

A New Stage for Grievances?: Members-Only Grievance Insurance and the Duty of Fair Representation Post-*Janus*

LOGAN HOUSEHOLDER*

TABLE OF CONTENTS

I. INTRODUCTION	754
II. LABOR STRUCTURE BEFORE AND AFTER <i>JANUS</i>	757
A. <i>Current Challenges to Exclusive Representation and Labor Peace</i>	758
B. <i>Janus Leaves Unions in a Double Bind</i>	759
III. THE ROLE OF LABOR PEACE IN SHAPING THE NLRA	760
A. <i>Public Outcry and the Judicial Invention of Labor Peace</i>	761
B. <i>Labor Peace after the NLRA</i>	762
IV. LABOR PEACE AND THE DEVELOPMENT OF EXCLUSIVE AND FAIR REPRESENTATION	766
A. <i>The Legislative Origins of Exclusive Representation</i>	766
B. <i>Judicial Response: The Duty of Fair Representation</i>	767
C. <i>The Labor Peace Balance: Exclusive and Fair Representation</i>	769
V. GRIEVANCE INSURANCE AND MEMBERS-ONLY BENEFITS RESTORE THE LABOR PEACE BALANCE	770
A. <i>Grievance Insurance Fits Within Existing Labor Frameworks</i>	772
B. <i>Grievance Insurance Restores the Fair Balance Struck by Pre-Janus Labor Systems</i>	776
C. <i>Grievance Insurance Answers the Janus Court's Concern for Compelled Speech</i>	780
VI. CONCLUSION.....	782

* Chief Note Editor, *Ohio State Law Journal*; J.D. Candidate, The Ohio State University Moritz College of Law, 2023. This Note is dedicated to my father, Craig Householder, June 12, 1966–July 23, 2021. I would also like to thank my wife, Julia, for her willingness to listen to me ramble. All errors are my own; much gratitude to the fantastic editing staff at the *Ohio State Law Journal*.

I. INTRODUCTION

During the first half of the twentieth century, labor-related violence was the “stuff of daily life.”¹ From 1933–1970, it was common to see anywhere from three to five thousand strikes affecting up to five percent of the national workforce.² These strikes were not just numerous; they were also quite violent.³ Shootings between rival factions, at strikebreakers, and even at law enforcement were standard elements of labor disputes.⁴ So, too, were bombs.⁵ Federal, state, and local governments were often stretched for men and munitions in quelling the violent disputes.⁶

Congress adopted the National Labor Relations Act (“NLRA”) in 1935 against the backdrop of this endemic violence.⁷ Nearly overnight, union conflicts waned.⁸ Owing to this success, states began looking to the NLRA as a model for public employee relations statutes beginning in the 1960s.⁹ Public unions had long been seen as dangerous, both for their potentially political nature, and because critics feared public employees’ strikes would bring essential government functions to a halt.¹⁰ Despite the worries of critics, public employee unions existed alongside private unions for much of the later twentieth

¹ Mariano-Florentino Cuéllar, Margaret Levi & Barry R. Weingast, *Twentieth-Century America as a Developing Country: Conflict, Institutions, and the Evolution of Public Law*, 57 HARV. J. ON LEGIS. 25, 33 (2020).

² See Melvyn Dubofsky, *Labor Unrest in the United States, 1906–90*, 18 REV. 125, 125–28 (1995).

³ See IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1940*, at 63–64, 158–59, 222–24 (Haymarket Books 2010) (1969).

⁴ See *id.*

⁵ *Id.* at 63–64, 433.

⁶ See *id.* at 63–64, 223–27.

⁷ Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 A.B.A. J. LAB. & EMP. L. 327, 327 (2011).

⁸ *Id.* at 329. In effect, the NLRA served to reduce one significant source of union violence by quelling employer resistance to the developing labor movement. *Id.* Other common causes of violence, including confrontational union tactics like jurisdictional disputes or wildcat strikes, were further restricted with the passage of the Taft-Hartley Act just over a decade later. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533–35 (2002). The Taft-Hartley Act was not without its faults, however. Vehemently anti-union, the Act reduced labor violence in part by reigning in union power writ large. See *id.* at 1533–34. Taft-Hartley also required union leaders to sign anti-communist affidavits. Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 782 (1998). The overwhelming effect of the NLRA and its refinement has been an increasingly stable and peaceful labor market that, during the height of unionization, redounded to the benefit of employees across the country. Paul F. Lipold, “*Striking Deaths*” at *Their Roots: Assaying the Social Determinants of Extreme Labor-Management Violence in US Labor History—1877–1947*, 38 SOC. SCI. HIST. 541, 548, 558 (2014).

⁹ Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 313–14 (1993).

¹⁰ *Id.*

century and to the present.¹¹ Concerns about strikes, while valid in some respects, were largely obviated by provisions limiting the right to strike for critical government employees like police or fire departments.¹² The second concern—that the goals of public unions would be hopelessly intertwined with politics—has persisted.¹³

While the Supreme Court had long upheld the fundamental balance of labor relations struck by the NLRA, its decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* upended this precedent.¹⁴ By removing the obligation of nonmembers to pay fair share fees,¹⁵ *Janus* struck at both union finances and fundamental fairness values. Recognizing the politically charged nature of public unions, the Court reasoned that fair share fees compelled employee speech.¹⁶ In doing so, the Court dismissed the danger of free riders and suggested a declining importance of labor peace in modern industrial relations.¹⁷

Alternative visions for the future of public labor unions have proliferated in the wake of the *Janus* decision.¹⁸ The labor movement has struggled to put forward a new model that preserves the public union's coveted position as exclusive representative for all employees in a given workplace, while also

¹¹ See Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 162–68 (2016).

¹² See Malin, *supra* note 9, at 343–53.

¹³ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 215–16 (1977).

¹⁴ *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); William B. Gould IV, *How Five Young Men Channeled Nine Old Men: Janus and the High Court's Anti-Labor Policymaking*, 53 U.S.F. L. REV. 209, 225 (2019) (“The confirmation of Justice Gorsuch as the ninth member of the Court created a five to four majority on the *Abood* question, which, through Justice Alito's majority opinion, pulled the trigger to overrule forty-one years of precedent.”).

¹⁵ *Janus*, 138 S. Ct. at 2460–61.

¹⁶ *Id.* at 2464.

¹⁷ *Id.* at 2466 (“[A]voiding free riders is not a compelling interest.”); *id.* at 2465 (“We assume that ‘labor peace,’ in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed.”).

¹⁸ See *Sweeney v. Raoul*, 990 F.3d 555, 557 (7th Cir. 2021) (challenging public unions' right to refuse representation to non-paying employees); Tang, *supra* note 11, at 172–77 (advocating for government-financed public unions); Courtlyn Roser-Jones, *Labor Unions, Draw Your Swords: Janus v. AFSCME and Future Labor Litigation*, AM. CONST. SOC'Y: EXPERT F. (June 29, 2018), <https://www.acslaw.org/expertforum/labor-unions-draw-your-swords-janus-v-afscme-and-future-labor-litigation/> [<https://perma.cc/RT78-7Y9M>]; Tom Campbell, *Exclusive Representation in Public and Private Labor Law After Janus*, 70 SYRACUSE L. REV. 731, 765–71 (2020) (arguing for a “multiple union” solution to public union representation). See generally Alan M. Klinger & Dina Kolker, *Public Sector Unions Can Survive Janus*, 34 A.B.A. J. LAB. & EMP. L. 267 (2020) (examining new challenges to the duty of fair representation and the right of exclusive representation post-*Janus*).

combatting the free rider problem that inspired agency fees in the first place.¹⁹ Members-only representation, for example, would immediately solve the free rider issue, but would necessarily forfeit the union's status as exclusive representative.²⁰ Another potential model—shifting public union costs to the employer—provides a temporary solution to both the exclusive representation and the free rider problem by extricating the union's financial stake altogether, but leaves unions vulnerable to shifting political landscapes.²¹

One promising solution comes courtesy of Catherine Fisk and Martin Malin, who have a members-only benefits structure that would allow the union to bargain for benefits like better health insurance for dues-paying members only.²² The member-benefit structure preserves the union's role as representative of all employees while also encouraging employees to voluntarily pay dues by increasing incentives.²³ The issue with this structure, as Fisk and Malin acknowledge, is it potentially runs afoul of the union's concomitant duty of fair representation.²⁴ Moreover, as anti-union challenges to exclusive representation continue to grow out of the *Janus* decision, unions rightfully worry that any move that undermines the duty of fair representation could spell the end of exclusive representation as well.²⁵

This Note argues that members-only benefits—particularly a grievance insurance benefit—do not violate the duty of fair representation, but instead restore the pre-*Janus* balance struck by the NLRA. Part II outlines the current structure and challenges to American labor that constrain union action post-*Janus*. Part III traces the origins of American labor with particular attention to the role of labor peace in shaping the balance struck by the NLRA. Part IV demonstrates the important role of labor peace in defining the union right of exclusive representation and duty of fair representation. Part V argues for a members-only grievance insurance benefit as a method of restoring pre-*Janus* understandings of labor peace without implicating the union's duty of fair representation. Part VI briefly concludes.

¹⁹ See Kim Geiger, *After Losing Landmark Supreme Court Case, Labor Splits on What to Do Next*, CHI. TRIB. (June 28, 2018), <https://www.chicagotribune.com/politics/ct-met-janus-afscme-union-response-20180628-story.html> [<https://perma.cc/GQ6Y-J8DB>].

²⁰ Shaun Richman, *The Promise and the Peril of Members-Only Unions*, IN THESE TIMES (Nov. 4, 2015), <https://inthesetimes.com/article/members-only-minority-unions> [<https://perma.cc/F9XN-ZQMS>]; Chris Brooks, *Why We Shouldn't Fall for the Members-Only Unionism Trap*, IN THESE TIMES (Dec. 22, 2017), <https://inthesetimes.com/article/members-only-union-labor-right-to-work> [<https://perma.cc/H6AZ-3566>].

²¹ See Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 755–58 (2019).

²² Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. 1821, 1868–72 (2019).

²³ *Id.* at 1868–69.

²⁴ *Id.* at 1869–70.

²⁵ See, e.g., Brief of Defendants-Appellees at 15–16, *Sweeney v. Raoul*, 990 F.3d 555 (7th Cir. 2021) (No. 19-3413).

