

## Article

# The Roberts Court and the Unraveling of Labor Law

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*Labor law comprises several doctrines and procedures that oversee the relationships between employers, unions, and the workers they represent. These doctrines—the duty of fair representation, exclusivity, good-faith bargaining, captive-audience speech, and rights of equal access—are all component threads to a tapestry designed to facilitate widespread organizing and collective bargaining. Yet the Roberts Court has brushed aside how entwined these threads are and, in so doing, has undercut labor law’s far-reaching mandate. Likewise, this Court has disregarded the expertise of the National Labor Relations Board, the administrative agency tasked with weaving together specific legal canons in ways that reflect labor’s broad policy initiatives.*

*This Court’s 2018 decision in *Janus v. AFSCME* remains the most blatant upending of embedded labor doctrine in history. But it is not the last. Rather, in a series of maneuvers, the Roberts Court has unraveled interwoven labor strands without regard for the careful balancing of interests or the core principles labor’s entire legal system strives to maintain. What remains is a mish-mash of compromising doctrines that, when viewed apart from each other, are hard to reconcile with expanding protections of individual liberties. That is, these remain until they too are*

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*unwound by a judiciary scripted to play only a minor role in labor's specialized regime.*

*In this Article, I describe ongoing efforts to extend Janus's reasoning and interpretive methods as a roadmap to overriding collective bargaining obligations, and as a series of roadblocks to future labor reform. But these routes have a toll. As the Court considered another high-profile labor case this past term, the aftermath of a worldwide pandemic has shined new light on workplace inequity and renewed public support of organized labor. As such, the Roberts Court's chipping away at labor strike protections and preemptive guardrails in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters* has profound implications for more than just labor law and the labor movement. Out of step with public preferences again, *Glacier Northwest, Inc.* and other Janus-extending decisions are central in debates on the Court's legitimacy and its role in shaping social and economic landscapes.*

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## INTRODUCTION

Few laws are tailored to suit our democracy more than the National Labor Relations Act (NLRA or Wagner Act).<sup>1</sup> When Congress enacted the NLRA in 1935, it embraced a national policy committed to overcoming widespread power and wealth disparities between workers and their employers.<sup>2</sup> Patterned off of the legislative mandate, American labor law evolved into a rich tapestry of doctrines and procedures—all woven together to reflect the functional realities of labor-management relations and balance conflicting concerns. More recently, though, labor law has been unraveling at the hands of the Supreme Court.<sup>3</sup> Led by a conservative majority, the Roberts Court has heightened standards of constitutional review for labor activities, narrowly interpreted provisions of the NLRA, diminished the administrative role of the National Labor Relations Board (NLRB), and overruled decades-old labor precedent with little regard for *stare decisis*.<sup>4</sup>

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1. National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169.

2. *See id.* § 151 (declaring a national policy to encourage “the practice and procedure of collective bargaining” and “protect[] 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”).

3. Commonly, the Court takes on the name of the Chief Justice as a nod to his role as the leader of the Court and the Judicial Branch. Thus, I refer throughout this Article to this Court (2005–present) as the “Roberts Court” for identification purposes. If the naming has any secondary meaning, it is to position the labor project articulated herein with the Chief Justice’s own tenure—not to suggest the Chief Justice has authored many key labor law opinions (he has not), nor that he is any more anti-labor than his conservative colleagues (although his father was a Bethlehem Steel executive). *See* Frederick N. Rasmussen, *John G. Roberts Sr., Father of U.S. Chief Justice*, *BALT. SUN* (Nov. 19, 2008), <https://www.baltimoresun.com/news/bs-xpm-2008-11-19-0811180063-story.html> [<https://perma.cc/U59Y-ALAT>].

4. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624–32 (2018) (declining to extend *Chevron* deference to NLRB interpretation of the applicable law and holding that the NLRA is limited by the Federal Arbitration Act and does not contain a right to class and collective action); *cf.* *Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60, 62, 66 (2008) (finding that the NLRA preempted a California statute that limited the ability of employers who received certain state grants from using the money “to assist, promote, or deter union organizing” because they regulate a zone that the Act designates for market freedom); *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 302, 322 (2012) (holding that a public-sector union violates the First Amendment by “requir[ing]

Overruling precedent frays the edges of any substantive common law regime. But because labor’s doctrinal strands are deliberately entwined, negating one has cascading effects on the legal project that remains. As such, the Roberts Court’s impact on labor law has been far more significant than a few pro-business decisions.<sup>5</sup> By centering individual interests over majority values and minimizing the NLRB’s administrative authority, the Court has disregarded the NLRA’s normative foundations and set the stage to unravel labor law’s entire uniform regime.<sup>6</sup>

The Court’s *Janus v. AFSCME*<sup>7</sup> decision, which prohibited unions from collecting “agency” or “fair share” fees from public-sector employees, was easy to criticize.<sup>8</sup> Decided 5-4 along party lines, some viewed *Janus*’s routing of a standard union security measure on First Amendment grounds as evincing the Court’s decidedly partisan agenda.<sup>9</sup> Other scholars were puzzled by the majority’s willingness to ignore the High Court’s own heavily

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objecting nonmembers to pay a special fee for the purpose of financial the union’s political and ideological activities”).

5. See generally Michael J. Yelnosky, *Labor Law Illiteracy: Epic Systems Corp. v. Lewis and Janus v. AFSCME*, 24 ROGER WILLIAMS U. L. REV. 104, 106, 110–11 (2019) (arguing that the Roberts Court’s analyses in labor cases “reflect notable labor law illiteracy” and “a hostility to the concept of unionization and collective bargaining in the public sector”).

6. See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 176–82 (arguing that the Court’s modern First Amendment jurisprudence has infinite deregulatory potential); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1964 (2018) (“The egalitarian critiques that currently swirl around cases like *Citizens United*, *Hobby Lobby*, and *Janus* may one day be taught together with—and enjoy the same cachet as—the classic legal-realist and progressive critiques leveled against cases like *Allgeyer*, *Adair*, and *Lochner*.”).

7. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (holding that “States and public-sector unions may no longer extract agency fees from nonconsenting employees” because it violates the First Amendment).

8. See Kessler & Pozen, *supra* note 6, at 1964; see also *infra* Part II.B. “Agency” or “fair share” fees represent a pro-rated amount of full union dues to compensate union representatives for their collective bargaining and contract-administrative services but do not include union political activities. *Janus*, 138 S. Ct. at 2460–61.

9. See Paul Waldman, *The Republicans Are Winning Their War on Unions*, WASH. POST (June 27, 2018), <https://www.washingtonpost.com/blogs/plum-line/wp/2018/06/27/the-republicans-are-winning-their-war-on-unions> [https://perma.cc/P3ER-8FBV] (characterizing the *Janus* decision as “the five conservative justices on the Supreme Court [giving] the GOP a huge victory”).

relied upon precedent.<sup>10</sup> And others, still, decried *Janus*'s understanding that agency fees involved fundamental First Amendment interests at all—fearing that *Janus* would extend to other government-compelled subsidies such as professional dues, student activity fees, and even taxes.<sup>11</sup> But five years have now gone by since *Janus*, and commentary on the Court's political nature remains as loud as ever, collectively bargained-for contracts still exist (if some without agency fees), and *Janus* has not polluted the rest of the First Amendment's compelled-speech or subsidy landscape.<sup>12</sup> Instead, time has revealed *Janus*'s true legacy to be something else. Subsequent *Janus*-extending litigation un-masks *Janus* as just the beginning of a critical unraveling period for labor law—not the end of one single union-bolstering precedent.

This Article situates *Janus* within a larger unraveling of labor's private-ordering and majoritarian legal regime. *Janus*'s rejection of agency fees did not just ignore labor law's complimentary union obligation to represent agency-fee-paying employees. As others have noted, *Janus* upsets several labor doctrines that also rest on the long-held distinction between "political" and "economic" labor activities or "speech."<sup>13</sup> Now involving

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10. See Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 101–04 (2020) (arguing that by overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Janus* represents the culmination of a "trend towards a weak stare decisis tradition").

11. See generally William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 172 (2018) (suggesting that the reasoning in the *Janus* decision could be extended to affect state bar dues and student activity fees).

12. See generally Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42, 54–57 (2018) (discussing *Janus* as applied to professional dues, insurance mandates, and taxes).

13. See, e.g., Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2062–63 (2018) (suggesting that although *Janus* "invalidated statutes and collective bargaining agreements in twenty-two states," it may also aid in the resurgence of unions by protecting protests as political speech). Sorting out these uncertainties in post-*Janus* First Amendment jurisprudence through litigation will not be cheap or quick. See, e.g., Adriene Hill, *How Much Does a Big Supreme Court Case Like Gay Marriage Cost?*, MARKETPLACE (Mar. 25, 2013), <https://www.marketplace.org/2013/03/25/how-much-does-big-supreme-court-case-gay-marriage-cost> [https://perma.cc/4V5H-4SZF] (noting that the millions in attorney's fees "are only the beginning of the money that gets poured into Supreme Court cases").

significant political speech interests in the public sector, organizing and collective bargaining restrictions, representative elections, grievance processing, and limitations on strikes and picketing all require a new balancing against state interests.<sup>14</sup> But *Janus*'s uncertainties are not limited to speech rights or the public sector.<sup>15</sup> In subsequent terms, the Court has expanded other First Amendment rights and property protections along these same interpretive lines, such that private and individual interests eclipse group concerns in a variety of organized public and private sector labor contexts.<sup>16</sup>

While the tension between labor's majority rule and the Court's safeguarding of minority interests is not new, in the past, agency deference norms kept them (mostly) at bay.<sup>17</sup> But the Roberts Court has taken on a more authoritative role in labor law.<sup>18</sup> Coupling its disregard for analytically sound agency

14. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465–69 (2018) (weighing state interests in labor peace and preventing the free-rider problem against the compelled speech the Court saw in agency fees).

15. *See, e.g., Baisley v. Int'l Ass'n of Machinists & Aerospace Workers*, 983 F.3d 809, 810 (5th Cir. 2020) ("*Janus* . . . dealt with public-sector unions, so it is undisputed that applying [*Janus*] to this private-sector dispute would require us to extend into a new realm. The difficulty . . . is that *Janus* itself cautions against such an extension."); *Rizzo-Rupon v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO Dist.* 141, Loc. 914, 822 F. App'x 49, 50 (3d Cir. 2020) (noting that *Janus* "took pains to distinguish" private-sector unions from the public-sector unions at issue in *Janus*).

16. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) (resolving Fifth Amendment question about union access to employer property in favor of employers); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383–89 (2021) (using "exacting scrutiny" to weigh governmental interests against freedom of association rights under the First Amendment); Leah Litman, *The Supreme Court Is Uber-Conservative. A Few Recent Decisions Don't Change That.*, NBC NEWS: THINK (July 3, 2021), <https://www.nbcnews.com/think/opinion/supreme-court-uber-conservative-few-recent-decisions-don-t-change-nca-1273014> [<https://perma.cc/NV2M-FFLN>] (arguing that a few seemingly moderate and narrow blockbuster decisions in the 2020–2021 term do not consequentially depart from the Roberts Court's generally politically conservative agenda). Likewise, Litman uses *Hassid*'s and *Bonta*'s less closely watched opinions decided 6-3 along party lines as evidence of the Roberts Court's ideological orientation. *See* Litman, *supra*.

17. For important examples, see JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN LABOR LAW* (1983).

18. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629–30 (2018) (declining to extend *Chevron* deference to NLRB interpretation of the applicable

interpretations with an overall distrust of the administrative state, in the 2023 term the Court flirted with doing away with the NLRB's preemptive jurisdiction over labor matters "arguably protected" by the NLRA.<sup>19</sup> And while the Court in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters* ultimately left intact the doctrine of preemption that tasks a centralized administrative agency with adjudicating labor disputes and administering labor law and legal protections,<sup>20</sup> the decision is a harbinger of more uncertain times ahead. *Glacier Northwest, Inc.* implies that well-drafted complaints alleging unprotected striking activity may survive a motion to dismiss in the future—at least until the NLRB issues a complaint—Justices Thomas and Gorsuch wrote separately in support of doing away with NLRB preemption altogether.<sup>21</sup> These opinions clear a path to replacing the Board's holistic appraisals of labor law and its connected parts with this Court's own "Lochnerized" understandings of individual labor doctrines.<sup>22</sup>

Public opinion does not share this Court's sentiments on labor.<sup>23</sup> Fed up with soaring economic inequality, workers are

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law). See also Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1122–25 (2021) (describing "judicial administration," whereby "courts influence agencies to engage in certain conduct or to adopt a particular approach to implementing the law," which she notes "has been on full display lately"). Shah contends that judicial administration happens both when courts review agencies' statutory interpretations and when they assess agency adherence to constitutional and rule-of-law norms. Shah, *supra*, at 1133–34.

19. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1412 (2023).

20. See *id.* at 1412–13 (finding that preemption does not apply, but otherwise leaving the doctrine of preemption alone).

21. *Id.* at 1417 (Thomas, J., concurring) (advocating that the Court "reexamine" preemption).

22. Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 60–72 (1999) (describing how courts' constitutional review came to privilege individual rights over group rights). For a discussion on First Amendment "Lochnerism," see Shanor, *supra* note 6, at 135 (arguing that the modern First Amendment has infinite deregulatory potential). See also Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) ("It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation.").

23. See, e.g., Steven Greenhouse, *New Poll: Americans See Big Power Imbalance in the Workplace*, ONLABOR (May 14, 2020), <https://onlabor.org/new-poll-americans-see-big-power-imbalance-in-the-workplace> [<https://perma.cc/>



mobilizing at rates not seen in decades and in new industries and forms.<sup>24</sup> Moreover, the COVID-19 pandemic has shined new light on just how little voice and how few legal protections most workers have on the job.<sup>25</sup> Americans now overwhelmingly favor more government interventions empowering workers vis-à-vis their employers, not less.<sup>26</sup> In response to popular demand,

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BL36-4YSD] (“If nothing else, the survey’s findings show that millions of American, indeed tens of millions, think something is hugely out of whack in the American workplace and in the American economy – that corporations have far too much power over their workers and that workers have far too little voice.”); Alexander Hertel-Fernandez, *What Americans Think About Worker Power and Organization: Lessons from a New Survey*, DATA FOR PROGRESS 2 (May 2020), <https://www.filesforprogress.org/memos/worker-power.pdf> [<https://perma.cc/MVK5-CZUV>] (“[T]aken together the survey results indicate that public opinion is squarely behind policies that could revive worker power and organization.”).

24. See, e.g., Greg Jaffe, *It’s a Walkout!?: Inside the Fast-Food Workers’ Season of Rebellion*, WASH. POST (Nov. 6, 2021), <https://www.washingtonpost.com/nation/interactive/2021/rebellion-mcdonalds-bradford-pa> [<https://perma.cc/83Y5-7XHG>] (“Definitive numbers on these small-scale walkouts do not exist. The Bureau of Labor Statistics only tracks major stoppages that involve more than 1,000 workers. But Mike Elk, a labor reporter and founder of [paydayreport.com](http://paydayreport.com), has compiled a database of 1,600 walkouts since March 2020 that included as many as 100,000 workers.”).

25. See Jimmy O’Donnell, *Essential Workers During COVID-19: At Risk and Lacking Union Representation*, BROOKINGS (Sept. 3, 2020), <https://www.brookings.edu/blog/up-front/2020/09/03/essential-workers-during-covid-19-at-risk-and-lacking-union-representation> [<https://perma.cc/7MTL-QVDJ>] (“Since the pandemic began, many have been exposed to unsafe work conditions, with the number of safety complaints skyrocketing in recent months. . . . Since nearly 90 percent of essential workers lack union representation, their ability to ensure safe workplaces is limited.”).

26. Leah Zamore & Ben Phillips, *COVID-19 and Public Support for Radical Policies*, N.Y.U. CTR. ON INT’L COOP. 3 (June 2020), <https://s42831.pcdn.co/wp-content/uploads/2020/06/zamore-phillips-covid19-public-support-radical-policies-web-final.pdf> [<https://perma.cc/VZD5-CERU>] (“Among Americans, 62 percent want the government to address both immediate economic needs and underlying problems like poverty and inequality . . .”). The effects of the COVID-19 pandemic on the meatpacking industry, for example, were exacerbated by the significant imbalance between the outsized power and economic and political influence wielded by the industry’s employers and that of the industry’s workers. See Wilson J. Warren, *The Meat Industry Goes Back to the Jungle*, 120 CURRENT HIST. 21, 25–27 (2021); Taylor Telford, *Meat Industry Hyped ‘Baseless’ Shortage to Keep Plants Open Amid Covid*, WASH. POST (May 12, 2022), <https://www.washingtonpost.com/business/2022/05/12/meatpackers-covid-deaths-trump-industry> [<https://perma.cc/692V-4WVK>] (“The biggest players in the U.S. meat industry pressed ‘baseless’ claims of beef and pork shortages early in the pandemic to persuade the Trump White House

progressive lawmakers have put protective labor reform near the top of their political agenda.<sup>27</sup> But renewed discussions about labor reform only modernize the ongoing conflict at the heart of this piece: labor law's administrative model and the egalitarian promises the NLRA embodies do not align with this deregulatory Court's understandings of individual liberties and judicial review.<sup>28</sup>

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to keep processing plants running, disregarding the coronavirus risks that eventually killed at least 269 workers . . .").

27. See, e.g., Protecting the Right to Organize (PRO) Act of 2021, H.R. 842, 117th Cong. (2021). The PRO Act would have amended existing federal labor law to increase worker protections against retaliation and coercion, among other things, and passed in the House but is unlikely to succeed in the Senate. *Id.* § 104(5)(2), (3) (prohibiting retaliation and coercion); *H.R. 842 – Protecting the Right to Organize Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/842> [<https://perma.cc/T97F-2PNB>] (showing bill's passage in the House and no further action in the Senate).

28. But, for examples of the Court acting in a way that has caused some to question the degree of the Court's political alignment, see *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1787 (2022) (holding airline workers exempt from Federal Arbitration Act); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (holding that sexual orientation and identity is covered under Title VII); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016) (holding that an unaccepted settlement offer does not make a plaintiff's claim moot, and that a government contractor is not entitled to derivative sovereign immunity). See also Elizabeth Pollman, Comment, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 224–25 (2021) (suggesting that the “pro-business label” applied to the Roberts Court “is at once correct but also wrong—or at least too simple”). The Court's 2019–2020 term ended with a series of surprising victories for progressive social interests and against the Trump Administration. See, e.g., *Bostock*, 140 S. Ct. at 1737; *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (vacating the Department of Homeland Security's decision to rescind Deferred Action for Child Arrivals (DACA)). These decisions moderated some critics' views regarding the Roberts Court as just as political as our other government branches and just as divided along partisan lines as the rest of the country. See, e.g., Stuart Gerson, *Understanding John Roberts: A Conservative Institutional Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020), <https://www.jurist.org/commentary/2020/07/stuart-gerson-understanding-john-roberts> [<https://perma.cc/Q469-XV6G>] (“Perhaps the primary example of the view that there is a material difference between jurisprudential conservatism and nominal political conservatism (or the preferences of the President) can be found in the opinion written by Justice Gorsuch, and joined by the Chief Justice, in *Bostock* . . .”); Dahlia Lithwick & Mark Joseph Stern, *The Political Genius of John Roberts*, SLATE (July 9, 2020), <https://slate.com/news-and-politics/2020/07/political-genius-supreme-court-john-roberts.html> [<https://perma.cc/G2RF-HLCU>] (“It was also clear that Roberts would prioritize public respect for the Supreme

In some ways, the United States has been here before. Prior to President Roosevelt's "court-packing" proposal in the 1930s, the Court routinely went against politically enacted regulations of economic activity.<sup>29</sup> Then, as history tells it, the "switch in time" not only "saved nine" and the liberal democratic order, but also preserved constitutional labor laws.<sup>30</sup> Now, though, the modern dance between our policymaking branches, labor law, and the Court is more complicated. Wealthy private interests spend billions lobbying in gerrymandered states and districts for anti-labor initiatives such as "Right-to-Work" laws, or California's Proposition 22.<sup>31</sup> When their efforts fail in the ordinary

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Court and the federal judiciary over short-term gains for the president and his party."). But these critics oversimplify the Court's decades-long conservative project that views the occasional loss to the far-right social agenda and an unpopular administration as a small price to pay for a legitimate judiciary.

29. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) ("It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."); *Adair v. United States*, 208 U.S. 161, 180 (1908), *overruled by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) ("[U]nder the guise of regulating interstate commerce and as applied to this case [the statute] arbitrarily sanctions an illegal invasion of personal liberty as well as the right of property of the defendant Adair."); *Adkins v. Children's Hosp.*, 261 U.S. 525, 560–61 (1923), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) ("If, in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree."). See generally Jamie L. Carson & Benjamin A. Kleinerman, *A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan*, 113 PUB. CHOICE 301, 302–05 (2002) (describing the historical context in which FDR announced his court-packing plan).

30. See Carson & Kleinerman, *supra* note 29, at 305 (noting that the Court upheld a minimum-wage law and "far-reaching federal control over labor and industry" after President Roosevelt proposed his court-packing plan).

31. See, e.g., Ryan Erickson & Karla Walter, *Right to Work Would Harm All Americans*, CTR. FOR AM. PROGRESS ACTION FUND (May 2017), <https://www.americanprogressaction.org/article/right-work-harm-americans> [<https://perma.cc/4V7F-CPJG>] ("The National Right to Work Committee, which advocates for the passage of right-to-work legislation, received \$1,000,000 from Freedom Partners, a group affiliated with the Koch brothers, in 2012 alone."); Idrian Mollaneda, *The Aftermath of California's Proposition 22*, CALIF. L. REV.: BLOG (May 2021), <https://www.californialawreview.org/online/the-aftermath-of-californias-proposition-22> [<https://perma.cc/UG8U-EKV4>] ("Uber, Lyft, DoorDash, and other gig companies who authored and advertised Proposition 22 spent a record \$200 million on the ballot initiative to persuade Californians to

political process, they pirouette into bringing constitutional challenges in federal courts where ideologically-aligned networks have influenced the appointment of conservative judges.<sup>32</sup> At the very top is a supermajority of Supreme Court Justices who also lean to the right of the public majority on labor issues.<sup>33</sup> Of course, the Court as the defender of marginalized groups and minority interests may go against the public and political majority.<sup>34</sup> But doing so, impervious to the social, political, economic, and ideological context around it, has delegitimizing costs. Gaslighted by a constitutional democracy that routinely produces anti-democratic results in favor of an already privileged few, Americans are questioning the political process and the role of the Supreme Court within it.<sup>35</sup> Amid a labor revival and the first

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vote it into law.”). During the first campaign cycle after *Citizens United*, outside groups reported spending \$298 million, more than a fourfold increase over the amount of outside spending four years before. See *Money in Politics 101: What You Need to Know About Campaign Finance After Citizens United*, BRENNAN CTR. FOR JUST. (Sept. 28, 2012), <https://www.brennancenter.org/our-work/research-reports/money-politics-101-what-you-need-know-about-campaign-finance-after> [<https://perma.cc/AV6Q-WY7K>].

