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## Compelled Unionism in the Private Sector After Janus: Why Unions Should Not Profit from Dissenting Employees

### Cover Page Footnote

Giovanna Bonafede is an alumna of The Catholic University of America Columbus School of Law, Class of 2021 and an alumna of Villanova University, Class of 2018. For all his guidance during this process, she thanks Frank D. Garrison, Esq. Frank's edits, advice, and passion for labor law were crucial to this Note; no amount of thanks is enough.

# COMPELLED UNIONISM IN THE PRIVATE SECTOR AFTER *JANUS*: WHY UNIONS SHOULD NOT PROFIT FROM DISSENTING EMPLOYEES

*Giovanna Bonafede*<sup>+</sup>

Labor unions in the United States have enjoyed a bright spot in history for their positive role in the progression of civil rights, workplace safety, gender equality, and immigrant rights.<sup>1</sup> Unions' abuse of their power as employees' sole representative, however, has tarnished this bright spot. As unions grew from small organizations into multi-level, profit-seeking organizations, employees who dissented from a union's agenda began to have their voices oppressed by the power of compulsory unionism.<sup>2</sup> Compulsory unionism has forced employees to choose between their political autonomy—choosing whether to financially support the union or risk discharge from employment—and a voice and vote in their working conditions.<sup>3</sup>

A union's power in the private workplace derives largely from the National Labor Relations Act (NLRA), a federal statute aimed at “restoring equality of

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<sup>+</sup> Giovanna Bonafede is an alumna of The Catholic University of America Columbus School of Law, Class of 2021 and an alumna of Villanova University, Class of 2018. For all his guidance during this process, she thanks Frank D. Garrison, Esq. Frank's edits, advice, and passion for labor law were crucial to this Note; no amount of thanks is enough.

1. *Our Labor History Timeline*, AFL-CIO, <https://aflcio.org/about-us/history> (last visited Mar. 5, 2021, 10:30 AM). The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a “democratic, voluntary federation of 56 national and international labor unions that represent[s] 12.5 million working men and women.” *About Us*, AFL-CIO, <https://aflcio.org/about-us> (last visited Mar. 22, 2021). The AFL-CIO uses its financial power, derived from the union dues of the workers it supports, to advance and influence legislation and invest in a myriad of industries. *Id.*

2. Compulsory unionism occurs when “forced dues” clauses are negotiated into employee contracts. NATIONAL INSTITUTE FOR LABOR RELATIONS RESEARCH, <https://nilrr.org/compulsory-unionism-education/> (last visited Mar. 2, 2021). Union officials who demand these forced dues claim all employees in the bargaining unit get the same benefits “and therefore should pay for the union's representation, regardless of whether it is wanted or not.” *Id. What are Bargaining Units?*, USAJOBS, <https://www.usajobs.gov/Help/faq/job-announcement/bargaining-units/> (last visited Mar. 4, 2021). (“A bargaining unit position is a job that is represented by a labor union. . . . Labor unions negotiate various conditions of employment . . . , however they [do not] generally negotiate compensation or other matters that the management team deems to be their sole prerogative. If your job is in a bargaining unit, you [do not] have to join the union. However, if you want to join a union, your job must be in a recognized bargaining unit.”) *Id.*

3. *See Ry. Emp.'s Dep't v. Hanson*, 351 U.S. 225, 236–39 (1956) (discussing a failed constitutional claim under the Railway Labor Act where challengers argued that money forcibly obtained to support the union's political agenda, with which the employees disagreed, violated the dissenting employees' constitutional rights); *see also Summers, Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483 (1950) (arguing that unions subject its members to their disciplinary policies, in turn making them conform to their ideologies).

bargaining power between employers and employees.”<sup>4</sup> The NLRA applies to most private sector employers and employees, but does not apply to public sector employers, employers of agricultural workers, or employers of interstate railroads and airlines.<sup>5</sup>

The NLRA gives private sector unions organizational, monetary, and disciplinary powers to bargain with the employer on behalf of the employees for employment agreements, known as collective bargaining agreements (CBAs).<sup>6</sup> In exchange for the union’s negotiation on CBAs, which are presumptively favorable to employee rights, employees who are “consenting” union members must pay dues to the union.<sup>7</sup> Historically, employees in certain bargaining units had to pay full union dues—whether they were members of the union or not—until *Abood v. Detroit Board of Education* and *Communications Workers of America v. Beck* banned the use of compulsory union dues for a union’s political spending.<sup>8</sup> Because of these opinions, unions in both the public and private sector could only exact dues for chargeable activities considered “germane” to collective bargaining activities.<sup>9</sup> For example, chargeable activities include the “negotiating and administering [of] collective agreements, and the costs of the

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4. 29 U.S.C. § 151 (2012). The equality between employers and employees is essential because

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

*Id.*

5. *Is my Employer Subject to the National Labor Relations Act (NLRA)?*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/faq/nlr/> (last visited Mar. 10, 2021). Public sector employers are instead restrained by other state and federal statutes that largely mirror the regulations in the NLRA. JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962* 71–72 (2004). Similarly, railroad and airline employers are governed by the Railway Labor Act, a federal statute that has been called the statutory equivalent to the NLRA. *Lehnert v. Ferris Fac. Ass’n*, 500 U.S. 507, 555 (1991).

6. 29 U.S.C. § 157 (2012). CBAs are used to mitigate and eliminate obstructions to the free flow of commerce by way of negotiating the terms and conditions of the worker’s “employment or other mutual aid or protection.” *Id.* § 151.

7. *See*, 29 U.S.C. § 158(a)(3) (2012). “Consenting” union members means employees who voluntarily elect to become a part of the union. *Id.*

8. *Lehnert*, 500 U.S. at 517–19, 522 (banning full compulsory union dues in the public sector); *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 752–54 (1988) (banning full compulsory union dues in the private sector).