II. LABOR STRUCTURE BEFORE AND AFTER *JANUS*

For much of the twentieth century and until 2018, labor relations in the United States were defined by a series of corresponding duties and powers.²⁶ The NLRA granted labor unions the right of exclusive representation, conferring with it the power to represent an entire workplace regardless of actual membership.²⁷ This massive grant of power was offset in two important ways: the financial burden of representation itself and the court-created duty of fair representation.²⁸

Exclusive representation places a structural burden on union power: the financial burden of representation. Because a union is the exclusive representative of all employees in a given workplace, the union is obligated to represent even nonmembers.²⁹ But nonmembers do not pay dues offsetting the cost of their representation.³⁰ Agency fees—a prorated payment directed to the union—were thus charged to recover the cost of representing nonmembers.³¹ In addition to this structural burden, however, the courts also developed a duty of fair representation to ensure that unions could not wield their power in an arbitrary or discriminatory manner.³²

In 2018, the Supreme Court in *Janus* upended four decades of settled labor law when it held that agency fees were an unconstitutional abridgment of free speech.³³ In doing so, it struck a blow to the careful balance prior courts struck between a union’s power as exclusive representative, and the limits on that power. Labor peace left *Janus* feeling like an antiquated concern, as free speech was ascendant and the memory of America’s violent labor history dulled.³⁴ On

²⁶ See *infra* Part IV (describing the right of exclusive representation and duty of fair representation as developed during the first half of the twentieth century).

²⁷ 29 U.S.C. § 159(a); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (noting “[i]t is equally clear” that exclusive representation is required because “the collective trade agreement is to serve the purpose contemplated by the Act”); 29 U.S.C. § 151 (explaining that the purpose of the NLRA is to eliminate “industrial strife or unrest,” restore the flow of commerce, and increase and stabilize wages and employment).

²⁸ See *infra* Part IV.

²⁹ See *infra* Part IV.

³⁰ See Fisk & Malin, *supra* note 22, at 1823–24.

³¹ Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1052–55 (2018).

³² See *infra* Part IV.B.

³³ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018).

³⁴ *Id.* at 2465 (“*Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*’s fears were unfounded.”). For more on the Court’s sweeping expansion of First Amendment jurisprudence in the face of traditional government interests, see Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html> [<https://perma.cc/RYT7-WLEN>], and Roser-Jones, *supra* note 18.

a less abstract level, the Court's reconsideration of *Abood v. Detroit Board of Education* signaled to some litigants that the Court might also be willing to reconsider decisions even more fundamental to current labor structures such as *Minnesota State Board for Community Colleges v. Knight*.³⁵ In the wake of *Janus*, a wide array of challenges proliferated in the lower courts.³⁶

A. Current Challenges to Exclusive Representation and Labor Peace

Post-*Janus* challenges largely divide into two separate questions: first, whether *Knight* addresses the system of exclusive representation at all and second, whether the Court's holding in *Janus* undermines or even overrules the system of exclusive representation.³⁷ These attacks coincide with the steady degradation of the labor peace interest throughout the Court's jurisprudence, culminating in its recent decisions in *Janus* and in *Cedar Point Nursery v. Hassid*.³⁸ *Cedar Point* addresses a different issue than union representation generally, instead challenging a California law that required businesses to allow union organizers into their place of business to communicate with employees.³⁹ The plaintiffs challenged this law as an unconstitutional taking, and the Court agreed.⁴⁰ However, so as not to limit all government-mandated intrusions on private businesses, such as health inspector visits at a restaurant, the Court also stressed that when "certain benefits" are conferred, the government may require access to private property without affecting a taking.⁴¹ As Justice Breyer points out in his dissent, the California law was written with the express purpose of ensuring "labor peace," a clear benefit in the eyes of the legislature if not the

³⁵ *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 278 (1984) (upholding the system of exclusive representation established by the NLRA). For an example of the challenges that followed *Janus*, see *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1009 (D. Alaska 2019) ("Despite the dicta set forth in *Janus* that enticed Plaintiff McCollum to bring such a First Amendment challenge, binding Supreme Court precedent flatly rejects her position."), *aff'd*, 854 F. App'x 785 (9th Cir. 2021).

³⁶ See *infra* notes 37–47 and accompanying text.

³⁷ See *Mentele v. Inslee*, 916 F.3d 783, 788–90 (9th Cir. 2019). First, the plaintiff argued for an application of *Janus* that overruled *Knight*. *Id.* Second, the plaintiff argued that *Knight* no longer controlled the issue of exclusive representation at all. *Id.*; see also *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813–14 (6th Cir. 2020) (dismissing similar compelled representation claims but noting that *Knight* and *Janus* seem to contradict one another), *cert. denied*, 141 S. Ct. 2721 (2021).

³⁸ *Janus*, 138 S. Ct. at 2465; *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting) (noting the Court's failure to consider labor peace when deciding whether private landowners received a benefit from allowing labor organizers to access their property).

³⁹ *Cedar Point*, 141 S. Ct. at 2069.

⁴⁰ *Id.* at 2079–80.

⁴¹ *Id.* at 2079 ("Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." (emphasis omitted)).

individual landowner.⁴² Thus, in excluding labor peace from the list of permissible benefits, such as being able to sell meat as USDA inspected, the Court implicitly undermined the significance of the labor peace interest.⁴³

Some plaintiffs, recognizing the threat these attacks on agency and exclusive representation pose to essential labor structures, have sought to strengthen unions by cutting nonmember support.⁴⁴ The plaintiff in *Sweeney v. Raoul*, for instance, sought to expand on dicta in *Janus* that would allow unions to charge nonmembers for grievance proceedings.⁴⁵ The court declined to rule on that question, noting that no nonmember was currently seeking grievance representation and that the injury was thus entirely hypothetical.⁴⁶ However, the Seventh Circuit recognized the inherent tensions that remained in union structures post-*Janus*.⁴⁷

B. *Janus Leaves Unions in a Double Bind*

The fact that both unions and nonmembers find language in *Janus* supporting a favorable reorganization of labor systems points to the apparent contradictions that remain. On one hand, *Janus* stood for the proposition that financial support of unions, regardless of whether it finances political speech, represents an inherent abridgment of freedom of speech.⁴⁸ Under *Janus*, agency fees are understood as a form of compelled speech, an especially egregious abridgment of First Amendment rights.⁴⁹ On the other hand, *Janus* explicitly affirms the exclusive representation system that necessarily compels association.⁵⁰ The bind unions find themselves in is not only that they go unpaid for serving nonmembers, but also that any attempt to incentivize membership by focusing benefits on members tends to strengthen arguments against exclusive representation. As courts have noted, the right to exclusive

⁴² *Id.* at 2089 (Breyer, J., dissenting).

⁴³ *Id.* Breyer continues this line of questioning, pointing to several other government conferred benefits, such as access to sewer and electricity. *Id.*

⁴⁴ See, e.g., *Sweeney v. Raoul*, 990 F.3d 555, 558 (7th Cir. 2021).

⁴⁵ *Id.* at 561; see also *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2468–69, 2469 n.6 (2018) (noting that some states allow for systems in which nonmembers “could be required to pay for that service or could be denied union representation altogether”).

⁴⁶ *Sweeney*, 990 F.3d at 561.

⁴⁷ *Id.* at 558–59 (“Local 150’s lawsuit presents a question courts are certain to confront in *Janus*’s wake—whether a public union, no longer allowed to charge nonmembers fair share fees, must nonetheless represent those nonmembers in employment disputes.”).

⁴⁸ *Janus*, 138 S. Ct. at 2460.

⁴⁹ *Id.* at 2464. The Court argued that, while restrictions on speech frustrate democratic participation and the “search for truth,” compelled speech was an even more egregious violation because it risks “demeaning” the speaker. *Id.*

⁵⁰ *Id.* at 2485 n.27 (“States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.”).

representation is already on shaky ground following the *Janus* decision.⁵¹ Additional moves that make unions look like members-only unions might push courts to do away with exclusive representation altogether. At the same time, arguments that implicate the duty of fair representation—like that made in *Sweeney*⁵²—run the risk of undermining the right of exclusive representation altogether.

This lack of clarity concerning the permissible scope of union benefits following the *Janus* decision has left labor organizations in the lurch. It is clear that unions can no longer seek to recover financial loss implicit in free rider arrangements.⁵³ Less clear is the extent to which unions can further coerce nonmembers to join by offering greater membership incentives. So long as unions seek to retain their right to exclusive representation, an important hallmark in American labor that strengthens the employee bargaining power, they must represent members and nonmembers equally.⁵⁴ But, as *Janus* points out, there may be ways in which unions can favor their members without running afoul of the duty of fair representation.⁵⁵ Doing so requires careful consideration of the differing applications of labor peace to exclusive representation and fair representation, and a reexamination of labor peace in during the twenty-first century.

III. THE ROLE OF LABOR PEACE IN SHAPING THE NLRA

Perhaps the most shocking element of labor history in the United States is the prevalence of explosives. The Haymarket Square bombing, which killed at least eleven people, including police officers, is the most widely known of such incidents.⁵⁶ However, less known incidents involving dynamite and other forms of homemade explosives persisted well into the twentieth century.⁵⁷ While the *Los Angeles Times* bombing stands out as a uniquely terroristic act in the history of American labor, mass violence and casualties themselves were much more

⁵¹ See *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809, 813–14 (6th Cir. 2020) (“To be sure, *Knight*’s reasoning conflicts with the reasoning in *Janus*.”), *cert. denied*, 141 S. Ct. 2721 (2021).

⁵² *Sweeney*, 990 F.3d at 558.

⁵³ See Marion C. Crain & Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 EMP. RTS. & EMP. POL’Y J. 259, 279–82 (2018).

⁵⁴ See *infra* Part IV.

⁵⁵ *Janus*, 138 S. Ct. at 2468–69 (“Individual nonmembers could be required to pay for that service or could be denied union representation altogether.”).

⁵⁶ PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 145 (Anchor Books 2011) (2010).

