

2020

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### Recommended Citation

Garden, Charlotte (2020) "Is There an Anti-Democracy Principle in the Post- Janus v. AFSCME First Amendment?," *University of Chicago Legal Forum*: Vol. 2020 , Article 4.

Available at: <https://chicagounbound.uchicago.edu/uclf/vol2020/iss1/4>

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# Is There an Anti-Democracy Principle in the Post-*Janus v. AFSCME* First Amendment?

Charlotte Garden<sup>†</sup>

## I. INTRODUCTION

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,<sup>1</sup> the Supreme Court held that union-represented public sector workers could not be compelled to pay money to the union that represents them. However, even as the Court affirmed that public sector labor-relations systems could remain “exactly as they are”<sup>2</sup> as long as they did not mandate union dues or fees, the Court also hinted in dicta that it might not be finished announcing new First Amendment principles regarding public sector union arrangements. Specifically, the five-Justice majority also observed that the exclusive representation system—in which an elected union represents every employee in a bargaining unit—“substantially restricts the rights of individual employees.”<sup>3</sup>

This observation was enough to prompt dozens of new lawsuits challenging exclusive representation in the public sector. These cases, which have uniformly and rightly failed, differ in their specific legal theories. But they all target collective bargaining and not other public sector workplace management systems under the First Amendment. For example, those who argue that exclusive representation by a labor union is unconstitutional do not—and presumably would not—argue that it would be unconstitutional for a public employer to hire a management consulting firm to assist it in determining pay and other benefits for groups of workers. Likewise, if employers simply empowered an internal human resources department to set wages and working conditions, that department would face few constitutional constraints

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<sup>1</sup> 138 S. Ct. 2448 (2018). The respondent’s name is frequently shortened to “AFSCME.”

<sup>2</sup> *Id.* at 2485 n.27.

<sup>3</sup> *Id.* at 2460.

regarding whether or to what extent it permitted employee input into its decisions.

What is the constitutional objection to collective bargaining with an exclusive representative? As I explain in Part III, the lawyers bringing these cases imply that the answer lies either in the fact that collective bargaining representatives are elected by employees themselves, or that unions commit themselves to representing the interests of workers, rather than management. If that is right, then there is a central irony at the crux of these cases: plaintiffs often couch their arguments in terms of rights to speech and association, but success could imply that workers have a constitutional right not to more democratic participation in their workplaces, but instead to have their wages and working conditions determined unilaterally by their employers.

This Article explores the current wave of First Amendment challenges to the exclusive representation system and other aspects of public sector labor relations, arguing that these systems are constitutional as a matter of both law and of logic. Part II begins with an overview of the relevant Supreme Court case law, which mainly dates to the 1970s and 1980s. It then discusses the Court's more recent cases holding that public employees cannot be compelled to pay union fees as a condition of keeping their jobs—these cases do not concern exclusive representation, but their existence helps to explain why some union opponents have chosen now to attempt to unsettle the constitutionality of exclusive representation. Part III analyzes some of the arguments common to the new round of challenges to exclusive representation. This section focuses first on the arguments that collective bargaining displaces a right to bargain individually with a public employer, or creates the appearance that represented workers support their union, arguing that neither premise is accurate. It then turns to the argument that unions are engaged in state action when they set membership requirements or determine internal decision-making criteria. This argument—which the Article argues is unfounded—is the predicate to a set of arguments that unions cannot exclude nonmembers from their own internal deliberations, leadership, or benefits.

## II. THE CHALLENGE TO EXCLUSIVE REPRESENTATION

### A. The First Challenges to Exclusive Representation

Public-sector collective bargaining became widespread in the United States in the 1960s and 1970s.<sup>4</sup> Both then and today, virtually

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<sup>4</sup> SETH D. HARRIS ET AL., *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS* 64–65 (2d ed. 2016).

all jurisdictions that permit public sector collective bargaining use what is known as the exclusive representation system, in which an elected union is charged with representing every worker in the bargaining unit.<sup>5</sup> In turn, the union owes each represented worker what is known as the duty of fair representation, which requires the union to treat workers fairly and not to discriminate based on workers' individual characteristics such as race, gender, or union membership.<sup>6</sup>

The rapid growth of public sector unionization was followed by litigation, including several cases challenging aspects of public sector collective bargaining under the First Amendment. This section recounts and analyzes those cases. The bottom line is that the Court mostly affirmed that governments were free to decide to handle labor relations with their public sector workforces through collective bargaining with an elected exclusive representative. The main exception, in which the Court imposed limits on states' choices, involves union dues and fees. In *Abood v. Detroit Board of Education*,<sup>7</sup> the Court limited how unions could finance certain expenses, but it did not question the constitutionality of the underlying logic or structure of bargaining.

This subsection considers the relevant cases chronologically. Collectively, they establish that workers have a right to associate with a labor union even in the absence of a collective bargaining statute,<sup>8</sup> but also a right to criticize publicly union proposals or the collective bargaining process.<sup>9</sup> On the other hand, states also have considerable flexibility: they may adopt the exclusive representation system without even implicating employees' First Amendment rights,<sup>10</sup> bar rival unions from accessing channels of communication reserved for the exclusive representative,<sup>11</sup> or refuse to permit union participation in any or all aspects of workplace governance.<sup>12</sup> Finally, in the now-overruled *Abood v. Detroit Board of Education*,<sup>13</sup> the Court limited how unions could finance activities other than collective bargaining, though it agreed that governments and unions could jointly require represented workers to pay for their share of union representation.

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<sup>5</sup> See Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry Into a "Unique" American Principle*, 20 COMP. LAB. L. & POL'Y J. 47 (1998).

<sup>6</sup> For a more detailed discussion of the relationship between the exclusive representation system and the duty of fair representation, see Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 206–07 (2015).

<sup>7</sup> 431 U.S. 209 (1977).

<sup>8</sup> *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463 (1979).

<sup>9</sup> *City of Madison v. Wis. Emp't. Relations Comm'n*, 429 U.S. 167 (1976).

<sup>10</sup> *Minnesota State Bd. of Cmty. Colls. v. Knight*, 465 U.S. 271, 274 (1984) ("*Knight II*").

<sup>11</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

<sup>12</sup> *Smith*, 441 U.S. at 463–64.

<sup>13</sup> 431 U.S. 209 (1977), *overruled by Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The first of these cases, *Madison v. Wisconsin Employment Relations Commission*, arose after a union-represented teacher spoke at a school board meeting in opposition to certain union bargaining proposals, including that represented teachers be required to pay agency fees. In an administrative complaint, the union alleged that “the board had engaged in negotiations with a member of the bargaining unit other than the exclusive collective-bargaining representative,” thereby violating a provision of state law forbidding city employers from striking individual employment contracts with union-represented employees.<sup>14</sup> The Wisconsin Employment Relations Commission agreed that the school board had committed an unfair labor practice, and ordered that it “immediately cease and desist from permitting employees, other than representatives of Madison Teachers, Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc.”<sup>15</sup> The Supreme Court of Wisconsin affirmed the Commission’s decision, writing that “[t]he principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts . . . . But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations.”<sup>16</sup>

The U.S. Supreme Court reversed, citing earlier cases holding that public employees did not “relinquish the First Amendment rights they would otherwise enjoy as citizens.”<sup>17</sup> Then, the Court distinguished speaking at a school board meeting—something that any citizen of Madison was free to do—with true union negotiations.<sup>18</sup> “Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.”<sup>19</sup> Likewise, the Court observed that teachers who objected to union representation could express their views in other available fora, such as the news media.<sup>20</sup>

The key here is the Court’s focus on where the relevant speech occurred—at a public-school board meeting—and whether union-represented teachers were disadvantaged as compared to other citizens. In a

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<sup>14</sup> *City of Madison*, 429 U.S. at 172, 173 n.4.

<sup>15</sup> *Id.* at 172–73.

<sup>16</sup> *City of Madison Joint Sch. Dist. No. 8 v. Wisc. Emp’t Relations Comm’n*, 231 N.W.2d 206, 212–13 (1975), *rev’d and remanded sub nom. City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp’t Relations Comm’n*, 429 U.S. 167 (1976).