32. See generally Alex Botoman, Note, *Divisional Judge Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 300–08 (2018) (arguing that Texas used “divisional judge-shopping” in three cases challenging Obama administration initiatives); Jackie Calmes, *How Republicans Have Packed the Courts for Years*, TIME (June 22, 2021), <https://time.com/6074707/republicans-courts-congress-mcconnell> [<https://perma.cc/P3MZ-VV72>] (providing an overview of “how Republicans have bested Democrats in filling seats on the federal bench at all levels for years”).

33. Compare Litman, *supra* note 16 (“June’s 6-3 decision in *Cedar Point Nursery v. Hassid* invalidated a longstanding California labor regulation that made it easier for migrant agricultural workers to unionize.”), with Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [<https://perma.cc/V9AD-PN79>] (“Seventy-one percent of Americans now approve of labor unions.”).

34. See Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 277–78 (1995) (describing the role of the federal courts in a constitutional democracy of protecting certain minority interests when threatened by a majoritarian-driven government). See also THE FEDERALIST NOS. 10, 51 (James Madison) (expressing the importance of protecting the rights of political minorities from being “trample[d] on” by the most numerous parties, or, in other words, “the most powerful faction”).

35. See, e.g., Lee Rainie & Andrew Perrin, *Key Findings About Americans’ Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about>

realistic discussion on Court reform in nearly a century, now is an opportune time to consider the impending labor litigation ahead and to ask where its unraveling exceeds the bounds of what most are willing to accept.

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This Article proceeds in four parts. Part I details labor’s foundational principles and interconnected doctrines. It begins by describing the democratic values that undergird the NLRA, and then explains how these values shaped interpretations of specific statutory provisions and labor’s surrounding common law. Notably, Part I details how several labor doctrines embrace a constitutional compromise—whereby restrictions of constitutional interests in one doctrine are paired with legal privileges afforded in others. Also explored throughout Part I is the role of the NLRB in weaving together labor doctrines into the system’s final composition.

Part II pivots to the Roberts Court. Using *Janus*, it accounts for how the Court orchestrated the undoing of a labor doctrine—overcoming stare decisis principles and legislative deference norms. It details how the Court, in a pair of narrow procedural cases, engineered the “special circumstances” later cited in *Janus* for why stare decisis did not apply to the agency fee precedent it overruled.<sup>36</sup> But disregarding precedent only exposed a labor thread. To undo it, the Court enlisted one of its favorite deregulatory tools—the First Amendment.<sup>37</sup> Using an expanded

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-americans-declining-trust-in-government-and-each-other [https://perma.cc/7SAU-QAB8] (“Those who think there has been a decline of trust in the federal government over these two decades often see the problem tied to the government’s performance . . .”); Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/L4J5-6F72] (“Many institutions have suffered a decline in confidence this year, but the 11-point drop in confidence in the Supreme Court is roughly double what it is for most institutions that experienced a decline.”).

36. As Justice Kagan points out, these criticisms are dicta. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2498 (2018) (Kagan, J., dissenting) (“Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. . . . Relying on them is bootstrapping—and mocking *stare decisis*.”).

37. See, e.g., *id.* at 2486 (majority opinion) (holding that the extraction of agency fees from nonconsenting public employees violates the First Amendment); *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (striking down longstanding regulations of corporate political expenditures on First

and malleable understanding of First Amendment protections, *Janus* likened agency fees compensating union representatives for their services to the same substantial First Amendment interests involved in compelled political speech.<sup>38</sup> This view divorced agency fee doctrine from labor law's comprehensive legal regime and ignored the political and social context in which agency fee challenges arrive at the Court.

*Janus* is no outlier thread, though. It is a roadmap. Parts III and IV, therefore, highlight the prospective consequences of *Janus* undoing and upsetting the delicate balance of doctrines that labor's legal system strives to maintain. It details subsequent legal challenges to related labor doctrines now guided by *Janus*'s interpretive reasoning and constitutional approach. Some of these extensions, like the ongoing challenges to exclusivity and future challenges to collective bargaining, are undeniably linked to *Janus* and the line it blurs between political and economic speech. Others, however—such as *Cedar Point Nursery v. Hasid's*<sup>39</sup> view of labor regulation as a private-property taking, or *Americans for Prosperity Foundation v. Bonta's*<sup>40</sup> strengthened associational protections—have made their way through the lower courts with little scholarly connection to *Janus*. Part III makes these connections. It highlights *Janus*'s expansive potential using the First Amendment in Part III, while Part IV discusses *Janus*'s relation to other unraveling tools and maneuvers. Both Parts III and IV also explore the extent the Court's active undoing of labor doctrines, or "Janusism," trumps other beliefs and interpretive theories the Roberts Court purports to assume. Janusism reigning supreme over originalism, institutionalism, and minimalism, Part IV highlights *Glacier Northwest, Inc.'s*<sup>41</sup> questioning of preemptive norms as the next unraveling thread along the Court's long and devastating route through labor law's existent tapestry.

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Amendment grounds). See generally Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323 (2016) ("In this Article, I discuss a new generation of deregulatory First Amendment theories, and their potentially calamitous effects on workers if courts accept them.").

38. *Janus*, 138 S. Ct. at 2463–65 (comparing agency fees to compelled speech under the First Amendment).

39. 141 S. Ct. 2063 (2021).

40. 141 S. Ct. 2373 (2021).

41. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404 (2023).

A brief Conclusion ties up any loose ends. Likewise, it situates calls for Court reform and revived collective worker movements as responsive to the Roberts Court's undoing of labor law and perceived mismanagement of individual liberties and equality values when they collide.

## I. WEAVING TOGETHER LABOR'S LEGAL TAPESTRY

The vision of labor's legal system as a rich tapestry of carefully blended material is outlined in Part I below. It begins by describing the NLRA's affirmative purpose statement as a "quasi-constitutional" policy directive guiding labor's raw materials towards a common design. These raw materials (the NLRA's statutory provisions and labor's common-law doctrines) are then briefly described and situated within labor's entire legal project. But interweaving these materials together at the right places and times, and understanding their relations to one another, is a learned skill. As such, this Part also highlights the administrative role of the Board in performing labor law's functional mechanics.

### A. THE STATED PURPOSE OF THE NLRA

Labor law in the United States has a storied relationship to democratic ideals.<sup>42</sup> These accounts almost always begin with the NLRA's transcendent purpose statement that embraced collective bargaining as "the policy of the United States" to accomplish two primary goals: an equal balance of power and resources, and industrial peace.<sup>43</sup> Despite the country's egalitarian notions and Reconstruction's promises of liberty, the law was not always kind to collective bargaining and the organized labor movement.<sup>44</sup> During the late nineteenth and early twentieth

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42. See National Labor Relations Act § 1, 29 U.S.C. § 151 (declaring a policy to encourage collective bargaining and freedom to associate and organize); see also Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 215–18 (1960) (detailing statements made by the NLRA's sponsor, Senator Wagner, related to the democratic ideals embodied in the Act).

43. See 29 U.S.C. § 151.

44. See JULIUS G. GETMAN, *THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS* 1–6 (2016) (noting that after declaring early union activities and organizing efforts to be unlawful conspiracies, courts issued speedy injunctions to employers to prevent strikes, boycotts, and even peaceful picketing and demonstrations).

centuries, courts routinely enjoined union activities as unlawful conspiracies.<sup>45</sup> Likewise, corporate cries of individual freedom of contract during the *Lochner* Era stalled any meaningful attempts at legislative intervention in private labor relations.<sup>46</sup> But public sentiment changed after the Great Depression and a particularly trying period of labor discord.<sup>47</sup> In response, New Deal lawmakers enacted the NLRA in 1935.<sup>48</sup>

A radical rejection of past laissez-faire labor policies, Congress did not mince words when drafting the NLRA's purpose and articulating the circumstances that brought the

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45. *Id.*; see, e.g., *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 136 (1842) (overturning a lower court's conviction for criminal conspiracy of members of the Boston Journeymen Bootmakers' Society); *Vegeahn v. Guntner*, 44 N.E. 1077, 1077–78 (Mass. 1896) (issuing an injunction to stop protests “seeking to secure better wages”); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 261–62 (1917) (issuing an injunction against the United Mine Workers of America).

46. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 6, 13 (1915), *overruled by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (invalidating state law that prohibited employers from requiring employees “to enter into any agreement . . . not to join or become or remain a member of any labor organization or association, as a condition of . . . securing employment, or continuing in the employment of such individual, firm, or corporation”); *Loewe v. Lawlor*, 208 U.S. 274, 292–97 (1908), *superseded by statute*, Clayton Antitrust Act, 15 U.S.C. §§ 12–27 (holding that the Sherman Antitrust Act was enforceable against a union boycott). The Sherman Antitrust Act, designed to prevent business monopolies and to remedy violations, provided for injunctive relief and potential treble damages. 15 U.S.C. §§ 1–2.

47. See Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 WIS. L. REV. 1065, 1085–86 (describing a massive wave of striking activity, beginning in 1933). These labor strikes frequently damaged the national economy and required the deployment of the National Guard or federal troops to restore order. See Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1275–78 (1989) (arguing that labor militance, radical organization, and Communists' involvement in labor activity had a major influence on the passage of the 1935 NLRA).

48. See National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–166); see also Keyserling, *supra* note 42, at 201–12 (describing the efforts of Senator Robert Wagner to pass the NLRA in the face of ambivalence and hostility); Goldfield, *supra* note 47, at 1270–76 (describing the context in which the NLRA was passed). For purposes of this Article, the term “New Deal” refers to a set of domestic policies during the Franklin Delano Roosevelt administration that were generally in favor of regulatory checks on private businesses, against ideas of economic liberty, and promoted expansions of the welfare state.



transcendent statute into being.<sup>49</sup> The NLRA's preamble, now Section 1, diagnosed the tense state of labor affairs as symptomatic of a power imbalance that prevented workers from securing decent living standards and fair working conditions through other means.<sup>50</sup> Congress's attempt to correct this imbalance was the government's facilitation of "the practice and procedure of collective bargaining" via the NLRA.<sup>51</sup>

Read properly, the preamble clarifies that the statute's preliminary goal of equalizing leverage and wealth fits neatly with the auxiliary one of "industrial peace"—both of which are accomplished through collective bargaining.<sup>52</sup> But as scholars and the drafters of the Act have noted, industrial peace was never meant to be the fulcrum, or purchased at the cost of workers' collective activity.<sup>53</sup> To do so would have ignored the factors contributing to labor unrest in the first place—mainly a centralized industrial design that promoted economic inequality and worker subjugation.<sup>54</sup> Indeed, in subsequent speeches and writings, chief architects of the NLRA depicted collective bargaining as far more

49. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978) (describing the NLRA as "perhaps the most radical piece of legislation ever enacted by the United States Congress").

50. National Labor Relations Act § 1, 29 U.S.C. § 151. The preamble alludes to workers once securing fair wages and working conditions through individual contract bargaining. See *id.* However, the rise of "corporate or other forms of ownership" destroyed any "actual liberty of contract" that may have existed between workers and their employers and depressed wage competition, "wage rates[,] and the purchasing power of wage earners." *Id.*

51. *Id.*; see Klare, *supra* note 49, at 281–85 (describing the goals of the NLRA).

52. See 29 U.S.C. § 151. Workers needed collective bargaining protections and a legal apparatus for peacefully resolving labor disputes, or their only alternative was labor and industrial unrest. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937) ("Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.").

53. See, e.g., 78 CONG. REC. 12044 (1934) (statement of Sen. Wagner) ("I would not buy peace at the price of slavery. . . . I shall never subscribe to the proposition that peace is so valuable that we should have it at the expense of liberty."); Klare, *supra* note 49, at 281 n.53 (noting the irony in the fact that "the industrial peace rationale only makes sense on the assumption that employers would eventually come to their senses and accept collective bargaining as more productive from the long-run standpoint").

54. See 29 U.S.C. § 151 and text accompanying note 50.

than merely a tool for peacefully determining wages, hours, and working conditions.<sup>55</sup> To Senator Robert Wagner and his drafting aide, Leon Keyserling, this redistribution of wealth and power struck at the core of democratic principles, and the federal government's promotion of these principles was the essence of the statute.<sup>56</sup>

In 1947, the Taft-Hartley Act amended the NLRA by adding feasible limitations on labor activity that interfered with employers' and employees' individual liberties.<sup>57</sup> But the preamble's overarching policy language remained untouched.<sup>58</sup> Proposals to eliminate the Act's assertion that it was the declared policy of the United States to encourage collective bargaining failed—as even members of the then-conservative congressional majority deemed the purposive language central to the law itself.<sup>59</sup>

Although long-held canons of statutory construction counsel that all statutes should be construed to effectuate their general purpose,<sup>60</sup> the NLRA's decisive purpose statement was

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55. See, e.g., Keyserling, *supra* note 42, at 216 (quoting an article Senator Wagner wrote for the *New York Times* where he wrote about how “collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America”).

56. See *id.*; see also Leon H. Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT: AFTER TEN YEARS* 5, 13 (Louis G. Silverberg ed., 1945) (noting that Senator Wagner described “[t]he development of a partnership between industry and labor” as “the indispensable complement to political democracy”).

57. See Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151–166); see also *infra* Part I.C.1. Among other things, the Taft-Hartley Act articulated unfair labor practices of representatives, preserved employer speech rights during organizing, and highlighted the majoritarian right of employees not to choose a representative for collective bargaining purposes. See Taft-Hartley Act § 101(7), (8)(b)–(c).

58. JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947*, at 199 (1981) (describing unsuccessful attempts to alter the preamble of the NLRA).

59. See National Labor Relations Act § 1, 29 U.S.C. § 151; GROSS, *supra* note 58, at 253–54 (describing Fred Hartley's proposed house bill to eliminate the NLRA's explicit endorsement of collective bargaining from its purpose statement).

60. See, e.g., *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (“All statutes must be construed in the light of their purpose.”); NORMAN SINGER & SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 46:5 (7th ed. 2007), Westlaw SUTHERLAND (characterizing a statute as “animated by one general purpose,” which serves as a “touchstone” to interpreting “subsidiary provisions”); cf. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK:*

particularly important for interpreting later provisions of the Act.<sup>61</sup> Provisions which were, quite frankly, pretty vague. Early on, the Act's unequivocal purpose statement served as an interpretive lens when deciding the functional meanings and explicit applications of the law's broad protections and guarantees.<sup>62</sup> The NLRB (and by deference, the courts)—when confronted with two plausible understandings—embraced the one most in line with the statute's stated intent of promoting collective bargaining as a means to equality.<sup>63</sup>

#### B. LABOR LAW'S FOUNDATIONAL TEXT

The NLRA's weightiest provision is Section 7, which affirms employees' rights to self-organize and designate representatives for collective bargaining purposes and other concerted activities.<sup>64</sup> But the statute does more than just acknowledge those employee rights.<sup>65</sup> Section 8 throws the weight of the federal

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A JUDGE'S VIEW 94–95 (2010) (arguing that purposeful statutory construction serves democratic values because voters can hold legislators accountable for the goals in statutes).

61. See, e.g., GROSS, *supra* note 58, at 10–11 (noting the excitement of the NLRB staff to work towards the purpose of the NLRA).

62. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 23, 42–43 (1937) (finding that Congress's stated purpose of “eliminat[ing] these causes of obstruction to the free flow of commerce,” to be within the scope of Congress's authority); Republic Steel Corp. v. NLRB, 311 U.S. 7, 11 (1940) (interpreting the NLRA “in harmony with the spirit and remedial purposes of the Act”); Va. Elec. & Power Co. v. NLRB, 319 U.S. 533, 543–44 (1943) (relying on the purpose of the NLRA).

63. See, e.g., NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266–67 (1975) (deferring to the NLRB's interpretation of the NLRA because the Board “reached a fair and reasoned balance upon a question within its special competence”); NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984) (finding that the NLRB's interpretation of “concerted activity” serves to mitigate “the potential inequality in the relationship between the employee and the employer . . . throughout the duration of the employment relationship, and is, therefore, fully consistent with congressional intent”).

64. 29 U.S.C. § 157; see also Gerald Friedman, *American Labor and American Law: Exceptionalism and Its Politics in the Decline of the American Labor Movement*, 11 L. CULTURE & HUMANS. 30, 39 (2015) (describing the NLRA's reception in the Supreme Court).

65. Although Section 7(a) of the National Industrial Recovery Act of 1933 (NIRA) previously codified employees' right to collective bargaining and concerted activity, it lacked meaningful enforcement mechanisms to support these rights. See National Industrial Recovery Act of 1933, Pub. L. No. 73-67, § 7(a), 48 Stat. 195, 198–99 (1933); Devki K. Virk, Note, *Participation with*

government behind protecting them by prohibiting employers from, among other things, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.<sup>66</sup> Other provisions of the NLRA establish representative election and certification procedures<sup>67</sup> and summarize the appropriate behaviors of employers, workers, and chosen representatives during organizing and collective bargaining.<sup>68</sup> All in all, though, the statute thought to be “perhaps the most radical piece of legislation ever enacted” is remarkably nebulous when it comes to specific details.<sup>69</sup>

What brought the NLRA’s text to life was its creation of the NLRB in Section 3—a bifurcated administrative agency comprising separate and independent investigatory and adjudication divisions.<sup>70</sup> On one side, the NLRB’s General Counsel investigates allegations of unfair labor practices and brings forth meritorious complaints.<sup>71</sup> These complaints are then heard before a tribunal of subject-matter experts (the “Board”) that use these gathered facts, past Board decisions, and the NLRA’s purposive mandate to perform the factually and legally complex task of giving the Act practical meaning.<sup>72</sup>

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*Representation: Ensuring Workers’ Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729, 734–37, 734 n.28 (noting that the NIRA’s infirmities allowed employers to create company unions, which exacerbated the power imbalance abhorrent to Senator Wagner).

66. 29 U.S.C. § 158(a)(1). Section 8, now Section 8(a), also prohibits employers from dominating or assisting labor organizations, discriminating against employees based on union membership or participation in statutory proceedings, and refusing to bargain with employee representatives. *Id.* § 158(a)(2)–(5).

67. *Id.* § 159. Representatives are “certified” through a majoritarian election. *Id.*

68. *Id.* § 158(b); § 159(c). See *infra* Part I.C.2 for further explanation of exclusivity.

69. Klare, *supra* note 49, at 265, 291 (“The statute was a texture of openness and divergency, not a crystallization of consensus or a signpost indicating a solitary direction for future development.”).

70. 29 U.S.C. § 153 (establishing the NLRB and describing its structure and duties).

71. *Id.* § 153(a) (describing the investigatory power of the NLRB General Counsel).

72. See *id.* § 160 (outlining the NLRB’s congressionally delegated authority); see also 29 C.F.R. § 101.4–.10 (2023) (illustrating the process of investigating and process unfair labor practice claims).

By delegating interpretation to the Board, Congress recognized a limitation lawmakers had confronted in labor relations' past: no 1930s lawmaker could possibly conceive of all the potential ways employers might interfere with employees' collective rights, or all the ways labor's conflicting interests might collide in the years to come. As such, by leaving the Act's text vague with unidentified terms like "interference," and by tasking an agency of experts with its interpretation, the text would outlive its time.<sup>73</sup> The Board could articulate its meaning and resolve conflicting NLRA interpretations through case-by-case adjudication of an infinite number of events charged as violative of the statute in an ever-changing economy.<sup>74</sup>

Congress also understood that to administer the NLRA's complex and interrelated national labor policy, the Board must be the primary adjudicator of labor disputes.<sup>75</sup> Out of this spirit developed a substantial body of precedent preempting state and federal courts from entertaining claims based on conduct protected by Section 7 of the Act. Under this doctrine, known as "Garmon Preemption," named after *San Diego Building Trades Council v. Garmon*, if conduct is even arguably protected under Section 7 of the NLRA, state courts must pause proceedings for claims involving the same conduct under state law to allow the Board to first consider whether the conduct is protected.<sup>76</sup>

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73. Cf. *Purple Commc'ns, Inc.*, 361 N.L.R.B. 1050, 1066 (2014) (overruling *Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007)). The Board's modern understanding of employer-sponsored email systems as "critical means of communication" and not a finite resource, exemplifies how the NLRA's imprecise text frees the Board to work through functional details and modern workplace developments. See *id.* at 1055–57.

74. Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 95 (1954) ("The Board, in exercising its function of interpreting and elaborating the skeletal words of the statute, is compelled to mould and develop a body of law. It can not act as a mechanical brain, but must choose between competing considerations."). See 29 U.S.C. § 160(e)–(f) for the textual description of the federal courts' limited scope of Board review.

75. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.").

76. *Id.* ("If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction.").

Thanks to the NLRA's broad preemptive scope and uniform application, the Board's growing body of past interpretive decisions developed into its own form of labor common law over the years. These Board precedents and their relation to each other are discussed in the Section that ensues.

### C. LABOR'S COMMON LAW DOCTRINES

Within labor's tapestry, long-standing Board interpretations of the NLRA are the horizontal threads tightly wound around the statute's broad text to give it functional meaning. Interlaced with the NLRA's broad textual provisions, several of labor's common law doctrines have become nearly as important to labor's legal design as the statute's language itself.<sup>77</sup> Common law, though, can and does change on occasion to meet social needs, modern understandings, and changed circumstances—and labor's common law is no exception.<sup>78</sup> However, when the Board modifies its own labor precedent, it does not do so in isolation or without care. As experts in the entanglements of the law and the functional aspects of labor-management relations, the Board devotes special attention to how its modifications impact adjacent common law doctrines, greater concepts of fairness,<sup>79</sup> and the overall balance labor strives to maintain between collective bargaining-enabling policy objectives and individual liberties.