9. *Lehnert*, 500 U.S. at 519 (defining chargeable activities as those that are “germane to collective-bargaining activit[ies]; . . . justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; . . . and [those that do not] significantly add to the burdening of free speech that is inherent in the allowance of agency or union shop.”); *Beck*, 487 U.S. at 752.

adjustment and settlement of disputes.”<sup>10</sup> Chargeable activities do not include, however, using employees’ dues for the union’s political activities.<sup>11</sup> This was the prevailing rule in the public sector until the recent Supreme Court case, *Janus v. American Federation of State, County, and Municipal Employees*, which declared all union fees in the public sector unconstitutional under the First Amendment.<sup>12</sup>

Unfortunately, private sector employees are still required to pay union fees against their will, which may violate their First Amendment freedom of speech and freedom of association rights.<sup>13</sup> For these constitutional protections to apply to the private sector and for the holding in *Janus* to be extended to private sector unions, there needs to be a showing of state action, and courts have split on this issue.<sup>14</sup> As defined in *Jackson v. Metropolitan Edison Co.*, state action may exist “in the exercise by a private entity of powers traditionally exclusively reserved to the State.”<sup>15</sup> When the government itself, or a branch of the government, delegates the authority to exercise a uniquely governmental power to a private person or entity, then the constitutional protections and limitations on that power follow.

This Note argues that state action is present under the exclusive representation scheme in the private workplace based on a theory of state compulsion. State action exists in private workplaces when labor unions, acting as the exclusive representative of the employees under the federal authority of the NLRA, deduct fees from dissenting employees. Private entities, however, do not become state

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10. *Beck*, 487 U.S. at 745–46, 751–52 (explaining Congress’s intent in creating compulsory unionism as a means of cost sharing between employees for mutually beneficial activities such as collective bargaining). See *Machinits v. Street*, 367 U.S. 740 (1961).

11. *Lehnert*, 500 U.S. at 522; *Beck*, 487 U.S. at 752 (explaining that expenditures on political activities do not mutually benefit everyone in the bargaining unit, namely those who oppose the political causes the union financially supports).

12. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478, 2486 (2018) (holding that Illinois’ agency-fee scheme “violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern” and that all “public sector agency-shop arrangements violate the First Amendment”).

13. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (explaining that money is often a form of speech because “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”).

14. *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977) (stating that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”); see Joseph E. Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?*, 96 NEB. L. REV. 62, 69 (2017) (discussing the implications of a finding of state action in the private sector union context).

15. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (refusing to find state action for purposes of the Fourteenth Amendment when Pennsylvania’s only intervention into the private company was to approve a termination practice).

actors merely by extensive regulation; private entities need to assume a governmental role to fulfill the state action requirement.<sup>16</sup>

For nearly fifty years, the Court has consistently held that requiring employees to pay money to a union raises serious First Amendment concerns.<sup>17</sup> The Court has held that employees' constitutional rights—their First Amendment freedom of speech and associations rights—are violated when this money is used for political advocacy rather than for activities germane to collective bargaining duties of the union.<sup>18</sup>

In *Janus*, the Court went one step further by declaring public sector agency fee requirements categorically unconstitutional under the First Amendment.<sup>19</sup> Agency fees—distinct from union dues which union members must pay as a prerequisite to union membership—are a percentage of union dues which “cover the basic costs that the union incurs representing” workers who decline to join their workplace's union.<sup>20</sup> The Court held that “[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.”<sup>21</sup> In *Janus*, Mark Janus, a state employee whose unit was represented by a public sector union, refused to join the union because he opposed both the political and collective bargaining positions in which the union participated.<sup>22</sup> Mr. Janus challenged the constitutionality of the agency fees he was forced to pay in order to remain employed, even though he was not a member of the union.<sup>23</sup>

*Janus* has been highly acclaimed by some, and fervently critiqued by others in the labor law community. The question the Court should now decide is

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16. See *id.* at 358–59 (holding that state action does not exist because a state agency merely regulates the action of a private company).

17. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. at 2460.

18. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171 (2018) (discussing compelled subsidies from unwilling individuals in the union and bar membership contexts); see *Abood*, 431 U.S. at 235–36.

19. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2459–60 (2018).

20. Celine McNicholas et al., *Janus and Fair Share Fees*, ECONOMIC POLICY INSTITUTE, Feb. 21, 2018, <https://www.epi.org/publication/janus-and-fair-share-fees-the-organizations-financing-the-attack-on-unions-ability-to-represent-workers/>. As discussed further in this Note, agency fees paid by “employees who do not join the union but are part of the bargaining unit . . . cover the union's expenses related to collective bargaining and contract administration, but no expenses for political or ideological advocacy.” *Id.*

21. *Id.* at 2486 (holding that employee's constitutional rights were better protected with a system requiring affirmative consent to become a union member rather than the opt-out system the court had previously put into place).

22. *Id.* at 2461 (stating that Plaintiff, Mark “Janus believes that the Union's ‘behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens.’”).

23. *Id.* at 2462. Although Janus was not forced to be a full, participating member of the union, he was being forced to financially support the union's activities. *Id.* at 2460.

whether private sector employees should enjoy the same First Amendment protections in the workplace as their public sector counterparts. *Janus* was a huge win for right-to-work groups and public sector employees because it prohibited public sector unions from forcing nonmembers to pay compulsory union fees as a term of their employment. Under this holding, objecting employees have to affirmatively consent to paying union fees rather than having to opt-out of the wage-deduction system.<sup>24</sup>

As noted above, although the Supreme Court decided the question for public sector unions, the question of the constitutionality of compulsory union fees in the private sector remains. Public sector cases implicate the First Amendment because there is clear state action from the government. But it is less clear how state action is involved in private sector union cases. This Note will explore the implications of applying the holding in *Janus* to private sector unions. It will also argue that state action exists in the private sector unionized workplace based on theories of exclusive representation, delegation of government authority through a federal statute, and the extension of Railway Labor Act (RLA) Supreme Court holdings. This Note will conclude with a discussion of the potential areas of litigation that might arise in the post-*Janus* world.

## I. PRIOR LAW

### A. *National Labor Relations Act*

The NLRA is a federal statute that outlines the rights and boundaries of employees, unions, and employers in private sector labor law. Congress enacted the NLRA to level the playing field between the historically powerful employer and the employee who generally lacked leverage in determining his or her terms of employment such as wages and hours.<sup>25</sup> As noted, the Act applies to most private sector employees (including private universities, retailers, health care facilities, and manufacturers) but does not apply to federal, state, or local governments, employers of agricultural workers, or employers subject to the RLA (including airlines and interstate railroads).<sup>26</sup> The basic policy declared by the NLRA was to

eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of

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24. *Id.* at 2486.