<sup>17</sup> *City of Madison*, 429 U.S. at 175 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 176.

<sup>20</sup> *Id.* at 176 n.10.

concurrence joined by Justice Marshall, Justice Brennan emphasized this point, writing that public employers could hold “closed bargaining sessions” in which only union representatives could be heard.<sup>21</sup>

Next, in *Abood v. Detroit Board of Education*, the Court held that union-represented public employees could not be required to contribute toward the cost of a union’s activities outside of its role as bargaining representative.<sup>22</sup> A large number of scholarly articles discuss *Abood* and cases that rely on it, and I will not retread their discussions of *Abood*’s holding or consequences. For purposes of this Article, I want to make only two points about *Abood* and the exclusive representation system. First, the decision treated the fact of exclusive representation as a reason that mandatory union agency fees were justifiable,<sup>23</sup> as part of what Cynthia Estlund has called labor law’s “quid-pro-quo.”<sup>24</sup> But, as Estlund also describes, under this view, it is the exclusive representation system (coupled with the duty of fair representation, which prohibits unions from discriminating against represented nonmembers) that offers one basis for agency fees, not the other way around.<sup>25</sup> In other words, even though agency fees help the exclusive representation system function well, *Abood* did not suggest that agency fees are a prerequisite to the constitutionality of exclusive representation.

Second, the *Abood* Court addressed an argument that bears more directly on one iteration of the current day challenges to exclusive representation. The Court noted that “[t]he appellants’ complaints also alleged that the Union carries on various ‘social activities’ which are not open to nonmembers.”<sup>26</sup> The Court made this observation in the course of discussing an issue it ultimately left for another day—which union activities fell into the category of expenses that were germane to its role as representative, and were therefore chargeable. But with the allegation left undeveloped, the Court simply noted that “[i]t is unclear to what extent such activities fall outside the Union’s duties as exclusive representative or involve constitutionally protected rights of association.”<sup>27</sup> The Court did not say whose rights of association were at issue,

<sup>21</sup> *Id.* at 178.

<sup>22</sup> 431 U.S. at 236 (discussing “drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited”).

<sup>23</sup> *Id.* at 221–22 (“The designation of a union as exclusive representative carries with it great responsibilities . . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit . . .”).

<sup>24</sup> Estlund, *supra* note 6, at 206.

<sup>25</sup> *Id.* at 217–218 (describing the “free rider” problem that would result from a system in which unions are required to fairly represent each worker in a bargaining unit, but foreclosed from requiring them to pay their share).

<sup>26</sup> *Abood*, 431 U.S. at 236 n.33.

<sup>27</sup> *Id.* (emphasis added).

but it would have been logical for the Court to think that a union, as a private association, had a First Amendment right to refuse to associate socially with represented nonmembers.<sup>28</sup>

Next, the Court addressed whether the First Amendment required public employers to allow a role for public sector unions in workplace governance. In *Smith v. Arkansas State Highway Employees, Local 1315*,<sup>29</sup> the Court rejected a union's argument that it violated the First Amendment for the State Highway Commission to refuse to "consider a grievance unless the employee submits his written complaint directly to the designated employer representative."<sup>30</sup> While observing that the Commission's rule would be inconsistent with labor statutes applicable in other jurisdictions, the Court held that it did not violate—or even implicate—the First Amendment. "[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond to, or in this context, to recognize the [union] and bargain with it."<sup>31</sup>

However, in the course of ruling against the union, the Court also wrote that the Commission did not "prohibit[] its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas." If it had, the Court continued, it would give rise to a "claim of retaliation or discrimination proscribed by the First Amendment."<sup>32</sup> This language suggests that public sector employers may not refuse to hire or otherwise retaliate against public employees based on their union membership. Likewise, it suggests that, at a minimum, unions and public employees have the right to advocate on workplace issues in whatever fora are available to them, even though public employers are not required to open channels that are otherwise closed for communication.

The Court again dealt with the relationship between closed channels of communication and union representation in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.<sup>33</sup> There, a rival union challenged a provision in a collective bargaining agreement that required the district to allow its teachers' elected exclusive representative access to the in-school mail delivery system, while denying access to competing unions.<sup>34</sup>

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<sup>28</sup> Other cases confirm this right to exclude. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (discussing contours of this right).

<sup>29</sup> 441 U.S. 463 (1979).

<sup>30</sup> *Id.* Arkansas demanded that employees themselves handle the potentially stressful process of submitting a grievance, instead of allowing the union to take that step. *Id.*

<sup>31</sup> *Id.* at 465.

<sup>32</sup> *Id.*

<sup>33</sup> 460 U.S. 37 (1983).

<sup>34</sup> *Id.* at 40–41.

This time, the Court found that the rival union's First Amendment rights were implicated by the differential access policy,<sup>35</sup> but then turned to the characteristics of the mailboxes themselves. The Court held that the mailboxes were a "nonpublic forum," which meant that the school could "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>36</sup> Viewing the case through the lens of state-as-property-owner,<sup>37</sup> the Court held that as long as the district did not convert the mailboxes to a designated public forum by allowing indiscriminate access for the public, the school district was free to privilege an exclusive representative's access over a rival union's. And while a state's discretion to exclude would-be speakers from a nonpublic forum does not extend to viewpoint discrimination, the Court held that the exclusion was viewpoint neutral; this conclusion was buttressed by the fact that the employees, not the school, were charged with choosing the exclusive representative that would in turn receive mailbox access. At the same time, the Court observed that "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools," and deterring "inter-union squabbles."<sup>38</sup>

*Perry Education Association* is different than some of the other cases discussed in this section because it involved state control over one channel of communication between a union and teachers, rather than communication between the union and the state itself. In *Smith* and *Madison*, the Court grappled with when the state, itself an unwilling audience, was free to close its metaphorical ears to an unwanted message. *Perry* more directly involved listeners' rights in addition to speakers' rights—some teachers may have liked to hear from the Local Educators' Association, while others would have tossed its missives in the trash.

A closely related concern prompted a dissent by four justices who would have held that the mailbox restriction was viewpoint discriminatory.<sup>39</sup> But the dissenting justices focused on the *Perry Education Association's* likely reason for wanting to exclude the Local Education Association,<sup>40</sup> raising the question of whether or when it is appropriate to

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<sup>35</sup> *Id.* at 44 ("There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system.").

<sup>36</sup> *Id.* at 46.

<sup>37</sup> *Id.* ("[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (internal quotation marks omitted).

<sup>38</sup> *Id.* at 52.

<sup>39</sup> *Id.* at 65.

<sup>40</sup> *Id.* ("On a practical level, the only reason for the petition to seek an exclusive access policy



impute the reasoning of the union—a private organization that by definition cannot violate the First Amendment—to the school district.

The last case in the series discussed in this Section is also the one that deals with exclusive representation most directly. *Minnesota State Board for Community Colleges v. Knight*<sup>41</sup> involved a challenge by a public employee to a “meet and confer” statute that required the state to discuss topics that fell outside of the state’s collective bargaining process with its employees’ union or (if there was no union) other representative.<sup>42</sup> Inversely, the statute prohibited state employers from either negotiating or conferring with employees individually or with other representatives.<sup>43</sup> The plaintiffs in *Knight* were state university employees who wanted their own seat at the bargaining table and in the “meet and confer” process.<sup>44</sup>

*Knight* made two trips to the Supreme Court. In the first, the Court summarily affirmed a decision of a three-judge district court that it was lawful for the state to exclude parties other than elected union representatives from collective bargaining.<sup>45</sup> In the second, the Court upheld Minnesota’s meet-and-confer statute in an opinion that focused on public employers’ rights to control which parties may participate in non-public forums.<sup>46</sup>

The plaintiffs in *Knight* objected to the fact that the statute also restricted public employers from either bargaining or conferring with represented employees except through their elected representative—that is, the suit challenged the state’s decision to create a channel of communication to which only an elected representative would have access.<sup>47</sup> On the other hand, the state did not limit what represented public employees could say in public settings or private settings to which they could gain access; for example, they were free to criticize employer or union positions on topics of collective bargaining or collective conferring in any available forum.<sup>48</sup>

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is to deny its rivals access to an effective channel of communication.”).