#### 1. Organizing, Concerted Activity, and Good Faith Bargaining

One of the Board's initial constructive tasks was to outline what the NLRA's organizing and concerted activity protections functionally entailed. While Section 7 grants employees the right to organize and engage in concerted activity for the purpose of

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77. See IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 18 (1950) (identifying four central ideas of the NLRB: (1) the right of employees to associate and choose representatives; (2) the injunction to employers not to interfere in organizing, including through company unions; (3) the right to choose outside representatives by majority rule; and (4) the duty to bargain in good faith).

78. See, e.g., *Purple Commc'ns*, 361 N.L.R.B. at 1060 (“[W]e must formulate a new analytical framework for evaluating employees’ use of their employer’s email systems.”).

79. Because Congress passed the NLRA to remedy an already unequal system, I do not mean to imply that fairness here denotes a one-to-one balancing of threads.

collective bargaining or for other mutual aid or protection,<sup>80</sup> the Act is silent as to what these protections actually look like, as well as what prompts them and when.<sup>81</sup> Early Board decisions recognized that Section 7's organizing rights came with some limited access rights to employer property for organizing activity.<sup>82</sup> But these access rights evolved so as to only disturb private property interests to the extent necessary for employees to learn about organizing from others and exercise their rights.<sup>83</sup> For instance, Section 7 was interpreted as allowing employees to organize on employers' property during non-work times since employees had already been allowed onto the property, but non-employee organizers could only access employer property when there were no other available means of getting the union's message to employees.<sup>84</sup>

Most of the Board's early interpretations, though, were preoccupied with defining and protecting "strikes"—or union-organized withholdings of employee labor—as the quintessential protected "concerted activity."<sup>85</sup> Indeed, the Board saw a legally protected strike option as operating in tandem with the statute's collective bargaining obligations because the economic loss caused by strikes to both sides incentivized the parties to come

80. 29 U.S.C. § 157 ("Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining . . .").

81. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624–25 (2018) (rejecting employees' argument that Section 7 protects a right to class or collective actions rather than individual arbitrations).

82. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–05 (1945) (surveying early twentieth century cases discussing employer property access for labor organization purposes).

83. *Id.* at 805 ("If a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization."); see also *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113–14 (1956) ("The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.").

84. *Republic Aviation*, 324 U.S. at 802 n.8 (describing how the Board has that employers may not prohibit union solicitation on company property after work hours); *Babcock & Wilcox*, 351 U.S. at 113 ("[I]f the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.").

85. See, e.g., *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 476 (3d Cir. 1939) (affirming the Board's findings regarding employer's strike-related unfair labor practices).

to the bargaining table with the shared goal of reaching an agreement.<sup>86</sup>

Soon, the Board would learn that achieving a redistributive and labor-promoting economy would prove to be far more complicated than *strike protection leads to collective bargaining*. For one, the Act's protection of concerted activity said nothing about the factual and legal limits of this protection—despite a long-held understanding that the right to strike was not absolute.<sup>87</sup> As such, the Board's early interpretations affirmatively limited strike protections by purpose, as well as only to strikes that were predominately non-violent.<sup>88</sup> Over time, the Board's interpretations devoted more attention to the public harm and interference with economic efficiency strikes caused.<sup>89</sup> Thus, in the 1940s, the Act's right to strike became subject to several other procedural constraints to ensure that the practice was exercised “responsibly,” which is to say, exercised in line with the Board's and courts' notions of property and order.<sup>90</sup> Included in these decisions were condemnations of sit downs, and by the mid-1940s, strikes were only granted legal protections when workers ceased

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86. See *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488–89 (1960) (describing strikes as “economic weapons” that are “part and parcel of the system” the NLRA designs).

87. See, e.g., *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938) (permitting employers to replace striking workers); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308–11 (1965) (permitting employers to “lockout” striking workers “in support of a legitimate bargaining position”). But see White, *supra* note 47, at 1069–70 (arguing that the “once-vital right to strike” has been “eviscerated” by labor law doctrines, including replacement of striking workers and limitations on sympathy strikes and “wildcat” strikes); Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 395–96 (1995) (disputing that replacement of striking workers under the *Mackay* doctrine promotes “economic efficiency”).

88. See White, *supra* note 47, at 1084–88, 1096–1101 (noting that the Wagner Act—passed to support worker self-organization—was quickly used to limit strikes, especially in the Court's decision in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)).

89. *Id.* at 1109–14 (describing how changes in the political landscape led the NLRB to further limit strikers' rights).

90. *Id.* at 1092 (“[NLRB] rulings hewed to a similar approach which confirmed the right to strike but . . . qualified it by a slew of mandates to ensure that it was exercised responsibly, which is to say in line with newly reaffirmed notions of property and order.”).



performing all working duties and abandoned their employer's premises entirely.<sup>91</sup>

Employer abandonment during a strike, however, came with its own complicated factual scenarios. Likewise, during the next decade, the Board would also require employees to “take reasonable precautions to protect the employer’s plant, equipment, or products from foreseeable imminent danger” when abandoning an employer’s premises to strike.<sup>92</sup> But, balancing the efficacy of strategically timed strikes that threaten economic harm and employer interests, the Board drew a delineating line. While employees owed this “reasonable precautions” duty when a strike’s timing put employers’ nonperishable property and equipment in eminent danger, employees did not lose legal protection when the timing of their work stoppage foresaw the ordinary spoilage of an employer’s perishable goods and other economic losses flowing from the interruption of operations.<sup>93</sup>

While trimming the Act’s early strike protections, the Board carefully considered how its new limitations impacted the ultimate balance labor law was meant to preserve—one that protected individual interests and the interests of the public at large, but ultimately not at the expense of collective bargaining and other Section 7 rights. While the Board dulled the protections of strikes and threatened strikes—the most effective economic weapon and practical leveraging tool for getting employers to the bargaining table—it also refined collective bargaining obligations themselves by interpreting the existent statutory requirement to collectively bargain as including a common law

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91. *Id.* at 1098 (describing “sit-down strikes” as successful alterations to employees’ withholding of labor that were thought to unfairly compromise employers’ property interests and their positions at the bargaining table).

92. *Bethany Med. Ctr.*, 328 N.L.R.B. 1094, 1094 (1999) (paraphrasing *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314, 315 (1953), *enforcement denied*, 218 F.2d 409 (5th Cir. 1955)).

93. *See, e.g., Leprino Cheese Co.*, 170 N.L.R.B. 601, 606–07 (1968), *enforced*, 424 F.2d 184 (10th Cir. 1970) (protecting a workers’ strike at cheese factory that caused the milk on hand and the cheese-processing in progress to go bad because spoilage and resulting “[e]conomic loss . . . is often a byproduct of labor disputes.”). *But see NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955) (refusing to protect striking activity that was timed to occur in the middle of pouring molten iron because it caused safety hazards and equipment loss, not only loss or spoilage of the iron product itself).

duty that representatives and employers bargain in good faith.<sup>94</sup> Recognizing it as not just a duty to come to the bargaining table and go through the motions, or surface bargain, the Board interpreted its good faith obligation as a duty “to make every reasonable effort to reach an agreement,” including requiring employers to match unacceptable proposals put forth by designated representatives with counterproposals of their own.<sup>95</sup>

While still not forcing the parties to reach an agreement, the Board’s “good faith” obligations arguably interfered with employers’ individual rights by forcing them to the bargaining table and to make counterproposals.<sup>96</sup> But the Board’s admonitions on “good faith” bargaining and its limitations on strikes were done in tandem with each other. Both maneuvers were designed to maintain an overall balance of Section 7 and employer rights, with as little destruction to one as was consistent with the maintenance of the other.<sup>97</sup>

## 2. The Taft-Hartley Act, Good Faith, and Secondary Concerted Activity

When Congress’s Taft-Hartley Act amended the NLRA by expressly adopting the Board’s “good faith” obligation and further limiting strikes and other concerted activity protections in 1947, again, the Board stepped in to preserve the symbiotic relationship between good-faith bargaining and concerted activities. Taft-Hartley excluded from legal protection “secondary strikes,” as well as other forms of “secondary” concerted activity that “threaten[ed], coerce[d], or restrain[ed]” another party from

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94. See generally *Montgomery Ward & Co.*, 39 N.L.R.B. 229, 242 (1941) (demonstrating the importance of labor negotiations being performed in good faith). To be sure, without clairvoyant powers, the Board has not had an easy time evaluating whether a party has bargained in good faith, since it requires them to draw inferences concerning a party’s state of mind.

95. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1405 (1958) (quoting *Houde Eng’g Co.*, 1 N.L.R.B. 35 (1934)).

96. See generally Russell A. Smith, *The Evolution of the “Duty to Bargain” Concept in American Law*, 39 MICH. L. REV. 1065, 1106–07 (1941) (assessing whether the NLRA’s duty to bargain effectively created “compulsory arbitration of a unilateral character”).

97. See, e.g., Cox, *supra* note 95, at 1412–13 (explaining that the duty to bargain in good faith strikes a balance between unions’ power to strike and employers’ ability to wear down their bargaining partners by “engag[ing] in the forms of collective bargaining without the substance”).

doing business with an employer involved in a labor dispute.<sup>98</sup> However, Congress, per usual, provided the Board with little guidance for what prohibited threatening, coercive, or restraining activity actually looked like in a real-life labor dispute.<sup>99</sup> Moreover, it was difficult to ignore how much the restrictions on “secondary” activity—that is, restricting conduct such as boycotting or peacefully picketing outside of an establishment—looked like the restrictions on political protests and boycotts that courts had struck down on First Amendment grounds.

Nevertheless, presuming Congress’s actions were constitutional, the Board began the particularly mind-numbing task of interpreting and administering Taft-Hartley’s restrictions of secondary concerted activity.<sup>100</sup> To distinguish secondary activity from other political protests, it highlighted the economic nature of labor’s concerted activities.<sup>101</sup> According to the Board and

98. 29 U.S.C. § 158(b)(4). The NLRA describes other forms of secondary concerted activity, such as picketing and handbilling. *See id.* But without excluding these activities outright, the Board has been tasked with determining whether these activities are unprotected because they threaten, coerce, or restrain activity. *See id.*; *see also* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 43 (1930) (describing “secondary” activity as “a combination to influence *A* by exerting some sort of economic or social pressure against persons who deal with *A*” (footnote omitted)). Although it has been ninety years since Frankfurter and Greene’s influential work, their definition of secondary activity remains the most straightforward. The activity is considered secondary because it is not directed at the real target of the actors’ discontent; as opposed to primary activity, which is activity directed towards the party involved in the dispute.

99. 29 U.S.C. § 158(b) (not defining the terms “threaten,” “coerce,” or “restrain”).

100. *See* NLRB v. Drivers, Chauffeurs, Helpers, Loc. Union No. 639, 362 U.S. 274, 290 (1960) (describing the particularly challenging interpretation task Section 8(b)(4) presents). Commentaries on labor’s prohibition of “coercive” concerted activities note that all effective protests are “coercive”—to the extent they persuade others into taking desired actions. *See, e.g.,* White, *supra* note 47, at 1065. Nonetheless, the Court has clarified that these political protests did not lose First Amendment protection “simply because [the activity] may embarrass others or coerce them into action.” NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1962).

101. *Drivers, Chauffeurs, Helpers*, 362 U.S. at 290–91 (“Congress in the Taft-Hartley Act authorized the Board to regulate peaceful ‘recognitional’ picketing only when it is employed to accomplish objectives specified in § 8 (b)(4); and that § 8 (b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.”).

adoptive courts, while indeed secondary labor activities were just forms of collective protest or speech, labor speech was different. Labor speech was aimed at influencing economic circumstances, not political ones.<sup>102</sup> As such, because labor's economic or commercial speech was not as constitutionally protected as political speech, Congress's restriction on certain coercive, threatening, or restraining types did not run afoul of the First Amendment.<sup>103</sup>

This delineating line between labor's economic speech and political speech would also prove useful when the Board embraced a broader understanding of good faith bargaining to account for the imbalance the new restrictions on secondary activities created. Taft-Hartley amended the NLRA with a description of the parties' collective bargaining obligations as a responsibility "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."<sup>104</sup> This text codified the good faith duty to collectively bargain first recognized by the Board, but the Board rejected arguments that this provision should be read as an expressed limitation to future interpretations of good faith. To the contrary, after the Taft-Hartley amendments, the Board expounded on "good faith" bargaining obligations with even more all-encompassing language.<sup>105</sup> Now, when reviewing a party's good or bad faith, it did so as a whole—drawing inferences concerning a party's state of mind based on their actions taken at

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102. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) ("The interests of the contestants in a labor dispute are primarily economic . . .").

103. See *Carey v. Brown*, 447 U.S. 455, 465 (1980) (contrasting labor picketing from "picketing on issues of broader social concern"). In addition to the Board's view that regulations of secondary picketing received more latitude because labor speech was economic in nature, the Court also viewed picketing as "more than speech." See *Bldg. Serv. Emps. Int'l Union, Loc. 262 v. Gazzam*, 339 U.S. 532, 537 (1950). Because picketing involved patrol of a particular area, it was considered a packaged deal of "speech" plus regulatable "conduct" (i.e., the patrol). See *Bakery & Pastry Drivers & Helpers Loc. 802 v. Wohl*, 315 U.S. 769, 776–77 (1942) (Douglas, J., concurring).

104. 29 U.S.C. § 158(d).

105. See Leroy S. Maxwell, Jr., *The Duty to Bargain in Good Faith, Boulwarism, and a Proposal—The Ascendance of the Rule of Reasonableness*, 71 *DICK. L. REV.* 531, 541–44 (1967) (outlining various "catch-phrase"-based formulations of good faith requirements by the Board, including the "surface indicia" of bargaining and "closed mind" bargaining).

the bargaining table and their conduct at other relevant times.<sup>106</sup>  
This obligation

requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties existing between the[m] . . . Mere pretended bargaining will not suffice, neither must the mind be hermetically sealed against the thought of entering into an agreement.<sup>107</sup>

Furthermore, declining Taft-Harley's invitation to describe specific examples of bad faith—the Board noted that banal descriptions of the standard and case-by-case assessments preserved robust negotiation, as conscious parties would do so to be sure they met the vague standard.<sup>108</sup>

When it comes to legally compelling negotiations or speech, this airing on the side of over-prescription is certainly not the narrow tailoring of government interests that is associated with highly-protected speech interests.<sup>109</sup> But this speech was collective bargaining speech, now of the lesser-protected economic-

106. See *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 490 (1960) (“The scope of § 8 (b)(3) and the limitations on Board power which were the design of § 8 (d) are exceeded . . . by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations.”).

107. *NLRB v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941) (citations omitted); see also *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1603 (1984). In cases of “surface bargaining”—where a party appears to be going through the motions of negotiations without any real intention of coming to an agreement, and only circumstantial evidence is available to discern their true intent—the Board considers seven activities for determining legal bad faith: (1) delaying tactics; (2) unreasonable bargaining demands; (3) unilateral changes in mandatory subjects of bargaining; (4) efforts to bypass the union; (5) failure to designate an agent with sufficient bargaining authority; (6) withdrawal of already agreed-upon provisions; and (7) arbitrary scheduling of meetings. While parties need not have engaged in all of these to be found to have bargained in bad faith, their overall conduct is evaluated based on whether they engaged in these activities. *Id.*

108. *E.g.*, *L.W. Le Fort Co.*, 290 N.L.R.B. 344, 352 (1988) (“Determinations regarding good faith must necessarily be made on a case-by-case basis.”).

109. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that First Amendment “freedoms are delicate and vulnerable, as well as supremely precious in our society,” and that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity”).

speech variety.<sup>110</sup> Furthermore, at least for the Board, the compelled obligation existed as part of an even-handed constitutional arrangement that regulated economic speech on both sides of the labor dispute.<sup>111</sup> The Act constitutionally compelled employers to participate at the bargaining table in good faith, as it constitutionally restricted labor's secondary concerted activity.<sup>112</sup>

### 3. Exclusivity and the Duty of Fair Representation

The relationship between the NLRA's exclusivity assurance and the common law duty of fair representation is another example of how understandings of labor law have developed side by side to fulfill policy initiatives. Under the NLRA, exclusivity entitles labor representatives with majority support to act for and collectively bargain on behalf of all covered employees in a bargaining unit.<sup>113</sup> Exclusivity strengthens a representative's role and the majority's position in the bargaining process by designating it as the sole path to workers when negotiating terms and conditions of employment.<sup>114</sup> Likewise, exclusive representation also promotes the systemic goals of industrial efficiency and industrial democracy, as employers need only negotiate with a single, majoritarian, labor representative.

Although exclusive representation comes with benefits for the group and the representative, it also comes with individual

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110. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763 n.17 (1976) ("The speech of labor disputants . . . is subject to a number of restrictions.").

111. The NLRA imposes the duty to bargain in good faith on both "the employer and the representative of the employees." 29 U.S.C. § 158(d).

112. *Id.* §§ 151, 158(a)–(b) (illustrating the reasoning behind the Act's commitment to good-faith bargaining and outlining unfair labor practices prohibited by the Act).

113. See *id.* §§ 159(c), 158(d) (illustrating the scope of labor representatives' ability to advocate on employees' behalf). Once a labor organization is properly selected according to the NLRA's procedures, that labor union "shall be the exclusive representative[] 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." *Id.* § 159(a).

114. See *id.* § 159(a) (noting that the representative designated for bargaining is the exclusive representative); *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678, 683–85 (1944) (determining that an employer violates the NLRA and commits an unfair labor practice when it attempts to circumvent a certified labor representative and bargain directly with covered employees or through any other means besides through their exclusive representative).

worker limitations.<sup>115</sup> Consider the extraordinary employee who may be able to negotiate better employment terms on an individual basis—this employee is precluded from doing so because of exclusivity. Or, because majority rules in exclusive representation, even a sizeable minority of workers within a bargaining unit may be opposed to the positions their representative takes at the bargaining table.<sup>116</sup> As such, to balance out these individual limitations and preserve exclusive representation’s collective benefits, the Board and reviewing courts recognized a common law “duty of fair representation” for all exclusive representatives.<sup>117</sup>

This duty of fair representation requires exclusive representatives to provide their services and apply bargained-for contract terms to all employees they represent without discrimination. Subsequent interpretations would standardize the duty of fair representation’s practical meaning in a variety of different contexts and intertwine it even more with exclusivity. Commonly arising out of issues relating to the processing of worker grievances, the duty of fair representation now requires exclusive representatives to process all grievances fairly—even if a grievant has neglected to pay union dues, or declined to become a full union member.<sup>118</sup> Practically speaking, this means a

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115. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). In *J.I. Case Co.*, after an employer refused to bargain with a newly certified union while the terms of existing individual contracts remained in effect, the Court held: “The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.” *Id.*

116. See, e.g., *id.* (“[I]t is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group . . .”). In early challenges to exclusive representation, a minority of African American workers objected to being represented by a union negotiating for racially discriminatory contract provisions and employment terms. *But cf.* *United States v. Hayes Int’l Corp.*, 415 F.2d 1038, 1041 (5th Cir. 1969) (describing a union agreement that allowed Black employees to transfer into jobs that the company previously excluded Black employees from holding).

117. *J.I. Case Co.*, 321 U.S. at 338; see also *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202–04 (1944) (sanctioning the common law duty of fair representation, the Court reasoned that “the language of the Act . . . read in the light of the purposes of the Act” imposes on labor representatives a “duty to exercise fairly the power conferred upon [them]”).

118. See *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (“[W]e accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion . . .”).

covered employee in a bargaining unit who does not support their union representative during the organizing and collective bargaining process can still expect the benefits in the bargained-for contract to apply to them, and can expect the union to expend its resources representing them if an employer breaches these contract provisions in the future.<sup>119</sup>

Recognizing how exclusivity confers a legal privilege on labor representatives, and the duty of fair representation confers an obligation, Cynthia Estlund describes this zeroing out as the “quid pro quo” of labor law.<sup>120</sup> Others have analogized these privileges and obligations to the duties and obligations imposed on political representatives in our democratic republic.<sup>121</sup> The political representative is chosen by a majority, but once elected, they represent the interests of all their constituents—regardless to whether they supported them during the election. Likewise, political representatives have a mandate to speak on behalf of their constituents (even opposing ones) in state-sanctioned discussions, like the Congress floor—just as labor representatives have a like mandate to speak on behalf of all represented employees (even objecting ones) at the bargaining table.<sup>122</sup>

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119. *Id.* at 194 (“In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances.”).

120. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 194 (2015) (“[U]nions are . . . central actors in a regulatory system in which they enjoy legal powers and privileges and are subject to duties and restrictions unlike those of other private voluntary associations.”). *But see id.* at 173 (conceding that this *sui generis* forfeiture of fundamental rights in exchange for statutory advantages is what makes labor law and its institutions constitutionally unique).

121. *See Steele*, 323 U.S. at 202–03 (comparing an exclusive representatives’ duty to the duties of a political representative: “Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty. . . . [T]he duty [is] to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them.” (citation omitted)).

122. *Id.* The comparison of a labor representative’s privileges and duties to a political representative’s is also fitting considering an individual employee’s voice and options in the minority. These individual employees, like political constituents, may be dissatisfied with their representatives and still have no immediate recourse for opting out of their representation. Like political minorities, their options are limited until they can garner majoritarian support. Then, they



## 4. Union Security and Agency Fees

Since exclusivity and the duty of fair representation meant that all represented employees were equally benefitting from a union's services and bargained-for contract terms, the NLRA permitted unions to include union security arrangements in their negotiated contracts. These arrangements ensured the union's financial stability and prevented free riding, or employees benefitting from union representation and negotiated benefits without contributing to its costs.<sup>123</sup> Several forms of union security arrangements were initially permitted—including closed shop arrangements, which required employees to be members of a union as a condition of employment.<sup>124</sup> But after Taft-Hartley prohibited the closed shop arrangement and allowed states to restrict other forms of union security within their jurisdiction, the Board set out to articulate a standard for union security

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may try to decertify the representative through the electoral process. Labor representatives, like political ones, perform their duties knowing they are politically accountable to represented employees.

