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Total Eclipse of the Court? Janus v. AFSCME, Council 31 in Historical, Legal, and Public Policy Contexts

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TOTAL ECLIPSE OF THE COURT? *JANUS V. AFSCME, COUNCIL 31* IN
HISTORICAL, LEGAL, AND PUBLIC POLICY CONTEXTS

*Sarah W. Cudahy**, *William A. Herbert,*** & *John F. Wirenius***¹*

INTRODUCTION

Decisions of the United States Supreme Court are all too often treated as dispositive of more than just the discrete legal question posed to and answered by the Court, but also of political decisions surrounding, but not necessarily precluded by, the Court's ruling. Moreover, the decisions are often read and interpreted in an ahistorical manner, ignoring the political, social, and economic forces underlying, and sometimes undermining, them.

The Court's decision in *Brown v. Board of Education*,² for example, declared unconstitutional state-mandated segregation in schools, but the battle to eliminate racial discrimination in education, employment, and housing was waged and continues to be fought not just before the courts,

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2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

but also in the political arena, at the federal, state, and local levels.³ Likewise, the Court's decision in *Roe v. Wade*,⁴ far from finally resolving all of the questions concerning the legal status of abortion, has spawned a series of test cases (leading to *Roe*'s significant modification by the Court itself⁵), political battles, and state legislation that is in tension with the Court's own recent rulings in the field, and yet which the Court declined to review.⁶

In both the context of *Brown* and of *Roe*, finality was not achieved by judicial fiat. Forces opposed to those rulings waged legislative, political, and litigation campaigns against them.⁷ The reaction to the decisions by the stakeholders—state and local governments, political parties and actors, and the people themselves, can cement a decision into the judicial pantheon while its mandate is thwarted in actuality. Absent enforcement, adherence, and ultimately acceptance, a judicial decision can diminish, by degrees, into a footnote or be overturned by a future court with justices who have different values, perspectives, and experiences. The Supreme Court's recent decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* ("*Janus*")⁸ is a perfect example.⁹

The same factors can be found at work from the very different perspectives of the right-to-work state of Indiana, and the comprehensive labor relations statutes governing both the public and private sectors in New

3. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 774-78 (1976); CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 13 (2004).

4. *Roe v. Wade*, 410 U.S. 113, 164-66 (1973).

5. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 872-77 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 146-47, 156-160 (2007).

6. *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir., 2017) *cert. denied*, 138 S. Ct. 2573 (2018). The Arkansas law at issue in *Jegley* is strikingly similar to that found unconstitutional in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310-18 (2016).

7. KLUGER, *supra* note 3, at 751-787; CLOTFELTER, *supra* note 3; Robert Lowe, *Richard Kluger's Simple Justice After Twenty-Nine Years: Simple Justice*, 44 HIST. OF EDUC. Q. 125, 125-132 (2004); see also MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

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

9. See William A. Herbert, *Public Sector Labor Law and History: The Politics of Ancient History?*, 28 HOFSTRA LAB. & EMP. L.J. 335, 336 (2011) ("The long-term existence of enforceable legal rights, like collective bargaining, has the tendency to cause complacency and an expectation of perpetuity. At the same time, committed opponents of such rights, and their descendants, await circumstances that provide an opportunity to end or substantially limit those rights. Over time, the historical, political, and economic forces that gave rise to the birth of the rights are frequently forgotten by both proponents and opponents. Therefore, the potential adverse consequences of eliminating or substantially changing established rights, including the resurrection of old problems and injustices, and the creation of new ones, are frequently absent from debate.").