<sup>41</sup> 465 U.S. 271 (1984).

<sup>42</sup> *Id.* at 274. Unlike the state’s separate collective bargaining law, the meet-and-confer statute did not require the state to bargain in good faith over covered topics. Rather, the statute created a channel for employees to provide input through their chosen representatives. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 278.

<sup>45</sup> *Knight v. Minn. Cmty. Coll. Faculty Ass’n*, 460 U.S. 1048 (1983) (“*Knight I*”).

<sup>46</sup> *Knight II*, 465 U.S. at 280.

<sup>47</sup> *Id.* at 275.

<sup>48</sup> *Id.* (noting that “nothing in PELRA restricts the right of any public employee to speak on any matter related to the conditions or compensation of public employment or their betterment’ as long as doing so ‘is not designed to and does not interfere’ with the exclusive representative’s rights or duties).

The *Knight II* Court upheld the collective conferencing statute, ultimately writing that the plaintiffs' argument was less compelling than the (also unsuccessful) challenge in *Perry Education Association*.<sup>49</sup> The difference was that, whereas *Perry Education Association* involved a claim of access to a nonpublic forum, the *Knight* plaintiffs "claim[ed] an entitlement to a government audience for their views."<sup>50</sup> The Court emphasized that government bodies are free to decide whom to consult, and that the decision to solicit "outside" advice from one voice does not create an obligation to listen to competing outside views.<sup>51</sup> The alternative, the Court continued, could create an unworkable morass for both policymaking parts of government and for the courts, because "[g]overnment makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard."<sup>52</sup> Thus, the Court's conclusion rested on two premises. First, that as a doctrinal and theoretical matter, the First Amendment does not guarantee a government audience—there is no such thing as a First Amendment right to participate in private deliberations of government. And second, that as a practical matter, "the government could not work" if the First Amendment required it to listen to either nobody or everybody.<sup>53</sup>

Finally, the Court also rejected two arguments that—as Part III discusses—also appear in the new set of challenges to exclusive representation. First, the fact that the Faculty Association did not choose the plaintiffs—individuals who objected to the Association's positions—to represent it in its deliberations with the state "no more unconstitutionally inhibits [plaintiffs'] speech than voters' power to reject a candidate for office inhibits the candidate's speech."<sup>54</sup> And second, the meet-and-confer statute did not violate the plaintiffs' associational rights, even though its functioning meant that they "may well feel some pressure to join the exclusive representative" in order to participate in its advocacy.<sup>55</sup>

*Knight II* was not unanimous—Justices Brennan, Stevens, and Powell dissented, with Justices Brennan and Stevens writing separate opinions. Justice Brennan saw the case through the lens of academic freedom, and he objected to the faculty's choice either to join the Faculty

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<sup>49</sup> *Id.* at 281.

<sup>50</sup> *Id.* at 282.

<sup>51</sup> *Id.* at 284–85.

<sup>52</sup> *Id.* at 285.

<sup>53</sup> See generally Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV. 1 (2019) (discussing cases in which the Court has reasoned that its outcome is necessary to the government's ability to function).

<sup>54</sup> *Knight II*, 465 U.S. at 289.

<sup>55</sup> *Id.* at 289–90.

Association, or be excluded from meet-and-confer sessions.<sup>56</sup> It is unclear whether he would have dissented from a similar majority opinion involving non-academic workers, or even public school teachers who worked in a K-12 setting. Justice Brennan also emphasized that his objection did not extend to collective bargaining settings, because of “the state’s compelling interest in reaching an enforceable agreement, an interest that is best served when the state is free to reserve closed bargaining sessions to the designated representative of a union selected by public employees.”<sup>57</sup>

Justice Stevens’s dissent, which Justices Brennan and Powell each joined in part, reasoned that “the First Amendment does not permit any state legislature to grant a single favored speaker an effective monopoly on the opportunity to petition the government.”<sup>58</sup> Thus, Justice Stevens would have required the state to satisfy strict scrutiny before excluding the plaintiffs from the meet-and-confer process. However, he also noted that collective bargaining was different, citing *Abood*.<sup>59</sup>

*Knight II* settled things for almost 30 years. As the next section discusses, in 2012, the Supreme Court’s conservative-leaning justices suggested they were open to new arguments regarding public sector labor relations. That suggestion arose in a case that, like *Janus*, was focused on union dues and fees. But union opponents soon began to push against other aspects of public-sector labor relations, including the exclusive representation system. Outside of the agency fee context, these arguments have gotten nearly no traction, although they have been percolating in dozens of cases.

## B. New Challenges to Exclusive Representation

In 2012, the Supreme Court held in *Knox v. Service Employees International Union, Local 1000*<sup>60</sup> that union-represented public workers who were not union members had to affirmatively consent before they could be charged a mid-year fees increase.<sup>61</sup> I have criticized *Knox* in detail elsewhere,<sup>62</sup> but its main significance for this Article was as a triggering mechanism. By signaling that the Court was open to expanding the rights of union-represented nonmembers,<sup>63</sup> *Knox* prompted a new round of exclusive representation challenges.

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<sup>56</sup> *Id.* at 295–96 (discussing “the free exchange of ideas at institutions of higher learning”).

<sup>57</sup> *Id.* at 299.

<sup>58</sup> *Id.* at 301.

<sup>59</sup> *Id.* at 315–16.

<sup>60</sup> 567 U.S. 298 (2012).

<sup>61</sup> *Id.* at 321.

<sup>62</sup> See, e.g., Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855 (2014).

<sup>63</sup> *Knox*, 567 U.S. at 311 (referring to *Abood* as an “anomaly”). But perhaps more importantly,

One of those challenges became the Supreme Court's next major decision concerning public sector unions, *Harris v. Quinn*.<sup>64</sup> The *Harris* Court held that union-represented "partial-" or "quasi-" public employees could not be required to pay agency fees to their elected union representative.<sup>65</sup> In the District Court and the United States Court of Appeals for the Seventh Circuit, the case focused on this issue, in addition to procedural and justiciability issues that are not relevant to this Article.<sup>66</sup> However, the Seventh Circuit issued its decision in 2011, and the Supreme Court did not grant certiorari in the case until 2013—shortly after the Court's decision in *Knox*.

In the Supreme Court, the *Harris* plaintiffs sought to raise the constitutionality of exclusive representation alongside their agency fee arguments. For example, they wrote in their opening brief that "requir[ing] providers to accept [an elected union] as their 'exclusive representative' . . . infringes on their associational rights, as it inextricably affiliates them with the Union's petitioning, speech, and policy positions."<sup>67</sup> This argument proceeded in two steps. First, the plaintiffs argued that their First Amendment rights were implicated because a mandatory agency relationship links union-represented workers to the union's speech. Then—echoing both the *Knight* plaintiffs and Justice Stevens's dissent in that case—the *Harris* plaintiffs argued that the State was required to satisfy strict scrutiny in order to justify infringing associational rights, but that "[t]he State has no interest in suppressing providers' ability to petition it through diverse associations."<sup>68</sup> Here, the *Harris* plaintiffs analogized collective bargaining to lobbying, arguing that "the expressive activity is *identical*."<sup>69</sup>

The argument seemed to get off to a rocky start for the *Harris* plaintiffs, with Justice Scalia asking a series of skeptical-sounding questions about whether public sector employees really had a First Amendment right to demand that their employers listen to them:

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*Knox* gave the petitioners more relief than they requested, signaling that union objectors should make more ambitious requests of the Court. For a more detailed accounting of the litigation in *Knox*, see Garden, *supra* note 62 at 876–77.

<sup>64</sup> 573 U.S. 616 (2014).