123. See *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 761–63 (1961) (discussing congressional hearings regarding the NLRA, the costs of exclusive representation, and the burden of nonmembers who participate in the benefits without contribution); see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 16 (1965) (“The individual member of a typical large organization . . . will not have a noticeable effect on the situation of his organization, and he can enjoy any improvements brought about by others whether or not he has worked in support of his organization.”); John M. Jermier et al., *Paying Dues to the Union: A Study of Blue-Collar Workers in a Right-to-Work Environment*, 9 J. LAB. RSCH. 167, 175 (1988) (“In both private and public sector employment, many employees who are represented by unions have the option of not paying dues to the union that represents them.”). In labor relations, employees have little incentive to join the union or voluntarily contribute to it financially if, under a duty of fair representation, they are entitled to share in union-negotiated benefits and services whether they contribute or not. This becomes a free-rider problem when a union is left to represent the same number of employees but now with fewer dues-paying members. The union becomes less effective, because their resources have been slashed but the number of employees they represent remains the same. See also OLSON, *supra*, at 66–97 (using the union context to describe what he believed to be the quintessential collective action problem).

124. For several more forms of union security arrangements, see CHARLES HANSON ET AL., *THE CLOSED SHOP: A COMPARATIVE STUDY IN PUBLIC POLICY AND TRADE UNION SECURITY IN BRITAIN, THE USA, AND WEST GERMANY* 121–23 (1982) (defining “preferential shop,” “maintenance of membership,” and “check-off agreements”—all terms used in collective bargaining that fall under the general topic of “union security”).

arrangements in line with Congress's intent.<sup>125</sup> Weighing this intent with other competing interests, it articulated another labor compromise in a sequence of decisions. Unions could charge non-members a pro-rated agency fee to cover the costs the statute obliged them to perform for all represented employees—i.e., their collective bargaining and contract-related services.<sup>126</sup> However, other union activities, such as political activities, could not be part of the pro-rated agency fee charged to non-member employees represented by the union.<sup>127</sup>

While the categorical distinction agency fee doctrine drew between chargeable activities and non-chargeable ones remains the law in the private sector today, not everyone agreed with this compromise at its initiation.<sup>128</sup> Reviewing the Board's agency fee doctrine in *Railway Employees' Department v. Hanson*, Justice Black argued that constitutional protections and not statutory construction should prohibit unions from charging employees for political activities they oppose.<sup>129</sup> Other critics, like Justice Frankfurter, rejected the argument that union activities could be categorized as either political or collective-bargaining-related at all. Highlighting the labor movement's political involvement in passing labor and other workplace legislation, he opined that

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125. See 29 U.S.C. §§ 158(a)(3), 164(b) (allowing states to limit union security arrangements within their jurisdiction); see also Margaret C. Rung, *Richard Nixon, State, and Party: Democracy and Bureaucracy in the Postwar Era*, 29 PRESIDENTIAL STUDS. Q. 421, 424 (1999) (describing how the Republican Party's realignment as anti-Communist, anti-labor, and anti-New Deal in 1946 helped it gain its first majority in Congress since 1930 and initiated a conservative counterrevolution).

126. *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 238 (1956) (“[T]he requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.”).

127. See *id.* (“Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects periodic dues, initiation fees, and assessments.”).

128. See *Int'l Ass'n of Machinists*, 367 U.S. at 780 (Black, J., dissenting) (arguing that the First Amendment indeed protected employees from being forced to pay for union political activity they oppose in the private sector).

129. *Id.* at 787 (“In a word, the *Hanson* case did not hold that the existence of union-shop contracts could be used as an excuse to force workers to associate with people they do not want to associate with, or to pay their money to support causes they detest.”).

political actions relating to the economic and social concerns of employees are “the *raison d’être* of unions.”<sup>130</sup>

Frankfurter’s understanding that a union’s political activities have always been inextricably linked to their representation and collective bargaining is logically and historically correct. But the categorization of chargeable and non-chargeable activities fits best within labor law’s compromising history and logic that strives for an overall systemic balancing of competing interests and practical concerns. This distinction, though, became even harder to make and justify when, years later, challenges to agency fees arrived from the public sector.<sup>131</sup>

In 1977, a group of Detroit public school teachers challenged the agency fee arrangement negotiated by their union representative under Michigan’s new public sector labor law in *Abood v. Detroit Board of Education*.<sup>132</sup> They argued that the private sector compromise for these arrangements—delineating collective bargaining expenses as chargeable and political ones as not—did not apply in the public sector because “public sector collective bargaining itself is inherently ‘political.’”<sup>133</sup> Furthermore, the teachers argued that because they were employed in the public sector, the Court could no longer avoid the constitutional question involving agency fees.

The *Abood* Court agreed. Agency fees in the public sector did indeed trigger constitutional review—specifically, First

130. *Id.* at 800 (Frankfurter, J., dissenting) (noting that the dissidents had not been denied an ability to participate in the union, to influence the collective position, nor to speak out in opposition to the union).

131. The NLRA does not cover workers employed in the public sector. But by the 1970s, nearly every state had adopted their own miniature version of the NLRA, along with labor’s common law doctrines. *See, e.g.*, MICH. COMP. LAWS § 423.211 (2023) (extending some bargaining rights to public employees). The Court noted in *Abood* that “although not identical in every respect,” Michigan’s collective bargaining statute was “broadly modeled after federal law.” *Abood v. Detroit Bd. of Educ.* 431 U.S. 209, 223 (1976), *overruled by* *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

132. *Abood*, 431 U.S. at 212–13.

133. *Id.* at 226; *see also* Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 56 (2018) (noting the obvious state action that existed in *Abood*—unlike in the private sector, where the government was only involved by means of permitting union security arrangements between two private parties, in the public sector the government was involved as a party to union security arrangements).

Amendment analysis.<sup>134</sup> But determining that agency fees involved First Amendment interests was not the end of *Abood's* analysis. Rather, the *Abood* Court went on to balance their newly recognized First Amendment interests against the state's interests in agency fee regulation.<sup>135</sup> *Abood* viewed the state's proposed interests in preventing free riding and promoting "labor peace" through financially stable representatives as compelling and the infringement on objectors' First Amendment rights insignificant when it came to agency fees subsidizing collective bargaining and contract-related activities (economic speech).<sup>136</sup> As such, these state interests outweighed the First Amendment interests, and no First Amendment violation occurred.<sup>137</sup> But the balancing act came out differently when agency fees were used to subsidize a union representative's political activities in the public sector.<sup>138</sup> *Abood* determined that because political speech interests are given more weight than economic ones in First Amendment analysis, the objectors' political speech interests that agency fees interfered with outweighed the policy interests of the state.<sup>139</sup> Consequently, agency fees to subsidize political activities were prohibited as First Amendment violations in the

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134. *Abood*, 431 U.S. at 222 ("To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."); *see also id.* at 231 n.28 (relying on *Wooley v. Maynard's* establishment of a link between First Amendment interests and freedom from forced association through the public purveying of ideological messages).

135. *Id.* at 222 ("[S]uch interference as exists [with union members' freedom to advance ideas or refrain therefrom] is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.").

136. *Id.* at 224, 233–34. *But see* Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 859 (1989) (criticizing *Abood's* First Amendment analysis as incomplete because it does not apply the proper level of scrutiny to the state's policy interests in agency-fee-permitting statutes).

137. *Abood*, 431 U.S. at 225–26 (reasoning that the exaction of agency fees is necessary for the efficient designation and efficacy of exclusive representatives).

138. *Id.* at 234 (recognizing First Amendment protection of the right to contribute, or refrain from contributing to, political causes).

139. *Id.* at 235–36 (holding that compelling union members to contribute to political causes "not germane to its duties as collective-bargaining representative" would violate members' First Amendment rights and declining to extend deference to government interests in agency fee collection for such purposes).

public sector, but agency fees that subsidized the economic speech activities of collective bargaining were not.<sup>140</sup>

In practice, *Abood's* categorical distinction between constitutional and unconstitutional union fees paralleled the chargeable and non-chargeable compromise reached in the private labor sector.<sup>141</sup> In the public sector, employees who did not wish to become a member of the union could also be charged a pro-rated agency fee for their fair share of a union representative's collective bargaining and contract-administration costs.<sup>142</sup> Perhaps the court reached this conclusion because the decision fit so well within the existent legal terrain, where constitutional compromises existing in one labor doctrine were accounted for in another, or because the decision was functionally workable. But few questioned *Abood's* reasoning that agency fees in the public sector actually should have triggered First Amendment analysis. Even fewer critics foresaw the consequences of this reasoning for labor doctrine as a whole, as constitutional challenges to specific labor doctrines in court do not give much deference to related agency interpretations. Nevertheless, in the decades that followed *Abood*, the Court identified several practical additions, clarifications, and boundaries to the workings and administration of agency fees.<sup>143</sup> In so doing, agency fee doctrine became another constitutional compromise tightly woven into public and private sector labor law.

That labor law triggers constitutional compromises at all is telling of the normative influence the NLRA commands. William Eskridge, Jr., and John Ferejohn describe the Act as among an elite group of "super-statutes" capable of reshaping constitutional understandings and the legal landscape that surrounds

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140. See *supra* Part I.C.3. Here, again, labor law's description of collective bargaining and contract-administration activities as economic speech was important.

141. See *supra* notes 125–40 and accompanying text.

142. *Abood*, 431 U.S. at 232 (finding that union fees charged to non-member public employees are constitutional when spent on specific collective bargaining-related expenses).

143. See, e.g., *Chi. Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 302–03 (1986) (requiring procedural safeguards to protect non-union members' First Amendment Rights); *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 524 (1991) (finding that local representatives' contributions to state and national affiliates are chargeable to dissenters, with limitations, even without a showing of "a direct and tangible impact upon the dissenting employee's unit").

them.<sup>144</sup> According to Eskridge and Ferejohn, super-statutes are “quasi-constitutional” in that they embody principles so axiomatic to society that when they clash with other legal authorities, ordinary rules of construction are routinely suspended to enable them.<sup>145</sup> This revered status may partially explain why some labor doctrines avoided constitutional review for so long. But it also makes the Court’s recent acceptance of these reviews, and moreover, its direct solicitation of them, more baffling.

Even among other super-statutes, there’s something unique about labor law. Indeed, in labor law, constitutional understandings have not only shifted to preserve the broad fundamental principles labor law embodies, but labor law and the Constitution have *the same* fundamental principles and challenge—the functional balancing of majority values and individual rights.<sup>146</sup> If both labor law and constitutional interpretations are supposedly guided by the same democracy-enhancing and individual-preserving constitutionalism, then one should often be a check on the other, not an excuse to regulate it. But super-statutes are the sum of many parts, and the broad fundamental principles these tapestries embody can be blurred when out of focus.

## II. *JANUS* AND THE ROADMAP FOR UNDOING LABOR DOCTRINE

If Congress fashioned labor law’s collective bargaining system and the NLRB brought it to life, then interventions by the Roberts Court are undoing it. This Part accounts for the preceding cases and maneuvers leading up to *Janus v. AFSCME* in 2018, and the *Janus* decision itself. Doing so illustrates how this Court extracted agency fee doctrine from a settled portion of labor law, exposing it to constitutional challenge in federal court. Despite the Board already balancing conflicting majoritarian and minority interests throughout labor’s interconnected legal system, the Roberts Court conducted an isolated review of a single doctrine, and then viewed it through a microscopic lens that

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144. William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1217 (2001).

145. *Id.* at 1216–17.

146. *Compare id.* at 1220–21 (discussing the historical tension in U.S. constitutional structure between popular sovereignty and judicial protection of individual liberties), *with* National Labor Relations Act § 1, 29 U.S.C. § 151 (declaring a policy of promoting collective bargaining and individual worker freedoms).

heightened and expanded individual-rights concerns. This left labor law's democracy-enhancing and redistributive principles out of view.

#### A. KNOX AND HARRIS EXPOSE A LABOR THREAD

Until about ten years ago, it was a firmly-rooted notion in labor law that public sector unions could charge agency fees to offset collective bargaining-related services they were required by law to provide to all represented employees.<sup>147</sup> Even well-funded opposition stood down, content to litigate the categorical boundaries of these pro-rata fees and their administrative requirements.<sup>148</sup> Then, in 2011, the Court granted certiorari to one of these low-profile administrative agency fee cases, *Knox v. SEIU, Local 1000*.<sup>149</sup> *Knox* challenged a public sector union's assessment of a special mid-year agency fee to cover unexpected costs arising from the initiation of an "Emergency Temporary Assessment to Build a Political Fight-Back Fund."<sup>150</sup> But the petitioners did not ask the Court to revisit *Abood* or its demarcating line between collective bargaining and political expenses.<sup>151</sup> To the contrary, the petitioners' arguments relied on *Abood's* distinction between agency fees for collective bargaining (which the First Amendment permitted), and agency fees for political expenses (which the First Amendment did not) to support their contention that objecting employees had not been given

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147. Since being decided, *Abood* had been cited favorably several times—as the Board and courts worked out a private- and public-sector system for ensuring that unions properly maintained *Abood's* line between political and collective-bargaining expenses and only charged agency fee payers for the latter. See, e.g., cases cited *supra* note 143; *Glickman v. Wileman Bros. & Elliott, Inc.* 521 U.S. 457, 473–77 (1997) (citing favorably to *Abood* in upholding compelled contributions for advertising under the Agricultural Marketing Agreement Act); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007) (upholding restrictions on the use of non-members' fees for political purposes, but citing *Abood* for the distinction between political and chargeable fees); see also *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgement in part and dissenting in part) ("Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them . . .").

148. See, e.g., *supra* notes 143, 147, and accompanying text.

149. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298 (2012).

150. *Id.* at 298.

151. Brief for Petitioners at 9–11, *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298 (2012) (No. 10-1121) (asking the court to affirm the unconstitutionality of "involuntary political loans," but accepting public employee unions' general power to collect agency fees as recognized in *Abood*).

sufficient information and time to gauge whether the special fee assessment had been the properly categorized.<sup>152</sup>

Unremarkably, the Court sided with the petitioner-employees, 7-2.<sup>153</sup> But the *Knox* majority opinion was remarkable in other respects.<sup>154</sup> Despite traditional principles of judicial restraint, Justice Alito penned an opinion that went straight to the validity of agency fees, describing *Abood* as an “unusual” and “extraordinary” precedent in First Amendment jurisprudence.<sup>155</sup> Then, for the first time, *Knox* categorized agency fees charged for collective bargaining purposes as “significant impingement[s]” on First Amendment interests similar to the interests involved in compelled speech and association claims—as opposed to the marginal infringement outweighed by state interests identified in *Abood*.<sup>156</sup>

Three years later, the Court heard another issue relating to the boundaries and procedures of established agency fee doctrine. *Harris v. Quinn* considered whether agency fee arrangements permitted in the public sector under Illinois law should apply to the state’s “quasi-public” home healthcare workers.<sup>157</sup> In other words, *Harris* dealt with whether *Abood*’s precedent should apply to healthcare workers who were funded by public

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152. *Id.* at 3 (citing *Chi. Tchrs. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 301 (1986)) (arguing that not following agency fee procedural requirements in the public sector violates employees’ First Amendment rights).

153. *See Knox*, 567 U.S. at 320 (arguing that SEIU’s emergency temporary assessment clearly fell outside the category of chargeable expenses due to its overt political nature).

154. *Id.* at 323–26 (Sotomayor, J., concurring) (arguing that the majority’s imposition of an affirmative opt-in requirement—a remedy not sought by the petitioners—violated Court rules and tradition by addressing “significant constitutional issues” that were not presented to the Court); *see id.* at 328 (arguing that the Court’s decision to reach an important question “without adversarial presentation is both unfair and unwise”).

155. *See id.* at 313 (majority opinion) (highlighting the tendency of union agency fees to impinge on nonmembers First Amendment rights) (citing *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 184, 187 (2007)).

156. *Id.* at 310–11.

157. *Harris v. Quinn*, 573 U.S. 616, 621–22, 646 (2014) (referring to petitioner home health personal assistants as “quasi-public employees” because, although they are paid by the government through Medicare, “customers exercise predominant control over their employment relationship”). *But see id.* at 660 n.1 (Kagan, J., dissenting) (noting that the *Harris* majority’s description of the petitioners as “partial” or “quasi” public employees is a label of its own devising for “joint employees” (citation omitted)).



Medicare dollars but classified as employees of private individuals receiving home care.<sup>158</sup> The *Harris* Court declined to extend *Abood* to quasi-public healthcare workers, but only after devoting several pages of dicta attacking it.<sup>159</sup> Justice Alito, again writing for the majority, repeated the themes articulated in *Knox* and cited to his *Knox* opinion extensively.<sup>160</sup> However, where *Knox* only described agency fees' impingement on First Amendment rights as "closely related" to violations in compelled speech cases,<sup>161</sup> *Harris* viewed agency fees as "present[ing] the same dangers as compelled speech."<sup>162</sup> *Harris* then openly questioned the importance of the state interests *Abood* had weighed against these newly-coined "significant" First Amendment interests and asked whether agency fee provisions were properly tailored to them.<sup>163</sup> Nowhere in the majority's opinion, though, was there any acknowledgment of labor's interwoven structure, its policy mandate, or the legal restrictions and obligations put on representatives to balance out individual agency fee infringements.<sup>164</sup>

*Knox* and *Harris*'s unnecessary "potshots" at *Abood* were clear signaling.<sup>165</sup> The Court was inviting future litigants to bring a direct challenge to the precedent permitting agency fees in the public sector. Union opponents responded quickly to the invitation, shepherding *Friedrichs v. California Teachers' Association* through the lower courts and onto the Court's 2016

158. *Id.* at 622 (majority opinion).

159. *Id.* at 637–38 (discussing problematic consequences of *Abood*).

160. *See id.* at 627 ("Two Terms ago, in *Knox v. Service Employees*, we pointed out that *Abood* is 'something of an anomaly.'" (citation omitted)); *see also id.* at 647–49 (explaining relevant provisions of *Knox*).

161. *Knox*, 567 U.S. at 309.

162. *Harris*, 573 U.S. at 647 (emphasis added) (citing compelled speech cases dealing with, *inter alia*, compelled flag salute and pledge of allegiance, and compulsory display of a state slogan on license plates); *see also id.* at 675 (Kagan, J., dissenting) (citing *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 391 (2011)) (arguing that the majority's focus on union members' First Amendment rights conflicts with precedent that "except in narrow circumstances [the Court] will not allow an employee to make a 'federal constitutional issue' out of basic 'employment matters'"). *But see id.* at 645–46, 646 n.19 (majority opinion) (distinguishing the employees in *Harris* from those in *Abood*, thereby refusing to expand *Abood*'s holding, but not overturning it).

163. *Id.* at 638–40.

164. *Id.*

165. *Id.* at 658 (Kagan, J., dissenting) ("Today's majority cannot resist taking potshots at *Abood* . . .").

docket.<sup>166</sup> But *Friedrichs* ended in a 4-4 per curiam decision after Justice Scalia's death left the Court shorthanded.<sup>167</sup> Undeterred by the outcome in *Friedrichs*, union opponents immediately began bringing subsequent lawsuits, hoping the Supreme Court would again take up the issue once restored to its full complement of Justices.<sup>168</sup> When Justice Neil Gorsuch succeeded Justice Scalia the next year, their hopes came to fruition. In September 2017, the now-full Supreme Court agreed to hear another direct challenge to *Abood*, *Janus v. AFSCME*.<sup>169</sup>

#### B. *JANUS* UNDOES A LABOR THREAD

Like its predecessor, *Janus* argued that even agency fees used for collective bargaining and contract-administrative services are significant infringements of First Amendment interests.<sup>170</sup> Like its predecessor, *Janus* claimed the line *Abood* drew between political and non-political activity was improper in the public sector because core union activities influenced "matters of public concern."<sup>171</sup> Unlike its predecessor, though, nearly every

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166. *Friedrichs v. Cal. Tchrs. Ass'n*, 136 S. Ct. 1083 (2016), *reh'g denied*, 136 S. Ct. 2545 (2016) (mem.) (per curiam). See Brief for Petitioners at 16, *Friedrichs v. Cal. Tchrs. Ass'n*, 136 S. Ct. 2545 (2016) (No. 14-915) (challenging California's agency-fee-permitting statute and unequivocally asking the Court to overturn *Abood* without leaving room for a narrower resolution).

167. In the past, Justice Scalia had accepted the line drawn in *Abood*. See *supra* note 147 and accompanying text. The Justice, however, appeared to have changed during oral argument, stating that "[t]he problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition." Transcript of Oral Argument at 45, *Friedrichs*, 136 S. Ct. 1083 (2016) (No. 14-915).

168. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 851 F.3d 746 (7th Cir. 2017), *rev'd*, 138 S. Ct. 54 (2018) (challenging public employee union dues under Illinois state law); Complaint at 4, *Hartnett v. Penn. State Educ. Ass'n*, 1:17-cv-00100-YK, (M.D. Pa. 2017), 2017 WL 279464 (challenging compulsory fees charged to non-union member public school employees).

169. Grant of Certiorari, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 54 (2018) (No. 16-1466). See *Janus*, 851 F.3d at 747-48 ("[Plaintiffs] *Janus* and *Trygg* acknowledge that they therefore cannot prevail either in the district court or in our court—that their case must travel through both lower courts . . . before they can seek review by the Supreme Court.").

170. See *Janus*, 851 F.3d at 747 (noting petitioners' challenge to any compulsory contribution to a union).

171. Reply Brief for the Petitioners at 12-13, *Friedrichs v. Cal. Tchrs. Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915) ("Anyway, collective bargaining is not even 'private.' In California, the 'union and the employer must present initial

legal observer predicted that at least five Justices would be receptive to Janus's claims.<sup>172</sup>

Mindful of this dynamic during oral argument, the liberal justices all but abandoned their position that *Abood* had correctly balanced competing interests under the First Amendment's framework.<sup>173</sup> Instead, Justices Kagan and Breyer attempted to steer their conservative colleagues away from overturning *Abood* by citing to principles of stare decisis and stressing the reliance interests—the thousands of contract clauses overruling *Abood* would invalidate.<sup>174</sup> But the Justices were unmoved.

