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Issue Brief

June 2021

The Doomed Constitutional Case Against Exclusive Representation

Michael M. Oswalt

When the Supreme Court decided *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)*¹ in 2018, the decision not only made it unconstitutional for public sector unions to require “fair share fees” for negotiating contracts and defending workers, it also set off a litigation landslide. Literally hundreds of cases have waded through the courts urging various theoretical extensions of *Janus* that—boiled down—seek to starve unions and their members of even more funding.²

Janus does, in fact, raise new First Amendment questions about workplace relations in states, cities, and towns that cannot be ignored.³ But one prominent series of challenges should, if not be ignored, at least be quickly dismissed. In the past few years, anti-union forces have launched repeated constitutional attacks against one of labor law’s oldest and most foundational principles: majority rule. It takes a majority to win a union, and—like any democratic system—once established the union represents and fights for everyone, supporters and non-supporters alike. This concept, known as “exclusive representation,” is both a legal standard and a relational philosophy summed up by the saying, “an injury to one is an injury to all.”

So far none of the attacks have gained traction, for good reason. The constitutional case against exclusive representation is flatly foreclosed by Supreme Court precedent and otherwise

¹ *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

² See Ann C. Hodges, *The U.S. Labor Relations System after Janus v. AFSCME: an Early Assessment*, 33 EMP. RESP. & RIGHTS J. 49, 51 (2021) (“The forces that have long funded the litigation challenging union finances immediately went to work to take advantage of the decision to both recoup previously paid dues and fees and to convince employees to withdraw their membership from unions.”).

³ See Martin H. Malin, *Janus and the First Amendment in the Workplace*, 24 EMP. RIGHTS AND EMP. POL’Y J. 9 (2020) (describing “the implications of *Janus* for the First Amendment as applied in the workplace” as “profound”).

logically and doctrinally unpersuasive. But since the challenges continue, that underlying legal reality is worth revisiting.

This Issue Brief covers the main issues, in four parts. Part I explains what exclusive representation is and why, for decades, labor and management have considered it an essential feature of unionized workplaces. Part II introduces *Minnesota State Board for Community Colleges v. Knight*,⁴ the 1984 litigation that failed to persuade the Supreme Court that exclusive representation violates the First Amendment. It then touches on how the Court's evolving approach to free speech has emboldened forces long opposed to collective bargaining in the public sector. Part III shows how that confidence is misplaced. The newest wave of First Amendment decisions, including *Janus v. AFSCME*, have actually strengthened *Knight's* reasoning. In 2021, as in 1984, exclusive representation is not just constitutional, it's the only system that works. Part IV concludes.

I. Exclusive Representation and its Benefits: A Decades-Long Consensus

Collective bargaining operates a bit like a mini-democracy. The process starts with workers campaigning for a union. If a majority votes in favor of representation—often through a secret ballot, but sometimes using signed cards—negotiations on a contract begin. The standards written into the final agreement function as “an agreed-upon rule of law” governing the workplace.⁵ And just like in politics, the union represents everyone, whether they voted for the union, against the union, or not at all.

The principle that a majority-elected union advocates for the group, contracts for the group, and that the employer may “treat with no other”⁶ is known as exclusive representation. The concept is codified in the National Labor Relations Act (NLRA), the Railway Labor Act, and the federal civil service laws. It is the employee relations system used by 40 states, the District of Columbia, and Puerto Rico. The Supreme Court has declared exclusive representation the “central premise” of private sector collective bargaining.⁷ State courts have called it “the core of our national labor policy,”⁸ and scholars stamp it as the “cardinal principle[] of American labor law.”⁹

⁴ *Minnesota State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 271 (1984).

⁵ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960).

⁶ *Virginia R.R. Co. v. Sys. Fed. No. 40*, 300 U.S. 515, 548 (1937).

⁷ *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009).

⁸ *Lullo v. Int'l Ass'n of Fire Fighters, Local 1066*, 262 A.2d 681, 690 (N.J. 1970).

⁹ ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 502 (2d ed. 2004).

In the workplace, views on exclusive representation have traditionally ranged from neutral¹⁰ to absolutely essential. For unions, exclusive representation substitutes the weakness of demands lobbed by individuals or warring sub-groups for the strength of “a united front.”¹¹ Exclusive representation limits employer attempts to poison the collective by playing workers against each other. Combined, as it always is, with the union’s duty to fairly represent all workers, members or not,¹² exclusive representation effectively translates the concept of workplace solidarity into a legal standard. Employers, for their part, get simplicity: one set of bottom-up interests, one set of negotiations, and ultimately one set of workplace rules.

