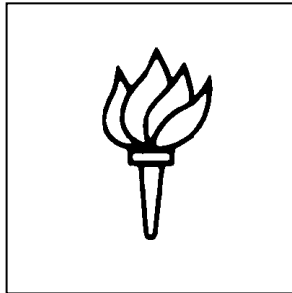


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Are Unions a Constitutional Anomaly?

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ABSTRACT

This term in Friedrichs v. California Teachers Association, the Supreme Court will take up the question whether ordinary public employees may constitutionally be required to pay an “agency fee,” as a condition of employment, to the union that represents them in collective bargaining. The terms of engagement were established in the Court’s 2014 decision in Harris v. Quinn, which struck down an “agency fee” on narrower grounds while describing the current doctrine approving agency fees, blessed many times by the Court itself, as an “anomaly.” This Article asks whether labor unions are themselves “anomalies” in our legal system, particularly in their constitutional entitlements. Its answer is a qualified and complicated “yes.”

Unions are indeed distinctive in our legal system -- distinctive even among private entities with public regulatory functions, which have frequently provoked constitutional controversy. On the one hand, unions are voluntary associations of workers with constitutional entitlements to freedom of expression and associational autonomy. On the other hand, unions are both regulated and regulatory actors within a statutory scheme that sets them far apart from other voluntary associations. They are subject to a sui generis constellation of rights, powers, restrictions, and duties -- a quid pro quo that both constrains and empowers unions, and that is embodied, in the paradigmatic case that is the central focus here, in the National Labor Relations Act, the Taft-Hartley Act, and the Landrum-Griffin Act. Whatever the wisdom of that particular quid pro quo -- and it has been criticized from both ends of the political spectrum -- it provides an essential context for the adjudication of constitutional claims by and against unions.

This Article calls for reframing those constitutional claims to include both the quid and the quo of labor law -- not only the alleged burdens that the labor laws impose on unions or individuals, but also any logically linked benefits or powers it confers on the claimant. If the alleged burden is logically linked to some corresponding benefit or power, the latter may offset or justify the former, and lower the level of constitutional scrutiny that is required. Rigorous attention to both the additions to and subtractions from unions’ entitlements under the labor laws, along with a cautious approach to the threshold question of “state action,” is necessary to preserve the residual yet fundamental autonomy interests of unions. The proposed analysis recasts not only the agency fee controversy and the related puzzle posed by state “right-to-work” laws, but also recurring challenges to the constitutionality of restrictions on union expression and recent efforts to bring “worker centers” under the umbrella of labor law. At the same time it offers clues to the future of unions and labor law if the Court continues down the path that may be foreshadowed in Harris.

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Introduction

This term in Friedrichs v. California Teachers Association¹ the Supreme Court will take up the question whether ordinary public employees may constitutionally be required to pay an “agency fee,” as a condition of employment, to the union that represents them in collective bargaining. The terms of engagement were established in the Court’s 2014 decision in Harris v. Quinn,² which struck down an “agency fee” provision on narrower grounds, but which expanded the “right to refrain” from associating with unions and raised the spectre of constitutionalizing across the nation the right-to-work regime that that now prevails in nearly half the states. Along the way, the Court proclaimed the current agency fee regime, blessed many times by the Court itself, to be an “anomaly.” This Article takes that observation as a point of departure for a broader inquiry into whether labor unions are themselves “anomalies” in our legal system, particularly in their constitutional entitlements. Its answer is a qualified and complicated “yes.”

It is important not to overstate the anomaly, for unions belong to a larger category of private entities with public regulatory functions.³ As Professor Louis Jaffe observed in 1937, the legislature “has neither the personnel nor the information to provide the detailed day-by-day regulation which is necessary if regulation is to be responsive to complex, ever changing situations.”⁴ Nor are administrative bodies always up to the job. Rather, “[g]roup self-government” by regulated actors can better solve some problems – for “experience and experiment lie immediately at hand” – and better satisfy demands for participation and self-expression in a complex democratic society.⁵ The New Deal launched a number of experiments in “group self-government,” some short-lived, others more enduring.⁶ More recently, much modern regulatory scholarship has converged

¹ No. 13-57095 (9th Cir. 2014), cert. granted, 135 S.Ct. 2933 (2015).

² 134 S. Ct. 2618 (2014).

³ For a classic early examination of the role of private groups in governance, see Louis L. Jaffe, Law Making by Private Groups, 51 **Harv. L. Rev.** 201 (1937).

⁴ Id. at 211–12.

⁵ Id. at 212.

⁶ In addition to the New Deal framework for collective bargaining, some New Deal-era programs delegated self-regulatory powers to trade associations and professional associations, the modern versions of which have generated a variety of constitutional controversies. See infra text accompanying notes 11–14. The idea of governing in part through private intermediate organizations -- corporations, unions, trade and professional associations -- had roots in both American and European reflections on how best to govern an increasingly complex industrial society. See James Q. Whitman, Of Corporatism, Fascism, and the First New Deal, 39 **Am. J. Comp. L.** 747, 761–64 (1991). Although “corporatism,” as this cluster of ideas came to be called, was neither historically nor logically allied with “fascism,” for historically contingent reasons that association took hold in the American mind in the 1930s. See id. at 754–55. It helped to doom the “First New Deal,” and curbed the nature and extent of “corporatist” policies in the U.S. thereafter. Id. at 777–78. The “Second New Deal,” of which the NLRA is a centerpiece, included more democratic and societal (vs. state-directed) forms of group self-government, along the lines advocated by Jaffe, supra note 3. In the realm of industry, the governance strategy shifted from corporatism toward a hybrid of industry

around the notion of “regulated self-regulation,” and the importance of engaging both targets and beneficiaries of regulation -- mostly private corporations and private associations -- in the regulatory enterprise.⁷ The domain of labor law, in which collective bargaining between unions and employers partially supplants direct regulation of terms and conditions of employment, was and is a leading exemplar of “regulated self-regulation” through private groups.⁸

Constitutional controversy has periodically flared over regulatory structures in which private groups play a leading role.⁹ The controversy was at its apex in the mid-1930s when the Court blew up central components of the early New Deal partly on grounds of improper delegation of legislative power to private groups.¹⁰ But even after the New Deal “switch in time,” public regulatory schemes in which private institutions play central roles have drawn constitutional scrutiny.¹¹ Examples include vestiges of New Deal-style corporatism, such as state-backed trade associations;¹² venerable vessels of professional self-regulation, such as the integrated bar associations that regulate lawyers in many states;¹³ and innovative adjuncts to urban government, such as “business improvement districts” that represent, tax, and regulate local businesses.¹⁴

regulation and a reinvigorated competition policy. See Michael L. Wachter, Labor Unions: A Corporatist Institution in a Competitive World, 155 U. Pa. L. Rev. 581 (2007).

⁷ See Ian Ayres & John Braithwaite, **Responsive Regulation** (1992); Peter Grabosky, Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process, 7 **Reg. & Governance** 114 (2013).

⁸ See Cynthia Estlund, **Regoverning the Workplace: From Self-Regulation to Co-Regulation** (2010).

⁹ Private delivery of public services – as by private prisons, military contractors, or hospitals – also raises constitutional questions, but of a rather different sort than I mean to include here. On the former, see Martha Minow, **Partners, Not Rivals: Privatization and the Public Good** (2002); Gillian E. Metzger, Privatization as Delegation, 103 **Colum. L. Rev.** 1367 (2003).

¹⁰ See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹¹ The Affordable Care Act alone generated two recent examples: National Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566 (2012), holding that the individual health insurance mandate was beyond Congress’s power to regulate commerce (though mostly within its taxing power) because it was more properly viewed as compelling commerce between individuals and private health insurance companies; and Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), holding (the same day as *Harris*) that closely-held for-profit corporations had a right on religious grounds to opt out of the ACA mandate to provide contraceptive coverage for their employees. *Hobby Lobby* was decided under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), but was quasi-constitutional in its reasoning and closely allied with the Court’s free exercise jurisprudence.

¹² See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (striking down federal law requiring fresh mushroom handlers to pay assessments that are mainly used to finance advertisements promoting mushroom sales).

¹³ See *infra* text accompanying notes 115-18.

¹⁴ See, e.g., *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92 (2d Cir. 1998) (rejecting one-person, one-vote challenge to “business improvement district” governed by local property owners). For a

One constitutional challenge to some of these public-private regulatory schemes is that they violate a First Amendment "right to refrain" from associating with private organizations and from contributing to their expressive activities.¹⁵ The single biggest target of these First Amendment challenges, and a recurring source of constitutional litigation from the New Deal to the present, has been organized labor. Under U.S. labor laws, unions typically represent not only their own members but also some non-members of the union, some of whom object to paying dues or fees that may be required of them as a condition of employment. Those objectors have contributed to and benefitted from an expanding constitutional "right to refrain" from what they claim is compelled association and expression.

For private entities with public regulatory functions, it may be inevitable that those regulatory functions come with powers, responsibilities, and restrictions that would otherwise be intolerable, or at least anomalous, for voluntary associations in a free society. But that is about as far as generalities will take us in understanding the nature of labor unions for purposes of constitutional adjudication. For unions are unlike other organizations in our society, even other private groups exercising public regulatory functions. Very simply, context matters, and it should matter in adjudicating constitutional challenges that arise from the mix of public and private power in the labor setting (as it should in other settings). This Article contends for what Professor Richard Pildes calls "institutional realism"¹⁶ in the constitutional review of claims by and against labor unions. Pildes addresses the constitutional status of public institutions such as courts and administrative agencies;¹⁷ but the virtues of realism versus formalism extend to the analysis of private institutions that play a central role in public regulatory schemes. Institutional realism in the labor law context requires courts to grapple with the institutional particularities of labor unions and labor law.¹⁸

Unions are voluntary membership associations with a long history of independent activism, a foundational claim to organizational autonomy, and constitutional rights to

review of the constitutional issues in this arena, see Richard Briffault, A Government for Our Time? Business Improvement Districts and Urban Governance, 99 **Colum. L. Rev.** 365, 430–54 (1999).

¹⁵ For a perceptive critique of the expanding "right to exit," or to "opt out" of some central public or civic project," see Robin West, A Tale of Two Rights, 94 **B.U. L. Rev.** 893, 894–95 (2014).

¹⁶ Richard H. Pildes, Institutional Formalism and Realism in Constitutional and Public Law, 2013 **Sup. Ct. Rev.** 1.

¹⁷ Id.

¹⁸ This is a call for categorical or "wholesale" realism about unions – one that is sensitive to their basic legal architecture, not to the particulars of one union or another at some particular time. That is how Pildes approvingly characterizes the argument about state courts in Burt Neuborne, The Myth of Parity, 90 **Harv. L. Rev.** 1105 (1977). Pildes, supra note 16, at 7–9.

freedom of speech and association.¹⁹ They were central protagonists in the epic industrial conflict that roiled American society for much of the past century; and they were also central to its settlement.²⁰ By virtue of that settlement, unions became regulatory actors, as well as regulated actors, in the administration of industrial relations, and became subject to a constellation of powers, privileges, duties, and restrictions that is unique to the labor relations setting. Labor law both restricts and empowers labor unions in ways that set them apart from other voluntary associations.²¹

Consider the current controversy over unions' ability to collect an "agency fee" from workers they represent, including objecting non-members. It is indeed unusual for voluntary associations to be able to demand fees from non-members. But it is equally unusual for voluntary associations to bear legal responsibilities toward non-members, as unions do when chosen by a majority of workers within a bargaining unit to serve as the exclusive representative of all. Over the course of several decades, Congress and the Court hammered out a constitutional compromise over the agency fee issue that governs both the public and private sectors: Individuals cannot be compelled as a condition of employment to join a union, nor to contribute money to its political and ideological activities; but they can be required, if a contract so provides and if state law allows, to pay the portion of union dues that reflects the costs of its collective bargaining and contract administration activities. The latter was necessary, said the Court, to prevent workers from "free riding" – from getting the benefit of the union's services without paying for them.²²

Alarm bells went off in the union bar in 2012 when a majority of the Court characterized the prevailing constitutional compromise over unions' ability to demand a fee from non-members as "something of an anomaly."²³ It is an "anomaly" that the Court found unacceptable for the so-called "partial public employees" in Harris – home health care workers who were state employees only for limited purposes – and that the Court will scrutinize closely when it confronts the challenge to agency fees in the core of public employment, as it will in Friedrichs. And if history is any guide, the issue will soon be joined in the private sector (where the First Amendment claim will face an imposing state action hurdle).

¹⁹ See Catherine L. Fisk & Margaux Poueymirou, Harris v. Quinn and the Contradictions of Compelled Speech, 48 Loy. L.A. L. Rev. (forthcoming 2015) (manuscript at 124–33), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535400.

²⁰ See *infra* text accompanying notes 198–99.

²¹ For example, labor law restricts union expression in ways that would be unconstitutional as applied to ordinary voluntary associations. See *infra* text accompanying notes 162–184.

²² See *infra* text accompanying notes 33–86. For a thoughtful constitutional defense of the pre-Harris agency fee structure along distinct but compatible grounds to those urged here, see Fisk & Poueymirou, *supra* note 19.

²³ Knox v. Service Employees International Union, Local 1000, 132 S. Ct. 2277, 2290 (2012).

This Article uses the agency fee conundrum as a point of entry into a deeper inquiry into why and how unions are distinctive in our legal system (and elsewhere). The power to compel dissenting non-members to pay an agency fee to a union must be understood as part of a tacit legislative bargain – a larger constellation of rights, powers, restrictions, and duties that U.S. labor law confers or imposes on unions. The “free rider” problem at the heart of both Harris and Friedrichs only hints at the larger quid pro quo by which the labor laws constrain and empower unions.²⁴ Some of its particulars vary across the federal and state laws that govern private and public sector labor relations; but the basic architecture of all those labor laws echoes that of the National Labor Relations Act (NLRA) regime that governs most of the private sector, and that will serve as the paradigmatic case here.

Under the NLRA, unions gained powers and privileges unlike those of other voluntary associations. Those are mainly embodied in the principle of exclusive representation and the employer’s duty to bargain in good faith, both contingent on a collective decision by a majority of employees in a particular workplace in favor of union representation.²⁵ But unions also lost large chunks of the autonomy and freedom of action that other voluntary associations enjoy, or later came to enjoy, under the First Amendment.²⁶ Both the unusual powers of unions (conferred in the original NLRA in 1935) and the unusual restrictions on their associational and expressive freedoms (mostly codified into federal law by the Taft-Hartley amendments of 1947 and the Landrum-Griffin Act of 1959) have generated constitutional controversies over the decades. This Article seeks to illuminate those controversies by linking the quid and the quo of labor law – both the additions to and the subtractions from unions’ entitlements – in the constitutional analysis of its parts. The unusual restrictions on unions, and the corresponding benefits to individuals, might justify the unions’ unusual legal privileges and powers. That might help the unions in their agency fee battles. But the reverse is also true: Unions’ unusual legal privileges and powers might justify some of the unusual restrictions on their freedom and autonomy.

Either way, the first step in a sensible constitutional analysis in this area -- that is, assuming a threshold finding of state action -- is to identify the net burdens imposed on

²⁴ The concept of a “quid pro quo” in labor law is unsurprising in a statute devoted to encouraging bargaining. For example, the quid pro quo between unions’ no-strike promise and management’s agreement to arbitrate disputes under a collective bargaining agreement. *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). *Lincoln Mills* has been criticized for its skew toward management in Staughton Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 *Case W. Res. L. Rev.* 396 (1979). This Article elaborates a different quid pro quo that governs the constitutional treatment of unions as institutions under the labor laws.

²⁵ See *infra* text accompanying notes 140–153.

²⁶ See *infra* text accompanying notes 162–184.

the individual or institutional claimant. That requires us to expand the frame of analysis, and to ask whether the alleged burden on constitutional rights – the rights of individuals in relation to unions or of unions themselves – is rationally linked to, and potentially offset or justified by, a corresponding benefit or power that the rights-bearer enjoys under the same legal framework.²⁷ Juxtaposing the quid to the quo -- the additions to and the subtractions from the baseline powers, privileges, and restrictions that would otherwise apply to unions as voluntary associations – does a better job both of identifying the constitutional interests at stake and of preserving the residual liberty and autonomy that both unions and individuals ought to enjoy within a system in which unions function in part as regulatory actors.

The point here is decidedly not that the existing statutory quid pro quo gets it just right, or that the courts should defer to “Congress’ striking of the delicate balance” among the competing interests at stake in labor relations, as the Supreme Court has been wont to do.²⁸ As a policy matter, I join the legions of labor law scholars who contend that the “delicate balance” struck by Congress is far out of whack, and sharply tilted against workers’ ability to claim union representation and the benefits of collective bargaining.²⁹ These arguments are not irrelevant to the constitutional analysis of claims by and against unions, but they are not constitutional arguments. This Article takes the basic architecture of the existing labor law system as given, and asks how it should shape the analysis of constitutional claims by and against unions. It argues that the link between the quid and the quo must be more fine-tuned than a general wave in the direction of “Congress’ striking of the delicate balance.”

The thesis developed here recasts the First Amendment problem posed by agency fees by clarifying – and dramatically deflating – the “net” burden on individual rights imposed by the partial agency fee that unions in most states are able to charge represented individuals. When both sides of the ledger are taken into account, agency fees look less like an anomalous deviation from normal constitutional principles, and more like an

²⁷ The proposed analysis is an illustration of the “framing” exercise that appears frequently, and usually sub rosa, in constitutional analysis, as elucidated in Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 **Yale L.J.** 1311 (2002). See infra text accompanying notes 219–220.

²⁸ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (quoting *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 617 (1980) (Blackmun, J., concurring in part)). That is the gist of the Supreme Court’s justification for upholding restrictions on unions’ peaceful secondary picketing against First Amendment objections. See id.; infra note 283 and accompanying text.

²⁹ For a small sampling of perspectives on the law’s tilt against workers’ collective action, see **James B. Atleson**, Values and Assumptions in American Labor Law (1983) and **Julius Getman**, The Betrayal of Local 14 (1998); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 **Minn. L. Rev.** 265 (1978); Lynd, supra note 24; Joel Rogers, Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws”, 1990 **Wis. L. Rev.** 1; Paul Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 **Harv. L. Rev.** 1769 (1983); Paul Weiler, Striking a New Balance: Freedom of Contract and the Prospects for Union Representation, 98 **Harv. L. Rev.** 351 (1984).

integral and logical component of a deliberately constructed system for regulating industrial relations, one from which individuals should have no right to “opt out.” Indeed, state right-to-work laws, which bar unions from recovering agency fees from non-members who benefit from the union's services, emerge as the real constitutional anomaly, given the overall federal scheme; and the quid pro quo thesis gives reason to revisit the extent to which those state laws are preempted by the NLRA.

The quid pro quo thesis also casts a revealing light on other labor law controversies, old and new. Consider, for example, the constitutionality of restrictions on unions’ peaceful picketing, enacted nearly 70 years ago in a context of growing union power.³⁰ The quid pro quo thesis suggests that the role of federal law in buttressing union power might justify some of those restrictions; but it calls for a more finely tuned inquiry than an invocation of “Congress’ striking a delicate balance”: To the extent that the restricted forms of union expression are fortified by, or would trigger, extraordinary powers or privileges that the law grants to unions, that might justify some of the law’s extraordinary restrictions on union expression.

The quid pro quo thesis also illuminates a recent controversy over the legal status of “worker centers” – informal associations of workers that advocate for low-wage workers.³¹ The claim by some advocates that worker centers are “labor organizations” under the labor laws attempts to divorce labor law’s quid from its quo – to impose the extraordinary restrictions of federal labor law on voluntary associations of workers that neither exercise nor claim the special privileges and powers that the labor laws afford unions. Without the special privileges and powers of unions, there is no constitutional justification for narrowing the freedoms of association and expression that the First Amendment affords to these voluntary associations. Indeed, the present of worker centers may foreshadow the future of unions. For if the special legal privileges and powers of unions become too eroded by legislative or judicial action, they may cease to supply a justification for the exceptional duties and restrictions that the law imposes on unions. The point will be sharpened if the right-to-work movement succeeds in its campaign against all agency fees and, by design or by implication, against the principle of exclusive representation.

Part II of this Article will sketch the background of the agency fee debate, and take note of some peculiar features of that debate, with the aim of beginning to elucidate the “anomalous” nature of unions. Part III will outline the basic architectural features of labor law – the components of the quid pro quo – that render unions “anomalous” in our legal

³⁰ See discussion infra Section III.A.2.

³¹ Benjamin Sachs, Worker Centers and the “Labor Organization” Question, **On Labor** (Sept. 1, 2013), <http://onlabor.org/2013/09/01/worker-centers-and-the-labor-organization-question/> (describing recent advocacy efforts).

system. It will also argue that, while the precise contours of the quid pro quo in U.S. labor law are distinctive, some kind of distinctive quid pro quo is common to Western industrial relations systems, for its roots lie in the nature of wage labor and labor conflict in democratic market economies. Part IV will propose a reframing of the constitutional analysis of claims by and against unions that takes appropriate account of the quid pro quo in U.S. labor law, and will apply the proposed analysis to several live constitutional controversies involving unions: the agency fee problem, the puzzle of state right-to-work laws, the constitutionality of restrictions on union expression, and the legal status of “worker centers.” And it will briefly consider some consequences for the future of unions in a hypothetical post-agency fee, post-exclusivity world.

A better theory of unions will not reverse the longstanding trend of union decline. Indeed, it may be vain to hope that a better theory of unions will alter even the course of constitutional adjudication in labor law. Judicial attachment to an ever more robust individual “right to refrain” from collective decisions and institutions and growing skepticism toward organized labor are mutually reinforcing; together they act as a powerful prism, bending the light cast by theory. But even if that is so, a better legal theory of unions may illuminate the current path and where it might lead in the field of labor law.

