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Brishen Rogers

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Three Concepts of Workplace Freedom of Association

Brishen Rogers[†]

This Article identifies three distinct concepts of workplace freedom of association (“FOA”) and traces their influence on labor law doctrine, focusing on the law of union security devices—contractual clauses that require workers, on pain of termination, to remit fees to unions. The “social democratic” concept informed the passage of the National Labor Relations Act (“NLRA” or “the Act”) and continues to inform social movement practice and some other countries’ jurisprudence. It views workplace freedom of association as a means to the end of ensuring economic equality and economic democracy, and generally endorses the so-called “union shop,” under which workers must contribute both to unions’ representational activities and to their legislative and organizing efforts. The “civil libertarian” concept was predominant in Supreme Court doctrine from the Warren Court era until recently. It emphasized individual rights of expression and political participation, and backstopped the line of cases

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declaring the union shop unlawful but requiring workers to help defray representational expenses. The “neoliberal” concept now appears ascendant. It views market behavior as a form of expressive behavior, and views compulsory payment of any union fees as unconstitutional. Disaggregating these concepts can enrich debates around workplace freedom of association in three ways. First, doing so illustrates that determining the scope of workplace freedom of association involves contestable value judgments about the goods and ends of unionization and association. Second, doing so illustrates that the Supreme Court’s recent union security cases reflect broader trends in the Court’s recent case law that constitutionalize a neoliberal political economy. Third, doing so suggests that the social democratic concept is both more coherent and more morally compelling than the civil libertarian concept, and may help it regain a foothold in debates around workplace freedom of association.

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INTRODUCTION

Today, global legal actors typically classify rights to unionize and bargain collectively as elements of workers’ “freedom of association”

(“FOA”).¹ This linkage is, of course, not new; the preamble of the United States’ National Labor Relations Act (“NLRA” or “the Act”), for example, attributes industrial strife and inequality to workers’ lack of “full freedom of association.”² But FOA has taken on greater prominence in recent years, reflecting global trends toward the constitutionalization of labor rights, as well as the influence of the International Labour Organization’s Core Labor Standards on numerous legal regimes.³

The contours of workplace FOA nevertheless remain deeply contested. What are its constitutional underpinnings?⁴ Is it an individual or a collective entitlement? A liberty or a right?⁵ Does it imply rights to collective bargaining or to strike?⁶ More generally, what is the appropriate balance

1. See, e.g., Alan L. Bogg & Cynthia L. Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics* (N.Y. Univ. Sch. of Law, Working Paper No. 13–81, 2013), <http://ssrn.com/abstract=2364586> (noting pervasive appeals to freedom of association in contemporary labor law debates).

2. 29 U.S.C. § 151 (2012).

3. See generally Int’l Labour Org. [ILO], *Declaration on Fundamental Principles and Rights at Work* (1998), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm>. See also U.N. H.R. Office of the High Comm’r, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04, at 14 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, (incorporating by reference ILO Core Labour Standards); Org. for Econ. Cooperation & Dev. [OECD], *OECD Guidelines for Multinational Enterprises*, at 37 (2011), <http://dx.doi.org/10.1787/9789264115415-en> (same).

4. The right to association does not actually appear in the First Amendment, which protects freedom of *assembly*, and the courts’ protection of FOA is a relatively recent development. Compare *Hague v. CIO*, 307 U.S. 496, 512 (1939) (stating that the right to disseminate information concerning the NLRA is protected as an incident of First Amendment freedom of assembly), and *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (stating that the rights to gather and discuss unionization are protected as incidents of First Amendment freedom of assembly) with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (holding that organizations’ immunities are protected as incidents of freedom of association). See also JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 118-49 (2012) (describing this transformation).

5. Compare Brian Langille, *The Freedom of Association Mess: How We Got into It and How We Can Get Out of It*, 54 MCGILL L.J. 177, 204-09 (2009) (arguing that a commitment to basic liberties prohibits the liberal state from favoring unions over other sorts of associations, and from favoring rights to associate over rights *not* to associate), with Alan Bogg & Keith Ewing, *A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada*, 33 COMP. LAB. L. & POL’Y J. 379, 395-96 (2011-2012) (criticizing Langille’s theory as essentially libertarian in its preference for negative rights).

6. These issues have come up repeatedly at the European Court of Human Rights. See, e.g., *Wilson v. United Kingdom*, 2002-V Eur. Ct. H.R. 49, 64 (stating that Article 11 of the European Convention of Human Rights (“Article 11”) protects the fundamental right to join a trade union and engage in trade union activities); *Demir v. Turkey*, 2008-V Eur. Ct. H.R. 395, 419-20 (stating that Article 11 protects collective bargaining as an incident of freedom of association); *Matelly v. France*, App. No. 10609/10, 2014 Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-146695> (holding that Article 11 protections for freedom of association and unionization even extend to police and military personnel); *ADEFDROMIL v. France*, App. No. 32191/09, 2014 Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-146700> (companion case to *Matelly*). These issues have also come up at the Supreme Court of Canada. See *Sask. Fed’n of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, 248 (Can.) (holding that a law restricting public employees’ right to strike but not providing for interest arbitration or other dispute resolution mechanisms violates the freedom of association guarantee of section 2(d) of the Canadian Charter of Rights and Freedoms); *Health Servs. and Support - Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391, 393 (Can.)

between “positive” workplace FOA, rights *to* associate and to unionize, and “negative” FOA, rights *not to* associate or unionize, and not to pay particular fees to unions?⁷ Such questions have recently become more prominent in the United States via a series of blockbuster cases expanding workers’ negative FOA.⁸

To better answer those questions, this Article identifies three ideal-typical⁹ concepts of workplace FOA that have informed United States jurisprudence.¹⁰ I call these the “civil libertarian,” the “neoliberal,” and the “social democratic” concepts.¹¹ Each is liberal in that it prioritizes individual liberty. Each has a distinct view of the proper relationship between the political and economic spheres that is grounded in extra-legal considerations. And each has a distinct approach to workplace FOA. I focus on how each concept has informed the law of union security devices, both because very hard questions of workplace FOA arise in such cases and because the Court has recently remade that doctrine. But I also note each concept’s influence on other areas of labor law.¹²

The civil libertarian concept, which has been predominant for many years, holds that the state may never compel association in the political sphere, but may do so without restriction in the economic sphere.¹³ This concept can draw normative support from a variety of sources. For example, it is consistent with the civic republican view that political and expressive speech should enjoy the utmost First Amendment protection given its close

(holding that Charter section 2(d) freedom of association guarantees include some rights to collective bargaining).

7. See discussion *infra* Part I.A.

8. See *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (holding that “partial public employees” cannot be compelled to contribute any funds to unions that bargain on their behalf); *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012) (altering procedure unions must follow before levying special assessment for political activity).

9. Since these concepts are ideal types, many jurists’ and scholars’ views, and many cases, will fall somewhere in between them.

10. The article is indebted to Duncan Kennedy’s work on the globalization of legal thought, both in this periodization and in its general effort to link doctrinal developments to broad integrating concepts that predominate in particular historical periods. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006).

11. See discussion *infra* Parts II-III (explaining three concepts and various normative considerations they build upon, and tracing their influence on law of union security devices and on other labor law doctrines).

12. I do not, however, consider two adjacent doctrinal questions. First, I do not consider questions of “freedom of intimate association” rooted in the Due Process Clauses rather than the First Amendment. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (noting differences between intimate and expressive association). Second, I do not consider questions of the powers of the government acting as an employer to restrict employees’ free speech while acting in their capacity as employees. See *Harris*, 134 S. Ct. at 2653-55 (Kagan, J., dissenting) (summarizing such case law).

13. See discussion *infra* Part II.A (outlining civil libertarian concept).

connection to self-government.¹⁴ The civil libertarian concept also has Rawlsian overtones, strongly prioritizing individual liberties but also encouraging distributive justice.¹⁵ The civil libertarian concept's major weakness, however, is that the border between the political and economic spheres is unstable.¹⁶ This deficiency comes to the fore in union security cases for several reasons: (1) union action cannot be neatly separated into political and economic activities, (2) protecting some workers' negative FOA (i.e., their rights *not* to associate) tends to undermine other workers' positive FOA (i.e., their rights to associate), and (3) undermining union power tends to undermine other liberal goals such as distributive justice.¹⁷

The neoliberal concept, which now appears ascendant, resolves these tensions. "Neoliberal" is an overused and confusing term, but I use it in a particular way: to describe approaches to economic policy and law under which the state is legitimate just insofar as it creates and polices systems of market ordering.¹⁸ According to the neoliberal concept, association in the economic sphere is itself a form of political association.¹⁹ The neoliberal concept also places a high value on consumer welfare and sovereignty. Accordingly, it defines workplace FOA as an exercise of workers' individual wills akin to a consumer transaction, strongly emphasizing negative FOA and enabling positive FOA only as desired by individual workers. The major shortcoming of the neoliberal concept is that it disregards distributive justice.²⁰

Finally, the "social democratic" concept informed the NLRA as originally passed, and had some influence over courts and the National Labor Relations Board ("NLRB") from the New Deal era until the 1960s.²¹ Within U.S. law, it has since been overshadowed by the other approaches, but it continues to influence social movement practices and courts in other nations.²² The social democratic concept reflects in part the "social citizenship" tradition of labor constitutionalism, a tradition "centered on

14. See *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed.").

15. In Rawls' terms, the state should grant "lexical" priority to basic individual liberties, and then ensure distributive justice. JOHN RAWLS, *A THEORY OF JUSTICE* 42-43 (1st ed. 1971) [hereinafter RAWLS, *THEORY*].

16. See discussion *infra* Part II.A.

17. See discussion *infra* Parts II.A, III.

18. See discussion *infra* Part II.B.

19. See discussion *infra* Part II.B.

20. See Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 147, 151 (2014) ("[T]he real significance of neoliberalism has been to obliterate the previous limitation of inequality.")

21. See discussion *infra* Part II.C (outlining social democratic concept).

22. See discussion *infra* Parts II.C, III.B (noting influence of social democratic concept on Supreme Court of Canada).

decent work and livelihoods, social provision, and a measure of economic independence and democracy.”²³ Like the neoliberal concept, the social democratic concept is skeptical of the political/economic distinction. But it strongly emphasizes positive FOA, and would endorse various labor law reforms to ensure workplace equality and economic democracy, including even the union shop. While the social democratic concept may appear downright perverse to civil libertarians, it is nevertheless consistent with liberal justice, I argue, because the policies it embraces do not generally infringe any individual liberties that a liberal state must protect.²⁴

Distinguishing these three concepts can enrich debates surrounding workplace FOA in two ways. First, doing so highlights that the scope of FOA in particular cases cannot be determined *ex ante*, or by derivation from some abstract ideal of FOA. As the legal realists taught long ago, such an approach gets things backwards.²⁵ We should not be asking, “What is FOA?” We should instead be asking, “What are the effects of recognizing particular entitlements to associate or not associate?”²⁶ Such a decision involves contestable value judgments about the goods of association, unionization, and an egalitarian political economy. The three concepts are, in essence, three distinct approaches to such matters.

Second, doing so shows that *Harris* and related cases are not just a more aggressive iteration of our nation’s strong libertarian commitments or of our courts’ tendency to privilege the individual over the collective.²⁷ Rather, those cases suggest that the neoliberal concept of FOA is now ascendant in U.S. law. Indeed, the Supreme Court’s recent union security cases parallel other recent cases, such as the blockbuster *Citizens United*,²⁸ which scholars have begun to describe as “neoliberal” for their laser-like focus on market rationality.²⁹ Understanding neoliberalism’s distinct approach to workplace

23. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999).

24. See discussion *infra* Part III.

25. See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935) (“To justify or criticize legal rules in purely legal terms is always to argue in a vicious circle.”)

26. Here I paraphrase Micah Schwartzman & Richard Schragger, *Some Realism About Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 360 (Schwartzman et al. eds., 2016).

27. See Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 1 (1999) (arguing that in the 1960s the courts tended to “protect[] the rights of individual workers, even if it meant weakening organized labor in the process.”).

28. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

29. See, e.g., David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014) (outlining influence of neoliberalism on recent U.S. law generally); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014) (outlining the influence of neoliberalism on recent U.S. constitutional law); Eric Tucker, *Labor’s Many Constitutions (and Capital’s Too)*, 33 COMP. LAB. L. & POL’Y J. 355 (2012) (discussing constitutionalization of neoliberal economic policy); Robin West, *A Tale of Two Rights*, 94

FOA also explains several aspects of recent cases that otherwise appear incoherent. For example, to civil libertarians and social democrats, the idea that compelled subsidization of commercial speech infringes First Amendment rights is nonsense. But in the neoliberal view, where market behavior and consumer choice are important means of self-actualization, the notion that money equals speech makes perfect sense.³⁰

Third, and more ambitiously, identifying and defending the social democratic conception may help it regain a foothold in debates around FOA. Left-liberal common sense today embraces the civil libertarian concept,³¹ in large part because of the general turn toward rights consciousness in the law.³² But insofar as the civil libertarian concept discourages efforts to bolster unions' political power, it may undermine distributive justice.³³ Given the startling growth in economic inequality since the 1970s,³⁴ the social democratic concept is, in my view, once again morally compelling. Defending that concept may then bolster the case for union security devices, and also for broader labor law reforms to advance economic democracy and distributive justice.³⁵

This Article proceeds as follows: Part I outlines the economic importance of union security devices and the Supreme Court's evolving union security doctrine, identifies why such devices may be constitutionally or morally problematic, and summarizes prominent case law around FOA outside the workplace. Part II outlines the three concepts and traces their influence on doctrine as well as their characteristic weaknesses. Part III defends the social democratic concept. It first argues, based on a quick review of European labor law systems, that economic equality probably requires state policies to boost unions' political power. It then argues that such

B.U. L. REV. 893 (2014) (not using term "neoliberalism" but arguing that the proliferation of constitutional "opt-out" rights is beginning to threaten civil society).

30. See discussion *infra* Part II.B.

31. See discussion *infra* Part II.A.

32. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (influential theory of role of rights in liberal jurisprudence); Schiller, *supra* note 27 (arguing that in the 1960s the courts tended to "protect[] the rights of individual workers, even if it meant weakening organized labor in the process.").

33. See discussion *infra* Part III.A.

34. See generally Thomas Picketty, *Capital in the Twenty-First Century* (2014) (exploring causes and consequences of growth in inequality in recent decades).