<sup>65</sup> *Id.* at 656. "Partial" or "quasi" public employees are those who are jointly employed by a government and a private individual or organization; for example, the plaintiffs in *Harris* were home healthcare providers who were paid by the state but directed in their day-to-day work by individual customers.

<sup>66</sup> See *Harris v. Quinn*, No. 10-cv-02477, 2010 WL 4736500, at \*1 (N.D. Ill. Nov. 12, 2010), *aff'd in part, remanded in part*, 656 F.3d 692 (7th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 573 U.S. 616 (2014), and *rev'd in part sub nom*, *Harris v. Rauner*, 601 F. App'x 452 (7th Cir. 2015) (listing issues presented in the case); *Harris v. Quinn*, 656 F.3d 692, 693–94 (7th Cir. 2011) (same).

<sup>67</sup> Brief for Petitioners at 37, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681).

<sup>68</sup> *Id.* at 39.

<sup>69</sup> *Id.* at 41 (emphasis in original).

Suppose you have a policeman who . . . is dissatisfied with his wages. So he makes an appointment with the . . . police commissioner, and he goes in and grouses about his wages. He does this . . . 10 or 11 times. And the commissioner finally is fed up, and he tells his secretary, I don't . . . want to see this man again. Has he violated the Constitution?<sup>70</sup>

Counsel for Harris replied, “No, because . . . with an individual speaking, it's . . . a matter of private or internal proprietary matter that, under this Court's precedents, [doesn't] rise to a matter of public concern.”<sup>71</sup> Later, Justice Sotomayor asked whether there was “anything wrong with the State saying, ‘we're not going to negotiate with any employee who's not a member of the union?’”<sup>72</sup> Harris's counsel answered “no,” and he later elaborated that “[u]nder *Knight*, the State can choose who it bargains with.”<sup>73</sup>

Perhaps because of that exchange, the *Harris* Court did not ultimately discuss the briefed exclusive representation argument at all, instead stating that “Petitioners do not contend that they have a First Amendment right to form a rival union. Nor do they challenge the authority of the [elected union] to serve as the exclusive representative of all of the personal assistants.”<sup>74</sup>

The Court's next (and most recent) case about public sector unions is *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.<sup>75</sup> *Janus* overruled *Abood*, holding that public sector employers and unions could not require represented workers to pay an agency fee as a condition of employment. As in *Knox* and *Harris*, Justice Alito wrote for the majority. Of significance for this Article, the majority opinion assumed the existence of exclusive representation, asserting repeatedly that unions would continue to serve as exclusive representatives for groups of employees even without agency fees.<sup>76</sup> Further, the majority wrote that—aside from having to discontinue mandatory agency fees—“[s]tates can keep their labor-relations systems exactly as they are.”<sup>77</sup> Given that the *Janus* opinion spent considerable time discussing exclusive representation, this statement suggests that the majority did not see that aspect of labor relations systems as legally problematic.

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<sup>70</sup> Transcript of Oral Argument at 6, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.*

<sup>74</sup> *Harris*, 573 U.S. at 649.

<sup>75</sup> 138 S. Ct. 2448 (2018).

<sup>76</sup> *See, e.g., id.* at 2480, 2483.

<sup>77</sup> *Id.* at 2486 n.27.

On the other hand, the majority also sent two contradictory signals. First, the opinion stated that exclusive representation “substantially restricts the rights of individual employees,” because “this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer.”<sup>78</sup> Later, it characterized exclusive representation as “a significant impingement on associational freedoms that would not be tolerated in other contexts”<sup>79</sup>—a statement that is reminiscent of the *Knox* majority’s characterization of *Abood* as “something of an anomaly—one that we have found to be justified by the interest in furthering ‘labor peace.’ But . . . an anomaly nonetheless.”<sup>80</sup> However, the *Janus* majority did not elaborate on either of these statements, and it did not cite *Knight II* or other cases on associational freedoms—in fact, *Knight II* is not cited a single time in *Janus*.

*Knox*, *Harris*, and *Janus* offer at least a tentative signal to union objectors and opponents that the Court’s conservative majority is open to arguments that various aspects of public sector labor relations violate the First Amendment. Unsurprisingly, this has led to a large number of new cases arguing that exclusive representation is unconstitutional. The next subsection discusses the main arguments in those cases. To be clear, these arguments have rightly received a chilly reception in the federal courts so far—but the same was true of cases arguing that *Abood* should not be applied to home healthcare workers, or should be overturned, until conservative Supreme Court majorities in *Harris* and *Janus* adopted those positions. Thus, the remainder of this Article offers an analysis of, and conceptual rejoinder to, those arguments.

### III. ASSESSING THE NEW ARGUMENTS ABOUT EXCLUSIVE REPRESENTATION

There are dozens of post-*Knox* cases that challenge aspects of exclusive representation in the public sector.<sup>81</sup> Rather than attempting to catalogue each of them, this section discusses a handful of representative cases, focusing on two lines of argument in particular.<sup>82</sup> The first

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<sup>78</sup> *Id.* at 2460.

<sup>79</sup> *Id.* at 2478.

<sup>80</sup> *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 311 (2012).

<sup>81</sup> This Article focuses on First Amendment challenges, but some cases also raise other arguments, such as an argument that exclusive representation violates federal antitrust law. *See, e.g.*, *Crockett v. NEA-Alaska*, 376 F. Supp. 3d 996, 1009–10 (D. Alaska 2019) (describing and rejecting an antitrust argument).

<sup>82</sup> These cases also vary in terms of the workers involved. Some follow the *Harris* Court’s distinction between regular public employees and “partial” or “quasi” public employees who are paid by the state but directed in their day-to-day duties by private organizations or individual clients. *See, e.g.*, *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043

line insists that the First Amendment is violated when a public employer designates a union as representative for an employee, because doing so puts the union's words in the employee's mouth. These arguments focus mainly on the relationship between the union and the employer, but fail to make a legal and factual case that the link between a union and a represented worker counts as compelled association, or its appearance. Second, other cases argue that union membership incentives or other practical constraints on workers' choices about union membership violate the First Amendment. These cases argue that exclusive representation requires unions to grant represented nonmembers all the same rights and benefits that usually come with union membership, including rights to participate in union governance. This argument faces the opposite difficulty from the first set—it links the union and its members, but excludes the government, meaning that the state action necessary to trigger constitutional protection is not present.

#### A. Exclusive Representation as Compelled Speech or Association?

*Uradnik v. Inter Faculty Organization*<sup>83</sup> is representative of the first set of arguments. In a petition for a writ of certiorari that the Supreme Court denied in April 2019, the petitioner echoed the *Harris* plaintiffs in arguing that the problem with exclusive representation is that it requires “compelled representation” of public sector workers,<sup>84</sup> and that it results in workers being “forced to accept [a union’s] speech, made on their behalf by a state-appointed representative, as their own.”<sup>85</sup>

The petitioner in *Uradnik* was a professor employed by a public university in Minnesota. *Uradnik* challenged the Minnesota Public Employment Labor Relations Act<sup>86</sup>—the same statute that was at issue in *Knight*<sup>87</sup>—although she focused on the collective bargaining provision that had been summarily approved by the Supreme Court in *Knight I* rather than the meet-and-confer provision that was discussed in greater detail in *Knight II*.

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(2019) (exclusive representation challenge involving home healthcare providers). In the next Section, I note a few instances in which plaintiffs develop arguments that the First Amendment analysis should turn on their partial public employee status.

<sup>83</sup> No.18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *summarily aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

<sup>84</sup> Petition for a Writ of Certiorari at 1, *Uradnik v. Inter Faculty Org.*, 139 S. Ct. 1618 (2019) (No. 18-719) [https://www.supremecourt.gov/DocketPDF/18/18-719/74002/20181204095722857\\_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf](https://www.supremecourt.gov/DocketPDF/18/18-719/74002/20181204095722857_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf) [<https://perma.cc/2GE5-8G8N>].

<sup>85</sup> *Id.* at 2–3.

<sup>86</sup> MINN. STAT. § 179A.06–08 (2019).

<sup>87</sup> *Id.* at 10.