While labor law reform is always a hot topic, historically, few efforts have targeted this basic framework of majority rule. After twenty-one hearings and 411 witnesses, in 1995 the federal Dunlop Commission on the Future of Worker-Management Relations recommended no changes, concluding that “American society—management, labor, and the general public—supports the principle[.]”¹³ When major reform bills have been filibustered by the Senate or vetoed by the President, exclusive representation has not been part of the debate. Even Wisconsin’s infamous Act 10—short of an outright ban, the most debilitating collective bargaining bill ever enacted—left exclusive representation untouched. The landscape, however, has changed. Exclusive representation is suddenly under attack, starting in the public sector where mega-donors¹⁴ have seized on a mix of misread precedent and misapplied First Amendment theory in the hope of dismantling regimes that have offered states stable and efficient workplace relations for decades. How did we get here?

II. From *Knight* to *Janus* and Beyond

Deciphering the current moment begins with *Minnesota State Board for Community Colleges v. Knight*,¹⁵ the Supreme Court’s 1984 decision that underpins exclusive representation’s constitutionality for public employers. In 1971, Minnesota passed a law allowing public

¹⁰ See Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 817 (1992) (“Today, the Wagner Act’s style of exclusive representation is among the least controversial aspects of American labor law.”).

¹¹ *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 70 (1975).

¹² This is known as the duty of fair representation. See *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) (“While the majority of the craft chooses the bargaining representative, when chosen it represents...all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.”).

¹³ THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 4, 27, 38 (1994).

¹⁴ Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018).

¹⁵ *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).

employees to designate a union supported by a majority as their exclusive representative. State agencies, in this case a university board, were required to “meet and negotiate” with the union to set wages, hours, and working conditions for the faculty. Agencies were also required to “meet and confer” with the union on subjects less directly related to employment issues, say, admissions standards, with no expectation that they come to any formal agreement. Both relationships were challenged on First Amendment speech and association grounds, freedoms the Court concluded were “in no way restrained.”¹⁶ Since over half the workforce backed the union, the board presumed it conveyed “the faculty’s official collective position,” but also recognized—logically—that “not every instructor agrees with the official faculty view on every policy question.”¹⁷ And, in fact, dissenters were welcome “to form whatever advocacy groups they like”¹⁸ and present their views to the board or university administrators by showing up at various “luncheons and breakfasts,” townhalls, assorted faculty meetings attended by officials, or by simply making appointments through documented “open-door” policies.¹⁹

Knight is, and should be, the beginning and the end to the story. The decision is broad, well-reasoned, and the intervening quarter-century has not seen significant changes to state-designed exclusive representation systems.²⁰ What has arguably transformed is the Court’s take on the First Amendment, which Justice Kagan recently warned has become “weaponized” to undo any economic or regulatory policy that “affects or touches speech.”²¹ That is to say, potentially all of it.

A raft of advertising,²² health care,²³ and election-related²⁴ laws have already fallen prey to evolving speech theories, but the First Amendment’s new powers to upend settled workplace

¹⁶ *Id.* at 288. The “meet and negotiate” challenge was rejected by the district court and summarily affirmed by the Supreme Court. *Knight v. Minn. Cmty. Coll. Faculty Ass’n*, 571 F.Supp. 1, 5-7 (D. Minn. 1982), *aff’d mem.*, 460 U.S. 1048 (1983).

¹⁷ *Knight* at 276.

¹⁸ *Id.* at 289.

¹⁹ *Id.* at 276 n. 3.

²⁰ See, e.g., *Thompson v. Marietta Educ. Assoc.*, 972 F.3d 809, 813-14 (6th Cir. 2020) (“[I]n *Knight*, the Court framed the question presented in broad terms....”).

²¹ *Janus v. AFSCME*, 138 S. Ct. 2448, 2501-02 (2018) (J. Kagan, dissenting) (“Speech is everywhere—a part of every human activity (employment, health care, securities training, you name it.”)). See also Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (Jun. 30, 2018).

²² *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (rejecting a law regulating tobacco advertising near schools).

²³ *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (rejecting a law limiting pharmacies from selling doctor prescription data); *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (rejecting a law requiring dissemination of relevant medical information to patients).

