Statutory Employee Representation in Italian and U.S. Workplaces: A Comparative Analysis of the Fiat/Chrysler Case

By Marco Biasi

Abstract

Italian and the U.S. rules relating to workplace employee representation are radically different, as they originated in diverse historical and social contexts. In this sense, the Fiat-Chrysler case marks a paradigmatic example of the issues arising from the attempt of a global employer to set the same working conditions throughout the whole group, notwithstanding the different legal framework in the countries where its national branches (Fiat and Chrysler) are located. Fiat had to counter the harsh opposition of one of the main Italian unions, which led to several disputes and, ultimately, to the amendment of the Italian law provisions on employee representation by the Constitutional Court. Chrysler's employees had to accept severe cuts in their salary and the other significant concessions agreed by their exclusive union representative (UAW), as the only alternative to company liquidation. While comparing the rules in the matter of union representation in the two countries, the author examines labor law reform proposals in both countries' industrial relations systems and, more broadly, the role of unions and collective bargaining in the current era.

I. Introduction

Any comparison between Italian and US labor institutions is an ambitious and risky task indeed. Following Otto Kahn Freund's seminal lesson[1], we cannot avoid recognizing that the two industrial relations systems at stake have their origins in utterly different historical and social contexts and they are molded by two business environments based on radically divergent rules and values[2]. Furthermore, things get even more complicated when the scope of comparison is the statutory employee representation at the workplace, a matter deeply rooted in each country's tradition.

MARCO BIASI is a Lecturer, Labor Law, University of Milan; Teaching Fellow, "Comparative Industrial Relations Law" and "European Social Law", Bocconi University of Milan; and Visiting Scholar, ILR School, Cornell University, Summer 2015.

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Nonetheless, the recent Fiat/Chrysler case provides an appealing or even irresistible occasion for undertaking such a complicated effort. Apart from the delicate corporate law aspects involved in the takeover and subsequent merger between the Italian and the US automotive companies, the case raises an intense debate in both Italian and to a lesser extent US industrial relations discourse on the future of collective bargaining at the workplace and, more specifically, on its main actors and procedures.

Italy is searching for a statutory model that may give certainty to both employers and employees on the selection of the management interlocutors, notwithstanding the fact that collective bargaining negotiations are conducted more at sectoral level than at the company or plant level.

The US is facing a dramatic decline in union density and a general reduction of bargaining activities at the company and plant level, where negotiations have historically taken place almost exclusively.

Yet, Italy, originally based on a pluralistic system of union representation organized at "peak" (cross-sectoral and sectoral) levels, has recently started to move towards the decentralization of collective bargaining. This makes it necessary to govern the pluralistic process at the company or plant level to more effectively face the challenges of global competition and economic crisis.

In this sense, the Fiat case, as depicted in the following section II, played the role, not only of "trigger event" (as analyzed in section III), but also of "mirror" of the changes ultimately undergone by the Italian industrial relations framework. Not by chance, as emerging at the end of section III, very authoritative voices in the Italian scenario (Italian Prime Minister Matteo Renzi and Sergio Marchionne, prominent CEO of "Fiat/Chrysler") now endorse the enactment of solutions based on the exclusivity principle in union representation in lieu of the traditional pluralistic model. Conversely, as illustrated in section IV, US scholars have been examining for decades whether a system based on a pluralistic or cooperative pattern might regenerate a collective labor structure founded on the exclusivity principle, which has apparently "ossified" since 1935 NLRA[3].

The major differences between the two models constitute a valid reason for a comparative inquiry, if we consider the common urges to face global market competition, the transformation in economic activities (and, broadly, in society) which occurred after the early establishment of the two models. In the concluding section V, the comparative analysis will be the starting point of the Author's attempt to develop his argument on the grounds, values and institutions the "new" industrial relations in the two countries might be (re)founded upon.

II. The case of Fiat/Chrysler: a "global" company and its challenge to National industrial relation systems

Italian industrial relations scholars started referring to a "*Fiat-case*" earlier than and independently from the recent merger with Chrysler. They generally used this expression to designate the aggressive bargaining strategy of the company's management in corporate transactions as well as in labor relations[4].

The clock has to be turned back to June 2004, when Fiat, which had been struggling for decades and had benefitted several times from the assistance of State's Car Allowance Rebate Program, was very close to collapse[5]. At that time, Sergio Marchionne, an Italian-Canadian Manager, took office as CEO of Fiat and was handed command by the Agnelli Family (the main shareholders of the company) subject to three basic commitments: 1) do not sell; 2) do not nationalize; 3) do not undergo bankruptcy[6].

What followed was an intense reorganization activity at Fiat plants in Italy, involving plant closings, collective and individual layoffs and retirement incentives. Notwithstanding these efforts, the conditions of the company did not consistently improve. Yet, as a clear display of the company's critical position (and its dubious value on the market), it is worth mentioning the disbursement of 1.55 billion dollars undergone in February 2005 by GM to merely *contract out* a *put* – N.B.: not a call! – buyout option that had been negotiated in favor of Fiat in a previous joint venture agreement in 2000.

Across the Atlantic Ocean, Chrysler faced its most dramatic turmoil in the period 2006-2008, along with its main competitors in the American auto sector[7]. At first, in May 2007 the company was sold by the German firm Daimler, who had purchased it in 1998 for 36 billion dollars, to Cerberus Capital Fund for only 7.4 billion dollars[8]. Then, in 2008, at the end of the Bush Administration, Chrysler benefitted from taxpayers' money, and one year later, at the beginning of the Obama Administration (which could not afford – also under the political point of view – a "false start" with the liquidation of a traditional US company in one core auto sector and the consequences in terms of mass job losses), it still needed another bailout by US and Canadian Governments, in the absence of credible takeovers by a competitor[9].

In brief, at the turning point of March 2009, both Fiat and Chrysler were severely impacted by the crisis (prolonged for Fiat and more contingent for Chrysler[10], together with the other two firms of the "Detroit 3", Ford

and GM[11]) and they *both* urged a "survival plan" in the highly competitive global context. If already in January 2009 an initial agreement between Fiat and Chrysler established an alliance and common strategy, it was in March 2009 that Chrysler's debt stake seemed to let no other way-out than company liquidation. But, on 30th March 2009, the Obama Administration, while providing a new loan, decided to give a final deadline of just one month to find a way to sell the company and thus to avoid liquidation, under the conditions of repayment of the public loans. This choice by the Obama Administration was followed by the filing of a Chapter 11 reorganization procedure by Chrysler to get rid of "bad assets" and thus raise its "appeal" to an eventual purchaser. Early in April 2009 a rapid and intense negotiation started among several actors: the team of Chrysler's creditors, Chrysler's management, the employee trust VEBA[12], which had previously converted its enormous credit for medical expenses in (the majority of) company's equity[13], the exclusive union representative at Chrysler (United Automobile Workers – UAW), management of the prospective buyer Fiat and the "Auto Task Force" of the US Government[14].

The subsequent collective agreement negotiated in late April 2009 by the team of Chrysler's future CEO Sergio Marchionne and UAW representatives contained severe concessions by the union, in terms of both salary and working conditions[15]. Still, all the parties involved knew that it was the necessary step towards the corporate agreement formalizing the new alliance, which was signed on 10th June 2009 and was the first, fundamental stage of Fiat-Chrysler as a new integrated group, established in Amsterdam, fiscally seated in London and listed on the New York Stock Exchange and on Borsa Italiana[16]. If it was later possible to complete the operation with the final takeover of Chrysler by Fiat (in exchange of technology and capability transfer, more than monetary price), occurring on 21st June 2011, when Fiat advanced to 53.5% of Chrysler's share capital[17], it was also due to the union role in the whole procedure, which was crucial and controversial at the same time. As clearly appears by the feeling of both relief and consternation affecting UAW's then President, Ron Gettelfinger, at the moment of signing the agreement, he was well aware of the sacrifices required to Chrysler's employees by the company's overhaul plan, in terms of loss of many of the protective elements which had over decades become the hallmarks of "Detroit Contract"[18].

Not by chance, only one year later, in 2010 the newly-elected President of the UAW, Bob King, during a public speech at the Center of Automotive Research Conference, stressed a shift of the union approach and function during the "Fiat/Chrysler" negotiation. He sought a sharp break between 20th century and 21st century unionism[19], marking a challenge for bolstering or even "reinventing" unionism consisting in a new form of collaboration with the employers, which were no longer seen as "*adversaries or enemies*", but now as "*partners in innovation and quality*"[20], in a context of "*respect, shared goals, and a common mission*"[21].

However, in view of further remarks, it is immediately worth mentioning that this new "partnership" did not imply any involvement of the union in the governance of the new corporate entity. In fact, the union's right to appoint one of the nine members of the board of directors did not grant a significant *voice* in the management of the company, nor did VEBA's equity in Chrysler allow any voting right[22]. On the contrary, the agreement tended to align the interests of the company and the workforce, with a further space for variable salary wage forms that could tie employee income to labor productivity and firm's profits. This was surely a breakpoint in UAW's bargaining policy in the auto sector, but the (unavoidable?) "gamble" of UAW on Fiat's takeover plan revealed itself in hindsight successful, at least in economic terms. When the debt with American and Canadian Governments was entirely refunded in 2011 and the company marked 116 million profits[23], Chrysler employees were immediately compensated in terms of additional salary and further improvement of working and economic conditions were then negotiated in a new Chrysler/UAW agreement in October 2011[24].

Across the Atlantic Ocean, when Chrysler and Fiat were negotiating the merger and Chrysler employees undertook the sacrifice of severe concessions, the situation was not static nor plain either. In spring 2010, company management presented the ambitious plan "Fabbrica Italia", aimed at doubling the production of cars in Italy. The strategy was approached with concern by the three main Italian unions (CIGL, CISL and UIL), who warned that the new systems of work organization ("WCM-ErgoUas"), based on a high degree of flexibility and on the avoidance of stoppage in the production (*e.g.*, strike in breach of peace obligation, cases of excessive or suspect absences) could severely affect the overall employee working conditions as well as the industrial relations in the company[25]. In brief, the idea of Fiat was to extend to whole group the same labor methods, based on the innovative World Class Manufacturing and Ergo-UAS, without altering the basic remuneration structure, which, on the contrary, would have further benefitted from company productivity improvements. Significantly, unlike the concessions in the Chrysler agreements in 2009, the key issues in the negotiations on Fiat plants were the union (and employee)

responsibility clauses and the derogations to the working hours, breaks and overtime set out by the metalworking industrial sectoral agreement[26].

As of June 2010, during an intense discussion at the Ministry of Labor in Rome, the front of Italian major union Federations (the "trio" CGIL, CISL and UIL) and their Sectoral Branches (CGIL/FIOM, CISL/FIM and UIL/UILM) all of a sudden split. Before the ultimatum "sign or leave"[27], Fiat and only two of the three main Italian unions (CISL/FIM and UIL/UILM) entered into 15th June 2010 Pomigliano agreement, regulating the working conditions at the Fiat plant in Pomigliano d'Arco[28]. From that moment, CGIL and, mostly, FIOM/CIGL began an intense dissenting campaign against company management, featured by an extensive recourse to Labor Courts as well as appearances on Italian Newspapers and TV shows.

Like in a mirror game, the aggressive strategy of Fiat implied the creation of a new company (Fabbrica Italia Pomigliano) and the individual transfer of Pomigliano plant employees to this new co[29]. Tribunal of Torino upheld the lawfulness of Pomigliano agreement and the individual employee transfer, but it also ruled that preventing the dissenting union CGIL/FIOM from workplace representation in the newco was an anti-union and unfair conduct[30]. Later, Tribunal of Rome held that the lack of any CGIL/FIOM member in the overall 2093 hires by the newco, motivated by the company with "*the necessity of the choice of employees that could share the choices of company management*", was discriminatory and newco was ordered to employ a certain amount of CGIL/FIOM members in its whole workforce[31].

Subsequently, Fiat Group entered into four additional agreements with CISL/FIM and UIL/UILM, on 23th December 2010 for the Mirafiori Plant, on 29th December 2010[32] for the whole Fiat Group, a second Pomigliano Agreement on 17th February 2011, and, ultimately, a similar agreement for the Carrozzeria Bertone Grugliasco Plant on 4th May 2011)[33]. Despite the opposition by CGIL/FIOM, the employee ballots, called to "test" the employee pulse on the agreements at stake, were finally approved by the workforce, although with disparate proportions: a) Pomigliano on 22 June 2010: 63% majority; b) Mirafiori on 14th January 2011: 54% majority; c) Carrozzeria Bertone Grugliasco on 3rd May 2011: 93% majority. A few months later, the ballot results became extremely relevant when the 3rd paragraph of Article 8 of Act 148 of 14th September 2011 stipulated that "*the provisions embedded in plant-level collective agreements which were concluded before 28th June 2011 carried their effects to the whole workforce in so far as they were approved by employee majority via ballot*"[34].

Still, what attracts the attention of the observer is how the Fiat case (as the Italian part of the Fiat/Chrysler case) originated in the attempt by the company to develop an alternative contractual system and to apply uniform working conditions throughout the whole, expanding the Fiat Group. Unsurprisingly, the 29th December Agreement was labelled by the contracting parties as the "National-level" collective agreement", as *sectoral* collective agreements in Italy are normally called, despite the fact that the agreement at stake regulated the working conditions of only Fiat employees[35].

The "contractual strategy" of Fiat was certainly a break with the tradition of Italian industrial relations, but it did not induce any spillover effect in other companies in the main employer association Confindustria. The most striking and, afterwards, "systemic" consequences derived from the lack of FIOM/CGIL's signature on the collective agreements at hand, which at first triggered the loss of the dissenting union's right to its statutory representation at the workplace. This critically important argument as to whether a union must *sign* a collective agreement to represent its members needs further elaboration and a brief recap of the evolution of statutory employee representation in Italy.

III. Statutory employee representation at the workplace in Italy

1. Preliminary remarks

Industrial relations in Italy have been featured, since the end of WWII, by a mix of statutory and voluntary sources, as well as by the longstanding issue of the lack of implementation of Article 39 of the Constitutional Charter on union representation and collective activity. The latter provision was enshrined in a democratic and pluralistic Constitutional Charter following the fall of the Fascist regime and its corporatist exclusive unionism[36]. Article 39 was aimed at granting, under paragraph 1, the basic principle of freedom of union association and, at the same time, at drawing up a system of collective labor law where the unions had to provide themselves with a democratic constitution and bylaws and to enroll on a specific State register. Under these two conditions, unions, acting as exclusive bargaining agents based on representing the largest proportion of employees, would have been entitled to conclude collective agreements with general (*erga omnes*) effects, binding all workers and businesses operating in the related industry branch[37].

However, due the opposition by the Italian three main union confederations (the – originally – communist CIGL, the catholic CISL and the moderate UIL) to State control and to any measurement of their "numbers" or rates of support among workers, Italian industrial relations developed in the form of a pluralistic and adversarial system that deviated from the scheme drawn by the Constitution[38].

With regards to union representation at the workplace, Article 19 of Act 300 of 20th May 1970 (the so-called "Worker Statute"), in its original version[39], allowed, in *any* establishment with more than 15 employees and upon employee request, the right to install a Workplace Representative Body ("RSA": *Rappresentanza Sindacale Aziendale*) and thus to enjoy the collective rights listed under Title III of the Worker Statute. These rights were limited to:

a) the most representative unions at the national level;
b) any other unions concluding the national or regional-level agreements applied by the employer.

Whilst the criterion *sub* a) was a clear promotion of the activity of the Italian three main unions (CGIL, CISL, UIL), letter *sub* b) was an opening to other unions that could provide, by signing the collective agreement applied by the employer, evidence of their representativeness among workers. In this sense, the conclusion of an agreement above the single-plant level could trace a link between State selection (preference for the three "main" actors, *i.e.* the "Trio" unions) and the inter-union system, rewarding the unions that were able to show their effective support among workers with the right to workplace representation[40]. Still, in the aftermath of the enactment of the 1970 Worker Statute, the two-tier statutory criterion of representation thereby was challenged as unconstitutional by minority unions, due to its favoring the three main unions, against the pluralistic *ratio* of Article 39 of the Constitutional Charter. At first, the Constitutional Court rejected the challenge to the evoked provision because the system of representation was not limited to the most representative unions at the national level. It was also open to other unions, which could give evidence of their representativeness by reaching collective agreements above the single-plant level[41].

