JANUS'S NEXT TARGET? DEFENDING PRIVATE SECTOR EXCLUSIVE REPRESENTATION UNDER THE FIRST AMENDMENT

IAN M. PULTZ-EARLE*

This Note considers what may be the next major constitutional attack on American labor law: a First Amendment challenge to private sector exclusive representation. In the wake of Janus v. AFSCME*, public sector employees filed hundreds of lawsuits alleging that exclusivity compels speech and association by requiring employees to be represented by and associate with a union whose views they oppose. Although those challenges uniformly failed, some commentators have suggested that the same constitutional theory applies with equal force in the private sector, where the state action requirement is satisfied and the Supreme Court has not spoken directly to uphold the arrangement.*

*Drawing on compelled speech and expressive association doctrine, as well as the post-*Janus *cases, this Note argues that private sector exclusive representation can survive a First Amendment challenge. It notes that the constitutional impingements imposed by exclusivity are real yet sufficiently attenuated that they fail to outweigh the state interests in labor peace, unitary representation, and workplace majoritarianism. Collective bargaining over the terms and conditions of employment is primarily economic rather than expressive activity, and the involuntary association with unions under the National Labor Relations Act does not interfere with employees' ability to express their own views, even as unions wade deeper into partisan politics. At the same time, dismantling exclusive representation would invite competing unions in a single workplace and the proliferation of individual employment contracts, threatening the stability of labor relations.*

Noting the Supreme Court's treatment of integrated bar associations and other mandatory relationships, this Note situates exclusive representation within a broader debate about the boundary between economic and political association. Ultimately, it concludes that, even under the current Court's expansive view of compelled speech and association, the harms imposed by exclusivity are constitutionally permissible because of the federal government's strong interest in preserving an orderly system of collective bargaining.

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INTRODUCTION

In 2019, an Illinois public-school custodian filed suit against her union, the school district, and several state officials, alleging that the union had unlawfully deducted dues from her paycheck.[1] The year before, the Supreme Court, in *Janus v. AFSCME*, had ruled that public sector unions cannot require nonmembers to pay for the costs of bargaining—so-called agency or fair-share fees.[2] Like many other state-level public employees, Susan Bennett—who had previously been a full-fledged member of the union—chose to end her membership and terminate all payments to the union, as *Janus* allowed. Bennett went to court seeking back pay for the agency fees she had paid before the *Janus* decision.[3] Additionally, she contended that the entire Illinois

[1] Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 729 (7th Cir. 2021).

[2] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018).

[3] *Bennett*, 991 F.3d at 727.

system of public school collective bargaining was unconstitutional.[4] Specifically, she argued that the arrangement, wherein the union was the sole representative of employees in her workplace, violated the First Amendment because it "compels her to both associate with the Union and endorse speech that she finds objectionable."[5]

Bennett's was one in a flood of lawsuits in the wake of *Janus* arguing that public sector exclusive representation is an unconstitutional infringement on the First Amendment rights of free speech and association.[6] These challenges uniformly failed—for a variety of reasons I will discuss[7]—leaving intact the many state collective bargaining regimes for public employees. This Note considers what is perhaps the greater risk to American labor relations: an attack on *private sector* exclusive representation. In the context of *Janus* and increased polarization and political activism by unions, several commentators have argued that private sector exclusive representation infringes on the freedoms of speech and association by denying employees the right to negotiate individually with their employer and forcing them to associate with a political entity from whose views they may dissent.[8] While this view remains confined to legal journals today, it is only a matter of time before the argument reaches the courts.[9] Success before the Supreme Court would upend the existing system of labor relations, leading to workplace discord and a weakened voice for employees.

In certain ways, private sector labor law may be *more* vulnerable to the anti-exclusivity attack because, unlike public sector challenges to agency fees, the private sector challenge to *exclusive representation itself* avoids procedural hurdles—namely, state action—and precedential

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[4] *Id.* at 729.

[5] *Id.* at 734.

[6] *See infra* note 82 and accompanying text.

[7] *See infra* notes 132–35 and accompanying text.

[8] *See* Alex MacDonald, *Political Unions, Free Speech, and the Death of Voluntarism: Why Exclusive Representation Violates the First Amendment*, 22 GEO. J. L. & PUB. POL'Y 229, 232–33 (2024) (noting that over half of union spending goes to political campaigns and that exclusive representation violates the First Amendment); Tom Campbell, *Exclusive Representation in Public and Private Labor Law After* Janus, 70 SYRACUSE L. REV. 731, 736 (2020) (arguing that exclusive representation is unconstitutional because it requires employees to let unions speak for them); Giovanna Bonafede, *Compelled Unionism in the Private Sector After* Janus*: Why Unions Should Not Profit from Dissenting Employees*, 70 CATH. U. L. REV. 677, 680–81 (2021) (arguing that agency fees in the private sector may violate the First Amendment); Charles Baird, *Government Action and Private Unions*, THE DAILY ECON. (Aug. 4, 2021), https://thedailyeconomy.org/article/government-action-and-private-unions [https://perma.cc/97SC-HFZG].

[9] As of the time of writing, there were no court filings challenging private sector exclusive labor relations. Since *Janus* concerned public sector unions, the resulting lawsuits have been confined to that realm. However, private sector legal challenges tend to trail behind their public sector counterparts.

constraints, as the Supreme Court has arguably upheld public-sector exclusive representation but has not spoken on the private sector issue.[10] A First Amendment challenge to private sector labor law would force courts and defendant unions to address head-on the associational and speech concerns inherent in this central arrangement. While scholars have sought to defend public sector exclusive representation against a First Amendment challenge,[11] this Note takes up the task of defending the private sector side. I argue, marshalling relevant case law and doctrine, that the private sector can survive a First Amendment challenge. Cognizant of the current moment, I endeavor to take seriously the current Supreme Court's concerns that mandatory association with unions raises potential First Amendment harms. The result in *Janus* was once unthinkable, but today it is the law of the land. Therefore, this Note aims to demonstrate that exclusive representation *can* be upheld in accordance with recent cases like *Janus*, along with older foundational speech and association cases.

There is no avoiding the core of the issue: Exclusive representation does impose certain restrictions on associational freedoms. However, as this Note argues, the associational and speech harms are sufficiently attenuated that the government's interest in our current system of labor relations outweighs the harm. The existing legislative regime avoids the dangers of dueling unions in a single workplace and a proliferation of individual employment contracts, both of which would be highly disruptive to peaceful labor relations and, by extension, the economy.[12] The upshot of *Janus* is that the restrictions on associational freedom that exclusive representation poses must be tolerated, just as many other minor restrictions on absolute rights are tolerated in the name of other compelling interests.[13] Ultimately, if private sector exclusive representation survives a constitutional challenge, it will be under the framework of balancing interests: a relatively diminished First Amendment infringement outweighed by significant governmental interests.[14]

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10 *See infra* notes 131–36 and accompanying text.

11 *See* Charlotte Garden, *Is There an Anti-Democracy Principle in the Post-*Janus v. AFSCME *First Amendment?*, 2020 U. CHI. LEGAL F. 77, 78 (2020) (arguing that public sector challenges to exclusive representation are unfounded); Brad Baranowski, Note, *The Representative First Amendment: Public-Sector Exclusive Representation After* Janus v. AFSCME, 99 B.U. L. REV. 2249, 2255 (2019) (same); Michael M. Oswalt, *The Doomed Constitutional Case Against Exclusive Representation*, AM. CONST. SOC'Y (June 2021), https://www.acslaw.org/wp-content/uploads/2021/06/Constitutional-Attacks-on-Exclusive-Representation-Oswalt.pdf [https://perma.cc/P5PG-B845] (detailing the failed post-*Janus* challenges).

12 *See infra* notes 252–57 and accompanying text.

13 *See infra* notes 283–84 and accompanying text.

14 *See infra* Section III.B.2.

While not its central aim, this Note also touches on broader issues at the heart of the First Amendment. Focusing on private sector unions allows a more straightforward analysis of associational concerns in the economic and political realms, as opposed to public sector unions, where the government's role as employer and bargaining counterparty adds wrinkles. In an age of increasing political polarization and economic interconnectedness, there are versions of compelled speech and association all around. Those who own shares of a corporation may unwittingly finance political expenditures they strongly oppose, but unlike in the union context, shareholders have no right to opt out or control the use of their money.[15] How the law treats these relationships as a society is an open issue, but the constitutional law of exclusive representation will influence where the line is drawn. No court considers the corporation example to be a "compelled subsidy"—a required monetary contribution to political speech—and yet that exact attack is leveled at unions.[16] As another example, integrated state bar associations have begun to make political statements, often with negative responses from members.[17] Since the law of free expression in bar associations tends to follow that of unions,[18] any changes to the latter will likely affect the former.

This Note proceeds as follows: Part I outlines in broad strokes the history of challenges to union security, mandatory fees, and exclusive representation, as well as the relevant First Amendment doctrine. Part II sets out the constitutional argument against exclusive representation in the private sector, drawing on existing case law in the public sector and views by commentators. Part III defends private sector exclusive representation by arguing that state interests in labor peace, unified representation, and workplace majoritarianism outweigh the

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[15] Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 803 (2012) (observing the asymmetry between union employees, who have "a federally protected right to control the way their dues are spent," and corporate shareholders, who have no such right); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 475 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that "shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions").

[16] *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 894 (2018) (observing that "the compelled subsidization of private speech seriously impinges on First Amendment rights"); First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 767, 792–95 (1978) (invalidating a state law prohibiting certain corporate contributions and rejecting the idea that it was needed to protect dissenting shareholders from having their money used for antithetical causes).

[17] *See infra* note 205 and accompanying text.

[18] *See* Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990) (applying the rule that unions cannot spend dues from dissenting employees on non-"germane" activities to state bar associations).

attenuated harms to First Amendment rights of speech and association. Finally, Part IV reads *Janus* in light of this First Amendment doctrine.

I
Background

This Part gives a relatively abridged background on labor law, union security, and the First Amendment freedoms of speech and association. The introduction to labor law focuses on exclusive representation and union security agreements, the latter of which has been challenged extensively through both legal and political avenues. These legal attacks on union security focus on the First Amendment implications of mandatory fees. In contrast, a challenge to exclusive representation would concern the First Amendment doctrines of speech and association, applied outside the realm of compelled subsidization. Accordingly, the final Section lays out the necessary background of nonmonetary speech and associational jurisprudence.

A. Exclusive Representation in Labor Relations

Exclusive representation is at the core of American labor relations. Private sector labor relations are governed at the federal level by the National Labor Relations Act (NLRA) of 1935, also known as the Wagner Act or, simply, the Act.[19] Public sector employees are expressly excluded from the Act but may have bargaining rights under state or federal statute. Under section 9(a) of the Act, the "designated or selected" bargaining representative "shall be the exclusive representative of all the employees in such unit."[20] Exclusive representation applies to all employees within a bargaining unit, a group of employees who are grouped together for collective bargaining purposes.[21] Exclusivity stands for the idea of majority rule within the workplace; even those employees who vote against the union during the election process or oppose the specific collective bargaining agreement (CBA) will be represented by the union and be covered by the CBA.[22] Additionally,

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19 29 U.S.C. §§ 151–169.

20 *Id.* § 159(a).

21 *Id.* § 159(b).

