Rev. 1247 (1982); Paul C. Weiler, Striking a New Balance: Freedom of Contract and The Prospects for Union Representation, 98 Harv. L. Rev. 351 (1974); the extensive writings of members of the Critical Legal Studies movement: for example, James B. Atleson, Values and Assumptions in American Labor Law (1983); Karl E. Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 Indus. Rel. L.J. 450 (1981); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265 (1978); Katherine Van Wezel Stone, The Structure of Post-War Labor Relations, 11 N.Y.U. Rev. L. & Soc. Change 125 (1982-83); Katherine Van Wezel Stone, The Post-War Paradigm in American Labor Law, 90 Yale L.J. 1509 (1981).


7. See generally Reinhold Fahlbeck, Industrial Relations i USA. Ett porträtt av "The Land of the Free" (1988).
That is not at all what I mean to imply. In fact, the heavy dose of government intervention in the labor market that is characteristic of U.S. labor law, as well as the very collectivist nature of important features of its labor law, would suit my own country, Sweden, quite well. The theme here is that these characteristics of U.S. labor law do not suit the United States.

Why is collective bargaining in demise in the United States? Why is the unionization rate so low? Conventional wisdom points to the forceful, consistent and unrelenting opposition to unionism on the part of employers. Empirical studies amply support that position. There can be no doubt that employer resistance is a mighty factor. At the same time it is obvious that this explanation is not exhaustive. For instance, the efforts made by unions to retain old members and recruit new ones have decreased continuously for several decades. Unions, it appears, are not overly concerned. A 1972 statement by then AFL-CIO President George Meany vividly expresses and illustrates union attitudes in this respect:

Why should we worry about organizing groups of people who do not want to be organized? If they prefer to have others speak for them and make the decisions which affect their lives, without effective participation on their part, that is their right. . . . I used to worry about the size of the membership. But quite a few years ago I stopped worrying about it, because to me it doesn’t make any difference.

Employer resistance and modern-day union indifference—or perhaps resignation to the inevitable—are undoubtedly important. Nonetheless, to a large extent they are symptoms of deep-rooted factors of much greater magnitude.

What are the more fundamental factors that have reduced union membership rates to levels not seen since before the societal intervention of the mid-1930s, an intervention that strongly favored unionism? What are the factors that have simultaneously reduced collective bargaining to only a small fraction of the labor market? What are the factors that explain employer resistance to unionism?

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8. See, e.g., Summers, Worker Participation, supra note 2; Summers, Comparisons in Labor Law, supra note 1.
10. When analyzing industrial relations, I find it useful to do so at three levels: the grass-roots level, the treetop level, and the eagle’s level. At the grass-roots level, the analysis focuses on technicalities. At treetop level, the analysis is broader and focuses on structures and basic ideas in case law, statutes and other relevant data. At eagle’s level the analysis aims at overlooking and explaining the entire legal landscape under observation: for example, the ideology of the entire industrial relations system of a country. Bare references to employer resistance to unionism as the explanation for the low rate of unionization in the U.S. are at the treetop level of analysis.
These questions will be discussed from two angles, the micro-perspective (section IV) and the macro-perspective (section III). The micro-perspective is that of the individual employee. The macro-perspective looks at the situation from the point of view of other actors in the labor market, primarily job-seekers, employers, and the public-at-large (as consumers, as producers—i.e. potential investors and entrepreneurs—and as the ultimate holders of political power).

The macro-perspective employed in section III considers concerted employee activity, unions, and collective bargaining from different angles: III.A. explores concerted activity and the freedom of marketplaces (the restraint-of-trade aspect), III.B. examines concerted activity and intervention by the federal government to direct and supervise it (the "big government" aspect), and III.C. looks at concerted activity and the American archetype (the contempt-for-collective-action aspect).

The micro-perspective employed in Section IV will offer comments on those features of U.S. labor law that entail compulsory elements (IV.A.) and those that involve collectivist elements (IV.B.). Here, as in Section III, elements of patronizing attitudes and contempt also emerge.

III
THE OVERARCHING PERSPECTIVE: CONCERTED ACTIVITY IN
CONFLICT WITH AND GIVING RISE TO RESPONSES IN
CONFLICT WITH FUNDAMENTAL
AMERICAN VALUES

The labor market first appeared as a legal issue in the United States in the early years of the nineteenth century, amid intense discussion of the role of society and the reasons for which the colonies had seceded from England—in short, "the spirit of '76." The outcome, as reflected in cases like Philadelphia Cordwainers, was that concerted employee activity was branded a criminal conspiracy.

The background of Philadelphia Cordwainers was simple enough. Some journeymen shoemakers in Philadelphia had agreed upon three things: that they would not work unless they were paid certain specific sums of money for specific tasks, that they would attempt to see to it that no one else would work for less money, and that they would refuse to work alongside someone who worked for less than the agreed sums. The jury found them guilty of criminal conspiracy. In his address to the jury the

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15. Id. at 236.
presiding judge, recorder Moses Levy, analyzed the situation from the points of view of six constituents (or actors). The first party was the people as legislators. "We live in a community, where the people in their collective capacity give the first momentum, and their representatives pass laws . . . " The issue was "whether we shall have an imperium in imperio, whether we shall have, besides our state legislature a new legislature consisting of journeymen shoemakers. Levy looked upon the demands of the shoemakers as an attempt to legislate without constitutional authority. Striking down this attempt would not result in any curtailment of civil liberties but, rather, would protect them. The second interest that Levy addressed was the freedom of the market for goods and services. He considered the action of the shoemakers an artificial regulation, and an "unnatural way of raising the price of goods or work"—in short, "an arbitrary jump from one price to another." Consumers were the third part of the balance of competing interests. The shoemakers would take "undue advantage of the public." The employer community constituted the fourth interest group. "Is there any man who can calculate (if this is tolerated) at what price he may safely contract to deliver articles, . . . if he is to be regulated by the journeymen . . . ?" The employee community, the fifth group, also had important interests at stake, namely the mandatory nature of the society. No shoemaker was "at liberty to join the society or reject it." Individual freedom of contract was thus threatened. Finally, the purpose of the shoemakers was not just to benefit themselves but also "to injure those who [did] not join their society." In short, the agreement between the shoemakers would, if upheld, mean that they would "put the whole body of the people into their power." The Philadelphia Cordwainers case and the criminal conspiracy doctrine have long since ceased to be the law of the land. However, this encounter, the first recorded in the U.S. between organized labor and society, has had an immense impact in the United States on opinions, perspectives and rules concerning concerted employee activity. This is particularly so in regard to the concern for the freedom of the markets—the labor market, the market for goods, and the market for anyone to do business—but also in regard to the notion that union rule-making is a kind of legislation. Distrust of concerted employee activities is another lingering legacy. Indeed, it