On the last day of its 2017–2018 term, the Supreme Court handed down its 5-4 decision in *Janus v. AFSCME*.<sup>175</sup> Striking down agency-fee-permitting statutes and overruling *Abood*, the majority concluded that unions in the public sector are engaged in political advocacy *even during collective bargaining* because their positions touch on important political decisions, like the

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[collective-bargaining] proposals to the public.” (alteration in original) (citations omitted)); *Janus*, 138 S. Ct. at 2459–60 (finding that union fee arrangement compels a subsidy to “private speech on matters of substantial public concern”); see also Mary Bottari, *Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), [http://inthesetimes.com/features/janus\\_supreme\\_court\\_unions\\_investigation.html](http://inthesetimes.com/features/janus_supreme_court_unions_investigation.html) [<https://perma.cc/UW43-DWFY>] (“The *Abood* decision is not a good enough compromise for the *Janus* lawyers, who argue everything a public-sector union does is political.”).

172. See, e.g., Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018), <https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html> [<https://perma.cc/H73J-XJT7>] (discussing Justice Gorsuch's alignment with conservative viewpoints that support restrictions on unions, and efforts by “groups like the Federalist Society that work to orient the judiciary in a more conservative direction[,] [who] have helped produce a Supreme Court that most experts expect to rule in Mr. Janus's favor”).

173. Transcript of Oral Argument at 18–19, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466) (comments of Kagan, J.) (discussing the reliance interests that would be harmed by overturning *Abood*).

174. Compare *id.* (“Thousands of municipalities would have contracts invalidated.”), with *Harris v. Quinn*, 573 U.S. 616, 657 (2014) (Kagan, J., dissenting) (arguing that *Abood* answers the question whether union agency fees are permissible under the First Amendment).

175. *Janus*, 138 S. Ct. 2448 (2018).

allocations of public funds.<sup>176</sup> As such, agency fees in the public sector were a “significant impingement on First Amendment rights,” weighing heavily against the application of *stare decisis*.<sup>177</sup>

The *Janus* majority opinion made several other familiar stops along the way to overturning *Abood*. Citing the position that First Amendment interests are harmed when one is compelled to associate with an objectionable message,<sup>178</sup> *Janus* adopted *Harris*’s determination that those First Amendment interests are harmed to the same extent when individuals are compelled to subsidize the objectionable expression of labor unions in the public sector.<sup>179</sup>

The *Janus* majority also rejected the state interests asserted in *Abood*—promoting labor peace and preventing free riding—as sufficient justification for the First Amendment harm caused by public union agency fees. While the Court accepted that promoting labor peace is a compelling interest, it found that “labor peace can readily be achieved through means significantly less restrictive of associational freedoms” than the assessment of agency fees.<sup>180</sup> Further, the Court stated that “avoiding free

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176. *Id.* at 2474–77 (arguing that public union expenditures necessarily implicate political questions because they impact government spending and policy, concluding that “the union speech at issue in this case is overwhelmingly of substantial public concern”).

177. *Id.* at 2464 (quoting *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 310–11 (2012) (citations omitted)).

178. *Id.* at 2464 (“When speech is compelled, however, additional damage is done . . . . Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . .”).

179. *Id.* (“We have therefore recognized that a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union . . . .” (internal quotations omitted)). *But see* *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 310 (2012) (“We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny . . .”). The Court declined to specify the standard of review appropriate for public union agency fees, stating, “we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.” *Janus*, 138 S. Ct. at 2465. For further analysis of standards of review of public sector agency fees, see Courtlyn G. Roser-Jones, *Reconciling Agency Fee Doctrine, the First Amendment, and the Modern Public Sector Union*, 112 NW. U. L. REV. 597, 646–48 (2018) (arguing for the adoption of “closely drawn” scrutiny, analogous to the standard applied in modern campaign finance law).

180. *Janus*, 138 S. Ct. at 2466 (internal quotations omitted).

riders is not a compelling interest.”<sup>181</sup> Regardless of *Abood*’s past mistakes, agency fees surely did not outweigh the *significant* “[f]undamental free speech rights” now at stake in *Janus*.<sup>182</sup> Moreover, *Janus*’s reweighing of government and speech interests was necessary to bring agency fee doctrine in line with the rest of First Amendment jurisprudence.<sup>183</sup>

Justice Kagan did not mince words in her *Janus* dissent. Joined by the Court’s liberal bloc, she defended the balance *Abood* struck as “right at home in First Amendment doctrine,”<sup>184</sup> and accused the majority of wielding the First Amendment like a “sword” and slashing through “economic and regulatory policy.”<sup>185</sup> But Justice Kagan saved her strongest critique for her colleagues’ complete disregard of *stare decisis* and the reliance interests that did “not come any stronger than those surrounding *Abood*.”<sup>186</sup> She assailed the majority’s perversion of process for overturning precedent—using the dicta from their own *Knox* and *Harris* opinions to build an evidentiary case against *Abood*.<sup>187</sup> Justice Kagan wrote, “Relying on [*Knox* and *Harris*] is bootstrapping—and mocking *stare decisis*. Don’t like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as ‘special justifications’” for departing from *stare decisis*.<sup>188</sup>

Few dissents come more strongly worded than Justice Kagan’s in *Janus*, which referred to the Justices in the majority as “black-robed rulers overriding citizens’ choices.”<sup>189</sup> But one could

181. *Id.*

182. *Id.* at 2460.

183. *Id.* (“[*Abood*] is inconsistent with other First Amendment cases and has been undermined by more recent decisions.”).

184. *Id.* at 2489 (Kagan, J., dissenting).

185. *Id.* at 2501; *see also* Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (coining the phrase “First Amendment Opportunism” to describe the pervasive use of First Amendment claims, which Schauer refers to as “the rhetorical equivalent of pounding one’s fist on the table”).

186. *Janus*, 138 S. Ct. at 2487–88 (Kagan, J., dissenting); *see also id.* at 2497 (“[T]he worse part of today’s opinion is where the majority subverts all known principles of *stare decisis*.”).

187. *Id.* at 2497–99.

188. *Id.* at 2498; *see also id.* at 2486 (listing the “special justifications” the majority relies on in overturning *Abood*).

189. *Id.* at 2502.

imagine another dissenting approach to *Janus*—one that emphasized not only the contract-reliance interests at stake, but also labor law’s reliance interests as well. When labor’s entire legal system is emphasized—one where the constitutional harms in one doctrine are balanced out in others—not only are the reliance interests stronger for *stare decisis* purposes, but so are the countervailing state’s interests. Instead of the limited state interests that the *Janus* majority identified through an isolated review of agency fees as a single doctrine, an emphasis on labor’s entire legal system broadens the state interests involved. No longer is *Janus* about preventing free riding at the expense of individual First Amendment interests.<sup>190</sup> Instead, *Janus* is part of an entire legal structure designed to accomplish labor law’s broader policy goals of wealth redistribution and majoritarianism, to the benefit of our self-governing democracy.<sup>191</sup>

Instead of this holistic approach to reviewing labor law, *Janus* plucks a single doctrine from a woven-together regime. Parts III and IV detail the cascading consequences of this seemingly isolated decision. They apply *Janus*’s reasoning and interpretive methods, or “Janusism,” to ongoing litigation and other speculative post-*Janus* activities.<sup>192</sup> This argument highlights the incongruencies that now need to be sorted out in other *Janus*-related labor doctrines, and forecasts how Janusism will threaten labor’s underlying policies and core principles in the future. Furthermore, it emphasizes how Janusism differs from *and* reigns supreme over other values and methods of interpretation espoused by the Roberts Court.

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190. See *id.* at 2466 (majority opinion) (“Free-rider arguments . . . are generally insufficient to overcome First Amendment objections.” (quoting *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 311 (2012))); see also *Knox*, 567 U.S. at 311 (“Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly . . .”).

191. Compare *Janus*, 138 S. Ct. at 2466 (weighing narrow free speech interests with pragmatic free-rider objections), with Andrias, *supra* note 133, at 56 (embracing a broader government interest in labor regulation, including agency fees). “[U]nions enable workers’ effective participation in the political process, they facilitate worker voice, and they serve as a critical countervailing force to organized business interests in the public square. They also help achieve social equality.” Andrias, *supra* note 133, at 56.

192. I define “Janusism” as the Roberts Court’s enthusiastic constitutional review of individual labor doctrines—using heightened and expanding protections of individual rights, and other deregulatory tools, to invalidate majoritarian or equality-promoting labor doctrines.

### III. THE FIRST AMENDMENT'S CONTINUED UNRAVELING OF SUBSTANTIVE LABOR LAW

Although the outcome was widely anticipated, the *Janus* decision sent shockwaves throughout the academic community.<sup>193</sup> Interestingly, despite *Janus*'s claims to bring agency fee doctrine in line with other First Amendment jurisprudence, its loudest initial critics were constitutional scholars who feared *Janus* would perpetuate undesirable outcomes in other contexts where the government compelled payment.<sup>194</sup> What of professional licensing requirements and dues, insurance mandates, and even taxes if significant First Amendment interests are involved when the government compels spending money on things you oppose?<sup>195</sup> These broader concerns, however, have not come to fruition.<sup>196</sup> Instead, the First Amendment uncertainty *Janus* has triggered has been almost entirely confined to the labor terrain. As the following Sections describe, litigants are now using the *Janus* model to discretely challenge other individual labor doctrines as “anomalous” harms to significant First Amendment interests.<sup>197</sup>

Why would they not? Referring to the phenomenon of litigants crafting arguments as First Amendment claims whenever possible, Frederick Schauer describes the First Amendment as an “argumentative showstopper,” or “the rhetorical equivalent of

193. See Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 677 (2019) (referring to “[c]ountless press stories, law review articles, and amicus briefs” responding to the *Janus* decision).

194. See Baude & Volokh, *supra* note 11, at 194–204 (raising concerns for bar associations, university student groups, and union liability).

195. *But see* Chemerinsky & Fisk, *supra* note 12, at 54–58 (arguing that the precedent and reasoning in *Janus* clearly distinguish public union expenditures from other classes of mandatory fees).

196. See, e.g., *McDonald v. Longley*, 4 F.4th 229, 247 (5th Cir. 2021) (finding that compulsory bar membership and dues are constitutional where funding activities are germane to “regulating the legal profession” and “improving the quality of legal services” (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 13 (1990)); *File v. Martin*, 33 F.4th 385, 387 (7th Cir. 2022) (upholding mandatory bar dues under *Keller*); see also *Mooney v. Ill. Educ. Ass’n*, 942 F.3d 368, 371 (7th Cir. 2019) (dismissing a claim for restitution of agency fees deducted prior to *Janus*); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 942 F.3d 352, 359 (7th Cir. 2019) (rejecting attempts to recoup past paid agency fees).

197. Schauer, *supra* note 185, at 176.

pounding one's fist on the table.”<sup>198</sup> This fist-pounding has been a welcome distraction for the Roberts Court while it dismantles labor law's politically popular and democracy-enhancing doctrines.

#### A. UNDOING EXCLUSIVITY

Just hours after *Janus* was decided, The Buckeye Institute, a special interest group based in Columbus, Ohio, filed *Thompson v. Marietta Education Association*.<sup>199</sup> Latching on to *Janus*'s signaled disdain of exclusivity, *Thompson*, and similar cases brought in other jurisdictions, called for the immediate end to exclusive representation in the public sector on First Amendment grounds.<sup>200</sup> While not a member of the Marietta Education Association (MEA), and as such, not obligated to pay agency fees to her union after *Janus*, schoolteacher Jade Thompson objected to the collective bargaining positions her union representative took on “matters ranging from education policy . . . to social and economic justice.”<sup>201</sup> But for added dramatic effect, the MEA had also publicly opposed Ms. Thompson's late husband during his election bid for the Ohio General Assembly, another position with which Ms. Thompson and her union disagreed.<sup>202</sup>

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198. *Id.* For scholarship on minority rights and constitutional analysis, see generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing the flexibility and discretion inherent in the Court's constitutional analysis); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006) (exploring development and beginnings of the strict scrutiny test during the 1940s and 1950s).

199. *Following Janus Decision, the Buckeye Institute Blazes Trail in Suing for Immediate Recognition of Workers' First Amendment Rights*, BUCKEYE INST. (Aug. 2, 2018), <https://www.buckeyeinstitute.org/research/detail/following-janus-decision-the-buckeye-institute-blazes-trail-in-suing-for-immediate-recognition-of-workers-first-amendment-rights> [https://perma.cc/B69W-RPGM]; Complaint at 1, 20, *Thompson v. Marietta Educ. Ass'n*, No. 2:18-cv-628 (S.D. Ohio, June 27, 2018).

200. Complaint, *supra* note 199, at 17; *see also* Complaint at 1, *Uradnik v. Inter Fac. Ass'n*, No. 0:18-01895 (D. Minn. July 6, 2018) (alleging compelled speech violations based on a union's exclusive representation agreement). The Buckeye Institute filed *Uradnik* and corresponding motions for preliminary within weeks after the *Thompson* filing. *Following Janus Decision, the Buckeye Institute Blazes Trail in Suing for Immediate Recognition of Workers' First Amendment Rights*, *supra* note 199.

201. Complaint, *supra* note 199, at 10 (quotation omitted).

202. *Thompson v. MEA*, BUCKEYE INST., <https://www.buckeyeinstitute.org/issues/detail/thompson-v-mea> [https://perma.cc/77C7-4XCX] (“Imagine my



While the Court had explicitly rejected a First Amendment challenge to exclusivity decades before in *Minnesota State Board for Community Colleges v. Knight*,<sup>203</sup> Thompson argued that *Janus* overruled *Knight*, or at the very least, destabilized the reasoning behind it.<sup>204</sup> Indeed, *Janus* had not only given litigants a virtual invitation to challenge exclusivity—referring to the precedent as “itself a significant impingement on associational freedoms that would not be tolerated in other contexts.”<sup>205</sup> *Janus*’s dicta here provided the same unsolicited brand of “gratuitous criticisms” for *Knight*’s exclusivity doctrine that *Knox* and *Harris* had provided for *Abood*—criticisms that could easily be cut and pasted into litigants’ briefs, and later pasted into an opinion in support of disregarding *stare decisis*.<sup>206</sup>

Nonetheless, after short stops in the district court and the Sixth Circuit Court of Appeals, the Court declined to grant *certiorari* to Thompson’s petition challenging exclusivity.<sup>207</sup> But this denial was not a nod to incrementalism, or a responsive recalibrating after *Janus*’s disapproval. Rather, time has shown these early post-*Janus* denials to be demonstrative of the Roberts Court’s understanding of labor law’s ingenuity, its deep commitment to labor’s subtle unraveling, and its knack for timing.<sup>208</sup>

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dismay when I received political propaganda against my husband’s candidacy that was paid for and mailed by an organization related to my own union.”).

203. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 292 (1984).

204. See Reply Brief of Appellant Jade Thompson at 9–12, *Thompson v. Marietta Educ. Ass’n*, 972 F.3d 809 (6th Cir. 2020) (No. 19-4217), 2020 WL 2543925 at \*9–12.

205. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018).

206. *Id.* at 2498 (Kagan, J., dissenting); see also *id.* at 2483 (majority opinion) (casting doubt on the importance of unions and “agency shop” arrangements for exclusive representation in the public sector). The *Janus* Court identified five relevant factors in its decision to overturn *Abood*: “the quality of *Abood*’s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.” *Id.* at 2478–79. In this analysis, one can see the effect of recent cases critical of *Abood* on the *Janus* court’s decision: “An important factor in determining whether a precedent should be overruled is the quality of its reasoning, and as we explained in *Harris*, *Abood* was poorly reasoned.” *Id.* (citations omitted).

207. *Thompson v. Marietta Educ. Ass’n*, 141 S. Ct. 2721 (2021) (mem.).

208. *Janus*, 138 S. Ct. at 2478 (describing exclusive representation as “itself a significant impingement on associational freedoms that would not be tolerated in other contexts”).

For instance, consider Thompson's denial from the perspective of evolving associational jurisprudence. Although *Janus's* dicta suggested that significant First Amendment interests are involved in exclusivity regimes, *Janus's* holding drew First Amendment protections from the compelled speech interests involved when public-sector employees are compelled to subsidize union activities.<sup>209</sup> But with these subsidies (or agency fees) now gone, so too was the compelled speech theory of constitutional violation.

*Knight*, moreover, had explicitly rejected the argument that exclusive representation involves compelled *speech* interests because unions do not speak for objecting employees. Instead, they speak for the entire bargaining unit.<sup>210</sup> So, rather than claiming that *Janus's* dicta had cast substantial doubt on *Knight's* principal analysis about exclusivity and compelled speech, *Janus* hinted that the firmer foundation for exclusivity's constitutional harm is in its harm to associational interests.<sup>211</sup> Thompson's petition, however (probably recognizing at the time how underdeveloped the First Amendment's associational jurisprudence was) continued to argue primarily for exclusivity's harm to speech interests, not for *Janus's* proposed associational ones.<sup>212</sup>

Since *Thompson's* denied petition, though, the Court has devoted significant effort to clarifying and expanding upon the First Amendment's associational freedoms. While the basic implicit right to associate for the advancement of ideological beliefs, and a corollary right not to be associated with others who espouse opposing ideological beliefs had already been established, the Roberts Court provided a more comprehensive explanation

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209. *Id.* at 2464.

210. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984) ("A person's right to speak is not infringed when government simply ignores that person while listening to others.").

211. *Janus*, 138 S. Ct. at 2464.

212. *See* Reply Brief of Appellant Jade Thompson, *supra* note 204, at 11–16 (nominally raising an associational violation but discussing speech-related injuries). Courts have questioned whether speech interests are implicated because exclusivity does not prevent objecting employees from doing their own bargaining with their employer, and because these employees never had an affirmative right to bargain with their government employer. *See Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 814 (6th Cir. 2020) (reasoning that in the absence of any affirmative obligation for the government to bargain with its employees under the First Amendment, the government's choice to bargain with any particular representative does not harm employees' First Amendment speech rights).

of the appropriate constitutional analysis involved when associational interests were harmed by government regulation in *Americans for Prosperity Foundation v. Bonta*.<sup>213</sup> Decided the very next term after *Thompson*'s denied petition, *Americans for Prosperity Foundation* was not a labor case, but a low-profile challenge to a California law requiring tax-exempt charities to disclose their donor information to the Attorney General.<sup>214</sup> Striking down this disclosure requirement as unconstitutional, *Americans for Prosperity Foundation* clarified two key issues about the First Amendment's protections of associational expression. First, regarding the correct standard of review, the Court explained that a heightened "exacting scrutiny" review standard applies whenever government regulations burden associational interests, "regardless of the type of association"<sup>215</sup> or "whether the beliefs sought to be advanced . . . pertain to political, economic, religious or cultural matters."<sup>216</sup> But notably, unlike speech protections that are heightened by the category of speech, *Americans for Prosperity Foundation* assigned the exacting level of scrutiny to all associational infringements.<sup>217</sup> Second, the

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213. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (challenging a law that required nonprofits to disclose information about all donors who contributed more than \$5,000 each year).

214. *Id.* at 2382.

215. *Id.* at 2383.

216. *Id.* (quoting *NAACP v. Alabama* 357 U.S. 449, 460–61 (1958)). Three Justices—the Chief Justice, Justice Kavanaugh, and Justice Barrett—concluded that the "exacting scrutiny" standard applied to these interests. Justice Thomas, in a separate concurring opinion, argued that a "strict scrutiny" standard should apply. *Id.* at 2389–90 (Thomas, J., concurring). Justice Alito, in a separate concurring opinion joined by Justice Gorsuch, concluded that deciding which standard applies for associational expression was unnecessary, as it was clear that at the minimum, exacting scrutiny did. *Id.* at 2391–92 (Alito, J., concurring).

217. *Id.* at 2383 (majority opinion) ("[I]t is immaterial to the level of scrutiny whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." (quotation omitted)). Notably, in this plurality opinion, Justice Thomas argued that strict scrutiny should apply to compelled disclosure of association. *Id.* at 2390 (Thomas, J., concurring). Justices Alito and Gorsuch left open the question of whether "exacting scrutiny" would apply in all compelled disclosure cases, or whether strict scrutiny might apply in some instances. "Because the choice between exacting and strict scrutiny has no effect on the decision in these cases, I see no need to decide . . . whether the same level of scrutiny should apply in all cases." *Id.* at 2392 (Alito, J., concurring).

*Americans for Prosperity Foundation* Court clarified what this heightened “exacting scrutiny” actually required of government regulations to survive constitutional review. The Court concluded that exacting scrutiny requires government regulation to be “narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.”<sup>218</sup>

How will *Americans for Prosperity Foundation* contribute to future labor law challenges to exclusivity? *Janus* may have hinted that these challenges fit best as significant associational interests, but *Americans for Prosperity* does the important work of clarifying the heavy scrutiny standard applied to exclusivity regimes harmful to these associational interests.<sup>219</sup> Accordingly, after *Americans for Prosperity Foundation*, exclusivity regimes will likely be found not to be narrowly tailored to the government’s stated interest in negotiating efficiently with a single union representative. Insofar as the NLRA could be described as an experiment in compelled (economic) association in the private sector, unions are now vulnerable to compelled associational challenges triggering a heightened standard of judicial review. Compelled speech challenges in the private sector, on the other hand, are still privy (for now) to the lesser scrutiny standard applied to economic or commercial speech.<sup>220</sup>

Lastly, *Americans for Prosperity Foundation* is another lesson in *Janus*’s successful framing of minority interests. Like *Janus*’s analysis, *Americans for Prosperity Foundation*’s narrow discussion on the constitutional harms to individuals in donor disclosure laws distracts from the democratic values these laws promote.<sup>221</sup> Indeed, both donor disclosure laws and labor laws enhance democracy. But these minority groups are not the “politically powerless” ones from *Carolene Products Co.*’s famous

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218. *Id.* at 2384 (majority opinion). This subtle relaxing of the “least restrictive means” requirement distinguishes the “exacting scrutiny” standard from “strict scrutiny.”