22 *Id.* From a comparative perspective, the American model of exclusive representation stands in contrast to that of so-called members-only unionism, wherein only the employees who vote for the union become represented by it at the bargaining table. Members-only unions existed before the Wagner Act and remain prevalent in other countries. For an account of members-only unionism, see Moshe Marvit & Leigh Anne Schriever, *With Traditional Unions on the Decline, Can Members-Only Unions Breathe Life Back Into Labor?*, In These Times (Oct. 21, 2015), https://inthesetimes.com/article/members-only-unions-minority-labor-decline [https://perma.cc/8PQH-MZ27].

the union is required to advocate on behalf of all members of the unit, including by representing them in individual grievance procedures for alleged violations of the CBA by the employer.[23] This duty of fair representation constitutes the union's obligation in the give-and-take of exclusive representation: The union benefits from the channeled bargaining power of even dissenting employees, and in turn it must also protect those employees.[24]

In *J.I. Case*, an early judicial construction of the Wagner Act, the Supreme Court upheld the idea of majority rule in ruling that an employer could not ask employees in a unionized workplace to sign individual contracts waiving certain rights of the CBA.[25] In this new scheme of labor relations, the Court rejected the notion of individual liberty of contract, which had characterized the previous *Lochner* Era.[26] The Court ruled that individual terms less favorable than those in the CBA are prohibited by the NLRA for obvious reasons, and suggested but did not decide that more favorable individual terms may be just as harmful to the spirit and practice of collective bargaining.[27] Today, while some unions—notably in the sports and entertainment industries—specifically allow individual contracts with more favorable terms,[28] the default rule is that an employee may not individually bargain with her employer for higher wages, greater benefits, or any other terms and conditions of employment.

B. Challenges to Union Security Agreements

Closely related to exclusive representation is the issue of so-called union security agreements. These agreements, memorialized in a CBA, determine whether employees in a unionized bargaining unit must

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[23] Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 184–85 (2015).

[24] *Id.* The duty of fair representation is of particular interest in combination with right-to-work laws, which allow employees of unionized workplaces to pay no fees and refrain from joining the union. The union still must represent these employees who opt out in bargaining and in grievance proceedings. In the former, bargaining on behalf of additional employees presents no greater cost to the union, and if anything increases its leverage at the bargaining table. Individual representations, however, are very costly to the union, creating a free-rider problem in right-to-work states where unions must represent employees who pay no fees to cover those costs. *Id.* at 217.

[25] J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

[26] *See, e.g.*, Adair v. United States, 208 U.S. 161, 179 (1908) (overturning a law banning anti-union contracts).

[27] *J.I. Case*, 321 U.S. at 338 ("[A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages.").

[28] *See, e.g.*, John C. Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, 44 L. CONTEMP. PROBS. 109, 120 (1981) (noting that players in the National Football League can negotiate salaries independently, despite being represented by a union).

become members of the union and, more importantly, pay fees. The name "union security agreements" reflects that they provide the union security in its continued existence and financial well-being. According to common union nomenclature,[29] there are three categories of union workplaces (or "shops") that exist today (at least in theory)[30]: union shops, agency shops, and open shops. Union shops allow anyone to become an employee but mandate that they become members of the union within a certain period of hiring to remain employed.[31] Agency shops require employees to pay the union for the costs associated with bargaining, but not for other activities.[32] Open shops have unrestricted hiring and never require employees to become members of the union.[33] In practice, however, union shops cannot require membership because, while the NLRA appears to allow the union and employer to require membership as a condition of continued employment,[34] the only aspect of membership on which employment can be contingent is payment of dues.[35] As a result, there are now only agency shops and open shops, meaning employees can never be required to become full members of the union that represents their bargaining unit.

Union security agreements have been a key line of attack for anti-labor groups, leading to the so-called "right-to-work" movement.[36] On a pragmatic level, these attacks reflect the reality that security agreements give unions their main source of funding and power: mandatory dues.[37] On legal and philosophical grounds, the argument is

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29 *See, e.g.*, *Union Security Clause*, PRAC. L. GLOSSARY, 5-508-5483, Westlaw (database updated 2026) (listing the union shop, agency shop, and open shop); *Shop*, BLACK'S LAW DICTIONARY (12th ed. 2024) (same).

30 Previously, there was another category, closed shops, which stipulated that an employer could not hire any candidate who was not already a member of the union. The Taft-Hartley Act banned closed shops in 1947. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141–197).

31 Todd C. Duffield & Adrian D. Healy, *Union Security*, *in* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 4 (2024).

32 *Id.* at 19.

33 *See* PRAC. L. GLOSSARY, *supra* note 29.

34 29 U.S.C. § 158(a)(3) ("[N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . .").

35 *Id.* ("[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues . . . ."); NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963) (confirming this interpretation).

36 *See* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 57–62 (2014).

37 *See id.* at 68.

that union security agreements and mandatory dues force a dissenting employee to associate with and contribute money to an organization with which she may disagree on broader political grounds.[38] On the legislative front, twenty-six states have passed right-to-work laws,[39] which prohibit union security agreements and mandate open shops, meaning employees cannot be required to pay anything to the union. And, as detailed in the rest of this Part, there has been a steady line of legal attacks in both the public and private sectors, although with slight variations in each.

1. Foundational Cases

The legal challenge against union security began in earnest in the railroad industry, which is governed by the Railway Labor Act (RLA).[40] The RLA—which also covers the airline industry—is the third realm of American labor law, alongside the traditional private sector (governed by the NLRA)[41] and the public sector (governed by separate state and federal laws at the respective levels).[42]

In *Railway Employees' Department v. Hanson*,[43] non-union employees, assisted by right-to-work advocates,[44] challenged a union shop arrangement between the railway union and its employer, arguing that the RLA's allowance of such agreements violated the non-union employees' First Amendment rights. Specifically, the challengers contended that the "union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights."[45] The Court rejected the First Amendment claim, although on the narrow grounds that the record contained no indication that union dues were being used for activities other than collective bargaining.[46]

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[38] *See id.* at 61–62; *see also* MacDonald, *supra* note 8, at 236 ("[The law] forces [employees] to associate with a politically active group with a distinct political agenda.").

[39] *Right to Work States*, Nat'l Right to Work Legal Def. Found. (2024), https://www.nrtw.org/right-to-work-states [https://perma.cc/Y72L-T8QM] (last visited May 13, 2026).

[40] 45 U.S.C. §§ 151–188.

[41] *Id.*

[42] *See* Jon O. Shimabukuro & Julie M. Whittaker, Cong. Rsch. Serv., R42526, Federal Labor Relations Statutes: An Overview 1, 30 (2014). Today, railroads and airlines remain exempt from the NLRA. RLA doctrine is the subject of less litigation but remains important for historical reasons, namely the developments that later found their way into NLRA doctrine.

[43] 351 U.S. 225, 228 (1956).

[44] Lee, *supra* note 36, at 122–23.

[45] Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 236 (1956).

[46] *Id.* at 238.

For present purposes, I highlight two salient features of the opinion. First, the Court found that the state action requirement—an outgrowth of the understanding that certain constitutional protections, including the First Amendment, apply only against government actors[47]—was met because the RLA had been recently amended to allow union shops, making the statute the "source of the power and authority by which any private rights are lost or sacrificed."[48] This reasoning from *Hanson* may come back in modern challenges.[49] Second, in upholding the union shop against the First Amendment challenge, the Court reasoned that no greater infringement exists than in the case of an integrated state bar, and the latter is presumed to be legal.[50] Unions and integrated state bars—that is, bar associations that combine the legal aspect of certification with the professional aspects of discipline, development, and advocacy[51]—are frequently analogized to one another but otherwise anomalous in the world of voluntary membership organizations.[52] Legal developments in one area tend to affect the other.

After a defeat in *Hanson*, right-to-work forces in *International Association of Machinists v. Street* sought to produce what was missing from the record in *Hanson*: the use of union funds for political purposes with which the challenging employees disagreed.[53] Several railroad employees in a union shop complained that, as a condition of holding the job, they were required to pay union dues, a portion of which was donated to political candidates and used to "promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed."[54] Siding with the challengers, the Court read the RLA "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[55] Having decided this question, the Court turned to the remedy and rejected the employees' proposal that the entire union shop agreement be enjoined.[56] Instead, it suggested a scheme wherein a dissenting employee may request the return of the portion of her dues that would be used for political purposes.[57] This

47 *See infra* notes 126–27 and accompanying text.

48 *Hanson*, 351 U.S. at 232.

49 *See infra* notes 137–40 and accompanying text.

50 *Hanson*, 351 U.S. at 238.

51 *Bar Types*, A.B.A., https://www.americanbar.org/groups/bar-leadership/resources/bar-world-basics/bar-types [https://perma.cc/BQY6-MTST] (last visited July 1, 2026).

52 *See infra* notes 207–08 and accompanying text.

53 367 U.S. 740, 744 (1961).

54 *Id.*

55 *Id.* at 768–69.

56 *Id.* at 771.

57 *Id.* at 772.

was a "compromise" ruling[58]: The challengers sought to prohibit *all* union fees because some are used for political purposes, but the Court only struck down the portion of fees going to political activities.

This scheme of so-called agency fees—wherein employees are only required to pay for the costs the union incurs in acting as their agent and not for costs related to political advocacy—was subsequently imported into the public sector in *Abood v. Detroit Board of Education*[59] and the private sector in *Communications Workers of America v. Beck*.[60] As a result, all union shops are now in practice agency shops, since employers can never be compelled to pay non-bargaining expenses. While there has been some litigation about whether specific expenses are chargeable or not,[61] this scheme remained stable until *Janus*. The Court applied the same distinction to integrated state bar associations, holding that they can use mandatory dues for "germane" activities (i.e., those related to "regulating the legal profession and 'improving the quality of legal service[s]'") but not for political, or "nongermane," activities.[62] The decision, which leans heavily on the union cases, further emphasizes the kindredness of unions and integrated bars for purposes of First Amendment analysis.

Concluding the pre-modern line of cases is *Minnesota State Board for Community Colleges v. Knight*,[63] in which public sector challengers turned their attention to exclusive representation. Minnesota's public employee labor relations law created "meet and confer" sessions between (public) community colleges and those colleges' teachers' unions.[64] The challengers argued that the arrangement effectively blocked non-union members from having their voices heard in a forum meant to address broader education-related issues at the college, including topics not covered by collective bargaining.[65] The Court held that the employees' "speech and associational rights . . . [had] not been infringed by Minnesota's restriction of participation in 'meet

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58 Estlund, *supra* note 23, at 183.

59 431 U.S. 209 (1977).

60 Unlike in previous cases which resulted in "compromise" rulings, the *Beck* plaintiff challenged only the portion of fees going to political activities, saving the Court from having to confront the constitutionality of mandatory assessments writ large. Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 740 (1988).

61 *See, e.g.*, Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps., 466 U.S. 435, 457 (1984) (holding that expenses for social activities, publications, and relevant litigation are chargeable); Pirlott v. NLRB, 522 F.3d 423, 435 (D.C. Cir. 2008) (finding that organizing expenses were not chargeable).

62 Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1961)).

63 Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271 (1984).

64 *Id.* at 274 (quoting MINN. STAT. §§ 179.63, 179.65 (1984)).

65 *Id.* at 278.

and confer' sessions to the faculty's exclusive representative" since dissenting employees remained free to use all the other channels of influence available to them.[66] The Court's main reasoning was that the state had set up these sessions voluntarily, so it could control who attended them.[67] As courts and commentators have noted, *Knight* was not squarely about exclusive representation as it exists under the NLRA; the case concerned a bespoke statutory scheme of "meet and confer" sessions and, in any case, was in the public sector context.[68] Regardless, *Knight* is the most that the Supreme Court has ventured directly into the question of exclusive representation and so remains the main authority for lower courts that have considered constitutional challenges to exclusive representation in the public sector.[69]

2. *Modern Challenges in the Public Sector*

Beginning in the late 2010s, the Supreme Court began to reexamine its case law on agency fees for public sector employees. In *Harris v. Quinn*, the Court considered a challenge to mandatory agency fees for in-home care workers—known as "personal assistants"—who had been classified by Illinois as public employees solely for the purpose of bargaining, on the grounds that the personal assistants received state Medicaid funding.[70] *Abood*'s holding that employees could be required to pay for bargaining costs, the Court reasoned, applied only to "full-fledged" state employees, not the quasi-state employees at issue here.[71] The Court saw no reason to "extend" *Abood* beyond its foundation and risk violating the "bedrock principle that . . . no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."[72] Accordingly,

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66 *Id.* at 288.

67 *Id.* at 289.

68 *See, e.g.*, MacDonald, *supra* note 8, at 282 (arguing that courts' reliance on *Knight* in upholding exclusive representation "overreads" the decision); Mentele v. Inslee, 916 F.3d 783, 788 (9th Cir. 2019) (noting the differences between the scheme in *Knight* and exclusive representation in collective bargaining).

