

## EXCLUSIVE REPRESENTATION IN PUBLIC AND PRIVATE LABOR LAW AFTER *JANUS*

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#### ABSTRACT

Exclusive representation by a union chosen by a majority of a bargaining unit is mandated in the private sector by the National Labor Relations Act (NLRA). In light of the reasoning of *Janus v. American Federation of State, County and Municipal Employees, Council 31*, this

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requirement should be held to violate the First Amendment right of employees to associate outside of the union, and not to be compelled to be silent while another, not of their choosing, speaks for them. Researching the legislative history of the NLRA demonstrates no support that exclusive representation was necessary for collective bargaining, nor that the benefits its advocates claimed would withstand “exacting scrutiny” which the Court applied in *Janus*. The right to be the exclusive representative of employees carries the duty of fair representation of all employees in a bargaining unit, including those who are not union members. If exclusive representation is struck down, the future of American labor law would be one of proportional representation, where a union would represent only those employees who choose to join that union. This development is already underway in the public sector and might prove beneficial to a restoration of health for unions in the private sector, where membership has been steadily declining. Unions would then compete for members on the basis of what they can provide them. Eliminating both exclusive representation and the duty of fair representation would solve the free rider problem which the doctrine of exclusive representation was thought to be necessary to cure.

In *Janus*, the Supreme Court held:

It is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itsself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.<sup>1</sup>

This article focuses on the “significant impingement on associational freedoms” caused by the requirement that an employee be represented only by a union chosen by a majority of employees in a bargaining unit, but not by that individual employee.<sup>2</sup> In *Janus*, the Court

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1. 138 S. Ct. 2448, 2478 (2018).

2. *Id.* The bargaining unit is determined by the National Labor Relations Board, under 29 U.S.C. § 159(a):

(a) Exclusive representatives; employees’ adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a

assumed, without deciding, that there was no constitutional infirmity to exclusive representation.<sup>3</sup> The Court's logic in the *Janus* decision, however, opens serious questions about that assumption. In a subsequent case, the Court might revisit what it was not called on to decide in *Janus*: whether the loss of First Amendment associational freedoms entailed by the concept of an exclusive bargaining representative could be justified.<sup>4</sup> This article anticipates such a court case.

In pursuing such an analysis, this article begins with identifying the limits on several First Amendment rights that result from exclusive representation: a) compelling employees to be silent while another (with whom they disagree) purports to speak for them, and b) restricting the right of employees to associate with each other outside of the majority-chosen union.

Any court called on to uphold those First Amendment restraints would have to identify the interests that lay behind the exclusive representation rule.<sup>5</sup> Exclusive representation was assumed to be desirable by the Congress that passed the NLRA in 1935.<sup>6</sup> To perform the balance against First Amendment rights, however, the nature of the harm Congress purported to address by creating exclusive representation has to be considered in some detail. It might be sufficient simply to advert to Congressional concern about interruptions of commerce in order to rebut the claim that the NLRA exceeded the authority of the commerce clause,<sup>7</sup> but the balance required under a claim of infringement of First Amendment rights is much more searching.<sup>8</sup> The government interest

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collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment. 29 U.S.C. § 159(a) (2012).

3. See *Janus*, 138 S. Ct. at 2456–57.

4. This consideration, furthermore, would, unlike *Janus*, have implications for the private sector, where exclusive representation is mandated by federal law.

5. The Supreme Court balances an employee's First Amendment rights against the employer's right to protect its managerial interests. *Janus*, 138 S. Ct. at 2493 (Sotomayor, J., dissenting). “[W]hen the regulated expression concerns the terms and conditions of employment . . . the government really cannot lose.” *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)) (citing *Pickering v. Bd. of Educ. of High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)). However, if the employee “spoke as a citizen on a public matter,” the employer would “need to show that legitimate workplace interests lay behind the speech regulation.” *Id.*

6. See 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 1095, 1300, 1319 (1935).

7. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937).

8. *Janus*, 138 S. Ct. at 2480 (finding deference to the Commerce Clause and the “legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress” is inappropriate in deciding free speech issues.); see Clay Calvert, *Is Everything a Full-Blown First Amendment Case After Becerra and Janus? Sorting*

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must be subjected to “exacting scrutiny.”<sup>9</sup> This article researches every reference to “exclusive representation” in the legislative history of the NLRA and the Taft Hartley Act and finds that record strikingly bare of justification. Thus, the claimed benefits of exclusive representation cannot be used to deprive employees of free speech and associational rights.

This article concludes with consideration of what would likely emerge in American labor-management relations if exclusive representation were held to be unconstitutional. If the Court so ruled, a labor union would probably shed its duty of fair representation as well. That duty was found by the Supreme Court as a necessary corollary to a union being the only representative of the workers: the union had to represent all the employees in a bargaining unit with equal diligence, whether they had voted for the union or not.<sup>10</sup> Without either exclusive representation or a duty of fair representation, labor-management relations in the United States would transform into a system where employees chose their own representative, of whom there could be several in any employment situation. The result would be representation by choice, with each union responsible only for the employees who chose to be represented by it. This outcome has already been suggested in the aftermath of *Janus*, with some states considering “workers’ choice” legislation<sup>11</sup> for public employees, and some union spokespersons opining that they could tolerate a system in which, though they could not compel fair-share payments from non-union members, they would also not have the duty of representing them.<sup>12</sup>

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*Out Standards of Scrutiny and Untangling “Speech as Speech” Cases from Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73, 79, 126–27 (2019) (noting the *Janus* majority “flatly rejected the notion that rational basis review should apply in analyzing the statute’s constitutionality” and applied an “exacting scrutiny” standard).

9. *Janus*, 138 S. Ct. at 2465 (quoting *Knox v. Serv. Emp.’s Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012)). “Under ‘exacting’ scrutiny, we noted, a compelled subsidy must ‘serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.’” *Id.*

10. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)).

11. Chantal Lovell, *Michigan Lawmaker Introduces Worker’s Choice Bill*, MACKINAC CENTER FOR PUBLIC POLICY (Sept. 7, 2016), <https://www.mackinac.org/22762>. Workers’ choice legislation under consideration in Michigan, for example, undoes the exclusive representation rule for state employees. *Id.*

12. Kate Bronfenbrenner, Chris Brooks & Shaun Richman, *After “Janus,” Should Unions Abandon Exclusive Representation?*, TRUTHOUT (May 30, 2018), <https://truthout.org/articles/after-janus-should-unions-abandon-exclusive-representation/>.

I. THE FIRST AMENDMENT CONCERNS WITH AN EXCLUSIVE BARGAINING REPRESENTATIVE

*A. Government Compelling Individuals to Let Another (with Whom They Disagree) Speak for Them Violates the First Amendment*

Under exclusive bargaining, an individual employee may not speak to her or his employer concerning “wages, hours, and other terms and conditions of employment.”<sup>13</sup> There is an exception for an employee or group of employees to present a grievance directly to management, provided the union has the right to be present, and provided that the resolution is in conformity with the contract.<sup>14</sup> As to a major area of speech, therefore, the NLRA cuts off the employee’s ability to speak.<sup>15</sup>

Just requiring silence, however, on matters of commercial speech, does not require a high governmental justification.<sup>16</sup> A government employer could force its employees not to complain about a supervisor,<sup>17</sup> and not to disagree in a court filing with a supervisor’s evaluation of a criminal case.<sup>18</sup> Such matters are mundane, within the prerogative of the government as an employer, similar to commercial speech. For restrictions on commercial speech, the Court has been satisfied with a lower level of scrutiny.<sup>19</sup>

In *Janus*, however, the Court refused to lower the standard of review because the speech might be characterized as commercial.<sup>20</sup>

Even though commercial speech has been thought to enjoy a lesser degree of protection, prior precedent in that area, specifically *United Foods*, had applied what we characterized as “exacting” scrutiny, a less demanding test than the “strict” scrutiny that might be thought to apply outside the commercial sphere. Under “exacting” scrutiny, we noted, a compelled subsidy must “serve a compelling state interest that cannot

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13. See 29 U.S.C. § 158(d) (2012).

14. See 29 U.S.C. § 159(a) (2012).

15. See *id.*; see also *Janus*, 138 S. Ct. at 2460 (“designating a union as the employees’ exclusive representative substantially restricts the rights of individual employees.”).

16. See Calvert, *supra* note 8, at 74 n. 2, 90 n. 117, 91–92 (regulations on commercial speech are typically subject to intermediate scrutiny).

17. *Connick v. Myers*, 461 U.S. 138, 148, 154 (1983) (discussing the inapplicability of the First Amendment to a government employee fired for criticizing her supervisor).

18. *Garcetti v. Ceballos*, 547 U.S. 410, 413–14, 426 (2006) (finding the First Amendment did not protect a government employee whose speech was made pursuant to his official duties).

19. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978). *But see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 (1976).

20. *Janus*, 138 S. Ct. at 2465.

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be achieved through means significantly less restrictive of associational freedoms.<sup>21</sup>

Where there is an element of compulsion, therefore, the commercial nature of the speech being compelled does not serve to lower scrutiny below “exacting.”<sup>22</sup> “The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech.”<sup>23</sup> The *Janus* Court did not address what standard would be appropriate if *compelled* speech were not involved.<sup>24</sup>

To be careful not to overstate the argument that exclusive representation violates the First Amendment under an exacting scrutiny standard, this article will assume some element of compulsion must be shown. That element is present in exclusive representation. It is not simply that the function of speaking with the employer is forbidden the employee. What invades an employee’s rights is that the function of speaking with the employer on behalf of that employee is given to another: the union. This distinction becomes clearer if we first explore why compulsion is so odious.

*1. It Is More Obnoxious for Government to Compel an Individual to Speak than Simply to Compel the Individual to Remain Silent*

It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.<sup>25</sup>

There are many reasons behind this holding in *Barnette*, reaffirmed in *Janus*.<sup>26</sup> Among the clearest, however, is that, when compelled to remain silent, an individual maintains her or his own views within her or his conscience; but, when compelled to speak words that an individual does not believe, the individual’s very conscience has been betrayed.<sup>27</sup>

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21. *Id.* at 2464-65 (quoting *Knox v. Serv. Emp.’s Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980))).

22. *Id.* at 2472.

23. *Id.* at 2477.

24. *Id.* at 2473.

25. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

26. *Janus*, 138 S. Ct. at 2464 (citing *Barnette*, 319 U.S. at 633).