25. *See generally* STAFF OF SUBCOMM. ON LAB. AND PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (Comm. Print 1974). The Labor Management Relations Act (LMRA) is an amendment to the National Labor Relations Act. *Id.* at 1.

26. *Frequently Asked Questions – NLRB*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/faq/nlr/#t38n3180> (last visited Jan. 12, 2020).

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>27</sup>

The NLRA grants employees the right to “form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities.”<sup>28</sup> It is an important facet of the statute that it gives employees protection for either participating in the union or not because it means employers or unions may not discriminate against employees based on their union membership or lack thereof. However, this has not always been the case. With the passage of the Wagner Act in 1935 and the Taft-Hartley Act in 1947, Congress amended the NLRA to restrict the activities and power of labor unions.<sup>29</sup> These amendments outlawed a type of union security agreement, called the closed shop, “wherein a person is required to be a member of the union in order to be eligible [for] employment.”<sup>30</sup> These amendments, among other labor trends in the wake of Congress passing the NLRA, reflected Congress’s increasing skepticism of the growing power of labor unions, and the recognition that often employees needed to be protected not only from their employers, but also from the unions that represented them.<sup>31</sup>

### B. Railway Labor Act

As Congress enacted the NLRA to protect the private sector labor market, Congress enacted the RLA to protect the labor markets of interstate railroads and airlines.<sup>32</sup> Like the NLRA, the RLA was the first federal transportation statute “guaranteeing the right of workers to organize and join unions and elect representatives without employer coercion or interference.”<sup>33</sup> Specifically, the

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27. 29 U.S.C. § 151; *see also* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540 (1992) (holding that employers cannot be compelled to distribute union literature to its employees at their place of work—giving employees freedom of choice—unless the union can show that no other reasonable means of communicating its organizational message exists).

28. *Frequently Asked Questions – NLRB*, *supra* note 26.

29. *See* STAFF OF SUBCOMM. ON LAB. AND PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 409, 545, 734, 1009, 1420 (Comm. Print 1974). The Labor Management Relations Act is another name for the Taft-Hartley Act.

30. THOMAS R. HAGGARD, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS* 34 (1978).

31. *See, e.g.*, *NLRB v. Midwest Transfer Co. of Illinois*, 287 F.2d 443 (3d. Cir. 1961) (holding that an employer and a union cannot agree to make union membership a condition of initially obtaining a job with the employer).

32. *The Railway Labor Act Simplified*, PA. FED’N BMWED-IBT, [http://www.pennfedbmwe.org/Docs/reference/RLA\\_Simplified.html](http://www.pennfedbmwe.org/Docs/reference/RLA_Simplified.html) (last visited Jan. 12, 2020). The Railway Labor Act was amended to include the airline industries, but only initially covered interstate railroads. *Highlights of the Railway Labor Act (“RLA”), and the U.S. Department of Transportation’s (“DOT”) Role in RLA Disputes*, FEDERAL RAILROAD ADMINISTRATION, [https://railroads.dot.gov/sites/fra.dot.gov/files/fra\\_net/1647/Railway%20Labor%20Act%20Overview.pdf](https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1647/Railway%20Labor%20Act%20Overview.pdf).

33. *Id.*

RLA's purpose was "to avoid work stoppages that threaten to substantially interrupt interstate commerce to a degree such as to deprive any section of the country essential transportation services."<sup>34</sup> The RLA tries to encourage voluntary settlement of disputes over all other options to avoid interruptions in interstate commerce.<sup>35</sup>

The importance of mentioning the RLA in a paper involving an issue governed by the NLRA is the almost identical nature of the two statutes, as well as the outcomes courts have reached on issues that parallel both statutes. The significance of the resemblances between the statutes will be discussed below as they pertain to Supreme Court decisions. The key difference between the RLA and the NLRA is that the RLA overrides state right-to-work laws while the NLRA does not.<sup>36</sup>

### C. *Right-to-Work Laws*

During the mid-20th century, Congress proposed changes to the "pro-union" structure of the NLRA, enacting provisions of the Taft-Hartley Act that only allows "union shops in the absence of state law to the contrary."<sup>37</sup> Union shops are workplaces that do not require union membership as a prerequisite to obtaining employment but do require that each worker join the union within a certain period after being hired.<sup>38</sup> The Taft-Hartley Act, later added as section 14(b) to the NLRA, laid "the foundation for right-to-work laws by allowing states to prohibit union security agreements [and] compulsory union

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34. *Id.* The RLA applies to "freight and commuter railroads, airlines, companies directly or indirectly controlled by carriers who perform services related to transportation of freight or passengers and the employees of these railroads, airlines, and companies." *Id.*

35. *Railway Labor Act*, SMART UNION, <https://smart-union.org/7113-2/> (last visited Jan. 12, 2020).

36. BENJAMIN COLLINS, CONGRESSIONAL RESEARCH SERVICE, RIGHT TO WORK LAWS: LEGISLATIVE BACKGROUND AND EMPIRICAL RESEARCH 4 (2014).

For example, both a federal appeals court and the Oklahoma Supreme Court have determined that Oklahoma's prohibition of union security agreements does not extend to workers covered by the Railway Labor Act. . . . [However,] [s]ince the 104th Congress, a National Right to Work bill has been introduced in the House during the first session of each Congress. Similar bills have regularly been introduced in the Senate during this time. These bills would amend the NLRA by striking the language that permits union security agreements and would make similar changes to the Railway Labor Act.

*Id.* at 5–6.

37. *History of Unions and Right-to-Work Laws*, JURIST LEGAL NEWS & COMMENTARY (Dec. 17, 2013, 10:36:50 PM), <https://www.jurist.org/archives/feature/history-of-unions-and-right-to-work-laws/>.