II. Putting the Agency Fee Controversy in Context

The campaign against mandatory union fees began soon after the New Deal labor legislation put the force of federal law behind the right to form a union and to bargain collectively. Under both the NLRA³² and the earlier Railway Labor Act (RLA),³³ once a majority of employees in an appropriate bargaining unit chooses to be represented by a union, the union becomes the exclusive representative of the whole bargaining unit; and the employer has a duty to bargain with the union over all those employees’ wages and working conditions.³⁴

One of the things unions have historically bargained for is “union security” provisions that require workers to join the union or to pay union dues as a condition of employment.³⁵ Union security provisions, the changing nature of which is at the heart of this story, were controversial both inside and outside the labor movement. For some labor activists on the left, union security provisions tended to promote union bureaucratization

³² 29 U.S.C. §§ 151–169 (2012).

³³ 45 U.S.C. §§ 151–188 (2012).

³⁴ 29 U.S.C. § 159(a); 45 U.S.C. § 152, Fourth.

³⁵ As part of “union security,” unions often bargain for “dues check-off,” or deduction of dues from employees’ paychecks. Michael M. Oswalt, Note, The Grand Bargain: Revitalizing Labor Through NLRA Reform and Radical Workplace Relations, 57 *Duke L.J.* 691, 698–99, 702 n.60 (2007).

and insulation from the rank-and-file.³⁶ But those provisions were also controversial among a coalition of anti-union activists who claimed for themselves the appealing moniker of "right to work."³⁷ The political branch of the right-to-work campaign produced a series of state right-to-work or "open shop" laws, most of which bar any requirement of union membership or fees as a condition of employment.³⁸ The legal branch of the campaign has produced dozens of judicial decisions on the constitutionality and contours of mandatory union fees, to which we will turn below.

In view of its larger agenda, this Article will begin with a brisk stroll through the broader historical and constitutional landscape surrounding the agency fee question.³⁹ It will tarry for a while in the 1940s, for, with one exception discussed in Part III, that is the last time Congress made major revisions to the basic labor law framework that governs most of the private sector today.⁴⁰

A. A Short History of the Long Campaign against Union Security

The Supreme Court's 1944 decision in Steele v. Louisville & Nashville Railroad Co.⁴¹ is a fitting place to begin; although not a case about union security, it was the Court's first effort to reckon with the constitutional implications of union conduct in the post-New Deal era. The plaintiff in Steele was a black railroad worker who was represented in collective bargaining by an all-white union.⁴² Based on majority support in the larger bargaining unit, the union was designated under the RLA as the workers' exclusive representative; and it proceeded to bargain with the employer to marginalize

³⁶ See Staughton Lynd, Ideology and Labor Law, 36 **Stan. L. Rev.** 1273, 1283–84 (1984) (book review). Lynd reports ACLU opposition to emerging labor reform proposals in 1933, and specifically to the endorsement of exclusive representation, the closed shop, and dues check-off, for their tendency to entrench union bureaucrats to the detriment of rank-and-file worker activists. Id. at 1295–96. Lynd is particularly critical of "dues check-off" provisions: "[U]nion representatives no longer had to approach the membership on the shop floor in order to collect dues, and came to enjoy a secure income insulated from accountability" and insulation from the rank-and-file membership. Id. at 1283–84.

³⁷ Sophia Z. Lee, The Workplace Constitution from the New Deal to the New Right 56–78 (2014).

³⁸ See Raymond L. Hogler, The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions, 23 **Hofstra Lab. & Empl. L.J.** 101, 129–31 (2005); infra text accompanying notes 48–57.

³⁹ The history of both the agency fee controversy and the civil rights challenges to unions is brilliantly traced in Lee, supra note 37. For my review of Lee, see Cynthia Estlund, How the Workplace Constitution Ties Liberals and Conservatives in Knots, 93 **Tex. L. Rev.** 1137 (2015) (book review).

⁴⁰ Cynthia L. Estlund, The Ossification of American Labor Law, 102 **Colum. L. Rev.** 1527, 1532–44 (2002).

⁴¹ 323 U.S. 192 (1944). The story of Steele is retold in Lee, supra note 37, at 28–34. See generally Deborah C. Malamud, The Story of Steele v. Louisville & Nashville Railroad: White Unions, Black Unions, and the Struggle for Racial Justice on the Rails, in **Labor Law Stories** 55 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

⁴² Steele, 323 U.S. at 194–96.

black workers and ultimately drive them out of their jobs.⁴³ That was what exclusive union representation meant for many black railroad workers in the era of Jim Crow. (Fortunately for them, the RLA then barred “closed shop” and “union shop” agreements, which limited employment to union members.⁴⁴ In industries covered by the NLRA, “closed shop” agreements in some trades made all-white unions the gatekeepers to the trade and prevented black workers from even getting their foot in the door.⁴⁵)

Faced with this injustice, the Supreme Court read into the RLA a union duty to fairly represent all of the workers in the bargaining unit.⁴⁶ It did so to avoid “constitutional questions.” Of course, “constitutional questions” would arise only if the discrimination stemmed from “state action”; but state action was arguably present here in the statutory principle of exclusive representation: “For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to . . . discriminate against . . . those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.”⁴⁷ That sentence was virtually the entire analysis of the state action question that the Court avoided by finding a statutory duty of fair representation. Steele’s broad but vague theory of state action has cast a constitutional shadow under which the history of litigation against private sector unions has unfolded.

By the time of Steele, the nascent right-to-work movement had already begun to campaign against mandatory union fees; and its lawyers had begun to craft constitutional challenges to union security provisions.⁴⁸ Like the Steele plaintiffs, the “right-to-work” advocates sought to salvage an individual constitutional “right to work” from the general disrepute into which the old “liberty of contract” doctrine had recently fallen.⁴⁹ But they also relied on newly-emerging constitutional case law protecting minority and individual rights against majoritarian overreach, and on an expanding conception of “state action” of the sort that Steele hinted at.⁵⁰ Turning the emerging liberal jurisprudence to the anti-union cause was made easier in the early 1940s by the racially exclusionary practices of some unions and the power that they exercised over individuals’ ability to get or keep a

⁴³ Id.

⁴⁴ See *Railway Empl. Dep’t v. Hanson*, 351 U.S. 225, 231 (1956).

⁴⁵ See Note, *Discrimination by Labor Union Bargaining Representatives Against Racial Minorities*, 56 *Yale L.J.* 731 (1947).

⁴⁶ Steele, 323 U.S. at 202–03.

⁴⁷ Id. at 198 (emphasis added).

⁴⁸ See Lee, *supra* note 37, at 59–66.

⁴⁹ See id. at 62–66.

⁵⁰ See id. at 64–66. One might detect opportunism if not cynicism in these arguments, for the early right-to-work movement was funded largely by anti-New Deal conservatives and industrialists, and it drew much of its popular support from Southern white supremacists. Id. at 128.

job.⁵¹ In both closed shops, common in craft unions of the American Federation of Labor (AFL), and union shops, favored by some industry-wide unions of the Congress of Industrial Organizations (CIO), union membership was a condition of employment, and the union controlled membership.⁵²

The “right-to-work” movement, together with anti-New Dealers, anti-Communists, anti-collectivists, and moderates who believed that unions had become too powerful, scored a colossal victory with the Taft-Hartley Act of 1947.⁵³ Taft-Hartley amended the NLRA and reshaped the New Deal labor settlement in some very basic ways to which we will return. Some provisions directly curbed unions’ collective economic power vis-à-vis employers, largely by restricting unions’ ability to appeal to workers or consumers for their support in labor disputes.⁵⁴ Other provisions of Taft-Hartley weakened unions’ power vis-à-vis individual workers. In particular, Congress abolished the closed shop and whittled the union shop down from a requirement of membership (controlled by the union) to a requirement of dues payment.⁵⁵

⁵¹ *Id.* at 129.

⁵² See Kenneth G. Dau-Schmidt, Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck, 27 *Harv. J. on Legis.* 51, 81-84 (1990). The CIO was itself a pioneer of racial integration. See **Lizabeth Cohen, Making a New Deal: Industrial Workers in Chicago, 1919–1939**, 333–37 (2d ed. 2014); William E. Forbath, Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements, 2 *U. Pa. J. of Lab. & Empl. L.* 697, 701-05 (2000). That did not erase ambivalence or worse among the white rank-and-file, however. *Id.* at 703.

⁵³ Labor Management Relations (Taft-Hartley) Act, 61 Stat. 136 (1947) (codified as amended at 29 *U.S.C.* §§ 141–197 (2012)).

⁵⁴ See discussion *infra* Section IV.B.3.

⁵⁵ The NLRA as amended prohibits employer “discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization.” 29 *U.S.C.* § 158(a)(3). That is followed by two provisos: First, nothing in the Act precludes “an agreement with a labor organization . . . to require as a condition of employment membership therein” within 30 days after hiring; and second:

[N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id. As the Court explained in *Communications Workers of America v. Beck*, “[t]aken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the ‘membership’ that may be so required has been ‘whittled down to its financial core.’” 487 U.S. 735, 745 (1988) (footnote omitted) (quoting *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963)).

After the Taft-Hartley Act, unions operating under the NLRA could no longer lawfully control individuals' right to work.⁵⁶ Yet the "right-to-work" campaign against mandatory union fees continued. The amended NLRA gave a green light to the ongoing campaign to pass "open shop" or "right-to-work" laws at the state level: Section 14(b) of the amended Act expressly permitted states to bar contracts requiring union membership.⁵⁷ The constitutional battles also continued, and the "state action" issue moved to center stage. (Public sector unionism, where state action was more direct, was still in the future.)

By the late 1940s, the "right-to-work" lawyers had both Steele and Shelley v. Kraemer⁵⁸ to aid them in their constitutional attacks on union security provisions. But those provisions were located in privately bargained agreements, not in the labor statutes; and they were rarely enforced by courts.⁵⁹ So the right-to-work lawyers were moved to argue that there is state action whenever the courts permit a powerful private entity to infringe the constitutional rights of individuals.⁶⁰ Among other things, this theory would have upended the venerable but much-criticized employment-at-will doctrine, and exposed private employers to a wide array of constitutional rights claims by their employees.⁶¹ Although the Supreme Court never went as far as right-to-work advocates (and some civil rights advocates) urged, beginning in the 1940s the Court did expand both the meaning of state action and the scope of substantive civil rights and civil

⁵⁶ On the ground unions continued to exercise considerable power over access to employment in many trades, partly because some outlawed union security practices continued "by subterfuge in many instances." Clyde W. Summers, Union Powers and Workers' Rights, 49 **Mich. L. Rev.** 805, 807 & n.5 (1951) [hereinafter Summers, Union Powers].

⁵⁷ NLRA Section 14(b) provides: "Nothing 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." 29 **U.S.C.** § 164(b). That provision has been generally understood to allow state laws that prohibit not only agreements requiring union membership but also those requiring payment of any union fees. But that understanding has come under some pressure as mandatory union fees have been whittled down through Supreme Court adjudication to the non-political "agency fee" for representation. See *infra* text accompanying notes 244-51.

⁵⁸ 334 U.S. 1 (1948) (holding that judicial enforcement of private restrictive covenant barring sale of real estate to black buyers was state action in violation of the Fourteenth Amendment).

⁵⁹ See Lee, *supra* note 37, at 75-77.

⁶⁰ They argued in one brief: "No distinction can properly be made as to whether the judicial action challenged on constitutional grounds is affirmative or negative." *Id.* at 77. For one thoughtful critique of this state action theory, see Harry H. Wellington, The Constitution, the Labor Union, and "Governmental Action", 70 **Yale L.J.** 345 (1961).

⁶¹ See Lee, *supra* note 37, at 77, 231-33. Arguments for the abandonment of employment-at-will gained wide currency in the 1960s and 1970s. See, e.g., Lawrence E. Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 **Colum. L. Rev.** 1404 (1967); Cornelius J. Peck, Unjust Discharges from Employment: A Necessary Change in the Law, 40 **Ohio St. L.J.** 1 (1979); Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 **Va. L. Rev.** 481 (1976).

liberties, including freedoms of speech and association.⁶² Armed with those expanding constitutional rights, the “right-to-work” movement continued its legal battle against mandatory union fees. Both the labor movement and its adversaries counted many of the key decisions as losses, for unions long sought to defend their right to collect full union dues from unit members, as the labor statutes on their face allowed, while the latter maintained that any mandatory union fees violated the First Amendment.⁶³

The right-to-work advocates lost the maximalist argument in Railway Employees’ Department v. Hanson,⁶⁴ which in 1956 upheld a “union shop” agreement under the RLA against the claim that it violated dissenters’ free speech rights to compel them to join or pay any dues to a union that they opposed. The Court in Hanson found state action in the RLA’s recent authorization of union shop agreements and its preemption of contrary state laws.⁶⁵ (The NLRA did the former, but not the latter.) As a consequence, said the Court, a union security agreement under the RLA had “the imprimatur of the federal law upon it.”⁶⁶ Still, there was no constitutional violation: “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.”⁶⁷ The plaintiff in Hanson had failed to support the narrower claim “that compulsory membership will be used to impair freedom of expression.”⁶⁸

The narrower claim was presented five years later in International Association of Machinists v. Street,⁶⁹ in which a majority of the Court held that the RLA itself “denies the authority to a union, over the employee’s objection, to spend his money for political causes which he opposes.”⁷⁰ Several justices found it inescapably clear that the RLA gave unions precisely that authority, and thus found it impossible to avoid the constitutional question; but they disagreed on how to resolve it. Justice Black would have held that “the federally sanctioned union-shop contract” unconstitutionally allowed unions to finance political causes that are deeply opposed by “those whose money has been forced from them under authority of law,” and “injects federal compulsion into the political and

⁶² See Lee, *supra* note 37, at 232–33.

⁶³ This account will be brief, for the history of this litigation is familiar, and well-recounted elsewhere. For two excellent recent accounts, see *id.* at 56–78, 115–32, 223–55, and Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After Citizens United, 112 *Colum. L. Rev.* 800, 811–19 (2012) [hereinafter Sachs, Unions, Corporations].

⁶⁴ 351 U.S. 225 (1956).

⁶⁵ As of 1951, the RLA not only “permit[ted] the negotiation of union shop agreements,” but “expressly allow[ed] those agreements notwithstanding any law ‘of any State.’” Hanson, 351 U.S. at 232.

⁶⁶ Id.

⁶⁷ Id. at 238.

⁶⁸ Id.

⁶⁹ 367 U.S. 740 (1961).

⁷⁰ Street, 367 U.S. at 750.

ideological processes.”⁷¹ But Justices Frankfurter and Harlan found “not a trace of compulsion” in allowing a union, “democratically elected by a majority of workers,” to enter into a union shop agreement “under the give-and-take of duly safeguarded bargaining procedures.”⁷² Even if there were federal compulsion, the constitutional claim was “too fine-spun”: “The individual member may express his views in any public or private forum as freely as he could before the union collected his dues.”⁷³ Given the majority’s strained interpretation of the RLA, however, the constitutional controversy remained unresolved.

Street established a basic compromise that held for over half a century: It was permissible to charge objectors for union expenditures that were germane to collective bargaining and contract administration; that was a legitimate response to the free rider problem otherwise created by the union’s duty of fair representation.⁷⁴ But it was not permissible to charge objectors for political and ideological expenditures;⁷⁵ such charges failed to address a free rider problem, and created a colorable “compelled speech” problem.

The split verdict of Street was later extended to the public sector in Abood v. Detroit Board of Education in 1977,⁷⁶ and to the rest of the private sector, under the NLRA, in Communications Workers of America v. Beck in 1988.⁷⁷ All of the relevant labor statutes – state and federal, public and private – provided that a union supported by a majority within an appropriate bargaining unit became the exclusive representative of all unit employees, and was required (by judicial construction) to fairly represent members and non-members alike.⁷⁸ As the Court explained in Abood, whatever minor infringement agency fees entailed for dissenters’ free speech interests was justified by the state’s legitimate interest in preventing free riders from undermining the union’s ability to represent the whole bargaining unit.⁷⁹

⁷¹ Id. at 789 (Black, J., dissenting).

⁷² Id. at 807 (Frankfurter, J., dissenting). They added, citing Steele, that the RLA “forbids distortion of these procedures as, for instance, through racial discrimination.” Id. By the time of Street, Congress had enacted the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 431(a) (2012), which imposed standards of democracy, free speech, and due process in internal union affairs, as well as extensive reporting and disclosure requirements. See *infra* text accompanying notes 178–180.

⁷³ Street, 367 U.S. at 806 (Frankfurter, J., dissenting).

⁷⁴ See id. at 768–70 (majority opinion).

⁷⁵ Id.

⁷⁶ 431 U.S. 209 (1977).

⁷⁷ 487 U.S. 735 (1988).

⁷⁸ Sachs, Unions, Corporations, *supra* note 63, at 811 & n.48.

⁷⁹ See Abood, 431 U.S. at 224–26; see also Beck, 487 U.S. at 753; Street, 367 U.S. at 767.

Street, Abood, and Beck thus reached parallel results, but by different routes. In Abood, where state action was undeniable and constitutional avoidance unavailable, the majority accepted the “fine spun” First Amendment objection that was avoided in Street;⁸⁰ but it also accepted the free rider argument in support of the core agency fee.⁸¹ In Street, and again in Beck, the Court avoided the constitutional issue by locating the distinction between chargeable and non-chargeable expenses in rather strained interpretations of the RLA and the NLRA. The Court has never decided whether there is state action in a collectively-bargained requirement of dues payment that is merely permitted by the NLRA.⁸²

As of Beck, the right-to-work advocates had succeeded in denying unions the ability to require either full membership or contributions to their political activities as a condition of employment, and in making the core agency fee-for-services the outer limit of union security nationwide in both the private and public sectors. Most state right-to-work laws prohibit mandatory union fees of any kind; and the NLRA as conventionally read saves those state laws from preemption.⁸³ On that view, which we will revisit below, federal labor law allows states to create a free-rider problem by denying unions the ability to require workers to pay for services that federal law requires unions to render as part of their duty of fair representation. In non-right-to-work states, federal labor law enables unions to solve that free-rider problem by bargaining for union security provisions that require payment of the core agency fee as a condition of employment. In all states,

⁸⁰ Abood, 431 U.S. at 232–37.

⁸¹ Id. at 224–26. Justice Rehnquist agreed, though he did so based on his view of the limited First Amendment rights of public employees; he chastised the liberal justices in the majority for avoiding the implications of their prior decisions expanding public employee speech rights. See id. at 242–44 (Rehnquist, J., concurring).

⁸² Brishen Rogers identifies in these decisions a “civil libertarian” conception of workers’ freedom of association, in contrast to the “social democratic” conception that preceded it (and the “neoliberal” conception that may be supplanting it). See Brishen Rogers, Three Liberal Concepts of Workplace Freedom of Association, -- Berk. J. of Empl. & Lab. L. --- (forthcoming 2015). The “civil libertarian” conception of freedom of association that came to the fore in Street and its progeny distinguishes between economic and political associations; it condemns compelled support of the latter but not of the former. Rogers seeks instead to rehabilitate a “social democratic” (and New Deal) vision, which values associations of workers and their economic *and* political activities as a means of combatting economic inequality; in that vision, individuals could be compelled to join and pay dues to a majority-backed union, provided that they are entitled to participate freely and equally in democratic union governance. I find Rogers’ analysis illuminating, and its potentially sweeping normative implications quite attractive. But this Article’s aim is more internal to existing law (including parts of it that I would gladly revise). It seeks to elucidate the existing statutory architecture of labor law and its implications for the constitutional analysis of its parts.

⁸³ That is despite a more-than-plausible reading of the NLRA to the contrary. See infra text accompanying notes 251–275.

individual objectors have a right – statutory in form, quasi-constitutional in content – to opt out of the political portion of union dues.⁸⁴

After Beck, the right-to-work advocates continued to batter the unions with litigation, much of it reaching the Supreme Court, over precisely which expenses were “germane” to collective bargaining and chargeable to dissenters and which were not,⁸⁵ and over the procedures for allowing dissenters to opt out of the non-chargeable portion of dues.⁸⁶ But their ultimate goal remained clear: Workers should not have to pay any dues at all to a union they oppose, even if the union represents them in collective bargaining and in grievances, and even if it thereby secures higher wages and benefits for them. The Constitution in their view compels an “open shop,” or a “right-to-work regime,” across the country.

B. Harris v. Quinn, and Some Paradoxes in the Agency Fee Debate

That maximalist claim recently prevailed for one group of public employees in Harris v. Quinn. The Harris petitioners were several in-home care workers employed both by the state of Illinois and by individual clients.⁸⁷ State employment had allowed the in-home care workers to choose union representation, which they did by majority vote, and to engage in collective bargaining, which yielded them a near-doubling of their wages, health insurance, and training and safety provisions.⁸⁸ And it required the workers, including those who opposed union representation, to pay a “fair share” agency fee for the cost of collective bargaining and contract administration, as sanctioned by Abood.⁸⁹ There was no doubt that the agency fee provisions in Harris reflected “state action.”

The Court in Harris, by a 5-4 vote, struck down the “fair share” agency fee as a violation of the dissenters’ First Amendment rights. The Harris Court was not persuaded that the “free rider” problem that has been pivotal to the Court’s acceptance of agency fees up to now was unique enough or serious enough to justify the imposition on objectors’ First Amendment rights, nor that the mandatory agency fee was necessary to advance the public’s interest in a system of collective bargaining based on exclusive

⁸⁴ Notably, corporate shareholders enjoy no parallel right to opt out of contributing to corporations’ political expenditures, now permissible under Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). Professor Sachs argues persuasively that the asymmetry is unjustifiable. See Sachs, Unions, Corporations, *supra* note 63.

⁸⁵ See, e.g., Locke v. Karass, 555 U.S. 207 (2009); Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507 (1991); Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435 (1984).

⁸⁶ See Harris v. Quinn, 134 S. Ct. 2618, 2633 (2014).

⁸⁷ Id. at 2623–24, 2626.

⁸⁸ Id. at 2648 (Kagan, J., dissenting).

⁸⁹ Id. at 2645.

representation and majority rule.⁹⁰ The Court distinguished Abood rather than overruling it, citing the attenuated nature of the in-home care workers' employment relationship with the state in Harris: the state had defined those workers as its "employees" only for purposes of collective bargaining, and the scope of collective bargaining was narrower than for ordinary public employees.⁹¹ But the Court's newly invented distinction between "full-fledged" and "partial" public employees, ably dismantled by Justice Kagan in dissent,⁹² may not last for long. For the majority sent strong signals that Abood, and mandatory agency fees for "full-fledged" public employees, were now in the Court's crosshairs. And the Court's grant of certiorari in Friedrichs ensured that the issue would be joined sooner rather than later.