York State, one of the most densely unionized state in the Nation.¹⁰ In both states, the *Janus* decision, or even Indiana's "right to work" law, does not automatically sound the death knell for public sector unions and collective bargaining.¹¹ Rather, the next chapter will be written by public officials, unions and public employees, both union members and non-members, advocacy groups, and voters, as well as by the courts.¹² Far from being settled, the future is all to play for, and, to paraphrase Mark Twain, the predictions of organized labor's demise may prove to be greatly exaggerated.¹³ Public sector collective bargaining was born at a time of labor militancy, and a consequence of the *Janus* case may prove to be the reemergence of an active and spirited form of public sector activism.¹⁴

In this article, we give an account of the rise and institutionalization of the agency shop, and its sudden and swift fall from the graces of the very judicial body that extended it as recently as 2009. We then give an account of the functioning—in many ways surprisingly robust—of unions and of union density in Indiana, and of the effect on loss of agency fee rights. From there, we examine the ways states have reacted to *Janus*—some anticipating its outcome with prophylactic legislation to protect stable collective bargaining relationships, and ameliorative proposals that are pending before similarly pro-public sector collective bargaining states. We finally examine other ways states and state actors may act in response to the *Janus* decision, and other possible ramifications of the case.

10. See *The Economics Daily: Hawaii and New York had highest union membership rates, the Carolinas the lowest, in 2018*. BUREAU OF LABOR STATISTICS (Feb. 22, 2019), <https://www.bls.gov/opub/ted/2019/hawaii-and-new-york-had-highest-union-membership-rates-the-carolinas-the-lowest-in-2018.htm> bls-print.

11. See Josh Edelson, *Koch Brothers-Linked Group Declares New War on Unions*, BLOOMBERG NEWS, (June 27, 2018), https://www.bloomberg.com/amp/news/articles/2018-06-27/koch-brothers-linked-group-declares-new-war-on-unions?__twitter_impression=true.

12. Sarah Cudahy, James Roemer, Kate Luscombe & John Wirenius, *Strategies for Adapting to a Post-Janus World*, in *THE TAYLOR LAW AT 50: PUBLIC SECTOR LABOR RELATIONS IN A SHIFTING LANDSCAPE* (John F. Wirenius, ed.) at 207-45 (2019).

13. See Catherine L. Fisk and Martin H. Malin, *After Janus*, 107 Cal L. Rev. (forthcoming 2019), archived at <https://lwp.law.harvard.edu/files/lwp/files/2019-fisk-c-malin-m-after-janus-clr-107.pdf> (visited April 15, 2019); see also Richard A. Greenwald, *After Janus, Labor Is In a Deep Hole. Here's How It Could Dig Itself Out*, DAILY BEAST (June 30, 2018), <https://www.thedailybeast.com/after-janus-labor-is-in-a-deep-hole-heres-how-it-could-dig-itself-out>.

14. Fisk & Malin, *supra* note 13, at 53-64; see also Justin Miller, *Janus: A New Attack Presents Old Challenges for Unions*, THE AMERICAN PROSPECT (Oct. 24, 2017) <http://prospect.org/article/janus-new-attack-presents-old-challenges-unions> (last visited July 11, 2018).

I. EVOLUTIONARY HISTORY OF THE AGENCY SHOP

The development of the agency shop, and the subsequent evolution of constitutional limitations on such fees, may best be viewed as a conflict between two models. One reflects the institutionalization of public policies favoring collective bargaining and exclusive representation as means of ensuring labor peace, while the second reflects a backlash favoring a highly individualistic model antithetical to collective bargaining, and ultimately seeking to weaken the bargaining and/or political power of labor.¹⁵ The rise, and subsequent fall, of the agency shop, though, do not stand in a vacuum.

A. *Open v. Closed Shop*

For over a century, there have been concerted efforts to mandate an open shop in unionized workplaces.¹⁶ The movement to impose the open shop began in the late 19th century and early 20th century in response to the rise of stronger private sector unions.¹⁷ From the start, the movement was an effort led by employer associations like the National Association of Manufacturers, which insisted that the open shop was constitutionally mandated.¹⁸

The original target of the movement was the elimination of the closed shop, in which union membership is mandated as a condition of initial and continued employment.¹⁹ In a closed shop, the employer is prohibited from hiring anyone who is not already a union member and cannot retain

15. See H. E. Hoagland, *Closed Shop Versus Open Shop*, 8 THE AM. ECON. REV. 752, 753-56 (1918) (discussing the difference between open and closed shops).