Uradnik’s petition began by attempting to distinguish *Knight*, arguing that although *Knight* upheld a state’s ability to exclude persons from a meet-and-confer session, it had not approved “compelled representation,” because the plaintiffs had focused only on the former and not the latter. The main problem with this system, according to Uradnik, was that Minnesota law treated an elected union as the “representative” of all employees in a bargaining unit, whether or not each employee actually agreed with the union’s positions.<sup>88</sup> Or, as Uradnik put it, “when the Union speaks, it is speaking for the Petitioner, putting words in her mouth.”<sup>89</sup> This representation, Uradnik reasoned, violated the Court’s precedents about compelled speech and compelled association because exclusive representation could not be justified by any sufficiently compelling interest, nor was it narrowly tailored to any such potential interest.<sup>90</sup>

Each iteration of this argument is premised on the idea that exclusive representation either actually compels or restricts public employees’ speech or association, or that it creates the false appearance of speech or association by, for example, causing third parties to believe the employee is a union supporter. But that premise is flawed as both a matter of case law and of logic. A union’s relationship to represented workers is more like a voter’s relationship to an elected government than it is to a lawyer’s relationship to a client. No reasonable observer would attribute a government’s views to each voter—of course, the voter might have preferred different representatives. In the same way, no reasonable observer would assume that every union-represented worker supports the union’s positions.

Many courts have correctly relied on *Knight II* to conclude that exclusive representation does not involve actual compelled speech or association.<sup>91</sup> The key is that unions may not require represented workers to join them, nor may they bar represented workers from joining other organizations. Likewise, unions cannot compel represented workers to tow the metaphorical line during negotiations, or to walk the literal picket line during a strike. As the *Knight II* Court put it, exclusive representation “in no way restrained appellees’ . . . freedom to associate or not to associate with whom they please, including the exclusive

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<sup>88</sup> *Id.* at 14 (citing MINN. STAT. § 179A).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 16–17.

<sup>91</sup> *See, e.g.,* Mentele v. Inslee, 916 F.3d 783, 788–89 (9th Cir. 2019); Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019); Hill v. Serv. Emps. Int’l Union, 850 F.3d 861, 866 (7th Cir. 2017); Jarvis v. Cuomo, 660 F. App’x 72, 74 (2d Cir. 2016); D’Agostino v. Baker, 812 F.3d 240, 244 (1st Cir. 2016); Thompson v. Marietta Educ. Ass’n, 371 F. Supp. 3d 431 (S.D. Ohio 2019).



representative.”<sup>92</sup> That much is underscored by the Court’s holding in *Madison v. WERC* that a union-represented employee had the same freedom as any other citizen (or as any other public employee) to express her views in any available forum, including views that her employer should reject union bargaining proposals.<sup>93</sup>

Even beyond the fact that union representation does not limit represented workers’ rights to join other organizations or express themselves in opposition to the union, there are also multiple senses in which union representation enhances—rather than detracts from—opportunities for workers to make themselves heard, even if they are union opponents. First, there is the fact that unions are elected (and can later be rejected) through a democratic process, and if a union is elected then collective bargaining replaces other methods by which employers impose wages and working conditions, which are often unilateral and autocratic.<sup>94</sup> Second, as a practical matter, union representation tends to lead to working conditions that are conducive to employee speech. For example, union-represented workers tend to earn a wage premium, and union contracts often contain provisions related to job security, seniority, scheduling, and other matters that make work more predictable and less precarious.<sup>95</sup> Perhaps most important, collective bargaining agreements usually limit the grounds on which an employee can be fired, and include a disciplinary process. These conditions usually aren’t a formal “right to speak out,” but they are speech-enhancing. For example, predictable schedules make it easier for workers to plan to attend government town-halls and other fora, campaign for a preferred candidate, and otherwise participate in civic life.<sup>96</sup> And protections against arbitrary termination can help workers feel confident that they won’t be retaliated against at work if they take an unpopular position, either in the public square, or in water-cooler conversation with co-workers.

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<sup>92</sup> *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984).

<sup>93</sup> 429 U.S. at 174–75.

<sup>94</sup> See ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 57 (2017) (discussing scope of employer power over wages and working conditions).

<sup>95</sup> See Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1067 (2018) (discussing the union wage premium in the context of represented workers’ First Amendment rights); see also Estlund, *supra* note 6, at 218 (observing that if a union represented employee “is *more* free to express his views—or at least has more money with which to do so out of the larger paycheck that comes with union representation”) (emphasis in original).

<sup>96</sup> For a more extended discussion of how unions can promote represented workers’ engagement in civil society, see Charlotte Garden, *Labor Values are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 FORDHAM L. REV. 2617, 2652–58 (2011).

1. Does collective bargaining displace a right to individual bargaining?

Opponents of exclusive representation sometimes frame their challenge in a way that suggests that union representation means objectors are losing the right to negotiate on their own behalf. For example, the employee plaintiffs in *Branch v. Commonwealth Employment Relations Board*,<sup>97</sup> discussed further in the next subsection, wrote that “the government . . . extinguishes the Educators’ right to represent themselves with their employers.”<sup>98</sup> Similarly, the challengers in another recent case, *Bierman v. Dayton*, “allege[d] that [exclusive representation] violates their First Amendment right to choose who speaks for them in their relations with the State.”<sup>99</sup>

If public employees truly had a legal right to negotiate with their employer, then it would follow that electing an exclusive representative extinguished an opportunity for speech that public employees would otherwise have had. But recent Supreme Court cases have rejected that premise.<sup>100</sup> For example, in *Borough of Duryea v. Guarnieri*,<sup>101</sup> the Court held that the First Amendment right to petition—like the First Amendment right to free speech—does not protect a public employee’s complaints and requests of their employer unless those complaints or requests are about a matter of public concern.<sup>102</sup> And in *Connick v. Myers*,<sup>103</sup> the Court made clear that most workplace problems—including those related to “confidence and trust . . . in various supervisors, the level of office morale, and the need for a grievance committee”<sup>104</sup>—do not rise to the level of matters of public concern.

Further, there are no signs that the Court is likely to shift on this point. To the contrary, Justice Alito—the author of the majority opinions in *Knox*, *Harris*, and *Janus*—emphasized during oral argument that public employees have no First Amendment right to seek better treatment from their supervisors: “I suppose that [a public sector

<sup>97</sup> *Branch v. Dep’t of Labor Relations, Commonwealth Emp’t Relations Bd.*, 120 N.E.3d 1163 (Mass. 2019), *cert. denied* 140 S. Ct. 858 (2020).

<sup>98</sup> Petition for Writ of Certiorari at 6, *Branch v. Dep’t of Labor Relations, Commonwealth Emp’t Relations Bd.*, 140 S. Ct. 858 (2020) (No. 19-51).

<sup>99</sup> Appellants’ Brief at \*I, *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018) (No. 17-1244).

<sup>100</sup> To be clear, I am not suggesting that it would be constitutionally *impermissible* for a public employer to negotiate with an individual employee, or that public employers never voluntarily negotiate with individual employees or job applicants. My point is simply that the alternative to a system of exclusive representation is not necessarily one in which individual employees negotiate with their employers.

<sup>101</sup> 564 U.S. 379 (2011).

<sup>102</sup> *Id.* at 382–83.

<sup>103</sup> 461 U.S. 138 (1983).