The history of constitutional litigation over union security suggests that the action will soon move to the private sector. At each step along the way – from Harris to ordinary public sector employees in Friedrichs, and from there to the private sector employees covered by the RLA and the NLRA – the right-to-work movement's constitutional claims against union security face additional doctrinal hurdles. In particular, the state action issue will be a formidable obstacle to those claims, especially under the NLRA. But eventually those claims, in gestation for over 70 years, are almost certainly bound for the Supreme Court.

It is worth pausing to take note of some peculiarities in the legal debate over agency fees – peculiarities that produce strange bedfellows and intellectual contortions on both sides of the debate, and that begin to expose larger questions about the nature of unions for purposes of constitutional analysis.⁹³ To begin with, in holding that compelled support of unions' bargaining activities triggers "exacting First Amendment scrutiny," the Harris majority proclaimed that bread-and-butter collective bargaining issues in the public sector were "matters of public concern."⁹⁴ Ordinarily that might be cause for celebration among liberal scholars, who have criticized the Court's holding in Connick v.

⁹⁰ Id. at 2637–43 (majority opinion).

⁹¹ Id. at 2634–36. The home care workers were defined as public employees "[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act." 20 **Ill. Comp. Stat.** 2405/3(f) (2012). But the state also paid their salaries and maintained sufficient control over the workers' terms and conditions of employment to qualify them as "employees" under the standard common law definition. Harris, 134 S. Ct. at 2646–47 (Kagan, J., dissenting).

⁹² Harris, 134 S. Ct. at 2648–51 (Kagan, J., dissenting); see also Fisk & Poueymirou, supra note 19, at 114–15.

⁹³ See Lee, supra note 37, at 245 (recounting Justice Rehnquist's description of Justice Brennan's opinion in United Steelworkers v. Weber, 443 U.S. 193 (1979), as "Houdini-like" in escaping from the implications of Brennan's own prior rulings).

⁹⁴ Harris, 134 S. Ct. at 2639, 2642 (majority opinion) (quoting Knox v. Service Employees International Union, Local 1000, 132 S. Ct. 2277, 2289 (2012), and Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

Myers⁹⁵ that public employees' ordinary workplace grievances are not "matters of public concern," and enjoy no First Amendment protection as against their employers.⁹⁶ In Harris, however, it was the liberal dissenters who cited Connick's stingy conception of "matters of public concern" as support for the current agency fee compromise and the line it draws between chargeable collective bargaining expenses and non-chargeable political expenses.⁹⁷

The irony will resurface as the litigation moves to the private sector. The Harris majority suggested in dicta that "core issues such as wages, pensions, and benefits" are not usually important political issues in the private sector, and that compelled support of speech on such issues might not raise a First Amendment question.⁹⁸ That is one point on which the unions may hang their hat in resisting the extension of Harris to the private sector.⁹⁹ But if they do, they may have to turn their backs on a revered Supreme Court precedent, Thornhill v. Alabama,¹⁰⁰ which declared in 1940 that "labor relations are not matters of mere local or private concern," and that peaceful communication of the facts of ordinary labor disputes, including by means of picketing, was entitled to a high level of First Amendment protection.¹⁰¹

Other ironies await in the state action issue that will come to the fore in the private sector agency fee litigation. Liberal labor and employment law scholars have long sought to infuse constitutional principles into the private sector workplace. In the long wait for

⁹⁵ 461 U.S. 138 (1983).

⁹⁶ See Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1 (1990); Richard Michael Fischl, Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?, 10 Cardozo L. Rev. 729, 736–37 (1989); Risa L. Lieberwitz, Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace, 19 U.C. Davis L. Rev. 597, 648–49 (1986); Toni M. Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. Cal. L. Rev. 3, 29 (1987).

⁹⁷ Harris, 134 S. Ct. at 2653–54. The irony was underscored by speculation before Harris that Justice Scalia was the unions' best hope for a fifth vote, in part because of his narrow view of public employees' First Amendment rights. See Joel Rogers, Why 'Harris v. Quinn' Has Labor Very, Very Nervous, The Nation (Mar. 27, 2014), <http://www.thenation.com/article/179033/why-harris-v-quinn-has-labor-very-very-nervous>; Benjamin Sachs, The Problem with the WSJ's Appeal to Scalia, On Labor (Jan. 24, 2014), <http://onlabor.org/2014/01/24/the-problem-with-the-wsj-s-appeal-to-scalia/>.

⁹⁸ Harris, 134 S. Ct. at 2632.

⁹⁹ They might also argue, Harris notwithstanding, that speech that is merely incidental to carrying out the union's statutory bargaining functions is not fairly regarded as "speech" for First Amendment purposes, and in any event that compelled financial support of such activity is not "compelled speech." Cf. Fisk & Poueymirou, supra note 19.

¹⁰⁰ 310 U.S. 88 (1940).

¹⁰¹ Id. at 103–05. Labor law scholars have long drawn on Thornhill in criticizing subsequent failures to protect labor picketing. See James G. Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 Hastings Const. L.Q. 189, 219–20 (1984); Mark D. Schneider, Note, Peaceful Labor Picketing and the First Amendment, 82 Colum. L. Rev. 1469, 1475–95 (1982); Note, Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech, 91 Yale L.J. 938, 940–46 (1982) [hereinafter Note, Labor Picketing and Commercial Speech].

the 1964 Civil Rights Act, some argued, building on Steele, that race discrimination by unions and private employers violated the Equal Protection Clause.¹⁰² Later, scholars contending for broader employee rights of free speech, association, privacy, and due process argued that ordinary personnel decisions of private employers were freighted with state action,¹⁰³ and that judicial enforcement of private employment agreements (such as those mandating arbitration) constituted state action.¹⁰⁴ For these scholars, a broad conception of state action promised to bring to the non-union workplace some of the rights and protections that unions elsewhere brought through collective bargaining. Now the right-to-work camp will make similarly broad state action arguments when it seeks to invalidate agency fees in the private sector and to further undermine unions and collective bargaining. They face an uphill battle, for finding state action in private agreements that are merely permitted by the labor laws would require a significant constitutional innovation.¹⁰⁵ As the litigation proceeds, however, some scholars and some advocates of both labor and business may be hard pressed to reconcile past and present views on the matter.

Both the state action question and the political significance of speech on shared conditions of work will surely feature in future litigation over agency fees, especially as it moves into the private sector. But all of these issues should be viewed in the context of a deeper understanding of the basic architecture of both public and private sector labor law in the United States, one that has implications not only for the agency fee controversy but also for other constitutional controversies in labor law.

C. What Unions Are Not: The Limited Value of Analogies

The cross-currents discussed above are symptomatic of a deeper tension in the conception of unions for constitutional purposes. Much of the debate over agency fees, for example, oscillates between two sharply opposing conceptions of unions: Are unions essentially voluntary advocacy organizations? Or are they state-like? Of course unions are neither in any simple sense; these two conceptions operate as analogies, and as

¹⁰² See Lee, *supra* note 37, at 53.

¹⁰³ See Erwin Chemerinsky, Rethinking State Action, 80 *Nw. U. L. Rev.* 503, 520–27 (1985); Christopher D. Stone, Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?, 130 *U. Pa. L. Rev.* 1441, 1445–48 (1982).

¹⁰⁴ Cynthia L. Estlund, Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law, 155 *U. Pa. L. Rev.* 379, 410–11 & n.95 (2006); Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 *Calif. L. Rev.* 577, 615–19 (1997); Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 *Tul. L. Rev.* 1, 44 (1997).

¹⁰⁵ See Lee, *supra* note 37, at 238–55; Wellington, *supra* note 60. Indeed, the Court has arguably retreated from the state action argument that carried the day in Hanson. For an analysis of the state action question that agency fees raise under the NLRA, see Dau-Schmidt, *supra* note --, at 118–140.

implicit or explicit baselines against which unions' entitlements are judged.¹⁰⁶

Importantly, both analogies are double edged: Voluntary advocacy organizations have constitutional entitlements that unions might envy, but they lack the statutory powers that unions enjoy. And states have powers that unions might wish to claim by analogy (like the power to make majoritarian decisions binding on all, and to tax constituents), but they are also subject to the manifold constitutional restrictions on "state action."

The two opposing analogies, and the opposing implications of each, create a kind of grab bag of arguments from which both unions' advocates and their adversaries draw in debates over constitutional and quasi-constitutional claims by and against unions. That is hardly conducive to coherent constitutional analysis. But there is no simple solution to the problem, for both analogies, doubled-edged as they are, reflect some dimension of unions in our system. The objective of this Article is to offer a more integrated conception of unions for constitutional purposes. But first it will be useful to see what the simpler analogies miss.

Let us begin with the analogy to ordinary voluntary advocacy organizations, or "expressive associations."¹⁰⁷ That analogy led the majority in Harris to ask: Why do unions, unlike other non-governmental associations, get to demand that those who oppose them must nonetheless contribute money to them (or else lose their jobs)? "A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions."¹⁰⁸ Justice Kagan, dissenting in Harris, rightly objected to the majority's analogy to other voluntary advocacy organizations: There is "an essential distinction between unions and special-interest organizations generally. The law compels unions to represent—and represent fairly—every worker in a bargaining unit, regardless whether they join or contribute to the union. That creates a collective action problem of far greater magnitude than in the typical interest group"¹⁰⁹ In highlighting the duty of fair representation, Justice Kagan recognized the need to expand the frame of analysis to include other aspects of the statutory scheme, and put her finger on one of the

¹⁰⁶ Voluntary advocacy associations will in fact serve as one baseline here for identifying the extraordinary entitlements and liabilities of unions. See *infra* text accompanying notes 141-42.

¹⁰⁷ There is no doubt that unions are, in part, "expressive associations" as that term has been elucidated by the Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000), and *Roberts v. Jaycees*, 468 U.S. 609 (1984). That does not make them or any other expressive association immune from regulation, of course, but it requires close scrutiny of regulations that might impinge on the association's expressive mission. See *Dale*, 530 U.S. at 648.

¹⁰⁸ *Harris v. Quinn*, 134 S. Ct. 2618, 2641 (2014).

¹⁰⁹ *Id.* at 2656 (Kagan, J., dissenting) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221-22 & n.15 (1977); *Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 750 (1988); and *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 762 (1961)).

extraordinary features of labor law that distinguishes unions from other voluntary associations.

To expand the frame a bit more: Employees have a statutory right to form a union and bargain collectively, or to refrain from doing so. Under our labor laws, however, the decision whether to bargain collectively through a union is not an individual but a collective choice; and that decision – like many contested decisions in many organizations in our society, governmental and non-governmental – is made by majority rule. If a majority chooses union representation, its benefits and burdens extend to all employees within the bargaining unit, including through the union’s duty of fair representation. If a majority’s choice of union representation is to be effective, it must be protected against the corrosive effect of free riders – those who do not want to pay for the cost of collective representation.¹¹⁰

The union’s representation of non-members of the union and the principles of majority rule and exclusivity, all prescribed by law, make it clear that unions are unlike other voluntary associations. But those same features lead some analysts to look in precisely the opposite direction, and to analogize unions to the state itself and its power to tax all the citizens of a jurisdiction based on the support of a majority.¹¹¹ For those seeking to constrain union power in the agency fee setting, that analogy merely underscores the anomaly: It is rare to grant government-like powers, including the power to bind and tax dissenters, to non-governmental organizations. But unions might question the analogy as well, for it echoes the broad but vague suggestion of state action in Steele: “the representative is clothed with power not unlike that of a legislature.”¹¹² Having long resisted the claim that they are “state actors,” subject to the attendant constitutional claims and restrictions on their autonomy, unions might well resist the argument that they are sufficiently state-like to partake of its taxing power.¹¹³ There is something in the analogy between unions and the government, but it must be teased out and distinguished from the question of state action, as I will do below.¹¹⁴

Unions are neither ordinary voluntary associations nor their antithesis, the state itself. As previewed in the introduction, unions occupy an intermediate category of private associations with public functions. Of course they are not the only such institutions. Political parties, for example, are both voluntary associations through which groups and

¹¹⁰ See supra Section II.A.

¹¹¹ In Street, Justices Frankfurter and Harlan used this analogy, among others, to support their view of the constitutionality of charging all workers for unions’ political expenditures. Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 808 (1961) (Frankfurter, J., dissenting).

¹¹² Steele v. Louisville & Nashville R.R., 323 U.S. 192, 198 (1944).

¹¹³ To be sure, analogizing a union’s power to collect an agency fee with the state’s taxing power is not the same as finding state action in the former.

¹¹⁴ See infra text accompanying notes 190-96.

individuals participate in the political process and central institutions in the organization of the political process. The constitutional law governing political parties is rife with contradictions and controversies arising out of that basic tension, a tension that is heightened by the location of political parties at the core of the democratic process.¹¹⁵

In both political parties and labor unions, the state plays a larger role than is usual for voluntary associations. In some cases that role might entail “state action” against the association; in others it might inject “state action” into the association's actions vis-à-vis others. For example, in the early 1940s, both political parties and trade unions were seen as private membership organizations with a state-enhanced monopoly over access to crucial political or economy opportunities; when that monopoly was exercised to exclude black citizens, the Supreme Court was moved to stretch the boundaries of “state action” doctrine to afford a remedy against discrimination.¹¹⁶ That is an intriguing parallel history, but it reflects nothing more than what we have already observed about both political parties and unions: As private associations invested with public functions, they occupy a middle ground between purely private and purely governmental entities; and that middle ground was hotly contested at a time when civil rights advocates were seeking to expand the meaning of “equal protection of the law.” Given the profound differences between the domains of democratic politics and of industrial relations, the constitutional law governing political parties is an unlikely place to look for deeper insights into the nature and appropriate constitutional treatment of labor unions. “Institutional realism,” per Pildes, demands a more contextual examination of these two vastly different institutions.¹¹⁷

More apt analogies might be found among other private associations that play a regulatory role in the economic sphere, and especially in the arena of professional or occupational self-regulation. For example, many states require all lawyers to belong to an “integrated” or “unified” bar association that administers professional ethics and disciplinary rules.¹¹⁸ The constitutional treatment of mandatory bar dues has tracked that of union fees, albeit with a slight lag. In 1961, on the same day that it decided Street, and

¹¹⁵ For two major contributions to the literature on that tension, see Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 **Colum. L. Rev.** 274 (2001), and Richard H. Pildes, Foreword: The Constitutionalization of Democratic Politics, 118 **Harv. L. Rev.** 28 (2004).

¹¹⁶ Indeed, the Court did just that in one of the “White Primary Cases,” Smith v. Allwright, 321 U.S. 649 (1944), during the same term in which it decided Steele, discussed supra text accompanying notes 41–47, creating a statutory duty of fair representation by unions in order to avoid a claim of unconstitutional “state action.” For analysis of Smith, a crucial ruling against the exclusionary practices of the Democratic Party organizations in the South, see Samuel Issacharoff & Richard Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 **Stan. L. Rev.** 643, 653–55 (1998).

¹¹⁷ See supra text accompanying notes 16–18.

¹¹⁸ See Bradley A. Smith, The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession, 22 Fla. St. U. L. Rev. 35 (1994).

relying heavily on Hanson, the Supreme Court held that mandatory bar dues did not violate the First Amendment despite some incidental and vaguely described bar expenditures on political and legislative speech.¹¹⁹ Later in Keller v. State Bar of California,¹²⁰ in which plaintiffs did point to bar expenditures for political and ideological activities, the Court relied on Abood to hold that a bar association cannot charge objectors for those costs, though it could charge for the cost of administering professional ethics rules to which lawyers were subject. The Harris Court denied any inconsistency between that holding and its invalidation of union agency fees, though it did not provide much reasoning for that conclusion.¹²¹

The bar association analogy points to something important in the agency fee controversy and beyond: Like bar associations, unions are central actors in a regulatory scheme that relies heavily on self-regulation through group action instead of extensive direct government regulation. In both contexts, the choice of private self-regulation within a public law framework reflects a mix of pragmatism and principle: The private actors – lawyers and their professional association in one case, unions and employers in the other – have regulatory resources that the public does not, and they also have interests in freedom and autonomy that deserve respect. Yet collective bargaining is a very different kind of self-regulation, and unions’ role in it is very different. Lawyers have no individual or collective “right to refrain” from bar oversight – submission to regulation by the bar is mandatory for all lawyers – and they do not get to choose among competing bar associations or to form their own.¹²² By contrast, at least in principle, workers may choose among existing unions, or form their own union, or have none at all, based on majority rule in particular workplaces.

The analogy to bar associations and its limitations will surely be parsed in upcoming litigation. So, too, will the more remote analogy to state-backed trade associations and their mandatory assessments for advertising. Harris thus relied partly on United States v. United Foods, Inc.,¹²³ which struck down on First Amendment grounds a mandatory

¹¹⁹ Lathrop v. Donohue, 367 U.S. 820 (1961).

¹²⁰ 496 U.S. 1 (1990).

¹²¹ The Court distinguishes Keller as follows:

Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the “State’s interest in regulating the legal profession and improving the quality of legal services.” States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in Keller.

Harris v. Quinn, 134 S. Ct. 2618, 2643–44 (2014) (citation omitted) (quoting Keller, 496 U.S. at 14). This explanation does nothing to explain why the regulatory scheme in Harris, and the state interests behind it, were any less worthy of deference.

¹²² See Smith, *supra* note ---.

¹²³ 533 U.S. 405 (2001).

assessment on mushroom distributors to fund generic advertising of mushrooms.¹²⁴ But United Foods distinguished a prior decision upholding mandatory assessments on tree fruit producers to fund advertising; the difference was that, in the prior case, “the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy,” whereas the assessments in United Foods were almost entirely about funding commercial speech.¹²⁵ There is little doubt which side of that line agency fees would fall on, given the elaborate scheme of collective bargaining and exclusive representation of which they are a part.

But the Court in both of these trade association cases said something much important here: It “stressed . . . that the entire regulatory program must be considered in resolving the case . . . [and] emphasized ‘the importance of the statutory context in which it arises.’”¹²⁶ If the constitutionality of mandatory assessments can turn on the difference between a state-backed association of mushroom producers and a state-backed association of tree fruit producers, then perhaps there is more to be gained from a deeper understanding of the “entire regulatory program” to which unions are subject than from parsing analogies to trade associations and professional associations and the highly divergent regulatory contexts in which they operate.

Clearly unions are not the only private organizations that play a legally-constructed regulatory role, and that are entitled to collect fees even from individuals who object to that regulatory role. Yet the nature of the regulatory system in which unions play a central role, and unions’ role in that system, are distinctive. It may seem tendentious to describe unions as “anomalous” – as deviating from some normal or standard pattern. But the anomaly is both undeniable and defensible. A better understanding of how and why unions are distinctive will lay the foundation for a sounder assessment of not only the constitutionality of mandatory agency fees but also other constitutional puzzles in labor law.

III. The Anomalous Quid Pro Quo at the Heart of Labor Law

The Harris dissenters recognized “an essential distinction between unions and special-interest organizations” – one that they located in the union’s duty of fair representation.¹²⁷ But that duty is only part of a larger set of interlocking powers, privileges, restrictions, and duties that the labor laws confer or impose on unions, and that

¹²⁴ See Harris, 134 S. Ct. at 2639.

¹²⁵ United Foods, 533 U.S. at 411–12 (distinguishing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997)).

¹²⁶ Id. at 412 (quoting Glickman, 521 U.S. at 469).

¹²⁷ Harris, 134 S. Ct. at 2656 (Kagan, J., dissenting) (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221–222 & n.15 (1977); Comm’n Workers v. Beck, 487 U.S. 735, 750 (1988); and Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 762 (1961)).

make them sui generis institutions in our society. Labor unions are both regulated by and regulators within the industrial relations system; they are both “fighting forces” for their members and regulatory actors with quasi-fiduciary duties toward the larger groups of workers they represent.¹²⁸

On the one hand, unions are independent voluntary associations that are possessed of First Amendment rights, protected against some forms of state interference, and governed by their members through democratic processes.¹²⁹ Their independence is fundamental to their nature and to their ability to faithfully represent workers, and we will return to it.¹³⁰ On the other hand, unions are also central actors in a regulatory system in which they enjoy legal powers and privileges and are subject to duties and restrictions unlike those of other private voluntary associations. Some of those powers, privileges, duties, or restrictions may raise constitutional questions; but as I will argue below, those questions must be analyzed in light of the larger context – both sides of the quid pro quo established by the labor laws as well as the residual and still fundamental autonomy of unions.

For now let us examine the most basic of the sui generis powers, privileges, duties and restrictions by which the labor laws define the unique nature of unions. The NLRA will serve as the primary point of reference here, for it establishes a template of sorts for most private and public sector labor law in the U.S. The focus here will be on the major legal liabilities and powers of unions as institutions that distinguish them from other associations, not the legal rights of employees who may support the union, nor the manifold other details of labor law.

Before proceeding, a preliminary point: To identify some entitlements of unions as exceptional, one must have in mind a baseline set of “ordinary” entitlements. That is bound to be a contestable and hypothetical construct, for unions have never operated without extraordinary legal restrictions, powers, or both. The closest they came was within federal law during the few years after Congress dismantled the federal labor injunction in the Norris-LaGuardia Act of 1932¹³¹ and before it enacted the Wagner Act

¹²⁸ See generally, Clark Kerr, John T. Dunlop, Frederick H. Harbison & Charles A. Myers, *Industrialism and Industrial Man* (2d ed.1964).

¹²⁹ See, e.g., *Wirtz v. Local 153, Glass Bottle Blowers Ass’n*, 389 U.S. 463, 470–72 (1968) (recognizing autonomy interests of democratically governed unions); *Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 8 (1964) (recognizing union’s First Amendment right to advise injured members on obtaining legal assistance). For an overview of the constitutional autonomy and expressive rights of unions, see Fisk & Poueymirou, *supra* note 19, at 124–33.

¹³⁰ See *infra* text accompanying notes 153–57.