16. Id. at 224-36.  
17. Id. at 231.  
18. Id. at 235 (emphasis in original).  
19. Id. at 228.  
20. Id. at 229.  
21. Id. at 228.  
22. Id. at 229.  
23. Id. at 231.  
24. Id. at 233.  
25. Id. at 230.
seems justified to say that organized employee cooperation in the U.S. has never fully recovered from the devastating blow that it was dealt in Philadelphia on the 21st of May, 1806.

A. Freedom of Markets, Restraints of Trade

The central role of the free market and the resulting concern for the unrestricted flow of goods and services are at the very core of U.S. society. "The chief business of the American people is business."26 The U.S. was the pioneer in antitrust legislation, and its antitrust legislation is unparalleled in the world in its promotion of competition, its fight against restrictive business practices and its encouragement of individual competition.27

In this context, reference should also be made to the ubiquitous fear in the United States of the concentration of power and to the unflagging efforts to combat such concentration wherever it occurs. Promotion of the separation of powers, by means of checks and balances, is but one expression of this overriding concern that big government is bad government.

Labor is exempted from the coverage of federal antitrust law. This situation did not come about without serious conflict, involving the federal courts (which applied federal antitrust laws to various activities by unions and employees acting in concert) as well as various other groups in society. In 1932, Congress took labor definitively out of the reach of federal antitrust legislation by enacting the Norris-La Guardia Act,28 which is still the law of the land. However, the free hand which the Act gave to unions to conduct their internal and external affairs was supplanted in 1935 by federal labor legislation, the epochal Wagner Act.29 Subsequently amended in 194730 and 1959,31 the Wagner Act is still the core of federal labor law. This body of law can best be understood from the perspective of antitrust and unfair-competition law. It vividly illustrates the theme that concerted activity by employees, unions, and the employer-union relationship are considered an alien presence in the U.S. landscape.

In order to avoid misunderstandings, I should add that, by and large, U.S. federal antitrust law does not apply to labor.\textsuperscript{32} Federal antitrust legislation deals with antitrust matters in the market for goods and services; it is federal labor legislation that, to a great extent, deals with antitrust matters in the labor market.

Clearly, labor law takes a much more permissive view of antitrust than do the core federal antitrust statutes. Indeed, the basic purpose of labor statutes is to provide the legal structure for employees to organize so as to reduce competition in the labor market. In this respect, labor law is a departure from a central precept of American law and social values—the promotion of individual competition and opposition to restraints on trade. It is my argument that Congress realized that it was deviating from antitrust principles and thus created only a circumscribed exemption from those principles. What Congress granted with one stroke of the pen, it constrained with the next by including a number of antitrust elements in the labor statutes. These restrictions on collective bargaining demonstrate that Congress regarded unionism suspiciously, as a phenomenon out of step with larger American values.

In looking at U.S. labor law from an antitrust perspective, I refer to four different areas: labor law—like antitrust law—as a legitimate concern for every citizen (III.A.1.); the structure of bargaining and the size of bargaining units (III.A.2.); the non-existence of employer organizations (III.A.3.); and industrial-action law (specifically, the ban on secondary action and the \textit{Mackay} doctrine) (III.A.4.).

1. \textit{Labor Law as a Kind of Antitrust Law}

One way of looking at labor law from the perspective adopted here is to ask who in the legal family are the relatives of labor law. In Sweden, interestingly, collective-bargaining law shares many features with matrimonial law. The labor market parties have a rather emotional relationship. The collective agreement is their marriage contract. They are united by bonds that cannot really be severed, since it is more or less out of the question to end a collective agreement relationship definitively. The bond between employers and unions is much like a marriage without recourse to divorce. The relationship is based on convenience and common sense: cooperation between the parties is taken for granted and encouraged. The parties are expected to consult with each other; they are expected to inform each other; they work together on company boards for the good of the company. The freedom of the labor parties is a cherished notion. Just as in

matrimonial law, society does best to stay out of the relationship as far as is possible.

In the American context, a reference to matrimonial law would make no sense. Indeed, U.S. labor law is concerned with keeping the parties apart. Excessively close cooperation is looked upon with distrust and suspicion and risks being in violation of federal antitrust legislation if the parties try to extend the scope of their cooperation beyond their contractual relationship. It is not matrimonial law but antitrust law that presents itself as a natural relative.