⁵⁷ See, e.g., *id.* at 302. For example, Harrison Gray Otis, owner of the *Los Angeles Times* and a virulent anti-labor advocate, found himself on the receiving end of such an outburst when an explosion at the newspaper headquarters killed twenty-one people. *Id.* During the ensuing trial, the bombers’ ties to the American Federation of Labor came to light, and the bombers themselves eventually admitted that they intended to terrorize Otis over his “open shop” advocacy. *Id.* at 303.

common.⁵⁸ The 1933 conflict between the Progressive Mine Workers of America (“PMWA”) and the United Mine Workers (“UMW”) is one example of the kind of interunion strife that was commonplace before the passage of the NLRA.⁵⁹

The conflict between the PMWA and UMW showcased the particularly fractured and divisive nature of union politics during the first half of the twentieth century. Interunion strife, however, was not the only source of such violence.⁶⁰ Rather, the lack of formalized shop agreements, exclusive representation, or fair representation created a system rife with potential for conflict.⁶¹

A. Public Outcry and the Judicial Invention of Labor Peace

Courts, being the natural endpoint of many labor disputes, frequently looked to the concept of labor or industrial peace to justify all manner of government action in the labor sphere.⁶² One early example of “labor peace” shaping the outcome of a case comes from *Berry v. Donovan*.⁶³ The plaintiff in *Berry* was a shoemaker who alleged that he had been improperly terminated by Hazen B. Goodrich & Co. as a result of union discrimination.⁶⁴ Prior to the plaintiff’s termination, Goodrich had signed a bargaining agreement with the Boot and Shoe Workers’ Union.⁶⁵ The agreement required that Goodrich terminate any employee found objectionable by the Union.⁶⁶ The plaintiff was one such employee.⁶⁷ Writing in favor of the plaintiff, the Supreme Judicial Court of

⁵⁸ BERNSTEIN, *supra* note 3, at 63. From August 1, 1932 to October 1, 1934, more than three hundred crimes were committed, two houses were targeted with dynamite, and at least one police officer was fatally shot. *Id.* The conflict between the two competing unions lasted nearly two years and ultimately required federal intervention. *Id.* at 64.

⁵⁹ *Id.* at 62–65.

⁶⁰ See Cuéllar, Levi & Weingast, *supra* note 1, at 33–34.

⁶¹ See *infra* Part III.A.

⁶² See, e.g., *Berry v. Donovan*, 74 N.E. 603, 606 (Mass. 1905), *abrogated by* *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990); see also *Neelley v. Farr*, 158 P. 458, 473 (Colo. 1916) (Gabbert, J., dissenting) (arguing that a sheriff was correct in refusing to allow mining camp workers on strike to return to their campsites in order to vote in local elections because the striking employees would likely interfere with “industrial peace”); *Leveranz v. Cleveland Home Brewing Co.*, 24 Ohio N.P. (n.s.) 193, 198 (Ct. Com. Pl. 1922) (“It was also important for these eight brewing companies in a city where unionism is as strong as it is in the city of Cleveland, to enjoy, during the period of such contract, industrial peace.”).

⁶³ 74 N.E. at 606.

⁶⁴ *Id.* at 603–04.

⁶⁵ *Id.* at 604.

⁶⁶ *Id.*

⁶⁷ *Id.*

Massachusetts emphasized the importance of “industrial peace” and denigrated the kind of monopolistic thinking that lead to union “warfare.”⁶⁸

But concerns about the proliferation of inter-union violence were not relegated to the judiciary alone.⁶⁹ By the late 1920s, commentators were calling for an end to the so-called “jurisdictional disputes” that fueled union violence as they disputed representation of a particular workplace, industry, or set of employees.⁷⁰ The cost of these disputes was not measured solely in violence. Instead, labor disputes throughout the first three decades of the twentieth century were known to distract unions from representing employees,⁷¹ foment negative public opinion,⁷² cause massive delays in building projects,⁷³ and increase unemployment.⁷⁴ While state courts worked to create a patchwork solution with the industrial peace interest, it was increasingly clear to commentators that the United States needed a comprehensive solution to ensure that the violence, stoppages, and overall disorganization would not continue to plague the labor market.⁷⁵

B. *Labor Peace after the NLRA*

The Supreme Court lagged somewhat behind both the states and public sentiment.⁷⁶ In fact, it was not until the passage of the NLRA in 1935 that the

⁶⁸ *Id.* at 606.

⁶⁹ See, e.g., Note, *The Labor Provisions of the Clayton Act*, 30 HARV. L. REV. 632, 632–35 (1917) (describing the legislative efforts to reign in labor violence through the Clayton Act).

⁷⁰ E.E. CUMMINS, *THE LABOR PROBLEM IN THE UNITED STATES* 253 (1932) (“If labor organization is to reach anything like its full efficacy as a means of furthering the common interests of the wage earners, some means of settling jurisdictional controversies must be devised.”); Comment, *The Stonecutters’ Case—Strikes on “Unfair” Material Entering Interstate Commerce*, 37 YALE L.J. 84, 85–86, nn.4–5 (1927) (discussing *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Association*, 274 U.S. 37 (1927), in which rival unions halted the flow of stone into Indiana due to ongoing inter-union tensions); see Henry J. Fletcher, *The Railway War*, ATL. MONTHLY, Oct. 1894, at 534–35, 537.

⁷¹ See CUMMINS, *supra* note 70, at 250 (“The disputes lead to controversies among the unions that are at times far more bitter than their controversies with the employers.”).

⁷² Jay Newton Baker, *The American Federation of Labor*, 22 YALE L.J. 73, 85–86 (1912) (“If such violence [as the *Los Angeles Times* bombing] is permitted or acquiesced in by the organization, they are following a wrong course, as any well balanced minded man knows it will bring no relief, but rather tends to weaken support of the general public.”).

⁷³ CUMMINS, *supra* note 70, at 252.

⁷⁴ *Id.*

⁷⁵ E.g., Francis Bowes Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 704–05 (1930) (arguing for a new set of laws governing the use of labor injunctions to restore order during labor disputes); CUMMINS, *supra* note 70, at 253–59 (arguing for, among other possible solutions, a replacement for the Structural Building Trades Alliance, which had served as an arbitrator for interunion dispute during the early twentieth century).

⁷⁶ The Supreme Court first referenced industrial peace in *Adkins v. Children’s Hospital of the District of Columbia*, 261 U.S. 525, 571 (1923) (Holmes, J., dissenting). The law at

Court began considering the value of labor peace.⁷⁷ Perhaps this is because the NLRA spoke so specifically to the “strife” and “unrest” that had been endemic to labor in the United States.⁷⁸ In any case, the passage of the NLRA brought the Court numerous occasions to consider the value of labor peace throughout the pre-war period and beyond.⁷⁹

Early cases centered largely on the core legitimacy of labor unions and their members.⁸⁰ For example, the Supreme Court in *Phelps Dodge Corp. v. NLRB* found that the NLRB had the power to reinstate employees who had been terminated due to their union affiliation.⁸¹ To do so, the Court reasoned, was “basic to the attainment of industrial peace.”⁸² To hold otherwise would allow the employer to effectively destroy the balance of power that Congress had sought in establishing the NLRA and would threaten the structures Congress found so important to obtaining nationwide labor peace.⁸³

At the same time, employers frequently challenged the principle of collective bargaining and, implicitly, exclusive representation, throughout the early years of the NLRA.⁸⁴ Questions about what terms employers and unions could bargain over, and jurisdictional disputes, predominated.⁸⁵ The Court,

issue in *Adkins* instituted a minimum wage for women in the District of Columbia. *Id.* at 539 (majority opinion). While the majority struck down the law, Justice Holmes dissented, writing that the law should be upheld if the legislature determined it would further industrial peace. *Id.* at 571 (Holmes, J., dissenting).

⁷⁷ *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 551–52 (1937) (“[W]e cannot ignore the judgment of Congress . . . that the meeting of employers and employees at the conference table is a powerful aid to industrial peace.”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937) (“Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.”).

⁷⁸ 29 U.S.C. § 151; see also FRANKLIN D. ROOSEVELT, *Presidential Statement upon Signing National Labor Relations Act. 5, 1935*, in 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 294 (Samuel I. Rosenman ed., 1938) (1935).

⁷⁹ See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183–85 (1941); *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 401–02 (1952); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271–72 (1964).

⁸⁰ See *Phelps*, 313 U.S. at 183–85.

⁸¹ *Id.* at 204.

⁸² *Id.* at 185.

⁸³ *Id.*

⁸⁴ See *Brooks*, 348 U.S. at 103; *Carey*, 375 U.S. at 272 (“By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to ‘industrial peace’ . . . are encouraged.” (quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957))).

⁸⁵ See cases cited *supra* note 79. In *Brooks*, the Court was called to decide whether an employer was required to bargain with a duly elected union that had subsequently lost the support of a majority of its membership. 348 U.S. at 97–98. “In placing a nonconsenting minority under the bargaining responsibility of an agency,” the Court wrote, “Congress has discarded common-law doctrines of agency.” *Id.* at 103. To allow employers to refuse to

however, was quick to recognize the potential dangers of allowing employers to bargain with minority interests in the workplace.⁸⁶ An employer's duty to participate in arbitration and bargaining with the designated exclusive representative was essential to the formula for industrial peace proposed by Congress.⁸⁷ Even in situations where the majority of employees no longer supported the elected representative, or when arbitration may not be binding, employers' recognition of one exclusive representative and support in bargaining and arbitration was essential.⁸⁸

As fights raged about the role of labor peace as it pertained to exclusive representation, separate challenges to a judicially created duty of fair representation were percolating through the courts.⁸⁹ As Part IV will explore in greater depth, the early challenges to the duty of fair representation were frequently thinly veiled attempts to sanction racial discrimination.⁹⁰ Like in *Phelps*,⁹¹ these cases required the Court to consider the application of federal labor law in the context of the congressional goal of labor peace.⁹² However, perhaps because the history of labor disputes in America centered largely around jurisdictional disputes between rival labor unions, the fair representation cases did not center their analyses on labor peace.⁹³

These separate lines of jurisprudence converged in the late 1970s, when the Court decided two critical cases: *Abood v. Detroit Board of Education* and *Emporium Capwell Company v. Western Addition Community Organization*.⁹⁴ *Emporium* involved a challenge to the system of exclusive representation brought by a group of Black employees alleging discrimination by their employer.⁹⁵ The employees, who were represented by a union, attempted to bring their complaints through standard union grievance procedures, but were dissatisfied with the pace and tenor of negotiations.⁹⁶ The Black employees then opted to engage in direct picketing in violation of the collective bargaining agreement.⁹⁷ The employees were ultimately fired for their picketing and sought

bargain with a union, even one lacking a clear majority backing, was "inimical" to industrial peace. *Id.*

⁸⁶ See cases cited *supra* note 79.

⁸⁷ See *supra* notes 84–85 and accompanying text.

⁸⁸ See *supra* notes 84–85 and accompanying text.

