

How Five Young Men Channeled Nine Old Men[†]: *Janus* and the High Court's Anti-Labor Policymaking

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I. Introduction

"The great lives are lived *against* the perceived current of their times."¹

GOVERNANCE OF OUR SOCIETY IS BASED ON MAJORITY RULE, with constitutional limits to protect civil liberties. If citizens could readily opt out of paying taxes for police protection by local government because they prefer private provision of security services, the municipality would have considerable difficulty maintaining an effective local police force. Similarly, if citizens could opt out of paying taxes for public schools—perhaps because they are homeowners who no longer have children in the public schools or are ideolog-

[†] Russell Owen Washington, *Nine Justices—and Nine Personalities*, N.Y. TIMES, Jan. 5, 1936, at SM3 (referring to Justices as "nine old men in black"), DREW PEARSON AND ROBERT S. ALLEN, *THE NINE OLD MEN* (1936) (referring to the Justices as "the nine old men").

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1. William B. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 4 (1981) (citing Murray Kempton, *On Cardinal Wyszynski*, N.Y. REV. OF BOOKS, July 16, 1981, at 8).

ically opposed to public provision of education—public education would suffer because the level of funding would decline significantly. Depending on the varying objections of the citizenry, the funding base for public services would be undermined with inevitably negative effects on the provision of those services.²

Five years ago I was anything but clairvoyant in assessing the future of litigation about union security or “fair share” provisions of collective agreements requiring employees to pay union dues in the public sector. I said the “good news is that Justice Scalia,” whose views were so sensible merely three decades ago,³ could still tip the balance of a deeply divided Court. The “bad news,” I said, is “that Justice Scalia could tip the balance.”⁴ This commentary could not properly anticipate Justice Scalia’s death⁵ and the arguably unconstitutional obduracy of Senator Mitch McConnell blocking President Barack Obama’s appointment of the moderate Chief Judge Garland to the Supreme Court to fill the Scalia vacancy.⁶ Moreover, it did not anticipate the profound politicization of the Court by President Trump through the 2016 election and the subsequent appointment of Justice Neal Gorsuch⁷ (and later Brett Kavanaugh), which was to tip the balance of the so-called “fair share” issue.⁸

The Gorsuch appointment and Senate’s unwillingness to even consider President Obama’s nomination of Merrick Garland set the stage for *Janus v. American Federation of State, County, and Municipal Employees, Council 31* and a 5-4 opinion authored for the majority by Jus-

2. Brief of Professors Cynthia L. Estlund et al. as Amici Curiae in Support of Respondents at 15–16, *Janus v. Am. Fed’n of State, Cty., and Municipal Emps., Council 31*, 138. S. Ct. 2448 (2018) (No. 16-1446).

3. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 506, 550 (1991).

4. William B. Gould IV, *Organized Labor, The Supreme Court, and Harris v. Quinn: Déjà Vu All Over Again?*, 2014 Sup. Ct. Rev. 133, 173 (2014).

5. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [https://perma.cc/9CYK-7P65].

6. Nicholas Fandos, *Garland Shouldn’t Be Considered After Election, McConnell Says*, N.Y. TIMES (Mar. 20, 2016), <https://www.nytimes.com/2016/03/21/us/politics/merrick-garland-supreme-court-mitch-mcconnell.html> [https://perma.cc/UE5A-KVHT].

7. Julie Hirschfeld Davis, *Neil Gorsuch Is Sworn in as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/us/politics/neil-gorsuch-supreme-court.html> [https://perma.cc/AR8G-KXD4].

8. See generally *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (denying employee group protests (in a 5–4 opinion written by Justice Gorsuch) and demonstrating a willingness to brush aside inconvenient facts in order to reach a result which would diminish the strength and solidarity of labor (while not presenting a fair share issue), by ignoring the fact that collective action is frequently unrelated to union activity).

tice Samuel Alito, who had expressed considerable impatience for the better part of this decade with the Court's extant precedent and the principle of *stare decisis*.⁹ As Yale Law School scholar Linda Greenhouse wrote on the eve of *Janus*:

It's no secret that public employee unions skew Democratic. Teachers unions, in particular, give Democrats a lot of money, some \$60 million alone during the 2016 election. It's also no secret that as private sector unions shrink into near invisibility—6.5 percent of the private sector work force was unionized in 2017—unions still cover 34.4 percent of public sector workers, and public sector unions represent the future of organized labor. *Take them down, and you remove a money engine for the Democrats and cast a big shadow over the future of organized labor itself.*¹⁰

Ms. Greenhouse, noting the 2018 upheaval and protest by public school teachers in states to which collective bargaining had not extended,¹¹ stressed the fact that not only was the Court transparently political in its involvement in the politics of labor management relations but that it had also reflected the polarization of the political parties.¹²

9. *Janus v. Am. Fed'n of State, Cty, and Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2478–79 (2018); Richard M. Re, *Second Thoughts on "One Last Chance"?*, UCLA L. REV. (forthcoming 2019) (citations omitted):

Had Hillary Clinton won the presidency instead of Donald Trump, *Janus* almost certainly would not have happened—and *Abood*'s supporters would have had the doctrine of one last chance to thank. *Janus* thus offers an example of how deferred decisions create opportunities for politics to either check or reinforce the Court: during the 2016 presidential election, unions, their members, and the public were on notice that *Abood* was hanging in the balance. Those actors could mobilize and vote accordingly.

10. Linda Greenhouse, *A Question of Legitimacy Looms for the Supreme Court*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/opinion/supreme-court-janus-unions.html> [<https://perma.cc/TT7Z-AB8W>].

11. Dana Goldstein, *Arizona Teachers Vote in Favor of Statewide Walkout*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/arizona-teacher-walkout.html> [<https://perma.cc/9AVK-C2V7>]; Dana Goldstein, *Teacher Walkouts: What to Know and What to Expect*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/03/us/teacher-walkouts-strikes.html> [<https://perma.cc/7QGB-DTKZ>]; Dana Goldstein & Alexander Burns, *Teacher Walkouts Threaten Republicans' Grip on Red States*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/12/us/teacher-walkouts-threaten-republican-grip-on-conservative-states.html> [<https://perma.cc/4UXN-L6QU>]; Michelle Chen, *The Oklahoma Teacher's Strike Is a Mutiny Against Austerity*, IN THESE TIMES (Apr. 5, 2018, 7:37 AM), <http://inthesetimes.com/working/entry/21040/Oklahoma-teachers-strike-austerity-west-virginia-kentucky-wages-students> [<https://perma.cc/HG7P-65RJ>]; Noam Scheiber, *Can Weak Unions Get Teachers More Money?*, N.Y. TIMES (May 5, 2018), <https://www.nytimes.com/2018/05/05/sunday-review/unions-teachers-money-strike.html> [<https://perma.cc/B82H-UG7B>].

12. See generally WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB –A MEMOIR* (2000) (highlighting the integration of politics and law in the management of labor relations and unions).

This reality is vividly demonstrated by the fact that just seventy years ago a leading conservative spokesman of the Republican party, Senator Robert Taft of Ohio, could shape the Taft-Hartley amendments by expressing support for the so-called *Rand* formula.¹³ This was reflected in the Canadian arbitration decision when he discussed the union security provisions of the 1947 Act by stating:

The rule adopted by the committee is substantially the rule now in effect in Canada . . . [T]he present rule in Canada is that there can be a closed shop or union shop, and the union does not have to admit an employee who applies for union membership, but [if] the employee . . . pays dues without joining the union, he has the right to be employed.¹⁴

Senator Taft expressed himself in support of a compromise between the union shop requiring full membership as a condition of employment and the open shop which precluded any encouragement of union membership. This position became that of American labor law which in some respects, is now wholly out of step with an expanding support for right-to-work legislation (twenty-seven states now have enacted such legislation¹⁵), as well as the *Janus* interpretation of the First Amendment, which is illustrative of expansive¹⁶

13. WILLIAM KAPLAN, CANADIAN MAVERICK: THE LIFE AND TIMES OF IVAN C. RAND 165-220 (2009).

14. Note, *The Agency Shop, Federal Law, and the Right-to-Work States*, 71 YALE L.J. 330, 333-34 (1961).

15. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW (6th ed. forthcoming 2019) (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming currently have right-to-work laws); Kurt Erickson & Jack Suntrup, *Democrats, unions declare victory as 'right to work' loses by wide margin in Missouri*, ST. LOUIS POST-DISPATCH (Aug. 8, 2018), https://www.stltoday.com/news/local/govt-and-politics/democrats-unions-declare-victory-as-right-to-work-loses-by/article_d75fc640-45e0-5ecc-93c9-91cecca36113.html [https://perma.cc/W4AT-DA7L] (Missouri has repealed its legislation through a 2018 referendum); Noam Scheiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/business/economy/missouri-labor-right-to-work.html> [https://perma.cc/9LCX-8XKL].

16. *Walker, III v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46 (2015); *see generally* *Pleasant Grove City v. Summun*, 129 S. Ct. 1125 (2009) (holding that the government allowing some private entities to place permanent monuments in a park but not others is government speech not covered by the First Amendment); *see generally* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (holding that the government's generic advertising funded by beef producers was government speech not susceptible to the First Amendment); *see generally* *Delano Farms Co. v. Cal. Table. Grape Comm'n*, 417 P.3d 699 (Cal. 2018) (holding that the Table Grape Commission's campaign funded by grape producers was not compelled speech but government speech); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171-72 (2018) ("[t]he employees in *Janus* were not compelled to speak, or to associate. They were

and misleading¹⁷ judicial activism.

We have been here before. The initiatives undertaken by President Roosevelt and the Democratic Congresses in the Great Depression of the 1930's produced enormous tension as the Court of "nine old men" invalidated a series of legislative enactments produced by the New Deal. In their wake, President Franklin D. Roosevelt proposed what came to be known as the "Court packing" proposal. But today new ideas about more limited tenure or terms for Court members have emerged again¹⁸ as the Court seems to have injected itself so extensively into legislative policy judgments by demonstrating a willingness to upend precedent as part of an unparalleled judicial activism, far beyond anything for which the Warren Court was criticized.¹⁹

The "switch in time which saves nine" came with the Court's shift in sustaining legislation regulating minimum wages and providing for collective bargaining through majority rule, both of which saved that day.²⁰ A new edifice emerged as the Court, confronted by the claims on behalf of individual liberty and advantage said:

The practice and philosophy of collective bargaining looks with suspicion on such individual advantages . . . advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of

compelled to pay, just as we all are compelled to pay taxes; our having to pay taxes doesn't violate our First Amendment rights, even when the taxes are used for speech we disapprove of"; this persuasive point is, of course, separate from the dispute about so-called government speech).

17. Baude & Volokh, *supra* note 16, at 184 (the Court in *Abood, Janus*, and many other cases has vaguely hinted at a historical argument, citing Jefferson's objection "to compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s];" but Jefferson was actually talking about the propagation of religious opinions in that quote, which is regulated by a separate constitutional provision—the Establishment Clause (citations omitted)).

18. David Leonhardt, Opinion, *The Supreme Court Needs Term Limits*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/opinion/columnists/brett-kavanaugh-supreme-court-term-limits.html> [<https://perma.cc/ZB3M-E48L>]; David Leonhardt, Opinion, *The Supreme Court Is Coming Apart*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/opinion/columnists/supreme-court-brett-kavanaugh-partisan-republicans.html> [<https://perma.cc/WTF4-PB73>].

19. See generally CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960) (highlighting the fundamentally different standards applicable to areas of Warren Court activism compared to the judicial activism of the 1920s–30s).

20. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937).

the group as a whole . . . [t]he workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result."²¹

In the same year, the Court fashioned an implied duty of fair representation that the union owed to all employees that it represented within the bargaining unit, be they union or nonunion supporters.²² The above-referenced brief filed by labor law academics²³ in *Janus* made the fundamental point that just as the Court had deferred to the legislative judgments supporting collective bargaining in the 1930's in the private sector, comparable deference was necessitated by the political decisions that the states had made to promote the collective bargaining process through the same public sector private financing of the system that had already become rooted in the above noted private sector 20 years earlier.²⁴ Employers, as well as labor unions, saw a considerable benefit in this process in that it was inevitably based upon the view that frivolous grievances would be screened out by the exclusive bargaining agent, conserving its resources to focus upon more important or meritorious cases, some of which might involve precedents for the entire workforce in the bargaining unit.

Now in 2018, the Court in *Janus* held by a 5-4 vote that this private system of dispute resolution finance, insofar as it rests upon the payment of dues by nonmembers as well as members, is unconstitutional under a newly minted version of the First Amendment's protection of freedom of speech and against a wide variety of issues of which this Court disapproves. The Court in *Janus* opined:

[P]ublic-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees . . . This ascendancy of public-sector unions has been marked by a parallel increase in public spending . . . the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role . . . These developments, and the political debate over public spending and debt they have spurred, have given collective-

21. *J. I. Case Co. v. NLRB*, 321 U.S. 332, 338-39 (1944).

22. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944).

23. Amicus Brief, *supra* note 2, at 14.

24. Compare *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960), and *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960), and *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 591, 598-99 (1960), and *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), with *Clayton v. Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am.*, 451 U.S. 679, 696 (1981).

bargaining issues a political valence that *Abood* did not fully appreciate.²⁵

The now retired Justice Kennedy, widely viewed as sympathetic to minorities in sexual orientation²⁶ and criminal law as it relates to the juveniles arenas,²⁷ emphasized in oral argument how he objected to the collective bargaining policies pursued by public sector unions,²⁸ just as Justice Alito did in the *Janus* opinion itself²⁹ and the preceding opinions which he authored.

This article examines the caselaw and arguments that antedated *Janus* as well as the rationale of the majority opinion of which now revives the early New Deal judicial personal predilections regarding economic and regulatory policy which, in Justice Kagan's persuasive dissent, means that, "the majority's road runs long . . . at every stop are

25. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2483 (2018).

26. *See generally* *United States v. Windsor*, 570 U.S. 744 (2013) (majority opinion by Justice Kennedy holding that the federal Defense of Marriage Act (DOMA) was unconstitutional as unequally disadvantaging same-sex couples economically). *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (majority opinion by Justice Kennedy holding that denying same sex couples the fundamental right to marry violates the Due Process Clause of the Fourteenth Amendment). *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003) (majority opinion by Justice Kennedy holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional).

27. *See generally* *Roper v. Simmons*, 543 U.S. 551 (2005) (majority opinion by Justice Kennedy holding that the execution of individuals who were under 18 years of age at the time of their capital crime is prohibited by the Eighth and Fourteenth Amendment).

28. *Janus*, 138 S. Ct. at 2502. Consider:

[The union] can be a partner with [the state] in advocating for a greater size workforce, against privatization, against merit promotion, against—for teacher tenure, for higher wages, for massive government, for increasing bonded indebtedness, for increasing taxes? That's—that's the interest the state has? . . . doesn't it blink reality to deny that that is what's happening here?

Transcript of Oral Argument at 47, *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466) (comment by Justice Kennedy).

[A] union's position necessarily affects the size of government. Is not the size of government a question on which there are fundamental political beliefs fundamental convictions that are being sacrificed if a nonunion member objects to this line of policy? Are there not other union proposals that say that State employee's salary must be a certain percentage of the total State expenditure? Does this not also involve the size of government, which is a fundamental issue of political belief? . . . I'm asking the justification for [chargeable and nonchargeable dues under *Abood*] under the First Amendment . . . In an era where government is getting bigger and bigger, and this is becoming more and more of an important issue to more people. . . . [Y]ou say it's fair share. The objectors to *Abood* say that it isn't.

Transcript of Oral Argument at 37–39, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681) (comment by Justice Kennedy).