38. *Union Shop*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/union\\_shop](https://www.law.cornell.edu/wex/union_shop) (last visited Jan. 12, 2020).

membership” that would weaken the dissenting employee’s voice in a unionized workplace.<sup>39</sup>

Section 14(b) of the NLRA, titled “Agreements requiring union membership in violation of State law” reads: “[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”<sup>40</sup> Twenty-eight states and territories currently have state right-to-work laws, while employees in the remaining states and territories are subject to forced unionism.<sup>41</sup> The existence of right-to-work states is significant for this Note because if an employee works in one of these twenty-eight states or territories, they “not only have the right to refrain from becoming a union member, [they] cannot be required to pay dues or an agency fee to the union unless [they] choose to join the union.”<sup>42</sup>

#### D. Supreme Court Cases Before *Janus*

##### 1. Public Sector Cases

One of the most prolific cases in twentieth century labor law, *Abood v. Detroit Board of Education*—which the Supreme Court overturned in *Janus*—held that unions cannot use employee dues or fees to finance political activities that the employee does not personally support.<sup>43</sup> The Court ruled that although it is constitutionally valid to require public sector employees to pay agency fees to maintain employment, it is only constitutional “insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes.”<sup>44</sup> While the Court noted it is not holding that “a union

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39. *History of Unions and Right-to-Work Laws*, *supra* note 37. Virginia, the first state to enact a Right to Work Law, contains a provision specifically regarding dues payment: “No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.” VA. CODE ANN. § 40.1-62 (1970).

40. 29 U.S.C. § 164(b) (2012).

41. *Right to Work States*, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, <https://nrtw.org/right-to-work-states> (last visited Jan. 12, 2020). The following states and territories have enacted right to work laws: Alabama, Arizona, Arkansas, Florida, Georgia, Guam, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

42. *Can I Be Required to be a Union Member or Pay Dues to a Union? (Private Sector Employee)*, NAT’L RIGHT TO WORK FOUND., <https://nrtw.org/required-join-pay-private> (last visited Jan. 12, 2020).

43. *See generally Abood*, 431 U.S. at 209.

44. *Id.* at 232; *see Hanson*, 351 U.S. at 225 (stating that unions may not use objector’s union funds to “forc[e] ideological conformity or other action in contravention of the First . . . Amendment.”); *see also Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961) (holding a union

cannot constitutionally spend [an objector's] funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative[,]" it does state that the Constitution requires "such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."<sup>45</sup>

The Court later decided *Chicago Teachers Union, Local No. 1 v. Hudson*, a forced fees case based on constitutional principles. The Court held that First Amendment due process requires unions to provide certain safeguards before they can collect forced union fees from public employees.<sup>46</sup> The majority explained that nonmembers have a constitutional right to prevent the union from spending their required fees on political causes, stating that

[t]he fact that the [nonmembers] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.<sup>47</sup>

The Court's recognition of a First Amendment constitutional right to not have nonmember's fees used for political purposes suggested the Court believed that paying is speaking.

Twenty years later, the Supreme Court decided *Davenport v. Washington Education Association*, affirming the constitutionality of right-to-work laws and holding that because unions do not have a constitutional right to collect dues from nonmembers, a state may require unions to get affirmative consent from a public employee before spending their dues on political activities.<sup>48</sup> This affirmative consent option conflicted with the default opt-out system most unions had in place where, for an objector to ensure that his forced union dues

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does not have the power to use a dissenter's exacted union funds to support political causes which he or she opposes).

45. *Abood*, 431 U.S. at 235–36. It is important to note that this case does not stand for the proposition that no union dues can be used towards the advancement of the union's ideological causes; rather, only such expenditures can be financed from dues "paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 236.

46. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986). The Court specified that the procedural safeguards necessary to protect dissenting nonmembers from forced fees were as follows: adequate notice of the fee's basis along with an independent audit, prompt neutral review of nonmember's challenges, and "an escrow for amounts reasonably in dispute." *Id.* at 310.

47. *Id.* at 301 n.9; see *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (discussing the implications of the First Amendment freedoms of belief and of association).

48. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 191 (2007).

were not being used to finance a political campaign, they would have go through a tedious process of opting out of political expenditures.<sup>49</sup> If an objector did not opt-out during the specified period to do so, their dues or fees would automatically be used by the union until the next opt-out period.<sup>50</sup>

In 2012, the Supreme Court decided *Knox v. SEIU, Local 1000*, establishing that “when a public-sector union imposes a special assessment or dues increase, the union must provide [a notice of the purpose of the assessment or increase] and may not exact any funds from nonmembers without their affirmative consent.”<sup>51</sup> The Court noted that “First Amendment values [would be] at serious risk if the government [could] compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors.”<sup>52</sup> This opinion went further than *Davenport* by requiring affirmative consent for dues increases or special expenditures, whatever these expenditures were on, rather than simply authorizing the state to implement an affirmative consent system.

The last major public sector union case that set the stage for the decision in *Janus* was the Supreme Court’s decision in *Harris v. Quinn*. The Court held an Illinois requirement that nonunion Medicaid-funded home-care personal assistants pay union fees unconstitutional under the First Amendment.<sup>53</sup> In *Harris*, the Court refused to extend the decision in *Abood*, which upheld forced fees on public employees for collective bargaining purposes, to this situation “[b]ecause of *Abood’s* questionable foundations, and because the personal assistants are quite different from full-fledge public employees.”<sup>54</sup> The Court recognized that the central issues in public sector collective bargaining, “such as wages, pensions, and benefits are important political issues.”<sup>55</sup> This holding foreshadowed what the Court later decided in *Janus*: if a case involving employees more like a typical public employee were to come before the Court, a majority may overrule *Abood* and hold that public sector forced fee requirements are unconstitutional.

Then came the twenty-first century’s landmark case—*Janus*. As noted, this case overruled *Abood* and held that public sector agency fee requirements were

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49. *Id.* at 182. The union objector used a provision of the Fair Campaign Practices Act in his argument: “A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.” *Id.*

50. *See generally id.* at 183 (describing the process of the “Hudson packet” opt-out procedure).