¹³¹ Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (2012)).

in 1935.¹³² In that brief period unions had no special legal powers, but were free (so far as the federal courts were concerned) to use peaceful means of concerted economic pressure – strikes, picketing, boycotts – to induce employers to bargain collectively and make economic concessions.¹³³ Indeed, the Supreme Court later held that the effect of Norris-LaGuardia was not only to curb injunctive remedies, but to exclude nearly all collective labor activity from the reach of the antitrust laws' ban on “combinations in restraint of trade.”¹³⁴ This was the high water mark of “collective laissez faire,” or “voluntarism” in U.S. labor law,¹³⁵ and it will serve as one useful benchmark for this analysis. Notably, I do not count the right of workers to form associations and act in concert for mutual aid, free from the constraints of antitrust law, as one of the “extraordinary” entitlements conferred by the labor laws, but rather as part of the baseline from which our New Deal labor law departed both upward and downward.¹³⁶ That basic freedom was a defining feature of the concept and the short reign of “collective laissez faire,” and a legal expression of the hard-won affirmation that “labor is not a commodity.”¹³⁷

Using a baseline from the 1930s, however, risks neglecting the expansion of the rights of voluntary associations since the New Deal.¹³⁸ Harris shows that voluntary expressive associations are a relevant comparator for the Court, and it is against that

¹³² Wagner Act, Pub. L. No. 74–198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

¹³³ See **William E. Forbath, Law and the Shaping of the American Labor Movement** 164–66 (1991).

¹³⁴ See United States v. Hutcheson, 312 U.S. 219 (1941). The 1932 Norris-LaGuardia Act had removed a long list of union activities from the equitable jurisdiction of the federal courts. Hutcheson read that enumeration of non-enjoinable activities backward into Sec. 20 of the Clayton Act of 1914. Id. at 234–36. In so doing, Hutcheson corrected what was widely seen as the error of Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), which had narrowly construed the Clayton Act’s exclusion of union practices from the reach of the antitrust laws and exposed much union activity to criminal, civil, and equitable sanctions. Still, as an exercise of statutory reinterpretation, Hutcheson was nearly as breathtaking as Duplex Printing; notably, Hutcheson’s author Justice Frankfurter was also the primary author and proponent of the Norris-LaGuardia Act. Robert A. Gorman & Matthew W. Finkin, The Individual and the Requirement of “Concert” Under the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 334 (1981).

¹³⁵ See **Forbath**, supra note 133, at ---.

¹³⁶ On the pre-New Deal history of hostility to workers’ concerted action, see **Forbath**, supra note 133, at 98–127, and Gorman & Finkin, supra note 134, at 331–32.

¹³⁷ This rallying cry of organized labor was inscribed into the Clayton Act of 1914, Pub. L. No. 63–212, 38 Stat. 730, which was promptly hailed as “labor’s Magna Carta” by Samuel Gompers, head of the American Federation of Labor. **Forbath**, supra note 133, at 157. But it was not until the Supreme Court’s 1941 decision in Hutcheson, discussed supra note 134, that the Clayton Act regained its original meaning: with rare exceptions, activities of unions or combinations of workers were not meant to come within the scope of the antitrust prohibition. See Hutcheson, 312 U.S. at 236.

¹³⁸ It also risks importing the anti-union tilt of the pre-New Deal common law, which still applied in the state courts, into contemporary constitutional analysis. On the libertarian logic of that old common law, and the “liberty of contract” at its core, see Richard A. Epstein, A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation, 92 Yale L.J. 1357 (1983).

baseline that unions' ability to collect an agency fee is deemed "anomalous."¹³⁹ So that baseline will also feature in what follows. Whatever slipperiness there might be in this double baseline will have little bearing on the particular departures identified here as extraordinary.

A. The Quid and the Quo in the NLRA's Treatment of Labor Unions

The quid and the quo of federal labor law did not come at the same time, or as part of a single negotiated compromise, but in stages. In short, the unusual federal powers and privileges of unions came first, against a background of various state restrictions on unions. As one contemporary commentator noted, the NLRA "aimed to redress an existing unbalance. There was quite enough legal control of the activities of labor unions."¹⁴⁰ State restrictions on unions were later supplanted and codified in amendments to the NLRA. The chronology complicates the interpretive enterprise. As Catherine Fisk and Deborah Malamud put it, "[t]he NLRA is an amalgam of two statutes [that] arose under diametrically opposed historical circumstances, and were aimed at correcting diametrically opposed abuses of power."¹⁴¹ Yet those charged with interpreting, enforcing, and reviewing the constitutionality of the NLRA have little choice but to try to make sense of the "odd marriage" at the core of the statutory scheme, and of the basic structural features of the scheme that emerged out of these contradictory impulses.¹⁴² Let us begin with the unusual powers or privileges of unions.

1. The unusual powers of unions under federal labor law

The sui generis powers and privileges of unions under the NLRA were chiefly embodied in the original Wagner Act of 1935, which imposed on employers a duty to recognize a union selected by a majority of workers in an appropriate bargaining unit as the exclusive representative of all workers in the bargaining unit, whether union members or not, and a duty to bargain with that union in good faith.¹⁴³

¹³⁹ See *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

¹⁴⁰ Calvert Magruder, A Half Century of Legal Influence upon the Development of Collective Bargaining, 50 *Harv. L. Rev.* 1071, 1107–09 (1937).

¹⁴¹ Catherine L. Fisk & Deborah C. Malamud, The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform, 58 *Duke L. J.* 2013, 2035 (2009). That is:

The Wagner Act declared employers' militant refusal to recognize unions as the major cause of industrial unrest, and the abuse of employer economic power as the major obstacle to improved labor standards. Taft-Hartley saw union militancy as the cause of industrial unrest, and union coercive tactics as socially damaging rent seeking that distorted the labor market and threatened capitalist economic growth.

Id. at 2035–36

¹⁴² *Id.* at 2036–38.

¹⁴³ 29 *U.S.C.* §§ 158(a)(5), 159(a) (2012). The Wagner Act did many other important things; in particular it protected employees' "concerted activities," including in union organizing, against reprisals. *Id.* §§ 157, 158(c). But the focus here is on the special privileges and powers of majority-backed unions. I

Section 9(a) of the NLRA provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.”¹⁴⁴ The principle of exclusivity is at the heart of what makes unions distinctive in constitutional terms.¹⁴⁵ Although there was some history of “members-only” bargaining before the NLRA, exclusive representation by a single union in a particular work group was rooted in the historic traditions of the U.S. labor movement.¹⁴⁶ Exclusivity had advantages for employers as well, as it protected them from multiple demands for collective bargaining and the resulting fragmentation (and from any obligation to bargain with a union in the absence of majority support).¹⁴⁷ The Wagner Act made exclusivity the core organizing principle for the regulation of industrial relations in the U.S.; that necessarily made union representation a collective rather than an individual decision; and that in turn necessitated both a rule of decision – naturally enough, majority rule – and a process for defining the denominator, or the “appropriate bargaining units” within which majority rule reigned.

do not aim to offer a theory of all of labor law, but rather a theory of how the distinct nature of unions under the labor law should affect constitutional analysis.

¹⁴⁴ 29 U.S.C. § 159(a). Section 9(a)’s text is at odds with the suggestion that unions chosen by a majority of employees could choose to forego exclusivity and to represent their members only. See James Sherk, *On the Takings Clause and Exclusive Representation — A Reply to Heather Whitney*, **On Labor** (Sept. 8, 2014), <http://onlabor.org/2014/09/08/guest-post-on-the-takings-clause-and-exclusive-representation-a-reply-to-heather-whitney/>. Although one Supreme Court decision appears to approve the possibility of members-only bargaining by majority-supported unions, see *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 239 (1938), that case arose very early in the Act’s development, before the Court’s elaboration of the exclusivity doctrine in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), and before its elaboration of the duty of fair representation in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202–03 (1944). Since the NLRA fully took hold, there is no support for the notion that a majority supported union could choose to represent its members only, foregoing the benefits and burdens of exclusivity, including the duty to fairly represent non-members in the bargaining unit. For further discussion of the implications of these points, see *infra* text accompanying notes 257–65.

¹⁴⁵ On the importance of these and other extraordinary powers and privileges of unions in enhancing unions’ power over employees and their work lives, see Summers, *Union Powers*, *supra* note 56, at 809–15.

¹⁴⁶ See Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 **Duq. L. Rev.** 779, 784–91 (1992). On the history and possible future of members-only bargaining, see Charles J. Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (2005). Morris, like most of the commentary his work has stimulated, focuses heavily on members-only bargaining in the absence of majority support. See, e.g., Clyde Summers, *Unions Without Majority—A Black Hole?*, 66 **Chi.-Kent L. Rev.** 531 (1990) (assuming that a majority-backed union is an exclusive bargaining representative). The idea of members-only bargaining by majority-backed unions has recently entered the debate over agency fees: The questionable assumption that it is currently available under the NLRA is said to justify state right-to-work laws, and the proposal that it be made available to unions in right-to-work states is advanced as a possible solution to the inequity and illogic of those right-to-work laws. See *infra* notes 271–273 and accompanying text.

¹⁴⁷ The Supreme Court recognized these advantages in *Abood v. Detroit Board of Education*, 431 U.S. 209, 220–21 (1977).

More important for our purposes are the legal consequences of exclusivity: Once a majority-backed union is in place, an employer is compelled by law to bargain with the union on behalf of all the employees in the bargaining unit, and is prohibited from dealing separately with its employees, singly or in groups.¹⁴⁸ Exclusive representation is not inconceivable without the force of law; before the NLRA, unions successfully sought exclusive representation of groups of workers.¹⁴⁹ But the NLRA put the force of federal law behind exclusivity, and behind the corresponding prohibitions on separate bargaining with individuals or groups. That is an extraordinary departure from the background principle of freedom of contract, all the more striking given its enactment in 1935, when the “liberty of contract” was still part of the constitutional firmament (even if its star was already fading).¹⁵⁰

The employer’s duty to bargain in good faith with the union was another controversial innovation, and one that exists in tension with the law’s commitment to “freedom of contract” within collective bargaining.¹⁵¹ The latter was later underscored in the Taft-Hartley amendments, which provided that the duty to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.”¹⁵² The result has been an intricate web of restrictions on employers’ freedom of action, all constructed around a soft core of voluntarism that can render the “duty to bargain” impotent as against a recalcitrant employer.¹⁵³ Still, the notion that employers are required by law to bargain in good faith, and to seek an agreement, with an actor they may vehemently oppose is another extraordinary power that the law grants to unions, unlike any other voluntary associations.

What about the power of unions (outside the “right-to-work” states) to collect an agency fee from non-members for the costs of representing them, as a condition of employment? Harris implies that is an extraordinary power or privilege of unions.¹⁵⁴ At least in the private sector, however, the power to collect an agency fee is merely what remains of the unions’ freedom in a voluntarist system to bargain for stronger union

¹⁴⁸ Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 63 (1975); J.I. Case Co., 321 U.S. at 337–38.

¹⁴⁹ See John T. Dunlop, Industrial Relations Systems 254 (1958); Carlson, *supra* note 146, at 791–92.

¹⁵⁰ The final blow to the “liberty of contract” as a bar to regulation of labor contracts came in West Coast Hotel v. Parrish, 300 U.S. 379 (1937). But the NLRA’s ban on individual bargaining pursuant to the exclusivity doctrine is arguably even more at odds with the concept of a constitutional “liberty of contract.”

¹⁵¹ See H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970); see also Julius G. Getman & F. Ray Marshall, Industrial Relations in Transition: The Paper Industry Example, 102 Yale L.J. 1803, 1875–76 (1993). For an early assessment of the controversy, see Russell A. Smith, The Evolution of the “Duty to Bargain” Concept in American Law, 39 Mich. L. Rev. 1065, 1098–1106 (1941).

¹⁵² National Labor Relations Act § 8(d), 29 U.S.C. §158(d) (2012).

¹⁵³ Catherine L. Fisk & Adam R. Pulver, First Contract Arbitration and the Employee Free Choice Act, 70 La. L. Rev. 47, 55–59 (2009).

¹⁵⁴ See Harris v. Quinn, 134 S. Ct. 2618, 2636–37 (2014).

security provisions. Under the collective *laissez faire* principles that briefly reigned before the NLRA, unions were free to bargain with employers to make union membership a condition of initial or continued employment through the “closed shop” and the original “union shop.”¹⁵⁵ But once the NLRA was enacted, those union security practices were fortified by statutory privileges and powers: The NLRA compelled employers to bargain exclusively with majority-backed unions, including over union security, and including on behalf of individuals who were not and could not become union members.¹⁵⁶ Notwithstanding the judicially-imposed “duty of fair representation,” unions at that point, and especially discriminatory unions, plainly exercised too much power over individuals’ access to good jobs.¹⁵⁷ Congress’s further step in banning the original closed and union shops was justifiable, given the law’s role in helping unions gain union security provisions and in making them potentially oppressive to individual workers.¹⁵⁸ That may serve as a preliminary illustration of how the special legal privileges and powers of unions might justify special restrictions on unions.

The agency fee issue looks very different today, since the Supreme Court has further dialed back the permissible level of union security. Unions’ ability to collect a fee from non-members to cover the costs of collective bargaining and representation may be one of the “anomalies” that requires explanation, and we will return to it. But first let us complete the sketch of the larger *quid pro quo* that the labor laws embody in their treatment of unions as institutions.

2. The unusual restrictions on unions under federal labor law

The *sui generis* powers of unions co-exist with a set of extraordinary restrictions and obligations imposed on unions – extraordinary as compared to both a regime of collective liberty of contract and the ordinary freedom and autonomy of voluntary membership organizations. This was not a “bargain” in the normal sense; unions did not negotiate for

¹⁵⁵ The unions’ ability to make membership a condition of employment has no real analog among ordinary voluntary associations; that ability derives not from the law but from some unique features of unions that precede the law and help to explain it, as we will see *infra* in Part III.

¹⁵⁶ That is not to say that everything to which unions and employers agree in collective bargaining, including union security provisions, constitutes “state action” and triggers constitutional scrutiny. Even assuming that is not so, the weight that federal law put behind union security practices might make those practices a legitimate subject of legislative concern.

¹⁵⁷ Other responses were under consideration. For example, the National Labor Relations Board (NLRB) was urged to deny certification to “closed unions”—those that refused to admit black members—or to discriminatory unions. But these were resisted—even by some black unionists and civil rights advocates—on the ground that they would simply empower employers in resisting unionization. *Lee, supra* note 37, at 101. The NLRB did eventually determine in 1946 that “closed unions” could not lawfully have a “closed shop.” *Id.* at 54.

¹⁵⁸ Brishen Rogers argues for a revival of the “union shop” subject to unions’ adherence to both antidiscrimination law and guarantees of free speech, due process, and democratic governance. See Rogers, *supra* note --.

nor accept these restrictions and obligations in exchange for the special powers they had gained in 1935. Rather, Congress (and the Supreme Court) imposed those burdens on unions, and justified them, sometimes explicitly, by reference to the extraordinary powers previously granted them.¹⁵⁹ I will return in Part IV to the question whether those justifications hold up to close scrutiny; but there is a strong logic in judging the benefits and the burdens of the labor law framework in relation to each other.

Some of the extraordinary duties and restrictions on unions directly constrain their power vis-à-vis employers; we will come to those soon. Others constrain unions in relation to workers (and indirectly reduce unions' power vis-à-vis employers). The first of those, as a matter of federal law, came with the Supreme Court's derivation of a statutory duty of fair representation, first under the RLA in Steele, later imported into the NLRA.¹⁶⁰ The duty of fair representation serves as another preliminary illustration of why and how the quid and the quo of labor law relate to each other: To require a voluntary membership organization to represent non-members – at some cost in resources and bargaining priorities – is one of the law's extraordinary impositions on unions relative to other voluntary associations; standing alone, it might even raise a constitutional question. But it does not stand alone; it was explicitly justified by the extraordinary legal powers of unions – in particular, the exclusivity doctrine – and their impact on workers' livelihoods.¹⁶¹ Conversely, the union's duty of fair representation helps to justify the extraordinary power that the exclusivity doctrine confers on unions – power that might otherwise raise serious constitutional questions.

The chief statutory restrictions on unions were embodied in the Taft-Hartley amendments of 1947 (though one major set of statutory restrictions on unions' autonomy was yet to come). Again, Congress did not create those restrictions out of whole cloth in 1947; it codified restraints on union activity that were located in a patchwork of state laws and doctrines, some of which were more tolerant and some more restrictive than those adopted by Congress. Once amended in 1947, the NLRA itself embodied a quid pro quo in its treatment of unions.¹⁶²

¹⁵⁹ That was clear in Steele v. Louisville & Nashville Railroad, 323 U.S. 192, 202 (1944). See *infra* notes 58-60---; see also **H.R. Rep.** 80-245, at 28 (1947), reprinted in 1 **NLRB, Legislative History of the Labor Management Relations Act, 1947**, at 292, 319 (U.S. Gov't Printing Office 1985) ("When, under the Labor Act, we confer upon unions the power they have as exclusive bargaining agents, entitled by law to handle all the dealings of employees with their employers, clearly it is incumbent upon us, by the same law, to assure to the employees whom we subject to union control some voice in the union's affairs.").

¹⁶⁰ The Supreme Court applied a statutory duty of fair representation under the NLRA in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

¹⁶¹ That is not to say that the exact contours of the duty of fair representation are correct or flow logically and inexorably from those powers and privileges.

¹⁶² Had Taft-Hartley not done so, Congress or the courts would have had to determine which state restrictions could survive, and which were preempted by federal statutory protections of labor activity.

The NLRA's deviation from the baseline constitutional entitlements of voluntary associations is perhaps most striking in its treatment of peaceful picketing. A key aim of the Taft-Hartley Act was to curb some of the tactics by which unions had been expanding their membership and their leverage in organizing and bargaining contests, including unions' ability to appeal for support from members and sympathizers through peaceful picketing.¹⁶³ A peaceful picket line constructs not a physical barrier to entry but a "symbolic barrier," the efficacy of which depends on the audience response to its message; the message, in the case of labor picketing, consists of an appeal to workers, customers, or both to support the union in a labor dispute by not patronizing or working at the picketed site.¹⁶⁴

The NLRA as amended restricts two kinds of picketing by unions: "recognitional picketing," which seeks to induce an employer to recognize and bargain with a union,¹⁶⁵ and "secondary picketing," which seeks to induce one employer (a "secondary") to support the union in its dispute with another employer (the "primary"), for example, by declining to supply a struck plant or to sell its products for the duration of the strike.¹⁶⁶ The secondary boycott ban in particular provoked furious union opposition.¹⁶⁷ For union adversaries, unions' ability to tap into a reservoir of broader support in particular labor disputes had made them "too powerful" and led to the spread of disruptive labor strife.¹⁶⁸ But for organized labor and its allies, the law condemned solidarity itself.¹⁶⁹ Some

Even with Taft-Hartley's codification of the restrictions on unions, the contours of federal labor preemption has generated scores of Supreme Court decisions and a very complex body of law. For an overview, see Stephen F. Befort, Demystifying Federal Labor and Employment Law Preemption, 13 **Lab. Law.** 429 (1998).

¹⁶³ See James Gross, **Broken Promises: The Subversion of U.S. Labor Relations 1947-1994** 2-14 (Philadelphia: Temple Univ. Press 1995).

¹⁶⁴ See Picketing, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁶⁵ The restrictions on unions' recognitional picketing, inaugurated by Taft-Hartley, were expanded and given their current form in the Landrum-Griffin Act of 1959. Labor Management Reporting and Disclosure Act of 1959 § 704(c), 29 **U.S.C.** § 158(b)(7).

¹⁶⁶ 29 **U.S.C.** § 158(b)(4).

¹⁶⁷ It is at the heart of what led many unionists to label Taft-Hartley a "slave labor" statute. See National Affairs: The Presidency, **Time**, June 23, 1947, at 17. The vehemence of the response to Taft-Hartley may seem puzzling given that restrictions on secondary pressures were already common at the state level. See Ludwig Teller, Picketing and Free Speech, 56 **Harv. L. Rev.** 180, 197-98 (1942). But until Taft-Hartley was enacted, union advocates hoped that the NLRA (and the First Amendment) would eventually override those state restrictions under the Supremacy Clause. Taft-Hartley's enactment of similar restrictions eliminated that argument and raised the hurdle for other constitutional challenges.

¹⁶⁸ See generally **S. Rep. No.** 80-105, at 22 (1947), reprinted in 1 **NLRB**, supra note 159, at 407, 428.

¹⁶⁹ See James B. Atleson, Reflections on Labor, Power, and Society, 44 **Md. L. Rev.** 841, 842-56 (1985); Karl E. Klare, The Public/Private Distinction in Labor Law, 130 **U. Pa. L. Rev.** 1358, 1403-05 (1982); James Gray Pope, How American Workers Lost the Right to Strike, and Other Tales, 103 **Mich. L. Rev.** 518, 545-50 (2004).

observers regard the ban on secondary activity as a major culprit in unions' subsequent decline.¹⁷⁰

The restrictions on picketing also raised a serious and much-mooted First Amendment question, for they bar unions from peacefully communicating the facts of a labor dispute and appealing to individuals to support the union by withholding their patronage or their labor (as they are normally free to do).¹⁷¹ The Supreme Court in Thornhill v. Alabama had declared in 1940 that peaceful communication of the facts of labor disputes, including by peaceful picketing, was within the protection of the First Amendment.¹⁷² But the Court soon set about carving out exceptions to that protection, and later upheld the constitutionality of the Taft-Hartley restrictions on grounds that raised more questions than they answered.¹⁷³ Those questions grew sharper in the 1960s and 1970s, as the Court expanded the rights of non-labor protesters,¹⁷⁴ and especially with its 1982 ruling that picketing by a civil rights group in support of a "secondary boycott" is protected by the First Amendment as long as it is peaceful.¹⁷⁵ Under the Court's "normal" First Amendment analysis, the speaker-specific and content-based nature of the NLRA's restrictions would seem to doom them.¹⁷⁶ For now it is enough to recognize that unions are subject to restrictions on expression that would be unconstitutional if applied to other voluntary associations. We will return in Part IV to the First Amendment puzzle posed by the Taft-Hartley restrictions on picketing, and

¹⁷⁰ See James Gray Pope, Labor and the Constitution: From Abolition to Deindustrialization, 65 **Tex. L. Rev.** 1071, 1078–79 (1987); Rogers, supra note 29, at 138.