35. The paper therefore also hopes to help fill a gap in the literature: the relative dearth of scholarship on the relationship between contemporary liberalism and labor law. See Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB & EMP. L. J. 527, 530 n.6 (2001) (noting the near-total absence of unions from philosophy outside the Marxist tradition). Some prominent liberal theorists have even been skeptical that unions and other workplace regulations would be necessary in a just society. See, e.g., PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL: WHAT, IF ANYTHING, CAN JUSTIFY CAPITALISM?* 107, 188-89, 211-13 (1995) (criticizing minimum wage laws and unionization as partial barriers to equality). See also Brishen Rogers, *Justice at Work*, 92 TEX. L. REV. 1543, 1557-59 (2014) (summarizing Van Parijs' and other liberal theorists' criticism of minimum wage laws and unions); *id.* at 1570-86 (developing alternative case for minimum wage laws that responds to such criticisms).

policies are generally consistent with core liberal commitments because they generally do not thwart basic individual liberties.

I.

UNION SECURITY CLAUSES AND THE FIRST AMENDMENT

Freedom of association lies at the center of American labor law as established by the NLRA. The Act aims to ensure “full freedom of association”³⁶ for covered workers by prohibiting both employers and unions from interfering with workers’ concerted activities.³⁷ The Act also establishes the basic contours of workplace FOA: rather than mandating unionization or other forms of representation, the Act preserves the common law default rule of individualized bargaining³⁸ and establishes a process for unionization.³⁹ Per that process, the NLRB can only certify a union upon a showing that a majority of workers in a proper bargaining unit support it.⁴⁰ Thereafter, the union is the exclusive representative of all workers within that bargaining unit,⁴¹ and the employer has a duty to bargain in good faith.⁴² The terms of the resulting collective bargaining agreements then apply to all represented workers regardless of their union membership, but only to those workers, not to other workers in the industrial sector.⁴³ Unions also owe a duty of fair representation toward all workers in the bargaining unit.⁴⁴ This duty applies to disciplinary matters as well as economic terms and conditions.⁴⁵ Thus, a certified union “must grieve and arbitrate on behalf of nonmembers just as zealously (and expensively) as it does on behalf of members.”⁴⁶

Unions everywhere face a significant free-rider problem: activities such as collective bargaining generate financial costs, yet individual workers have

36. 29 U.S.C. § 151 (2012).

37. 29 U.S.C. §§ 157, 158(a)(1) (rights of concerted action; employers and unions prohibited from interfering with same). Whether the NLRA regime effectively accomplishes that goal is another matter. See generally Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (outlining problems with the NLRA regime, particularly NLRB’s inability to deter employer coercion of workers).

38. See Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 664 (2010).

39. See 29 U.S.C. § 157.

40. 29 U.S.C. § 159(a).

41. *Id.*

42. 29 U.S.C. § 158(a)(5).

43. Cf. Samuel Estreicher, *Trade Unionism Under Globalization: The Demise of Voluntarism*, 54 ST. LOUIS U. L. REV. 415, 416 (2010) (discussing extension laws in various European countries that extend terms of collective bargaining agreements to other workers in sectors); see also discussion *infra* Part III.A.

44. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944) (finding duty of fair representation under RLA); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (finding duty of fair representation under NLRA).

45. See *Vaca v. Sipes*, 386 U.S. 171, 186 (1967).

46. Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 858 (2014).

an incentive to reap the benefits of a union contract without joining the union or paying dues. Indeed, this free-rider problem is so pervasive that it formed the basis for Mancur Olsen's seminal book, *The Logic of Collective Action*.⁴⁷

Unions in the United States and elsewhere have responded to this collective action problem through contractual devices known as "union security clauses."⁴⁸ These clauses fall into three categories. "Closed shop" clauses require the employer to hire only union members, while "union shop" clauses require all workers to join the union within a period of time after beginning employment.⁴⁹ While the closed shop was lawful and common in the early days of the NLRA,⁵⁰ Congress banned it in the 1947 Taft-Hartley Act but continued to permit the union shop.⁵¹ Due largely to the case law summarized below, however, the union shop is rare today. Instead, union security clauses typically require the "agency shop," in which workers must pay the union "agency fees" for contract bargaining and administration, but may refuse to pay fees for the union's other efforts including lobbying and many forms of organizing or strike support.⁵² (Federal election law prohibits unions from contributing members' dues to political candidates,⁵³ so that issue is not implicated in debates about union security). Taft-Hartley also enabled states to pass what are known as "right-to-work" laws,⁵⁴ under which even agency shop clauses are unlawful and unions cannot require represented workers to remit any fees whatsoever.⁵⁵ Particularly given the duty of fair

47. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

48. See ROBERT A. GORMAN & MATTHEW W. FINKIN: *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 897-906 (2d ed., 2004) (discussing purpose and evolution of union security clauses in United States).

49. See *id.* at 900-01 (defining and distinguishing closed shop, union shop, and agency shop).

50. *Id.* at 898 (closed shop lawful under NLRA as originally passed).

51. *Id.* at 898-99 (discussing Taft-Hartley's changes to union security rules); 29 U.S.C. § 8(a)(3) (2012) (permitting union shop); 29 U.S.C. § 157 (declaring that employees have the right *not* to join unions "except to the extent that such right may be effected by an agreement requiring membership in a labor organization as authorized by § 8(a)(3) . . .").

52. See cases cited *infra* note 82.

53. See 2 U.S.C. § 441b(a-b) (2012). Such contributions can be made only by unions' political action committees, which cannot be funded with member dues, but only by separate voluntary member contributions. 2 U.S.C. § 441b(b). Granted, there is a fuzzy line between advocacy on behalf of candidates and independent issue advocacy, which can be undertaken with general funds. See Peter Overby, *A Fine Line: Distinguishing Issue Ads From Advocacy*, NPR (June 19, 2012), <http://www.npr.org/2012/06/19/155325685/a-fine-line-distinguishing-issue-ads-from-advocacy> ("Political scientists say the line between issue ads and express advocacy has almost been erased."). Accordingly, regulations of independent issue advocacy, such as those struck down in *Citizens United v. FEC*, 558 U.S. 310 (2010), seem entirely warranted as means of preventing corruption and of ensuring distributive justice.

54. See 29 U.S.C. § 164(b).

55. See GORMAN & FINKIN, *supra* note 48, at 898-99. As of early 2016, half of the states have passed such laws. See *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., www.nrtw.org/rtws.htm (last visited Feb. 4, 2016).

representation that unions owe to all represented workers, right-to-work laws impose significant uncompensated costs on unions.⁵⁶

A. First Amendment Jurisprudence on Union Security Clauses

Union shop and agency shop arrangements have led to frequent litigation in which workers allege that the requirement to remit fees to a union violates their First Amendment rights to freedom of speech and association.⁵⁷ The Supreme Court's first treatment of the issue came in *Railway Employees Department v. Hanson*,⁵⁸ a 1956 case arising under the Railway Labor Act. The Court held that the bare requirement to subsidize a union as bargaining agent did not infringe workers' First Amendment rights given Congress' power to legislate so as to ensure industrial peace.⁵⁹ But since there was no evidence regarding how the union had spent workers' money, the Court did not reach the question of whether the use of dues for political or expressive purposes would infringe dissenters' First Amendment rights.⁶⁰

Five years later, that question was presented in *International Association of Machinists v. Street*.⁶¹ The plaintiffs alleged that the union had violated their First Amendment rights by using their dues payments "in substantial part . . . to finance the campaigns of candidates for federal and state offices whom [they] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed."⁶² Justice Brennan's majority opinion noted that the case raised First Amendment "questions of the utmost gravity"⁶³ but ultimately interpreted the statute so as to avoid constitutional issues. Brennan reasoned that Congress, in enabling the union shop under the Railway Labor Act, did not intend to permit use of union dues for political purposes without workers' consent.⁶⁴ Brennan nevertheless held that a union could require workers to contribute to its costs of bargaining and representation, since eliminating free riders would advance the important state interest in labor peace.⁶⁵ This was, to put it

56. Fisk & Sachs, *supra* note 46, at 859; *see also* Lehnert v. Ferris Faculty Assn., 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) (noting that duty of fair representation exacerbates unions' free-rider problem).

57. For a more detailed summary of this case law, see Catherine L. Fisk and Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1034-39 (2013).

58. 351 U.S. 225 (1956).

59. *Id.* at 236-38.

60. *Id.* at 238.

61. 367 U.S. 740 (1961).

62. *Id.* at 744.

63. *Id.* at 749.

64. *Id.* at 764.

65. *Id.* at 760-62 (importance of free riding); *id.* at 771-75 (lower court, on remand, must develop remedy that prevents union expenditure of dues on political activities).

mildly, a creative reading of the statute, the plain text of which said nothing at all about how union dues could be used.⁶⁶ In dissent, Justice Frankfurter argued that there was simply no evidence that Congress intended any such restrictions, particularly given unions' long history of engaging in political action both to advance their agenda at the bargaining table and to promote workers' interests more generally.⁶⁷

The Court finally took on the constitutional question in 1977 in *Abood v. Detroit Board of Education*, holding that the First Amendment prohibits public sector unions from requiring workers to contribute to their political efforts.⁶⁸ “[A]t the heart of the First Amendment,” the Court noted, “is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the state.”⁶⁹ Because the state could not require an individual to “associate with a political party” or to “affirm his belief in God” as a condition of employment, the Court reasoned that the state could not require any state employee “to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.”⁷⁰ Notably, the *Abood* Court held that requiring individuals to support a union’s bargaining and administrative activities *also* triggered First Amendment questions,⁷¹ but found the state interest in preventing free riding and ensuring labor peace to be sufficiently strong to permit agency shop agreements.⁷²

In *Communication Workers of America v. Beck*,⁷³ the Court extended the same set of rules to the private sector workers covered by the NLRA. The Court built on *Street* to decide the case on statutory interpretation grounds,⁷⁴ holding that section 8(a)(3) of the NLRA⁷⁵—despite containing plain language that permits union shops—requires that unions allow workers to opt out of supporting activities “unrelated” to collective bargaining.⁷⁶ While *Beck*

66. *See id.* at 784-86 (Whittaker, J., concurring in part and dissenting in part) (explaining that RLA explicitly permits union shop, and criticizing majority for “carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme.”).

67. *Id.* at 801 (Frankfurter, J., dissenting).

68. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

69. *Id.* at 234-35.

70. *Id.* at 235.

71. *See id.* at 222.

72. *See id.* at 225-26. A concurring opinion by Justices Powell, Burger and Blackmun would have gone further, placing the burden on the state to demonstrate that the agency shop is “needed to serve paramount governmental interests,” and finding “no assurance whatever” that the State could make such a showing in the case at bar. *See id.* at 255, 262-64 (Powell, J., concurring).

73. 487 U.S. 735 (1988).

74. *See id.* at 746-47 (finding that language in NLRA must be interpreted in line with earlier interpretation of parallel language in RLA).

75. 29 U.S.C. § 158(a)(3) (2012).

76. *See Beck*, 487 U.S. at 740.

did not directly address First Amendment concerns, presumably because the Court has never found that the NLRA's regulations of private conduct involve state action,⁷⁷ the case clearly incorporates the First Amendment concerns that animated *Street* and *Abood*.⁷⁸

The Court and the Board have also established processes for dues dissenters to make their dissent known, and for unions to determine the size of their rebate. Unions must account for all their expenditures each year, and classify them as either “chargeable” or “non-chargeable.”⁷⁹ A union must also send a notice to represented workers each year informing them of their rights to opt out of non-chargeable expenses,⁸⁰ and must have a process for dues dissenters to challenge the union's allocation of costs for the year.⁸¹ Such “non-chargeable” expenses include most costs incurred from organizing, litigation, and issue advocacy.⁸²

Two recent cases have significantly expanded dues dissenters' rights. In *Knox v. Service Employees International Union, Local 1000*,⁸³ the Court altered the procedure unions must follow with regard to dues dissenters. Rather than permitting workers to opt out of paying a special assessment for political activity, *Knox* held that unions must obtain an affirmative opt-in from workers prior to beginning the assessment—including from workers who have not previously exercised their opt-out rights.⁸⁴ In the majority opinion, Justice Alito wrote that the agency shop “represents a remarkable boon for unions” and that the prior dues-dissenter cases “approach, if they do

77. See *Fitz v. Comm'n Workers*, 132 LRRM 2186 (D.D.C. 1989), *aff'd* 917 F.2d 62 (D.C. Cir. 1990), *cert denied*, 499 U.S. 960 (1991); *Price v. Auto Workers*, 927 F.2d 88 (2d Cir. 1991); see also Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 844-51 (2012) (discussing question of state action in NLRA context); Fisk & Chemerinsky, *supra* note 57, at 1037-38 (same).

78. See Roger Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Dues Objector Cases*, 41 HASTINGS L.J. 1 (1989) (arguing that *Beck* incorporates constitutional values).

79. See, e.g., *Knox v. SEIU, Local 1000*, 132 S. Ct. 2284-87 (discussing union's efforts to calculate chargeable expenses and give workers notice of their rights to opt out). In the public sector this is known as a “Hudson Notice,” *id.*, after *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 302-11 (1986) (establishing basic procedural requirements).

80. *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 231-34 (1995) (discussing notification requirements for private sector workers).

81. *Chi. Teachers Union*, 475 U.S. at 307 (requiring such an internal process).

82. *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 451-53 (1984) (considering which expenses are chargeable, holding that organizing expenses are not under RLA); *CWA v. Beck*, 487 U.S. 735, 752-53 (1988) (clarifying that same division between chargeable and non-chargeable expenses announced in *Ellis* applies to NLRA); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 527 (1991) (legislative efforts around public education funding not chargeable). *But see Cal. Saw & Knife Works*, 320 N.L.R.B. at 18 (litigation expenses outside bargaining unit may be chargeable); *Conn. Limousine Serv., Inc.*, 324 N.L.R.B. 633, 637 (1997) (organizing expenses outside bargaining unit may be chargeable where they “ultimately inure” to benefit of bargaining unit members).

83. 132 S. Ct. 2277 (2012).

84. *Id.* at 2296.

not cross, the limit of what the First Amendment can tolerate.”⁸⁵ Two years later, in *Harris v. Quinn*, Alito expanded on his opinion in *Knox* to constitutionalize right to work for a new legal category of workers deemed “partial public employees.”⁸⁶ Given the slim likelihood of labor unrest among the home care workers at issue in the case, Alito reasoned, agency fee arrangements were not necessary to ensure labor peace, and therefore violated the “bedrock principle that, except perhaps in the rarest of circumstances, no person in the country may be compelled to subsidize speech by a third party that he or she does not wish to support.”⁸⁷ The Court did not, however, clarify which workers, aside from home-care workers, would be classified as “partial public employees.”

Just before this Article went to press, the Court handed down its decision in *Friedrichs v. California Teachers Association*,⁸⁸ considering whether *Abood* should be overruled and right-to-work established across the public sector. Nearly fifty organizations or individuals had filed amicus briefs in the case,⁸⁹ and unions and some worker advocates had sounded alarms that the case could fatally undermine public sector unions.⁹⁰ The Court split 4-4, and thereby affirmed—per curiam, in a single sentence opinion—the lower court’s refusal to overturn *Abood*. The future of *Abood* will therefore be determined by the Court’s future composition.