However, in the early '90s, during a period of divisive conflict among the "Trio" unions, a first sign of the effect of contingencies on the Court's reasoning occurred. In fact, the Court issued a warning to the Legislator, stressing the necessity to re-think the criteria of union access to workplace representation, due to "*deep transformations in the production and the following diversification of interests and infighting between unions*"[42]. No wonder that, during those times, the statutory system of representation was backed up by a voluntary and alternative system, established by a 1993 Cross-Sectoral Agreement, which entailed, in companies falling under the scope of application of the agreement[43], the replacement of the "RSA" with a new representative body, named "RSU" (*Rappresentanza Sindacale Unitaria*), two thirds of which had to be appointed by the workers on an electoral (universal) basis, while the remaining one third could be selected by the "Trio" unions[44].

The warning of the Court anticipated the promotion by the minority unions of a popular referendum on Article 19 of the Worker Statute posing a choice between two propositions:

a) the repeal of both the criteria of selection under Article 19 of the Worker Statute; or
b) the repeal of the sole criterion of "*most representativeness*" and the residual application of the criterion under letter b) of Article 19 of the Worker Statute, allowing unions which concluded and signed the national, local or even enterprise-level collective agreement(s) applied by the employer to enjoy workplace representation rights.

The popular referendum took place on 11th June 1995 and resulted in majority support for the second proposition, which led to a version of Article 19 of the Worker Statute based on the sole (revised) letter b) of the original provision[45]. In the aftermath of the ballot, authoritative scholars excluded that the outcome of the referendum could significantly affect the previous system, in view of the fact that the most representative unions (*i.e.* the "Trio" unions) would have continued to jointly sign the collective agreements (and thus have all access to workplace statutory rights)[46].

Yet new doubts on the constitutionality of the resulting criterion were raised, with regard to the meaning of collective agreements' signing or "*stipulation*" as the criterion for statutory workplace representation. In this sense, in the following judgment No. 244/1996, the Constitutional Court ruled that "*union representativeness does not derive from the employer contractual recognition, but from the union capacity to impose itself on the employer as contractual counterparty*"[47]. Therefore, a mere adhesion to an agreement negotiated by others could not be sufficient to have access to statutory workplace representation, which required "*an active participation by the union in the negotiation of a collective agreement providing an extensive regulation of the working conditions*" (whether at national, local or enterprise-level). As remarked by Constitutional Court, the "signature-only" criterion, resulting from the 1995 referendum, was still justified by the measurement

of the union strength and based on its effective representativeness, notwithstanding the repeal of the criterion under letter a) by the 1995 referendum[48].

However, in judgment No. 345/1996, the Court held that the unions were potentially called to a cost-benefit reasoning in their choice between agreeing on the content of the contract resulting from the negotiation (thus enjoying workplace union rights), and disagreeing (thus renouncing statutory union rights at the workplace). Accordingly, this alternative did not violate the freedom union association (protected under Article 39, paragraph 1 of the Constitution), but the choice whether to sign or not was simply a free decision to be taken by the union, evaluating, like any other contractor, the convenience of any contractual arrangement[49].

In relation to the latest formulation of Article 19 of the Worker Statute, it is also possible to understand the decision by Fiat to resign from the employer association "Confindustria" and to establish the new company Newco. In fact, the loss of workplace representation by FIOM/CGIL in Fiat's plants might have been among the – intentional?[50] – consequences of the stipulation of "Fiat Agreements" without the union: since, as above observed, Article 19 of the Worker Statute, after the modification by the 1995 referendum, granted the presence of union representatives (RSA) only to unions that "*have concluded the agreement that is applied in the plant*". Due to its refusal to sign "Fiat Agreements", CGIL/FIOM was no more *apparently* entitled to appoint any workplace representative.

2. The path towards Constitutional Court judgment No. 231/2013

The exclusion of FIOM/CGIL from workplace representation by Fiat was the "trigger event" and the first step to the Constitutional Court judgment No. 231/2013. In the series of complaints against the "anti-union" conduct of the company before several merit courts across the country (where Fiat Plants were located), FIOM/CGIL claimed the right to workplace statutory representation. The argument of the claimant was the following: if Article 19, par. 1 letter b) of the Worker Statute, as resulting from the 1995 referendum, did not allow access to workplace representation by a union that actively participated in the bargaining process and freely chose not to sign an agreement, then the statutory provision was inconsistent with: a) Article 39 of the Italian Constitution in matter of freedom of union association; and b) Article 3 of the Constitution, due to the unreasonableness of the criterion of selection for the access to statutory representation.

The responses of the merit courts varied among three different solutions:

a) Tribunal of Milano[51] and Tribunal of Lecce[52] rejected the claim, because the wording of Article 19 of the Worker Statute, as resulting from 1995 referendum, was clear and the Constitutional Court had previously rejected similar censures against the provision;
b) Tribunal of Napoli[53] and Tribunal of Bologna[54] upheld the claim, stating that an adequate interpretation of Article 19, par. 2 letter b) of the Worker Statute had to extend rights of unions "*stipulating the agreement*" to unions "*taking part in the negotiation of the agreement*";
c) Tribunal of Modena[55], Tribunal of Vercelli[56] and Tribunal of Torino[57] referred to the Constitutional Court the question whether "*Article 19, par. 1, letter b) of the Worker Statute, as resulting from the 1995 referendum, was consistent with Arts. 2, 3, 39 of the Italian Constitution…in the part where the statutory provision granted the right to workplace representation to unions who stipulated the collective contract and not to those unions who took an active part in the negotiations and freely decided not to agree on the final terms*".

According to the latter view, "*the current wording of Article 19 of the Worker Statute seems anachronistic in the new context of Italian industrial relations, considering the evolution of the normative and social framework*". Evidently, in the opinion of merit courts *sub* c), an active role in the negotiation could be enough to give evidence of union's contractual power and, indirectly, representativeness. Consequently, while the right to exercise "*union activity at the workplace*" is conferred upon to *any individual employee* by Article 14 of the Worker Statute[58], it was held unreasonable to distinguish in view of allocating the access to statutory workplace representation between unions who decided to "sign" at the end of negotiations and those (like CGIL/FIOM in the Fiat case) who refused to agree on the final terms of a contract which, in their view, did not fulfill employee interests. However, as underlined by an authoritative scholar, the peculiarities of the Fiat case were deeply influencing the constitutional scrutiny on Article 19 of the Worker Statute. In brief, it seemed that the Court was not only asked to rule on the provision constitutionality, but also (or mostly) to play the role of an "arbitrator" in the Fiat vs. CGIL/FIOM dispute[59].

3. The grounds of the unconstitutionality verdict by Constitutional Court judgment No. 231/2013

At first, in the landmark judgment No. 231/2013 of 23rd July, the Constitutional Court recalled the same Court's

precedents No. 244/1996 and No. 345/1996, where, as already noted, all claims moved against Article 19 of the Worker Statute were rejected[60]. However, in the opinion of the Court, those precedents were "*linked to a different context, which was featured by unity of action among unions and by the joint stipulation of any collective agreements, so that* **reasonably** *the signature of the collective agreement could play, according to Article 19 of the Worker Statute, the role of – the sole – criterion to measure Union representativeness and thus to allocate the right to workplace representation*".

Yet, the Court added, the selection criterion had to be "*updated*", in light of the rupture of union unity of action in the context of the economic crisis, considering that collective action was no more directed towards exacting better working conditions, but towards avoiding job losses with eventual renunciation of employee rights (via "concession bargaining"). Hence, the promotional soul of Article 19 of the Worker Statute, aimed at granting workplace representation to the most representative unions, was unreasonably undermined by a rule which conditioned the access to workplace employee representation upon the final conclusion of a collective agreement which could eventually imply a loss of worker rights. In such a case, as CGIL/FIOM observed before merit courts, the union strength had to be ascertained by its *capacity to resist* and not by its adherence to counterparty's proposal. In the Court's view, the exclusion from workplace representation of unions (like CGIL in Fiat Plants) which were featured by an effective support among the workforce, as revealed by their active participation in the collective negotiations, was an issue which could not be bypassed through a mere "*interpretative verdict*".

Still, it was not possible, due to the clear wording of Article 19 of the Worker Statute, as resulting from the 1995 referendum, to hold that an active participation in the negotiation process without the "signature" on the final agreement could be equated to the "*stipulation of a collective contract*". However, the Court noted, the selection of the union representative at workplace according to the sole conclusion of the agreement inevitably collided with the function of Article 19 of the Worker Statute to allocate union rights according to their effective support among the workforce. Accordingly, the application of the criterion embedded in Article 19 of the Worker Statute with the effect of excluding the most representative union from workplace representation resulted in conflicting interpretations. Therefore, the model drawn by Article 19 of the Worker Statute, as resulted from the 1995 referendum, was burdened by a "*supervening unconstitutionality*", becoming inconsistent with Article 3 of the Italian Constitution, because it generated an unreasonable disparity among unions. In fact, the access to workplace representation derived from the "relationship" with the employer (the conclusion of the agreement) and not with the employees (the level of support among the workforce, as shown by the union participation in the collective agreement negotiation).

Conclusively, according to the Court, the principles of pluralism and freedom of collective action were infringed by a rule which: a) punished FIOM/CGIL's resistance with the loss of workplace representation; b) allowed the company and the other two unions to reach an agreement with the mere aim of distancing the dissident union from the workplace, despite the significant support of the latter among the workforce. Yet, the Court did not only declare the "supervening" unconstitutionality of Article 19 of the Worker Statute, but issued an "*additive decision*", ruling that "*Article 19 of the Worker Statute should grant the right to establish workplace representatives not only to unions who concluded the agreement applied by the company, but also to those unions that had taken an active part in the negotiation without signing the final text*".

4. Italian doctrine on the Constitutional Court's decision

Scholars split in their comments to such decision.

Professor Antonio Vallebona argued that the Court betrayed the Legislator's and the People's will, as expressed in the 1970 Worker Statute and in its amendment by the 1995 referendum, which linked the right to workplace representation to union capacity to force the counterparty to conclude an agreement fulfilling workers' interest. His argument was based on the fact that, if a union did not sign an agreement, it was simply the material proof of the latter union's incapacity to force the counterparty to comply with its terms. This lawfully implied, according to the *rationale* and wording of Article 19 of the Worker Statute, the loss of right to statutory workplace representation[61], as the same Constitutional Court stated in the above mentioned precedent No. 345/1996[62].

Under a different perspective, many voices in the literature generally agreed with the content of the judgment, but they added criticism. Some of the concerns regarded, as Professor Franco Carinci pointed out, the innovative idea of "*grass-root democracy*" discerned by the Court behind the (silent) wording of Article 19[63]. In fact, the criterion of "*most representativeness*" was clearly set aside by the 1995 referendum[64], so it was "*magically brought back to*

reality" by the decision[65]. It has been also noted how the Court decision gave evidence of how the 1995 referendum was a sheer "*twist in the tale*"[66], even though it was only *de facto* silenced for a long time by the "unity of action" of the social parties (both unions and employers)[67]. Only this time, it became necessary, due to the innovative – still unique in the Italian scenario[68] – strategy of Fiat, for the Constitution Court to address the complexities and irrationalities of the post-1995 provision with the aim of deciding (or, better, arbitrating) a single case more than solving a law dilemma.

Yet, without referring specifically to the Fiat case, it was not clear in the Court's reasoning on which grounds a union could show its representativeness by means of an active participation in a negotiation, which may theoretically never take place[69]. In fact, unlike in the US system, Italian labor law does not place upon the employer any statutory duty to bargain, beside special circumstances like collective redundancies and transfer of undertakings. Therefore, a union may still be potentially denied access to workplace representation notwithstanding a potential high degree of support at the plant-level, in the event that the employer – freely and lawfully[70] – decided to refuse to enter any collective agreement negotiation[71].

5. The final auspice of the Court, the unsatisfactory solution by the social parties and the variable responses in the following merit court decisions

Ultimately, the Court acknowledged that its own statement did not address nor solve the general issue of the lack of implementation of Article 39 of the Italian Constitution. As already noted, the Court did not opt for a selective criterion to determine which union was entitled to exercise union rights at the workplace in case of lack of any applied collective agreement[72]. Hence, the observer cannot be surprised that the decision was depicted by an authoritative scholar as "*an interlocutory statement for the overall system and a definitive judgment in the Fiat case*"[73].

Indeed, in the final part of the judgment, the Court suggested a variety of possible solutions that the Italian Legislator could discretionarily introduce as union selective criteria for access to workplace representation:

a) the number of union members;
b) a numeric threshold to have access to collective agreement negotiation;
c) other criteria established by the overall collective bargaining system;
d) the right of any employee to appoint workplace representatives.

Obviously, an intense debate has then occurred in Italy on the implications of State intervention setting the rules in matter of trade union representation, at the workplace as well as at the higher levels of negotiations. While similar discussions had been a constant in the Italian tradition, the number of suggested proposals showed ultimately a significant increase[74]. At least, in view of finding adequate rules in the aftermath of Constitutional Court judgment No. 231/2013, scholars stressed the fact that the social parties finally set by their 31st May 2013 Cross-Sectoral Agreement as a requirement for access to sectoral collective negotiations: a minimum 5% rate of *support* resulting in the average between union members in the whole sector and in workplace representative election votes[75]. The requirement was confirmed by the following 10th January 2014 Cross-Sectoral Agreement[76] and it was also indicated, in Part III of the latter, as one of the criteria to determine union "*participation*" in the negotiation for the purposes of Article 19, along with union's active contribution to the contract proposals and involvement in the negotiation of the latest relevant sectoral collective agreement[77].

However, if collective self-regulation was an effective solution in times when unions showed mutual recognition and unity of intent and action, a system drawn by protocols and cross-sectoral agreements became certainly a tangled knot for the Italian industrial relations system in a competitive, globalized and struggling economy and a divided union movement, well beyond the specific Fiat case[78]. As easily predictable, in the aftermath of the Constitutional Court judgment, the situation of uncertainty in the resulting rules in matter of workplace employee representation was dramatically shown by the merit court decisions giving conflicting interpretations of the vague[79] criterion of "*active participation*" in the negotiation as a condition of the union's right to appoint its representative at the workplace[80]:

i) At first, Tribunal of Brescia[81] held that, to have the right to appoint a workplace representative, a union had to be actively participating in the negotiation of the applied collective agreement and, *at the same time*, it had to show a significant degree of "*representativeness*" among the company workforce.
ii) On the contrary, Tribunal of Busto Arsizio[82] ruled that *any* Union which could give evidence of its representativeness at the workplace consequently had the right to take part in the collective negotiations and, accordingly, to *automatically* appoint its representative.
iii) Ultimately, Tribunal of Rome[83] stated that union representativeness had to be demonstrated through the participation in the collective negotiation.

Accordingly, if a union did not take part in the collective negotiations, then it would not enjoy the right to appoint its workplace representative.

Conclusively, in the Italian legal scenario it does not seem clear: a) if and, eventually, under which conditions, a union has the right to participate in a collective bargaining negotiation at the company-level; and b) the criteria to determine whether a union has participated or not in a negotiation and, thus, whether a union has the right to appoint its statutory workplace representative.

6. The latest "trial balloon" for a "unique union" in Italy

In the light of the above, it looks like a statutory intervention has now become essential, but the several urges and needs of a struggling economy have this far deterred the Legislator from an extensive intervention in the industrial relations field[84]. At the same time, the safeguard of the Italian traditional model by the Constitutional Court, in addition to the lack of a shared overall vision by the social parties, apparently keeps the door locked to a possible evolution towards something other than continuous collective self-regulation and judicial statements[85]. Additionally, the majority of the interpreters is now convinced that a normative intervention is necessary: however, almost anyone has a different, personal idea on its shapes and contours.