²⁴ *Citizens United v. FEC*, 558 U.S. 310 (2011) (rejecting federal limits on certain independent political spending by corporations).

governance took center-stage in the Supreme Court’s 2018 decision in *Janus*. Since 1977, constitutional doctrine was clear that just as a town could charge citizens taxes to support schools, police, or parks, states could allow public sector unions and state agencies to collect “fair share fees” from employees to help cover the mandatory costs of bargaining, enforcing, and defending workers under the contract. The *Janus* majority said all of it—the money and the representation—was speech. Since preventing unions from being forced to work for free was, according to the Court, not a compelling interest, payments could never be required.

As commentators predicted,²⁵ and are now documenting,²⁶ *Janus*’s underlying theory has become the swiss-army knife of workplace speech claims, justifying an astonishing array of challenges to otherwise vanilla public sector employment principles. That includes a wave of frontal attacks on exclusive representation. To this point, all have failed,²⁷ up to and including multiple denials of certiorari in 2019.²⁸ The composition of the Court, though, has changed. Justice Barrett now votes in place of Justice Ginsburg. And last year, in *Thompson v. Marietta Education Association*, the Sixth Circuit rejected a challenge to Ohio’s system of exclusive representation while also characterizing it as a “take-it-or-leave-it system...in direct conflict with the principles enunciated in *Janus v. AFSCME*.”²⁹ Again, challengers sought certiorari. Again, Americans for Prosperity, the National Right to Work Legal Defense Foundation, the Pacific Legal Foundation, and the Cato, Goldwater, and Competitive Enterprise Institutes – the same groups that supported and funded *Janus* –filed briefs in support. And while again the petition was denied, the attacks on exclusive representation are likely to persist. But so should the futility. As it turns out, the legal case for exclusive representation is stronger than ever.

III. Exclusive Representation is Constitutional

The main reason exclusive representation is constitutional is the simplest: far from overruling or even casting doubt on *Knight*, *Janus* reaffirmed it. In all concluded and pending suits, challengers seize on a single aside in *Janus*’s majority opinion stating that exclusive

²⁵ See, e.g., Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323 (2016) (discussing “a new generation of deregulatory First Amendment theories, and their potentially calamitous effects on workers if courts accept them”).

²⁶ Ann C. Hodges, *The Aftermath of Janus v. AFSCME: An Ongoing Assault on Public Sector Unions*, ACS Issue Brief (March 2020).

²⁷ *Reisman v. Assoc. Faculties of Univ. of Maine*, 939 F.3d 409 (1st Cir. 2019); *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Hill v. Serv. Emps. Int’l Union*, 850 F.3d 861 (7th Cir. 2017); *Jarvis v. Cuomo*, 660 F. App’x 72 (2d Cir. 2016).

²⁸ See *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), cert denied, 139 S. Ct. 2043 (2019); *Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), aff’d, No. 18-3086 (8th Cir. Dec. 3, 2018), cert denied, 139 S. Ct. 1618 (2019).

²⁹ *Thompson v. Marietta Educ. Ass’n*, 972 F.3d 809, 811-12 (6th Cir. 2020).

representation is “a significant impingement on associational freedoms that would not be tolerated in other contexts.”³⁰ Literally, the remark means that the “impingement” is constitutional in this context.³¹ That this literal reading is also the correct one—and not some sort of bread crumb for the future—is confirmed elsewhere, where the majority stressed that, outside of reforming fair share fees, states “can keep their labor-relations systems exactly as they are” and simply “follow the model” of so-called right-to-work states.³² Right-to-work jurisdictions have long banned fair share agreements—but they keep exclusive representation.³³

Yet, exclusive representation would be constitutional even if *Knight* did not exist. Challengers tend to make both compelled and free-standing speech and association claims attacking the principle,³⁴ none of which are especially persuasive or supported by even the most recent wave of First Amendment precedents.

A. “Compelled” Association and “Compelled” Speech Where Nothing is Compelled

Compelled association and speech suits contend that the government has forced people to identify with others or “mouth support for views” that “they find objectionable.”³⁵ The claims are an inherently strange fit for exclusive representation challenges, because majority rule does not require anyone to actually *do* anything.³⁶ No worker is ever required to join the union. No worker is ever expected to parrot, endorse, or make any effort to even pretend to support union speech. Post-*Janus*, dissenters get the union wage scale for free.