27. *See id.* This contrast was recently manifest in a different context with a pair of Ninth Circuit opinions. *See Chamness v. Bowen*, 722 F.3d 1110, 1116 (9th Cir. 2013); *Soltysik v. Padilla*, 910 F.3d 438, 440-41 (9th Cir. 2018). The court in *Chamness* upheld the State of

The Supreme Court in *National Federation of the Blind* called this the “freedom of [the] mind,” drawing on a wealth of precedent.<sup>28</sup> The *Janus* majority put it this way:

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.<sup>29</sup>

Compelled speech might thus be unconstitutional when compelled silence in the same context would not be. It was on this basis that the *Janus* majority distinguished the Court’s prior holdings permitting a state or municipal government to silence an employee whose stifled speech dealt with the mundane details of the employee’s job.<sup>30</sup> Even granting

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California’s election law disallowing an individual candidate the right to put “Independent” after his name on the ballot. *Chamness*, 722 F.3d at 1116. In *Soltysik*, the court upheld an individual’s challenge to the California law requiring his candidacy to be labeled “No Party Preference,” when he actually did have a party preference (the Socialist Party USA, which was not officially registered in California). *Soltysik*, 910 F.3d at 440–41. The Ninth Circuit panel in the latter case opined that California could remedy the problem by silencing the candidate entirely as to his party affiliation (with only an asterisk after his name) but could not put words in his mouth. *Id.* at 447.

For example, the Secretary could place an asterisk by the name of any candidate who does not affiliate with one of the six qualified parties, directing the voter to a short and clear explanation that the candidate is not so affiliated. Or the ballot could list the political body with which a candidate identifies (such as the Socialist Party USA), and, again using an asterisk, specify that that body does not qualify as a “party” under California law. *Id.*

Another manifestation of our society’s greater abhorrence at forcing speech on someone than on requiring silence can be found in the stage drama based on actual historical events. See ROBERT BOLT, *A MAN FOR ALL SEASONS* 83 (1962). Thomas More was content to remain silent regarding the legitimacy of King Henry VIII’s marriage to Ann Boleyn; but he objected (at the sacrifice of his own life) to being forced to take an oath upholding that marriage. *Id.* “When a man takes an oath . . . he’s holding his own self in his own hands. Like water . . . and if he opens his fingers then—he needn’t hope to find himself again.” *Id.*

28. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (quoting *Barnette*, 319 U.S. at 637) (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974)). “[W]e relied on the principle that ‘[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind,”’ as illustrated in *Tornillo*.” *Id.*

29. *Janus*, 138 S. Ct. at 2464 (quoting *Barnette*, 319 U.S. at 633).

30. *Id.* at 2470–74, 2477. The government employee in *Ceballos* was disciplined for disagreeing with his supervisor on a matter assigned to him, as part of the “duties” of his job. *Garcetti v. Ceballos*, 547 U.S. 410, 421–22, 426 (2006). The government employee in *Connick* disagreed with her reassignment and complained about it to other employees. See *Connick v. Myers*, 461 U.S. 138, 141 (1983). Both cases upheld the government employer, who silenced its employee. See *Ceballos*, 547 U.S. at 426; *Connick*, 461 U.S. at 154. By



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that the speech in *Janus* was related to the workplace (as in *Garcetti* and *Connick*), and not public policy (as in *Pickering*), the *Janus* Court found that there was a critical difference between prohibiting speech as in those three cases and compelling speech (through the obligation to pay agency fees) as in *Janus*.<sup>31</sup>

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.<sup>32</sup>

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. As a result, we held, the district attorney could fire her for making those comments. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.<sup>33</sup>

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contrast, when the government silenced an employee commenting on a matter of public interest, far beyond the circumstances of the workplace, the Court held the government had overstepped the First Amendment. *See Pickering v. Bd. of Educ. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 572–74 (1968). The union in *Janus* attempted to portray those cases as holding that if a matter was mundane, related to the workplace, there was no First Amendment issue. *See Janus*, 138 S. Ct at 2474. That argument, however, overstates what the Court held in those cases. The distinction regarding topic made sense when dealing with a government ordering an individual to be silent; but that is as far as those holdings went. When the government compels speech, the distinction is not a valid one.

31. *See Janus*, 138 S. Ct at 2472–74.

32. *Id.* at 2473.

33. *Id.* (citing *Connick*, 461 U.S. at 154).

*2. Requiring Employees to Let the Union Speak for Them Is a Form of Compelled Speech, When the Employees Disagree with the Union*

In analyzing the payment of agency fees in *Janus*, the Court did not address exclusive representation.<sup>34</sup> Exploring the majority's and the dissents' bases for disagreement in *Janus*, however, exposes a common lens through which each would likely evaluate exclusive representation were it to be presented in a new case.<sup>35</sup> This focus is on compelled speech versus forbidden speech.<sup>36</sup> The element of compulsion that caused the majority to strike down the agency fees would logically compel finding exclusive union representation objectionable as well.<sup>37</sup> Indeed, the fees are a trivial form of compelled speech as contrasted with compelling employees to have someone else speak for them.<sup>38</sup>

Also realizing the importance of the element of compulsion, the dissenters in *Janus* tried to dilute the holding that forced payment of an agency fee was compelled speech.<sup>39</sup> When a case challenging exclusive bargaining is presented, the Justices in the minority in *Janus* would likely attempt the same gambit. That effort, however, would be no more successful than it was in *Janus*.

The dissenters' failing effort helps clarify how exclusive representation contains more compulsion than having to pay an agency fee does.<sup>40</sup> Justice Kagan attempted to downplay the higher degree of offensiveness to government compelling speech rather than simply forbidding it.<sup>41</sup> The majority's statement, which Justice Kagan cites, is

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34. *See id.* at 2448 (only addressing whether nonmember fees are coerced political speech and whether the First Amendment forbids coercing money from nonmembers in determining whether public-sector agency-fees are unconstitutional).

35. *See id.* at 2464 (emphasizing the danger of compelled speech), 2488–89 (Kagan, J., dissenting) (noting that exclusive bargaining units “facilitate peaceful and stable labor relations”).

36. *See Janus*, 138 S. Ct. at 2464.

37. *See id.* (arguing that a union requiring employees to financially support it as it takes a “powerful political” position during collective bargaining presents “significant impingement” on First Amendment rights).

38. *Id.*

39. *See id.* at 2495 (Kagan, J., dissenting) (distinguishing between “important speech” and speech “about and directed to the workplace”).

40. *Id.* at 2495–96 (Kagan, J., dissenting).

41. *See Janus*, 138 S. Ct. at 2494 (Kagan, J., dissenting) (quoting *Riley*, 487 U.S. at 796) (citing *Wooley*, 430 U.S. at 714) (referring to “[t]he right to speak and the right to refrain from speaking” as ‘complementary components’ of the First Amendment”).

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. But the only case the majority cites for

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actually more telling than she might have intended by drawing attention to it.<sup>42</sup> The majority noted the greater offensiveness of government requiring its employees to “mouth” words than to be silent.<sup>43</sup> “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.”<sup>44</sup> “Mouthing” words is not vocalizing them.<sup>45</sup> It is being silent while others make the sounds, thus giving the appearance, by the absence of contrary sound, of agreement.<sup>46</sup>

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that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the “difference between compelled speech and compelled silence” is “without constitutional significance.” *Id.*

Justice Kagan is guilty of some legal legerdemain. First, she does nothing to rebut the force of *Barnette* (striking down state requirement that public school students salute the flag and recite the pledge of allegiance). *See Barnette*, 319 U.S. at 642. It’s a devastating case to her position. So, she simply comments that the *Barnette* fact situation is rare; but she cannot rebut that the Court’s holding was, squarely, that compelled speech required more from government than forbidden speech. *See Janus*, 138 S. Ct. at 2494 (Kagan, J., dissenting) (noting that “[r]egulations challenged as compelling expression do not usually look anything like that”). Second, Justice Kagan attempts to limit *Barnette* by reference to the fact that the school children there had a religious based aversion to the flag salute and pledge of allegiance. *See id.* at 2494 (Kagan, J., dissenting) (stating *Barnette* “involved the state forcing children to swear an oath contrary to their religious beliefs”). The Court’s opinion, however, in *Barnette* was not based on freedom of religion, but, rather, on freedom from compelled speech. *See Barnette*, 319 U.S. at 634, 642.

Nor does the issue, as we see it, turn on one’s possession of particular religious views or the sincerity with which they are held. While religion supplies appellees’ motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty. *Id.* at 634–35.

Lastly, the quotes Justice Kagan takes from *Riley v. National Federation of Blind* and *Wooley v. Maynard* do not stand for the principle that compelled speech deserves no higher protection than forbidden speech. Each case dealt with a challenge to compelled speech, which the Court struck down under standards set for prohibited speech. *See Riley*, 487 U.S. at 798; *Wooley*, 430 U.S. at 715–17. In saying that the difference between the two kinds of First Amendment violation was of no constitutional significance, the Court was holding merely that compelled speech deserved no less vigorous a condemnation than prohibited speech. *See Riley*, 487 U.S. at 796–97. Neither opinion reached whether compelled speech deserved more vigilant scrutiny; neither held that it didn’t. *See id.* at 798; *Wooley*, 430 U.S. at 715–17.

42. *Janus*, 138 S. Ct. at 2494 (Kagan, J., dissenting).

43. *Id.* at 2463–64.

44. *Id.* at 2463.

45. *Mouthed*, *Mouthing*, *Mouthed*, WEBSTER’S II NEW COLLEGE DICTIONARY (1999) (defining mouthing as “form[ing] or articulat[ing] words soundlessly”).

46. *Id.*

Citing the amicus curiae brief of Professor Eugene Volokh, Justice Kagan's dissent in *Janus* claims spending taxpayers' or government employees' money for purposes not favored by the taxpayers or government employees is a commonplace occurrence and does not raise First Amendment concerns.<sup>47</sup> Of course, this position was rejected by the majority in *Janus*.<sup>48</sup> Further, it does not reach the case of exclusive representation because the taxpayers, or government employees, are not compelled to allow another to speak *for them*,<sup>49</sup> even if they do have to pay some money that goes to supporting views contrary to their own. Professor Volokh's examples are that doctors and lawyers have to pay for continuing professional education even if they disagree with the content thereof, and property owners must be represented by attorneys at real estate closings in some states even if they'd rather not be.<sup>50</sup> No lawyer, however, is compelled, in counseling her or his own client, to accept the interpretation of a particular law put forward by the continuing legal education vendor.<sup>51</sup> The real estate closing hypothetical is even more inapposite to exclusive representation. The client is free to fire her or his attorney if the attorney's position in the real estate closing is contrary to that of the client.<sup>52</sup> No client has to remain silent, while her or his attorney represents a position contrary to one the client actually holds.<sup>53</sup> The same may be said for the examples Justice Kagan uses: "mandatory fees imposed on state bar members (for professional expression); university

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47. *Janus*, 138 S. Ct. at 2494–95 (Kagan, J., dissenting) (quoting Brief of Eugene Volokh & William Baude as Amici Curiae Supporting Respondents, *Janus v. Am. Fed'n of State, Cty & Mun. Emp.'s Council*, 31, 138 S. Ct. 2448 (2018) (No. 16-1466), 2018 WL 527958). "[O]ffering many examples to show that the First Amendment 'simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of.'" *Id.* "[I]f anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression . . . [s]o when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's 'freer hand' in dealing with its employees should apply with equal (if not greater) force." *Id.* at 2494–95 (Kagan, J., dissenting) (quoting *NASA v. Nelson*, 562 U.S. 134, 148 (2011)).