Recently, however, to solve the impasse and to break with the past, Italian Prime Minister Renzi suddenly invoked the enactment of a new employee representation model, no more based on pluralism, but on an unspecified "unique" or "exclusive" representative ("*sindacato unico*")[86]. A preliminary question immediately arose: what is this "*unique union*"? Is it an example of a single union association at national or sectoral levels, or is it a form of exclusive bargaining agent at the workplace? If we opted for the former interpretation, as a compulsory promotion of one only union – not as a free and autonomous aggregation of unions at sectoral level, as recently suggested by Professor Giuseppe Berta[87] –, memories of the past experience of exclusive union and employer association during the Fascist era would fully justify the alarmed and ironically *unified* reaction of Italian unions[88]. If, on the contrary, we might hopefully focus on the above suggested alternative significance of "unique union", then there might be grounds for the analysis of the US model of "exclusive" statutory workplace representation, which, as discussed in the next section, still finds its regulation in the National Labor Relations Act of 1935.

IV. The US model of statutory representation at the workplace

1. Brief summary of the evolution of the US employee representation model

An extensive narration of the rise of US labor movement referred to this phenomen as an "*Epic History*"[89]. It has been in fact a long journey made of massive strikes and hard repression[90], which began with the earliest combinations by a workforce organized on a profession/skill basis, very far from the labor aggregations on sectoral/political basis characteristic of Italian and, broadly, continental European unionism. In fact, in the US, the 19th century pushes by the Knights of Labor and, later, by the Industrial Workers of the World towards cooperatives of workers and universal representation ("*One Big Union*") did not succeed[91].

The union movement mounted legal challenges to the application of the criminal offence of conspiracy by common law courts in the cases of combinations of workers, until the bedrock decision *Commonwealth v. Hunt* in 1842 excluded criminal liability for employee engagement in concerted activity undertaken without criminal or unlawful means[92].

In the early 20th century, the first examples of collective bargaining negotiations arose[93]. Courts were reluctant to recognize the binding nature of those agreements, which were thus considered binding in honor, like in the British tradition[94]. Afterwards, when US economy showed a strong expansion, along with union movement demands, new obstacles to union activity took shape. One was application of the 1890 Sherman Act antitrust provisions[95] to employees whose combination might hamper free commerce protected by the federal statute[96]. Another was the widespread use of court injunctions against strikes and boycotts[97]. This was the state of things until the Clayton Act of 1914 granted immunity to unions from injunctions and provided a general exemption from the Sherman Act, besides affirming the principle that the "*labor of a human being is not a commodity or article of commerce*"[98]. The provision was nonetheless short-reaching, as clearly evidenced by the *Duplex Printing* decision of 1921, where the Supreme Court held that the Clayton Act did not take a secondary boycott by the machinists' union out from the scope of application of the Sherman Act[99]. Moreover, at its early stage (and not only), the labor movement initiatives were opposed by a two-fold employer reaction, through lobbying and direct opposition as well as through company welfare programs, both aimed at limiting employee efforts to "engage in concerted activity".

The first signs of change occurred in the railway sector, one of the most controversial and turbulent areas in those years. At first, the 1898 Erdman Act, which attempted to ban railway sector employers from discharging unionized employees and to outlaw yellow dog contracts, was declared unconstitutional by the Supreme Court in 1908[100]. Then, in 1926, due to the pressure of the United Mine Workers of America and the Railroad Brotherhoods, the Railway Labor Act formally recognized workers' right to organize and to be protected against dismissal related to union activity[101].

However, the turning point was certainly 1929, when the collapse and the Great Depression led to a severe wave of cuts, layoffs and changes in work environment[102], which was the prologue of the election of Franklin Delano Roosevelt in 1932. The new administration tried to intervene promptly on collective labor law starting in its first year, following enactment of the Norris-LaGuardia Act in 1932. That law sought to keep the courts out of the area of industrial relations by banning injunctions in labor disputes, still without conferring upon employees any positive right[103]. On the contrary, with the National Industrial Recovery Act 1933 (NIRA), Roosevelt's Administration aimed at establishing a statutory system of employee representation protecting employees' "*right to organize and bargain collectively through representatives of their own choosing*"[104]. That attempt substantially failed, due to two main factors. Without an exclusivity rule, *intra-union* competition for recognition[105] brought along waves of strikes and jurisdictional disputes which impaired the whole economic recovery[106]. Moreover, the enactment of the NIRA set off the massive formation of unions controlled by employers (so-called "company unions") to preempt organizing drives by independent trade unions[107].

In such a context, the National Labor Relations Act (NLRA or Wagner Act[108]) of July 5th 1935, which followed the NIRA[109], was a necessary step in recovery from the great depression[110]. The NLRA was aimed at protecting collective rights to organize and to collectively bargain. Its primary purpose was to provide employees with an effective voice in determining the terms and conditions of their employment, to promote the idea of "*industrial and workplace democracy*"[111]. In brief, the choice of the Legislator was thus to create a "*mechanism to accommodate the partially conflicting and partially shared goals of the parties to the employment relationship*" [112], conferring upon collective bargaining, as institutional mechanism, the cornerstone role of realizing "*a decree of stability that* [the parties] *were not able to achieve in absence of such legislation*"[113].

As further remarked, the system was based on the exclusivity doctrine to allow employees to present a united front to the employer[114]. Otherwise, they would have continued competing with each other, undoing each other's efforts to gain more space[115]. Evidently, the Act carried a promotional soul directed towards union and collective activity: this explains why it was described by an authoritative scholar as a "*non-neutral act*"[116], whereas the critics pointed at the Wagner Act as "*the most radical piece of legislation ever enacted by the United States Congress*"[117].

At the same time, starting with in its Preamble[118], the NLRA, by securing employees' right to organize and bargain collectively, seemed to also pursue the safeguard of commerce against "*industrial strife and unrest*"[119] in the interest of the whole nation and not of the employees only. Not by chance, commerce protection as one of the goals of the Wagner Act was the main argument lying behind the fundamental decision of the Supreme Court of 1937 on the constitutionality of the NLRA, where the Court upheld it as a measure to eliminate strikes and disruptions in interstate commerce[120].

Accordingly, Senator Wagner had argued in presenting the bill that "*collective bargaining is not an artificial procedure devoted to an unknown end, but, on the contrary, its object is the making of agreements which will stabilize employment conditions and promote fair working standards*"[121]. Hence, Wagner's ideal of labor relations was founded on a highly *collaborative*, integrationist model of collective bargaining[122]. Nonetheless, it was not feasible to extend it to a wide sphere of US workers mainly due to political reasons. In fact, the NLRA carried a limited scope of application, covering only private sector employees with the relevant exception of agricultural and domestic workers[123]. Later, the amendments by the 1947 Labor Management Relations Act (LMRA or Taft-Hartley Act) excluded from coverage employee supervisors[124] and independent contractors[125].

The Taft-Hartley Act was vetoed by Truman, but this veto was overridden by a two-thirds Republican majority in Congress[126]. The Act reflected a conservative view of industrial relations and an evident break with the Wagner Act[127]. It added several unfair labor practices by unions to the NLRA's provision on employer unfair labor practices. It secured the employer free speech clause (*see infra*), consisting in the employer right to express "*any views, argument, or opinion...if such expression contains no threat of reprisal or force or promise of benefit*"[128].

Whereas the so called closed shop, a hallmark of the British tradition, was expressly outlawed[129], the Taft-Hartley Act allowed the union shop (or, better, agency shop). This meant that unions and employers were entitled to negotiate the compulsory employee payments of agency fees to compensate the bargaining and representation costs, as a condition for the employees of the bargaining union to

retain their jobs[130]. Still, under Section 14(b) of the Taft-Hartley Act, State-level legislation was allowed to envisage a "Right-To-Work" (RTW) provision, forbidding agency shop agreements, with the aim of protecting the single employee's (negative) freedom of association or, more likely, of stifling the union presence at the workplace[131]. Not by chance, RTW statutes have been even since controversial and they are highly debated at present, after Michigan in December 2012 became the 24th State with a RTW statute, ultimately followed in 2015 by Wisconsin, as the 25th US State enacting such legislation[132]. Now half of US States have a RTW legislation: among these, not only the Southern "anti-union" States, but also Michigan, *i.e.* the stronghold of the automotive industry, where Chrysler had its headquarters and its main plants[133].

2. The employee selection of the exclusive bargaining agent

Before focusing on the peculiar feature of US Labor Law (*i.e.* the exclusivity rule), it is important to note that the NLRA does not compel employees to have a representation, which is thus subject to a free choice of the workforce. Furthermore, the NLRA broadly protects employees' "*right to engage in concerted activity for collective bargaining and other mutual aid and protection*" with the aim of improving collectively the working conditions, which are otherwise determined by unilateral employer power[134]. Moreover, Congress outlawed company unions under Sections 2(5) and 8(a)(2) of the NLRA: in brief, Senator Wagner's bill made it illegal for employers "*to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it*"[135]. The choice turned into a milestone provision to guarantee the union independence as bargaining agent during the negotiation with company management as a *real* counterparty[136], thus "*cementing the Act's adversarial model of industrial relation*"[137].

US labor law contemplates both "craft" union organization according to professional skills, which might yield different unions in the same workplace, and "industrial" union organization with workers in different occupational groups together in the same bargaining unit. In either case, the NLRA does not limit the employees' right to choose any union through a recognition procedure following one of two alternative patterns:

a) "card-check" or "voluntary recognition" through the collection of the majority of individual employees' signed cards indicating their desire to join a certain union and to have the union representation in collective negotiation with their employer;

b) a secret ballot election under the scrutiny of the NLRB, occurring when the employer (lawfully) refuses to accept the "card-check" procedure as evidence of the majority status of the union, regardless of the *ratio* of cards collected[138]. Still, once cards are signed by at least 30 percent of the workers in the "bargaining unit", workers are entitled to petition the nearest regional office of the NLRB to hold a secret-ballot election, which takes place normally within 2 months from the request. Notably, it is a delicate period of campaigns by both the union and the employer. The latter, pursuant to the above mentioned "free-speech" provision, can use a wide variety of procedural and factual devices: among these, holding captive audience speeches, distributing literature and compelling supervisors to campaign against the union[139]. Interestingly, according to a recent research[140], employers undertake these conducts in more than 90% of the cases, with the advice of special consultants in anti-union campaigns[141], ultimately a highly developed and lucrative business branch[142].

If the employee majority votes for representation, the NLRB will certify the results and the employer is required to bargain with the workers' chosen representative in the "*appropriate*" bargaining unit (depending on the facts, groups and subgroups of employees in a single workplace or in a single company[143]), whether or not the employees are union members or they just would rather bargain individually[144]. Notably, pursuant to Section 9(a) of the NLRA, when a union designated by a majority of the employees in a bargaining unit reaches a labor contract with the employer, the terms are binding for the entire bargaining unit[145], included the dissident minority and individual employees[146].

Once a union is certified, the employer has the duty to bargain collectively "*in good faith*" (*i.e.* with "*open mind*" and "*sincere desire to reach an agreement*") with the exclusive employee representative[147]. Pursuant to Section 8(a) of the NLRA, the good faith bargain obligation applies to both parties on "*mandatory subjects of bargaining*", such as "*rates of pay, wages, hours of employment or other conditions of employment*"[148]. Still, if the employer fails to bargain, the NLRB may only order a further negotiation to take place[149]. In other terms, the Board can neither "*sit in judgment upon the substantive terms of collective bargaining agreements*"[150], nor it can impose monetary remedies to compensate employee damages for an employer's illegal refusal to bargain[151]. In a nutshell, the Wagner model does require neither employer duty to agree to any particular union proposal, nor any duty to reach an agreement: the Act

is in the spirit of freedom of contract and freedom to (and not to) contract[152].

Moreover, the NLRB, especially in the years following WWII[153], interpreted narrowly the mentioned provision, in the sense that those decisions that "*lie at the core of entrepreneurial control*" are to be left out of collective mandatory negotiation[154]. Consequently, those matters which "*significantly abridge the freedom to manage the business*" strictly lie in the employer's hands[155] (unless the decisions are motivated by antiunion animus[156]) and thus might be bargained upon only with the employer's consent (so called "permissive terms"). Conversely, the mandatory bargaining matters are only those regarding "*wages, hours, and other terms and conditions of employment*", *i.e.* those which the NLRB and courts consider "*plainly germane to the working environment*"[157].

Furthermore, the bargaining process may possibly end without any conclusive agreement, notwithstanding a genuine (*bona fide*) negotiation over the economic and/or work rules. In this case, the so called "implement upon impasse" applies. This is a case-law development which does not find any reference in the NLRA and derives from the *dictum* of the Supreme Court in NLRB v. Katz[158], where the adjudication was simply that unilateral changes *prior* to impasse were unlawful. This statement was interpreted rather extensively in the sense that the employer might compel employees to adhere to his last offer *before* the "impasse"[159] and that, whether the latter occurred, the employer was not obliged to grant the employees better conditions than those previously offered on the bargaining table[160].

Yet, whether or not an impasse in the collective bargaining occurs, workers would still be entitled to go on strike and, conversely, employers to lockout[161]. In fact, industrial conflict is a lawful instrument during the negotiation[162], unless a prior contract – still in effect – embedded a no-strike/no-lockout clause[163]. However, as broadly known, the strike threat has to be credible to pay its dividends. In this sense, a serious harm to the effectiveness of strike efforts in the US system derives from the recognition by the Supreme Court of the employer right to replace temporarily or even *permanently* strikers with other workers, in accordance with the "*clear*" right of the employer "*to protect and continue his business*"[164]. Even though the replacement of strikers is not technically a discharge of the latter (which integrates an employer unfair labor practice if it is due to strike action[165]), as Professor Lance Compa pointed out, the legalistic "Mackay doctrine" on permanent strike replacement *de facto* allowed the employer to nullify or, at least, consistently reduce the effect of employee collective action[166].

3. Minority unions and employee groups under the Wagner Act

Notwithstanding the core function of the exclusivity rule in US labor law, which renders the employee eventual disagreement with the bargaining union decisions legally irrelevant, it is also true, as highlighted by Matthew Finkin, that "*Congress did [not] authorize a tyranny of the majority over minority interests*"[167].

At first, it is worth mentioning that Section 7 of the NLRA generally protects "the right to form or assist labor organizations, the right to engage in collective bargaining or other concerted activities for mutual aid or protection, and the right to refrain from any or all of these activities". Accordingly, the right to a "concerted activity" for mutual aid or protection has a broader scope than the mere right to organize[168] and it is not necessarily union related[169].

Moreover, the Wagner Act permitted minority unions to organize and to bargain with willing employers on behalf of members (so called "members-only" unionism)[170]: as reckoned by scholars, "a labor union that represents that group may do nearly everything that it could do if it represented a bare majority"[171]. In fact, as already observed, Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing the exercise of the rights under Section 7 and does not expressly condition the prohibition on the majority of the employees having chosen the same union[172]. Conclusively, employees enjoy the right to form unions both in non-union workplaces and in those where a majority-certified union exists, where they can even bargain and make a collective agreement for its own members[173]. However, minority unions are still not allowed to: a) bargain generally on behalf of all the employees[174] when there is no majority union[175]; b) compel the employer to bargain[176] on the selected labor matters on behalf of their members in workplaces where a certified union representative exists[177].

A further boundary to the possible harshness of majority rule is the case-law-developed "duty of fair representation", which place relevant limits on the behavior of the union exclusive agent. As adjudicated by US Supreme Court in Steele vs. Louisville and Nashville Railroad[178], the exclusive employee representative has "at least as exacting a duty to protect equally the interests of the members of the craft [it represents] as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates". In decades of intense judicial statements in matter, courts further developed the principle in such a way that the exclusive agent was refrained from acting, not only with "hostile discrimination"[179], but also, more broadly, "arbitrarily" or

"in bad faith"[180]. Notably, the development of the duty of fair representation might potentially expand or imply a scrutiny on the internal evaluation of union's determination in its collective bargaining strategy, but it still seems that the rule simply requires that the union representation satisfy a wide range of reasonableness, excluding thus an overwhelming, external (i.e. judicial) control on the merits of collective determinations[181].