16. CHAD PEARSON, *Employers' Associations and Open Shops in the United States*, OXFORD RES. ENCYCLOPEDIAS OF AM. HIST. (Feb. 2018), <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-459>.

17. GILBERT J. GALL, THE POLITICS OF RIGHT TO WORK: THE LABOR FEDERATIONS AS SPECIAL INTERESTS, 1943-1979, at 3-4 (1988); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE AND AMERICAN LABOR ACTIVISM, 1865-1925, at 269-275 (1987).

18. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 64 (Harvard Univ. Press ed., 1991); Allen M. Wakstein, *The Origins of the Open Shop Movement, 1919-1920*, 51 J. OF AM. HIST. 460, 460 (1964). See Henry White, *The Issue of the Open and Closed Shop*, 180 N. AM. REV. 28, 30 (1905) (quoting the Pittsburgh convention of the National Association of Manufacturers) ("The employees have the right to contract for their services in a collective capacity, but any contract that contains a stipulation that employment shall be denied to men not parties to the contract is an invasion of the constitutional rights of the American workman, is against public policy, and is in violation of the conspiracy laws. This Association declares its unalterable antagonism to the closed shop, and insists that the doors of no industry shall be closed against American workmen because of their membership or non-membership in any labor organization.").

19. See White, *supra* note 18, at 28-29; Wakstein, *supra* note 18, at 462, 463, 466, 467, 470.

that employee if membership lapses.²⁰ The closed shop was a product of private sector skilled trade unions in the 19th century.²¹ The primary exception was printer unions with relatively small percentages of public sector members who sought a closed shop to protect the standards of their entire membership.²²

From the beginning, the goal of the open shop movement was to diminish union strength in the workplace.²³ One historian has described the movement as “a power struggle between employers wishing to assert their domination and employees desiring, through stronger unions, to have a greater share in those decisions of management that affected them.”²⁴

One of the earliest articulations of an equitable argument against the open shop was made by American Federation of Labor President Samuel Gompers in 1905: “[I]f a man desires to participate in the benefits resulting from an agreement which our unions obtain with our employers, that man assumes, or should assume, equal obligations with every union man to bear the responsibility of that agreement.”²⁵

President Theodore Roosevelt substantially aided the movement with his imposition of an open shop policy for the unionized United States Government Printing Office.²⁶ Roosevelt’s unilateral action ended a closed shop practice at that federal office.²⁷ In a 1903 letter to Secretary of Commerce and Labor George B. Cortelyou objecting to the firing of an assistant foreman because of the foreman’s expulsion from the bookbinders’ union, President Roosevelt outlined his reason for supporting an open shop:

But I am President of the United States and my business is to see fair play among all men, capitalists or wage-workers, whether they conduct their private business as individuals or as members of organizations. The office in

20. See White, *supra* note 18, at 28.

21. T. STOCKTON, *THE CLOSED SHOP IN AMERICAN TRADE UNIONS*, 17-32 (1911).

22. *Id.* at 160-61 (citing evidence that government employees in the building trades engaged in strikes seeking a closed shop); DAVID ZISKIND, *ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES* 165 (1940).

23. See Samuel Gompers, *Talks on Labor*, AM. FEDERATIONIST, Aug. 1905, at 521 (referencing the president of the Manufacturers’ Association of the United States as the most prominent spokesperson against union security who publicly advocated for the elimination of unions in the United States).

24. Wakstein, *supra* note 18, at 465.

25. Samuel Gompers, *The Open Shop*, in *THE JOURNEYMAN BARBER, HAIRDRESSER AND COSMETOLOGIST* 176, 177 (1905).

26. EDMUND MORRIS, *THEODORE REX*, 271-72 (2001).

27. STERLING D. SPERO, *GOVERNMENT AS EMPLOYER*, 378-82 (1948).

question is under the civil service law. Admission thereto and retention therein must be in accordance with the civil services rules, and also, I may add, in accordance with the principles upon which our Government was established and is now carried on. There is not the slightest objection to the members of the force belonging to a labor union; indeed, I should rather favor them as belonging. But there must be no compulsion of any kind brought to bear upon them to force them to belong, and the Government, through its agents must act with absolutely even-handed justice toward all its employees, just as it does toward all citizens.²⁸