⁸⁹ See *infra* Part IV.B.

⁹⁰ See *infra* Parts IV.A–B.

⁹¹ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183–85 (1941).

⁹² See, e.g., *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 201–03 (1944) (discussing the duty of fair representation based on the statute requiring labor unions to treat fairly members and nonmembers alike); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

⁹³ See cases cited *supra* notes 79, 92.

⁹⁴ See generally *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 215–16 (1977); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

⁹⁵ *Emporium Capwell Co.*, 420 U.S. at 52–57.

⁹⁶ *Id.* at 53–55.

⁹⁷ *Id.* at 54–56.

redress in the courts.⁹⁸ But the Supreme Court was unsympathetic. Multiple and inconsistent demands from minoritarian interests, the Court wrote, increase the probability of deadlock.⁹⁹ With each minoritarian interest vying for attention from the employer, formation of a stable labor agreement becomes increasingly difficult.¹⁰⁰ Ultimately, the kind of minoritarian advocacy the employees advanced in *Emporium* heightened the potential that no grievances would actually be acted on, and also increased the likelihood of labor strife.¹⁰¹

Later, in *Abood*, the Court reemphasized the importance of exclusive representation to the congressional vision of labor relations sought in the NLRA.¹⁰² Absent exclusive representation, the Court wrote, interunion rivalries would create “dissension within the work force and eliminat[e] the advantages to the employee of collectivization.”¹⁰³ The congressional goal to establish labor peace, then, was appropriately furthered by union shop arrangements that brought a unified voice to the bargaining table and prevented rivalries like those formed in the pre-NLRA era between the PMWA and the UMW.¹⁰⁴ This elevation of labor peace was appropriate even provided that the shop agreement necessarily involves the subordination of some minority interests.¹⁰⁵

Still, recent decisions in *Janus* and *Cedar Point Nursery* question the fundamental importance of labor peace, while a growing number of cases challenge the core structures of American labor: the right of exclusive representation and the duty of fair representation.¹⁰⁶ The labor peace interest grew out of a period of intense violence, but it was also concerned with more mundane economic issues like labor pauses, supply shortages, and unemployment.¹⁰⁷ The fact that courts and commentators alike developed common solutions to problems like the *Los Angeles Times* bombing, industrial deadlock, and racial discrimination suggests an often unspoken truth: labor, and the policies that shape it, has the power to create social and economic upheaval that stretches far beyond the Monday-through-Friday desk job. Labor peace, then, was understood to be a compelling enough interest to suppress certain

⁹⁸ *Id.* at 56.

⁹⁹ *Id.* at 68–69.

¹⁰⁰ *Id.* at 67–68.

¹⁰¹ *Emporium Capwell Co.*, 420 U.S. at 66–69.

¹⁰² *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 217–22 (1977).

¹⁰³ *Id.* at 220–21.

¹⁰⁴ *Id.*; see also *supra* notes 59–61 and accompanying text.

¹⁰⁵ See, e.g., *Abood*, 431 U.S. at 221–22; *id.* at 246 n.1 (Powell, J., concurring) (“[T]here 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.” (quoting *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 238 (1956))).

¹⁰⁶ See, e.g., *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2465 (2018); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2089 (2021) (Breyer, J., dissenting); *Sweeney v. Raoul*, 990 F.3d 555, 558–59 (7th Cir. 2021); *Thompson v. Marietta Educ. Ass’n*, 972 F.3d 809, 813 (6th Cir. 2020); and *Mentele v. Inslee*, 916 F.3d 783, 786 (9th Cir. 2019).

¹⁰⁷ See *supra* notes 70–75 and accompanying text.

forms of speech and create reluctant affiliations.¹⁰⁸ That interest, and the systems that grew out of it, are weakened today. However, given proper context, the labor peace interest provides valuable insight into the problems, and solutions, demanded during a new era of labor upheaval.

IV. LABOR PEACE AND THE DEVELOPMENT OF EXCLUSIVE AND FAIR REPRESENTATION

The system of exclusive representation provided by the NLRA grew directly out of the history of factitious labor disputes described above.¹⁰⁹ Other countries largely employ a "members-only" system of collective bargaining, where a union only represents its members.¹¹⁰ Exclusive representation substitutes a majority-rules principle.¹¹¹ This difference accommodates the historical fear of inter-union conflict, but it also allows for the troublesome possibility that a bare majority of employees can shape the working conditions of an entire shop.¹¹² To combat against the most excessive and arbitrary uses of this power, the courts adopted a corresponding duty of fair representation.¹¹³ Thus, at its core, American labor functions according to a set of two interlocking principles: a statutory right of exclusive representation and a judicially created duty of fair representation.¹¹⁴

A. The Legislative Origins of Exclusive Representation

The right of exclusive representation is a legislative innovation created in an attempt to ease the intense interunion rivalries that dominated the early twentieth century and to bring about labor peace in the United States.¹¹⁵ First recognized by the Supreme Court in *NLRB v Jones & Laughlin Steel Corp.*,¹¹⁶ exclusive representation provides a system in which a majority of employees

¹⁰⁸ See *Abood*, 431 U.S. at 234–35; *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).

¹⁰⁹ Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 COMPAR. LAB. L. & POL'Y J. 47, 47–48 (1998).

¹¹⁰ *Id.* at 49.

¹¹¹ See, e.g., *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 273–74 (1984) (describing exclusive representation as a system by which majority support necessarily subordinates some minority interests).

¹¹² See Note, *Duty of Union to Minority Groups in the Bargaining Unit*, 65 HARV. L. REV. 490, 490 (1952).

¹¹³ *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 201 (1944) ("[T]he labor union . . . owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them . . .").

¹¹⁴ *Id.* at 201–03.

¹¹⁵ See *supra* notes 27–29, 56–61, 83–84 and accompanying text.

¹¹⁶ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

elect a representative union to serve as the exclusive bargaining agent for all employees in a given place of employment.¹¹⁷

Importantly, the right of exclusive representation contains a positive obligation for the employer to recognize the employees' chosen bargaining agent, but it also includes a negative obligation to refrain from negotiating with minority unions or individuals.¹¹⁸ With only one negotiator speaking for either side, the system was designed to eliminate the types of controversies that sprang out of inter-union rivalries.¹¹⁹ The obligation to bargain with the employees' chosen representative has provoked little controversy; the obligation to refrain from bargaining with minority interests has brought numerous challenges.¹²⁰

Early challenges surrounding the right to exclusive representation largely centered on the desire of minority interests to contract directly with the employer.¹²¹ These challenges were in direct conflict with the goals of the NLRA in bringing about unified and peaceful labor relations.¹²² At the same time, however, exclusive representation also served to protect defendants from plaintiffs seeking redress for more insidious forms of discrimination.¹²³

B. Judicial Response: The Duty of Fair Representation

Courts responded to plaintiffs claiming unlawful discrimination by creating a duty of fair representation.¹²⁴ This duty requires that unions represent all members in good faith and do so without arbitrary or discriminatory conduct.¹²⁵

¹¹⁷ Summers, *supra* note 109, at 54–55. An exclusive representative requires a definitive majority of employees. *Id.* If multiple unions receive less than a majority of votes, a runoff election is initiated. *Id.* at 54 n.37. At all times, employees are free to vote “No Union.” *Id.* Once certified, a union maintains its representation for at least one year. Comment, *Union Affiliations and Collective Bargaining*, 128 U. PA. L. REV. 430, 440–41 (1979). After that point, it may be decertified if it receives less than majority support during an employee-initiated special election. *Id.* at 442 n.67.

¹¹⁸ *Jones & Laughlin Steel Corp.*, 301 U.S. at 44–45.

¹¹⁹ See *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 553–54 (1937) (explaining that the purpose of collective bargaining and exclusive representation is to “avoid any interruption to commerce”).

¹²⁰ Compare Campbell, *supra* note 18, at 758 (explaining that early challenges to the status of individual bargaining were quickly undercut by post-NLRA courts), with Charlotte Garden, *Is There an Anti-Democracy Principle in the Post-Janus v. AFSCME First Amendment?*, 2020 U. CHI. LEGAL F. 77, 90–93 (outlining recent first amendment challenges to exclusive representation after the *Janus* decision).

¹²¹ See Campbell, *supra* note 18, at 758.

¹²² See *Jones & Laughlin Steel Corp.*, 301 U.S. at 34 (“Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife.”); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).

¹²³ See Garden, *supra* note 120, at 81; Summers, *supra* note 109, at 64–68.

¹²⁴ *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202–03 (1944) (explaining that the congressional grant of power to exclusive representatives conferred “the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts”).

¹²⁵ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Again, however, it is important to understand this duty within its context. Here, the Supreme Court's decision in *Knight* is instructive. In *Knight*, several represented employees argued that Minnesota's system of exclusive representation restricted their associational rights and their freedom of speech.¹²⁶ The Court held against the plaintiffs, finding that, while exclusive representation did compel the government to listen to a bargaining agent in "meet and confer" sessions, it did not require the nonmembers to join the union, nor did it deprive them of speech.¹²⁷ Instead, exclusive representation simply served to amplify the voices of represented employees.¹²⁸ That is to say, the nonmembers did not have an *equal* voice to union members—the Court admitted as much—but neither were nonmembers discriminated against or treated arbitrarily.¹²⁹

The duty of fair representation did not develop as an antidote to treatment that was simply unfair. In fact, it was understood that unions would disproportionately *benefit* their members.¹³⁰ Instead, the duty of fair representation prohibited a union from using its position of power to disadvantage nonmembers.¹³¹ This is a key distinction, and one that tracks closely with the historical development of labor peace as a congressional interest. Recall, for example, the plaintiff who was discharged for his union membership in *Berry v. Donovan*.¹³² In that case, the court expressed concern that allowing a union to exert monopolistic power in terminating employees would provoke union "warfare."¹³³ This kind of discrimination based on union status, however, is very different from the union's right to advocate on behalf of its members.¹³⁴

¹²⁶ *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 278 (1984).

¹²⁷ *Id.* at 288.

¹²⁸ *Id.* The Court explained that, because the government has no obligation to listen to any individual, whether in the context of bargaining or otherwise, the plaintiff was essentially being denied nothing. *Id.* The "amplification" of some voices through the collective bargaining process did nothing to change the voices of the nonmembers. *Id.* Instead, it simply elevated the "volume" of the employees who chose to be members of the union, while leaving the nonmembers' speech unaffected. *Id.*

¹²⁹ *See id.* at 288.