In conclusion, nothwithstanding the pattern of exclusivity, "dissenting" employees still enjoy the right to engage in concerted activity. At the same time, the exclusive bargaining agent has the duty to equally represent the whole workforce in the relevant "community of interest", regardless of union membership.

4. The issues of a dated model and the proposals at stake

As earlier mentioned, the US model of employee workplace representation, dating back to 1935 and to the NLRA, survived until now, but several issues emerged in the meanwhile.

At first, current data reports that unionization rate is at the lowest since 1916, recording 11.1% in 2014 (only 6.6% in the private sector), in a continuous decrease[182] along with the number of union elections[183].

Even though authoritative voices observed that the NLRA was flawed from the very beginning, notwithstanding its success (*i.e.* high percentages of unionism) in the first decades following its enactment[184], almost anyone agrees that US collective labor law is now "aged"[185]. The turning point was probably in the '70s, when the significant transformation from industry to high-tech, finance and service economy started leading to the current condition of "*fissurization*" of the workplace[186] and thus complicated reasoning in terms of employee "*community of interest*" both as criterion for determining the bargaining appropriate unit[187] and agent's space as mediating institution[188]. However, the decreasing trend emerged dramatically only in the '80s, when collective labor law had to counter two complementary forces. Firstly, President Reagan's anti-labor policy culminated in the decision to bluntly lay off eleven thousand air traffic controllers gone on strike in August 1981[189]. Then, the employee protection in those matters once entirely devoted to collective bargaining[190] started to be progressively entrusted to federal or state laws[191], marking a turning shift "*from labor law to employment law*"[192].

Notably, the fall of union density and collective coverage carried severe consequences on wage inequality[193], on the exercise of workplace rights and on dismissal protection, considering the harshness and enduring extension of the employment at will doctrine[194]. Moreover, labor contracts could no longer carry the fundamental function of setting patterns for the improvement of working conditions and, more generally, work organization in non-unionized workplaces[195].

Therefore, it is no surprise that several efforts to reform or amend the NLRA blossomed in the last decades. Among those discussed in the political arena, four recent proposals are most noteworthy:

a) In 1994, the Report of the "Commission on the Future of Worker-Management Relations" (so called "Dunlop Commission"), commissioned by the Clinton administration, recommended the conferral of union certification on the sole ground of card majority and the enactment of a system of compulsory arbitration in case of impossibility to reach an agreement[196];
b) In 1995, in the aftermath of the debated Electromation case[197] and duPont case[198], the Bill for Teamwork for Employees and Managers Act (TEAM Act)[199], which was vetoed by President Clinton in 1996, sought to rewrite Section 8(a)(2) of the NLRA to allow employers to create Employee Participation Plans ("EPPs") in non-union workplaces, as long as the programs represented the employees to the same extent as management;
c) In 2008, Obama's Employee Free Choice Act (EFCA)[200] aimed at promoting the card check procedure, compelling employers to grant immediately recognition to the union providing evidence of its majority status in the relevant bargaining unit by means of signed membership cards. Moreover, the now-dead EFCA Bill expanded remedies against anti-union coercion and a mandatory mediation device for cases where the parties could not reach an agreement on a first contract in a reasonable time[201];
d) In 2011, a "Right-To-Work" federal bill was presented in US Congress to set aside agency shop clauses[202].

Also in the academic field, a vivid discussion on the renewal of US collective labor law took place and different solutions were envisioned by scholars:

A) The shift from majority to members-only representation, *i.e.* the extension of employer duty to recognize and bargain with minority union on a member-only basis, when there is no majority union at the workplace[203], or, alternatively, in general[204], replacing exclusive representation[205];
B) The intensification of unions' link to political parties to "*insulate political organizing efforts from the vulnerabilities of collective bargaining*" and to take thus advantage of the unions as political vehicles[206];

C) The relaxation of the company union ban through the amendment of Sec. 8(a)2 of the NLRA, to enhance employee voice in non-union shop[207] and to bolster the participatory function of unions[208], thus recognizing – or even incentivizing[209] – what "spontaneously" developed in several workplaces in the forms of "*quality circles*", "*labor-management cooperation*" and "*work teams*"[210];
D) The introduction of a "double channel" of employee representation based on the collective negotiation function of an exclusive bargaining agent (according to the Wagner model) as well as on the activity of cooperation with management carried out by a German-type works councils[211];
E) Ultimately, the intriguing idea of protecting the self-representation of individual employees and not only "concerted" activities, as in the NLRA, with potential positive effects also on the collective representation[212].

Outside the political and academic arenas, the "labor question" shook the same union movement. In particular, seven unions in 2005, among which the United Food and Commercial Workers (UFCW), the Service Employees International Union (SEIU) and the International Brotherhood of Teamsters (IBT), left AFL-CIO to form the Change to Win Federation (CTW). Their goal of huge new organizing gains had only limited success[213].

Other forms of "grassroot movements" arose, from "Justice for Janitors" (with the goal of improving the conditions of janitors working in big cities, mainly in Los Angeles) to "Working Today", an organization of New York City freelancers, and several more[214]. Notably, these latter forms of "labor aggregation" departed from the official channel of representation drawn in the Wagner Act, offering a steady argument for those who consider the regulatory framework outdated. Whereas it is impossible to foresee which model of representation is going to emerge in the near future in the US, a few hints for a further discussion will be provided in the concluding remarks on the possible impact of the Fiat/Chrysler case on the US as well as Italian scenarios.

V. Conclusion

As noted above, the Fiat case played the role of trigger event and mirror on the weaknesses of the Italian labor law system, considering that the strategy of the company, albeit somehow opportunistic, was formally conducted in accordance with the legal framework, at least until the intervention of the Constitutional Court. The latter seemed to put a patch on a specific flaw, but it also showed the remnants of the Italian tradition, by defending the legitimacy of CGIL/FIOM opposition strategy[215] and by looking with a certain degree of suspicion at Enterprise-level arrangements beyond Fiat case[216].

Without insisting on the tricky criterion of "*participation*" in the negotiation as the condition for a union maintaining a role as workplace statutory representative, it seems that the Italian industrial relations system is affected by both delicate dualisms (statutory representation vs. voluntary representation; collective self-regulation vs. state intervention) and uncertainty in the legal rules, which harms both employers and employees.

Still, the system is inevitably shifting towards a higher decree of decentralization of negotiations, and this trend cannot be slowed down or hampered by a court judgment, nor by the opposition of a single actor. At the same time, also considering that the Fiat case did not generate any spillover effect on other Italian companies and it thus remained exceptional, it is rather unlikely that collective bargaining in Italy will be in the future conducted according to a mere bilateral pattern (one company/plant *vis-à-vis* one union). On the contrary, not only the Italian tradition is intimately pluralistic, but also the Fiat case itself was marked by the opposition of one of the main unions, while the other two big ones agreed on the Fiat arrangements and this revealed themselves as a multi-headed and nonetheless reliable interlocutor of management.

Accordingly, the Italian framework seems to reveal its incapacity in governing efficiently the plurality of voices more than its urge to drag the unions into a competition for the one and only bargaining agent position[217]. Hence, the transplant of the US rule of exclusivity (whether at sectoral or company level) would be simply unrealistic and likely to be rejected[218]. Furthermore and rather ironically, the application of US majority rule in Italian Fiat Plants would probably result in the Company's duty to bargain exclusively and in good faith with FIOM/CGIL, which is, at least numerically, the prevailing union at Fiat plants. Conclusively, the enactment of the exclusivity rule would likely intensify intra-union competition, with the potential implication of an extensive use of the strike weapon[219]: exactly what Italian policymakers now strive to avoid, in view of achieving better efficiency standards, and what the Wagner Act back in the '30s was aimed at preventing.

By contrast, a better regulation of majority principle within a pluralistic system would be certainly consistent with the Italian tradition and with the solutions that the same social parties on both sides agreed on in the above mentioned January 2014 Protocol. Nonetheless, those standards need to be turned into legally binding rules to be resistant to external raids or internal dissidents and thus to be sheltered from the eventual tyranny of minorities[220]. As for workplace representation, both

mechanisms of democratic elections among the list of candidates presented by majority unions and the right of most representative unions to appoint their workplace representatives (as in the original version of Article 19 of the Worker Statute) might be rational options within a comprehensive reform of employee representation[221]. In a nutshell, what is felt as a pressing urge in Italy is the replacement of the continuous "temporary armistices" with a stable "peace treaty", setting legal rules in matter of statutory workplace employee representation, whatever reasonable solution might the Legislator opt for.

If the Italian Fiat case was a normative shock, the same did not occur in the US, where the Chrysler case had much more to do with industrial relations and the UAW's negotiation strategy than with labor law regulation. Still, the case seemed to affect the core of the "labor issue" in its cultural and political determinants, as originally expressed by the Wagner Act. With this regard, under an external observer point of view, it looks as if the conception of US employers and policymakers of labor law institutions as market-unfriendly mechanisms and burdens for an efficient economy[222] (which is, by the way, a typical belief of a wide-spreading neoliberal thinking grounded upon value choices[223] more than on empirical studies[224]) might have affected the Wagner Act model more than the eventual flaws in the Act, among which the fairy tale of the alleged "tyranny" by the exclusive representative[225].

Under these preconditions, any attempt to overhaul the whole system though the mere transplant of a different normative solution[226] is certainly doomed to rejection. Eventually, slight adjustments might eventually help[227], such as the extension of the personal scope of NLRA, to agricultural workers, domestic workers[228] and to workers who are formally classified as independent contractors[229] to possibly compact the overall labor movement. Conversely, as already noted, any radical modification in the rules on collective relations deserve to be socially promoted[230] or, at least, accepted. This was the case in 1935 and 1947[231], but today it appears unfeasible.

Hence, if the hopes of US collective labor law seem to lie on a profound change in the employer attitude towards the union phenomenon, the unionization process in the context of company transplants in southern US might have carried a symbolic value. However, the UAW's failed attempt to organize the Volkswagen plant in Chattanooga, Tennessee in February 2014 provided a negative outcome[232].

Nonetheless, new auspices may now derive from the development of a "*new form of unionism for the 21st century*", as UAW then-president Bob King put it. As the Fiat/Chrysler case demonstrated, at both sides of the Atlantic Ocean, the unions' cooperative attitude and its efforts in reaching and fulfilling the collective agreement, which implied serious – initial – sacrifices, paid dividends.

Notably, this fruitful form of cooperation did not require any role of the union in the management of the company, a matter which remains unrelated to both the US and Italian traditions[233]. In fact, the "collaboration" at stake lays in the terms of the labor contract, in furtherance of the US (and Italian as well[234]) way to industrial democracy[235]. In the overall negotiation process, the UAW was capable of avoiding the following polar and potentially harmful reactions, which might have likely precluded the "happy ending"[236]: a) an obstructive approach, like FIOM/CGIL in Italy, which was finally recognized its right to appoint its representative at Fiat, but it nonetheless did not contribute to the setting of working conditions at Fiat, which were embedded in the labor contract concluded by the other unions; b) an over-accommodating attitude, on the edge with company unionism.

Indeed, for both the US and Italy, there is neither need to return to the "pre-Wagner Act" pluralistic model, potentially subject to the same inefficiencies that the Italian system currently shows, nor to the Fascist period in Italy and its corporatist (and thus "cooperative") "unique" union. For neither of these two models anyone should feel nostalgic, nor does any remnant of the latter emerge in the Fiat-Chrysler case[237]. On the contrary, the newly established global group benefitted from reaching an agreement with its national counterparty following an adversarial (not antagonistic, though), bread-and-butter and thus "old school" (but not necessarily obsolete) pattern of negotiation[238]: i) an intense and even harsh collective bargaining between company management and a compact union front (the exclusive agent in the US; the two of the three unions in Italy); ii) the signature of the collective agreement(s) in function of settlement and compromise between the conflicting interests inherent to an adversarial partnership, entailing mutual responsibility of company management and labor; iii) a serious investment program and a mid/long term strategy by the company management; iv) the workforce effort to enhance labor productivity; v) company profits and employee additional income and job security.

Nonetheless, the Fiat-Chrysler case carries undoubtedly distinctive traits and critics may still counter that the company went too far with its threats of liquidation (Chrysler) or relocation (Fiat) in a take-it-or-leave-it strategy of negotiation. Above all, it would be hard to guess what might have happened if the Fiat/Chrysler Group had not soon returned to solid economic performance. But what were the real alternatives for unions and employees in those

negotiations? In the US, perhaps reversion to a unilateral determination of the working conditions of a nuanced, disorganized and at-will terminable workforce. In Italy, the answer would have been the sectoral agreement covering all automakers and other metalworking firms, if only Fiat had not *lawfully* left the "umbrella" of the employer association and the national bargaining coverage.

Conclusively, there might be nothing revolutionary in the Fiat/Chrysler case beyond an example of concession bargaining consistent with the current regulatory framework (at least, with regard to the US law), followed by the prompt recovery of company productivity. In this sense, the reference by Bob King to a brand new 21st century unionism seems more akin to a slogan than to a real innovation, considering how the idea of "collaboration" between labor and management/capital has been a *leitmotiv* throughout the whole history of industrial relations[239].

On the contrary, a true challenge would be convincing employees, employers and policy makers that what was achieved through this form of "contractual collaboration" might be *profitably* replicated elsewhere[240]. Only if this conviction becomes shared, collective bargaining would be (re)set as the "cornerstone" of labor-management interactions[241], facing up to the changes in the current times of globalization and need for adaption as it was in past economic (the New Deal in the US) and democratic (the postwar period in Italy) recovery stages.

A bedrock challenge was expected for UAW in the negotiation of the renewal of Chrysler's labor contract in Fall 2015[242] and in the further Fiat agreements in Italy, since the Group keeps reporting "*spectacular profits*"[243] and liquidation threats seemed left behind.

This is why the tentative agreement the parties quickly reached on 16th September 2015, in so far as it delivered significant increases in wage rates for both new and long-time autoworkers[244], might have constituted a fundamental step for the following collective labor relations in the whole US auto sector.

However, rather surprisingly, Chrysler's employees voted down the latter agreement and this left serious uncertainties, not only on the epilogue of the negotiation, but also on the union's capacity to represent the employees' interests[245]. UAW is thus called to even a more hazardous challenge, which might be the mirror of the current stage of labor relations in the US. The union needs to find its way back to the bargaining table with Chrysler and, primarily, to regain the employees' support: in such a scenario, the eventual approval of the employees on a new "Treaty of Detroit-plus-Turin" might evidently carry symbolic implications well beyond the US auto sector.

ENDNOTES

1 *See* Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Modern Law Review*, 1974, 1, 1.

2 *See* Peter A. Hall, David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (2002), who classify the US as a "Liberal Market Economy" (LME) and Italy as a "Coordinated Market Economy" (CME).

3 *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *Colum. L. Rev.* 1527 (2002).

4 *See* Iacopo Senatori, *Multinationals and National Industrial Relations in Times of Crisis: The Case of FIAT*, 28 *Int.Journ.Comp.Lab.L.Ind.Rel.* 169 (2012).

5 For an insightful account on the history of Fiat before "Marchionne Era", *See* Giorgio Garuzzo, *FIAT. The Secrets of an Epoch* (2014).

6 *See* Marco Cobianchi, *American Dream. Così Marchionne ha salvato la Chrysler e ucciso la Fiat* (2014), at 5.

7 *See* Paul Ingrassia, *Crash Course: The American Automobile Industry's Road from Glory to Disaster* (2010).

8 For an account, with a special focus on GM, *See* Bill Vlasic, *Once upon a car: the fall and resurrection of America's big three auto makers – GM, Ford, and Chrysler* (2011).

9 For critical remarks, *See* Neil Barofsky, *Bailout. An Inside Account of How Washington Abandoned Main Street While Rescruing* (2012), at 176-178.

10 *See* Andrea Caputo, *Fiat and Chrysler, Negotiating for survival*, 31(1) *Strategic Decision* 27 (2015), at 27-29.