B. What Exactly Is Wrong with the Union Shop?

The argument that the union shop infringes workers’ FOA builds on a simple and attractive notion: that the state may not require any person to associate with another individual or group against their will. In other words, legal protection of workers’ “positive” FOA requires legal protection of workers’ “negative” FOA. The Court often speaks in this manner, holding in one prominent case that the freedom to associate “plainly presupposes a freedom not to associate.”⁹¹

85. *Id.* at 2290, 2291.

86. *See Harris v. Quinn*, 134 S. Ct. 2618, 2634-38 (2014).

87. *Id.* at 2644. The case thus overlaps with the Court’s jurisprudence on compelled subsidization of speech, discussed *infra* Part I.B.

88. *Friedrichs v. Cal. Teachers Ass’n*, No. 14-915 (U.S. decided March 29, 2016).

89. *See* Docket Report, *Friedrichs*, No. 14-915, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-915.htm>.

90. *See, e.g.,* Andrew J. Rotherman, *Doomsday for Teacher’s Unions?*, U.S. NEWS & WORLD REPORT (July 2, 2015); Charlotte Garden, *Symposium: Another Battle in the War Over Union Fees*, SCOTUSBLOG (Aug. 28, 2015), <http://www.scotusblog.com/2015/08/symposium-another-battle-in-the-war-over-union-fees/> (“It is an exaggeration to say that public-sector unions will cease to exist” if *Friedrichs* overturns *Abood*).

91. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977)).

But this sort of assertion clouds legal analysis.⁹² For one thing, all sorts of laws limit freedom of association in the marketplace: employment discrimination and public accommodations laws are obvious examples, and neither faces serious constitutional challenge today given the accepted public interest in ensuring racial and gender equality.⁹³ For another, rights to speech and association are “interdependent . . . [but] analytically distinct.”⁹⁴ The Court has extended First Amendment protections to include the freedom of association in large part because “[t]he right to speak is often exercised most effectively by combining one’s voice with the voices of others.”⁹⁵ But there are empirical differences between being forced to speak, between being forced to join an organization, and being forced to subsidize its speech, even if some cases have largely treated these as coterminous.⁹⁶

The fact that the NLRA protects a particular form of FOA—the freedom to unionize without management interference under a regime of majority rule and exclusive representation⁹⁷—therefore tells us little to nothing about whether individual workers should be able to opt out of paying particular fees.⁹⁸ Instead, determining the scope of workers’ negative FOA requires courts to consider “the principles or values associated with” workplace FOA,⁹⁹ and to explain how particular laws undermine those values. The Court and scholars have identified four different potential harms of compelled speech, association, and subsidization of speech. I lay those out immediately

92. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (cataloging and critiquing reasoning errors under which courts find that the existence of one legal entitlement implies the existence of another legal entitlement). Like many basic liberties such as freedoms of speech and religion, FOA is actually not one legal entitlement but many, not “atomic” but “molecular.” Bogg and Ewing, *supra* note 5, at 396-97. The core “atoms” include immunities from prosecution or civil liability for mere association. See *id.* at 394, 400 (discussing “atomic” elements of FOA). Other key “atoms” include the entitlements protected under the NLRA, namely the right to engage in concerted action and to unionize without either management or union interference. See 29 U.S.C. § 157 (2012).

93. See *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (school desegregation case) (“Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.”). But see Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Laws*, 66 STAN. L. REV. 1205 (2015) (outlining ongoing libertarian arguments that freedoms not to associate render public accommodation laws unconstitutional).

94. Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. L. REV. 555, 567 (2006); see also discussion *supra* note 4 (discussing constitutional grounding of FOA).

95. *Rumsfeld v. FAIR*, 547 U.S. 47, 68 (2006) (citing *Jaycees*, 468 U.S. at 622).

96. See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2623, 2639 (2014) (framing legal question as “whether the First Amendment permits a State to compel personal care providers to subsidize speech,” then holding that agency fee provision at issue did not satisfy *Knox*’s test that the state interest at stake could not be advanced through means “significantly less restrictive of associational freedoms”).

97. See discussion *supra* notes 36-43.

98. See Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 763 (2012) (noting that existence of a right to do something does not necessarily imply a right not to do something).

99. *Id.* at 763.

below, drawing both on the dues dissenter cases and other FOA cases, but I leave a full analysis of their magnitude to Parts II and III, where I consider the broader values associated with workplace FOA.¹⁰⁰

First, compelled speech or association may interfere with freedom of thought, among the most important First Amendment values, by requiring individuals to espouse beliefs or attitudes they reject.¹⁰¹ The iconic cases are *West Virginia v. Barnette*,¹⁰² holding that a school district may not require students with religious objections to recite the pledge of allegiance, and *Wooley v. Maynard*, holding that motorists with religious objections cannot be required to display the state slogan “Live Free or Die” on their license plates.¹⁰³ While the Court has referred to this notion in its union security cases,¹⁰⁴ the connection feels tenuous because the Court held in 1963 that the NLRA permits only a form of membership that is “whittled down to its financial core.”¹⁰⁵ The distinction between speech and association therefore has bite in this context: even under a union shop clause, represented workers only must pay initiation and agency fees. They need never express allegiance to the union’s goals or participate in union activities.¹⁰⁶

Second, compelled speech or association may lead to crises of conscience insofar as individuals have religious or moral objections to an association’s activities.¹⁰⁷ The Court in *Abood* noted this concern, but sought to mitigate it by holding that unions cannot use agency fees for political or other non-germane purposes.¹⁰⁸ In a controversial extension of *Abood*, the Court in *United States v. United Foods, Inc.*, invalidated a program requiring mushroom producers to contribute to generic product advertising.¹⁰⁹ “First Amendment values are at serious risk,” the Court reasoned, apparently

100. *But see* Fisk & Chemerinsky, *supra* note 57, at 1056-57 (noting that the Court is “markedly inconsistent” in its analysis of compelled speech cases).

101. *See* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) (“[F]reedom of the mind” and freedom of conscience both “have preferred position in our basic scheme.”); *see also* Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association*, 99 NW. UNIV. L. REV. 840-41 (2005) (discussing impact of compelled speech and association on “autonomous thinking processes”).

102. 319 U.S. 624 (1943).

103. *See* *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

104. *See, e.g., Abood*, 431 U.S. at 234-35.

105. *NLRB v. General Motors*, 373 U.S. 734, 742 (1963).

106. *See id.* at 742-43.

107. *See, e.g., Abood*, 431 U.S. at 234-35.

108. *Id.* at 235; *see also* *Keller v. State Bar of Cal.*, 496 U.S. 1, 14-15 (1990) (following *Abood* to hold that integrated bar association cannot use compulsory dues for political purposes).

109. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *id.* at 408 (describing the mandatory assessments); *id.* at 413-14 (discussing *Abood*); *id.* at 415-16 (striking down the mandatory assessments); *id.* at 425 (Breyer, J. dissenting) (rejecting majority’s reasoning in part because “[m]oney and speech are not identical”).

referring to the values at stake in *Abood*, “if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.”¹¹⁰ Justice Alito’s opinion in *Knox* then built on that logic from *United Foods*.¹¹¹

As with freedom of thought, however, it is difficult to see how union security clauses could lead to crises of conscience because Title VII permits workers with religious objections to opt out of agency fees so long as they make equivalent charitable contributions.¹¹² The provision at issue is limited to bona fide religious objectors, those with an objection based on “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by” God or religious convictions within traditional religions.¹¹³ Nonetheless, the provision could presumably be extended to workers with non-religious but clear moral objections to union affiliation if necessary.¹¹⁴

The third potential harm is somewhat more problematic in the union security context. Compelled association—and perhaps also compelled subsidization of speech—could undermine individuals’ and groups’ ability “to render public opinion responsive to their own views.”¹¹⁵ Outside of labor law this question has come up in two contexts. The first involves the converse question of when a group may be required to admit particular members. For example, in *Boy Scouts of America v. Dale*, the Court held that the Boy Scouts could refuse to admit a gay scoutmaster given their putative opposition to homosexuality,¹¹⁶ and given the courts’ refusal at that time to recognize a

110. See *id.* at 411. Compare *id.*, with *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 472 (1997) (upholding similar assessment in part on grounds that it could not plausibly lead to crises of conscience).

111. See *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012).

112. See 29 C.F.R. § 1605.2 (2015) (“When an employee’s religious practices do not permit compliance with [an agency fee] provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.”); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981) (holding that employer’s refusal to allow Seventh-Day Adventist to make charitable contribution in lieu of union dues not reasonable accommodation); *accord EEOC v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981). The NLRA has a similar provision. See 29 U.S.C. §169 (2012). *But see Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (holding that the NLRA’s definition of religion is unconstitutionally restrictive in that applies only to established and traditional churches).

113. *United States v. Seeger*, 380 U.S. 163, 176 (1965); *accord EEOC Decision No. 71-779*, 3 FEP 172 (Dec. 21, 1970) (citing *Seeger*); see also *Young v. Sw. Sav. & Loan Ass’n*, 509 F.2d 140 (5th Cir. 1975) (protecting atheists).

114. See *Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 182139, at *10-11 (S.D. Ohio 2012) (presuming that vegans protected under Title VII). *But see Friedman v. S. Cal. Permanente Med. Group*, 102 Cal. App. 4th 39, 70 (2002) (veganism “not a religious creed” and therefore not protected under California anti-discrimination law).

115. Post, *Transparent and Efficient Markets*, *supra* note 94, at 567.

116. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (ruling that forcing a group to include particular members may “impair the ability of the group to express those views, and only those views, that

compelling state interest in protecting LGBT individuals against discrimination.¹¹⁷ But the Court also held in *Roberts v. United States Jaycees* that the state could require the Junior Chamber of Commerce (or “Jaycees”) to admit women given the important state interest in ending discrimination.¹¹⁸ In both cases, the potential harm was that forced inclusion of plaintiffs would impair the groups’ ability to express their desired messages to the public.¹¹⁹

The notion that compelled association may thwart individuals’ ability to control their own messages has also come up in cases considering when the state may compel individuals and institutions to allow their property to be used for others’ speech.¹²⁰ Those cases largely turn on the risk that the public will attribute outsiders’ speech to the property owner or occupier.¹²¹ In *Pruneyard Shopping Center v. Robins*, for example, the Court upheld a state law requiring a shopping center to allow petitioning and similar activity by civic groups, on the grounds that few would identify such speech as reflecting the shopping center’s views.¹²² In *PG&E v. Public Utilities Commission of California*, however, the Court held that a public utility could not be forced to include literature from a civic group in its regular mailings, because doing so required PG&E “to associate with speech with which [it] may disagree,”¹²³ and could lead members of the public to believe that the utility had endorsed the group’s message.¹²⁴

it intends to express”); *see also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 566, 574-75 (1995) (holding that parade organizer need not include LGBT organization given its right to control its own expressive message).

117. *But see* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that gay couples have fundamental right to marry under Due Process and Equal Protection Clauses of Fourteenth Amendment).

118. *See* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

119. *See id.* at 627; *Dale*, 530 U.S. at 648; *see also* *NAACP v. Patterson*, 357 U.S. 449, 459 (1958) (noting connection between association and advocacy). *But see* *Shiffrin*, *supra* note 101, at 840 (arguing that requiring groups to admit members is a problem insofar as it can interfere with “autonomous thinking processes”).

120. *See, e.g.*, *Rumsfeld v. FAIR*, 547 U.S. 47, 56-57 (2006) (holding that university that accepts federal funding must allow military recruiters onto campus); *Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 233 (2000) (finding student activity fees constitutional so long as distributed in viewpoint-neutral manner); *PG&E v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 9 (1986) (holding that utility need not include information from public interest organization in its mailings); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980) (upholding California law requiring mall to allow citizens’ organization to speak on its property); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that right-of-reply statute violates editors’ right to determine the content of their newspapers).

121. *See, e.g.*, *Pruneyard*, 447 U.S. at 87-88 (noting that shopping center is “not compelled to affirm [its] belief” in civic organization’s speech, distinguishing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

122. *Id.* at 87 (“The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner.”); *accord* *Rumsfeld*, 547 U.S. at 65 (“[S]tudents can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so. . .”).

123. *PG&E*, 475 U.S. at 15.

124. *Id.*

How could compelled contributions to a union undermine workers' own ability to speak? One possibility is that the risk of attribution in the union context is high, and dues dissenters therefore need to expend resources to make clear their disagreement with a union's speech. If so, they have suffered a First Amendment harm by losing the right *not* to speak.¹²⁵ Another is that requirements to subsidize others' political and expressive speech are problematic per se because they conflict with basic commitments to self-governance.¹²⁶ I treat both arguments in more detail below.¹²⁷

The final potential harm is that compelled speech or compelled subsidization of speech may warp public discourse by granting state favor to particular viewpoints.¹²⁸ This is basically a marketplace of ideas theory, and it has come up in the cases discussed above regarding compelled permission of another's speech on one's property. In *PG&E*, for example, the Court noted that requiring PG&E to include other group's messages whenever it spoke might lead it not to speak at all, "reducing the free flow of information and ideas that the First Amendment seeks to promote."¹²⁹ Justice Alito's opinion in *Knox* also emphasized this theory, noting that the "First Amendment creates 'an open marketplace'" of ideas, and that the state may not "compel the endorsement of ideas that it approves."¹³⁰ As with the third potential harm, I take up the merits of this argument below.¹³¹

II.

THE THREE CONCEPTS OF WORKPLACE FOA

This Part summarizes the civil libertarian, neoliberal, and social democratic concepts of workplace FOA, and traces their influence on the doctrine around union security. As noted above, each of the concepts seeks to link legal doctrines to deeper principles and values, so as to answer the

125. See Todd E. Pettys, *Unions, Corporations, and the First Amendment: A Response to Professors Fisk and Chemerinsky*, 99 CORNELL L. REV. ONLINE 23A, 30A-39A (2013) (arguing that compelled subsidization of union speech may be harmful due to risk that public will attribute unions' speech to dues dissenters).

126. This is the general view of the civil libertarian concept of FOA. See discussion *infra* Part II.A.

127. See discussion *infra* Part II.A (challenges of civil libertarian approach), III.B (risk of attribution).

128. See Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1807, 1811 (arguing that any First Amendment right against compelled subsidization of speech must rest on compelled subsidization's "potential harm to public political discourse"); see also *Thornhill v. Alabama*, 310 U.S. 88, 85 (1940) (finding that conviction of union organizers under loitering and picketing statute for non-violent conduct violated First Amendment rights to speech, in part because First Amendment speech rights protected "to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion . . .").

129. *PG&E*, 475 U.S. at 14.

130. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012).

131. See discussion *infra* Part III.

questions set up by the previous section: when and why are union security devices problematic?