219. *Id.*

220. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562–63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

221. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2398 (Sotomayor, J., dissenting). Donor disclosures are designed to promote democratic ideals by ensuring that wealthy individuals cannot privately distort the marketplace of ideas in political debate. For a discussion of the damage elite philanthropy does to democratic equality, see generally Emma Saunders-Hastings, *Plutocratic Philanthropy*, 80 J. POLS. 149 (2018).

footnote—far from it.<sup>222</sup> Instead, the same groups that funded *Janus* and *Americans for Prosperity Foundation*'s litigation are also disproportionately powerful politically because of their wealth, and they used this power (albeit ultimately unsuccessfully) to influence the democratic bazaar on the laws their constitutional lawsuits would later challenge.<sup>223</sup>

Aaron Tang suggests that courts should be attentive to situations when minority groups burdened by laws are politically powerful, not just when minority groups are powerless, and that special deference should be afforded to democratically enacted laws burdening the politically powerful elite.<sup>224</sup> Contrary to the “political power doctrine” that Tang identifies as being in force in other areas of constitutional law, the First Amendment’s analysis in *Janus* and *Americans for Prosperity Foundation* actually affords heightened constitutional protections to minority groups that are also politically powerful in the democratic process.<sup>225</sup> This “two *large* bites at the same apple” result has been harmful to democratic values, not protective of them—and as Justice Kagan’s *Janus* dissent so elegantly put it, “The First Amendment was meant for better things.”<sup>226</sup>

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222. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting a stricter standard of review when laws discriminate against “religious,” “national,” or “racial” minorities because “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

223. See Bottari, *supra* note 171 (describing the “public” and “private” opposite motives of *Janus* funders and organizations like Americans for Prosperity).

224. Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. 1755, 1758 (2018) (arguing that the discourse about political power should move focusing on “its absence to its presence”).

225. *Id.* at 1758–59 (describing the normative mismatch of judicial review that grants enhanced protection to society’s most politically powerful minority groups). See also *id.* at 1775–84 (explaining how heightened judicial deference is already used in cases where politically powerful entities are challenging their losses in the democratic process).

226. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting); see *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1983) (holding First Amendment rights not violated because “[a] person’s right to speak is not infringed when government simply ignores that person while listening to others”). While both categories of speech involve First Amendment interests, political speech interests represent a more serious harm to First Amendment interests and, therefore, require a more vital government interest to outweigh it. Economic speech and

## B. UNDOING FAIR REPRESENTATION DUTIES

*Janus* reads almost as a begrudging inevitability, and as the constitutional protections for associational interests expand, a future decision overturning *Knight* and exclusivity may one day read the same. Indeed, what is the Court to do besides overturn long-held labor law precedents in the face of incurable fundamental rights burdens and jurisprudential inconsistencies? But this sacrifice of labor precedent for supposed First Amendment cohesion is an insidious one. The First Amendment's doctrines are notoriously inconsistent. The Roberts Court not only knows this, but it has also played a key role in crafting its current state.<sup>227</sup>

Considering these inconsistencies, *Janus*'s "reconciliation" with some parts of First Amendment jurisprudence inevitably creates new incongruencies in others. For instance, *Janus*'s rejecting of agency fees as compelled political speech that harms objecting individuals' significant First Amendment interests, ignores the harm to the same significant First Amendment interests *Janus* creates for union members under the duty of fair representation.<sup>228</sup> As explained in Part I, the duty of fair

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associational interests on the other hand, do not outweigh the government interest(s) in the labor regulation.

227. For recent scholarship criticizing the modern First Amendment's speech doctrine, see Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1154 (2005) ("[T]he broad, expansive, and slippery conceptualization of the First Amendment at the core of the First Amendment critique is ultimately inconsistent with the basic dualist premise of modern constitutionalism—the bifurcated standards of judicial review given to civil versus economic rights."); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051–52 (2000) (criticizing the speech doctrine as too rigidly protecting expression in an information age, where access to personal information should be balanced with individual privacy and personal dignity concerns); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) (noting that in the 1970s, "[c]apitalism almost always won" at the Court); David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT, *supra* note 185, at 32, 36 (lambasting the broad scope of activities the First Amendment has been devised to protect); and Kathleen M. Sullivan & Robert C. Post, *It's What's for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 365–67 (2007) (describing the "doctrinal instability and incoherence" of the First Amendment's compelled-subsidy doctrine).

228. See *Janus*, 138 S. Ct. at 2490 (Kagan, J., dissenting) ("[M]aintaining an effective system of exclusive representation often entails agency fees.").

representation means represented nonmembers still benefit from a union's representation and negotiated agreements. Without agency fees, unions and their members in the public sector are compelled to subsidize the representation and collective bargaining activities of nonmembers who now contribute nothing in exchange for these services.<sup>229</sup> Likewise, these compelled subsidizations now involve the same harms to speech and associational interests *Janus* identified as significant.<sup>230</sup> So, after *Janus*, both agency fees and the duty of fair representation without agency fees compels subsidization of "political" collective bargaining and representational activities the payer opposes.<sup>231</sup> The only difference between allowable and unallowable harms, of course, is who the speaker is—which is speaker-based discrimination.<sup>232</sup>

Scholars Catherine Fisk and Margaux Poueymirou described these mirror-image First Amendment interests years ago, while the Court was still deliberating *Harris v. Quinn*.<sup>233</sup> Considering these alike competing First Amendment interests, they viewed *Abood's* decision as a reasonable compromise of two doctrines that both infringed on like speech interests—the kind of compromise that was right at home in labor law.<sup>234</sup> Charlotte

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229. While the Court has reasoned that fair representation is an apt trade for the union privilege of exclusivity, fair and free representation are not one in the same. Moreover, even if the added representation costs of non-members are nominal and arguably related to government interests in labor efficiency, the costs of individual free-rider representation in grievance and arbitration procedures are significant and not even rationally related to government interests. *Id.* at 2490–91 (arguing that although the Court found that the benefits of exclusive representation "outweigh[ed] the costs," in fact, without fees, "chances are that the union will lack the resources to effectively perform the responsibilities").

230. *Id.* at 2468 (majority opinion) (arguing for "means significantly less restrictive" than agency fees).

231. *Id.* at 2466 (describing public opposition to free-riders as "not a compelling interest").

232. *Id.* at 2486 ("By agreeing to pay, nonmembers are waiving their First Amendment Rights . . ."); see also *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

233. Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 483–86 (2014).

234. *Id.* at 468. Of course, Fisk and Poueymirou were referring to the First Amendment interests involved being the same—not necessarily of equal importance to promoting First Amendment values.

Garden, on the other hand, notes how even before *Janus*, the duty of fair representation imposed a special surcharge on union members as a condition of engaging in political advocacy vis-à-vis their union, which also in effect siphoned valuable collective resources away from these political initiatives.<sup>235</sup> Of course, *Janus* has only expanded Garden's identified "speech inequality."<sup>236</sup> But Garden's work also highlights the unique democratic importance of union speech as the facilitators of political engagement for their membership and amplifiers of middle-class interests.<sup>237</sup> In this way, union speech interests may be the same as the interests of objecting individual employees when compelled to support them, but the egalitarian value of union speech is quite different and more valuable to our democracy overall.

Indeed, the Roberts Court may try and rectify this incongruity involving the duty of fair representation in the future, but it has not indicated a desire to do so. As such, the First Amendment incongruities that *Janus* creates and the Roberts Court lives comfortably with is more evidence of its First Amendment protections being a means to an end of an anti-labor project—not First Amendment protections being an end to themselves.

### C. UNDOING GOOD FAITH COLLECTIVE BARGAINING OBLIGATIONS

Practically speaking, the problem with applying heightened First Amendment review standards to individual labor doctrines is that labor's collective bargaining obligations and its facilitative design have always touched on "speech" in the broadest sense of the term. Indeed, speech infringements are everywhere in a system that regulates party negotiations and requires certain notices and disclosures throughout a relationship. However,

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235. Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 *FORDHAM L. REV.* 2617, 2632–56 (2011) (suggesting (before *Janus*) that fair representation duties infringe upon union members' and unions' political speech interests before *Janus*'s recognition of bargaining table activities as political because they siphoned valuable union resources away from the political activities they would have been able to finance had union dues not had to go towards the representation of non-paying members first).

236. Charlotte Garden, *Speech Inequality After Janus v. AFSCME*, 95 *IND. L.J.* 269, 270 (2020).

237. Garden, *supra* note 235, at 2652 (arguing that "associations may afford their members direct experience with democratic structures").



originalists note how the framers did not understand the First Amendment to mean that all expression was immune from government regulations, and, furthermore, the First Amendment was far less determinative during labor law's first few decades.<sup>238</sup> But, as the First Amendment became a powerful deregulatory tool over the last twenty-five years, free speech arguments have been set on a collision course towards labor policy's preference for collective bargaining and its requirement that employees negotiate with certified representatives in good faith.<sup>239</sup> For a while, labor law's bright-line understanding of collective bargaining as less-protected economic speech stymied this confrontation.<sup>240</sup> But *Janus* ended that compromising era.

Labor opponents are on the path towards arguing that collective bargaining itself is compelled speech or association that violates the First Amendment rights of objecting employees.<sup>241</sup> This argument will be made by objecting employers in the private sector as well if the Court continues to blur the line between economic and political speech and association.<sup>242</sup>

As was discussed during the review of exclusivity challenges, and is explained more below, the semantics in *Knight* may have staved off these compelled-speech challenges of

238. See, e.g., SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 56–72 (2014) (noting how although nineteenth- and early twentieth-century objections to collective bargaining and the NLRA were grounded as freedom of contract claims, after the *Lochner* Era, objectors increasingly lost these contract liberty claims and looked for other legal avenues).

239. See Shanor, *supra* note 6, at 176–82 (arguing that the modern First Amendment has infinite deregulatory potential); see also Post & Shanor, *supra* note 22, at 167 (“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation.”).

240. Post & Shanor, *supra* note 22, at 167 (describing commercial speech as “beyond the ambit” of the First Amendment until the 1970s).

241. Petition for a Writ of Certiorari at 4–5, *Thompson v. Marietta Educ. Ass’n*, 141 S. Ct. 2721 (2021) (No. 20-1019) (arguing that union representatives compel employee speech).

242. See, e.g., *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 39–40 (2017) (holding that regulations of credit card swipe fees are regulations of speech); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 525 (2001) (striking down state regulations of tobacco advertising and sales on First Amendment grounds); *Citizens United v. FEC*, 558 U.S. 310, 311 (2010) (striking down longstanding regulations of corporate political expenditures as regulations of political speech).

collective bargaining for now.<sup>243</sup> This is because exclusive representatives' speech is not attributed to objecting employees themselves.<sup>244</sup> Rather, union representatives speak for or on behalf of the bargaining unit at the bargaining table—not for any single employee. Similarly, objecting employee-individuals challenging collective bargaining as compelled speech would have the same problem—there is no compelled speech because unions do not speak for objecting employees.<sup>245</sup>

While this attribution view could change with time as speech protections continue to expand, it does not have to for there to be grounds to overturn exclusivity and collective bargaining regimes.<sup>246</sup> *Janus* and *Americans for Prosperity Foundation* have provided a path through compelled association for that. Similar to the associational interests involved in exclusivity, litigants wishing to challenge collective bargaining obligations may also express their First Amendment interests as compelled association with an expressive group they ideologically oppose in the future.<sup>247</sup> *Janus* has already blessed bargaining exclusivity as involving these interests, and *Americans for Prosperity Foundation* says future courts must apply heightened scrutiny to them regardless of the type of expression an associational group is engaged in.<sup>248</sup>

Moreover, closely related to collective bargaining activities are the exclusive representational duties that unions have during the grievance processing of collectively-bargained-for contracts. A labor union's speech at the bargaining table may be attributed to the bargaining unit and not any single employee, but

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243. See *supra* Part III.A (describing *Knight* and compelled speech issues).

244. E.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (holding that forced inclusion of unwanted individuals infringes on groups' rights). Like compelled expression, compelled associational interest considerations must ask whether a reasonable observer would consider a message to be endorsed by the objector.

245. *Id.* (finding that the ability of a group to express its views mean it need not accept certain members with opposing views).

246. Petition for Writ of Certiorari, *supra* note 241, at i (describing the question of “[w]hether it violates the First Amendment to designate a labor union to represent and speak for public sector employees,” which is deliberately designed to change the reasonable observer's views on a representative's collective bargaining speech).

247. See *supra* Part III.A (describing associational jurisprudence and ideological strategies).

248. See *supra* Part III.A (analyzing the use of “exacting scrutiny”).

the speech attribution is a closer call when that union represents an individual grievant during their own grievance procedure. Certainly, the associational relation to that representatives' speech and an individual grievant is also much closer—leaving the door open to challenge collective bargaining activities as a compelled association based on the grievance procedures they require.<sup>249</sup>

#### D. DESTABILIZING SECONDARY CONCERTED ACTIVITY REGULATIONS

The interest in minimizing economic damages resulting from concerted activities has led to some of labor law's most nuanced compromises and bizarre outcomes in the private sector.<sup>250</sup> Consider the NLRB's restrictions of "secondary picketing," or picketing an establishment to which they are not in a direct labor dispute.<sup>251</sup> Under this restriction, two different people holding identical picket signs outside a bicycle store will have

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249. See, e.g., LEE, *supra* note 238, at 60, 64 (describing how the "right to work" phrase was used in early challenges to workplace segregation); Risa Lauren Goluboff, "Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 UCLA L. Rev. 1393, 1437–39 (2005) (same). Now, the well-organized and well-funded National Right to Work Committee (NRWC) has monopolized the meaning as something else—the "right to work" without being compelled to join or support a union. *About the National Right to Work Committee*, NAT'L RIGHT TO WORK COMM., <https://nrtwc.org/about-the-national-right-to-work-committee> [<https://perma.cc/53D3-3THQ>]. In associational expression claims, courts also ask whether the claimant can take steps to disclaim or disassociate from the speech. Employees have ways to do so in exclusivity and collective bargaining regimes, but whether the First Amendment protects them from having to engage in this kind of "dis-associational" speech may be another argument that gains traction in future claims.

250. 29 U.S.C. § 158(b)(4)(ii). The provision makes it an unfair labor practice for a labor organization to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization . . ." *Id.*

251. See *id.* For simplicity purposes, the Act prohibits unions from secondary strikes and from calling for a secondary boycott (boycott of an entity with which they are not in a direct labor dispute) using tactics that coerce, threaten, or restrain—such as picketing.

their message evaluated using different standards.<sup>252</sup> The first picketer, a union-affiliate who holds a sign asking customers not to shop there because the store sells products through Amazon, which they believe has exploitive working conditions, will be violating the NLRA's restrictions against secondary picketing and boycotting activity. By contrast, the second picketer with the identical message, a human rights activist, will see their speech protected under the First Amendment as political speech.<sup>253</sup>

Although these two outcomes for identical picket signs have not been easy to reconcile, the Board and affirming courts have upheld the NLRA's secondary activity restrictions based on a blanket understanding that labor picketing is always of the once less-protected "economic speech" variety.<sup>254</sup> *Janus*, however, not only highlights the legal fiction of this distinction, it should also usher in new careful analyses of the labor picketing involved to determine if it is economic, or rather "political" expression. Either that, or the restrictions of secondary activity are facially unconstitutional.<sup>255</sup>

Of course, there are the arguments that by legal extension are correct, and then there are the arguments that litigants actually choose to make. And, like with challenges to the duty of fair representation, there are practical and strategic reasons as to why labor proponents have not challenged the constitutionality of secondary activity provisions as relentlessly as some have

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252. I have based this hypothetical on a scenario originally presented by James Gray Pope to illustrate how labor law's regulations of secondary activity are a textbook example of viewpoint discrimination—despite having been upheld by the Court for over fifty years. See James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950–51 (1999).

253. See *id.* at 951; see also James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L. Q. 189, 190–91 (1984) (describing a ladder of First Amendment values where political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a "black hole" beneath the ladder").

254. See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 584 (2011) (Breyer, J., dissenting) ("The Court has also normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech . . .").

255. Categorically economic in nature before, the NLRA's secondary speech restrictions never received the heightened scrutiny reserved for regulations of political speech and protest activity. See, e.g., Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 22–26 (2011) (illustrating the Court's unequal treatment of the speech rights of unions and corporations).

suggested.<sup>256</sup> The most obvious, if not cynical, of these is that few labor proponents actually believe this Court will assess labor’s political speech evenhandedly. And although getting this contradiction on the record bolsters arguments about the Court’s political nature and “delegitimacy,” and perhaps even supports future Court reform initiatives, this maneuver also gets rid of another piece of labor’s threaded tapestry of carefully balanced interests.<sup>257</sup> Being that this challenge would be a union-initiated undoing of an embedded labor thread, success could make it harder later on for these proponents to justify the connectivity of labor’s legal system overall. Accordingly, there is a tactical divide amongst labor proponents regarding this Hobson’s choice—whether they should refrain from taking any part in labor law’s unraveling, or whether participation in that unraveling is worth the costs if it leads to a more evenhanded dismantling.<sup>258</sup>

#### IV. PRIVATE PROPERTY PROTECTIONS AND OTHER DIMINUTIVE TOOLS FOR UNRAVELING SUBSTANTIVE LABOR LAW

If the Roberts Court’s undoing of labor efforts were limited to the First Amendment, perhaps *Janus* and *Janus*-extending litigation could be excused as part and parcel of a more general project of First Amendment expansionism. Indeed, as mentioned, the Court has sacrificed other interpretative values, like originalism and *stare decisis* for its preferred modern version of

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256. See Courtlyn Roser-Jones, *Labor Unions, Draw Your Swords: Janus v. AFSCME and Future Labor Litigation*, AM. CONST. SOC’Y FOR L. & POL’Y: EXPERT F., (June 29, 2018), <https://www.acslaw.org/expertforum/labor-unions-draw-your-swords-janus-v-afscme-and-future-labor-litigation> [https://perma.cc/7BYP-6V42] (arguing for the legality of *Janus*-extending litigations). As they are applied now, these restrictions indeed impose viewpoint- and speaker-discriminatory restrictions on labor unions, without considering the content of their speech. Moreover, the government’s compelling interests for restricting secondary concerted activity are the same types of similarly broad justifications like “labor efficiency” and promoting labor peace that *Janus* dismisses. *Id.* (describing arbitrary restrictions).

257. See, e.g., Protecting the Right to Organize (PRO) Act of 2021, H.R. 842, 117th Cong. (2021). The PRO Act is an iteration of this tactical debate. Legislatively, the PRO Act would delete the NLRA’s prohibitions on secondary activity.

258. Roser-Jones, *supra* note 256 (describing the potential for using recent anti-labor Court decisions as a pro-labor, First Amendment “sword”); *Hobson’s Choice*, MERRIAM-WEBSTER’S DICTIONARY (2023) (defining a “Hobson’s Choice” as “an apparently free choice when there is no real alternative” or “the necessity of accepting one of two or more equally objectionable alternatives”).

First Amendment protections outside the labor context, as well.<sup>259</sup> But particularly within the last few years, the Roberts Court has recruited other tools for destabilizing labor's legal protections and deemphasizing the NLRA and the Board. Together with the First Amendment, the Court has adopted unconventional views of private property and the administrative state to continue whittling away the rights of workers to effectively organize and collectively bargain as Congress intended.

#### A. UNDOING CONCERTED ACTIVITY'S ORGANIZING PROTECTIONS

Also being unwound by the Roberts Court are labor law's limited allowances for organizing activities on private property. Viewing organizing and the right to hear about the benefits of organizing from others as a condition precedent to concerted-activity rights, the NLRA grants employees and union organizers temporary use and access rights to private worksites for organizing purposes.<sup>260</sup> In this narrow set of circumstances, employees' rights to learn about self-organization and organize effectively have been said to outweigh the minimum intrusion on employers' private property interests.<sup>261</sup> But the Roberts Court has aggressively elevated individuals' private property interests via constitutional challenges, such that these interests now eclipse organizing and concerted activity that promotes the public good.

In 2020, the Court confronted one of labor law's limited property access rights in *Cedar Point Nursery v. Hassid*.<sup>262</sup> Balancing property and concerted activity rights before, the Board had afforded union organizers a limited right to access employer property when there was no other adequate means for union organizers to communicate their message to employees.<sup>263</sup> In this

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259. See *supra* Part III.C (describing how the Roberts Court's labor decisions are not rooted in originalism).

260. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–05 (1945) (describing the NLRA's temporary access rights).

261. *Id.*

262. 141 S. Ct. 2063, 2072 (2021) (holding that invading employers' property constitutes a physical taking).

263. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540–41 (1992) (describing the conditions when limited trespass is permissible); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (same). *But see Cedar Point Nursery*, 141 S. Ct. at 2077 (dismissing as irrelevant *Babcock & Wilcox*, which applied the NLRA to union organizers on employer premises, but only after suggesting that *Babcock*

spirit, when California granted labor rights to agricultural workers in 1975—after activists César Chávez and Dolores Huerta worked for decades to combat the grueling working conditions of agricultural workers—a key state regulation designated dates and times where union organizers could access large agricultural employers’ property.<sup>264</sup> The regulation asserted that the temporary access was necessary to enable unions to educate and organize seasonal farmworkers, who oftentimes live in dispersed areas and are only present on employers’ property a few weeks at a time.<sup>265</sup>

Agricultural employers challenged this regulation immediately in the court of public opinion with television ads of farmers “who complained that their daughters ‘fe[lt] threatened’ by the thought of strangers [union organizers] trespassing in their yards.”<sup>266</sup> Then they challenged the regulations in court as an unlawful invasion of their property rights, only to lose at the California Supreme Court and have their case summarily dismissed by the United States Supreme Court in 1976.<sup>267</sup> But in 2021, the Roberts Court got another chance to hear a challenge to California’s temporary-access regulation—the same one the Court had summarily dismissed to hear challenges to nearly fifty years before.<sup>268</sup> This time, an ideologically divided *Cedar Point Nursery*

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& *Wilcox*’s “highly contingent access right” might present its own takings issues).

264. CAL. CODE REGS. tit. 8, § 20900(e)(1)(C) (2021), *invalidated by Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (describing time periods for access). César Chávez, Dolores Huerta, and the United Farm Workers organized for decades to combat the grueling and exploitative practices of large farm owners and get California’s Agricultural Labor Relations Law passed. See CAL LAB. CODE § 1140 (West 2023); see also César Chávez, *The California Farm Workers’ Struggle*, 7 BLACK SCHOLAR 16, 17 (1976) (describing collective legislative efforts).

