Political Unions, Free Speech, and the Death of Voluntarism: Why Exclusive Representation Violates the First Amendment

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INTRODUCTION

Mary Kay Henry, president of the Service Employee's International Union (SEIU), was fired up. In May 2023, she gave an interview to Restaurant Dive.[1]

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1. *See* Aneurin Canham-Clyne, *How the Biggest Private Sector Union Wants to Transform the Restaurant Workforce*, RESTAURANT DIVE (May 1, 2023), https://www.restaurantdive.com/news/how-labor-union-seiu-wants-to-transform-the-restaurant-workforce/648986/ (https://perma.cc/YW5A-8LNN) (interviewing SEIU President Mary Kay Henry).

Her union was then embroiled in a fight over AB 257, a California law that created a labor council for fast-food workers.[2] The union had sponsored the law and helped steer it to passage.[3] The union had also invested years into the process, and along the way made significant concessions.[4] For example, it agreed to drop a provision that would have held fast-food franchisors liable for their franchisees' labor violations.[5] The union gave up that provision because, it hoped, the franchisors would drop their objections to the bill—or at least cool their opposition to a low boil.[6]

But that didn't happen. Only days after the governor signed the bill, a franchisor coalition announced that it would run an opposing referendum.[7] It would ask voters to repeal the law.[8]

So predictably, Kay Henry was agitated. She didn't hesitate to share her thoughts on the referendum. "The question for California voters," she said, "is 'are we going to continue to allow corporations to override what our democratically elected state legislature and governor are trying to do to improve the lives of all Californians?'"[9]

But Kay Henry wasn't just concerned with California. Even outside the Golden State, she noted, organizing in the fast-food industry had proven impossible.[10] The primary barrier was federal law. Federal law required unions to organize workplace by workplace.[11] Unions had to petition for an election in each restaurant and workers in each location could vote on whether they wanted the

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2. Assemb. B. 257, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

3. *See A.B. 257 Is a Big Step Forward for California Fast-Food Workers*, AFL-CIO (Sept. 7, 2022), https://aflcio.org/2022/9/7/ab-257-big-step-forward-california-fast-food-workers#:~:text=The%20passage%20of%20A.B.,fast%2Dfood%20workers%20in%20California [https://perma.cc/DF4D-PQJ7] (crediting the SEIU with steering the bill to passage).

4. *See id.* (describing the SEIU's efforts over "a decade of perseverance and tireless organizing").

5. Canham-Clyne, *supra* note 1 ("The governor's office thought that if they compromised joint liability out, that it would keep the owners from putting it up for a referendum.") (quoting Henry).

6. *See id.*

7. *See* Memorandum from Shirley N. Weber, Cal. Sec'y of State, Referendum 1939: Related to Food Facilities and Employment (Jan. 24, 2023), https://elections.cdn.sos.ca.gov/ccrov/2023/january/23012jh.pdf [https://perma.cc/VC4Q-HX8N] (announcing referendum to challenge A.B. 227). *See also* Nathaniel Meyersohn, *McDonald's, In-N-Out, and Chipotle Are Spending Millions to Block Raises for Their Workers*, CNN BUSINESS (Jan. 26, 2023, 3:28 AM), https://www.cnn.com/2023/01/25/business/california-fast-food-law-workers/index.html [https://perma.cc/ZGS7-XAJH] (reporting that Chipotle, Starbucks, Chick-fil-A, In-N-Out Burger, and Yum! Brands contributed more than $1 million each to fund the referendum).

8. *See* Meyersohn, *supra* note 7 (reporting that referendum, if successful, would "overturn" A.B. 257).

9. Canham-Clyne, *supra* note 1 (quoting Henry).

10. *Id.*

11. *See id.* (complaining that federal law required unions to organize "store-by-store"). *But see* 29 U.S.C. § 159(b) (empowering the NLRB to direct an election in an "appropriate" bargaining unit); Bry-Fern Care Ctr., Inc. v. N.L.R.B., 21 F.3d 706, 711 (6th Cir. 1994) (explaining that while NLRB typically presumes a single facility is an appropriate unit, the presumption does not apply when the petitioning union requests a larger unit).

union's services.[12] So it could take months, or even years, to organize a single restaurant chain.[13] In Kay Henry's view, that was impossible: fast-food workers would "never" unionize that way.[14]

Asked how she planned to solve the problem, she offered a three pronged approach. The first was new state laws.[15] Her union would push for more state-level industry-council schemes like AB 257.[16] It would also push for other minimum-standards laws.[17] Those laws might include higher minimum wages,[18] predictable scheduling requirements,[19] and for-cause termination protections.[20]

Second, she pointed to federal law. Her union would lobby for new federal legislation streamlining the organizing process.[21] Such legislation might even require employers to bargain at a sectoral or industry level—again, much like AB 257.[22]

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12. *See* Canham-Clyne, *supra* note 1 (quoting Henry).

13. *See id.*

14. *Id.*

15. *Id.*

16. *Id. See also* Meyersohn, *supra* note 7 (reporting that unions hoped A.B. 257 would persuade other states to pass similar industry-council laws); *cf.* Minn. S.F. 3035A sec. 3, 93rd Reg. Sess. (2023) (creating the "Minnesota Nursing Workforce Standards Board" to set minimum employment standards across industry and requiring that the board include at least three members from "worker organizations"); N.Y. City Int. No. 1054-2023 (proposing to create joint labor-industry board with power to investigate working conditions and regulate wages for last-mile distribution centers); Max Nesterak, *Minnesota Lawmakers Approve 9 Major Worker-Friendly Changes*, MINNESOTA REFORMER (May 17, 2023), https://minnesotareformer.com/2023/05/17/labor-victory-minnesota-lawmakers-approve-9-major-worker-friendly-changes/#:~:text=The%20bill%20mandates%20paid%20sick,sites%2C%20hospitals%20and%20public%20schools [https://perma.cc/QP7Q-QAAL] (reporting on SF 3035A) ("The board is a leap forward for unions like SEIU Healthcare Minnesota and Iowa, which represent about a quarter of nursing home workers in the state.").

17. Canham-Clyne, *supra* note 1.

18. *Id. See also Home Care and the Fight For $15: Why It Matters*, SERV. EMPS. INT'L UNION, https://www.seiu.org/cards/home-care-and-the-fight-for-15 [https://perma.cc/9FWW-GQNR] (last visited May 26, 2023) (advocating for a $15 minimum wage); Dylan Miettinen, *SEIU's Mary Kay Henry on the Fight for $15's 10-Year Anniversary*, MARKETPLACE (Nov. 28, 2022), https://www.marketplace.org/2022/11/28/fight-for-15-10-year-anniversary-seiu-mary-kay-henry/ [https://perma.cc/H4VN-3BRU] (reporting that "after a decade of protests and advocacy," the SEIU-backed movement had "helped push raising the minimum wage into mainstream political discourse.").

19. *See* Jenny Brown, *A Starbucks Worker Fired for Organizing Got His Job Back Thanks to NYC "Just Cause" Laws*, JACOBIN (Feb. 19, 2023), https://jacobin.com/2023/02/new-york-city-just-cause-firing-law-at-will-employment-starbucks-union-organizing [https://perma.cc/63DG-YQZK] (describing SEIU's role in lobbying for "Fair Workweek Law" in New York City).

20. *See* N.Y. City Int. No. 1396-2019 (adopting just-cause protections for certain fast-food workers); Eliza Bates, *In Historic Victory, New York City Fast Food Workers Become First in the Nation to Win Just Cause Protections*, 32BJ (Dec. 17, 2020), https://www.seiu32bj.org/press-release/in-historic-victory-new-york-city-fast-food-workers-become-first-in-the-nation-to-win-just-cause-protections/ [https://perma.cc/84R8-8YVQ] (praising ordinance as a win for workers); Brian J. Gershengorn & Seth D. Kaufman, *New York City Passes "Just Cause" Legislation for the Fast Food Industry, Greatly Increasing Workplace Protections for Employees*, FISHERPHILIPS (Dec. 24, 2020), https://www.fisherphillips.com/news-insights/new-york-city-passes-just-cause-legislation-for-the-fast-food-industry-greatly-increasing-workplace-protections-for-employees.html [https://perma.cc/YP2V-QPAZ] (describing SEIU local 32BJ as "one of the major proponents of this legislation").

21. Canham-Clyne, *supra* note 1 (quoting Henry).

22. *Id. See also* Mary Kay Henry, President, Serv. Emps. Int'l Union, We're Demanding #UnionsForAll (Aug. 21, 2019), https://www.facebook.com/SEIU/videos/392400058081142/ [https://perma.cc/N4C2-SEZW] (calling on Democratic presidential candidates to support sectoral bargaining);

Only last did she mention private action.[23] Her union might, she said, organize more restaurants through private agreements.[24] But, even then, it would extract those agreements by threatening "government action."[25] If companies didn't deal with the union, she said, they would face "government involvement."[26]

The most striking thing about Kay Henry's interview was how typical it was. Here was the president of one of the most powerful unions in the country, and she was talking about labor issues in purely political terms. If unions were to grow, she seemed to say, they would do it not by organizing new workers, but by lobbying for new laws.[27] Yet, as odd as that might seem, almost no one was surprised. This was just how union leaders talked about the labor movement.[28]

In part, that was because the movement itself had changed. At the turn of the twentieth century, unions were avowedly apolitical.[29] Under the leadership of Samuel Gompers, first president of the American Federation of Labor, unions adhered to the doctrine of "voluntarism"—a rejection of politics in favor of direct industrial action.[30] But voluntarism has been dead for a long time now.[31] Far

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Dylan Matthews, *The Big New Plan to Save Unions Endorsed by Bernie Sanders and Pete Buttigieg, Explained*, VOX (Aug. 22, 2019, 7:40 AM), https://www.vox.com/policy-and-politics/2019/8/22/20826642/mary-kay-henry-seiu-sectoral-bargaining [https://perma.cc/R9MK-M4G8] ("Bargaining by industry, where workers from multiple companies sit across a table from the largest employers in their industry to negotiate for wages and benefits, is standard practice in almost every developed country in the world.") (quoting Henry).

23. *See* Canham-Clyne, *supra* note 1 (quoting Henry).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See id.* (listing only political solutions to organizing problem).

28. *See, e.g.*, *id.*; *Q&A: AFL-CIO President Liz Schuler on Organizing, Infrastructure, Diversity, and How Proud She Is of Her Home Union*, IBEW (Aug. 8, 2022), http://www.ibew.org/media-center/Articles/22Daily/2208/220808_AFL-CIOPresident [https://perma.cc/9LXY-635T] [hereinafter *Schuler Q&A*] (arguing that the "political climate" was the biggest obstacle to organizing and promising a massive political response, nothing that"[t]his year, we are building more than a 'political program'—we are mobilizing for democracy.").

29. *See* John R. Commons et al., HISTORY OF LABOUR IN THE UNITED STATES 132 (1918) (explaining that under Samuel Gompers, the AFL rejected political involvement and widespread government intervention in labor market).

30. *See, e.g.*, Gary M. Fink, *The Rejection of Voluntarism*, 26 INDUS. & LAB. REL. REV. 805, 805 (1973) ("Voluntarism . . . was essentially an anti-statist policy which placed its emphasis on the potential economic power of the trade union movement."); Michael Rogin, *Voluntarism: The Political Functions of an Antipolitical Doctrine*, 15 INDUS. & LAB. REL. REV. 521, 530 (1962) (noting that voluntarism was the "unchallenged practice" of the AFL until the 1920s); Samuel Gompers, President, AFL, The American Labor Movement: Its Makeup, Achievements and Aspirations, Address to the AFL National Convention (Aug. 1914) *in* THE AM. FEDERALIST, 1914, at 621 [hereinafter Gompers, *The American Labor Movement*] (warning that government intervention into labor relations would result in "a long era of industrial slavery."); CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 119 (2005) (explaining that before legal reforms on the 1930s, collective bargaining was founded on voluntarism and direct industrial action).

31. *See* Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS U. L.J. 415, 418 (2010) ("We are now, however, beginning to see a qualitative change in labor's relationship to the state: trade unionism as a supplement to politics."). *See also id.* at 417 (remarking that voluntarism is no longer the view of any major labor organization or leader).

from rejecting politics, modern unions are fully engaged in it.[32] They write policy platforms, endorse political candidates, and fund electoral campaigns.[33] They even have their own political action committees.[34] In fact, as Kay Henry's interview showed, many now see themselves first and foremost as political actors.[35] Unions believe they can score more victories at the ballot box than they can at the

32. *See, e.g.*, PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC SECTOR UNIONS 20 (2023) (arguing that power of modern unions stems in part from status as one of the largest single political donors); DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 24 (1970) ("[M]any labor organizations have greatly increased their efforts to interest the membership in politics through broader education programs and greater emphasis on political editorials and columns in their newspapers and communications media."); David J. Saposs, *Voluntarism in the American Labor Movement*, 77 MONTHLY LAB. REV. 967, 967 (1954) (observing that unions have "become adherents of the concept of Government intervention in economic and social affairs and have found it profitable to engage extensively in political action."). *See also* Jonathan Weisman, *Michigan Democrats Set to Repeal Law That Hampered Unions*, N.Y. TIMES (Mar. 22, 2023), https://www.nytimes.com/2023/03/22/us/politics/michigan-union-repeal.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/KLL2-9SFZ] (reporting on evolving union attitude toward partisan politics in context of Michigan elections in spring 2023) ("Union leaders are more transactional, acknowledging they are getting a return on the investments they made in Democrats last year.").

33. *See, e.g.*, Estreicher, *supra* note 31, at 415–18 (detailing union political contributions, which have risen dramatically in 21st century); BOK & DUNLOP, *supra* note 32, at 35 (noting rising political spending, lobbying, and public advocacy by unions); HOWARD, *supra* note 32, at 107 (reporting that modern unions have organized themselves like political parties, with war chests, campaign staff, legislative functions, and public-relations arms). *See also* Noam Scheiber, *Battle Over Labor Secretary Nominee Reflects a Larger Fight for Biden*, N.Y TIMES (Apr. 20, 2023), https://www.nytimes.com/2023/04/20/business/economy/julie-su-labor-secretary.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/JKP2-EDBD] (reporting that AFL-CIO endorsed Biden's nominee for Secretary, Julie Su, and that the AFL-CIO would spend "six figures" buying ads to promote her nomination); Ian Kullgren, *Julie Su Hits the Senate: Key Points from DOL Nominee's Hearing*, BLOOMBERG LAW (Apr. 20, 2023, 4:35 PM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/daily-labor-report/BNA%2000000187-a001-da28-af87-fad5b8730000?isAlert=false&item=body-link [https://perma.cc/V9TQ-CD5T] ("In advance of committee vote next week, the AFL-CIO made an unprecedented six-figure ad buy to influence public opinion in Arizona, West Virginia, and other key states.").

34. *See, e.g.*, *PAC Profile: Service Employees International Union*, OPEN SECRETS, https://www.opensecrets.org/political-action-committees-pacs/service-employees-international-union/C00004036/summary/2020 [https://perma.cc/3WCV-28E6] (last visited June 6, 2023) (reporting on contribution activity by SEIU's PAC from 2019 to 2020). *See also* Saposs, *supra* note 32, at 971 (noting that major unions no longer form ad hoc committees for each election; they instead maintain "specialized political arms" manned by "experience staffs which function continuously on a professional basis"); Zach Williams et al., *Lefty Groups Like Working Families Party Mobilize Voters to Save Gov. Hochul Amid Zeldin Surge*, N.Y. POST (Oct. 28, 2022, 7:06 PM), https://nypost.com/2022/10/28/working-families-party-mobilizes-voters-to-save-hochul/amp/ [https://perma.cc/4YAX-3A9J] (reporting that N.Y. State United Teachers Union gave $500,000 to a PAC supporting Democratic candidate for governor of New York).

35. *See, e.g.*, *Schuler Q&A*, *supra* note 28 ("We can't just get out the vote every four years[;] we have to be active participants in every voting cycle. And that is where our focus lies."); *The Steward as Political Organizer*, SERV. EMPS. INT'L UNION, https://www.seiu.org/cards/the-complete-stewards-manual/the-steward-as-political-organizer/p19 [https://perma.cc/KF3C-W7NY] [hereinafter *Steward as Political Organizer*] ("To protect our members' interests, the union must be involved in electing candidates who will pass and enforce laws which will increase and protect our rights and benefits."). *See also* Estreicher, *supra* note 31, at 415–18 (describing shift of modern unions away from traditional direct action and toward government, legislation, and political engagement; they now function mainly as "political organizations").

bargaining table.[36] And they put their money where their mouth is, spending six dollars on politics for every four dollars they spend on anything else.[37]

That shift in focus has changed not only union tactics, but also the very meaning of unionism.[38] Modern unionism goes hand in hand with a suite of other political views.[39] It embraces positions on taxes, climate change, homelessness, and a swath of other social and economic issues.[40] As a result, it has become harder and

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36. *See, e.g.*, Schuler Q&A, *supra* note 28 ("We need to elect people, especially union members, who share our values and who put worker first. That will result in guaranteed change."); *see also* Estreicher, *supra* note 31, at 415 (observing that unions have increasingly failed to achieve bargaining demands and turned instead toward politics); BOK & DUNLOP, *supra* note 32, at 316–17 (citing examples of unions that have secured gains mostly through legislation, including unions at the U.S. Postal Service); Saposs, *supra* note 32 at 967 (arguing that labor shifted emphasis toward politics in the mid-nineteenth century because of increased government intervention in the labor market); Milton and Rose Friedman, *Free to Choose: A Personal Statement*, in THEORIES OF THE LABOR MOVEMENT 300 (Simeon Larson & Bruce Nissen, eds., 1987) (arguing that unions had learned that it was easier to enforce their demands through legislation than through direct action). *See also, e.g.*, Miettinen, *supra* note 18 (reporting that in response to union campaign, a dozen states and the District of Columbia raised their minimum wages); Brown, *supra* note 19 (reporting SEIU's role in lobbying for and passing predictive scheduling, minimum wage, and just-cause protections in New York City); Weisman, *supra* note 32 (quoting Ron Bieber, president of Michigan AFL-CIO, as saying that union expenditures on Democrats would pay off through "the difference between what it means to have a worker-friendly administration and legislature and the worker-suppression attacks that we had before").

37. *See* HOWARD, *supra* note 32, at 101 (estimating that unions allocate 58% of all spending to political activities).

38. *See* Estreicher, *supra* note 31, at 417 (explaining that while unionism was once an "expression of self-organization of working people," it is now a "political organization"); *see also* BOK & DUNLOP, *supra* note 32, at 40 (describing rising union engagement in despite intellectual criticisms that they're not doing enough—in part because of perceived decline in bargaining's importance to workers).

39. *See* BOK & DUNLOP, *supra* note 32, at 33-35 (describing rising lobbying, public advocacy, and political spending by unions in service of policies such as medical coverage, civil rights, and antipoverty measures); *see also* Estreicher at 33 (tracing evolution of unions to 1960s, when intellectuals called on labor to lift its eyes from the "routine functions" of bargaining and grievances to broader social concerns, the "political and social life" of the country); Kurt Stand, *The AFL-CIO's "Regime of 1995": A Partial Turning Point for Labor*, SOCIALIST FORUM, Democratic Socialists of America (1995), https://socialistforum.dsausa.org/issues/spring-2021/the-afl-cios-regime-of-1995-a-partial-turning-point-for-labor/ [https://perma.cc/3XGQ-TRJJ] (describing embrace by unions in mid-90s of political causes such as environmentalism and immigrant rights); *Unions in Our Communities and Democracy*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/workcenter/unions-and-democracy [https://perma.cc/7KWR-975M] (last visited June 17, 2023) (Biden administration web page) (equating union density within a state to state's propensity to pass "voter suppression" laws).

40. *See, e.g.*, *What We Care About*, AFL-CIO, https://aflcio.org/issues [https://perma.cc/HUN4-766P] [hereinafter AFL-CIO Platform] (taking positions on issues including immigration, gender equality, civil rights, and "corporate greed"); BOK & DUNLOP, *supra* note 32, at 33-35, 40 (describing union political engagement in broader social issues); Schuler Q&A, *supra* note 28 (arguing that unions should support action on climate change even if it negatively affects some workers; other workers will gain, and the affected workers will "swiftly transition to another sector"); Mary Kay Henry, Testimony Before the Health, Education, Labor & Pensions (HELP) Committee, U.S. Senate (March 8, 2023), https://www.seiu.org/2023/03/full-testimony-seius-mary-kay-henry-before-the-health-education-labor-pensions-help-committee-u-s-senate [https://perma.cc/JBY4-K8FD] (praising elected officials for taking "action" on climate change and calling for further reforms, including "commonsense immigration reform"); *see also Oakland Teachers Strike for Climate Justice: The Union's Demands Go Far Beyond Pay and Working Conditions*, WALL ST. J. (May 9, 2023), https://www.wsj.com/articles/oakland-teachers-union-strike-oakland-education-association-students-climate-progressives-9f938d2

harder to see where unionism ends and politics begins.[41] They are increasingly becoming the same thing.[42]

That change isn't just an interesting sociological phenomenon; it also has constitutional significance. In *Janus v. AFSCME*,[43] the U.S. Supreme Court held that the government cannot force public employees to fund union activities. It reasoned that public-sector bargaining necessarily requires bargaining with the government.[44] Bargaining with the government implicates public policy, which in turn makes it political.[45] And the government cannot force people to associate with political positions.[46] Likewise, it cannot force them to support public unions' activities.[47]

[https://perma.cc/4JAE-WXHJ] (reporting on strike by Oakland teachers union not because of pay or benefits, but because of issues related to climate change and housing shortages); Miettinen, *supra* note 18 (quoting Kay Henry, who connects the Fight for $15 campaign to "effective economic and racial justice" and urges union leaders to support workers by partnering more closely with "movement leaders from immigration to environmental and racial justice organizations").

41. *See* Estreicher, *supra* note 31, at 417 (observing that unions' turn toward politics has affected policy; and politics, in turn, have affected positions of unions); *see also* BOK & DUNLOP, *supra* note 32, at 82 ("In the last three decades, unions have paid increasing attention to political-action programs."), 55 (noting that left-leaning intellectuals were drawn to the labor movement "as a force for promoting certain social or political ideals"); HOWARD, *supra* note 32, at 102 (observing that no single interest group in modern politics comes close to the influence or financial heft of unions); Micah Uetricht, *Jane McAlevey's Plan for How to Build a Fighting Labor Movement*, JACOBIN (May 7, 2023), https://jacobin.com/2023/05/jane-mcalevey-interview-labor-movement-strategy-whole-worker-organizing-supermajority-leadership [https://perma.cc/D8ST-48SS] [hereinafter McAlevey Interview] (describing union organizing as "radical political education").

42. *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 791 (1961) (Black, J., dissenting) (arguing that unionism itself is as political as any other economic or social issue of import) ("I believe the First Amendment bars use of dues extorted from an employee by law for the promotion of causes, doctrines and laws that unions generally favor to help unions, as well as any other political purposes. I think workers have as much right to their own views about matters affecting unions as they have to views about other matters in the fields of politics and economics."); *see also* Saposs, *supra* note 32, at 970 (pointing out that unlike unions in other industrial democracies, where labor parties are organized as separate entities, American labor unions serve as direct political actors) ("[In America,] all other organized activism such as political action . . . emanate from [the union] and are organically part of the [union]."); Miettinen, *supra* note 18 (quoting Kay Henry, who says that a major goal of the Fight for $15 campaign was to make a $15 minimum wage the "mainstream political position") ("And so this movement has moved from a bold demand in 2012 to inspiring action by elected leaders and corporations to a tipping point where workers took their demands to a ballot box . . . ."); *Steward as Political Organizer*, *supra* note 35 (equating union organizing with political organizing); Rich Yeselson, *Fortress Unionism*, DEMOCRACY (summer 2013), https://democracyjournal.org/magazine/29/fortress-unionism/ [https://perma.cc/986P-AEF9] ("There is no contradiction between organizing around class issues and so-called 'identity politics.'").

43. 138 S. Ct. 2448, 2460, 2486 (2018).

44. *Id.* at 2472–73, 2476.

45. *See id.*

46. *See id.*; *see also* Rutan v. Republican Party of Ill., 497 U.S. 62, 74, 77–78 (1990) (holding that discrimination against employees for political associations violated First Amendment); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982) ("Thus we have held that forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy."); Abood v. Detroit Bd. of Ed., 431 U.S. 209, 222 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."), *overruled on other grounds by Janus*, 138 S. Ct. at 2486.

47. *Janus*, 138 S. Ct. at 2486.

Yet today, federal law does something similar to private-sector employees. The law channels collective bargaining through a concept called "exclusive representation."[48] As the name implies, exclusive representation gives a union the exclusive right to bargain for wages, hours, and working conditions.[49] It also denies individual employees the right to bargain for themselves.[50] In effect, it forces them to delegate their bargaining authority to a union[51]—an organization increasingly associated with a discrete set of political viewpoints.[52] The resulting arrangement is like requiring people to register their pets with PETA or their firearms with the NRA.[53] It forces them to associate with a politically active group with a distinct political agenda.[54]

Janus would seem to condemn that arrangement.[55] But as yet, lower courts have refused to take the argument that far.[56] They've rejected challenges to exclusive

48. *See* 29 U.S.C. § 159(a); J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

49. *See* 29 U.S.C. § 158(a)(5), (d); *J.I. Case*, 321 U.S. at 338.

50. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 68–69 (1975); *see also* Steele v. Louisville & N.R. Co., 323 U.S. 192, 200 (1944) (recognizing same point under Railway Labor Act) ("The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining.").

51. *See Emporium Capwell*, 420 U.S. at 62–63 (explaining that exclusive representation "extinguishes the individual employee's power to order his own relations with his employer"); Vaca v. Sipes, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee."); *see also* Tom Campbell, *Exclusive Representation in Public and Private Labor Law After Janus*, 70 SYRACUSE L. REV. 731, 733 (2020) ("It is not simply that the function of speaking with the employer is forbidden to the employee. What invades an employee's rights is that the function of speaking with the employer on behalf of that employee is given to another: the union.").

52. *See Janus*, 138 S. Ct. at 2483 (explaining that developments in debates over unionism have given labor issues a "political valence" that prior caselaw did not "fully appreciate"); *cf.* BOK & DUNLOP, *supra* note 32, at 384 (citing public-polling data showing that respondents considered unions the most powerful lobbying group in the country).

53. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 636–38 (1984) (O'Connor, J., concurring) (explaining that, when considering a forced-association claim, the question for courts is whether the group in question is predominantly expressive).

54. *See* James E. Bond, *The National Labor Relations Act and the Forgotten First Amendment*, 28 S. C. L. REV. 421, 423 (1977) (arguing that exclusive representation "interferes with those associational rights for reasons that cannot be fairly characterized as compelling"); *see also Emporium Capwell*, 420 U. S. at 68–69 (observing that under exclusive bargaining, the will of the minority is "subordinated to the interest of the majority"); *cf.* BOK & DUNLOP, *supra* note 32, at 82–83 (noting that decisions about endorsements and political donations often made by union leadership without involvement by rank-and-file members, meaning that ordinary members have little to no direct voice in these decisions).

55. *See* Thompson v. Marietta Educ. Ass'n, 972 F.3d 809, 814 (6th Cir. 2020) (noting tension between *Janus*'s reasoning and exclusive representation), *cert. denied,* 141 S. Ct. 2721, 210 L. Ed. 2d 882 (2021); *see also* Campbell, *supra* note 51, at 733 (2020) (arguing that exclusive bargaining representation unconstitutional in post-*Janus* world).

56. *See Thompson*, 972 F.3d at 814 (declining to extend *Janus* to exclusive representation); Goldstein v. Pro. Staff Cong./CUNY, No. 22 CIV. 321 (PAE), 2022 WL 17342676, at *6 n.4 (S.D.N.Y. Nov. 30, 2022) (relying on *Knight* to reject challenge by CNYU professors to exclusive union representation); Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 734 (7th Cir.) (relying on *Knight* to reject challenge to exclusivity, again in the public sector),

representation by relying on older, public-sector precedents.[57] They say that whatever *Janus* might imply about exclusive representation, the older precedents continue to allow exclusivity in the public sector.[58] So until those precedents are overruled, exclusivity remains constitutional in all its forms.[59]

This article argues that these courts are asking the wrong question. By focusing on public sector, they overlook the private one.[60] And in the private sector, the older precedents do not apply.[61] Those precedents grounded their logic in the distinct dynamics of public-sector bargaining.[62] They did not consider private-sector rights.[63] And more to the point, none of them considered the evolution of unionism itself.[64]

That evolution matters. By longstanding rule, the government cannot force a person to endorse a set of political views.[65] Yet, that is just what exclusive representation does: it forces an employee, however unwilling, to associate with a movement and an agenda that has become increasingly political.[66] Exclusivity has been allowed to continue only because courts still see unions as basically economic agents—groups that bargain for their members workplace by workplace.[67]

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cert. denied sub nom. Bennett v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, AFL-CIO, 142 S. Ct. 424 (2021); *see also* authorities cited in notes 215–240, *infra*.

57. *See, e.g.*, Minn. State Bd. for Cmty. Colleges v. Knight (Knight III), 465 U.S. 271, 277–88 (1984) (rejecting First Amendment challenge to exclusive representation in non-bargaining consultation process for public-sector university faculty).

58. *See, e.g.*, *Goldstein*, 2022 WL 17342676, at *5 (concluding that the representation scheme blessed in *Knight* is "logically analogous" to exclusive representation); *Bennett*, 991 F.3d at 734–35.

59. *See, e.g.*, *Goldstein*, 2022 WL 17342676, at *8–9 (distinguishing *Janus* and relying on *Knight* to uphold exclusivity scheme); *Bennett*, 991 F.3d at 734–35.

60. *Cf.* Campbell, *supra* note 51, at 733 (largely ignoring public-sector authorities and arguing that exclusivity is unconstitutional in the private sector).

61. *See* Baisley v. Int'l Ass'n of Machinists & Aerospace Workers, 983 F.3d 809, 811 (5th Cir. 2020) (rejecting *Janus*-based First Amendment challenge to private-sector union's opt-out procedure for annual dues deduction in part because *Janus* was a public-sector case and so did not apply directly).

62. *See Knight III*, 465 U.S. at 277–88; *Abood*, 431 U.S. at 220–224.

63. *See Knight III*, 465 U.S. at 277–88; *Abood*, 431 U.S. at 22–224.

64. *See Janus*, 138 S. Ct. at 2448 (criticizing *Abood* for failing to take account of increasing politicization of unionism).

65. *See Rutan*, 497 U.S. at 74–78 (1990); Elrod v. Burns, 427 U.S. 347, 355–36 (1976); *see also Jaycees*, 468 U.S. at 638 (recognizing that the government may compel commercial associations, but not "ideological or political associations").

66. *See* Bond, *supra* note 54, at 423; Estreicher, *supra* note 31, at 415–18 (describing political evolution of unionism); Lopez v. Shiroma, No. 1:14-CV-00236-LJO, 2014 WL 3689696, at *8 (E.D. Cal. July 24, 2014) (finding that plaintiff plausibly alleged that she suffered continued association with union while decertification petition was pending), *aff'd in part, rev'd in part on other grounds and remanded,* 668 F. App'x 804 (9th Cir. 2016); *see also Jaycees*, 468 U.S. at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."); *Knight III*, 465 U.S. at 297 (Brennan, J., dissenting) ("The basis of the . . . right to be free from compelled associations . . . is found in our conviction that individuals may not be forced to join or support positions or views which they find objectionable on moral, ideological, or personal grounds.").

67. *See, e.g.*, Goldstein v. Pro. Staff Cong./CUNY, No. 22 CIV. 321 (PAE), 2022 WL 17342676, at *11–12 (S.D.N.Y. Nov. 30, 2022) (rejecting argument premises on union's political status because there was no evidence the union threatened to retaliate against nonmembers; it merely represented them in workplace negotiations).

But that view no longer fits the labor movement.[68] The facts on the ground have changed; the doctrine must change as well.[69]

I. EXCLUSIVITY AND ITS DISCONTENTS

A. The Origins of Exclusivity

Like so much of American law, exclusive representation dates back to the New Deal.[70] In 1933, Congress passed the National Industrial Recovery Act (NIRA), a sweeping measure aimed at jump-starting the Depression-era economy.[71] Among other things, the NIRA created a statutory right to bargain collectively.[72] The Supreme Court struck the NIRA down two years later on Commerce Clause grounds.[73] In response, Congress quickly reenacted parts of it. In particular, it imported the NIRA's bargaining rights into the 1935 Wagner Act, better known today as the National Labor Relations Act (NLRA).[74]

Like the NIRA, the NLRA protected and promoted collective bargaining.[75] But it also added a few new wrinkles. For example, it established a new union-election procedure.[76] It dictated that elections would be held in an "appropriate" bargaining unit.[77] The election might involve multiple unions or only one union.[78] Either way, if any single union won more than 50% of the vote, it would become the "exclusive bargaining representative."[79]

"Exclusive" was left undefined. But over the years, it has come to mean three things. First, it means that the employer has to bargain with the certified union.[80]

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68. Estreicher, *supra* note 31, at 418 (describing unions as "political organizations").