¹³⁰ *Id.*

¹³¹ *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

¹³² *Berry v. Donovan*, 74 N.E. 603, 603–04 (Mass. 1905), *abrogated by* *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990).

¹³³ *Id.* at 606.

¹³⁴ The union is bargaining for the advantage of its members, rather than to punish nonmembers. It would, for example, violate the duty of fair representation for a union to employ a list like that in *Berry*. *Id.* at 603–04. However, it accords with general principles of fairness that dues-paying members may be entitled to some greater benefit than non-paying members, so long as the non-paying members still receive adequate representation. *See Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 520–22 (1991). The fact that some nonmembers may feel like the benefits of membership are unfairly distributed is immaterial to finding that the benefits themselves are arbitrary or discriminatory. *See Knight*, 465 U.S. at 289–90

C. *The Labor Peace Balance: Exclusive and Fair Representation*

The right of exclusive representation and the duty of fair representation represent a combined judicial and legislative attempt to ensure labor peace. As demonstrated above, exclusive representation developed out of a concern for the types of jurisdictional disputes that proliferated during the early twentieth century.¹³⁵ The duty of fair representation, on the other hand, developed in direct response to exclusive representation.¹³⁶ Fair representation did not guard against jurisdictional disputes directly, but served to regulate the newly conferred power granted to unions as exclusive representatives.¹³⁷ Thus, the history of the duty of fair representation runs counter to the narrative expressed *Janus*.¹³⁸ Union structures did not, as the majority claimed, exist only to counter the danger of conflict between multiple unions.¹³⁹ Certainly, that was the job of exclusive representation as it was originally conceived, but the labor system as currently constituted expands far beyond that initial aim.

In assuming that the duty of fair representation protected only the danger of “inter-union rivalries,” the Court improperly cabined the interests the labor system is designed to protect.¹⁴⁰ Labor peace is a notably capacious interest.¹⁴¹ While originally protecting primarily against jurisdictional disputes, labor peace developed recursively throughout the twentieth century.¹⁴² In fact, as this Part demonstrates, the latter half of the twentieth century saw courts primarily wrestling not with the danger of violence between competing unions, but with the potential for intra-union strife brought on by abuses of union power.¹⁴³ This

(finding that the pressure to join a union in order to receive the benefits of membership “is no different from the pressure to join a majority party that persons in the minority always feel” and does not amount to an unconstitutional abridgment of speech).

¹³⁵ See *supra* Part IV.A.

¹³⁶ See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202–03 (1944).

¹³⁷ *Id.*

¹³⁸ See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2466 (2018); Gould, *supra* note 14, at 226–27 (discussing the application of labor peace in *Janus* as one concerned with “multi-unionism”). As Gould notes, the *Janus* majority redefined labor peace against precedent by asserting that *Abood* was founded only on the concern for inter-union strife. *Id.* But *Abood* did not itself seek to define the labor peace interest. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–25 (1977). Rather, the majority in *Abood* emphasized that it was not the Court’s place to “judge the wisdom” of the State’s interest. *Id.* In seeking to put such extensive limits on the State labor peace interest, the Court in *Janus* relied on *Abood*’s dicta while simultaneously ignoring the deference on which that decision was premised. *Janus*, 138 S. Ct. at 2465.

¹³⁹ See, e.g., CUMMINS, *supra* note 70, at 250–53 (advocating for labor peace as an antidote to, among other problems, interunion violence, economic disruption, anti-labor public sentiment, and intra-union strife).

¹⁴⁰ See *Janus*, 138 S. Ct. at 2466.

¹⁴¹ See *supra* Part III; see also *supra* notes 70–75 and accompanying text.

¹⁴² See *supra* Part III.A.

¹⁴³ See *supra* Part IV.B.

concern for monopolistic power, though eclipsed during the early twentieth century, was present from the very beginning of labor relations in the United States,¹⁴⁴ and continues today in the form of challenges to exclusive representation writ large.¹⁴⁵ As Part V will show, history and current practice allow unions to continue recovering nonmember costs without either violating the duty of fair representation or endangering their status as exclusive representative.

V. GRIEVANCE INSURANCE AND MEMBERS-ONLY BENEFITS RESTORE THE LABOR PEACE BALANCE

Concerns about the peaceful organization of American labor shaped the NLRA and its many provisions and the current state of American labor post-*Janus*. These systems—exclusive representation, fair representation, and labor peace—are connected chronologically,¹⁴⁶ but also share a convergent future. As unions seek to reorient themselves in a post-*Janus* landscape, it will be instructive for future courts to consider the interests that exclusive representation and fair representation are designed to protect. And while labor peace is often referred to in the abstract by recent decisions like *Janus*, *Cedar Point*, and *Harris v. Quinn*, it is important to remember that courts and legislatures are seldom referring to only one interest when discussing labor peace broadly.¹⁴⁷ Rather, as early scholars of American labor explained, labor peace involved not only the control of violent rioting, interunion strife, and discrimination, but also concerns about employment, transaction costs, and the supply chain.¹⁴⁸

In *After Janus*, Catherine Fisk and Martin Malin argue for an array of potential solutions to restore union power post-*Janus*.¹⁴⁹ Rejecting the more sweeping arguments in favor of abandoning exclusive representation altogether or adopting a cost-shifting structure that would see the government fund public

¹⁴⁴ See, e.g., *Berry v. Donovan*, 74 N.E. 603, 606 (Mass. 1905), *abrogated by* *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990).

¹⁴⁵ See *supra* Part II.

¹⁴⁶ See *supra* Part IV.

¹⁴⁷ See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465 (2018) (“By ‘labor peace,’ the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union.”); see also *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2089 (2021) (discussing labor peace as it ensures “stability” in labor relations); *Harris v. Quinn*, 573 U.S. 616, 649–50 (2014) (dismissing the labor peace interest because employees do not work together). Presumably, the Court in *Harris* dismissed the labor peace interest because it only considered the potential disruptions posed by large collective action such as a picket line. See *id.* An understanding of labor peace that reflects economic disruptions, such as the potential fallout of a “sick out,” for example, would recognize that the fact that employees are largely isolated does not eliminate the potential for disruptions to labor peace.

¹⁴⁸ See *supra* notes 70–75.

¹⁴⁹ Fisk & Malin, *supra* note 22, at 1834.

unions directly, Fisk and Malin instead opt to bolster unions through the use of soft power.¹⁵⁰ For example, Fisk and Malin suggest building increased union solidarity through grassroots outreach, deducting arbitration fees through a model based on health insurance premiums, and distributing stronger members-only benefits.¹⁵¹ These fixes aim to make unions more attractive to employees, and thus to increase membership.¹⁵² They largely ignore, however, the money lost from free riding nonmembers absent the agency fee regime. To this point, Fisk and Malin seem to suggest that unions are best off focusing on growing and retaining membership rather than chasing money the authors view as already too far gone.¹⁵³

While focusing on growing and retaining membership makes sense when the sole goal is to preserve unions place in American labor, it does little to alleviate the fundamental unfairness of the free riding system that exists today. Far from being a moralistic concern alone, this unfairness itself makes union membership less attractive.¹⁵⁴ Potential members must know that, should they join the union and agree to pay dues, their money will be used to subsidize coworkers who choose not to pay for their services.¹⁵⁵

However, there is another way forward. In passing, Fisk and Malin mention the potential for shifting all grievance fees directly to the employees.¹⁵⁶ In doing so, the union could then offer grievance insurance as a benefit of membership.¹⁵⁷ For example, a union could announce that it is no longer covering the cost of representation for employees in a workplace grievance. Any employee, member or nonmember, would then be required to pay the costs of grievance proceedings

¹⁵⁰ *Id.* at 1860–75.

¹⁵¹ *Id.* at 1860, 1868, 1872.

¹⁵² *Id.* at 1876 (“Most importantly, unions should strive to emulate smaller organizations where member understanding of the impact of their dues and norms of solidarity and mutual support guard against collective action problems.”).

¹⁵³ *Id.* Fisk and Malin argue that unions are strongest when they focus on worker solidarity, using the example of fire departments. *Id.* at 1870–71, 1873, 1876. They are certainly correct in acknowledging the importance of solidarity for workers, but solidarity alone does not address fundamental impediments to expanding membership.

¹⁵⁴ See *Free Riders Weaken Unions*, CSEA WORK FORCE (Mar. 23, 2018), <https://cseany.org/workforce/?p=3931> [<https://perma.cc/6LW2-YUA6>].

¹⁵⁵ Brooks, *supra* note 20. In this case, it is not just that membership dues confer fewer benefits than they used to—a problem that Fisk and Malin rightfully seek to redress—but also that joining a union incurs a direct cost on the member to pay for his or her coworkers that would not exist otherwise. *Id.* That is to say, in the pre-*Janus* system, all employees began from a baseline of required payments. Sachs, *supra* note 31, at 1052–55. Today, all employees begin from a baseline of no payments. See *Free Riders Weaken Unions*, *supra* note 154. Fisk and Malin’s major proposals do little to combat this reality.

¹⁵⁶ Fisk & Malin, *supra* note 22, at 1866. (“Alternatively, employers could charge all employees who resort to arbitration an arbitration process fee. The union would pay the fee for its members, and those employees who choose not to join would have to pay the fee themselves.”).

¹⁵⁷ *Id.*

and representation just as one would be required to pay for court costs and counsel in ordinary legal proceedings. The union could then incorporate the estimated annual grievance costs into its membership dues. These costs would be an itemized portion of the dues contributed directly to a grievance insurance fund. Thus, in exchange for increasing dues, the union would agree to cover the cost of all member grievances by drawing on the member-only insurance fund.

This system of grievance insurance provides a number of benefits above the current model. First, grievance insurance fits within well-established labor frameworks and does little to upset the intricate balance struck between competing labor interests.¹⁵⁸ Second, grievance insurance promotes fairness to unions, members, and nonmembers, insuring that all parties are responsible to one another for duties owed and services rendered.¹⁵⁹ Finally, and most importantly, grievance insurance allows unions to accurately assess costs to members and nonmembers alike without running afoul of the duty of fair representation.¹⁶⁰ In short, grievance insurance best restores the post-*Janus* balance struck between employees and their unions while also recognizing important changes in labor law today.