265. CAL. CODE REGS. tit. 8, § 20900(b)–(d) (describing lack of farmworkers’ alternate means of organizing and necessity of access for “a sense of fair play”).

266. Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 190 (2021).

267. *Agric. Lab. Rels. Bd. v. Superior Ct.*, 546 P.2d 687 (Cal. 1976), *appeal dismissed sub nom.*, *Pandol & Sons v. Agric. Lab. Rels. Bd.*, 429 U.S. 802 (1976) (mem.).

268. *Cedar Point Nursery*, 141 S. Ct. at 2081 (describing the prior 1976 decision). Under the regulation, employers are required to allow union organizers to enter their property for four months each year for three nonconsecutive hours outside of the workday (one hour before the start of work, one hour during lunch break, and one hour after work).

decision struck down the regulation as a violation of the Fifth and Fourteenth Amendments.<sup>269</sup>

To get to this important and protective thread of labor law, *Cedar Point Nursery's* majority opinion rewrote the entire Takings Clause doctrine.<sup>270</sup> Rather than applying the balancing test articulated in *Penn Central Transportation Co. v. City of New York* for when government regulation temporarily invades private property, a test that has looked favorably on regulations that achieve important public benefits with minimal economic impact on property owners, *Cedar Point Nursery* considered the labor regulation a permanent physical invasion of private property, or a per se regulatory taking.<sup>271</sup> Then attempting to assuage the liberal Justices' concerns that the majority's interpretation threatened all government business regulation involving access to private property, Justice Roberts reasoned in his majority opinion that safety inspections and other original understandings of acceptable government regulation (or their functional modern-day equivalents) were not jeopardized by *Cedar Point Nursery's* decision.<sup>272</sup>

This nod to originalism put few at ease. For one, while Justice Roberts expounded on the property right to exclude as "one of the most treasured" rights and invoked "[t]he Founders," both progressive and conservative scholars noted that *Cedar Point Nursery* was not really an originalist decision at all.<sup>273</sup> At the time the Fifth Amendment was ratified, American law recognized numerous private property access rights that served the public interest, and courts regularly dismissed trespass lawsuits as frivolous unless they caused economic harm.<sup>274</sup> Indeed, even Justice Scalia once recognized that "early constitutional theorists did not believe the Takings Clause embraced regulations of

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269. *Id.* at 2067.

270. *Id.* at 2071 (discussing the Takings Clause).

271. *See* *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Cedar Point Nursery*, 141 S. Ct. at 2070 (describing a "permanent and continuous" taking).

272. *Cedar Point Nursery*, 141 S. Ct. at 2079 ("[G]overnment health and safety inspection regimes will generally not constitute takings.").

273. *See id.* at 2071–72; *cf.* Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, 33 YALE J.L. & HUMANS. 307, 309–10 (2022) (arguing that *Cedar Point Nursery* is not an originalist opinion).

274. Berger, *supra* note 273, at 319 (noting harm requirement).



property.”<sup>275</sup> But originalism’s exception aside, Nikolas Bowie pointed out that *Cedar Point Nursery* compromised anti-discrimination laws that were surely outside the framers’ regulatory vision.<sup>276</sup> Moreover, Bowie noted how the same arguments about the Takings Clause and the “right to exclude” that *Cedar Point Nursery* embraced were used to unsuccessfully challenge the 1964 Civil Rights Act.<sup>277</sup>

But almost as if critics were conceding that the Court’s labor project is an island to itself, concerns about *Cedar Point Nursery*’s widespread implications outside of labor were quieter than they had been two years before with *Janus*. Instead, the most resounding scholarship after *Cedar Point Nursery* compared the Court’s line of reasoning in it and *Janus* to the deregulatory decisions from the *Lochner* era, where, along with *Lochner*’s regulation of hours-worked for bakers, the Court struck down a number of democratically enacted regulations of labor activity.<sup>278</sup> After President Roosevelt and his political allies won the presidency and control of both congressional houses campaigning on a progressive slate of New Deal reform programs, the *Lochner* Court’s continued commitment to striking down politically popular legislation delegitimized it in the eyes of the public and the other government branches.<sup>279</sup>

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275. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

276. Bowie, *supra* note 266, at 191–96 (2021) (arguing that the *Cedar Point Nursery* opinion was based on Justice Roberts’s personal opinion).

277. *See id.* at 188–90 (describing the hotel owner’s argument in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)). Because the Fifth Amendment prohibits the federal government from taking “private property” without “just compensation,” and the “idea of private property include[s] the right to exclude,” Congress owed the hotel owner one million dollars “for taking away his right to exclude Black customers” with the Civil Rights Act of 1964. *Id.* at 190.

278. *See Lochner v. New York*, 198 U.S. 45, 46 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (invalidating a New York statute setting maximum working hours for bakers); *Adkins v. Child’s Hosp.*, 261 U.S. 525, 539, 562 (1923), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (invalidating a federal statute setting minimum wages for women and children in the District of Columbia); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (invalidating portions of the first national labor law guaranteeing laborers a right to collective bargaining, the National Industrial Recovery Act).

279. *Cf.* Carson & Kleinerman, *supra* note 29, at 313–15 (describing conflict between the Court and Roosevelt). *See generally* JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 10, 229

Indeed, it is this conservative judicial activism and commitment to anti-labor decisions where the *Lochner* Court and the Roberts Court are most alike. However, *Cedar Point Nursery* also highlights significant differences between the two. While both the *Lochner* Court and the Roberts Court have applied constitutional theories to undo labor regulation, only the Roberts Court has done so in the face of decades of administrative precedent and constitutional interpretations upholding the NLRA.<sup>280</sup> In defense of the *Lochner* Court, the modern labor scheme was untested, and decades of interwoven Board decisions did not exist when the validity of labor law clashed with the *Lochner* Court. Furthermore, while the *Lochner* Court's laissez-faire constitutional values were used to invalidate labor laws, the Court was at least consistent in these values—applying steady freedom of contract principles to a variety of cases over the *Lochner* Era's thirty-plus years.<sup>281</sup> But the Roberts Court is so committed to invalidating labor laws that it is willing to run roughshod over its own professed interpretive methods and institutional values, and some of the High Court's most seminal decisions to do so.<sup>282</sup> As such, nods to their decisions being limited to circumstances involving labor, or rather, true applications of precedents despite being utterly transformative in context are perhaps even more institutionally costly than a *Lochner* Court with steady views on a constitutional landscape contrary to the democratic government branches.

The “nine old men” who made up the *Lochner* Court were rightly criticized in the 1930s for being out of touch with the changing world and using their own laissez-faire constitutional views to thwart popular reforms.<sup>283</sup> But they were at least

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(2019) (supporting the inference that Chief Justice Roberts was aware of the *Lochner* era since, before he voted to uphold the Affordable Care Act, “[a]dministration lawyers warned the Court in their written filing that if it rejected the ACA it would be striking down a major federal social welfare law for the first time since the *Lochner* era and the Court's 1937 shift”).

280. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (justifying departure in judicial interpretation of the NLRA).

281. E.g., *Adkins*, 261 U.S. at 562; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 542.

282. E.g., *Cedar Point Nursery*, 141 S. Ct. at 2077 (distinguishing past cases).

283. Barry Friedman, Opinion, *The Coming Storm over the Supreme Court*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/opinion/>

consistent—rather, everything around them had changed. The Roberts Court, on the other hand, not only holds views different from a majority of the public’s when it comes to labor law, but also compromises its own interpretative theories and popular Court precedents when these do not yield the anti-labor outcomes the Court wants.<sup>284</sup> In this respect, the long-term consequences of the Roberts Court will likely end up being far more significant for labor law than the *Lochner* Court’s, and far more institutionally delegitimizing, too.<sup>285</sup>

#### B. UNDOING CONCERTED ACTIVITY PROTECTIONS AND SHIELDING ECONOMIC LOSS

After recalibrating the weight given to individual property rights in *Cedar Point Nursery*, the Court sought out another opportunity to balance these weighted interests against labor rights. Only this time, in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*,<sup>286</sup> the Court had the quintessential protected concerted activity—the “strike”—in its crosshairs. While the number of strikes had been steadily declining in decades prior, *Glacier Northwest, Inc.* arrived during a wave of headline-grabbing organizing, strikes, and collective bargaining activity that led to historic increases in employee pay and benefits.<sup>287</sup> *Glacier Northwest, Inc.* involved one of these strikes, this one ending with a Seattle-based concrete company (Glacier Northwest) agreeing to “record-setting” collectively-

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kavanaugh-supreme-court-conservative.html [https://perma.cc/VT5B-KLFA] (describing the problems with a Court that is “out of step with the populace” like that of the 1930s).

284. *Cf. id.* (noting popularity of left-leaning policies among Americans).

285. *See id.* (describing “the makings for a serious collision” between the Court and the public).

286. *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 500 P.3d 119 (Wash. 2021), *rev’d*, 143 S. Ct. 1404 (2023).

287. *See* Faiz Shakir, *America Is in the Midst of a Dramatic Labor Resurgence*, NEW REPUBLIC (Oct. 8, 2021), <https://newrepublic.com/article/163936/america-midst-dramatic-labor-resurgence> [https://perma.cc/47U8-HEYY] (describing a “renewed breath of labor activism” and the highest approval rating of unions in decades); Max Zahn, *Amazon and Starbucks Workers Led a Union Resurgence in 2022. Will It Last?*, ABC NEWS (Dec. 22, 2022), <https://abcnews.go.com/Business/amazon-starbucks-workers-led-union-resurgence-2022/story?id=95090198> [https://perma.cc/DD6B-LAEU] (discussing a fifty-three percent increase in petitions for union representation and the highest level of public support for unions since 1965).

bargained-for employment terms.<sup>288</sup> But the strike's contract victories have since been eclipsed by the strike-related litigation that followed. By overshadowing this labor victory, *Glacier Northwest, Inc.* was already a win in the eyes of labor opponents.<sup>289</sup> But by the time *Glacier Northwest, Inc.* arrived at the Supreme Court, the case came with colossal implications for the legal right to strike and the new wave of labor activity in general.

The key events at Glacier Northwest began in the summer of 2017, when the company and International Brotherhood of Teamsters Local Union No. 174 (Local 174) began new contract negotiations.<sup>290</sup> Negotiations, however, did not go smoothly, and Local 174 filed a charge with the NLRB alleging Glacier Northwest had refused to bargain in good faith.<sup>291</sup> Likewise, on July 22, 2017, members of Local 174 voted to authorize a strike, and the union gave notice to Glacier Northwest that a strike could commence at any time.<sup>292</sup>

That time came the morning of August 11, 2017, when fifty-eight employees across three Glacier Northwest locations went on strike.<sup>293</sup> Included in these striking employees were several

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288. See *Calportland Strike Ends and Larger Strike Avoided as Teamsters Local 174 Members Ratify Contract with Sand and Gravel Companies*, TEAMSTERS LOC. UNION NO. 174 (Aug. 18, 2017), <https://teamsters174.net/calportland-strike-ends-and-larger-strike-avoided-as-teamsters-local-174-members-ratify-contract-with-sand-and-gravel-companies> [<https://perma.cc/R5Q8-LMDH>]. In addition to wage increases, the 2017 contract included increases in pension contributions, full maintenance of healthcare benefits, and language that protected work performed in the county "from being undercut by drivers brought in from outlying areas at lower wage rates." *Id.*

289. See, e.g., David Enrich, *How a Corporate Law Firm Led a Political Revolution*, N.Y. TIMES MAG. (Aug. 25, 2022), <https://www.nytimes.com/2022/08/25/magazine/jones-day-trump.html> [<https://perma.cc/SS2X-B2P5>] (describing how companies are victorious in the general struggle against organized labor when they direct union attention away from grassroots activities and onto litigation).

290. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1412 (2023).

291. See Amended NLRB Charge Against Employer at 1, 19-CA-203068 (Sept. 6, 2017) [hereinafter NLRB Charge] (detailing employer refusal to provide reasons in its refusal to agree to at least five union proposals, answer questions regarding bases for its purported refusal reasons, and refusal to provide information to the Union to bargain meaningfully to such an extent that it made bargaining impossible).

292. Counsel for the General Counsel's Brief to the Administrative Law Judge at 12, *Glacier Nw., Inc. & Teamsters Union Loc. 174*, No. 19-CA-203068; 19-CA-211776 (May 26, 2023) [hereinafter Post-Hearing Brief].

293. *Id.* at 16.

truck drivers who, when the strike began, were either in the process of having their truck loaded with concrete or had already set out to make deliveries with batched concrete in tow. There was widespread confusion among these drivers about what to do with the ready-made concrete in the trucks when the strike commenced, and drivers took various courses of action.<sup>294</sup> Most truck drivers returned their trucks to Glacier Northwest's facilities with the truck's mixing drum left spinning, so as to prevent the concrete inside from hardening and causing damage to the truck.<sup>295</sup> Three drivers returned their trucks and, upon specific direction, dumped their remaining concrete into facility bunkers.<sup>296</sup> Another driver completed all his deliveries before returning to the facility, having tried but been unable to get other instructions from a supervisor on the radio.<sup>297</sup> Another driver brought his loaded truck back to the company facility, turned it off, and left the truck there with the key in the ignition.<sup>298</sup>

Once the strike began and drivers returned loaded trucks to the facility, Glacier Northwest needed to take quick action to prevent the loaded concrete from hardening in the truck's drums and causing damage.<sup>299</sup> With the help of non-striking employees, the company managed to identify all the trucks with concrete inside, offload the mixed concrete into facility bunkers, and prevent any truck damage—but the dumped concrete was destroyed.<sup>300</sup>

Within eight days, the parties had agreed to a new contract and the strike was over.<sup>301</sup> But after Glacier Northwest sent disciplinary letters to sixteen drivers for failing to deliver their batched concrete during the onset of the August 11th strike, Local 174 amended its NLRB charge to include these letters as

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294. *Id.* at 20–24.

295. *Id.* at 22–23.

296. *Id.* at 21, 25–26.

297. *Id.* at 27.

298. *Id.* at 25 (describing driver Bill Roark's actions during the strike).

299. *See generally id.* at 7 n.4 (explaining that hardened concrete will “ruin the barrel” of a truck).

300. *See* Complaint for Damages at 8–9, *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, No. 17-2-31194-4-KNT (Wash. Dec. 4, 2017) [hereinafter *Complaint for Damages*].

301. Post-Hearing Brief, *supra* note 292, at 89–91.

alleged interferences in the drivers' protected activity.<sup>302</sup> Four months later—rather than first challenging the protective nature of the drivers' activities via the ongoing NLRB's investigation—Glacier Northwest sued Local 174 in state court for the concrete loss and other related damages.<sup>303</sup>

While state lawsuits involving striking activities are generally preempted under the NLRA,<sup>304</sup> Glacier Northwest's complaint alleged their claims fell within an exception to *Garmon* preemption reserved for intentionally violent or tortious acts.<sup>305</sup> Indeed, the company's short complaint did not mention the words "strike" or "work stoppage" at all.<sup>306</sup> Rather, it alleged a "conspiracy" to "sabotage" its business relationships by the union and its members, and a carefully timed "abandon[ment]" of its property, done with the "malicious" intent of its "ruination and destruction."<sup>307</sup>

Relying on this recitation of the facts, the company went on to allege that, even if Local 174's activities did not fall within this limited exception to *Garmon* preemption for intentionally tortious acts, its claims were still not preempted by the Board.<sup>308</sup>

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302. NLRB Charge, *supra* note 291, at 2; Post-Hearing Brief, *supra* note 292, at 45; *see also* Post-Hearing Brief, *supra* note 292, at 38–51, 54–57 (discussing the incomplete investigation that led to several inaccurate strike discipline letters later being rescinded by the company).

303. Post-Hearing Brief, *supra* note 292, at 121. While Glacier Northwest's complaint alleged six causes of action, only the first three causes ((1) Conversion and/or trespass to chattels, (2) Intentional interference with business relationships, and (3) Civil conspiracy) relate to the striking activities on August 11, 2017. *Id.* The other causes of action relate to a weekend mat pour that was to take place the day after the strike ended. *Id.* This second set of claims, however, did not advance to the Supreme Court. *Id.* at 122. As such, for simplicity's sake, this Article's discussion of the lower court's proceedings only relates to the causes of action relating to the strike on August 11, 2017.

304. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245–46 (1959) (articulating the "Garmon Preemption" doctrine).

305. Post-Hearing Brief, *supra* note 292, at 132–33.

306. *Id.* at 122; *see also* Complaint for Damages, *supra* note 300, at 6–7, 10 (referring to the strike or work stoppage as the less colloquial "sudden cessation of work").

307. Complaint for Damages, *supra* note 300, at 7–9, 16.

308. *Id.* at 2–3; *see also* Plaintiff's Opposition to Defendant's Motion to Dismiss Pursuant to CR12(b)(1) and 12(b)(6) at 3–4, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, No. 17-2-31194-4 (Wash. Super. Ct. Nov. 19, 2018) [hereinafter Opposition to Motion to Dismiss] (arguing that "an employer has the right to discharge participating [striking] employees and the right to

Glacier Northwest highlighted the behavior of the truck drivers who returned their full trucks to their facilities and turned them off and, omitting any discussion about the other drivers' activities, alleged this behavior to be so indefensibly far from the reasonable precautions employees must take to protect property from imminent harm during the commencement of a strike that it was not even *arguably* protected under the NLRA.<sup>309</sup>

Years of procedural mess would follow, as the same striking event was adjudicated contemporaneously through administrative and Washington State judicial processes. First, the union amended its pending NLRB charge against Glacier Northwest to include their initiation of the litigation as also violative of the Act.<sup>310</sup> Then Local 174 filed a motion to dismiss Glacier Northwest's lawsuit as preempted by the NLRB.<sup>311</sup> After a state trial court granted Local 174's motion to dismiss on preemptive grounds and an appellate court reversed,<sup>312</sup> the Washington Supreme Court reinstated the dismissal of the lawsuit in December 2021.<sup>313</sup> In its opinion, the court distinguished "intentional destructions" of property that fell within the exception to *Garmon*, and those property losses that are the direct result of a work stoppage during a labor dispute.<sup>314</sup> Glacier Northwest's claims being the latter, the court reasoned that they were not excluded from *Garmon*—lest every strike that was timed strategically to

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'resort to the state court to recover' . . . because Congress did not supplant traditional state court procedure for collecting damages caused by tortious conduct").

309. Opposition to Motion to Dismiss, *supra* note 308, at 4–5.

310. See NLRB Charge, *supra* note 291, for Union's addition to the July NLRB charge.

311. Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, No. 17-2-3119-4, 2018 WL 11397914, at \*1 (Wash. Super. Ct. Nov. 19, 2018), *aff'd in part, rev'd in part*, 475 P.3d 1025 (Wash. Ct. App. 2020), *aff'd in part, rev'd in part*, 500 P.3d 119, 138 (Wash. 2021), *rev'd*, 143 S. Ct. 1404 (2023).

312. Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 475 P.3d 1025, 1028, 1038 (Wash. Ct. App. 2020), *aff'd in part, rev'd in part*, 500 P.3d 119, 138 (Wash. 2021), *rev'd*, 143 S. Ct. 1404 (2023).

313. See Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 500 P.3d 119, 138 (Wash. 2021), *rev'd*, 143 S. Ct. 1404 (2023) ("[T]he NLRA preempts the property destruction claims because the concrete damage occurred incidental to a work stoppage and was therefore at least arguably protected under the NLRA. Summary judgment of dismissal is therefore appropriate as to those claims.").

314. *Id.* at 130–31.

maximize employers' economic losses would fall outside of *Garmon's* purview.<sup>315</sup>

As for whether employees took reasonable precautions to protect Glacier Northwest's property from foreseeable, imminent harm, the state's highest court left this determination to the Board.<sup>316</sup> Acknowledging the employers' property interests behind the reasonable precautions standard and the interests of striking employees in leveraging the incidental destruction of *perishable* goods as a bargaining tactic, the court noted that when two competing labor principles are implicated as they were here, "the strike is, at least, arguably protected conduct under section 7."<sup>317</sup>

About a month after the Washington Supreme Court's decision, the NLRB's Regional Director completed its initial investigation of the union's charge and issued a complaint against Glacier Northwest.<sup>318</sup> Among other things, the agency's complaint asserted that the truck drivers probably had been engaged in arguably protected conduct when they stopped working and took the precautions they did on August 11th.<sup>319</sup> But, despite the NLRB's initial investigation giving credence to the lawsuit's preemptive status and providing a fuller picture than Glacier Northwest's complaint of the facts and circumstances on August

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315. *See id.* at 130 ("The Court has held that state jurisdiction to enforce its laws prohibiting violence, defamation, the intentional infliction of emotional distress, or obstruction of access to property is not preempted by the NLRA. But none of those violations of state law involves protected conduct." (quoting *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 204 (1978))).

316. *See id.* at 132–33 (holding that the Board determination was the persuasive source for determining failure to take reasonable precautions).

317. *See id.* at 131 ("Specifically, the [Washington Court of Appeals] improperly 'harmonized' the two competing principles recognized in this case: (1) employees must take reasonable precautions to protect an employer's plant, property, and products and (2) economic harm may be inflicted through a strike as a legitimate bargaining tactic.").

318. *See* NLRB Order Consolidating Cases, Consolidated Complaint and Notice of Hearing at 5a–6a, *Glacier Nw., Inc. & Teamsters Loc. Union No. 174*, 19-CA-203068, 19-CA-211776 (Jan. 31, 2022) (finding that Glacier Northwest violated Sections 8(a)(1) by "interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7," and violated Sections 8(a)(1) and (3) by "discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization" and by "affect[ing] commerce within the meaning of §§ 2(6) and (7)").

319. *Id.* at 5a.