48. *Janus*, 138 S. Ct. at 2466–67.

49. *Id.* at 2467. The status of being the exclusive bargaining representative was characterized as the union having the right to "speak for" the employees in *Janus*. *Id.*

50. Brief of Eugene Volokh & William Baude, *Janus*, 2018 WL 527958, at \*4–5.

51. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2019) (stating "a lawyer shall exercise independent professional judgment").

52. *See, e.g.*, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 568–69 (generally speaking, a "client can fire his attorney if he is dissatisfied with his attorney's performance").

53. *See id.*

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students (for campus events); and fruit processors (for generic advertising).”<sup>54</sup> None of these examples compel silence by the person paying the fee. Similarly, the motorist in New Hampshire who objected to the “Live Free or Die” motto the state printed on his license plate, was free to express a contrary point of view in his own bumper sticker, a point that Justice Rehnquist found compelling in his dissent.<sup>55</sup> Were an individual employee, however, to attempt to express her or his own views on wages, hours, or terms of employment, a violation of the NLRA would have occurred.<sup>56</sup>

Paying for someone else’s speech does not include the factor of an individual also being prohibited from speaking on her or his own.<sup>57</sup> It is, rather, the combination of being prohibited from speaking on her or his own behalf, and of being forced to have another speak for an employee, that tramples on an employee’s “freedom of mind”<sup>58</sup> and constitutes government coercing individuals into “betraying their convictions.”<sup>59</sup>

The situation in *Janus* involved these two elements: employees had to be silent, and someone else purported to speak for them.<sup>60</sup> Since the complaint was based on the agency fee that was compelled from the employees, the majority logically focused on that aspect.<sup>61</sup> Nevertheless, the majority’s treatment of the fee requirement reinforces the centrality of the two elements that someone else speaks *for* the employees and in words with which the employees do not agree.<sup>62</sup> It was the fact that the employee had to give support to views the employee did not share that

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54. *Janus*, 138 S. Ct. at 2495 n.3 (Kagan, J., dissenting).

55. *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting). Cf. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 369 n.84 (2018) (noting that while Justice Rehnquist found this persuasive, the majority viewed it as irrelevant).

56. See 29 U.S.C. § 158(d) (2012).

57. See *Riley*, 487 U.S. at 801 (“a speaker’s rights are not lost merely because compensation is received”).

58. *Riley*, 487 U.S. at 797 (quoting *Wooley*, 430 U.S. at 714).

59. *Janus*, 138 S. Ct. at 2464. This effect of being forced to be silent while another speaks on one’s behalf can thus be distinguished from the situation unavoidable in any democracy where some voters in a district might not have preferred the individual chosen at the polls to represent them on a city council, county board, or legislature. Any constituent remains free to express her or his own opinion on matters on which her or his representative votes. Exclusive representation, by contrast, compels silence, while having another speak for the silenced employee. And the silenced employee might not even have had the right to vote that the disappointed constituent had, since the election to designate the union might have taken place many years before an employee joined the bargaining unit.

60. *Id.* at 2462.

61. *Id.* at 2464.

62. *Id.* at 2463–64 (citing *Knox*, 138 S. Ct. at 310–311) (discussing the court’s objection regarding compelling individuals to speak and constitutional concerns).

offended the Constitution in *Janus*.<sup>63</sup> Forced silence while another (with whom the employee disagrees) speaks, claiming to represent the employee, is at least as much an instance of giving support to positions the employee does not share as having to pay something to the one who is speaking *for* the employee.<sup>64</sup>

The majority paid no attention to the amount of the agency fees in *Janus*.<sup>65</sup> Seemingly, had the compelled contribution of agency fees totaled no more than a dollar in that case, the majority would have come out the same way because the employees were forced to let another speak for them. The same conclusion can be inferred from *Wooley v. Maynard*, where a New Hampshire motorist objected to having “Live Free or Die” printed on his license plate.<sup>66</sup> The motorist did not propose an alternative message to be placed on his license plate.<sup>67</sup> He did not object to the fee for the license plate.<sup>68</sup> He objected simply to being forced to display *on his property* the government’s message which he did not share.<sup>69</sup> The New Hampshire citizen would not have succeeded in a case against a tax-funded banner across the state capitol reading “Live Free or Die.”<sup>70</sup> It was the fact that it was on his car, signaling to the public that it was his belief, that constituted unconstitutional compulsion, in the majority’s view.<sup>71</sup> Exclusive representation is even worse, since the New Hampshire motorist was not forbidden from displaying a bumper sticker with a contrary message on his car, as noted by Justice Rehnquist’s dissent.<sup>72</sup>

It is in this regard that exclusive representation is also different from the employer’s right to discipline employees for speaking out on matters of the employer’s business that had no public import, with which *Connick* and *Garcetti* were concerned.<sup>73</sup> No one would infer the employee’s views were identical with her or his employer in those cases. The NLRA, by contrast, makes the union the exclusive representative of some employees who disagree with the union, compels the employees to be silent, and treats the union’s views as those of the employee.<sup>74</sup> That element, having

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63. *Id.*

64. *Janus*, 138 S. Ct. at 2463–64.

65. *Id.* at 2461 (limiting the discussion of agency fees to only one portion of the opinion).

66. 430 U.S. at 706–07.

67. *See id.* at 707.

68. *See id.*

69. *Id.*

70. *See id.* at 713–15.

71. *Wooley*, 430 U.S. at 715.

72. *Id.* at 722 (Rehnquist, J., dissenting).

73. *See Connick*, 461 U.S. at 148; *Garcetti*, 547 U.S. at 421–22.

74. *See* 29 U.S.C. § 159(a) (2012).

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someone else's views represented as your own, was present in *Barnette*, present in *Wooley* (according to the majority), and absent from any of the government employer cases cited by the dissent in *Janus*.<sup>75</sup> It was present in *Riley v. National Federation of the Blind*, where the Court struck down a requirement forcing solicitors of charitable donations to state in their own solicitation letters what percentage of the funds they had raised in-state during the previous year actually went to the charity mentioned: a disclosure different for each fund-raiser and hence, to the reader, a message seeming to be of the fund-raiser's own creation.<sup>76</sup>

This concern is so strong, it dominates even when the party being compelled could label the other's speech not his/her own.<sup>77</sup> The mere fact that government would interfere with a newspaper's judgment of what to publish was enough, since the requirement to allow rebuttal space to a candidate criticized by the newspaper interfered with the freedom "to publish that which 'reason tells them should not be published.'"<sup>78</sup> How much more to be respected would be the newspaper's right if the inference were that the compelled speech was on behalf of the newspaper, as it is with the speech of an exclusive bargaining representative on behalf of employees who must remain silent.<sup>79</sup>

*B. Exclusive Representation Requires Employees to Associate with the Union, in Violation of the Employees' Right Not to Associate*

The First Amendment includes the right of association.<sup>80</sup> Indeed, that is the right to which the *Janus* court referred, whose infringement would not be tolerated "in other contexts."<sup>81</sup> It is the right to associate, or to choose not to associate, with others.<sup>82</sup> In 1977, Professor (later Dean)

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75. *Wooley*, 430 U.S. at 707; *Barnette*, 319 U.S. at 629; *Janus*, 138 S. Ct. at 2494 (Kagan, J., dissenting).

76. 487 U.S. at 784.

77. See generally *Tornillo*, 418 U.S. at 241 (discussing whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of free press).

78. *Id.* at 254.

79. In a separate category, deserving very little First Amendment protection, are restrictions requiring individuals to include statements of law or fact in their advertising, as in *Zauderer v. Office of Disciplinary Counsel*, or product content disclosures required by the Federal Trade Commission or the Food and Drug Administration. 471 U.S. 626, 651 (1985). While in these instances the regulated entity might prefer not to have made the disclosure, the situation is far distant from compelling the *Miami Herald* to print editorials with which it disagreed.

80. See *Janus*, 138 S. Ct. at 2463 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

81. *Id.* at 2478.

82. *Id.* at 2463. (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

Bond set out the argument that the exclusive bargaining representation provision of the NLRA violated employees' First Amendment freedom not to associate.<sup>83</sup> Bond noted: "Originally, the Court permitted individual negotiation under the NLRA and that permission was essential to a finding that the NLRA was constitutional."<sup>84</sup> Bond cites *NLRB v. Jones & Laughlin Steel Corporation*, where the Court, relying on precedent from the Railway Labor Act, held:

We said that the obligation to treat with the true representative was exclusive, and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the Company might "elect to make directly with individual employees." We think this construction also applies to § 9(a) of the National Labor Relations Act.<sup>85</sup>

Seven years later, as Bond observed, the Court narrowed the possibility of individual employees' bargaining with the employer in *J.I. Case Company v. NLRB*.<sup>86</sup> Bond comments:

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83. James E. Bond, *The National Labor Relations Act and the Forgotten First Amendment*, 28 S. C. L. REV. 421, 423 (1977).

84. *Id.* at 446.

85. 301 U.S. 1, 44–45 (1937). *Cf.* *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 548–49 (1937) (construing the Railway Labor Act as permitting individual contracts).

86. Bond, *supra* note 83, at 447. *J.I. Case* actually left open the possibility of individual contracts in very narrow circumstances. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).

We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. *Id.* at 338.

Even that slim circumstance was cut off by the Court, however, later in the same Term, as Bond notes, in *Medo Photo Supply Corp. v. Labor Board*. 321 U.S. 678, 683–84 (1944); Bond, *supra* note 83, at 447.

