Charles Morris, a distinguished U.S. labor law professor, wants us to believe that 60 years of reliance on the most deeply-ingrained element of U.S. industrial relations has been completely wrong. And if he’s right, union representation and collective bargaining can be extended to millions of U.S. workers without reforming a single law or overturning a single legal precedent. Even those who want to believe Morris’s thesis have to be quite skeptical.

A little background is necessary. In the U.S. model of exclusive representation with majority support, a labor union only has workplace rights when it can demonstrate that a majority of the workers want it to represent them. Such support is typically demonstrated through a secret ballot election supervised by the National Labor Relations Board (NLRB). With this majority support, a union is certified as the exclusive bargaining agent and must bargain for and otherwise represent all of the employees regardless of whether they pay dues or support the union. Without majority support, unions are non-entities—employers can shut them out of the workplace and refuse to deal with them. Multiple unions representing the same set of workers in a single workplace and minority unions representing less than a majority of the workers are therefore not part of the U.S. industrial relations system.

Outside of North America, this model of exclusive representation with majority support and the accompanying NLRB election process have appeared odd for many years. North American
scholars and advocates increasingly share this view. The emphasis on majority support is seen as depriving many workers of union representation when they are in the minority in a specific workplace. And the NLRB election process is seen as giving employers fertile opportunities for fighting unions and preventing them from winning majority support. In fact, employer resistance in the context of such elections is widely believed to be a critical reason for the weak state of U.S. labor unions; legislative reform of the NLRB election process tops the wish list of the American labor movement.

Into this pessimistic situation steps Professor Morris with a determined and provocative thesis: undeterred by more than 60 years of thoroughly-ingrained conventional wisdom in law and in practice, *The Blue Eagle at Work* argues that minority unionism is fully supported by existing U.S. labor law. In other words, it is universally accepted that U.S. employers only have an obligation to bargain with a union after it has been certified as representing a majority of employees, but Morris argues that in the absence of a union with majority support, the National Labor Relations Act (NLRA) also obligates employers to bargain with unions on a members-only basis. This is referred to as minority unionism.

Central to Professor Morris’s thesis is his demonstration that members-only collective bargaining was common when the NLRA was passed in 1935. This is important because it therefore logically follows that absent any explicit statements to the contrary, the legislative intent was to continue to allow such arrangements. In fact, the famous 1937 General Motors sit-down strike resulted in a members-only agreement because the United Auto Workers did not have majority support, and members-only agreements were common in steel and other industries in 1937. But
unions quickly became victims of their own success—in the late 1930s and early 1940s, they were so successful in winning majority support through the NLRB that the use of members-only minority unionism faded away. Morris also shows that members-only minority unionism was never ruled to be illegal.

But *The Blue Eagle at Work* takes matters one (huge) step further—in the absence of a majority union, employers have an affirmative legal obligation to bargain on a members-only basis when requested by a minority union. Because of the absence of minority unionism in the United States for so long, the entire academic, legal, and practitioner industrial relations community has assumed that there is no such obligation. When pushed to justify such an assumption, it’s natural to point to section 8(a)(5) of the NLRA which prohibits employers from refusing to bargain with unions as an exclusive representative when they can demonstrate majority support.

So employers only have an obligation to bargain when a union has majority support, right? WRONG, argues Morris. Through a meticulous analysis of the legislative history of the NLRA—including a careful look at each draft of the proposed legislation which interested scholars will find fascinating—Morris shows that section 8(a)(5) was not intended to be limiting. Rather, section 8(a)(1) is the “universal enforcer” as it bans all forms of employer interference with employee collective action—including the refusal to bargain with a minority union. The other unfair labor practices, including section 8(a)(5), were included only to reinforce the illegality of the most important employer violations at the time. Before the passage of the NLRA, some employers would agree to bargain with a union that had majority support, but would not recognize the union as the *exclusive* representative of all of the employees. Instead, the employer
would only agree to apply the resulting contractual terms to union members and would push alternative company unions for non-members. To promote stable collective bargaining arrangements, section 8(a)(5) explicitly reminds employers that when a union has majority support, the employer must recognize the union as the exclusive representative of all employees and bargain with it accordingly. When seen in this light, Morris argues that section 8(a)(5) does not limit employers’ bargaining obligations to majority unions. And since a refusal to bargain with a minority union also violates section 8(a)(1), employers have an obligation to bargain with minority unions on a members-only basis in the absence of certified majority union. Such a legal obligation was established by the precursor to the NLRB, and absent restrictions to the contrary, was continued in the NLRA according to Morris.