The Lloyd-La Follette Act of 1912²⁹ was the first major statute to protect the collective rights of public workers. It overturned executive orders issued by President Roosevelt and his successor William Howard Taft prohibiting federal workers, individually or collectively, from petitioning Congress concerning their salaries and benefits and it protected the right of postal workers to join unions.³⁰

The period of the First World War saw a partial decline in open shop advocacy.³¹ The primary source for the decline was Wilsonian government policies that emphasized industrial democracy and provided certain protections that helped enable workers to organize and engage in collective bargaining.³² The war-related policies increased the strength and militancy of labor at the end of the war.³³ The scope of that militancy is revealed in three major strikes in 1919: the Great Steel Strike, the Seattle general strike, and the Boston police strike.³⁴

In the 1920's, the National Association of Manufacturers began a

28. Letter from President Theodore Roosevelt to George B. Cortelyou, (July 13, 1903), Theodore Roosevelt Papers. Library of Congress Manuscript Division, <https://www.theodoreroosevelt-center.org/Research/Digital-Library/Record?libID=o185339>.

29. Lloyd-La Follette Act, 5 U.S.C. § 7211 (2012).

30. William A. Herbert, *The Chill of a Wintry Light: Borough of Duryea v. Guarnieri and the Right to Petition in Public Employment*, 43 U. TOL. L. REV. 583, 592-94 (2012).

31. GALL, *supra* note 17, at 4; Wakstein, *supra* note 18, at 461.

32. GALL, *supra* note 17, at 4 ("The federal government's industrial relations regulations during World War I, fostered by the need for uninterrupted industrial production, led in short order to a quasi-collective bargaining system in many segments of the economy formerly operating on an open shop basis."). See also JOSEPH A. MCCARTIN, *LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921*, at 14-18 (1997).

33. Wakstein, *supra* note 18, at 461-462.

34. SPERO, *supra* note 27, at 251; Wakstein, *supra* note 18, at 462, 465-66.

coordinated campaign in support of the open shop.³⁵ The employer organization played a central role in disseminating open shop advocacy materials nationwide.³⁶

The now outlawed closed shop provides the strongest form of union security.³⁷ In a union shop, an employee is obligated to join the union within a fixed time period after being hired and continue that membership as a condition of employment.³⁸ Under a maintenance of membership provision, an employee is not obligated to become a union member.³⁹ However, if the employee elects to join the union he or she must remain a member during the duration of the contract.⁴⁰

Efforts to ban or substantially restrict union security by open shop proponents on the state level pre-date the enactment of the Taft-Hartley Act in 1947, which among other things granted states the power to modify federal labor policy concerning union security.⁴¹ As Elizabeth Tandy Shermer has noted “[t]he earliest right-to-work referenda were in the South and Southwest.”⁴² Promoters of the open shop were business leaders in such industries as agriculture, mining, tourism, and gambling.⁴³

State constitutional “right to work” amendments were approved in Arkansas and Florida in 1944.⁴⁴ In 1946, similar amendments were approved in Arizona and Nebraska.⁴⁵ A number of states including Virginia, Tennessee, North Carolina, Georgia and Iowa had statutory “right to work” mandates at the time Taft-Hartley was enacted.⁴⁶ Laws in Colorado and Wisconsin mandated a favorable vote of 75% of a bargaining

35. GALL, *supra* note 17, at 5.

36. IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933*, at 156 (1969).

37. GALL, *supra* note 17, at 10 n.3.

38. *Id.*; Charles E. Hopfl, *The Agency Shop Question*, 49 CORNELL L. Q. 478, 478 n. 2.