A. *The Civil Libertarian Concept*

The civil libertarian concept of workplace FOA, as I define it, holds that the state may almost never compel association in the political or expressive sphere, but may do so without limit in the economic or commercial sphere. This concept is libertarian in that it understands FOA as the right to do collectively what one may do individually,¹³² such that one person's freedom ends where another's begins, and the state is prohibited from interfering with FOA in the political sphere.¹³³ But this approach is "civil" libertarian rather than economically libertarian because it sees no harm in compelled association for purposes of economic regulation.¹³⁴

This civil libertarian concept has a distinguished pedigree. It came to prominence in the law of union security devices through Justice Brennan's majority opinion in *Street*, which itself reflects the Warren Court's strong emphasis upon individual rights as the cornerstone of democracy.¹³⁵ Another prominent example is Justice O'Connor's influential concurring opinion in *Jaycees*, which distinguishes associations that are primarily "commercial" versus "expressive" in nature, with the latter deserving far greater First Amendment protection.¹³⁶ *Abood* and *Jaycees*, Justice O'Connor wrote, both reflect this distinction: "a State may compel association for the commercial purposes" of bargaining and administration, "but it may not infringe on associational rights involving ideological or political associations."¹³⁷

The civil libertarian concept resonates with Rawlsian approaches to social justice in that it prioritizes individual liberty while encouraging

132. See Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 4 ("Association is an extension of individual freedom."); SHELDON LEADER, FREEDOM OF ASSOCIATION: A STUDY IN LABOR LAW AND POLITICAL THEORY 23-24 (1992) (defining freedom of association as a "general right to liberty," which gives "to individuals the right to do together what they could do alone"); see also Langille, *supra* note 5, at 183 (arguing that "best" understanding of freedom of association is "the freedom to do in combination with others what one is free to do alone").

133. See C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMM. 251, 254 (2011) (arguing that rights of association do not allow anyone to exercise power over others).

134. In comparison, the neoliberal approach has a strong economically libertarian bent. See discussion *infra* Part II.B.

135. See Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8-10 (1993) (discussing resurrection of rights discourse by Warren Court).

136. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 633-34 (1984) (O'Connor, J., concurring). O'Connor's distinction may have been weakened by the Court's more recent case law banning compelled subsidization of speech in the commercial context, especially *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

137. *Jaycees*, 468 U.S. at 638 (O'Connor, J. concurring).

egalitarian economic regulations.¹³⁸ It can also draw support from at least two distinct bodies of liberal First Amendment thought, one which views First Amendment protections as a means of enabling self-governance,¹³⁹ and another which views those protections as basic negative liberties.¹⁴⁰ Despite their different baseline commitments, these theories converge in their prescriptions around compelled speech and association. In the self-governance approach, First Amendment doctrine should regard those in public discourse as autonomous and therefore immunize them against infringements of speech and association rights. “[P]ersons outside public discourse,” in contrast, need not be “regarded as autonomous,”¹⁴¹ and speech in the commercial sphere may be compelled without triggering constitutional concerns.¹⁴² The negative-liberty approach, meanwhile, holds that speech “warrants virtually absolute protection from, and respect by, the state . . . in relation to self-expressive or value-expressive behavior,” but not in relation to commercial or economic behavior.¹⁴³ Whether one’s baseline commitments are to self-governance or negative liberty, the state may compel association in the economic sphere but not in the political sphere.

1. *The Civil Libertarian Concept and Labor Law Doctrine*

While theorists within both the self-governance and negative-liberty groups often bracket workplace FOA on the grounds that it raises unique concerns,¹⁴⁴ one self-governance theorist has explicitly defended *Street* and *Abood*, arguing that the union shop can “undermine the value of democratic legitimation by frustrating the aspiration of persons to render public opinion

138. See RAWLS, THEORY, *supra* note 15, at 302-03 (outlining two principles of justice which grant lexical priority to liberty).

139. See Robert Post, *Participatory Democracy and Free Speech*, 91 VA. L. REV. 477, 482 (2011) (“Democracy is achieved when those who are subject to law believe that they are also potential authors of law.”); RAWLS, POLITICAL LIBERALISM, *supra* note 138, at 310-24 (noting import of basic freedoms of conscience, association, and thought to individuals’ abilities to develop their own moral views); see also Post, *Transparent and Efficient Markets*, *supra* note 94, at 565-68 (defending results in *Street* and *Abood*).

140. See Baker, *supra* note 133, at 254 n.8 (clarifying that this “autonomy-based” theory’s central value was negative liberty, not the substantive autonomy associated with Kantian tradition); *id.* at 266 (distinguishing self-governance theories).

141. Post, *supra* note 139, at 483.

142. *Id.* at 485.

143. Baker, *supra* note 133, at 252 (theory grants absolute protection for expression); *id.* at 254 (but does not imply laissez-faire); *id.* at 272 (and does not protect commercial speech).

144. Regarding self-governance theories, see INAZU, *supra* note 4, at 16 (bracketing unions because they serve multiple purposes); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 748 (2002) (bracketing unions as economic organizations that do not enable self-governance); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 978 n.218 (stating that “labor unions are a tough, in-between case” because their goals are primarily economic, but they often engage in politics). Regarding negative liberty theories, see Shiffrin, *supra* note 101, at 876 (setting to the side unions, political parties, and other “complex cases”); Larry Alexander, *What is Freedom of Association, and What is Its Denial?*, in 15 UNIV. OF SAN DIEGO LEGAL STUDIES RESEARCH PAPER SERIES 08-025 (2008) (unions as “sui generis”).

responsive to their own views.”¹⁴⁵ Within the negative-liberty tradition, such cases seem rightly decided because forced association in the political or expressive sphere can interfere with “autonomous thinking processes”¹⁴⁶ by enabling the state to shape the identity of civil society groups. While different infringements of individuals’ rights may lead to more or less thwarting of their powers of self-governance or basic negative liberties, the magnitude of the threat is not the issue. According to civil libertarians, speech and association may not be compelled in the political and expressive sphere—period.

United Foods nevertheless seems wrongly decided and even unjust in the civil libertarian view,¹⁴⁷ and the same is likely true of *Knox* and *Harris*. According to the civil libertarian view, compelled commercial speech and association cannot trigger concerns of autonomy because the market is an amoral sphere.¹⁴⁸ Moreover, treating commercial speech like other forms of protected speech can substantially undermine distributive justice by subjecting all manner of ordinary economic regulations to constitutional scrutiny.¹⁴⁹ The civil libertarian view also highlights an important tension between the union security cases and the Court’s cases considering the rights of shareholders vis-à-vis corporations. Since unions can only engage in political speech with funds from workers who affirmatively opt in to such spending, some have argued, corporations should be able to engage in political speech only if shareholders affirmatively approve.¹⁵⁰ The extent of compulsion endured by dues dissenters versus shareholders is an empirical question,¹⁵¹ but the basic argument is clearly civil libertarian.

The major weakness of the civil libertarian approach is that determining which activities fall on what side of the political-commercial divide is far from simple. Indeed, the boundary itself is unstable. As Justice Frankfurter wrote in his blistering dissent in *Street*, “the notion that economic and political concerns are separable is pre-Victorian.”¹⁵² Unions will tend to be less effective economic advocates if they cannot engage in political action

145. Post, *supra* note 94, at 565-68.

146. Shiffrin, *supra* note 101, at 840.

147. See Post, *supra* note 94, at 557 (describing *United Foods* holding and reasoning as “seriously misguided”).

148. See discussion *supra* Part II.A.

149. See Post, *supra* note 94, at 582-86; see also *infra* notes 184-188 and accompanying text (showing subsequent doctrinal developments).

150. See, e.g., Sachs, *supra* note 77, at 862-66 (proposing shareholders should have opt-out rights); see also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978) (cited in Sachs, *supra* note 77, at 804 n.15) (rejecting analogy to union security cases in case regarding state law that prohibited corporate contributions to certain referenda); Sachs, *supra* note 77, at 828-29.

151. Compare Sachs, *supra* note 77, at 833-43 (detailing costs borne by shareholders versus dues dissenters), and Fisk & Chemerinsky, *supra* note 57, at 1060-61 (same), with Pettys, *supra* note 125, at 29A-30A (contesting notion that costs are similar).

152. *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 814 (1961) (Frankfurter, J., dissenting).

around issues like minimum wage laws, workplace health and safety, and of course efforts to reform labor laws. Moreover, under existing doctrine, unions' organizing efforts are not "chargeable,"¹⁵³ implying that they fall into the political and expressive category, even though unions' ability to win at the bargaining table—the core of their economic effects—is directly proportional to their depth of representation.

This places civil libertarians with egalitarian commitments in a difficult position because one likely effect of the Court's union security cases, even before *Knox* and *Harris*, has been to undermine distributive justice by making it harder for unions to organize new members and to advocate politically on behalf of their existing members.¹⁵⁴ But under the civil libertarian concept, labor law is just another species of economic regulation, which must yield before individual liberties of (non-commercial) expression. As will be clear after the discussion in Part II.C., this concept of FOA contrasts with the social democratic concept, which understands labor law as part of a charter of economic democracy.

The difficulty in distinguishing political from economic activities also emerges in other areas of labor law doctrine. For example, the NLR and the Court's regulation of speech during union organizing campaigns reflect the ambiguous constitutional status of organizing efforts. On the one hand, employer speech (and union speech) during union campaigns is largely immunized from constitutional challenge,¹⁵⁵ implying that it is political or expressive speech. But if so, then surely the United States' byzantine rules around secondary boycotts, often criticized as content-based and speaker-based restrictions on speech, should be constitutionally vulnerable.¹⁵⁶ Employers' direct restrictions on worker speech and association also present difficult questions. While workers owe no duty of loyalty to a union, they do owe such a duty to employers, such that public disparagement of an employer can be grounds for termination.¹⁵⁷ Courts have even held that workers may

153. See discussion *supra* Part I.A.

154. See Mark B. Stewart, *Union Wage Differentials in an Era of Declining Unionization*, 57 OXFORD BULL. ECON. & STATISTICS 143, 143 (1995) (suggesting end of closed shop in Britain associated with lower union wage premium); ELISE GOULD & WILL KIMBALL, ECON. POLICY INST., "RIGHT-TO-WORK" STATES STILL HAVE LOWER WAGES (2015), <http://www.epi.org/publication/right-to-work-states-have-lower-wages/> (finding statistically significant negative relationship between "right-to-work" status and wage levels, implying that agency shop improves unions' bargaining power); LAURENCE TRIBE, CONSTITUTIONAL CHOICES 202 (1985) (arguing that differential treatment of unions' and corporations' political speech has undermined union strength in political sphere).

155. See *NLRB v. Va. Elec. Power Co.*, 314 U.S. 469, 477 (1941) (holding that employer enjoys First Amendment right to express opinions regarding unionization); see also 29 U.S.C. § 158(c) (2012) (declaring that expression of "any views, argument or opinion" shall not be an unfair labor practice absent a "threat of reprisal or force or promise of benefit").

156. See, e.g., James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 919-31 (1991) (summarizing different treatment of labor protest compared to other protest that falls under the First Amendment).

157. See *NLRB v. Local No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 472 (1953).

lawfully be terminated for speaking out against laws or regulations that employers support, or for refusing to participate in public-education campaigns around such laws.¹⁵⁸ Whether this is a cognizable harm in the civil libertarian view would presumably depend on whether the employment relationship itself is public or private—an issue that has caused courts interminable difficulty over the years.¹⁵⁹ Regardless, such questions are essentially impossible to resolve within the civil libertarian view because of its emphasis on the political-economic distinction. Indeed, the civil libertarian view reflects a common conception of self and citizen in political liberalism: that our political and economic lives are separate, and state interference is permissible in the latter but not in the former.¹⁶⁰

While labor law scholars have often criticized liberalism for seeking to enforce such distinctions,¹⁶¹ it is important to recognize that the civil libertarian concept is egalitarian in the sense that it immunizes union's representational activities from constitutional challenge. The agency shop is entirely permissible in a civil libertarian view, since it does not threaten individuals' powers of self-governance. And of course the civil libertarian view is grounded in deeply rooted commitments to liberty and self-governance, which helps explain its staying power and legitimacy.

B. *The Neoliberal Concept*

The neoliberal approach to workplace FOA differs significantly from the civil libertarian view. This Part of the Article defines neoliberalism,¹⁶²

158. See Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 254-59 (2013) (discussing such claims). Compare *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (3d Cir. 1983) (recognizing claim for wrongful discharge in violation of public policy where employee terminated for refusing to engage in employer-sponsored lobbying effort), with *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 618-20 (3d Cir. 1992) (declining to follow *Novosel*), and *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 738-39 (Idaho 2003) (upholding summary judgment for employer where employee fired after for publicly opposing employer-supported development project, stating that “public policy adopted in *Novosel* has not been endorsed by any other court, not even the Pennsylvania state courts within the federal district of the Circuit that issued *Novosel*”).

159. See Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1981).

160. See *id.* (“The essence of the public/private distinction is the conviction that it is possible to conceive of social and economic life apart from government and law”).

161. See, e.g., *id.* (Liberal public/private distinction “inhibit[s] the perception that the institutions in which we live are the product of human design and can therefore be changed.”).

162. My discussion draws on two distinct literatures on neoliberalism. The first traces neoliberalism as an approach to political economy that supplanted the Keynesian consensus in the 1970s. See WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* 26-31 (2014) (outlining transition to neoliberalism in advanced market economies in 1970s). The other traces neoliberalism as political rationality or moral theory that encourages individuals to apply market principles to all social spheres, and to understand themselves as become entrepreneurs. See generally WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* (2014) (outlining this conception of neoliberalism). Foucault’s influential history of neoliberalism has influenced both of these literatures. Compare MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE*

traces the distinctive neoliberal approach to workplace FOA as evidenced in *Knox* and *Harris*, and discusses its potential impact on other areas of labor law.

1. Neoliberalism Defined

“Neoliberalism” is a somewhat confusing term, but for present purposes I define it as the view that the state is legitimate only insofar as it creates and polices systems of market ordering.¹⁶³ As an approach to policy that has developed over the last thirty years, neoliberalism systematically favors market imperatives over egalitarian commitments.¹⁶⁴ Sometimes this preference is defended on grounds of welfare maximization or efficiency, other times on grounds of liberty, other times on grounds of fairness.¹⁶⁵ The argumentative strategy is less important than the basic contrast between neoliberalism and approaches to economic policy in which the state “disciplines the market for planning and redistribution.”¹⁶⁶ One manifestation of neoliberalism’s influence is that welfare states and social insurance schemes have been ratcheted back, while finance capital has been empowered in most advanced economies.¹⁶⁷ Another manifestation is that consumer freedom and individual welfare maximization have taken on such great importance in contemporary policy debates that other swaths of life including education, speech, and even voting are often understood in terms of individual consumption.¹⁶⁸

While neoliberalism has strong overtones of laissez-faire and economic libertarianism, it is distinct from classical liberalism.¹⁶⁹ The major difference

FRANCE, 1978-79 at 101-29 (Graham Burchell, trans., Michel Senellart, ed., 2010) (discussing German neoliberalism), and *id.* at 185-214 (discussing transition to neoliberal economics), with *id.* at 215-38 (discussing “redefinition of homo oeconomicus as an entrepreneur of himself”).