69 *Knight* will be important later in this Note to understanding why post-*Janus* challenges to public sector exclusivity have failed but that such a result does not necessarily foreclose similar challenges in the private sector. *See infra* notes 134, 148 and accompanying text.

70 Harris v. Quinn, 573 U.S. 616, 622–23, 625 (2014). Due in part to racial discrimination, domestic workers are excluded from the NLRA. *See* Abbie Lieberman, Aaron Loewenberg, Ivy Love, Cassandra Robertson & Lul Tesfai, *Valuing Home and Child Care Workers*, New Am. 10–11 (June 28, 2021, at 09:08 ET), https://www.newamerica.org/insights/valuing-home-child-care-workers [https://perma.cc/6LZF-F5GX]. The Illinois law at issue was one of several advocated for by unions to make collective bargaining by in-home workers possible. *See id.*

71 *Harris*, 573 U.S. at 638–39.

72 *Id.* at 656.

the Court struck down agency fees under Illinois law, as applied to personal assistants.[73]

In *Janus*, the Court went a step further and banned all agency fees in the public sector, overturning *Abood*.[74] Mark Janus, the plaintiff, opposed many of the positions that the union took in bargaining concerning benefits, pensions, and alternative sources of revenue.[75] Illinois was facing a budget shortfall, to which the state and the public employees' union had different solutions.[76] Janus already refused to join the union and had opted out of the non-chargeable fees, but maintained that the remaining agency fees still violated his First Amendment rights by compelling support for bargaining positions he opposed—positions that affected the state budget.[77] The Court began by observing that compelled subsidization of speech by others is a serious First Amendment concern, the same concern that led the *Abood* Court to rule that only bargaining-related activities could be funded with mandatory dues.[78] However, in light of recent developments and reconsidered reasoning, the Court decided that in the public sector, even collective bargaining activities are "matters of substantial public concern," since any gains the union secures necessarily come out of the state budget.[79] The Court considered the countervailing state interests of labor peace and preventing free riders but found the former unfounded and the latter insufficiently compelling to overcome the First Amendment harms.[80]

As a result of *Janus*, all public sector workplaces are now open shops, meaning employees may opt out of all fees. However, the greatest impact of Justice Alito's opinion may be a single line of dicta, noting that exclusive representation is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts."[81] This line resulted in over 200 lawsuits by public sector employees challenging state statutory schemes of exclusive representation on First Amendment grounds.[82] Plaintiffs in these cases sought to eliminate the one remaining mandatory pillar of public sector unionism: exclusive

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[73] *Id.*

[74] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 886 (2018).

[75] *Id.* at 889.

[76] *Id.* at 911.

[77] *Id.* at 888–89.

[78] *Id.* at 893.

[79] *Id.* at 886.

[80] *Id.* at 895–97.

[81] *Id.* at 916.

[82] *See* Michael Artz, *The Impact of* Janus *on the Labor Movement, Five Years Later*, ABA Hum. Rts. Mag. (Oct. 31, 2023), https://www.americanbar.org/groups/crsj/resources/human-rights/archive/impact-janus-labor-movement-five-years-later [https://perma.cc/2GT5-LYQ8].

representation by the union certified as the agent of a given bargaining unit. A victory in one of these suits would let the challengers negotiate their own terms and conditions of employment with the public employer.[83] While the federal appellate courts have unanimously rejected these challenges, and the Supreme Court has thus far refused to grant certiorari in every case it has been asked to review,[84] it cannot be said with certainty that exclusive representation is safe from a Court that is willing to take a skeptical view of union representation and a broad view of what constitutes compelled speech and association.

C. First Amendment Doctrine

While the past line of attacks—from *Hanson* to *Janus*—concerned the First Amendment harms of compelled subsidization, a potential challenge to private sector exclusivity would isolate the symbolic, nonmonetary concerns of being associated with a union for bargaining purposes. It is necessary, then, to offer a brief overview of this rather opaque and confused area of law, focusing on the topics of compelled speech, association, and state action.

The First Amendment's prohibition of laws "abridging the freedom of speech" has long been understood to include "both the right to speak freely and the right to refrain from speaking at all."[85] The prohibition on compelled speech reflects the view that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[86] There are two main buckets

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[83] *See, e.g.*, Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 729, 734 (7th Cir. 2021) (denying the plaintiff's request for an injunction barring enforcement of the state public employee labor relations law, which would have allowed the plaintiff to negotiate her own contract with the employer).

[84] *See* Daniel DiSalvo, *The Legal Aftermath of* Janus v. AFSCME, Manhattan Inst. 1, 6 (Dec. 21, 2021), https://manhattan.institute/article/the-legal-aftermath-of-janus-v-afscme [https://perma.cc/NXD4-U7QV] (noting that, as of late 2021, fourteen lawsuits challenging exclusive representation had been appealed to the Supreme Court and nine had been denied certiorari, with several pending). The Court later declined to hear the one relevant (public sector) case pending at the time. *See, e.g.*, Boardman v. Inslee, 978 F.3d 1092 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 387 (2021). Since 2021, several other challengers have petitioned for review, but none have been successful. Adams v. Teamsters Union Loc. 429, No. 20-1824, 2022 WL 186045 (3d Cir. Jan. 20, 2022), *cert. denied*, 143 S. Ct. 88 (2022); Peltz-Steele v. UMass Fac. Fed'n, 60 F.4th 1 (1st Cir. 2023), *cert. denied*, 143 S. Ct. 2614 (2023); Goldstein v. Pro. Staff Cong./CUNY, 96 F.4th 345 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1044 (2025). Challenges to agency fees under the Railway Labor Act have been similarly unsuccessful. *See, e.g.*, Baisley v. Int'l Ass'n of Machinists & Aerospace Workers, 983 F.3d 809 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 90.

[85] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

[86] *Id.* at 642 (majority opinion).

of the compelled speech doctrine. First, there is the basic principle that the government cannot tell people what to say.[87] Under this principle, the Supreme Court has struck down laws requiring that students say the Pledge of Allegiance at school[88] or that New Hampshire residents use license plates displaying the state motto, "Live Free or Die."[89] Second, the Court has disapproved of laws that require private individuals to speak or accommodate the message of another private actor. An Irish parade was allowed to exclude an LGBTQ group, despite a state law to the contrary,[90] and a state utility could not be required to include information about a competitor in its billing envelope.[91] The second category is at issue when the government requires a relationship between individual workers and *private* labor organizations (that is to say, unions).[92]

Whether speech is protected depends on whether or not it is expressive. Compelled expression is highly disfavored by the Court and receives heightened scrutiny,[93] while non-expressive speech and conduct are unprotected.[94] The expressive quality of speech breaks along at least two key axes. First, the success of challenging parties often hinges on the existence of established religious, ideological, or economic positions that predispose them to contest the compelled speech. In both the Pledge of Allegiance and license plate cases, the main plaintiffs were Jehovah's Witnesses who could not follow the laws due to religious requirements.[95] In *Hurley*, the Irish parade organizers similarly had religious opposition,[96] while the utility company in *Pacific Gas* had an economic interest in avoiding subsidizing an opponent's messaging.[97] While not a formal requirement, in practice, the preexistence of values appears necessary—or at least helpful—to show

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87 *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 61 (2006) (stating the general rule but then finding that the government *could* require schools receiving federal funds to allow military recruiters on campus).

88 *Barnette*, 319 U.S. at 642.

89 Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977).

90 *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559, 574–75 (1995).

91 *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 4, 20–21 (1986).

92 *See* Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. Rev. 1475, 1478 (2018) (positing a constitutional right to be free of state-imposed association with undesired expression by other private parties).

93 Baranowski, *supra* note 11, at 2263.

94 *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64 (2006).

95 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943); Wooley v. Maynard, 430 U.S. 705, 707 (1977).

96 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995).

97 *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15 (1986) (noting that the company would be forced to assist in disseminating its opponent's message).

that the harmed individual or organization is engaged in expressive speech of the sort that the First Amendment is meant to protect.[98]

Second, the expressivity of speech also depends on the nature of that speech. Usually, the answer lies in the difference between what the speaker wants to say and what the government requires them to say. In *Hurley*, the parade organizers wanted to march without the LGBTQ group, but the law required them to include the group.[99] The speech was the decision of which groups to include in the parade, since the parade was set to happen regardless. In *Rumsfeld v. Forum for Academic and Institutional Rights* (*FAIR*), the Court upheld a federal statute requiring law schools to allow military recruiters on campus as a condition of receiving federal funds.[100] The options for law schools were allowing military recruiters to participate in campus recruiting or not allowing them, so any speech existed only in the selection of recruiters.[101] The *FAIR* Court drew a distinction between the parade in *Hurley*, where the choice of participants was inherently expressive, and campus recruiting, where schools play a largely administrative—and therefore non-expressive—role in helping match students with employers.[102] Only the former is protected.

More recent decisions, however, destabilize the line between conduct and expressive speech. In *NIFLA v. Becerra* and *303 Creative v. Elenis*, the Court showed a greater willingness to treat professional and commercial speech as protected expression, especially when it is required to host or accommodate the speech of another.[103] While *FAIR* remains good law, the distinction is more contestable today.[104]

Once the court has determined that the speech at issue is expressive, the subsequent inquiry is whether the compelled accommodation of the unwanted speech unavoidably crowds out the speaker's own expression.

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98 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 651–52 (2000). In *Dale*, the Court, when considering the expressiveness of the Boy Scouts' association, placed great weight on the organization's evidence that anti-gay values were consistent and longstanding. *Id.*

99 *Hurley*, 515 U.S. at 562.

100 Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 51, 70 (2006).

101 *See id.* at 60 (holding that the statute regulated the conduct of allowing military recruiters access to campus recruiting).

102 *Id.* at 63–64.

103 NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018) (declining to recognize "professional speech" as "a separate category of speech" exempt from ordinary protection); 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318 (2023) (reiterating that the government may not compel a person to "accommodate" a message or "alter" their personal speech).

104 *See 303 Creative*, 143 S. Ct. at 2317–18 (characterizing *FAIR* as a "far cry" from the case at hand as the former involved only "incidental" logistics while the latter required the speaker to "utter what is not in her mind"). *But see id.* at 2335–36 (Sotomayor, J., dissenting) (arguing that the majority is "deeply inconsistent" with *FAIR*'s holding that laws directed at conduct may impose incidental burdens on speech).

For example, a state "right-of-reply" statute that impermissibly requires newspaper editors to print certain letters takes up space that would otherwise go to the editor's desired content,[105] and a state agency's requirement that a utility company send third-party information along with its paper bills deprives the utility of the opportunity to send its own newsletter.[106] While not explicitly limited to these grounds, successful challenges tend to involve a physical limitation on the expression of speech or another situation where the choice of messages is inherently zero-sum. Combining these elements, the test for expressive speech asks (1) whether the speech affected by law is expressive and (2) whether the alleged violation interferes with the speaker's ability to express themselves.[107]

There is a separate category of commercial speech, which is defined as "speech proposing a commercial transaction," with advertising being the quintessential example.[108] Commercial speech receives lesser protection but still requires the government to assert a valid interest in restricting speech.[109] The category of commercial speech is fairly narrow, and the mere fact that something is economic in nature does not make it commercial.[110] That is to say, economic speech is a larger, unrecognized category that includes both protected and unprotected speech.

Freedom of association is not enumerated in the text of the First Amendment but has been recognized as a necessary subsidiary of the freedom of speech.[111] When first explicitly recognizing this right, the Court observed that association with others improves the efficacy and reach of expression while also vindicating the liberty promised by the Due Process Clause.[112] Later, the Court separated freedom of association into intimate association based on the Due Process Clause and expressive association based on the First Amendment.[113] With these developments, expressive association—the version at issue for

105 Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–57 (1974).

106 Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 17–18 (1986).

107 Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63–64 (2006) (finding the "expressive nature" of the speech and the "result[ing] . . . interference with a speaker's desired message" dispositive).