39. Jay W. Waks, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547, 547, n.2 (1970).

40. *Id.*

41. GALL, *supra* note 17, at 13; Labor Management Relations Act of 1947, 29 U.S.C. §157 (1947).

42. ELIZABETH TANDY SHERMER, “IS FREEDOM OF THE INDIVIDUAL UN-AMERICAN?” RIGHT-TO-WORK CAMPAIGNS AND ANTI-UNION CONSERVATISM, 1943-1958 at 115 in *THE RIGHT AND LABOR IN AMERICA: POLITICS, IDEOLOGY, AND IMAGINATION* (Nelson Lichtenstein and Elizabeth Tandy Shermer, Eds.) (2012).

43. *Id.*

44. GALL, *supra* note 17, at 19-20.

45. *Id.* at 20.

46. *Id.* See *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 100 (1963) (“By the time §14(b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices”); NAT’L RIGHT TO WORK COMM., *STATE RIGHT TO WORK TIMELINE*, <https://nrtwc.org/facts-issues/state-right-to-work-timeline-2016/> (last visited Nov. 2, 2018).

unit concerning a union security clause before it would be enforceable.⁴⁷

Taft-Hartley amended Section 7 of the National Labor Relations Act to grant employees the right to refrain from engaging in union activities or activities for mutual aid and protection "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment."⁴⁸ Section 8(a)(3) prohibited the closed shop but permitted negotiated agreements that imposed a union shop or a maintenance of membership requirement.⁴⁹

In section 14(b) of Taft-Hartley, Congress eliminated federal preemption over state "right to work" laws by providing that the federal labor relations statute shall not "be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."⁵⁰ It took many years before the Supreme Court resolved the questions of whether a negotiated agency fee provision was a lawful form of union security under Taft-Hartley, and subject to Section 14(b) and state "right to work" laws.⁵¹

By the 1950s, private sector union leaders understood that:

[w]ith constant turnover, unions might experience a rising proportion of non-members at the workplace and, the election statistics seemed to suggest, some unions could lose up to 15 percent of their membership while still having to represent those workers in collective bargaining and grievance handling. Even worse, the subsequent dues decline would drain resources from other valued programs.⁵²

47. Memorandum on State Statutes Pertaining to Wage Assignments, Check-Off of Union Dues, and Union Security, in THE TERMINATION REPORT OF THE NAT'L WAR LABOR BOARD: INDUSTRIAL DISPUTES AND WAGE STABILIZATION IN WARTIME, 450 (May 17, 1944).

48. 29 U.S.C. §157 (1947).

49. 29 U.S.C. §158(a)(3).

50. 29 U.S.C. §158; GALL, *supra* note 17, at 60.

51. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963) (concluding that an agency shop proposal sought to condition "employment upon the practical equivalent of union 'membership,' as Congress used that term in the provision to §8(a)(3)" of the Taft-Hartley Act); *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 97-98 (1963) (holding that a negotiated agency fee provision was subject to §14(b) of Taft-Hartley, and Florida's right to work law).

52. GALL, *supra* note 17, at 60.

United Auto Workers (“UAW”) President Walter Reuther warned against the “tragic tactical mistake” of fighting “right to work” laws “on a purely negative defensive basis.”⁵³ He urged, instead, that the fight be on a “positive basis in which we put all these issues in their proper relationship[,] one to the other[,] and then equate them with the forces pushing the ‘right to work’ laws.”⁵⁴

B. Neither Open Nor Closed: The Agency Fee Compromise

The agency shop was originally developed in private sector negotiations in the 1940’s, and it is one of the weakest forms of union security.⁵⁵ In an agency shop, a non-member employee is obligated to pay a fair share toward the costs of collective negotiations and contract administration.⁵⁶ It is well-recognized that the duties associated with collective union representation “entails the expenditure of considerable funds.”⁵⁷

The primary rationale for the agency shop stems from the legal structure of collective bargaining in the United States. Virtually all collective bargaining statutes mandate a certified or recognized union to be the exclusive representative of all employees in a bargaining unit. Adoption of this model by Congress and the States was based on a determination that it is necessary for effective collective bargaining. Under the exclusive representation model, a union can face liability and litigation costs when a non-member asserts that the union breached its duty of fair representation by acting arbitrarily or discriminatorily.⁵⁸

Voluntary recognition of public sector unions for purposes of collective bargaining, however, existed before the enactment of state and local public sector collective bargaining laws.⁵⁹ A 1955 study by the New York

53. *Id.* at 105.