51. *Knox v. SEIU Local 1000*, 567 U.S. 298, 322 (2012). The Court also held that unions cannot constitutionally charge nonmembers for its expenditures opposing ballot questions even if they “may be said to have an effect on present and future contracts between public-sector workers and their employers.” *Id.* at 320–21.

52. *Id.* at 322 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001)).

53. *Harris v. Quinn*, 573 U.S. 616, 620 (2014).

54. *Id.* at 645–46.

55. *Id.* at 636.

unconstitutional under the First Amendment.<sup>56</sup> The Court declared that “[n]either an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.”<sup>57</sup>

## 2. *Private Sector Cases*

Private sector cases, like *Ellis v. Brotherhood of Railway Clerks*, have been decided differently and with greater deference to unions than their public sector counterparts. Nevertheless, in *Ellis*, the Court held that under the RLA, coerced financial support of a union’s ideological or political causes, and other union activities not concerning the dissenting employee’s particular bargaining unit, is prohibited.<sup>58</sup> The Court reasoned:

[B]y allowing the union at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree. ‘To be required to help finance the union as a collective-bargaining agent might well be thought...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.’<sup>59</sup>

The majority went even further by prohibiting the union’s improper use of dissenter’s funds even for temporary use, thus prohibiting “rebate” schemes where unions could use dues or fees for improper uses and only later refund the amount exacted to dissenting employees.<sup>60</sup>

Later the Court declared in *Communications Workers v. Beck* that the NLRA and RLA’s provisions authorizing compulsory unionism arrangements are substantially “identical” and that Congress intended for them “to have the same meaning.”<sup>61</sup> The Court thus held that like the RLA in *Hudson*, the NLRA “authorizes the exaction of only those fees and dues necessary to ‘performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.’”<sup>62</sup> Private sector employees thus were granted the same rights as airline, railway, and public employees to not subsidize a union’s non-bargaining activities.

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56. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2459–60 (2018).

57. *Id.* at 2486. The Court explained that “[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.” *Id.*

58. *Ellis v. Brotherhood of Ry.*, 466 U.S. 435, 455–56 (1984).

59. *Id.* at 455. The Court notes that although the dissenting employee’s First Amendment rights have been infringed upon in this case, “[i]t has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace.” *Id.* at 455–56.

60. *Ellis*, 466 U.S. at 457.

61. *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 746–47 (1988).

62. *Id.* at 762–63 (quoting *Ellis*, 466 U.S. at 448).

II. *JANUS*' IMPACT

Before *Janus*, hundreds of thousands of employees had large portions of their money unfairly exacted from them without their consent. After four decades of old precedent created by *Abood*, public employers and labor unions can no longer require employees to pay for the unions' costs of negotiating and enforcing labor contracts on employees' behalf.<sup>63</sup> This decision gave protected employees First Amendment freedom of speech and freedom of association rights once and for all. It allowed those dissenters to be free from any financial coercion, not only for the union's political causes, but also for contract negotiations and administration. Because of *Janus*, thousands of public sector labor-management contracts affecting millions of government employees were partially invalidated.<sup>64</sup> This decision will more than likely have a considerable adverse effect on union revenues and union membership in the "twenty-two states [plus Puerto Rico and the District of Columbia] that allowed government employers to collect fair-share fees from union-represented employees who chose not to join the union."<sup>65</sup>

Critics of the decision consider *Janus* to be "a huge blow to public-sector unions and the labor movement," and view the decision a win for so-called connivingly opportunistic "free-riders."<sup>66</sup> Those who oppose the holding in *Janus* argue that now, "union members have an incentive to become 'free-riders,' benefiting from collective bargaining but not paying for it."<sup>67</sup> The critiquing argument sides with Justice Elena Kagan's dissenting opinion which scrutinized the majority's cold shoulder to the *stare decisis* doctrine, arguing that the majority "overturned a previous decision, deeply entrenched in the real world, with little justification."<sup>68</sup> It does so, Kagan wrote, "by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."<sup>69</sup> This argument, however, is

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63. Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42, 42 (2018).

64. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2487–88 (2018) (Kagan, J., dissenting) ("More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today."); Chemerinsky & Fisk, *supra* note 63, at 42–43. *Janus* only invalidated the "agency fee" portions of collective bargaining agreements. *Id.*

65. Chemerinsky & Fisk, *supra* note 63, at 42.

66. Alana Semuels, *Is This the End of Public-Sector Unions in America?*, THE ATLANTIC (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/>.

67. *Id.*

68. *Id.*

69. *Id.* A study by Frank Manzo and Robert Bruno, skeptics of *Janus*, suggest "[t]he decision could also mean that unions will have less political impact than they once did. The decline of unions has already had implications for national politics: Some analyses argue that Hillary Clinton would have been elected president had union membership been higher." *Id.*

incorrect, superficial, and charged with political bias, without regard for the Constitution and the minority views of employees.

#### *A. Post-Janus Litigation*

In the wake of *Janus*, there has been a rise in labor litigation on multiple fronts. First, there have been dozens of suits filed “seeking repayment of fees paid going back for as many years as the statute of limitations will allow.”<sup>70</sup> If courts conclude that *Janus* applies retroactively, the potential liabilities are staggering because the unions will be forced to refund or pay damages for all the fees paid by dissenting employees within applicable statute of limitations.<sup>71</sup> For example, in *Oliver v. Service Employees International Union Local 668*, a former union member brought suit seeking monetary damages against her former union for “membership dues paid to the Union from the beginning of her employment in December 2014 through the date of her resignation in August 2018.”<sup>72</sup> The plaintiff argued that she could not have “given her ‘affirmative consent’ in her choice to become a member and is now entitled to a full refund on her membership dues.”<sup>73</sup> The court, however, disagreed and held that she cannot recover damages because she was not compelled to join the union in the first place.<sup>74</sup> This court also discussed issues concerning both standing and mootness because the plaintiff was no longer a union member.<sup>75</sup> Similarly, in *Hendrickson v. AFSCME, Council 18*, a former union member and state employee brought action against the union alleging violation of his First Amendment rights to free speech and free association, and seeking monetary damages for past union dues.<sup>76</sup> Like in *Oliver*, the court held that the employee’s claim for relief requesting past union dues was moot because the employee voluntarily chose to contract with the union, therefore negating any First Amendment claim.<sup>77</sup>

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70. Catherine L. Fisk, *Janus and the Future of Unions*, AMERICAN CONSTITUTION SOCIETY, <https://www.acslaw.org/analysis/acs-supreme-court-review/janus-and-the-future-of-unions/> (last visited Mar. 2, 2021). Fisk also highlights another issue *Janus* poses: whether the decision will lead to a dramatic drop in union membership. *Id.* She suggests that anti-union groups are going head to head with unions in encouraging employees to “quit their union and quit paying dues by convincing them that they can get the benefits of the union contract without paying for it,” while unions are “vigorously signing up fee-payers as full members.” *Id.*

71. *Id.*

72. *Oliver v. SEIU, Local 668*, 415 F. Supp. 3d 602, 605 (E.D. Pa. 2019).