Like antitrust legislation, labor law is a significant concern for everyone in the United States. In the U.S. any citizen can file an unfair labor practice charge and, to some extent at least, have the complaint investigated. Though it may not be common practice for citizens-at-large to bring charges, it is nevertheless true that "the policy of keeping people 'completely free from coercion' against making complaints to the Board is . . . important in the functioning of the Act as an organic whole." Organizations such as the National Association of Manufacturers (NAM) or the American Civil Liberties Union (ACLU) can file unfair labor practice complaints or encourage members to do so. Investigations of unfair labor practice complaints are not in the hands of those most concerned but are conducted by society through the general counsel of the NLRB, just as criminal investigations and antitrust violations are carried out by public prosecutors. The general counsel, not the aggrieved party, has the final authority "in respect of the prosecution of such complaints." The principle underlying these practices is that labor law should not be confined solely to the private realm. The "NLRB is charged with serving the public interest to enforce labor relations rights which are public, not private rights," and "unfair labor practice are matters of public concern." The relationship between the labor market parties is not a private one that they are free to dispose of at will. In that sense there is no "freedom of the labor market parties" or "freedom of the labor market" in U.S. labor law. This is surprising in view of the fact that the United States relies on markets and protects the freedom of marketplaces more than any other country. How-

34. I know of only one such instance, namely the complaint filed by the National Right to Work Committee against "the Saturn Agreement" between General Motors and the United Automobile Workers Union. Advice Memorandum of NLRB General Counsel, 122 L.R.R.M. (BNA) 1187 (June 2, 1986).
35. 29 U.S.C.A. § 153(d).
ever, it is precisely this concern for markets that led society to intervene here. Intervention aims at safeguarding markets and market freedom from the labor market parties, who are considered to be potential malefactors acting in restraint of trade. From this perspective, labor law is a kind of antitrust law which serves the purpose of protecting the public-at-large (i.e., buyers of goods and services), job-seekers (sellers of jobs), investors (present and future), as well as other companies and employers (present and future) from restraints of trade imposed by the labor market parties, jointly and separately. Paraphrasing a familiar and well-known quotation, it can be said that in the U.S. "labor law is too important to be left to the labor market parties."

2. Bargaining Structures and Bargaining Units

Bargaining structures and bargaining units in the U.S. also illustrate concern for the freedom of markets and fears of restraints and undue concentration of power. U.S. labor law employs the bargaining unit as the basic legal entity for purposes of negotiation. The Wagner Act mentions four possible bargaining units: "the employer unit, craft unit, plant unit, or subdivision thereof." It is not a violation of the Act for the NLRB to establish other units, including larger ones: multi-employer units are common. However, in most instances units are small. Statistics from the annual reports of the NLRB show that units with fewer than 40 employees consistently account for approximately 60 per cent of all units established by the NLRB. The NLRB has never established a truly large bargaining unit—for example, a unit comprising all employers in one state—much less a unit for an entire branch of the nation's industry. Such units would probably not be illegal per se. Instances of industry-wide bargaining have occurred and have not been challenged from a strictly legal point of view.

The U.S. Supreme Court has accepted far-reaching standardization because "an elimination of price competition based on differences in labor standards is the objective of any national labor organization . . . [and] this effect on competition has not been considered to be the kind of curtailment of price

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38. The original quote, "War is much too serious a matter to be entrusted to the military," is attributed to Charles Maurice de Talleyrand-Périgord. John Bartlett, Familiar Quotations 354 (Justin Kaplan ed., 16th ed. 1992).
40. Id.
42. Industry-wide bargaining has existed in the trucking industry (National Freight Agreement), the coal industry (National Bituminous Coal Wage Agreement) and the steel industry (National Steel Agreement). Such bargaining did not continue for very many years, however, and no industry-wide agreements of true importance exist today. See gener-ally Collective Bargaining: Contemporary American Experience (Gerald G. Somers ed., 1979); Charles R. Perry, Collective Bargaining and the Decline of the United Mine Workers (1984); Charles R. Perry, Deregulation and the Decline of the Unionized Trucking Industry (1986).
competition prohibited by the Sherman Act." Attempts have been made on several occasions to outlaw industry-wide bargaining altogether, but they have failed.

However, despite what has just been said, very little bargaining actually takes place at a multi-employer level and even less at an industry-wide level. No bargaining has ever taken place on a truly national level, covering the entire labor market or at least some substantial part of it. The typical bargaining relationship in the U.S. is thus extremely decentralized, typically between one employer at company or plant level and the small bargaining unit of the local union.

It is clear that the extremely decentralized bargaining structure reflects concerns in U.S. society for the freedom of markets and fears of restraints on individual competition.

3. Non-Existence of Employer Organizations

Closely related to the decentralized bargaining structure—partly a cause and partly a consequence—is the fact that there are virtually no employer organizations in the United States for the purpose of collective bargaining. Those which do exist are more often than not rather loosely knit and resemble bargaining coalitions more than true organizations. No national federation for employers exists, nor, by and large, do any industry-wide federations. The labor statutes make no mention of employer organizations; the Wagner Act takes it for granted that concerted employee units or unions meet with only one employer.

Why did the Wagner Act fail to mention employer organizations, much less promote their creation? The question may seem odd, since employer organizations have never existed to any degree in the U.S. It is, however, pertinent. One goal of the Wagner Act—indeed the most important one, in the short run—was to help take the U.S. out of the Depression. The Findings and Policies of the Act amply testify to that. A crucial factor in the economic crisis was the depressed "wage rates and the purchasing power of wage earners in industry." Unions were seen as beneficial to a rapid increase in purchasing power, thanks partly to majority rule. Employer organizations might have contributed as well, since wage increases in collective agreements entered into by such organizations would have had

43. Apex Hosiery Co. v. Leander, 310 U.S. 469, 503-04 (1940); see also United Mine Workers v. Pennington, 381 U.S. 657, 664 (1964).
44. See, e.g., NLRB v. Truck Drivers Local 449 (Buffalo Linen), 353 U.S. 87, 95-96 & n.25 (1957); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATON AND COLLECTIVE BARGAINING 86-87 (1976).
45. See supra note 41 and accompanying text.
47. Id.
48. See infra section IV.A.2.
the potential of covering many more employees. However, not a word is said in the Act about employer organizations. To some extent the reason is probably that no one had yet either considered it desirable to have such organizations or advocated having them. More important, in all likelihood, was the fact that having employer organizations would run counter to the very core of federal antitrust legislation. That legislation aims at preventing all agreements limiting competition among companies (employers) and at eliminating them if they occur. To promote actively anti-competitive employer cooperation would have been (and would be today) anomalous and, from a broad perspective, potentially counter-productive.