163. See Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, in ASSOCIATIONS AND DEMOCRACY 12-14, 12 n.10 (Wright, ed., 1995) (outlining neoliberal view of the state as evidenced in, for example, JAMES BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975), MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) and FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960)); see also *id.* at 12 n.10 (noting that neoliberalism is largely coterminous with what Rawls described as the “system of natural liberty” (citing RAWLS, *THEORY*, *supra* note 15, at 66-72)).

164. See Grewal & Purdy, *supra* note 29, at 2-3; see also SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY & CAPITALISM* (1986) (arguing that democracy and capitalism are in inherent conflict).

165. Grewal & Purdy, *supra* note 29, at 10-11.

166. STREECK, *BUYING TIME*, *supra* note 162, at 24-25; see also *id.* at 96 (arguing that under neoliberalism, “Capitalism is emptied of democracy.”)

167. See *id.* at 26-46 (outlining transformation of state and global economic institutions in neoliberal era); *id.* at 84 (describing contemporary finance capital “as a second people” to whom state leaders owe duties, “a *Marktvolk* rivaling the *Staatvolk*.”); see also KATHLEEN THELEN, *VARIETIES OF LIBERALIZATION AND THE NEW POLITICS OF SOCIAL SOLIDARITY* (2014) (tracing variety of changes to labor market and economic institutions in various nations in neoliberal era).

168. Grewal & Purdy, *supra* note 29, at 13.

169. See *id.* at 1.

is that classical liberalism viewed “market ordering under the common law” as “part of nature rather than a legal construct.”¹⁷⁰ Neoliberalism, in contrast, tends to view the market as a creature of law—not as a natural phenomenon.¹⁷¹ This is in part the legacy of the so-called “Ordoliberal,” a group of German political and economic thinkers clustered around the journal “Ordo” in the 1930s and 1940s.¹⁷² After decades of state planning that culminated in National Socialism, the Ordoliberals sought to re-legitimize the state by limiting it to the task of ensuring competition and other market freedoms.¹⁷³ Hence, the state should not retreat from the economic sphere, but rather it should act positively in that sphere “so that competitive mechanisms can play a regulatory role at every moment and every point in society.”¹⁷⁴

Neoliberalism is nevertheless *liberal* in that it advocates a limited state, one that acts mainly to solve market failures.¹⁷⁵ That said, the notion that the state could merely solve market failures is borderline nonsensical, since modern markets cannot function without a state-enforced framework of property and contract rights.¹⁷⁶ Whether a market is “failing” is therefore a mixed empirical and normative question. This suggests that the market is both the object and the subject of neoliberalism—both a consciously designed institution *and* a model for that institution’s legitimacy. Therefore, the notional “market” is serving an ideological as well as a practical function.

Before proceeding, I should offer a few caveats. First, it is important not to overstate the significance or scope of neoliberalism.¹⁷⁷ The rise of left parties amid the recent debt crises in the Eurozone,¹⁷⁸ rising concern with

170. Cass Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

171. FOUCAULT, *supra* note 162, at 131 (suggesting that neoliberalism involves “dissociating the market economy from the political principle of laissez-faire”).

172. *Id.* at 103.

173. *Id.* at 119-21.

174. *Id.* at 145. *See also id.*, at 225-27 (homo oeconomicus as entrepreneur of the self); Grewal & Purdy, *supra* note 29, at 5 (arguing that neoliberalism often supports “the affirmative use of political power to restructure areas of law and social life along market lines”).

175. Cohen & Rogers, *supra* note 163, at 13.

176. *See generally* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (countering arguments that state regulations are coercive by showing how state-enforcement of property rights is also coercive).

177. In my opinion, there is a tendency in the moral strain of the literature to disregard how neoliberalism coexists with other moral theories and other logics of social organization. *See* James Chappel, *A Servant Heart: How Neoliberalism Came to Be*, BOS. REV. (Nov. 30, 2015), <http://bostonreview.net/books-ideas/james-chappel-servant-heart-religion-neoliberalism> (noting persistence of “communities of faith, care, and love” amid the “exhaustion and despair” described as the hallmark of neoliberal culture in WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* (2014)).

178. *See* Giles Tremlett, *The Podemos Revolution: How a Small Group of Radical Academics Changed European Politics*, THE GUARDIAN (Mar. 31, 2015), <http://www.theguardian.com/world/2015/mar/31/podemos-revolution-radical-academics-changed-european-politics>.

economic inequality in the United States, and Pope Francis' recent encyclical *Laudato si'*¹⁷⁹ all demonstrate substantial popular support for political and communal efforts to limit the influence of markets. Second, neoliberalism is not reducible to a preference for deregulation or the desires of the rich. Many scholars and policymakers have embraced it in good faith, particularly given the apparent inability of Keynesianism to stop spiraling inflation and unemployment in the 1970s,¹⁸⁰ and the various failures of socialist and welfare states.¹⁸¹ Against such a backdrop, markets may have seemed like the best possible means of organizing human affairs. That said, it is increasingly clear that neoliberal policies have tended to “obliterate the previous limitation of inequality,” calling into question both their wisdom and their legitimacy.¹⁸²

2. *The Neoliberal Concept and Labor Law Doctrine*

The neoliberal approach to workplace FOA collapses the distinction between political and economic action. Market behavior simply *is* expressive behavior, and “negative economic liberty [is] a touchstone personal freedom.”¹⁸³ As Jedediah Purdy and David Grewal have shown, these commitments inform the Court's recent First Amendment jurisprudence, which has increasingly granted corporate property and “speech” rights the same protections traditionally reserved for political and expressive action.¹⁸⁴ Purdy and Grewal point to (1) *Citizens United's* assertion that corporate political speech cannot be limited at all because it contributes to public debate;¹⁸⁵ (2) *Sorrell v. IMS Health's* holding that bans on the sale of prescription records for data-mining purposes are an unconstitutional content- and speaker-based restriction on speech, despite the activity at issue looking nothing like speech;¹⁸⁶ and (3) *National Federation of Independent*

179. *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for Our Common Home*, VATICAN (last visited May 24, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html (last visited May 24, 2015).

180. As Streeck has emphasized, it may turn out that the wealthy and stable post-war period was an historical anomaly in the longer history of capitalism, bracketed by *laissez-faire* at one end and neoliberalism at the other. This may have been the one time when major economies successfully accommodated capitalism to democracy. Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 *NEW LEFT REV.* 5 (2011); see also Grewal and Purdy, *supra* note 29, at 4, 19-23.

181. See Grewal & Purdy, *supra* note 29, at 7 (noting good-faith embrace of neoliberalism by many); see also *id.* at 13 (noting that neoliberalism has “proven compatible with normatively attractive doctrines of personal autonomy and identity,” in contrast to classical liberalism's tendency to view the self as static and fixed, and suggesting that this may bolster claims for equality based on race, gender, and sexuality).

182. Moyn, *supra* note 20, at 151.

183. Grewal & Purdy, *supra* note 29, at 13.

184. See Purdy, *supra* note 29, at 198 (describing cases as reflecting “an image of the world in which politics and argument are practically the same as pursuing one's preferences through spending and seeking profit by advertising”).

185. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

186. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011).

Businesses v. Sebelius's holding that the Commerce Clause does not allow Congress to require individuals to purchase health insurance.¹⁸⁷ The baseline assumption behind these cases is that the “[p]ursuit of individual preferences through spending decisions . . . is sufficient as an account of personal liberty and of the structural relation of that liberty to a scheme of good-enough government.”¹⁸⁸ Whether such strong deference to individuals’ and corporations’ spending decisions is defended under libertarian or welfarist premises, the results advance the neoliberal injunction to systematically advance market “imperatives.”

Neoliberalism’s characteristic approach to groups and FOA follows from these premises: “If associations are wholly voluntary and do not impede market efficiency or burden the fundamental liberties of non-members, they are tolerated, or more, in the neoliberal scheme.”¹⁸⁹ Workplace FOA, in this view, is essentially an exercise of consumer sovereignty, albeit one entitled to the same First Amendment protections as traditional expressive association.¹⁹⁰ This is clear in the Court’s reasoning in *Knox* and *Harris*. *Knox* built directly on the holding in *United Foods* that “compulsory subsidies for private speech are subject to exacting First Amendment scrutiny” regardless of whether they involved expressive activity.¹⁹¹ But neither case explained why economic speech and association deserved the same degree of protection granted to political speech and association.

A clue comes in the *Knox* opinion’s discussion of the free-rider problem, where Justice Alito quotes a law review article by the late, great Clyde Summers noting that other voluntary organizations—such as PTAs, community associations, and medical associations—cannot compel fee payments from the beneficiaries of their efforts.¹⁹² The implication is that unions are the same: voluntary associations that serve the purposes set by

187. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2584-91 (2012).

188. Grewal & Purdy, *supra* note 29, at 17 (emphasis in original removed).

189. Cohen & Rogers, *supra* note 163, at 14.

190. In retrospect, other elements of United States labor law may reflect a similar logic. For example, the longstanding rule that the NLRB will police campaign tactics so as to enable workers to decide whether to unionize based on their own free choice under “laboratory conditions” may be a proto-neoliberal view of FOA insofar as it reduces complicated distributive questions to workers’ individual and collective choices. See *General Shoe Corp.*, 77 N.L.R.B. 124 (1948) (establishing “laboratory conditions” doctrine); see also Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313 (2012) (criticizing NLRB’s, courts’, and scholars’ focus on uncoerced employee choice as normative foundation of labor law).

191. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2289 (2012) (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001)).

192. See *id.* at 2290 n.2 (citing Clyde W. Summers, *Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory*, 16 COMP. LAB. L. & POL’Y J. 262, 268 (1995) (book review)). This view of consumer sovereignty is also reflected elsewhere in the opinion. See, e.g., *id.* at 2290 (“[W]hat is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn’t the default rule comport with the probable preferences of most nonmembers?”).

members, but only those purposes.¹⁹³ This disregards the economic and social context in which unions operate. PTAs, community groups, and most professional associations do not confront economically and politically powerful actors as adversaries. And, unlike unions, state modification of common law rules is not necessary for their survival.¹⁹⁴ *Knox* therefore instantiates an approach to workplace FOA where values such as positive self-governance and equality are unimportant and unions are understood as nothing more than voluntary associations of workers who are consumers of the unions' services.

Building on *Knox*'s reasoning, *Harris* held that no state interest justifies requiring home care workers to pay an agency fee.¹⁹⁵ Like *Knox*, *Harris* gave little consideration to the free-rider problem, mentioning only that it is generally insufficient to overcome First Amendment concerns.¹⁹⁶ The Court reasoned that the state had not demonstrated that its interest in labor peace and the welfare of home care workers required the agency fee arrangement.¹⁹⁷ *Harris* also collapsed the traditional political-economic divide, holding that "the category of union speech that is germane to collective bargaining" for public employees includes speech pushing for higher wages and benefits.¹⁹⁸ Although the Court saw all union activities as matters of public concern, it interpreted this as a reason to ban all compelled fee payments, once again adopting the neoliberal view of consumer sovereignty.¹⁹⁹ The Court did not explain whether this bright-line rule was justified because of potential crises of conscience, risks of attribution, or general thwarting of individuals' speech rights. But any of the above might justify prohibiting the agency shop once the economy itself is a site of moral development and action.

To be clear, if the Court extends *Harris* to all public and private workers,²⁰⁰ nothing in the decision would explicitly foreclose unions from

193. This echoes nineteenth-century labor cases that banned certain strikes and boycotts on the theory that unions' powers extended only as far as their members' individual wills. *See, e.g.,* *Vegeahn v. Guntner*, 167 Mass. 92, 98-99 (1896) (distinguishing lawful "combination among persons merely to regulate their own conduct" from unlawful combination aiming "to do injurious acts to another."); *see also id.* at 107-09 (Holmes, J., dissenting) (rejecting such logic on grounds that combination often imposes temporal economic harm on others).

194. *See generally* Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 337 (2012) (arguing that unions provide collective workplace goods that market would otherwise not provide, but to bargain for those goods, "firms must concede to such negotiations and unions must be recognized as legitimate counterparts," highlighting need for state support of unionization).

195. *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (holding that agency fee provision in case serves no "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms").

196. *See id.* at 2627-28.

197. *See id.* at 2640-41.

198. *Id.* at 2642.

199. *See id.* at 2643.

200. Whether the Court will extend *Harris* to the private sector is, of course, unclear. As noted in *supra* note 77, the Court has never held that the NLRA involves state action, without which no First

organizing and bargaining. They could do so, but only as purely voluntary associations. Under such a regime, unions of workers who can control the labor supply, such as unions of actors and professional athletes, should still be able to act and bargain collectively because their human capital gives them an independent basis of market power.²⁰¹ But unions of workers without much human capital, such as industrial unions and large service unions, have typically relied upon union security clauses²⁰² and will struggle to expand or even survive under a national right-to-work regime.

If its influence continues to expand, the neoliberal approach to workplace FOA could undermine vast swaths of labor law doctrine. The rule that non-union workers within a bargaining unit are bound by a collective economic agreement²⁰³ would seem to be at risk insofar as economic activity receives the same First Amendment protections as political and expressive activity. The same principle, taken to its logical limits, could give rise to claims that employer duties to bargain with certified unions are unconstitutional.²⁰⁴ On the plus side for unions, the neoliberal view of union members as consumers would presumably undermine unions' duty to process grievances for non-members,²⁰⁵ though courts may well disregard that tension in the law.²⁰⁶

The neoliberal approach may also undermine some earlier FOA case law. As should now be clear, *United Foods* reflects the neoliberal approach to questions of speech and association. *Jaycees* is at risk, however, insofar as that decision depended on the fact that Jaycees' members obtained commercial benefits from their membership.²⁰⁷ If consumer sovereignty

Amendment claim is possible. It nevertheless strikes me as plausible that the Court would find the NLRA's authorization of union security clauses to involve state action even if the rest of the statute does not. *But see* Benjamin Sachs, *Friedrichs and the Private Sector*, ONLABOR.ORG (Jan. 14, 2016), <http://onlabor.org/2016/01/14/friedrichs-and-the-private-sector/> (expressing skepticism that Court will find state action in private sector, despite comments by Justice Kennedy that may imply willingness to do so).

201. In this regard, they are like early craft unions, whose specialized skills enabled them to control the supply of labor. *See* Wolfgang Streeck, *The Sociology of Labor Markets and Trade Unions*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 254, 266-67 (Smelser & Swedberg eds., Princeton Univ. Press 2d ed. 2005).