69. *See* Bond, *supra* note 54, at 423 (arguing that exclusivity cannot be squared with modern First Amendment associational jurisprudence).

70. JOHN T. DUNLOP, LABOR IN THE TWENTIETH CENTURY 36 (1978) [hereinafter LABOR IN THE TWENTIETH CENTURY] (observing that exclusivity became a "basic element" of labor law with passage of the NLRA in 1935); MORRIS, *supra* note 30, 9, 19–20 (tracing statutory history of bargaining rights under NIRA, RLA, and NLRA). *But see* BOK & DUNLOP, *supra* note 32, at 210 (noting that the AFL developed an early concept of exclusivity among its members to prevent rivalries among unions).

71. *See* National Industrial Recovery Act, Pub. L. 7367, 48 Stat. 195 (1933).

72. *See id.* § 7(a) at 198–99. *See also* MORRIS, *supra* note 30, at 9 (describing bargaining rights under § 7(a)).

73. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935). The Court also struck down parts of the statute for improperly delegating legislative power to the president. *Id.* at 541–42.

74. National Labor Relations Act, Pub. L. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69).

75. *See* 29 U.S.C. § 151 (declaring the promotion of collective bargaining to be national labor policy). *See also* MORRIS, *supra* note 30, at 19–20 (arguing that the NLRA was meant to create no new substantive rights; it merely provided enforcement procedures for the bargaining rights recognized in the NIRA and prior caselaw).

76. 29 U.S.C. § 159.

77. *Id.* § 159(a).

78. *See* MORRIS, *supra* note 30, at 33–34 (noting that most early elections involved contests between multiple unions, not one union seeking recognition).

79. 29 U.S.C. § 159(a).

80. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683 (1944) ("The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees.").

If the employer fails to bargain in good faith, it breaks the law.[81] Second, the employer cannot bargain with any other union.[82] If the employer tries to bargain with a different union, it breaks the law again.[83] And third, the employer cannot bargain with individual employees.[84] If the employer tries to go around the union and deal with the employees directly, it breaks the law yet again.[85]

Those rules give the union a lot of power.[86] Bargaining under the NLRA is broad: it covers all wages, hours, and "other terms and conditions of employment."[87] That last item is especially capacious: it includes nearly everything that happens at work.[88] Promotions, training, uniforms, even the price of food in vending machines—all qualify as terms and conditions.[89] And because they're terms and conditions, the employer can talk about them only with the union.[90] The

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81. *Id.*

82. *See* Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 366 U.S. 731, 738–39 (1961) (holding that it was an unfair labor practice for employer to recognize and bargain with minority union when that union had not been certified by Board and did not in fact represent a majority of the employees in the unit).

83. *See, e.g.*, *id.*; NLRB v. Canton Sign Co., 457 F.2d 832, 835 (6th Cir. 1972) ("The making of such a contract by a union and an employer without a majority of the involved employees having chosen the union as its bargaining agent would be illegal and confers no right on the union."). *But see* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 36 (observing that exclusivity does not mean there is only one union per plant; it means only that one union exclusively represents a distinct group of employees, and there can be multiple such unions in a single plant at once).

84. *See, e.g.*, *Medo Photo Supply*, 321 U.S. at 684 ("Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8 (1) of the Act . . ."); Sec. Walls, LLC, 371 N.L.R.B. No. 74, slip op. at 12 (March 14, 2022) ("An employer cannot engage in direct dealing with employees . . . .").

85. *See, e.g.*, McLaren Macomb, 376 N.L.R.B. No. 58, slip op. at 2 (Feb. 21, 2023) (holding that employer violated § 8(a)(5) of the NLRA by negotiating severance agreements directly with represented employees); United States Postal Serv., 281 N.L.R.B. 1015, 1016 (1986) (holding that employer violated § 8(a)(5) of the Act by negotiating directly with employees to resolve administrative discrimination complaints).

86. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 336 (1953) (explaining that the union's authority under § 9(a) is "stated in broad terms"). *See also* MORRIS, *supra* note 30, at 219 (arguing that an exclusive union has the power to both create and destroy employee rights).

87. *See* 29 U.S.C. § 158(b)(4), (d). *See also* Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762 (1988) (pointing out the breadth of authority § 9(a) gives the majority union); BOK & DUNLOP, *supra* note 32, at 351 (pointing out that traditional bargaining subjects and resulting agreements leave little room for individual variance).

88. *See, e.g.*, City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n, 429 U.S. 167, 176 (1976) (recognizing that nearly anything that happens in a workplace can be the subject of collective bargaining); Abood v. Detroit Bd. of Ed., 431 U.S. 209, 250 (1977) (Powell, J., concurring) (comparing a collective-bargaining agreement to a legislative code, with the power to expand or restrict a broad array of rights).

89. *See, e.g.*, Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979) (holding that the price of food in a workplace cafeteria was a mandatory subject of bargaining); THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT, PART IV § 16.IV.C (John Higgins Jr., et al. eds., 8th ed. 2022) [hereinafter DEVELOPING LABOR LAW] (surveying subjects deemed to be "terms and conditions" and thus subject to mandatory bargaining).

90. *See, e.g.*, Everist, L. G., Inc., 103 N.L.R.B. 308, 309 (1953) (holding that employer violated the Act merely by insisting that employees be allowed to attend and observe bargaining sessions); Lennox

employer can't cut side deals with individual employees.[91] Employees are stuck with the union's deal, whether they like it or not.[92]

Not everyone thinks exclusivity was supposed to work that way. Some scholars have argued that "exclusive" was supposed to mean only that the government couldn't certify more than one union in a single bargaining unit.[93] The goal was to stop jurisdictional spats between unions.[94] Before the NLRA, union disputes could be disruptive, even violent.[95] So instead, Congress directed unions to resolve their disputes through an election.[96] The winner would be "exclusive"; the loser would move on.[97] But the winner wouldn't gain any new power over the individual employees.[98] The employees would continue to have the right to bargain for themselves.[99]

Right or wrong, that's not how the law developed. Only a few years after the NLRA was passed, the Supreme Court held in *J.I. Case v. NLRB*[100] that employers couldn't bargain with individual employees. The Court reasoned that individual deals would spark infighting, breed dissent, and undercut the union's

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Furnace Co., Inc., 20 N.L.R.B. 962, 976 (1940) (same). *See also* DEVELOPING LABOR LAW, *supra* note 89, § 13.II.B (describing scope of bargaining and prohibitions on direct dealing with employees).

91. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 68–69 (1975) ("In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority . . .").

92. *See, e.g.*, J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (holding that employer could not refuse to bargain with union on ground that it already had individual contracts with employees); United States Postal Serv., 281 N.L.R.B. 1015, 1016 (1986) ("Congress clearly indicated an intent to ensure that the institutional role of the collective-bargaining representative of all the employees in a bargaining unit is not subordinated to that of individual employees."); Vaca v. Sipes, 386 U.S. 171, 182 (1967) (observing that exclusivity "subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit"). *Cf.* BOK & DUNLOP, *supra* note 32, at 99 (recognizing that exclusive representation may hurt some employees who could bargain for better deals individually); DEVELOPING LABOR LAW, *supra* note 89, § 25.III.C (observing that even under judicially created doctrine of "duty of fair representation," union may negotiate terms that affect unit members differently, including seniority and probation provisions).

93. *See* MORRIS, *supra* note 30, at 25 (tracing NLRA's language to NIRA § 7(a) and arguing that the concept of exclusivity—which did not exist under the NIRA—was meant only to resolve disputes between two unions both seeking to be the majority representative); See Bond, *supra* note 54, at 423 (arguing that NLRA was never intended to ban individual bargaining).

94. *See id.* at 103.

95. *See id. Cf.* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 52 (1983) (reasoning that exclusivity promotes labor peace by preventing intra-unit competition among unions). *Cf. also* H.R. REP. NO. 245, at 23 (1947) (detailing harms caused by certain abusive union practices, including jurisdictional disputes); Zoran Tasic, *The Speaker the Court Forgot: Re-Evaluating NLRA Section 8(b)(4)(b)'s Secondary Boycott Restrictions in Light of Citizens United and Sorrell*, 90 WASH. U.L. REV. 237, 247 (2012) (describing concerns that led Congress to pass the Taft–Hartley Act, including out-of-control jurisdictional disputes).

96. *See* MORRIS, *supra* note 30, at 33–34 (arguing that the Wagner Act's framers saw the election as a mere dispute-resolution tool for competing unions).

97. *See id.*

98. *See id.* at 33, 88, 103 (arguing that before an election, unions would have a right to bargain only for their own members).

99. *See id.*

100. 321 U.S. 332, 338 (1944).

authority.[101] So, to maintain solidarity, the union had to bargain for everyone—no exceptions.[102]

B. Challenges to Exclusivity

J.I. Case has been the law for almost a century. But that's not to say exclusivity has gone unchallenged. From time to time, employees have argued that exclusivity violates the Constitution.[103] They've tested various theories, including the nondelegation doctrine and the "liberty of contract."[104] But more recently, they've relied on free speech and free association.[105] They've argued that by requiring them to bargain through a union, exclusivity forces them to associate with the union's views.[106] It effectively forces them to speak, and forced speech violates the First Amendment.[107]

That argument has cropped up several times over the twentieth century. But each time, courts have waved it away.[108] Lower courts have dismissed it out of hand; and the Supreme Court seemed to reject it not once, but twice.[109]

The first time came in *Abood v. Detroit Board of Education*. *Abood* involved a challenge to Detroit's "agency fee" scheme.[110] Agency fees are paid by employees who refuse to join the union.[111] The fees are supposed to make sure all employees pay their "fair share" of bargaining costs and prevent nonmembers from "free riding" on the union's services.[112] *Abood* upheld the fees as constitutional in the

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101. *Id.*

102. *See id.* ("The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.").

103. *See, e.g.*, Bond, *supra* note 54, at 446 (describing early challenges to NLRA's constitutionality).

104. *See id.* (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); Precision Castings Co. v. Boland, 13 F. Supp. 877 (W.D.N.Y. 1936)). *See also* Knight v. Minnesota Cmty. Coll. Fac. Ass'n (Knight I), 571 F. Supp. 1, 7–10 (D. Minn. 1982) (considering and rejecting nondelegation challenge).

105. *See* authorities cited in notes 108–12, *infra*.

106. *See infra* notes 215–240, for authorities supporting this position.

107. *See infra* notes 215–240, for authorities supporting this position.

108. *See* Tom Campbell, *Exclusive Representation in Public and Private Labor Law After Janus*, 70 SYRACUSE L. REV. 731, 733 (2020), *supra* note 51, at 733-734.

109. *See* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 222 (1977); Minn. State Bd. for Cmty. Colleges v. Knight (Knight III), 465 U.S. 271, 286 (1984).; *See infra* notes 215–240, for authorities supporting this position.

110. *Abood*, 431 U.S. at 220–21.

111. *See id.* at 221–22.

112. *See, e.g.*, Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps., 466 U.S. 435, 447 (1984) ("Congress' essential justification for authorizing the union shop was the desire to eliminate free riders . . . ."); Buckley v. Am. Fed'n of Television & Radio Artists, 496 F.2d 305, 311 (2d Cir. 1974) (explaining that agency fees help prevent free-riding by nonmember employees); Brad Baranowski*: Public-Sector Exclusive Representation After* Janus v. AFSCME, 99 B.U. L. REV. 2249, 2263–64 (2019). *See also* DEREK C. BOK & JOHN DUNLOP, LABOR AND THE AMERICAN COMMUNITY 24 (1970), *supra* note 32, at 94 (arguing that forms of "coercion," including forced dues, can sometimes be "defended on the principle that those who enjoy a benefit should pay a fair share of the cost"), 99 (arguing that the prevention of free riding is the best argument for agency fees). *Cf.* PAUL SECUNDA ET AL., MASTERING LABOR LAW 326 (2014) (explaining that the main argument against right-

public sector.[113] And in the process, it linked the fees to exclusive representation.[114] Both the fees and exclusivity, the Court said, were essential to "labor peace":

> The principle of exclusive union representation, which underlies the National Labor Relations Act as well as the Railway Labor Act, is a central element in the congressional structuring of industrial relations. . . . The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.[115]

Though dicta, these statements left little doubt about the Court's views on exclusivity.[116] The Court thought exclusivity promoted stable collective bargaining.[117] In fact, the Court saw exclusivity as a pillar of American labor law.[118]

The second decision came half a decade later, in *Knight v. Minnesota State Board for Community Colleges*.[119] Unlike *Abood*, *Knight* involved a direct challenge to exclusive representation.[120] It arose under a Minnesota labor law for public employees.[121] Like the NLRA, Minnesota's law allowed university faculty to elect a union as their exclusive bargaining representative.[122] But unlike the NLRA, it also allowed them to elect a representative for certain "meet and confer" sessions.[123] These sessions covered policy issues normally excluded from bargaining, such as curricula, finances, and student affairs.[124]

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to-work laws, which bar fair-share fees in the private sector, is that they allow free riding by nonmembers).

113. *Abood*, 431 U.S. at 221–22.

114. *See id.* at 222 (describing purposes of exclusive representation and connection to agency fees).

115. *Id.* at 220–21.

116. *See id. See also* Knight v. Minnesota Cmty. Coll. Fac. Ass'n (Knight I), 571 F. Supp. 1, 4 (D. Minn. 1982) (interpreting *Abood* as "squarely uphold[ing]" public-sector exclusivity); Minn. State Bd. for Cmty. Colleges v. Knight (Knight III,), 465 U.S. at271, 286, 313-314 (1984) (Stevens, J., dissenting) (asserting that *Abood* "settled" the constitutionality of exclusive representation in the public sector).

117. *See Abood*, 431 U.S. at 220–22.

118. *See id. See also* Brad Baranowski, *The Representative First Amendment: Public-Sector Exclusive Representation After* Janus v. AFSCME, 99 B.U. L. REV. 2249, 2263–64 (2019), *supra* note 112, at 2252 (describing exclusivity as the "backbone" of U.S. labor law); Meijer, Inc. v. NLRB, 564 F.2d 737, 744–45 (6th Cir. 1977) (Weick, J., dissenting) (describing exclusivity as a "central element in the congressional structuring of industrial relations").

119. Minn. State Bd. for Cmty. Colleges v. Knight (Knight III), 465 U.S. 271 (1984).

120. *See id.* at 278 (describing plaintiffs' challenge).

121. *See Knight III*, 465 U.S. at 273–75 (describing statutory bargaining scheme, codified at Minn. Stat. §§ 179.61 et seq. (1982)).

122. Knight v. Minnesota Cmty. Coll. Fac. Ass'n (Knight I), 571 F. Supp. 1, 7 (D. Minn. 1982) (citing Minn. Stat. §§ 179.63, 179.65).

123. *Id.* (citing Minn. Stat. § 179.73).

124. *Id.* at 7–8.

Theoretically, the "meet and confer" representative and bargaining representative could have been different.[125] The faculty could have taken separate votes and chosen separate representatives.[126] But in practice, the representatives were the same.[127] After a union was elected as the bargaining representative, it negotiated an agreement giving it the right to choose the meet-and-confer representative on the employees' behalf.[128] That is, the union got to pick who went to the meet-and-confer sessions. Unsurprisingly, it picked its own members.[129]

That arrangement didn't please everyone, and a group of professors sued.[130] They argued that exclusive representation was unconstitutional in both contexts.[131] First, in bargaining, they argued that it violated the separation of powers.[132] Working conditions in public workplaces were effectively public policies,[133] and public policies were inherently legislative decisions.[134] So by giving the union exclusive bargaining authority, the state had delegated legislative power to a private entity.[135] Second, in the meet-and-confer sessions, they argued that exclusivity violated the First Amendment.[136] The sessions were the only formal venue where faculty could express their views on university policy.[137] Speaking about university policy was vital to their jobs as professors.[138] But exclusivity allowed the union to exclude them from the meet-and-confer sessions unless they joined its ranks.[139] In other words, exclusivity forced them to choose between their right to associate and their right to speak.[140]

A three-judge district court issued a split decision.[141] First, the court rejected the bargaining challenge.[142] It reasoned that because the state could accept or reject the union's bargaining proposals, it had not delegated its legislative authority.[143] It had merely decided to bargain over its own legislative choices.[144] Second, the court sustained the meet-and-confer challenge.[145] The meet-and-

125. *Id.* at 8.
126. *Id.*
127. *Id.*
128. *Id.*
129. *See id.*
130. *Id.* at 3.
131. *Id.* at 3–6, 7–10.
132. *Id.* at 3.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 6.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 3–4.
143. *Id.*
144. *Id.*
145. *Id.* at 10.

confer sessions were the only place faculty could discuss policy issues.[146] And in practice, exclusivity blocked nonmembers from attending.[147] So it effectively suppressed their speech on matters of public concern.[148]

Both parties then petitioned the Supreme Court. For its part, the Court dealt with the challenges separately. First, it affirmed the district court's ruling on bargaining.[149] It published no opinion and offered no rationale.[150] Instead, it issued an unsigned, summary affirmance.[151] Second, in an opinion by Justice Sandra Day O'Connor, it reversed the meet-and-confer ruling.[152] It emphasized that the meet-and-confer sessions were not a public forum.[153] The state had not opened them for general participation.[154] It had instead set them up to consult with the faculty's representative.[155] More to the point, it had no duty to consult with anyone.[156] It could have chosen to shut the sessions down entirely.[157] So if it decided to have the sessions at all, it could also decide whom to let in.[158] It did not have to open the sessions to the entire faculty, much less to faculty who refused to support the union.[159] These dissenters had a right to speak but no right to an effective venue or an attentive audience.[160]

C. The Bargaining–Politics Distinction

A sometimes tacit assumption undergirded these opinions: that bargaining and politics were distinct.[161] This bargaining–politics distinction reflected a long-standing view of unions and their activities.[162] The distinction treated bargaining

146. *Id.*
147. *Id.*
148. *Id.*
149. Knight v. Minn. Cmty. Coll. Fac. Ass'n (*Knight II*), 460 U.S. 1048 (1983).
150. *See id.*
151. *Id.* ("The judgment is affirmed.").
152. *Knight III*, 465 U.S. 271, 289–90 (1984).
153. *Id.* at 280–81.
154. *Id.*
155. *Id.*
156. *Id.* at 284.
157. *See id.* at 285 (explaining that nothing in the Constitution requires the government to provide for public participation in policy decisions).
158. *See id.* at 285 (reasoning that absent some positive restraint, the state could consult with whomever it chooses).
159. *See id.* at 286–88.
160. *See id.* at 288 ("A person's right to speak is not infringed when government simply ignores that person while listening to others.").
161. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233–34 (1977) (holding that the state could compel employees to pay for bargaining as condition of employment, but could not compel them to pay for political activities); *Knight I*, 571 F. Supp. 1, 5–7 (D. Minn. 1982) (relying on then-current Supreme Court precedent and treating bargaining and politics as distinct spheres of union activity). *See also* Baranowski, *supra* note 112, at 2264 (noting the "balance" struck in *Abood*—unions could collect fees for bargaining, but not for politics).
162. *See, e.g.*, *Abood*, 431 U.S. at 233–34; Roberts v. U.S. Jaycees, 468 U.S. 609, 637–38 (1984) (O'Connor, J., concurring) (distinguishing between unions' "business" and "ideological" activities).

as basically apolitical—an economic task.[163] And it treated unions as mostly apolitical agents carrying out that task on employees' behalf.[164]

The distinction didn't originate with either *Knight* or *Abood*.[165] It emerged much earlier, out of a pair of mid-century decisions under the Railway Labor Act (RLA).[166] Those decisions, *Railway Employees Department v. Hanson*[167] and *International Ass'n of Machinists v. Street*,[168] involved agency fees. *Hanson* and *Street* upheld agency fees when used for economic activities, such as bargaining.[169] But they refused to allow the fees for political activities, such as lobbying and campaign donations.[170] Formally, the Court drew that distinction on statutory grounds: it read the RLA to allow fees only for economic purposes.[171] But, substantively, its premises were constitutional.[172] It reasoned that had the RLA allowed fees for political purposes, the statute likely would have violated the First Amendment.[173]

Abood imported that analysis into the public sector.[174] It drew the same line between bargaining and politics.[175] Bargaining was essentially an economic activity that benefited all employees in the unit.[176] But political activity was expressive; it sat at the heart of the First Amendment.[177] So while employees could be

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163. *See Abood*, 431 U.S. at 233–34 (differentiating between bargaining and non-bargaining ideological tasks); *Jaycees*, 468 U.S. at 638 (treating collective bargaining as a presumptively "commercial" activity, not an ideological one).

164. *See Abood*, 431 U.S. at 233–36; *Jaycees*, 468 U.S. at 637–38 (O'Connor, J., concurring). *But see Abood*, 431 U.S. at 257 (Powell, J., concurring) ("Collective bargaining in the public sector is 'political' in any meaningful sense of the word.").

165. *See* Baranowski, *supra* note 112, at 2264–65 (describing the development of the distinction).

166. *See* DEVELOPING LABOR LAW, *supra* note 89, § 26.VII.A (tracing disputes over the constitutionality of union shops to *Railway Employees Department v. Hanson*, which dealt with the argument that a union was an ideological organization, and so a union-shop requirement forced employees into "ideological and political associations which violate[d] their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights").

167. 351 U.S. 225 (1956).

168. 367 U.S. 740 (1961).

169. *Hanson*, 351 U.S. at 238; *Street*, 367 U.S. at 768.

170. *See Hanson*, 351 U.S. at 235; *Street*, 367 U.S. at 768–69.

171. *See Hanson*, 351 U.S. at 235; *Street*, 367 U.S. at 768–69. *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 248–50 (Powell, J., concurring) (explaining that *Street* rested its holding on an interpretation of the RLA, not the Constitution).

172. *See Street*, 367 U.S. at 777 (Douglas, J., concurring) (expressing the view that Congress could not have allowed unions to collect agency fees for political expenditures consistent with the First Amendment).

173. *See Hanson*, 351 U.S. at 235 (observing that if Congress had authorized the imposition of agency fees for non-bargaining purposes as a condition to union membership, "a different problem would be presented").

174. *Abood*, 431 U.S. at 225–26 (citing *Hanson* and *Street* as the controlling precedents).

175. *See Knight I*, 571 F. Supp. 1, 5–6 (D. Minn. 1982) (observing that *Abood* imported private-sector concepts regarding the difference between bargaining and politics into the public sector); Baranowski, *supra* note 112, at 2264–66 (describing the "balance" struck by *Abood* and arguing that it was consistent with the Court's approach to the free-speech rights of public employees in general).

176. *See Abood*, 431 U.S. at 225-26, 233-36.

177. *Id.*

forced to pay for bargaining, they couldn't be forced to pay for political activity.[178] To do the latter would have forced them to subsidize political speech.[179]

Later, the Court drew the same distinction under the NLRA. In *Communication Workers of America v. Beck*,[180] it allowed agency fees for bargaining, but not for politics.[181] As in *Hanson* and *Street*, it formally grounded its decision in the statute.[182] It assumed that Congress hadn't meant to allow unions to collect fees for political purposes.[183] If that's what the statute had done, it likely would have violated the First Amendment.[184] So the Court interpreted it to avoid that result.[185]

Together, these decisions embedded the bargaining–politics distinction in American labor law.[186] They stood for the idea that employees couldn't be forced to endorse a union's political views.[187] But the decisions also assumed that most union activities weren't political.[188] Bargaining, organizing, and administering contracts were all economic.[189] And because they were economic, employees could be forced to pay for them.[190]

That assumption set in among courts, scholars, and the bar.[191] It became a legal commonplace—one so obvious it sometimes went unstated.[192] But it would not last.

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178. *Id.*

179. *See id.* at 235-36.

180. 487 U.S. 735, 751 (1988).

181. *Id.* at 735.

182. *Id.* at 762.

183. *Id.* at 751, 762.

184. *See id.* at 762 (describing its chosen interpretation as "constitutionally expedient" for the same reasons described in *Street*).

185. *See id.*

186. *See* Baranowski, *supra* note 112, at 2264 (describing development of the doctrine). *See also* DEVELOPING LABOR LAW, *supra* note 89, § 26.VII (same).

187. *See, e.g.*, *Abood*, 431 U.S. at 235-38 (distinguishing between bargaining and political expenses for purposes of First Amendment analysis); *Street*, 361 U.S. at 768 (interpreting RLA and finding that supporting candidates and "advance[ing] political programs" were not the purposes to which Congress wanted unions to devote members' funds).

188. *See, e.g.*, *Abood*, 431 U.S. at 229 (concluding that public employees could be forced to pay for share of bargaining expenses); *Street*, 361 U.S. at 749-50, 765-66 (permitting expenditures of member funds for ostensibly apolitical activities such as general negotiating committees and convention expenses).

189. *Cf.* Mark Paul, *We Need an Economic Bill of Rights*, JACOBIN (May 12, 2023), https://jacobin.com/2023/05/economic-bill-of-rights-insecurity-poverty-freedom [https://perma.cc/3PRM-AQEQ]] (describing union rights as economic rights).

190. *See Abood*, 431 U.S. at 235–38; *Street*, 361 U.S. at 773 (concluding that RLA would be overbroad if it allowed unions to spend members' funds on political activities instead of activities that directly advanced members' economic interests).

191. *See, e.g.*, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUMB. L. REV. 2057, 2061–82 (2018) (describing historical differentiation between economic and political speech in context of law governing secondary boycotts); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 180 (2007) (examining Washington law distinguishing between charges for bargaining and charges for electoral-related expenses); *Ellis*, 466 U.S. at 448 (explaining that extracted fees must be "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor–management issues"). *See also* Baranowski, *supra* note 112, at 2264–66 (describing development and acceptance of distinction post-*Abood*).

192. *See id. See also* DEVELOPING LABOR LAW, *supra* note 89, § 26.VII.B (treating the distinction as effectively settled law).

D. Janus *Opens the Door*

The cracks began to show in the early 2010s, when the Supreme Court started invalidating agency fees in certain narrow contexts.[193] While the Court held back from declaring agency fees per se unconstitutional, it showed an increasing concern for how the fees affected First Amendment rights.[194] It referred to the fees as an "anomaly" in First Amendment jurisprudence.[195] It also questioned the logic of some of its own precedents, including *Abood*.[196] It did not, however, disavow the bargaining–politics distinction.[197] Lower courts continued to recognize the distinction and apply it.[198]

Then, in 2018, the Court abruptly swept the distinction aside—at least in the public sector.[199] In *Janus v. AFSCME*, it held that public-sector agency fees were unconstitutional for all purposes.[200] It reasoned that in the public sector, unions bargained with the government.[201] That made bargaining an effort to influence government policy.[202] Bargaining was therefore indistinguishable from campaigning, lobbying, or public advocacy.[203] It was all political.[204] And because it was all political, employees couldn't be forced to pay for any of it.[205]

Janus also explicitly overruled *Abood*.[206] But in one sense, the two decisions were mirror images. Both dealt only with agency fees,[207] and both also connected

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193. *See* Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 321 (2012) (invalidating opt-out procedure for agency fees because it provided inadequate opportunity to avoid paying for political activities); Harris v. Quinn, 573 U.S. 616, 635 (2014) (holding that *Abood* did not extend to quasi-public employees and the agency-fee requirement was unconstitutional as applied to quasi-public home-care workers).

194. *See Knox*, 567 U.S. at 321 (describing the "general rule" that "individuals should not be compelled to subsidize private groups or private speech" and therefore that agency fees are therefore may only be collected with the affirmative consent of the employees); *Harris*, 573 U.S. at 649–50 (questioning whether purported interest in labor peace could justify burden on speech imposed by agency fees).

195. *Knox*, 567 U.S. at 311.

196. *Harris*, 573 U.S. at 645 (referring to "*Abood*'s questionable foundations").

197. *See Knox*, 567 U.S. at 316–18 (applying distinction between chargeable bargaining expenses and nonchargeable political expenses); *Harris*, 573 U.S. at 629–35 (describing precedents applying distinction and, while not overruling them, treating them as narrow exceptions).

198. *See* In re Grand Jury Proceeding, 842 F.2d 1229, 1234 (11th Cir. 1988) (recognizing that unions have both political and economic functions for purposes of First Amendment association analysis). *See also* authorities cited in notes 215–240, *infra*.

199. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2481–83 (2018) (rejecting distinction between chargeable bargaining fees and nonchargeable political fees because events had undermined prior caselaw and shown all public-sector union activities to be political). *See also* Baranowski, *supra* note 112, at 2277 (observing that while prior decisions assumed that bargaining was not protected speech under the First Amendment, *Janus* swept that assumption aside).

200. *Janus*, 138 S. Ct. at 2460, 2486.

201. *Id*. at 2476.

202. *Id*.

203. *Id*.

204. *Id*.

205. *Id*. at 2476, 2486.

206. *Id*. at 2484.

207. *See* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 232–38 (1977); *–Janus*, 138 S. Ct. at 2460–61 (describing fee scheme).

the fees to exclusive representation.[208] Yet where *Abood* praised exclusivity's virtues, *Janus* cast them into doubt.[209] In particular, *Janus* referred to exclusivity as a "significant impingement on associational freedoms that would not be tolerated in other contexts."[210] In other words, by forcing employees to bargain through a union, the state was burdening their associational rights.[211] Whether that burden was still justified, the Court didn't say; no one had challenged exclusivity in the case before it.[212]

Still, the Court's skepticism was hard to miss—and few did.[213] Over the next several years, employees filed a slew of lawsuits challenging exclusivity.[214] They argued that after *Janus*, the bargaining-political distinction was gone.[215] And without it, exclusivity was untenable.[216] Exclusivity forced employees into relationships with unions; and if unions were political actors, exclusivity amounted to forced political association—a core First Amendment violation.[217]

Most courts, however, refused to go that far. The First,[218] Second,[219] Third,[220] Sixth,[221] Seventh,[222] Eighth,[223] Ninth,[224] and Tenth[225] Circuits rejected challenges to exclusivity. So did state courts, including a California appellate court and the

208. *See Abood*, 431 U.S. at 221–22 (assuming that agency fees were a necessary corollary of exclusive representation); *Janus*, 138 S. Ct. at 2465 (concluding the opposite).

209. *Compare Abood*, 431 U.S. at 221–22, *with Janus*, 138 S. Ct. at 2478.

210. *Janus*, 138 S. Ct. at 2478.

211. *See id.*

212. *See id.*

213. *See* Campbell, *supra* note 51, at 733–34 (arguing that exclusive representation was unconstitutional after *Janus*).

214. *See* Baranowski, *supra* note 112, at 2273–74 (describing litigation strategy and claims of post-*Janus* challenges to exclusivity); Alan M. Klinger & Dina Kolker, *Public Sector Unions Can Survive Janus*, 34 ABA J. LAB. & EMP. L. 267, 286 (2020) (describing a slew of challenges to exclusivity following *Janus*). *See also* Luke Taylor, *Political Equality and First Amendment Challenges to Labor Law*, 90 U. CIN. L. REV. 505, 510–11 (2021) (describing various labor laws imperiled by *Janus*'s reasoning, including bans on "captive audience" meetings and sectoral-bargaining schemes).

215. *See, e.g.*, Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 735 (7th Cir. 2021) (reciting plaintiff's arguments, relying on *Janus*), *cert. denied sub nom.* Bennett v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, AFL-CIO, 142 S. Ct. 424 (2021).

216. *See* Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 863 (7th Cir. 2017) (recounting plaintiffs' argument that exclusivity forced them into an "agency-like association" with a union).

217. *See* Baranowski, *supra* note 112, at 2274 (describing post-*Janus* litigation strategy). *See also* Elrod v. Burns 427 U.S. 347, 356 (1976) (explaining that "political belief and association constitute the core of those activities protected by the First Amendment").

218. D'Agostino v. Baker, 812 F.3d 240, 242 (1st Cir. 2016).

219. Jarvis v. Cuomo, 660 F. App'x 72, 74 (2d Cir. 2016).

220. Adams v. Teamsters Union Loc. 429, No. 20-1824, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022); Oliver v. Serv. Emps. Int'l Union Loc. 668, 830 F. App'x 76, 81 (3d Cir. 2020).