4. Industrial Actions

In most industrialized countries, industrial actions are regulated more or less in detail. The U.S. displays concern for the freedom of markets to a much greater extent than any comparable country that allows industrial actions. Two entirely separate regulations stand out: the ban on secondary action and the Mackay doctrine.

Secondary actions, industrial actions that affect neutral employers, were outlawed in the United States in 1947.49 (Primary actions have, by and large, remained legal.50) The Taft-Hartley Act’s amendment to the Findings and Policies of the Wagner Act illustrates the concern behind the ban on secondary actions, condemning concerted practices that have the “effect of burdening or obstructing commerce by preventing the free flow of goods . . . which impair the interest of the public in the free flow” of commerce.51

The Mackay doctrine arose from case law, with no explicit statutory basis.52 Under this doctrine employers are allowed to hire replacement workers during a strike, on a temporary or a permanent basis. If replacement workers have been hired for permanent employment, the employer is entitled to keep them when the strike is over, thus barring returning strikers from getting their old jobs back. The Mackay doctrine is primarily concerned with striking a balance between employers and striking employees. However, it also involves other actors/constituents in the labor market, primarily replacement workers and the public-at-large as consumers but also

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52. The doctrine has been developed by the U.S. Supreme Court, starting in 1938 with the ruling in NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). Several subsequent rulings have elaborated on the 1938 decision. See, e.g., Trans World Airlines, Inc. v. Independent Fed’n of Flight Attendants (TWA II), 489 U.S. 426, 432-34 (1989).
as producers. Generally speaking, the Mackay doctrine testifies to the heavy emphasis in the U.S. on the freedom of markets.53

5. Summary

The overriding concern in the United States for the freedom of markets has profound consequences for labor regulation and practices in the industrial relations field. The common denominator of that concern is the restriction of activities that threaten to restrain trade and the free flow of commerce, and the promotion of individual competition. There can be no doubt that this concern is one of the most powerful factors behind the demise of collective bargaining in the U.S.

U.S. regulation in this respect does not conform to the title of this article, The Un-American Character of U.S. Labor Law. Indeed, it is an outflow of one of the most prominent characteristics of the American social fabric. However, what it does illustrate is that concerted employee activity, unionism and collective bargaining have not managed to gain full acceptance. They have not been fully integrated into the social fabric of the U.S.

There has been a great deal of change since the mid-1930s with regard to collective bargaining and unionization. The 1935 Wagner Act represented a forceful intervention by the federal government in the labor market. It exhibited an overwhelmingly collectivist character in its unprecedented and unparalleled support of collective bargaining and unions. There should be little surprise that unions expanded very rapidly. When the economic crisis that triggered the Wagner Act had subsided, and in particular when the United States had emerged victorious from the Second World War, more fundamental factors in the social fabric of the U.S. affecting unionization slowly regained the upper hand. In the legal arena, the return to a less collectivist approach occurred in 194754 and again in 1959.55 In the labor market the unionization rate peaked in the mid-1950s but then started to fall.56 The movement towards concerted activity among employees still had sufficient momentum to ensure growth in total union membership for a further twenty-five years, albeit at an ever-diminishing rate. By 1980 that movement had lost its momentum and total membership started to decline. The mid-1950s represent a turning point in other respects as well. Up until that time the number of unfair labor practice complaints

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53. Mackay is under attack and several attempts have been made in the U.S. Congress to overrule it. Resolutions to that effect were introduced in both 1992 and 1994 in Congress, each time narrowly failing passage. The most recent strike involving the hiring of replacement workers on a large scale took place in April, 1992, at Caterpillar, Inc. See Wage Bargaining: Pattern & Practice, The Economist, Apr. 11, 1992, at 28.


56. Weiler, supra note 5, at 9-10.
had been relatively stable and fairly small. Sharp increases occurred in the mid-1950s and have continued ever since.\textsuperscript{57} Furthermore, prior to the 1950s complaints by employees against either employers or unions had been rare, particularly the latter. Drastic increases occurred towards the end of the 1950s and have continued. Today employees file some seventy percent of all complaints against unions and well over forty percent of those against employers.\textsuperscript{58} It is not just an avalanche but a veritable revolt on the part of the U.S. employee community.

B. The Role of the Federal Government

The U.S. labor law system to a very great extent entails intervention by the federal government. When the Wagner Act was enacted in 1935, its framers may not have realized to what extent government intervention would be needed to make the statutory scheme work. Perhaps no one could have foreseen the heavy reliance on the National Labor Relations Board (NLRB) for investigation of complaints of unfair labor practices, and the litigation explosion of the past several decades has certainly taken everyone by surprise. Still, it must have been clear to the lawmakers that a heavy dose of government intervention would be necessary, at least during the initial years when collective bargaining was to be introduced on a large scale in the labor market. The employer community at that time was as aggressively anti-union as it had ever been. The lawmakers simply cannot have failed to realize that reliance on determined and far-reaching government intervention to support the employee side would be necessary in order to get the statutory scheme off the ground and working.

In the mid-1930s, statutory schemes involving intervention by the federal government increased considerably. Government agencies mushroomed as part of the New Deal. The U.S. was in the midst of a deep depression, and an activist and interventionist federal government was seen as one vehicle to revive the economy. Though conceived not by the Roosevelt administration, but by activist Democrats in Congress, the Wagner Act was one outflow of that effort, as the findings and policies in its preamble testify.\textsuperscript{59} This preamble demonstrates, and the legislative history corroborates, that the Act had both short-term and long-term goals. The short-term goals involved taking the U.S. out of the Depression. To a great extent the Act was an emergency measure to counter a crisis of unprecedented magnitude. This crisis had crushed "the American dream" in the minds of many citizens and it threatened the social order. Apart from the economic justification for emergency actions, political justifications were also put forward. One of the leading proponents of the Wagner Act, Lloyd

\textsuperscript{58} Id. at 26.
\textsuperscript{59} 29 U.S.C.A. § 151.
Garrison, explained that he was in favor of the proposed statute “as a safety measure, because I regard organized labor in this country as our chief bulwark against communism and other revolutionary movements.” It would have been natural to change that statute once the U.S. had overcome the Depression, and to remove much of the governmental intervention from the statutory scheme. However, that is not at all what happened. On the contrary, when the statute was amended in 1947 by the Taft-Hartley Act, the role of the government was expanded, both in areas where it had previously been involved (the handling of unfair labor practice charges, where new grounds for such charges were added) and in areas where it had not (title II, conciliation and mediation). The effect was—and still is—that the United States' basic labor statute is a law conceived at a time of grave unrest and designed to help overcome that unrest. Whereas extraordinary times may have called for extraordinary measures in terms of massive intervention by the federal government, such measures are not necessarily appropriate at other times.