54. *Id.*

55. Hopfl, *supra* note 38, at 478. Arguably, dues deduction checkoff is the weakest form of union security.

56. *Id.*

57. *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 760 (1961); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 520 (1991).

58. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255-256 (1944) (“The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation.”). *See also Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (holding that a union violates its duty of fair representation by discriminating against bargaining unit members based on race).

59. *See CITY OF N.Y., DEP’T OF LABOR, EXTENT OF RECOGNITION AND THE BARGAINING UNIT IN PUBLIC EMPLOYMENT 8-9* (1960) (citing twenty-six public employer survey responses stating that they had recognized a union as the exclusive representative for all employees in bargaining units.).

City Department of Labor found that the exclusive representation model of recognition was the most common with certain public employers limiting recognition to members-only unions.⁶⁰ The study cited the University of Illinois as having “[o]ne of the most complete programs,” dating back to the 1940s, for recognizing unions to represent university non-academic employees.⁶¹

In the period before the enactment of public sector collective bargaining laws, union security was the subject of negotiations in contracts for government workers.⁶² The New York City Department of Labor study found that ten out of forty-two public employers with recognized unions nationwide had negotiated a union shop or a maintenance of membership provision in their agreements.⁶³ By 1962, the American Federation of State, County, and Municipal Employees (“AFSCME”) had negotiated dozens of collective bargaining agreements that included union security provisions.⁶⁴ At the same time, a top assistant to the AFSCME President insisted that “[s]o-called ‘right-to-work’ legislation, fought

See also Herbert W. Cornell, *Collective Bargaining By Public Employee Groups*, 107 U. PA. L. REV. 43, 43 (1958) (citing 122 bilateral collectively negotiated agreements in the public sector); William A. Herbert, *The History Books Tell It? Collective Bargaining in Higher Education in the 1940s*, 9 J. OF COLLECTIVE BARGAINING IN THE ACAD., 1 (2017) (referencing public sector collective bargaining agreements in the 1940s with the Tennessee Valley Authority, the University of Akron, municipalities and school districts).

60. CITY OF N.Y., DEP’T OF LABOR, *supra* note 59, at 7-10, 12-14 (Among the larger public employers cited in the study with members only bargaining units were Philadelphia, Louisville, and the transit systems in Boston, Cleveland and Seattle.). In devising New York City’s original system of collective bargaining, the New York City Department of Labor established a compromise between exclusive and plural representational models. Under that compromise, the certified union functioned as the exclusive representative for purposes of collective bargaining and grievance administration. However, minority unions representing individuals in bargaining units had an opportunity to present their own views on issues to municipal officials. *See* CITY OF N.Y., DEP’T OF LABOR, REPORT ON A PROGRAM OF LABOR RELATIONS FOR NEW YORK CITY EMPLOYEES, 84-85, 94 (June 1957).

61. CITY OF N.Y. DEP’T OF LABOR, *supra* note 59, at 11; *see also* William A. Herbert, *The History Books Tell It? Collective Bargaining in Higher Education in the 1940s*, *supra*, note 59 (describing the development of the University of Illinois program and other early examples of voluntary public sector collective bargaining).

62. Richard B. Freeman, *Unionism Comes to the Public Sector*, 24 J. OF ECON. LITERATURE 41, 41 (1986).

63. CITY OF N.Y. DEP’T OF LABOR, *supra* note 59, at 17-18 (The study identified the following public employers with negotiated union security provisions: Chicago Transit Authority; Kenton County, Kentucky; Dover, New Hampshire; Kewanee, Illinois; Berlin, New Hampshire; Cloquette, Minnesota; Nashua, New Hampshire; Aberdeen School District 5, Washington; East St. Louis, Illinois; and Woonsocket, Rhode Island.).