108 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

109 *Id.* at 564.

110 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (holding pharmaceutical marketing to be protected expression subject to heightened scrutiny).

111 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association . . . is an inseparable aspect of . . . freedom of speech.").

112 *Id.*

113 Baranowski, *supra* note 11, at 2249.

unions and other membership organizations—is now a standalone right protecting associations engaged in speech.[114] The Supreme Court's most recent guidance on this topic is *Boy Scouts of America v. Dale*, in which the Court upheld the Boy Scouts' ability to exclude gay men from leadership positions.[115] This controversial decision appeared to overturn a previous ruling that a service organization could not exclude women from membership.[116] Like speech, association rights receive varied protection based on the nature of the association, with economic associations being protected to a lesser extent.[117]

In *Dale*, the Court gives a two-part test for determining whether the "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association," which closely resembles the test for compelled speech.[118] First, does the group engage in "expressive association"?[119] The Court here is short on details of the standard, declaring simply that the expression can be public or private and that the designation is not limited to advocacy groups.[120] This initial inquiry—whether the group itself is capable of expressive inquiry—reappears in the attribution-based test that at least one lower court has applied to the converse issue of individuals who object to inclusion.[121] Second, would the forced inclusion "significantly affect" the group's "ability to advocate public or private viewpoints"?[122] The viewpoint allegedly affected by forced inclusion does not have to be the group's primary "purpose"; impairing just one of the group's activities is sufficient.[123] Some courts have collapsed the inquiry into a single step,[124] but the result is the same: The organization's activities must be expressive in the first instance for forced inclusion to have an effect on freedom of expression. This framework is focused on claims of groups opposing forced inclusion but it provides the best doctrinal clues for the inverse claim of an individual seeking to avoid association with a group's message, the topic taken up in Part III.[125]

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114 Wayne Batchis, Citizens United *and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of* the *Association*, 36 N.Y.U. Rev. L. & Soc. Change 7 (2012).

115 530 U.S. 640, 644 (2000).

116 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984).

117 *Id.* at 620.

118 530 U.S. at 648.

119 *Id.*

120 *Id.*

121 *See infra* notes 201–03 and accompanying text.

122 *Id.* at 650.

123 *Id.* at 655.

124 *See, e.g.*, Crowe v. Or. State Bar, 112 F.4th 1218, 1236 (9th Cir. 2024) (collapsing the steps into a test of whether "a reasonable observer" would attribute an expressive message to membership in an association).

125 *See infra* Section III.A.2.

First Amendment protection only extends to laws enacted by Congress and to actions by the states.[126] The actions of private individuals, on the other hand, are not covered. Any challenge under the First Amendment, then, must pass the "state action" hurdle. Cases involving private sector unions straddle the line of state action, since unions are private actors but are granted certain privileges and requirements by statute, including the right to speak on behalf of employees in bargaining and the duty to represent them in grievance arbitration.[127] While the state action requirement has repeatedly stifled previous challenges to union arrangements under the First Amendment, the anti-exclusivity argument discussed in this Note may avoid that problem by attacking the heart of the statutory scheme.[128]

II
The Case Against Private Sector Exclusive Representation

In this Part, I consider the post-*Janus* challenges to public sector exclusive representation and courts' reasoning in rejecting those challenges. I then use those cases, as well as work from commentators, to sketch out the two main versions of an anti-exclusive representation argument in the private sector. This Note uses *public sector* case law to consider the potential challenges to and defenses of *private sector* exclusive representation. This methodology is necessary because there have been no legal challenges to the private sector arrangement at the time of writing, despite calls from commentators.[129]

A. Public-Sector Challenges and Judicial Responses

After *Janus*, dissenting employees, assisted by anti-union legal groups,[130] initiated a flood of cases directly attacking public sector exclusive representation—a feature of labor relations that, as Justice Alito observed, presented some concerns for free association but was generally accepted as part of the system.[131] Confronted with this constitutional assault on public sector exclusive representation, courts

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126 Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 808 (2019).

127 *See supra* notes 22–24 and accompanying text.

128 *See infra* notes 138–45 and accompanying text.

129 *See supra* note 8 and accompanying text.

130 *See, e.g.*, Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 726 (7th Cir. 2021) (listing the National Right to Work Legal Defense Foundation as counsel for the employee's amicus curiae brief).

131 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 916 (2018).

have upheld the arrangement for three main reasons.[132] First, challenges to agency-fee arrangements, even in the public sector, have been found to be wanting of sufficient state action to trigger a constitutional infringement.[133] Second, courts hold that *Knight* is enough on point to uphold the statutory arrangement and that even if *Janus* casts doubt on exclusive representation, the holding leaves it—and *Knight*—intact.[134] Third, courts find that no association is created through the minimal relationship of collective bargaining[135] and that any restriction of speech is minor.[136]

For private sector exclusive representation, the third response—limited association and attenuated harm—is the key defense of the arrangement and will be taken up in Part III. To briefly address the first two: The holding of *Knight* has no direct precedential power in the private sector, and indeed is not even binding on public sector exclusive representation, given the unusual scheme at issue.[137] In addition, the state action barrier, which has stymied many early attacks on union security[138] as well as post-*Janus* public-sector suits related to dues,[139] may not bar challenges to the scheme of exclusive representation itself.[140] Unlike union security agreements established through contract, exclusive representation is a product of statute: section 9(a) of the NLRA.[141] To be sure, section 9(a) does not compel unionization, but once the bargaining-unit majority elects a representative, the provision gives that choice legal significance. Through the Act, Congress mandated that a union that wins an election will represent in bargaining all those who voted, creating compelled association by law. The employer is prohibited from negotiating with individual employees just

132 *See* MacDonald, *supra* note 8, at 275–84 (examining why courts have rejected attacks on exclusive representation).

133 *See, e.g.*, Branch v. Commonwealth Emp. Rels. Bd., 120 N.E.3d 1163, 1176–77 (Mass. 2019) (finding a lack of state action in a challenge to public sector exclusivity).

134 *See, e.g.*, Bierman v. Dayton, 900 F.3d 570, 574 (8th Cir. 2018), *cert denied sub nom.*, Bierman v. Walz, 587 U.S. 985 (2019).

135 *See, e.g.*, 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) ("[The plaintiff] remains free to join or support a union and to associate or not associate with whomever she chooses.").

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

137 *See supra* note 68 and accompanying text.

138 *See* Lee, *supra* note 36, at 64–66 (noting that federal courts repeatedly dismissed right-to-work claims against unions for lack of state action).

139 *See supra* note 133 and accompanying text.

140 *See* MacDonald, *supra* note 8, at 280–81 (noting that exclusive representation is required by the NLRA); Baird, *supra* note 8 ("Section 9(a) is a disguised government action forbidden by the First Amendment.").

141 29 U.S.C. § 159(a).

as the union is prohibited from declining to represent any members of the bargaining unit.[142]

The *Janus* Court was careful to distinguish the instant case—where Illinois law mandated agency fees—from laws "allowing, but not requiring, private parties to enter into union-shop arrangements," noting that in the latter instance, the existence of state action is "questionable."[143] Here, the law *requires* that a designated union act as the exclusive representative of workers in bargaining and may allow mandatory agency fees in non-"right-to-work" states.[144] The reason that parties may not enter into individual private contracts—as they would otherwise be free to do—is that Congress makes a statutory requirement, not an allowance, that the union bargain for all those in the unit.[145] Courts have also noted the meaningful difference between statutorily created bargaining power and unions' private membership requirements, with only the former constituting state action.[146] Exclusive representation is not pure statutory compulsion but rather state enforcement of private arrangements. Still, a direct assault on the core of labor relations might bypass the hurdle that has plagued many past challenges to union security agreements. The ultimate question will be whether courts treat a challenge to exclusivity itself more like *Hanson* and *Steele* or more like the early private-sector cases, where a lack of state action proved conclusive.

B. Potential Private Sector Arguments

While the challenges to exclusive representation have so far been confined to the public sector, there are several reasons to be concerned about the private sector. First, trends in this area of law tend to move

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142 *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) ("Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining . . . ."); Vaca v. Sipes, 386 U.S. 171, 177 (1967) ("It is . . . well established that, as the exclusive bargaining representative of the employees in [the employees'] bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with [the employer] and in its enforcement of the resulting collective bargaining agreement." (citations omitted)).

143 Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 918 n.24 (2018).

144 *See* Bonafede, *supra* note 8, at 681, 692 ("State action is affirmatively present under the exclusive representation scheme in the private workplace based on a theory of state compulsion.").

145 *See* Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 232 (1956) ("The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.").

146 *See, e.g.*, Hovan v. United Bhd. of Carpenters & Joiners of Am., 704 F.2d 641, 645 (1st Cir. 1983).

from the public to the private sector.[147] Second, the private sector does not have *Knight*, which so far has served to defend public sector exclusive representation in the lower courts,[148] even if it is not directly applicable. Finally, there have been several commentators in recent years arguing that private sector exclusive representation violates the First Amendment.[149] Attacking private sector exclusive representation would be squarely in line with the current trend of the "deregulatory First Amendment," wherein powerful interests use free expression arguments to invalidate regulations they dislike.[150] If the Court is willing to see union dues for bargaining as compelled subsidization of speech, one can easily imagine that it would take a serious look at the statutorily mandated association with and representation by a group that engages in political activities. That is to say, *Janus*'s baseline premise that agency fees are compelled speech is far from inevitable, so the fact that it has become the law indicates the Court's willingness to take a broad view of compelled speech and to credit symbolic injury in a constitutionally significant way. As Professor Catherine Fisk has noted, the First Amendment jurisprudence regarding labor law has been a one-way ratchet towards greater individual employee liberty at the expense of unions' ability to require membership or collect dues to cover their expenses.[151]

This Section identifies the arguments that potential challengers could make against private sector exclusive representation. There are two main versions, focusing on the words and actions of the union inside and outside the bargaining context, respectively. Here, the examples draw from public sector cases, but the arguments are easily transferable to the private sector.

1. Bargaining-as-Speech

The first version of the anti-exclusive representation argument is the bargaining-as-speech argument: Being represented by an entity

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147 *Beck* followed *Abood*. Estlund, *supra* note 23, at 183–85 (noting the expansion of dues-splitting from railroads to the public sector to the NLRA); *see* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220–21 (1977); Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762 (1988).

148 *See, e.g.*, Bierman v. Dayton, 900 F.3d 570, 572 (8th Cir. 2018) (relying on *Knight* to conclude that a state public sector labor law did not violate the First Amendment); Ocol v. Chicago Tchrs. Union, 982 F.3d 529, 533 (7th Cir. 2020) ("*Knight* and its progeny firmly establish the constitutionality of exclusive representation . . . .").

149 *See supra* note 8 and accompanying text.

150 Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323–25 (2016).

151 Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2071–72 (2018).

that takes certain positions in bargaining creates forced speech *in bargaining*. As an employee's inherent agent in negotiations, the union might "force" the employee to say things she does not wish to by taking certain positions at the negotiating table. The argument is that by requiring employees to let the union—with which they may disagree—negotiate on their behalf, the government is creating compelled speech.[152] Within this version, most employees raise an abstract challenge to the fundamental existence of exclusive representation, alleging no specific harm but that the union "necessarily spoke and negotiated on their behalf."[153] However, in one case, a law professor at UMass Dartmouth alleged that the union's negotiations dealing with post-COVID budget cuts resulted in a twelve percent reduction in his research funds, a worse outcome for him than under the university's original proposal.[154] The professor contended that the union violated his First Amendment rights by "compelling his speech and association during the negotiations" over the pay cuts.[155] The appellate court rejected the idea that exclusive representation by a democratic union violates the First Amendment and found that *Janus* did not cast doubt on the constitutionality of exclusivity arrangements.[156] Even though the case occurred in the public sector, it remains applicable to the private sector: Unlike in *Janus*, the plaintiff suffered personal pecuniary loss, which looks no different in a private workplace.