11 *See* Michaela D. Platzer, Glennon J. Harrison, *The U.S. automotive industry: National and state trends in manufacturing employment*. Washington DC Congressional Research Service (2009).

12 VEBA was incorporated in 2007 to manage the sums contractually due by Chrysler for retiree health care and medical expenses and benefits.

13 Technically, Chrysler's shares belonged to the Trust VEBA, not to the individual employee, nor to the UAW either.

14 *See* Steven Rattner, *Overhaul: an insider's account of the Obama Administration's emergency rescue* (2010), at 92.

15 *See* Peter Haldis, *Chrysler Reaches Tentative Agreement with UAW*, 80 *World Refining & Fuels Today* 5 (2009).

16 *See* Michael De la Merced, Micheline Maynard, *Fiat Deal with Chrysler Seals Swift 42-Day Overhaul*, New York Times, 10th June 2009.

17 For a detailed account, *See* Giuseppe Berta, *Fiat-Chrysler e la deriva dell'Italia Industriale* (2011).

18 Among the institutions targeted by the concession: "Jobs Bank" and "Sub-Pay", aimed at compensating the temporary loss of job; the "Thirty and out" rule in matter of retiring requirement; the introduction of a "Two-Tier" wage system, where employees hired after 2007 are entitled to a significantly lower wage rate. *See* Stephen Lerner, *An Injury to all. Going Beyond Collective Bargaining as We Have Known It*, 19(2) *New Labor Forum* 45 2010, strongly criticizing UAW's strategy in the negotiation with Chrysler during the bailout period ("*Instead of playing defense, it could have led the call to rebuild the middle class by producing green cars in America*").

19 *See* UAW's President Bob King's speech given at the Center for Automotive Research Conference on 7th August 2010: *http://www.uaw.org/articles/uaw-21st-century*.

20 *See* again Bob King, *supra note 20*: "*The 20th-century UAW fell into a pattern with our employers where we saw each other as adversaries rather than partners…out of the ashes of the cataclysm of 2008 and 2009, a new, more visionary and stronger 21st-century UAW is being born…so the keywords of the 21st-century UAW are flexibility, innovation, quality, teamwork, productivity, continuous cost-savings, and respect*".

21 Still, the new union's "*mission*" was not universally shared. In fact, the Indiana State Police Fund, the Indiana Teachers Retirement Fund and the State Major Move Construction Fund brought proceedings for the suspension of the merger, claiming that the unlawful breach of their credit rights by the bankruptcy agreements. The case went up to the US Supreme Court, which rejected the claim with a temporary order and thus permitted the closing of the merger: 556 U.S. Indiana State Police Pension Trust et Al. vs. Chrysler LLC et Al., 9th June 2009.

[22] *See* Raffaello Santagata, *Prime riflessioni sulla "partecipazione" nell'accordo UAW-Chrysler alla luce dell'esperienza statunitense*, III *Diritti Lavori Mercati* 475 (2009), at 476 and 487.

[23] In 2013, Chrysler marked a 1.9 billion dollar surplus, when the Italian branch (or tail?) of the new global group was still struggling and performing a minus of 911 million euros.

[24] A summary of the 2011 Chrysler/UAW collective agreement at *http://www.uaw.org/UAW-Chrysler-Hourly-Workers-Contract-Summary/0816AAAA2C7D076229C0FEB0418B3AD8/UAWChrysler_Hourly.pdf*.

[25] However, World Class Manufacturing was first time experienced in Fiat plant in Cassino early in 2005.

[26] *See* Paolo Rebaudengo, *Nuove regole in fabbrica. Dal contratto Fiat alle nuove relazioni industriali* (2015), at 34-47.

[27] Fiat's alternative was rather plain: if the unions did not sign the agreement, the company would have relocated the Italian production to Poland or Serbia, where labor cost and the overall employment protections (or, under another point of view, "boundaries") were consistently lower.

[28] *See* Raffaele De Luca Tamajo, *Accordo di Pomigliano e criticità del sistema di relazioni industriali italiane*, I *Rivista Italiana di Diritto del Lavoro* 797 (2010); Vincenzo Bavaro, *Contrattazione collettiva e relazioni industriali nell'"Archetipo" Fiat di Pomigliano D'Arco*, 3 *Quaderni Rassegna Sindacale* 337 (2010).

[29] *See* the critical remarks by Federica Micoli, *Undermining collective bargaining: Fiat-Chrysler agreement*, 18(3) *International Union Rights* 16 (2011), at 16-17.

[30] Tribunal of Torino 14th September 2011, II *Rivista Italiana Diritto del Lavoro* 360 (2011).

[31] Tribunal of Roma 21st june 2012, substantially upheld by Court of Appeal Roma 9th October 2012, both in II(2) *Rivista Giuridica del Lavoro* (2014).

[32] *See* Franco Carinci, *La cronaca si fa storia: da Pomigliano a Mirafiori*, 131 *WP C.S.D.L.E. "Massimo D'Antona".IT* (2011); Edoardo Ales, *Dal "caso Fiat" al "caso Italia". Il diritto del lavoro "di prossimità", le sue scaturigini e i suoi limiti costituzionali*, 134 *WP C.S.D.L.E. "Massimo D'Antona".IT* (2011).

[33] *See* Raffaele De Luca Tamajo, *I quattro accordi collettivi del gruppo Fiat: una prima ricognizione*, I *Rivista Italiana Diritto del Lavoro* 113 (2011); Paolo Tomassetti, *The Shift towards Single-employer Bargaining in the Italian Car Sector: Determinants and Prospects at FIAT*, 2(1) *E-Journal of International and Comparative Labour Studies* 93 (2013), at 95-99.

[34] On the "Fiat Paragraph", *See* Bruno Caruso, Anna Alaimo, *Diritto Sindacale* (2012), at 216-218.

[35] It is also due mentioning that the agreement in word was not signed by neither the most widespread union in the metal sector (FIOM/CGIL) nor the main employer association (Confindustria/Federmeccanica).

[36] *See* Lodovico Barassi, *Diritto corporativo e diritto del lavoro* (1939).

[37] *See generally* Tiziano Treu, *Labour Law in Italy* (2014), 4th ed., Part II; Marco Biasi, *The Effect of the Global Crisis on the Labor Market: Report on Italy*, 35(3) *Comparative Labor Law and Policy Journal* 371 (2014), at 387-395.

[38] *See* Giuseppe Pera, *Problemi constituzionali del diritto sindacale italiano* (1960); Giuseppe Federico Mancini, *Libertà sindacale e contratto collettivo erga omnes*, *Rivista Trimestrale Diritto Procedura Civile* 570 (1963); Mario Rusciano, *Contratto collettivo e autonomia sindacale* (2003), at 4.

[39] *See* Giuseppe Federico Mancini, *Le rappresentanze aziendali nello Statuto dei lavoratori, Rivista Trimestrale Diritto Procedura Civile* 66 (1986); Tiziano Treu, *Sindacato e rappresentanze aziendali* (1973).

[40] *See* Bruno Veneziani*, Il sindacato dalla rappresentanza alla rappresentarività*, 43(1) *DLRI* 373 (1989); Piera Campanella, *Rappresentatività sindacale: fattispecie e effetti* (2000).

[41] Constitutional Court 6th March 1974, No. 54, I *Foro Italiano* 953 (1974); Constitutional Court 24th March 1988, No. 334, I *Foro Italiano* 1774 (1988).

[42] Constitutional Court 26th January 1990, No. 30, I(1) *Giurisprudenza Italiana* 1337(1990).

[43] Those were, basically, the members of the Italian main employer association of the industry sector, Confindustria, which had concluded the 1993 Agreement with the "Trio" unions.

[44] *See* Barbara De Mozzi, *La rappresentanza sindacale in azienda: modello legale e modello contrattuale* (2012); Mimmo Carrieri, *L'incerta rappresentamza. Sindacati e consenso negli anni '90: dal monopolio confederale alle rappresentanze sindacali unitarie* (1995).

[45] *See* Arturo Maresca, *Le rappresentanze sindacali aziendali dopo il referendum: problemi interpretativi e prime osservazioni*, 1 *Quaderni Argomenti Diritto del Lavoro* 19 (1996); Paolo Tosi, *L'esito referendario e i suoi effetti sulle relazioni industriali in azienda*, 1 *Diritto delle Relazioni Industriali* 113 (1996).

[46] *See* Gino Giugni, *La rappresentanza sindacale dopo il referendum*, 67(3) *Diritto del Lavoro e delle Relazioni Industriali* 357 (1995).

[47] Constitutional Court 12th July 1996, No. 244, I *Foro Italiano* 2968 (1996).

[48] Constitutional Court 4th December 1995, No. 492, I *Foro Italiano* 5 (1996).

[49] Constitutional Court 18th October 1996, No. 345, *Notiziario Giurisprudenza del Lavoro* 655 (1996).

[50] *See* Franco Liso, *Appunti su alcuni profili giuridici delle recenti vicende Fiat*, 130(2) *Diritto del Lavoro e delle Relazioni Industriali* 331 (2011), at 335.

[51] Tribunal of Milano 3rd April 2012, I(6) *Giurisprudenza Italiana* 1365 (2012).

[52] Tribunal of Lecce 12th April 2012, I (6) *Giurisprudenza Italiana* 1366 (2012).

[53] Tribunal of Napoli 13th April 2012, I(6) *Giurisprudenza Italiana* 1366(2012).

[54] Tribunal of Bologna 27th April 2012, *Massimario Giurisprudenza del Lavoro* 339 (2012).

[55] Tribunal of Modena 4th June 2012, (I) *Giurisprudenza Italiana* 1833 (2012).

[56] Tribunal of Vercelli 25th September 2012, II *Rivista Italiana Diritto del Lavoro* 996 (2012).

[57] Tribunal of Torino 12th December 2012, *Argomenti Diritto del Lavoro* 709 (2012).

[58] *See* Mattia Persiani, *Ancora sul caso Fiat: eccessiva spericolatezza nel tentativo di soddisfare le aspettative sociali ovvero eccessiva prudenza nella fedeltà alla legge*, 6 *Giurisprudenza Italiana* 1376 (2012).

[59] *See* Bruno Caruso, *La Corte Costituzionale tra Don Abbondio e il passero solitario: il sistema di rappresentanza sindacale dopo la sentenza n. 231/13*, I(4) *Rivista Italiana Diritto del Lavoro* 901 (2013).

[60] *See* Antonio Vallebona, *Ostinazione per le Rsa Fiom-Cgil: ora viene proposta una questione di costituzionalità già rigettata*, *Massimario Giurisprudenza del Lavoro* 524 (2012).

[61] See Antonio Vallebona, *L'Art. 19 stat. Lav.: una sentenza che fa sorridere*, 10 *Massimario Giurisprudenza del Lavoro* 654 (2013).

[62] *See* Franco Carinci, *Il buio oltre la siepe: Corte Costituzionale 23 luglio 2013, n. 231"*, 4 *Diritto delle Relazioni Industriali* 899 (2014), at 940.

[63] *See* Franco Carinci, *Alice non abita più qui (a proposito e sproposito del "nostro" diritto sindacale*, 140(4) *Diritto del Lavoro e delle Relazioni Industriali* 665(2013), at 674.

[64] *See* Valerio De Stefano, *La Corte Costituzionale e l'Art. 19 dello Statuto dei Lavoratori: molto più che un semplice aggiornamento*, 6 *Argomenti di Diritto del Lavoro* 1396(2013), at 1420; for a different opinion, *See* Stefania Scarponi, *La sentenza della Corte Costituzionale n. 231 del 2013: la quadratura del cerchio?*, 4 *Lavoro e Diritto* 495(2013), at 503.

[65] *See* Vito Leccese, *Partecipazione alle trattative, tutela del dissenso e Art. 19 dello Statuto dei lavoratori*, 4 *Lavoro e Diritto* 539(2013), at 546; Andrea Lassandari, *Tra diritti sindacali e contrattazione collettiva: la Consulta trova una difficile via*, III *Diritti Lavori Mercati* 721 (2013), at 724; Elisabetta Bavasso, *Overruling della Consulta: basta che il sindacato partecipi alla negoziazione collettiva per poter costituire R.S.A.*, 10 *Lavoro nella Giurisprudenza* 899(2013), at 903.

[66] *See* Antonello Zoppoli, *Art. 19 dello Statuto dei lavoratori, democrazia sindacale e realismo della consulta nella sentenza n. 231/2013*, 2 *Argomenti Diritto del Lavoro* 333(2014), at 335.

[67] The same unity of action which, according to Franco Liso, *Opinioni sul "nuovo" art. 19 dello Statuto dei Lavoratori*, 141(1) *Diritto del Lavoro e delle Relazioni Industriali* 106(2014), at 112, was marking the "*genetic code*" of the original version of Article 19 Worker Statute.

[68] *See* Riccardo Salomone, *Opinioni sul "nuovo" art. 19 dello Statuto dei Lavoratori*, 141(1) *Diritto del Lavoro e delle Relazioni Industriali* 128(2014), at 129.

[69] *See* Raffaele De Luca Tamajo, *La sentenza n. 231)2013 della Corte Costituzionale sullo sfondo della crisi del sistema sindacale anomico*, I(1) *Rivista Giuridica del Lavoro* 45(2014), at 48.

[70] At least, according to the majority of the previous Judicial decisions in matter: see *below*.

[71] *See* Maria Teresa Crotti, *Il "nuovo" articolo 19 dello Statuto dei Lavoratori*, I(4) *Rivista Italiana Diritto del Lavoro* 635 (2014), at 641.

[72] *See* Franco Carinci, *Se il legislatore latita, la Corte costituzionale ne approfitta per fare il bello e il cattivo tempo*, III *Diritti Lavori Mercati* 711 (2013), at 715; Fausta Guarriello, *La partecipazione al processo negoziale nel quadro europeo e comparato*, I(1) *Rivista Giuridica del Lavoro* 25 (2014), at 35; Antonio Vallebona, *L'art. 19 stat. lav.: la Corte*

costituzionale stravolge la volontà del popolo, III *Diritti Lavori Mercati* 747 (2013), at 749.

[73] *See* Riccardo Del Punta, *L'Art. 19 Statuto dei lavoratori davanti alla Consulta: una pronuncia condivisibile ma interlocutoria*, 4 *Lavoro e Diritto* 527 (2013), at 537; *See* also Mariella Magnani, *Opinioni sul "nuovo" art. 19 dello Statuto dei Lavoratori*, 141(1) *Diritto del Lavoro e delle Relazioni Industriali* 122 (2014), at 124; Marco Esposito, *Opinioni sulla sentenza della Corte costituzionale n. 231 del 2013: "sentieri" e "cantieri" per una nuova stagione sindacale*, III *Diritti Lavori Mercati* 689 (2013), at 690.

[74] *See* Paolo Tosi, *I diritti sindacali tra rappresentatività e rappresentanza*, 1 *Argomenti di Diritto del Lavoro* 1(2014), at 14.

[75] *See* Mariella Magnani, *Il Protocollo d'intesa e la sentenza sull'Art. 19 st. lav.*, AA.VV., *Treccani. Il libro dell'anno del diritto 2014* (2014), at 386; Arturo Maresca, *Il contratto collettivo nazionale di categoria dopo il Protocollo d'intesa 31 maggio 2013*, I(3) *Rivista Italiana Diritto del Lavoro* 707 (2013); Antonio Viscomi, *Prime note sul Protocollo 31 maggio 2013*, I(3) *Rivista Italiana Diritto del Lavoro* 769 (2013); Antonello Zoppoli, *Il Protocollo di maggio 2013, una svolta sospesa tra prassi (assenti) e norme (inadeguate)*, II *Diritti Lavori Mercati* 249 (2013).