[W]e think that the negotiations by petitioner for wage increases with anyone other than the union, the designated representative of the employees, was an unfair labor practice . . . The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, it exacts "the negative duty to treat with no other." *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 301 U. S. 44, and see *Virginian Ry. Co. v. System*



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Justice Jackson [the author of the Court's opinion] failed, however, to explain how or why individual contracts would destroy the NLRA. Over a decade later in the *Hanson* case, the Court was still accepting without any serious inquiry the assertion that 'the long-range interest of workers would be better served' by compulsory unionism. Decisions such as these, which rest on *ipse dixit* rather than empirical proof, may be overturned if the Court can be induced to review present evidence which suggest that the assumptions upon which the conclusion in these cases were based are factually erroneous.<sup>87</sup>

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Federation, 300 U. S. 515, 300 U. S. 548-549. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8 (1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.

That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a majority [sic], with respect to wages, hours and working conditions was recognized by this Court in *J.I. Case Co. v. Labor Board*.

*Medo Photo Supply Corp.*, 321 U.S. at 683-84. See also *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 69 (1975) (allowing separate representation of employees would undermine purposes of the National Labor Relations Act).

87. Bond, *supra* note 83, at 447. The ruling in *Ry. Emp. 's Dep't v. Hanson*, was that union shop provisions allowed under the Railway Labor Act did not violate employees' First Amendment Rights. 351 U.S. 225, 238 (1956). En route to that conclusion, the Court stated: "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Id.* at 233. It is important to note that Justice Douglas' majority opinion then immediately expressed doubts about whether that conclusion was, in fact, correct. *Id.* at 233-34.

The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one. Much might be said pro and con if the policy issue were before us. Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis, who had wide experience in labor-management relations prior to his appointment to the Court, wrote forcefully against the closed shop. He feared that the closed shop would swing the pendulum in the opposite extreme and substitute "tyranny of the employee" for "tyranny of the employer." But the question is one of policy with which the judiciary has no concern, as Mr. Justice Brandeis would have been the first to concede. Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful

This is especially true when the statements made in the Court's opinions upholding exclusive representation or the union shop were not in cases that raised the First Amendment issue.<sup>88</sup> It is one thing for the Court to refer in a hand-waving way to purposes of labor peace in construing a statute,<sup>89</sup> or in ruling on whether Congress had power under the Commerce Clause to enact the NLRA.<sup>90</sup> To apply the exacting scrutiny test required under a First Amendment challenge, however, the *Janus* Court looked to more specific and more recent labor-management history to determine whether the restrictions could be justified.<sup>91</sup> "Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms'

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one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary. *Id.*

88. Justice Douglas' analysis in *Hanson* is appropriately deferential to Congress' right to make policy decisions; but it is utterly devoid of the "exacting scrutiny" required to ascertain whether the averred purpose of "industrial peace" was sufficient to overcome First Amendment concerns. *Ry. Emp. 's Dep't*, 351 U.S. at 227. That was for a good reason: there was no government action in *Hanson*. *Id.* The Railway Labor Act, at issue in *Hanson*, did not compel a union shop. *Id.* at 231. It only permitted one. *Id.* at 231. "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements." *Id.* Though Justice Douglas referred to challenges being raised under the First Amendment, he concluded: "It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record." *Ry. Emp. 's Dep't*, 351 U.S. at 238. His discussion of the virtue of a union shop in promoting industrial peace was thus relevant only to the issue of Congressional authority under the Commerce Clause, a much lower hurdle to overcome. *Id.*

89. *See, e.g., J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (upholding the NLRB's interpretation of the NLRA that the continued existence of individual contracts with some employees did not allow an employer freedom to refuse to bargain with a union certified as a collective bargaining representative subsequent to those individual contracts; individual contracts may be disruptive of industrial peace since if comparisons with terms in union contracts showed the latter to be less advantageous).

90. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937):

The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce, and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining. *Id.*

91. *Janus*, 138 S. Ct. at 2466 (quoting *Harris v. Quinn*, 573 U.S. 616, 616 (2014)).

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than the assessment of agency fees.”<sup>92</sup> In doing that analysis, the *Janus* Court also resurrected the associational rights of employees.<sup>93</sup>

The right to eschew association for expressive purposes is likewise protected. (“Freedom of association . . . plainly presupposes a freedom not to associate.”) (“[F]orced associations that burden protected speech are impermissible.”) As Justice Jackson memorably put it: “If there is any fixed star in our constitutional constellation, it is 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.”<sup>94</sup>

## II. COUNTERVAILING INTERESTS TO WEIGH AGAINST THE FIRST AMENDMENT INFRINGEMENTS

### A. *The Legislative Record*

Reviewing the entire history of Section 9(a) of the NLRA, which created exclusive representation, one finds not a single study or even anecdote connecting labor peace to exclusivity, or championing the fairness of making non-union employees pay fees to the union.<sup>95</sup> Indeed, the fairness argument had to come later, since the duty of fair representation, on which it was based, was court-created, rather than written by Congress.<sup>96</sup> What one finds instead, however, in full measure, is a sense by the majority in Congress in 1935 that labor needed to be supported in its struggles with management.<sup>97</sup> Individual labor agreements not blessed by the majority union were most often characterized as the product of sweet-heart deals between employers and company sponsored unions.<sup>98</sup> When the Act was amended in 1947, the same sentiments were expressed by the Democratic Members of Congress, now in the minority, in defense of not allowing any individual

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92. *Id.*

93. *Id.* at 2463.

94. *Id.* (citing *Roberts*, 468 U.S. at 623).

95. See generally 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949); 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949).

96. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–03 (1944); *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944).

97. See generally 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949); 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949).

98. Michael J. Goldberg, *Cleaning Labor’s House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L. J. 903, 910–11 (1989). A sweet-heart deal is an agreement between a union official and an employer. *Id.* In this agreement, the employer receives favorable treatment from a union official without the consent of other union members. *Id.*

grievance resolutions undercut the terms of a contract negotiated by the union.<sup>99</sup>

*1. The Focus on Commerce*

Before reviewing the legislative history, it is important to note the findings made by Congress explicitly in the text of the Wagner Act in 1935.<sup>100</sup> Congress appeared to be consciously building a record that would withstand the scrutiny of the Supreme Court, very much in its anti-New Deal period.<sup>101</sup> The congressional findings put into the statute included the benefits both of collective bargaining, and of giving more economic power to employees.<sup>102</sup> What was missing, however, from the text of the findings in 1935, and from their re-promulgation in the Taft Hartley Act of 1947, was any documentation of the need for exclusive representation in order to achieve the benefits promised by the Act.<sup>103</sup>

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99. Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 286 (1961).

100. See generally 29 U.S.C. § 151–69 (2012) (codifying Congress’s legislative findings into the Wagner Act, also known as the National Labor Relations Act, which prevents unfair labor practices and guarantees the right to strike, to become a member of a trade union, and engage in collective bargaining).

101. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

102. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2911, 2915–16 (1949).

103. 29 U.S.C. § 151. The text follows. The 1935 version did not include the penultimate paragraph. *Id.*

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the

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The legislative history of the Wagner Act includes reference to everything the Supreme Court might need to uphold the statute as a permissible regulation of commerce.<sup>104</sup> The House Committee on Labor's Report even quoted a Supreme Court opinion as though to make that point.<sup>105</sup> "The bill seeks, to borrow a phrase of the United States Supreme Court, 'to make the appropriate collective action (of employees) an instrument of peace rather than of strife.'"<sup>106</sup> Many scholarly articles were cited in the legislative history for the proposition that labor strife, due to the absence of collective bargaining, had cost the economy a great deal.<sup>107</sup> "The loss in wages, trade, and commerce from such strife has been enormous, as competent investigation demonstrates."<sup>108</sup> There is no doubt the drafters were cognizant of the Supreme Court's antipathy to the New Deal, and wanted to do everything possible to defend against the

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friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. *Id.*

104. *See generally* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949); 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949) (spanning over 3,000 pages of legislative history for the National Labor Relations Act of 1935, including explanatory statements, speeches, articles, hearings, proposed amendments, resolutions, and other documents in the congressional record).

105. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2917 (1949) (quoting *Texas & New Orleans R. R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 571 (1930)).

106. *Id.*

107. *Id.* at 2916 (first citing *CARROLL R. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY* 356, 358, 360 (1933)).

108. *Id.*

criticism that the NLRA, like the National Recovery Act before it, exceeded Congress' Commerce Clause authority.<sup>109</sup>

First Amendment scrutiny of exclusive representation, however, requires more than simply loading up the legislative history with citations to the benefits of collective bargaining. Taking as given that collective bargaining was desirable, the proper inquiry is whether exclusive representation was necessary for successful collective bargaining to occur.<sup>110</sup> There, the legislative history of the Wagner Act tells a different story.<sup>111</sup>

*2. The Legislative History Provides No Evidence That Congress Thought Exclusive Representation Was Necessary for Effective Collective Bargaining*

Researching every citation to exclusive representation in the legislative history<sup>112</sup> reveals something startling: the evidence linking exclusive representation to effective collective bargaining was sparse, and entirely conclusory. Here is every reference:

*A. The Report of the Senate Committee on Education & Labor Made the Efficiency of Bargaining the Primary Reason for Exclusive Representation.*

“The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is well nigh universally recognized that it is

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109. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); see J. CHOPER, R. FALLON JR., Y. KAMISAR, S. SHIFFRIN, *CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS* 292–94 (9th ed. 2001).

110. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464–65 (2018) (analyzing the level of scrutiny the Court should apply for an infringement of First Amendment rights and discussing how exclusive representation serves as a state interest by avoiding potential conflict and disruption if the employees were represented by more than one union); see also VICTORIA L. KILLION, CONG. RESEARCH SERV., LSB10174, *SUPREME COURT INVALIDATES PUBLIC-SECTOR UNION AGENCY FEES: CONSIDERATIONS FOR CONGRESS IN THE WAKE OF JANUS 2* (2018) (analyzing Justice Alito’s opinion, which addresses the proper level of scrutiny to apply to agency fee arrangements under First Amendment principles, considering whether strict scrutiny or exacting scrutiny should apply).

111. See generally 2 NLRB, *Legislative History of the National Labor Relations Act, 1935* (1949) (showing minimal references to whether exclusive representation is necessary for effective collective bargaining, limited to a Senate Committee report, a House Committee report, and Senate hearings, which are discussed in the text, *infra*).

112. This task was made greatly easier by the existence of *Legislative History of the National Labor Relations Act 1935*, published in 1949 by the National Labor Relations Board. See generally 1 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935* (1949); 2 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935* (1949).