¹⁷¹ The debate spans over 70 years, with a spike in the 1980s. See, e.g., E. Merrick Dodd, Picketing and Free Speech: A Dissent, 56 **Harv. L. Rev.** 513 (1943); Charlotte Garden, Citizens, United and Citizens United: The Future of Labor Speech Rights?, 53 **Wm. & Mary L. Rev.** 1 (2011); Julius Getman, Labor Law and Free Speech: The Curious Policy of Limited Expression, 43 **Md. L. Rev.** 4 (1984); Pope, supra note 170; Pope, supra note 101; Schneider, supra, note 101, at 1475–95; Note, Labor Picketing and Commercial Speech, supra note 101.

¹⁷² 310 U.S. 88 (1940).

¹⁷³ See Int'l Bhd. of Elec. Workers v. NLRB, 341 U.S. 694 (1951). The Court was terse: "The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise." Id. at 705 (footnote omitted). Scholars have long criticized the "unlawful objective" test for its circularity and its inconsistency with Thornhill. See Pope, supra note 101, at 219–20.

¹⁷⁴ The Court has approved content-neutral time, place, and manner restrictions on non-labor picketing, but has struck down many other restrictions on picketing since the 1960s. See Carey v. Brown, 447 U.S. 455 (1980); Police Dep't. of Chi. v. Mosley, 408 U.S. 92 (1972). More recently the Court reaffirmed the protected status of picketing outside abortion clinics. See Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., 512 U.S. 753 (1994); see also Snyder v. Phelps, 131 S. Ct. 1207 (2011) (overturning damages award based on "outrageous" and offensive picketing of a funeral).

¹⁷⁵ NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

¹⁷⁶ See generally Seth F. Kreimer, Good Enough for Government Work: Two Cheers for Content Neutrality, 16 **U. Pa. J. Const. L.** 1261 (2014) (on the centrality and function of First Amendment doctrine's principle of content neutrality).

whether those restrictions can be justified, in part or in whole, based on the other side of the labor law quid pro quo.

Another set of legal restrictions on unions, often neglected by labor law scholars,¹⁷⁷ is similarly extraordinary of all when judged against the baseline constitutional entitlements of voluntary associations: The Landrum-Griffin Act, or Labor-Management Reporting and Disclosure Act, of 1959 (LMRDA) imposed extensive reporting and disclosure obligations on union finances and administration; detailed regulation of union elections;¹⁷⁸ and a union members' "bill of rights" to protect their freedom of expression and ensure due process in internal union discipline.¹⁷⁹ Although internal union affairs had previously been subject to a patchwork of state laws and doctrines, the LMRDA went further in pursuit of democracy, fairness, and freedom of expression within unions, and intruded more deeply into union autonomy, than state law had done.¹⁸⁰

Democracy, free speech, and due process are all good principles; and their imposition by the LMRDA surely helped to clean up some autocratic, arbitrary, and corrupt practices in some unions.¹⁸¹ But the law does not normally impose those good principles on voluntary advocacy groups, for to do so intrudes on the organizational autonomy that is an aspect of the constitutional freedom of association.¹⁸² The LMRDA's intrusion into

¹⁷⁷ See Herman Benson, Landrum-Griffin Act at 50: Has It Been Good or Bad for Unions?, 13 **New Pol.**, no. 2 Winter 2011, <http://newpol.org/content/landrum-griffin-act-50-has-it-been-good-or-bad-unions>.

¹⁷⁸ The federal law governing union elections is more elaborate and detailed than federal law governing public elections, which leaves election oversight, even in presidential elections, to state and local officials.

¹⁷⁹ Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 431 (2012). Unions must adopt a constitution and by-laws with detailed provisions affecting membership, assessments, fines, discipline, use of funds, audits, meetings, selection of officers, and authorization of bargaining demands and strikes; and they must file annual financial reports detailing assets, liabilities, receipts, salaries, loans, and disbursements. Id. § 431(a).

¹⁸⁰ Professor Summers described the patchwork of state doctrine in this area as "[m]otivated by conflicting impulses to avoid entanglement in union affairs and yet to protect union members from injustice," and as "inconsistent in result and contradictory in principle." Clyde W. Summers, Legal Limitations on Union Discipline, 64 **Harv. L. Rev.** 1049, 1100 (1951). Congress failed again in 1959 to deal with the issue of race. See Wellington, supra note 60, at 372.

¹⁸¹ Some of this history is recounted in **James B. Jacobs, Mobsters, Unions, and Feds: The Mafia and the American Labor Movement** (2006). For a skeptical view on whether the law actually promoted union democracy, see Catherine Fisk, Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers and Members-Only Unions, 17 *Theoretical Inquiries in Law* No. 2 (forthcoming 2016) (hereinafter, Workplace Democracy).

¹⁸² See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984); *Cousins v. Wigoda*, 419 U.S. 477, 489-91 (1975); *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-49 (2000). That aspect of the freedom of association is no more absolute than any other constitutional right, but it imposes a heavy burden of justification on infringing state action. Beyond the case of antidiscrimination law (where the burden of justification has sometimes been met; compare *Roberts* with *Dale*, supra) there is rather little caselaw reviewing significant legal intrusions into the internal affairs of voluntary associations; that may reflect a strong political norm of non-interference in the affairs of expressive associations. The contours of the organizational autonomy that inheres in the constitutional freedom of association merits closer scrutiny than I can give it here.

internal union affairs was controversial at the time – and excoriated by most unions.¹⁸³ Its strongest justification lies in unions’ regulatory role and the extraordinary legal privileges and powers granted to unions in accordance with that role.¹⁸⁴

One more intrusion on union autonomy came from outside the labor relations laws: After decades of controversy over exclusionary union membership practices, the Civil Rights Act of 1964 finally prohibited union (and employer) discrimination because of race (as well as color, religion, sex, or national origin).¹⁸⁵ For decades after the Wagner Act, many civil rights and labor movement activists – even those devoted to racial equality – questioned the legitimacy and constitutionality of legal interference with union membership policies.¹⁸⁶ Today it may be hard to reconstruct their mindset. Given the broad reach of antidiscrimination law, it may not count as an extraordinary restriction on unions; it is surely less extraordinary – less of a departure from how other associations are regulated – than the LRMDA’s regulations of internal union affairs.¹⁸⁷ Still, unions’ subjection to antidiscrimination law – like employers but unlike many voluntary associations – is justified by, and helps to legitimate, their public regulatory role.

3. Union autonomy, freedom of association, and state action

Under the federal labor laws, unions in some ways are “clothed with power not unlike that of a legislature,” as the Court said in Steele.¹⁸⁸ At the same time, unions are subject to some constraints not unlike those that the Constitution imposes on the legislature and the rest of government – not just equal protection of those it represents, but also democracy, free speech, and due process in relation to its members. The government-like

¹⁸³ See Benson, supra note 177..

¹⁸⁴ Professor Clyde Summers began making that case in the early 1950s for reform of internal union affairs: Unions’ power over individuals – stemming partly from their special legal powers – required standards of democracy and fairness within unions. Summers, Union Powers, supra note 56. One might argue that, even apart from the special legal privileges of unions, their economic power, and their role as economic actors justifies these legal burdens. Insofar as unions are also expressive associations, however, that would present a harder case (much harder than the parallel case for regulation of ordinary commercial entities). That harder case is not posed as long as unions do in fact enjoy extraordinary legal powers, but it could be posed in the future. See infra text accompanying notes 302-12.

¹⁸⁵ See 42 U.S.C. § 2000e(a) (2012).

¹⁸⁶ See Lee, supra note 37, at 41–42.

¹⁸⁷ Few voluntary membership associations are subject to antidiscrimination laws; neither federal law nor most state laws reach those organizations. Yet relatively few are constitutionally exempt from such laws if states or cities do impose them. Compare Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (upholding application of state law prohibiting sex discrimination to Jaycees), with Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (striking down application of state law prohibiting discrimination on basis of sexual orientation to the Boy Scouts). Unions are clearly not in the latter camp; even those that once claimed the right to discriminate could not have met the standard set in Dale for avoiding coverage by discrimination laws. See Dale, 530 U.S. at 648 (“The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”).

¹⁸⁸ Steele v. Louisville & Nashville R.R., 323 U.S. 192, 198 (1944).

features of unions might seem to break down the constitutional barriers to imposing additional restrictions on unions, and might seem to invite courts to impose additional constitutional constraints on unions vis-à-vis individuals.¹⁸⁹

Having dwelt thus far, however, on the exceptional deductions from and accretions to unions' basic entitlements as a voluntary association, it is crucial to return to a bedrock principle: Unions are still voluntary, self-governed, and independent associations of workers – collective voices and “fighting forces” for their members. This is not just a formal or theoretical point. The “freedom of association,” a lodestar of international labor law, is defined as the right of workers to form independent trade unions.¹⁹⁰ That is a lodestar of American labor law as well.¹⁹¹ Moreover, individuals' constitutional freedom of association is largely realized through the freedom to engage in peaceful expression within and through such associations in the society at large.¹⁹² Unions' liberty and autonomy are every bit as fundamental to their nature as is the mix of legal powers and restrictions that is superimposed on that foundation. Indeed, it is this combination of features that makes unions constitutionally distinctive actors in our society: A constellation of exceptional legal rights, powers, restrictions, and responsibilities, which attend their regulatory role in our system of collective bargaining, and a residual core of associational autonomy and freedom of expression, which derives from their members' rights and freedoms.

The independence and autonomy interests of unions and their members have important consequences here. First, while some actions of unions might be sufficiently intertwined with or dependent on state action to subject them to constitutional claims of individuals, that state action question should be approached with caution, and with due regard for the residual autonomy interests of unions. It would be a grave mistake to treat

¹⁸⁹ The idea that unions' power – economic or legal or both – justifies the imposition of constitutional principles on them was a recurring scholarly theme in the decades following the enactment of the NLRA. Wellington, *supra* note 60; *see, e.g.*, Jaffe, *supra* note 3; Summers, *Union Powers*, *supra* note 56.

¹⁹⁰ *See, e.g.*, Int'l Labor Org. [ILO], Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17, part I, art. III (guaranteeing workers the ability to join organizations that “have the right to draw up their own constitutions and rules, to elect their representatives in full freedom to organise their administration and activities and to formulate their programmes.”).

¹⁹¹ The United States has not ratified the Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), Countries that have not ratified the Convention, Co87 – Freedom of Association and Protection of the Rights to Organize Convention, 1948, International Labor Organization (May 10, 2015), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312232:NO, but as a member of the ILO, the U.S. is subject to the Declaration of Fundamental Principles and Rights at Work, which requires all member states to uphold the principle of freedom of association, among others. *See* ILO, ILO Declaration on Fundamental Principles and Rights at Work, June 1998, 37 I.L.M. 1237.

¹⁹² *See* Catherine L. Fisk & Erwin Chemerinsky, Political Speech and Association Rights After Knox v. SEIU, Local 1000, 98 *Cornell L. Rev.* 1023, 1090 (2013).

unions as state actors as such in either the private sector or the public sector.¹⁹³ Second, when state action does restrict unions' freedom – for example, their freedom of expression – such restrictions have to be justified in light of the basic constitutional entitlements of unions and their members. That might seem obvious enough, but it has often been overlooked or casually swept aside by the Supreme Court. The quid pro quo analysis that is being developed here would open some avenues of justification, but it affirms the need for justification.¹⁹⁴ It aims to discipline the constitutional analysis of legal burdens and restrictions on unions, as well as legal powers of unions vis-à-vis individuals, in part to guard against further erosion of the basic constitutional entitlements of unions.

4. A brief note on the quid pro quo in public sector labor law

The foregoing account of labor law's quid pro quo is based on the NLRA regime that governs most of the private sector. Yet much of the contestation over agency fees, as in Harris and Friedrichs, is in the public sector. One might wonder whether the quid pro quo that governs unions under the NLRA illuminates the constitutional status of public sector unions, or whether the public sector context makes all the difference. Although there are some important differences between private and public sector unions and labor law regimes, the central point here holds for both: Unions are distinctive constitutional actors governed by an array of unusual rights, privileges, responsibilities and duties (the whole of which ought to be considered in assessing a challenge to any of the parts, as I will argue below).

Public sector collective bargaining regimes, first crafted in the 1960s, were largely modeled on the NLRA.¹⁹⁵ The central role of independent unions is defined by a similar package of powers and privileges, including exclusive representation based on majority rule and an employer duty to bargain, and a roughly similar set of sui generis duties and restrictions, including a duty of fair representation and restrictions on economic weapons.

¹⁹³ It would also be a grave mistake to treat as state action everything in the private sector agreements that emerge out of the collective bargaining process. To do so would not only infringe the autonomy interests of unions; it would obliterate the sphere of private ordering that labor law strives to preserve. . The “right-to-work” movement has targeted union security provisions, see supra Section II.A; but individual workers and their lawyers would find a host of other constitutional claims in rules governing workplace speech and procedures for discipline and discharge, for example. This aspect of the state action inquiry is beyond the scope of the present Article, but it will have to be faced in future agency fee litigation in the private sector.

¹⁹⁴ The state action issue does create an asymmetry in existing doctrine: it provides a conduit by which some government-granted powers of unions might justify imposing burdens on unions (as in Steele); yet it creates no parallel logic by which government restrictions on unions (e.g., their freedom of speech) can compel or justify a corresponding expansion in unions' powers or privileges. (I thank Ben Sachs for highlighting this point.) The analysis developed here would effectively introduce greater symmetry into constitutional claims by and against unions.

¹⁹⁵ See Aboud v. Detroit Bd. of Educ., 431 U.S. 209, 211–12, 221–22 (1977).

Most unions that represent workers in the public sector are also subject to the LMRDA, at least in part.¹⁹⁶ Yet those unions all retain a core of associational autonomy and freedom of expression on behalf of their members. Those architectural features provide the foundation for the constitutional analysis that follows in Part IV below.

The public sector context makes one major difference: state action is pervasive and transparent in the public sector. There was little doubt, for example, that the agency fee arrangements between the state employer and the union in Harris were the product of state action. The employer is a government entity whose actions -- whether embodied in a collective bargaining agreement or in legislation -- constitute state action. As already noted, state action will be a much more formidable hurdle to agency fee opponents in the private sector.¹⁹⁷ But the argument under construction here is chiefly directed not to the state action question but to the constitutional questions that arise if and when state action is present. And on that score, while some particulars of the quid pro quo are different in the public sector, its basic outlines are roughly similar -- and similarly divergent from the legal entitlements of ordinary voluntary associations.¹⁹⁸

A related difference between public and private sector bargaining lies in the manner and forum in which unions pursue their bargaining aims. In the public sector, “‘decisionmaking by a public employer is above all a political process’ undertaken by people ‘ultimately responsible to the electorate.’”¹⁹⁹ The Court in Abood held that difference did not call for a different approach to agency fees in the two sectors.²⁰⁰ But the Harris Court opined that it might, for it blurred the distinction between collective bargaining and politics.²⁰¹ Whether or not this matters in the agency fee context, it has little bearing on existence or basic nature of the quid pro quo that governs unions in both the public and private sectors.

¹⁹⁶ Most are covered either because they represent federal civil service employees, and are covered pursuant to Department of Labor regulations, see 29 C.F.R. § 458.29 (2011), or because they also represent some private sector employees (as in the case of Service Employees International Union (SEIU), National Education Association (NEA), and American Federation of Teachers (AFT)). The major exception is the American Federation of State, County, & Municipal Employees (AFSCME); because it only represents government employees, it is not subject to the LMRDA. See 29 U.S.C. § 402(e) (2012).

¹⁹⁷ See supra text accompanying notes 102–105.

¹⁹⁸ Another difference between private sector and public sector collective bargaining schemes is that the latter are arguably not regulatory in nature but proprietary; they represent a state’s judgment about how best to structure relations with their own employees. That difference might call for greater deference to the states in the context of constitutional challenges to public sector labor laws (though it did not seem to do so in Harris).

¹⁹⁹ Harris v. Quinn, 134 S. Ct. 2618, 2631–32 (2014) (quoting Abood, 431 U.S. at 228).

²⁰⁰ Abood, 431 U.S. at 229–30.

²⁰¹ In the private sector, “[c]ollective bargaining concerns the union’s dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.” Harris, 134 S. Ct. at 2632–33.

To be sure, the distinct political economy of public sector unions may affect policy judgments about the proper mix of powers, privileges, duties and restrictions on unions in public sector labor law.²⁰² For example, the strike, which is central in private sector bargaining regimes, is usually prohibited in the public sector; that obviously affects the process of collective bargaining and of resolving disputes over new contract terms.²⁰³ There are other variations as well among state and federal public sector bargaining regimes, including some relating to union security.²⁰⁴ But none of those differences calls for a different frame of analysis, for the overall picture remains the same: Unions in the public sector as in the private sector are “anomalous” in relation to other voluntary membership associations; but the anomaly stems from their deliberately constructed role within a particular system of collective bargaining: the coupling of a distinctive package of powers, privileges, duties, and restrictions, with a powerful residual claim to associational freedom and autonomy.

B. Why Are Unions Anomalous (in the United States and Beyond)?

This distinctive mix of union independence, *sui generis* union powers, and *sui generis* restrictions on unions invites an obvious question: Why are unions subject to this unique body of law – so unlike that which governs other voluntary non-governmental associations? This is not the place for lengthy discussion of the impulses and interests that gave rise to labor unions and led to their incorporation as leading actors into modern industrial relations systems. But a few observations will help to ground the rest of the discussion.

Workers depend on their jobs and their wages, and typically on a single employer, for the economic support of themselves and their families. As individuals, they face serious collective action problems in seeking to improve their lot at work. Yet shared work often proved to be a conducive medium for self-organization. Those simple facts have historically both impelled and enabled many workers to form associations for mutual protection and collective advancement, and have given those associations a weight in workers’ lives, and infused them with a passion, beyond that of most other voluntary associations. At the same time, workers supply the labor that drives the economy, and collectively they have (or historically had) the power to shut it down by withholding their

²⁰² For sharply contrasting views on public sector unions, compare Anne Marie Lofaso, In Defense of Public-Sector Unions, 28 **Hofstra Lab. & Emp. L.J.** 301 (2011), with John O. McGinnis & Max Schanzenbach, The Case Against Public Sector Unions, **Hoover Institution** (Aug. 1, 2010), <http://www.hoover.org/research/case-against-public-sector-unions>.

²⁰³ See Martin H. Malin, Public Employees’ Right to Strike: Law and Experience, 26 **U. Mich. J.L. Reform** 313, 313–314 (1993).

²⁰⁴ Harris referred to one: Federal sector unions do not collect “agency fees” from non-members. Harris, 134 S. Ct. at 2640. On the other hand, they enjoy some offsetting advantages in carrying out their representational functions, such as paid time for contract administration duties. See 5 U.S.C. §7131 (2015?? – current).

labor power. That has given associations of workers a source of economic power that could not be ignored, either by their employers or by the society as a whole. Moreover, unions proved to be useful to employers and society, for they helped to coordinate both workers' collective agitation and its peaceful conclusion through negotiated settlements.

These three factors – workers' dependence on work and wages, employers' and society's dependence on workers' labor power, and the crucial role of unions in coordinating collective demands and negotiations – were central to the politics that led every democratic industrialized society in the world during the first half of the 20th century to adopt a dedicated labor law framework with collective bargaining at its core and unions in a leading role.²⁰⁵ Industrial relations was a regulatory arena like none other, and its institutions were bound to break the mold that was still being shaped with the expansion of the administrative state. Conditions across industries were too varied and complex, and both unions and employers had too much at stake, to subject wages and working conditions to comprehensive government regulation; some mechanism for collective negotiation and compromise – for self-regulation through private organizations – was inevitable. As central actors in a major regulatory arena, unions were inevitably endowed and saddled with a unique package of privileges, powers, duties, and restrictions. Yet unions had both the power and the recognized entitlement to shape that package and to resist complete submission to regulatory control.

The United States was no exception, though the particulars of American labor law are exceptional in many respects.²⁰⁶ Workers' dependence on work and wages and society's dependence on workers' labor were self-evident to most Americans in 1935, amidst the Great Depression and a rising wave of strikes.²⁰⁷ Those propositions underlay the political demand to protect the right to form unions and promote collective bargaining, seen then as an embodiment of industrial democracy; and they underlay the conviction that industrial peace could not be achieved without a measure of industrial democracy. The result was a system of private collective bargaining and dispute resolution within a public law framework. Once amended, the labor law framework conferred on unions several regulatory functions – as regulators of workers' collective action, as workers' exclusive representatives (when chosen by a majority) in the negotiation of collective

²⁰⁵ See **Bruce E. Kaufman**, *The Global Evolution of Industrial Relations*, 15–80 (2004). In particular, serious worker unrest has often spurred significant labor reform. See **Alan Hyde**, *A Theory of Labor Legislation*, 38 **Buff. L. Rev.** 383, 445–46 (1990).

²⁰⁶ See generally, **Derek C. Bok**, *Reflections on the Distinctive Character of American Labor Laws*, 84 **Harv. L. Rev.** 1394 (1971); **Hyde**, *supra* note 205.

²⁰⁷ See generally **Irving Bernstein**, *The Turbulent Years: A History of the American Worker 1933-1941* (1969).

agreements, and as co-administrators of a system of workplace dispute resolution.²⁰⁸ Those regulatory functions are reflected in the array of unusual restrictions, duties, rights, and powers that are outlined above. Yet unions could not perform their regulatory functions if they were not also independent, accountable to workers, and effective in coordinating their economic power and demands.

Concededly, this is a highly schematic and functionalist account of a legal framework that is plagued by internal contradictions and shaped as much by shifting political winds as by principles or purposive planning. Still, the basic labor law framework that took shape in the mid-20th century, and the *quid pro quo* at its heart, reflects a more-or-less conscious, episodically explicit appreciation of the unique regulatory functions that unions play in industrial relations in a democratic capitalist society.