[76] This was emphatically named "*Unified Code on Employee Representation*" by the Social Parties, despite its lack of normative, universal effectiveness and its large continuity with previous self-regulation agreements by the same Social Parties). *See* Pietro Lambertucci, *La rappresentanza sindacale e gli assetti della contrattazione collettiva dopo il Testo Unico sulla rappresentanza del 2014: spunti di riflessione*, I(2) *Rivista Italiana Diritto del Lavoro* 237(2014), at 239. On the 10th January 2014 Agreement, *See generally* Franco Carinci, *Il lungo cammino per Santiago della rappresentatività sindacale: dal titolo III dello Statuto dei lavoratori al Testo Unico sulla rappresentanza 10 gennaio 2014*, 2 *Diritto delle Relazioni Industriali* 309 (2014); Riccardo Del Punta, *Note sparse sul Testo Unico sulla rappresentanza*, 3 *Diritto delle Relazioni Industriali* 673 (2014); Alessandro Garilli, *Crisi e prospettive della rappresentatività sindacale: il dialogo tra Corte Costituzionale e accordi sindacali*, 1 *Argomenti di Diritto del Lavoro* 38 (2015), at 47-52; Stella La Forgia, *L'accordo interconfederale del 10 gennaio 2014 e le "nuove" RSU*, I(3) *Rivista Giuridica del Lavoro* 513 (2014).

[77] *See* Franco Liso, *Alcune osservazioni a proposito dell'accordo del 10 gennaio 2014*, I(4) *Rivista Giuridica del Lavoro* 643 (2014).

[78] *See* Gian Primo Cella, *Una sentenza sulla rappresentanza sindacale (o del lavoro?)*, 4 *Lavoro e Diritto* 509 (2013).

[79] *See* Fausta Guarriello, *L'articolo 19 dello Statuto rivisitato*, 144(4) *Diritto del Lavoro e delle Relazioni Industriali* 767 (2014), at 771.

[80] *See* Paolo Tosi, *Avventure della rappresentatività sindacale "effettiva" dopo Corte Costituzionale 231/2013*, 2 *Nuovo Notiziario Giuridico* 423 (2014); Giovanna Pacchiana Parravicini, *Hic sunt leones, l'art. 19 St. Lav. al banco di prova di un sindacato diverso dalla Fiom*, II(1) *Rivista Italiana Diritto del Lavoro* 205(2014); Franco Scarpelli, *La prima giurisprudenza sul "nuovo" art. 19 St. Lav.: si conferma l'incertezza del quadro regolativo*, II(1) *Rivista Italiana Diritto del Lavoro* 212 (2014); Maria Teresa Crotti, *L'articolo 19 dello Statuto dei lavoratori: il difficile rapporto fra partecipazione alle trattative e rappresentatività nella prima giurisprudenza di merito*, 2 *Diritto delle Relazioni Industriali* 489 (2015).

[81] Tribunal of Brescia 4th February 2014, II(1) *Rivista Italiana Diritto del Lavoro* 204(2014).

[82] Tribunal of Busto Arsizio 30th July 2014, *Bollettino Adapt*, 2014, 41.

[83] Trib. Roma 16th September 2014, *Bollettino Adapt*, 2014, 40.

[84] *See* Bruno Caruso, *Per un intervento eteronomo sulla rappresentanza sindacale: se non ora quando!*, 206 *WP C.S.D.L.E. "Massimo D'Antona".IT* (2014).

[85] *See* Bruno Caruso, *"Costituzionalizzare" il sindacato. I sindacati italiani alla ricerca di regole: tra crisi di legittimità e ipertrofia pubblicistica*, 4 *Lavoro e Diritto* 595 (2014).

[86] *See* Matteo Renzi, *Interview with Enrico Mentana*, *La7*, 22nd May 2015.

[87] *See* Giuseppe Berta, *Fiat-Chrysler e la deriva dell'Italia Industriale* (2011), at 135-136, canvassing the establishment of an "umbrella" union association in the industry sector.

[88] Immediate and unanimous criticism was addressed by CGIL, CISL and UIL to Prime Minister Renzi when he came out with the proposal of the "*unique union*": *See http://www.ansa.it/sito/notizie/politica/2015/05/22/renzi-mi-piacerebbe-un-sindacato-unico_c95a727c-c9ea-4a88-b735-09f344bbc827.html*.

[89] *See* Philip Dray, *There is Power in a Union: the Epic Story of Labor in America* (2011).

[90] Above all, it is due mentioning the Homestead Strike in 1892, when the Carnegie Steel Corporation hired 300 Pinkerton Agents as strikebreakers during a conflict that led to more than a dozen victims, and the Pullman Strike in 1984. For a narration on the two cases, *See* Nick Salvatore, *The Pullman Strike and and the crisis of 1890s: essays on labor and politics* (1999).

[91] *See generally* Kenneth G. Dau-Schmidt et Alii, *Labor Law in the Contemporary Workplace* (2014), 2nd ed., at 1-55.

[92] Commonwealth of Massachusetts vs. Hunt, Massachusetts, 4 Metcalf 3 (1842), reversing the doctrine of Commonwealth v. Pullis (1806), People v. Melvin (1809), Commonwealth v. Morrow (1815), all three transcripted in John Commons (ed.), *A Documentary History of American Industrial Society* (1910), vol. III. For an account, *See* Edwin E. Witte, *Early American Labor Cases*, 35 *Yale L. J.* 825 (1926).

[93] Notably, the early labor contracts were concluded at "sectoral level", in particular in the coal field, when the United Mine Workers of America (UMWA) negotiated with the mine operators in the States of Illinois, Indiana, Ohio, and Pennsylvania uniform working conditions throughout the industry. *See* Katherine V.W. Stone, *Labor and the American State: The Evolution of Labor Law in the United States*, Marcel van der Linden and Richard Price (eds.), *The Rise and Development of Collective Labour Law* (2000), at 359.

[94] *See generally* Philip Selznick, *Law, Society and Industrial Justice (1969)*, at 139-141.

[95] In particular, the Sherman Act provided the unlawfulness of "*every contract, combinations in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the Several States*" (Section 1). Moreover, "*every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce*" was punished under criminal law and subject of civil accountability (Section 2).

[96] Loewe v. Lawlor, 208 U.S. 274 (1908), commonly known as "Danbury Hatters" case; Gompers v. Bucks Stove and Range Company, 221 U.S. 418 (1911).

[97] In re Debs, 158 U.S. 564 (1895). *See generally* William E. Forbath, *Law and the Shaping of American Labor Movement: Government by Injunction*, Kenneth M. Casebeer (ed.), *American Struggles and Law Histories* (2011), at 81-89.

[98] *See* Section 6 and Section 20 of the Clayton Act, the latter setting forth the ban of courts' injunctions "*in any case between an employer and employees, or between employer and employees, or between employees…unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application*".

[99] "Duplex" Printing Press v. Deering 254 U.S. 443 (1921). *See* also Bedford Cut Stone Company v. Journeymen Stone Cutters Association, 274 U.S. 37 (1927).

[100] Adair v. U.S., 208 U.S. 161 (1908).

[101] Moreover, the Railway Labor Act entailed the employer duty to bargain and the creation of a federal agency (National Mediation Board) to determine railroad bargaining unit and mediation services. *See* generally Katherine V.W. Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 *Stanford Law Review* 1485 (1990).

[102] *See* John Kennet Galbraight, *The Great Crash* (1961), at 3.

[103] *See* Benjamin J. Taylor, Fred Witney, *Labor Relations Law* (1996), 7th ed., at 14.

[104] Section 7(a) of the NIRA. *See* Minier Sargent, *Majority Rule in Collective Bargaining Under Section 7(a)*, 29 *ILL. L. REv.* 275 (1934). Moreover, under Section 7(a) of the NIRA, nobody could be "*required as a condition of employment to join a company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing*".

[105] *See* Benjamin J. Taylor, Fred Witney, *U.S. Labor Relations Law. Historical Development* (1992), at 118-161.

[106] *See generally* Irving Bernstein, *Turbolent Years. A history of the American Worker 1933-1941 (1970)*, at 217-317.

[107] *See* Milton Derber, *The American Idea of Industrial Democracy. 1865-1965 (1970)*, at 199-229, in terms of "*Industrial Democracy in the Corporate Vein*".

[108] Senator Robert Wagner was the drafter (between January 1934 and June 1935), or, better, the *Deus*

ex machina of the Bill of the NLRA, and he had been previously the chairman of National Labor Board under NIRA.

[109] The Supreme Court found the NIRA unconstitutional on 16th June 1935: Schecter Poultry Corporation v. United States, 295 U.S. 495 (1935).

[110] On the New Deal model of industrial relations, *See generally* Thomas A. Kochan, Harry C. Katz, Robert B. McKersie, *The Transformation of American Industrial Relations* (1986).

[111] *See* Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 *Geo. Wash. L. Rev.* 199 (1961), at 218: "*Senator Wagner's central argument for his bill was always on general economy and social grounds. He never valued the measure primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for the economic and related social progress*". *See* also James A. Gross, *Conflicting Statutory purposes: another look at fifty years of NLRB Lawmaking*, 39 *Industrial and Labor Relations Review* 1985 (1), at 10: "*Wagner wanted management and labor to resolve their mutual problems through a system of self-government…collective bargaining was intended to be more than a system of checks and balances based on the countervailing power, but it was to be based on a positive cooperative power operating in a system of industrial democracy and self-government*".

[112] A Federal Agency, the National Labor Relation Board (NLRB), was entrusted to promote the goals of the NLRA, mainly through two functions: a) the supervision of employee representative election supervision, with the assistance of the Board's regional offices; b) the adjudication of unfair labor practice (subject to the review by Federal Courts of Appeal), when first instance decisions of administrative law judges are appealed. *See* James A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (1974), at 2: "*the Wagner Act NLRB was a quasi-judicial body of neutrals that decided cases by setting forth principles of law, conducting formal hearings, issuing rules and regulations, and requiring legalistic uniformity in its procedures*"). According to the majority of scholars, the "undulating" nature of the Board may be explained with the influence of politics and ideology, considering that the five Board members sitting in Washington DC are appointed by the President (on the advice and consent of the Senate). *See* Catherine L. Fisk, Deborah C. Malamud, *The NLRB in Administrative Law Exile: problems with its structure and function and suggestions for reform*, 58 *Duke L.J.* 2013 (2009); William B. Gould, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board,* 82 *IND. L.J.* 461 (2007); Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 *Syracuse L. Rev.* 93 (1955). More recently, an interesting comparison between the functioning (and reasoning) of the NLRB and the German Labor Supreme Court was conducted by Matthew M. Bodah and Martin R. Schneidert, *Politics, Ideology, And Adjudication: The German Federal Labor Court And The U.S. National Labor Relations Board*, 36(1) *Comp. Lab. L. & Pol'y J.* 1 (2014). The administrative nature of the NLRB jurisdiction implies that the remedies for the NLRA violations and in particular for "*unfair labor practices*" do not coincide with those of other jurisdictions. Section 10(c) of the NLRA authorizes the Board "*to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies*" of the Act. Therefore, in case of unfair labor practice consisting in employee layoff or refused to be hired due to union membership, the remedy would be the reinstatement or the order to hire, plus the back pay (Phelps Dodge Corp. v. NLRB 22, 313 U.S. 177 (1941). If these remedies may appear rather protective at a glimpse, it is also true that the remedial philosophy, as it has evolved, is primarily oriented toward the repair of harm inflicted on individual victims of antiunion action by employer. Moreover, the lack of punitive damages due to administrative jurisdiction of the NLRB and the length of the whole proceedings render this form of administrative justice rather ineffective compared to US civil courts. *See* Clyde W. Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 *U. Pa. L. Rev.* 457 (1993), at 472-479.

[113] *See* Thomas A. Kochan, Harry C. Katz, Robert B. McKersie, *The transformation of American Industrial Relations*, (1994), 24.

[114] *See* Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 *Duq. L. Rev.* 779 (1992), at 781: "*Many of the special powers and rights the Act grants employees, and nearly all the rights it grants their "representatives," have no genesis without exclusivity*".

[115] *See* E.G. Latham, *Legislative Purpose and Administrative Policy under the National Labor Relations Act*, 4 *Geo. Wash. L. Rev.* 433 (1936), at 434.

[116] *See* James A. Gross, *Broken Promise. The Subversion of U.S. Labor Relations Policy, 1947-1994* (1994), at 1.

[117] *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *Minn. L. Rev.* 265 (1978), at 265, according to whom only court interpretations could limit the "*utopian aspirations for a radical restructuring of the workplace*".

[118] Section 1 of the NLRA.

[119] This point is stressed by Mattew W. Finkin, *Revisionism In Labor Law*, 43 *Md. L. Rev.* 23 (1984), at 25, persuasively countering the thesis of the radical (and, potentially, anticapitalist) nature of the Wagner Act. *See* also Theodore J. St. Antoine, *How The Wagner Act Came To Be: A Prospectus*, 96 *Mich. L. Rev.* 2201 (1998).

[120] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[121] *See* NLRB, *Legislative History of the National Labor Relations Act* (1935), vol. 1, at 37: "*it is universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit. For this reason, collective bargaining means majority rule. This rule is conducive not only to agreements, but also to friendly relations. Workers find it easier to approach their employers in a spirit of good will if they are not torn by internal dissent. And employers, wherever majority rule has been given a fair chance, have discovered it more profitable to deal with a single group than to be harassed by a constant series of negotiations with rival factions*".

[122] *See generally* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, And Workplace Cooperation*, 106 *Harv. L. Rev.* 1379 (1993).

[123] Section 152(3) of the NLRA. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 *Ohio St. L.J.* 95 (2011).

[124] For the complex qualification of an employee as "supervisor", NLRB v. Ky. River Cmty Care, Ink., 532 U.S. 706 (2001). *See generally* Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work,* 5 *FIU L. Rev.* 495 (2010).

[125] *See* also the Labor Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act) of 1959, providing rules in matter of union democracy and thus granting right of employee minority voices to be heard in internal union affairs. *See generally* Janice R. Bellace, Alan D. Berkovitz, *The Landrum-Griffith Act. Twenty Years of Federal Protection of Union Members' Rights* (1979); Doris B. McLaughlin, Anita L.W. Schoomaker, *The Landrum-Griffith Act and Union Democracy* (1979).

[126] *See* Gerard D. Reilly, *The Legislative History Of The Taft-Hartley Act*, 29 *Geo. Wash. L. Rev.* 285 (1961).

[127] Not by chance, the LMRA followed an intense strike wave, which took place in the aftermath of the II WW, when unions, which enjoyed the rise of overall unionized workforce in the US from two million to 15 million in the decade following the passage of the Wagner Act, aimed at raising the wage rates, which were frozen during the war. In doing so, unions drew the criticism of the public opinion, which was also worried about the "*Comunist threat*". *See* James A. Gross, *Worker Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 *U. Pa. J. Lab. & Emp. L.* 479 (2002), at 482

[128] Sec. 8(c) of the NLRA. *See* James A. Gross, *The Human Rights Movement At U.S. Workplaces: Challenges And Changes*, 65 *ILR Rev. J. Work & Pol'y* 3 (2012), at 8.

[129] Section 14(b) of the LMRA: "*the execution or application of agreements requiring membership in a labor organization as a condition of employment…is prohibited by Federal or Territorial law*".

[130] In strict sense, agency fee obligation is separate from union membership. In fact, employees do not have to become real members to retain their jobs in shops that have union security clauses and Section 8(a) of the NLRA authorizes the exaction of only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues: National Relations Board v. General Motors Corp., 374 U.S. 734, 742 (1963). *See* Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 *UC Irvine*

L. Rev. 857 (2014), at 858. Accordingly, union dues for political activities cannot be required to non-members: Communication Workers of America v. Beck, 487 U.S. 735 (1988). For a comment, *See* Kenneth G. Dau-Schmidt, *Union Security Agreements under the National Labor Relations Act: the Statute, the Constitution, and the Court's Opinion in Beck, 27 Harv. J. on Legis. 51* (1990).

[131] *See generally* James A. Gross, *The NLRB: Then and Now*, 26 *A.B.A. J. Lab. & Emp. L.* 213 (2011), at 221.

[132] On the origin (and predecessors) of the RTW provisions, *See* Cedric de Leon, *The origins of right to work: antilabor democracy in nineteenth century Chicago* (2015).