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practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.”<sup>113</sup>

*B. Later, in Floor Debate, Senator Wagner Repeated This Point*

“Students of industrial relations are in almost unanimous accord that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit. For these reasons collective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all. This is possible only by means of majority rule.”<sup>114</sup>

*C. The House Committee on Labor’s Report on the Senate Version of the Wagner Bill Repeats the Defense of Exclusive Representation in Order to Prevent Collective Bargaining from Breaking Down*

“There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.”<sup>115</sup>

“Well nigh universally recognized,” “in almost unanimous accord,” and “virtually conceded on all sides” are the kind of phrases one might expect after a string of citations to studies, as were included in the

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113. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2313 (1949). Almost identical words were included in Senator Wagner’s floor statement on the bill on May 15, 1935. *Id.* at 2336.

114. *Id.* at 2490.

115. *Id.* at 2974.

legislative history regarding the effect labor strife had on commerce.<sup>116</sup> Instead, they appear just as conclusory and unsubstantiated as they sound.

The only other reference to a connection between exclusive representation and efficiency of collective bargaining is found in the Senate hearings, where an employer witness proposed proportional representation, a suggestion summarily rejected by Senator Wagner.<sup>117</sup> Mr. Clifford Cartwright, representing the Employees' Representation Plan of the Oklahoma Pipe Line Co., complained that the Wagner Bill imposed exclusive representation, in contrast to proportional representation for workers that had been proposed by President Roosevelt the year before.<sup>118</sup>

"I would like to insert there the President's own statement to the automobile industry in 1934, which would read as follows: 'Representatives designated or selected for the purpose of collective bargaining shall constitute a bargaining committee. If there is more than one group each bargaining committee shall have a total membership pro rata to the number of men each member represents. Such committee shall represent all of the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions.'

If the President asked that much, and I think it is nothing but fair, then why should we not have it included in this legislation? It will give the right of equal representation to both sides, if there was an organized union, along with our union. In other words, the minority would be represented there, and if we were to be in the minority, we could have equal representation on this board, the same as the union, or vice versa.

Senator WAGNER. I do not want to take that up for discussion, but we cannot agree with each other at all. I think it would make collective bargaining ineffective."<sup>119</sup>

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116. *Id.* at 2321, 2473, 2910.

117. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2043 (1949).

118. *See id.* at 2038-43.

119. *Id.* at 2043.



2020] **Exclusive Representation in Labor Law After *Janus*** 755*D. Other Justifications for Exclusive Representation in the Legislative History: Enhancing the Power of “Real” Unions Against Employer-Dominated Unions*

There were two other justifications for exclusive representation in the legislative history.<sup>120</sup>

*1. Exclusive Representation Allows Labor Unions to Have More Power Against Their Employer*

The Chairman of the National Labor Relations Board wrote a letter to the Senate Committee, noting that the Chamber of Commerce favored the ability of employers to present a united front to employees, but not the same right for employees.<sup>121</sup> “What is sauce for the goose is evidently not sauce for the gander.”<sup>122</sup>

Senator Walsh, the Chairman of the Senate Committee on Education and Labor, in colloquy with Mr. Harvey Ellard, speaking on behalf of the Institute of American Meat Packers, claimed that allowing more than one representative could divide labor’s force in negotiations.<sup>123</sup>

Senator WAGNER. Do these representatives speak for all of the employees in your dealings?

Mr. ELLARD. Yes, sir.

Senator WAGNER. And they are elected by a majority?

Mr. ELLARD. Yes; in the precinct in which they serve. However, the minority still has a perfect right to appear and present their side of every case if they so desire, or they may select an outside organization to represent them if they wish, and there has been dealing with that sort of organization.

Senator WAGNER. Of course that is dividing the force?

Mr. ELLARD. That is right.<sup>124</sup>

In his floor statement, Senator Walsh ascribed management opposition to exclusive representation as springing from a desire not to engage in collective bargaining at all.<sup>125</sup>

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120. See 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1318 (1949); 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1881 (1949).

121. 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1318 (1949).

122. *Id.*

123. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1882 (1949).

124. *Id.*

125. *Id.* at 2337.

The animus behind the crocodile tears now being shed for the welfare of minorities was laid bare by the liberal dean of the Wisconsin Law School, Lloyd K. Garrison, a former Chairman of the National Labor Relations Board. Testifying before the Committee on Education and Labor upon this bill, he said:

It seemed to me last summer, as I sat on the Board and listened to these cases, quite evident that the opposition to this rule came down simply to this, that the employer who opposed the rule merely wanted to avoid doing any collective bargaining at all so long as he could keep his responsibility diffused. So long as he could say, 'I will bargain first with this group, then I will bargain with that group, and then I will run back to the first and see what they think about the proposals', and so on ad infinitum, he would end up by reaching no collective agreement at all. And that is why the majority rule is opposed.<sup>126</sup>

The House Committee on Labor's Report on the Wagner bill notes that allowing multiple representation would permit an employer to play one group of employees against another.<sup>127</sup>

If, however, the company should undertake to deal with each group separately, there would result the conditions pointed out by the present National Labor Relations Board in its decision in the *Matter of Houde Engineering Corporation*:

It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. \* \* \* Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks.<sup>128</sup>

## *2. Non-union Employee Representative Groups Had Been Dominated by the Employer*

Chairman Walsh asked the spokesman for the Institute of American Meat Packers, "[m]any of the employee-representation plans I believe you will admit are dominated by the employer."<sup>129</sup>

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126. *Id.*

127. *Id.* at 2975.

128. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2974-75 (1949).

129. *Id.* at 1881.

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On the House side, the Chairman of the House Committee on Labor, stated to a witness, “[o]f course, the entire purpose of this bill is to do away with company unions. There is no doubt about that, because we feel—Senator Wagner and I feel that they are given a very unfair advantage.”<sup>130</sup>

The Report of the House Committee on Labor on the Senate bill included:

It has been the experience of the National Labor Relations Board in cases before it that employers opposing majority rule wished only to keep their responsibilities diffused and to maintain in the picture a complacent minority group, typically a company union, so that no collective agreement might be reached at all. This motivation has been brought to the surface in specific cases where employers refused to recognize the rule when trade unions represented the majority, although in the course of the previous history of the disputes in question, when the opposing employer-promoted company unions had a majority, the employers had invoked the majority rule as the excuse for their refusal to deal with the same trade unions.<sup>131</sup>

In these two additional motivations, the legislative history makes clear the 1935 Congress’s desire to help organized labor.<sup>132</sup> The Wagner Act did that.<sup>133</sup> The desire to help labor over management, however, is a governmental interest very different from that of promoting collective bargaining and, thus, presumably, labor peace. Looked at from the perspective of the minority employees who were not members of the union, the balance appears that their First Amendment interests were sacrificed for the financial gain of one side in an economic struggle.<sup>134</sup> The disfavored employees were presumed to be the servants of management, in the eyes of the Members of Congress who participated in creating this legislative record.<sup>135</sup> Congress decided to give unions an economic benefit taken from management and their servants.<sup>136</sup> Whereas that might be perfectly permissible economic legislation, it constitutes an insufficient rebuttal to a group whose First Amendment rights were

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130. *Id.* at 2536.

131. *Id.* at 2975–76.

132. *See id.* at 2979.

133. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2979 (1949).

134. *Id.* at 2188.

135. *Id.* at 1679–80 (using the analogy of servants continuously to speak about the minority group that will not work under a collective agreement system).

136. *See id.* at 2537–39 (speaking on the importance of collective bargaining and using statistical examples to demonstrate the workingman’s monetary struggles and concerns to feed their children).

compromised to say the deprivation of their rights was done for the purpose of taking economic power away from that group as well.

*E. Other Discussion of Exclusivity*

The only other discussions of exclusive representation revolved around an ambiguity that persisted in the Act as to whether an employer could ever bargain with an employee or group of employees other than the recognized bargaining representative.<sup>137</sup> As mentioned above, this ambiguity persisted into the Supreme Court's early jurisprudence on section 9(a) of the NLRA: with the *Jones & Laughlin* Court interpreting the language to allow individual bargaining to continue.<sup>138</sup> The NLRA's sponsors' apparent concession that separate negotiations could continue, and the Supreme Court's early adoption of that view, undercuts the claim that a single bargaining agent was essential to the effectiveness of the statute, as seen by those closest to the time the law was enacted.

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137. There are three references.

First, in response to criticism from the League for Industrial Rights of New York, Senator Walsh, the Chairman of the Senate Committee on Education and Labor, said the purpose of section 9(a) was only to require a single signature on an agreement, not to bar employee groups other than the bargaining unit representative from participating in the negotiations. *Id.* at 1912. He then appeared to withdraw a bit from that position to say that such participation would have to be with the approval of the union and the employer; if that was not forthcoming, the minority groups could nevertheless approach the employer separately with their grievances, as the text of Section 9(a) specifies. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1912 (1949). President Roosevelt's statement on the goal of the Automobile Labor Board was quoted by Mr. C.S. Craigmile, representing the Electric Industry of Illinois:

In the settlement just accomplished two outstanding advances have been achieved. In the first place, we have set forth a basis on which, for the first time in any large industry, a more comprehensive, a more adequate, and a more equitable system of industrial relations may be built than ever before. It is my hope that this system may develop into a kind of works council in industry in which all groups of employees, whatever may be their choice of organization or form of representation, may participate in joint conferences with their employers, and I am assured by the industry that such is also their goal and wish. *Id.* at 1912.

Second, Senator Wagner's floor statement during debate of his bill included the following statement, "[i]n addition, the bill preserves the right of any individual or minority group to present grievances to its employer." *Id.* at 2337.

Third, the President of the American Federation of Labor and the Chairman of the House Committee on Labor discussed the possible need for an amendment to make it clear that if an individual employee brought a grievance to the employer, it would have to be settled between the exclusive representative and the employer. *Id.* at 2685. The proposed amendment, however, was not adopted. *Id.*

138. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 45.

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Beyond the legislative record, the defense of exclusive representation put forward by the *Janus* dissenters were three: 1) to foster collective bargaining in the interests of labor peace,<sup>139</sup> 2) to induce labor unions to undertake collective bargaining by preventing free-riding by employees who get the benefit of union representation without paying union dues,<sup>140</sup> and 3) to streamline bargaining by providing only one counter-party to management.<sup>141</sup>

*1. Inducing Unions to Undertake Collective Bargaining*

The major point of contention between the *Janus* majority and the lead dissent (by Justice Kagan) opinions dealt with whether agency fees were necessary in order to induce unions to represent workers in labor-management relations.<sup>142</sup>

In overturning *Abood*, the *Janus* majority cited actual labor-management relations experience that undercut the *Abood* premise that agency fees were necessary to induce effective labor-management negotiations.<sup>143</sup> The twenty-eight states that do not permit agency fees, under the “right to work” proviso of the Taft-Hartley Act, presented the *Janus* Court with ample evidence that labor unions would be willing to represent all employees in a bargaining unit even if some of the

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139. *Janus*, 138 S. Ct. at 2488 (Kagan, J., dissenting). The *Janus* majority ruled:

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests— ‘labor peace’—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked. *Id.* at 2480.