That was then; this is now. In the U.S. today, unions and collective bargaining occupy a shrinking niche of the economy, especially in the private sector. That is partly because of some signature weaknesses of the distinctive American system of collective bargaining.²⁰⁹ Given the principles of exclusive representation based on majority rule and decentralized bargaining at the enterprise or plant level, organizing a workplace is an all-or-nothing affair that requires a campaign for majority support, and that affords ample opportunity for employer opposition.²¹⁰ And employer opposition is almost guaranteed in an enterprise-based bargaining system. Unless unions manage to organize the whole product market and to “take wages out of competition,” unionized employers must compete with non-union employers in part over labor costs; that fuels employer resistance to both union organizing and bargaining demands.²¹¹

By contrast, some advanced industrial democracies espouse the goal of taking wages out of competition, in part through sectoral bargaining.²¹² Particularly in the “coordinated

²⁰⁸ See Archibald Cox & John T. Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 **Harv. L. Rev.** 389 (1950); Karl E. Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 **Indus. Rel. L.J.** 450, 458–68 (1981).

²⁰⁹ For reflections on the distinctive features of U.S. labor law, see Bok, *supra* note 206; Rogers, *supra* note 29, at 88 & n.241. Similar basic elements are present in Canadian labor law (where it is called “the Wagner model”), and to some degree in the U.K., but are otherwise unusual in the Western world. See Alexander J.S. Colvin & Owen Darbshire, Convergence in industrial relations institutions: The emerging AngloAmerican model? 66 **Indus. & Lab. Rel. Rev.** 1047 (2013).

²¹⁰ In part that stems from the “employer free speech” provisions of the Taft Hartley Amendments. See Archibald Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 **Harv. L. Rev.** 1, 15–20 (1947).

²¹¹ See Samuel Estreicher, Labor Law Reform in a World of Competitive Product Markets, 69 **Chi.-Kent L. Rev.** 3, 12–14 (1993); Rogers, *supra* note 29, at 29–32; Wachter, *supra* note 6, at 628–29.

²¹² For a comparative analysis of the collective bargaining systems of North America and Europe, see Roy J. Adams, **Industrial Relations Under Liberal Democracy: North America in Comparative Perspective** (1995); Bok, *supra* note 206; and Clyde Summers, Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective, 133 **U. Pa. L. Rev.** 175 (1984).

market economies” of Germany and Scandinavia, sectoral bargaining over major economic issues is conducted at the national level between the dominant trade union and employer association in the sector, and the results are extended throughout much of the sector.²¹³ Sectoral bargaining both curtails competition based on labor costs (within the nation) and lowers the aggregate cost of collective bargaining. Sectoral bargaining over basic economic issues is often coupled, most famously in Germany, with enterprise-based institutions for worker participation and dispute resolution in other workplace matters.²¹⁴ Unions often play a role in such “works councils,” but not on an exclusive basis; multiple unions may represent workers in the same workplace.²¹⁵ There are no high-stakes elections and no high-pressure campaigns for a majority vote at the workplace; individual employers have both less incentive and less opportunity to resist union organizing and bargaining demands.

Whatever the strengths and weaknesses of the distinct systems of collective bargaining elsewhere in the world, it is easy to see why some have greater economic staying power than the U.S. system.²¹⁶ It is also apparent that these divergent collective bargaining frameworks will produce divergent constellations of legal privileges, powers, duties, and restrictions on the part of unions. In every case, the legal status of unions is bound to be *sui generis*, given the unique coupling of unions’ regulatory functions with their fundamental independence. But the particulars are bound to vary given the variety of industrial relations frameworks. Let us now return to the U.S. framework and draw some implications for constitutional analysis within labor law.

IV. Reframing Constitutional Claims By and Against Unions

Federal labor law has both added to and subtracted from the baseline entitlements that unions would have as either voluntary associations or voluntarist unions. Some of those additions and subtractions may trigger constitutional claims (if state action is present) of

²¹³ The distinction between the “coordinated market economies” of Germany and Scandinavian countries and the “liberal market economies,” of which the U.S. is the prototype, and the different industrial relations institutions that are characteristic of each, are central to the “varieties of capitalism” theory outlined in Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in **Varieties of Capitalism: The Institutional Foundations of Comparative Advantage** 1 (Peter A. Hall & David Soskice eds., 2001).

²¹⁴ See Walther Müller-Jentsch, *Germany: From Collective Voice to Co-Management*, in **Works Councils: Consultation, Representation, and Cooperation in Industrial Relations** 53, 58–61 (Joel Rogers & Wolfgang Streeck eds., 1995).

²¹⁵ On works councils and the legal and institutional relationship between works councils and unions, see **Works Councils**, *supra* note 214.

²¹⁶ Union density is declining across the developed world, but is much higher in the more sectoral systems of Northern Europe than in the enterprise-based systems of the Anglo-American world. See *Trade Union Density*, **Org. for Econ. Co-Operation & Dev.**, <http://stats.oecd.org/> (on left side, expand “Labour”; then expand “Trade Union”; then follow “Trade union density” hyperlink) (last visited May 14, 2015).

either unions or individuals.²¹⁷ But these claims should be analyzed not in isolation from the rest of the statutory scheme but as part of the whole. This Part argues for expanding the frame for analysis of constitutional claims by and against unions that stem from any part of the labor law framework, and illustrates the import of that larger frame in four areas of constitutional controversy involving unions. Expanding the frame does not itself resolve these constitutional issues, but it recasts them in important ways.

A. Expanding the Frame of Constitutional Analysis

The normal mode of constitutional analysis of rights claims is to scrutinize the "fit" between the government's claimed interest and the action it has taken in pursuit of that interest. Depending on the gravity of the constitutional interest at stake, the test may require a tighter fit with a weightier government interest. For most government actions, it is enough that they bear a "rational relation" to a "legitimate government interest"; but invasions of "fundamental rights" and distinctions among "suspect classes" require a closer fit with a weightier government interest.²¹⁸ This is obviously a simplified conventional account of how federal constitutional rights claims are analyzed, but it will suffice for present purposes, for whatever mode of analysis one applies to an allegedly unconstitutional state action, it is first necessary to identify the nature of the challenged action. And that, I argue, is where the quid pro quo of labor law comes into play.

The first step in analyzing constitutional claims by or against unions is to expand the frame to include additional parts of the labor law edifice. Specifically, in order to determine whether and to what degree the challenged action threatens the constitutional interests of either individuals or unions, it is necessary first to ask whether the alleged burden on constitutional rights is logically linked to, and potentially offset or justified by, some corresponding benefit or power that the rights-bearer enjoys under the same legal framework. The point, illustrated in several applications below, is to identify something like the net burden of the challenged action on constitutional interests; depending on its nature and magnitude, it may or may not be subject to heightened scrutiny, and may or may not survive such scrutiny. To be sure, not all of the burdens and benefits imposed by the labor laws are commensurable, or amenable to simple addition and subtraction. That is not the exercise proposed here. But the proof will be in the pudding, or in the particular applications as illustrated below.

²¹⁷ Of course some of those unusual union powers might also implicate constitutional interests of employers; but most of those fall into the category of economic liberties, as to which the New Deal retreat to rational relations scrutiny is taken as given.

²¹⁸ For an illuminating history of the tiers of scrutiny, see Michael Klarman, An Interpretive History of Modern Equal Protection, 90 **Mich. L. Rev.** 213, 214–19 (1991); and on their importation into First Amendment doctrine, see Ashutosh Bhagwat, The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence, 2007 **U. Ill. L. Rev.** 783, 786–87.

Professor Daryl Levinson has shown that the framing question is pervasive in constitutional law, perhaps most visibly in takings cases, but also, if often sub rosa, in free speech and equal protection cases, and beyond.²¹⁹ Levinson argues that the framing question is not only pervasive, but plagued by a pervasive indeterminacy: Given the continuous stream of benefits and burdens between the government and its citizens, he says, it is almost always possible to find some governmentally-conferred benefit to offset an alleged burden on constitutional rights.²²⁰ That being so, an overly expansive approach to the framing question risks unravelling constitutional protections altogether. But framing itself is inescapable, and some reframing moves are clearly more compelling and well-founded than others.

The reframing proposed here treats the NLRA, the Taft-Hartley amendments, and parts of the Landrum-Griffin Act as a unified statutory scheme for collective labor relations that together define unions as distinctive constitutional actors that are both regulated by and regulators within that scheme. I contend that the additions to and subtractions from the baseline entitlements of unions should be evaluated in relation to each other. When an alleged burden under that scheme – a burden imposed on unions or individuals – is challenged as unconstitutional, the frame of analysis should include potentially offsetting benefits or entitlements within the larger scheme. Particular powers or privileges of unions, as well as particular restrictions or burdens imposed on unions, may be troubling or “anomalous” when viewed in isolation; but they might, like an oddly shaped puzzle piece, fit logically into the larger and deliberately constructed regime that defines the sui generis nature of unions and their role in the regulatory system that collective bargaining represents.

A model for the reframing move proposed here may be found in a landmark 1917 labor case, New York Central Railroad Co. v. White,²²¹ which upheld New York’s workers compensation statute. The employer claimed that it was unconstitutional to strip the employer of its common law defenses to liability, and to impose liability without

²¹⁹ See Levinson, supra note 27, at 1316–18.

²²⁰ Id. at 1315. Professors Cox and Samaha take the argument a step further: Once we recognize that the frame can be enlarged to include all of the government benefits as well as the burdens associated with a particular activity, most burdens can be understood as “optional” conditions on discretionary benefits, and most constitutional rights claims become questions about “unconstitutional conditions.” See Adam B. Cox & Adam M. Samaha, Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory, 5 **J. of Legal Analysis** 61 (2012). Cox and Samaha recognize that to reframe issues as “unconstitutional conditions” questions is not to answer them, id. at 78; but it does destabilize conventional constitutional doctrine by muddying the line between “rights” and discretionary benefits and between “infringements” and avoidable conditions; and it directs our attention more systematically to possibilities of “exit” and “sorting” in response to state impositions. Id. at 83. The reframing proposed in this Article, which remains within the confines of a single integrated federal statutory scheme, does not begin to push the limits of conventional doctrine or to raise the spectre of destabilizing constitutional law.

²²¹ 243 U.S. 188 (1917).

negligence.²²² But the Supreme Court held that the burden on the employer was offset and justified by the statute's limitations on liability: Injured employees were entitled not to full compensation under common law tort principles, but to a lower level of statutory compensation that was deliberately pegged well below those levels.²²³ Both sides had given something and gotten something in the move from common law tort liability to statutory workers' compensation liability, and the burdens and benefits were rationally enough related to each other (as well as to the state's legitimate regulatory goals) to pass constitutional muster.²²⁴

What the Court said of the workers' compensation statute in New York Central Railroad is equally true of the labor relations framework at issue here: "The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety."²²⁵ To be sure, it took a quarter century and three major enactments for Congress to construct the much more complex and hotly contested statutory scheme for governing labor-management relations in the private sector. And virtually nobody was or is happy with all of the elements of that statutory scheme; indeed, some of them may be unconstitutional under the analysis proposed here. But it is undoubtedly a unified scheme whose elements are interdependent, and "it is to be judged in its entirety" when any of those elements comes under constitutional challenge.

It is important to emphasize what this proposal is not: First, it is not a one-way ratchet for unions. We have already begun to see that some burdens or restrictions on unions, though anomalous as compared to the constitutional entitlements of other voluntary associations, may find their justification elsewhere in the constellation of extraordinary powers and privileges that the law confers on unions. (That was the case, for example, with unions' duty of fair representation and their power of exclusive representation.) Second, the proposal here is not to afford Congress extraordinary deference in the field of labor relations. The Court has sometimes invoked "Congress' striking of the delicate balance" between unions' constitutional entitlements and competing interests as a basis

²²² Id. at 191–93, 196.

²²³ Id. at 201–04.

²²⁴ Id. One might resist the analogy by questioning whether constitutional entitlements were actually at stake on either side of the "bargain" in New York Central Railroad. The idea that common law entitlements were a form of "property" protected against deprivation, even by legislation, meets little favor today, but it had fairly broad support within the Supreme Court at the time New York Central Railroad was decided. See John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 Yale L.J. 524, 572–83 (2005). Goldberg seeks to rehabilitate a version of the constitutional right to redress through tort law (or some reasonable substitute), and portrays New York Central Railroad as a sensible application of the principle. Id. at 583, 616–17.

²²⁵ New York Central Railroad, 243 U.S. at 202.

for sidestepping constitutional principles in the labor context.²²⁶ The constitutional analysis proposed here is both more attentive to the particularity of labor law and, within that context, more attentive to the particular elements of labor law that depart from the baseline entitlements of unions as voluntary or voluntarist associations of workers.

The reframing proposed here might seem more apt for assessing the claims of unions than the claims of individuals in relation to unions. Unions might be deemed to have somehow accepted the quid pro quo – the additions and subtractions to their basic entitlements that are entailed by the labor laws – by participating as central institutional actors in the scheme established by those laws. On that logic, any statutory burdens on unions would be accepted and therefore acceptable conditions on unions’ representation of workers under the existing labor law framework. But that logic would vitiate not only the associational rights of unions but those of workers to choose union representation and collective bargaining. That logic also ignores the ability of individuals to avoid the burdens associated with the statutory quid pro quo simply by choosing non-union employment.²²⁷ In either case, avoidance or “exit” has some costs, and their magnitude is relevant.²²⁸ It may be more conducive to sound constitutional analysis, to recognize that the labor laws impose a quid pro quo that affects both unions and individuals.²²⁹ Regulatory schemes often do that: They constrain the choices and freedoms of individuals and institutions pursuant to a legislative judgment about what serves the greater good. Obviously regulatory schemes are subject to constitutional limits. But in adjudicating those limits, the impact of a regulatory scheme on the claimant should “be judged in its entirety.”

B. Some Applications

One application of the thesis is foreshadowed in Steele: Unions’ statutory power of exclusive representation, based on majority rule within a bargaining unit, was justified and limited by the union’s implied statutory duty to fairly represent all bargaining unit members. By the same token, the duty of fair representation that unions bear toward non-members of the union, though “anomalous” in comparison to other voluntary associations, was recognized as a necessary corollary of the union’s power of exclusive representation. Both doctrines, one textual and one implied, were justified as logical

²²⁶ See Pope, supra note 101, at 225–26 & n.28 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982)).

²²⁷ For a careful analysis of the constitutional import of individuals’ ability to avoid unionized employment, particularly in comparison to the ability of investors to avoid investing in corporations that make political expenditures, see Sachs, Unions, Corporations, supra note --, at 833-43.

²²⁸ That is central to the argument in Cox & Samaha, supra note --; see id. at 83.

²²⁹ Indeed, although I have placed unions at the center of the analysis, implicit in the package of special rights, powers, duties and restrictions that affect unions is a corresponding set of burdens and benefits that affect individuals in relation to unions.

counterparts of each other within the statutory scheme. The correspondence is not one-to-one or perfect. The power of exclusive representation could justify more than one corresponding duty or burden; and the duty of fair representation might justify more than one corresponding union entitlement. That brings us to the first of several additional applications of the quid pro quo thesis: the agency fee controversy, various incarnations of which have occupied the Supreme Court for many decades, and will continue to do so for years to come.

1. Revisiting The Agency Fee Problem

Unions' ability to collect an agency fee from objecting non-members may be an "anomaly" as compared to other voluntary associations; but unions are not like other voluntary associations. The mandatory agency fee (or what is left of it) is intertwined with the larger quid pro quo established by the labor laws. How does that affect the constitutional analysis of the agency fee problem?

As a threshold matter, private sector agency fees, stemming as they do from privately-bargained agreements that are merely permitted by federal labor law, may not pose any constitutional problem at all.²³⁰ The analysis proposed here does not purport to alter the state action analysis, though it does suggest reasons for caution in treating union action as state action.²³¹ So what follows is relevant only if the Court crosses the state action threshold under the NLRA or the RLA, or in the public sector where state action is clearly present.

With that proviso, the analysis proposed here resonates with the Supreme Court's pre-Harris approach to agency fees: To require individuals as a condition of employment to pay a fee to the union for expenditures that are germane to collective bargaining and contract administration is a logical counterpart of the obligations that the union undertakes pursuant to the law's exclusivity and fair representation doctrines, and the economic benefits the individual receives from union representation. That logic does not clearly extend to union expenditures for partisan political activities; unions' ability (before Street, Abood, and Beck) to demand support of those activities arguably amounted to a net burden on individuals who did not share the union's political aims.²³² But the economic burden of the fee-for-services on individuals is counterbalanced by the services for which they pay. The frame for constitutional analysis should include both.

Let us underscore this point: The First Amendment challenge to agency fees is premised on the notion that money is speech, and therefore that compelled payment of

²³⁰ See supra note 105 and accompanying text. For a rigorous criticism of the claim that union security agreements in the private sector partake of state action because of the exclusivity doctrine, see Sachs, Unions, Corporations, supra note 63, at 849–51.

²³¹ See supra Section III.A.3.

²³² That is only arguable; see *infra* note --.

the agency fee is equivalent to compelled speech. If that is so, then it must be relevant that the agency fee is much more than offset by the economic benefits of union representation. The average union wage premium (about 17 percent) is over 13 times as much as the average full union dues (only a portion of which is chargeable to objectors).²³³ To be sure, some individuals might doubt that union representation is “worth it” as an economic matter.²³⁴ But the law submits that judgment to majorities; and the data suggest that a majority’s choice of union representation is economically rational.²³⁵ An individual objector is free to spend some or all of the net economic gains from union representation on speech opposing unions – for example, seeking to persuade a majority of co-workers to reject union representation.²³⁶

The analysis proposed here gives constitutional heft to the “free rider” problem that unions face, for that problem stems precisely from other components of the statutory scheme that burden unions and benefit individuals. Given the foundational legal principles of exclusive representation, majority rule, and the duty of fair representation, unions face a “free rider” problem very unlike that of other voluntary associations that confer incidental benefits on non-contributors. Collective bargaining, contract administration, and dispute resolution are both costly for unions and economically valuable for the workers involved. Absent the offsetting agency fee, employees have a transparent and legally-constructed incentive to “free ride,” taking the benefits of union representation without the costs.²³⁷ Union members would have to subsidize the cost of

²³³ Sachs, Unions, Corporations, *supra* note 63, at 811 & n.47 (citing David G. Blanchflower & Alex Bryson, What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?, in **What Do Unions Do? A Twenty-Year Perspective** 79 (James T. Bennett & Bruce E. Kaufman eds., 2007) (on the wage premium); John W. Budd & In-Gang Na, The Union Membership Wage Premium for Employees Covered by Collective Bargaining Agreements, 18 **J. Lab. Econ.** 783, 803 (2000) (on union dues)).

²³⁴ They might worry, for example, that unionization, and the wage premium it brings, increase the risk of job loss.

²³⁵ See, e.g., Richard B. Freeman & Morris M. Kleiner, Do Unions Make Enterprises Insolvent?, 52 **Indus. & Lab. Rel. Rev.** 510 (1999) (arguing that unions generally push wages upwards, but not to the point where the firm shuts down).

²³⁶ Indeed, that logic could justify charging the full union dues. Even the political expenditures that are non-chargeable, to the extent they strengthen unions’ ability to organize and represent workers effectively, redound to the economic benefit of bargaining unit members. See Reuel E. Schiller, From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength, 20 **Berkeley J. Emp. & Lab. L.** 1, 43, 67 (1999). For purposes of this argument, however, I accept the prevailing distinction between expenses that are “germane” to collective bargaining and contract administration and those that are not, including “political” and “ideological” activities. For an argument against that distinction in favor of allowing unions to charge full union dues – the original “union shop” – see Rogers, discussed *supra* note 85.

²³⁷ To be sure, unions might be able to counteract the free-rider problem by investing continuously in internal organizing among workers they already represent; some argue that would be a good thing for unions. E.g., Jordan Weissmann, Right to Work Won’t Doom Michigan’s Unions—It Might Even Save Them, **The Atlantic** (Dec. 12, 2012), <http://www.theatlantic.com/business/archive/2012/12/right-to-work->

representing non-members – not just dissenters but those who choose to save a buck. Higher dues may trigger additional opt-outs, which may lead to higher dues, and so on. The cascading impact of opportunistic and ideological opt-outs may seriously undermine unions’ ability to represent employees, to carry out the will of the majority, and to perform their regulatory functions under the labor laws.²³⁸

The free-rider problem turns out to illustrate one variation on a larger theme developed here: The labor laws confer an array of rights, powers, privileges, burdens, and restrictions on unions that distinguish them from other voluntary associations; and some of those have their mirror image in a set of burdens and benefits for individuals in relation to unions. A constitutional complaint about any one of those components should be viewed in the larger context: Is the challenged burden or restriction logically related to and justified by a benefit or power enjoyed by the claimant under the statutory scheme as a whole?

The result is not only to recast and fortify the free-rider justification for the agency fee, but also to dramatically deflate the First Amendment interest of dissenters in the agency fee context. The Harris Court held that “an agency-fee provision imposes ‘a significant impingement on First Amendment rights,’ ” one that “cannot be tolerated unless it passes ‘exacting First Amendment scrutiny.’ ”²³⁹ But what does the “impingement” consist of? Insofar as the economic burden of the agency fee is more than offset by the economic benefits of representation, the net impact of the core fee-for-services on objectors amounts to a feeling of indignation over being compelled to support an organization that they oppose, but that the majority supports. That is a daily experience in a society in which many decisions are necessarily collective, not individual. It is on a par with the feeling of taxpayers forced to support a war or a welfare system that they oppose, or the feelings of electricity customers forced to support a company whose reliance on fossil fuels they abhor, or the feelings of lawyers forced to pay dues to

wont-doom-michigans-unions-it-might-even-save-them/266160/; see also, e.g., **Julius G. Getman, Restoring the Power of Unions** (2010). That argument is in keeping with past misgivings within the labor movement about the impact of union security on unions’ responsiveness to the rank-and-file. See supra notes 35–37 and accompanying text. But Congress chose to permit unions, through bargaining, to shift their resources away from constant reorganizing into collective representation. See supra text accompanying notes 37–38.