221. Thompson v. Marietta Educ. Ass'n, 972 F.3d 809, 811–12 (6th Cir. 2020).

222. Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 734 (7th Cir. 2021); Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 863–64 (7th Cir. 2017).

223. Bierman v. Dayton, 900 F.3d 570, 574 (8th Cir. 2018).

224. Mentele v. Inslee, 916 F.3d 783, 790 (9th Cir. 2019).

225. Hendrickson v. AFSCME Council 18, 992 F.3d 950, 969 (10th Cir. 2021).

Massachusetts Supreme Judicial Court.[226] These courts concluded that whatever *Janus* may have implied about exclusivity, it did not decide the issue.[227] Formally, *Janus* dealt only with agency fees.[228] More important, courts have concluded it did not overrule *Knight*.[229]

In fact, *Knight* struck these courts as the more important precedent.[230] True, *Knight* had not decided squarely whether exclusive representation violated the First Amendment.[231] But it had addressed exclusivity in the meet-and-confer sessions.[232] And if exclusivity was permissible for those sessions, it was permissible for bargaining as well.[233] There was no meaningful difference between the two.[234]

To be sure, some courts embraced that rationale only reluctantly. In an opinion for the Sixth Circuit, Judge Amul Thapar acknowledged that *Janus* cast doubt on exclusive representation.[235] If a union acted politically even when bargaining, how could a state force an employee to accept the union's services?[236] Wasn't the

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226. Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1172 (Mass. 2019); Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 40 Cal. App. 5th 241, 275–76 (Cal. Ct. App. 2019).

227. *See Bierman*, 900 F.3d at 574 (concluding that *Janus* did not overrule *Knight*).

228. *See id.* at 574 (noting that *Janus* formally dealt with agency fees, not exclusive representation); *Mentele*, 916 F.3d at 786–87 (concluding that *Janus* did not affect constitutionality of exclusive representation because, though it overturned *Abood*, *Abood* dealt only with agency fees).

229. *See, e.g.*, *Bierman*, 900 F.3d at 574 (finding challenge to exclusive representation "foreclosed by *Knight*"); *Mentele*, 916 F.3d at 789 (concluding that until the Supreme Court overrules *Knight*, lower courts are required to reject challenges to exclusive representation, *Janus* notwithstanding).

230. *See* Adams v. Teamsters Union Loc. 429, No. 20-1824, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2023) ("*Knight* forecloses the First Amendment challenge."); *Mentele*, 916 F.3d at 789 (calling *Knight* the "more directly applicable precedent"); Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724,735 (7th Cir. 2021) (reasoning that unlike *Janus*, *Knight* "speaks directly to the constitutionality of exclusive representation"); Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 864 (7th Cir. 2017) (finding that challenge to exclusivity was "foreclose[d]" by *Knight*). *See also* Goldstein v. Pro. Staff Cong./CUNY, 643 F. Supp. 3d. 431, 439 n.4, 441–42, 445 nn.8–9 (distinguishing *Janus* and relying instead on *Knight);* Baranowski, *supra* note 112, at 2270 (noting that *Knight* has been the "key case" in decisions upholding exclusivity against forced-association claims); Klinger & Kolker, *supra* note 214, at 286 (reporting that each post-*Janus* challenge has run into *Knight* as an obstacle).

231. *See* Minn. State Bd. for Cmty. Colleges v. Knight (Knight III), 465 U.S. 271, 285–90 (1984) (addressing only meet-and-confer process); *Thompson* v. Marietta Educ. Ass'n, 972 F.3d 809, 813–14 (6th Cir. 2020) (acknowledging this limitation in *Knight*).

232. *See Adams*, 2022 WL 186045, at *2 (analogizing scheme approved in *Knight* to exclusive bargaining); Jarvis v. Cuomo, 660 F. App'x 72, 74 (2d Cir. 2016) (treating *Knight* as dispositive in attack on exclusive representation).

233. *See, e.g.*, *Adams*, 2022 WL 186045, at *2; *Goldstein*, 633 F. Supp. 3d at 6 n.4; *Bennett*, 991 F.3d at 734–35; *Hill*, 850 F.3d at 864.

234. *See, e.g.*, *Adams*, 2022 WL 186045, at *2 ("Given these similarities, this [exclusive-representation] law does not violate the First Amendment."); *Hill*, 850 F.3d at 864 (rejecting challenge to exclusivity on strength of *Knight*); *Goldstein*, 633 F. Supp. 3d at 6 n.4 ("If the First Amendment did protect individuals from being represented by a group that they do not wish to have represent them, it is difficult to understand why that right would cease to exist when a majority of the workers elected the union." (quoting Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1251–52 (2d Cir. 1992))); *Bennett*, 991 F.3d at 734–35 (reaching same conclusion); D'Agostino v. Baker, 812 F.3d 240, 242 (1st Cir. 2016) (same).

235. *Thompson*, 972 F.3d at 813.

236. *See id.*

state forcing the employee to participate in a political act?[237] Even so, Judge Thapar threw up his hands. He saw himself bound by precedent.[238] As a circuit judge, he had no power to overrule a Supreme Court decision.[239] And by his reading, any attack on exclusivity ran squarely into *Knight*.[240] So until the Court revisited *Knight*, there was nothing he could do.[241]

E. The Missing Lawsuit: Exclusivity and Politics in the Private Sector

Absent from this debate was a fulsome discussion of the private sector. Employees argued that *Janus* broke down the bargaining-political distinction in the public sector, which made exclusivity untenable.[242] But few extended that argument to private workplaces.[243] They seemed to assume that the private sector was off limits. And it's not hard to understand why. On its face, *Janus* seemed a poor fit for private unions. Private unions bargained not with the government, but with private companies.[244] They weren't trying to influence government policy, at least not while bargaining.[245] So they were still largely apolitical—still mere bargaining agents performing an economic task.[246]

But in truth, the situation is more complex. In recent decades, private unions have taken on an increasingly political character.[247] They've adopted policy platforms, endorsed partisan candidates, and funded electoral campaigns.[248] They've

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237. *See id.* at 814 ("To be sure, *Knight*'s reasoning conflicts with the reasoning in *Janus*.").

238. *Id.*

239. *Id.*

240. *See id.*

241. *Id. See also* Robert Iafolla, *Justices Reject Bids to Extend* Janus *to More Union Issues*, BLOOMBERG LAW (Nov. 7, 2022), https://news.bloomberglaw.com/daily-labor-report/justices-reject-bids-to-extend-janus-ruling-to-more-union-issues [https://perma.cc/D5LY-7279] (reporting that the Supreme Court declined to take up two petitions related to extending *Janus* to other contexts, including limits on dues-deductions authorizations).

242. *See* authorities cited notes 215–240, *supra*.

243. *See* authorities cited in notes 215–240, *supra*. *But cf.* Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 40 Cal. App. 5th 241, 275–76 (Cal. Ct. App. 2019) (extending principles of *Knight* and *Abood* regarding exclusive representation to mandatory arbitration proceedings for private-sector agricultural employees under California law).

244. *See* Buckley v. Am. Fed'n of Television & Radio Artists, 496 F.2d 305, 309–10 (2d Cir. 1974) (observing that private bargaining does not directly involve the government).

245. *See id.*

246. *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 768 (1961) (distinguishing between political and bargaining expenses for purposes of First Amendment challenge to agency fees).

247. *See* Estreicher, *supra* note 31, at 418 (marking transition of unions away from bargaining and organizing and toward political activities), 423 (observing that unions have taken advantage of political maneuvering and regulation to increase density in some sectors; they have leveraged political influence to extract concessions from employers who need government approval for certain activities, such as licenses for building new hospitals).

248. *See* Estreicher, *supra* note 31, at 418–20. *See also* AFL-CIO Platform, *supra* note 40 (taking positions on issues including immigration, gender equality, civil rights, and "corporate greed"); Schuler Q&A, *supra* note 28 ("We need to elect people, especially union members, who share our values and who put workers first. That will result in guaranteed change."); Henry, *supra* note 40 (calling on Congress to pass new laws on climate change and immigration alongside more traditional workplace issues, such as the minimum wage).

also deemphasized traditional bargaining.[249] They've invested less at the bargaining table and more at the ballot box.[250] They've turned steadily away from economic representation and toward political agitation.[251] The result is that today, they have become no less political than their public-sector counterparts—maybe even more so.[252] And that shift raises questions about their constitutional status.

II. THE EMERGENCE OF POLITICAL UNIONS

Though hard to imagine now, the labor movement was once avowedly apolitical.[253] Consider the early AFL. At the dawn of the twentieth century, the AFL was the nation's largest and most powerful labor organization.[254] It boasted nearly 1.5 million members—a full 77.8% of all union members in the country.[255] It operated in a broad swath of industries, including construction, retail, and shipping.[256] That breadth gave it a legitimate claim to be the voice of the American worker[257]—a claim it maintained in part by disavowing any interest in partisan politics.[258] It backed no party, endorsed no candidates, and took no positions on

249. *See* Estreicher, *supra* note 31, at 418 (observing that unions have increasingly deemphasized traditional functions in service of political activities).

250. *See id.* at 418–20 (noting declining investments in organizing at the same time political investments increased).

251. *See id. Cf. also* Fowler Packing Co. v. Lanier, 844 F.3d 809, 815 (9th Cir. 2016) (describing successful efforts by union to lobby state legislature to target employers with whom they had a labor dispute for less favorable treatment under state's wage-and-hour laws).

252. *See, e.g.*, AFL-CIO Platform, *supra* note 40 (taking positions on wide range of political issues); *Steward as Political Organizer*, *supra* note 35 (urging union stewards to register voters, raise money, educate their members about political issues, and lobby government officials). *See also* William Green, *The Taft–Hartley Act: A Critical View*, 274 Annals Am. Acad. Pol. & Soc. Sci. 200, 200 (1951) (arguing in 1951 that increased government regulation of working conditions would turn unions into "political instruments").

253. *See* BOK & DUNLOP, *supra* note 32, at 387 (explaining that while unions were not unanimous on this point, "the overwhelming majority" followed apolitical strategy).

254. *See id.* at 189 (observing that AFL encompassed supermajority of labor movement); HAROLD C. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA 99 (1978) (observing that after disintegration of the Knights of Labor, the AFL was "supreme among American labor organizations" for forty years). *Cf. Unions 101: What Is a Union?*, U.S. DEP'T OF LAB., https://web.archive.org/web/20230610022018/https://www.dol.gov/general/workcenter/unions-101 [https://perma.cc/PP6H-2NDR] (last visited June 17, 2023) (noting that more than half of all modern U.S. unions belong to the AFL-CIO).

255. LIVESAY, *supra* note 254, at 31.

256. *See, e.g.*, *Welcome to AFL-CIO: Origins and Divisions*, N.Y. UNIV., https://wp.nyu.edu/mappingnyclaborhistory/ [https://perma.cc/MZ9R-AWUC](last visited on Mar. 24, 2023) (listing early constituent unions of AFL).

257. *See* LIVESAY, *supra* note 254, at 6 (explaining that the AFL's aim was to gather the entire workforce under one banner; and it could do that only by maintaining a big ideological tent), 115 (noting that the AFL aspired to organize every wage earner in the country). *See also* Rogin, *supra* note 30, at 526, 528 (observing that labor unions framed unions as organizations built on consent to maintain broadest possible appeal).

258. *See* LIVESAY, *supra* note 254, at 6, 87 (noting that AFL under Gompers was dedicated to "ignoring politics"). *See also* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 50 (noting that AFL opposed political entanglements at its inception).

political issues.[259] Instead, it ascribed to a creed of political agnosticism, commonly known as "voluntarism."[260]

Voluntarism was the brainchild of the AFL's first president, Samuel Gompers.[261] Gompers believed that workers could never achieve lasting gains through politics.[262] Politics, he thought, were the road to dependence; and dependence was antithetical to his vision for the labor movement.[263] He saw the movement as an independent force—independent from ideology, employers, and especially the government.[264] Government, in his view, posed some of the most insidious risks of all.[265] It could attract workers with easy, short-term benefits: it could offer them higher wages, shorter work hours, and safer working conditions at the stroke of a pen.[266] But in the long run, those benefits would breed complacency.[267] They would accustom workers to cost-free largess.[268] Workers would

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259. BOK & DUNLOP, *supra* note 32, at 386. *See also* Labor in the Twentieth Century, *supra* note 70, at 50–51 (describing early disagreements over ideology within the AFL, which were ultimately won by pragmatists who rejected more politically radical doctrines, including socialism); Rogin, *supra* note 30, at 534 (noting that AFL opposed not only political machines but all forms of party loyalty).

260. *See* Fink, *supra* note 30, at 805 (describing voluntarism as an "anti-statist" policy favoring direct action over political engagement).

261. *See* LIVESAY, *supra* note 254, at 3–6 (surveying Gompers's philosophy and influence on early labor movement).

262. *See* Gompers, *The American Labor Movement*, *supra* note 30 ("The A. F. of L. has apprehensions as to the wisdom of placing in the hands of the government additional powers which may be used to the detriment of the working people. It particularly opposes this policy when the things can be done by the workmen themselves."). *See also* Rogin, *supra* note 30, at 522; LIVESAY, *supra* note 254, at 40, 43.

263. *See* Rogin, *supra* note 30, at 522 (describing how Gompers developed normative ideal of worker independent from the state but arguing that the norm developed after voluntarism's inception as a post hoc justification); Livesay, *supra* note 254, at 102–04 (recounting Gompers's rejection of calls to join Granger movement and other reform efforts, which he saw as risks to labor's nonpartisan mission of improving working conditions). *See also* Commons, *supra* note 29, at 139 (arguing that while political movements require partnership with other groups, a pure labor movement remains free to act unilaterally).

264. *See* Rogin, *supra* note 30, at 525 ("No lasting gain has ever come from coercion." (quoting Samuel Gompers, *Trade Unions and Liberty*, 12 FEDERATIONIST 447 (1905))). *See also* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 51 (noting that early AFL leadership rejected political entanglement on pragmatic grounds; they feared public backlash and wanted to gain as widespread acceptance as possible); LIVESAY, *supra* note 254, at 131–33 (observing that Gompers refused to support government interventions like eight-hour legislation because there was "no way to bargain collectively with the national government" and that he believed involvement in politics was "suicide" for the labor movement).

265. *See* Rogin, *supra* note 30, at 534 (noting that Gompers warned workers against "political servitude").

266. *See id.* at 533 (arguing that fear of political involvement led AFL to oppose things like minimum-wage laws for women, compulsory health insurance, and unemployment insurance).

267. *See* Saposs, *supra* note 32, at 968 (explaining that Gompers believed favorable workplace legislation would lead workers to fail to organize themselves). *See also* Sidney & Beatrice Webb, *The Assumptions of Trade Unionism*, in THEORIES OF THE LABOR MOVEMENT 204–05 (Simeon Larson & Bruce Nissen, eds., 1987) [hereinafter *Assumptions of Trade Unionism*] (arguing that as the state intervenes more directly in labor markets, workers' connection to their unions weakens; they become more accustomed to making decisions as citizens than as workers).

268. *See* Gompers, *The American Labor Movement*, *supra* note 30 (opposing minimum-wage legislation because, "according to the teachings of history," it would result in "a long era of industrial slavery"). *See also* Saposs, *supra* note 32, at 967 (explaining that under voluntarism, unions actively avoided government aid to avoid entanglement and dependence; not only would they seek no such aid,

lose their fighting spirit.[269] And as a result, they would be unable to defend themselves when government inevitably turned against them.[270]

So Gompers instead believed that workers had to rely on their own strength.[271] They had to win better conditions on their own.[272] And they could only do that if they banded together—under the aegis, of course, of a voluntaristic union.[273]

In fact, for Gompers, voluntarism wasn't just an ideal; it was a practical strategy.[274] It sprang from the character of the American worker.[275] Unlike European

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but such aid "was to be resisted"). *Cf. Assumptions of Trade Unionism*, *supra* note 267, at 197 (arguing that before heavy government intervention and institution of "living wage" ideology, workers were more likely to turn to direct action and collective bargaining to improve their conditions).

269. *See* Gompers, *The American Labor Movement*, *supra* note 30 (declaring himself "suspicious" of the "activities of governmental agencies" because of the possibility of a slippery slope: "[I]f the legislature were allowed to establish a maximum workday it might also compel workmen to work up to the maximum allowed."). *See also Assumptions of Trade Unionism*, *supra* note 267, at 198 (arguing that strategy of restricting labor supply is inconsistent with strategy of enlisting state intervention; trade unions must give up one or the other).

270. *See* LIVESAY, *supra* note 254, at 52–53 (describing Gompers's experience with failed tenement reform in New York and his conclusion that politics was a dead end for labor); Rogin, *supra* note 30, at 522 (explaining that Gompers thought reform legislation would be ineffective because courts would just strike it down). *Cf.* BOK & DUNLOP, *supra* note 32, at 389; Commons, *supra* note 29, at 136–37 (describing how courts blocked pro-labor legislation in late nineteenth and early twentieth centuries, slowing union progress).

271. *See* Gompers, *The American Labor Movement supra* note 30 (arguing that direct action by workers was the only "effective" means of change); Livesay, *supra* note 254, at 135. *See also* Bok & Dunlop, *supra* note 32, at 389 (noting Gompers's emphasis on gains through direct action instead of government largess).

272. *See* Gompers, *The American Labor Movement*, *supra* note 30 (arguing that labor didn't need legislation; it had already secured minimum wages and maximum-hours guarantees on its own for its members). *See also* Rogin, *supra* note 30, at 522; BOK & DUNLOP, *supra* note 32, at 386 (describing how late nineteenth-century unions emphasized ways to strengthen their own bargaining power as opposed to broader social reforms).

273. *See* Gompers, *The American Labor Movement*, *supra* note 30 (arguing that it was in workers' best interests to secure gains through direct industrial action, including "collective bargaining and other methods employed by labor unions"); Livesay, *supra* note 254, at 3, 6 (explaining that Gompers built voluntarism on his views about the attitudes of the American worker). *See also* Rogin, *supra* note 30, at 525 (describing Gompers's philosophy of pursuing greater worker freedom through voluntarism). *But see id.* at 534–35 (arguing that aversion to politics was limited to national unions, and that local unions were much more willing to engage in politics for their members' benefit—most often, to get those members jobs).

274. *See* Gompers, *The American Labor Movement*, *supra* note 30 (asserting that the AFL was driven not by some "Social Philosophy," but by a desire to improve workers' conditions a little bit every day). *See also* Rogin, *supra* note 30, at 522 (explaining that labor historians have come to see voluntarism as a practical strategy, as opposed to ideology for ideology's sake); John Dunlop, *The Development of Labor Organization: A Theoretical Framework*, in THEORIES OF THE LABOR MOVEMENT 20 (Simeon Larson & Bruce Nissen, eds., 1987) (describing calculus of American labor leaders in late 19th and early 20th centuries, driven in part by ideology of American worker) ("It is no accident that the American Federation of Labor was opposed to a program of compulsory insurance until 1932.").

275. *See* Gompers, *The American Labor Movement*, *supra* note 30 (opposing state unemployment-insurance legislation because of the attitudes of the American worker, who did not see unemployment as a "permanent evil"). *See also* LIVESAY, *supra* note 254, at 4–5 (explaining that Gompers did not believe American workers would ever embrace radical labor ideology); Bok & Dunlop, *supra* note 32, at 387 (arguing that unions' early role in politics was limited mostly because of the attitudes of the employees they represented).

laborers, American workers had no class identity.[276] They saw themselves less as members of a permanent working class and more as entrepreneurs, clawing their way up the economic ladder.[277] They believed in economic and social mobility.[278] They would never subscribe to revolutionary politics or extreme labor ideology.[279] And, more importantly, they would never look to their unions for broad social change.[280] They joined unions for one purpose and one purpose only: to improve their wages and working conditions.[281]

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276. *See* Simeon Larson & Bruce Nissen, *Introduction*, in THEORIES OF THE LABOR MOVEMENT 1, 4 (Simeon Larson & Bruce Nissen, eds., 1987) (stating that alone among western industrial democracies, the United States has a labor movement that embraces the fundamental pillars of capitalism; contrasted with collectivist views of European workers and unions); *See* Bok & Dunlop, *supra* note 32, at 19 (reporting that polls show a consistent lack of class consciousness among workers in general or manual workers in particular, the latter of which show no major difference in opinion from the population as a whole).

277. *See* BOK & DUNLOP, *supra* note 32, at 388. *See also id.* at 24 (marking a "tenacious" preference among American union members for focus on bargaining over politics, in contrast to attitudes among union members in some other industrial democracies); *id.*, at 18–19 (explaining that ideology of American founders was hostile to collectivism—an attitude that over time seeped into intellectual and business elites and, from there, into the labor movement itself); LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 5 (contrasting U.S. unions with counterparts in other western industrialized democracies, where unions have more formal ties with government and political parties).

278. *See* Gompers, *The American Labor Movement*, *supra* note 30 (arguing that American workers were focused on improving their working conditions in the here and now, not in achieving some "dream" of social reform or industrial perfection). *See also* Commons, *supra* note 29, at 139 (arguing that American labor movement, because of historical and geographical factors, was more wage conscious than class conscious, more pragmatic and ready to partner with enterprise).

279. *See* BOK & DUNLOP, *supra* note 32, at 389. *See also* Commons, *supra* note 29, at 139 (noting that despite early stirrings of political activity in labor movement in 1830s, including involvement with socialist elements, political ideology failed to take hold of mainstream labor movement). *Cf.* LIVESAY, *supra* note 254, at 112–13 (arguing that Gompers's apolitical approach better matched the views of the average laborer than did those of more radical reformers of the time), 127 (explaining that Gompers refused to lead workers into more ideologically charged territory because he did not believe they would follow); NORMAN WARE, THE INDUSTRIAL WORKER, 1840–1860: THE REACTION OF AMERICAN INDUSTRIAL SOCIETY TO THE ADVANCE OF THE INDUSTRIAL REVOLUTION xxiv-xxv (Ivan R. Dee ed. 1990) (portraying even the "radicals" of the 1840s labor movement as fundamentally conservative and seeking to preserve an earlier republican ideal of independent free labor).

280. *See* Larson & Nissen, *supra* note 276, at 5–6 (describing views of labor theorists, including John Commons and Mark Perlman, who saw unions' proper role as improving working conditions). *See also* Green, *supra* note 252, at 202 (arguing that American trade unionists "prefer to defend their own rights in relation to their employers, as free men, through collective bargaining"); BOK & DUNLOP, *supra* note 32, at 403 (noting that even among modern union members, the idea of a labor party is unpopular: only 30% of union members support it).

281. *See* Gompers, *The American Labor Movement*, *supra* note 30 (describing the "general object" of the AFL as "to better the conditions of workers," principally their economic conditions—the main goal of the American worker); Commons, *supra* note 29, at 139 (describing American union members as more wage conscious than class conscious); Selig Perlman, *A Theory of the Labor Movement*, in THEORIES OF THE LABOR MOVEMENT 162 (Simeon Larson & Bruce Nissen, eds., 1987) (arguing that American trade unionism was "essentially pragmatic" until corrupted by intellectuals). *See also* Bok & Dunlop, *supra* note 32, at 23 (reporting that union members consistently say their unions should focus on bargaining and not politics; a 1967 poll showed that 79% thought unions should not take up collections for candidates, and 57% thought they should not campaign for specific candidates) ("[M]ost union members are also cool to the idea of large-scale political participation."), 473 (reporting that modern union members want their unions to engage in as little politics as possible; they want their

Gompers was also mindful of the prevailing political economy.[282] In the late nineteenth century, American politics were dominated by big businesses, especially the emerging "trusts."[283] The trusts were massive combinations of capital stretching across state and national lines. They had accumulated wealth on a historic scale.[284] And as deft as they were in the marketplace, they were equally adept in the statehouse. They had secured favorable legislation across the country: lenient tax treatment, favorable eminent-domain laws, and weak labor regulations.[285] Their skill in extracting political advantage was unmatched.[286]

To challenge them at their own game would have been quixotic at best, suicidal at worst.[287] So Gompers looked for a more realistic strategy.[288] Unions, he thought, could survive without government paternalism.[289] But they could never survive without industrial partnership.[290] They had to find a way to work with business.[291] Gompers therefore preached the gospel of voluntarism.[292] Rather than regulate employers into submission, he would cajole them into cooperation.[293] He would

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unions to focus on bargaining). *But see* Fink, *supra* note 30, at 818 (arguing that contrary to prevailing historical narrative, individual union members were agnostic about methods of achieving gains in wages and working conditions) ("There is simply little evidence to suggest that the average union member greatly cared whether a desired objective was acquired through economic or political activity.").

282. *See* LIVESAY, *supra* note 254, at 7 (explaining that Gompers embraced collaborative attitude with big business out of pragmatic fear that the alternative—confrontation and coercion—would not work).

283. *See* Elinor R. Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOK. L. REV. 1, 9–19 (1983) (describing rise of trusts in response to increasingly complex and integrated national economy).

284. *See id. See also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §§ 2.1–2.2 (5th ed. 2016) (describing development of antitrust law in response to growing political and economic power of trusts); Alexander T. MacDonald, *Secondary Picketing, Trade Restraints, and the First Amendment: A Historical and Practical Case for Legal Stability*, 40 HOFSTRA LAB. & EMP. L.J. 1, 25–27 (2023) (describing rise of trusts in late-nineteenth century); David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 141–43 (1990) [hereinafter *First Antitrust Statute*] (same).

285. *See First Antitrust Statute*, *supra* note 284, at 143–44 (describing concerns over concentration of political power in trusts); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1246 (1988) (same); WARE, *supra* note 279, at 127 (explaining that corporate employers were able to fend off legislation for a ten-hour workday in mid-nineteenth century because of their influence with legislators).

286. *See First Antitrust Statute*, *supra* note 284, at 143–44 (discussing public fears in early twentieth century over rising political influence of trusts).

287. *See* Perlman, *supra* note 281, at 172–73 (arguing that labor's pragmatism and rejection of revolution stemmed in part from knowledge of fierce resistance it would face from business).

288. *See* LIVESAY, *supra* note 254, at 7 (explaining that Gompers embraced business in part to help legitimize labor and in part to blunt employer resistance).

289. *See* Rogin, *supra* note 30, at 531 (citing Gompers's belief in cooperation for AFL's early pro-business, pro-partnership stance and tactics).

290. *See id.* at 533–34 (arguing that focus on industrial cooperation led AFL away from political engagement).

291. *See id. See also* LIVESAY, *supra* note 254, at 63 (explaining that Gompers accepted industrialization and capitalism; he wanted not to change the system, but to cooperate with employers within the system), 126 (explaining that Gompers embraced the trusts because he thought workers could benefit from their efficiency).

292. *See* Rogin, *supra* note 30, at 522 (describing Gompers's voluntaristic philosophy).

293. *See id.* (explaining that Gompers emphasized cooperation over regulation).

find willing employers and strike mutually beneficial deals.[294] Industry and labor would reach their own accommodation.[295]

That strategy, however, foundered on the rocks of employer resistance.[296] Employers did not see unions—even voluntaristic ones—as potential partners.[297] They saw unions instead as existential threats.[298] And rather than cooperate, they found new ways to fight back.[299] They devised new anti-union tools, such as strike breakers, company unions, and "yellow dog" contracts.[300] They also turned to the courts, where they found eager allies in their battles with labor.[301] From 1890 to 1930, courts issued no fewer than 4,300 labor injunctions, many of them under the Sherman Antitrust Act.[302] The Sherman Act allowed courts not only to block union boycotts and strikes, but also to impose liability on individual union members.[303] That liability could run as high as three times a company's actual damages—a crushing sum for even the most dedicated unionist.[304]

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294. *See id.*

295. *See id.* at 530 (explaining that Gompers's desire to be partner with management led him to oppose state intervention even more vigorously); Livesay, *supra* note 254, at 3–4 (describing voluntarism as a fundamentally practical policy based on a rejection of coercion and a "dedication to independence and free will"). *See also id.* at 153 (explaining that Gompers sought partnership and "treaties" with large business interests; he saw cooperation as sign of capitalism's maturity). *Cf.* Ware, *supra* note 279, at 169 (explaining that mid-nineteenth-century reformers such as Charles Fourier sought not conflict with employers, but accommodation and cooperation aimed at improving working conditions alongside efficiency of capital).

296. Saposs, *supra* note 32, at 967 (reporting that by 1908, AFL had "lost out" in most major industries, in part because of counteroffensive by employers); Livesay, *supra* note 254, at 7 (explaining that Gompers's effort to cooperate with business largely failed because business rejected his overtures).

297. *See id.*

298. *See id.*

299. *See* LIVESAY, *supra* note 254, at 61 (describing employer reaction to strikes and protests: employers turned to courts and legislatures to protect their property rights).

300. *See* Saposs, *supra* note 32, at 967 (describing management tactics used to resist union organizing, including the introduction of welfare programs); LIVESAY, *supra* note 254, at 145, 178–79 (describing business tactics, including yellow-dog contracts). *See also* SECUNDA ET AL., *supra* note 112, at 10 (explaining that yellow-dog contracts were unnecessary to fire union members under an at-will employment regime; they were instead used as mechanisms for suing the union for inducement); RICHARD EPSTEIN, FREE MARKETS UNDER SIEGE: CARTELS, POLITICS, AND SOCIAL WELFARE ch. 5 (2004) (making the same point); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 251–57 (1917) (sustaining action for inducement against union that recruited employees for membership after employees signed yellow-dog contracts).

301. *See* Commons, *supra* note 29, at 137 (explaining that as unions grew stronger, employers turned to courts for their defense; the injunction obtained new strength in 1880s and 90s).

302. William E. Forbath, Law and the Shaping of the American Labor Movement 60 (Harvard University Press 1991).

303. *See* Loewe v. Lawlor (Loewe I), 208 U.S. 274, 294 (1908) (holding that Sherman Act applied to certain union activities, including secondary boycotts); Lawlor v. Loewe (Loewe II), 235 U.S. 522, 535–36 (1915) (holding that individual union members could be held liable for employer's antitrust damages). *See also* Gary Minda, *The Common Law, Labor and Antitrust*, 11 INDUS. REL. L.J. 461, 517–18 (1989) (describing effect of the *Loewe* decisions on labor movement).

304. *See* Jane McAlevey, *How Should Workers Respond to the Supreme Court's Ruling in* Glacier Northwest*?*, NATION (June 1, 2023), https://www.thenation.com/article/politics/supreme-court-glacier-northwest-workers/ [https://perma.cc/RQV3-PJBC] ("[S]tate court interventions into labor disputes

These attacks left their mark. The AFL found itself pushed out of key industries, including steel, iron, and meatpacking.[305] It kept a foothold only in marginal sectors populated with smaller, weaker employers.[306] It was still expanding in absolute terms, but its growth slowed.[307] And more worryingly, it had been excluded from the country's most dynamic enterprises.[308]

Facing an existential crisis, Gompers decided that he had no choice but to seek government aid.[309] He went to both parties, hat in hand, and begged them to stop the injunctions.[310] Republicans rebuffed him; they wanted no special pleading by unions.[311] But Democrats were more sympathetic.[312] They responded by including an antitrust exemption in their official party platform.[313] And with the help of a grateful labor movement, they retook the White House in 1912.[314]

Two years later, Congress passed the Clayton Act.[315] The Clayton Act did nearly everything Gompers wanted. It closed loopholes for big mergers, striking a blow against labor's most dedicated foes.[316] It also exempted certain union activities, including strikes and secondary boycotts.[317] On paper, these exemptions neutralized hostile courts.[318] They also pointed the way to more aggressive organizing.[319] Gompers called the Act labor's "magna carta."[320]

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were almost uniformly disastrous for workers and unions, creating legal uncertainty, fear, and a tool for employers to impose ruinous liability on workers taking collective action.").

305. Saposs, *supra* note 32, at 967, 969.

306. *Id*.

307. *Id*. at 968.

308. *Id*. at 967–68; Livesay, *supra* note 254, at 122 (noting that AFL found itself relegated to industries with declining importance in American economy).

309. *See* LIVESAY, *supra* note 254, at 136–38 (describing struggles with existential threat of labor injunctions under Sherman Act); Saposs, *supra* note 32, at 969 (noting that "it was the devastating issuance of injunctions in labor disputes which led the AFL to embark seriously on its early nonpartisan political action"); Rogin, *supra* note 30, at 530. *See also* Commons, *supra* note 29, at 137–38 (describing how labor movement turned to politics in early 1900s after industrial action failed to protect laborers from competitive pressures, including harsh business cycles and competition from immigrants).