29. *Janus*, 138 S. Ct. at 2466–67, 2474–77.

black-robed rulers overriding citizens' choices.³⁰ Then this article discusses *Janus*'s impact, the issues immediately posed to the lower courts (ultimately some of them undoubtedly for the High Court itself) and, perhaps equally important, what can be done to fill in the collective bargaining void in a process that has declined so considerably in the private sector as well as the public sector. In this connection, this article also examines the direct impact of *Janus* on private sector litigation. The above-mentioned decline is correctly viewed as one of the major factors in the ever-increasing inequality in our society today.³¹

II. *Janus* – How We Got There and Where It Takes Us Now

The issue before the Court in *Janus* first emerged in cases involving attacks upon the union shop, requiring membership as a condition of employment, under the Railway Labor Act of 1926 ("RLA"), which regulates both railroads and airlines. Until Congress enacted amendments to the statute in 1951, the practice on railways had been that of the "open shop"—where no one could be compelled to become a member or pay dues exacted by a labor organization. The year 1951 altered that, and constitutional litigation attacking negotiated union security clauses soon followed. In the first of these cases, *Railway Employees' Department v. Hanson*,³² the Court, speaking through Justice Douglas, said that these agreements were made pursuant to the federal law, and by the force of the Supremacy Clause³³ could not be constitutionally invalidated.³⁴ Neither the First nor the Fifth Amendments were violated, in the view of the Court, when the obligation was the payment of "periodic dues, initiation fees, and assessments" permitted by the statute.³⁵ Congress, said the Court, had a compelling interest in seeking to fashion "[i]ndustrial peace along the arteries of commerce,"³⁶ and nothing in the decision spoke conclusively about the use to which dues were being put. Thus, the Court was able to

30. *Id.* at 2502.

31. See generally Jared Bernstein & Dean Baker, *Unions in the 21st century: A potent weapon against inequality*, WASH. POST. (Sept. 3, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/09/03/unions-in-the-21st-century-a-potent-weapon-against-inequality/?noredirect=on&utm_term=.fbfc3c10f8b7 [https://perma.cc/A6ZK-SZUT].

32. Gould IV, *supra* note 4, at 173. See generally *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225 (1956) (one of the first cases challenging the constitutionality of open shop agreements and union dues).

33. U.S. CONST. art. VI, cl. 2.

34. *Hanson*, 351 U.S. at 232.

35. *Id.* at 238.

36. *Id.* at 233.

reserve the question of possible First Amendment violations in the event of attempts to secure ideological conformity.³⁷

A subsequent and important decision presenting this issue was one authored by Justice Brennan in *International Association of Machinists v. Street*.³⁸ In this case, the Court reiterated the point made in *Hanson*³⁹ that the payment of dues and initiation fees as a condition of employment was not unlawful or unconstitutional. However, in *Street*, the majority staked out new ground and safeguarded the rights of dissidents when it said the following:

A congressional concern over possible infringements on the interests of individual dissenters from union policies is . . . discernible . . . We may assume that Congress was also fully conversant with the long history of intensive involvement of the railroad unions in political activities. But it does not follow that [the Act] places no restriction on the use of an employee's money, over his objection, to support political causes he opposes merely because Congress did not enact a comprehensive regulatory scheme governing expenditures.⁴⁰

Expressing no view on the question of whether "other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes"⁴¹ could be charged, the Court held that, though dissent could never be presumed, dissidents could lawfully object to payments used for political causes with which they disagree. Thus began an unfolding drama, the tempo of which has accelerated in this century. Justice Frankfurter dissented in *Street*,⁴² finding no legislative intent to preclude union expenditures on the political process.⁴³ He properly emphasized the

37. *Id.* at 238.

38. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 744–46 (1961); *Bhd. of Ry. and S.S. Clerks, Freight Handlers, Express and Station Emp. v. Allen*, 373 U.S. 113, 121 (1963) (subsequently, the *Street* principle was reiterated in this case, which said that "[t]he necessary predicate for such remedies [vis-à-vis union expenditures over a proper objection] . . . is a division of the union's political expenditures from those germane to collective bargaining").

39. *Hanson*, 351 U.S. at 338.

40. *Street*, 367 U.S. at 766–67; J. Albert Woll, *Unions in Politics: A Study in Law and the Workers' Needs*, 34 S. CAL. L. REV. 130, 143–44 (1961). Cf. Joseph L. Rauh, Jr., *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152, 163 (1961).

41. *Street*, 367 U.S. at 769.

42. *Id.* at 797 (Frankfurter, J., dissenting).

43. *Street*, 367 U.S. at 800–02 (Frankfurter, J., dissenting); David B. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C. DAVIS L. REV. 591, 595 (1981). Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 U. TEX. L. REV. 1, 28 (1981).

deep involvement of the labor movement in the political process through its adoption of a "program of political action in furtherance of its industrial standards."⁴⁴ Justice Frankfurter noted that the dissenters had not been denied an ability to participate in the union so as to influence the collective position, nor were they precluded from speaking out in opposition to the union. Rejecting the argument that the union's role in the political process was unrelated to collective bargaining about employment conditions, the Frankfurter dissent noted that the pressure for legislation (e.g., legislation that established an eight-hour day for the railroad industry) "affords positive proof that labor may achieve its desired result through legislation after bargaining techniques fail."⁴⁵

Abood v. Detroit Board of Education extended this controversy to the public sector, where constitutional objections articulated by dissenters could be made more directly because of the involvement of the government itself and consequent state action in the negotiated union security agreements.⁴⁶ In considering the expenditure of dues obtained through such union security agreements, the Court in *Abood* drew a line of demarcation between that which was "germane"⁴⁷ to collective bargaining and chargeable on the one hand, and that which was unrelated, including political activities, which was unconstitutionally imposed upon dissenters where they objected.⁴⁸ Again, this case directly presented a constitutional issue because of the involvement of government.

Meanwhile, union security agreements in the private sector had been legislatively contentious at least since the Taft-Hartley amend-

44. *Street*, 367 U.S. at 812-13 (Frankfurter, J., dissenting).

45. *Id.* at 814 (Frankfurter, J., dissenting) (Justice Frankfurter made this point dramatically when he said: "[t]he notion that economic and political concerns are separable is pre-Victorian").

46. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977).

47. *Id.* at 235.

48. Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982); *Abood*, 431 U.S. at 235-36 ("We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."). See generally *Pipefitters Local No. 562 v. U.S.*, 407 U.S. 385 (1972) (campaign expenditure legislation regulating union involvement in politics have proceeded on the assumption that such monies would be obtained voluntarily).

ments in 1947.⁴⁹ The amendments: (1) prohibited the "closed shop," compelling membership prior to employment,⁵⁰ (2) provided for the voluntary negotiation of a limited type of so-called "union shop" agreement, requiring membership or financial obligations as a condition of employment (frequently called the "agency shop"), and (3) and allowed the states to enact so-called "right-to-work" laws that prohibit such collective bargaining agreement clauses.⁵¹ More than half the states in the Union have enacted such laws.⁵² In the public sector, where the nomenclature is "fair share" agreements, a storm had been building by virtue of dual attacks upon both relatively successful public-sector unions generally, and upon union security agreements, in particular. One public sector illustration of this trend is Wisconsin, which pioneered comprehensive collective bargaining legislation⁵³ and is now in the midst of debate about labor law reform. These initiatives have threatened the very existence of public-sector unions in that state,⁵⁴ although attempts to enact similar legislation in the private

49. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–87).

50. *Algoma Plywood & Veneer Co. v. Wis. Emp't Relations Bd.*, 336 U.S. 301, 307 (1949).

51. Benjamin Collins, *Right to Work Laws: Legislative Background and Empirical Research*, CONG. RESEARCH SERV. (Jan. 6, 2014), <http://fas.org/sgp/crs/misc/R42575.pdf> [https://perma.cc/G7U8-ADBW]. David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1150 (1992); Vincent G. Macaluso, *The NLRB "Opens the Union," Taft-Hartley Style*, 36 CORNELL L.Q. 443, 446 (1951).

52. *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin City, Ky.*, 842 F.3d 407, 411 (6th Cir. 2016); *Int'l Union of Operating Eng'rs Local 399 v. Vill. of Lincolnshire*, 905 F.3d 995, 998–1001 (7th Cir. 2018); *Ky. State AFL-CIO v. Puckett*, 391 S.W.2d 360, 361 (Ky. Ct. App. 1965); Kurt Erickson & Jack Suntrup, *Democrats, unions declare victory as 'right to work' loses by wide margin in Missouri*, ST. LOUIS POST-DISPATCH (Aug. 8, 2018), https://www.stltoday.com/news/local/govt-and-politics/democrats-unions-declare-victory-as-right-to-work-loses-by/article_d75fc640-45e0-5ecc-93c9-91cecca36113.html [https://perma.cc/W1AT-DA7L]; Noam Scheiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/business/economy/missouri-labor-right-to-work.html> [https://perma.cc/9LCX-8XKL] (twenty-eight states have enacted such legislation but Missouri by referendum repealed its law). WILLIAM B. GOULD IV, *A PRIMER ON LABOR LAW* (6th ed. forthcoming 2019). See also Shaila Dewan, *Foes of Unions Try Their Luck in County Laws*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/us/politics/foes-of-unions-try-their-luck-in-county-laws.html> [https://perma.cc/MCZ9-ZQ9M] (circuit courts of appeals are divided on the question of the lawfulness on such essentialized legislation of counties and local governments, the now dominant view being that is neither has the requisite legislative authority under the NLRA). *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., <http://www.nrtw.org/rtws.htm> [https://perma.cc/H5XU-QGVK].

53. Arvid Anderson, *Labor Relations in the Public Service*, 1961 WIS. L. REV. 601, 633 (1961).

54. The Walker administration has enacted much litigated legislation prohibiting a wide variety of union activity. *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 630

sector have thus far been deemed unconstitutional.⁵⁵ Even in California, where the labor movement enjoys more membership support than it possesses nationally,⁵⁶ there have been numerous statewide

(7th Cir. 2014); *Wis. Ednc. Ass'n Council v. Walker*, 705 F.3d 640, 642 (7th Cir. 2013); *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 346 (Wis. 2014); Steven Greenhouse, *Wisconsin's Legacy for Unions*, N.Y. TIMES (Feb. 22, 2014), <https://www.nytimes.com/2014/02/23/business/wisconsins-legacy-for-unions.html> [<https://perma.cc/U63E-CV7Q>] (apparently, Governor Walker had not encouraged passage of a Wisconsin right-to-work law—but so also did the governors of Indiana and Michigan adopt similar stances before their states fell into the right-to-work column). See Monica Davey, *Scott Walker, Starting Second Term as Wisconsin Governor, Resists New Union Battle*, N.Y. TIMES (Jan. 5, 2015), <https://www.nytimes.com/2015/01/06/us/scott-walker-starting-second-term-in-wisconsin-steers-away-from-new-battle-with-unions.html> [<https://perma.cc/7F6V-MZST>] (however, Governor Walker, like his Indiana and Michigan counterparts, has had a change of heart). Michael Bologna, *Wisconsin Lawmakers Expected to Take Swift Action on Right-to-Work Legislation*, BLOOMBERG L. (Feb. 19, 2015, 9:00 PM), <https://news.bloomberglaw.com/daily-labor-report/wisconsin-lawmakers-expected-to-take-swift-action-on-right-to-work-legislation> [<https://perma.cc/9V4D-ZWZ6>]; Mitch Smith, *Word of Threat Cuts Short Hearing on Right-to-Work Measure in Wisconsin*, N.Y. TIMES (Feb. 24, 2015), <https://www.nytimes.com/2015/02/25/us/word-of-threat-cuts-short-hearing-on-right-to-work-measure-in-wisconsin.html> [<https://perma.cc/93LQ-49KT>]; Monica Davey & Mitch Smith, *Scott Walker Is Set to Deliver New Blow to Labor in Wisconsin*, N.Y. TIMES (Feb. 25, 2015), <https://www.nytimes.com/2015/02/26/ns/politics/walker-is-set-to-deliver-new-blow-to-labor-and-holster-credentials.html> [<https://perma.cc/62UD-3V6C>]; The Editorial Board, *Editorial, Wisconsin, Workers and the 2016 Election*, N.Y. TIMES (Feb. 26, 2015), <https://www.nytimes.com/2015/02/27/opinion/wisconsin-workers-and-the-2016-election.html> [<https://perma.cc/WL62-5V3K>].

55. *Int'l Ass'n of Machinists Dist. Ten & Local Lodge 873 v. Allen*, 904 F.3d 490, 494–95 (7th Cir. 2018).

56. *In Two Minds*, THE ECONOMIST (June 3, 2010), <http://www.economist.com/node/16271975> [<https://perma.cc/SP4H-WXFU>] (in 2017, the union membership rate—the percent of wage and salary workers who were members of unions—was 10.7%, the same as 2016; during that period, the union membership rate in California was 15.9% and 15.5% in 2016 and 2017, respectively; public employee unions have kept the American labor movement afloat through organizational activity; but there have been discussions of efforts to stifle union activity; it is said that the “public has no appetite for a public-sector *intifada*. . . . Governments have no choice but to cut public-sector debt, which is ballooning across the rich world. Mighty private-sector unions were destroyed when they tried to take on elected governments in the 1980s. The same thing could happen to the survivors if they overplay their hands.”). See William B. Gould IV, *Bill no cure-all for what ails labor*, SAN JOSE MERCURY NEWS (Mar. 6, 2007, 6:57 PM), <https://www.mercurynews.com/2007/03/05/bill-no-cure-all-for-what-ails-labor/> [<https://perma.cc/Q8AR-UQZB>] (the decline in private-sector unions has been addressed through debate about the Employee Free Choice Act); William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 35 (2009); see generally William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291 (2008) (the Employee Free Choice Act should be expanded and amended). See *The limits of solidarity*, THE ECONOMIST (Sept. 21, 2006), <https://www.economist.com/united-states/2006/09/21/the-limits-of-solidarity> [<https://perma.cc/7UK9-BLAL>] (organized labor’s decline is attributable to much more than the law itself); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 259–64 (1993).

propositions attempting to circumscribe the role of unions in this area.⁵⁷

For the National Labor Relations Act ("NLRA"), the circle on the union dues issue was substantially closed in *Communications Workers of America v. Beck*.⁵⁸ The *Beck* Court held, albeit curiously under the so-called "duty of fair representation"⁵⁹ obligation to represent all within the bargaining unit fairly, that the same demarcation line drawn in *Abood* would apply in cases involving the NLRA itself. Notwithstanding the dramatically different legislative history of the Railway Labor Act and the NLRA—the former arising out of the open shop, where unions had had no union security agreements at all, and the latter involving Congress's attempt to regulate union power and associated abuses in the rest of the private sector—the *Beck* majority held that the same standard applied. Said the Court in *Beck*: "however much union-security practices may have differed between the railway and NLRA-governed industries prior to 1951, it is abundantly clear that Congress itself understood its actions in 1947 and 1951 to have placed these respective industries on an equal footing insofar as compulsory unionism was concerned."⁶⁰ Though state action was more difficult to find

57. Bob Egelko, *Prop. 32 not unions' only worry*, SAN FRAN. CHRON. (Oct. 23, 2012), <https://www.sfgate.com/news/article/Prop-32-not-unions-only-worry-3972680.php> [<https://perma.cc/KCS9-ANWW>]; Bob Egelko, *Romney favors restrictions on union dues*, SAN FRAN. CHRON. (Nov. 1, 2012), <https://www.sfgate.com/politics/article/Romney-favors-restrictions-on-union-dues-4002212.php> [<https://perma.cc/ZVP8-BX4F>] (this series of attempts began in earnest in 1998). WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB –A MEMOIR 386 (2000).

58. Comm. Workers of Am. v. Beck, 487 U.S. 735, 673–74 (1988); Kenneth G. Dan-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck*, 27 HARV. J. L. & R. 51, 52 (1990).

59. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Vaca v. Sipes, Adm'r*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *R.R. Trainmen v. Howard*, 343 U.S. 768, 772 (1952); *see Steele v. Louisville and Nashville R.R.*, 323 U.S. 192 (1944) (the duty of fair representation is not the appropriate standard, given the fact that litigation before and since *Beck* involving employee rights has taken place under the rubric of the so-called "restraint and coercion" standard of § 8(b)(1)(A) under the NLRA). *California Saw & Knife Works*, 320 N.L.R.B. 224, 383 (Chairman Gould concurring), aff'd in Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 183 F.3d 1012, 1015 (7th Cir. 1998). *See generally Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1998) (this standard, more ambitious in scope than the duty of fair representation standard, proved to be significant in the poorly reasoned Supreme Court's Marquez opinion holding that there was no duty of representation obligation to specify workers' obligations in a collective bargaining agreement, in part because workers did not read them). *But see Monson Trucking Inc.*, 324 N.L.R.B. 933, 938 (1997) (Chairman Gould concurring) (referenced by Justice Kennedy in his *Marquez* concurrence, *Marquez*, 525 U.S. at 53, Kennedy, J., concurring).

60. Commc'n Workers of Am. v. Beck, 487 U.S. 735, 756 (1988).

under the NLRA,⁶¹ the same freedom-of-association principles promoted by the First Amendment⁶² seemed to be in play.⁶³ Thus, the attempt to draw a line between representational activity, manifested through collective bargaining and the adjustment of grievances, and that which was not germane to it emerged in both the NLRA as well as the RLA, and *Beck* loomed large in the NLRB's deliberations during the 1980s and 1990s.⁶⁴

This set the stage for the constitutional public sector litigation which unfolded in this century. In the first of the important decisions, *Knox v. Service Employees International Union, Local 100*,⁶⁵ a 5-4 majority, reaching out for issues and arguments not even presented or briefed, held that an agreement under which workers provided compulsory union fees as a condition of employment was a "form of compelled speech and association"⁶⁶ that imposes a "significant impairment on First Amendment rights."⁶⁷ The Court, citing to an earlier opinion of Justice Scalia,⁶⁸ rejected the proposition that there was a balance to be struck between the rights of public sector unions to finance their own expressive activities, on the one hand, and the rights of unions to collect fees from nonmembers on the other.⁶⁹ The *Knox* Court held that a union, which sought to collect fees from both members and non-members through a special assessment to mount a political campaign, was required to give notice to nonmembers and allow them to opt out

61. David H. Topol, Note, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1135 (1992).

62. NAACP v. Alabama, 357 U.S. 449, 499 (1958).

63. Roger Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act, Dues Objector Cases*, 41 HASTINGS L.J. 1, 19 (1989); Clyde W. Summers, *Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. Rev. 689, 693 (1986).

64. See GOULD IV, *supra* note 12, at 73-74 (between 1988, when *Beck* was decided, and 1994, when I became Chairman of the NLRB, no case involving the application of the *Beck* standards to the NLRA was decided, notwithstanding the fact that a substantial number of unfair labor practice charges involving this issue were pending for at least six years).

65. *Knox v. Serv. Emp. Int'l Union*, 132 S. Ct. 2277 (2012).

66. *Id.* at 2282.

67. *Id.* (citing *Ellis v. Bhd. Of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Emp.*, 466 U.S. 435, 455 (1984)).

68. *Id.* at 2291 (citing *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 191 (2007), which held that First Amendment principles are not violated when a state requires public-sector unions to obtain affirmative consent from a nonmember before spending that non-member's agency-shop fees for election-related purposes).

69. *Id.* (citing *Davenport*, 551 U.S. at 185) (the Court had earlier found a constitutional right for both members and nonmembers in a fair share union security agreement and had struck a balance between the competing interests of each; *Abood*, 431 U.S. at 23132).

of paying for these activities if they so chose. "Affirmative consent" of nonmembers was required, said the Court, even though Supreme Court precedent had said that dissent was not to be presumed.

Knox did not involve a union security or fair share agreement itself, but rather a special assessment.⁷⁰ Nonetheless, the requirement of "affirmative consent" combined with Justice Alito's comment that the Court's previous uniform acceptance of a so-called "opt-out approach" (which would require nonmembers or dissenters to affirmatively object to expenditure of union dues for purposes that are not germane to the collective bargaining process) "appears to have come about more as a historical accident than through the careful application of First Amendment principles,"⁷¹ seemingly spelled out a substantial reconsideration of precedent. This factor was one which Justice Alito stressed in his majority opinion in *Janus*, which argued against the principle that that decision had betrayed the principles of *stare decisis*.

The next step in the process was *Harris v. Quinn*, where the same 5-4 majority held a collective bargaining agreement negotiated between a union acting as an exclusive bargaining representative for so called quasi-public employees to be unconstitutional, notwithstanding the *Abood* precedent to the contrary. Derisively, Justice Alito sounded a theme similar to that employed earlier in *Knox* i.e., characterizing the First Amendment analysis contained in *Railway Employees Dept. v. Hanson*⁷² as possessing an analysis which was "thin."⁷³ Justice Alito was critical of the failure to acknowledge differences between public and private sector collective bargaining in the *Harris* opinion. Said the Court majority:

Abood failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector. In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. In the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home.⁷⁴

70. *Id.* at 2285.

71. *Id.* at 2290.

72. *Ry. Emp. Dept. v. Hanson*, 351 U.S. 225 (1956).

73. *Harris v. Quinn*, 134 S. Ct. 2618, 2629-32 (2014).

74. *Id.* at 2632.

The Court was also critical of what was characterized as an “unwarranted” assumption that exclusivity for a union was dependent upon the existence of a fair share agreement.⁷⁵ Without reversing *Abood* the Court simply stated that it was “not controlling,” inasmuch as only “quasi-public employees” were involved. The reasoning of *Abood*, which was in substantial part predicated upon the relationship between fair share agreement and labor peace, is applicable here inasmuch as the employees did not “work together” but rather with the customer who had control over where they work. Over Justice Kagan’s dissent, the Court proclaimed that “[a] union’s status as exclusive bargaining agent and the right to collect an agency fee for non-members are not inextricably linked.”⁷⁶ The test, said the Court, was whether the benefits could not have been obtained if the union had been dependent upon voluntary contributions, and no showing of such had been made.⁷⁷

The majority also discussed the applicability of the Supreme Court’s landmark *Pickering*⁷⁸ holding that employees’ speech is only constitutionally protected if it expresses a “matter of public concern.”⁷⁹ But the Court in *Harris* distinguished this line of authority from *Pickering* as involving “a single public employee’s pay [which] . . . is usually not a matter of public concern” in “contrast to the entire collective bargaining unit” involved in the collective bargaining process in *Harris* where substantial budgeting decisions were made as the result.⁸⁰

Justice Kagan, who was to author a compelling dissent in *Janus*, wrote a dissent in *Harris* as well, and in both cases was joined by Justices Ginsburg, Breyer, and Sotomayor. Her opinion in the first instance was predicated upon *stare decisis*, and the fact that thousands of agreements between unions and public employers throughout the nation had been negotiated while relying upon *Abood*. Special justification was required to depart from *stare decisis*, but there was not so much as a “whisper” for departure from precedent under these circumstances.

75. *Id.* at 2634.

76. *Id.* at 2640.

77. *Id.* at 2641.

78. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 570 (1968).

79. *Harris*, 134 S. Ct. at 2642 (citing *Pickering*, 391 U.S. at 568).

80. *Id.* at 2642 n.28.

Subsequently, the issue returned again in *Friedrichs v. California Teachers Association*⁸¹ where *certiorari* was granted. But Justice Scalia's death left the Court with eight members, divided four to four on the question of whether *Abood* was still good law, and thus leaving the 1977 ruling in place.

Then came *Janus* itself. The confirmation of Justice Gorsuch as the ninth member of the Court created a five to four majority on the *Abood* question, which, through Justice Alito's majority opinion, pulled the trigger to overrule forty-one years of precedent. The justification, hinted at in *Knox* and *Harris*, was predicated upon the view that the Railway Labor Act cases had been poorly reasoned and that "[d]evelopments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years."⁸² The Court emphasized that "fundamental free speech rights are at stake."⁸³

The majority opinion commenced with the observation that under Illinois state law, where *Janus*'s refusal to pay dues had arisen, and under federal labor policy providing for exclusive representation, the process "substantially restricts the rights of individual employees."⁸⁴ The duty of fair representation applies to all employees in the bargaining unit, members and nonmembers alike. Employees who declined to join the union were not assessed full union dues, but instead paid what was characterized as an "agency fee" as in *Harris* and *Abood*, a principle long recognized in the private sector.⁸⁵ As in all the cases over the past forty-one years, the union dues were for functions germane to the union's role as the collective bargaining representative and were required of all employees, members and nonmembers. However, nonmembers were not required to fund the union's political and ideological campaigns and projects if they objected to so doing. The former group was so-called "chargeable" expenditures and the latter was "nonchargeable." After receipt of a *Hudson*⁸⁶ notice, which ad-

81. 136 S. Ct. 1083 (2016).

82. *Janus v. Am. Fed'n of State, Cty, and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018).

83. *Id.*

84. *Id.* at 2641.

85. NLRB v. The Gen. Motors Corp., 373 U.S. 734, 736-37 (1963).

86. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986) (holding that unions collecting agency fees are constitutionally required to "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount

vised employees as to what expenses were chargeable and nonchargeable, nonmembers could object to nonchargeable expenditures if they chose to do so. In *Janus*, the charge for nonmembers was 78.06% of full union dues. The plaintiff's agency fee dues consisted of \$44.58 per month and \$535 per year. *Janus* refused to join the union because he opposed many of its public policy positions as well as its collective bargaining stance, concluding that the union's bargaining did not take into account the "current fiscal crises in Illinois"⁸⁷ and therefore did not reflect his best interests.

The *Janus* opinion began by noting the considerable skepticism articulated about the viability of *Abood* in both *Knox* and *Harris*, leaving the question that was now before the Court aside for another day in those opinions citing the Court's Jehovah's Witnesses precedent.⁸⁸ Of course, the payment of taxes or monies for a practice or cause with which plaintiffs disagreed was not at issue in those cases—all that was involved was the refusal to engage in the practice itself, i.e., a refusal to salute and pledge allegiance to the flag and this was not a compelled subsidy. Nonetheless, the *Janus* Court emphasized that speech compulsion was an important part of the First Amendment's protection of free speech. The Court mentioned that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."⁸⁹ At issue here, said Justice Alito, was "compelled subsidization of private speech" which, as in *Harris*, required "exacting scrutiny."⁹⁰

Janus stated that *Abood* and its defense of the agency fee arrangement, which was predicated on the state's interest in "labor peace," was tied to the problems that were associated with multi-unionism. These problems presupposed the conflict and disruption often associated with interunion rivalries and thus the possibility that an employer could be confronted with conflicting demands from different unions.⁹¹ The fears expressed in *Abood* were "unfounded," and the ma-

of the fee before an impartial decisionmaker, and as escrow for the amounts reasonably in dispute while such challenges are pending").

87. *Janus*, 138 S. Ct. at 2461.

88. See generally *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that requiring all school children to salute the American flag, including Jehovah's Witness children whose faith restricts them from pledging allegiance to any flag, violates the First Amendment).

89. *Janus*, 138 S. Ct. at 2464.

90. *Id.* at 2465.

91. See *DiQuisto v. Cty. of Santa Clara*, 181 Cal. App. 4th 236, 249 (2010) (the author was an expert witness in the case).

jority stated “[t]he *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true.”⁹² In the Court’s view, federal employment supported this proposition since twenty-seven percent of the federal workforce was union members, notwithstanding (1) the absence of agency fees or arrangements and (2) the fact that the union plays a far less ambitious role given that it does not bargain over wages, which was a factor which *Janus* conveniently omitted. The Court also alluded to the same situation in the Postal Service as well as in the so-called right-to-work states, twenty-eight at the time of the opinion in June 2018. With regard to the latter, the Court did not take care to note that the legislation had considerably weakened the economic and political mission of unions in those states.⁹³ That point hardly fit with the majority’s expressed narrative. The tone of the *Janus* opinion as well as Justice Kennedy’s direct comments during oral argument in both *Harris* and *Janus*,⁹⁴ indicate *sub rosa* that, if anything, this phenomenon was satisfactory to the Court.

Casting aside the proposition that protection against free riders was constituted as a compelling interest or justification for agency fee arrangements, the Court was at pains in stressing the fact that exclusive bargaining representative status was sought “avidly” by unions. In Justice Alito’s view, the unions would still have benefits in any event by virtue of exclusive representative status. The opinion noted (1) a “privileged place in negotiations over wages, benefits, and working conditions;”⁹⁵ (2) the right to speak for workers as exclusive representative and the obligation to bargain in good faith imposed upon the employer; (3) the ability to have “special privileges” including “information about employees” and “having dues and fees deducted directly from employee wages . . .”⁹⁶ Justice Alito said these benefits outweigh any extra burden thrust upon the unions by a duty of fair representation obligation for nonmembers as well as members. The representation of nonmembers would further the “control” of the

92. *Janus*, 138 S. Ct. at 2466.

93. James Feigenbaum, Alexander Hertel-Fernandez, & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws*, NBER Working Paper No. 24259, comment under *Working Papers and Publications*, THE NAT’L. BUREAU OF ECON. RESEARCH (Jan. 2018), <https://www.nber.org/papers/w24259> [https://perma.cc/S78U-XY7T].

94. *Janus*, 138 S. Ct. at 2502.

95. *Id.* at 2468.

96. *Id.*

administration of the collective bargaining agreement through which the union, under Illinois state law, had the ability to send a representative to the grievance process covering those workers who did not wish to have union representation.

Another line of precedent posed problems for the majority approach in *Janus*. Justice Kennedy⁹⁷ has warned against the free speech rights of public employees, even into this century,⁹⁸ on the ground that much of their speech could not be "constitutionalized." But the proposition that it was inappropriate to constitutionalize every employee grievance was downplayed in both *Harris* and *Janus* and was dramatically at odds with the Court's solicitude toward the constitutional right of the dissenting public employees in *Janus*—thus, that concern was swept aside.⁹⁹ The majority opinion then returned to a theme propounded earlier in *Harris*, i.e., that public employee free speech issues presented in other cases had involved simply one employee's concerns as opposed to a blanket subsidization of speech with which employees here did not agree. The Court said that exacting scrutiny was warranted here, because unlike employee speech involving conditions of employment for a particular grievance, most of the speech at issue was not "private." The Court said:

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk.¹⁰⁰

97. See *Connick v. Myers*, 461 U.S. 138 (1983) (though *Connick* was authored prior to Justice Kennedy's appointment to the Court, some of its themes foreshadow the Kennedy opinion in *Garcetti*).

98. See *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006) ("[u]nderlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance'" (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983))).

99. *Janus*, 138 S. Ct. at 2471 (the Court relied upon the view that the Founding Fathers "condemned laws requiring public employees to affirm or support beliefs of which they disagreed").

100. *Id.* at 2472–73.

In essence, the opinion adopted the view that most employee grievances were private and therefore unprotected under the First Amendment analysis. On the other hand, union negotiation on health insurance benefits, pension, and other matters as well as its proposals about wage and tax increases generally involve the public sphere, and this fact made the earlier cases inapplicable. Union speech on public issues was of considerable importance—a point that the Court disapprovingly dramatized by its reference to merit pay, seniority, and tenure issues as well as other sensitive and controversial political issues affecting teachers.

There remains the issue of *stare decisis*, however, given the fact that the Court had followed *Abood* for most of the forty-one years preceding *Janus*. The Court looked to a number of considerations to support its position here: (1) that *Abood* had gone “wrong” when it relied upon the Railway Labor Act cases, which provided mere authorization of private sector union shops under that statute and in contrast to a state requirement that its own employees pay agency fees; (2) the early Railway Labor Act cases had not given “careful consideration to the First Amendment;” (3) the constitutionality of public sector agency fees had been reviewed under “a deferential standard” which in the railway cases was not appropriate to what the Court characterized as the free speech cases.¹⁰¹ As it deferred to the legislative judgment involved, “*Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked.”¹⁰² Yet, this itself failed to take note of the unassailable proposition that members would be induced to resign membership if nonmembers received the exact same benefits without any expense. The principle upon which exclusivity is based would be eroded and the union unable to finance representation.