²³⁸ A recent review of the empirical literature noted the frequent finding that right-to-work laws are associated with lower levels of unionization and higher levels of “free-riding” in unionized bargaining units, **Benjamin Collins, Cong. Research Serv., Right to Work Laws: Legislative Background and Empirical Research** 6–9 (2014), <http://fas.org/sqp/crs/misc/R42575.pdf>, but also the notorious difficulty of measuring the impact of right-to-work laws. William J. Moore, The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature, 19 **J. Lab. Research** 445, 446–48 (1998); David T. Ellwood & Glenn Fine, The Impact of Right-to-Work Laws on Union Organizing, 95 **J. Pol. Econ.** 250, 251–52 (1987).

²³⁹ Harris v. Quinn, 134 S. Ct. 2618, 2639 (2014) (quoting Knox v. Serv. Emps. Int’l Union, Local 1000, 132 S. Ct. 2277, 2289 (2012)).

a bar association that administers ethical standards they oppose. There are two differences, both of which cut in favor of the agency fee: That fee is accompanied by significant net benefits that show up in one's paycheck; and it is much easier for individuals to avoid paying agency fees than it is to avoid paying taxes or electricity bills or bar dues; it requires either finding a non-union job or persuading a majority of one's co-workers to reject the union.²⁴⁰

The interest at stake in these agency fee cases simply does not warrant either the "exacting scrutiny" or the overwrought rhetoric deployed in Harris. The majority went so far as to quote Justice Douglas's view (in dissent) that, by sanctioning mandatory bar association fees, "we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades."²⁴¹ Really? One might long for the sobriety of Justice Frankfurter in Street: "The individual member may express his views in any public or private forum as freely as he could before the union collected his dues."²⁴² Indeed, the 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.²⁴³

It is worth recalling that both the bombast of Justices Douglas and the demurrer of Justice Frankfurter, quoted above, were directed to the issue of compelled contributions to a private organization's political and ideological speech.²⁴⁴ The unions' adversaries won that battle long ago. What is at stake now is compelled support of "speech" that is merely incidental to the organization's performance of its core representational functions, and that confers tangible economic benefits on the individual. The feeling of indignation that remains, if it is a constitutionally cognizable burden at all,²⁴⁵ is much less weighty than the Harris Court suggested; and it is more than justified by the state's interest in a

²⁴⁰ The notion that employees are "compelled" to pay dues or fees under union security agreements, often articulated but seldom defended, is dissected in Sachs, Unions, Corporations, supra note 63 at 829–38.

²⁴¹ Harris, 134 S. Ct. at 2629 (quoting Lathrop v. Donohue, 367 U.S. 820, 884 (1961) (Douglas, J., dissenting)).

²⁴² Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 806 (1961) (Frankfurter, J., dissenting).

²⁴³ See supra notes 232–235 and accompanying text.

²⁴⁴ See supra text accompanying notes 69–75, 119.

²⁴⁵ See Fisk & Poueymirou, supra note 19; West, supra note 15, at 910. Fisk and Poueymirou argue that the individual expressive interest threatened by the core agency fee is precisely counterposed by the expressive interests of the union and its members in not being forced to subsidize representation of free-riding non-members; and that this symmetry exposes the error in treating the financial transactions entailed by the agency fee as "compelled speech" at all. Fisk & Poueymirou, supra note 19. But even if one accepts the Court's contrary premise on that score, offsetting benefits to the claimant, and burdens on its adversary, should be taken into account. Our arguments regarding the agency fee problem are different but compatible in adopting a larger frame of analysis that includes the other side of the constitutional equation. On the tensions between the agency fee cases and corporate speech rights, including Citizens United, see Fisk & Chemerinsky, supra note 182.

fair and economically sustainable system of collective bargaining, whether in the public sector or in the private sector.

My analysis echoes Justice Scalia's defense of the agency fee, but with a difference. Justice Scalia said this:

Our First Amendment jurisprudence . . . recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The “compelling state interest” that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of “free-riding” nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the “free riders” [in unions] . . . is that . . . the law requires the union to carry [them]—indeed, requires the union to go out of its way to benefit [them], even at the expense of its other interests [T]he free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.²⁴⁶

The difference between Justice Scalia's analysis and mine is this: Where he invokes the “free rider” problem as a “compelling state interest” justifying the agency fee requirement, I argue that no significant constitutional infringement arises, and no compelling state interest need be identified, because the agency fee is offset and justified by the costs (to the union) and benefits (to the individual) of union representation.

Notably, this defense of agency fees does not deny that the subjects of collective bargaining are often “matters of public concern.” That was vividly so in private sector labor relations when the NLRA was enacted, and when the Supreme Court decided Thornhill v. Alabama in 1940;²⁴⁷ and it was evident to the Harris Court in public sector labor relations in 2014.²⁴⁸ But once we recognize that unions function as part of a public regulatory scheme, that proposition becomes both more obvious and less significant. A society presumably only exerts regulatory control over issues that have attracted “public concern.” The legislature could presumably respond to that concern by regulating wages and working conditions directly through a more comprehensive labor standards regime; or it could ignore that concern and leave the determination of wages and working conditions to managerial decision making and individual bargaining. Only a very wooden view of the First Amendment would manufacture an opt-out right for individuals whenever the society chooses instead to empower private actors to engage in collective self-regulation.

²⁴⁶ Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part).

²⁴⁷ 310 U.S. 88 (1940).

²⁴⁸ Harris v. Quinn, 134 S. Ct. 2618, 2642 (2014).

The “fair share” agency fee is what remains of union security after Congress barred agreements requiring full membership, and after the Supreme Court cut down the permissible agency fee to its non-ideological core.²⁴⁹ What remains of the agency fee is an integral and logical component of the system of collective bargaining that Congress created, and a fair exchange for the representational services that unions render, given the costs for unions and the tangible benefits for individuals that follow.

2. Reconsidering the Anomaly of State “Right to Work” Laws

For the Harris Court, the ability of unions to collect an agency fee is a constitutional “anomaly” that this Article has sought to explain and justify. But that explanation highlights the opposing anomaly of state right-to-work laws. Those laws prohibit agreements that compel workers to contribute to a union, within a federal labor law regime that enables groups of workers, by majority rule, to choose collective representation and mutual support over individual bargaining; yet such laws are expressly permitted – saved from preemption – by the NLRA itself as it is conventionally read.²⁵⁰ On that conventional reading, Congress itself long ago undercut the supposed logic of the statute, or allowed states to do so, with regard to agency fees.²⁵¹ The logic of the statute is restored, however, by a more literal reading of its text recently espoused by Professors Fisk and Sachs,²⁵² and by Judge Diane Wood of the Seventh Circuit, albeit in dissent, in Sweeney v. Pence, which upheld Indiana’s “right-to-work” law.²⁵³ Reframing the issue posed by these state “right-to-work” laws, pursuant to the analysis proposed here, strengthens the case for that more literal reading.

Understanding the legal status of state “right-to-work” laws requires some exegesis.²⁵⁴ Congress in 1947 did three things (by some rather convoluted statutory language): In what is now Section 8(a)(3) of the NLRA, it both banned “closed shop” and “union shop” agreements requiring actual union membership as a condition of employment (thus dissolving union control over individuals’ “right to work”), and permitted agreements requiring payment of union dues and fees as a condition of employment (what has come to be called an “agency shop” provision).²⁵⁵ Then in

²⁴⁹ See supra notes 55–57 and accompanying text.

²⁵⁰ See Sweeney v. Pence, 767 F.3d 654, 658–65 (7th Cir. 2014).

²⁵¹ Of course, even if Congress permits illogical exceptions to its own legislation on political grounds, that would not justify the Court’s undercutting the system’s logic further by invalidating the agency fee nationwide. Concededly, however, my argument regarding the logic of the statutory scheme would be stronger without that exception (as per the argument made below).

²⁵² Catherine L. Fisk & Benjamin I. Sachs, Restoring Equity in Right-to-Work Law, 4 U.C. Irvine L. Rev. 857, 860–66 (2014).

²⁵³ Sweeney, 767 F.3d at 671–85 (Wood, C.J., dissenting).

²⁵⁴ That exegesis is undertaken by Judge Wood in much greater detail in her Sweeney dissent.

²⁵⁵ See supra note 55 and accompanying text.

Section 14(b), Congress allowed states to prohibit "agreements requiring membership" in a union.²⁵⁶ That last phrase has generally been read, as it was by the Seventh Circuit in Sweeney, to include agreements requiring payment of any union dues and fees.²⁵⁷ That reading made some sense as to agreements requiring non-members to pay the same dues as members; the NLRA's text appeared to permit such agreements, but states could prohibit them. But this reading of Section 14(b) does not make sense as to agreements requiring only a reduced fee-for-services – only the fees that are necessary to prevent free riding – as a condition of employment. And that is all that any union is permitted to demand after Beck.

In short, agreements requiring payment of lesser, Beck-compliant agency fees are not fairly construed as “agreements requiring membership” in a union within the meaning of Section 14(b).²⁵⁸ On this reading, Section 14(b) would permit states to bar agreements requiring either actual union membership or its financial equivalent, but not agreements requiring payment of the core fee-for-services.²⁵⁹ The result would be that state right-to-work laws no longer do any work; but that is only because the Supreme Court in Beck later did all the work (nationwide) that such state laws could do consistent with the NLRA: It barred agreements requiring individuals to pay the full financial equivalent of membership, and allowed only those that directly meet the free-rider problem otherwise entailed by exclusive representation.²⁶⁰ Given Beck's narrow reading of Section 8(a)(3), a narrow reading of Section 14(b) restores an equilibrium between the economic burdens and benefits of exclusive representation both for the union and for those whom it represents.

This Article will not recapitulate in detail the legislative history and judicial precedent that Judge Wood marshals in her dissent; its aim is to show how the narrower view of Section 14(b) resonates with the general approach proposed here for the analysis of constitutional claims by and against unions. But one point bears emphasis: Critics will object to a reading of Section 14(b) that renders it superfluous: If Congress meant in 1947 for Section 8(a)(3) to prohibit agreements requiring more than the partial agency fee (as Beck holds it did), it must have intended in Section 14(b) to permit states to prohibit more than that. But that is simply to compound the error of Beck, whose reading of

²⁵⁶ See supra note 57 and accompanying text. For a more detailed analysis of the statutory intricacies and their judicial interpretation, see Fisk & Sachs, supra note 252, at 860–66.

²⁵⁷ Sweeney, 767 F.3d at 660–61; Fisk & Sachs, supra note 252, at 861–62. The Supreme Court thus read it in Retail Clerks International Ass'n, Local 1625 v. Schermerhorn, 373 U.S. 746 (1963), in which the dues and fees required of non-members were the same as those for members.

²⁵⁸ Schermerhorn expressly distinguished a hypothetical ban on union security agreements "less stringent" than those requiring the full financial equivalent of membership. Schermerhorn, 373 U.S. at 751–52; Fisk & Sachs, supra note 252, at 863–64.

²⁵⁹ Fisk & Sachs, supra note 252, at 864–66.

²⁶⁰ See Comm'ns Workers of Am. v. Beck, 487 U.S. 735, 735–63 (1988).

Section 8(a)(3) was fairly described by the dissent as “foreign to that section’s express language and legislative history.”²⁶¹ Stated differently, it was Beck’s dubious reading of Section 8(a)(3) that rendered superfluous Section 14(b), as properly understood. It did so by banishing, under the supposed pressure of constitutional avoidance, the last vestige of “compulsory unionism,” something that Congress had left for the states to decide. Beck should not now supply the basis for ratcheting up the permissible scope of state “right-to-work” laws under Section 14(b) and destabilizing the federal scheme.

If the narrower, more literal reading of Section 14(b) is right, then state laws that prohibit even the core fee-for-services, and that create a well-recognized free rider problem, are preempted by the NLRA.²⁶² Preemption doctrine itself has constitutional underpinnings in the Supremacy Clause.²⁶³ But there is another constitutional problem with broader state “right-to-work” laws, one that Judge Wood elaborated in her Sweeney dissent.²⁶⁴ Indiana’s “right-to-work” law, like most others, prohibits unions from securing payment for representational services that federal law requires them to render to employees under its principles of majority rule and exclusive representation.²⁶⁵ That, says Judge Wood, works an unconstitutional taking of unions’ property.²⁶⁶ And that suggests an additional “constitutional avoidance” argument for reading Section 14(b) of the NLRA narrowly, and for reading the NLRA as a whole to preempt state right-to-work laws that bar the agency fee-for-services.

The takings claim elaborated by Judge Wood offers another opportunity to illustrate how the analysis proposed here might work. Faced with the union’s constitutional challenge to Indiana’s law, the first question should be what if anything was “taken” – in this case whether anything in the remainder of the labor law quid pro quo offsets the exaction of unpaid representational services under these state laws. To borrow Justice Scalia’s formulation, the “free rider” problem that results from these state laws, given the union’s duties under federal labor law, is “not incidental but calculated, not imposed

²⁶¹ Id. at 763 (Blackmun, J., concurring in part and dissenting in part). According to the dissent, “that section’s express language and legislative history . . . show that Congress did not intend to limit either the amount of ‘agency fees’ . . . or the union’s expenditure of such funds.” Id.

²⁶² See Stanley D. Henderson, The Confrontation of Federal Preemption and State Right-to-Work Laws, 1967 **Duke L.J.** 1079, 1122–23. For an overview of the labor preemption doctrine, see David L. Gregory, The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?, 27 **Wm. & Mary L. Rev.** 507 (1986).

²⁶³ E.g., Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712–13 (1985).

²⁶⁴ Sweeney v. Pence, 767 F.3d 654, 671–85 (7th Cir. 2014) (Wood, C.J., dissenting).

²⁶⁵ Fisk & Sachs, supra note 252, at 857–58.

²⁶⁶ Sweeney, 767 F.3d at 683–84 (Wood, C.J., dissenting). En banc review was denied, Order, Sweeney v. Pence, No. 13-1264 (7th Cir. Jan. 13, 2015), but with five members of the court indicating their agreement with Wood’s dissent.

by circumstances but mandated by government decree.”²⁶⁷ It should count as a state-imposed “taking” from the union. The panel majority in Sweeney held that the federal right to represent non-members under the NLRA’s exclusivity doctrine is itself “compensation” – or an offsetting benefit – for the burden of representing free-riding non-members.²⁶⁸ But that is implausible given the transparent free rider problem, and the destabilizing cascade of opt-outs, dues increases, and more opt-outs that could follow.²⁶⁹ The burden of representing non-members without compensation upsets an equilibrium that otherwise attains among the burdens and benefits of exclusivity. That significant net exaction calls for heightened scrutiny.²⁷⁰ The agency fee-for-services that the NLRA allows unions to demand from non-members, and that the state right-to-work laws block, is a logical and integral component of a federal labor law scheme that enables workers to choose union representation by majority rule, and that obligates the union to represent all unit members fairly.

Professors Fisk and Sachs propose another possible solution to the inequity of the right-to-work laws: Abandonment of the principle of exclusivity and the duty of fair representation in right-to-work states with regard to those who opt out of all fees.²⁷¹ Unions in right-to-work states would then represent only their own dues-paying members – even if those members constituted a majority in a workplace – both in collective bargaining and grievance handling.²⁷² Other employees could bargain for themselves, or

²⁶⁷ Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507, 556, (1991) (Scalia, J., concurring in judgment in part and dissenting in part).

²⁶⁸ Sweeney, 767 F.3d at 666. Ironically, the majority cites Steele for the proposition that “[t]he powers of the bargaining representative are ‘comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents,’ ” and that are matched by a corresponding duty of fair representation. Id. (quoting Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944)). But of course the majoritarian legislature is also empowered to tax all the citizens for the services it renders them.

²⁶⁹ See supra notes 237–238 and accompanying text.

²⁷⁰ The conditional nature of the exaction here might seem to complicate the inquiry, but it leads to the same result. In principle, even if a state-imposed duty to represent non-fee payers would be a taking if done outright, it might nonetheless be a permissible condition on the union’s entitlement to serve as exclusive representative of the whole bargaining unit. A conditional exaction may be constitutional if (1) the entitlement on which the condition is imposed – here, the right to represent employees exclusively – could have been denied altogether; and (2) the condition imposed bears an “essential nexus” and is “roughly proportional” to the burdens that stem from the grant of the entitlement that the state is seeking to ameliorate. See Dolan v. City of Tigard, 512 U.S. 374 (1994). The first requirement is not met by the state law in Sweeney, as federal law establishes the union’s right to represent employees exclusively based on majority rule. Even if that requirement were met, the condition of representing non-fee payers is not a “roughly proportional” response to the “burdens” imposed by the union’s exclusive representation.

²⁷¹ Fisk & Sachs, supra note 252, at 866–67.

²⁷² The idea of members-only bargaining, not uncommon before the NLRA, was revived in Morris, supra note 146, at 194–200, which argues that employers have a duty to bargain with a minority-supported union on a members-only basis. Morris’ argument has been met with some skepticism. See, e.g., Joseph E. Slater, Do Unions Representing a Minority of Employees Have the Right to Bargain Collectively?: A Review of Charles Morris, The Blue Eagle at Work, 9 Emp. Rts. & Emp’t. Pol’y J. 383 (2005) (book review). There has been much less discussion of the notion that unions can bargain on a members-only

perhaps through another organization, but they could not demand the union's services without paying for them. Fisk and Sachs argue persuasively that this is where the logic of right-to-work should lead (if it is not curtailed by preemption).²⁷³

But the Fisk and Sachs argument for members-only bargaining underscores the point made here: The resulting mix, even within a single group of workers, of unilateral managerial authority, individual bargaining, and members-only collective bargaining, possibly with multiple unions, would drastically reconfigure if not undo altogether the quid pro quo at the heart of the current system within the right-to-work states. As a policy matter, that kind of drastic change, and even a little attendant chaos, might not be a bad thing; their proposal warrants serious consideration. But for judges charged with reviewing and interpreting existing law, the disintegration of the integrated federal labor law regime that lies down that path is another good reason to choose a different path, and to revisit the permissible reach of state right-to-work laws under Section 14(b).

3. Rethinking the Constitutionality of Restrictions on Peaceful Labor Picketing

The NLRA's restrictions on peaceful labor picketing pose a knotty and much-mooted First Amendment problem, for they bar unions from peacefully communicating the facts of a labor dispute and appealing to individuals, through the symbolic message of a picket line, to support the union's cause by lawfully withholding their patronage or their labor from the targeted business. The secondary boycott ban is especially problematic, for ordinarily both the action the union urges on consumers and workers and the action it urges on the secondary target (to pressure the primary) are lawful. Moreover, Supreme Court has held that the same conduct by a civil rights group is protected by the First Amendment.²⁷⁴ The quid pro quo thesis developed here counsels us to ask whether other features of the NLRA, and particularly the special powers or privileges that it confers on unions, offer a constitutional justification for its speaker-specific, content-based speech restrictions.

basis for a majority of employees in a cohesive work unit, foregoing the rights and responsibilities associated with exclusive representation (as Fisk and Sachs argue they should be able to do in the right-to-work states). The notion is in tension with the text of Section 9(a), and its sole precedential support lies in a single very old Supreme Court decision, Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938). Since then, unions that can prove majority support have routinely sought the exclusive representation rights that the NLRA contemplates they will exercise. Fisk and Sachs argue, however, that members-only bargaining is a sensible policy response to the right-to-work anomaly. Fisk & Sachs, supra note 252.

²⁷³ The idea of members-only bargaining is put to a different use, as a defense of right-to-work laws and a rejoinder to the free-rider argument, in Sherk, supra note 144. On Sherk's account, unions that are chosen by a majority can choose whether to claim exclusive representation rights under the NLRA or to bargain for their members only, and thus have no complaint (and certainly no takings claim) if the price or condition of exclusive representation in some states is uncompensated representation costs for objecting non-members. Id. But that reading of the NLRA is contradicted by the text of § 9(a) and finds no support in the modern caselaw. See supra notes 144–146 and accompanying text.

²⁷⁴ NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

One recurring theme in the decisions upholding restrictions on labor picketing is the suggestion that even peaceful labor picketing is coercive – and somehow more coercive than non-labor picketing; but the Court's decisions lack an account of what makes it so.²⁷⁵ Some have sought to fill that gap by positing that labor picketing operates as a “signal” whose impact depends not on the appeal of its message but at least partly on unions’ economic power over their members.²⁷⁶ And that claim directs our attention to other parts of the labor law scheme: Suppose that a picket appealed to union members who were subject to union discipline for crossing a picket line, and that union membership were a condition of employment under an agreement between the union and an employer compelled to bargain with that union on an exclusive basis. Where those conditions held, as they did for some union pickets as of 1947, unions could leverage their legally fortified power over individual workers into economic power versus employers. That suggests a constitutional basis for some of the restrictions on peaceful picketing.

This potential and decidedly partial defense of the Taft-Hartley restrictions on peaceful picketing turns out to be illusory, however, for Taft-Hartley itself prohibited union security agreements that made union membership a condition of employment.²⁷⁷ Thereafter, unions controlled their membership but not workers’ jobs; and their power to discipline their members for crossing a picket line neither threatened workers’ livelihoods nor was amplified by the special legal powers of unions. At that point, a union’s decision to back up a picket line with the threat of union discipline against members who cross it should be a matter between unions and their members, within their expressive and associational freedoms.²⁷⁸

²⁷⁵ In particular, the “coercion” of secondary employers that might follow from a successful appeal to workers and consumers to lawfully support the union's cause.

²⁷⁶ See NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 619 (1980) (Stevens, J., concurring in part); see also **Thomas I. Emerson, The System of Freedom of Expression** 445–47 (1970); Archibald Cox, The Influence of Mr. Justice Murphy on Labor Law, 48 **Mich. L. Rev.** 767, 782–89 (1950). Of course if the picket was backed by a threat of physical assault, that would be unprotected; that is not what I mean by “peaceful picketing.” But such a threat should not be presumed, and is not presumed outside the union setting. See Claiborne Hardware, 458 U.S. at 933–34.