This case highlights a key challenge of union representation: Members may have divergent economic interests, especially in a larger, more diverse bargaining unit. For instance, a newer employee might favor performance-based pay while those with more tenure would want seniority pay. Whatever choice it makes, the union (as bargaining agent) offers speech at the bargaining table that directly contradicts what some of its members—or nonmember agency fee payers—want and would theoretically negotiate for themselves if allowed to do so. While the UMass law professor in the example above failed to find purchase for his argument that asking to be paid more is protected activity, there is no categorical rule that economic requests are unprotected speech.[157]

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152 Campbell, *supra* note 8, at 740–45; Garden, *supra* note 11, at 90 (noting that this line of cases argues that exclusive representation puts "the union's words in the employee's mouth").

153 Mentele v. Inslee, 916 F.3d 783, 785 (9th Cir. 2019).

154 Peltz-Steele v. UMass Fac. Fed'n, 60 F.4th 1, 3 (1st Cir. 2023), *cert. denied*, 143 S. Ct. 2614 (2023).

155 *Id.*

156 *Id.* at 1, 4, 7–8.

157 *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (finding that solicitations for charitable donations are protected speech).

We could imagine a more compelling First Amendment argument, where an employee has a longstanding political belief in meritocratic compensation and opposes seniority pay, a common practice in unionized workplaces.[158] Furthermore, with a Supreme Court willing to equate money to words, as it has done in *Janus* and *Citizens United*, it is not inconceivable that the Court finds some harm in forced economic speech at the bargaining table.

2. *Political Unions*

The second variation of the anti-exclusive representation view is the "political unions" argument, expounded most forcefully by Alex MacDonald, a leading advocate on the management side.[159] Proponents of this view argue that the law of exclusive representation forces employees "to delegate their bargaining authority to a union—an organization increasingly associated with a discrete set of political viewpoints."[160] Under this view, exclusive representation may not have posed any associational harms when unions subscribed to the notion of voluntarism, wherein they remained politically neutral and focused on gaining economic advances for their members through strikes and boycotts.[161] The situation, however, is different today, as unions are increasingly political and spend large portions of their budgets on political contributions.[162] Indeed, Justice Alito makes a broad reference in *Janus* to the "developments since *Abood*," which seem to include the increasing propensity for unions to speak out on "sensitive political topics" of significant public concern.[163] The "political unions" argument contends that, just as *Janus* erased the distinction between bargaining and politics in public-sector negotiations, private-sector unions should be thought of as thoroughly political.[164] Since exclusive representation requires employees who join a unionized workplace to associate with—and in non-right-to-work states, pay agency fees to—a political organization, the

158 Plaintiffs with preexisting beliefs (often religious) have been successful in compelled speech cases. *See supra* notes 95–98 and accompanying text.

159 MacDonald, *supra* note 8, at 271–75.

160 *Id.* at 236. By "discrete set of political viewpoints," MacDonald means unions' strong and lopsided support for the Democratic Party. *Id.* at 262–63.

161 *Id.* at 251–53.

162 *Id.* at 263–64.

163 Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 886, 914 (2018).

164 *See* MacDonald, *supra* note 8, at 271; *see also* Fisk, *supra* note 151, at 2062 ("The Court's determination to erase the First Amendment line between political and economic speech in the labor law realm could hasten the demise of unions . . . .").

arrangement allegedly violates First Amendment protections against compelled political association.[165]

A recent example of this argument comes from *Goldstein v. Pro. Staff Cong./CUNY*, in which a group of Jewish professors at CUNY expressed that they "vehemently" disagreed with positions that their union was taking on the Israel-Palestine conflict.[166] They argued that the state collective bargaining law "unconstitutionally compels them to associate with" a union whose political views they oppose.[167] Surprisingly, this case stands alone in its direct articulation of political dissent from the union,[168] but there are likely other potential plaintiffs who feel similarly and would be compelled to bring a similar challenge.[169]

There are two main versions of the anti-exclusive representation challenge that emerged in the post-*Janus* public sector litigation, and both could be turned into private sector arguments. In the following Part, this Note contests both articulations of the anti-exclusivity argument and ultimately concludes that the "political unions" version is stronger. However, given the weakened nature of the harms and the compelling government interests, neither is likely to survive balancing, even before the current Court.

III
Defending Private Sector Exclusive Representation

This Part represents the core aspect of this Note's project: defending private sector exclusive representation. It does so with an eye towards legal practice: What would it take to defend the system against a constitutional attack in front of the current Supreme Court? As mentioned above, the statutory compulsion of exclusive representation likely satisfies the state action requirement, and *Knight*'s putative defense of exclusivity does not apply to the private sector.[170] Without procedural hurdles and controlling precedent, the Court would turn to the First Amendment doctrine laid out in Section I.C, just as *Janus* and its predecessors relied on the

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165 MacDonald, *supra* note 8, at 248.

166 Goldstein v. Pro. Staff Cong./CUNY, 96 F.4th 345, 347 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1044 (2025) (internal quotation marks omitted).

167 *Id.* at 348.

168 *Goldstein* was the only example of the "political unions" argument, with the bargaining-as-speech version being more common.

169 *See, e.g.*, Press Release, Teamsters Release Presidential Endorsement Polling Data Teamsters (Sep. 18, 2024), https://teamster.org/2024/09/teamsters-release-presidential-endorsement-polling-data [https://perma.cc/32R9-QPZA] (showing that the Teamsters were sharply divided on support for presidential candidates in the 2024 election). Internal dissent is increasingly likely as unions take political positions unrelated to economic conditions. *See infra* note 217.

170 *See supra* notes 137–42 and accompanying text.

"liberal" speech cases.[171] Along with the practical arguments, this Part also considers related theoretical issues, such as the appropriate legal status of unions, the difference between groups and individuals, and the distinction between political and economic speech—issues with doctrinal implications for areas beyond labor law. Following the typical First Amendment framework, I begin with the potential harm before turning to countervailing interests and the balancing test.

A. Attenuated Constitutional Harms

This Section considers the First Amendment harms presented by the legal designation of an elected union as the bargaining representative for all employees in that unit. In the public sector context, the circuits considering this issue have all rejected the First Amendment claims.[172] They are, however, constrained by the lack of a Supreme Court case squarely on point and admittedly indisposed to break new ground on this constitutional issue.[173] That is to say, exclusive representation is not necessarily safe from the Constitution just because the lower courts have declined to accept the charge. Indeed, a Supreme Court willing to overturn *Abood* might be willing to reconsider *Knight* or confine it to the facts. And in the private sector, the Court has no practical constraints (like *Knight*) and could evaluate exclusive representation on a relatively clean slate.

Such a decision would apply a line of cases from outside the labor relations context, looking at compelled speech and association. The inescapable reality is that exclusive representation *does* pose a restriction on perfectly free speech and association, but so do many other laws. The Court has never enforced an absolute right to free speech,[174] and

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171 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 892 (2018) (grounding free speech rights in *Wooley*, *Barnette*, and other similar cases); *see also* Estlund, *supra* note 23, at 187 (noting the "irony" that the conservative majority in *Harris* expounded a broad view of what constitutes "matters of public concern," a position usually occupied by liberals in debates over First Amendment protections for public employees).

172 *See* Peltz-Steele v. UMass Fac. Fed'n, 60 F.4th 1, 1, 4 (1st Cir. 2023); Jarvis v. Cuomo, 660 F. App'x 72, 74–75 (2d Cir. 2016); Adams v. Teamsters Union Loc. 429, No. 20-1824, 2022 WL 186045, at *2 (3d Cir. Jan. 20, 2022); Thompson v. Marietta Educ. Ass'n, 972 F.3d 809, 813–14 (6th Cir. 2020); Bennett v. Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, 991 F.3d 724, 733, 735 (7th Cir. 2021); Bierman v. Dayton, 900 F.3d 570, 574 (8th Cir. 2018); Mentele v. Inslee, 916 F.3d 783, 790–91 (9th Cir. 2019); Hendrickson v. AFSCME Council 18, 992 F.3d 950, 969–70 (10th Cir. 2021).

173 *See, e.g.*, Ocol v. Chi. Tchrs. Union, 982 F.3d 529, 533 (7th Cir. 2020) ("*Knight* and its progeny firmly establish the constitutionality of exclusive representation, and the Supreme Court is the proper forum for challenging that rule.").

174 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("The right to associate for expressive purposes is not, however, absolute. Infringements on [the right of association] may be justified by regulations adopted to serve compelling state interests, unrelated to the

in economic contexts such as contract bargaining, the government has more leeway in regulation.[175] The question that this Section seeks to answer is to what extent the restriction is attenuated by the particular nature of labor law. Gauging the relative "harm" of the arrangement will determine how it balances with the government interest, which will be considered in the next Section.

The relationship between the freedom of speech and that of association is far from clear. Suits in this area may characterize the violated right as speech, association, or both. For example, the plaintiffs in *Knight* argued that the meet-and-confer sessions violated their speech rights and their associational rights: speech because the individual employees could not speak on their own during the sessions and association because the union necessarily appeared on behalf of the dissenting employees in the sessions.[176] But this distinction is murky at best. What the *Knight* plaintiffs describe as separate violations are both derivative of the fact that the union represented them in the sessions. Regardless, plaintiffs do tend to present separate claims, and the relevant case law and tests differ in important ways. Accordingly, I will separate these claims for analytical purposes, keeping in mind the inherent overlap and nebulous boundaries.

1. Freedom of Speech

Concerns purely about speech align most closely with the bargaining-as-speech argument identified in Section II.B.1. Recall that the core contention is that unions inherently speak on behalf of all employees, whether or not the employees desire such representation or agree with the outcome.[177] NLRA section 9(a)—as *J.I. Case* illustrates—generally prohibits employees and employers in a unionized workplace from entering into individual agreements on the terms and conditions of employment, even if both parties consent and the agreement offers better terms than the CBA.[178] As a result, employees must pay for the union's services at the bargaining table, where the union can claim to speak for all employees, even when making demands with which a

suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."); Burson v. Freeman, 504 U.S. 191, 198 (1992) (noting that speech restrictions can be upheld if they survive exacting scrutiny).

175 *See* Edenfield v. Fane, 507 U.S. 761, 767 (1993) (applying intermediate scrutiny to a ban on commercial solicitation).

176 *See* Minn. State Bd. for Cnty. Colls. v. Knight, 465 U.S. 271, 288–90 (1984) (rejecting those arguments).

177 Mentele v. Inslee, 916 F.3d 783, 785 (9th Cir. 2019); *see supra* note 22 and accompanying text.

178 *See supra* notes 25–27 and accompanying text (discussing *J.I. Case*).

certain employee disagrees. To determine whether this arrangement violates the First Amendment, the key questions are (1) whether the speech affected by law is expressive and (2) whether the alleged violation interferes with the speaker's ability to express her own ideas and opinions.[179]

To determine whether the putatively stifled speech of individuals who are represented by the union is expressive speech requires defining what that speech is.[180] For employees under exclusive representation, the speech at issue is negotiating the terms and conditions of employment with the employer. Under current law, that happens through the union, which is the exclusive representative of all covered employees at the bargaining table and may consider employee input, depending on its internal governance structure. The alternative sought by opponents of exclusive representation would be for employees to negotiate their own employment terms with the employer.[181] Section 9(a) does, however, allow individuals and groups of employees to present grievances to the employer and negotiate a resolution not inconsistent with the CBA.[182] This provision complicates the notion that exclusive representation wholly stifles individual voices, although it does not apply to core employment terms. The speech at issue, then, is the negotiation of employment terms, and the impact of the law is whether it happens directly or is mediated through the bargaining agent. Compelled speech, according to proponents of this argument, also arises from the agency fees that non-union members in unionized bargaining units must pay.[183]

An employee's terms and conditions of employment are largely matters of economic activity, which resembles commercial—or at least non-expressive—speech receiving more limited First Amendment protection.[184] While I will return to the issue of economics vs. politics in Section III.A.3 (since it merges issues of speech and association), for now, simply note that employment contract negotiations look more

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179 *See supra* note 107 and accompanying text (citing Rumsfeld v. F. for Acad. & Institutional Rts., 547 U.S. 47, 63–64 (2006)).