73. *Id.*

74. *Id.* at 613. The court noted that “[a]gency fees are not at issue in this case, because they would be subsumed by the union dues that Plaintiff voluntarily paid. Even if they were, no federal court has interpreted *Janus* as entitling non-members to a refund of agency fees.” *Id.* at 608 n.7; see *Cook v. Brown*, 364 F. Supp. 3d 1184, 1193 (D. Or. 2019) (noting that “there is no indication that *Janus* intended to open the floodgates to retroactive monetary relief.”).

75. *Oliver*, 415 F. Supp. 3d at 613.

76. *Hendrickson v. AFSCME Council 18*, 434 F. Supp. 3d 1014, 1018 (D.N.M. 2020), *aff’d*, No. 20-2018, 2021 U.S. App. LEXIS 8878 (10th Cir. Mar. 26, 2021).

77. *Id.* at 1022.

Second, many suits have been filed seeking to expand the prohibition on union dues to a full prohibition on union exclusive representation based on a majority rule.<sup>78</sup> The plaintiff's argument is that:

[I]f paying fees to support bargaining is unconstitutional, it should be unconstitutional for a union to negotiate a contract on behalf of those who do not want union representation at all. Anti-union advocates have lost those cases before. The majority stated that it was not calling majority-rule representation into doubt.<sup>79</sup>

Cases like *Bierman v. Dayton*, highlight the opposing view rejecting challenges to exclusive representation.<sup>80</sup> Here, the plaintiffs claimed the Minnesota law, which permitted union representation, violated their First Amendment right to freedom of association.<sup>81</sup> The court was not convinced, finding that “the employees had not shown that the state’s recognition of the union infringed on the First Amendment rights of non-members to freedom of association in the form of a mandatory agency relationship, as they were not required to pay dues or union fees.”<sup>82</sup>

The theories behind these two types of prospective litigation support this Note’s greater argument that *Janus* should be extended to the private sector because public sector employees should not be afforded greater constitutional protections just because they work for the government.

Currently, private sector employees in unionized workplaces have an option that could partially satisfy their disdain for financing a cause they do not support, at least for the short term. These employees who do not wish to be union members can file paperwork as a *Beck* objector, “which means they pay lower fees that go only to collective bargaining, contract administration and grievance adjustment.”<sup>83</sup> Yet, the fee reduction for the *Beck* objector is usually only about fifteen percent less than normal full union dues, and for many busy employees,

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78. See Fisk, *supra* note 70.

79. *Id.*

80. *Bierman v. Dayton*, 900 F.3d 570, 572 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019).

81. *Id.*; see also *Mentele v. Inslee*, 916 F.3d 783, 791 (9th Cir. 2019) (designation of SEIU as the exclusive bargaining representative did not violate worker’s First Amendment rights); *Branch v. Commonwealth Emp. Relations Bd.*, 481 Mass. 810, 828–29 (2019) (finding exclusive representation coupled with the duty of fair representation not to be violative of the Constitution); *Uradnik v. Inter Fac. Org.*, No. 18-1895, 2018 U.S. Dist. LEXIS 165951 (D. Minn. Sept. 27, 2018) (denying a motion for a preliminary injunction in case challenging constitutionality of forced representation by a union).

82. Ronald J. Kramer, *Janus One Year Later: Litigation Has Come*, AM. BAR ASS’N, (July 23, 2019), [https://www.americanbar.org/groups/state\\_local\\_government/publications/state\\_local\\_law\\_news/2018-19/summer/janus-one-year-later-litigation-has-come/](https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2018-19/summer/janus-one-year-later-litigation-has-come/).

83. Alexia Elejalde-Ruiz, *Supreme Court’s Janus Ruling Could Undercut Private Sector Unions Too*, CHICAGO TRIBUNE (July 11, 2018), <https://www.chicagotribune.com/business/ct-biz-janus-private-sector-ramifications-20180709-story.html>.

this unfortunately is not worth the hassle. More enticing would be the option to opt out entirely.

This Note argues that the one obstacle that courts have found when debating whether the decision in *Janus* can be extended to the private sector—state action—is a non-issue because of the clear federal authorization of union action through the NLRA and the RLA.<sup>84</sup> This Note will argue that the exclusive representation scheme set up by the federal government is also evidence of state action because of the government-like coercive monopoly power unions are granted because of these federal statutes.<sup>85</sup> Further, the collective bargaining agreement is nothing like a sample contract between two private entities, rather it is like a contract between a private actor and a government actor. A finding of state action in the private sector union context would extend the holding in *Janus* to the private sector, thus protecting private sector employees from being forced to pay fees to unions which they do not support.

### III. ANALYSIS

#### *A. State Action Exists in the Private Sector: Private Employees Should be Afforded the Same Protections as Public Employees*

##### *1. State Action Doctrine*

There are three main judicially created theories of state action: nexus, conspiracy, and the *Edmonson* test. The nexus theory of state action applies when government regulations underlie the claim of state action.<sup>86</sup> This theory focuses on the link between the government regulation and the alleged constitutional violation: “[t]he inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so the action of the latter may be fairly treated as that of the State itself.”<sup>87</sup> The conspiracy or joint action theory of state action involves a court’s examination of “whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights.”<sup>88</sup> The plaintiff may prove joint action by showing that there was “a conspiracy or by showing [a] private party was ‘a willful participant in the joint action.’”<sup>89</sup> The *Edmonson* state action test involves a two-part inquiry: (1) the deprivation must be caused by exercising some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible; and (2) the party

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84. See, *infra* 24–26.