202. *See id.* at 267 (noting import of state support, including union security clauses, for industrial unions).

203. 29 U.S.C. § 159(a) (2012).

204. *See* Bogg & Ewing, *supra* note 5, at 395 (discussing possibility of such claims if libertarian notion of workplace FOA gains traction).

205. *See* *Sweeney v. Pence*, 767 F.3d 654, 683 (7th Cir. 2014) (Wood, C.J., dissenting) (arguing that Indiana right-to-work law requiring unions to expend resources to represent non-members in grievances is an unconstitutional taking); Fisk & Sachs, *supra* note 46, at 858-60 (noting inequities of right-to-work and proposing several policy solutions including members-only bargaining and fee-for-services arrangements by unions).

206. *See* Grewal & Purdy, *supra* note 29, at 7-9 (noting tensions within very idea of neoliberalism).

207. *See* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984) (discussing leadership programs and commercial opportunities offered to Jaycees members).

defines our duties as citizens, then presumably the Jaycees' rights to exclude would parallel those of the Boy Scouts or other expressive associations.²⁰⁸ The cases considering when individuals must enable others to use their property for speech and association may also be at risk.²⁰⁹ If property and money simply *are* speech and association, a stronger line seems appropriate in cases like *PG&E* and *Pruneyard*: the harm to the property owners may lie not in the risk of attribution, nor in the fact that they needed to spend resources to counter the compelled message, but rather that their property was used for such purposes in the first place.²¹⁰

C. *The Social Democratic Concept*

The social democratic concept of FOA has little impact on U.S. jurisprudence today, but it has deep historical roots. I call it the “social democratic” concept because it explicitly incorporates the traditional social democratic concern with building an egalitarian political economy. While the social democratic concept sees FOA as a critical means of self-governance, it differs from the civil libertarian concept, and overlaps with the neoliberal concept, in its skepticism toward any strong political-commercial divide. This is because a more egalitarian political economy cannot be achieved realistically without politicizing economic relations and encouraging citizens to support egalitarian policies such as collective bargaining rights and redistributive taxation. Workplace FOA, in this view, is best understood as part of a charter of economic democracy, and legal claims based on FOA should be interpreted in light of such commitments. In practice, then, the social democratic concept of FOA strongly emphasizes positive workplace FOA, and even affirmatively promotes unionization and collective bargaining, while de-emphasizing negative FOA.

208. Recent arguments that individuals have rights rooted in religious freedom not to sell goods to LGBT individuals may also reflect a neoliberal logic of consumer sovereignty, though I will not unpack such claims here given the complexity of questions of religious freedom. See Campbell Robertson & Richard Perez-Pena, *Bills on “Religious Freedom” Upset Capitols in Arkansas and Indiana*, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?_r=0 (discussing “religious freedom” law in Indiana widely criticized for explicitly permitting discrimination against LGBT individuals). *But see* Leonore Carpenter & David S. Cohen, *Concerned About Indiana and Arkansas? Turn Your Attention to North Dakota*, SLATE (Apr. 1, 2015), http://www.slate.com/blogs/outward/2015/04/01/north_dakota_possible_expansion_of_anti_discrimination_laws_is_crucial_for.html (noting that Indiana legislation simply codified existing gap in anti-discrimination protection for LGBT individuals). See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that Religious Freedom Restoration Act permits closely-held corporation to opt out of ACA contraception mandate).

209. See discussion *supra* notes 120-125.

210. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), discussed *supra* note 120, raises distinct questions, since it does not concern economic regulation but rather the state's ability to compel compliance with a government program. I take no position on whether neoliberalism has a distinct approach to such questions.

1. *The Social Democratic Concept Defined*

The social democratic view of FOA has numerous historical precedents in twentieth-century labor law systems. For example, the NLRA's preamble declared a national policy of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association."²¹¹ To contemporary eyes, those goals appear in tension, since state efforts to encourage collective bargaining may involve infringing workers' negative FOA. But the Act did not protect workers' FOA for its own sake, but rather as a means of preventing the sorts of industrial strife and crises of underconsumption that had led to repeated recessions and the Great Depression.²¹² Since managerial interference had so often thwarted past unionization efforts, the theory was that simply getting employers out of the way would lead workers to organize and thereby democratize workplace and market relationships.²¹³

This approach to labor law had two important constitutional precedents. First, the Supreme Court in 1930 upheld a similar approach in the Railway Labor Act ("RLA") against *Lochner*-era challenges. In its decision, the Court noted that "Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme," and that the RLA provisions prohibiting employer interference with union organizing efforts "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."²¹⁴ Thus, at the time of the NLRA's passage in 1935,²¹⁵ Congress had the constitutional power to protect workers' choices around unionization.

Second, and just as importantly, when it passed the NLRA, Congress likely did not have the power simply to order unionization or other forms of workplace representation. In *A.L.A. Schechter Poultry Corp. v. United States*²¹⁶ the Court invalidated most of the National Industrial Recovery Act's ("NIRA")²¹⁷ regulatory scheme as an unconstitutional delegation of legislative authority to the executive. The NIRA had encouraged industrial

211. 29 U.S.C. § 151 (2012).

212. See 29 U.S.C. § 151 (Workers' lack of "full freedom of association" leads to "strikes and other forms of industrial strife" and "tends to aggravate recurrent business recessions.").

213. See, e.g., Mark Barenberg, *Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1390 (1993) ("[Senator] Wagner's quasi-utopian mission was to 'build[] . . . a co-operative order' designed to reintegrate a class-riven society and to replace or at least legitimate asymmetric power relations. Democratic consent to enterprise and state authority would flow from a regime of egalitarian communication and reason, presided over by the newly fortified administrative state of which Wagner was the principal legislative architect.")

214. *Texas & N.O.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930).

215. National Labor Relations Act ("Wagner Act"), 49 Stat. 449 (1935).

216. 295 U.S. 495 (1935).

217. National Industrial Recovery Act of June 16, 1933, Pub. L. No. 67, ch. 90, 48 Stat. 195 (1933) (codified at 15 U.S.C. § 701 (1933)).

groupings in the country to establish “Codes of Fair Competition” to stabilize prices, which the President could then approve as binding on all parties within that industrial sector.²¹⁸ This was a more corporatist form of economic regulation, meaning a regulatory strategy rooted in “officially sponsored cartels” that enjoy delegated state powers to set policy.²¹⁹ While the corporatist aspects of the NIRA were struck down, another element of the law survived: section 7(a) of the NIRA protected workers’ “right to organize and bargain collectively through representatives of their own choosing,” and prohibited employer “interference, restraint, or coercion” with that right.²²⁰ That language made its way almost verbatim into section 7 of the NLRA, protecting workers’ rights to organize free of employer interference.²²¹

The NLRA also built on the long U.S. “social citizenship” tradition of constitutional debate, a tradition that ran from Reconstruction-era reformers through Populism, Progressivism, and the New Deal.²²² The core of the social citizenship tradition was a focus on class inequalities and an envisioned constitutional order in which the state would ensure citizens real opportunities for “decent livelihoods, independence, responsibility and dignifying work.”²²³ In a speech introducing his never-enacted “Second Bill of Rights,” for example, President Franklin D. Roosevelt proposed a new “economic constitutional order” under which “the government . . . formal and informal, political and economic, owes to everyone an avenue to possess himself of a portion of [the nation’s wealth] sufficient for his needs, through his own work.”²²⁴ Through guarantees of work, of income supports, and of trade union rights, the state would make real for all citizens the classic constitutional guarantees of liberty and equality.²²⁵ The NLRA, with its robust protections of workers’ positive FOA, was central to this agenda.

Robust conceptions of economic democracy also underlaid European labor law systems in the early and mid-twentieth century. This is clear, for

218. *See id.* at § 3(a). *See generally* ARCHIBALD COX ET AL., *LABOR LAW, CASES AND MATERIALS* 81 (13th ed., 2001) (discussing NIRA’s labor provisions); James Q. Whitman, *Of Corporatism, Fascism and the First New Deal*, 39 AM. J. COMP. L. 747, 766 (1991) (same).

219. Whitman, *supra* note 219, at 752-53.

220. National Industrial Recovery Act of June 16, 1933, Pub. L. No. 67, ch. 90, § 7(a), 48 Stat. 195 (1933) (codified at 15 U.S.C. 701 (1933)) (held unconstitutional by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

221. *Compare* National Labor Relations Act of July 5, 1935, Pub. L. No. 74-198 § 7, 49 Stat. 449 (1935) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”), with 29 U.S.C. § 157 (2012) (protecting such rights, but also protecting rights to refrain from such activities).

222. William Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821, 1827 (2001).

223. *Id.* at 1829.

224. Forbath, *Caste, Class, and Equal Citizenship*, *supra* note 23, at 68.

225. Forbath, *Constitutional Welfare Rights*, *supra* note 222, at 1833.

example, in the work of Hugo Sinzheimer, the architect of Weimar-era German labor law, and his student Otto Kahn-Freund, the architect of labor law in the United Kingdom.²²⁶ Granted, the German and U.K. systems have historically been viewed as quite different. The German model relied heavily on state regulation to both enable and set limits on labor and management's regulation of the economy.²²⁷ By contrast, the U.K. model was based on "collective laissez-faire" under which the state refrained from regulating the collective bargaining process.²²⁸ But both Sinzheimer and Kahn-Freund saw labor law as a means of enabling autonomous economic regulation by altering background private law entitlements.²²⁹ Protecting workers' FOA required state intervention in the German context and state recession in the U.K. context (taking private law as a baseline) but the ultimate effect was the same: an "economic constitution" to democratize the economy "based on the joint action of organizations representative of employers and workers."²³⁰

The social democratic concept of FOA accordingly conceives of workers as both political and economic citizens, in the sense that they collectively and democratically help set the terms of social cooperation. The role of the state is to establish the legal entitlements necessary for those deliberations and choices to take place.²³¹ The social democratic concept overlaps with the industrial pluralist tradition that heavily influenced post-war labor jurisprudence,²³² in that both endorse industrial governance based on collective bargaining and are willing, at times, to emphasize union power over individual rights. But the conception of economic democracy is far more robust in the social democratic tradition than in the industrial pluralist tradition, which limited labor's role to collective bargaining and tended to assume rather than to ensure equality between labor and management.²³³ The social democratic view also clearly contrasts with the neoliberal approach, which views workers' FOA as an exercise of individual will.

226. See Ruth Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law*, 35 J.L. & SOCIETY 341, 342-44 (2008).

227. *Id.*

228. ALAN BOGG, *THE DEMOCRATIC ASPECTS OF TRADE UNION RECOGNITION* 31-32 (2009) (discussing origins of collective laissez-faire).

229. Dukes, *Constitutionalizing Employment Relations*, *supra* note 226, at 344.

230. Ruth Dukes, *Hugo Sinzheimer and the Constitutional Function of Labor Law*, in *THE IDEA OF LABOR LAW* 61 (2011).

231. See Barenberg, *supra* note 213 at 1390.

232. See generally Katherine Van Wesel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (leading discussion of industrial pluralism and its influence on post-war labor law). See also Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 65 MINN. L. REV. 265, 293-307 (1977) (arguing that early Supreme Court interpretations of the NLRA undermined its egalitarian promise by re-introducing private law doctrines back into labor law).

233. See Stone, *Post-War Paradigm*, *supra* note 232, at 1516 (summarizing tenets of industrial pluralist view).

The social democratic approach would likely endorse the result in *Pruneyard* and reject the result in *PG&E* on the grounds that First Amendment doctrine should encourage the growth and stability of civil society organizations that check corporate power. This approach also suggests a different resolution of the tension between *Citizens United* and the Court's recent union security cases. Put simply, the problem with enabling workers but not shareholders to opt out has nothing to do with the degrees of coercion, the risk of attribution, or even speech rights generally. The problem, in the social democratic view, is that preventing shareholder opt-outs encourages distributive injustice and undermines democracy by granting corporations vast political power.

2. *The Social Democratic Concept and Labor Law Doctrine*

The social democratic approach to workplace FOA is reflected in various aspects of the early NLRA regime that positively encouraged union organizing rather than employee choice. For example, as originally passed, the Act protected workers' rights to organize but did *not* protect their rights to refrain from organizing or acting collectively.²³⁴ Early NLRB practice—which frequently certified unions based on a showing of cards, a strike vote, or other indicia of majority support less formal than a secret-ballot election²³⁵—also reflected the background assumptions that workers tend to desire unionization, and that unionization should be positively encouraged. The decline of the social democratic approach can be traced in part to Taft-Hartley's protection of workers' rights *not* to organize, and in part to the emergence of the civil libertarian approach in cases such as *Street* and *Hanson*. The Court's unwillingness since *Street* to give any heed to unions' own First Amendment rights, independent of their members' rights, is particularly striking²³⁶ because it shows the rise of the civil libertarian and neoliberal approaches, both of which place greater emphasis on individual will and negative FOA.

The most striking aspect of the social democratic concept in the United States is that it has tended to support the union shop. As noted in Part I, the union shop was explicitly permitted even under the 1947 Taft-Hartley Act, and Congress has never repealed the language authorizing it.²³⁷ The closest example in U.S. case law to a full-throated defense of the social democratic approach to union security is likely Justice Frankfurter's dissent in *Street*, which argued forcefully that the union shop does not infringe dissenting

234. See National Labor Relations Act of July 5, 1935, Pub. L. No. 74-198, § 7, 49 Stat. 449 (1935).

235. Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 nn.45 & 48 (1993).

236. See Fisk & Chemerinsky, *supra* note 57, at 1035 (discussing this omission).

237. See 29 U.S.C. § 158(a)(3) (2012) (permitting employers to make union membership as condition of employment after thirty days when so required under contract).

workers' First Amendment rights. Frankfurter argued that unions had engaged in political activities for so long that those activities were "as organic" as their other bargaining activities, that such political activities were "indissolubly relat[ed] to the immediate economic and social concerns that are the *raison d'être* of unions."²³⁸

The social democratic concept also continues to influence courts outside the United States, most notably the Supreme Court of Canada ("SCC"), which has held that the union shop is *not* unconstitutional²³⁹ and which has constitutionalized numerous aspects of positive FOA.²⁴⁰ For example, in *Saskatchewan Federation of Labour v. Saskatchewan*, a 2015 decision invalidating a law that restricted public employees' rights to strike, the SCC majority reasoned that during a strike "workers come together to participate directly in the process of determining their wages, working conditions" and other work rules, and that "[t]his collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives."²⁴¹

These passages from *Street* and *Saskatchewan* reflect a central proposition of the social democratic approach: that the political and expressive association involved in union activities tends to enhance rather than thwart workers' autonomy. In other words, there are very good reasons to positively encourage collective bargaining and to restrict workers' negative FOA insofar as doing so advances distributive justice and workplace democracy.²⁴² For expository reasons, I will address additional doctrinal implications of social democratic FOA in Part III.²⁴³

III.