A. *Grievance Insurance Fits Within Existing Labor Frameworks.*

Offering insurance for labor-related expenses fits into a long history of membership benefits,¹⁶¹ and does so in a way that is sensitive to the union's role as exclusive representative while also recognizing the duty of fair representation. Unions have traditionally existed to benefit their membership.¹⁶² During the late nineteenth and early twentieth centuries, unions often discriminated against nonmembers outright.¹⁶³ With the passage of the NLRA,

¹⁵⁸ See *supra* Part IV.C.

¹⁵⁹ Under this model, employees would be assessed the exact cost of their grievances. Thus, unions would not be left to guess at the grievances costs for a given year, and employees would not be required to contribute money in excess of their actual needs. Both the union and the employee would benefit from the increased accuracy and fair accounting.

¹⁶⁰ See *infra* Part V.B; see also Fisk & Malin, *supra* note 22, at 1869–70 (“Recognizing [that unions must be allowed to benefit some employees more than others], the Supreme Court said that only arbitrary or invidious discrimination violates the DFR, and ‘[t]he complete satisfaction of all who are represented is hardly to be expected.’” (quoting *Bain v. Cal. Tchrs. Ass’n*, 156 F. Supp. 3d 1142 (C.D. Cal. 2015))).

¹⁶¹ Fisk & Malin, *supra* note 22, at 1868.

¹⁶² Michael J. Hayes, *Let Unions Be Unions: Allowing Grants of Benefits During Representation Campaigns*, 5 U. PA. J. LAB. & EMP. L. 259, 259 (2003).

¹⁶³ See, e.g., *supra* notes 62–68 and accompanying text. *Berry v. Donovan*, for example, arises directly out of a union's attempt to discriminate against nonmembers. 74 N.E. 603, 605 (Mass. 1905), *abrogated by* *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990). As Part III explains, this type of discrimination laid the basis for implementing the duty of fair representation.

unions promised fairness to nonmembers in exchange for the right of exclusive representation.¹⁶⁴

The NLRA did not, however, require that unions stop distributing benefits to their members.¹⁶⁵ Unions could, and continue to, distribute benefits on a members-only basis.¹⁶⁶ For example, a union might offer sick leave pools where eligible employees can contribute their unused sick days for others to use.¹⁶⁷ Unions have also offered exclusive deals with banks or credit cards,¹⁶⁸ supplemental health plans,¹⁶⁹ scholarships,¹⁷⁰ training programs,¹⁷¹ legal assistance,¹⁷² and even discounts on hotels, golf, ski resorts, and other recreational activities.¹⁷³

Two programs in particular are structurally similar to the grievance insurance model: strike pay and liability insurance. Strike pay has a long history in the labor movement.¹⁷⁴ To protect members in the case of an extended strike,

¹⁶⁴ See 29 U.S.C. § 159(a).

¹⁶⁵ See *infra* notes 167–173.

¹⁶⁶ See *infra* notes 167–173.

¹⁶⁷ Fisk & Malin, *supra* note 22, at 1871.

¹⁶⁸ E.g., *NEA Members Only Programs*, TABCO, <https://tabco.org/member-benefits/nea-members-only-programs/> [<https://perma.cc/GZ55-LT4J>] (offering “[s]uperior benefits exclusive to members with the NEA Platinum Plus MasterCard, NEA Premier Gold MasterCard, or the NEA School Days MasterCard”).

¹⁶⁹ E.g., *id.* (providing additional resources for long term care, hospital stays, critical illness, and a Medicare supplement option for members); see also *Members-Only Benefits*, COUNCIL 31 AFSCME, <https://www.afscme31.org/benefits> [<https://perma.cc/6DHB-EGPA>] (offering hearing aid discounts in addition to standard health insurance offerings).

¹⁷⁰ E.g., *Union Scholarships Available*, COUNCIL 31 AFSCME, <https://www.afscme31.org/union-scholarships> [<https://perma.cc/6JSV-PPHR>]; *Member Only Benefits*, SEIU LOCAL 517M, <http://seiu517m.org/member-only-benefits/> [<https://perma.cc/S2AN-LSJB>] (“The scholarship is now open to dues-paying members in good standing (as defined in the SEIU Local 517M Constitution and Bylaws), their spouse, children, step children, adopted children or grandchildren with college or trade school expenses.” (emphasis added)).

¹⁷¹ E.g., *Member Benefits*, MEA, <https://mea.org/member-benefits/> [<https://perma.cc/D6AM-TJTY>] (describing a range of training programs and certifications provided by the union).

¹⁷² E.g., *The Value of Belonging*, MEA, <https://mea.org/valueofbelonging/> [<https://perma.cc/HJM3-44KZ>]; *Educators Employment Liability Program: Benefits*, NEA (June 22, 2020), <https://www.nea.org/resource-library/educators-employment-liability-program-benefits> [<https://perma.cc/456F-9P3R>]; *Legal Program*, UNION PLUS, <https://www.unionplus.org/benefits/home/legal-help?union=afscme> [<https://perma.cc/4QP8-VKMP>].

¹⁷³ *NEA Travel Dollars*, NEA MEMBER BENEFITS, <https://www.neamb.com/products/nea-travel-dollars> [<https://perma.cc/QME9-UAAQ>]; *Travel*, UNION PLUS, <https://www.unionplus.org/benefits/travel> [<https://perma.cc/YRT7-WBLB>].

¹⁷⁴ Sheldon M. Kline, *Strike Benefits of National Unions*, 98 MONTHLY LAB. REV., Mar. 1975, at 17, 20 (“The advisability of maintaining a permanent strike fund for the mutual support of the locals and national organization was recognized in the 1860’s.”).

unions collect and pool money in a general strike fund.¹⁷⁵ Unions differ on the rules surrounding their strike fund, but typically they require a member to be in good standing and actively participating in the strike in order to receive pay.¹⁷⁶ Strike pay is then disbursed from the pool to all qualifying members after a set period of labor disruptions, often a week or longer.¹⁷⁷ Strike pay thus functions like a form of insurance. It is collected directly from dues that members pay into throughout the year, and only disbursed when certain conditions are met.¹⁷⁸ Critically, one of these conditions is membership in the union and payment of dues.¹⁷⁹ In this way, strike pay is only made accessible to union members, without taking anything from nonmembers and risking fair representation challenges.

Similarly, some unions offer their members liability insurance for outside legal challenges.¹⁸⁰ For example, the National Education Association (“NEA”) offers members access to liability insurance for claims arising from the performance of educational duties.¹⁸¹ This insurance covers not only the costs of representation, but also insures against potential damages up to three million dollars.¹⁸² In this sense, the liability insurance offered by the NEA far exceeds the relatively limited grievance insurance policy in both scope and potential payout.

The American Federation for Government Employees’ (“AFGE”) liability insurance program offers a promising example of a nonmandatory model for grievance insurance.¹⁸³ Under the AFGE model, members may opt-in to a premium liability insurance program for \$19.95 per month.¹⁸⁴ This insurance allows for the member to pick from any of over fifteen thousand attorneys covered under the plan and the union agrees to cover any fees arising from the member’s legal needs.¹⁸⁵ This type of program could be adapted to the grievance context with relative ease. For example, union members could opt to

¹⁷⁵ See *Teamster Basics—Frequently Asked Questions (FAQ)*, TEAMSTER, <https://teamster.org/about/frequently-asked-questions-faq/#faq06> [https://perma.cc/JV79-YHBA] (answer to “What is strike pay and how much would I receive?”).

¹⁷⁶ *FAQ on Strikes and UAW Strike Assistance*, UAW, <https://uaw.org/strike-faq/> [https://perma.cc/LY2B-EW6B] (listing requirements to receive strike pay, including payment of union dues); COMMUNICATIONS WORKERS OF AMERICA, *Part XVIII: Strike Manual*, in CWA UNION OPERATING PROCEDURES MANUAL 1, 4 (2020), https://cwa-union.org/sites/default/files/cwa_union_operating_procedures_manual.pdf [https://perma.cc/N4FH-6DZC].

¹⁷⁷ See Kline, *supra* note 174, at 17–19.

¹⁷⁸ *Id.*

¹⁷⁹ *FAQ on Strikes and UAW Strike Assistance*, *supra* note 176.

¹⁸⁰ *Legal Services*, AFGE, <https://www.afge.org/member-benefits/legal/legal-services/> [https://perma.cc/KDL9-9Q7G].

¹⁸¹ *Educators Employment Liability Program: Benefits*, *supra* note 172.

¹⁸² *Id.*

¹⁸³ *Legal Services*, *supra* note 180.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

insure themselves against grievance costs by paying an additional amount towards their dues. However, members could also choose to forgo coverage and would then be liable for their own grievance costs. In this way, the optional program even further highlights the equal treatment of members and nonmembers: both groups would have members who pay for their own grievances.

That said, instituting grievance insurance presents at least two important structural concerns. First, unions may worry that insured employees could be more likely to bring grievances than those who are uninsured. This presents another financial problem: unions could be inundated with relatively meritless claims from insured members. Importantly, however, unions maintain control over the grievance process, and are free to dismiss meritless claims so long as they do not do so in an arbitrary or discriminatory manner.¹⁸⁶ In fact, courts have been reluctant to find that unions violate their duty to process grievances even when they act negligently.¹⁸⁷ Therefore, unions need not worry about being forced to financially back meritless claims. Instead, unions can simply reject meritless claims before they proceed.

Still, to the extent that a lack of insurance might cause nonmembers to forgo meritorious claims, unions might worry about violating their duty of fair representation. But, as discussed in Part IV.B, the duty of fair representation requires that unions refrain from acting in an arbitrary or discriminatory manner.¹⁸⁸ The duty of fair representation does not require the government to listen to any given employee.¹⁸⁹ Public employees do not have an intrinsic right to bring any grievance to their employer.¹⁹⁰ If public unions were compelled to bring every claim to the attention of the government, then the system of grievances would fall apart.¹⁹¹ To suggest otherwise runs counter to nearly every other form of employment dispute: certainly, no employee would suggest that her coworkers should pay for her representation in federal court under a Fair Labor Standards Act (“FLSA”) claim. If the FLSA litigant is not unfairly denied access to adjudication when she is forced to pay for her attorney, then it makes little sense to suggest she is treated unfairly when she is required to pay for representation in a grievance.

¹⁸⁶ *Vaca v. Sipes*, 386 U.S. 171, 192–93 (1967).

¹⁸⁷ *United Steelworkers v. Rawson*, 495 U.S. 362, 372–73 (1990) (“The courts have in general assumed that mere negligence . . . would not state a claim for breach of the duty of fair representation, and we endorse that view today.”).