Beyond this consideration, the majority opinion said that when a government employer is involved political speech was inherently present, in contrast to bargaining in the private sector. Referencing its earlier pronouncements in *Harris*, the Court concluded that *Abood* “was not well reasoned.”¹⁰³

101. *Id.* at 2479–80.

102. *Id.* at 2480. Cf. Adam Liptak, *The Threat to Roe v. Wade in the Case of the Missing Precedent*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/17/us/politics/kavanaugh-abortion-precedent.html> [https://perma.cc/ET7V-34Z3]; See Randy J. Kozel, *Precedent and Constitutional Structure*, 112 Nw. U. L. Rev. 789 (2018) (discussing the constitutional foundations for *stare decisis*); Richard M. Re, *Second Thoughts on “One Last Chance”?*, 66 UCLA L. Rev. (forthcoming 2019) (manuscript at 12) (on file with authors).

103. *Janus*, 138 S. Ct. at 2481.

The Court also concluded that the demarcation line established in *Abood* was not workable, another consideration directly relevant to *stare decisis*. The Court found that the previously-established demarcation line between that which was germane to collective bargaining and therefore appropriate, and that which was used for political speech (i.e., lobbying expenses incurred by public employee unions as well as services which would benefit the local bargaining unit), was unworkable because it was “broad enough to encompass just about anything that the union might choose to do.”¹⁰⁴

Developments also militating against *stare decisis* in Justice Alito’s view were the very opinions upon which Justice Alito himself had written in the years 2012 onward leading up to a full-fledged attack upon *Abood*. True, departure from *stare decisis* had been used by the Court in labor law elsewhere, albeit in a situation involving statutory construction,¹⁰⁵ where the departure was predicated upon tensions that its own caselaw had created. No such development was present in *Janus*. Public employee unions in the seventies, reasoned the Court, were a “new phenomenon” and were embryonic at that juncture. Collective bargaining as it had come to exist in the twenty-first century with expanding budgets and consequent cost to the public, was not a matter before the Court in the seventies when *Abood* was decided. But surely this consideration was a matter for the political process rather than the judiciary.

Finally, debunking the idea put forward by the dissents in *Janus*, *Knox*, and *Harris*, the majority took the position that agency fee arrangements in the public sector should have made the unions and employers uncertain for some years beginning with *Knox* in 2012—and in any event the short-term duration of collective bargaining agreements allowed the unions to make adjustments in the interim. In concluding that agency fees could not be extracted from nonconsenting employees, the majority said:

[n]either an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee af-

104. *Id.*

105. *Boys Mkt., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 237–38 (1970). See also William B. Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Market Case*, 1970 SUP. CT. REV. 215 (1970) (discussing the Court’s departure from *stare decisis* in *Boys Market, Inc., v. Retail Clerks Union*, 398 U.S. 235 (1970), where the Court held that that the Norris-LaGuardia Act did not prohibit injunctions against strikes conducted in violation of collective bargaining agreements). Cf. William B. Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533, 562 (1978).

firmatively consents to pay . . . Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.¹⁰⁶

In arriving at this conclusion, of course, Justice Alito turned not only forty-one years of precedent on its head but may have also altered aspects of case analysis under the National Labor Relations Act and the Railway Labor Act cases which have always presumed that the duty is upon the objector to assert his or her objection prior to extraction of dues. As the British would put it, this is contracting in rather than contracting out,¹⁰⁷ an enormously important consideration given the fact that inertia generally diminishes the potential for employee action one way or the other, i.e., to make a decision to pay dues or not to pay dues. A judicially devised contracting in obligation for workers had been a cherished part of Justice Alito's program for actions since he had written *Knox* and reached out for this issue even before it was briefed.

Justice Kagan dissented along with Justices Breyer, Sotomayor, and Ginsburg, as she had in the past, beginning with *Knox*.¹⁰⁸ Noting the "large scale consequences" of the decision, the dissent stated that "judicial disruption does not get any greater than what the Court does today."¹⁰⁹ Her persuasive dissenting opinion emphasized the relationship between exclusivity, the duty of fair representation, and the need to adequately fund a system of dispute resolution and administration. The peaceable and stable relations served as the justification for the agency fee arrangements, avoiding a situation where only members would pay the cost. The appropriate balance had been struck, i.e., one allowing workers to opt out where political and ideological expenditures were contrary to their views, but one which would at the same time fund the system of collective bargaining itself through expenditures for germane matters. Essentially, agency fees permitted exclusive representation to work inasmuch as free riding occurred when fees were absent. As Justice Kagan reasoned:

Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so

106. *Janus*, 138 S. Ct. at 2486.

107. STEPHEN JAMES BAILEY, PUBLIC SECTOR ECONOMICS: THEORY, POLICY AND PRACTICE 398 (1995) (comparing aspects of labor law in Britain and the US).

108. *Knox v. Serv. Emp. Int'l. Union*, 132 S. Ct. 2277, 2299–2307 (Breyer, J., dissenting); *Harris v. Quinn*, 134 S. Ct. 2618, 2644–58 (Kagan, J., dissenting); *Janus v. Am. Fed'n of State, 138 S. Ct. 2448, 2487–2502 (Sotomayor, J., dissenting; Kagan, J., dissenting).*

109. *Janus*, 138 S. Ct. at 2487–88 (Kagan, J., dissenting).

emerged *Abood*'s rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.¹¹⁰

Justice Kagan alluded to the fact that unions, unlike other private groups that the Court cited in *Janus*, were exclusive representatives with special responsibilities for all employees within the bargaining unit whether members or nonmembers, by citing Justice Scalia's all but forgotten concurring opinion in *Lehnert*.¹¹¹ Dues could be compelled where the subject matter bargained about was one required by the duty of fair representation. Justice Kagan reiterated the fundamental point that members, as well as nonmembers, would be dissuaded from contributing, writing: "when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations."¹¹²

As in *Harris* itself, the basic inconsistency between the free speech rights generally given to government employees and the holding in this case was emphasized anew in the *Janus* dissent. Countering the point that the speech was being compelled, the dissent noted that a subsidy was all that was on hand and that it would be used by others for expression. The essential point, as Justice Kagan noted, was that the speech, regardless of whether the public is interested in it, is government employee speech, the regulation of which had previously been provided great deference.

Finally, much, if not most, of the passion in the dissent was saved for the *stare decisis* issue. The dissent noted the continued citation of *Abood* going right up until 2009 on the eve of *Knox* itself. Justice Kagan said "[d]on't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as 'special justifications.'"¹¹³ Similarly, the idea that constitutional line drawing between collective bargaining and politics is unworkable, contained in Justice Alito's opinion, was rebutted by the fact that "only a handful of cases raising questions about the distinction" had emerged.¹¹⁴ The idea that contracts were of short duration and that they could be re-

110. *Id.* at 2490.

111. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991).

112. *Janus*, 138 S. Ct. at 2491.

113. *Id.* at 2498.

114. *Id.*

vised or readjusted after expiration was probably identified as a misunderstanding of the "nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page."¹¹⁵ Fundamentally, as Justice Kagan stressed, the heart of the matter here was judicial use of policy issues which had been traditionally left to the parties, labor, and management, and to the political process itself. Judicial activism ran rampant in *Janus*, with the Court picking "the winning side" in what should be "an energetic policy debate."¹¹⁶ As such, democratic governance was undermined in a manner reminiscent of the Nine Old Men in the 1930s.¹¹⁷

But in the absence of new appointments to the Supreme Court a few years down the road, it is unlikely that any of this will change soon notwithstanding the power of the dissents provided for future generations.¹¹⁸ Both judges and policymakers must now focus upon the is-

115. *Id.* at 2500. *See also* *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960) (noting that the Court should give "special heed" to the "context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve"); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580–81 (1960) (recognizing the complexities of collective bargaining agreements and the compulsive nature of the parties' relationships); *see generally* *United Steelworkers v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960) (nothing demonstrates Justice Kagan's view more vividly than the so called the "dynamic status quo" cases, i.e., those cases which present the issue of whether the so-called dynamic status quo during the negotiation of an agreement subsequent to its predecessor's expiration, relates to what had been previously bargained to itself in the old CBA; these differences, involving the balance of power between the parties in negotiating a new agreement are sure to be resolved in the future by both the circuit courts and in all probability, the Supreme Court itself; but the new and old agreements are inevitably connected through the expectations and formal and informal practices which have evolved over the years). *Compare* the Obama Board in *E.I. Du Pont De Nemours*, 364 N.L.R.B. No. 113 (2016) remanded in *E.I. Du Pont De Nemours v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012) (holding that the so-called management prerogative clause limiting the obligation of an employer to bargain with the union about changes and conditions of employment did not survive the contract's expiration), with the Trump Board one year later in *Raytheon Network Centric Sys.*, 365 N.L.R.B. No. 161 (2017) (reversing, holding that the management prerogatives were not rooted in the predecessor collective bargaining agreement alone and did survive the contract's expiration).

116. *Janus*, 138 S. Ct. at 2501 (judicial interference of legislative policy matters in the 1920's and 1930's by the Court, here also the dissent stressed the point that the "First Amendment" was now turned into a sword when it came to "using it against workaday economic and regulatory policy").

117. Russell Owen Washington, *Nine Justices –and Nine Personalities*, N.Y. TIMES, Jan. 5, 1936, at SM3 (referring to Justices as "nine old men in black"). *See generally* DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN (1996) (referring to the Justices as "the nine old men").

118. William B. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 5 (1981); William B. Gould IV, *The Supreme*

sues that have arisen from *Janus* and the potential for legislative response to it.

III. In the Wake of *Janus*

A. Exclusive Bargaining Representative Status

This concept embodied in modern American labor law for more than eighty years is under some measure of attack in the wake of *Janus*. Some have unsuccessfully contended that recognition of minority unions can be mandated under the NLRA as written,¹¹⁹ notwithstanding the principles of exclusivity contained in the statute, a feature mirrored in the public sector statutes scrutinized in *Janus*. By virtue of the difficulties involved in obtaining majority status as well as the burdens imposed by right to work laws, it has been an easy jump by some on the left and elsewhere to conclude that so-called members-only unions, which stick to negotiations and bargaining only for the members, should take the place of or coexist with exclusive representation.¹²⁰ Indeed, in the wake of *Janus*, the argument that exclusivity is unconstitutional has grown due to the exclusive representation commentary in that case.¹²¹ This is attributable to two themes on exclusivity in the Court's dicta, i.e., (1) that exclusivity represents a "significant impairment on associational freedoms that would not be

Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg's Term, 36 HAWAII L. REV. 371, 400–01 (2014).

119. See generally CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005) (demonstrating that in private-sector nonunion workplaces, the NLRA guarantees that employees have a viable right to engage in collective bargaining through a minority union on a members-only basis). Dick's Sporting Goods Adv. Mem. 6 CA-34821 (June 22, 2006).

120. Catherine L. Fisk, *Labor at a Crossroads: In Defense of Members Only Unionism*, AM. PROSPECT (Jan. 15, 2015), <https://prospect.org/article/labor-crossroads-defense-members-only-unionism> [https://perma.cc/9NWT-8UQR]; James Gray Pope, Ed Bruno, & Peter Kellman, *It's Times for Unions to Let Go of Exclusive Representation*, IN THESE TIMES (July 19/Aug. 2018), http://inthesetimes.com/features/unions_exclusive_representation_janus.html [https://perma.cc/Y9PY-8FXW]; Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 879 (2014); John M. True III, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, 26 BERKELEY J. EMP. & LAB. L. 181, 186–89 (2005); see generally Charles J. Morris, *Back to the Future: Reviving Minority-Union Collective Bargaining Under the National Labor Relations Act*, 57 LAB. L.J. 61 (2006) (highlighting the shift towards labor union acceptance to protect unrepresented workers in the workplace); Charles J. Morris, *Minority Union Collective Bargaining: A Commentary on John True's Review Essay on The Blue Eagle at Work, and a Reply to Skeptics Regarding Members-Only Bargaining Under the NLRA*, 27 BERKELEY J. EMP. & LAB. L. 179, 180 (2006). Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 J. LAB. & EMP. L. 1, 3 (2011).

121. *Janus*, 138 S. Ct. at 2478.

tolerated in other contexts”¹²² and (2) the reliance in *Janus* upon the Jehovah’s Witnesses’ First Amendment religious liberty precedent in *Barnette* which was not itself dependent upon “voting.”¹²³

Meanwhile, another problem with exclusivity in the private sector had been presented even prior to the *Janus* holding, when Chief Judge Wood for the Court of Appeals for the Seventh Circuit expressed the view that the obligation of exclusive representation to represent all workers within the bargaining unit when some were not obliged by statute or other legal instruments to finance the system was an unconstitutional deprivation of union property.¹²⁴ Now, some contend that *Janus* “calls for a radical rethinking of labor law,” and that abandonment of the system would not only eliminate the free rider inequity for unions, but also solve a wide variety of other problems such as a lack of competition among otherwise competitive unions as well as diminishing discrimination by the exclusive representative.¹²⁵ Some representation, it seems to me, is better than no representation.¹²⁶

But the difficulty with the members-only idea is that it fails to take account of the universe outside of membership ranks and the potential for discrimination or favoritism by employers on behalf of non-members or favored unions who compete as part of a beauty contest

122. *Id.* at 2478.

123. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

124. *See Sweeney v. Pence*, 767 F.3d 654, 684–85 (7th Cir. 2014) (Wood, J., dissenting) (concluding that exclusive representation without the ability to compel dues unconstitutionally deprives the union of property):

Unless or until [unions are permitted to deny service to nonmembers], the only constitutional path is to permit unions to charge fees to nonmembers that cover only the limited, mandatory representational services that nonmembers receive. The majority has forbidden this, and has thus sanctioned the confiscation of one private party’s resources for the benefit of another private party.).

125. *Cf. Steele v. Louisville and Nashville R.R.*, 323 U.S. 192 (1944) (holding that the executive representative cannot discriminate as to which members it represents); *see generally* *The Emporium Capwell Co. v. W. Addition Cnty. Org.*, 420 U.S. 50 (1975) (holding that employees may not circumvent the collective bargaining process); *see generally* WILLIAM B. GOULD IV, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* (1977) (tensions and divisiveness about the color line have been chronicled here); *see generally* William B. Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining*, 79 YALE L.J. 46 (1969) (highlighting problems which arise due to racial discrimination in employment).

126. WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 164–65 (1993) (I have previously advocated this here); WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB –A MEMOIR* 21–23 (2000) (referring to the issue as politically explosive).

for representation.¹²⁷ Two responses to this point have been put forward: (1) the political strength of public sector unions which may diminish the potential for public employer abuses of this kind will make such unions less vulnerable; (2) advocacy of a prohibition of any contract in the employment universe outside of the membership realm, an idea that in all probability is a political non-starter as well as arguably unconstitutional—and to have the “most representative” union lead the negotiations.¹²⁸ The American and Canadian systems¹²⁹ both remain deeply and idiosyncratically wedded to the idea of majority rule and exclusivity with a consequent duty of fair representation obligation to all employees, union or non-union, within a bargaining unit.¹³⁰ Major public sector unions have expressed no interest in the

127. See *Indep.-Nat'l Educ. Ass'n v. Indep. Sch. Dist.*, 223 S.W.3d 131, 137–39 (Mo. 2007) (en banc) (providing public employees with constitutional right to collective bargaining without requiring exclusivity as a predicate). *City of Miami Beach v. Bd. of Tr. of City Pension Fund for Firefighters & Police Officers in Miami Beach*, 91 So. 3d 237, 240–41 (Fla. Dist. Ct. App. 2012); *State v. Fla. Police Benevolent Ass'n*, 613 So. 2d 415, 419–21 (Fla. 1992). See generally David M. Orta, *Public Employee Collective Bargaining in Florida: Collective Bargaining or Collective Begging?*, 23 STETSON L. REV. 269 (1994) (some of my thinking has proceeded upon the assumption that there are inherent vulnerabilities in minority union bargaining where two or more unions are on the scene). But see E-mail from Rafael Gely, James E. Campbell Mo. Endowed Professor of Law, U. of Mo., to William B. Gould, Charles A. Beardsley Professor of Law Emeritus at Stanford Law School (Jan. 20, 2019) (on file with author) (Professor Gely, on the other hand, points out that this does not appear to be true in the Missouri system where the Missouri Supreme Court has held that there is a constitutional right to bargain for public employees). But see MNEA National Assembly, *Position Statement on Collective Bargaining*, MO. NAT'L EDUC. ASS'N (Nov. 17, 2018), http://grandview.mnea.org/Missouri/News/MNEA_Representative_Assembly_approves_position_sta_880.aspx [https://perma.cc/YNX3-P8C5]. Cf. E. Mo. Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield, 386 S.W.3d 755, 758 (Mo. 2012); Am. Fed'n of Teachers v. Ledbeiter, 387 S.W.3d 360, 361–62 (Mo. 2012). See Chris Brooks & Rebecca Kollins Givan, *How a Scrappy Campus Union Saved Tennessee From Privatization*, IN THESE TIMES (Mar. 20, 2018), <http://inthesetimes.com/article/20977/Tennessee-privatization-governor-Haslam-south-university-unions-labor> [https://perma.cc/8GLF-NR2H] (the experience with Tennessee public school teachers appears to be quite different and to have posed the problems that I have assumed); Chris Brooks, *Why We Shouldn't Fall for the Members-only Unionism Trap*, IN THESE TIMES (Dec. 22, 2017), <http://inthesetimes.com/working/entry/20791/members-only-union-labor-right-to-work> [https://perma.cc/4RL7-6JAE].

128. See E-mail from James Pope, Professor of Law and Sidney Reitman Scholar, Rutgers Law Sch., to William B. Gould, Charles A. Beardsley Professor of Law Emeritus at Stanford Law Sch. (Aug. 13, 2018) (on file with author) (these are ideas that Professor Pope has advanced to me). James Gray Pope, Ed Bruno, & Peter Kellman, *It's Time for Unions To Let Go of Exclusive Representation*, IN THESE TIMES (July 19, 2018), http://inthesetimes.com/features/unions_exclusive_representation_janus.html [https://perma.cc/PS55-NA5E].

129. WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 205–34 (1993).

130. See Hassan Kanu, *Labor Board Ratchets Up Prosecution of 'Negligent' Unions*, DAILY LAB. REP. (BNA), Sept. 17, 2018 (quoting the Author as saying the new standard is a “stretch

members-only proposal, related, as it is, to the proponents of *Janus*, who see exclusivity as the next shoe to drop weakening unions after the above referenced invalidation of the agency shop.¹³¹ These unions said:

[O]ur four unions have joined in opposition to state and local policy proposals that abandon or weaken the duty of fair representation, or in any other way undermine the bedrock principle of exclusive representation in the workplace. In meeting attacks on our members and our unions, including the *Janus v. AFSCME Council 31* challenge to fair-share fees pending in the Supreme Court, we stand together against proposals that would threaten our strength in exchange for unproven benefits. Proposals to weaken or eliminate the duty of fair representation hold appeal because the idea of union members devoting significant resources to representing non-members seems unfair. However, initiatives that disrupt our legal obligation to fairly represent non-members inevitably erode our rights as exclusive representatives, in turn weakening our power at the bargaining table. Not coincidentally, proposals of this kind have been enthusiastically advocated by anti-union zealots, including the AFLC, the NRTWF, and others.

Specifically, our four unions oppose policy proposals that modify existing laws regarding the duty of fair representation (DFR).¹³²

beyond" what the Supreme Court considers a breach of the fair representation duty: "[e]quating the failure to return phone calls in and of itself with more than 'mere negligence' is a stretch, particularly where the representative isn't a full time union official").

131. *Janus v. Am. Fed'n of State, Cty, and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). *See Transcript of Oral Argument at 19–20*, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11–681).

JUSTICE GINSBURG: But you're not challenging —or it's confusing whether you are or not—the very idea of exclusive representation by a union. Are you saying that, in the public sector, there cannot be exclusive—an exclusive bargaining agent?

MR. MESSENGER: It's not directly challenged in this case, but it becomes relevant under the first *Knox* test, which asks whether the mandatory association being supported by the compulsory fees is justified by a compelling State interest.

JUSTICE GINSBURG: [L]et's take out . . . the agency fee or fair-share fee or whatever it is, but there is an exclusive bargaining agent. Workers, your clients, say, we don't want to be represented by that union. The union is authorized to represent everybody in the workplace and has to represent even nonmembers as well, without any discrimination. And—are you taking the position that there cannot be an exclusive bargaining agent if there are any dissenters who don't want to be represented by a union?

MR. MESSENGER: Not in this case, Your Honor. This case does not present the question of whether exclusive representation alone would constitute a First Amendment injury because the complaint here is focused towards the compulsory fees, so that particular issue is not here.

132. Am. Fed'n of State, Cty., & Mun. Emps., Am. Fed'n of Teachers, Nat'l Educ. Ass'n, & Svc. Emp. Int'l Union, *Public Policy Priorities for Partner Unions: Countering Initiatives to Undermine the Duty of Fair Representation*, <http://nashtu.us/wp-content/uploads/2018/05/Maryann-Parker-Partner-Unions.pdf> [<https://perma.cc/Z8BK-UYBF>]. *But see Sweeney v.*

Meanwhile, the *Janus* proponents now bring a renewed attack upon the constitutionality of the exclusive bargaining representative system triggered in part by the dicta in *Janus*.¹³³ This has spawned more litigation attacking exclusivity that had earlier been commenced on the basis of both *Knox* and *Harris*.¹³⁴

The decisions on this matter that have emerged in the wake of *Janus* have, thus far, reflected the judicial unanimity that prevailed before it. In a case involving homecare workers, the Court of Appeals for the Eighth Circuit, acting consistently with principles from *Harris v. Quinn*, established before *Janus*, expressed the view that legislation granting a public sector union exclusive bargaining representative status upon obtaining an allegiance of the majority remained constitutional, just as it was before *Janus*.¹³⁵ The Eighth Circuit, referencing the Supreme Court's landmark *Knight* decision, which had held that the obligation to have professional exchanges only with the exclusive bargaining representative on nonmandatory issues was constitu-

Madigan, No. 1:18-cv-1362, 2019 WL 462480, at *4–5 (N.D. Ill. Feb. 6, 2019) (where a contrary position taken by the Operating Engineers produced some measure of success):

Here, the plaintiffs primarily contend that, as a result of *Janus*, the agency fee incorporated into the IPLRA will no longer be enforceable. Because the remainder of that statute, including the duty to provide fair representation to non-members, remains enforceable, the plaintiffs assert that they, and therefore their membership, will be compelled to speak on behalf of non-members, infringing on their First Amendment rights.¹ Indeed, the provisions of the IPLRA in question expressly require such speech and expressly limit the plaintiffs' ability to receive reimbursement for that speech to the fair share payments that the Supreme Court ruled unconstitutional in *Janus*. The plaintiffs' alleged injury is accordingly far from speculative. Although the defendants claim that any injury is hypothetical at this juncture, they argue that the duty of fair representation of non-members remains binding upon the plaintiffs, and thus effectively concede that prosecution would result if the plaintiffs ended their compliance with the statute. Although it may be true that nothing has changed except for the Supreme Court's decision in *Janus*, that decision altered the nature of the plaintiffs' preexisting statutory obligations and created the imminent constitutional injury alleged to exist here. This injury is sufficient to establish both that standing exists and that there is a dispute ripe for resolution with respect to the plaintiffs' claims arising directly from their duty of representation.

133. Cf. *Janus*, 138 S. Ct. at 2460, 2478 (“[d]esignating a Union as the employees’ exclusive representative substantially restricts the rights of individual employees;” “[i]t is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts”).

134. See, e.g., *D’Agostino v. Baker*, 812 F.3d 240, 243–44 (1st Cir. 2016); *Hill v. Serv. Emp. Int’l Union*, 850 F.3d 861, 864–65 (7th Cir. 2017); *Jarvis v. Cuomo*, 660 Fed. Appx. 72, 75 (2d Cir. 2016).

135. *Bierman v. Dayton*, 900 F.3d 570, 571 (8th Cir. 2018).

tional,¹³⁶ said that “there is no meaningful distinction between this case and *Knight*.¹³⁷ Precedent has “treated the position of the exclusive representative as the official position of the faculty, even though not every instructor agreed . . . but nonetheless ruled that the exclusive representation did not impinge on the right of association.”¹³⁸

Did *Janus* alter any of this? The Eighth Circuit answered this question in the negative and noted that *Janus* did not even reference or mention the earlier authority of *Knight* and that “the constitutionality of exclusive representation standing alone was not at issue,”¹³⁹ notwithstanding some of the rather hostile dicta on this point contained in the latter opinion.¹⁴⁰ The Ninth Circuit, partially relying upon *Knight*, was of the same view.¹⁴¹ A district court sustained the constitutionality of exclusivity in representation.¹⁴² Noting that objecting employees were not required to pay fees, attend meetings, or endorse the union or take actions contrary to their own position, the court said:

The exclusive representation requirement is likely the least restrictive means possible for employees who are members to still enjoy the benefits of union representation. Without exclusive representation, the Union’s power and persuasion would be significantly eroded and the state interest in labor peace would be undermined. Because PELRA serves a compelling state interest [providing Minnesota’s public employees with representation ‘and greater bargaining power’] and is already tailored in a non-restrictive manner, the statute passes exacting scrutiny.¹⁴³

But, make no mistake, exclusivity burdens the dissenting workers’ speech more directly than the fiction of “compelled speech” concept created by *Janus* for dues. The majoritarian process,¹⁴⁴ so deeply linked to exclusivity and its constitutional limitations,¹⁴⁵ may well give way to some other system to which the *Janus*-type dissenters object.

Yet, in *Janus* itself the Court said: “It is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for

136. *Minn. State Bd. for Cnty. Coll. v. Knight*, 104 S. Ct. 1058, 1060 (1984).

137. *Bierman*, 900 F.3d at 574.

138. *Id.*

139. *Id.*

140. *Minn. State Bd. for Cnty. Coll.*, 104 S. Ct. at 1058.

141. *See generally* *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019) (holding that state’s authorization of union as exclusive collective bargaining representative for state’s publicly subsidized childcare providers did not violate her rights of free speech and association).

142. *Uradnik v. Inter Faculty Org.*, Civ. No. 18-1895, 2018 WL 4654751, at *4 (D. Minn. Sept. 28, 2018), *affirmed*, No. 18-3086 (8th Cir. Dec. 3, 2018), *petition for cert. filed* (U.S. Dec. 4, 2018) (No. 18-719).

143. *Id.* at 3.

144. *J.L. Case Co. v. NLRB*, 321 U.S. 332, 338–39 (1944).

145. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 198–99 (1944).

its employees . . . We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.”¹⁴⁶ Accordingly, in the best reasoned and recent decision by District Court Judge Levy in Maine, the court has sustained the constitutionality of Maine’s exclusive bargaining representative system. Said Judge Levy:

Under the [Maine] Act, the Union was not, as Reisman asserts, appointed by the Board as his representative and agent. Instead, it was selected by a majority vote of the employees to serve as their bargaining-unit’s agent . . . And by authorizing the Union, in its role as the agent for the bargaining-unit, to negotiate with the Board on matters related to the terms and conditions of the employment . . . the Act does not cloak the Union with the authority to speak on issues of public concern on behalf of employees, such as Reisman, who do not belong to the Union. Reisman remains free to speak out in opposition to the Union and its positions as he sees fit. His constitutional challenge to the Act thus rests on a fundamental misconception. The Union is not, as Reisman appears to believe, his individual agent. Rather, the Union is the agent for the bargaining-unit which is a distinct entity separate from the individual employees who comprise it. Because the Union is not Reisman’s agent, representative, or spokesperson, the Act does not compel him, in violation of the First Amendment, to engage in speech or maintain an association with which he disagrees.¹⁴⁷

B. Grievance-Arbitration Process

In *Janus*, the majority opinion concluded that no one had explained “why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.”¹⁴⁸ But one of the reasons why the system works so well for broad, industrial units combining the unskilled, semi-skilled, and skilled tradespeople in one bargaining unit is because the union acts as a broker for groups that would more overtly and sometimes dramatically compete, and that it therefore avoids some of the tensions associated with competition.¹⁴⁹

146. *Janus v. Am. Fed’n of State, Cty., and Mun. Emp.*, Council 31, 138 S. Ct. 2448, 2478 (2018).

147. *Reisman v. Associated Faculties of Univ. of Me.*, No. 1:18-cv-00307-JDL, 2018 WL 6312996, at *10 (D. Me. Dec. 3, 2018) [statutory citations omitted].

148. *Janus v. Am. Fed’n of State, Cty., and Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2468 (2018).

149. Cf. *Gen. Motors Corp. (Cadillac Motor Car Div.)*, 120 N.L.R.B. 1215 (1958) (in which the Board, relying on the long bargaining history of exclusive UAW representation on a multiplant, national basis, denied severance of single-plant units as too narrow in scope and thus inappropriate), *with Mallinckrodt Chem. Works*, 162 N.L.R.B. 387 (1966) (in which the Board overruled *American Potash* and reinstated history and existing patterns

an issue which has posed a substantial threat to labor peace, as *Abood* contemplated. Those tensions are more likely to emerge in the form of inter-union rivalries in the public sector, where multi-unionism has been so prevalent and vexatiously problematic.¹⁵⁰

Regardless of the validity of the *Janus* commentary regarding negotiations, the Court seemed to recognize some of the difficulties in connection with grievance representation and the representation of nonmembers. In seniority cases where workers are in competition with one another,¹⁵¹ and those involving employment discrimination where there is a conflict, tension, or distrust between the exclusive agent and the worker,¹⁵² labor and management have sometimes negotiated specialized procedures that can bridge potential conflict. In *Janus*, the majority opinion argued that the “unwanted burden” that is imposed by representation of nonmembers who were not paying dues could be eliminated through less restrictive methods than the imposition of agency fees. The Court mentioned that “[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether.”¹⁵³ In this connection, the Court referenced a California statutory provision, which authorized the charging of a reasonable fee to religious objectors who refused to pay agency dues.¹⁵⁴ Though the Supreme Court of Nevada has held that the requirement of “reasonable costs associated with individual grievance representation” did not “interfere with, restrain or coerce” employees under Nevada’s state public sector statute,¹⁵⁵ the NLRB has held that a union “by charging only nonmembers for grievance representation [as opposed to charging its members for dues] has discriminated against nonmembers.”¹⁵⁶

of collective bargaining as factors relevant to the determination of the appropriate bargaining unit).

150. See HARRY H. WELLINGTON & RALPH K. WINTER, JR., THE UNIONS AND THE CITIES 32–35 (1971).

151. Compare *Acuff v. United Paper Workers, AFL-CIO*, 404 F.2d 169 (5th Cir. 1968), with *Clark v. State*, 286 N.W.2d 344 (1979) (addressing inherent seniority conflicts for the exclusive representative).

152. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52–53 (1974); *Basic Vegetable Prods., Inc., Local 890*, 64 Lab. Arb. Rep. 620 (1975) (Gould, Arb.); *Weyerhaeuser Co., Local 5-15*, 78 Lab. Arb. Rep. 1109 (1982) (Gould, Arb.). William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. Rev. 40, 58–59 (1969).

153. *Janus*, 138 S. Ct. at 2468–69 n.6.

154. *Id.* at 2469 n.6.

155. *Cone v. Nev. Serv. Emps. Union/SEIU Local 1107*, 998 P.2d 1178, 1182 (Nev. 2000).