<sup>104</sup> *Id.* at 148.

employer] has a perfect right to say: Enough is enough; I don't want to meet with you for the fifth time *or for the first time*.”<sup>105</sup> Then, in *Janus*, the Court majority took care to avoid calling into question *Guarnieri*, *Connick*, and other cases concerning the limited First Amendment rights of individual public employees. Instead, the Court wrote that while it is a matter of only private concern when a single employee requests a raise, “a public-sector union’s demand for a 5% raise for many thousands of employees it represents” would qualify as a public concern because of the potential budgetary effects, were the employer to agree to such a demand.<sup>106</sup> As a result, public employers would not violate the First Amendment if they decided to ignore or even punish employees attempting to use workplace channels to negotiate on their own behalfs.<sup>107</sup>

2. Does exclusive representation create an appearance of union support?

Even if exclusive representation does not restrict speech or association, it might still implicate the First Amendment if it creates the false appearance that represented workers were union supporters.<sup>108</sup> For example, the plaintiffs in *Harris* argued that the fact that an exclusive representative union owed them the duty of fair representation was enough to “affiliate[] them with the Union’s petitioning, speech, and policy positions.”<sup>109</sup> In their reply brief, the plaintiffs similarly argued that Illinois had “dictate[d] . . . who shall speak for every provider by designating an exclusive representative to petition for them . . . thrust[ing] providers into a fiduciary relationship with” the union.<sup>110</sup> The lynchpin of that argument seems to be the “fiduciary relationship” between a

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<sup>105</sup> *Supra* note 70, at 10 (emphasis added).

<sup>106</sup> *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2472–73. (2018). The correctness of the Court’s approach is beyond the scope of this Article, but I have critiqued it elsewhere. See Charlotte Garden, *Speech Inequality after Janus v. AFSCME*, 95 IND. L.J. 269, 288–89 (2020).

<sup>107</sup> Many states that allow public sector collective bargaining also protect by statute the ability of union-represented workers to raise grievances directly with their employers. For example, Massachusetts law states that an “employee may present a grievance to his employer and have such grievance heard without intervention by the exclusive representative,” though the public employer cannot resolve the grievance in a way that is inconsistent with an applicable collective bargaining agreement. MASS. G.L. c. 150E § 5.

<sup>108</sup> See Seana V. Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW U. L. REV. 839, 851–52 (discussing First Amendment “rulings [that] protect individuals from having to attest to beliefs that they reject and thus from having others wrongly associate them with those beliefs”).

<sup>109</sup> Brief for Petitioners at 37, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681), [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/11-681\\_pet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/11-681_pet.authcheckdam.pdf) [<https://perma.cc/38UX-2QC4>].

<sup>110</sup> Reply Brief for Petitioners at 11, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681), <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/05/11-681-Harris-v.-Quinn-Reply-2.pdf> [<https://perma.cc/P5RC-UTP9>].

union and represented workers, which the *Harris* plaintiffs argued was enough to “inextricably affiliate[] them with the union’s petitioning and policy positions.”<sup>111</sup> The petitioner in *Uradnik* made a similar argument, focused on statutory language referring to an elected union as the “representative” of employees in the bargaining unit, and reasoning that a “representative” speaks for the person they represent.<sup>112</sup>

In other words, the argument is: if a union can truthfully say it is a worker’s “representative,” then others would assume that the union’s positions are also the positions of the represented worker. But that argument relies on a specific version of “representation,” similar to that undertaken by lawyers or hired spokespeople. But elected representatives also “represent” their constituents—though they do not speak for them. Only the first type of “representative” can reasonably be regarded as speaking for those they represent—for example, judges and opposing counsel will attribute an attorney’s statements to their client, and a client whose attorney makes an admission or concedes a point during oral argument cannot usually take a different position later. Instead, their remedy is usually to assert in a later court proceeding or a bar complaint that the attorney breached their duty as the client’s representative.

If union representation worked like attorney representation, then it would make sense to argue that the union’s speech put words in the mouths of represented workers. But union representation is crucially different. First, recall that neither private- nor public-sector unions may compel represented workers to join the union as a condition of keeping their job, and in the public sector (as well as in states with “right-to-work” laws), unions also cannot compel represented nonmembers to pay anything towards the costs of the costs of union representation. And, while unions have a duty of fair representation to all represented workers, their performance of their duty is evaluated according to a flexible standard that recognizes that some represented workers may flatly disagree with some or all union decisions.<sup>113</sup> This disagreement can be both forceful and public—for example, the union’s brief opposing certiorari in *Uradnik* cited evidence reflecting *Uradnik*’s frequent and public opposition to the union’s positions.<sup>114</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> Petition for a Writ of Certiorari at 1, *Uradnik v. Inter Faculty Org.*, 139 S. Ct. 1618 (2019) (No. 18-719).

<sup>113</sup> See, e.g., *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65 (1991) (holding that union duty of fair representation under the Railway Labor Act required that union not act in arbitrary, discriminatory, or bad faith manner, but that union did not breach duty by negotiating strike settlement that may have placed represented workers in a worse position than if the union had unilaterally ended the strike without a settlement).

<sup>114</sup> Brief in Opposition of Respondent *Inter Faculty Org.*, at 4, *Uradnik v. Inter Faculty Org.*,

Further, unions negotiate collective bargaining agreements in their own names; workers are third-party beneficiaries rather than parties.<sup>115</sup> This means that although workers benefit from union-negotiated collective bargaining agreements, they cannot be bound by the union to honor its provisions. For example, a union that calls a strike in violation of a no-strike clause can be enjoined<sup>116</sup>—but an employer cannot successfully sue striking employees for breach of contract, even if they are covered by a collective bargaining agreement that contains a no-strike clause.<sup>117</sup> In contrast, a lawyer who negotiates a contract is typically doing so on behalf of a client, who will then become a party with obligations that can be enforced by the other party.

These differences make attorney representation a poor analogy for union representation. Instead, as the First Circuit observed in the course of rejecting a challenge to exclusive representation, “once [a union] becomes the exclusive bargaining agent for a bargaining unit, [it] must represent the *unit* as an entity . . . solely for the purposes of collective bargaining.”<sup>118</sup> This makes representation by an elected official a closer analogy. Voters are entitled to vote for or against a candidate, but they will be stuck with the results of the election unless they move out of the jurisdiction. The winning candidate will then have significant (but not unlimited) latitude to implement their policy preferences; there is no legally enforceable duty of fair representation, but elected officials generally may not discriminate or retaliate against their opponents’ supporters.<sup>119</sup>

Given these rules, it would be irrational to think that everyone who lives in a jurisdiction supports their elected officials—inevitably, some

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139 S. Ct. 1618 (2019) (No. 18-719), [https://www.supremecourt.gov/DocketPDF/18/18-719/93384/20190327130415676\\_18-719\\_bio\\_Inter\\_Faculty\\_Organization.3.27.19.pdf](https://www.supremecourt.gov/DocketPDF/18/18-719/93384/20190327130415676_18-719_bio_Inter_Faculty_Organization.3.27.19.pdf) [<https://perma.cc/4A9K-ACJ8>] (“Petitioner’s disagreements with the IFO and its views are well known on campus.”).

<sup>115</sup> See Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 538–39 (1969) (“Professor Corbin treats collective agreements as contracts made for the benefit of third persons, and quite properly so. The union and the employer clearly intend to provide benefits for the individual employees, and the individual employees acquire legally enforceable rights under the agreement.”).

<sup>116</sup> *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 254–55 (1970).

<sup>117</sup> See *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 408–09 (1981) (holding that the employer was not entitled to recover damages from employees who engaged in strike that was in violation of a contractual no-strike clause); *United Food and Commercial Workers Union Local 951 v. Mulder*, 31 F.3d 365, 370 (6th Cir. 1994) (discussing ability of employees to sue—but not be sued—as third party beneficiaries to a collective bargaining agreement).

<sup>118</sup> *Reisman v. Associated Faculties of the Univ. of Me.*, 939 F.3d 409 (1st Cir. 2019) (emphasis in original).

<sup>119</sup> See, e.g., *O’Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 714–15 (1996) (“Although the government has broad discretion in formulating its contracting policies, we hold that the protections of *Elrod* and *Branti* extend to an instance . . . where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.”).

voters would have preferred different candidates. In the same way, it would be irrational to assume that an elected union that owes a duty of fair representation to each worker in a bargaining unit is in fact taking positions that each worker prefers. Rather, the union is each worker's representative in the political sense—it is the representative chosen in a likely contested election, and it is bound to advocate for its view of what workplace conditions will advance workers' interests within the confines of the duty of fair representation.