310. *See* LIVESAY, *supra* note 254, at 165–67 (describing AFL's attempts to lobby for a labor exception to stop the injunctions). *See also* BOK & DUNLOP, *supra* note 32, at 386–87 (citing opposition to labor injunctions as early exception to voluntarism strategy).

311. LIVESAY, *supra* note 254, at 165-67.

312. *See id*.

313. *Id*.

314. *Id*.

315. Pub. L. 63-212, 38 Stat. 730 (1914) (codified at 15 U.S.C. § 12–27, 29 U.S.C. §§ 52–53).

316. *See* 15 U.S.C. § 18.

317. *See* 15 U.S.C. § 17; 29 U.S.C. § 52.

318. *See Labor Law and Antitrust: "So Deceptive and Opaque Are the Elements of These Problems*," 1966 DUKE L.J. 191, 192 (explaining that today, sections 6 and 20 of the Clayton Act, taken with the later Norris–LaGuardia Act, have been interpreted to mean that "specified types of union activity undertaken in the course of a labor dispute are to be exempt from prosecution under the federal antitrust laws").

319. *See* LIVESAY, *supra* note 254, at 178 (marking boom in union organizing in years following Clayton Act's passage).

320. *Id*. at 168 (quoting Gompers). *Cf*. Letter from Samuel Gompers, president of the AFL, to Organizers of the AFL (Feb. 24, 1915), https://gompers.umd.edu/SG%20Clayton%20defense%201915.htm [https://perma.cc/H8D5-DRE5] (arguing that the Clayton Act "secured to labor organizations

The Clayton Act would indeed prove to be a turning point—but not in the way Gompers thought. As a legal instrument, it was largely ineffective; courts interpreted it narrowly and kept issuing injunctions.[321] But as a political tool, it shifted the paradigm.[322] It taught Democrats that they could benefit from labor's political support.[323] Labor put Democrats in positions of power they hadn't seen in decades.[324] And they were eager to repeat the experience. They went on to pass even more pro-labor laws, including the Norris–LaGuardia Act,[325] the NIRA,[326] and the NLRA.[327] Increasingly, they became the "pro-labor" party.[328]

The labor movement changed as well. Labor learned that self-reliance wasn't enough: it also needed political patronage.[329] And that lesson was only reinforced in the following decades.[330] During World War I, government intervention helped boost union ranks from 1.5 to 2.4 million members.[331] And in the 1930s, favorable legislation produced yet another organizing boom.[332] In the ten years after passage of the NLRA, union membership nearly quadrupled from 3.6 million to 14.3 million.[333] Those gains made politics seem less like a forbidden fruit and

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recognition as legal organizations" and "the right to exist and to carry out the legitimate purposes of organization.").

321. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 467–68, 474 (1921) (holding that Clayton Act did not exempt labor activities outside the immediate employment relationship, such as secondary boycotts); Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L.A. L. REV. 151, 168 (1988) (describing judicial treatment of Clayton Act).

322. *See* Rogin, *supra* note 30, at 530 ("Increasing employer and state opposition, however, forced [the AFL] into a greater emphasis on political action until 1914, when the Clayton Act was passed.").

323. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 57 (attributing Democratic success in national elections from 1933 to 1970 to union money and organization drives).

324. *See id.* (noting that with labor's help, Democrats held Congress for all but two sessions from 1933 to 1970 and won the presidency in all but three terms).

325. Pub. L. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–109).

326. Pub. L. 73-67, 48 Stat. 195 (1933).

327. Pub. L. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169).

328. *See* BOK & DUNLOP, *supra* note 32, at 390 (marking Democratic Party's evolution toward becoming a "pro-worker" party). *Cf. Assumptions of Trade Unionism*, *supra* note 267, at 203–04 (arguing that as state intervenes more directly in labor markets, it will increasingly look to unions as source of policy, leverage their familiarity with working conditions, and make increasing use of their existing "machinery").

329. *See Assumptions of Trade Unionism*, *supra* note 267, at 203–04 (explaining that as state intervention in workplace policy becomes more pervasive, nature of unions changes; less concerned with bargaining and more concerned with raising common standards through legislation).

330. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 32–33 (marking two periods of union-membership growth in first half of twentieth century, both following passage of federal labor legislation: one postwar boom from 1915 to 1920, and a second following the New Deal from 1934 to 1939).

331. LIVESAY, *supra* note 254, at 114.

332. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 29 (reporting that union membership grew 450% in twelve years after passage of NLRA); Saposs, *supra* note 32, at 970 (reporting that NLRA boosted AFL membership from 2.1 million to 4 million despite secession of CIO); Morris, *supra* note 30, at 25 (describing organizing wave after codification of bargaining rights in NIRA).

333. *See* Yeselson, *supra* note 42 (reporting on union growth after favorable labor legislation). *See also AFL-CIO*, Britannica, https://www.britannica.com/topic/AFL-CIO [https://perma.cc/SLC7-RTEZ]

more like a magic elixir.[334] If politics were so bad, why did they work so well?[335]

Voluntarism thus began its slow death.[336] Labor partnered ever more closely with Democrats, promoting the party's positions even beyond workplace issues.[337] Gompers himself cooperated closely with the Wilson administration, supporting its international agenda.[338] And his successors lent similar support to the Roosevelt and Truman administrations.[339] Whatever remained of their apolitical veneer slowly wore away.[340] The labor movement had become politically active—and increasingly active for only one party.[341]

(last visited March 25, 2023) (noting that after passage of the Wagner Act in 1935, labor unions saw "unprecedented growth").

334. *See, e.g.*, LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 41 (observing that NLRA sparked a revolution in contract coverage: in some places, like Massachusetts, less than half (43%) of union members were covered by agreements before the Act, but afterward, because of legal changes, 13. 8 million employees were covered by CBAs by 1945; some industries even reached 80%–100% percent coverage, and overall, 67% of manufacturing wage earners became covered). *Cf. Assumptions of Trade Unionism*, *supra* note 267, at 205–06 (describing the process of political integration as natural; as unions involve themselves more in national politics, they will "be conscious of their own special functions in the political world, and busy themselves primarily with its fulfillment").

335. *See* Saposs, *supra* note 32, at 970 (arguing that advances in membership coverage would have been impossible under a strictly voluntaristic approach); BOK & DUNLOP, *supra* note 32, at 391 (explaining how New Deal legislation helped unions realize potential of government intervention in labor markets). *But see* Commons, *supra* note 29, at 153–55 (arguing that unions turned to politics to protect themselves from competition, first from immigrants, then from other domestic workers willing to work for lower wages, and that labor legislation tended to track government involvement in the economy as a whole).

336. *See* Fink, *supra* note 30, at 806 (tracing the end of voluntarism as the official "dogma" of organized labor to the 1930s). *Cf.* Rogin, *supra* note 30, at 521 (attributing voluntarism's decline in part to its change in purpose; it became less a mechanism for building worker power and more a way to insulate union leadership).

337. BOK & DUNLOP, *supra* note 32, at 391 (explaining that early labor legislation almost immediately changed unions' behavior and led them to support subsequent Democratic administrations). *See also id.* at 192–93, 200 (describing the AFL twentieth-century role as a coordinator of political activity, where it has had its "greatest influence").

338. *See* Samuel Gompers, *Labor's Service to Freedom* (1918), *in* ERIC FONER, GIVE ME LIBERTY! ch. 19 (2d ed. 2007), *available at* https://wwnorton.com/college/history/foner2/contents/ch19/audio04.asp [https://perma.cc/EEM7-9VUV] (expressing support for administration's war efforts).

339. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 52 (noting that in 1936, the CIO "led the movement for the reelection" of FDR and contributed "a substantial amount of money" to Democratic campaigns); Bok & Dunlop, *supra* note 32, at 391 (describing union support for Roosevelt administration as reward for New Deal legislation). *See also* Tyrone Richardson, *GOP Candidates, Labor Unions Make Strange Bedfellows*, BLOOMBERG LAW (Aug. 16, 2023), https://news.bloomberglaw.com/daily-labor-report/gop-candidates-labor-unions-make-strange-bedfellows [https://perma.cc/6Z2Y-RCDB] ("[T]he labor movement tilted toward the Democrats under FDR." (quoting Michael Merrill of the Rutgers School of Management and Labor Relations)).

340. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 52 (reporting that despite official policy of partisan neutrality, unions became even more engaged in 1944: the CIO spent $700,000 supporting FDR, and the AFL sent three delegates to the Democratic national convention). *But cf.* BOK & DUNLOP, *supra* note 32, at 390 (attributing the death of voluntarism to economic conditions during the Great Depression and acute need for government intervention to support workers).

341. *But see* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 52 (noting that despite labor's drift toward Democratic party, some important labor leaders, including William Hutcheson and John Lewis, were nominally Republicans).

That partisan shift eventually sparked a backlash. In 1946, the country was struck by an unprecedented wave of strikes.[342] The causes were complex. As soldiers returned from World War II, they flooded the labor market with able-bodied workers.[343] Wages naturally took a hit.[344] And just as naturally, falling wages triggered uncertainty and unrest.[345] But whatever the causes, voters blamed unions.[346] And they punished unions' political allies, handing both houses of Congress to Republicans.[347]

These Republicans heard the message as well, and they quickly moved to rein in labor's power.[348] Within a year, they had passed the Taft–Hartley Act,[349] the most important labor-law reform since the Wagner Act.[350] Among (many) other things, Taft–Hartley cut back on labor's most potent weapons: sympathy strikes, secondary boycotts, and union-security agreements.[351] The Act also added new protections for dissenting employees, such as an explicit right to refuse union membership.[352] Republicans made no secret of why they thought these changes were necessary: labor had grown too big, too strong, too entrenched.[353] It had

342. *See* BOK & DUNLOP, *supra* note 32, at 234 (noting that from 1955 to 1964, US lost to work stoppages three and a half average man days more than UK, which itself was 20 times Sweden).

343. Yeselson, *supra* note 42.

344. *See id.* (attributing labor-market conditions to influx of returning soldiers and resulting wage suppression of up to 30%).

345. *See id.*

346. *See id.* (observing that Republicans seized on strikes by campaigning under the slogan, "Had enough?").

347. *See Historical Highlights: The 1946 House Elections*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1901-1950/The-1946-House-elections/ [https://perma.cc/P5M4-TZA5] (last visited June 7, 2023) (reporting that Republicans gained 55 seats in the House to capture first majority in 15 years); *Losses by the President's Party in Midterm Elections, 1862–2014*, Brookings Inst., https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch2_tbl4.pdf [https://perma.cc/S9RT-NHEB] (last visited June 7, 2023) (showing loss of nine seats by Democrats in Senate).

348. *See* Greenslade, *supra* note 321, at 176 (describing Taft–Hartley as a reaction to growing union power). *See also* Green, *supra* note 252, at 202 (arguing that Taft–Hartley was an effort by businessmen to exercise "economic and political power").

349. Pub. L. 80–101, 61 Stat. 136 (1947).

350. *See, e.g.*, LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 44 (noting that Taft–Hartley was the last major labor-law reform in the United States until the present day); Green, *supra* note 252, at 201 (describing Taft–Hartley as a "complete reversal of national labor policy," a "far-reaching intrusion into the economic sphere," and the "most drastic limitation of the freedom of labor and management ever undertaken by the government").

351. See 29 U.S.C. §§ 158(b)(2), (4). *See also* Tasic, *supra* note 95, at 247–48 (describing Taft–Hartley reforms). *See also* SECUNDA ET AL., *supra* note 112, at 11 (recognizing the effectiveness of secondary activities).

352. *See* 29 U.S.C. § 157, 158(b)(1). *See also* BOK & DUNLOP, *supra* note 32, at 98 (observing that Taft–Hartley reformed union shops, reduced compelled membership to the payment of dues, and allowed right-to-work laws–changes that "[u]nion[s]. . . objected [to] vociferously").

353. *See* S. Rep. No. 105, at 2 (1947) (justifying bill as a way to curb "monopolistic" power of unions); House Rep. No. 245, at 3–4 (accusing unions of creating "widespread industrial strife" and causing a "staggering" loss of "national wealth"). *But see* Green, *supra* note 252, at 201 (arguing that Republicans were wrong to see the original Wagner Act as one-sided because collective bargaining was "endangered by employers, not unions").

abused its monopoly power,[354] and that abuse hurt workers, business, and the public at large.[355]

Feeling threatened, labor redoubled its partisan strategy.[356] In 1952, the AFL broke with tradition and gave a blanket endorsement to the national Democratic ticket.[357] The Democratic candidate for president that year, Adlai Stevenson, had vowed to repeal Taft−Hartley, and unions rewarded him handsomely.[358] The Congress of Industrial Organizations (CIO) spent an unprecedented $2 million to support his campaign.[359] The AFL's League for Political Education chipped in another $250,000.[360] And though Stevenson lost (badly), similar endorsements for the Democratic candidate followed in 1960, 1964, and 1968.[361] Labor historians have described the latter two endorsements as "virtually automatic."[362] A new model had taken hold: the AFL was now fully engaged in politics.[363] And it was engaged almost exclusively on behalf of Democrats.[364]

Unions remained more or less close to Democrats over the next few decades.[365] The connection weakened in the early 1980s, when many rank-and-file members

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354. *See* S. Rep. No. 105, at 2. *Cf.* Henry Simmons, *Some Reflections on Syndicalism*, in THEORIES OF THE LABOR MOVEMENT 76 (Simeon Larson & Bruce Nissen, eds., 1987) ("Monopoly power must be abused. It has no use save abuse.").

355. *See* S. Rep. No. 105, at 2, 8 (arguing that reforms were necessary to protect workers, businesses, and public welfare). *See also* U.S. Chamber of Commerce v. Brown, 554 U.S. 60, 67 (2008) (stating that Congress passed Taft–Hartley because the NLRA had "pushed the labor relations balance too far in favor of unions").

356. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 52–53 (arguing that Taft–Hartley convinced unions that they had to take a more active role in politics; educating their members about political issues was not enough); Bok & Dunlop, *supra* note 32, at 391–92 (arguing that Taft–Hartley led unions to engage even more deeply in politics and abandon some prior reservations, such as refusing to support broader social issues beyond the workplace, including civil rights).

357. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 53 (reporting that AFL endorsed Adalai Stevenson in part because he vowed to repeal Taft–Hartley). *See also* Arthur S. Leonard, *The AFL-CIO's First National Campaign*, 8 INDUS. & LAB. REL. F. 25, 26 (1972) (noting that the AFL studiously avoided endorsements before the New Deal but "broke with. . . [that] tradition" in 1952).

358. *See* Robert Alexander, *Organized Labor, 1954*, 27 CURRENT HIST. 42, 43 (1954) (describing labor's "overwhelming" support for Stevenson and attributing support to opposition to Taft–Hartley); *Labor in the Twentieth Century*, *supra* note 70, at 53 (same).

359. *Labor in the Twentieth Century*, *supra* note 70, at 53.

360. *Id*.

361. *Leonard, supra* note 357, at 25.

362. *Id*. at 35.

363. *See id*. at 32 (describing in-kind support for Stevenson, including a full-page attack on Richard Nixon, then the Republican candidate for vice president), 33–34 (describing major labor unions' increased involvement in national partisan politics). *See also* BOK & DUNLOP, *supra* note 32, at 392 (tracking how, after 1952, labor unions associated more closely with Democrats at every level of government).

364. *See* Leonard, *supra* note 357, at 32 (reporting that in 1956, the AFL's Committee on Political Education spent $1.8 million, $970,000 of which "went to individual Congressional races with the rest going for general support of the Democrats," including the distribution of pro-labor candidate records).

365. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 55–57 (tracking labor's involvement with Democratic party through 1970s and crediting labor's support for President Ford's 1976 defeat); *See* BOK & DUNLOP, *supra* note 32, at 392 (tracking greater emphasis on politics outside labor issues: labor's political contributions grew "from $750,000 in 1936 to more than $7 million in 1968").

gravitated toward Ronald Reagan.[366] But that support proved short-lived. In 1981, Reagan crushed a strike of air-traffic controllers, firing thousands of union members.[367] His decision was a political victory for Republicans, and he waltzed to a second term.[368] But it was also a lesson for labor.[369] As much as some members might like Reagan's up-by-the-bootstraps rhetoric, the movement's fortunes were still linked to the Democratic Party.[370]

That lesson didn't go unheeded. Over the following decades, unions put their full financial muscle behind Democrats. From 1990 to 2010, the AFSCME was the second-largest donor on record. And it gave Democrats 98% of its money.[371] Likewise, the National Education Association (the seventh largest) gave Democrats 92% of its donations.[372] Other unions were only marginally less lopsided, giving Democrats about 90% of their funds.[373] They also donated more than before in absolute terms. From 2000 to 2009, teachers' unions outspent all business groups combined in 36 states.[374] And from 2009 to 2020, their spending rose four-fold.[375] They paid out roughly $4 billion per election cycle, or $1 billion per year.[376]

These trends only accelerated in the early 2020s. In 2022, unions gave political candidates $78 million—an increase of more than 658% over 1990.[377] Their top-

366. *See* Richardson, *supra* note 339 (noting that the labor movement's support for Democrats "was neutral" while the party was led by Walter McGovern and Jimmy Carter); Hedrick Smith, *Blue-Collar Workers' Support for Reagan Declines*, N.Y. TIMES (March 1982), https://www.nytimes.com/1982/03/08/us/blue-collar-workers-support-for-reagan-declines.html (reporting that at one point in his first term, Reagan's approval among union households was as high as 63%; even after economic factors drove down his numbers across the board, 43% of union households still reported approving of Reagan). *Cf.* Leonard, *supra* note 357, at 33–34 (noting that even at the height of labor's support for Adlai Stevenson in 1952, millions of "[r]ank-and-file members" voted for Dwight Eisenhower).

367. *See* Mark Schickman, *You Want a Living Wage with That?*, 23 No. 11 CAL. EMP. L. LETTER 3 (Sept. 9, 2013) (describing strike, terminations, and aftermath and tracing them to subsequent union decline).

368. *See* Steven J. Rosenstone, *Explaining the 1984 Presidential Election*, 1985 BROOKINGS REV. 25, 25–27 (describing landslide victories and causes, including, among others, a strong economy and perceived advantages on social issues).

369. *See* Schickman, *supra* note 367 (describing union reaction to Reagan's decision); Glenn Houlihan, *The Legacy of the Crushed 1981 PATCO Strike*, JACOBIN (Aug. 3, 2021), https://jacobin.com/2021/08/reagan-patco-1981-strike-legacy-air-traffic-controllers-union-public-sector-strikebreaking [https://perma.cc/X5U8-GBBJ] (arguing that Reagan's response to the strike sent "a clear signal to corporate America that it could declare open season on organized labor").

370. *Cf.* Milton and Rose Friedman, *Free to Choose: A Personal Statement*, in THEORIES OF THE LABOR MOVEMENT 300 at 119 (Simeon Larson & Bruce Nissen, eds., 1987) (arguing in 1980 that unions received so much government aid they had effectively become "wards of the state").

371. *See* Estreicher, *supra* note 31, n. 23, at 423–24 (citing contributions data from OpenSecrets.org).

372. *Id.*

373. *Id.*

374. HOWARD, *supra* note 32, at 100.

375. *Id.*

376. *Id.*

377. *Top Contributors*, OPEN SECRETS, https://www.opensecrets.org/industries/contrib.php?ind=p04&Bkdn=DemRep&cycle=2022 [https://perma.cc/WT5Q-SCGW] (last visited June 9, 2023).

five recipients were all Democrats.[378] Similarly, they reported lobbying expenses of $52.5 million, more than doubling their expenditure in 2000.[379] They spread that money around, courting officials at every level of government.[380] The beneficiaries were still almost all Democrats.[381]

These investments came at a cost. Even as unions were spending more on politics, they were recruiting fewer members.[382] From 1980 to 2022, their share of the non-agricultural private workforce fell from 21% to 6%.[383] So they couldn't count on new members to fuel their political largess. Instead, they had to siphon off money from their traditional, nonpolitical functions.[384] And that strategy led to a lopsided budget. Over the last twenty years, unions spent 60% of their money on politics.[385] That is, for every dollar they spent on politics, they spent only 66 cents on bargaining, organizing, administering contracts, processing grievances, arbitrating disputes, and all other activities.[386] If budgets reveal priorities, it's

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378. *Interest Groups: Labor*, OPEN SECRETS, https://www.opensecrets.org/industries/indus.php?ind=P [https://perma.cc/LUR2-6KCA] (last visited June 9, 2023).

379. *Id.*

380. *See, e.g.*, LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 50 (observing that unions are now "very much involved in politics on both a local and a national basis"), 57 (reporting that candidates at every level of government owe their elections to union support). *See also* Mitch Smith, *In Chicago Mayor's Race, a Former Teacher Rises with Union Support*, N.Y. TIMES (March 22, 2023), https://www.nytimes.com/2023/03/22/us/brandon-johnson-chicago-mayor-runoff-teachers.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/6RT8-TBLU] (reporting that Democratic candidate for Chicago Mayor Brandon Johnson received "more than $5.2 million" of the total $5.6 million raised "came from organized labor").

381. *See Union Dues for Politics*, UNION FACTS, https://www.unionfacts.com/article/political-money/ [https://perma.cc/S6VV-LBX8] (last visited June 9, 2023) (reporting that unions spent $25 million on "political activities and lobbying" and $65.5 million on "contributions, gifts, and grants" in 2005–06 cycle, largely in favor of Democrats and progressive causes) (internal quotations omitted); HOWARD, *supra* note 32, at 103 (noting that about 90% of union political spending goes to support Democrats).

382. *See* HOWARD, *supra* note 32, at 31–32 (noting that union membership declined from a high of 35% in 1950 to roughly 6% today).

383. Gerald Mayer, UNION MEMBERSHIP TRENDS IN THE UNITED STATES, CONG. RESEARCH SERV. 11 (2004), https://sgp.fas.org/crs/misc/RL32553.pdf [https://perma.cc/STG2-QUJH].

384. *See* Chris Bohner, *The Labor Movement's "Business Unionism" Has Transformed Into "Finance Unionism*," JACOBIN (Feb. 5, 2023), https://jacobin.com/2023/02/finance-unionism-union-density-decline-american-labor-movement-mass-organizing [https://perma.cc/Z87W-N7PS] (reporting on spending trends among major labor unions and concluding that the unions had given up on large-scale organizing until they could affect political change).

385. HOWARD, *supra* note 32, at 101. *Compare also* Livesay, *supra* note 254, at 113 (noting that during voluntaristic era, unions spent as much as one third of their budgets on organizing alone), *with* Hamilton Nolan, *At UFCW, A Reform Movement Rises*, IN THESE TIMES (May 2, 2023), https://inthesetimes.com/article/ufcw-convention-reform-movement-rises [https://perma.cc/W4M3-WELX] ("According to an analysis by the reformers, the UFCW International has spent less than 5% of its budget on organizing for the past three years.").

386. *See* HOWARD, *supra* note 32, at 101 (estimating that when indirect support is included, political spending makes up about 58% of all union spending—not counting the time union officials spend on union activities while on the government payroll). *Cf.* Chris Townsend, *Salting Wouldn't Be Necessary if Employers Didn't Union Bust*, JACOBIN (May 23, 2023), https://jacobin.com/2023/05/american-labor-movement-decline-salting-union-organizing [https://perma.cc/UBM5-WZ4S] (describing modern union organizing efforts as "incidental and sporadic."); Bohner, *supra* note 384 (reporting that spending

easy to see what labor thought was most important.[387]

But spending was only the starting point.[388] Besides funding campaigns, unions also embedded themselves in the party's machinery.[389] They accounted for more than 10% of all delegates to the Democratic National Convention—more than any other group.[390] They also routinely ran their own members for office.[391] For example, in 2023, they backed Brandon Johnson, a union member himself, to be the next mayor of Chicago.[392] With their help,[393] Johnson beat out a deep field of rivals, including the incumbent mayor, Lori Lightfoot—also a Democrat.[394] Most observers attributed Johnson's victory to labor's financial muscle.[395] But the win

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among major labor unions on organizing declined from more than 50% of their budgets in the 1930s to as low as 20% for the SEIU, 13% for the Teamsters, 6% for the United Auto Workers, and 3% for the United Steelworkers).

387. *See* HOWARD, *supra* note 32, at 101 (*"*There is not much, in other words, that unions do with their revenues that is not political."). *See also* Townsend, *supra* note 386 (criticizing AFL-CIO for pledging "transformational" expenses but dedicating few resources to the effort) ("While the U.S. union movement is the most financially wealthy union movement on planet Earth, allocations of resources to tackle the organizing crisis are minuscule and often short-lived). *See also* Hamilton Nolan, *Damning Report Shows Unions Have Plenty of Money to Organize—They Just Don't Spend It*, IN THESE TIMES (Aug. 8, 2022), https://inthesetimes.com/article/union-labor-organizing-funding-strike [https://perma.cc/7NTQ-BJLT] (criticizing unions for focusing on elections and legal reform—a strategy that has produced no major victories in Congress).

388. *See* BOK & DUNLOP, *supra* note 32, at 416 (pointing out that direct contributions undercounts union assistance; many observers think that the campaign services unions provide (e.g., manning phone banks) are more consequential).

389. *See* Saposs, *supra* note 32 at 971 (describing union efforts to insert themselves into policymaking process). *See also* BOK & DUNLOP, *supra* note 32, at 401 (describing union efforts to seize control over local Democratic operations, such as the UAW's efforts to coopt Michigan's Democratic party); HOWARD, *supra* note 32, at 100–01 (noting that by some accounts, unions' in-kind contributions, such as voter-registration drives, dwarf their direct contributions).

390. HOWARD, *supra* note 32, at 102.

391. *Id.*

392. *See* Mailee Smith, *Unions Still Fund Johnson, Individuals Back Vallas for Chicago Mayor*, ILL. POL'Y INST. (March 31, 2023), https://www.illinoispolicy.org/unions-still-fund-johnson-individuals-back-vallas-for-chicago-mayor/ [https://perma.cc/8U4A-VQEE].

393. *See id.* (reporting that through March 31, 2023, Johnson had raised $10.1 million, 91% of which came from the Chicago Teachers Union).

394. *See* Smith, *supra* note 392 (reporting that Johnson "soared" past rivals in Democratic primary "after an endorsement and donations from the Chicago Teachers Union."); Ben Kisling & Joe Barrett, *Chicago Mayor Lori Lightfoot Fails in Re-Election Bid*, Wall St. J. (Feb. 28, 2023), https://www.wsj.com/articles/chicagos-mayor-lori-lightfoot-fights-for-second-term-tuesday-ba91a243 [https://perma.cc/4U3J-333V] (reporting that incumbent mayor was defeated in primary by two union-backed candidates).

395. *See, e.g.*, Micha Uetricht, *How Chicago's Working-Class Movement Elected Mayor Brandon Johnson*, IN THESE TIMES (May 15, 2023), https://inthesetimes.com/article/how-chicagos-working-class-movement-elected-mayor-brandon-johnson [https://perma.cc/DC8M-YF6Z] (quoting Alderman Carlos Ramirez-Rosa, who credits the Chicago Teachers Union for Johnson's victory) ("[T]here would be no Brandon Johnson as mayor, there would be no progressive movement that is bringing the people into City Hall, without a fighting, militant, rank-and-file-led union."); *Chicago's New Mayor Has One of the Trickiest Jobs in Politics*, ECONOMIST (May 11, 2023), https://www.economist.com/united-states/2023/05/11/chicagos-new-mayor-has-one-of-the-trickiest-jobs-in-politics [https://perma.cc/WN4N-TNMJ] (reporting that Johnson "was elected with the enthusiastic support and money of the teacher's union"); Smith, *supra* note 392 (reporting that Johnson was "[b]oosted by the union's endorsement—and perhaps more critically, its money"); *Who Will Save Chicago?*, WALL ST. J. (March 1, 2023), https://www.wsj.com/articles/chicago-mayor-election-lori-lightfoot-paul-vallas-brandon-johnson-crime-teachers-unions-schools-6956202c

showed more than the power of union money. It also showed that unions no longer simply supported the Democratic Party. They increasingly were the Democratic Party.[396]

This political symbiosis coincided with a shift in policy priorities—on both sides of the aisle.[397] Democrats and Republicans alike started seeing labor in purely partisan terms.[398] When Taft–Hartley passed in 1947, it enjoyed support from both sides. Some Democrats even joined Republicans to override a veto by President Truman.[399] But today, few politicians cross the aisle on labor votes.[400] In 2013, the Employee Free Choice Act—then labor's top priority—drew support only from Democrats.[401] Likewise, in 2023, only Democrats supported the Protect the Right to Organize (PRO) Act.[402] Among other things, the PRO Act

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[https://perma.cc/X9GN-GXWY] (calling Johnson a "wholly owned subsidiary" of the CTU because of the union's investments in his campaign).

396. *See* BOK & DUNLOP, *supra* note 32, at 396 (observing that through their contributions, unions have gained "a degree of influence within the Democratic party—a special stake in its long-run strength and success—that it does not have in the Republican party"). *See also, e.g.*, Dylan Sharkey, *Brandon Johnson Appoints Chicago Union Leaders to Transition Team*, ILL. POL'Y INST. (May 23, 2023), https://www.illinoispolicy.org/brandon-johnson-appoints-chicago-teachers-union-leader-to-transition-team/ [https://perma.cc/P3MQ-B6JA] (reporting that Johnson selected officials from CTU and SEIU for key posts, including his chief of staff and transition director, in his transition team). *Cf.* Reid J. Epstein & Shane Goldmacher, *5 Reasons Democrats Picked Chicago for Their 2024 Convention*, N.Y. TIMES (April 11, 2023), https://www.nytimes.com/2023/04/11/us/politics/democratic-national-convention-chicago.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/KA4L-MNBA] (reporting that Democrats picked Chicago over Atlanta for their 2024 convention in part to mollify labor unions).

397. *See* Estreicher, *supra* note 31, at 417 (observing that unions' turn toward politics has affected policy; and politics, in turn, have affected positions of unions).

398. *See id.* (citing as examples Obama administration's policies on healthcare coverage and subsidies for certain industries (e.g., auto manufacturing)). *See also* Leonard, *supra* note 357, at 28 (observing that after endorsements in 1952, Democratic party's platform came to more closely track labor's priorities, with focus on repealing Taft–Hartley).

399. *See* Yeselson, *supra* note 42 (describing legislative buildup, veto, and override vote).

400. *See* Saposs, *supra* note 32 at 971 (arguing that unions no longer want to merely influence policy making; they want to participate in it). *See also, e.g.*, Chris Marr, *Minnesota Democrats Go Big on Paid Leave, Noncompetes, Unions*, BLOOMBERG LAW (May 19, 2023), https://news.bloomberglaw.com/daily-labor-report/minnesota-democrats-go-big-on-paid-leave-noncompetes-unions [https://perma.cc/QYA8-WF4S] (reporting that controversial package including pro-union changes, Minn. SF 3035, passed on a party-line vote, with Democrats supporting and Republicans opposing).

401. *See* Employee Free Choice Act, H.R. 1409, 111th Cong. (2007). *See also* Estreicher, *supra* note 31, at 424 (citing the EFCA as a symptom of labor's turn toward politics).

402. *See* Richard L. Trumka Protecting the Right to Organize Act of 2023, H.R. 20, 118th Cong. (2023–24), https://www.congress.gov/bill/118th-congress/house-bill/20/all-info [https://perma.cc/3TYL-BTMM] (listing cosponsors). *See also* Press Release: Int'l Brotherhood of Teamsters, Teamsters Commend U.S. Senate HELP Committee for Passing PRO Act (June 23, 2023), https://teamster.org/2023/06/teamsters-commend-u-s-senate-help-committee-for-passing-pro-act/ [https://perma.cc/AFB4-DQJV] ("Democrats on the HELP Committee did the right thing by voting in favor of the PRO Act . . . ." (quoting Teamsters President Sean O'Brien)); *Ranking Member Cassidy Delivers Remarks During Committee Markup of Partisan Labor Bills*, U.S. SENATE COMMITTEE ON HEALTH, EDUC., LABOR & PENSIONS (June 21, 2023), https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-delivers-remarks-during-committee-markup-of-partisan-labor-bills-1 [https://perma.cc/6MDG-663K] (describing the PRO Act as part of a "disturbing trend by President Biden and Congressional Democrats to erode workers' individual rights.").

would have rolled back parts of Taft−Hartley, including a provision allowing states to ban union shops.[403] It therefore enjoyed nearly universal Democratic support.[404] But for the same reasons, it faced universal Republican opposition.[405] In fact, only a week after it was introduced, Republican senators introduced a bill doing just the opposite: banning union shops nationwide.[406]

The same divide has split state legislatures.[407] Democrat-dominated states like California, New York, Washington, and Illinois now regularly pass pro-union measures.[408] They have allowed home-care workers—ostensibly independent contractors—to form and join unions.[409] They have also banned "captive audience"

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403. *See* H.R. 20, *supra* note 402 (proposing to amend NLRA by, among other things, restoring unions' ability to engage in secondary boycotts and limiting employer election speech). *See also* David Sparkman, *The PRO Act: Labor's Pandora's Box*, MH&L NEWS (March 10, 2021), https://www.mhlnews.com/labor-management/article/21157609/the-pro-act-labors-pandoras-box [https://perma.cc/L37A-CWJW] ("If enacted in its present form, [the PRO Act] would repeal much of the 1947 Taft–Hartley Act and permanently enshrine in law a total imbalance in the relationship between unions and employers.").