156. *H.O. Canfield Rubber Co. of Va., Inc.*, 223 N.L.R.B. 832, 835 (1976) (relying upon its holding in *Hughes Tool Company*, where a union had both a flat fee of \$15 for

The fundamental conundrum here is the same one that arises in connection with the use of hospital emergency rooms by the uninsured. The dues system that finances labor-management union representation is predicated upon an insurance payment concept, i.e., the individual in question does not likely have to use the monies, and the outlay when an emergency arises would be considerably more expensive than dues. The nonmember is not part of the insurance system, which is the essential reason the sweet spot of an appropriate fee for nonmembers is difficult to find. The cost of representation in one particular proceeding presents costs that are or can be calamitous for the individual worker.

One way to address this matter is to require dues-paying membership for some reasonable period of time in advance of the incidents in question, or a “window,” to use the hospital insurance system analog. Yet the Court’s profound hostility to compelled subsidization which, in its view, is compelled speech, makes it questionable that such a system could be constitutionally sustained by a majority of the Court, notwithstanding the Court’s promise of nonmember representation by unions.

Even assuming that some kind of appropriate compromise between ad hoc representation of nonmembers and dues-paying members can be found, it is unlikely that most of the labor movement will pursue this with enthusiasm, or at all, given the explicit opposition fashioned by the major public sector labor organizations.¹⁵⁷

C. The Religious Objector Approach for Nonunion Members in *Janus*

Whatever the practicability of the Court’s suggestion with regard to grievance administration, the religious objectors statutes cited in

grievance processing and \$400 for arbitration; that Board was of the view that a disproportionate burden had been thrust upon the nonmembers). *Hughes Tool Company*, 104 N.L.R.B. 318, 329 (1953); *American Postal Workers Union*, 277 N.L.R.B. 541, 543 (1986); *Furniture Worker Div. Local 282*, 291 N.L.R.B. 182, 183 (1988); *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int’l Union Local 1192*, 362 N.L.R.B. 1649, 1653 (2015). Cf. *NLRB v. N.D.*, 504 F. Supp. 2d 750, 757 (D.N.D. 2007).

157. See generally Am. Fed’n of State, Cty., & Mun. Emps., Am. Fed’n of Teachers, Nat’l Educ. Ass’n, & Svc. Emp. Int’l Union, *Public Policy Priorities for Partner Unions: Countering Initiatives to Undermine the Duty of Fair Representation*, <http://nashua.us/wp-content/uploads/2018/05/Maryann-Parker-Partner-Unions.pdf> [https://perma.cc/Z8BK-UYBF] (“our four unions oppose policy proposals . . . [c]reating fee for service arrangements for non-members . . . [l]imiting an exclusive representative union’s duty to represent non-members in grievance and/or arbitration procedures or otherwise limiting the DFR [Duty of Fair Representation] in the administration of a Collective Bargaining Agreement”).

Janus mimic the provisions of the National Labor Relations Act, which allows for religious objectors to opt out of union membership.¹⁵⁸ The *quid pro quo* is the payment of dues by objectors that such workers are required to provide an equivalent sum payable to a charitable organization rather than the union. Yet the details often provoke disputes related to the identity of the third party. Unions would like to have the monies go to scholarships, for instance, in which the union or labor movement is involved—or some other organization which is union friendly or pro-worker in the union's view. Nonunion members, if they constitute a substantial cohesive group, may well be interested in organizations like the National Right to Work Foundation, which are anathema to organized labor. Nonetheless, the idea is that the free rider problem¹⁵⁹ is addressed in that there is no longer an incentive to become nonunion because all workers, union or nonunion, are paying the same amount. The drawback for labor is the fact that those monies from nonunion workers do not go to the union, which is correspondingly burdened in its administration of the contract and in bargaining.

It remains unclear and arguably unlikely that this Court will uphold such a statute given the High Court's rather cavalier disregard of harm for the union as exclusive bargaining representative in the *Janus* opinion. Such an approach, after all, would be an attempt to address the free rider problem, which the Court in *Janus* disregarded as a threat to the union as exclusive bargaining representative.¹⁶⁰ If such nonunion objecting workers are relatively idiosyncratic, as may be true in many of the religious objector cases, it is quite possible that many

158. Christopher J. Conant, *Toward a More Reasonable Accommodation for Union Religious Objectors*, 37 MCGEORE L. REV. 105, 121 (2006); David B. Schwartz, *The NLRA's Religious Exemption in a Post-Hobby Lobby World: Current Status, Future Difficulties, and a Proposed Solution*, 30 A.B.A. J. LAB. & EMP. L. 227, 253 (2015); Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LAB. L. 185, 202 (1996).

159. Samuel Estreicher, *How Unions Can Survive a Supreme Court Defeat*, BLOOMBERG OPINION (Mar. 2, 2018), <https://www.bloomberg.com/opinion/articles/2018-03-02/how-unions-can-survive-a-supreme-court-defeat> [https://perma.cc/H5BU-L54V].

160. *Janus v. Am. Fed'n of State, Cty., and Mun. Emp.*, Council 31, 138 S. Ct. 2448, 2469 (2018):

Nor can [agency] fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. . . . [D]esignating a union as the exclusive representative of nonmembers substantially restricts the non-members' rights. . . . Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected.

nonunion members will simply continue to pay union dues because of inertia and not opt out. After all, ever since the Court decided *Knox* at the beginning of this decade, it has always been assumed that the burden for the worker to opt in or opt out was critical because inertia made it unlikely that most workers would take action to change their status or the status quo in the employment relationship.¹⁶¹ In summing up, *Janus*—and what seemed like an afterthought at the end of its opinion—the Court stated that agency fees can no longer be extracted from workers in the absence of some form of explicit authorization and that the proposition meant the following:

Neither an agency fee representing proportionate share of union dues attributable to public-sector union's activities as collective-bargaining representative, nor any other payment to the union, may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay; by agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed . . . unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.¹⁶²

It is possible that this Court will come to the conclusion that such an arrangement is a transparent preservation of the same approach which was condemned as unconstitutional in *Janus*. On the other hand, it can be said that the worker affirmatively consents given the fact that he or she is presented with a choice and consents through the exercise of the choice. It is also possible that this Court, notwithstanding the great haste with which it reached for issues not presented

161. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 817 n.31 (1961) (Frankfurter, J. dissenting) (Justice Frankfurter describing in his dissenting opinion how Britain's debate over political exemptions for union dues rested on the assumption that workers' would not change their default status; "[a]s a consequence of a restrictive interpretation of the Trade Union Act of 1876, 39 & 40 Vict., c. 22, by the House of Lords in *Amalgamated Society of Ry. Servants v. Osborne*, [1910] A. C. 87, Parliament in 1913 passed legislation which allowed a union member to exempt himself from political contributions by giving specific notice. Trade Union Act of 1913, 2 & 3 Geo. V, c. 30. The fear instilled by the general strike in 1926 caused the Conservative Parliament to amend the 'contracting out' procedure by a 'contracting in' scheme, the net effect of which was to require that each individual give notice of his consent to contribute before his dues could be used for political purposes. Trade Disputes and Trade Unions Act of 1927, 17 & 18 Geo. V, c. 22. When the Labor Party came to power, Parliament returned to the 1913 method. Trade Disputes and Trade Unions Act of 1946, 9 & 10 Geo. VI, c. 52. The Conservative Party, when it came back, retained the legislation of its opponents;" the assumption in the U.K. and the U.S. being that workers are unlikely to contract out if they wish to be free from politics and unlikely to contract in if they might wish to participate in politics).

162. *Janus*, 138 S. Ct. at 2486 n.53.

in litigation arising prior to *Janus*,¹⁶³ may be reluctant to wait for a judicial or administrative proceedings aimed at determining how workers have actually functioned in such a system, i.e., do unit members actually choose or does inertia and problems relating to the identity of the third party mean that most of the dues go to the union rather than a charitable organization. The former result — dues paid to the union, assuming that the Court examines the actual consequences of such arrangements, is a result surely unacceptable to the majority in *Janus*.

D. Dues Authorizations and Agency Fee or Membership Contractual Requirements

In its condemnation of the extraction of agency fees, the Court stressed the Illinois statutory scheme and condemned automatic deduction of fees from nonmembers wages.¹⁶⁴ The Court said “[n]o form of employee consent is required.”¹⁶⁵ The view that the dues authorization in question in Illinois was deemed unconstitutional because no employee consent was required, is fortified by Justice Alito’s earlier discussion of the same subject.¹⁶⁶ Concluding that the unions would actively seek the status of exclusive bargaining representative notwithstanding the unconstitutionality of agency fee clauses requiring the payment of dues as a condition of employment, the Court noted the many benefits associated with this status. One of them, said the majority, alluded to the fact that the “exclusive representative is often granted special privileges, such as . . . having dues and fees deducted directly from employee wages . . .”¹⁶⁷

163. *Knox v. Serv. Emps. Intern. Union*, 132 S. Ct. 2277, 2277 (2012).

164. *Janus*, 138 S. Ct. at 2486.

165. *Id.* (five states mandate dues deduction without individual employee authorization: DELAWARE*, MINNESOTA*, NEW JERSEY*, OREGON*, VERMONT*; twenty-eight states require authorization before dues deduction: Arizona, CALIFORNIA*, Florida, Georgia, Hawaii, Idaho, ILLINOIS*, Kansas, Kentucky, Louisiana, MAINE*, Massachusetts, Michigan, Mississippi, MISSOURI*, NEW HAMPSHIRE*, New York*, North Dakota, OHIO*, PENNSYLVANIA*, RHODE ISLAND*, South Carolina, Tennessee, Texas, Utah, WASHINGTON*, Wisconsin, Wyoming; states in **BOLD*** required agency fees before *Janus*; see Table 1.0).

166. *Id.* at 2484.

167. *Id.* at 2467.

Table 1. Dues Deduction State Statutes

States Mandating Dues Deduction Without Authorization	States Requiring Authorization Before Dues Deduction
Delaware*	Arizona
Minnesota*	California*
New Jersey*	Florida
Oregon*	Georgia
Vermont*	Hawaii
	Idaho
	Illinois*
	Kansas
	Kentucky
	Louisiana
	Maine*
	Massachusetts
	Michigan
	Mississippi
	Missouri*
	New Hampshire*
	New York*
	North Dakota
	Ohio*
	Pennsylvania*
	Rhode Island*
	South Carolina
	Tennessee
	Texas
	Utah
	Washington*
	Wisconsin
	Wyoming

Bold: States that required agency fees before *Janus*. All 5 of the states that mandate dues deduction without employee authorization required agency fees. 10 of the 28 states that require dues authorization fall in this category as well.

Perhaps the subsequently rendered ruling of the Court of Appeals for the Seventh Circuit in *International Association of Machinists District Ten and Local Lodge 873 v. Allen*¹⁶⁸ puts the issue in clearer perspective. In that case, Judge Hamilton, speaking for the majority, held that a Wisconsin law providing for dues authorization standards relating to authorization agreements in the private sector was unconstitutional.

168. See generally Int'l Ass'n of Machinists Dist. Ten v. Allen, 904 F.3d 490 (7th Cir. 2018) (holding that federal labor law preempts Wisconsin law governing union dues deduction authorization).

tional under the doctrine of preemption, notwithstanding the recent passage of a right-to-work enactment in that state, noting that dues check-off authorizations are simply a "convenient way for employees to pay their union dues or fair-share fees."¹⁶⁹ The court stressed that the challenged legislation regulated an "employee's optional dues-checkoff authorization rather than an employee's obligation to pay dues as a condition of employment"¹⁷⁰ and therefore fell outside of the right-to-work jurisdiction, which a state may properly exercise with regard to union security or fair-share agreements. Judge Hamilton analogized this subject matter to others addressed in collective bargaining agreements like "health insurance premium payroll deductions or retirement savings arrangements."¹⁷¹ Opining on the same point further in a subsequent ruling, Judge Wood, speaking for the same Seventh Circuit, emphasized that in contrast to union security agreements, check-offs constituted an "administrative convenience in the collection of union dues."¹⁷² Judge Wood stressed their difference from agreements regulating "membership." The court said:

Checkoff provisions, though they govern relationships with the union after hiring, are also different from "membership" within the meaning of section 14(b). They do not, in and of themselves, require employees either to join unions or to make any payments to them. Rather, they facilitate payments once employees have themselves made the decision to contribute to a union or to accept a job requiring that contribution. To state the matter differently, filling out a checkoff form does not determine union membership either way¹⁷³

That is why courts addressing this issue have characterized dues payments as separate and apart from the issue of compulsory unionism, and thus not the subject matter that the Court condemned in *Janus*.¹⁷⁴ That is why the Board and the appellate courts have taken

169. *Id.* at 492–94.

170. *Id.* at 495.

171. *Id.* at 506.

172. Int'l Union of Operating Eng'rs Local 399 v. Vill. of Lincolnshire, 905 F.3d 995, 1003 (7th Cir. 2018) (citing NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527, 528 F.2d 783, 786 (5th Cir. 1975)).

173. *Id.*

174. See *Fisk v. Inslee*, No. C16-5889RBL, 2017 WL 4619223, at *5 (W.D. Wash. Oct. 16, 2017) (In this pre-*Janus* opinion, the court said:

Appellees' deduction of union dues in accordance with the membership cards' dues irrevocability provision does not violate Appellants' First Amendment rights. Although Appellants resigned their membership in the union and objected to providing continued financial support, the First Amendment does not preclude the enforcement of "legal obligations" that are bargained-for and "self-imposed" under state contract law. *Cohen v. ComEds Media Co.*, 501 U.S. 663, 668–71 (1991).

the position that resignation from the union does not affect the question of dues still owing under a check-off authorization.¹⁷⁵ This too is consistent with the position that the Board has taken for more than a half a century, i.e., that dues authorization and compulsory membership are separate issues.¹⁷⁶ They are separate matters.¹⁷⁷ Indeed, the promise contained in the authorization has been viewed as intrinsically separate in that it can survive the expiration of the collective bargaining agreement itself.¹⁷⁸ This is why the Court of Appeals for the Second Circuit held that in spite of the right to join or resign from unions, “financial obligations due and owing”¹⁷⁹ remain unaffected by those decisions, a conclusion cited approvingly by the United States Supreme Court.¹⁸⁰ State legislation now explicitly follows the lead of this authority.¹⁸¹ If and when the matter comes to the Court, even as

The provisions authorizing the withholding of dues and making that authorization irrevocable for certain periods were in clear, readable type on a simple one-page form, well within the ken of unrepresented or lay parties. Moreover, temporarily irrevocable payment authorizations are common and enforceable in many consumer contracts — e.g., gym memberships or cell phone contract — and we conclude that under state contract law those provisions should be similarly enforceable here.

See also *Belgau v. Inslee*, Case No. 18-5620 RJB, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) (to the same effect post-*Janus*: “*Janus* says nothing about people join a Union, agree to pay dues, and then later change their mind about paying union dues;” the same district court later said:

Plaintiffs’ assertions that the agreements are not valid because they had not waived their First Amendment rights under *Janus* in their authorization agreements because they did not know of those rights yet, is without merit. Plaintiffs seek a broad expansion of the holding *Janus*. *Janus* does not apply here – *Janus* was not a union member, unlike the Plaintiffs here, and *Janus* did not agree to a dues deduction, unlike the Plaintiffs here. *See Conley v. California Statewide Law Enforcement Ass’n*, 2019 WL 331170, at 2 (E.D. Cal. Jan. 25, 2019). “The relationship between unions and their voluntary members was not at issue in *Janus*.” *Id.* The notion that the Plaintiffs may have made a different choice if they knew “the Supreme Court would later invalidate public employee agency fee arrangements [in *Janus*] does not void” their previous agreements. *Belgau v. Inslee*, No. 18-5620 RJB (W.D. Wash. Feb. 15, 2019).