Government intervention under the Act covers the entire labor-management relationship. It starts with the establishment of a bargaining relationship. For all practical purposes, bargaining in the U.S. takes place only after the establishment of a bargaining unit, and for all practical purposes the establishment of a bargaining unit presupposes federal intervention. In the hostile and adversarial environment of labor relations in the United States, continued federal intervention on a massive scale is required to monitor the behavior of the labor market parties and to try to redress improper behavior (unfair labor market practices) by those parties.

Prevailing attitudes and opinions in the U.S. have always been that government power and government intervention in human affairs should, on the whole, be limited and of restricted proportions. Furthermore, what power there is should be separated rather than concentrated. By and large, "big government" is anathema and federal intervention even more so. Still, U.S. labor law entails massive intervention by the federal government. It has few if any parallels in the world in its scope and magnitude. Intervention occurs in an area of human affairs which, in many countries, is left by and large to the parties themselves. Another factor that makes this intervention even more intrusive is that it mainly happens at a local level, within a company or plant. This consequence of the United States' decentralized bargaining system means that federal intervention generally takes place where individual employers actually conduct their business, often right on their premises. What could be more abhorrent to an employer than to have the federal government—"Big Brother" personified—roaming her plant?

60. Legislative History (1935), supra note 37, at 1507.


It is hard not to see the situation prevailing in the U.S. as an anomaly of monumental proportions, whose significance for the demise of concerted employee action, collective bargaining and unionism cannot be overstated. Ironically, this is so despite the fact that societal intervention is, on the whole, carried out in the interests of concerted employee activity.

Another rationale for this massive intervention, a rationale which probably was not considered by the framers of the Wagner Act (or the framers of the Taft-Hartley Act), is that it is necessary in order to protect fundamental values in U.S. society. These values, including freedom of markets, individual competition, and protection against concentration of power, were discussed in part III.A.1. However, protection against massive intervention by the government is also a fundamental value in the U.S. In other words, massive federal intervention is in itself very un-American. By prescribing a regime of massive government intervention in the relationship between labor and management and by regulating virtually every aspect of it, Congress accomplished the statutory purpose of supporting the relationship, but at the same time unintentionally yet inevitably hindered it. The massive intervention by the federal government has become self-destructive and has turned the statutory scheme into a vicious circle.

C. Concerted Activity and the Archetypal American: the Element of Contempt

It seems to me that there is a strong element in American labor law of contempt for concerted employee activity, collective bargaining, and unions. By and large this notion is hidden, but it is no less strong for that. This contempt is based upon the unspoken notion that collective labor relations are somehow un-American. Three examples will illustrate this, all of them involving fundamental features of U.S. labor law.

1. Groups of Employees not Covered by Federal Labor Law and Reasons for Non-Coverage

The notion of unionism as un-American is perhaps nowhere more manifest than in the arguments advanced to support the idea that certain groups of employees should be exempted from the coverage of federal labor law.63 The exemption of supervisors (foremen) is particularly illuminating.

63. Seven groups of employees are exempted from coverage of the LMRA: (1) farm workers, (2) domestic service employees, (3) family member employees, (4) independent contractors, (5) supervisors/foremen, (6) managerial employees and (7) confidential employees. For the first five exemptions, see 29 U.S.C.A. § 152(3). For managerial employees, see, e.g., NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); for confidential employees, see, e.g., NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981). Both opinions include extensive references to case law and decisions by the NLRB. It has been estimated that in 1984 some 30 percent of the working population in the private sector was excluded, up from some 25 percent in 1954. Cf. THE CHANGING SITUATION OF WORKERS AND THEIR UNIONS: A REPORT BY THE AFL-CIO COMMITTEE ON THE EVOLUTION OF WORK 5 (1985).
When Congress discussed the exclusion of supervisors from the coverage of the LMRA in 1947, one representative stated that "it seems wrong, and it is wrong, to subject people of this kind, who have demonstrated their initiative, their ambition and their ability to go ahead, to the levelling process . . . of unionism." 64 Another speaker maintained that it is the responsibility of society to see to it that "those best qualified to get ahead" are not restrained by union membership. 65 Restraints on such people would pose a threat to "the future strength and productivity of our country." 66

The statements referred to are the tip of an iceberg. They point to fundamental, intuitive, more-or-less unspoken assumptions and values. Foremen are people with guts; in short, they are real Americans. The statements, in addition to testifying to how alien unionism is to the U.S. ideals of human behavior and of what constitutes a "real American," also amply illustrate another feature of fundamental importance in American attitudes towards concerted employee activity and unionism: a certain contempt for people who want and need the support of the collective strength that unions can provide. Such people do not correspond or live up to the archetypal American: the lone, strong horseman who rides off to shape his own destiny.

2. Who Decides What Constitutes a Bargaining Unit, and Why?

This contempt is nowhere more clearly displayed than in connection with the rules on deciding the appropriate bargaining unit. Collective bargaining in the United States takes place in well-defined bargaining units. The LMRA mentions "the employer unit, craft unit, plant unit, or subdivision thereof" 67 but other units can meet the statutory requirement of assuring "to employees the fullest freedom in exercising the rights guaranteed by this [Act]." 68

Who is entitled to make the decisions about what constitutes an appropriate bargaining unit? One would think the employees themselves, since their bargaining rights under the Act are at stake. Indeed, employees know best whether there is sufficient interest among them to form a unit in their relationship with the employer. Employees in Europe, for instance, have always made their own decisions about bargaining structures. Compulsory government interference of any kind in such matters would be considered an inappropriate intrusion as well as a misuse of government power.