11th, the Supreme Court granted Glacier Northwest’s certiorari petition in October 2022.<sup>320</sup> Regardless of the agency’s views, the Court would decide “whether the NLRA preempts Glacier’s tort claims alleging that the union intentionally destroyed its property during a labor dispute.”<sup>321</sup>

Now represented by anti-union juggernaut, Jones Day, Glacier Northwest’s Supreme Court briefs and oral argument took issue with the standard the Washington court applied in deciding whether the union’s conduct was preempted as arguably protected under the NLRA.<sup>322</sup> But the case’s unique procedural circumstances also meant that the company needed to convince the Court of this interpretation in a false reality, that false reality being the factual allegations made against the union in Glacier Northwest’s own initial complaint.<sup>323</sup> While the NLRB’s investigation and complaint had discredited Glacier Northwest’s factual allegations of coordinated “sabotage” and the “abandon[ment]” of trucks without taking any reasonable precautions to protect the company’s property,<sup>324</sup> the motion to dismiss stage

320. See *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 82, 82 (2022) (mem.).

321. *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1408–09 (2023) (examining the Union’s actions in light of the nature of employer’s business and subsequent losses, and the union protections granted under the NLRA).

322. Transcript of Oral Argument at 34, *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404 (2023) (No. 21-1449) [hereinafter Transcript of Oral Argument]; see Brief for Petitioner at 29–36, *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404 (2023) (No. 21-1149), 2022 WL 17370604, at \*29–36 (taking the stance that the lower court misapplied the “arguably protected” test by “balancing the economic pressure [caused by intentionally destroying Glacier’s property] against the strikers’ legitimate interest’ in the strike,” and that any judicial attempt at such “balancing” would be improper because it “would potentially interfere with important federal interests” (alteration in original) (citations and quotations omitted)). Instead, Petitioner argued that there is a “clear and obvious distinction between an ordinary work stoppage, and a work stoppage that is deliberately planned and timed to destroy the employer’s *property*.” *Id.* at 30 (citation and quotation omitted). The line crossing occurring when work stoppage withholds labor and when there is damage to the company’s property. *Id.* at 31.

323. See Transcript of Oral Argument, *supra* note 322, at 4–5 (“The more substantial question then is, who gets to decide whether the facts alleged in the complaint are true? The state court or the Board?”).

324. See Post-Hearing Brief, *supra* note 292, at 38–57 (discussing the incomplete investigation by Petitioner); see generally Complaint for Damages, *supra*

and appellate reviews accepted the allegations in the complaint as true.<sup>325</sup> And while the company had some help directing the Justices to the four corners of their complaint, the elephant in the room—what to do with the agency’s subsequent complaint,<sup>326</sup> nine-day hearing, and hundreds of pages in post-hearing briefs<sup>327</sup>—soon engulfed oral argument.<sup>328</sup> So much so, that by its conclusion, some Justices seemed prepared to toss the entire line of Board cases at the center of the procedural mess the Court helped to make.<sup>329</sup> Even more drastic, at least two Justices appeared ready to toss *Garmon* preemption altogether.<sup>330</sup>

In light of the more extreme alternatives, when the Court did decide *Glacier Northwest, Inc.* on June 1, 2023, many proponents of labor law’s integrative design heaved a sigh of relief.<sup>331</sup>

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note 300 (quoting the language in Petitioner’s Complaint to describe the Union’s actions on August 11, 2017).

325. See *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 500 P.3d 119, 120 (Wash. 2021), *rev’d*, 143 S. Ct. 1404 (2023) (accepting the facts alleged in the Complaint as true on appeals to review a motion to dismiss); *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 475 P.3d 1025, 1028–30 (Wash. Ct. App. 2020), *aff’d in part, rev’d in part*, 500 P.3d 119, 138 (Wash. 2021), *rev’d*, 143 S. Ct. 1404 (2023) (same).

326. See Transcript of Oral Argument, *supra* note 322, at 63–64 (asking what the Court should do with the Board’s complaint).

327. See *Glacier Northwest, Inc. d/b/a CalPortland*, NLRB, <https://www.nlr.gov/case/19-CA-203068> [<https://perma.cc/QT2T-S3TQ>] (listing the multitude of Post-Hearing Briefs to ALJ).

328. See *generally* Transcript of Oral Argument, *supra* note 322, at 8, 17–21, 42, 48–49 (outlining Court’s back-and-forth struggle with what to do with the Board’s decision and extensive discussion).

329. *Id.* at 39–41; *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1406 (2023).

330. See Transcript of Oral Argument, *supra* note 322, at 29–31, for excerpts where Justice Thomas expresses reluctance to acknowledge the *Garmon* preemption or a desire to revisit the preemption doctrine (questioning the textual basis for the terms “exhaustion” and “preemption” of the *Garmon* preemption). See also *Glacier Nw. Inc.*, 143 S. Ct. at 1417 (Thomas, J., concurring) (showing Justices Thomas and Gorsuch expressing an interest in revisiting the “logical contradiction” that is the *Garmon* preemption).

331. See, e.g., Andrew Strom, *Glacier Northwest Could Have Been Worse, but It’s Still Bad*, ONLABOR (June 6, 2023), <https://onlabor.org/glacier-northwest-could-have-been-worse-but-its-still-bad> [<https://perma.cc/6MFS-ANBW>]; see also Jenny Hunter, *Glacier Northwest Is Yet Another “Could Have Been Worse” Decision That’s Very Bad for Workers*, BALLS & STRIKES (June 2, 2023), <https://ballsandstrikes.org/scotus/glacier-northwest-is-yet-another-could-have-been-worse-decision-thats-very-bad-for-workers> [<https://perma.cc/358P-N39P>]

Yes, the union had lost eight to one,<sup>332</sup> but the majority opinion written by Justice Barrett had left intact labor’s preemption regime, and the line the Board had drawn between work stoppages timed when the incidental destruction of *perishable* goods was foreseeable, and work stoppages where employees must take “reasonable precautions” to protect their employer’s property from foreseeable, aggravated, and imminent harm.<sup>333</sup> Accepting the complaint’s allegations as true, *Glacier Northwest, Inc.*’s fact-specific and narrowly tailored opinion viewed the union’s activities as more akin to killing the cow than spoiling the milk,<sup>334</sup> or more like stopping a molten iron pour mid-production than stopping mid-production the making of cheese.<sup>335</sup>

Rather than getting rid of the Board’s delineating line between perishable goods and non-perishable property, Justice Barrett’s opinion, if anything, expanded on it. Adding an addendum to the protection of work stoppages when the destruction of perishable products is foreseeable, her majority opinion carved out a caveat for when striking employees “prompt . . . the creation of the perishable product.”<sup>336</sup>

While this decision is not the disastrous *tort damages for work stoppages when the destruction of any product is foreseeable* holding *Glacier Northwest, Inc.* could have been,<sup>337</sup> it is not without consequence. For one, different types of workers do countless different things in relation to perishable products that could be construed as prompting their creation. And now, *Glacier Northwest, Inc.* is open season for an array of courts and jurisdictions to opine on where the legal limits of all these countless activities are. Particularly, the prompting of perishables standard, or the idea of starting or completing any product production seems an especially grey area for the wave of new organizing activities in

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(expressing hesitant optimism that the Court had not done away with *Garmon* altogether).

332. *Glacier Nw., Inc.*, 143 S. Ct. at 1418–33 (Jackson, J., dissenting).

333. Transcript of Oral Argument, *supra* note 322, at 72–73.

334. *Id.* at 71–72.

335. *Id.* at 4, 74.

336. *Glacier Nw., Inc.*, 143 S. Ct. at 1414.

337. See generally Strom, *supra* note 331 (expressing relief that the Court reaffirmed that a strike is “not unprotected simply because the employer’s perishable products spoil when workers walk off the job”).

the service, creative, and intellectual industries.<sup>338</sup> After *Glacier Northwest, Inc.*, can graduate students who time their striking activities around finals be liable to a university because, in beginning to teach the semester, they have prompted the production of an entire fourteen week course?<sup>339</sup> What if they miss grant opportunities because a timed strike begins during the grant application process? Can Starbucks baristas stop work mid-pumpkin spice latte, or does *Glacier Northwest, Inc.* not apply to de minimis prompts of perishable products however delicious and seasonal they may be? The workers affected by this decision span almost every conceivable industry and occupation.<sup>340</sup>

Besides avoiding these inevitable incongruities being precisely the point of the NLRB, it is hard to imagine that risk-averse workers who handle perishable products, or those who live in places where state court judges are hostile to unions, will not have *Glacier Northwest Inc.*'s four-year litigation in the back of their mind when deciding whether or when to strike.<sup>341</sup> Indeed, if employers collectively bargain to lessen the economic harm of a strike, but *Glacier Northwest, Inc.* also minimizes a strike's economic harms, then some employers may forego

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338. See Hunter, *supra* note 331, for a discussion of a hypothetical bakery strike in which workers will have to wrestle with whether the bakery might sue them for the loss of perishable bakery items, lost sales, or even to the frosting and dough (by virtue of non-use once made). Hunter proposes that *Glacier Northwest* turns on the risk to property, not just perishable products.

339. Cf. Jay Caspian Kang, *What's at Stake in the University of California Graduate-Worker Strike*, NEW YORKER (Nov. 29, 2022), <https://www.newyorker.com/news/our-columnists/whats-at-stake-in-the-university-of-california-graduate-worker-strike> [<https://perma.cc/JJ2S-4ABP>] (emphasizing that the future of organized labor won't be in the coal mines but on places that cut against these stereotypes, like on UC Berkeley's campus).

340. See generally Jane McAlevey, *How Should Workers Respond to the Supreme Court's Ruling in Glacier Northwest?*, NATION (June 1, 2023), <https://www.thenation.com/article/politics/supreme-court-glacier-northwest-workers> [<https://perma.cc/U8Z9-DGPZ>] (describing how the most important source of leverage that striking workers have in their unequal relationship, the ability to cost a recalcitrant employer money, affects the leveraging power of employees across all sectors).

341. See Hunter, *supra* note 331 (discussing this scenario and goes on to mention how, to "minimize the chances of a costly lawsuit, [risk-averse striking employees] may start their strike before or after business hours, or give their employer notice—even though, as the Court acknowledged . . . the NLRA does not require workers to do that").

collective bargaining.<sup>342</sup> But regardless as to whether lawsuits to recover strike-related economic damages are successful in assessing tort liability under *Glacier Northwest, Inc.*'s new "prompting production" standard, in just allowing a potential lawsuit to impact workers' striking tactics, the Court has already struck the heart of labor law's purposeful design and disrupted the Board's careful balancing of competing interests.<sup>343</sup>

Speaking of drawn-out litigation and the disproportionate cost it imposes on organized labor interests, *Glacier Northwest, Inc.*, as written, may have another lasting procedural legacy to this effect. An oddity of *Glacier Northwest, Inc.* was that no one thought the company's initial lawsuit had a chance of succeeding on the merits by the time the case reached the Court for oral argument. Indeed, arguing counsel for Glacier Northwest conceded almost as much, admitting that while the Court must take the facts alleged in the pleadings as true at the motion to dismiss stage, after costly discovery, the Board's proceedings would likely be persuasive evidence for a dismissal at summary judgment.<sup>344</sup> Likewise, if nothing else, *Glacier Northwest, Inc.* creates an overlapping jurisdiction where an employer who suffers strike-related economic harm can craft such intentional striking activity as an intentional tort.<sup>345</sup> Then with an artfully crafted complaint, employers can sustain a lawsuit in state court concurrently with the Board's proceedings for months, if not years.<sup>346</sup>

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342. See *id.* (touching on the weakening of worker's bargaining power); see also *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1428 (Jackson, J., dissenting) ("The potential pain of a work stoppage is a powerful tool [that] . . . [u]nions leverage . . . into bargaining power.").

343. See *Glacier Nw., Inc.*, 143 S. Ct. at 1418 ("The right to strike is fundamental to American labor law."); *id.* at 1419 (arguing that the majority's decision undermines "an agency that is uniquely positioned to evaluate the facts and apply the law . . .").

344. See Transcript of Oral Argument, *supra* note 322, at 5 ("If the allegations are true, [the Court] can award relief.").

345. See *Glacier Nw., Inc.*, 143 S. Ct. at 1416, for Court's apparent favoring of "foreseeable, aggravated, and imminent harm" constraints on union striking activity (majority opinion). See generally Complaint for Damages, *supra* note 300, at 2–3 (demonstrating Glacier Northwest's crafting of striking activity as intentional tort).

346. See generally *supra* Part IV.B, for an overview of *Glacier Northwest, Inc.*'s case trajectory through the Washington court system and NLRB agency.

C. DIMINISHING THE BOARD AND LABOR LAW'S UNDERLYING PRINCIPLES

Both *Glacier Northwest, Inc.* and *Cedar Point Nursery* undergo a significant rebalancing of workers' collective and employers' property interests. But their questioning of labor law's facilitative protections and underlying redistributive principles is perhaps not even the most appropriate headline. Instead, even more concerning about these cases may be that the Court decided to hear them at all. That the Roberts Court appoints itself—instead of Congress or the expert regulatory agency—as the decision-maker on labor policy is the most threatening to our democracy.<sup>347</sup>

As Justice Jackson highlights in her dissent, a strict preemption regime has defined U.S. labor law for decades.<sup>348</sup> In light of the Board's expertise and the importance of uniform application of labor law's centralized labor regime, federal and state courts are preempted from deciding cases where an activity is *arguably* subject to Section 7 or Section 8 of the NLRA.<sup>349</sup> And although the NLRB is not immune to criticism, nowhere else in labor law has it earned its deference quite like it has in its

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347. Hunter, *supra* note 331 (noting that the NLRA was created through legislation by democratically elected congressional representatives, impliedly contrasting it with the unelected nature of the Supreme Court).

348. *Glacier Nw., Inc.*, 143 S. Ct. at 1421 (Jackson, J., dissenting) (“[T]his Court has long held that . . . if § 7—including its protection of the right to strike—‘arguably’ protects the conduct at issue in a state-court suit, then the court must await the Board’s words as to whether the conduct is, in fact, protected.”).

349. *See id.* (“[I]t is to the Board that Congress entrusted the task of applying the Act’s general . . . language in the light of the infinite combinations of events which might be charged as violative of its terms.” (alteration in original) (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500–01 (1978))); *Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60, 65 (2008) (stating that preemption is necessary to implement federal labor policy); *Wis. Dep’t of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (explaining that preemption prevents state courts from setting NLRA-inconsistent standards, ultimately avoiding conflict with the “complex and interrelated federal scheme of law, remedy, and administration” (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959))); *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers, v. Wis. Emp. Rels. Comm’n*, 427 U.S. 132, 139 (1976) (“To leave the States free to regulate conduct [under Sections 7 and 8] . . . involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.” (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959))).

protection of concerted activity, like the strike, while maintaining to the greatest extent possible individual property interests.<sup>350</sup>

Charged with this challenge early on, the Board has answered difficult line-drawing questions concerning sit down strikes, slow-down strikes, intermittent strikes, wildcat strikes, and everything in between.<sup>351</sup> It has been asked to apply opaque language like “coercive” to secondary concerted activities, while walking the constitutional tightrope that recognizes speech outside of the labor contexts as being the most persuasive to the extent it persuades people into taking actions they wouldn’t have otherwise done.<sup>352</sup> One could only imagine the different and conflicting interpretations of labor law’s restrictions on secondary concerted activity, had a bunch of different courts—all with their own local procedures and attitudes towards organized labor—been allowed to opine. Fortunately, uniformity in the law governing industrial relations has embodied the Court’s interpretation of labor law’s broad preemption doctrine until now.<sup>353</sup>

Nevertheless, if the Roberts Court’s anti-labor decisions can be consistently reconciled with any value at all, it is with its crusade against the regulatory state.<sup>354</sup> There was no need to hear *Glacier Northwest, Inc.* The Washington Supreme Court had decided unanimously in the union’s favor, there was no split in the circuit courts, and the agency’s subsequent complaint provided the Court with plenty of grounds to vacate the judgment below and remand to the lower court’s for consideration.<sup>355</sup> So, why take another politically unpopular case that threatens to erode the Supreme Court’s legitimacy in the eyes of a public, if not also to strike another decided blow to the authority of federal agencies?

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350. See *supra* Part I.C (discussing labor law common doctrines).

351. See *supra* Part I.C.

352. See *supra* text accompanying note 100 (discussing the “coercive” effects of strikes).

353. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241–42 (1959) (concerning Court’s desire to “delimit[] areas of potential conflict”).

354. See *Strom*, *supra* note 331 (stating that the *Glacier Northwest, Inc.* decision is “part of the right-wing’s ongoing attack on administrative agencies”).

355. See *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 500 P.3d 119, 138 (Wash. 2021), *rev’d*, 143 S. Ct. 1404 (2023) (depicting concurrence amongst the Washington Supreme Court before the Supreme Court reversed).

There are “dark clouds” shadowing the *Glacier Northwest, Inc.* opinion.<sup>356</sup> These clouds are in full view in Justices Gorsuch and Thomas’s *Glacier Northwest, Inc.* concurrence, where they proclaim their willingness to do away with *Garmon* preemption as soon as the court can get a better case with which to achieve this objective.<sup>357</sup>

Hinting at this outcome, lifelong enemy of the administrative state, Justice Gorsuch, asked employer’s counsel at oral argument for *Glacier Northwest, Inc.* “[w]hat’s at stake” in allowing state courts, rather than the NLRB, to hear claims against striking workers.<sup>358</sup> Answering the Justice’s question, the attorney said, frankly, that Glacier Northwest preferred not to be in a venue “where the agency is the judge, jury, and executioner” of their claims.<sup>359</sup> The overwrought terminology about agencies as executioners reeks of the conservative majority’s expressed views of federal agencies, and litigants are catching on.<sup>360</sup> And, for anyone against the administrative state, the NLRB is an irresistible target. It is *the* model New Deal administrative agency. An agency where expertise and professionalism, balanced by political accountability and careful institutional design, was thought to yield the best possible governance in a decidedly imperfect and changing world.<sup>361</sup>

Because of the particularly high hopes it had for the Board at the time it was created, Congress vested broad discretion in it for interpreting and administering labor law.<sup>362</sup> But today,

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356. Ruben J. Garcia, *The Supreme Court’s Latest Ruling Against Unions Is Really Aimed at the New Deal*, WASH. MONTHLY (June 8, 2023), <https://washingtonmonthly.com/2023/06/08/the-supreme-courts-latest-ruling-against-unions-is-really-aimed-at-the-new-deal> [<https://perma.cc/8WP9-E2BX>].

357. *Id.*; see also *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 143 S. Ct. 1404, 1417 (2023) (Thomas, J., concurring) (“[W]e should carefully reexamine whether the law supports *Garmon*’s ‘unusual’ preemption regime.”).

358. Transcript of Oral Argument, *supra* note 322, at 36.

359. *Id.* at 37.

360. See *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2618 (2022) (proclaiming that federal agencies’ regulatory powers “pose a serious threat to individual liberty”).

361. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2014 (2009) (explaining that administrative agencies were created to “yield the best possible governance in a decidedly imperfect world”).

362. See *id.*



*Glacier Northwest, Inc.*'s attempt to narrow this discretion highlights how this Court's broad goals of unraveling labor and reigning in federal agencies' power—even when Congress directs this power explicitly to it—are inextricably linked.<sup>363</sup> That the deregulatory goal “shifts more power to courts” to apply the NLRA's malleable statutory language in lieu of the Board enables the Roberts Court to have an even more determinative role in the once-democratic labor-policy debate.<sup>364</sup>

### CONCLUSION

*Janus* demonstrates the Roberts Court's commitment to striking down lasting and entwined labor doctrine—and its reasoning sets the stage for it to do so again.<sup>365</sup> In framing *Janus* as a necessary protection of individual liberties, the Court ignores the entire tapestry of labor law that accounts for doctrinal threads harmful to individual interests with special privileges or protections in others.<sup>366</sup> The resulting imbalance has now set up the logical unraveling of several foundational labor principles using the First Amendment in both the public and private employment sector.<sup>367</sup> However, even when there is no logically unraveling path to follow, this Court is willing to trailblaze. In *Cedar Point Nursery*, the Court abandoned its originalist commitments and embraced a view of private property that had been rejected for decades.<sup>368</sup> But these means were justified to get to a consequentially anti-labor end. And in deciding to hear *Glacier Northwest Inc.* at all, the Roberts Court exposes its proactive desire to substitute lawmakers' and the Board's labor policy for its own.<sup>369</sup>

Despite the Court's efforts, the U.S. labor movement has gotten stronger, its organizing efforts more creative, and its

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363. See Strom, *supra* note 331 (describing *Glacier*'s anti-union and anti-regulatory aim).

364. *Id.*

365. See *supra* Part II.B.

366. See *supra* Part II.B.

367. See *supra* Part III (including undoing (1) exclusivity, (2) fair representation duties, (3) good-faith collective bargaining obligation, and (4) destabilizing secondary concerted activity regulations).

368. See Berger, *supra* note 273, at 309 (“Although *Cedar Point v. Hassid* wraps itself in a façade of constitutional history, it violates this tradition.”).

369. See Strom, *supra* note 331 (explaining the Court, through *Glacier Northwest, Inc.*, advances its anti-union and anti-regulatory aim).

collective activity more publicly popular.<sup>370</sup> Likewise, it is worth reminding that, historically, when public opinion and the Supreme Court collide over labor issues, the public gets its way, and the Supreme Court as an institution gets battered and bruised.<sup>371</sup> But that this history lesson may need repeating reveals a concerning design flaw of our Constitution's democratic republic. If democratically enacted labor laws interpreted to facilitate democratic values can be struck down by our least-democratic government branch for the protection of an already privileged minority—then ours is perhaps not a functional democracy at all. Indeed, Abraham Lincoln wrestled with the same constitutional flaw after the infamous *Dred Scott* decision deprived lawmakers of prohibiting slavery in the territories.<sup>372</sup> Lincoln said, “If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court,” then “the people will have ceased to be their own masters.”<sup>373</sup> Fortunately, the aftermaths of *Dred Scott* and *Lochner* suggest the people will not cede to Court rule easily. Likewise, this Roberts Court may come to live in infamy—not as the Court that unraveled labor's important legal tapestry, but instead as the Court that challenged democratic efforts to patch it back together and lost.

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370. See generally Greenhouse, *supra* note 23 (stating that public opinion does not share this Court's sentiments on labor).

371. See *supra* Part IV.A (explaining the *Lochner* Court's labor law agenda and public opinion in response).

372. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 528–29 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend XIV (declaring the Missouri Compromise—which prohibited slavery in the western territories north of the 36°30' line of latitude—to be unconstitutional).

373. Abraham Lincoln, President of the U.S., First Inaugural Address (Mar. 4, 1861).