404. *See* Press Release, Sen. Alex Padilla, Padilla Introduces PRO Act to Protect Workers' Right to Organize (March 1, 2023), https://www.padilla.senate.gov/newsroom/press-releases/padilla-introduces-pro-act-to-protect-workers-right-to-organize%EF%BF%BC/ [https://perma.cc/PF5T-PPRT] (listing Senate cosponsors—all Democrats).

405. *See* Press Release, Virginia Foxx, Tell the Union Bosses to Take a Hike (March 2, 2022), https://foxx.house.gov/news/documentsingle.aspx?DocumentID=400069 [https://perma.cc/C3TW-CDU5] (describing the PRO Act as a "political hack job").

406. *See* National Right to Work Act, S. 532, 118th Cong. (2023); Press Release: Sen. Bill Cassidy (R-La.), Ranking Member Cassidy Joins Paul, Colleagues to Reintroduce National Right-to-Work Act to Protect Workers from Big Labor (Feb. 27, 2023), https://www.help.senate.gov/ranking/newsroom/press/ranking-member-cassidy-joins-paul-colleagues-to-reintroduce-national-right-to-work-act-to-protect-workers-from-big-labor [https://perma.cc/HV8T-5EE9] (listing 19 sponsors for the bill, all Republicans). *Cf.* Employee Rights Act, S. 3889, 117th Cong. (2021–22) (proposing suite of anti-union changes to federal law, such as requiring a majority of all represented employees to vote for union representation before certification, requiring unions to protect employees' private information, limiting the use of dues for "nonrepresentational" activities, restricting joint employment, creating an exemption for certain employers with religious objections to collective bargaining, and banning voluntary recognition by card check) (sponsored only by Republicans).

407. *See, e.g.*, Eric Scicchitano, *Vote on Simple Resolution in Pa. House Shows Party Split on Union Position*, NEW CASTLE NEWS (June 5, 2023), https://www.ncnewsonline.com/news/local_news/vote-on-simple-resolution-in-pa-house-shows-party-split-on-union-positions/article_71b7b01f-a94a-5d3e-bbad-d40a02eeb147.html [https://perma.cc/99X4-PX84] (reporting on Democrat-sponsored resolution to declare "union organizing week.").

408. *See, e.g.*, Press Release: Gretchen Whitmer, Gov. Whitmer Signs "Restoring Workers' Rights" Bill Package into Law (March 24, 2023), https://www.michigan.gov/whitmer/news/press-releases/whitmer-signs-restoring-workers-rights-bill-package-into-law [hereinafter Whitmer Statement] [https://perma.cc/HYS9-4ZMY] (endorsing package of pro-labor reforms, including prevailing-wage law and repeal of right-to-work law).

409. *See, e.g.*, Wash. Rev. Code § 74.39A.270 (authorizing collective bargaining by homecare workers on sectoral level by designating them public employees for the limited purpose of organizing and bargaining); Cal. WELF. & Inst. Code § 12301.6(c)(2)(A) (designating certain nonprofit consortiums contracting with the state as employers of in-home support workers to facilitate collective bargaining). *See also* A.B. 1672 (Cal. 2023) (proposing to deem the state the employer of certain in-home providers for purposes of collective bargaining); *Valuing Home and Child Care Workers*, NEW AMERICA, https://www.newamerica.org/new-practice-lab/reports/valuing-home-child-care-workers/policy-a-roadblock-and-pathway-to-securing-care-worker-rights/ [https://perma.cc/9FLL-UTRQ] (noting that Connecticut,

meetings, long a bête noire of labor.[410] And they have passed their own versions of the PRO Act, expanding union rights in sectors like agriculture and public services.[411]

Democrat-dominated states have also promoted unions with their spending power.[412] For example, some blue states have conditioned bids for public contracts on "project labor agreements."[413] Others have prioritized unionized applicants for special permits, such as licenses to operate marijuana dispensaries.[414] And still others have forbidden contractors to spend money on "union avoidance."[415]

Red states, for their part, have been no less partisan in their approach to unions. For example, in 2023, Tennessee forbade public contractors from recognizing unions by "card check."[416] Instead, contractors would have to demand a secret-ballot election.[417] Likewise, some red states banned dues-checkoffs.[418] Others

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Oregon, Illinois, Massachusetts, Minnesota, and Washington have established "home care authorities" to facilitate bargaining) ("Establishing HCAs as the employer of record for home care workers has positioned workers to collectively bargain for improved wages, benefits, and training opportunities.").

410. *See* S.B. 399 (Cal. 2023) (proposing to prohibit an employer from "subjecting, or threatening to subject, an employee to discharge, discrimination, retaliation, or any other adverse action because the employee declines to attend an employer-sponsored meeting" about specified matters, including union matters). *See also* Marr, *supra* note 400 (reporting that several Democrat-led states, including Minnesota and Connecticut, have banned captive-audience meetings).

411. *See* Agricultural Labor Relations Voter Choice Act, A.B. 2183 (Cal. 2022). *See also* Alexander T. MacDonald, *California's New Agricultural Labor Relations Voter Choice Act Leaves Employers with No Good Options*, FEDSOC BLOG (September 22, 2022), https://fedsoc.org/commentary/fedsoc-blog/california-s-new-agricultural-labor-relations-voter-choice-act-leaves-employers-with-no-good-options [https://perma.cc/KCN3-4SYQ] (comparing A.B. 2183 to the PRO Act).

412. *See* BOK & DUNLOP, *supra* note 32, at 407–08 (observing that outsized political contributions have gotten unions access to powerful legislators, who can repay favors through control of appropriations process). *See also id.* at 415 (pointing out that legislators who receive contributions may feel obligated to unions even when no express promises have been made).

413. *See* David Garrick, *San Diego Plans to Create Pact with Labor Unions for Construction Projects that Would Apply Citywide*, SAN DIEGO TRIBUNE (Feb. 3, 3023), https://www.sandiegouniontribune.com/news/politics/story/2023-02-03/citywide-project-labor-agreement [https://perma.cc/D5CY-4K9F] (reporting that democratic officials in San Diego were poised to enter a blanket project labor agreement with labor unions guaranteeing that construction work would go to unionized firms, despite criticisms that PLAs raise project costs). *Cf.* Ivan Moreno, *GOP Panel Warns of Costly Labor Deals for Federal Projects*, LAW360 (May 17, 2023), https://www.law360.com/employment-authority/labor/articles/1678470?nl_pk=90903fb8-25c5-400e-b80c-e370e41c6b0a&utm_source=newsletter&utm_medium=email&utm_campaign=employment-authority/labor&utm_content=2023-05-18&nlsidx=0&nlaidx=4 [https://perma.cc/PQ8N-V7FD] (reporting that congressional Republicans were objecting to Biden administration proposal to require project-labor agreements on federal contracts).

414. *See* Robert Iafolla & Joyce E. Cutler, *Cannabis Economy Peace Laws Spread, Fertilizing Union Growth*, BLOOMBERG LAW (May 13, 2021), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X3L7L08000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/K65B-K77D] (citing S.B. S854A, 2021–22 Leg. (N.Y. 2022); Pub. L. 2021, Assembly No. 21, ch. 16 (N.J. 2021); H. 2312, Spec. Sess. (Va. 2021); A.B. 1291, 2019 Reg. Sess. (Cal.)).

415. *See Brown*, 554 U.S. at 62 (discussing Cal. GOV'T Code §§ 16645.2 and 66645.7, which forbade public contractors from using state funds "to support or oppose unionization").

416. H.B. 1342, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

417. *See id.*

418. *See* H.B. 1445, § 2 (Fla. 2023) ("[A]n employee organization that has been certified as a bargaining agent may not have its dues and uniform assessments deducted and collected by the employer from the salaries of its employees in the unit."). *See also Florida Bill Targeting Unions Emerges in House*, TAMPA BAY TIMES (March 3, 2023), https://www.tampabay.com/news/florida-

required regular recertification votes.[419] And still others banned collective bargaining altogether.[420]

None of this even mentions the most controversial expression of state policy toward unionism: right-to-work laws.[421] First authorized by Taft–Hartley, right-to-work laws forbid agency-fee provisions.[422] The laws are controversial in part because they're effective.[423] They've been shown to not only reduce union membership, but also to reduce Democratic votes.[424] As a result, Republicans have long used them as a tool for eroding Democrat support.[425] And Democrats have

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politics/2023/03/03/bill-targets-public-employee-union-members-house-republican-senate/ [https://perma.cc/YHV8-EDDM] (reporting that HB 1445 would ban automatic dues checkoffs for public employees).

419. *See* S.B. 256 sec. 4 (Fla. 2023) (amending Florida law to require regular recertification votes). *See also* McKenna Schueler, *Florida Republican Sen. Blaise Ingoglia Files Bill Targeting Unions in Public Sector*, ORLANDO WEEKLY (March 1, 2023), https://www.orlandoweekly.com/news/florida-republican-sen-blaise-ingoglia-files-bill-targeting-some-public-sector-unions-33665635 [https://perma.cc/4P8G-JYZG] (describing S.B. 256 as "anti-union" and arguing that it would lead to "mass decertification"); Elyse Weissberger, *News & Commentary*, ONLABOR (March 6, 2023), https://onlabor.org/march-6-2023/ [https://perma.cc/5674-8GUG] (attributing S.B. 256's and H.B. 1445's success to a new Republican "supermajority" in the legislature).

420. *See* N.C. GEN. STAT. ANN. § 95–98 (voiding any contract between any instrumentality of the state and a labor union). *Cf.* Smith v. Ark. State Highway Emps., 441 U.S. 463, 465 (1979) (per curiam) (holding that state could constitutionally forbid its instrumentalities from bargaining collectively even if the right to join a union was constitutionally protected); Fraternal Order of Police v. Mayor and City Council of Ocean City, 916 F.2d 919, 921–22 (4th Cir. 1990) (same); Atkins v. City of Charlotte, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969) (same).

421. *See* BOK & DUNLOP, *supra* note 32, at 98 ("No issue has aroused greater furor in the field of labor relations than the status of the union shop.").

422. *See id.* at 98 (describing Taft-Hartley's authorization of right-to-work laws); 29 U.S.C. § 164(b) (allowing states to forbid contracts "requiring membership in a labor organization as a condition of employment.").

423. *See* David Leonhardt, *Why Unions Matter So Much*, N.Y. TIMES (March 10, 2023), https://www.nytimes.com/2023/03/10/briefing/labor-unions-democratic-party-right-to-work.html [https://perma.cc/U2D5-P8PU] (reporting that right-to-work laws decreases union density and the share of Democratic vote).

424. *See id.* Cf. Thomas Edsall, The Right Has a Greater Appreciation of Labor's Role than We Do: Can Democrats Figure Out How to Get Unions Back into the Equation in 2020?, N.Y. TIMES (May 1, 2019), https://www.nytimes.com/2019/05/01/opinion/democratic-primary-labor.html [https://perma.cc/NK3Q-2Y4B] ("The relentless Republican assault on unions in the industrial belt states during the first half of this decade was an unquestionable success, politically speaking.").

425. *See* Grover Norquist, *Why Republicans (and Trump) May Still Win Big in 2020—Despite 'Everything*,' OZY.COM (2017), https://www.ozy.com/politics-and-power/why-republicans-and-trump-may-still-win-big-in-2020-despite-everything/78775?utm_campaign=05282017&utm_me dium=email&utm_source=dd/ [https://perma.cc/2DGC-FALR] (arguing that right-to-work laws and similar laws in the public sector could help end Democratic victories) ("To understate it: If Act 10 is enacted in a dozen more states, the modern Democratic Party will cease to be a competitive power in American politics. It's that big a deal."). *Cf.* Mark Engler & Paul Engler, *Democrats Hold Trifecta Power in Over a Dozen States. Will They Actually Use It?*, IN THESE TIMES (Feb. 1, 2023), https://inthesetimes.com/article/democrats-michigan-minnesota-labor-unions-right-to-work-social-movements/ [https://perma.cc/WYN8-CRR9] (arguing that efforts by prior Republican administration in Wisconsin to weaken public-employee bargaining rights were in fact an effort to erode Democratic political base).

reacted in no less partisan terms.[426] They have resisted the laws however they can, sometimes even banning them by constitutional amendment.[427] And in one recent case, they repealed a right-to-work law outright[428]—even though right-to-work laws remain broadly popular.[429]

This behavior is telling. It shows that both sides see unionism as a political issue.[430] Democrats consistently support unions, and Republicans consistently oppose them.[431] The parties know that unionism helps one side and hurts the other.[432] In other

426. *See* Weisman, *supra* note 32 (reporting that Michigan repeal of right-to-work law was "meant to reverse the decline of organized labor and bolster Democratic political strength in elections to come"); Chris Marr, *Michigan Senate Passes 'Right to Work' Repeal Days After House*, BLOOMBERG LAW (March 14, 2023), https://tinyurl.com/3pazzdbe [https://perma.cc/HX4Y-JQHD] (reporting that right-to-work repeal passed Michigan Senate on 20–17 party-line vote).

427. *See* S.R. 11, 102d Gen. Assemb. (Ill. 2022) (proposing constitutional amendment to ban right-to-work laws); S. Const. amend. 7 Reg. Sess. (Cal. 2023) (same).

428. *See* S.B. 34, 102d Leg., sec. 14 (Mich. 2023) (permitting collective bargaining agreements with agency-fee provisions). *See also* H.B. 4004, 102d Leg. (Mich. 2023) (permitting unions and employers in public sector to agree to collective-bargaining agreements requiring employees to "share equally in the financial support of the bargaining representative" to the extent allowed by *Janus* or any subsequent decision or constitutional amendment overruling *Janus*). *See also* Leonhardt, *supra* note 423 (arguing that repeal of Michigan's right-to-work law showed that the "Democratic Party again seems to be emphasizing organized labor").

429. *See* BOK & DUNLOP, *supra* note 32, at 15 (reporting that polls consistently show public disapproval for mandatory membership and forced dues).

430. *See, e.g.*, Press Release, U.S. House of Representatives Comm. on Health, Educ., Lab. & Pensions, Ranking Member Cassidy Calls out Weaponization of National Labor Relations Board, (March 7, 2023) (on file with author), (accusing Democrat-controlled NLRB of coordinating with private unions, including Starbucks Workers United, in a "politicized" effort to target certain employers); Foxx, *supra* note 405 (criticizing Democrats for "touting their union-led schemes"). *See also* Uetricht, *supra* note 395 (quoting Alderman Carlos Ramirez-Rosa, who credits the Chicago Teachers Union for bolstering the city's "progressive movement" and electing Mayor Brandon Johnson).

431. *See Unions in Our Communities and Democracy*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/workcenter/unions-and-democracy/ [https://perma.cc/PSP7-XSMG] (last visited June 17, 2023) (Biden administration web page) (arguing that "[s]trong unions help policymakers focus on the most important issues for working families"). *Compare also* Joe Biden (@POTUS), Twitter (Feb. 28, 2021), https://tinyurl.com/7k5ar5pa [https://perma.cc/4S5K-FFFE] (endorsing union drive at Amazon warehouse in Bessemer, Alabama), *and* Jaclyn Diaz, *Biden Backs Amazon Warehouse Workers' Union Drive*, NAT'L PUB. RADIO (March 1, 2021), https://www.npr.org/2021/03/01/972410944/biden-backs-amazon-warehouse-workers-union-drive/ [https://perma.cc/5PQC-VBAF] (reporting on Biden's endorsement), *with* Press Release, Sen. Tim Scott (R-S.C.), Senator Scott, Congressman Allen, Colleagues Introduce Landmark Legislation to Protect Workers and Support Small Business Owners (April 19, 2023), https://tinyurl.com/yex9xb5a/ [https://perma.cc/4BQT-Z5LE] (explaining introduction of Employee Rights Act as a measure to "protect workers rather than union bosses"). *Cf. also* Peter Baker, *Biden is Running on His Record (and Away from It)*, N.Y. TIMES (April 25, 2023), https://www.nytimes.com/2023/04/25/us/politics/biden-record-presidential-campaign.html?smid=nytcore-ios-share&referringSource=articleShare/ [https://perma.cc/LWY4-6FTU] (reporting that Biden announced his reelection bid during "address to more than 3,000 members of North America's Building Trades Unions"); Sharon Block, *What Can We Learn from Growing Federal Sector Unions? (Hint: Maybe Clean Slate Works)*, ONLABOR (March 23, 2023), https://onlabor.org/lessons-from-federal-employee-unions/ [https://perma.cc/LF9L-LE6N] (crediting President Biden's policies for growing federal union ranks).

432. *See, e.g.*, Leonhardt, *supra* note 423 ("When a labor union talks to these voters about economic policy, they become more likely to vote for a Democrat. When they are not in a union, they may instead be swayed to vote Republican by their evangelical church or Fox News."). *See also* BOK & DUNLOP,

words, they know that unionism is a political phenomenon.[433] They sometimes even *define* unionism as political activity.[434]

Few today would quibble with that definition. Unions surely don't. In their rallies, press releases, and websites, they tout their political bona fides.[435] They declare their positions on inequality, immigration, housing, and even environmental justice.[436] They accept, even embrace, their political identity.[437] So while

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supra note 32, at 420 (pointing out that the longer a person is a union member, the more likely she is to vote Democratic) ("[Unions] exert significant influence only through a gradual process of reinforcing the loyalties of sympathetic members toward the Democratic Party.").

433. *See, e.g.*, Nancy Cook & Jordan Fabian, *Biden to Hold 2024 Kickoff Rally with Labor in Philadelphia*, BLOOMBERG LAW (June 9, 2023), https://tinyurl.com/bd8bxdpx/ [https://perma.cc/S47S-HNQZ] ("Biden, who has called himself the most pro-union president in US history, is signaling he intends to depend heavily on organized labor's support to win a second term."); *The Left Wins Big in Midwest Elections*, WALL ST. J. (April 5, 2023), https://www.wsj.com/articles/chicago-mayor-wisconsin-supreme-court-election-paul-vallas-brandon-johnson-janet-protasiewicz-dan-kelly-3673d166/ [https://perma.cc/T6KZ-2HM8] (arguing that the "biggest winners" of surprise victories for Democrats in spring 2023 were unions, who could expect to receive favorable policy treatment).

434. *See, e.g.*, SF 3035A sec. 25 (Minn. 2023) (defining "political matters" to include "matters relating to . . . any political, civic, community, fraternal, or labor organization"); A.B. 6604, 2023–24 Reg. Sess. (N.Y. 2023) ("'Political matters' shall mean matters relating to . . . the decision to join or support any . . . labor organization . . . ."); Conn. Pub. Act No. 22–24 sec. 1 (2022) (defining "political matters" to include "matters relating to . . . labor organization[s]"); S.P. 702, 131st Leg. § 1 (Ma. 2023) (same).

435. *See, e.g.*, Press Release, N.Y. State AFL-CIO, N.Y. State AFL-CIO Endorses Hochul for Governor (Jan. 26, 2022), https://nysaflcio.org/press-releases/new-york-state-afl-cio-endorses-hochul-governor/ [https://perma.cc/6Q7Q-YDBE] (endorsing Democratic candidate for governor); Press Release, AFL-CIO, AFL-CIO Votes to Endorse President Biden for Reelection (June 16, 2023), https://aflcio.org/press/releases/afl-cio-votes-endorse-president-biden-re-election#:~:text=The%20General%20Board%20of%20the,for%20re%2Delection%20in%202024/ [https://perma.cc/D6PK-MQZU] (endorsing Democratic candidate for President); Press Release, Serv. Emps. Int'l Union, SEIU's Henry: Following Bad Supreme Court Decision on Affirmative Action, Court Further Rigs the Rules Against Working People in Student Debt Case (June 30, 2023), https://www.seiu.org/2023/06/seius-henry-following-bad-supreme-court-decision-on-affirmative-action-court-further-rigs-the-rules-against-working-people-in-student-debt-case/ [https://perma.cc/7ZNK-D8QR] (taking positions on affirmative action and student-loan forgiveness); Press Release, AFL-CIO, The Fight for Student Debt Relief is Not Over (June 30, 2023), https://aflcio.org/press/releases/afl-cio-fight-student-debt-relief-not-over/ [https://perma.cc/D2YH-PHPH] (taking position on student-debt relief and framing debate in partisan terms). *See also* Jessica Corbett, *In "Unprecedented Show of Solidarity," Major Labor Unions Endorse Biden for 2024*, COMMON DREAMS (June 16, 2023), https://www.commondreams.org/news/unions-endorse-biden-2024/ [https://perma.cc/78SN-9DNR] (reporting on endorsements by major unions of Biden reelection campaign in 2024).

436. *See, e.g.*, AFL-CIO Platform, *supra* note 40 (taking positions on, among other things, immigration, civil rights, and "corporate greed"); Schuler Q&A, *supra* note 28 (taking positions on climate change). *See also* BOK & DUNLOP, *supra* note 32, at 395 (noting that starting in the 1930s, unions placed more emphasis on social issues, in part because of diversifying membership); Jireh Deng, *The WGA Strike Is More than an Issue of Pay—It's Part of the Battle for Diversity and Inclusion in Hollywood*, IN THESE TIMES (May 11, 2023), https://inthesetimes.com/article/wga-strike-diversity-amptp-hollywood/ [https://perma.cc/5YYU-9FA8] (reporting that many striking Hollywood writers linked their demands to diversity and inclusion issues).

437. *See* Bok & Dunlop, *supra* note 32, at 458 (pointing out that unions have failed to develop their own social platforms but instead, have been content to adopt the platform promoted by the Democratic party). *See also, e.g.*, Uetricht, *supra* note 395 (quoting Jane McAlevey as identifying union organizing with "political education") ("And if we're not doing radical political education as we're doing the organizing work, we're doing something wrong."); Smith, *supra* note 380 (reporting that Chicago

it may once have been possible to describe them as apolitical—or at least nonpartisan—it no longer is.[438] The days of voluntarism have long since passed.[439]

III. POLITICAL UNIONS AND EXCLUSIVITY: THE CONSTITUTIONAL DIFFICULTY

That point may seem obvious. Anyone vaguely familiar with the modern labor movement knows it has political overtones.[440] Less obvious, perhaps, is what those overtones mean for unions' constitutional status. If the labor movement is a political movement, then all unions—even private ones—raise the associational concerns that animated *Janus*.[441] In short: how can the government force people to associate with unions if unions are engaged in politics?[442]

A. The First Amendment and Forced Association

The words "freedom of association" appear nowhere in the Constitution.[443] Instead, associational rights have been inferred from the freedom of speech.[444] The inference follows from how speech has been understood.[445] Speech includes not only literal words but also expressive activity.[446] And expressive activity can

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Teachers Union has "emerged over the last dozen years as a defining voice on Chicago's political left, putting forth a progressive vision for the city that extends well beyond its classrooms").

438. *See, e.g.*, BOK & DUNLOP, *supra* note 32, at 396 (noting that the modern AFL is "plainly more partisan today than it was in earlier times"); Saposs, *supra* note 32, at 970 ("[E]ven a brief glance at the labor press and a superficial familiarity with developments at union conventions and other conferences reveals organized labor's determination to broaden its political activity."). *Cf.* Smith, *supra* note 380 (reporting that the political influence of Chicago Teachers Union had grown over the prior 12 years, culminating in its endorsement and backing of Brandon Johnson for mayor).

439. See LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 83 (arguing that as the workplace became more heavily regulated over the twentieth century, unions retreated from their "traditional attitude" that "they were the ones best suited to determine conditions of labor in their industries"; replaced it with an emphasis on public regulation); *AFL-CIO Convention Resolution Means More Organizing*, JACKSON LEWIS (April 13, 2002), https://www.jacksonlewis.com/resources-publication/afl-cio-convention-resolution-means-more-organizing/ [https://perma.cc/833H-PHMN] ("Connections between politics and organizing remain an essential part of the organizing movement. Politicians will continue to be enlisted to speak in [sic] behalf of specific union organizing campaigns.").

440. *See* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 800 (1961) (Frankfurter, J., dissenting) (observing that it is nearly impossible to write the history of labor unions without mentioning their political activity). *See also* Milton & Rose Friedman, *supra* note 36, at 299–300 (explaining that overwhelming politicization of labor movement could be seen in mere fact that unions had all moved their headquarters to Washington, DC).

441. *But see* Knight v. Minn. Cmty. Coll. Fac. Ass'n (Knight *I*), 571 F. Supp. 1, 5 (D. Minn. 1982) (rejecting argument based on union's status as a political organization, viewing that argument as unavailable based on the (since overturned) *Abood*).

442. *Cf.* BOK & DUNLOP, *supra* note 32, at 460 (noting that the political orientation of modern unions clashes with that of their members, who oppose labor's involvement in social issues by a wide margin).

443. *See* U.S. CONST. amend. I. *See also* Bond, *supra* note 54, at 423 (making the same point).

444. *See* Bond, *supra* note 54, at 423; MORRIS, *supra* note 30, at 111 (explaining that associational rights are an "amalgam" of speech, petition, and assembly rights).

445. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). *See also* MORRIS, *supra* note 30, at 111; Bond, *supra* note 54, at 427.

446. *See Dale*, 530 U.S. at 647–48.

include associating with a particular group.[447] For example, if you join the NRA, you are probably saying something about your views on guns.[448] And if you join PETA, you are probably saying something about your views on animals.[449] You don't have to use any words; your mere association with the group sends a message.[450]

Of course, not all associations equate to speech. Life is full of small associations, most of which convey no message at all.[451] Rather, an association conveys a message only when the group you associate with is itself expressive.[452] That is, the group has to convey some kind of message related to your association.[453] Admittedly, "expressive" in this context is hardly self-defining.[454] But there are some clear boundaries. For example, you probably send no message by joining a kickball league.[455] But you do send a message by joining a political party.[456]

And that's where the labor movement's political ties come in. If unions were only economic actors, they might not be expressive.[457] They would be like any other bargaining agent - say, a real-estate agent.[458] You send no message by

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447. *See id.* (explaining that expressive association includes not only association with explicit advocacy groups: it covers association with any group that engages "in some form of expression, whether it be public or private."). *See also* Morris, *supra* note 30, at 113 (crediting *Jaycees* for first recognizing the right of expressive association).

448. *Cf. Dale*, 530 U.S. at 650 (finding an associational link between being a scoutmaster and the Scouts' position on homosexuality).

449. *Cf. id.*

450. *See id.* at 648, 650, 652–53 (explaining that mere membership in a group can be a form of expression).

451. *See* Bond, *supra* note 54, at 431; Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 775 (1961) (Douglas, J., concurring) ("Some forced associations are inevitable in an industrial society.").

452. *See Dale*, 530 U.S. at 648, 650; *Jaycees*, 468 U.S. at 633-34 (O'Connor, J., concurring).

453. *See Jaycees*, 468 U.S. at 633-34 (O'Connor, J., concurring).

454. *See id.* at 636 (O'Connor, J., concurring) (acknowledging that it can be sometimes difficult to distinguish between expressive and nonexpressive groups; the distinction will depend on context and the group's predominant purpose).

455. *See Dale*, 530 U.S. at 648 (explaining that to be protected, the group must "engage in some form of expression, whether it be public or private"); *Jaycees*, 468 U.S. at 633-34 (O'Connor, J., concurring) (distinguishing between "expressive associations," which enjoy robust constitutional protection, and "commercial associations," which enjoy more limited protection). *Cf. Street*, 367 U.S. at 775 (Douglas, J., concurring) (citing as examples of non-expressive association the forced association you experience whenever you get on a bus, report to work at a factory, or reside in public housing).

456. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 77–78 (1990) (holding that discrimination in hiring of public employees violated the First Amendment because employees would feel pressure to associate with a particular party); *Elrod*, 427 U.S. at 356 ("Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment."). *Cf.* Baranowski, *supra* note 112, at 2268 (describing evolution of associational rights into two tracks - "intimate" and "expressive" - during 1950s and 1960s).

457. *See Street*, 367 U.S. at 778 (Douglas, J., concurring) (treating association with unions for bargaining purposes as one of the typical associations of modern industrial society). *But see id.* at 790-91 (Black, J., dissenting) (arguing that union issues are just as political as other issues of public debate, and thus just as subject to First Amendment scrutiny).

458. *See, e.g.*, D'Agostino v. Baker, 812 F.3d 240, 243 (1st Cir. 2016). (finding no First Amendment injury when employees were only forced to bargain for terms and conditions of work through union).

hiring a real-estate agent.[459] You are merely hiring someone to help you buy a house. But unions no longer work like that.[460] They do more than simply bargain for their members over wages, hours, and working conditions.[461] They also pursue broader social and political agendas in the public square.[462] In fact, the public square has increasingly become their main focus,[463] which makes them less like a real-estate agent and more like a political party.[464] They are less kickball league, more NRA.[465]

Lest we think that description unfair, unions themselves have recognized their political status.[466] When it has served them, they have argued that labor issues are matters of "public concern" on which people have a constitutional right to

459. *See Dale*, 530 U.S. at 655 (explaining that no associational rights are implicated unless the association involves expression).

460. *See, e.g.*, *Jaycees*, 468 U.S. at 637-38 (citing unions as an example of expressive organizations); Estreicher, *supra* note 31, at 418 (describing modern unions as predominantly political organizations).

461. *See* section III, *supra*.

462. *See* AFL-CIO Platform, *supra* note 3. *See also* BOK & DUNLOP, *supra* note 32, at 33, 35, 40, 84 (describing union engagement in non-workplace policy and political issues on which individual members may disagree and have little opportunity to influence). *Cf. How a Teachers Union Promotes Critical Race Theory*, WALL ST. J. (Mar. 8, 2023), https://www.wsj.com/articles/virginia-teachers-union-crt-toolkit-virginia-education-association-glenn-youngkin-7245a588, archived at https://perma.cc/LAH3-4GZH (reporting on dispute between Virginia's Republican governor and teachers union over "black lives matter" toolkits). *Cf. Assumptions of Trade Unionism*, *supra* note 267, at 199 (arguing that once unions involve themselves in politics, they must give up on appeals based on pragmatic economics and relative strength at bargaining table; must instead appeal to state on basis of community justice); Yeselson, *supra* note 42 ("Post-New Left egalitarians fill top leadership positions across the labor movement . . . . They have urged unions, with increasing success, to reach out to environmentalists, community organizations, immigration reformers, racial justice advocates, feminists, gay rights activists, and political reformers to pursue policy changes like limiting the filibuster and protecting voting rights.").

463. *See, e.g.*, Estreicher, *supra* note 31, at 418 (concluding that modern unions effectively function as political organizations); Labor in the Twentieth Century, *supra* note 70, at 83 (arguing that as government intervention in markets has become more pervasive, unions have shifted their focus from collective bargaining to government engagement). *Cf. Assumptions of Trade Unionism*, *supra* note 267, at 199 (explaining that political labor movements, relying as they do on legislation instead of direct action, must naturally make more explicit appeals to public opinion), 206 (arguing that as unions take a more active role in national politics, they naturally become "conscious of their own special functions in the political world, and busy themselves primarily with its fulfillment").

464. *See Jaycees*, 468 U.S. at 635-36 (O'Connor, J., concurring) (explaining that the question for First Amendment purposes is whether the organization is "predominantly" engaged in expressive activity"). *See also* Bond, *supra* note 54, at 426 (observing that while the Court has recognized some associational interests in commercial or associational contexts, the "bulk" of its caselaw deals with political association).

465. *See* Estreicher, *supra* note 31, at 418; *Assumptions of Trade Unionism*, *supra* note 267, at 206 (arguing that politicization of labor movement is inevitable in economy where government intervenes in labor markets through regulation) ("Political democracy will inevitably result in industrial democracy."). *Cf.* MORRIS, *supra* note 30, at 127 (arguing that workers have a First Amendment right to associate with a union even absent certification of a majority representative).