DEFENDING THE SOCIAL DEMOCRATIC CONCEPT OF FOA

Based on the summaries above, it may seem that no approach to FOA adequately promotes both liberty and equality. The neoliberal approach

238. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 800 (Frankfurter, J., dissenting); *see also id.* at 808-10 (noting that large organizations often take political positions opposed by some of their members); Fisk & Chemerinsky, *supra* note 57, at 1050, 1056 (endorsing logic of Frankfurter's dissent).

239. *Lavigne v. Ontario Pub. Serv. Emps. Union*, [1991] 2 S.C.R. 211, 263-64 (Can.) (finding that union shop in public employment does not violate rights to freedom of association under the Canadian Charter of Rights and Freedoms).

240. *See* cases cited *supra* note 6.

241. *Saskatchewan Fed'n of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, 281 (Can.).

242. Admittedly, collective bargaining is not sufficient to ensure distributive justice, since it excludes those outside the paid labor market. However, policy innovations could mitigate this deficiency—including robust transfers and other social supports for non-workers, and, where possible, labor law rules that encourage unions to advocate for the unemployed and for non-represented workers as well as their own members. *See* Stuart White, *Trade Unionism in a Liberal State*, in *FREEDOM OF ASSOCIATION* 340 (1998) (proposing that the liberal state should require unions to represent unemployed workers).

243. *See* discussion *infra* notes 287-307 and accompanying text.

protects negative economic liberties and opt-out rights, but simply disregards distributive justice. The civil libertarian approach prioritizes individual liberties of expression and political participation, but it may undermine distributive justice by disempowering unions. The social democratic view encourages distributive justice, but appears to thwart individual liberties in the process.²⁴⁴

That appearance is deceiving, however, and the social democratic approach is actually consistent with liberal commitments.²⁴⁵ Part III.A, after outlining some key aspects of European labor law systems, argues that egalitarian labor law likely requires laws or policies bolstering unions' political power and imposing representation on some workers who do not desire it. Part III.B then argues that such policies do not usually thwart any individual liberties that a liberal egalitarian state ought to recognize. A liberal state may, therefore, affirmatively promote unionization and even enable the union shop in some circumstances. Part III.B's argument builds on past scholars' arguments that union security devices do not meaningfully thwart individual workers' speech and associational rights.²⁴⁶ But it develops a new theoretical underpinning for those arguments by linking them to first principles of social justice.

A. *How Necessary Are Union Security Clauses?*

To better understand the empirical relationship between union security devices and union strength, it will be helpful to anticipate an important counterargument: that union security clauses have been far less important in Europe,²⁴⁷ yet unions in Europe have been far more powerful than their U.S.

244. Indeed, from a civil libertarian perspective, the social democratic approach appears downright perverse—not a concept of FOA *at all*, but rather an organicist view of unions as naturally and rightly empowered to thwart workers' actual desires, which predominated prior to the NLRA. See BOGG, DEMOCRATIC ASPECTS, *supra* note 228, at 29-32 (discussing TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 77, 116 (1985)); Leader, *supra* note 132, at 54-66 (discussing “pluralist” theories that attributed organic identity to unions); Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WISC. L. REV. 149, 197 n.212 (1990) (discussing import of groups that pre-exist the state). The NLRA model may occupy an intermediate ground between that organicist conception and the will-based conceptions of FOA within the civil libertarian and neoliberal concepts.

245. See RAWLS, POLITICAL LIBERALISM, *supra* note 138, at 416 (justice as fairness could be either “left liberal” or “social democratic”).

246. See, e.g., Fisk & Chemerinsky, *supra* note 57, at 1081-84 (discussing protections for dues dissenters within unions).

247. See generally Matthew Dimick, *Productive Unionism*, 4 U.C. IRVINE L. REV. 679 (2014) (discussing role of union security clauses in U.S. versus Europe); see also Dimick, *Ghent System*, *supra* note 194, at 326, 354-55 (noting longstanding rarity of union security devices in Denmark and Sweden, countries with historically powerful labor movements); Sørensen & Rasmussen v. Denmark, 2006-I Eur. Ct. H.R., slip op. at 65, 76-77 (2006) (declaring union security clauses incompatible with European Convention on Human Rights); MARCO BIAGI, INT'L LABOUR ORG., REPORT ON SIX NATIONAL CASE STUDIES IN THE FIELD OF FREEDOM OF ASSOCIATION (1998),

counterparts.²⁴⁸ The implication is that union security clauses are not necessary for union strength. But European labor law systems ensure unions' institutional stability through different means, many of which would be problematic under the neoliberal and civil libertarian approaches to FOA. Those fall into three basic categories,²⁴⁹ all of which are rooted in traditional social democratic commitments, and all of which differ radically from U.S. labor law.

The first set of policies encourage corporatist economic policy-making through rules favoring national or sectoral rather than local or firm-level bargaining,²⁵⁰ through "extension laws" that apply the terms of union contracts to all workers in a sector regardless of those workers' union status,²⁵¹ and through rules establishing de facto exclusive representation rights for "most representative unions," thereby empowering those unions to bargain on behalf of non-members as well as members.²⁵² The evidence is clear that such bargaining structures tend to reduce wage inequality far more than decentralized bargaining, since they enable unions to take wages out of competition across an entire sector.²⁵³ This set of policies also helps backstop social democratic politics by enabling powerful unions to check the political ambitions of large corporations and elites.²⁵⁴

http://training.itcilo.it/actrav_cdrom1/english/global/LISTS/MARCO.HTM (noting that union shop clauses illegal in France, Italy, & Germany as of 1998).

248. See Dimick, *Ghent System*, *supra* note 194, at 333 (outlining union density and coverage in United States and European states).

249. In this discussion, I disregard rules simply mandating representation in particular sectors, which is still practiced in nations including Brazil. See Pedro Romano Fragoso Pires et al., *Brazil*, in *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 74-57 (4th ed., vol. I 2014).

250. See Rogers, *Divide and Conquer*, *supra* note 272, at 56-57 (discussing centralized bargaining in many European countries); *id.* at 122-25 (discussing incentives for small bargaining units and decentralized bargaining in U.S. law).

251. See Estreicher, *supra* note 43 (discussing extension laws).

252. See generally Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 *COMP. LAB. L. & POL'Y. J.* 46 (1998) (arguing that exclusive representation is actually common since many nations have rules granting bargaining rights to most representative unions).

253. See generally Jelle Visser & Danielle Checchi, *Inequality and the Labor Market: Unions*, *THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY* (Nolan et al. eds., 2006) (finding that unions' power, coverage and level of bargaining coordination in particular nations correlates with economic equality in those nations); Streeck, *Sociology of Trade Unions*, *supra* note 201, at 271-72 (noting ability of more encompassing unions to ensure wage parity among workers); Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *VARIETIES OF CAPITALISM* 21-22 (2001) (noting tendency toward more equal distributions of wealth and income in "Coordinated Market Economies" with more centralized and encompassing bargaining compared to "Liberal Market Economies" such as the U.S. and U.K. which have decentralized bargaining); Stuart White, *Liberal Neutrality and Trade Unions*, 33 *COMP. LAB. L. & POL'Y J.* 417, 423 (2012) (suggesting liberal concerns of distributive justice would encourage more centralized bargaining structures).

254. See STREECK, *supra* note 162, at 110-12 ("Central to the Keynesian political economy were the corporatist interest associations of labour and capital, together with the negotiating system established between them."); THELAN, *supra* note 167, at 8-11, 30-31, 145 ("striking increases" in inequality

Yet such laws also bolster particular unions' political power regardless of non-members' desires. In Italy and France, for example, even non-majority unions can gain "most representative" union status, at which point they can negotiate collective agreements binding across sectors, and may enjoy special privileges to appoint members of administrative bodies and participate in social dialogue that leads to policy-making.²⁵⁵ Indeed, that is part of the point, since politically powerful unions will be better able to drive national-level bargains and participate in political processes.²⁵⁶ Corporatist labor movements have also historically been relatively undemocratic by American standards, in part because they negotiate at the national level, several degrees removed from workers.²⁵⁷

The second set of policies empower unions to administer state-funded social benefits programs, an approach known as the "Ghent System" after the Belgian city in which it was first implemented.²⁵⁸ The result has been a powerful norm of union membership, and very powerful unions that again can enforce social democratic commitments.²⁵⁹ To be clear, workers in that system are eligible for unemployment benefits regardless of their union membership, so long as they have contributed to the centralized benefits fund. Yet "since unions make the 'street level' determinations of eligibility,"²⁶⁰ workers face a Hobson's choice: join the union or risk losing basic state benefits.²⁶¹

The third set of policies mandate non-union forms of worker representation. Those include rules requiring workers to contribute to

accompanied decline of unions in U.S. and U.K., and that "unity and coordination" on the labor side in Scandinavian countries is essential to recent "flexicurity" programs).

255. See BIAGI, *supra* note 247 (noting privileges of "most representative" unions in Italy and France).

256. See Rogers, *Divide and Conquer*, *supra* note 272, at 59-60 ("As unions reach a certain level of density and organization, they are capable of passing over from the economic sphere into the sphere of politics, funding and maintaining competitive electoral vehicles."); *id.* at 59 ("[T]he organizational power of unions is very closely correlated to the strength of leftist parties."). The ECHR noted a related point in its decision establishing right-to-work across Europe, reasoning that even an agency shop rule "could give rise to some indirect support for the political parties" a union supports. Sørensen & Rasmussen v. Denmark, 2006-I Eur. Ct. H.R., slip op. at 32 (2006).

257. See Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 385-86 (1980) (noting that in German unions, elections are controlled by national officers; "procedures discourage opposition candidates"; opponents of union leadership "run risks of reprisal"; and voting occurs through layers of delegates "so that the members' voice is too remote to be heard"); Clyde Summers, *Worker Participation in Sweden and the United States: Some Comparisons From an American Perspective*, 133 U. PA. L. REV. 175, 215 (1984) (finding that workers in Sweden have "no effective voice in deciding the contents of" collective bargaining agreements, nor in selecting union officials).

258. See generally Dimick, *supra* note 194 (arguing that Ghent System enables significant union strength in Denmark and Sweden despite lack of union security devices).

259. *Id.*

260. *Id.* at 356.

261. See *id.* at 357 (noting strong norm of union membership under Ghent System).

organizations that provide them with social services and represent their interests in the legislative process, which raises obvious issues of negative FOA.²⁶² Some states, and the European Union, also mandate “works councils,” consultative bodies at the workplace level that do not have collective bargaining rights.²⁶³ While workers have rights to select works council representatives, they may have no right to refuse representation by a works council. Where unions are present in a workplace, moreover, they may dominate works council elections, such that works councils become an additional power base for unions.²⁶⁴ Finally, some states mandate “co-determination,” or worker representation on corporate boards.²⁶⁵ Such laws can empower unions directly by reserving supervisory board seats for unions, or indirectly by creating processes through which unions can influence the selection of board members.²⁶⁶ Co-determination and to a lesser extent works councils, therefore, weave unions into economic governance more generally.

Whether such policies are problematic depends on one’s theory of the ends of FOA. Most such rules are presumptively illegitimate to neoliberals since they strongly undermine market ordering. Such rules are also presumptively legitimate to social democrats since they strongly support economic equality and economic democracy. Matters are more complicated for civil libertarians. Laws encouraging national bargaining are probably acceptable as means of encouraging egalitarian economic policy.²⁶⁷ But the devolution of state power that tends to accompany those bargaining structures is problematic: the Ghent System all but forces workers to join unions, and most representative unions can gain quasi-state privileges without majority support from workers. Mandated forms of representation such as works

262. Austria, for example, does not mandate unionization, but does require all workers to contribute to the *Arbeiterkammer*, “a compulsory organization that represents the interests of approximately three million Austrian employees and consumers,” both by providing legal advice on workplace matters and by participating in the legislative process. Julian Feichtinger et al., *Austria*, in *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 9-35 (4th ed., vol. I 2014).

263. The European Works Council Directive (94/45/EC), for example, requires works councils be established at all large enterprises with operations in at least two member states.

264. See LASZLO GOERKE & MARKUS PANNENBERG, *TRADE UNION MEMBERSHIP AND WORKS COUNCILS IN WEST GERMANY*, IZA DISCUSSION PAPER NO. 2635 (2007) (noting that “fraction of works councilors belonging to a trade union in Germany is much higher than union density among employees.”); G.P. Cella & T. Treu, *National Trade Union Movements*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 491 (Blanpain ed., 2010) (noting influence of unions on works councils).

265. See REBECCA PAGE, *CO-DETERMINATION IN GERMANY— A BEGINNER’S GUIDE* 33 (Hans-Böckler-Foundation 4th ed. 2009), http://www.boeckler.de/pdf/p_arbp_033_2.pdf.

266. *Id.* at 31.

267. The civil libertarian approach might also endorse the division of labor between unions and works councils in some European states, wherein unions tend to negotiate only over economic issues, leaving employers to deal with seniority systems and workplace discipline in their discretion, or perhaps in consultation with works councils. See Dimick, *supra* note 247, at 683-89. By limiting unions’ governance authority in the workplace, I suspect that system reduces workers’ sense that union representation amounts to compelled association.

councils may also be problematic in the civil libertarian view insofar as they empower unions without significant support from workers.

This brief foray into comparative law also suggests that the United States' anomalous policy toward union security must be understood in the context of (1) our equally anomalous policies of voluntary unionism, majority rule, and exclusive representation;²⁶⁸ (2) our anomalous rules encouraging small single-employer bargaining units;²⁶⁹ and (3) our anomalous "single-channel" system that bans forms of collective worker representation other than NLRB-certified unions.²⁷⁰ The net result of these policies is a very low level of unionization and representation, and a highly decentralized labor movement in which unions negotiate at the firm or even worksite level, all while being required to expend resources on non-members' grievances.²⁷¹

As a result, U.S. unions cannot easily take wages out of competition; rational employers tend to resist unionization to avoid acquiring a competitive disadvantage; and unions are in a near-constant struggle for survival.²⁷² As noted above, the move from the union shop to the agency shop reduced unions' bargaining power by limiting their abilities to organize and to take political action.²⁷³ Right-to-work laws threaten to reduce it still further: after the recent passage of a right-to-work law in Indiana, for example, public sector unions' revenues declined by eighty percent within a few years.²⁷⁴ Union security clauses, in short, are superfluous in Europe, but essential in the United States.