180 *See supra* notes 99–102 and accompanying text.

181 *See* MacDonald, *supra* note 8, at 296–97.

182 29 U.S.C. § 159(a).

183 *See* Bonafede, *supra* note 8, at 679.

184 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). The Court has applied the lesser scrutiny used in commercial cases to the union context but suggested in *Janus* that the compelled speech caused by agency fees is not commercial. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 894 (2018) (quoting Harris v. Quinn, 573 U.S. 616, 648 (2014)). It remains an open question whether compelled speech in labor relations is properly treated as commercial. If such speech is not commercial, it could still be otherwise unprotected.

like campus recruiting than parades—more *FAIR* than *Hurley*, even if this analogy is increasingly fraught.[185] The UMass law professor whose income decreased as a result of his union's bargaining suffered an economic injury, but to argue that his First Amendment rights were violated because the union "compel[led] his speech . . . during the negotiations" takes the doctrine beyond its intended bounds.[186] Asking for higher wages or a different pay structure is not expressive speech; after all, private sector CBAs are just contracts—albeit complex ones—in which the employer purchases labor services from the employees in exchange for wages and other benefits.[187] In fact, the Court recognized the inherently personal and economic nature of employment negotiations in *Harris*, noting that "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector."[188] It might, however, be possible for challengers to frame their concerns as moral or political, especially as regarding pay structures.[189] Given that economic issues inherently bleed into other areas, private sector employees might still be able to show valid First Amendment concerns and get past this step.

The second question is whether the compelled speech interferes with the speaker's ability to express themselves. In essence, this inquiry considers whether the speaker has outside options to make their voice heard. As noted above, challenges are more successful on this count where the total "amount" of speech is necessarily limited, such as in physical media.[190] Such crowding out of individual speech does not occur in the same way or to the same degree in the labor relations context. While exclusive representation unavoidably dampens the free economic expression of employees, in that the union "necessarily [speaks] and negotiate[s] on their behalf"[191] and the employer is legally barred from making individual employment contracts,[192] this arrangement comes in the name of workplace democracy, channeled through a stronger representative. Further, there is no First Amendment right to individual bargaining.[193] The speech that unions make at the bargaining table is informed by the views of the bargaining unit members; it is not a matter

185 *See supra* notes 99–102 and accompanying text.
186 Peltz-Steele v. UMass Fac. Fed'n, 60 F.4th 1, 3 (1st Cir. 2023).
187 *See supra* note 108 and accompanying text (defining commercial speech).
188 *Harris*, 573 U.S. at 636.
189 *See supra* note 158 and accompanying text (discussing how preexisting beliefs are often successful in compelled speech cases).
190 *See supra* notes 105–07 and accompanying text.
191 Mentele v. Inslee, 916 F.3d 783, 785 (9th Cir. 2019).
192 *See supra* notes 25–27 and accompanying text.
193 Oswalt, *supra* note 11, at 8–9.

of crowding out so much as distilling voices. Those who dissent need not join the union or support its political activities; they can criticize it publicly and even seek decertification.

Ultimately, bargaining is the core of what unions are empowered to do under the NLRA. It would shatter the established regime of labor relations to label that activity as unlawful. Recall that after amendments to the NLRA and the Court's decision in *Beck*, employees in a unionized workplace can at most be required to pay agency fees, which cover only the costs associated with bargaining; they cannot be required to join the union or to pay for non-bargaining costs.[194] And bargaining activity is generally beneficial to all covered workers.[195] In a case challenging the Nevada state bar association's use of dues to fund a public information campaign to improve the image of lawyers, the court concluded that it was not unconstitutional for the state bar to spend funds on its raison d'être: promoting the profession.[196] Observing the parallel with unionized workplaces, the court noted that the state bar was already constitutionally prohibited from using the plaintiff's dues for any other activity, leaving no room to complain of dues paying for the "highly germane" activity those dues are meant to cover.[197] Similarly, after *Beck*, it is difficult to see what else could be challenged. Collective bargaining remains the cornerstone of industrial democracy and serves, if anything, to amplify the voices of workers. Accordingly, a challenge to the core of what unions do seems likely to fail.

2. *Freedom of Association*

The freedom-of-association challenge to exclusive representation, as advanced by Alex McDonald and others,[198] contends that being represented by a union—even if only for the purposes of bargaining and without the requirement of membership—that is active in political issues outside of bargaining violates the First Amendment. While the "political unions" argument was only raised once in the post-*Janus* public sector litigation, it might find greater purchase in a potential private sector challenge given that the bargaining-as-speech version is a weaker option in the private sector.

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194 Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762–63 (1988); *see also supra* notes 34–35, 60 and accompanying text.

195 *See* Laura Feiveson, *Labor Unions and the U.S. Economy*, U.S. DEP'T OF THE TREASURY (Aug. 23, 2023), https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy [https://perma.cc/QB9J-PTW9] (noting that research estimates a ten to fifteen percent union wage premium).

196 Gardner v. State Bar of Nev., 284 F.3d 1040, 1043 (9th Cir. 2002).

197 *Id.*

198 MacDonald, *supra* note 8, at 236, 272; Bonafede, *supra* note 8, at 680.

At the outset, there is a problem with applying existing compelled association doctrine to exclusive representation. The cases here present two different claims about compelled association. *Dale* and *Roberts* ask whether an expressive association can exclude individuals whose membership might alter the organization's message.[199] The mandatory bar cases are about whether an individual's compelled membership sends a message that might be attributable to the individual. Exclusive representation presents a third distinct issue about whether an employee, who need not become a member of the union but must accept a bargaining agent designated by federal law, has a constitutional claim. The issue is not whether the union can keep a dissenting employee out—which it cannot—but whether the union's message is attributable to the employee. As Professor Cynthia Estlund has pointed out, unions are anomalous in the landscape of organizations under the Constitution but are certainly "expressive associations," at least in some sense.[200] However, that label is less instructive here, where the analysis is focused not on the union's status as expressive association but on the potential for misattribution of the union's speech to the employee. Framed as such, the inquiry does not require adapting *Dale*'s test for an objecting individual rather than an excluding group; it instead poses a freestanding constitutional question about attribution that *Dale* never addressed.

Furthermore, the key forced association cases concern voluntary organizations that are seeking to exclude certain individuals, while the contention against exclusive representation is precisely that the organization with which individuals must associate is *not* voluntary. This fact likely cuts towards finding weaker constitutional harm in the case of unions: Voluntary organizations whose entire existence revolves around membership have a greater interest in regulating their membership than individuals have in deciding with whom they associate. The association between an unwilling employee and their union is limited and narrow, as the only legal requirement is to pay dues for the union's role as bargaining agent.[201] More broadly, the reality that involuntary association is unavoidable in modern society—in housing, public transportation, and representative government, to name a few examples—means that such association is less likely to result in misattribution of the group's message to the individual.[202] That

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199 Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

200 Estlund, *supra* note 24, at 189 n.107 (citing *Dale* and *Roberts*).

201 *See supra* notes 34–35 and accompanying text.

202 Baranowski, *supra* note 11, at 2287 (citing Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 775 (1961) (Douglas, J., concurring)).

unions are less tolerated than the listed examples turns on a contrived notion of what is natural, not on any inherent aspect of the association. In fact, we might want to specifically allow compelled association in the case of the individual to promote citizenship rights while still permitting certain organizations to exclude certain members.[203]

In the recent case *Crowe v. Oregon State Bar*, the Ninth Circuit used this attribution-based approach.[204] Several members of the Oregon State Bar objected to a statement published in the Oregon State Bar's bulletin criticizing President Trump.[205] The court found that the "bare fact" of membership was not enough to cause the bar association's message to be attributed to the individual, even if the organization sometimes engaged in expressive activity.[206] As previously discussed, state bar associations may be the closest comparison to unions, as groups that combine both economic and political goals and that are now subject to the same regime for dividing dues payments.[207] Given the close fit of unions and bar associations, the best way to test the associational harm may be to use the Ninth Circuit's test, which asks whether the required association sends a message that a reasonable observer would attribute to the individual and whether the individual disagrees with that message.[208]

Whether association with a group sends a message depends on whether that group is capable of sending an expressive message.[209] Unions typically combine both political and economic goals, although the relationship between the two has changed over time. Prior to the New Deal, unions adhered to a philosophy of "voluntarism," which held that workers should secure their own economic advancement at the bargaining table rather than through political channels that rely on the government.[210] An even less political view, called business unionism, holds that unions are simply businesses that provide a service—better wages and working conditions—in exchange for a fee.[211] However,

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203 Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* FREEDOM OF ASS'N 75, 75–76 (Amy Gutmann ed., 1998).

204 112 F.4th 1218, 1235 (9th Cir. 2024).

205 *Id.* at 1226–27.

206 *Id.* at 1236.

207 *See supra* note 18 and accompanying text.

208 *Crowe*, 112 F.4th at 1235.

209 *Id.* at 1236.

210 Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism?*, 54 ST. LOUIS UNIV. L.J. 415, 417 (2010). This anti-statist view was at least in part a result of organized labor's distrust of the legal system, which in the late nineteenth century had issued numerous injunctions against striking workers. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1179–80 (1989).

211 *See* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 49, n.8 (1987).

in the modern era, unions have been increasingly unable to achieve their demands at the bargaining table and have turned to the political process.[212] The view of unions as purely economic entities is increasingly hard to square with the reality that unions are highly active in political and social causes, often endorsing or donating to candidates and taking stands on national issues.[213]

To be sure, unions have always been political and have engaged in advocacy on economic issues beyond the workplace.[214] What is different today is that unions are tied strongly and solely with the Democratic Party, making union politics an extension of ordinary national politics.[215] In addition, unions are now more likely to take stands on non-economic issues.[216] Bargaining and union campaigns today may include political and social goals that have little or no relation to the employees' terms and conditions of employment.[217] Therefore, despite the fact that unions exist in a largely economic context of employment standards, it has become harder to argue that they are only concerned with dollars and cents. Even if these changes in the mode of union advocacy are only isolated incidents, they provide sufficient fodder for anti-union forces and make the "political unions" argument worth taking seriously.

Next, whether an observer will attribute the group's message to the individual depends on the relationship between the group and the individual. In this area of analysis, associational freedom's roots as a means to effectuate speech become relevant; the harm of compelled association, as described in recent cases, is that it compels speech from the unwitting associate in the form of a message emanated on their behalf.[218] Courts focus on the message that a reasonable external observer

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212 Estreicher, *supra* note 210, at 415.

213 *See* MacDonald, *supra* note 8, at 262–63 (detailing the extent to which unions engage in political activity).

214 *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 559–60 (1978) (noting that the union local had distributed a newspaper encouraging employees to write to their representatives to oppose a right-to-work law and to register to vote in order to oust President Nixon, who had recently vetoed a minimum wage increase).

215 *See* MacDonald, *supra* note 8, at 262–63.

216 *See, e.g.*, Press Release, SEIU President April Verrett Condemns Supreme Court Decision Gutting the Voting Rights Act of 1965 (Apr. 29, 2026), https://www.seiu.org/2026/04/seiu-president-april-verrett-condemns-supreme-court-decision-gutting-the-voting-rights-act-of-1965 [https://perma.cc/GQU7-R5AK].

217 For example, employees attempting to unionize a New York City bakery have demanded that the bakery stop supporting Israel. Patrick McGeehan, *N.Y.C. Bakery Workers Demand Owners Stop Supporting 'Israeli Occupation*,' N.Y. Times (Jan. 13, 2026), https://www.nytimes.com/2026/01/13/nyregion/breads-bakery-union-israel-gaza.html [https://perma.cc/M33N-XJEF].