Given this reality, plaintiffs are limited to arguing that merely allowing a majority’s selected representative to bargain for a workplace-wide contract is compelled association and speech. But having access to a negotiated health care plan is not forced “association” in any First Amendment sense. A constitutional question arises only if a reasonable outsider would think that those covered by the contract *agree with* the union’s position on drug pricing, co-pays, or

³⁰ *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018).

³¹ *See id.* (“It is...not disputed that the State may require that a union serve as exclusive bargaining agent for its employees.”).

³² *Id.* at 2485 n.27.

³³ *Id.* at 2466.

³⁴ For a more comprehensive review of the argument types and variants that have arisen, *see* Charlotte Garden, *Is There an Anti-Democracy Principle in the Post-Janus v. AFSCME First Amendment?*, 2020 U. CHI. LEGAL F. 77 (2020).

³⁵ *Janus*, 138 S. Ct. at 2463. *See also* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (stating that the First Amendment “includes both the right to speak freely and the right to refrain from speaking at all”).

³⁶ This is a point often emphasized by exclusive representation’s defenders in litigation. Appellee’s Brief at 13, *Thompson v. Marietta Educ. Ass’n*, 972 F.3d 809 (6th Cir. 2020) (No. 2:18-cv-00628-MHW-CMW) (“The Supreme Court has never validated a claim of compelled speech or compelled expressive association where, as here, the complaining party is not personally required to do *anything*...”).

anything else.³⁷ And reasonable people understand that democratic decision-making is rarely unanimous. That is why public school parents do not have a First Amendment case against the elected PTA when it revises library hours with the school board. Reasonable people also do not think every state university graduate supports the alumni association's take on the expensive stadium upgrade.³⁸ Absent state bar membership, lawyers cannot practice. Yet, "everyone understands or should understand that the views expressed are those of the State Bar as an entity separate and distinct from each individual" attorney.³⁹ Evidence that anyone assumes a union's view is naturally a non-member's view is never found in exclusive representation litigation because it does not exist. It would also make no sense, since unions do not bargain on behalf of individuals; they bargain on behalf of groups. And because every proposal will impact individuals a bit differently—free glasses are a boon to some and worthless to others—so will their feelings about it. Everyone understands this.

As for compelled speech, *Knight's* early insight that dissenters' freedom "to speak out publicly on any union position...counters the claim that there is an unacceptable risk the union speech will be attributed to them contrary to their own views"⁴⁰ has radically metastasized. All of the 1984 speech options remain—plus the internet. Online, everyone can be a critic, anyone can potentially draw a crowd, and all of it is free. It has never been easier to both amplify voice and mobilize protest—including in-person—against an institution or cause.⁴¹ It's no coincidence that

³⁷ See, e.g., *Rumsfeld v. F. for Acad. and Inst. Rights*, 547 U.S. 47, 65 (2016) (rejecting a compelled association claim where reasonable people would not believe "law schools agree[d] with any speech by [military] recruiters" even though they were forced to "associate with" them "in the sense that they interact with them" on campus); *Wash. State Grange v. Wash. State Republican Party*, 662 U.S. 442, 457-59 (2008) (Roberts, C.J., concurring) (emphasizing that "forced association" claims turn on whether outsiders would believe plaintiffs "endorse[]" or "agree[]" with the related party's message).

³⁸ See Appellee's Brief at 22, *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019) (No. 3:15-cv-05134-RBL).

³⁹ *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J. concurring).

⁴⁰ *D'Agostino v. Baker*, 812 F.3d 240, 244 (1st Cir. 2016).

⁴¹ Zeynep Tufekci, a leading scholar on shifts from online to in-person activism, reported in a study of participants in the 2013 Gezi Park protests in Turkey that, "[m]any people...had gone from merely hearing about the news on social media—most for the first time on that day—to becoming full fledged participants in the country's largest-ever spontaneous protest movement, eventually involving hundreds of thousands to millions of people around the country with no lead-up." ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTESTS 71 (2017). And while Tufekci is ultimately critical of social media as an organizing tool, she reserves particular praise for its capacity to persuade non-activists through the efficient dissemination of compelling narratives, the precise impact relevant to union dissenters. *Id.* at 204, 237, 239.

Occupy, Black Lives Matter, Me Too, and countless other narrower resistance campaigns that eventually saturated public consciousness can also be stated as hashtags.⁴²

It is true that the state allows the exclusive representative to advocate for workers at set times and places. But even the “higher volume of the union’s speech”⁴³ does not risk misattributing it to others, who remain free to make opposite points in many other settings and at many other times.⁴⁴ For this reason, none of the Court’s compelled speech cases are good analogies.