Courts in future cases might well take this as an invitation to consider whether “labor peace” demands exclusive representation, any more than it does agency fees.

140. *Id.* at 2489 (Kagan, J., dissenting). A variant of the free-rider argument is that unions be adequately compensated for carrying out their bargaining representative duties. The *Janus* majority ruled that this rationale was “insufficient.” *Id.* at 2477.

141. *Id.* at 2465, 2489 (Kagan, J., dissenting).

142. *See id.* at 2489 (Kagan, J., dissenting).

143. *See id.* at 2466 (citing *Harris v. Quinn*, 573 U.S. 616, 618 (2014) (using illustrative federal employment experience and statistics, namely the Postal Service, to demonstrate that requirement to pay an agency fee is no longer needed as the *Abood* Court thought to achieve effective representation)).

employees did not pay for representation.<sup>144</sup> The Court noted that there were, evidently, other attractions to being the representative of employees in a bargaining unit.<sup>145</sup> The exclusive nature of the union's representation was one such attraction, but not the only one.<sup>146</sup>

If the Court were to consider eliminating exclusive representation, therefore, in a future case, it would likely consider the possible diminution of labor unions' willingness to take on the bargaining task, if denied exclusivity as well as agency fees. The Court will look for evidence, as it did in *Janus*, from contemporary labor management relations. Can effective labor-management relations, and collective bargaining, survive an end to a union's exclusivity? The NLRA forbids a natural experiment to answer that question in the private sector but not in state and municipal government.<sup>147</sup>

That evidence will now begin to be developed as states experiment with non-exclusive representation. This trend has already begun, with a push both from public employers and public employee unions.<sup>148</sup> The *Janus* decision will cause public employee unions to consider whether the burden of the duty of fair representation is worth bearing, when those they consider free-riders are excused from paying agency fees. At the same time, state and municipal government employers (or state

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144. *Id.* The majority also made reference to experience with federal labor-management relations. *Janus*, 138 S. Ct. at 2488 (Kagan, J., dissenting).

145. *Id.* at 2467.

146. *Id.*

Even without agency fees, designation as the exclusive representative confers many benefits. . . . Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. . . . Designation as exclusive representative thus 'results in a tremendous increase in the power' of the union. *Id.* (quoting *Am. Commc'ns Ass'n. v. Douds*, 339 U.S. 382, 401 (1950)).

"In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees . . . and having dues and fees deducted directly from employee wages . . . . The collective-bargaining agreement in this case guarantees a long list of additional privileges." *Janus*, 138 S. Ct. at 2467.

147. See 29 U.S.C. §§ 152, 159(a) (2012).

148. See Heather Gies, *Disaster Averted: How Unions Have Dodged the Blow of Janus (So Far)*, INTHESSETIMES (Jan. 10, 2019), <http://inthesetimes.com/article/21661/public-sector-unions-response-to-janus> (describing the potential "existential threat to membership" after *Janus* due to "opt-out" campaigns that allow employees to leave the union knowing they can get benefits for free); Kim Crockett, *The Janus Effect: Public Sector Unionization Rate is Slightly Down*, CENTER OF THE AMERICAN EXPERIMENT (Jan. 21, 2019), <https://www.americanexperiment.org/2019/01/janus-effect-public-sector-unionization-rate-slightly/> (discussing the Bureau of Labor Statistics' data on union membership showing a slight decrease in union membership since *Janus* in both the private and public sectors).

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legislatures, city councils, and county boards) will have to decide whether dealing with one exclusive representative of their employees in a bargaining unit is more desirable than being able to deal with groups of employees separately. Some employment relationships already exist where a government employer deals with more than one representative of the workers in a government unit.<sup>149</sup> The Court's approach in *Janus* suggests it would look to actual practice before deciding whether it was essential that First Amendment interests be outweighed in order to induce collective bargaining.<sup>150</sup>

### 2. *Fostering Labor Peace by Preventing Inter-union Rivalry*

The *Janus* court explicitly ruled that labor peace was insufficient to justify the requirement for non-union employees to pay union dues.<sup>151</sup> That case, of course, dealt with public employers.<sup>152</sup> As for private employers, canvassing the legislative history of the two enactments of the NLRA, in 1935 (the “Wagner”), and in 1947 (the “Taft–Hartley Act”) as this article does above reveals a paucity of evidence that exclusive representation was considered necessary to achieve labor peace. Rather, it is the balance of power between employers and labor unions that dominates the legislative history. Whether or not ensuring labor peace would rise to the level adequate to override First Amendment interests under the exacting scrutiny standard, in point of fact, it is the conveying of economic power to labor, and not labor peace *per se*, that one discerns from a reading of the legislative history as the reason for exclusive representation. Employees unwilling to join the labor union were disfavored under the Wagner Act: they were called free-riders, and stooges for management.<sup>153</sup>

Congress certainly had the right, under the Commerce Clause, to enact legislation expressing that degree of favoritism; but it is an entirely different matter whether the interest to favor one group of employees over another in economic terms constitutes a valid reason to override the First Amendment rights of the second group of employees. That second group

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149. See Nicole Ogrysko, *SSA, AFGE reach new collective bargaining agreement after contentious saga*, FEDERAL NEWS NETWORK (Oct. 3, 2019, 5:47 PM), <https://federalnewsnetwork.com/unions/2019/10/ssa-afge-reach-new-collective-bargaining-agreement-after-contentious-saga/> (speaking about a recent tense negotiation between representatives of Social Security Administration and the American Federation of Government Employees over the bargaining process—specifically how long they could negotiate and what specifically they should negotiate over).

150. See *Janus*, 138 S. Ct. at 2464.

151. *Id.* at 2466 (quoting *Harris v. Quinn*, 573 U.S. 616, 618 (2014)).

152. *Id.* at 2459–60.

153. See Section II, D, 2, *supra*.

of employees would have been twice the victims of the majority group: first, in being forced to have the majority group speak for them; second, in having the economic interest of the majority group cited as sufficient reason for doing so.

Reducing the abilities of rivals to an exclusive union cannot, therefore, be an adequate interest to countervail the First Amendment interests of those employees not supportive of the union, because it stems exactly from the First Amendment violation.<sup>154</sup> Eliminating another union whom these other employees may have favored might, indeed, guarantee labor peace; but in just the way that banning all but one political party might foster fewer politically inspired disturbances.

Further, the inter-union rivalry of which Senator Wagner spoke was associated with the struggle of independent unions with company-unions.<sup>155</sup> The legislative history is entirely devoid of descriptions of competing unions independent of management fighting with each other to represent a bargaining unit, and thus jeopardizing labor peace.<sup>156</sup> Once the Wagner Act was passed, with its explicit prohibition on employer involvement in unions, the additional need for exclusive representation diminished.<sup>157</sup> That part of the NLRA remains unchallenged. It also provides a less restrictive alternative to restricting employees' First Amendment rights: the problem of company-dominated unions competing with workers' own choice was addressed directly by banning the former.<sup>158</sup>

If forcing an employee to be silent while another speaks for her or him is as much a First Amendment violation as forcing a non-union employee to pay an agency fee to a union, the labor peace rationale should be no more availing for exclusivity than it was for agency dues.

### *3. Exclusive Representation Might Help Employers by Making Bargaining Less Complex*

Justice Kagan's *Janus* dissent advanced an additional interest for agency fees that might be mustered on behalf of exclusive representation as well: employers might want to bargain with only one union.<sup>159</sup>

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154. See *Janus* 138 S. Ct. at 2464.

155. See 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2910 (1949).

156. See generally 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949); 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (1949) (failing to discuss descriptions of competing unions).

157. 29 U.S.C. § 159(a) (2012).

158. 29 U.S.C. § 158(a) (2012).

159. *Janus*, 138 S. Ct. at 2491 (citing *Harris*, 573 U.S. at 663).



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The NLRA, however, does not leave exclusive representation up to the choice of management.<sup>160</sup> It mandates it.<sup>161</sup> The NLRA decides, in a one-size-fits-all way, that exclusive bargaining is best—even in the case where the employer might prefer to bargain with different groups of employees.<sup>162</sup> The legislative history, as shown above, included reference to employers who preferred to bargain with more than one representative of employees.<sup>163</sup> The NLRA does not give them that choice because helping employers bargain was decidedly not what the NLRA was intended to do, in 1935.<sup>164</sup> Its real basis was a desire to give power to labor versus management in an economic struggle.<sup>165</sup> That is what the legislative history shows, and it’s also apparent from this aspect of the structure of the statute.<sup>166</sup>

The conclusion might be different when considering government employers.<sup>167</sup> Here, the NLRA is not applicable.<sup>168</sup> States, counties, and cities might decide to offer exclusive representation status to a government employee union. These decisions recognize that some government employers might want to deal with a single representative of their employees, while others may prefer to allow individual contracts.<sup>169</sup> The first group might require some employees to be silenced.<sup>170</sup> This was permissible, the Court held, where the subject matter was the mundane, daily operations of a government agency, like complaining about reassignment<sup>171</sup>, or disagreeing with a pre-sentence report in a prosecutor’s office.<sup>172</sup> In giving weight to this factor, the Court championed the employer’s choice of how best to run a workplace.<sup>173</sup>

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160. 29 U.S.C. § 159(a).

161. *Id.*

162. *Id.*

163. See 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2974–75 (1949).

164. *Id.*

165. See *id.* at 2974–76.

166. See *id.*; 29 U.S.C. § 159(a) (2012).

167. See 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1085 (1949) (explaining an employer “shall not include the United States, or any State, municipal corporation, or other governmental instrumentality”).

168. *Id.*

169. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007).

170. *Id.*

171. *Connick v. Myers*, 461 U.S. 138, 149 (1983).

172. *Garcetti v. Ceballos*, 547 U.S. 410, 414, 426 (2006).

173. See *Connick*, 461 U.S. at 149; *Garcetti*, 547 U.S. at 426. “Time and again our cases have recognized that the Government has a much freer hand in dealing ‘with citizen employees than it does when it brings its sovereign power to bear on citizens at large.’” *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (quoting *Engquist v. Oregon Dept. of Agric.*, 553 U.S.