68. Id.
same should be true in the United States, but such is not the case. In "the land of the free," in the land of "little government is good government and big government is bad government," these matters are decided by the federal government through the NLRB, by federal courts, and ultimately by the U.S. Supreme Court.

This is not the only role that "Big Brother" plays. Although the statute provides some guidelines as to which units are appropriate (or, more specifically, which units are not appropriate), the U.S. Supreme Court has affirmed that the NLRB does in fact enjoy "broad discretion" when making a decision. Complete neutrality is not possible: "virtually every Board decision concerning an appropriate bargaining unit . . . favors one side or the other." This means that the NLRB holds enormous power in deciding whether there will be any union representation or not. The NLRB, it should be added, is a Board composed of five members, all of whom are appointed by the President "by and with the advice and consent of the Senate." Board members serve for a period of five years and naturally tend to represent the political interests of the incumbent President. In this sense, the NLRB is a quasi-political body. Moreover, all three branches of the federal government, not just the executive (through the NLRB), have an important and often crucial say in deciding whether there shall be union representation or not. Thus, to a degree unknown in any other Western country, there is government intervention in res labora.

The rules for deciding bargaining units reveal much about the American distaste for collective action. The obvious question is why Congress did not entrust such decisions to those most directly affected—the employees. The legislative history provides the answer. Congress considered participation by society necessary to avoid endless harassment by employers and chaos from employees. Why chaos? Apparently, allowing employees to decide would risk internal strife and the atomization of the bargaining structure, resulting in too many and too small bargaining units—in short, a "Balkanization" of the labor market. Intervention by society was considered "the lesser of the evils involved." These statements, again, were only

73. "If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of majority rule; and, by breaking into small groups, could make it impossible for the employer to run his plant." Id. at 1458.
74. Expression used by both Francis Biddle and Senator La Follette during Congressional debates. Id. at 1459.
the tip of the iceberg. Employees were considered likely to succumb to internal strife and to defeat rules (e.g., majority rule) set up in their interest if they themselves were allowed to decide about bargaining units. The threat of “Balkanization” loomed on the horizon. And yet, there was no empirical support for these allegations in 1935, and no such support has been advanced since. Europe provided no discouraging example, for instance. How then could Congress know all these things? In other words, what were the real motives behind the unsupported rhetoric? Most probably the fears were real. The United States was in the midst of a terrifying economic depression, and the Wagner Act was one of many means to take the country out of it. Nothing that might jeopardize this aim could be tolerated.

The statements and attitudes referred to here are light years away from statements commonly made about Americans as citizens. The American citizen is generally considered to be perfectly capable of looking after his or her own affairs without causing chaos or serious disturbance, and also of acting as the final arbiter in all things public. One does not find Americans advocating the idea that citizens should not be allowed to decide themselves whether to form a political party and act through it as they think best. No one argues that society should protect itself against such potentially disruptive behavior by having some federal agency make decisions for citizens as to the appropriateness of such concerted activity. And yet could it not be maintained that the absence of such rules might “make it impossible for the [federal government] to run [the country]?”

It is hard not to interpret the statements referred to here, and the ensuing rules, as an expression of distrust, or even contempt, for employees who want to resort to concerted action. Those people who want and need concerted action and unions are not quite reliable. They are not like Americans-at-large.

3. Bars to Individual Access to Justice

Another striking example of the distrust of union people inherent in the U.S. labor law system is that when there is union representation in a bargaining unit, in most instances individual employees are effectively barred from access to the legal system to present grievances and to have claims against the employer decided by a court of justice (or an arbitrator). This is one aspect of the exclusivity rule. By and large only the union can “go to court.” Since it is only through the collectivity that individuals can have their claims decided, that collectivity—the union—enjoys far-reaching discretion. One reason for this state of the law is the fear that employees, left to their own devices, will flood the courts with suits. But why would they? Would they take legal claims to court more often than ordinary citizens?

75. See infra part IV.B.1.
Clearly, the employee represented by a union (whether in accordance with or against his/her will) is barred from access to justice in the usual sense.

4. **Summary**

It is difficult not to see the features of U.S. labor law discussed in Sections III.C.1 - C.3 as expressions of fear (and indeed of contempt) toward people who seek strength through collective action. Since individualism is one of the most prominent characteristics of American society, one might expect there to be alarm about people who want collective rather than individualistic self-assertion. What are such people capable of? Are not fears of irresponsible behavior justified? Must there not be guarantees to ensure orderly conditions? Must society not provide instruments to guide and to direct? Must it not act as legal guardian?

**IV**

**THE INDIVIDUAL PERSPECTIVE: LABOR LAW AS AN EXERCISE IN KEEPING INDIVIDUALS IN CHECK**

Voluntarism and freedom of choice for individual employees are commonly said to be hallmarks of U.S. federal labor law. However, from the shores of my country, Sweden, federal labor law does not appear to be a bastion of such principles. To the contrary, what is most striking are the heavy doses of compulsion and collectivism. This section will explore that theme. To some extent it will refer to the same features discussed in Section III, but the focus here will be on the individual and not on society-at-large.

A. **Compulsion Versus Voluntarism**

Two specific, characteristic features of U.S. labor law will be examined: the establishment of bargaining units (IV.A.1.), and union representation against the expressed will of a minority of employees (IV.A.2.).