Working under employment rules set by majority rule is different from being forced to recite the pledge of allegiance,⁴⁵ put a political motto on your car,⁴⁶ print an editorial,⁴⁷ or slip ideological messages into your mail.⁴⁸ No one, in other words, is “obliged personally to express a message [she] disagrees with.”⁴⁹ Unlike nearly every other job, the boss just doesn’t set wages and benefits unilaterally.

That last point, in fact, helps explain why exclusive representation does not violate affirmative association and speech rights either.

B. “Infringed” Association and “Infringed” Speech Where Nothing is Infringed

When the government restricts a person’s ability to associate with others or express certain content or views, that person can claim that their First Amendment rights have been infringed. But the existence of an exclusive union contract does not interfere with those freedoms because the alternatives—individual or small group bargaining—are not protected by the First

⁴² See, e.g., Victor Luckerson, *The Mainstreaming of #BlackLivesMatter*, RINGER (Aug. 16, 2016) (“What was once an online rallying cry is now popping up in the streets, at presidential primary debates, and at the Super Bowl...This is how a movement spreads in the 21st century.”); Catherine A. MacKinnon, *Where #MeToo Came From, and Where it’s Going*, ATLANTIC (Mar. 24, 2019) (“But #MeToo has been driven not by litigation but by mainstream and social media...”). #DeleteUber, which arose in response to the ride company’s attempt to break a strike by taxi drivers protesting President Trump’s ban on refugees and immigrants from predominantly Muslim countries, is a narrower example that led to real world backlash and profit loss. See Mike Isaac, *What You Need to Know About #DeleteUber*, N.Y. TIMES (Jan. 31, 2017).

⁴³ *D’Agostino*, 812 F.3d 240, 244 (stating that the “higher volume...has been held to have no constitutional significance” (citing *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984))).

⁴⁴ As Charlotte Garden has noted, “[t]his disagreement can be both forceful and public—for example, the union’s brief opposing certiorari in *Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018) cited evidence reflecting Uradnik’s frequent and public opposition to the union’s positions.” Garden, *supra* note 25, at 95.

⁴⁵ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943).

⁴⁶ *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

⁴⁷ *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

⁴⁸ *Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n of California*, 475 U.S. 1, 5 (1986).

⁴⁹ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005).

Amendment.⁵⁰ There is no constitutional “negotiate with me” right.⁵¹ *Knight* recognized that state officials need flexibility to “make policy decisions based only on the advice they decide they need and choose to hear”⁵² and constitutionalizing input would not just “work a revolution” in decision-making but “likely grind” government “to a halt.”⁵³ The leeway is especially critical when states make Human Resource-related judgments about their own workers, since *how* an agency sets workplace policies directly impacts government efficiency, reliability, and public trust.⁵⁴

So, it does not interfere with one individual’s speech rights if the state sweetens parental leave after meeting with a negotiator favored by many more individuals. Furthermore, nothing prevents the state from taking a position in that meeting based on the opinions of those opposed to the representative aired on Twitter, chanted at a rally, mentioned in a chance encounter, or stressed in any other forum. If anything, the union’s presence protects these views since the contract is nothing if not a legal bulwark against unfair, arbitrary, or retaliatory firings.⁵⁵ Unionization, in this sense, is a speech multiplier.

C. Exacting Scrutiny, Labor Peace, and the Only System that Works

For all of these reasons *Knight* said exclusive representation did not affect First Amendment interests at all. But even if an infringement is presumed, the principle would satisfy the “exacting” level of judicial scrutiny used in *Janus* and other recent public sector union cases.

⁵⁰ See *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979) (stating that the First Amendment creates no “affirmative obligation on the government to listen, to respond[,]...or bargain.”)(per curium)).

⁵¹ As Charlotte Garden notes, if such a right existed, a non-union employer would violate the First Amendment by hiring a management consultant to survey employees and make pay and benefit decisions on its recommendations. Garden, *supra* note 25 at 97-99. See also *id.* at 93-94 (tracing relevant caselaw and concluding that “public employers would not violate the First Amendment if they decided to ignore or even punish employees attempting to use workplace channels to negotiate on their own behalves”).

⁵² *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 284 (1984).

⁵³ *Id.*

⁵⁴ See, e.g., *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 599 (2008) (stating that the Court has “often recognized that government has significantly greater leeway in its dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (describing how a state’s internal managerial decisions receive “the same sort of presumption of legislative validity as...state choices designed to promote other aims within the cognizance of the State’s police power”).