[133] *See* the detailed account by Raymond L. Hogler, *The end of American Labor Unions. The Right-to-Work Movement and the Erosion of Collective Bargaining* (2015).

[134] Section 7 of the NLRA. Accordingly, the law prohibits employers from inquiring on workers' collective activity as well as from penalizing or discriminating employees because they have exercised their rights. Otherwise, pursuant to Section 8(a) of the NLRA, an unfair unfair labor practice. More specifically, Sections 8(a)(1) and 8(a)(3) of the NLRA, prohibit employers from: i) interfering with, coercing, or restraining employees in the exercise of their rights under Section 7 of the NLRA; ii) discriminating against employees to discourage their membership in a labor organization; iii) retaliating against a worker for filing unfair labor practice charges or giving testimony in NLRB proceedings. *See generally* Raymond L. Hogler, *Employment Relations in the United States. Law, Policy and Practice* (2004), at 113-114.

[135] *See* Robert F. Wagner, *Company Unions: A Vast Industrial Issue*, *N.Y. TIMES*, Mar. 11, 1934, hardly critical on the capacity of company unions to raise, or even defend, the employee wage rates.

[136] *See* Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, XVI(3) *Journal of Labor Research* 387 (1995), at 393-396; David Brody, *Labor Embattered. History, Power, Rights* (2005), at 49-59, illuminating on the experience of joint councils at John D. Rockefeller Junior's companies, which not by chance followed the hard battles for union recognition ended in the Ludlow Massacre of 1914.

[137] *See* Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, *27 B.C. L. Rev.* 499 (1986), at 518.

[138] NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969).

[139] *See* Butler D. Shaffer, *Some Gray Areas in Employer Free Speech*, 6 *Creighton L. Rev.* 39 (1973); Robert F. Koretz, *Employer Interference With Union Organization Versus Employer Free Speech*, 29 *Geo. Wash. L. Rev.* 399 (1961).

[140] *See* Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, *ECON. POL'Y INST.*, 20th May 2009, at 3.

[141] *See* John Logan, *Consultants, Lawyers, and the 'Union Free' Movement in the USA since the 1970s*, 33 *IND. REL. J.* 197 (2002), at 207.

[142] *See* John Logan, *The Union Avoidance Industry in the United States*, 44(4) *British Journal of Industrial Relations* 651 (2006), at 654: "*By the 1990s, the union avoidance industry had developed into a multimillion-dollar concern and consultant campaigns had become a standard feature of recognition campaigns, with over two-thirds of employers recruiting consultants when faced with a union drive*". Accordingly, an authoritative Scholar noted how the Statute had to be revised to avoid excessive employer pressures during campaigns, masked behind the free speech provision: Paul Weiler, *Promises to keep: securing workers' rights to self-organization*, 96 *Harv. L. Rev.* 1769 (1983).

[143] *See generally* Lawrence W. Marquess, *The NLRB and the appropriate bargaining unit* (2000).

[144] *See* Clyde W. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 *N.Y.U. Law Review* 362 (1962); Heinrich Hoeniger, *The Individual Employment Contract under the Wagner Act*, 10 *Fordham L. Rev.* 14 (1941); George W. Brooks, *Stability Versus Employee Free Choice,* 61 *Cornell L. Rev.* 344 (1976).

[145] On the importance of collective agreement as "*generalized code of industrial self-government*": Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960). It has also to be reminded that, pursuant to Section 301 Taft-Hartley Act, Collective Agreements were made enforceable in Federal courts. *See*, extensively, David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61(3) *California Law Review*, 663 (1973); Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 *Yale L.J.* 525 (1969).

[146] Dissenting employees, besides the special protection below described, might only attempt to promote the union decertification, eventually creating a new majority group. On the decertification procedure, *See generally* Robert A. Gorman, Matthew W. Finkin, *Labor Law Analysis and Advocacy. Practice Commentary by Lawrence J. Casazza and David A. Rosenfeld* (2013), at 78-81.

[147] NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956) and NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960). For an extensive comment, *See* Kenneth G. Dau-Schmidt, *The Story of NLRB v. Truitt Manufacturing Co. and NLRB v. Insurance Agents' International Union: The Duty to Bargain in Good Faith*, Laura J. Cooper, Catherine L. Fisk (eds.), *Labor Law Stories* (2005), at 107; Archibald Cox, *The Duty To Bargain in Good Faith*, 71 *Harv. L. Rev* 1401 (1958).

[148] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

[149] H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); more recently, Hardesty Co. v. Teamsters Local Union 373, 336 N.L.R.B. 258, 264 (2001).

[150] NLRB v. Am. Ins. Co., 343 U.S. 395, 404 (1952).

[151] Ex-Cell-O Corp., 185 NLRB. 107 (1970).

[152] *See* the persuasive answer by Julius G. Getman and Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92(8) *The Yale Law Journal* 1415(1983), at 1422, to Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92(8) *Yale Law Journal* 1357 (1983): "*The idea of the collective agreement was also consistent with the contract notions that had been developed over the course of the century. The terms of the employment agreement would continue to be privately set*".

[153] For the early, broader interpretation of the matters subject to mandatory negotiation, *See* Ruth Weyand, *Majority Rule in Collective Bargaining*, 45(4) *Columbia Law Review* 556 (1945).

[154] *See generally* Robert A. Swift, *NLRB And Management Decision Making* (1974); James B. Atleson, *Management Prerogatives, Plant Closings, and the NLRA*, 11 *N.Y.U. Rev. L. & Soc. Change* 83 (1983).

[155] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964), holding that subcontract or even partial or total closing of business is out of mandatory bargaining matters; First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 676-77 (1981), stating that investment decisions, financing decisions, advertising decisions, or product design decisions are left out of mandatory bargaining matter, because "*Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise*". Nonetheless, in the case of closing, the employer, which does not have the duty to bargain on the merits of the decision, may be placed upon the duty to bargaining on the consequences of the latter: United Food & Commercial Workers v. NLRB, 519 F.3d 490, 495-96 (D.C. Cir. 2008).

[156] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 274-75: closing of a part of the business may integrate an unfair labor practice only "*if motivated by a purpose to chill unionism in any of the remaining plants of the single employer*". *See* Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 *Employee Rights And Employment Policy Journal* 55 (2010).

[157] Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979); Otis Elevator Co., 269 N.L.R.B. 891(1984), n. 5.

[158] NLRB v. Katz, 369 U.S. 736 (1962).

[159] Recently, Carey Salt Co. v. NLRB, 736 F.3d 405 (5th Cir. 2013); Erie Brush & Manufacturing Corp. v. NLRB, 700 F.3d 17 (D.C. Cir. 2012). For an extensive comment, *See* David P. Twomey, *NLRA Impasse Cases: What's Right, What's Not Right and What Can Be Done About It*, *Labor Law Journal* 117(2014). *See generally* Ellen J. Dannin, *Legislative Intent and Impasse Resolution under the National Labor Relations Act: Does Law Matter?*, 15 *Hofstra Lab. & Emp. L. J.* 11(1998); Ellen J. Dannin, *Collective Bargaining, Impasse and the Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillmen*t, 19 *U. TOL. L. Rev*. 41(1987); Frank H. Stewart and William K. Engeman, *Impasse, Collective Bargaining and Action, U. Cin. L. Rev. 233 1970;* George Schatzki, *The Employer's Unilateral Act-A Per Se Violation-Sometimes*, 44 *Tex. L. Rev.* 470 (1966).

[160] Don Lee Distributors Inc., 322 N.L.R.B. 470 (1996).

[161] *See generally* Dell Bush Johannesen, *Lockouts: Past, Present, And Future*, 1964 *Duke L.J.* 257 (1964); Nelson G. Ross, *Lockouts: A New Dimension In Collective Bargaining*, 7 *B.C. Indus. & Com. L. Rev.* 847 (1966).

[162] Section 13 of the NLRA: "*Nothing in this Act shall be construed so as either to interfere with or*

impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right". *See generally* Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, *U. Ill. L. Rev.* 547 (1990).

[163] NLRB v. Sands Manufacturing Co., 306 U.S. 332 (1939).

[164] Mackay Radio & Telegraph Co., 304 U.S. 333 (1938), where the statement on the employer right to carry on the business during strike was rather gratuitous, since the case involved primarily an alleged discrimination by the employer in the choice of the employees to be resumed in their employment after the strike. For an insightful comment, *See* Julius G. Getman, Thomas C. Kohler, *The Story of NLRB v. Mackay Radio & Telegraph Co.: The High Cost of Solidarity*, Laura J. Cooper, Catherine L. Fisk (eds), *Labor Law Stories* (2005), at 13.

[165] Laidlaw Corp., 171 N.L.R.B. 1366, 1368-70 (1968).

[166] *See* Lance Compa, *Striker Replacements: A Human Rights Perspective*, 10(1) *Perspectives on Work* 26 (2006). *See* also James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 *Employee Rts. & Emp. Pol'y J.* 65 (1999); Daniel Pollit, *Mackay Radio: Turn It Off, Tune It Out*, 25 *U.S.F. L. Rev.* 295 (1991), at 296, in terms of right to strike as "*broken promise*". For a proposal on a statutory regulation of employer right to replace strikers, *See* Samuel Estreicher, *Collective bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 *Mich. L. Review* 577 (1994). Another limitation to industrial action is the ban on "*secondary boycotts*," which occurs when employees on strike call for solidarity action by other employers' worforce. *See generally* Bernard Cushman, *Secondary Boycotts and the Taft-Hartley Law*, 6(2) *Syracuse Law Review* 109 (1954). However, this provision was a "*child of its time*" and it is now hardly challenged in the context of global environment: *See* Matthew W. Finkin, *Employer Neutrality as Hot Cargo: Thoughts on the Making of Labor Policy*, 20 *Notre Dame J.L. Ethics & Pub. Pol'y* 541 (2006).

[167] *See* Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 *Minn. L. Rev.* 183 (1980), at 191, quoting J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). On the historical development of the institutions to protect the minorities under the exclusive representative rule, *See* Herbert Schreiber, *The Origin Of The Majority Rule And The Simultaneous Development Of Institutions To Protect The Minority: A Chapter In Early American Labor Law*, 25 *Rutgers L. Rev.* 237 (1971).

[168] *See generally* Michael Evan Gold, *An Introduction to Labor Law* (2014), 3rd ed., at 19; Rita Gail Smith, Richard A. Parr II, *Protection Of Individual Action As "Concerted Activity" Under The National Labor Relations Act*, 68 *Cornell L. Rev.* 369 (1983); Archibold Cox, *The right to engage in concerted activities*, 26(3*) Indiana Law Journal* 319 (1951)

[169] For instance, the Supreme Court ruled that this right included also concerted refusal to work in unsafe conditions: in the case at stake, seven non-unionized employees were laid off due to their refusal to to work in a bitterly cold environment: NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

[170] *See generally* Clyde W. Summers, *Unions without majority – a black hole?*, 66 *Chicago-Kent Law Review*,531 (1990), stressing on the distinction between the protection of concerted activity (Section 7 of the NLRA) and the exclusive agent mechanism (Section 9 of the NLRA): "*indeed, the rights guaranteed in section 7 are expressed in terms of rights of employees, and may be exercised with or without a union. Section 9(a) qualifies or limits the exercise of section 7 rights by employees or minority unions only when there is a majority union with exclusive representation rights*". For a different view, *see* Julius Getman, *The national labor relations act: what went wrong; can we fix it?*, 45 *B.C. L. Rev.* 125 (2004), at 137.

[171] *See* Alan Hyde et Alii, *After Smyrna: Rights And Powers Of Unions That Represent Less Than A Majority*, 45 *Rutgers L. Rev.* 637 (1993), at 668: "*this is quite well-established legally and stems simply from the fact that protected concerted activities, labor organizations and exclusive representative are three quite distinct concepts in labor law, listed here in decreasing order of scope*".

[172] *See* Catherine L. Fisk and Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 *A.B.A. J. Lab. & Emp. L.* 1 (2012), at 5.

[173] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); Epilepsy Found of N.E. Ohio, 331 N.L.R.B. 92 (2000).

[174] International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961); Olin Industries, Inc., 86 N.L.R.B. 203 (1949), enforced, 191 F.2d 613 (5th Cir. 1951); Agar Packing & Provision Corp., 81 N.L.R.B. 1262 (1949)

[175] Yet, an unfair labor practice occurs even when an employer negotiated a contract with a non-majority union notwithstanding that the union had subsequently attained majority status when the contract was signed: Majestic Weaving Co., Inc., 147 N.L.R.B. 859 (1964).

[176] Office Gen. Counsel NLRB, Advice Memo, GC 07-02, Dick's Sporting Goods 1 (22nd June 2006).

[177] J.L. Case Co. v. NLRB, 321 U.S. 332 (1944).

[178] Steele v. Louisville & Nashville R.R. Co. et al., 323 U.S. 192 (1944); Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952).

[179] Steele v. Louisville, *supra note 179*. The discriminatory conduct in union negotiation is now questionable also under Title VII of the "Civil Rights Act" of 1964. *See* Herbert L. Sherman Jr., *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 *MINN. L. REV.* 771 (1965); Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 *N.Y.U. L. REV.* 449 (1971).

[180] Vaca v. Sipes, 383 U.S. 171, 190 (1967), where the Court held that the duty of fair representation applied to grievance and arbitration proceedings as well. *See* also Humphrey v. Moore, 375 U.S. 350 (1964), in terms of "*honesty and good faith*", and Ford Motor Co. v. Huffinan, 345 U.S. 330 (1953), requiring a "*wide range of reasonableness*" to orient the exclusive representative's bargaining activity. *See generally* George Schatzi, *Majority Rule, Exclusive Representation, And The Interests Of Individual Workers: Should Exclusivity Be Abolished?*, 123 *U. Pa. L. Rev.* 897 (1975), at 901-913.

[181] The issue is scrutinized under different points of view in Jean T. McKelvey (ed.), *The duty of fair representation* (1977). *See generally* Timothy J. Boyce, Ronald Turner, *Fair Representation, The NLRB, And The Courts* (1984); Lee M. Modjeska, *The Supreme Court and the Duty of Fair Representation*, 7(1) *Ohio State Journal on Dispute Resolution* 1 (1991); Kurt L. Hanslowe, *The Collective Agreement and the Duty of Fair Representation*, *Labor Law Journal* 1052 (1963); John H. Fanning, *The duty of fair representation*, 19(5) *Boston College Law Review* 813(1978), at 814: "*a union needs to be able to compromise employee demands without fear that its actions will result in civil liability. Such flexibility is the essence of its bargaining power*".

[182] Bureau of Labor Statistic, U.S. Department of Labor, *Economic News Release: Union Membership (Annual) News Release*, *http://www.bls.gov/news.release/union2.htm* (January 2015).

[183] *See* the account by Victor G. Devinatz, *The Crisis Of Us Trade Unionism And What Needs To Be Done*, 1 *Labor Law Journal* 5 (2013), at 6.

[184] *See* Janice R. Bellace, *Labor Law for the Post Industrial Workplace: Breaking the New Deal Model in the USA*, Janice R. Bellace and M.G. Rood (eds.), *Labour Law at the Crossroads: Changing Employment Relationships* 11 (1997), at 12, criticizing, *inter alia*, the system option for the sole company (and not sectoral) negotiation. On this point, *See* also Matthew Dimick, *Productive Unionism*, 4 *UC Irvine L. Rev.* 679 (2014). On the original inadequacy of the Wagner Act, with regards to the goal of granting a democratic process in employee representative elections as well as in the unique bargaining agent's decision, *See* Steven L. Wilborn, *Industrial Democracy and the National Labor Relations Act: A preliminary Inquiry*, 25(4) *Boston College Law Review* 785 (1984). On different grounds, *See* Richard A. Epstein, *supra note 153*, at 1357, arguing that the Wagner Act (and, in general, the New Deal labor legislation) had to be "*scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law*".

[185] *See* James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Processes*, 74 *N.C. L. Rev.* 939 (1996).

[186] *See* David Weil, *The Fissured Workplace. Why work became so bad for so many and what can we do to improve it* (2014). *See* also, for the implication of the precariety at workplace on the collective labor representation, Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 *Ind. L.J.* 1 (2001).