²⁷⁷ See supra note 55 and accompanying text. On the ground in the 1950s, unions often still exercised power over employment. See Summers, Union Powers, supra note 56, at 808–10. They rarely do now; and the burden of proving the role of economic coercion in fortifying the union’s message should in any case rest on the party seeking to restrict peaceful expression. Cf. Claiborne Hardware, 458 U.S. at 932–34 (holding that First Amendment requires complaining businesses to prove that any economic damages from civil rights picketing stemmed from violence or physical threats against would-be customers rather than peaceful persuasion).

²⁷⁸ Once union membership could no longer be made a condition of employment, a worker's decision to join the union fairly subjects the worker to collective decisions about support of strikers, for example. Union membership in the presence of such policies represents a precommitment to solidarity and mutual support, and the union is entitled to enforce that precommitment. See David Abraham, Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy, 63 **N.Y.U. L. Rev.** 1268, 1283–86 (1988). Abraham argues

The law's restrictions on "recognitional picketing" present a different link between the unusual legal restrictions to which unions are subject and their unusual legal powers. Such picketing appeals to consumers and employees to withhold their patronage or labor from an employer, with the aim of inducing employees to join the union or of inducing the employer to recognize and bargain with a union. The language of the provision (now Section 8(b)(7) of the NLRA) is intricate and opaque,²⁷⁹ but a major target is picketing that threatens to induce an employer to recognize a union that lacks majority support among the employees; that action, unlike the action urged on employers by most secondary picketing, would itself violate the NLRA.²⁸⁰

Restrictions on peaceful picketing with that aim and likely effect might pass First Amendment muster even if the law gave no special backing to collective bargaining; but they might not. Normal First Amendment principles would normally require a tight fit between the restrictions on speech and the actual risk and harm of unlawful conduct.²⁸¹ But if we step back and look at the larger statutory frame for these restrictions, they may be more defensible. Once duly recognized, the union can invoke both the power of exclusive representation and the employer's legal duty to bargain in good faith. Given the legal consequences of workers' choice of union representation, the restrictions on recognitional picketing might be justified as ensuring that union recognition is indeed founded on employees' majority support, and not only on employers' submission to economic pressure.

Instead of the narrow-gauged restrictions on peaceful picketing that might be justified by the role of labor law in magnifying its impact, however, we have the much broader restrictions enacted by Congress in 1947. The Supreme Court, invoking the doctrine of constitutional avoidance, has read the secondary boycott ban narrowly to permit some

persuasively that the union should be entitled to enforce that commitment even against members who resign during a strike and become strikebreakers, contrary to the Supreme Court's holding in Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95 (1985). But especially given the strong commitment to a right of exit in cases like Pattern Makers', those who choose to remain union members, and who have the right to participate in its collective decisions, can fairly be bound by those decisions.

²⁷⁹ See, for example, the NLRB's own exegesis of Section 8(b)(7) at Recognitional Picketing (Section 8(b)(7)), NLRB, <http://www.nlr.gov/rights-we-protect/whats-law/unions/recognitional-picketing-section-8b7> (last visited May 14, 2015).

²⁸⁰ NLRA § 8(a)(2) prohibits employers from recognizing a union that does not in fact represent a majority of employees. Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 737–38 (1961).

²⁸¹ Expression that urges, and risks incitement to, unlawful action may be restricted or punished under the First Amendment; but the standard for justification is quite strict. See Cohen v. California, 403 U.S. 15, 16–19 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). Alternatively, expression that amounts to "solicitation" of unlawful activity might be subject to punishment. But the line between mere advocacy and either incitement or solicitation of unlawful activity is closely guarded by First Amendment doctrine.

secondary appeals to consumers, especially by non-picketing forms of publicity.²⁸² But what remains is a broad content-specific ban on expression that is constitutionally protected in the hands of other speakers. The Court has defended the labor-specific restrictions on picketing, particularly secondary picketing, as “part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.’”²⁸³ But there is nothing delicate about this balance. It restricts the freedom of expression of unions and their members because their speech threatens to persuade workers and customers to make common cause with them and withdraw their labor and patronage when they have every right to do so. Reframing these challenges suggests a partial defense in the few instances in which the unions' speech either draws on or threatens to unjustifiably trigger distinct legal powers of unions. But absent that more finely calibrated inquiry into the "delicate balance" struck by Congress, the law's infringement on the First Amendment rights of unions and their members stands unjustified.

4. Worker Centers as Labor Organizations? The Quid Without the Quo

The analysis proposed here would also reframe a newly brewing dispute over whether “worker centers” are “labor organizations” subject to the burdens and restrictions of the NLRA.²⁸⁴ Worker centers typically organize and serve low-wage workers, and especially immigrant workers – day laborers, farm workers, janitors, restaurant workers, car wash workers -- many of whom face chronic and serious employment law violations.²⁸⁵ They engage in a range of activities: educating workers about their rights, protesting and publicizing employer misconduct, litigating under various employment laws, pressuring employers to raise wages and working conditions above the legal minimum, for example,

²⁸² *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) (construing § 8(b)(4) not to reach non-picketing publicity aimed at customers); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) (construing § 8(b)(4) not to reach picketing of a secondary retailer that seeks only to discourage purchase of a single struck product that accounts for a trivial percentage of the retailer’s sales).

²⁸³ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (quoting *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 617–618 (Blackmun, J., concurring in part)). The Court also characterized labor picketing as “economic activity,” versus the “expression on public issues” involved in a civil rights picket, *id.* at 913; but that distinction is at odds with both *Thornhill v. Alabama*, 310 U.S. 88 (1940), and the sheer fact of political controversy and the role of politics and solidarity in labor conflict. Note, *Labor Picketing and Commercial Speech*, *supra* note 101.

²⁸⁴ A precursor to argument in this section is sketched in *Estlund*, *supra* note 8, at 181–85. For two other recent analyses of the legal status of worker centers under the NLRA (neither of which focuses on the constitutional questions that would be raised by their coverage under the Act), see Fisk, *Workplace Democracy*, *supra* note 188; and Thomas I.M. Gottheil, *Not Part of the Bargain: Worker Centers and Labor Law in Sociohistorical Context*, 89 *N.Y.U. L. Rev.* 2228 (2014).

²⁸⁵ See Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (2006); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 *Harv. C.R.-C.L. L. Rev.* 407, 407–09, 428–29 (1995).

to pay a “living wage.”²⁸⁶ Most worker centers operate on a financial shoestring, for they depend on voluntary member dues from their low-income constituents, sometimes supplemented by foundation grants or trade union support.²⁸⁷

Despite their limited resources, worker centers have mustered extraordinary organizational energy, and have become a thorn in the side of some employers. Hence the recent drumbeat, sounded by the Chamber of Commerce and others, that many worker centers that represent “employees” within the scope of the NLRA are “labor organizations”²⁸⁸ with the same legal obligations and restrictions as the United Auto Workers. That would be suffocating for most of these low-budget, informal organizations.²⁸⁹ It would bring into play restrictions on peaceful secondary picketing, which might bar worker centers from peacefully picketing the customers, building owners, or other employers that ultimately use the workers’ labor. It might also trigger the LMRDA’s detailed reporting and disclosure requirements and regulations of the internal affairs of “labor organizations.”²⁹⁰ Those burdens weigh heavily on traditional trade unions – with their thousands of members, their millions of dollars in membership dues, and their sizable organizations and staffs; they would be fatal – as they are likely intended to be – for most worker centers.

The argument that worker centers are covered by the labor laws is founded on the NLRA’s broad definition of “labor organization” – the statutory term for labor unions – which includes “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages,

²⁸⁶ See Gordon, *supra* note 285, at 433–37.

²⁸⁷ See *id.* at 442–43.

²⁸⁸ For a recent argument in favor of coverage, see Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage Under the NLRA and LMRDA*, 13 *Engage: J. Federalist Soc’y Prac. Groups*, Oct. 2012, at 79.

²⁸⁹ The Section 2(5) problem facing worker centers has been explored by others. See Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 *N.Y.L. Sch. L. Rev.* 385, 406–09 (2006); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 *Berkeley J. Emp. & Lab. L.* 232, 277–323 (2009); David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 *Berkeley J. Emp. & Lab. L.* 469, 493–98 (2006).

²⁹⁰ The LMRDA’s definition of “labor organization” incorporates the NLRA definition, and then adds several specific categories of unions or union federations. Compare 29 U.S.C. § 402(i) (2012) (LMRDA definition), with 29 U.S.C. § 152(5) (2012) (NLRA definition). It could conceivably be given either a narrower or a broader meaning than the NLRA’s definition. Compare Marculewicz & Thomas, *supra* note 288, at 84–85 (arguing for broader coverage), with Naduris-Weissman, *supra* note 289, at 287–91 (arguing for narrower coverage). The latter makes more sense, even apart from the argument presented here, given that the LMRDA was clearly *not* meant to cover company-sponsored employee representation plans of the sort that the NLRA clearly *was* intended to cover.

rates of pay, hours of employment, or conditions of work.”²⁹¹ Most worker centers are organizations in which employees participate;²⁹² and they typically concern themselves with terms and conditions of employment. The main question is whether worker centers “exist for the purpose, in whole or in part, of dealing with employers” on those matters. Under longstanding precedent, “dealing with” is not limited to collective bargaining, but includes a pattern of “bilateral exchange” between employee groups and employers.²⁹³ Thus far worker centers have not been found to meet this criterion.²⁹⁴ But the more active worker centers become in seeking to improve workers’ wages and working conditions, and the more regularly they interact with employers, the more they might look like “labor organizations.”

The argument that worker centers are subject to the constraints of federal labor law confronts a serious and underappreciated constitutional hurdle, and the foregoing account of the quid pro quo embodied in the labor laws’ treatment of unions explains why. Worker centers do not seek exclusive representation of a group of employees on the basis of majority rule. They do not seek to invoke a legal duty of employers to bargain with them. And they do not seek through bargaining to compel payment of dues or fees from non-members. Without the powers of exclusive representation, the duty to bargain, and mandatory dues exaction that unions have or seek, worker centers are simply associations of workers pursuing shared interests through constitutionally protected forms of expression. Without those sui generis union powers, there is no constitutional justification for denying to worker centers the full freedom of expression, assembly, and association, and the freedom from intrusive regulation of their internal affairs that other voluntary associations enjoy. In short, serious constitutional questions would arise from a construction of the labor laws that would suppress these organizations’ freedom of association, expression, and advocacy, or doom them altogether.

²⁹¹ 29 U.S.C. § 152(5).

²⁹² They may not participate in a “representative capacity,” as NLRB caselaw requires. See Electromation, Inc., 309 N.L.R.B. 990, 994–97 (1992). Moreover, some worker centers represent individuals who are not “employees” covered by the NLRA; they are not affected by the controversy explored here.

²⁹³ Id. at 995 (citing NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959)).

²⁹⁴ For example, the NLRB’s General Counsel’s office determined that ROCNY, a worker center serving restaurant workers, was not a labor organization because its efforts to pressure a restaurant to settle a lawsuit on behalf of employees were neither of a type or an extent to qualify as “dealing” under the NLRA. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, NLRB, to Celeste Mattina, Reg’l Dir., Region 2, NLRB 1–4 (Nov. 30, 2006), <http://apps.nlr.gov/link/document.aspx/09031d4580010c5a>. For a review of the relevant NLRB caselaw, see Marculewicz & Thomas, supra note 288, at 83–84.

The doctrine of constitutional avoidance, so often invoked in decisions construing the NLRA,²⁹⁵ makes good sense here. "Dealing with" could well be construed to include the regular exchanges with employers that are typical of both independent unions and internal workplace committees, but not the more episodic interactions typical of worker centers. The very broadly-worded definition of labor organization was first enacted in 1935 to reach, and ban, organizations that were seen as too weak and dependent on employers to represent employees effectively. That definition was left in place when Congress in 1947 sought to regulate labor organizations that were deemed too powerful, in part by virtue of the legal powers that Congress had granted unions in 1935. Worker centers have neither the peculiar vulnerabilities of company unions nor the extraordinary legal powers of independent unions. There is no reason to believe that Congress meant to reach small, informal, but independent associations of workers like worker centers. Absent major changes in the size and ambition of worker centers, they exist outside the quid pro quo of labor law, and they should be left there.

C. The Future of the Quid Pro Quo and of Unions

The present situation of worker centers suggests one vision of the future of labor unions: a return to voluntary associations of workers, with neither the enhancements nor the encumbrances of the labor laws. For now, the doctrine of exclusivity and its corollary, the duty of fair representation, is a large part of the argument for sustaining the legality of mandatory "fair share" agency fees. But if that argument fails, and the "right-to-work" ban on mandatory fees is imposed nationwide by judicial fiat, that threatens to unravel the logic of exclusivity.²⁹⁶ The unraveling might come at the hands of the "right-to-work" movement, whose challenge to exclusive representation lies just beneath the surface of its assault on agency fees (and is currently working its way through the courts).²⁹⁷ Or it might come at the hands of unions, who might conclude that exclusive representation of non-members, and its correlative duty of fair representation, is unsustainable without the ability to bargain for fair-share agency fees. Professors Fisk and Sachs have laid out the logic by which unions might abandon claims to exclusive representation, and avoid the duty to fairly represent non-members, in a right-to-work regime.²⁹⁸

²⁹⁵ See, e.g., *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 761–62 (1988); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575–76 (1988); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 62–64 (1964). Cf. *Steele*, 323 U.S. 192 (1944) (employing constitutional avoidance under the RLA).

²⁹⁶ For a similar claim regarding "piecemeal" attacks on Canada's "Wagner Model," see Brian Langille & Josh Mandryk, Unintended Consequences: The Legal Incoherence of a Piecemeal Attack on Majoritarianism and Exclusivity (Nov. 4, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2349631> (criticizing).

²⁹⁷ See Transcript of Oral Argument at 18–20, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681); see also *Lee*, *supra* note 37, at 246.

²⁹⁸ See *supra* text accompanying notes 271–273.

If exclusivity were to fall, and unions represented only their own members, then the only remaining “extraordinary” legal power of unions – what the law adds to the aggregate economic power of unions’ members – would lie in the ability to compel employers to bargain (if they represent a majority of employees in an appropriate unit). That legal duty is of notoriously limited value to a union faced with an employer that is determined to avoid an agreement.²⁹⁹ For a union that placed little faith in the legal duty to bargain, there would be little gained in demonstrating its majority support, and therefore little reason to identify an “appropriate bargaining unit” – the denominator for the determination of majority status.

In short, if a universal right-to-work regime did indeed kick a critical pillar out from under our system of exclusive representation and majority rule, it might lead back to a form of “voluntarism,” or “members-only” bargaining across the board: No power and no duty on unions’ part to represent non-members, and no duty on employers’ part to bargain with unions.³⁰⁰ Members-only bargaining without exclusivity and majority rule, and without an employer duty to bargain, would be an altogether different system of industrial relations.³⁰¹ As long as the rest of the NLRA remained on the books, it would still protect employees who engage in union organizing or other “concerted activity” from employer reprisals. That, too, might be up for grabs if the basic framework of exclusivity and majority rule were to collapse into a voluntarist free-for-all.³⁰²

In this imaginary voluntarist regime, the constitutionality of the extraordinary restrictions on unions’ peaceful expression would have to be revisited. That, too, follows from the quid pro quo thesis developed here: The extraordinary legal powers entailed by exclusive representation and the employer duty to bargain (at least under the old closed or union shop) arguably amplified the impact of some union picketing, and may have justified some restrictions. But purely voluntarist unions – self-governing associations of workers with no special legal powers or privileges – should enjoy the same constitutional freedoms of association, assembly, and expression that are enjoyed by any other voluntary membership organization. Those freedoms have expanded in the last half-century, while unions remained enmeshed in a body of federal labor law that has largely

²⁹⁹ See Fisk & Pulver, supra note 153, at 54–56.

³⁰⁰ That is not members-only bargaining as Professor Charles Morris envisions it – that is, the right to union representation, and an employer duty to bargain with the union, for any employees who choose it; but exclusive representation once those employees make up a majority. **Morris**, supra note 272, at 215–19.

³⁰¹ In some ways this regime would recall the collective liberty of contract that some unions sought, and for a brief moment arguably achieved under federal law, before the NLRA. See supra note 138. Unions sought “exclusive representation,” but without any legal compulsion on employers to grant it or to recognize and bargain with the union at all.

³⁰² Though that would offend core principles of the International Labor Organization to which the U.S. is bound, which require member nations to protect individuals’ freedom to form a union from employer reprisals.

resisted the incursion of constitutional norms (except for the ever more robust First Amendment "right to refrain").³⁰³ Of course voluntarist unions, like any other groups, would still be subject to laws against trespass, assault, and the like, as well as reasonable content-neutral restrictions on the time, place, and manner of expression. But unions that are not endowed with exceptional legal powers should be as free as other groups currently are to make peaceful and truthful appeals to customers and workers to support them, to take lawful sympathetic actions, in their disputes with employers, and to "signal" their members to support them.

So, too, with the LMRDA's manifold regulations of unions' internal affairs. If unions were voluntary membership organizations, supported by their own members and endowed with no special legal powers, what would justify the law's intrusive reporting and disclosure requirements, or its extensive regulation of internal union elections and members' rights? Those kinds of regulations are not imposed, and likely cannot constitutionally be imposed, on most ordinary voluntary associations. If unions were no longer "anomalous" in their legal powers and privileges, why should they be subject to "anomalous" legal restrictions and regulations?³⁰⁴

Of course, workers are still heavily dependent on their jobs for a decent livelihood, and the economy and its productive enterprises are still dependent on workers' labor.³⁰⁵ Those features of work are still a source of potential power, passion, and disruption. It is possible that voluntarist unions could regain enough collective power vis-à-vis employers and employees not only to trigger but also to justify restrictions on unions beyond what is now constitutionally permissible for ordinary voluntary associations. But if unions had that kind of economic power, they might also have the political clout to exact some concessions of their own. And there might begin the construction of a new sui generis body of law for unions, a new quid pro quo.

There is nothing inevitable, of course, in the imagined reconstruction of labor law's quid pro quo from the bottom up. The labor law framework statutes constructed in the 20th century in the United States and elsewhere grew out of a social, political, and economic world very different from ours today. If the existing system of collective bargaining were to collapse into voluntarism, one can imagine unions dispersing into the heterogeneous domain of voluntary associations, with some morphing into professional

³⁰³ See Estlund, supra note 40, at 1580–86.

³⁰⁴ One might attempt to reconstruct an argument for regulating these voluntarist unions based solely on their economic power. But that argument would have to reckon with the expressive nature of unions. Moreover, one might ask, how much power do unions have nowadays? And how much economic power would they have if stripped of their exceptional legal powers and privileges?

³⁰⁵ On the other hand, it is easier for many employers in a global and mobile economy to find labor elsewhere, and it may be harder for workers in today's more diverse workforces and more fragmented production networks to submerge their individual identities and interests in pursuit of collective gains.

associations, others becoming advocacy organizations like the AAUP or the Sierra Club, and others functioning like today's worker centers. The remaining niches of collective bargaining might largely melt into the non-union labor market, with its mix of market forces, managerial power, and statutory employment protections.³⁰⁶ That mix might look quite different, of course, without the political voice that unions have given workers in Congress since the 1930s, and without the "union threat effect" that has historically nudged employers toward more generous and decent employment practices than they might otherwise choose.³⁰⁷ That is another version of the future that awaits unions and their constituents, allies, and adversaries if the existing legal framework for collective bargaining collapses into voluntarism.

Conclusion

The mid-20th century labor law settlement followed a long and tumultuous period in which "the labor question" topped the nation's domestic policy agenda. Labor unions in the United States today are the product of two centuries of independent labor activism and collective self-help; an almost equally long history of liabilities and restrictions grounded in criminal law, tort law, equity, and antitrust law, eventually cabined and codified into federal labor law; and, since the New Deal, a set of unique statutory rights and powers on the other side of the ledger. The basic constellation of legal entitlements that define unions in our system of collective bargaining has an internal logic unlike that any other domain of regulation, including those in which private organizations play a central role.

The basic contours of that system have now been fairly stable if not stagnant for over half a century.³⁰⁸ In the meantime, unions have become a shadow of their mid-20th century selves, especially in the private sector. Once lauded as a source of "countervailing power" against powerful corporations,³⁰⁹ and once capable of helping workers to secure a fair share of the fruits of rising prosperity and productivity,³¹⁰ unions are now struggling for survival in an ever more inequitable economy. That is partly

³⁰⁶ There are other powerful economic forces pushing in that same direction. See Wachter, *supra* note 6.

³⁰⁷ For evidence on the union threat effect, see David Neumark & Michael L. Wachter, Union Effects on Nonunion Wages: Evidence from Panel Data on Industries and Cities, 49 *Indus. & Lab. Rel. Rev.* 20 (1995).

³⁰⁸ See James J. Brudney, Gathering Moss: The NLRA's Resistance to Legislative Change, 26 *A.B.A. J. Lab. & Emp. L.* 161 (2011); Estlund, *supra* note 40, at 1530–31.

³⁰⁹ See John Kenneth Galbraith, American Capitalism: The Concept of Countervailing Power 137–38 (1952).

³¹⁰ See, e.g., Timothy Noah, The Great Divergence: America's Growing Inequality Crisis and What We Can Do About It 128 (2012); David Jacobs & Lindsey Myers, Union Strength, Neoliberalism, and Inequality: Contingent Political Analyses of U.S. Income Differences Since 1950, 79 *Am. Soc. Rev.* 752 (2014); Frank Levy & Peter Temin, Inequality and Institutions in 20th Century America, (Nat'l Bureau of Econ. Research, Working Paper No. 13106, 2007), <http://www.nber.org/papers/w13106.pdf>.

because the 20th century collective bargaining framework in which they operate is in serious need of renovation. Perhaps its basic architecture – the basic quid pro quo and the principle of exclusive representation at its core – needs to be reimagined. Certainly workers need alternative forms of collective engagement around work and wages outside that basic architecture; that is why the legal status of worker centers is so important. But these projects of reimagination, reform, and reconstruction belong to the people – the workers, unions, employers, and others who care about their fate. It is not for the Supreme Court to start pulling pillars and beams out of the existing structure, heedless of the harm to its overall integrity, at the risk of bringing the roof down on the heads of the millions of workers who still find shelter there.