⁵⁵ See Garden, *supra* note 25, at 92.

Exacting scrutiny requires that a law “serve a compelling state interest” that cannot be met by a significantly less restrictive alternative.⁵⁶ Here, the compelling state interest is “labor peace,” which was reaffirmed as compelling in *Janus*⁵⁷ and is traditionally characterized as minimizing “conflict and disruption,” “dissension,” and “inter-union rivalries” in the workplace.⁵⁸ While the lack of such “pandemonium” in states that had already eliminated fair share fees suggested to the *Janus* majority that the payments were not related to labor peace,⁵⁹ the history of public sector labor relations in the absence of exclusive representation is, in fact, pandemonium.

In 1967, Life magazine published a photo essay with the headline, “The Shock of Public Strikes: Ford was expected, but teachers, firemen, cops!”⁶⁰ The astonishment was surely short-lived. In 1968, teachers shuttered schools in San Francisco, Pittsburgh, Cincinnati, D.C., Albuquerque, much of Maryland, and nearly the entire state of Florida. Twenty-thousand educators booed Pennsylvania’s governor off the stage. Leaders were jailed and confrontations sometimes turned violent.⁶¹ All of it happened before April, and all of it was in support of exclusive bargaining rights. Later that year, the nation’s attention turned to Martin Luther King, Jr.’s trip to Memphis and the last public remarks of his profound life. The speech is known for his vision of the “mountaintop.” But he was there to support the city’s sanitation workers.⁶² “The issue,” he said, “is the refusal of Memphis to be fair and honest in its dealings with its public servants,”⁶³ who were, like the teachers, striking for the right to negotiate collectively. “We went through this in the ‘30s in the private sector,” remarked a state official at the time. “Now we are going through it in the public.”⁶⁴

And just like the private sector, where strikes sparked the NLRA, the unrest led to legislation—this time state-by-state—to better employment relations by letting workers pick exclusive representatives and start negotiating. Proof that these laws exist to facilitate labor peace is everywhere. Half of the thirty exclusive representation provisions enacted between 1959 and

⁵⁶ *Janus v. AFSCME*, 138 S.Ct. 2448, 2465 (2018) (quoting *Knox v. Serv. Emp. Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012)).

⁵⁷ See *Mentele v. Inslee*, 916 F.3d 783, 790 (9th Cir. 2019) (“*Janus* did not revisit the longstanding conclusion that labor peace is “a compelling state interest....”).

⁵⁸ *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-21 (1977).

⁵⁹ *Janus*, 138 S.Ct. at 2465.

⁶⁰ Robert Shaffer, *Public Employee Unionism: A Neglected Social Movement of the 1960s*, 44 THE HISTORY TEACHER 489, 493 (2011).

⁶¹ *Id.* at 492, 494.

⁶² MICHAEL K. HONEY, GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE, MARTIN LUTHER KING’S LAST CAMPAIGN (2008).

⁶³ Martin Luther King, Jr., Address Delivered at Bishop Charles Mason Temple: *I’ve Been to the Mountaintop* (Apr. 3, 1968).

⁶⁴ Joseph A. McCartin, “*A Wagner Act for Public Employees*”: *Labor’s Deferred Dream and the Rise of Conservatism, 1970-1976*, 95 J. OF AM. HISTORY 123, 123 (2008).

1980 came in the twenty-four months following what journalist Irwin Ross called the “turbulent” public worker uprisings of 1967 and 1968.⁶⁵ Many statutes, like New York’s, declare “harmonious and cooperative relationships” as an express purpose.⁶⁶ The need for peaceful state and local employment relations is written in state court decisions reflecting on the era,⁶⁷ and over time the provisions have largely achieved that goal.⁶⁸

The same cannot be said for states that set wages and benefits unilaterally. Public employees in states like West Virginia, Oklahoma, Kentucky, Arizona, and North Carolina have unions, but the representatives have no right to sit at a bargaining table. So, in recent years advocacy has often taken the form of crowds marching through statehouses, spilling out of parks, and chanting in streets. In 2018, teachers shut down public education in five states for days on end.⁶⁹ In West Virginia, the Governor turned to ad hoc discussions with various unions to reach a “settlement,” which strikers, citing “a sense of chaos” and a lack of “solid proof that our demands are going to be met,” simply ignored.⁷⁰

Exacting scrutiny also asks whether the state’s compelling interest in labor peace can be “achieved through means” other than exclusive representation that are “significantly less

⁶⁵ Shaffer, *supra* note 60, at 496; McCartin, *supra* note 64, at 123.