85. See, *infra* 26–27.

86. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

87. *Id.*; see *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); see also *Blum v. Yaretsky*, 457 U.S. 991, 1002–05 (1982).

88. See *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002) (*quoting* *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995)).

89. See *id.*

charged with the deprivation must be a person who may fairly be said to be a state actor.<sup>90</sup>

State action is affirmatively present under the exclusive representation scheme in the private workplace based on a theory of state compulsion. This is because, “[t]he state action doctrine allows a court to find that private actions constitute government activity if there is significant involvement by the government.”<sup>91</sup> To illustrate, in *Lebron v. National R.R. Passenger Corp.*, the Supreme Court held that even though Amtrak was a nominally private corporation, it “could be sued as a government actor under the First Amendment because of the extensive role the federal government played in Amtrak’s activities.”<sup>92</sup> Although there are several variations of the state action doctrine, courts emphasize the nature and scope of the government involvement.<sup>93</sup> Private sector unions collecting agency fees could be treated as government actors in ways consistent with the state action doctrine for two main reasons.<sup>94</sup> First, the state action doctrine is fact-intensive, applied flexibly, and lacks hard rules in its application.<sup>95</sup> The second reason is that “private sector unions’ use of agency shop agreements could be construed as nominally private decisions that have been encouraged by the government to the extent that they constitute state action.”<sup>96</sup> The state action doctrine does not concretely answer whether *Janus*—striking down public sector agency fees—applies to the private sector.<sup>97</sup> Due to this uncertainty, “the Supreme Court *could* hold that the NLRA’s structure has given such a powerful incentive for unions to pursue agency fee arrangements, that unions doing so are effectively engaging in state action.”<sup>98</sup>

## 2. State Action Under the NLRA & RLA

The Supreme Court outlined in *Communications Workers of America v. Beck* that any action taken under the RLA—a federal statute equivalent to the NLRA—constitutes state action.<sup>99</sup> This supports the overall argument that unions, when acting under federal statutes, are state actors because they act

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90. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

91. Boyd Garriott, *How Janus Could Spill into the Private Sector Without Radically Redefining the State Action Doctrine*, ONLABOR (Apr. 19, 2018), <https://onlabor.org/how-janus-could-spill-into-the-private-sector-without-radically-redefining-the-state-action-doctrine/>.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*; see *Peterson v. City of Greenville*, 373 U.S. 244, 250–251 (1963) (holding that a private restaurant’s discriminatory behavior was state action because a local ordinance required the restaurant to discriminate).

97. Garriott, *supra* note 91.

98. See Garriott, *supra* note 91.

99. *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 761–63 (1988); see *Int’l Ass’n of Machinists, AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 695–96 (1963).

under color of federal law.<sup>100</sup> That unions operate, in part, to aid in the peaceful and reliable settlement of employee grievances, and are aided in that exercise by the federal force given to collective bargaining agreements paid under federal law, is precisely the nexus between government and private actors that the First Circuit found sufficient to constitute state action in *Linscott v. Miller Falls Co.*<sup>101</sup> It is like the circumstances where parties subject to the NLRA are forced to act or refrain from acting by the mandates of the National Labor Relations Board (NLRB), which the First, Fourth, and Ninth Circuits have all held to constitute state action.<sup>102</sup>

In three paramount cases, the Supreme Court found state action under the RLA: *Hanson*, *Street*, and *Ellis*. In *Hanson*, the Court held that state action was present because “the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.”<sup>103</sup> In *Street*, the Court reaffirmed its conclusion in *Hanson* that using dissenting members’ dues, which were compelled by a union security agreement negotiated under the RLA, involved state action.<sup>104</sup> That said, the Court in *Hanson* held that because the statute itself prohibited the use of dissenting members’ dues for political purposes, the case could be decided without reaching the constitutional issue.<sup>105</sup> Last, in *Ellis*, the

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100. Metaphors, like the phrase “act under color of law,” refer to a concept “in which a target domain is understood in terms of a source domain of more readily comprehended, embodied experience.” Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 390 (1992).

101. *Linscott v. Miller Falls Co.*, 440 F.2d 14, 16 (1st Cir. 1971) (finding state action under the LMRA, comparing the LMRA to the RLA).

102. See *Beck v. Commc’ns Workers of Am.*, 776 F.2d 1187, 1207–09 (4th Cir. 1985); *Linscott*, 440 F.2d at 16–17; *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970).

103. *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 231–32 (1956). The Court described the wide-ranged issues that are tendered under the First Amendment:

It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights. It is said that once a man becomes a member of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology. On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.

*Id.* at 236–38.

104. *Street*, 367 U.S. at 746–50. The Court again evaded answering the constitutional questions, ruling that the RLA “prohibits unions from using objecting nonmembers’ compulsory dues for political purposes. The Court did not clearly define political purposes, nor did it address whether unions could lawfully use objectors’ monies for nonpolitical activities unrelated to collective bargaining.” *Foundation Supreme Court Cases*, NAT’L RIGHT TO WORK LEGAL DEFENSE FUND, <https://www.nrtw.org/foundation-supreme-court-cases/> (last visited Mar. 22, 2021).

105. *Street*, 367 U.S. at 748–49.

Court revealed again its conclusion that state action exists when parties subject to the RLA negotiate union security agreements.<sup>106</sup>

### 3. *Exclusive Representation*

State action is present in a private unionized environment under the exclusive representation relationship between unions and employees. This relationship is authorized by the NLRA, a federal labor statute.<sup>107</sup> The NLRA provides unions with organizational, disciplinary, and monetary power that is the functional equivalent of “granting governmental coercive power to unions.”<sup>108</sup> Exclusive representation can become coercive because once a union representative has been certified, they are the sole way employees may communicate with their employer concerning terms of employment.<sup>109</sup> And based on the collective bargaining agreement negotiated by the union and the employer, the union representative has the power to execute and administer the rules of the CBA.<sup>110</sup> State action thus exists through the government delegation of union power over private employers and employees through the NLRA. But for the federal government’s authorization of union imposition into the private workplace through the NLRA, unions would not have the power to collect money, discipline employees, and enforce CBAs. In this way, unions serve as actors on behalf of the federal government.