3. Do union elections trigger First Amendment scrutiny where autocratic alternatives do not?

Finally, there is also a more intuitive reason to reject the argument that exclusive representation either restricts speech or association or creates the appearance of such a restriction. Consider a non-union public employer facing new budget constraints that compel cuts. The employer might choose to hire a management consultant to give advice about issues such as whether it would be better to make layoffs or cut benefits. The consultant—either at the employer's request or on its own initiative—might then ask workers about their views and preferences, and take those views into account when making its recommendations. In turn, the employer could give negligible or decisive weight to the employees' views as reported by the consultant.

In much the same way, another public employer that faces a significant amount of workplace turnover might ask a human-resources professional to conduct a series of focus-group-style interviews with current workers. Based on what the employees say in these meetings, the human resources professional might make recommendations about what to do, for example that the employer should improve pay, add a tuition benefit, or change the promotion process.

Do these scenarios give rise to a First Amendment problem? If the *Uradnik* and *Harris* plaintiffs are right about exclusive representation, then the answer should be yes: both hypothetical employers have asked others to aggregate and then make representations about employees' preferences. These employers have also declined to allow employees either to opt out of this process, or to form their own competing advisory groups. However, that argument seems obviously wrong under the case law discussed in Part I, and as a matter of logic.

There are two differences on which objector employees would likely rely to distinguish her arguments from the one in the previous paragraph. First, during collective bargaining, the employer is committed to bargain over union proposals, rather than to take the consultant's or the employees' recommendations into account to whatever degree it

chooses.<sup>120</sup> But that difference places us squarely back in *Knight II* territory, by focusing on the employer's own choice about how to engage with an employee representative. Second, there is the fact that a union is elected by employees themselves, and then it owes those employees a duty of fair representation. That is the difference on which the *Harris* and *Uradnik* plaintiffs focused—implying that, from their perspective, a First Amendment problem arises only when a public employer does not behave *autocratically enough*, instead allowing workers to elect a bargaining representative. We might then recharacterize the First Amendment arguments in these cases as seeking a right for public employees to have their wages and working conditions set unilaterally by their employers.

These arguments should fail, but if they were to succeed, some plaintiffs might hope that public employers respond by allowing multiple bargaining representatives to sit at the table. First, this approach would likely serve to empower employers rather than employees.<sup>121</sup> And employers could also respond in at least two other ways. First, they could decide that bargaining with one or more unions on a members-only basis is too complicated, and respond by eliminating collective bargaining altogether. Second, they could bargain with an elected union on a members-only basis. But this scenario would not mean that public employers would permit other employee representatives or individual employees to bargain for different working conditions. Far more likely, employers would find it expedient to unilaterally extend collectively-bargained-for working conditions to cover non-members.<sup>122</sup> This

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<sup>120</sup> See *Electromation, Inc.*, 309 NLRB 990 \*10–11 (1992) (distinguishing “bilateral” negotiation from other ways that management might solicit input from employees in context of deciding whether employer had created unlawful “dominated” union).

<sup>121</sup> This likelihood is illustrated by Tennessee's recent experience with “collaborative conferencing,” a system adopted in 2011 to set working conditions for public school teachers. TENN. CODE ANN. § 49-5-605 (2011). Under this system, teachers first vote on whether to engage in conferencing with their school districts, and then on their desired representative. TENN. CODE ANN. § 49-5-605(b). Any representative chosen by at least fifteen percent of teachers may participate in conferencing, with the right to participate apportioned among multiple organizations according to their vote share. *Id.* During conferencing, school boards discuss statutorily specified topics with representatives of multiple organizations; if the parties do not reach agreement, school boards determine working conditions unilaterally.

This system means that school boards can end up conferencing with a panel of teacher representatives whose members radically disagree about both teachers' working conditions, and the desirability of collective bargaining and teachers' unions. Thus, even though Tennessee's collaborative conferencing process is triggered when a majority of teachers vote to engage in it (and therefore to have compensation set through a process that involves discussion with a collective representative), subsequent conferencing sometimes entails a three-way split between school districts, teachers' unions, and organizations that want to weaken teachers' unions. See Chris Brooks, *The Cure Worse Than the Disease: Expelling Freeloaders in an Open-Shop State*, NEW LABOR FORUM (Aug. 2017), <https://newlaborforum.cuny.edu/2017/08/24/the-cure-worse-than-the-disease/> [https://perma.cc/7UB6-NKK4].

<sup>122</sup> This is already how some public employers choose to handle employees who are excluded

outcome would leave objectors with less security in their working conditions by depriving them of a contractual guarantee, while also giving them fewer opportunities to exercise voice at work. In other words, both the formal structure of this argument against exclusive representation, and its likely effect if it is accepted by courts, tends to undermine their proponents' abilities to have input over workplace conditions.

This section has argued that exclusive representation neither compels public employees' speech or association, nor creates the appearance of compulsion. The next section turns to an argument that does not argue directly that exclusive representation is unconstitutional, but instead challenges union membership incentives or restrictions, on the theory that they influence public employees' choices about whether or not to become union members.

#### B. State Action in Worker-Union Relations?

This set of arguments focuses on the relationship between unions and represented workers. It is exemplified by the petition for certiorari filed in *Branch v. Commonwealth Employment Relations Board*.<sup>123</sup> The *Branch* employees focused on the advantages of union membership over represented nonmember status, arguing that unions used the services and benefits offered as a condition of membership to coerce membership.<sup>124</sup> The *Branch* plaintiffs focused on the fact that represented nonmembers could not participate in union democracy, such as voting for union leadership, voting on certain decisions that the union put to its membership, and participating in internal union deliberations over topics like negotiation strategies.<sup>125</sup> Employees in another case, *Bain v. California Teachers Ass'n*, made a similar argument, but focused in part on union membership incentives such as insurance benefits for which only union members were eligible.<sup>126</sup>

These arguments depend on the success of two linked claims: first, that a public sector union's relationship with represented workers involves state action, even when the union is not interacting with the government employer but instead setting the terms on which workers may join; and second, that unions in this posture violate the First Amendment when they constrain represented workers' choices by excluding

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from a bargaining unit for other reasons, such as that they are designated "management and confidential" employees.

<sup>123</sup> Petition for Writ of Certiorari at 6, *Branch v. Dep't of Labor Relations, Commonwealth Emp't Relations Bd.*, 140 S. Ct. 858 (2020) (No. 19-51), [https://www.supremecourt.gov/DocketPDF/19/19-51/107367/20190708132424467\\_Branch%2019-\\_\\_PetitionForAWritOfCertiorari.pdf](https://www.supremecourt.gov/DocketPDF/19/19-51/107367/20190708132424467_Branch%2019-__PetitionForAWritOfCertiorari.pdf) [perma.cc/672X-2Y49].

<sup>124</sup> *Id.* at 2.

<sup>125</sup> *Id.* at 3, 5.

<sup>126</sup> 891 F.3d 1206 (9th Cir. 2018).



them from union participation rights or other benefits if they do not join the union.

The *Branch* plaintiffs made two arguments on this point. First, that “[i]f an organization can engage in a specific activity only by government empowerment, then that activity . . . must be one committed by the government.”<sup>127</sup> And second, that the state government “grants monopoly representation power to the union,” while making “‘direct dealing’ between government employers and individual employees unlawful.”<sup>128</sup> The *Branch* plaintiffs also argued that *Knight* should control the state action question. They reasoned that because *Knight* assumed that there was state action when a public employer excluded organizations other than an elected union from its meet-and-confer process, state action would also be present when “employees seek a voice and a vote in the collective bargaining process,” including the pre- or post-bargaining stage in which the union consults with its members about bargaining positions. In addition, they argued that the union is “entwined” with the public employer because state law sets the parameters of the state-union relationship, and that the union is a state actor because it performs functions that have traditionally been performed exclusively by government.

The *Bain* plaintiffs made a somewhat different argument about why a union’s decision to offer a membership incentive involved state action. They posited that “unions intentionally decline to bargain with school districts for certain critical job benefits that are within their state-conferred exclusive authority to bargain, and which (if bargained) would apply to *all* teachers.”<sup>129</sup> In other words, the argument is premised on the allegation that the *Bain* plaintiffs’ union conspired with the state to leave “gettable” benefits on the bargaining table so that the union could instead offer those benefits as a membership incentive.