1. **Compulsory Decisions on Establishing Bargaining Units**

As was discussed in Section III.C.2., for all practical purposes society (through the NLRB) makes the decisions about establishing bargaining units. The reasons given for allocating this powerful role to society reflect distrust of individual employees. The crucial matter of deciding which employees will join forces to face the employer is not in the hands of those employees. It is true that units must “assure to employees the fullest freedom in exercising the rights guaranteed by this [Act].” That sounds like true voluntarism, but a closer look reveals that the statutory language is ostentation rather than reality. Units are not established by the employees

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76. 29 U.S.C.A. § 159(b).
acting voluntarily. Units are established by society, and the employees are not party to the decision-making process in any true sense. The employees have no power to veto a preliminary decision by society, the preliminary decision is not put before them in a referendum, and they have no right even to be consulted before a final decision is made. For all intents and purposes bargaining units are established at the initiative of the union, but the wishes of the union are not the controlling factor in the actual process of establishing the unit.77

Once a bargaining unit has been established, every employee affected is bound by the decision. The only escape for a disgruntled employee is to find some other employment.

The AFL seemed to have accepted the rules as proposed in 1935, but many local union people expressed doubts. “It seems to us in the interest of genuine democracy,” said the representative of one union, “that the employees themselves shall determine whether the election should be by separate units or for the entire plant... The least interference of Government in industry in this particular is, from our viewpoint, most desirable.”78 Another representative stated, “After all, the employees are the ones affected and not the Board, and they should have the right, in my opinion, to decide themselves.”79

It is difficult to imagine that individual employees in the U.S. can much welcome the role that society has reserved for itself in protecting their rights. Americans are not commonly considered to be people in need of the federal government’s guidance as to what is in their best interest. The patronizing attitude inherent in the statutory scheme cannot possibly have served concerted employee activity, collective bargaining and unions well. On the contrary, it seems fair to assume that it has had very much the opposite effect.

It may well be that in 1935, when the rules were enacted, a different perspective was justified. Unemployment was at record levels, the American worker was (one might presume) rather dispirited, and employer resistance to all kinds of concerted action and unionism was fierce. Assistance from the government was a price well worth paying in the short run if it could effectively serve the overall aim of getting out of the Depression, however un-American such assistance might be as a general rule. At a later date, when things had returned to normal, this un-American feature could be abolished. That, however, did not come to pass, and so a structure that was born out of the desperate needs of an unprecedented crisis was allowed to live on. It can come as no surprise that American workers (and Ameri-

77. See, e.g., NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 441-43 (1965). The rule is based on the idea of voluntarism and promulgated ostensibly in the interest of employees, i.e., to protect them from pressure and coercion by the union.
78. LEGISLATIVE HISTORY (1935), supra note 37, at 1688.
79. Id. at 2044.
can employers) have not, since the initial euphoria in the 1930s shown much sympathy for it.

2. Compulsory Union Representation

Once a bargaining unit has been established, an election takes place among the employees. The purpose of the election is to find out whether a majority of (voting) employees wants to be represented "for the purposes of collective bargaining." But there remains the issue of the rights of employees who do not support collective representation, even if a majority of those voting does support it. In other words, what happens to the minority who did not vote for the representative(s) selected by the majority?

U.S. labor law is based on the idea of majority representation. This means that the representative(s) selected by the majority in a bargaining unit will represent all employees in that unit, the majority as well as the minority (however large); in short, "the majority rules." Majority rule means that a great deal of power is given to one organization. Such a scheme is highly collectivist: it firmly puts the interests of the collective ahead of those of the individual employee. Majority rule also means that many employees risk being represented against their will, a fact which gives rise to serious legal and democratic questions. Why then was majority rule chosen in the first place?

When enacted in 1935, majority rule was a novelty in industrial relations. Existing models in other countries were based on proportional representation. The legislative history makes it clear that majority rule, rather than a principle of proportional representation, was chosen for two principal reasons. First, majority rule accorded with political traditions in the U.S.: "the rule is in accord with American traditions of political democracy, which empower representatives elected by the majority of voters to speak for all the people." Senator Wagner stated during congressional debates that "democracy in industry must be based upon the same principles as democracy in government." Second, majority rule was considered to strengthen the employee side: "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power."

80. See supra part III.A.5.
81. 29 U.S.C.A § 159(a).
83. In re Houde Eng'g Corp., 1 N.L.R.B. 35, 43 (1934).
84. 79 CONG. REC. 7571 (1935), reprinted in LEGISLATIVE HISTORY (1935), supra note 37, at 2337.
Majority rule was an issue when the U.S. Supreme Court ruled on the constitutionality of the Wagner Act in the *Jones & Laughlin* case in 1937. While finding majority rule constitutional, the Court seems to have taken for granted that individual non-members of the majority union were at liberty to enter into individual deals with the employer. Indeed, only one year before upholding the Wagner Act the Court struck down a statute with a majority rule very much like the one found in the Wagner Act. Said the Court in 1936: "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form." It is not difficult for a foreigner to find that such a statement also amply sums up majority rule in the Wagner Act.

From the perspective adopted here—voluntarism versus compulsion—it is obvious that majority rule is closer to compulsion than to voluntarism. Compulsion in human affairs does not accord well with American traditions. References to political democracy in order to justify union majority rule are neither convincing nor pertinent. True, a country cannot be governed only with respect to those who agree to be governed: the very idea of a nation is that everyone shall be governed by one and the same government. In industry the same is true, but only because the employer—not the union—"governs" the entire workforce under the authority vested in it by the common law. In industry, the union—be it majoritarian or minoritarian—does not rule.

3. Compulsory Union Membership

The closed shop is illegal in the United States, but the union shop is not. Under a union shop employees can be forced to join a union some time after having begun employment, or risk being fired for just cause. Although the U.S. Supreme Court has reduced the union shop, at its minimum, to an agency shop, even membership under an agency shop regime means compulsion. It is true that the Court's rule to some extent rids the

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87. Id. at 44-45.
89. See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960), where the Supreme Court stated, *inter alia*: "Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions."
91. Under an agency shop employers do not have to be members of the union but do have to pay union dues (in as much as these are spent on work representing the employees to the employer). "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership'
union of a potential "fifth column" and definitely liberates the union and its members from "free riders." But it is nevertheless compulsion, and the U.S. is not a country where compulsion, however warranted, is much in favor.