### 4. *Close Government Regulation*

A union’s exclusive representation relationship imposes state action into a private workplace because of the close government regulation of all aspects of the collective bargaining process. CBAs are unlike any other contract between private parties, and instead resemble government contracts. Mainly, CBAs are created through a government-controlled process, a process in which First Amendment speech rights are suspended because of the union’s status as the employees’ exclusive representative.<sup>111</sup> Moreover under the NLRA, union representatives are selected through an election process executed by the NLRB, an independent government agency charged with enforcing the NLRA.<sup>112</sup> Further, the government controls the contract discussions and negotiations,

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106. *Ellis v. Brotherhood of Ry.*, 466 U.S. 435, 455–56 (1984).

107. 29 U.S.C. § 159(a) (2012). Exclusive representation is not required unless employees vote for the union as their exclusive representative. Robert P. Hunter, *Exclusive Representation*, MACKINAC CTR. FOR PUB. POL’Y (May 1, 1997), <https://www.mackinac.org/1007>.

108. *See* Hunter, *supra* note 107.

109. 29 U.S.C. § 159(a); *see* *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337–38 (1994) (interpreting the NLRA and RLA as prohibiting employees from individually negotiating their terms and conditions of employment where an exclusive bargaining representative has been recognized).

110. 29 U.S.C. § 151; *see* *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202–03 (1944) (holding that exclusive representatives have the duty to represent non-members “fairly”).

111. 29 U.S.C. § 159(a).

112. *Id.* § 153(a)–(b).

which imposes a duty to bargain in good faith upon the union and the employer over the employees' terms of employment.<sup>113</sup>

CBA's differ from other contracts between private parties in that the government regulates who can be fired and when, imposes special procedures to enforce the CBA, and imposes agent-principal rules on the parties.<sup>114</sup> For example, the NLRA prohibits an employee from being fired based on their union membership status.<sup>115</sup> That the government regulates the conduct of all parties to the contract is unlike other contracts between private parties where the parties themselves govern their conduct. This indicates that unions are more comparable to government actors than to private parties, based on unions' power over the structure and execution of the workplace they represent.

Extensive regulation does not, however, transform private entities into government entities.<sup>116</sup> Rather, it is when an entity performs those functions that have been traditionally the exclusive prerogative of the federal government that it is considered a government agency.<sup>117</sup>

##### *5. Governmental Pressure to Include Union Security Clauses*

Union security clauses are commonplace in CBA's because of governmental pressure to include them. Although the Taft-Hartley Act outlawed closed shop agreements—agreements requiring persons to be members of the union to be eligible for employment—agency fee agreements are still permitted in the private sector.<sup>118</sup> These agreements require employees in the bargaining unit to join the union, if only in the financial sense of paying core dues to the union, to maintain employment with the employer.<sup>119</sup> Although employers and unions do not have to agree to a union security clause, the government, through the NLRA, places substantial pressure on the parties to do so as these clauses are mandatory subjects of bargaining.<sup>120</sup> Because the NLRB administers union security

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113. *Id.* § 158(d).

114. *Id.* at §§ 158(a)(3), 158(e); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (establishing that, “as the exclusive bargaining representative of the employees in [the] bargaining unit, the Union ha[s] a statutory duty fairly to represent all of those employees, both in its collective bargaining[], and in its enforcement of the resulting collective bargaining agreement”) (citations omitted); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962) (holding for the first time that a union's breach of its statutory duty of fair representation is a union unfair labor practice).

115. 29 U.S.C. § 158(a)(3).

116. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974).

117. *Id.* at 351; *see also Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

118. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 111 (1985).

119. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 739–40 (1963).

120. 29 U.S.C. §§ 158(a)(5), 158(d), 159(a); *see Gen. Motors Corp.*, 373 U.S. at 737–38, 740 (showing that governmental pressure to agree to some form of union security clause is applied by the NLRB and the federal courts); *see also Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 409 (9th Cir. 1977); *see also NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 133 (9th Cir. 1949).

clauses, this direct governmental involvement supports a finding of state action.<sup>121</sup>

#### 6. *Payment of Dues by Nonmembers*

More evidence of state action in the private workplace branches off from nonunion members inescapably subject to union security clauses. Because union security clauses apply to all private employees in the bargaining unit, individuals are compelled to become financial members of the union even if they are not compelled to participate in union activities.<sup>122</sup> This means that nonmembers are being compelled by the NLRB to support an entity they dislike, or be fired. This “pay-or-leave” requirement imposed by the NLRB cannot be said to be private conduct. It is the federal agency, not the union itself, that will uphold and require firing of a nonmember who refuses to pay dues.

### IV. CONCLUSION

State action is affirmatively present under the exclusive representation scheme in the private workplace based on a theory of state compulsion. In the union context, private actors (the unions) are directly authorized by the legislature (through the NLRA) to wield the specific power used to infringe dissenting employees’ First Amendment rights. Thus, the constitutional protections of the First Amendment apply when recalcitrant nonunion members are being subject to compulsory unionism.

It is unjust and unconstitutional to allow the views of minority workers to be suppressed by the impending and coercive power of American labor unions. Unions have grown far too political and have lost sight of the very reason they were created: to ensure that the individual voices of workers in the workplace were not overpowered by their employers or by superiors. Unfortunately, unions have created an environment they had at first wanted to mend. The dissenter should maintain just as much power and constitutional rights in the private sector as in the public sector.

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121. See *Havas v. Commc’ns Workers of Am.*, 509 F. Supp. 144, 149 (N.D.N.Y. 1981) (finding state action under the NLRA based on the federal government’s “omnipresent weight and power in this case behind the agency shop clause contained in the collective bargaining agreement.”).

122. See *Commc’ns Workers of Am. v. Beck*, 487 U.S. 735, 761–63 (1988) (holding that nonunion private sector employees must pay union dues covering collective bargaining activities).