B. *Can a Liberal State Promote Unions' Political Power?*

So, assuming that union security devices or other state efforts to bolster unions' political power are necessary to a strong labor movement, do they impermissibly violate individual liberties? This final sub-Part argues that

268. See discussion *infra* Part I; see also Lance Compa, *The Wagner Model and International Freedom of Association Standards*, in AUTONOMIE COLLECTIVE ET DROIT DU TRAVAIL. MÉLANGES EN L'HONNEUR DU PROFESSEUR PIERRE VERGE, 427, 435-36 (2014) (outlining elements of U.S. "Wagner Model" including exclusivity & voluntarism and noting that model's uniqueness).

269. See GORMAN & FINKIN, *supra* note 48, at 84-86 (discussing factors tending toward small units); *id.* at 103-04 (discussing factors tending toward single-employer, localized bargaining).

270. See 29 U.S.C. § 158(a)(2) (2012).

271. See discussion *supra* notes 44-46.

272. See generally Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WIS. L. REV. 1 (outlining aspects of U.S. labor law that create incentives for conflict and localized bargaining, contrasting Continental labor law systems which create incentives for centralized bargaining and cooperation).

273. See sources cited *supra* note 154.

274. Joel Rogers, *Why "Harris v. Quinn" Has Labor Very, Very Nervous*, THE NATION (Mar. 27, 2014), <http://www.thenation.com/article/why-harris-v-quinn-has-labor-very-very-nervous>; see also GOULD & KIMBALL, *supra* note 154.

they generally do not, and therefore that the social democratic approach is consistent with basic liberal commitments.²⁷⁵

First, however, it will help to step back a bit and ask what it means for a state to prioritize liberty²⁷⁶ and to remain neutral toward the good.²⁷⁷ The first command prohibits a state from restricting basic liberties to ensure equality. That includes those liberties essential to our autonomy, such as rights of speech, expression, association, conscience, and political participation.²⁷⁸ But such a state generally must restrict some individual liberties to ensure an overall system of liberties.²⁷⁹ *Pruneyard* and *Jaycees* illustrate this logic.²⁸⁰ In *Pruneyard*, the flip-side of the attribution risk and the infringement of the mall's property rights was that the mall was one of the only local spaces where civic groups could hope to reach other members of the public. To deny them that right would significantly limit their freedom of expression. Similarly, while *Jaycees* is framed as a case posing a conflict between liberties of association and substantive concerns of gender equality, it is also a case of conflicting liberties: the Jaycees' freedom of association on the one hand and women's freedoms of occupation and political participation on the other.

State neutrality toward defining the good, meanwhile, prohibits the state (or citizens deliberating policy choices) from "justifying action by considerations that suppose the superiority of one or some 'comprehensive ethical doctrines'" such as religious beliefs.²⁸¹ But the state *should* act on the basis of principles of social justice,²⁸² including commitments to social

275. The argument in this sub-part draws extensively on Stuart White's prior work on this issue. See generally White, *supra* note 242; White, *supra* note 253.

276. See RAWLS, THEORY, *supra* note 15, at 266 (lexical priority of liberty). But see RAWLS, *supra* note 138, at 7 (arguing that a principle requiring the state to secure citizens' basic material needs may actually be lexically prior to the liberty principle).

277. See RAWLS, *supra* note 138, at 190-94 (discussing ideal of neutrality toward conceptions of the good).

278. See *id.* at 310-24 (explaining that basic liberties, including freedom of association, are "basic" because their protection enables development of individuals' moral powers); accord SAMUEL FREEMAN, RAWLS 55 (2007).

279. See Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in THE CAMBRIDGE COMPANION TO RAWLS 394, 416-17 (Freeman ed., 2002) (explaining that Rawls' framing of the First Principle in terms of a "fully adequate scheme," of liberties "positively invites whatever such curbs [on some individuals' liberties] are apt to the establishment of a scheme of equal basic liberties for everyone that best approximates the standard of full adequacy."); accord Cohen & Rogers, *supra* note 163, at 18.

280. See discussion *supra* Part I.B.

281. White, *supra* note 253, at 419.

282. Which Rawls, of course, presumed were sufficiently "neutral" because individuals holding different comprehensive moral views could converge around the two principles of justice to establish the most basic terms of social cooperation. See RAWLS, *supra* note 138, at 4-11 (outlining notion of an overlapping consensus around two principles of justice). This may assume far more normative consensus around the values of liberty and equality—indeed, around the very idea of a liberal society—than exists today in the United States.

equality and to distributive justice, even if doing so has asymmetric effects on particular individuals or groups, or even impacts citizens' preferences.²⁸³ Liberal neutrality, in other words, is about the justification of a law or policy rather than its impact.²⁸⁴

As one political theorist has put it, a liberal state forced to balance competing liberty claims should, therefore, adopt a "power-adjusted conception of neutrality,"²⁸⁵ one that takes account of those groups' background power relationships and seeks to advance basic commitments to social justice.²⁸⁶ This strikes me as very similar, if not identical, to what I have described as the social democratic approach to FOA.

How then should a liberal state best balance claims of positive versus negative workplace FOA that arise in union security cases? The threshold question is whether the legal incident of FOA at issue is essential to individuals' autonomy. As noted in Part I.B. above, it is very difficult to argue that the requirement to pay agency fees or even union dues could interfere with autonomous thought processes, since in such situations speech is not literally compelled.²⁸⁷ Crises of conscience are somewhat more plausible, since some individuals have serious religious objections either to joining a union or paying agency fees—but again, as noted in Part I.B., Title VII requires that such individuals be accommodated, a solution that does not exacerbate unions' free-rider problems.²⁸⁸

The right to participate in political activity and to express political opinions at will is surely important to individual autonomy, so the key question is whether union security arrangements actually thwart that right. While unions' speech does not prevent dissenting workers from speaking

283. For more discussion on how laws can shape preferences, see JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 208 (2001); Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (1991).

284. See White, *supra* note 253, at 421 (citing RAWLS, *POLITICAL LIBERALISM*, *supra* note 138, at 190-94).

285. White, *supra* note 242, at 337. White's logic condemns the result in *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (holding that Boy Scouts need not admit gay scoutmaster given organization's public opposition to homosexuality), because LGBT status is a morally arbitrary characteristic, and such exclusion could substantially limit individuals' opportunities for full civic participation and even freedom of occupation.

286. Those commitments might include, for example, ensuring that citizens "stand in relations of equality" to one another, not separated by barriers of race, sex, class, and other ascriptive social identities, as argued in Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 288-89 (1999). See also Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 22 (2003) (similar view of equality); Norman Daniels, *Democratic Equality: Rawls' Complex Egalitarianism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 241-276 (Freeman, ed. 2003) (similar view of equality). Similar ideals motivate Philip Pettit's influential theory of republicanism as freedom from domination. See generally PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

287. Cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that school district may not require students with religious objections to recite the Pledge of Allegiance).

288. See *supra* notes 112-125 and accompanying text.

their own minds,²⁸⁹ those workers do face barriers to countervailing speech.²⁹⁰ Unlike a corporation or university forced to accommodate outside speakers on their property,²⁹¹ dissenting workers have no power to make their dissent known to all who encounter union speech. That being said, members of the public can surely grasp that individual workers may disagree with their unions' political stances, which should mitigate the risk of attribution.²⁹² And to the extent members of the public do *not* draw that distinction, preventing dissenting workers from exiting unions would presumably encourage them to publicly dissent, helping to educate the public on such matters.

More importantly, even if the risk of attribution threatens autonomy—and, again, I am skeptical that it does—such risk is pervasive in contemporary society because all of us are embedded in social, legal, and institutional structures. This theme is familiar from so-called “communitarian” critiques of liberalism,²⁹³ but it is also well-established in contemporary liberalism itself.²⁹⁴ Some of the norms of those structures will inevitably rub off on citizens or be erroneously attributed to certain citizens by outsiders. As a result, deciding when erroneous attribution is unjust, rather than just annoying, requires a more substantive theory about what sorts of organizations and social structures a society ought to encourage. It also requires weighing multiple other parties' interests, including unions, unionized workers, employers, and the broader society.

Where to strike this balance is a hard question, but the social democratic concept of FOA suggests that any risk of attribution is worth running where doing so helps ensure strong unions capable of advancing egalitarian goals. Again, the SCC's case law is illustrative: in its case upholding the union shop in public employment, it reasoned that the infringements of workers' negative FOA were justified as a means of “enab[ling] unions to participate in the broader political, economic, and social debates in society.”²⁹⁵ Of course, unions can hinder egalitarian and democratic goals as well, for example through corruption or narrow representation of their own members at others' expense. Insofar as unions are leading to significant social harms,

289. See *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 806 (1961) (Frankfurter, J., dissenting) (noting this point).

290. See, e.g., *Pettys*, *supra* note 125, at 34A-39A (discussing attribution risk for workers).

291. See discussion *supra* Part I.C.

292. Cf. *Rumsfeld v. FAIR*, 547 U.S. 47, 65 (2006) (noting that students can make this distinction in the context of universities on-campus recruiting).

293. See generally Michael Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (criticizing Kantian liberalism for adopting a view of the self as independent from social circumstances).

294. See THOMAS POGGE, *REALIZING RAWLS* 3 (1989) (arguing that “communitarian” critique of Rawls misapprehends Rawls' conception of the person); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *POL. THEORY* 6, 6 (1990) (suggesting so-called “communitarian” critique is not so much a refutation of liberalism as “a consistently intermittent feature of liberal politics and social organization”).

295. *Lavigne v. Ontario Pub. Serv. Emps. Union*, [1991] 2 S.C.R. 211, 214 (Can.).

however, the risk of attribution is more of a problem for a society committed to justice.

A similar line of reasoning applies to arguments that state policies supporting powerful unions can warp the marketplace of ideas.²⁹⁶ The autonomy risk here is indirect, since union security clauses never require actual speech. Perhaps, then, such clauses threaten workers' autonomy by granting unions undue political power. But calling a group's political power "undue" incorporates a contestable value judgment about how much power different groups deserve. Moreover, since almost all laws empower some groups at others' expense, any approach to FOA that forbids indirect effects on FOA would be totally unworkable. Again, we need a more substantive theory of what sorts of organizations and economic arrangements a society ought to encourage. And again, the social democratic concept suggests that incidental effects on the marketplace of ideas are permissible where necessary to ensure a strong labor movement and economic equality.

Whether a labor movement will actually advance equality in particular circumstances is an empirical question. But, as noted above, there is powerful evidence that national bargaining by encompassing unions substantially enhances distributive justice by compressing wages and checking elites' power.²⁹⁷ A liberal state could therefore generally encourage such unions and bargaining structures.²⁹⁸ The European experience suggests that where such "strong and representative trade unions and organisations" have long been established, union security devices may no longer be necessary.²⁹⁹ In our voluntary and decentralized system, however, such devices are essential to ensure that unions can act as effective legislative advocates and organize new members. Over time, more powerful unions can be expected to demand national bargaining structures, since doing so is the only way to take wages out of competition, further enhancing equality.

Insofar as unions do thwart workers' desires, moreover, basic commitments to self-governance and to economic equality suggest that workers should be encouraged to dissent internally, and granted all legal rights within their unions necessary to ensure that they can do so.³⁰⁰ After all, a society that encourages workers' collective action or deliberation will give workers more concrete experiences of solidarity, mutual aid, and self-governance in their daily lives, an effect that has led many to describe unions

296. See discussion *supra* notes 128-130 and accompanying text.

297. See discussion *supra* notes 253-254 and accompanying text.

298. See White, *Trade Unionism in a Liberal State*, *supra* note 242, at 340.

299. See Sørensen & Rasmussen v. Denmark, 2006-I Eur. Ct. H.R., slip op. at 29 (2006).

300. See also Fisk & Chemerinsky, *supra* note 57, at 1081-84 (arguing that internal rights under the LMRDA provide sufficient protections for dues dissenters).

as “schools for democracy.”³⁰¹ U.S. labor law, it is worth noting, is fairly advanced in this regard. The Labor Management Reporting and Disclosure Act created a “bill of rights” for union members, including rights to freedoms of speech and assembly within unions, rights to nominate candidates and participate in elections, and rights to vote on dues and other assessments.³⁰² Against that backdrop, rights to opt out of union support or fee payment should be a last resort to protect workers when internal democratic mechanisms fail and would ideally carry a duty to contribute an equivalent sum to charity to prevent free riding.³⁰³

Beyond union security devices, the social democratic concept also suggests a vision of workplace FOA substantially different from what has evolved in the United States—one that emphasizes positive FOA over negative FOA and weaves commitments to equality and economic democracy into state processes. In the medium term, this may not be so far-fetched even in our increasingly neoliberal constitutional culture. The United States could follow the SCC, for example, and constitutionalize rights to collective bargaining and rights to strike,³⁰⁴ all while guaranteeing unions’ own rights of speech and association.³⁰⁵ It could go still further and guarantee such rights in the private sector as part of a general “right to contest” adverse managerial decisions,³⁰⁶ one that also protects workers’ rights to engage in political speech adverse to their employers’ interests.³⁰⁷ It could also encourage national-level bargaining over economic terms by encompassing unions and employer associations, locally controlled works councils, and even co-determination. None of those policies would infringe workers’ basic liberties, and, if properly designed, all would substantially advance workers’ autonomy. That is the broader promise of the social democratic approach.

CONCLUSION

This Article has identified three distinct concepts of workplace freedom of association in the United States—the “civil libertarian,” the “neoliberal,” and the “social democratic”—and has traced their distinctive approaches to the law regarding union security devices as well as other labor law doctrines. It has also argued that the social democratic concept best reconciles difficult

301. See generally CLAYTON SINYAI, *SCHOOLS OF DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN LABOR MOVEMENT* (2006) (examining relationship between U.S. labor movement and U.S. democratic tradition).

302. See 29 U.S.C. § 411(a) (2012).

303. See White, *supra* note 242, at 346-47.

304. See cases cited *supra* note 6.

305. See *Lavigne v. Ontario Pub. Serv. Emps. Union*, [1991] 2 S.C.R. 211, 214.

306. See Bogg & Estlund, *supra* note 1 (noting pervasive appeals to freedom of association in contemporary labor law debates).

307. See discussion *supra* note 158 and accompanying text.

tensions between individual liberty and equality. Disaggregating these different approaches to workplace FOA can sharpen legal debates around the place of workplace FOA in constitutional law and liberal theory more generally.

This Article also sheds new light on an increasing divide between domestic politics and Supreme Court precedent. While economic inequality has again become an important domestic political issue, Supreme Court precedent threatens to further exacerbate inequality by undermining union strength and eroding the last vestiges of the Keynesian political economy. That said, the staying power of neoliberal political economy will depend on various drivers of constitutional change—including domestic politics; broader patterns of political, social, and economic thought; and the ability of social movements to shape political and legal discourse.³⁰⁸ While I doubt that the social democratic concept of workplace FOA will take over our jurisprudence anytime soon, demonstrating its merits and its consistency with basic liberal principles may help lay the groundwork for a more egalitarian constitutional political economy.

308. *See generally* BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* (1984) (theorizing role of social and political movements in constitutional change).