¹⁸⁸ *See supra* Part IV.B.

¹⁸⁹ *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286 (1984) (“[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.” (quoting *Smith v. Ark. State Highway Emps., Loc. 1315*, 441 U.S. 463, 465 (1979))).

¹⁹⁰ *Id.*

¹⁹¹ *Vaca*, 386 U.S. at 191 (“If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined . . .”).

A grievance insurance model closely tracks with existing union structures like strike pay and liability insurance. These benefits, often offered on a members-only basis, form a key part of what makes union membership appealing.¹⁹² But benefits themselves are *not* a punishment for nonmembers; they are a benefit imparted on members on a clear and rational basis. There is, as it turns out, power in a union and, in a more elementary sense, power in numbers. By leveraging their membership to distribute costs, unions can offer their members increased security and ease of access to grievance procedures. At the same time, shifting grievance fees to employees also allows the union to recover the vast costs incurred through grievance representation. Moreover, doing so comports with both general and judicial concepts of fairness in labor.

B. Grievance Insurance Restores the Fair Balance Struck by Pre-Janus Labor Systems

Most all unions seek to maintain the system of exclusive representation that has been present in American labor since the passage of the NLRA.¹⁹³ Exclusive representation strengthens the American labor market by providing for labor peace and stability.¹⁹⁴ It also helps to ensure that labor maintains a degree of political power by virtue of sheer consolidation.¹⁹⁵ However, exclusive representation naturally breeds concerns about fairness, specifically to nonmembers.¹⁹⁶ The duty of fair representation provides an important assurance of fairness to nonmembers. In the post-*Janus* system, however, the duty of fair representation imparts significant burdens on members by forcing them to subsidize free riding nonmembers.¹⁹⁷ By revising the core structures of twentieth century labor, the *Janus* decision upsets the careful balance struck by

¹⁹² See *supra* notes 174–176; see also *Legal Services*, *supra* note 180.

¹⁹³ See Geiger, *supra* note 19 (assessing the multitude of approaches taken by unions in response to the disruption caused by the *Janus* decision).

¹⁹⁴ See *supra* Part IV.A.

¹⁹⁵ See Malin, *supra* note 9, at 318–20 (describing the powerful political effects of public employee strikes).

¹⁹⁶ Fairness concerns are discussed in depth in Part IV.B. The core tension that labor relations seeks to resolve can be summed up by comparing *Ford Motor Co. v. Huffman* with *Vaca v. Sipes*. Compare *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (“The complete satisfaction of all who are represented is hardly to be expected.”), with *Vaca*, 386 U.S. at 177 (“[T]he exclusive agent’s statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members . . .”). Where exactly a union’s failure to provide “complete satisfaction” becomes a failure to serve nonmembers’ interests altogether is at the core of fair representation litigation. As Part IV.B demonstrates, arbitrary or discriminatory conduct is clearly a failure to serve the nonmembers interests. But Fisk and Malin’s tepid endorsement of grievance insurance suggests an underlying concern that something even less than overt discrimination might trigger the duty of fair representation. Fisk & Malin, *supra* note 22, at 1868–69.

¹⁹⁷ See *Free Riders Weaken Unions*, *supra* note 154.

linking exclusive representation, fair representation, and agency fees.¹⁹⁸ A grievance insurance model restores the fundamental fairness balance that existed prior to *Janus* by ensuring members and nonmembers share *both* the costs and benefits of labor representation while still treating all parties equally.

First, and most importantly, grievance insurance complies with the duty of fair representation. The duty of fair representation, being primarily concerned with unions that wield arbitrary power to discriminate against nonmembers, does not require unions to give preferential treatment to nonmembers.¹⁹⁹ Instead, the duty of fair representation requires only that the union does not act in an arbitrary or discriminatory manner.²⁰⁰ These requirements set a low floor for union behavior. For example, a union might act negligently in failing to pursue a nonmember grievance and still not violate the duty of fair representation.²⁰¹ Requiring all employees to fund the cost of their grievance treats members and nonmembers equally.

Of course, critics of this system might argue that making insurance available to only members is a violation of fair representation. But courts have not traditionally policed the kinds of benefits unions can provide to their members.²⁰² And, even if they did, it is hard to imagine that excluding nonparticipating employees from a group resource could violate fair representation.²⁰³ If it did, many longstanding union practices would have to fall, including sick banks and strike pay.²⁰⁴ Like grievance insurance, both systems rely on pooled member resources and are only made available to members in good standing.²⁰⁵ Most importantly, such structures do not involve the duty of fair representation because they are primarily benefits of membership, not detriments to nonmembers.²⁰⁶

¹⁹⁸ See *supra* Part IV.C.

¹⁹⁹ See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62–65 (1975) (describing the majoritarian structure of labor relations).

²⁰⁰ *Vaca*, 386 U.S. at 177 (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)).

²⁰¹ *Id.* at 190–91.

²⁰² For example, the Court in *Knight* refuted the plaintiff’s argument that the union had unconstitutionally coerced nonmembers to join the union by withholding voting rights and access to meet and confer sessions. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 290 (1984). In doing so, the Court acknowledged that the benefits of union membership may exert some influence over nonmembers but maintained that “pressure to join a majority party . . . is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom.” *Id.*

²⁰³ See *NLRB v. Int’l Bhd. of Elec. Workers, Loc. 340*, 481 U.S. 573, 593 (1987) (“[I]t is simply unfair to require unions to accept members who receive all of the benefits of the association and bear none of the obligations.”).

²⁰⁴ See *supra* notes 167–173.

²⁰⁵ See *Fisk & Malin*, *supra* note 22, at 1871; see also *Kline*, *supra* note 174, at 17–19, 21.

²⁰⁶ See *Vaca*, 386 U.S. at 181–82 (“[T]he unique interests served by the duty of fair representation doctrine have a profound effect . . . on the applicability of [the duty of fair representation doctrine].”). In *Vaca*, the Court recognized the important role the duty of fair representation played in combatting racial discrimination, and it opted to expand available

As two recent cases illustrate, members-only benefits do not provide grounds for a fair representation claim.²⁰⁷ In *Bain v. California Teachers Association*, the Ninth Circuit upheld a district court finding that no injury existed for simple “coercion” to join a union for want of members-only benefits.²⁰⁸ The plaintiff in that case argued that, because the Teachers Association provided benefits not otherwise available to nonmembers, the union was essentially compelling nonmembers to join.²⁰⁹ Both the district court and the Ninth Circuit found this argument wanting, with the district court even acknowledging that the purpose of such benefits was to “deter teachers from opting out of membership.”²¹⁰

Meanwhile, in *Branch v. Commonwealth Employment Relations Board*, the Supreme Judicial Court of Massachusetts set aside a similar claim that member benefits in the form of voting rights coerced union membership.²¹¹ The court in that case was persuaded by the Board’s argument that allowing nonmembers to access membership benefits would be a violation of the *union’s* associational rights.²¹² To do so, the court explained would essentially amount to relitigating *Knight*.²¹³ Moreover, the plaintiffs’ claim that withholding benefits violated the duty of fair representation was also refuted directly by case law.²¹⁴ The court went on, citing over ten cases for the proposition that simply excluding nonmembers from voting benefits did not amount to a violation of the duty of fair representation.²¹⁵ The focus of the duty of fair representation, the court wrote, was on the “results of the collective bargaining process.”²¹⁶ To the extent that unions negotiated benefits outside that process, the duty of fair representation was simply not applicable.

At the same time, forcing employees to pay for their own grievance representation might be a detriment, but it is one that is distributed equally. Prior

remedies in service of that goal. *Id.* In doing so, it emphasized that courts should pay attention to the duty’s role within the labor system as a whole when applying it to future cases. *Id.*

²⁰⁷ *Bain v. Cal. Tchrs. Ass’n*, 891 F.3d 1206, 1214 (9th Cir. 2018); *Branch v. Commonwealth Emp. Rels. Bd.*, 120 N.E.3d 1163, 1174, 1178 (Mass. 2019).

²⁰⁸ 891 F.3d at 1214.

²⁰⁹ *Id.* at 1210 (“In addition, the Unions provide employment-related benefits such as disability insurance, free legal representation, life insurance, death and dismemberment benefits, and disaster relief.”).

²¹⁰ *Bain v. Cal. Tchrs. Ass’n*, 156 F. Supp. 3d 1142, 1147 (C.D. Cal. 2015).

²¹¹ 120 N.E.3d at 1175–76.

²¹² *Id.*; Brief of the Defendant-Appellee at 30–32, *Branch*, 120 N.E.3d 1163 (No. SJC-12603) (“[Granting nonmembers voting rights] may well violate the associational rights of the unions.”).

²¹³ *Branch*, 120 N.E.3d at 1173–74 (explaining that *Knight* had already held that the simple desire to share in membership benefits equally did not make exclusive representation unconstitutional).

²¹⁴ *Id.* at 1175–76.

²¹⁵ *Id.* at 1176.

²¹⁶ *Id.* at 1175.

to enrolling in insurance, even union members would be on the hook for costs of their grievance. Presumably, some members would make the calculation to forgo insurance. The presence of this third category—uninsured union members—demonstrates the nondiscriminatory nature of grievance insurances. It is true that nonmembers would make up a majority of the uninsured, and therefor would likely bear the brunt of this shift. Still, the policy of shifting grievance fees demonstrates neither discriminatory intent nor arbitrary lack of care. Rather, unions would simply be acting in a self-interested manner to recover costs from members and nonmembers alike.

Shifting the cost of grievance representation also helps to restore the fairness balance by relieving union members of the obligation to support nonmembers. Agency fees ensured fairness for dues-paying members by collecting money from nonmembers upfront.²¹⁷ Without agency fees, union members are left to pick up slack in the expensive grievance process and pay for nonmembers' services.²¹⁸ Shifting these costs from the union to the individual ensures that members are not being made to subsidize free riding nonmembers. Meanwhile, allowing members the choice to access insurance would allow employees to decide their own tolerance for risk. Employees who opt in to insurance would share in each other's costs but, critically absent from the system today, would do so with the knowledge that the rest of the pool would subsidize their grievance costs in return.