466. *See* Laborers Loc. 236, AFL-CIO v. Walker, 749 F.3d 628, 639 (7th Cir. 2014) (noting that unions challenged law restricting public-sector collective bargaining on First Amendment grounds; they argued that they were "expressive association[s] whose core purpose is to bargain with state employers on their employees' behalf").

speak.[467] They have also argued that workers have a First Amendment right to join together and bargain collectively.[468] More important, courts have agreed with them.[469] Even the Supreme Court has recognized that the First Amendment protects the right to associate with a union.[470]

But if people have a constitutionally protected right to associate with a union, the reverse must also be true. If the First Amendment protects your decision to join a union, it likewise protects your decision not to join.[471] The right to speak has always included the right not to speak.[472] And the right to associate has always included the right to stand apart.[473] One conclusion necessarily

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467. *See, e.g.*, *id.* at 639; MORRIS, *supra* note 30, at 111-13 (arguing that union association is protected by the First Amendment).

468. *See, e.g.*, Atkins v. City of Charlotte, 296 F. Supp. 1068, 1075-76 (W.D.N.C. 1969) (sustaining union's challenge to statute that forbade certain public employees from joining labor unions); *Ocean City*, 916 F.2d at 921 (rejecting union's argument that the First Amendment protects a positive right to bargain through a union). *Cf.* BOK & DUNLOP, *supra* note 32, at 25 (reporting that polls show even business leaders recognize the right of workers to choose to associate with each other, which shows a widespread public respect for individual freedom and the right to associate).

469. *See* Hanover Tp. Fed. Teach. L. 1954 v. Hanover Com, 457 F.2d 456, 460 (7th Cir. 1972) (recognizing that the First Amendment protects public employees from discharge for joining a union). *See also* Matter of Div., Crim. Justice St. Investigators, 289 N.J. Super. 426, 434-35 (N.J. Super. 1996) (noting that federal courts have interpreted the First Amendment to protect public employees from discharge for joining a union); IDK, Inc. v. Clark C'nty, 836 F.2d 1185, 1195 (9th Cir. 1988) (describing unions as a type of "overtly expressive association"). *Cf.* MORRIS, *supra* note 30f, at 112 (arguing that the law has long recognized a "special status" for association among workers).

470. *See* Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 309 (2012) (recognizing that the ability "of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed"); Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., 485 U.S. 360, 366 (1988) (acknowledging right of workers to associate with one another for self-organization); Bd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964) (holding that state could not enjoin union from alleged legal solicitation of injured members to assist them in obtaining legal advice). *See also* Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463, 464-65 (1979) (per curiam) (rejecting First Amendment claim based on state's refusal to bargain in part because there was no claim that the state tried to prevent employees from associating in a union or retaliated against them for doing so). *Cf.* Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) (holding that picketing over a labor dispute was protected expressive conduct regarding "a matter of public concern") ("[T]he facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the constitution."); Thomas v. Collins, 323 U.S. 516, 532 (1945) ("This Court has recognized that in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."); NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941) (recognizing that employers had a First Amendment right to engage in noncoercive speech about union-related issues); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 253 (1917) (recognizing "the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join," subject to the obligation not to injure others' rights).

471. *See* Muhall v. UNITE HERE Loc. 355, 618 F.3d 1279, 1288 (11th Cir. 2010) (concluding that freedom of association embraces the right not to associate with a union). *Cf.* BOK & DUNLOP, *supra* note 32, at 28 (reporting that polling data shows that public accepts right to join a union, but objects to forms of coercion, such as forced dues and forced membership).

472. *See, e.g.*, Janus v. AFSCME, 138 S. Ct. 2448, 2463 (2018); *Muhall*, 618 F.3d at 1287 (citing Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)).

473. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 657-59 (2000) (holding that forced inclusion of gay scout leader would have impaired Boy Scouts' expressive identity); *Jaycees*, 468 U.S.

implies the other.[474]

B. Fighting the Premise: Why Judges Haven't Applied the Doctrine

That point may seem straightforward, but it has not always seemed so to courts. Though rarely denying unions' expressive status, courts have often rejected attacks on exclusivity.[475] They have usually offered some mix of three reasons:

First, they have distinguished between representation and association. Representation, they say, allows a union to bargain on an employee's behalf.[476] But it does not require the employee to endorse the union's views.[477] The employee can always opt out of full membership.[478] And by opting out, the employee severs any associational link.[479]

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at 623 ("Freedom of association therefore plainly presupposes a freedom not to associate."); Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 863 (7th Cir. 2017) ("The First Amendment encompasses both the freedom to associate and the freedom *not* to associate.") (emphasis in original). *See also* MORRIS, *supra* note 30, at 116 (conceding that labor associational rights include the right against both forced inclusion and forced exclusion). *But see* Green, *supra* note 252, at 203 (arguing that the right to refuse union membership is no right at all) ("This 'right' is somewhat similar to the right of a lamb to remain outside the fold at night-unobjectionable in theory, but small comfort to the lamb.").

474. *See Jaycees*, 468 U.S. at 638 (O'Connor, J., concurring) ("Again, the constitutional inquiry is not qualified by any analysis of governmental interests and does not turn on an individual's ability to establish disagreement with the particular views promulgated by the union. It is enough if the individual simply expresses unwillingness to be associated with the union's ideological activities."). *Cf.* Lincoln Fed. Lab. Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co., 335 U.S. 525, 531 (1949) (holding that while workers had a constitutional right to associate, they had no correlative right to interfere with the employment of those who refused to associate with them); MORRIS, *supra* note 30, at 130 (arguing that employer speech rights protected by First Amendment and NLRA imply that workers have a concomitant right of association).

475. *See* authorities cited in notes 215-240, *supra*.

476. 29 U.S.C. §§ 158(a)(5), 159(a) (giving the exclusive representative a right to bargain on employees' behalf).

477. *See, e.g.*, *Hill*, 850 F.3d at 863; Goldstein v. Pro. Staff Cong./CUNY, No. 22 CIV. 321 (PAE), 2022 WL 17342676, at *11 (S.D.N.Y. Nov. 30, 2022). *See also* Baranowski, *supra* note 112, at 2275-76 (arguing that representation in bargaining alone creates only a loose kind of association; it does not require the employee to endorse the union's views). *Cf.* Minn. State Bd. for Cmty. Colleges v. Knight (Knight III), 465 U.S. 271, 289-90 (1984) (adopting similar rationale for purposes of nonbargaining meet-and-confer process).

478. *See* NLRB v. Hershey Foods Corp., 513 F.2d 1083, 1085–86 (9th Cir. 1975) (holding that an employee cannot be terminated for refusing full union membership as long as she continues to pay membership dues). *See also* DEVELOPING LABOR LAW, *supra* note 89, § 26.III.A (explaining that through amendment and judicial interpretation, the NLRA has come to allow unions to demand at most that nonmembers pay fair-share fees).

479. *See, e.g.*, Jarvis v. Cuomo, 660 F. App'x 72, 74 (2d Cir. 2016) (finding no constitutional injury because employees were not required to become full members of the union); D'Agostino v. Baker, 812 F.3d 240, 242-43 (1st Cir. 2016). (emphasizing employees' ability to opt out of full membership). *See also* BOK & DUNLOP, *supra* note 32, at 99 (arguing that associational injury associated with agency fees and closed shops are weak because all the employee has to do is pay dues). *Cf.* Buckley v. Am. Fed'n of Television & Radio Artists, 496 F.2d 305, 312-13 (2d Cir. 1974) (rejecting compelled-membership claim in part because employee could opt out of full membership and choose merely to pay dues).

Second, they have found a lack of government action.[480] The First Amendment limits only action by the government.[481] But in the private sector, exclusive representation involves only private parties.[482] A union bargains with an employer on behalf of employees, all of them private actors.[483] So the constitution has nothing to say about their interactions.[484]

Third, courts have relied on *Knight*. They have read *Knight* broadly to resolve all constitutional questions about exclusivity.[485] Of course, they've acknowledged that *Janus* may be in tension with *Knight*; the two may even be irreconcilable.[486] But they still say that *Janus* did not overrule *Knight*.[487] And until Supreme Court addresses *Knight* directly, their hands are tied.[488]

All three rationales are superficially appealing. But examined closely, none of them prevents a challenge to private-sector exclusivity. Whatever they might say about other kinds of challenges, they leave that particular challenge open and unresolved.

The "no-association" theory. Let's start with the no-association theory. This theory relies on an employee's ability to opt out of full union membership.[489] Under section 8(a)(3) of the NLRA, an employee can refuse to join a union in full.[490] Instead, she can pay an agency fee.[491] Some courts and commentators

480. *See Buckley*, 496 F.2d at 309-10 (considering government-action argument in private-sector agency-fee case). See also sources cited in notes 518-527, *infra*.

481. *See Buckley*, 496 F.2d at 309.

482. *See id.* at 309-10 (noting that in private-sector bargaining, both employer and union are private parties).

483. *See id.*

484. *See id.* at 309 (explaining that First Amendment does not apply to purely private action).

485. *See* authorities cited in notes 215-240, *supra*.

486. *See* Thompson v. Marietta Educ. Ass'n, 972 F.3d 809, 814 (6th Cir. 2020) ("To be sure, *Knight*'s reasoning conflicts with the reasoning in *Janus*."). *See also* Campbell, *supra* note 51, at 736 (arguing that exclusivity is unconstitutional in post-*Janus* world).

487. *Thompson*, 972 F.3d at 814 (noting that despite *Janus*, *Knight* remained formally good precedent).

488. *See id.*; Jarvis v. Cuomo, 660 F. App'x 72, 74 (2d Cir. 2016) (concluding that until the Supreme Court explicitly overrules *Knight*, lower courts are bound to follow it).

489. *See, e.g.*, Minn. State Bd. for Cmty. Colleges v. Knight (Knight III), 465 U.S. 271, 289-90 (1984) (finding no association injury in meet-and-confer context because employees did not have to join the union and thus did not have to endorse its views); Uradnik v. Inter Fac. Org., No. CV 18-1895 (PAM/LIB), 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018) (rejecting *Janus*-based compelled-speech claim because dissenting employee could opt out of membership, leaving her free to speak her own mind), *aff'd,* No. 18-3086, 2018 WL 11301550 (8th Cir. Dec. 3, 2018); Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 734-35 (7th Cir. 2021) (finding no First Amendment injury because employees were not required to join the union as full members).

490. *See* 29 U.S.C. § 158(a)(3); NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963) ("Under the second proviso to s 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues."); Radio Officers' Union of Com. Telegraphers Union v. NLRB, 347 U.S. 17, 41 (1954) ("Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees.").

491. *See Gen. Motors Corp.*, 373 U.S. at 742 (explaining that mandatory "membership" under NLRA is at most the duty to pay regular dues).

have seen that option as dispositive.[492] Because the employee can opt out, she can sever her ties to the union.[493] She no longer has to attend union meetings, vote for union officers, or follow union rules.[494] That is, she no longer has to associate with the union.[495] And if she's not forced to associate, her associational challenge fails by definition.[496]

But that argument ignores a basic fact about exclusive representation: the union maintains a relationship with an employee even after she opts out.[497] Remember, the union never bargains for itself; it bargains only for employees.[498] It collects their individual bargaining authority and concentrates the authority in one place.[499] Theoretically, that concentration allows it to bargain more effectively than the employees could by themselves.[500] But it also means the union

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492. *See, e.g.*, Bierman v. Dayton, 900 F.3d 570, 572, 574 (8th Cir. 2018) (rejecting challenge to exclusivity under state law because individual employees could opt out of full membership); Mentele v. Inslee, 916 F.3d 783, 785 (9th Cir. 2019) (emphasizing that employees need not join the union in full); *see also* Baranowski, *supra* note 112, at 2275-76 (arguing that representation in bargaining alone creates only a loose kind of association; it does not make employees tacitly responsible for the union's actions); *cf. Knight III*, 465 U.S. at 289-90 (relying on ability to choose not to join union as grounds for rejecting associational claim with respect to nonbargaining meet-and-confer process); Railway Employment Dep't v. Hanson, 351 U.S. 225, 238 (1956) (reasoning that agency-fee scheme under RLA did not require ideological conformity because employees had to pay only for bargaining expenses).

493. *See, e.g.*, D'Agostino v. Baker, 812 F.3d 240, 242-243 (1st Cir. 2016); *Uradnik*, 2018 WL 4654751, at *3; *Bennett*, 991 F.3d at 734 (arguing that because employees can opt out of full membership, they need not endorse the union's message).

494. *See, e.g.*, *D'Agostino*, 812 F.3d at 242-43; *Uradnik*, 2018 WL 4654751, at *2; Goldstein v. Pro. Staff Cong./CUNY, 643 F.Supp.3d 431, 443-444 (S.D.N.Y. 2022) (rejecting associational challenge because exclusivity requires little direct interaction with the union; bargaining units can be large, minimizing the individual employee's role in union decisions); *Bennett*, 991 F.3d at 734-35; *cf.* BOK & DUNLOP, *supra* note 32, at 98 (making a similar argument to support closed shops and agency fees).

495. *See D'Agostino*, 812 F.3d at 242-43; BOK & DUNLOP, *supra* note 32, at 101 (arguing that an individual employee's freedom is not limited by the union's political activities because the individual need not explicitly endorse the union's views).

496. *See D'Agostino*, 812 F.3d at 242-43; *Goldstein*, 2022 WL 17342676, at *11 (reasoning that exclusivity does not force an employee to associate with the union's views, even when those views are hostile to the employee or her interests).

497. *See* Steele v. Louisville & N.R. Co., 323 U.S. 192, 201-02 (1944); *cf.* Baranowski, *supra* note 112, at 2266 (conceding that "compelled-association issues do arise in distinct forms vis-à-vis exclusive representation").

498. *See, e.g.*, *Steele*, 323 U.S. at 201-02 (explaining that exclusive representative under RLA bargains on behalf of all employees in unit, whether they want representation or not); Ford Motor Co. v. Huffman, 345 U.S. 330, 339 (1953) ("Any authority to negotiate derives its principal strength from a delegation to the negotiators . . .").

499. *See Steele*, 323 U.S. at 201 ("The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it."); *see also* MORRIS, *supra* note 30, at 219 (pointing out that unions draw their strength from the employees they represent and arguing that members'-only bargaining is better because it makes that tie more direct).

500. *See* 29 U.S.C. § 151 (declaring that NLRA was intended to facilitate collective bargaining, in part to equalize bargaining power between workers and employers); *see also* HOWARD, *supra* note 32, at 31 (explaining that purpose of NLRA was in part to equalize bargaining power by pooling workers' bargaining authority in one bargaining agent); BOK & DUNLOP, *supra* note 32, at 108. *But see id.* at 99-100 (pointing out that some unions are ineffective and do little to improve the bargaining position of

remains connected to each employee, regardless of whether the employee is a full member.[501] Even if an employee opts out, the union still leverages her bargaining authority to get a better deal.[502] And it still owes her a fiduciary duty to exercise that authority fairly on her behalf; it cannot arbitrarily discard her interests just because she opted out.[503]

Seen in that light, union representation is really just a form of agency.[504] The union acts on the employee's behalf, which makes the employee the union's principal.[505] And in what other context would we say that a principal has no connection with her agent?[506] Agency law imposes liability on the principal precisely

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their members). *Cf.* RICHARD EPSTEIN, FREE MARKETS UNDER SIEGE: CARTELS, POLITICS, AND SOCIAL WELFARE ch. 5 (2008) (arguing that the rationale of unequal bargaining power is used as a justification for most government interventions into labor markets, and those interventions include the NLRA).

501. *See, e.g.*, *Huffman*, 345 U.S. at 337-38 ("The employees represented often are members of the labor organization which represents them at the bargaining table, but it is not essential that they be such."); *Steele*, 323 U.S. at 200 (explaining that by assuming exclusive bargaining authority, the union deprives nonconsenting employees of a preexisting right to bargain for themselves) ("The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining."); *cf.* MORRIS, *supra* note 30, at 124 (arguing that collective bargaining and freedom of association are "interwoven").

502. *See Huffman*, 345 U.S. at 337-38 (explaining that a union represents nonmembers in same capacity as members, and thus owes them the same fiduciary duty of care); *see also* MORRIS, *supra* note 30, at 122 (arguing that collective bargaining is a form of association protected by the constitution); Bok & Dunlop, *supra* note 32, at 103 (pointing out that exclusivity also gives the union full authority under the resulting contract and limits an individual's right to sue to enforce the contract); Campbell, *supra* note 51, at 744 (describing exclusive representation as a type of "forced silence"); *cf. Hanson*, 351 U.S. at 233 (contrasting exclusive representation with voluntary association).

503. *See Steele,* 323 U.S. at 201 (finding a duty of fair representation toward all members of the bargaining unit under the RLA); *Huffman*, 345 U.S. at 337 (finding the same duty under the NLRA). *But see* Klinger & Kolker, *supra* note 214, at 271-72 (noting that some states have experimented with limiting the duty of fair representation to members only following *Janus*).

504. *See, e.g.*, Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 74 (1991) (explaining that the NLRA gives unions authority to act for employees and thus imposes a fiduciary duty on unions to act fairly on their behalf); *Steele*, 323 U.S. at 199 (reaching the same conclusion under the RLA) ("The use of the word 'representative,' as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.").

505. *See* Restatement (Second) of Agency § 1 (Am. L. Inst. 1958) (explaining that "[t]he one for whom action is taken is the principal" and the "one who is to act is the agent"); *see also O'Neil*, 499 U.S. at 74 (comparing the union's relationship with employees to the relationships between trustees and beneficiaries or between attorneys and their clients); MORRIS, *supra* note 30, at 219 (arguing that members'-only bargaining is superior to exclusive bargaining because it gives the agent, a union, more incentive to respond to the desires of the principal, the employees).

506. *See, e.g.*, *Agent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *Agent* as "[s]omeone who is authorized to act for or in place of another; a representative"); Restatement (Second) of Agency § 1 (Am. L. Inst. 1958) (defining *agency* as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act").

because it recognizes a connection between them, one so strong that the principal becomes responsible for the agent's actions.[507] Is that connection not a form of association?[508] If not, what does association even mean?[509]

Conceptual issues aside, the no-association theory has another problem: *Janus*. In *Janus*, the Supreme Court said that exclusive representation burdens associational rights in a way that "would not be tolerated in other contexts."[510] That statement, of course, recognizes that exclusivity *has* been tolerated.[511] But it also recognizes that exclusivity is a form of association.[512] After all, one cannot have an associational burden without some kind of association to begin with.[513]

So whatever else we might say about exclusive representation, it *is* association.[514] We cannot coherently describe it as anything else.[515] And more important, the Supreme Court has already recognized the point.[516] So after *Janus*, courts

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507. *See* Restatement (Second) of Agency §§ 140, 144 (Am. L. Inst. 1958) (stating general rule that principal is liable for acts committed on his or her behalf by agent).

508. *See Steele*, 323 U.S. at 199 (explaining that employees are deemed to act "through" the agent, even though representation is imposed upon them not by choice, but by statute).

509. *See* Mulhall v. UNITE HERE Loc. 355, 618 F.3d 1279, 1288-89 (11th Cir. 2010) (concluding that exclusive representation was a form of forced association, which gave the plaintiff standing to challenge the representation under the First Amendment); *cf. Association*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *Association* to mean "[a] gathering of people for a common purpose; the persons so joined"). *But see* Baranowski, *supra* note 112, at 2276 (arguing that it is overly "formalist" to apply standard agency principles to exclusive bargaining).

510. Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018).

511. *See* Mentele v. Inslee, 916 F.3d 783, 787-88 (9th Cir. 2019) (reading *Janus*'s statement to mean that exclusive representation has been and should be continued to be tolerated).

512. *See* Hallinan v. Fraternal Ord. of Police of Chicago Lodge No. 7, 570 F.3d 811, 817 (7th Cir. 2009) ("[T]he plaintiffs are certainly correct that when a government employer forces its employees to join a union it is imposing on associational rights."); *Mulhall*, 618 F.3d at 1287 (concluding that union's designation as exclusive representative "plainly affects [an employee's] associational rights"); *see also* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 262 (1977) (Powell, J., concurring) (arguing that exclusive representation did more than give union an official voice; it blocked minority employees from communicating with their employer) ("The minority employee is excluded . . . from engaging in a meaningful dialogue with his employer on the subjects of collective bargaining, a dialogue that is reserved to the union.").

513. *See Janus*, 138 S. Ct. at 2478; *see also Abood*, 431 U.S. at 221 (recognizing that exclusive representation "has an impact on [employees'] First Amendment interests"); *cf.* Minn. State Bd. for Cmty. Colleges v. *Knight* (Knight III), 465 U.S. 271, 298-99 (1984) (Brennan, J., dissenting) (reasoning that by giving the union the right to choose who would attend the meet-and-confer sessions, the state tacitly pressured employees to join the union, thus burdening their associational rights)

514. *See* Bond, *supra* note 54, at 423 ("[T]he relationship of an employee both to his employer and to his fellow employees involves associational rights of the kind guaranteed and protected by the first amendment."); *see also, e.g.*, Lopez v. Shiroma, No. 1:14-CV-00236-LJO, 2014 WL 3689696, at *8 (E.D. Cal. July 24, 2014) (finding that plaintiff plausibly alleged that she suffered continued association with union while decertification petition was pending), *aff'd in part, rev'd in part on other grounds and remanded,* 668 F. App'x 804 (9th Cir. 2016); MORRIS, *supra* note 30, at 122 (arguing that collective bargaining is a form of association protected by the constitution).

515. *Cf. Knight III*, 465 U.S. at 298-99 (Brennan, J., dissenting) (arguing that exclusivity in meet-and-confer process forced employees to either "abandon their personal or ideological objections" or give up their right to participate as "full members of the academic community").

516. *See Janus*, 138 S. Ct. at 2478.

cannot dismiss exclusivity challenges simply by finding no association.[517] Exclusivity's defenders need a different theory.

The "no-government-action" theory. The no-government-action theory fares no better. It is true, of course, that the First Amendment applies only to government action.[518] And strictly speaking, exclusive representation involves only private parties.[519] The union bargains with an employer on behalf of employees—none of them government actors.[520] So courts have sometimes suggested that exclusivity involves no government action.[521] And without government action, the First Amendment doesn't even apply.[522]

This kind of rationale comes up most often in agency-fee cases.[523] And there, it makes some sense. The NLRA doesn't require agency fees.[524] Instead, it allows employers and unions to agree to agency-fee provisions (except in right-to-work states).[525] So if any employee has to pay an agency fee, the direct cause is a private contract.[526] The statute merely allows the contract to exist.[527]

But the same logic doesn't apply to exclusive representation. Unlike agency fees, exclusivity is required by law.[528] The NLRA requires the employer to bargain with one union and one union only.[529] It does not merely permit exclusive

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517. *See* William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court's Anti-Labor Policymaking*, 53 U.S.F. L. REV. 209, 234-35 (2019) (observing that *Janus* opened door to constitutional attacks on exclusivity). *But cf.* Mentele v. Inslee, 916 F.3d 783, 791 (9th Cir. 2019) (concluding that *Janus* tacitly recognized that exclusivity remains constitutional in the public sector).

518. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) ("The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech."); Buckley v. Am. Fed'n of Television & Radio Artists, 496 F.2d 305, 309 (2d Cir. 1974) ("It is elementary constitutional doctrine that the first amendment only restrains action undertaken by the Government.").

519. *See* Price v. Int'l Union, United Auto. Aerospace & Agr. Implement Workers of Am., 795 F.2d 1128, 1133 (2d Cir. 1986) (finding no state action in an agency-fee case in part because neither the union nor the employer was a government entity), *cert. granted, judgment vacated,* 487 U.S. 1229, 108 S. Ct. 2890, 101 L. Ed. 2d 924 (1988), and *abrogated on other grounds by* Communication Workers of America v. Beck, 487 U.S. 735, 735 (1988).

520. *See id.* ("[N]either the employer nor the union here can be said to be a state actor.").

521. *See* Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1176–77 (Mass. 2019).

522. *See id.* (reasoning that union's exclusion of nonmembers from bargaining decisions involved no state action, even though the union enjoyed exclusivity by virtue of a state statute).

523. *See, e.g.*, Buckley v. Am. Fed'n of Television & Radio Artists, 496 F.2d 305, 309–10 (2d Cir. 1974) (considering government-action issue in agency-fee case); Fitz v. Commc'n Workers of Am., No. 88-1214(RCL), 1989 BL 587, at *2 (D.D.C. Aug. 17, 1989) (same).

524. *See* 29 U.S.C. § 158(a)(3).

525. *Id.*

526. *See Fitz*, 1989 BL 587, at *2 (finding that NLRA's authorization of private agency-fee provisions did not transform those provisions into government action).

527. *See* Price v. Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am., 795 F.2d 1128, 1132 (2d Cir. 1986) ("The NLRA is merely permissive because it does no more than authorize a union shop in the *absence* of contrary state law . . . .").

528. *See* 29 U.S.C. § 159(a).

529. *Id.*; 29 U.S.C. § 158(a)(5) (making it an unfair labor practice not to bargain with the certified union).

bargaining; it mandates exclusivity.[530] And it backs up that mandate with legal penalties.[531]

Another way to think about exclusivity is as a government-backed monopoly.[532] Once the union is certified, the statute gives it a monopoly over workplace bargaining.[533] If an employer tries to go around the union—say, by bargaining directly with an employee—the government intervenes to enforce the union's monopoly.[534] And that intervention makes exclusivity different.[535] Exclusivity is produced and maintained by government force, which triggers constitutional coverage.[536]

The "*Knight*-made-me-do-it" theory. This last theory is by far the most common.[537] When courts reject challenges to exclusivity, they almost always point to *Knight*.[538] They say that *Knight* cemented exclusivity's constitutional

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530. *See, e.g.*, *U.S. Postal Serv.*, 281 N.L.R.B. at 1018 (finding that employer unlawfully bargained with employees in context of resolving discrimination complaints and ordering the employer to, among other things, pay the union's expenses). *Cf.* Minn. State Bd. for Cmty. Colls. v. Knight (Knight III), 465 U.S. 271, 304–05 (1984) (Stevens, J., dissenting) (arguing that meet-and-confer process violated First Amendment in part because it forbade public employers from talking about covered issues with anyone but the union).

531. *See U.S. Postal Serv.*, 281 N.L.R.B. at 1018. *Cf. Knight III*, 465 U.S. at 295 (Marshall, J., concurring) (explaining that he rejected challenge to meet-and-confer process because it did not otherwise limit any preexisting forum or right to speak with the employer—i.e., the state).

532. *See* EPSTEIN, *supra* note 500, at ch. 5 (comparing unions to miniature cartels of labor with a state-backed monopoly within a given bargaining unit).

533. *See id.* (calling union exclusivity and the duty to bargain a "state monopoly for the individual firm that has been organized"). *Cf. Knight III*, 465 U.S. at 319 (Stevens, J., dissenting) (discussing exclusivity in meet-and-confer process as in effect a state-granted monopoly on speech).

534. *See, e.g.*, *U.S. Postal Serv.*, 281 N.L.R.B. at 1018 (sanctioning employer for direct bargaining with employees); *Sec. Walls, LLC and Randall Kelley*, 371 N.R.R.B. No. 74 ("An employer cannot engage in direct dealing with employees . . . .").

535. *See* Melani Vogl, *State Action and Public Utilities - Jackson v. Metropolitan Edison Co.*, 24 DEPAUL L. REV. 1023, 1028 (1975) ("Where legislation converts private action into state action, sufficient involvement has been found." (citing Hall v. Garson, 430 F.2d 430 (5th Cir. 1970))); Jackson v. Metro. Edison Co., 419 U.S. 345, 350–51 (1974) ("It may well be that the acts of a heavily regulated utility with at least something of a government protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking those characteristics.").

536. *See, e.g.*, Linscott v. Millers Falls Co., 440 F.2d 14, 16 (1st Cir. 1971) (holding that private-sector agency-fee provision was government action by virtue of government enforcement) ("Once courts enforce the agreement the sanction of government is, of course, put behind them."); Vogl, *supra* note 535, at 1028 ("Another form of regulation, and certainly control, is the state's granting of monopoly power to a private entity."). *Cf.* MORRIS, *supra* note 30, at 113 (arguing that allowing employers to refuse to bargain with minority unions would be state action and would violate workers' associational rights). *But cf. Jackson*, 419 U.S. at 350–51 (finding that utility's action did not equate to government action merely because it operated under government license and regulation); Price v. International Union, United Auto. Aerospace & Agric. Implement Workers of Am., 795 F.2d 1128, 1133 (2d Cir. 1986) ("[T]he naked fact that a private entity is accorded monopoly status is insufficient alone to denominate that entity's action as government action.").

537. *See* Klinger & Kolker, *supra* note 214, at 286 (reporting that each post-*Janus* challenge has run into *Knight* as an obstacle).

538. *See, e.g.*, Adams v. Teamsters Union Local 429, No. 20-1824, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022) (rejecting challenge to exclusivity based on preclusive effect of *Knight*); Hendrickson v. AFSCME Council 18, 992 F.3d 950, 969 (10th Cir. 2021) (same); Uradnik v. Inter Fac. Org., No. CV

status.[539] *Knight* found no constitutional problem with allowing a single union to represent all employees in the meet-and-confer sessions.[540] So, the thinking goes, the government can require a single representative for bargaining as well.[541] Exclusive bargaining representation must, therefore, be constitutional.[542]

But that rationale overreads *Knight* in at least two ways. First, it extends *Knight* beyond the decision's unique circumstances—a nonbargaining consultation forum the state created specifically for soliciting the union's views on policy.[543] Second, it extends *Knight* to private-sector bargaining.[544] Neither extension is warranted, much less necessary.[545] Each stretches *Knight* beyond its bounds—a move particularly uncalled for given its tension with *Janus*.[546]

Rather than stretching *Knight*, courts should focus on what *Knight* actually said.[547] Remember that *Knight* involved not one decision, but two. In the first, the

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18-1895 (PAM/LIB), 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018) (same); Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1173 (Mass. 2019) (same); Bierman v. Dayton, 900 F.3d 570, 572–74 (8th Cir. 2018) (same); Bennett v. Council 31 of the Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 734–35 (7th Cir. 2021) (same); D'Agostino v. Baker, 812 F.3d 240, 244 (1st Cir. 2016) (same).

539. *See, e.g.*, *Adams*, 2022 WL 186045, at *2 ("*Knight* forecloses the First Amendment challenge."); *Branch*, 120 N.E.3d at 1173.

540. *See Branch*, 120 N.E.3d at 1173–74 (interpreting *Knight* to foreclose all exclusivity challenges); *Bennett*, 991 F.3d at 734–35 ("*Knight* and [circuit precedent relying on *Knight*] control here to foreclose Bennett's claims based on the alleged infringement of her First Amendment free speech and associational rights."). *See also* Baranowski, *supra* note 112, at 2275 (arguing that constitutionality of exclusive representation was implicit in *Knight*).

541. *See Hendrickson*, 992 F.3d at 969 ("*Knight* found exclusive representation permissible."); *D'Agostino*, 812 F.3d at 244 (reasoning that, under *Knight*, "exclusive bargaining representation by a democratically selected union does not, without more, violate the right of free association on the part of dissenting non-union members of the bargaining unit").

542. *See, e.g.*, *Adams*, 2022 WL 186045, at *2 ("Given these similarities, this law does not violate the First Amendment."). *See also* Baranowski, *supra* note 112, at 2275 ("Exclusive representation was, after all, the mechanism for preventing employees from attending the meet-and-confer sessions in question, the lynchpin of appellees' speech and association claims.").

543. *Compare Bierman*, 900 F.3d at 574 (interpreting *Knight* as precluding all challenges to exclusivity) ("The Court summarily affirmed the constitutionality of exclusive representation for subjects of mandatory bargaining."), *with Knight III*, 465 U.S. 271, 302 (1984) (Stevens, J., dissenting) ("The portion of the statute under challenge here has nothing to do with the process of negotiating labor contracts.").

544. *Cf.* Baisley v. Int'l Ass'n of Machinists & Aerospace Workers, 983 F.3d 809, 810–11 (5th Cir. 2020) (recognizing that applying public-sector precedents to the private sector would represent a doctrinal extension).

545. *Cf. Knight III*, 495 U.S. at 293 (Marshall, J., concurring) (explaining that he would have resolved the case on more limited grounds, relying on the "distinctive characteristics and needs of public institutions of higher education"); *Baisley*, 983 F.3d at 810 (in context of challenge to union opt-out procedure, reasoning that *Janus* "dealt with public-sector unions, so it is undisputed that applying them to this private-sector dispute would require us to extend into a new realm").