218 *See* Seana Valentine Shiffrin, *What is Really Wrong With Compelled Association*, 99 Nw. U. L. Rev. 839, 841–43 (2005) (observing that the Court's compelled association doctrine focuses on the external message of the association).

would take from the association at issue.[219] Here, precision in defining the associational harm is crucial for the analysis. While the prior cases focused on union membership and dues payments, exclusive representation gets at the heart of how labor relations function: The employee is, by law, represented by an entity whose public profile is highly political.[220] Even if the employee can avoid paying any dues or becoming a member, that relationship of representation remains and cannot be cut away without toppling the entire system. But the remaining relationship constitutes a relatively thin conception of association. Unlike being forced to physically display a public message[221] or recite certain words,[222] the passive status of *being* represented by a union is a relatively weak embrace of the union's political positions and creates very little risk of external attribution. And the relationship is purely private. Observers would not impute an endorsement of the organization's political views from the simple state of being represented, something that falls shy of membership and over which the employee has no control under exclusive representation.

Furthermore, that the challenger disagrees with the message attributed to them may not be enough to find First Amendment harm. While the Ninth Circuit's test sets a relatively low threshold based on disagreement,[223] the Supreme Court has indicated that the challenger must show that the forced inclusion diminishes the individual's own ability to advocate certain viewpoints.[224] In the case of unions, the complaining employee remains completely free to advocate for whatever positions she supports, political or otherwise. An employee whose union publicly endorses and donates to certain candidates can spend as much time as desired speaking out against those candidates and joining associations that oppose the union's position. Under federal labor law, unions cannot punish members or non-members in the bargaining unit for exercising this right of dissent.[225] Being associated with a group, no matter what that group says, runs very little risk of crowding out individual speech or association. The current Court wants to ensure that the marketplace of ideas is free and open;[226] it is

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219 *Id.*

220 This is the concern of MacDonald, *supra* note 8, at 273.

221 *See supra* note 89 and accompanying text.

222 *See supra* note 88 and accompanying text.

223 *See supra* notes 204–08 and accompanying text for a discussion of the Ninth Circuit's test.

224 *See Dale*, 530 U.S. at 648.

225 Labor-Management Reporting and Disclosure Act of 1959, § 101(a)(2), 29 U.S.C. 411 ("Every member of any labor organization shall have the right . . . to express any views, arguments, or opinions . . . .").

226 *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 335 (2010) (observing that government restrictions on speech deprive individuals of the "uninhibited marketplace of ideas" (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003))).

less concerned with making sure people can get exactly what they want. It was on precisely these grounds that the court in *Goldstein* dismissed the challenge of several professors suing their union because of its political stance, noting that "[d]esignating [the union] as Plaintiffs' exclusive bargaining representative does not impermissibly burden Plaintiffs' ability to speak with, associate with, or not associate with whom they please."[227]

In *Janus*, of course, such freedom was insufficient. The Court, facing a similar question, was willing to find an injury to personal speech from the sole fact of being compelled to support the union monetarily. Mark Janus was free to express his concerns about the state budget in many other ways, but the Court still found that he was "injured in fact by Illinois' agency-fee scheme."[228] Following this reasoning, the Court might be willing to find a similar injury in employees' being represented by unions they oppose, regardless of outside options to express their own views. And, the Court might decide that requiring employees to engage in outside speech against the union to avoid misattribution of their views is itself a form of compelled speech.

The *Janus* Court's disregard of employees' outside options, however, is not necessarily fatal to the union position on exclusivity. There is still a difference of degree: The *Janus* Court made much of the fact that speech was subsidized,[229] leaving open the possibility that the mere fact of being represented occupies a lower rung of constitutional impingement. Additionally, the "liberal" speech cases, on which *Janus* rests, present much stronger instances of restrictions on individual speech and external attribution to the speaker.[230] By contrast, the link between the two "spheres" of union activity—mandatory representation at the bargaining table and outside political advocacy—is far more tenuous.[231] Accordingly, the claim that such a minimal relationship with the union impairs the individual's ability to convey their own symbolic messages is "attenuated at best."[232] As for the argument that speech against the union is compelled speech, there has never been

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227 Goldstein v. Pro. Staff Cong./CUNY, 96 F.4th 345, 350 (2d Cir. 2024); *see supra* notes 166–67 and accompanying text.

228 Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 890 (2018).

229 *Id.* at 893.

230 *See supra* notes 221–22 and accompanying text.

231 *See* Sachs, *supra* note 15, at 806 (identifying the "spheres separation principle," which holds that unions' economic and political activities exist in separable realms).

232 Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984) (describing the claim that allowing women to vote in the organization would harm it, since they could already join as non-voting participants).

any indication that optional political speech is compelled; the fact that citizens inherently must speak to have their voices heard is a reality of life, not a constitutional violation.

Furthermore, the misattribution-of-message test might not even be the correct basis for assessing associational harm. Professor Seana Shiffrin argues convincingly that the Court has incorrectly drifted away from the foundations of compelled expression doctrine.[233] While the modern Court tends to look at the harm to the individual caused by outsiders misattributing the message of the organization to that individual, Shiffrin proposes that the better inquiry is whether the compelled association with the group harms the "internal thinking process" of the complaining individual.[234] Under Shiffrin's test, exclusive representation presents a more marginal harm than under the attribution-based test since it does not require the individual to think any particular way. While this view remains only academic, it could be of use to litigants wishing to adjust the course of compelled association doctrine.

3. The Economics-Politics Distinction

Both the speech and association claims raise the issue of distinguishing bargaining and politics, the two main activities of modern unions. There remains an open question how the law should treat unions as non-voluntary organizations which engage in both a core, statutorily assigned economic function in the workplace and discretionary, but now highly important, political position-taking on issues that affect their members both on and off the clock. Courts have long recognized a distinction between a union's activities in bargaining and politics, which undergirded the decisions in *Abood* and *Beck* to allow mandatory agency fees for bargaining while letting employees opt out of fees for political purposes.[235] For those who oppose all mandatory association, *Janus* "swept the distinction aside—at least in the public sector."[236] However, the distinction, if not perfect, exists in stronger form in the private sector.

In *Janus*, the Court recognized that the private sector differs from the public sector, where state spending on employee compensation is a "matter of great public concern," because such spending is necessarily funded by taxpayer dollars.[237] Private sector unions are less of a threat

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233 Shiffrin, *supra* note 218, at 840–41.

234 *Id.* at 841.

235 MacDonald, *supra* note 8, at 245–46.

236 *Id.* at 247.

237 Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 911 (2018) (quoting Harris v. Quinn, 573 U.S. 616, 654 (2014)). In fact, Justice Alito appears to

to employees' political rights because the union's representation and bargaining do not implicate public concerns. This view is consistent with the Court's First Amendment doctrine in *Roberts*, where it posited that associational protections exist on a "spectrum from the most intimate to the most attenuated of personal attachments," the latter end of which includes *economic* relations like "choice of one's fellow employee."[238] Here, the Court cited *Railway Mail Ass'n v. Corsi*, which found that a labor organization that "holds itself out to represent the general business needs of employees" cannot claim constitutional protection from state regulation because the matter is purely economic.[239] Furthermore, concurring in *Roberts*, Justice O'Connor made explicit that association for economic purposes receives no First Amendment protection:

> Lawyering to advance social goals may be speech, but ordinary commercial law practice is not. . . . A group boycott or refusal to deal for political purposes may be speech [citing *NAACP v. Claiborne Hardware*[240]], though a similar boycott for purposes of maintaining a cartel is not.[241]

To defend against the private-sector challenges, unions might argue that they fall closer to the latter half of both pairs, making any compelled association relatively attenuated.

If litigation reached this point, however, private-sector unions would face a strategic quandary, since labeling themselves as purely economic actors would come at the expense of other constitutional objectives. As Professor Estlund points out, characterizing unions as only economic entities would cost them protection in picketing, where they have successfully sought to characterize disputes over economic issues as matters of public concern.[242] Similarly, the "cartel" label would not be desirable for organizations that hold themselves out as

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have been worried about the Illinois budget already in *Harris*, observing in a footnote that the public sector unions were putting fiscal strain on the state by demanding more generous compensation and benefits. *Harris*, 573 U.S. at 636, n.7.

238 Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

239 326 U.S. 88, 94 (1945).

240 458 U.S. 886, 912–15 (1982).

241 *Roberts*, 468 U.S. at 636.

242 Estlund, *supra* note 23, at 187–88 (citing Thornhill v. Alabama, 310 U.S. 88 (1940), one of the few *expansions* of unions' rights on constitutional grounds); *see also* Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1418 (2023) (arguing that the longstanding characterization of unions as "apolitical" economic entities allowed them to gain power but also cost them the opportunity to gain certain rights, including those in the First Amendment).

being in the public interest, but might successfully serve to mitigate the perceived harms of association.[243]

If economic bargaining is non-political in the private sector, the next issue is whether unions' outside political activity is enough to change their status. Alex MacDonald argues that the answer is yes, given how much political campaigning unions carry out in the modern era.[244] However, there remains a significant conceptual difference between his argument and *Janus*'s reasoning: *Janus* did not find a problem with agency fees because of the union's political activity—which was extensive—but because of the nature of the bargaining topics, which inherently affected the state budget.[245] Indeed, the political advocacy side of the mandatory dues issue was addressed by *Abood* and *Beck* already.[246] Finding expressive harm on the *bargaining* side, the *Janus* Court nowhere endorsed MacDonald's notion that politics can "leak" into the bargaining space if the union does enough advocacy.[247]

In *Roberts*, O'Connor upheld this compartmentalized view of union activity: "The Court has thus ruled that a State may compel association for the commercial purposes of engaging in collective bargaining, administering labor contracts, and adjusting employment-related grievances, but it may not infringe on associational rights involving ideological or political associations."[248] By extending O'Connor's view, the Court could decide that it remains doctrinally consistent to treat the two facets of union activity separately as they are currently: On the bargaining side, exclusive representation is an attenuated enough form of compelled association (and financial support) to avoid constitutional violation given its confinement to commercial purposes, while on the political front, employees remain free to decline payment towards such activity.

B. Balancing Interests and Applying Scrutiny

Exclusive representation unavoidably infringes on the freedoms of speech and association, but to decide that a law violates the First Amendment requires a comparison of the harms and the legitimate government interest in that restriction. The prior Section argued

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243 Technically, unions *are* cartels; they are only exempt from antitrust enforcement due to a specific carve-out in the Clayton Act. 15 U.S.C. § 17; *see* United States v. Hutcheson, 312 U.S. 219, 232 (1941) (finding a statutory exemption from antitrust laws for labor unions).

244 MacDonald, *supra* note 8, at 300–01.

245 Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 912 (2018).

246 *See supra* notes 59–60 and accompanying text.

247 MacDonald, *supra* note 8, at 247.

248 Roberts v. U.S. Jaycees, 468 U.S. 609, 638 (1984).

that the harms of exclusive representation, while real, are relatively tempered in the private sector. This Section turns to the other side of the equation: compelling state interests in the existing regime of labor relations.

1. Government Interests in Exclusive Representation

The two main interests favoring exclusive representation are labor peace and workplace democracy. But first, I want to start with one interest that is often mentioned in this realm but is not compelling for exclusive representation: the free-rider problem. One of the main criticisms of *Janus* was that it allowed employees to free-ride on the union's efforts, permitting non-union employees to share in the benefits of bargaining and representation in grievance arbitration without the responsibilities of union membership.[249] The latter requirement of unions—the duty of fair representation—requires unions to represent individual employees even if they pay no fees to the union. Simple economics suggests that every employee would cease paying dues after *Janus*, since they could still reap all the rewards, and Justice Kagan predicted a precipitous decline of public sector unions.[250] In reality, public sector unions lost almost all agency-fee-paying employees but retained almost all of their dues-paying members, meaning those who had already elected to join the union generally remained.[251] Empirical effects aside, the free-rider issue is not a reason to support exclusive representation, as members-only unionism would free unions of any unfair duties. Unions would represent—both in bargaining and in individual arbitrations—only those employees who vote for or choose to be members of the union. All other employees in the bargaining unit would be free to negotiate their own employment contracts or join a different union.

Labor peace, as achieved through unitary representation, is the main interest advanced in favor of exclusive representation. The Court has long recognized that the NLRA seeks to achieve "industrial peace" through exclusive representation in bargaining.[252] That truth was perhaps more visceral when the number of strikes and labor

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249 *See Janus*, 585 U.S. at 936 (Kagan, J., dissenting); Estlund, *supra* note 23, at 175.