Grievance insurance ensures fairness to nonmembers as required by the duty of fair representation. It also recognizes that union members enjoy no guarantee of fairness under current law.²¹⁹ The loss of agency fees demands a new mechanism to ensure that union members are not unfairly required to subsidize employees who would rather not pay for their services. Shifting the cost of grievance proceedings to the individual ensures that each employee is responsible for his or her own costs, and not made to pick up the gratuitous costs of another. It treats members and nonmembers equally in assessing costs. And

²¹⁷ *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 778 (1961) (Douglas, J., concurring) ("The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.").

²¹⁸ Sachs, *supra* note 31, at 1047.

²¹⁹ *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2466 (2018). The Court in *Janus* dismissed the risk of free riders as a compelling interest capable of justifying agency fees. *Id.* In doing so, it pointed to numerous advantages the union as a whole receives as a result of exclusive representation but failed to connect those advantages to the individual union member. *Id.* at 2467. For example, *Janus* points to the union's ability to control the grievance process as one method of exercising control that is only available because of the union's unique status as exclusive representative. *Id.* at 2468. But this advantage does not similarly redound to the union member. Individual members, just like nonmembers, may be opposed to union decisions about handling grievances. Thus, the Court identifies advantages that incur to the union in its position as exclusive representative, but not necessarily to the dues-paying member. *Id.* at 2468–69.

it gives unions a critical tool to encourage membership: the opportunity to share costs in an insurance pool with other members. This benefit of membership is similar to many existing union structures and fits within the historical role of a union as an organization designed to benefit its members.²²⁰ Moreover, grievance insurance avoids the pitfalls of the agency fee system struck down in *Janus*.²²¹

C. Grievance Insurance Answers the Janus Court's Concern for Compelled Speech

The Court in *Janus* expressed the primary concern that agency fees unfairly required nonmembers to subsidize union speech.²²² Particularly in the public union context, *Janus* reasoned, most all union activities could be political in nature.²²³ Therefore, by collecting nonmember money to subsidize public union activities, the union essentially compelled political speech on behalf of nonmembers.²²⁴ These concerns manifested in two ways. First was the concern that it was difficult to determine what public union activity would be political in nature.²²⁵ Second, and downstream of the first concern, it was often practically impossible to separate union pools of money into discrete “political” and “non-political” funds to protect nonmembers from inadvertently subsidizing union speech.²²⁶

Shifting grievance costs answers both concerns. Grievance proceedings are inherently less political than other union functions.²²⁷ While grievances might occasionally touch on issues like overtime that could affect union—and, therefore, state—budgets, the purpose of grievances is to address personal rights, not to relitigate previously bargained issues.²²⁸ Moreover, unlike the

²²⁰ See *supra* Part V.A.

²²¹ See *infra* Part V.C.

²²² *Janus*, 138 S. Ct. at 2460 (“We conclude that [the agency fee system] violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”).

²²³ See *id.* at 2475–77 (explaining that public unions routinely bargain over state budgets and sensitive political judgments such as student evaluation and classroom management).

²²⁴ *Id.* at 2460.

²²⁵ *Harris v. Quinn*, 573 U.S. 616, 636 (2014) (“*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends.”).

²²⁶ *Id.* at 637 (“*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either ‘chargeable’ . . . or nonchargeable . . .”).

²²⁷ For example, there is no risk under a grievance insurance model that grievance fees would contribute to political campaigns. Instead, they would be charged directly based on the cost of representation, just as any other legal fees.

²²⁸ See generally COMMUNICATIONS WORKERS OF AMERICA, *Part XV: Local Trials and Appeals; Internal Appeals Procedures; Reinstatement Procedure; and Member Discipline*,

compelled payment of agency fees,²²⁹ grievance costs would be entirely voluntary. A nonmember who worried about the budgetary impact of a potential grievance would not be compelled to move forward with the grievance; they could simply elect not to proceed and not contribute to the perceived political speech. On an even larger scale, because every employee would be responsible for his or her personal grievance costs, no employee would be required to subsidize any grievance at all. An employee might object to a fellow employee pursuing a grievance with a political end in mind, but the objecting employee would not be compelled to subsidize that grievance. Even employees in an insurance pool would enter that program voluntarily; their speech would not be compelled.

Furthermore, because each employee would be responsible for her own grievance costs, there would not be a concern about potentially ambiguous pools of money. Excepting those who opt in to insurance, employees would not contribute to a prospective grievance fund that could potentially be used for political activities. Rather, employees would pay for the precise legal services required in processing their grievance, much in the same manner that any individual would pay legal fees in a typical court proceeding. Doing so allows the union to itemize services and ensure that all costs are paid without leaving them in the lurch to cover additional costs. Again, employees who opt in to insurance would necessarily pay in a prospective manner but, even then, money in excess of the precise grievance fees required during any given year would simply remain in the pool to cover years that require a larger draw. Thus, even among members, the excess money collected for fees would not flow back and forth from political and nonpolitical pools.

The majority in *Janus* was concerned with the thin line between political and nonpolitical speech in public unions.²³⁰ But, even *Janus* recognized the potential for fair solutions that would restore the balance of fairness in labor.²³¹ Hence, the *Janus* majority explicitly endorsed a system in which employees would bear the cost of grievances directly.²³² In doing so, *Janus* points toward the line between political and nonpolitical speech.²³³ Unions would be wise to follow *Janus* in shifting their grievance fees onto employees. Dues could be reduced to acknowledge this major shift in costs, making membership more attractive. At the same time, unions could further promote membership by increasing benefits—particularly, by offering the ability to enroll in grievance

in CWA UNION OPERATING PROCEDURES MANUAL (2020), https://cwa-union.org/sites/default/files/cwa_union_operating_procedures_manual.pdf [<https://perma.cc/N4FH-6DZC>] (listing the various types of grievance proceedings available to members, including proceedings against other members or against union management for violations of fair representation).

²²⁹ Sachs, *supra* note 31, at 1046–47.

²³⁰ See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460–61 (explaining that a union’s political expenditures are nonchargeable).

²³¹ See *id.* at 2468–69.

²³² *Id.*

²³³ *Id.* at 2468–69, 2475–77.

insurance. These solutions are both facially fair to members and nonmembers, and fair within the history and context informing the duty of fair representation. With American labor undergoing a period of massive transition,²³⁴ unions must look to provide fairness and stability. Shifting grievances fees will do just that.

VI. CONCLUSION

The NLRA ushered in a new era of labor peace in the United States.²³⁵ With its eye towards widespread jurisdictional disputes, the system of exclusive representation was instituted to quell the most common form of labor violence in the early twentieth century.²³⁶ Today, that system can seem like a vestigial structure. But American labor has largely built around the pillar of exclusive representation to ensure stability and peace in volatile times.²³⁷ The systems that developed around exclusive representation—fair representation and agency fees—worked within these confines to ensure fairness among members and nonmembers alike.²³⁸ Today, that balance has been upset. The fundamental structures that made union membership so attractive have been altered. Labor today faces an uncertain future.

Since the decision in *Janus*, American labor has experienced a renaissance of sorts. Far from predictions that *Janus* would spell the end of unions, the early parts of the new decade have seen reinvigorated unions and widespread protests.²³⁹ Moreover, some of the fundamental assumptions about American labor are undergoing increased scrutiny, as workers discover new leverage in the wake of COVID-19.²⁴⁰ Put succinctly, labor in the United States is undergoing a period of unprecedented change. Unions, to their credit, have been

²³⁴ See *infra* Part VI.

²³⁵ 29 U.S.C. § 151.

²³⁶ See *supra* Part III.

²³⁷ See generally Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779 (1992) (discussing the original function of exclusive representation).

²³⁸ See *supra* Part IV.

²³⁹ Alana Semuels, *U.S. Workers Are Realizing It's the Perfect Time to Go on Strike*, TIME (Oct. 8, 2021), <https://time.com/6105109/workers-strike-unemployment/> [<https://perma.cc/6MQ2-L6ED>]; Karl Evers-Hillstrom, *More than 100K Workers Threaten Strikes as Unions Flex Muscles*, HILL (Oct. 13, 2021), <https://thehill.com/business-a-lobbying/576456-more-than-100k-workers-threaten-strikes-as-unions-flex-muscles> [<https://perma.cc/EQ6D-XXD7>].

²⁴⁰ Abigail Abrams, *The Challenges Posed By COVID-19 Pushed Many Workers to Strike. Will the Labor Movement See Sustained Interest?*, TIME, <https://time.com/5928528/frontline-workers-strikes-labor/> [<https://perma.cc/A964-CVPE>] (Jan. 25, 2021); Noam Scheiber, *How the Pandemic Has Added to Labor Unrest*, N.Y. TIMES, <https://www.nytimes.com/2021/11/01/business/economy/strikes-labor-pandemic.html> [<https://perma.cc/9L7W-777T>] (Nov. 3, 2021).

able to exploit these changes to fight on behalf of workers and reassert their prominence in American life.²⁴¹

Still, unions incur massive budgetary losses every year because they are forced to subsidize free riding employees.²⁴² And, with the rate of union membership stagnant, there is currently little hope for unions seeking to regain the level of prominence they held in the mid-twentieth century.²⁴³ Going forward, unions will need to be creative in adopting programs designed to make membership more attractive to a new generation of workers. Some of these changes will impose costs on unions.²⁴⁴ In this sense, shifting grievance fees accomplishes two important objectives: shaving costs and benefiting members. As unions look to adapt to new American labor markets, they would do well to consider the fairness concerns that motivated key twentieth century developments. *Janus* need not be the death knell for public unions. As it has before, American labor can continue to adapt in its pursuit of labor peace and fairness for workers.

²⁴¹ See Abrams, *supra* note 240; Scheiber, *supra* note 240; see also Geiger, *supra* note 19.

²⁴² See Madeline Will, *Unions After Janus: Fewer Members, Less Money, and More Teacher Voice?*, EDUC. WEEK (June 7, 2018), <https://www.edweek.org/teaching-learning/unions-after-janus-fewer-members-less-money-and-more-teacher-voice/2018/06> [<https://perma.cc/W4M5-N28K>].

²⁴³ Bloomberg News, *U.S. Union Membership Falls, Despite Activism*, WASH. POST (Jan. 20, 2022), https://www.washingtonpost.com/business/economy/us-union-membership-falls-despite-activism/2022/01/20/918efe5e-79e8-11ec-bf97-6eac6f77fba2_story.html [<https://perma.cc/L3RH-S8X7>].

²⁴⁴ For example, increasing union solidarity will necessarily require an investment on the part of unions to strengthen membership in hopes of long-term payoff. See Fisk & Malin, *supra* note 22, at 1872–75.