546. *Cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 247 (1977) (Powell, J., concurring) (arguing that extension of private-sector precedents into public-sector cases was inappropriate because the constitutional considerations are different).

547. *Cf.* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 88 (2008) (arguing that rigid overextension of precedent makes bad, outdated rules "cling" in ways they wouldn't if lower courts applied precedents in ways they expected the Supreme Court itself to apply them).

Court affirmed a district court's order upholding exclusive bargaining.[548] But that part of the order did not address a First Amendment challenge.[549] Instead, it considered a different theory: nondelegation.[550] The district court reasoned that exclusivity caused no delegation problem because the state still had final say over its own policies: it could still accept or reject the union's proposals.[551] And by summarily affirming, the Supreme Court effectively adopted that conclusion.[552] But that conclusion says nothing about how the Court would have handled a First Amendment claim.[553] The Court itself offered no hints. It published no opinion of its own.[554] So the best we can do is speculate.

Maybe for that reason, lower courts have relied more on the Court's second decision.[555] That decision dealt with a challenge to the meet-and-confer process.[556] And this time, we know why the Court rejected the challenge. In a published opinion, the Court treated the meet-and-confer process as a limited forum.[557] The state created the forum as a place to consult with the faculty representative.[558] It did not have to create such a forum at all.[559] So if it wanted to open the forum only to the union, it could have done that.[560] It didn't have to admit individual employees as well.[561]

Lower courts have repurposed that logic for exclusive bargaining.[562] They've treated bargaining as simply another policy choice.[563] A state doesn't have to

548. *See* Knight v. Minn. Cmty. Coll. Fac. Ass'n (Knight II), 460 U.S. 1048 (1983).

549. *See* Knight *v. Minn. Cmty. Coll. Fac. Ass'n* (*Knight I*), 571 F. Supp. 1, 10–11 (D. Minn. 1982) (addressing separately nondelegation challenge to exclusive representation for bargaining and First Amendment challenge to exclusive representation for meet-and-confer representation).

550. *See id.* at 5–7.

551. *See id.*

552. *See* Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976) (treating a summary affirmance as "a controlling precedent, unless and until reexamined by this court); DeBoer v. Snyder, 772 F.3d 388, 401 (6th Cir. 2014) (treating summary affirmance as controlling even when "in tension with a new line of cases"), *rev'd on other grounds sub nom.* Obergefell v. Hodges, 576 U.S. 644, 135 S. Ct. 2584 (2015). *But see* BRYAN GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 214 (2017) ("A short per curiam opinion that summarily affirms or reverses a lower court's judgment is entitled to less precedential weight than a signed opinion. It is sometimes ignored altogether.").

553. *See Knight II*, 460 U.S. 1048 (offering no rationale).

554. *See id.*

555. *See, e.g.*, Hendrickson v. AFSCME Council 18, 992 F.3d 950, 969 (10th Cir. 2021) (citing *Knight III* and largely ignoring *Knight II*). *But see* Branch v. Commonwealth Emp. Rels. Bd., 120 N. E.3d 1163, 1173–74 (Mass. 2019) (also discussing *Knight II*).

556. *See* Knight III, 465 U.S. at 281–90.

557. *Id.* at 281–84.

558. *Id.* at 285, 288.

559. *See id.* (noting that while the process amplified the union's voice, the state could choose to listen to one voice to the exclusion of others).

560. *See id.* at 285–288.

561. *See id.* at 283, 285–86 (reasoning that government employees had no right to participate in government decision making, which was what the meet-and-confer process ultimately amounted to).

562. *See, e.g.*, Hendrickson v. AFSCME Council 18, 992 F.3d 950, 969 (10th Cir. 2021) (reading *Knight* as authorizing exclusive representation for bargaining as well); Mentele v. Inslee, 916 F.3d 783, 789–90 (9th Cir. 2019) (same); Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 863–64 (7th Cir. 2017) (same).

563. *See, e.g.*, Oliver v. Serv. Emps. Int'l Union Local 668, 830 F. App'x 76, 81 (3d Cir. 2020); Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 40 Cal. App. 5th 241, 275–76 (2019).

bargain about working conditions with anyone; if it wants to, it can set working conditions unilaterally.[564] So if it chooses to bargain about working conditions, it can also choose its bargaining partner.[565] It doesn't have to also bargain with individual employees.[566]

That extension makes some sense in the public sector. But it doesn't transfer to private bargaining.[567] In private bargaining, the government doesn't choose its own partner.[568] It forces two private parties to bargain with each other.[569] It also forbids the employer from bargaining with anyone else.[570] It effectively bans private bargaining between two otherwise willing parties: the employer and an individual employee.[571]

Knight never addressed that scenario.[572] Whatever *Knight* may have implied about public-sector bargaining, it said nothing about the private sector.[573] Private-sector exclusivity therefore remains an open question.[574] And the answer

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564. *See* Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1176–77 (Mass. 2019); *Mentele*, 916 F.3d at 791 (concluding that exclusivity imposes minimal associational burdens because the state is simply choosing to bargain with a single partner to make bargaining more easily administrable; in the alternative, the state could simply set terms unilaterally).

565. *See Oliver*, 830 F. App'x at 81 ("By choosing to bargain only with the Union, and thereby ignoring Oliver, the Commonwealth is not violating either her free speech rights or free association rights."); *Hill*, 850 F.3d at 863 (reasoning that state exclusivity statute merely allowed state to choose which voices it would listen to on bargaining subjects). *See also* Knight v. Minn. Cmty. Coll. Fac. Ass'n (Knight I), 571 F. Supp. 1, 7 (D. Minn. 1982) ("There is no constitutional infirmity in requiring public employers to solicit and meaningfully consider the views of public employees."); *Mentele*, 916 F.3d at 791 (reaching the same conclusion).

566. *See, e.g.*, *Hendrickson*, 992 F.3d at 969 (reasoning that *Janus* and *Knight* left state bargaining schemes largely intact); Bierman v. Dayton, 900 F.3d 570, 574 (8th Cir. 2018) (finding no constitutional difficulty with the state's choosing a union to speak for all employees within a bargaining unit).

567. *See* Harris v. Quinn, 573 U.S. 616, 639 (2014) (noting that state's roles in public and private bargaining are "vastly different").

568. *Cf.* Minn. State Bd. for Cmty. Colls. v. Knight (Knight III), 465 U.S. 271, 288–90 (1984) (emphasizing that by choosing its own bargaining partner, the state had not suppressed any other party's preexisting right to speak or participate).

569. *See* 29 U.S.C. §§ 158(a)(5) (making it an unfair labor practice for an employer to fail to bargain with a union); 158(b)(3) (making it an unfair labor practice for a union to fail to bargain with an employer).

570. *See, e.g.*, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683 (1944); *U.S. Postal Serv.*, 281 N.L.R.B. at 1016.

571. *See U.S. Postal Serv.*, 281 N.L.R.B. at 1016 (holding that employer committed unfair labor practice by negotiating directly with employees to resolve certain discrimination complaints). *Cf. Knight III*, 465 U.S. at 313–14 (Stevens, J. dissenting) (arguing that exclusivity in meet-and-confer process chilled exercise of First Amendment rights because it forbade two willing partners from speaking to each other about issues of public interest).

572. *See Knight III*, 465 U.S. at 284–90 (addressing only meet-and-confer process).

573. *See id.* at 302 (Stevens, J., dissenting) ("The portion of the statute under challenge here has nothing to do with the process of negotiating labor contracts."). *See also* Harris v. Quinn, 573 U.S. 616, 643 (2014) (refusing to apply public-sector precedent (*Abood*) to private-sector bargaining).

574. *See* Campbell, *supra* note 51, at 736 (arguing that private-sector exclusivity under the NLRA violates the First Amendment). *Cf.* Baisley v. Int'l Ass'n of Machinists & Aerospace Workers, 983 F.3d 809, 810 (5th Cir. 2020) (recognizing that applying public-sector agency-fee precedents to private sector would represent an as-yet untaken step); Ry. Emp. Dep't v. Hanson, 351 U.S. 225, 238 (1956) (rejecting First Amendment challenge to agency-fee arrangement under RLA, but expressing no opinion on "the

to that question turns not on some strained reading of *Knight*, but on whether the government can justify exclusivity on its own terms.[575] That is, does Congress have a compelling interest in forcing unwilling employees to bargain through a union?[576] Does it have a compelling interest in burdening employees' associational rights?

C. The (Vain) Search for Compelling Interests

Not every associational burden is unconstitutional.[577] Congress can, and sometimes does, burden First Amendment rights.[578] But when Congress imposes a burden, it has to justify its action as necessary to achieve a compelling government interest.[579] In other words, it needs to show that it has a really good reason.[580]

Exclusivity's defenders have cited three possible compelling interests: (1) the need for labor peace, (2) the need to avoid "plural" bargaining, and (3) the need to prevent "company unions."[581] Courts have sometimes cited those interests as

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use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement"); *Knight III*, 465 U.S. at 299–300 (Brennan, J., dissenting) (distinguishing exclusive representation for bargaining from the meet-and-confer process addressed in *Knight* in part based on the state's different interests in reaching an agreement).

575. *See Buckley*, 496 F.2d at 311 (recognizing that the government bears the burden of proving that its infringements of First Amendment rights are justified); Mentele v. Inslee, 916 F.3d 783, 790 (9th Cir. 2019) (applying "exacting scrutiny" to exclusivity scheme). Although *Buckley* mentions justifiable infringements of the First Amendment, it does not mention how the government has a burden to show the justification of the infringement.

576. *See, e.g.*, *Mentele*, 916 F.3d at 790. *Cf.* Baranowski, *supra* note 112, at 2270 (noting an "unavoidable collision course" between the First Amendment and exclusive representation after *Janus*).

577. *See, e.g.*, *Buckley*, 496 F.2d at 311 ("Acts of speech and of expression, although protected by the first amendment, are not so exalted that they can never be, even indirectly, obstructed." (citing Cox v. New Hampshire, 312 U.S. 569 (1941))); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 776 (1961) (Douglas, J., concurring) (remarking that legislatures have some flexibility in "dealing with the problems created by . . . modern phenomena," even when their solutions impinge perfect freedom of association).

578. *See* Linscott v. Millers Falls Co., 440 F.2d 14, 17 (1st Cir. 1971) (recognizing that courts must balance interests in promoting peaceful labor relations against alleged injuries to First Amendment rights).

579. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982); Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018) (applying "exacting scrutiny" to agency-fee scheme that burdened First Amendment rights). *See also* Bond, *supra* note 54, at 428 (arguing that legislation burdening associational rights "carries an enormous burden of justification").

580. *See Claiborne Hardware*, 458 U.S. at 912 n.47 (describing the meaning of "compelling" "interest") ("Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (quoting United States v. O'Brien, 391 U.S. 367, 376-77 (1968))); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 262 (1977) (Powell, J., concurring) (explaining that the government must justify burdens on association rights). *See also* Baranowski, *supra* note 112, at 2277 (conceding that in light of modern jurisprudence treating labor issues as matters of public concern, it is "difficult to square applying rational scrutiny to exclusive representation").

581. *See, e.g.*, Baranowski, *supra* note 112, at 2278–79 (reciting traditional defenses of exclusivity).

well.[582] But upon close inspection, none of them justifies exclusivity.[583] Each of them either fails for lack of evidence or has no logical connection to exclusivity in the first place.[584] Let's consider them in turn.

Labor peace. The "labor peace" idea relies on a simple chain of reasoning: To avoid strikes and other work stoppages, we need collective bargaining.[585] And to have collective bargaining, we need exclusive representation.[586] Exclusive representation is therefore necessary to protect us from industrial chaos.[587]

Notice that this chain requires two connections. First, it requires a connection between labor peace and collective bargaining.[588] Second, it requires one between collective bargaining and exclusive representation.[589] Without either connection, the chain breaks.[590]

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582. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 182 (1967) (explaining that Congress set up a system of collective bargaining to promote "industrial peace"); Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 66–67 (1975) (reasoning that individual or plural bargaining would undermine national labor policy); Buckley, 496 F.2d at 311 (holding that private-sector agency fees did not violate First Amendment because they promoted labor peace through the mechanisms of collective bargaining and exclusive representation); Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1172 (Mass. 2019) (arguing that exclusivity was necessary to "effectively and efficiently" negotiate agreements, which in turn was necessary for labor peace); Mentele v. Inslee, 916 F.3d 783, 790 (9th Cir. 2019) ("Washington's continued compelling interest in labor peace justifies the minimal infringement associated with SEIU's exclusive representation."); Jarvis v. Cuomo, 660 F. App'x 72, 74 (2d Cir. 2016) (accepting plural-bargaining rationale).

583. *See* Bond, *supra* note 54, at 444–46 (considering and rejecting traditional defenses of exclusivity).

584. *See id.*

585. *See, e.g.*, Green, *supra* note 252, at 204–05 (arguing that collective bargaining is necessary for "industrial harmony"); *see also* Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 68 (1966) (Black, J., dissenting) (observing that Congress's goal in promoting collective bargaining was the peaceful resolution of labor disputes); *Vaca*, 386 U.S. at 182 (explaining that purpose of collective bargaining is to promote "industrial peace"); *Mentele*, 916 F.3d at 790 (finding exclusivity justified by "the compelling—and enduring—state interest of labor peace"). *But see* Bond, *supra* note 54, at 443 (arguing that even if exclusivity prevents strikes, the government's interest in industrial peace isn't strong enough to justify the burden it places on associational rights).

586. *See, e.g.*, *Vaca*, 386 U.S. at 182 (connecting "industrial peace" to the union's role as exclusive bargaining agent); *Branch*, 120 N.E.3d at 1172 (tying exclusivity to peaceful labor relations). *See also* MORRIS, *supra* note 30, at xi (arguing that exclusivity is justified by "industrial stability").

587. *See, e.g.*, Uradnik v. Inter Fac. Org., No. CV 18-1895 (PAM/LIB), 2018 WL 4654751, at *3 (D. Minn. Sept. 27, 2018) (rejecting First Amendment challenge in part because exclusivity promotes labor peace); *Linscott* v. Millers Falls Co., 440 F.2d 14, 18 (1st Cir. 1971) (holding that government's interests in "collective bargaining and industrial peace" justified burden on employee's religious beliefs). *See also* Bok & Dunlop, *supra* note 32, at 96 (arguing that "multiple units will lead to multiple negotiations, inter-union rivalries, and possibly added strikes, which can unduly burden the employer and the public"). *Cf.* Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018) (assuming without deciding that labor peace is a compelling interest).

588. *See, e.g.*, Buckley v. Am. Fed'n of Television & Radio Artists, 496 F.2d 305, 311 (2d Cir. 1974) (connecting collective bargaining to the prevention of "industrial strife"); *Mentele*, 916 F.3d at 790 (concluding that exclusive representation was justified by state's interest in labor peace).

589. *Mentele*, 916 F.3d at 789 (connecting collective bargaining and exclusive representation).

590. *See Branch*, 120 N.E.3d at 1172 (reasoning that exclusivity is necessary for effective collective bargaining, which in turn is necessary for labor peace). *Cf. Janus*, 138 S. Ct. at 2465 (rejecting similar chain of connections between agency fees, exclusive representation, and labor peace, because there was no proven connection between agency fees and either of the other components); Harris v. Quinn, 573

Both connections, however, are flimsy at best.[591] Let's start with the one between collective bargaining and labor peace. If we measure labor peace by the absence of strikes, collective bargaining is a rank failure.[592] In 1933, the year before Congress first enacted a right to bargain collectively, the United States saw about 753 strikes per year.[593] Those strikes involved an average of 297,000 workers.[594] But over the next six years, the country experienced 2,541 strikes per year involving 1.18 million workers.[595] And over a five-year period after that, it was rocked by 3,514 strikes per year involving 1.5 million workers.[596]

These trends peaked in the 1940s. Not only did unions achieve some of their highest recorded densities—more than a third of all non-agricultural workers belonged to a union[597]—but they also helped trigger the largest strike wave in U.S. history.[598] From 1945 to 1946, nearly one in ten American workers withheld his or her labor.[599] These strikes spanned the economy, disrupting textile, oil, lumber, auto, mining, steel, and transportation industries.[600] Whole sectors ground to a halt for weeks and months.[601] At one point, nearly 1.8 million people were on strike at the same time.[602]

But since then, two things have happened. First, union membership has plummeted.[603] While at mid-century unions represented almost a third of all private-sector workers, they now represent only six percent—less than at any time in the last one hundred years.[604] Second, work stoppages have plummeted at nearly the same pace. In 1947, the Bureau of Labor Statistics tracked 270 major work stoppages.[605] By 2020, that number had fallen to eight.[606] The connection is

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U.S. 616, 649-50 (2014) (finding that labor peace did not justify agency fees because there was no link between agency fees and exclusive representation, which itself was ostensibly necessary for labor peace).

591. *See* Campbell, *supra* note 51, at 752 (describing evidence connecting exclusivity to collective bargaining and labor peace as "sparse" and "entirely conclusory").

592. *See* HOWARD, *supra* note 32, at 120 (concluding from historical trends that collective-bargaining rights encourage strikes).

593. H.R. REP. NO. 80-245, at 3–4 (1947).

594. *Id*.

595. *Id*.

596. *Id*. *But see* SECUNDA ET AL., *supra* note 112, at 13 (arguing that strikes were prevalent even before the NLRA).

597. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 31.

598. *See* Yeselson, *supra* note 42.

599. *Id*.

600. *Id*.

601. *Id*.

602. *Id*.

603. *See Union Members Summary*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT. (Jan. 19, 2023), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/9G6S-EN53] (reporting that in 2022, union membership fell to 10.1% of the overall workforce and only 6% of the private-sector workforce, both historic lows).

604. *Compare id*., *with* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 31 (showing higher private-sector membership rates than today over the course of the twentieth century).

605. *Work Stoppages*, U.S. DEP'T OF LAB., BUREAU OF LABO STAT., https://www.bls.gov/web/wkstp/annual-listing.htm [https://perma.cc/9VFU-FG3Q] (last visited May 25, 2022).

606. *Id*.

impossible to miss: according to the numbers, collective bargaining and strikes go hand-in-hand.[607]

But even without these numbers, the connection between unions and strikes makes intuitive sense. Millions of workers don't just walk off the job in spontaneous fits of pique. Someone has to organize them; and more often than not, that someone is a union.[608] Nor would most unions deny the connection: to the contrary, they see strikes as among their most powerful bargaining tools.[609]

Unions also see strikes as an organizing device—a way to build solidarity and support among workers.[610] So naturally, they have developed the infrastructure and expertise to make strikes happen.[611] They hold strike votes to get workers engaged, pay strike benefits to encourage workers to stay off the job, and enforce strikebreaking rules to prevent defections.[612] Some of them even hold "strike

607. *See id. Cf.* Ware, *supra* note 279, at 228 (observing that a wave of strikes in mid-nineteenth century exploded after widespread organization of industrial workers into "aggressive" labor unions).

608. *See* Richard McHugh, *Productivity Effects of Strikes in Struck and Nonstruck Industries*, 44 INDUS. & LAB. REL. REV. 722, 722–23 (1991) (connecting rate of occurrence of strikes within an industry to rate of unionization); H. R. NO. 80-245, at 3–4 (detailing widespread work stoppages organized and triggered by labor unions) ("The resulting loss in national wealth is staggering."). *See also* Sean Orr & Elliot Lewis, *UPS Teamsters Are Ready to Strike*, JACOBIN (June 7, 2023), https://jacobin.com/2023/06/ups-teamsters-strike-contract-sean-obrien-tdu [https://perma.cc/68UQ-A4Y9] (describing efforts by new Teamsters leadership to build support among members for nationwide strike).

609. *See* Vincent St. John, *Political Parties and the I.W.W.*, in THEORIES OF THE LABOR MOVEMENT 76 (Simeon Larson & Bruce Nissen, eds., 1987) (arguing that only way for workers to gain power is to organize and stop production); Noam Scheiber, *Supreme Court Backs Employer in Suit Over Strike Losses*, N.Y. TIMES (June 1, 2023), https://www.nytimes.com/2023/06/01/business/economy/supreme-court-strikes-teamsters.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/H9LP-7F8Y] (quoting Stuart Applebaum, president of the Retail, Wholesale and Department Store Union) ("Without the threat of a strike, you have little leverage in negotiations."). *See also* Gompers, *The American Labor Movement*, *supra* note 30 (citing success of past strikes in securing better wages and working conditions).

610. *See* Bohner, *supra* note 384 (arguing that "[s]uccessful strikes that demonstrate the power of collective action could serve as a powerful object lesson for all workers that they can organize and win against some of the largest companies in the world."); McAlevey, *supra* note 304 (arguing that strikes help workers unite in the face of hardball employer tactics and adverse judicial rulings); Hamilton Nolan, *The War Over No Strike Clauses Has a New Front Line*, IN THESE TIMES (June 1, 2023), https://inthesetimes.com/article/no-strike-clause-ue-wabtec-labor-union [https://perma.cc/J466-34VU] (arguing that strikes are essential to building and maintaining union power) ("Expanding the right to strike makes workers stronger. Period. Always and everywhere.").

611. *Cf.* MORRIS, *supra* note 30, at 26 (explaining that even in pre-NLRA era, unions used strikes to enforce demands against employers who refused to bargain).

612. *See, e.g.*, *FAQ on Strikes and UAW Strike Assistance*, UNITED AUTO WORKERS, https://uaw.org/strike-faq-2/ [https://perma.cc/YC47-TVAT] (last visited June 25, 2023) (describing benefits for members who go on strike); *Teamsters Strike Benefits*, UPS TEAMSTERS UNITED, https://www.upsteamstersunited.org/teamster_strike_benefits [https://perma.cc/VCA4-FVUT] (last visited June 25, 2023) (same). *Cf. "Grassroots" Gig Workers Collective Exposed As UFCW Front*, LABOR PAINS (Oct. 22, 2020), https://laborpains.org/2020/10/22/grassroots-gig-workers-collective-exposed-as-ufcw-front/ [https://perma.cc/CH8T-86HD] (describing SEIU funding for certain "grassroots" strikes by workers to promote unionization in certain low-wage sectors). *But cf.* Bohner, *supra* note 384 (reporting that while unions are currently spending only 3% of their budgets on strike-support funds, they have accumulated "billions" to deploy for that purpose).

schools."[613] The combined effect is not to dissuade strikes but to encourage them.[614]

Still, correlation and causation can be hard to untangle. Do workers go on strike because they have a union? Or are workers who already want to strike more likely to join a union? The causation could theoretically run in either direction.

Fortunately, causation is easier to track in the public sector, where history offers a point of comparison. For much of the twentieth century, collective bargaining by public employees was illegal.[615] Governments thought collective bargaining was inconsistent with public service: it would divide employees' loyalties between the public and their union.[616] But that view started to change in the 1950s.[617] The prior decades had been marred by a series of strikes, including a particularly contentious police strike in Boston.[618] Governments started to think

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613. *See Strike School*, PHILA. COUNCIL AFL-CIO, https://philaflcio.org/strike-school-0 [https://perma.cc/C4SJ-6MKT] (last visited May 26, 2023) ("Learn how to get strike ready, fight hard, and win big."). *See also* Lizzy M. Ravitch, *So You Want to Go on Strike? Philadelphia's Union Council Is Teaching Workers How*, PHILA. INQUIRER (May 15, 2023), https://www.msn.com/en-us/news/us/so-you-want-to-go-on-strike-philadelphia-s-union-council-is-teaching-workers-how/ar-AA1bdl1a?utm_source=substack&utm_medium=email [https://perma.cc/L483-325S] (reporting that strike school would include instruction on preparing for a strike, timing the strike, and conducting the strike once underway).

614. *See* H.R. REP. 80-245, at 3–4 (1947) (tracking historical correlation between union organizing and work stoppages). *See also* Bond, *supra* note 54, at 444 (arguing that the incidence and impact of industrial strife caused by strikes is exaggerated; and in any event, they are at least as exacerbated as mitigated by the creation of powerful unions spreading across multiple employers, which is what the NLRA helps facilitate).

615. *See, e.g.*, HOWARD, *supra* note 32, at 26–28 (describing public attitudes toward government unions in the early and mid-twentieth century); SECUNDA ET AL., *supra* note 112, at 18 (describing early state hostility to collective bargaining).

616. *See, e.g.*, Letter from Franklin D. Roosevelt, President of the United States, to Luther C. Steward, President of National Federation of Employees (Aug. 16, 1937), https://www.presidency.ucsb.edu/documents/letter-the-resolution-federation-federal-employees-against-strikes-federal-service [https://perma.cc/8T97-9UHW] (observing that federal employees had an obligation to "serve the whole people" and, for that reason, "the process of collective bargaining, as usually understood, cannot be transplanted into the public service."); Michael Barone, *Are Public Employee Unions Unconstitutional?*, AM. ENTER. INST. (Jan. 26, 2023), https://www.aei.org/op-eds/are-public-employee-unions-unconstitutional/ [https://perma.cc/2MA5-ftpS] (quoting George Meany in 1955 saying that it was "impossible to bargain collectively with the government."); BOK & DUNLOP, *supra* note 32, at 13 (noting that as late as 1941, 79% of poll respondents said that government workers should not be allowed to join a union); Baranowski, *supra* note 112, at 2258 (explaining that historical concern with safeguarding public interest fostered skepticism of public unions); Ry. Mail Ass'n v. Murphy, 44 N.Y.S. 2d 601, 607 (N.Y. Sup. Ct. 1943) ("To tolerate or recognize any combination of civil service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded."), *rev'd sub nom.* Ry. Mail Ass'n v. Corsi, 47 N.Y.S.2d 404 (N.Y. App. Div. 1944). *But see* BOK & DUNLOP, *supra* note 32, at 315 (expressing skepticism toward argument that collective bargaining is incompatible with public employment because of state's sovereign status or civil-service rules).

617. *See* BOK & DUNLOP, *supra* note 32, at 315 (reporting that by 1967, a clear majority of poll respondents thought government employees should have the right to join a union).

618. *See* Howard J. Zibel, *The Role of Calvin Coolidge in the Boston Police Strike of 1919*, 6 INDUS. & LAB. REL. F. 299, 299–307 (1969) (describing strike's origins and aftermath—including a plea from

they could avoid further disturbances if they moderated their stance on bargaining.[619] Bargaining might give workers an outlet: rather than walking off the job, they could present their grievances at the bargaining table.[620] Yes, divided loyalty was still a risk,[621] but governments were willing to sacrifice undivided loyalty for labor peace.[622]

And so public-sector bargaining quickly went from nonexistent to the norm.[623] New York City went first, allowing bargaining in 1958.[624] Dozens of state governments quickly followed.[625] Even the federal government allowed collective bargaining under an executive order signed by President Kennedy.[626] By 1968, twenty states had recognized some sort of collective bargaining—up from zero only fifteen years earlier.[627]

This shift set up a natural experiment. After banning collective bargaining for decades, dozens of governments reversed course.[628] Would that change in policy reduce work stoppages? Would strikes tail off?[629]

The answer, to put it mildly, was no. Far from disappearing, strikes proliferated.[630] In 1946, there were about 50 major strikes by public employees.[631] But by 1978, that number had ballooned to 480—an increase of 824%.[632] Nor were

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Samuel Gompers to call off the strike because it was hurting labor's image); SECUNDA ET AL., *supra* note 112, at 12–13 (describing early public-sector strikes, including Boston police strike).

619. *See* HOWARD, *supra* note 32, at 26–27 (describing shift in attitudes toward public unionism).

620. *See id.* at 28 (observing that the quid pro quo for bargaining rights was usually a ban on strikes).

621. *See id.* at 26–27.

622. *See id.*

623. *See* BOK & DUNLOP, *supra* note 32, at 312 (describing fast expansion of public-sector bargaining from late 1950s to late 1960s); HOWARD, *supra* note 32, at 27–29 (describing wave of public-sector bargaining laws).

624. HOWARD, *supra* note 32, at 27.

625. *See, e.g.*, SECUNDA ET AL., *supra* note 112, at 18–19 (describing wave of state bargaining laws in late 1950s and 1960s); HOWARD, *supra* note 32, at 28–29 (reporting that 38 states would eventually adopt such laws).

626. *See* Employee Management Cooperation in the Federal Service, Exec. Order No. 10988, 3 C.F.R. 130, 130 (1959-1963), *reprinted as revised in* 32 C.F.R. §270.4 (1965). *See also* Bok & Dunlop, *supra* note 32, at 312–13 (noting that following Kennedy's executive order, the number of federal employees represented by a union increased from virtually none to 2 million by 1968); HOWARD, *supra* note 32, at 136 (observing that today, a quarter of federal employees are covered by collective-bargaining agreements).

627. *See* CRAIG OLSON ET AL., STRIKES IN THE PUBLIC SECTOR, U.S. DEP'T OF COMMERCE NAT'L TECH. INFO. SERV. 54 (1981). *Cf.* HOWARD, *supra* note 32, at 28 (describing wave of strikes before mass recognition of collective bargaining in public sector).

628. *See* Baranowski, *supra* note 112, at 2260 (describing "wave" of states authorizing bargaining and reporting that the number of represented public employees increased five-fold between 1970 and 1978).

629. *Cf.* Harris v. Quinn, 573 U.S. 616, 663–64 (2014) (Kagan, J., dissenting) (explaining that states such as California justified public-sector bargaining in part as a way to reduce strikes).

630. *See* HOWARD, *supra* note 32, at 27–28 (describing the wave of strikes in the 1960s).

631. *See* OLSON, *supra* note 627, at 54.

632. *Id. See also* BOK & DUNLOP, *supra* note 32, at 234 (noting that from 1955 to 1965, for every 1,000 people employed in certain industries, the United States lost 1,044 man days to strikes: more than 3.5 times the amount of days lost in the United Kingdom, which itself lost more than 20 times the amount lost in Sweden).

these strikes particularly peaceful or orderly. In New York City alone, multiple transit strikes shut down the city for weeks at a time.[633] Other states and cities faced massive walkouts by essential workers, such as teachers and police officers.[634] In fact, every single government that authorized collective bargaining suffered at least one strike—even though most continued to treat strikes as illegal.[635]

Now, we should be careful not to overinterpret this evidence. Can we say for sure that collective bargaining caused these strikes? No.[636] Correlation is not causation.[637] But for our purposes, the evidence need not be infallible.[638] The burden of proof does not fall on plaintiffs who challenge constitutional deprivations.[639] Rather, the burden falls on the government: the government must show that bargaining *prevents* strikes.[640] And if anything, the evidence suggests the opposite.[641]

But for argument's sake, assume the government could muster enough evidence to connect labor peace to collective bargaining. That connection would only get it halfway. It would still have to connect collective bargaining to

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633. *See* HOWARD, *supra* note 32, at 120 (describing wave of strikes by New York City workers after passage of Taylor Law, which authorized collective bargaining).

634. *See, e.g.*, Sch. Dist. for City of Holland, Ottawa & Allegan Cntys. v. Holland Ed. Ass'n, 157 N. W.2d 206, 207 (Mich. 1968) (discussing strike involving K–12 teachers); Uetricht, *supra* note 395 (reporting that the Chicago Teachers Union has "repeatedly gone on strike" in part to "reshape[] electoral politics in the city"); Sanjukta Paul, *The GEO Strike and Labor Injunctions*, MICH. DAILY, [https://perma.cc/PN2H-36VF] (April 9, 2023) (discussing strike by University of Michigan graduate-student instructors); *Phil Murphy Puts Strikers Over Students*, WALL ST. J. April 11, 2023), [https://perma.cc/9AGN-AFGP] (reporting on strike by faculty at University of Rutgers); Kurtis Lee & Jill Cowan, *Log Angeles School Workers Are on Strike, and Parents Say They Get It*, N.Y. TIMES March 22, 2023), [https://perma.cc/XGR6-HE3V] (reporting that "strikes by teachers and education workers have become increasingly common").

635. *See, e.g.*, MICH. COMP. LAWS ANN. § 423.202 (1947) ("A public employee shall not strike . . . ."); SECUNDA ET AL., *supra* note 112, at 159, 215 (explaining that strikes remain illegal in most public-sector bargaining schemes); Carol Gerwin, *Illegal Strikes*, COMMONWEALTH (April 1, 1999), [https://perma.cc/3WS6-37BM] (describing illegal strikes by teachers, police, and other public employees after the expansion of bargaining rights). *But cf. City of Holland*, 157 N.W.2d at 210 (holding that not all illegal strikes were necessarily subject to an injunction; the state had to show "violence, irreparable harm, or breach of the peace").