250 *Janus*, 585 U.S. at 936 (Kagan, J., dissenting) ("Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues.").

251 Heather Gies, *A Blow But Not Fatal: 9 Months After Janus, AFSCME Reports 94% Retention*, In These Times (Mar. 28, 2019), https://web.archive.org/web/20190709162443/https://www.workdayminnesota.org/articles/blow-not-fatal-9-months-after-janus-afscme-reports-94-retention [https://perma.cc/LA8Z-4VKC].

252 Vaca v. Sipes, 386 U.S. 171, 182 (1967).

stoppages was much higher,[253] but the *Janus* Court still accepted labor peace as a compelling state interest for maintaining exclusive representation.[254] The Court's reasoning in *Abood*, which *Janus* did not dispute, was that allowing multiple representatives in a bargaining unit would cause "inter-union rivalries," "dissension within the work force," and "conflicting demands from different unions."[255] Agreeing to one union's demand might trigger industrial action on the part of another.[256] And regardless of animosity, more unions or unrepresented individual employees would mean more contract negotiations, more litigation costs, and more opportunities for things to go wrong. Exclusive representation provides what is traditionally considered the main reason for employers to support—or less fiercely oppose—unions: cheaper negotiations.[257] Ending exclusive representation would increase administrative burdens for employers and increase the social cost of work stoppages.

In addition, exclusive representation makes worker voices stronger, creating more equal economic bargaining and greater workplace democracy. In passing the Wagner Act, Congress was explicitly motivated by the goal of strengthening the power of employees in bargaining through collectivity.[258] Noting the power inequality between employers and employees that resulted from individual bargaining, Congress sought to "encourag[e] the practice and procedure of collective bargaining."[259] Exclusivity ensures that the bargaining is indeed *collective*, rather than allowing individuals or multiple unions to negotiate their own terms, likely to the detriment of all employees. Alternatively, in the absence of exclusive representation, employers might simply extend the bargained-for terms to nonmember employees but without any contractual guarantee.[260]

In addition to balancing the economic scales, exclusivity facilitates workplace democracy. Senator Wagner, the Act's namesake, called

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253 *See* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 101 COLUM. L. REV. 1, 86–89 (2002) (noting that the Supreme Court's upholding of the NLRA came at a time of major industrial action which likely influenced the decision).

254 *Janus*, 585 U.S. at 895. The Court, however, found no labor peace justification for agency fees. *Id.* at 895–96.

255 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220–21 (1977).

256 *See id.*

257 Roger L. Faith & Joseph D. Reid, *An Agency Theory of Unionism*, 8 J. ECON. BEHAV. & ORG. 39, 47 (1987).

258 Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 697 (1986).

259 29 U.S.C. § 151, *quoted in id.*

260 Garden, *supra* note 11, at 98–99.

collective bargaining "the indispensable complement to political democracy," showing that Congress had this parallel motivation in mind.[261] Contrary to the anti-exclusivity view, unions may actually *increase* the freedom of employees' speech by making otherwise authoritarian workplaces more democratic.[262] Unions create some forced association, but they do so in the name of workplace democracy, a tradeoff that has been accepted—and often goes unnoticed—in other parts of modern society.[263] Exclusive representation furthers both goals—economic and democratic—by amplifying the messages of employees through the union as unitary agent of the bargaining unit. In any event, the world of nonexclusive representation looks far more unequal regarding bargaining power and far more autocratic regarding employee speech.

Perhaps the strongest justification in this vein is that the NLRA created a carefully balanced system of majoritarian rule, with judicial guardrails to protect minority interests. In dismissing one of the post-*Janus* challenges, the First Circuit wrote:

> The uniformity of the way in which these courts have resolved similar First Amendment challenges is hardly surprising, as it well comports with the "majoritarian principle" underlying the "long and consistent adherence" to "exclusive representation" under the federal National Labor Relations Act, which the Supreme Court has recognized is "tempered" by the recognition and protection of "minority interests."[264]

Here, the court quotes *Emporium Capwell v. Western Addition Community Organization*, a landmark labor law case holding that attempts to bargain with the employer outside of the exclusive bargaining relationship are not protected, meaning employees can be fired for such actions.[265] In *Emporium*, the Court doubled down on the system of majoritarian representation, notably rejecting the extra-statutory actions of two Black employees who felt the union was not adequately representing their interests to the employer.[266] There is a strong government interest in maintaining this existing system that seeks to channel employment decisions through the bargaining representative.

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261 Summers, *supra* note 258, at 698.
262 *See* Garden, *supra* note 11, at 92.
263 *See supra* notes 202–03 and accompanying text.
264 Peltz-Steele v. UMass Fac. Fed'n, 60 F.4th 1, 8 (1st Cir. 2023).
265 420 U.S. 50, 62–65 (1975).
266 *Id.* at 70, 73.

2. *Balancing Under Exacting Scrutiny*

For any alleged infringement of the First Amendment, the ultimate test is whether that harm has survived the appropriate level of judicial scrutiny. In the Court's cases on the compelled subsidization of private speech, it has applied "exacting" scrutiny, the test used for commercial speech and which provides slightly less protection than the "strict" scrutiny applied in non-commercial speech cases.[267] In *Janus*, the Court observed that public sector agency fees are not commercial speech, but found it unnecessary to resolve the question as to the correct level of scrutiny since the challenged law could not survive even the less demanding standard.[268] Absent a contrary message, and given the more commercial nature of private sector labor relations compared with the public sector, it seems appropriate to apply exacting scrutiny.[269] The test asks whether the allegedly infringing law "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[270]

Applying this test, it is difficult to identify a valid, less restrictive alternative that would not explode a system of labor relations that has worked for ninety years and would still achieve the necessary governmental objectives.[271] After Taft-Hartley erased union shops in practice[272] and *Beck* banned the use of mandatory dues for political purposes,[273] the requirements of the union workplace have been "whittled down to [their] financial core."[274] Only a unitary representative within the bargaining unit can achieve labor peace and avoid potentially calamitous plural bargaining. And majoritarian principles are already appropriately tempered by the duty of fair representation.[275] Given the extent to which union security agreements have fallen into political and judicial disfavor,[276] the status quo already resembles the least restrictive alternative.

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267 *Janus*, 585 U.S. at 894; *see also* Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 316 (2012) (applying exacting scrutiny); *Harris*, 573 U.S. at 651 (same).

268 *Janus*, 585 U.S. at 895.

269 *See* Crowe v. Oregon State Bar, 112 F.4th 1218, 1233 (9th Cir. 2024) (noting that exacting scrutiny applies in cases of compelled association).

270 *Janus*, 585 U.S. at 894 (quoting *Knox*, 567 U.S. at 310).

271 *See infra* notes 284–87.

272 Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 141 (1947).

273 Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 759–63 (1988).

274 NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963).

275 Steele v. Louisville & N.R. Co., 323 U.S. 192, 204 (1944) (holding that, because unions are delegated congressional powers under the RLA, they have a duty "to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith").

276 *See supra* Section I.B.2.

Additionally, the Court has shown itself willing to put a thumb on the balancing scale to preserve legislative intent. In *Glickman v. Wileman Bros. & Elliott*, the Court considered a First Amendment challenge to a law requiring certain California tree fruit farmers to pay fees used to fund marketing of their products.[277] The Court upheld the compelled assessment against free speech concerns, noting that it was part of a larger, valid regulatory scheme.[278] Just four years later, in *United States v. United Foods, Inc.*, the Court struck down a similar assessment imposed on mushroom handlers on the grounds that it was not part of a larger statutory program.[279] Exclusive representation fits much better in the former category, being a minor infringement on free speech and association collateral to the broader statutory project of effective labor relations.

Ultimately, if private sector exclusive representation ends up on the Supreme Court's docket, its best chance of survival lies in a balancing of interests. After *Janus*, unions can no longer contend that First Amendment harm is entirely absent from the relationship, but the Court might be willing to recognize that the effects of exclusive representation on the associational and expressive rights of individuals are more attenuated in the private sector than was the harm of mandatory dues in *Janus*. On the other side of the equation, the government interest in exclusive representation—where the alternative is a disruptive invalidation of the entire labor law system—is greater than that favoring mandatory dues. The *Janus* majority proved to be correct that the free rider problem was not enough to deter membership on a large scale.[280] But the "pandemonium" that failed to occur then likely would if the Court were to invalidate the core of the NLRA.[281]

IV

Reading *Janus* as Accepting of the Current Regime

In this final Part, I turn to the case that created the doctrinal urgency that led to this Note: *Janus*. The case, properly read, reveals how the current Court—which is certainly skeptical of labor rights and sensitive to First Amendment harms—might approach a head-on challenge to private sector exclusivity and why that Court might uphold the arrangement.

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277 521 U.S. 457, 460 (1997).

278 *Id.* at 476.

279 533 U.S. 405, 412–13 (2001).

280 *See supra* note 251 and accompanying text.

281 *Cf. Janus*, 585 U.S. 878, 895 (doubting that "pandemonium" would occur if agency fees were banned).

First, Justice Alito's oft-quoted line that exclusive representation is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts" is really about the strength of the state interest weighing against the impingement.[282] The quote recognizes that exclusive representation does pose some restrictions on perfectly free expression and association, a point I acknowledge in Part III. However, these restrictions *are* tolerated in this context, presumably because of the compelling government interests that adhere when applying scrutiny. While the Court did not give its reasoning for the relative weight of competing interests—since exclusive representation itself was not on the docket—the conclusion expressed an act of balancing already completed and relatively uncontroversial. As the First Circuit noted, this passage in *Janus* is about drawing the line between exclusive representation, which is permissible, and compelled financial support of the union's speech, which goes too far.[283] That line is exactly what *Janus* upheld. A union defending private sector exclusive representation in front of the Court would need to recognize that disclaiming all constitutional infringement is impossible at this point, but that the Court is willing to give serious weight to the countervailing interests.

Second, the Court appears to accept that those countervailing interests include the stability of the existing labor law regime. Reading *Janus* as an absolute repudiation of exclusive representation is a mistake. In one footnote, the Court allows "[s]tates [to] keep their labor-relations systems exactly as they are," just without the compelled agency fees.[284] While this line refers specifically to the public sector, where the states are free to make their own labor laws, it applies with equal force to the national context of private sector exclusive representation. In fact, the Court seems more likely to defer to Congress's choice in how to arrange a system of labor relations than to the states' choices on the matter.[285] In another footnote, the Court notes that collective bargaining was historically unlawful as a restraint on individual liberty.[286] However, the Court adds a disclaimer that this point is only made to reject a specific argument by the union in *Janus* and that the Court is "not in any way

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282 *Id.* at 916.

283 *Peltz-Steele*, 60 F.4th at 7.

284 *Janus*, 585 U.S. at 928 n.27.

285 *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) (arguing that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states").

286 *Id.* at 904–05 n.7.

questioning the foundations of modern labor law."[287] These foundations are exactly what a challenge to exclusive representation would target. To bring nearly a century of labor relations crashing down is not an act to be taken lightly, and the Court, even if providing fodder to the critics of exclusive representation, does not evince a strong desire to make that significant step.

Conclusion

The American labor movement is in a precarious state, with union density at an all-time low and a Supreme Court that appears increasingly willing to weaponize the First Amendment against labor organizations' rights.[288] After *Janus*—itself a major defeat for public sector unions—there was a wave of lawsuits seeking to end exclusive representation entirely in the public sector. While that effort has been thus far unsuccessful, another impact of *Janus* has been to push commentators to question private sector exclusivity. Although these arguments have not yet entered the courtroom, scholars and stakeholders should take them seriously, given the current Court's tendencies. That is the project of this Note. Ultimately, I argue that the harms of exclusivity to individual expression and associations are sufficiently attenuated that the interest in maintaining labor peace through the present regime of labor law is greater and cannot be achieved through any less restrictive means.

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287 *Id.*

288 And also property rights. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (holding that a California law allowing union organizers limited access to the agricultural property is an unconstitutional taking).