It is quite another matter, however, for the government employer to go beyond silencing one of its employees to designating another to speak for that employee, one with whom the employee disagrees. If this constitutes compelled speech, as this article maintains, then the efficiency rationales that sufficed for government employers simply to silence employees would have to stretch much farther.

*G. Conclusion: The Interest to Help Labor Unions' Economic Power by Granting Them Exclusive Representation*

In 1935, Congress chose to weigh in on behalf of labor and against management. The legislative history shows that employees who complained about having to yield to unions as their spokesperson, employees who preferred to represent themselves in dealing with management, were castigated as pawns of management. When the 1935 Congress made its decision to favor unions in the economic struggle, the unions' antagonist was seen as management and management's lackeys: employees who disfavored the union.<sup>174</sup> To help the unions, Congress constricted management prerogatives theretofore enjoyed.<sup>175</sup> That was constitutional.<sup>176</sup> However, when it went further and silenced non-union employees, compelling them to be silent while another spoke for them, Congress took away constitutional rights from a group of employees in order to effectuate another (economic) blow to that same group.<sup>177</sup>

The desire to confer economic wealth on one group in society might explain much of what Congress and state legislatures do,<sup>178</sup> but it cannot

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591, 599 (2008)). This distinction is grounded on the "common-sense realization" that if every "employment decision became a constitutional matter," the Government could not function. *Connick*, 461 U.S. at 143; *see also* *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("[t]he Due Process Clause . . . is not a guarantee against incorrect or ill-advised personnel decisions"). Justice Kagan, in her *Janus* dissent, cites that portion of *NASA v. Nelson*, then continues: "The government, we have stated, needs to run 'as effectively and efficiently as possible.' . . . [quoting *Engquist*, 553 U.S. 591 at 598]. That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to 'certain limitations on his or her freedom.' . . . [quoting *Garcetti*, 547 U.S. 410 at 418]. Government workers, of course, do not wholly 'lose their constitutional rights when they accept their positions.' . . . [quoting *Engquist*, 553 U.S. 591 at 600]. But under our precedent, their rights often yield when weighed 'against the realities of the employment context.' . . . [quoting *Engquist*]." *Janus*, 138 S. Ct. at 2492 (Kagan, J., dissenting).

174. *Id.* at 1125.

175. *Id.* at 1111.

176. *Id.*

177. 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1173 (1949).

178. *See, e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 485–86 (1955) (favoring one profession over others).

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seriously be considered as adequate to justify an intrusion on Constitutional rights.

### III. THE FUTURE WITHOUT EXCLUSIVE REPRESENTATION

Having identified the governmental interests behind exclusive representation, constitutional analysis must next consider whether means less intrusive on Constitutional rights could be used to achieve those interests.

What would be left to induce a union to represent a group of employees, if the union were denied both agency fees and exclusive status? The answer has been surprisingly strong from union partisans: the ability to show the union's comparative advantage by what it can get for its members will attract more workers to join the union, and the union should represent only those who choose to join. This might result in several different unions representing different workers in the same bargaining unit.

In the wake of *Janus*, public-sector unions have joined hands to reiterate their support for exclusive representation, rejecting proposals that have the potential to undermine exclusivity or limit representation to dues-paying members. While we applaud unions' instinct to reject a fee-for-services model as inconsistent with the solidarity principle that animates unionism, we worry that the embrace of exclusivity is simply an effort to substitute the power of coerced solidarity at law for the power of solidarity unionism in its true sense. We urge unions to relinquish their grip on the doctrine of exclusive representation and majority rule and experiment with new forms of unionism, including members-only arrangements. We and others have made the case for this more fully in previous work.<sup>179</sup>

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179. Marion C. Crain & Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 EMP. RTS. & EMP. POL'Y J. 259, 282–83 (2018). The “previous work” cited is in footnote 130. *Id.* at 283 n.130.

Our argument has been predicated on the propensity of the united front ideology and the exclusivity/majority rule principles that advance it to subordinate the interests of women and people of color within the union's ranks. *See, e.g.*, Marion Crain & Ken Matheny, *Labor's Divided Ranks*: Privilege and the United Front Ideology, 84 Cornell L. Rev. 1542, 1542 (1999); Marion Crain & Ken Matheny, *Making Labor's Rhetoric Reality*, 5 Green Bag 2d 17, 18 (2001); Ken Matheny & Marion Crain, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. Irvine L. Rev. 561, 561 (2014). Other scholars have made the case for nonmajority representation for different reasons. *See, e.g.*, Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 Chi.-Kent L. Rev. 195, 208 (1993) (pointing out the advantages of eliminating the need for the NLRA's burdensome election machinery and the delays it promotes); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. Pa. L. Rev. 897, 926 (1975) (questioning the doctrine and the

*A. Multiple Unions Represent Employees in a Single Bargaining Unit in Other Contexts*

The federal workforce made use of more than one union in a bargaining unit from 1961 to 1973, starting with an Executive Order from President Kennedy.<sup>180</sup> In 1986, Thomas Donahue, the Secretary-Treasurer of the AFL-CIO, commented on this period:

[H]ow do public employee unions live in . . . places where we don't have exclusive representation? They live very well, or they live well in terms of the members they represent on a members-only basis . . . . In the Federal sector, from '61 to '73, recognition in the Federal service was at 3 different levels. We had an informal, formal, and exclusive representation level . . . . We all railed against that. We said that's

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assumption that a united front confers power); Clyde W. Summers, Questioning the Unquestioned in Collective Labor Law, 47 Cath. U.L. Rev. 791, 795–801 (1998) (noting the all-or-nothing nature of the exclusive representation system and its majority rule counterpart). Prior to *Janus*, a number of commentators had also urged the NLRB to relax the exclusivity principle and relieve unions of their duty of fair representation in states with right to work laws, since the libertarian philosophy underlying the right to work regime prohibiting cost-sharing is fundamentally at odds with the federal rule of exclusive representation. See, e.g., Catherine Fisk & Benjamin Sachs, Restoring Equity in Right-to-Work Law, 4 U.C. Irvine L. Rev. 857, 859 (2014) (arguing that the confluence of the labor law doctrines of exclusivity, majority rule and the judicially created duty of fair representation are unjust when applied in states with right to work law: “If state law is to allow workers to decline union membership and to decline to pay for union representation, federal law ought not require that the union nonetheless provide equal representation to the nonpaying nonmember”). Fisk and Sachs suggested that the law should protect members-only unionism in right to work states, or at least permit unions to charge a fee for representation services provided directly to the non-paying nonmember. *Id.* at 861–62. See also Catherine Fisk & Xenia Tashlitsky, Imagine a World Where Employers are Required to Bargain with Minority Unions, 27 ABA J. Lab. & Emp. L. 1, 1 (2011) (discussing the pros and cons of members-only unionism and urging the NLRB to solicit feedback and undertake rulemaking in the area); Catherine L. Fisk, Labor at a Crossroads: In Defense of Members-Only Unionism, Am. Prospect (Jan. 15, 2015), <http://prospect.org/article/labor-crossroads-defense-members-only-unionism> (reversal of *Abood* should lay the legal groundwork for relieving unions of their duty of fair representation and protecting members-only unionism).

180. See CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 196 (1988). “Another variant was tried in public sector labor relations during the 1960s. An executive order by President Kennedy established different levels of standing: associations gaining the support of 50 percent of a unit gained exclusive recognition, but failing that any group of 10 percent gained formal rights of consultation.” *Id.*

[T]he ‘10 percent rule’ used in the federal sector during the 1970s [provided that] [a]ny association with at least 10 percent of a unit would have rights of representation. Within each unit a committee would be established composed of representatives of all employee groups that met this criterion—a kind of multilateral ‘labor-management committee.’ This committee would then have the authority to constitute task forces to negotiate specific issues, choosing their membership according to the nature of the problem. *Id.* at 224–25.

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terrible. It gives us a multiplicity of unions and we want to move onto exclusive representation. And we did. In 1973 the executive order was changed with the passage of the Civil Service Reform Act.

I don't know if we're any better off. I can tell you that the American Federation of Government Employees is half its former size . . . . Wouldn't it be fascinating if when we lost an election, but got 35 or 40 percent of the vote, we could settle for something less than exclusive recognition and could maintain a representation of that 30 or 40 percent of workers for grievance rights or for whatever rights we had, until next year?<sup>181</sup>

The *Janus* majority suggested just this approach regarding grievance arbitration: having struck down mandatory agency fees, the Court suggested individual employees could choose to pay a fee to a union for representing the employee in any given grievance.<sup>182</sup>

In response to *Janus*, changes in state government employment laws, unburdened by the federal labor law's constraints, have openly discussed giving up exclusive representation, in return for jettisoning the duty to represent all employees in a bargaining unit,<sup>183</sup> thus obviating the free-rider problem.<sup>184</sup>

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181. *Id.* at 183. Multiple union representation has long been practiced in Europe, as well. *See id.* at 174. *See also* Eckhard Voss, Katharina Schoneberg & Ricardo R. Contreras, *Collective Bargaining in Europe in the 21st century*, EUROFOUND 24–25 (2015), [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1548en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1548en.pdf) (describing multiple union representation in France, Italy, Germany, and Greece).

182. *Janus*, 138 S. Ct. at 2468–69.

183. Maria O'Brien Hylton, *A Few Observations About the Curious State of Massachusetts Labor Law: Public-Sector Unions After Janus*, 22 EMP. RTS. & EMP. POL'Y J. 301, 315–16 (2018).

Although commentators anticipated coordinated responses to *Janus*, several proposed amendments to labor laws in Massachusetts reflect an especially intense reaction. The proposals did not attempt to mask their true purpose through subtle language, instead overtly including provisions designed to discriminate against public employees that do not belong to a union. For example, the current provisions prohibit unions and employers from discriminating with regard to terms of employment in order to encourage union affiliation. Section 6 of the new proposal, however, added an exception that would allow collective bargaining agreements to 'provide different terms and conditions of employment for members of the employee organization (i.e. the union) than those terms and conditions applied by the public employer to employees who have elected not to maintain membership in the employee organization.' There is no need to read between the lines here; this proposal would allow unions to negotiate better deals for members of the union than for non-members.

*Id.*

*See also* Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. (forthcoming 2019) (manuscript at 17) (for a discussion of "Members Only Representation").

184. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 185 (2015)

Would multiple union bargaining units undermine labor peace by inducing inter-union raiding? Two union advocates respond to this concern in the negative:

A second argument raised by union advocates against members-only unionism is that nonmajority unions would spend most of their time and funds fending off challenges from business-backed worker representation groups (effectively company unions), undermining their strength. While there is certainly truth to this concern (indeed, it was part of Senator Wagner's original justification for exclusivity and section 8(a)(2), the prohibition on company unions), exclusivity also inhibits efforts to innovate and bring new concerns to the table. If exclusivity were abolished, it would create breathing space for new worker organizations that might emphasize issues of particular concern to groups of workers, for example women and people of color. Endorsing competition between unions would also provide a foothold for internal union reform movements to flourish—like the one that produced the Chicago teachers' strike of 2012 and revitalized the union—ultimately enhancing internal union democracy and insuring an engaged membership.<sup>185</sup>

*B. The Multiple Union Solution as it Bears on the Claimed Benefits to Employers from Exclusive Representation*

Consider next the supposed benefit having to deal with only one union confers on employers. If Justice Kagan's surmise that government employers prefer a single union by streamlining the bargaining process<sup>186</sup> carried over to the private sector as well, then, presumably, a large number of workplace situations would involve an employer acceding to a union's request for exclusive representation, and no great benefit would

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Most state 'right-to-work' laws prohibit mandatory union fees of any kind, and the NLRA, as conventionally read, does not preempt those state laws. On that view, federal labor law allows states to create a free-rider problem by denying unions the ability to require workers to pay for services that federal law requires unions to render as part of their duty of fair representation. *Id.*

185. Marion C. Crane & Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 EMP. RTS. & EMP. POL'Y J. 259, 286 (2018).

186. See *Janus*, 138 S. Ct. at 2488–89 (Kagan, J., dissenting). Justice Kagan extols the virtue of having exclusive bargaining representatives. *Id.* “[E]xclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment.” *Id.* If the issue were left open to the employer, then, some employers might prefer to bargain with only one union. However, this does not argue for a rule that all employers must bargain with an exclusive bargaining representative. All it would prove is that the choice should be left up to the bargaining parties. The NLRA, by contrast, mandates exclusive representation. 29 U.S.C. § 159(a).

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be lost by ending the compulsion of exclusive representation. It would happen anyway.<sup>187</sup>

When, however, labor and management disagreed about having an exclusive bargaining representative, the outcome would be determined by their relative economic power in bargaining—as is presently the case, for instance, with a union security agreement and check-off.<sup>188</sup> The constitutional violation is for Congress to have compelled exclusive representation in the NLRA, not for private parties to agree to this feature of their own labor-management contract.<sup>189</sup>

As for the supposed advantages of diminished strife between rival groups trying to represent workers, multiple union representation might also be a less restrictive alternative.<sup>190</sup> In the last quarter of the 20<sup>th</sup> century, strikes were most common in three industries, two of which involved one union (the industrial union model) and one where many different unions represented employees working next to each other (the craft union model).<sup>191</sup>

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187. 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1319 (1949).

188. See *Janus*, 138 S. Ct. at 2463–64. Neither a union shop nor a check-off (the deduction of union dues or agency fees from an employee’s paycheck) violates the First Amendment since, in the private sector, the National Labor Relations Act permits but does not compel these features. *Id.* Exclusive bargaining, however, is compelled by the National Labor Relations Act, and hence constitutes governmental suppression of First Amendment rights. *Id.* at 2478.

189. *Id.* at 2455–56. Only the union may engage in collective bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. *Id.*

190. As shown above, the source of this rivalry most cited in the legislative history was the strife between employee groups actually dominated by employers and unions without employer ties. See *supra* text accompanying note 162.

191. U.S. Dep’t of Labor, *Small Number of Industries Involved in Largest Strikes*, U.S. BUREAU OF LABOR STATISTICS (Oct. 6, 2000), <https://www.bls.gov/opub/ted/2000/oct/wk1/art05.htm>.

Three industries accounted for 13 of the 19 months between 1975 and 1997 in which strike activity had a very large effect on payroll employment estimates. The telephone communications industry was involved in strikes that affected payroll employment estimates by more than 50,000 jobs in six months: August 1983, June 1986, and August through November 1989. The coal mining industry was involved in large strikes in four months: December 1977, January 1978, and April–May 1981. Strikes among general building contractors had large effects on employment estimates in May 1975, July 1980, and June 1981.

*Id.*

The *Janus* court proposed a less restrictive alternative to the agency fee: a public employee who wanted the union's help with a grievance could pay for that service without incurring any other charges included in an agency fee.<sup>192</sup> In parallel fashion, the less restrictive alternative to exclusive bargaining representation would allow an employee freedom to designate whomever the employee wished to represent that employee in collective bargaining, including the union if the employee so wished.

Would that impose an unworkable labor management situation on the government unit? In some industries, multiple unions representing different crafts bargain with a single employer.<sup>193</sup> The alternative model, where one industrial union represents all the employees in a single work site, also exists.<sup>194</sup> The co-existence of craft and industrial union models belies the argument that single union representatives are essential for effective collective bargaining, efficient labor management relations, or labor peace.<sup>195</sup>

[T]here is considerable concern expressed for the plight of the employer who will be faced with the ordeal of dealing with a number of unions and all that entails: more negotiating sessions, more grievance proceedings, more strikes or threats of strikes, and more competition among the several unions. This concern may not be universal, because there seem to be a number of employers today who desire to deal with as many unions as possible. I am unaware of any evidence that such employers are unduly burdened by the presence of several craft unions, rather than one industrial union.<sup>196</sup>

If multiple union bargaining units jeopardize labor peace in the public sector, government employers have a much stronger alternative than private employers: they can choose not to have a union for their employees at all.<sup>197</sup> That would completely eliminate any inter-union

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Telephone communications and coal mining are characterized by industrial unions; construction is characterized by craft unions. *Id.*

192. *Janus*, 138 S. Ct. at 2468–69 (citing *Harris v. Quinn*, 573 U.S. 616, 618 (2014)).

193. ALBERT REES, *THE ECONOMICS OF TRADE UNIONS* 22 (3d ed. 1989).

194. *Id.*

195. Labor management relations in professional sports also undermines such an argument. Sports team owners negotiate different agreements with virtually every star athlete in professional baseball, basketball, and football. Thomas Barrabi & Renwick Wilson, *The Biggest Sports Contracts in History*, Fox Business (Mar. 19, 2019), <https://www.foxbusiness.com/media/canelo-alvarez-alex-rodriguez-worlds-most-expensive-athlete-contracts> (citing numerous contracts signed by individual professional athletes).

196. George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished*, 123 U. Penn. L. Rev. 897, 937 (1975).

197. 29 U.S.C. § 152(2) (2012).



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strife. Public employers are on one side of labor-management relations, and they are also writers of the laws that govern labor-management relations.<sup>198</sup> State and local government executive and legislative branches have the broadest scheme of less restrictive alternatives from which to choose, rather than intruding upon First Amendment rights of their employees.<sup>199</sup>

*C. Giving Economic Power to Unions*

The only interest that might be predicted to be damaged by abandoning the NLRA's legal mandate of exclusive representation is the interest to convey economic power to unions. That was explicitly a dominant rationale for the 1935 Wagner Act.<sup>200</sup> However, the goal of advancing one side in an economic struggle is not of the same valence as preventing imminent lawless action,<sup>201</sup> averting a clear and present danger of a criminal act,<sup>202</sup> administering the national selective service system,<sup>203</sup> or virtually any of the other governmental interests that have been held sufficient to outweigh First Amendment interests.

On the public employer side, it might be that government employers have agreed to exclusive representation for their unions, as they did on agency fees prior to *Janus*, because they were pressured to do so by powerful public employee unions.<sup>204</sup> The American labor movement now draws much more deeply from the public than the private side,<sup>205</sup> and political considerations cannot be discounted as explanations for the terms of public employee contracts. Obviously, however, this is precisely the reason to be especially protective of the First Amendment rights of employees who are not in solidarity with the union, and do not wish the union to speak for them.<sup>206</sup>

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198. 29 U.S.C. § 156 (2012).

199. *Janus*, 138 S. Ct. at 2492 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006)).

200. See text, section II, A, 1, D, 1, *supra*.

201. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

202. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

203. *United States v. O'Brien*, 391 U.S. 367, 375 (1968).

204. *Janus*, 138 S. Ct. at 2448.

205. See U.S. Dep't of Labor, *Economic News Release*, U.S. BUREAU OF LABOR STATISTICS (Jan. 22, 2020), <https://www.bls.gov/news.release/union2.t03.htm>. In 2018, though one sixth the size of the number of employees in the private sector, union membership in the public sector was roughly equal to that in the public sector. *Id.*

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

## CONCLUSION

Exclusive representation compels employees to be silent while others, with whom they disagree, speak for them.<sup>207</sup> Exclusive representation denies workers the right to associate with representatives of their own choosing.<sup>208</sup> In public employment, the Supreme Court's opinion in *Janus* recognized these impositions on First Amendment rights in the context of mandatory union agency fees in the public sector.<sup>209</sup> The Court's logic leads to the same conclusion for exclusive representation.<sup>210</sup>

Further, the Court's logic leads to the same conclusion in the private sector, where exclusive representation is mandated by the NLRA.<sup>211</sup> None of the Supreme Court precedent upholding the NLRA as a legitimate exercise of Congress' authority over interstate commerce requires upholding exclusive representation.<sup>212</sup> Indeed, none has addressed the First Amendment issues.<sup>213</sup> The legislative history of the NLRA is devoid of any demonstration that exclusive representation was necessary for labor peace, let alone any suggestion of a governmental interest that would survive "exacting scrutiny," the relevant test.

Should the federal mandate for exclusive representation be struck down, private employment contracts could still provide for exclusive representation if management and labor bargained for it. If bargaining in the private sector did not yield exclusive representation, then in that sector, as in the public sector, unions would compete for membership and have the duty of representing only those employees who chose to join that particular union. That system has existed before in the American public sector, and early indications post-*Janus* are that it is reviving in several states as well. As for the private sector, this development might actually energize a labor movement that has been atrophying in America, as unions would earn their right to represent members by delivering benefits for those who choose to join them, rather than compelling unwilling workers to submerge their Constitutional free speech and free associational rights.

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207. *See id.* at 2467.

208. *See id.* at 2469.

209. *See id.* at 2478.

210. *See id.* at 2480.

211. 29 U.S.C. § 159(a) (2012).

212. *See generally, e.g., Ry. Emp.'s Dep't v. Hanson*, 351 U.S. 225 (1956); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding exclusive representation unnecessary).

213. *See generally, e.g., Ry. Emp.'s Dep't v. Hanson*, 351 U.S. 225 (1956); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (failing to address First Amendment issues).