[187] *See* Katherine V.W. Stone, *From Widgets to Digits. Employment Regulation for the Changing Workplace* (2004), at 206-209.

[188] *See* Thomas C. Kohler, *The Overlooked Middle*, 69 *Chi.-Kent L. Rev.* 229 (1994).

[189] *See* Michael A. Round, *Grounded: Reagan and the PATCO Crash* (1999); Willis. J. Nordlund, *Silent Skies: The Air Traffic Controllers' Strike* (1998).

[190] Among these, health and safety at the workplace and special protection in the event of mass layoffs. *See* Occupational Safety and Health Act (OSHA) of 1970 and Workers' Adjustment and Retraining Notification Act (WARN) of 1988.

[191] *See* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 *Neb. L. Rev.* 7 (1988).

[192] *See* Cynthia L. Estlund, *Rebuilding The Law Of The Workplace In An Era Of Self-Regulation*, 105(2) *Columbia Law Review* 319 (2005), at 321; Katherine V.W. Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 *U. Chi. L. Rev.* 575 (1992), at 591. On the possible "*galvanization*" of labor law through the enactment of employment statutes, Benjamin I. Sachs, *Employment law as labor law*, 29 *Cardozo L. Rev.* 2685 (2008). *Compare* Keith N. Hylton, *Law and the future of organized labor in America*, 49 *Wayne L. Rev.* 685 (2004).

[193] *See* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26(2) *Berkeley Journal of Employment & Labor Law* 223(2005).

[194] *See extensively* Paul C. Weiler, *Governing the Workplace. The Future of Labor and Employment Law* (1990), at 48-104.

[195] *See Sanford M. Jacoby*, *Employing Bueaucracy. Managers, Unions, and the Transformation of Work in 20th Century* (2004), rev. ed., at 214.

[196] U.S. Department of Labor. 1994. Report and Recommendations: Commission on the Future of Worker-Management Relations. Washington, D.C.: Government Printing Office, December.

[197] Electromation, Inc. v. Teamsters Local 1049, 309 N.L.R.B. 990 (1992), upheld by Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994). In a nutshell, Electromation, a nonunion manufacturing plant, formed employee "action committees" to consider issues such as absenteeism and attendance bonuses and thus, according to NLRB, breached the rule banning company union under Section 8(a)(2)1 of the NLRA.

[198] E.L duPont de Nemours, 311 N.L.R.B. 893 (1993), where Board upheld the unfair labor practice charges against a company that set up six safety committees and a fitness committee. For a complete account on the "Electromation" and the "Dupont" cases, *See* Robert B. Moberly, *The Story of Electromation: Are Employee Participation Programs a Competitive Necessity or a Wolf in Sheep's Clothing?*, Laura J. Cooper, Catherine L. Fisk (eds.), *Labor Law Stories* (2005), at 315-351.

[199] The TEAM ACT would have amended Sec. 8(a)(2) of the NLRA, allowing an exception for employers who set up, assist, and/or participate in EPPs "*to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer*". *See* Carol Brooke, *Nonmajority Unions, Employee Participation Programs, And Worker Organizing: Irreconcilable Differences?*, 76 *Chi.-Kent L. Rev.* 1237 (2001), at 1238 and 1239.

[200] Employee Free Choice Act 2009, H.R. 1409, 11th Cong. (2009). For a midly positive evaluation and an extensive comment, *See* Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 *Harv. L. Rev.* 655 (2010); William B. Gould, IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 *La. L. Rev.* 1 (2010), canvassing the Bill as a first step in an overall reform of the NLRA. For critical remarks to the "EFCA" Bill, due to the secrecy of the card check procedure, *See* Richard A. Epstein, *The Employee Free Choice Act Is Unconstitutional*, *WALL ST. J.*, 19th Dec. 2008.

[201] For a favourable opinion on the "EFCA" Bill, *See* Catherine L. Fisk, Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 *La. L. Rev.* 47 (2010).

[202] *See* Victor G. Devinatz, *The Continuing Controversy over Right-to-Work Laws in the Early Twenty-First Century*, 23 *Employment Responsibility Rights Journal* 287 (2011).

[203] *See* Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 *Chi.-Kent L. Rev.* 195 (1994), at 197, observing how the idea of members-only representation draws from the historical wellspring in practice and, to a limited extent, in law as well. *See* also Charles B. Morris, *The Blue Eagle At Work: Reclaiming Democratic Rights In The American Workplace* (2005), advocating that unions should envision the members-only representation to face labor decline, without necessarily amending the NLRA.

[204] *See* Cynthia L. Estlund, *Regoverning the Workplace. From Self-Regulation to Co-Regulation* (2010), at 162-188.

[205] *See* George Schatzi, *supra note 181*, at 919-933; Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: a Call for Comprehensive Reform*, 94 *Marq. L. Rev.* 765 (2011), at 830; Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 *Cornell Law Review* 1542 (1999), at 1616; Clyde W. Summers, *Questioning the unquestioned in "Collective Labor Law"*, 47 *Cath. U. L. Rev.* 791 (1998), at 800-801.

[206] *See* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *Yale L. J.* 148 (2014), at 183. On the possible return to social movement unionism in the US, *See* Lowell Turner, Richard Hurd, *Building Social Movement Unionism. The Transformation of the American Labor Movement*, Lowell Turner, Harry C. Katz, Richard Hurd (eds.), *Rekindling the movement. Labor's quest for relevance in the 21st century* (2001), at 9.

[207] *See* Paul C. Weiler, *supra note 195*, at 186-224; Paul C. Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 *YALE L.J.* 1907 (1993), at 1922; Samuel Estreicher, *Deregulating Union Democracy*, 2000 *COLUM. Bus. L. REV.* 501 (2000), at 521, in favor of the possibility to conventionally determine a system of representation other than the NLRA election system and, at the same time, to bolster the "exit" chances of employees from representation, by subjecting bargaining agencies to periodic secret-ballot reauthorization votes.

[208] *See* Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 *Yale L. & Pol'y Rev.* 729 (1999), at 808, proposing that, leaving Section 8(a)(2) of the NLRA unchanged, the definition of a "*labor organization*" under Section 2(5) of the NLRA might be narrowed to include only independent associations of workers formed for the purpose of collective bargaining. *See* also Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 *A.B.A. J. Lab. & Emp. L.* 327 (2011); Orly Lobel, *Agency And Coercion In Labor And Employment Relations: Four Dimensions Of Power In Shifting Patterns Of Work*, 4 *U. Pa. J. Lab. & Emp. L.* 121 (2002).

[209] *See* Sanford M. Jacoby, *Reflections On Labor Law Reform And The Crisis Of American Labor*, 69 *Chi.-Kent L. Rev.* 219 (1994), at 222.

[210] *See* William B. Gould IV, *Labor Law and Its Limits: Some Proposals For Reform*, 49 *Wayne L. Rev.* 667 (2004), at 680 and 681; Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 *Geo. Wash. L. Rev.* 1812 (1993), at 1834. These initiatives arose to somehow counter the far-reaching limitations deriving from the interpretation by NLRB on the mentioned ban on company unions pursuant to Sec. 8(2)(a) of the NLRA: *See supra notes 198 and 199*.

[211] *See* Janice R. Bellace, *The Role Of The Law In Supporting Cooperative Employee Representation Systems*, 15 *Comp. Lab. L.J.* 441 (1994), at 458-460; Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 *Mo. L. Rev.* 607 (2004); Clyde W. Summers, *Employee Voice And Employer Choice: A Structured Exception To Section 8(A)(2)*, 69 *Chi.-Kent L. Rev.* 129 (1994), at 148, only where there is no majoritarian union that may carry out collective bargaining representation; Jamin B. Raskin, *Reviving the Democratic Vision of Labor Law*, 42 *Hastings L.J.* 1067 (1991).

[212] *See* Matthew W. Finkin, *Employee Self-Representation and the Law in the United States*, 50 *Osgoode Hall L. J.* 937 (2013).

[213] *See* Rachel Aleks, *Estimating The Effect Of "Change To Win" On Union Organizing*, 68 *ILR Rev. J. Work & Pol'y* 584 (2015); Victor G. Devinatz, *Why Politics Should Not be Liberated From Collective Bargaining: Problems with the Unbundled Union Regime*, 66(2) *Labor Law Journal* 99 (2015).

[214] *See* Kenneth G. Dau-Schmidt, *The Changing Face Of Collective Representation: The Future Of Collective Bargaining*, 82 *Chi.-Kent L. Rev.* 903 (2007), at 904-905.

[215] *See* Vincenzo Bavaro, *La razionalità pratica dell'art. 19 st. lav. e la democrazia industriale*, 184 *WP C.S.D.L.E. "Massimo D'Antona".IT* (2013), at 14-16.

[216] *See* Mario Napoli, *La Corte Costituzionale "legifera" sulla Fiom nelle Aziende Fiat*, 4 *Lavoro e Diritto* 521 (2013), at 523.

[217] Moreover, the urge to govern the plurality seems to affect specifically the union role in collective

negotiations, whereas significant spheres of union representational activity in Italy (*e.g.*, the organization of employee meetings and the promotion of union activity at the workplace) pluralism deserves a lower degree of control.

[218] *See* Giuseppe Berta, *Produzione intelligente. Un viaggio nelle nuove fabbriche* (2014), at 87.

[219] It is noteworthy that, in accordance with courts' interpretation of Article 40 of the Italian Constitution, the right to strict is protected as an individual employee's right in the Italian scenario. *See generally*, Franco Carinci, *Il diritto di sciopero: la nouvelle vague all'assalto della titolarità individuale*, 123(3) *Diritto del Lavoro e delle Relazioni Industriali* 423(2009).

[220] *See* Vincenzo Bavaro, *Il principio maggioritario nelle relazioni industriali*, 1 *Lavoro e Diritto* 3 (2014); Francesco Santoni, *Contrattazione collettiva e principio di maggioranza*, I(1) *Rivista Italiana Diritto del Lavoro* 79 (2013).

[221] *See* Raffaele De Luca Tamajo, *Postfazione*, Paolo Rebaudengo, *supra note 27*, at 106.

[222] *See* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 *Tex. L. Rev.* 921 (1993).

[223] *See* James A. Gross, *A Shameful Business. The Case for Human Rights in the Maerican Workplace* (2010), at 43-65.

[224] On a possible link between (certain forms of) unionization and productivity, *See* Richard Barry Freeman, James L. Medoff, *The Impact of Collective Bargaining* (1981).

[225] On the "*implicit or hinten values*" rooted in US History prior to the Wagner Act, influencing the interpretation of the NLRA, *See* James B. Atleson, *Values and Assumptions in American Labor Law* (1983).

[226] *See* Lance Compa, *The Wagner Model and International Freedom of Association Standards*, Dominic Roux (ed.), *Autonomie Collective et Droit du Travail: Mélanges en l'Honneur du Professeur Pierre Verge* (2014), at 459.

[227] *See* Lance Compa, *Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies*, 4 *UC Irvine L. Rev.* 609 (2014), at 618.

[228] *See* P.R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 *N.C.L. Rev.* 45 (2000), at 73-74.

[229] *See* Kent Wong, *A new Labor Movement for a New Working Class: Unions, Worker Centers, and Immigrants*, 36(1) *Berkley Journal of Employment & Labor Law*, 205 (2015); Ellen Dannin, *Not A Limited, Confined, Or Private Matter - Who Is An "Employee" Under The National Labor Relations Act*, 59 *Labor Law Journal* 5 (2008), with particular regard to the concerted employee activity in the premises of other employers.

[230] *See* Otto Kahn-Freund, *supra note 1*, at 20.

[231] *See* James J. Brudney, *Gathering Moss: The NLRA's Resistance to Legislative Change*, 26 *A.B.A. J. Lab. & Emp. L.* 161 (2011), convincingly explaining the reasons of the failure of the NLRA reform attempts in 1978 and 1992.

[232] *See* Lydia DePillis, *Auto Union Loses Historic Election at Volkswagen Plant in Tennessee*, *Washington Post*, 14th Febraury 2014; Steven Greenhouse, *Volkswagen Vote is Defeat for Labor in South*, *The New York Times*, 14th February 2014.

[233] Interestingly, the same UAW did not complain much that VEBA was conferred upon the right to appoint only one member in Chrysler board and that its stock in Chrysler did not entail any voting right. However, the voice in governance was not the hot issue in the negotiation, which was much more focused on the preservation of working conditions (and jobs continuity), along the traditional bread-and-butter pattern.

[234] *See* Marco Biasi, *Il nodo della partecipazione dei lavoratori in Italia. Evoluzioni e prospettive nel confronto con il modello tedesco ed europeo* (2013).

[235] *See* Milton Derber, *Collective bargaining: The American approach to industrial democracy*, 431 *The Annals of the American Academy of Political and Social Science* 83 (1977); Roy J. Adams, *The Right to Participate,* 5(2) *Employee Responsibilities and Rights Journal*, 91 (1992); Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 *Clev. St. L. Rev.* 29 (1979), at 41: "*the only permissible form of industrial democracy is collective bargaining conceived as an adversarial collective bargaining process. Employees are forced to a choice, not between industrial democracy and no industrial democracy, but between unions and no industrial democracy*".

[236] *See* A.B. Cochran III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act,* 16(2) *Berkeley J. Emp. & Lab. L.* 458 (1995); Marco Biasi, *On uses and misuses of worker participation. Different forms for different goals of employee involvement*, 30(4) *I.J.C.L.L.I.R.* 459 (2014), at 481, quoting the motto of French protesters in May 1968: "*je participe, tu participes, il participe, nous participons, vouz participez, ils profitent*".

[237] *See* Harry C. Katz, Charles F. Sabel, *Industrial Relations & Industrial Adjustment in the Car Industry*, 24(3) *Industrial Relations* 295 (1985), at 314: "*the unions will have to find ways of tying the interest of particular companies to the interests of their industry, and even of the company as a whole*".

[238] *See* Ralf Dahrendorf, *Class and Class Conflict in Industrial Society* (1959), at 257-278.

[239] *Compare* Bob King's speech on the shift between XX and XXI Centruy Unionism, *supra note 20*, with the statement by District Judge Nields in United States v. Weirton Steel Co., 10 F. Supp. 55, 86 (D. Del. 1935), quoted by Raymond L. Hogler, *supra note 133*, at 84: "*the idea of a conflict of interest between labor and capital was the traditional old world theory. It is not the Twentieth Century American Theory of that relation as dependent upon mutual interest, understanding and good will*".

[240] *See* Cynthia L. Estlund, *Something Old, Something New: Governing The Workplace By Contract Again*, 28 *Comp. Lab. L. & Pol'y J.* 351 (2007), at 357: "*Collective bargaining…is well suited in principle to accommodating the varied and changing needs and possibilities that firms and workers face throughout the economy... but society, for its part, needs to make it possible for labor to organize-to exercise their internationally recognized freedom to associate and bargain collectively*". *See* also Charles B. Cravert, *Why Labor Unions Must [And Can] Survive*, 1 *U. Pa. J. Lab. & Emp. L.* 15 (1998); Joel Rogers, *Reforming U.S. Labor Relations*, 69 *Chi. Kent L. Rev.* 97 (1994).

[241] *See* Harry Shulman, *Reason, Contract, And Law In Labor Relations*, 68 *Harv. L. Rev.* 999 (1955).

[242] *See* Bill Vlasic, *Autoworkers go to Fiat Chrysler for First Talks*, *The New York Times*, 14th September 2015.

[243] *See* Giorgio Barba Novaretti, Gianmarco I.P. Ottaviano, *Made in Torino? Fiat Chrysler Automobiles e il futuro dell'Industria* (2014), at 14, with regards to the incomes of FCA Group in 2014.

[244] *See* Brent Snavely, *FCA-UAW contract sets new wage range for 2nd tier*, *Detroit Free Press*, 17th September 2015.

[245] *See* Greg Gardner, Brent Snavely, *UAW, FCA officials miscalculated young worker angst*, *Detroit Free Press*, 4th October 2015.