175. United Steelworkers of Am., Local 4671, 302 N.L.R.B. 367, 368 (1991); United Postal Service, 302 N.L.R.B. 332, 333 (1991); *NLRB v. U.S. Postal Service*, 833 F.2d 1195, 1196 (6th Cir. 1987).

176. Standard Lime and Stone Co., 95 N.L.R.B. 628, 630 (1951).

177. Graphic Commc’n Dist. Council No. 2, 278 N.L.R.B. 365, 367 (1986).

178. Smith’s Food & Drug Ctr., Inc., 366 N.L.R.B. 1, 3 (2018); Frito-Lay, Inc., 243 N.L.R.B. 16, 146 (1979); *Cf. Int’l Bhd. of Teamsters Local 385*, 366 N.L.R.B. 96 (2018).

179. Commc’n Workers of Am., CIO v. NLRB, 215 F.2d 835, 838 (2d Cir. 1954).

180. *NLRB v. Granite State Joint Bd.*, 409 U.S. 213, 216 (1972).

181. Public Sector Power Through Member Engagement; IBEW 1245 Builds Leadership and Capacity in the Face of *Janus* vs. AFSCME, IBEW 1245 (Jan. 22, 2018), <https://ibew1245.com/2018/01/22/public-sector-power-through-member-engagement-ibew-1245-builds-leadership-and-capacity-in-the-face-of-janus-vs-afscme/> [https://perma.cc/72Q3-7D

presently constituted, it seems likely that the confluence of extant precedent noted above should carry the day, notwithstanding the Court's disregard for *stare decisis* in *Janus* itself.

Independent of the dues authorization issue is the question of the right to resign union membership so as to avoid the *Janus* dues obligation. The Court in *Janus* did not explicitly address this given that that decision only related to dissidents who were nonunion and whose only obligation was to pay the union dues. Though the ruling itself relates to nonmembers, its logic applies to members as well, a proposition in considerable dispute today—just as the NLRB held that the right to object by non-members inevitably implicated members who might be aware of their right to object.¹⁸² Just as there is a consti-

5X] (a number of jurisdictions finally addressing the subject of dues authorization; California obliges the exclusive representative to certify in writing that it collected dues authorization from members and the public employer is obliged to honor such requests for deductions as well as not to deter or discourage members from authorizing dues; New Jersey similarly prohibits any employer encouragement of employees to revoke dues authorizations and at least five states have passed legislation pertaining to dues authorization anticipating or reaction to the *Janus* decision); *See* S.B. 866 (Cal. 2018) (requiring the exclusive representative to certify in writing that it collected dues authorization from members, obliging the public employer to honor dues deduction requests, and prohibiting public employers from deterring or discouraging members from authorizing dues); A.B. 3686, 218th Leg. (N.J. 2018) (prohibiting public employers from encouraging unit members to revoke dues authorizations or resign membership). H.B. 314, 149th Gen. Assemb. (Dec. 2018) (similarly requiring public employers deduct dues from unit members without authorization and establishing procedures for employees to revoke deductions). H.B. 1725, 29th Leg. (Haw. 2018) (requiring that employees who no longer want dues automatically deducted from their paychecks have to notify their exclusive representative within 30 days of the anniversary of the first deduction). H.B. 2751, 65th Leg., Reg. Session (Wash. 2018) (providing for automatic dues deduction without authorization). *See generally* Carolyn Phenicie, *Even Before the Supreme Court Ruled Against Mandatory Union Dues, 7 States Moved to Protect Unions. But Will Those New Laws Stand?*, THE 74 (July 10, 2018), <https://www.the74million.org/article/even-before-the-supreme-court-ruled-against-mandatory-union-dues-7-states-moved-to-protect-unions-but-will-those-new-laws-stand/> [https://perma.cc/CVD8-U3GG] (discussing that several states would have prohibited automatic deduction of union dues from employees' paychecks).

182. Robert Iafolla, *States, Conservative Groups Spar Over Union Fee Ruling*, BLOOMBERG LAW DAILY LABOR REPORT (Oct. 12, 2018), <https://news.bloomberglaw.com/daily-labor-report/states-conservative-groups-spar-over-union-fee-ruling> [https://perma.cc/LXL2-MSY6]; *Setting the Record Straight on Teacher Rights in Rhode Island after Janus v. AFSCME Council 31*, NAT'L RIGHT TO WORK FOUND. (2018), <https://www.nrtw.org/setting-the-record-straight-on-teacher-rights-in-rhode-island-after-janus-v-afscme-council-31/> [https://perma.cc/N5YR-QU25]. *See* Letter from Att'y Gen., Maura Healey, Commonwealth of Mass. and Att'y Gen., Josh Shapiro, Commonwealth of Pa. to Patrick Hughes, President of Liberty Just. Ctr. (Oct. 5, 2018) (on file with the Office of the Attorney Gen., Healey); Letter from Patrick Hughes, President of Liberty Just. Ctr. to Att'y Gen., Xavier Becerra, State of Cal. (Sept. 26, 2018) (on file with the author); Letter from Patrick Hughes, President of Liberty Just. Ctr. to Att'y Gen., Barbara D. Underwood, State of N.Y. (Sept. 6, 2018) (on file with

tutional right to join public sector unions,¹⁸³ *Janus* means (though it did not explicitly hold) that there is now a constitutional right to resign, a right which is with all probability akin to that previously recognized by the Supreme Court in the private sector.¹⁸⁴

But as with much of labor law, the critical question is how to convey this relevant information about the rights and obligations of employees in the public sector to the workforce. The Supreme Court has, thus far, established notice obligations upon public employee unions.¹⁸⁵ Some regulation of communication by relevant administrative agencies or the judiciary seems appropriate here, just as is the case under the National Labor Relations Act.¹⁸⁶ California has led the way

the author); Letter from Patrick Hughes, President of Liberty Just, Ctr. to Att'y Gen., Mike DeWine, State of Ohio (Aug. 30, 2018) (on file with the author).

183. *Smith v. Ark. State Highway Emp.*, Local 1815, 441 U.S. 463, 466 (1979) (reiterating that “[t]he public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation from doing so;” numerous courts finding that “[n]union membership is protected by the right of association under the First and Fourteenth Amendments”). *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969) (citing *Thomas v. Collins*, 323 U.S. 516, 532–34 (1945)). *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D. N.C. 1969) (the three-judge court finding that the “right of association includes the right to form and join a labor union”).

184. *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 100–01 (1985); *William B. Gould IV, The Burger Court and Labor Law: The Beat Goes On – Marcato*, 24 SAN DIEGO L. REV. 51, 68 (1987). *Cf. NLRB v. Granite State Joint Bd.*, 409 U.S. 213, 216 (1972); *Saginaw Ednc. Ass'n v. Eady-Miskiewicz*, 902 N.W.2d 1, 21 (Mich. App. 2017). *Cf. Pattern and Model Makers Ass'n of Warren and Vicinity*, 310 N.L.R.B. 929 (1993) (unions can require written notice of an intent to resign from the union); *Local 58 Int'l Bhd. of Elec. Workers v. NLRB*, 888 F.3d 1313, 1315 (D.C. Cir. 2018) (requiring picture identification and a requirement to come to the union hall impermissibly burdened the exercise of the right to resign); *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003) (union policy that requires resigning employees to pay back dues when they remain within the bargaining unit while not imposing such a requirement upon those who resigned because they took jobs outside the unit is not unlawful); *Quick v. NLRB*, 245 F.3d 231, 241 (3d Cir. 2001) (holding that an employee may cease paying all union dues upon resignation from the union, despite a union security clause that required new employees to apply for union membership, because the clause did not further require continued membership). *See generally William B. Gould, Solidarity Forever - or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980) (analyzing the tension between the union's right to discipline its members and the union member's right to avoid discipline via resignation); *William B. Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1097 (1970).

185. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 293 (1986).

186. *California Saw & Knife Works*, 320 N.L.R.B. 224, 228 (1995); *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1018–19 (7th Cir. 1998) (holding that the unions are obliged to inform all workers which they represent, union or nonunion, about their right to resign as well as to continue as members and the implications and consequences of such); *Paperworkers Local 1033* (Weyerhaeuser Paper Co.), 320 N.L.R.B. 349, 350 (1995); *Rochester Mfg. Co.*, 323 N.L.R.B. 260, 261 (1997); *Group Health, Inc.*, 325 N.L.R.B. 342, 345 (1998) (Chairman Gould concurring); *Monson Trucking, Inc.*, 324

by establishing an obligation to provide the union with contact information for employees and, more importantly, consultation and agreement about communications made to the workforce.¹⁸⁷ The private sector experience demonstrates that there is considerable potential for mischief by both public employers, third party organizations like so called right-to-work groups, and even, insofar as the subject matter involves the right to resign, the unions themselves. The potential for coercion and misinformation is considerable absent some form of intervention designed to promote cooperation between both labor and management.¹⁸⁸

E. Public Employer Subsidization of Unions

Some academics have proposed that the answer to the *Janus* problem lies in the public employer subsidization of unions for the purpose of providing substantial financial aid that would have been furnished through dues themselves.¹⁸⁹ The idea is that the objections of nonunion dissidents will be eliminated and any protest would take the form of taxpayer litigation, which would have the same chances of success as a lawsuit against President Bush's invasion of Iraq.¹⁹⁰ But as Justice Holmes has said: "a page of history is worth a volume of

N.L.R.B. 933, 939 (1997) (Chairman Gould concurring). N.Y. Exec. Ord. No. 183 (June 27, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_183.pdf [https://perma.cc/3FKP-62XD] (private groups in the public sector are attempting to communicate with represented employees, a tactic never presented for resolution to the NLRB and one which has been barred in this order prohibiting State entities from sharing personal information of government employees with the purpose of protecting those individuals from harassing current or prospective union members).

187. A. 119 (Cal. 2017); S. 866 (Cal. 2018). *See* Complaint and Notice of Violation of Government Code Section 3558, AFSCME Local 3299 v. Regents of the University of California, Case No. SF-PE-1-H (State of California Public Employment Relations Board, Sept. 14, 2018); Complaint and Notice of Violation of Government Code Sections 3550 and 3553, AFSCME Local 3299 v. Regents of the Univ. of Cal., Case No. SF-CE-1188-H (State of California Public Employment Relations Board, Sept. 14, 2018).

188. Local 205, Lithographers and Photoengravers Int'l Union, 186 N.L.R.B. 454, 454-55 (1970) (the author was counsel to respondent).

189. *See* Aaron Tang, *Public Sector Unions, the First Amendment, and the Cost of Collective Bargaining*, 91 N.Y.U. L. Rev. 144 (2016) (arguing that public sector union financing does not create a conflict between First Amendment principles and labor law objectives); Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. (forthcoming 2019); *see generally* Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046 (2018) (proposing model legislation for state legislators to directly reimburse unions).

190. Commonwealth of Mass. v. Mellon, 262 U.S. 447, 480 (1923); Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1436-37 (2011); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 333 (2006).

logic."¹⁹¹ The idea lacks practical relevance to the real world and runs up against a number of obvious obstacles.

In the first place, it is at odds with the basic principle of trade unions and the industrialized West generally, let alone the United States specifically, i.e., the proposition that unions which purport to represent workers must act independently and autonomously. If employers subsidize, they can turn the financial faucet on and off depending upon how acceptable they deem union positions and tactics to be. A second and related concern here is that not only will the unions themselves be compromised, but so too will the political parties which rely on unions—so much so that they will become reticent about a less than arms-length relationships inherent in broad subsidies. Both groups, unions and their political allies, may have rendered the latter politically vulnerable to attack by political competitors, even in so-called union friendly jurisdictions.

It is equally troublesome that, while it is contended that disputes about the money provided by the public employer to the union go into a fund, and that disputes could be resolved much as public employment labor relations boards resolve problems that traditionally have arisen about what is "germane" to collective bargaining,¹⁹² the fact is that fundamental disputes here will be larger and more significant. The problem is not so much the appropriate demarcation line, but rather the amount of monies that would be so used. These kinds of disputes would grow larger, of course, during periods of economic downturn when budgets are probably relatively sparse and austerity is in order.

But there may be other ways in which assistance can be provided on discrete projects which will both (1) enhance the position of the union as an accepted partner of the employer and thus send a positive signal to employees both newly recruited and incumbents¹⁹³ and (2) involve the union in constructive efficiencies for the employer and taxpayer, a concern for the public with which the Supreme Court was quite obviously concerned with in *Janus*.

The truth is that a wide variety of union-employer cooperative mechanisms can be established (and should be encouraged by state statutes) to promote cooperation alongside the essentially adversarial

191. N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

192. See *Life After Janus*, *supra* note 189.

193. Keeler Brass Auto. Grp., 317 N.L.R.B. 1110, 1117-18 (1995) (Chairman Gould concurring); Q-1 Motor Express, Inc., 323 N.L.R.B. 767, 769 (1997) (Chairman Gould concurring).

relationship.¹⁹⁴ But the company union, while in many instances playing the role of promoting independent union militancy,¹⁹⁵ is hardly a “relic of history,” but rather has taken the more complex form of litigation about employee participation committees and whether they are in fact contemporary company unions.¹⁹⁶ This is an area where employers will inevitably subsidize unions and the employees that they represent as the proviso in Section 8(a)(2) explicitly acknowledges.¹⁹⁷ But the subsidization of a dues system goes to the core of independent trade unionism in this country and internationally as well,¹⁹⁸ and is therefore flawed.

F. Union Organizing and Recruitment of Workers

Probably no state has been more ambitious in addressing the implications of *Janus* than California. California has provided union access to new employee orientations and obliges the public employer to bargain about the structure, time, and manner of access to the orientation.¹⁹⁹ Similarly, Maryland provides for the same kind of notification and bargaining,²⁰⁰ as do New Jersey²⁰¹ and Washington.²⁰² Additionally, California has obliged employers that engage in “mass communication” concerning the right to join or support an employee organization to meet and confer with the exclusive representative about the content of the communication.²⁰³ If no agreement can be realized, the employer is still able to issue a communication, but there

194. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 500 (1960).

195. Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86, 90 (3d Cir. 1943).

196. Electromation, Inc. v. NLRB, 35 F.3d 1148, 1151 (7th Cir. 1994).

197. *Compare* 29 U.S.C. § 158(a)(2) (1935) (“[i]t shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay”), *with* Am. Fed'n of Gov't Emp., AFL-CIO v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018) (striking down aspects of President Trump's executive order restricting the use of on-duty time that union officials can spend representing their members).

198. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ILO Convention, July 9, 1948 (this Convention does not address dues but rather the principle that freedom of association means that unions must be able to function independently and autonomously).

199. Assem. Bill 119, 2016-2017 Reg. Sess. (Cal. 2017).

200. H.B. 811, 2018 Reg. Sess. (Md. July 21, 2018).

201. Assemb. No. 3686, 218th Leg. (N.J. May 18, 2018).

202. S.B. 6229, 2017-2018 Reg. Sess. (Wash. June 7, 2018).

203. S.B. 866, 2017-2018 Reg. Sess. (Cal. June 27, 2018).

must be an accompanying message from the exclusive representative.²⁰⁴

As noted above, one of the areas of controversy in the post-*Janus* era relates to the extent to which members as well as nonmembers are affected by the Court's ruling. New Jersey prohibits public employers from encouraging employees to resign membership,²⁰⁵ an issue that has arisen under the National Labor Relations Act.²⁰⁶ New York has amended its Taylor Law, allowing public sector unions to designate the time period in which members can withdraw their membership.

Inasmuch as the so called "right-to-work" groups engaged in considerable proselytizing for their own anti-union cause in the wake of *Janus*, some of the newly enacted legislation addresses their access as well. California prohibits disclosure of the time and place of new employee orientations and New York prohibits access to public employee personal information.²⁰⁷ Similarly, Washington requires that employers provide exclusive representatives with access to new employees within ninety days of their start date for no less than thirty minutes.²⁰⁸ The idea is to give the public sector union an opportunity to recruit effectively by using the workplace for direct one on one dialogue.²⁰⁹

G. *Janus* and the Private Sector Unions Under the National Labor Relations Act

Janus more than arguably promises to have an impact upon the private sector cases that are heard by both the NLRB and courts of general jurisdiction.²¹⁰ For instance, it is quite possible that the Trump Board will look to the Court's reasoning in interpreting the "right to refrain" under the NLRA and conclude that the burden should not be upon the objector, as has been held to be the case previously, but rather upon the union as the *Janus* Court held for First Amendment purposes.