⁶⁶ NY Civ. Serv. § 200 (1969) (stating the purpose of the state’s collective bargaining law as “promot[ing] harmonious and cooperative relationships between government and its employees and to protect the public”). *See also* Cal. Gov Code § 3512 (stating the purpose of the state’s collective bargaining law as “promot[ing] the improvement of personnel management and employer-employee relations”); Me. Rev. Stat. tit. 26 § 1021 (stating the purpose of the state’s collective bargaining law as “improv[ing] the relationship between public employers and their employees”).

⁶⁷ As the Ohio Supreme Court has written: “Given the history of public employer-safety employee relations in this state prior to the passage of R.C. Chapter 4117, the wisdom of the General Assembly in promulgating the Act becomes even more obvious. During those turbulent days, public employees, including safety forces, were also prohibited from striking, but frustrations stemming from employee powerlessness frequently erupted into illegal strikes. The General Assembly has put an end to such chaos, particularly where safety forces are concerned, by enacting R.C. Chapter 4117, the Public Employees’ Collective Bargaining Act.” *City of Rocky River v. State Emp’t Relations Bd.*, 539 N.E.2d 103, 119 (1989).

⁶⁸ Reporting on the Chicago Teacher Union’s seven-day stoppage in 2012, Pew noted that “the most remarkable thing about the strike may be that it happened all.” Melissa Maynard, *Public Strikes Explained: Why There Aren’t More of Them*, PEW (Sept. 25, 2012). *See also id.* (“Before [Pennsylvania’s bargaining law] the state experienced an average of 27.6 teacher strikes per year, but after the law, the average dropped to 8.6 per.”); Janet Currie & Sheena McConnell, *The Impact of Collective Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J. L. & ECON. 519, 532 (1994) (“Strike incidence is highest when the parties have neither a duty to bargain nor dispute-resolution procedures.”).

⁶⁹ *See, e.g.*, Lisette Partelow & Abby Quirk, *Strikes Driving Change in States with Lowest-Paid Teachers*, CTR. FOR AM. PROGRESS (Apr. 16, 2019) (“[T]he teachers who walked out in 2018 and 2019 do share one underlying concern: their states’ disinvestment in education.”).

⁷⁰ Eric Blanc, *The Strike Is On: An Interview with Jay O’Neal*, JACOBIN (Mar. 1, 2018).

restrictive of associational freedoms.”⁷¹ It cannot. Just ask the few states that have tried. California once let teachers negotiate in members-only groups. The arrangement created “administrative difficulties for districts, dissention among employees, and perceptions that the terms of employment were unfairly different among teachers in the same district.”⁷² The state replaced it with exclusive representation in 1975. Minnesota once tried a proportional system that allotted sub-groups seats on a “negotiation council” based on their size. It too was replaced by exclusive representation.⁷³ In 2011, Tennessee transitioned to a version of Minnesota’s old model, which it calls “collaborative conferencing.”⁷⁴ The move quickly attracted outside political entities wielding campaign-style tactics to attract splinter groups.⁷⁵ The early returns have been greater division, more delay, and, ultimately, less agreement.⁷⁶

It is this track record that likely explains why the universe of arguments against exclusive representation offers basically nothing in the way of better options. As a democratic vehicle providing voluntary-fee, unit-wide, uniform benefits⁷⁷ backed up by a legal right to have nothing to do with the union or the process,⁷⁸ exclusive representation is, quite simply, the only system that works.⁷⁹

⁷¹ *Janus v. AFSCME*, 138 S.Ct. 2448, 2465 (2018) (quoting *Knox v. Serv. Emp. Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012)).

⁷² Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. 1821, 1835 (2020).

⁷³ MARTIN H. MALIN, ANN C. HODGES, JOSEPH E. SLATER & JEFFREY M. HIRSCH, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 481 (2016).

⁷⁴ *Id.*

⁷⁵ Chris Brooks, *The Cure Worse Than the Disease: Expelling Freeloaders in an Open-Shop State*, NEW LABOR F. (Aug. 2017) (“They play on social issues like the Republicans do, claiming that the union promotes abortion.”).

⁷⁶ *Id.* See also Fisk & Malin, *supra* note 72, at 1835-36 (“This system allows the district to run out the clock on the time for contract agreement so that it can set terms unilaterally.”).