The state action inquiry is a famously flexible one, and it is beyond the scope of this Article to analyze each line of doctrine that the plaintiffs invoke in various cases. Instead, this Article is limited to two more conceptual points. First, the argument that public sector unions are state actors is in tension with *Harris* and *Janus*. Second, unions’ adversarial role in public systems of collective bargaining makes them less likely to qualify as state actors, not more; in this way, public sector unions are analogous to public defenders, who are treated as state actors only when they directly cause courts to act.

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<sup>127</sup> *Supra* note 123, at 6.

<sup>128</sup> *Id.*

<sup>129</sup> Appellants’ Opening Brief at 3–4, *Bain v. Cal. Teachers Ass’n*, 891 F.3d 1206 (9th Cir. 2018) (No. 16-55768), 2016 WL 6649995 at \*3–4.

In *Harris*, the majority emphasized that the union was a private organization, likening it to trade groups that “advocate on behalf of the interests of persons falling within an occupational group,” and asking why only unions were empowered to charge agency fees.<sup>130</sup> And when the *Janus* Court addressed the argument that unions should be permitted to charge agency fees because they (unlike other voluntary associations) owed a duty of fair representation to non-members, it wrote that “it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers.”<sup>131</sup> By focusing on employers’—not unions’—potential constitutional violations, this formulation differentiates and remains silent about a different question—whether it would be a constitutional violation for a union to suggest that an employer discriminate against nonmembers.

There also is a deeper inconsistency between the decisions in *Harris* and *Janus*, and the argument that a public sector union is a state actor. In *Johanns v. Livestock Marketing Ass’n*,<sup>132</sup> the Court held that a program requiring beef producers to pay a mandatory fee to finance generic beef advertising was constitutional because the advertisements were attributable to the government.<sup>133</sup> This was because, in the Court’s words, citizens “have no First Amendment right not to fund government speech.”<sup>134</sup> The *Johanns* Court specifically distinguished *Abood*—the then-controlling case on public sector agency fees—on the basis that *Abood* concerned “exactions to subsidize speech . . . of an entity other than the government itself.”<sup>135</sup> In other words, *Johanns* stands for the proposition that individuals can be charged an assessment that funds government speech, but not private speech. Applying this rule, either public sector unions are state actors, and there is no constitutional problem with agency fees—which would mean that *Harris* and *Janus* were wrongly decided; or they are private actors, whose dealings with represented workers do not involve state action as a general rule, although particular instances of union conduct could still qualify as state action.

Public defenders are a useful comparison. Public defender offices can be government departments, or they can be private attorneys or agencies that contract with the government to provide services. But in either case, they are not generally considered to be state actors, even though there are limited circumstances under which specific actions by

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<sup>130</sup> *Harris v. Quinn*, 573 U.S. 616 (2014).

<sup>131</sup> *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2468 (2018).

<sup>132</sup> 544 U.S. 550 (2005).

<sup>133</sup> *Id.* at 561–62.

<sup>134</sup> *Id.* at 562.

<sup>135</sup> *Id.* at 559.

public defenders might be treated as state action. That was the holding in *Polk County v. Dodson*, in which the Court held that even public defenders who were employed directly by the county did not necessarily act under color of state law just because they were funded by the state.<sup>136</sup> That is in part because they were “not amenable to administrative direction in the same sense as other employees of the State.”<sup>137</sup> Instead, public defenders were bound by duties to their clients to exercise “professional independence” not subject to state control, and typically in an adversarial posture to other state interests.<sup>138</sup>

On the other hand, public defenders are treated as state actors when they exercise government power. Thus, public defenders’ peremptory challenges are treated as state action because those challenges involve “wielding the power to choose a quintessential government body.”<sup>139</sup> Or, to put it another way, by exercising a peremptory challenge, a public defender triggers action by the government body—in that case, by prompting a judge to excuse a prospective juror. But the fact that public defenders’ peremptory challenges count as state action does not convert the other things public defenders do into state action.

Public sector unions are similar: even though state law generally empowers them to engage in collective bargaining if they are elected as the exclusive representative of a group of workers, the government cannot direct the positions that unions take in bargaining or grievances, or the tactics they use to try to convince government employers to agree to those positions.<sup>140</sup> As in the public defender example, this is one reason that unions are not generally state actors—and in fact, the case for treating public defenders as state actors is much stronger than the case for treating public sector unions as state actors, because unions are never organized as state agencies. In fact, states that allow public sector collective bargaining often also bar government employers from exercising control over how the unions operate.<sup>141</sup>

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<sup>136</sup> *Polk Cty. v. Dodson*, 454 U.S. 312, 321 (1981). In a later case, the Court stated that the constitutional state actor inquiry is the same as the question whether an entity acts under color of state law. See *Georgia v. McCollum*, 505 U.S. 42, 54 n.9 (1992); see also *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (characterizing *Dodson* as having held that public defenders were not state actors); *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 304–05 (2001) (discussing *Dodson* and observing that “[t]he state-action doctrine does not convert opponents into virtual agents”).

<sup>137</sup> *Dodson*, 454 U.S. at 321.

<sup>138</sup> *Id.*

<sup>139</sup> *McCollum*, 505 U.S. at 54.

<sup>140</sup> For a more extensive discussion of relevant differences and similarities between unions and public defenders, see Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 710–15 (2019).

<sup>141</sup> See, e.g., OHIO REV. CODE ANN. § 4117.11(A)(2) (West 2020); 115. ILL COMP. STAT. 5/14(a)(2) (2019).

In contrast, the state-action requirement is satisfied in public-sector agency-fee cases like *Harris* and *Janus* because either state law or a collective bargaining agreement signed by a public employer requires union-represented employees to pay the fees. The ability to require a public-sector employer to take that step is equivalent to exercising a peremptory challenge, compelling a government entity to dismiss a juror. Likewise, in *Knight*, state action was present when the Minnesota government enforced its statute foreclosing anyone other than an elected union from participating in its conferencing process. However, a union's decisions about its own membership requirements or internal decision-making are more like the public defender's decisions about how to represent her clients. The public defender and the union may hope these decisions will ultimately contribute to a favorable government decision on either a set of wages and working conditions or her clients' lack of criminal culpability, but they do not have the power to compel a favorable government decision.

Not only would it be inconsistent with unions' purposes and structures to treat every union decision as occurring under color of state law, but unions' own associational rights militate in favor of allowing unions to set requirements for membership and to exclude those who do not qualify. As Catherine Fisk and Erwin Chemerinsky have detailed, the Supreme Court has protected a robust right of associations to exclude.<sup>142</sup> And while the Court has permitted or required some incursions on that right to protect dissenting members,<sup>143</sup> those incursions have all come in contexts discussed above—those in which the union is directly engaged with determining the public employer's treatment of individual workers. By contrast, unions' internal deliberations and other internal functions both more squarely implicate the core of unions' own associational interests.

#### IV. CONCLUSION

This Article has discussed the new generation of challenges related to union exclusive representation. So far, these challenges have—appropriately—failed to gain a toehold, and therefore they have had few real-world consequences. But if these challenges ultimately succeed, they have the potential to significantly disrupt labor relations in the public sector. Moreover, it is possible that a holding that exclusive representation is unconstitutional in the public sector would translate into

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<sup>142</sup> Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU Local 1000*, 98 CORNELL L. REV. 1023, 1062–63 (2013).

<sup>143</sup> See generally *id.* (discussing tensions between the Court's agency fee case law and its cases on associational freedoms).

the private sector, where it could be used by anti-union employers to undermine union contracts.

At the same time, these cases generally suffer from one or more major conceptual flaws. Some attempt to limit *Knight's* reach—but end up arguing for a worker-disempowering right not to have a say in setting working conditions. Others recast unions as entities that always act under color of state law—an argument that must seem incomprehensible to the public employers sitting across the bargaining table. For these reasons, courts should continue to reject the new challenges to exclusive representation.