636. *See* OLSON ET AL., *supra* note 627, at 56–57 (noting that some other causes, such as macroeconomic conditions and state policy changes, could have contributed to the strike surge).

637. *But see* OLSON ET AL., *supra* note, at 56 (linking the spread of collective bargaining to increased strike activity) ("One result of the growth of this and other public sector unions and the concomitant increase in bargaining was more opportunities for public sector strikes to occur."). *See, e.g.*, Joseph Goldstein, *Resident Doctors Go on Strike at Elmherst Hospital in Queens*, N.Y. TIMES (May 22, 2023), [https://perma.cc/9N4F-3VCU] (reporting on strike by resident physicians at a public hospital in New York City despite state law forbidding strikes by public employees).

638. *See* Harris v. Quinn, 573 U.S. 616, 651 (2014) (putting the burden on the proponent of a law burdening speech to justify the burden and show that interests couldn't be achieved by less burdensome means).

639. *See id.*

640. *See id.*

641. *See* OLSON ET AL., *supra* note 627, at 56 (concluding that the proliferation of public-sector unions and public-sector collective bargaining was a principal cause of surge in strikes).

exclusive representation.[642] And on that point, it would again struggle to overcome the historical record.

Today, we think of exclusivity and collective bargaining as joined at the hip.[643] That mostly stems from section 9(a) of the NLRA, which ties the two together.[644] But the connection hasn't always been there. In fact, for much of the country's history, the concepts were distinct.[645] Proto-trade unions started emerging in the United States as early as the 1820s.[646] These early unions were made up mostly of skilled craftsmen. They banded together in "societies" to bargain with local "masters" over pay and working conditions.[647] But they had no right to bargain for workers outside their ranks.[648] And that remained true until late in the nineteenth century, when modern trade unionism started to take form.[649] As trade unions became more centralized and organized, they expanded their memberships and even gained a modicum of recognition from courts.[650] But by and large, they continued to bargain only for their members.[651]

Section 9(a) changed that. For the first time, it gave unions a statutory right to bargain for every employee in a bargaining unit, even those who refused to join.[652] But even after section 9(a) became the law, many unions continued to negotiate members-only contracts.[653] These contracts remained common in several major

642. *See* Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1172 (Mass. 2019) (justifying exclusivity by tying it to collective bargaining and tying collective bargaining to labor peace).

643. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 36 (describing exclusivity as a "basic element" of American labor law).

644. *See id*. (observing that exclusivity entered labor law through passage of NLRA in 1935).

645. *See* MORRIS, *supra* note 31, at xii, 5 (pointing out that members-only bargaining was taken for granted even into the 1930s, after the NLRA passed).

646. *See* Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic 139–43 (1993) (describing emergence of American labor unions in early nineteenth century). *See also* John Orth, Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906, 5–6 (1991) (noting that modern trade unions emerged in England in the eighteenth century); Commons, *supra* note 29, at 136–37 (noting that while unions existed in earlier decades of 19th century, modern labor unions started to form in the post-Civil War era, when markets and unions grew in tandem); Ware, *supra* note 279, at 23, 134 (describing "widespread organization" of workers in 1840s).

647. *Cf*. Sidney & Beatrice Webb, *The Origins of Trade Unionism*, in THEORIES OF THE LABOR MOVEMENT 189 (Simeon Larson & Bruce Nissen, eds., 1987) [hereinafter *Origins of Trade Unionism*] (describing the rise of trade unionism in England, which emerged only when industrial change made certain workers no longer independent produces, like craft journeymen, but instead lifelong wage earners).

648. *See* MORRIS, *supra* note 31, at 8–9 (explaining that pre-NLRA unions gained recognition and improved conditions through membership drives, direct action, and members-only bargaining), 20 (explaining that before the NLRA, membership was the "sine qua non" of collective bargaining).

649. *See* LIVESAY, *supra* note 254, at 31–32 (describing emergence of trade unions in late nineteenth century).

650. *See* Tomlins, *supra* note 646, at 130–51 (describing development of unions and struggle for legal recognition).

651. *See* MORRIS, *supra* note 30, at 20.

652. *See* 29 U.S.C §159(a); Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) (stating that section 9(a) gives the union a "statutory obligation to represent all members of an appropriate unit").

653. *See* MORRIS, *supra* note 30, at xii, 5.

industries, including steel and auto manufacturing.[654] In fact, as late as 1938, six out of ten auto-industry contracts covered only union members.[655]

Given that history, it is hard to say exclusivity is a prerequisite for collective bargaining.[656] While we may associate the two concepts now, they have never been inherently linked.[657] Unions can bargain—and indeed, have bargained—without exclusive rights.[658]

That fact, of course, has done nothing to staunch the flow of dire predictions.[659] Some observers still claim that without exclusivity, collective bargaining will be structurally unworkable.[660] Once employees can opt out, uniform standards will become impossible.[661] Certain traditional features of collective bargaining, such as seniority systems, will become unworkable.[662] These systems can be preserved only if everyone is covered.[663] So without exclusivity, bargaining as we know it will end.

Lest we take these predictions too seriously, remember that similar sky-is-falling lamentations preceded *Janus*.[664] Many predicted that without agency fees,

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654. *See* MORRIS, *supra* note 30, at 5, 84.

655. *Id.*

656. *See id.* at 215 (arguing that members-only bargaining might actually improve union density by demonstrating unions' value and persuading more employees to join).

657. *See id.* (arguing that exclusivity and collective bargaining were never inherently linked and, indeed, are not necessarily linked under current law).

658. *See* Consol. Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 218 (1938) (observing that even without certification as an exclusive representative, a union can negotiate a members-only contract, and enforcing just such a contract over the Board's objection). *See also* Klinger & Kolker, *supra* note 214, at 268–72, 275 (noting that following *Janus*, some commentators called for members-only bargaining, and some states have experimented with allowing unions to offer members-only services).

659. *See* Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. 1821, 1834 (2019) (arguing that *Janus* has forced states to fundamentally redesign their bargaining systems). *See also* Janus v. Am. Fed'n of State, City, and Mun. Emps., 138 S. Ct. 2448, 2489 (2018) (Kagan, J., dissenting) (arguing that agency fees were necessary for exclusive representation (and thus for collective bargaining) because they ensured that unions were stable and funded).

660. *See Janus*, 138 S. Ct. at 2489 (arguing that eliminating agency fees would cause collective-action problems of "nightmarish proportions"); Gould IV, *supra* note 517, at 213 (arguing that Janus marked a return to pre–New Deal conservative judicial attacks on collective bargaining); Baranowski, *supra* note 112, at 2252 (arguing that *Janus* threatens to upend collective bargaining in the public sector by interfering with exclusive representation); Taylor, *supra* note 214, at 510–11 (arguing that *Janus* imperiled a range of other state labor laws, including sectoral-bargaining schemes and efforts to restrict "captive audience" meetings). *See also* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 36 (arguing that exclusivity is necessary to shore up "structural weaknesses" in collective-bargaining systems, such as ability of individual stewards or committees to undermine union's authority); Ann C. Hodges, *Imagining U.S. Labor Relations Without Union Security,* 28 EMP. RESPONSIBILITIES & RTS. J. 135, 142 (2016) (detailing threats to union stability that would emerge without exclusive representation). *Cf.* Green, *supra* note 252, at 200 (arguing that exclusive bargaining as structured under the Wagner Act is "the only policy suitable to American conditions as a basis for labor relations legislation").

661. *See* LABOR IN THE TWENTIETH CENTURY, *supra* note 70, at 94.

662. *Id.*

663. *See id.*

664. *See, e.g.*, *Janus*, 138 S. Ct. at 2489 (Kagan, J., dissenting); Klinger & Kolker, *supra* note 214, at 273 (arguing that maintenance of dues is crucial to a union's ability to operate, and *Janus* interferes with that process).

unions would wither away.[665] But in fact, unions have held up well. While they've lost some members, the losses have been minimal: by one count, membership is down by as little as 0.8 percent.[666] And by raising dues, unions have kept their coffers about as full as they were before.[667] The predicted calamity has failed to emerge.[668]

The past, of course, is not necessarily prologue. But the doomsayers' track record should give us pause. Collective bargaining didn't collapse when the Supreme Court did away with agency fees.[669] To the contrary, bargaining continued pretty much as normal.[670] And there's no reason to think we'd see a different result if the Court did away with exclusive representation.[671]

"Plural" bargaining. Besides labor peace, exclusivity's defenders sometimes point to the dangers of so-called plural bargaining.[672] The plural-bargaining argument frames exclusivity as a device of administrative convenience.[673] In short, without exclusivity, multiple unions would vie for the same employees.[674] They

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665. *See, e.g.*, Adam Liptak, *Supreme Court Delivers a Sharp Blow to Labor Unions*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html [https://perma.cc/BY98-8QDV] ("The ruling means that public-sector unions across the nation, already under political pressure, could lose tens of millions of dollars and see their effectiveness diminished."); DANIEL DISALVO, PUBLIC SECTOR UNIONS AFTER *JANUS*: AN UPDATE 4 (2019), https://media4.manhattan-institute.org/sites/default/files/IB-DaD-0219.pdf [https://perma.cc/WZ7B-GW9T] ("*Janus* weakens public-sector unions economically, as they will lose revenue from agency fees. Furthermore, because government workers can now receive most of the benefits of union representation without paying for them, public unions are likely to lose some members (and their dues money) in the coming years.").

666. Joe Mayall, *Americans Love Unions. The Supreme Court's Conservatives Are Gutting Them*, BALLS & STRIKES (May 22, 2023), https://ballsandstrikes.org/law-politics/americans-love-unions-the-supreme-courts-conservatives-are-gutting-them/ [https://perma.cc/NB42-CPYT].

667. *See id.* (arguing that state laws passed in wake of *Janus* blunted the decision's effect on public-sector unions).

668. *See* Klinger & Kolker, *supra* note 214, at 269–72 (observing that states have adapted to *Janus* by experimenting with some forms of non-exclusive representation).

669. *See* DISALVO, *supra* note 666, at 4 (reporting only a moderate effect on union membership and funding); Mayall, *supra* note 667 (reporting that unions have mostly maintained their treasuries at prior levels).

670. *See* DISALVO, *supra* note 666, at 4; Mayall, *supra* note 667.

671. *See* Fisk & Malin, *supra* note 659, at 1834–43 (noting that states have already started experimenting with nonexclusive representation programs allowing employees to bargain collectively on a voluntary basis); Campbell, *supra* note 51, at 733 (arguing that without exclusivity, unions would continue to bargain, but only on behalf of their members).

672. *See* Baranowski, *supra* note 112, at 2278; Klinger & Kolker, *supra* note 214, at 276; Fisk & Malin, *supra* note 659, at 1839–40.

673. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2465 (describing the traditional justifications for limiting plural bargaining); Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1172 (Mass. 2019) (arguing that exclusivity is necessary for "effective and efficient" collective bargaining). *See also* BOK & DUNLOP, *supra* note 32, at 96 (arguing that "multiple units will lead to multiple negotiations, inter-union rivalries, and possibly added strikes, which will burden the employer and the public").

674. *See, e.g.*, *Janus*, 138 S. Ct. at 2465; Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 67 (1975) (warning that employer might not be able to handle competing demands); Mentele v. Inslee, 916 F.3d 783, 790 (9th Cir. 2019) (arguing that without exclusivity, inter-union rivalries would disrupt workplaces). *Cf.* BOK & DUNLOP, *supra* note 32, at 210 (noting that the AFL developed an early

would make competing demands and negotiate a web of overlapping contracts.[675] These demands would sow confusion, inefficiency, or even chaos.[676] So to make bargaining work, we need to designate one union to bargain for everyone.[677]

But notice whom this rationale mainly benefits: the employer.[678] It allows the employer to make a single, uniform deal.[679] The employer doesn't have to worry about multiple contracts or competing demands; it can apply one set of rules to everyone.[680] The result is peace and efficiency —a win-win.[681]

That sounds logical. But is it true? After all, if exclusive bargaining promotes efficiency, we should see employers rushing to adopt it.[682] Most employers are for-profit enterprises; they have to operate efficiently if they want to survive.[683] So even if they don't like exclusivity, they should be forced to adopt it.[684] If they

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concept of exclusivity in the 1880s among its members to prevent competition among unions for members); Fisk & Malin, *supra* note 659, at 1836 (reporting that limits on bargaining subjects in Wisconsin have led unions to compete among themselves for members).

675. *See Janus*, 138 S. Ct. at 2465; *Emporium Capwell*, 420 U.S. at 67; Jarvis v. Cuomo, 660 F. App'x 72, 74 (2d Cir. 2016). *See also* Baranowski, *supra* note 112, at 2278–79; Klinger & Kolker, *supra* note 214, at 276; *Mentele*, 916 F.3d at 790.

676. *See Janus*, 138 S. Ct. at 2465 (describing traditional fear that plural bargaining would cause "conflict and disruption"); *Emporium Capwell*, 420 U.S. at 67 (reasoning that plural bargaining would pull the employer in multiple directions, resulting in "seriatim . . . economic coercion"). *See also* BOK & DUNLOP, *supra* note 32, at 96 (arguing that accommodation of individual or competing demands can cause administrative problems). *Cf.* Knight III, 465 U.S. 271, 291 (1984) (finding that state could reasonably choose to listen to one voice in meet-and-confer process for administrative convenience) ("The state has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related questions, whatever other advice they may receive on those questions.").

677. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (accepting a similar premise).

678. *See* Baranowski, *supra* note 112, at 2278 (arguing that exclusivity protects management from "disparate individuals bargaining in isolation"); Meijer, Inc. v. NLRB, 564 F.2d 737, 744–45 (6th Cir. 1977) (Weick, J., dissenting) (arguing that exclusivity "frees the employer from the possibility of facing conflicting demands from different unions"). *Cf. Knight III*, 465 U.S. at 291 (reasoning that delegation of one union to speak for all employees made consultation and decision making more efficient).

679. *See Meijer, Inc.*, 562 F.2d at 744-45 (Weick, J., dissenting) (arguing that exclusivity "permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations"); Klinger & Kolker, *supra* note 214, at 276 (arguing that plural bargaining can't work because employer would face competing demands and multiple contracts).

680. *See Emporium Capwell*, 420 U.S. at 67-68. *See also* Green, *supra* note 252, at 205 (arguing that the exclusive bargaining agent serves as an efficient conduit for communication between the employer and its employees).

681. *See* Green, *supra* note 252, at 200 (arguing that collective bargaining offers management a "maximum of freedom of choice and action, short of unilateral dictation.").

682. *See* Campbell, *supra* note 51, at 768–69 (reasoning that if exclusivity benefits employers, they will agree to it without legal compulsion).

683. *See* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 932 (1993) (explaining that employer attitudes and tactics toward unions and bargaining are driven largely by the "economic objective of minimizing costs"). *Cf.* HOWARD, *supra* note 32, at 32-33 (arguing that private-sector unions have an incentive not to demand inefficient work rules because such rules make unionized employers less competitive).

684. *Cf.* Estlund, *supra* note 684, at 927 (explaining that some economists believe a "high-wage" strategy focused on employee motivation and retention would promote growth and prosperity throughout the economy).

don't, their competitors will, and they'll be undercut by more efficient rivals.[685] The iron laws of the market will force their hands.[686]

But in the real world, we see them doing the opposite.[687] They spend small fortunes to avoid exclusive bargaining.[688] They raise pay to blunt union wage differentials.[689] They run "positive employee relations" campaigns to keep workers happy.[690] And they hire consultants to tamp down union sentiment.[691] They act, in effect, like people who think exclusive bargaining is bad for business.[692]

Nor do these employers seem overwhelmed by bargaining's complexity.[693] They often have to deal with competing demands: employees may ask for different salaries, benefits, work schedules, and other accommodations.[694] Yet the

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685. Cf. HOWARD, *supra* note 32, at 33 (pointing out that public-sector unions, which are not disciplined by the market, often resist reforms aimed at cost saving and other efficiencies).

686. *Cf.* Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1025 (9th Cir. 2010) (reasoning that a state could rationally impose project labor agreement requirements on state projects, even if those agreements raised per-unit labor costs in part because the state might believe that such agreements reduce labor disruptions and result in overall more efficient construction).

687. *See* Estlund, *supra* note 684, at 926 (attributing low union densities in part to union-avoidance decisions by firms when making capital investments). *See also id.* at 927 ("[F]rom the individual firm's perspective . . . measures aimed at minimizing unionization are useful and rational tactics . . . ."); Campbell, *supra* note 51, at 770 (noting that there is no evidence employers in fact prefer exclusive representation to other forms of negotiation).

688. *See* CELINE MCNICHOLAS, ECON. POL'Y INST., EMPLOYERS SPEND MORE THAN $400 MILLION PER YEAR ON "UNION-AVOIDANCE" CONSULTANTS TO BOLSTER THEIR UNION-BUSTING EFFORTS 2 (2023), https://files.epi.org/uploads/265149.pdf [https://perma.cc/F9G5-5XG5] (estimating that employers spend $433 million per year on union-avoidance consultants). *See also* Estlund, *supra* note 684, at 929 (reporting on an "increasing prevalence of aggressive and illegal employer resistance").

689. *See, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 85 (1985) (reporting that unions tend to produce similar pay increases across establishments within an industry in part because nonunion employers raise wages to match union wages); JAKE ROSENFELD ET AL., ECON. POL'Y INST., UNION DECLINE LOWERS WAGES OF NONUNION WORKERS 5 (2016), https://files.epi.org/pdf/112811.pdf [https://perma.cc/E6NG-KR4D] (attributing stagnating wages to lower union rates, in part because of the upward pressure union wages can place on nonunion wages among similar employers) ("[N]onunion employers worried about a possible unionization drive may match union pay scales to reduce the demand for organization.").

690. *See generally* LLOYD M. FIELD, UNIONS ARE NOT INEVITABLE!: A GUIDE TO POSITIVE EMPLOYEE RELATIONS (2000) (describing a comprehensive program of positive employee relations designed to dissuade employees from seeking intervention by a union).

691. *See generally* MARTIN J. LEVITT, CONFESSIONS OF A UNION BUSTER (1993) (describing union-avoidance industry's growth in the 1980s, as well as tactics employed before and after union campaigns to dissuade unionization).

692. *See* Estlund, *supra* note 684, at 922 (describing union avoidance as "rational employer conduct that would serve the firm's economic self-interest"). *See also id.* at 924 (explaining that union avoidance tactics are a "response to forces inherent in the market itself. . . . [T]he firm that is successfully unionized, and as a result pays higher wages and benefits, must continue to compete against non-union forms that generally pay lower wages"), 932 (explaining that union-avoidance efforts reveal a "strongly held preference[] for maximizing management power, discretion, and flexibility").

693. *See* Estlund, *supra* note 684, at 976, 932 (observing that, to the contrary, unionization and exclusive bargaining are "economic threats" to the firm that can impair its competitiveness by raising labor costs).

694. *See* Bond, *supra* note 54, at 445.

employers seem to get by just fine.[695] They either negotiate individually or offer a single set of policies and conditions.[696] Employees who don't like the conditions can look elsewhere.[697] The market sorts itself out.[698]

Of course, market forces may not produce everyone's ideal workplace.[699] But they don't produce chaos, either.[700] They keep workplaces running and the economy churning. And they do it without much help from exclusive bargaining.[701] So if exclusive bargaining adds anything, it is something other than efficiency or ease of administration.[702] Exclusivity's defenders need a different theory.[703]

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695. *See id.* ("Employers and employees in nonunionized industries have developed various methods for handling disagreements and demands, and these methods would presumably work equally as well in industries with unions lacking exclusive authority to represent all workers."). *Cf.* Campbell, *supra* note 51, at 766 (quoting Thomas Donahue, then-Secretary–Treasurer of the AFL–CIO) ("[H]ow do public employee unions live . . . in places where we don't have exclusive representation? They live very well, or they live well in terms of the members they represent on a members-only basis.").

696. *See* Bond, *supra* note 54, at 445 (arguing that there is no evidence of non-exclusive employers being drowned by competing demands). *See also* Green, *supra* note 252, at 200 (describing three potential models for setting workplace policy: collective bargaining, individual bargaining, and government regulation). *Cf.* Mentele v. Inslee, 916 F.3d 783, 791 (9th Cir. 2019) (observing that alternative to collective bargaining is often unilateral imposition of terms by employer); Estlund, *supra* note 684, at 922 (observing that federal labor law limits an employer's "power to select and control its workforce" once an exclusive representative is certified).

697. *Cf.* BOK & DUNLOP, *supra* note 32, at 99 (recognizing that individual bargaining benefits some employees who are better equipped or positioned to bargain individually).

698. *See* EPSTEIN, *supra* note 500, at Ch. 5 (arguing that market forces produce more efficient results in labor markets without union cartelization; natural checks, such as turnover and replacement costs, prevent most employers from engaging in arbitrary or unfair behavior). *But see* Fisk & Malin, *supra* note 659, at 1840 (arguing that individual bargaining is incompatible with any form of collective bargaining because some collectively bargained benefits are non-excludable, meaning nonmembers will benefit even if the contract doesn't technically apply to them).

699. *See* Green, *supra* note 252, at 200 (criticizing individual-bargaining model as "in effect, employer dictation of the terms of employment").

700. *Cf.* Klinger & Kolker, *supra* note 214, at 275-76 (noting that some states already allow multiple representatives, and some allow employees to represent themselves in the grievance process); NEV. REV. STAT. ANN. § 288.140 (West 2023) (allowing employees within a bargaining unit to represent themselves with respect to their own terms and conditions); Baranowski, *supra* note 112, at 2280 (noting that many European countries allow plural bargaining "without workplaces descending into anarchy"); CAL. GOV'T CODE § 3502 (West 2023) (providing that public employees "shall have the right to represent themselves individually in their employment relations with the public agency"). *But see* Relyea v. Ventura Cnty. Fire Prot. Dist., 3 Cal. Rptr. 2d 614, 619 (Cal. Ct. App. 1992) (reading § 3502 narrowly to include only the right to present personal grievances, not a right to bargain for oneself).

701. *Cf.* MORRIS, *supra* note 30, at 219 (pointing out that many employers negotiate with multiple unions in the same facility).

702. *Cf. id.* at 217 (pointing out that plural bargaining is not impossible or even necessarily difficult to administer; it persisted under the NIRA and thrives in many European countries, including Belgium and the Netherlands).

703. *See* Baranowski, *supra* note 112, at 2279 (conceding that the plural-bargaining interest is unlikely to stand up under judicial scrutiny because there is no evidence that plural bargaining produces chaos).

Company unions. Last, we're sometimes told that exclusive bargaining helps ward off "company unions."[704] The argument goes like this: without exclusivity, companies would set up their own in-house unions.[705] These in-house unions would draw workers away from independent unions while offering only the veneer of collective bargaining.[706] So to protect real bargaining, we have to give exclusive status to one union only.[707]

This argument has an element of truth in it. In the early twentieth century, employers responded to organizing drives by creating in-house unions.[708] These unions captured a large part of the workforce.[709] By 1935, nearly six out of ten union members belonged to one.[710] But they were always controversial and drew significant criticism. Among the critics was Senator Robert Wagner, chief author of the NLRA.[711] Wagner saw company unions as a barrier to real, mature collective bargaining.[712] So when he wrote the first draft of the NLRA, he made them one of his chief targets.[713]

So yes, the NLRA's architects wanted to ban company unions.[714] But the company-union theory still faces two problems: one conceptual and one statutory.

The conceptual problem is that exclusivity doesn't actually prevent company unions. Exclusivity designates one union as the exclusive bargaining

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704. *See also* S. 34, 102d Leg. sec. 2 (Mich. 2023) (defining "company union" to include an organization of employees dominated, administered, controlled, sponsored, supervised, maintained, directed, or financed by an employer).

705. *See* MORRIS, *supra* note 30, at 53-54 (describing policy rationale for banning company unions in NLRA).

706. *See* Campbell, *supra* note 51, at 755 (observing that one of the purposes of the NLRA was to strengthen "real" unions against company unions); NLRB, Legislative History of the National Labor Relations Act 1935, at 2437-38 (1935) [hereinafter Wagner Act Legislative History] (statement of Congressman Boland) (arguing that existence of company unions allowed employers to undercut independent unions and play workers against one another).

707. *See* Green, *supra* note 252, at 204-05 (arguing that to preserve collective bargaining, the law must prevent employers from interfering with union's "internal affairs").

708. MORRIS, *supra* note 30, at 29 (noting a "strong presence" of company unions in American industry before the Wagner Act).

709. *See id.*

710. *Id.*

711. *See* Sen. Robert F. Wagner, Speech on the National Labor Relations Act (Feb. 21, 2023), https://web.mit.edu/21h.102/www/Primary%20source%20collections/The%20New%20Deal/Wagner,%20National%20Labor%20Relations%20Act.htm *archived at* https://perma.cc/3HG3-X2KK (explaining that NLRA was intended to ban company unions). *See also* Charles J. Morris, *Collective Rights as Human Rights: Fulfilling Senator Wagner's Promise of Democracy in the Workplace-The Blue Eagle Can Fly Again*, 39 UNIV. S.F.L. REV. 701, 715 (2005) (explaining that pre-NLRA disputes between company unions and external unions informed drafting of NLRA).

712. *See* Wagner, *supra* note 712; Ralph S. Rice, *The Wagner Act: It's [sic] Legislative History and It's [sic] Relation to National Defense*, 8 Ohio St. L.J. 17, 34 n.67 (1941) (quoting Wagner as expressing concern over company unions).

713. *See* Morris, *supra* note 712, at 53. *Cf.* Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 231 (1956) (explaining that drafters of RLA were also concerned with combatting spread of company unions).

714. *See, e.g.*, Rice, *supra* note 713, at 26, 34 (discussing debate over company unions in legislative hearings). *See also* Morris, *supra* note 712, at 715 (noting that one of the chief reasons the pre-NLRA National Labor Board ordered elections was to resolve disputes between company unions and external unions).

agent.[715] But it says nothing about which union that will be.[716] So the designated agent could, theoretically, be a company union.[717] And in that case, exclusivity would give the company union a legally enforceable monopoly. Rather than blocking company unions, exclusivity would help lock the company union in place.[718]

The NLRA's drafters, of course, knew that could happe—which brings us to the statutory problem. The drafters included section 8(a)(2), which forbade an employer from "dominat[ing] or interfer[ing]" with a labor organization.[719] Section 8(a)(2) not only outlaws company unions, but also prevents employers from meddling with independent ones.[720] It both bans "fake" unions and protects "real" ones.[721] And it does both things without any reference to exclusivity: even if exclusivity were not in the statute, company unions would still be illegal.[722]

So exclusivity's defenders cannot rely on the company-union problem. For that purpose, exclusivity is both insufficient and unnecessary. The defenders need another theory. And so far, they've yet to find one.

IV. POLITICAL MEANS, POLITICAL ENDS

Mary Kay Henry is a serious person. When she says she's going to do something, she usually follows through. So it was no surprise when, at a hearing before the U.S. Senate HELP committee, she renewed her calls for a wide range of new laws.[723] These laws included, of course, the PRO Act, which she said would make union organizing easier.[724] They also included laws guaranteeing "good jobs" in the air-travel, home-care, and child-care industries.[725] But they also included laws aimed further afield, such as climate-change legislation and

715. 29 U.S.C. § 159(a).

716. *See id.*

717. *See* Morris, *supra* note 30, at 54-55 (discussing exclusivity and company unionism as separate concerns: one concerned inter-union rivalries, the other employer interference with unions, whether exclusive or not).

718. *Cf. Hanson*, 351 U.S. at 231 (explaining that an early version of RLA banned union-shop agreements in part because they could insulate company unions).

719. *See* 29 U.S.C. § 158(a)(2); Consol. Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 218 (1938).

720. *See Consol. Edison*, 305 U.S. at 218.

721. *See, e.g.*, NLRB v. Mid-States Metal Prods., Inc., 403 F.2d 702, 705 (5th Cir. 1968) (observing § 8(a)(2) forbids both domination and support of labor organization); Electromation, Inc. v. NLRB, 35 F.3d 1148, 1165 (7th Cir. 1994) (explaining that dual purpose of § 8(a)(2) is to protect employees' free choice of a representative and promote bargaining between that chosen representative and the employer).

722. *See* 29 U.S.C. § 158(a)(2), (5) (treating the ban on interference with labor organizations and the duty to bargain with the exclusive representative as separate concepts and separate violations); MORRIS, *supra* note 30, at 54-55 (implying that ban on company unionism was meant to solve a different problem than exclusivity, which was aimed at inter-union rivalries). *Cf.* H.R. 4004, 102d Leg., sec. 10(1)(b) (Mich. 2023) (banning company unions in public sector without any reference to exclusivity).

723. Kay Henry, *supra* note 40.

724. *Id.* (citing Protecting the Right to Organize Act, S. 567, 118th Cong. (2023)).

725. *Id.* (citing Good Jobs for Good Airports Act, S. 4419, 117th Cong. (2022); Better Care Better Jobs Act, S. 100, 118th Cong. (2023); Child Care for Working Families Act, S. 1360, 117th Cong. (2021)).

"commonsense immigration reform."[726] Kay Henry made no distinction between the first kind of laws and the second.[727] All of them were, in her telling, part and parcel of a "working families" agenda.[728]

It's not that Kay Henry didn't try to find a common theme. She framed the whole package as a way to combat corporate "greed" and "union busting."[729] But that framing was a contentious one—one the committee's Republicans objected to strenuously.[730] Senator Bill Cassidy, for one, painted the union's legislative agenda as an effort to force unwilling workers into unions.[731]

This debate is a serious one: one Democrats and Republicans have been having for decades. But which side has the better of it is, for our purposes, irrelevant. The important point was the debate's internal logic. It treated labor issues as simply an extension of a wide-ranging, two-party contest. And it treated unions, once apolitical vessels, as mere political appendages.[732] Union leaders appeared not only to advocate not only for better wages and working conditions, but also for broader social reforms, from environmental protection to gay and transgender rights.[733] That left them looking something like a funhouse-mirror version of their former voluntaristic selves: fewer bargaining agents, more political action committees.[734]

That transformation may have been inevitable. It may be that, in a world of increasing automation and global trade, unions had no choice but to turn to politics.[735] But even so, the transformation has legal significance. Unions are now as political as any other advocacy group.[736] And as political entities, they carry constitutional significance. The government cannot force a person to associate with a

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726. *See id.*

727. *See id.* (listing other reforms alongside call for $15 minimum wage).

728. *Id.*

729. *Id.*

730. *See* U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS, *Defending the Right of Workers to Organize Unions Free from Illegal Corporate Union-Busting*, YouTube (March 8, 2023), https://www.help.senate.gov/hearings/defending-the-right-of-workers-to-organize-unions-free-from-illegal-corporate-union-busting, *archived at* https://perma.cc/A964-Y74A (statement of Sen. Bill Cassidy (R-La.) at 00:23:45) (objecting to what he perceived as forced unionization and framing the debates in terms of workers' right to choose).

731. *See id.*

732. *See* Estreicher, *supra* note 38, at 418 ("We are now, however, beginning to see a qualitative change in labor's relationship to the state: trade unionism as a supplement to politics. Labor's economic objectives have not changed; the means are undergoing substantial transformation.").

733. *See, e.g.*, Kay Henry, *supra* note 40 (combining social and workplace agendas); AFL-CIO Platform, *supra* note 40 (same); Schuler Q&A, *supra* note 28 (same).

734. *See* Estreicher, *supra* note 38, at 417 (arguing that while the labor movement started as "an expression of self-organization of working people," it is now a form of political organization).

735. *See id.* at 415-16 (attributing the turn toward politics to pressures created by technological and trade-policy changes). *See also* Webb & Webb, *supra* note 267, at 203 (implying that unions inevitably evolve into political advocacy groups as government regulation of labor markets grows more pervasive and that to protect their interests, unions must operate on an increasingly political plane).

736. *See* Estreicher, *supra* note 38, at 417-18 (labeling unions "political organizations").

political body.[737] It cannot require a person to align herself with a political view.[738] Yet today, that's exactly what exclusive representation does. It forces unwilling employees to sublimate their views and desires to those of a union.[739] That scheme might have been defensible when unions were mere bargaining agents. But it no longer is. Unionism has changed; and with it, so must our law.

737. *See, e.g.*, Roberts v. U.S. *Jaycees*, 468 U.S. 609, 636-38 (1984) (O'Connor, J., concurring); Janus v. Am. Fed'n of St., Cnty., & Mun. Emps., 138 S. Ct. 2448, 2463–64.

738. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 74-78; Elrod v. Burns, 427 U.S. 347, 355-56.

739. *See* Campbell, *supra* note 51, at 732-33; Bond, *supra* note 54, at 423.