*The Blue Eagle at Work* is on its weakest footings in chapters 6 and 7 when Morris argues that the protection of freedom of association in the U.S. Constitution and in the International Covenant on Civil and Political Rights implies that companies have an obligation to bargain with minority unions. The power of Morris’s NLRA-based arguments is that they are rooted in past practice, legislative intent, the plain meaning of the statute, and the absence of legal rulings to the contrary. But with freedom of association, this is not the case. Bargaining is not within the plain meaning of “freedom of association” and instead relies on a claim that many European (and U.S.) readers will object to: “Without the ability to exercise [a] bargaining function, there is no incentive, rhyme, or reason for [a labor union] to be organized or even to exist” (p. 124). Only with this belief does freedom of association necessarily equate to bargaining, and even Morris repudiates this excessively narrow vision of unionism when he later describes the functions that a union “can fill superbly without reference to the collective bargaining process” (p. 191). Morris
also overlooks the dichotomy between joining a union (freedom of association) and bargaining that has been well-established by the courts in the U.S. public sector. But this weak footing is not essential for his thesis.

Morris also candidly likes to play devil’s advocate so as to not leave any stone unturned when facing what he knows will be skeptical readers. In this spirit, I also raise an issue that would have been beneficial to address. In a system of majority rule, there is a tension between infringing on the rights of a minority to engage in bargaining (when the majority is not interested) and infringing on the rights of a minority not to engage in bargaining (when the majority favors collective bargaining). While full of faults, the existing conventional wisdom is at least consistent—the majority always rules. Promotion of minority unionism in the absence of majority support while maintaining exclusive representation when there is majority support creates inconsistencies in the respect accorded to minority rights. Some might object to this inconsistency.

Lest the book start to seem like esoteric legal squabbles, it bears emphasizing that if Morris is correct, then the ramifications for U.S. industrial relations are huge (as he explains). There is the potential for private sector U.S. industrial relations to undergo the biggest change since 1947, or even 1935—all without any new laws or overturning any legal precedents. Not only will many workers obtain union representation when a majority of their co-workers are not interested, but the entire industrial relations environment might be altered. Morris shows how Senator Wagner—the father of the NLRA—viewed minority unionism as a stepping stone to full-fledged majority unionism, especially as the benefits of union representation are vividly demonstrated to
skeptical co-workers. The organizing process can thus change as unions can focus their attention on building organizations rather than winning elections. Incentives for intense employer resistance are also weakened in both the election process and in negotiating first contracts because the current goal of keeping unions entirely out of a workplace is largely removed. Minority unionism can also encourage diverse new forms of workplace representation, and can provide widespread *Weingarten* rights because workers facing discipline can instantly join their workplace union.

Supporters of a vibrant U.S. labor movement have floated many strategies for revival. Whether Professor Morris’s thought-provoking argument is embraced in future legal rulings and union strategies will have to wait the test of time. In the meantime, *The Blue Eagle at Work* is an must-read for scholars and practitioners interested in the development of U.S. labor law and the future of U.S. unions. It is a well-written, engaging, and provocative book with something for everyone—careful legal scholarship for attorneys, judges, and legal scholars, a fascinating analysis of the drafting of the NLRA and its environmental context for historians, concrete strategies for unionists (including advice for picket sign language and a draft letter for minority unions to request bargaining), a fresh vision of U.S. industrial democracy for industrial relations scholars, and renewed hope for anyone interested in U.S. social justice. Non-U.S. readers will particularly enjoy Morris’s revelations on the evolution of the curious U.S. system of exclusive representation and his stimulating ideas for labor union revival.

But what about the skeptics? As I began reading *The Blue Eagle at Work*, I quickly developed a mental list of fatal flaws that surely the author overlooked. And I won’t be surprised if a cottage
industry springs up among academics trying to find the fatal flaw. But as I read further, Morris systematically raised and countered each of my objections. Can 60 years of accumulated practice and conventional wisdom really be so wrong? *The Blue Eagle at Work* is very persuasive and I’m now convinced that the conventional wisdom is indeed wrong. But don’t take my word for it—*The Blue Eagle at Work* is waiting to take on all skeptical challengers.

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