B. Collectivism Versus Individualism

U.S. labor law contains collectivist elements that cannot fail to surprise the foreign observer. Three elements will be discussed here: the union exclusivity rule (IV.B.1.), the union duty of fair representation (IV.B.2.), and the denial of access to justice to individual employees (IV.B.3.).

1. Exclusivity

The exclusivity rule means that the majority union "shall be the exclusive representative of all the employees" in the bargaining unit. This rule covers all contacts between the employee community as a bargaining unit and the employer: collective bargaining in order to reach a collective agreement, administration of a collective agreement, interpretation and implementation of the agreement, the handling of grievances arising under the agreement and, to a great extent, decisions concerning industrial action. As regards the relationship between the employees and the union, this means that a regime of collectivism is put in place. The individual must bow to the collective interest. As regards the relationship between the labor market parties, exclusivity means by and large that employers are barred from having direct contacts with employees in employment matters. Contacts must be channelled through the majority union, the exclusive representative.

2. Fair Representation

Majority rule coupled with exclusivity means that much power is vested in the union. In the best American tradition the legal system contains several sets of rules to ensure that the majority organization lives up to the confidence and faith placed in it: a system of "checks and balances," as it were. The U.S. Supreme Court points to three sets of guidelines: the rules concerning bargaining units (which aim at ensuring that only employees with a community of interest are included in any one bargaining unit), the rules on internal union democracy (the 1959 Landrum-Griffin Act), and the rules on the duty of fair representation. This duty puts restrictions on the freedom of action of the majority union when representing the employ-
ees. Only representation that is fair is accepted. Fair representation represents "an important check on the arbitrary exercise of union power, but it is a purposefully limited check" because in exercising this duty unions enjoy a "wide range of reasonableness."95 As this quote indicates, the rules on fair representation are two-sided. They put restraints on unions. At the same time they provide unions with the authority to represent their members.

The exact scope of that authority is hard to define. Court cases offer guidance but they are often shrouded in nebulous words.96 Clyde Summers once said that "Although amorphous and incomplete, those guides provide a sense of direction and suggest some inchoate standards . . . ."97 Others are less positive. One observer, Benjamin Aaron, finds that case law expresses "impenetrable ambiguity"98 and that it sounds like "a trumpet that gives an uncertain sound."99 What is beyond any doubt is that in granting majority unions "a wide range of reasonableness," the courts have given them a far-reaching authority. The foreigner is struck by the very broad scope of power that unions enjoy in the United States, an authority considerably broader than the corresponding authority in Sweden. For example, under Swedish law the employee is the final holder of authority regarding the processing of grievances—whether to process them and in what way—though it is true at the same time that the employee may have to proceed alone if the union does not agree with the proposed plan of action.100 The curtailment of union power in the U.S. that ensues from the duty of fair representation has more to do with the way the unions represent their members than the scope of their authority. In short, the checks are procedural rather than substantive. Again, U.S. labor law in this respect is highly collectivist.

3. Grievance Procedure and Access to Justice

Collective agreements give rise to rights for employees, some of them even vested. The question is whether the individual employee is entitled to

95. United Steelworkers v. Rawson, 495 U.S. 362, 374 (1990). The reasonableness test was laid down by the Supreme Court in one of the leading cases on fair representation, Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (stating that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.").


100. It should be noted that Sweden is a haven for unions and that by and large the rank and file have confidence in their unions to an extent that is probably unsurpassed anywhere in the world.
resort to the legal machinery to claim what she considers to be her rights. In other words, is there individual access to justice under the labor law regime in the U.S.? On the whole and for all practical purposes, the answer is that there is not. Only if some truly exceptional conditions are met can the individual employee “go to court.” By and large the processing of individual grievances is in the hands of the majority union. This process has come about through case law and is based on the principles of majority rule, exclusivity and fair representation. Justice Black, dissenting in one of the leading cases denying individual access to justice,101 maintained that if an employee has attempted to exhaust her contractual remedies, the union should have an absolute duty to exhaust contractual remedies on her behalf. “The merits of an employee’s grievance would thus be determined by either a jury or an arbitrator. Under today’s decision it will never be determined by either.”102 That outburst in 1967 still echoes. Nonetheless, the U.S. Supreme Court has proceeded on the collectivist road of vesting the authority to seek legal redress more or less exclusively in the hands of the union.103

The United States is not known as a land that propagates collectivist ways and means; rather, rugged individualism is the hallmark. Nor is the U.S. known for denying its citizens free access to justice; instead, it is the country where all people are entitled to their “day in court.” This is not so, however, if an employee happens to be in a unionized environment. In that case the employees become “prisoners of the Union.”104

It all looks very un-American. Small wonder that the American worker shows less and less interest in unions.

V

Closing Words

This article has dealt with the demise of collective bargaining in the United States. Commonly, employer resistance to unionism is quoted as the sole—or at least predominant—cause of this decline. The theme of this piece has been that one must look for more fundamental factors. If American employees wanted unionism and the legal system it entails, they would have overcome employer resistance. The demise of collective bargaining has come about as a result of (1) the perceived un-American character of concerted activity per se and (2), more importantly, the truly un-American legal rules to which concerted activity, unions and collective bargaining

102. Vaca, 386 U.S. at 208 (Black, J., dissenting).
have given rise in America. The main features of this “un-Americanism” permeating U.S. labor law are massive doses of intervention by the federal government (the “Big Brother” syndrome), compulsion, and collectivism. These features are fundamental and go far to explain both why employers in the U.S. resist unions and why employees have not flocked to unions (despite the obvious and substantial economic benefits that unions provide).105

I once met a U.S. congressman. He asked me what I thought should be done about “that mess which is federal labor law. . . . Complete deregulation and back to ‘the law of the jungle’?” My answer then, as now, is short and precise: “Get rid of the majority rule.”

105. See generally FREEMAN-MEDOFF, supra note 9.