204. Am. Fed'n of State, Cty. & Mun. Emp. Local 3299, SF-PE-1-H PERB (2018).

205. Assemb. No. 3686, 218th Leg. (N.J. May 18, 2018).

206. See *Solidarity Forever - or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, *supra* note 184 (collecting relevant NLRA cases).

207. S.B. 866, 2017-2018 Reg. Sess. (Cal. June 27, 2018); N.Y. Exec. Ord. No. 183 (June 27, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_183.pdf [<https://perma.cc/JW5K-RC4Q>].

208. S.B. 6229, 2017-2018 Reg. Sess. (Wash. June 7, 2018).

209. Cf. *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 326-27 (1974), with William B. Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73, 73-74 (1964); William B. Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505, 507-08 (1965).

210. E.g., *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 35 (1998).

In *Janus*, the Court stated:

No First Amendment issue [which] could have properly arisen in those [Railway Labor Act and *Beck* NLRA] cases unless Congress's enactment of a provision allowing but not requiring private parties to enter into union shop agreement arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today [citations omitted] . . . we reserve the decision on this question in *Communication Workers of America v. Beck*, 487 U.S. 735, 761 (1988), and do not resolve it here.²¹¹

A nuance apparently unappreciated by the Court is that many of the public sector statutes authorized, but did not require, agency shop agreements.²¹² The source of the proposition that state action can be held in the private sector under the National Labor Relations Act or the Railway Labor Act is *Steele v. Louisville and Nashville Railroad*,²¹³ where the Court said that "the congressional grant of power to a union to act as exclusive collective bargaining representative . . . would raise grave constitutional problems" if the power was misused.²¹⁴ The Court has said that "national labor policy vested unions with power to order the relations of employees with their employer,"²¹⁵ and additionally that the union "authority derives in part from Government's thumb on the scales."²¹⁶

As the Court in *Janus* noted, the question of state action has been directly litigated under the two-step test, which has been found to be generally applicable to the question of whether the presence of state

211. *Janus v. Am. Fed'n of State, Cty, and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 n.24 (2018).

212. Only 15 states required agency shop agreements in the public sector: California, Delaware, Illinois, Maine, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Another 18 states authorized, but did not require such agreements: Arizona, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, North Dakota, South Carolina, Tennessee, Texas, Utah, Wisconsin, Wyoming.

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

214. *Id.* at 198 (relied upon by the Court anew in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967)).

215. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967).

216. *Am. Comm'n Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 401 (1950). *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 437 (1984). *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 796 (1961) (expressing the view that state action could be present in private sector labor law cases); *Steele*, 323 U.S. at 208 (in a much-cited concurring opinion, Justice Murphy wrote the following: "[t]he constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress.").

action can be found. The test asks: (1) whether state action is mandated or represents a state created right or privilege, and (2) whether the party responsible for the deprivation can be viewed as a "state actor." Under federal labor law, exclusivity is mandated when the union obtains majority status²¹⁷ and the agency shop is a mandatory subject of bargaining.²¹⁸

Ironically, exclusivity, itself not directly addressed in *Janus* and thus far held to be unaffected by the *Janus* ruling as it relates to a public sector, presents a more considerable argument for state action given the mandate of the state, which is protested by the minority that does not wish to associate with the majority—the state mandating association through exclusivity for the union. The agency shop, notwithstanding the fact that it is a mandatory subject of bargaining, is not required by statute under federal law.²¹⁹ Few state statutes in the private sector are viable given the doctrine of preemption.

The view of the Court of Appeals for the District of Columbia appears to be the dominant one thus far:

In no sense is the agency shop clause compelled by federal law. Appellee cites no law, and our review of the NLRA fails to disclose any federal law, that forces the union and the company to adopt that provision as part of their labor contract. We are left with the question whether the authorization provided the agency shop clause by section 8(a)(3) of the NLRA makes the clause an exercise of a right or privilege created by the state or one for whom the state is responsible. We conclude that it does not None of the traditional indicia used to attribute private conduct to the state are present in this case.²²⁰

At one time, the scope of state action seemed to expand, particularly in the arena of racial discrimination.²²¹ But, as *Janus* has indi-

217. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

218. *NLRB v. The Gen. Motors Corp.*, 373 U.S. 734, 738 (1963).

219. See *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 243 (1959) (few state statutes in the private sector are viable given the doctrine of preemption). *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 138 (1976).

220. *Kolinske v. Lubbers*, 712 F.2d 471, 477-78 (D.C. Cir. 1983). *Accord Linscott v. Millers Falls Co.*, 440 F.2d 14, 19 (1st Cir. 1971), *contra* David H. Tophol, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1136 (1992). Dau-Schmidt, *supra* note 58, at 55. Cf. Vincent G. Macaluso, *NLRB "Opens the Union", Taft Hartley Style*, 36 CORNELL L. Q. 443, 451 (1951); *The Agency Shop*, *supra* note 14, at 340.

221. *Shelly v. Kraemer*, 334 U.S. 1, 20 (1948); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). Compare *Marsh v. Ala.*, 326 U.S. 501, 508 (1946), *with Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-20 (1968). Charles L. Black, Jr., *The Supreme Court 1966 Term: Foreword: "State Action," Equal protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 94-95 (1967).

cated, the issue, particularly given the decline in scope of state action,²²² may be unlikely to transfer the *Janus* principles to the private sector. But the inventiveness and imaginativeness of the *Janus* opinion in devising its new constitutional theory and, in the process, standing four decades of precedent on its head, indicates that it is quite possible that the Court as currently constituted will see the matter differently in order to reach a result which is less propitious for unions.²²³

And there is yet another avenue to private sector regulation which, it will be argued, has been opened through *Janus*. This has its roots in a Court of Appeals for the District of Columbia holding that NLRB posting procedures violated an employer's constitutional and statutory free speech rights.²²⁴ Since the early 1940s, the wearing of union insignia and buttons has been protected by the NLRA.²²⁵ Special circumstances limiting this right may be present under some conditions when the employees have contact and exposure to and with the public²²⁶ and employers now contend that the solicitude provided anti-union speech in *Janus* coupled with extant D.C. Circuit authority mean that a private sector employer has a free speech right to prohibit button and insignia wearing on its property which is contrary to the employer's viewpoint.²²⁷ This position would upset nearly eight decades of established authority—but then *Janus* itself was a major

222. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–72 (1972).

223. See Joseph E. Slater, *Will Labor Law Prompt Conservative Justice to Adopt a Radical Theory of State Action?* 96 NEB. L. REV. 62, 94–98 (2017) (thorough discussion of the state action issue and the potential for reviving the concept in the labor law arena).

224. These are the seminal free speech cases under the NLRA: *Nat'l Ass'n of Mfr. v. NLRB*, 717 F.3d 947, 959 (D.C. Cir. 2013); *NLRB v. Va. Elec. Power & Co.*, 314 U.S. 469, 478 (1941); and *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). See *Caterpillar Inc.*, 321 N.L.R.B. 1130 (1996) (on the issue of employee speech and its statutory protection; as I wrote earlier:

I would agree that some speech can go beyond the bounds of propriety in the workplace. But given the realities of the employment relationship alluded to above, I am of the view that the Supreme Court's approach to free speech in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), is applicable to employee speech under the Act, i.e., that the speech in question is protected unless the advocacy involved disrupts production by virtue of the fact that the advocate is "inciting or producing imminent lawless action and is likely to incite or produce such action." *Caterpillar Inc.*, 321 N.L.R.B. 1130, 1185 (1996) (Chairman Gould, concurring).

225. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945).

226. *NLRB v. Starbucks Corp.*, 679 F.3d 70, 78 (2d Cir. 2012); *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714–15 (5th Cir. 2018); *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 701 F.3d 710, 718 (D.C. Cir. 2012); *S. New England Tel. Co. v. NLRB*, 793 F.3d 93, 95 (D.C. Cir. 2015).

227. Brief for Petitioner at 7, *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707 (2018) (No. 18-340).

stretch going back more than four decades. With this Court, there can be little certainty.

H. Retroactivity

The greatest and most immediate time bomb for the labor movement under *Janus* may relate to the question of whether unions are liable for dues collected from nonunion workers prior to the *Janus* ruling itself. Numerous actions have been instituted.²²⁸

The presumption in cases like this has been that the doctrine reflects the law as it always was and is therefore retroactive with regard to damage claims.²²⁹ The group of claimants is considerable, constituting at least nonunion members and, under the logic of *Janus*, members themselves who can claim that they were confused by information provided on the right to resign or lack thereof, particularly as it relates to the *Janus* issue. The propriety of *Janus* class actions has thus far been denied.²³⁰

The relevant statute of limitations is likely to be two or three years in most states utilizing personal injury actions as the relevant statute, with the preliminary issues consisting of whether unions are acting under color of law or possess qualified immunity.²³¹ Assuming that the first two defenses are not available to unions, the principal defense is likely to be that of good faith defense given the fact that *Abood* was so well rooted over decades, though this kind of argument is eerily reminiscent of Justice Kagan's rejected dissent in both *Harris* and *Janus*. But the pre-*Janus* status quo, where plaintiffs' claims were uniformly rejected by the Courts of Appeals, would suggest that this defense has some validity. Yet the Court itself made short work of this kind of argument in *Janus* when it pushed to one side Justice Kagan's central point, i.e., that the expectations and procedures of the parties were substantially disrupted by change in the labor management rela-

228. Noam Scheiber, *Trump Nominee Is Mastermind of Anti-Union Legal Campaign*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/business/economy/union-fees-lawyer.html> [https://perma.cc/X2KZ-4CGF].

229. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J. L. & PUB. POL'Y 811, 812 (2003) (retroactive application of judicial decisions remains the norm).

230. *Rifsey v. Rauuer*, 910 F.3d 314, 316 (7th Cir. 2018).

231. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 202 (2018). See generally Catherine L. Fisk & Erwin Chemerinsky, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42 (Mar. 15, 2019), <https://harvardlawreview.org/2018/11/exaggerating-the-effects-of-janus-a-reply-to-professors-baude-and-volokh/> [https://perma.cc/3CFQ-C3T6] (hotly disputing the conclusion about union defenses).

tionship involving many aspects of collective bargaining previously cemented by virtue of four decades of precedent. The issue of retroactivity in this area is not well tested as of this writing, nor is the good faith defense. The upshot may indeed spell more trouble ahead for organized labor in the public sector and perhaps the private sector as well, though thus far the judiciary has been receptive to the good faith defense in this context.²³²

IV. Conclusion

Organized labor, never in a strong or secure position in the United States except in conditions of war,²³³ has been afforded inhospitable treatment by the Supreme Court for more than a half century.²³⁴ Yet *Janus* was especially and unduly wrongheaded in its exercise of activism, which has brought the judiciary once again into policy terrain that is normally that of the legislature and the people.

Janus was fundamentally flawed, and was one of the most poorly reasoned exercises of judicial activism since the pre-New Deal days of the “nine old men,” although the five young men, whose forces have been augmented by Justice Gorsuch and post-*Janus* appointee Justice Kavanaugh, seem resolved to tear down the system of self-government which the Court had previously promoted in tandem with duly enacted legislation. Not only is the *Janus* imposition of legislative policy misguided, but the policy itself is in opposition to that of Mr. conservative Republican, Senator Robert Taft of Ohio who supported the

232. *Danielson v. Am. Fed'n of State, Cty., and Mun. Emp., Council 28, AFL-CIO*, 340 F. Supp. 3d 1083, 1085 (W.D. Wash. 2018):

[T]he Union Defendant followed the then-applicable laws, because prior to *Janus*, collection and use of compelled agency fees was lawful . . . Although the overruling *Abood* has been considered by the Supreme Court, *see Harris*, 134 S.Ct. at 2632-34 and *Knox*, 567 U.S. at 298, the Union Defendant should not be expected to have known that *Abood* was unconstitutional, because the Supreme Court had not yet so decided. Inviting discovery on the subjective anticipation of an unpredictable shift in law undermines the importance of observing existing precedent and ignores the possibility that prevailing jurisprudential winds may shift. This is not a practice, sustainable or desirable model. The good faith defense should apply here as a matter of law. *See generally Jarvis v. Cuomo*, 660 F. Appx. 72 (2d Cir. 2016) (supporting the view that *Janus* is not retroactive for the same reasons are the post-*Harris* cases, which are all opposed to retroactivity); *Winner v. Rauner*, No. 15 CV 7213, 2016 WL 7374258, at *4-6 (N.D. Ill. Dec. 20, 2016); *Hoffman v. Inslee*, No. C14-200, 2016 WL 6126016, at *4-5 (W.D. Wash. Oct. 20, 2016).

233. *See generally Harry A. Millis & Royal E. Montgomery, ORGANIZED LABOR* (1945) (discussing the obstacles placed in the way of trade union movement in the United States and elsewhere beginning in the 19th century and concluding at the end of World War II).

234. *The Burger Court and Labor Law: The Bent Goes On – Marcato*, *supra* note 184, at 54.

Rand formula for the United States during the writing of the Taft-Hartley amendments.

The Court's majority opinion is directly at odds with the idea of self-government promoted in particular by the *Steelworkers Trilogy*,²³⁵ furthering a system of dispute resolution in the interest of self-government, a concept mirrored in the duty of fair representation²³⁶ cases to which self government is linked. Employers, some of whom had argued on the side of the unions in this litigation, benefited directly from *Abood*, given the fact that the exclusive bargaining representative was able to filter out the unmeritorious and relatively unimportant matters in the interest of conserving resources. *Janus* cast these considerations to the winds, sending the Court adrift in a blizzard of error.

For the foreseeable future, *Janus* is here to stay. And so begins a difficult period of litigation. It is possible, though not immediately probable, that this decision will cause mischief for the private sector as well as for the public sector, which its holding directly affects. Though the *Janus* opinion itself seems to (1) declare dues authorization systems intact given that the Court assumed dues authorization was one of the reasons why unions would seek majority bargaining status notwithstanding the Court's newly minted "compelled speech" concept and (2) though other dicta seems to take note of the fact that the concept of state action has been sufficiently withered so as to diminish the possibility of the application of the holding's principles to the private sector, one can never be sure about the five young men and their temptation to sail on to new vistas. *Janus* itself was an enormous analytical stretch undertaken to achieve a result that was considerably at odds with its judicial and political policy predecessors. Already, *Janus* proponents express surprise and frustration with the ability of public sector unions to persevere.²³⁷

^{235.} *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960) ("[a] collective bargaining agreement is an effort to erect a system of industrial self-government"). The following cases stress the importance of industrial self-government in connection with dispute resolution: *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 569 (1960); and *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

^{236.} *Steele v. Louisville and Nashville R.R. Co.*, 323 U.S. 192, 198 (1944) ("[f]or the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights"). See generally *Vaca v. Sipes*, 386 U.S. 171 (1967) (the system of industrial self-government is the product of the union's legislative duties of fair representation articulated in *Steele* and *Vaca* and their progeny).

^{237.} Daniel DiSalvo, *Public-Sector Unions After Janus: An Update*, MANHATTAN INST. (Feb. 14, 2019), <https://www.manhattan-institute.org/public-sector-unions-after-janus> [https://perma.cc/WP2D-BNF8].

Representative government in the political arena to which the system of labor management relations had long been built upon could not contemplate taxpayer litigation over matters so weighty as the Iraq War. But, through its attack upon labor management self-government, that is just what the Court has allowed for in *Janus*. It is a decision that can cause considerable harm and little good. The greatest lives are up against a current, which may be long-lasting given the continued tenure of the five young men.