⁷⁷ Surveying the landscape, the Ninth Circuit concluded that “we know of no alternative that is ‘significantly less restrictive of associational freedoms.’” *Mentele v. Inslee*, 916 F.3d 783, 791 (9th Cir. 2019). Tellingly, the panel also noted that “Miller has not suggested an alternative way for the State to solicit meaningful input from [workers] while simultaneously avoiding the chaos and inefficiency of having multiple bargaining representatives or negotiating with individual[s].” *Id.*

⁷⁸ The union’s duty to treat members and non-members equally ultimately protects workers’ right to *not* associate with it. See, e.g. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 556 (1991) (stating that an exclusive representative could not, for example “negotiate particularly high wage increases for its members in exchange for accepting no increases for others”) (Scalia, J. concurring in part and dissenting in part).

⁷⁹ As Richard Carlson once wrote, “most American labor lawyers for management or labor would probably find it difficult to imagine a workable system of representation that is *not* exclusive.” Carlson, *supra* note 10, at 779. The framers of the National Labor Relations Act can be added to that list. See, e.g., House Rep. No. 1147 (1935), reprinted in 2 LEG. HIST. OF THE NAT’L LAB. REL. ACT 3070 (1935) (“There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides.”)

IV. Conclusion

Faced with difficult, even hostile, legal environments, public sector unions have long experimented with different ways of fighting on behalf of workers and their communities.⁸⁰ *Janus* added to the degree of difficulty, but innovations in organizing and bargaining have simply accelerated.⁸¹

State law, too, has started to adapt. In some places, unions now have the right to make the case for membership during new employee orientations or over email.⁸² With *Janus*'s approval, some states now allow unions to adopt a members-only model solely for grievance handling.⁸³ These and other changes give unions a chance to reexamine and possibly change practices and procedures in a new legal environment—but only at their option.⁸⁴ The legal attacks on exclusive representation seek to do something much more radical: compel full scale members-only representation, now and forever, as a matter of constitutional law. But constitutional law itself stands in the way.

⁸⁰ Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 737 (2009) (comparing collective bargaining laws in Virginia—where it was banned—and Illinois—where it is robust—and concluding that “parties operating in different legal regimes adapt their strategies to fit their environment,” while noting that the “success of those strategies is not unique to the particular environment”).

⁸¹ In the short term, *Janus* led to renewed commitments to innovative—and largely successful—internal and external organizing. See Rebecca Rainey & Ian Kullgren, *One Year After Janus, Unions Are Flush*, POLITICO (May 17, 2019) (describing how “public employee unions end[ed] up with more money and in most cases with more members after a Supreme Court ruling that was expected to eviscerate both”); Ian Kullgren & Aaron Kessler, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, BLOOMBERG DAILY LABOR REP. (Jun. 26, 2020). A public sector union initiative known as “Bargaining for the Common Good” has revolutionized demands by incorporating explicitly community concerns into negotiations with employers. See [Bargaining for the Common Good](#).

⁸² Hodges, *supra* note 2 (describing “new legislation” helping unions “connect[] with employees at the beginning of their employment...”).

⁸³ Fisk and Malin, *supra* note 72, at 1836, 1839-40.

⁸⁴ As Professors Fisk and Malin note, whether to accept a state’s invitation to alter an internal organizing or representation practice post-*Janus* is an intensely local decision. *Id.* at 1844. Even in states where laws give unions the option of *not* representing non-members in workplace grievances, the four largest public sector unions do not take it. Malin, *supra* note 3, at 32. See also *Sweeney v. Raoul*, 990 F.3d 555, 557, 561 (7th Cir. 2021) (dismissing, for lack of standing, the claim that “forcing unions to represent nonmembers for free” violates the First Amendment while stating that the “wrong reaction to today’s decision is to think Local 150 has advanced a losing position”).

About the Author

Michael Oswald is an Associate Professor of Law at Northern Illinois University (NIU) College of Law where he teaches torts, labor law, employment law, and seminars on emerging legal issues in workplace discrimination and organizing. He is a co-author of two labor law casebooks, and his most recent article, *Liminal Labor Law*, will be published by the California Law Review in 2022. Oswald graduated from Haverford College and has degrees in law and theology from Duke University where he served on the *Duke Law Journal*. After law school he clerked on the United States Second Circuit Court of Appeals for Judge, now Justice, Sonia Sotomayor. Oswald previously worked for the Service Employees International Union.

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