64. LEO KRAMER, LABOR’S PARADOX: THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO 45-46 (1962) (stating that AFSCME had fifty-two agreements with a union shop, thirty with a “modified union shop,” forty-five with a maintenance of membership provision, six with a modified preferential form of maintenance of membership, and two with a preferential hiring provision).

bitterly by other unions, has at times proved beneficial to the AFSCME. . . and AFSCME remains a movement which employees can enter and leave at will.”⁶⁵

The massive growth of public sector unionization followed enactment of public sector collective bargaining laws and regulations beginning in the late 1950s. In New York,⁶⁶ Michigan,⁶⁷ and other states,⁶⁸ the right to unionize and engage in collective bargaining was extended to public sector employees. Those laws granted the related rights to freely associate over workplace issues, and to participate in collective bargaining over terms and conditions of employment.⁶⁹

Overall union density in government employment quadrupled nationwide following enactment of those laws.⁷⁰ This surge in unionization has been analogized to the rise of the Congress of Industrial Organizations in the 1930s.⁷¹ The rapid rise of public sector unionization took place under many state and local statutes that did not recognize union security as a statutory right or a subject of negotiations.⁷²

65. *Id.* at 2.

66. New York Public Employees' Fair Employment Act, ch. 392, 1967 N.Y. SESS. LAWS 396 (McKinney). Public sector collective bargaining in New York City began in the late 1950s pursuant to an executive order issued by Mayor Robert F. Wagner. *See* Exec. Order No. 49 (Mar. 31, 1958), reprinted in *Labor Relations Program for Employees of the City of New York*, 12 INDUS. & LAB. REL. REV. 371, 618–25 (1959).

67. Michigan Public Employment Relations Act, MICH. COMP. LAWS § 423.201 (2012).

68. *E.g.*, New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. § 34:13a-2 (West 2018); Pennsylvania Public Employee Relations Act, 43 PA. CONS. STAT. § 1101.101 (1970); Minnesota Public Employment Labor Relations Act, MINN. STAT. § 179.61 (1971).

69. N.J. STAT. ANN. § 34:13a-2 (West 2018); 43 PA. CONS. STAT. § 1101.101 (1970); MINN. STAT. § 179.61 (1971).

70. Freeman, *supra* note 62, at 44–49.

71. Joseph A. McCartin, “A Wagner Act for Public Employees”: Labor’s Deferred Dream and the Rise of Conservatism, 1970–1976, 98 J. OF AM. HIST. 123, 123 (2008).

72. *See* Foltz v. City of Dayton, 272 N.E.2d 169, 173 (Ohio Ct. App. 1970) (holding that a municipality did not have the legal authority to agree to a collective bargaining provision requiring it to dismiss an employee for failing to pay membership dues or a service charge.); *Farrigan v. Helsby*, 68 Misc.2d 952 (N.Y. Sup. Ct., Alb. Co., 1971), *aff’d*, 42 A.D. 2d 265, 267, (N.Y. App. Div. 3d Dep’t, 1973) (affirming an agency determination that a proposal for an agency shop was a prohibited subject of negotiations because public employees had the right to refrain from participating in union activities under state collective bargaining law); *N.J. Tpk. Emps’ Union, Local 194 v. N.J. Tpk. Auth.*, 303 A.2d 599, 601 (N.J. Super Ct. App. Div. 1973) *aff’d* 319 A.2d 224, 225 (1974) (finding that a negotiated agency fee provision violated the statutory right of public employees to refrain from engaging in union activity); *PLRB v. Zelem*, 329 A.2d 477, 477 (Pa. 1974) (sustaining a challenge by a university employee to a negotiated agency fee provision because it was not authorized under the state collective bargaining law); *State Emps’ Ass’n of N.H. v. Mills*, 344 A.2d 6, 7 (1975) (concluding that that agency fee was unlawful based on the inclusion of a “right to work” provision in the state statute protecting the right of public employees from refraining from forming, joining or assisting a union); *City of Hayward v. United Public Emps’*, Local 390, 126 Ca. Rptr. 710, 714 (1976) (holding that an agreement requiring non-members to pay an agency fee equivalent to membership dues violated the

A May 1973 study of union security in the public sector found only two states, Hawaii and Rhode Island, mandated an agency shop and seven other laws permitted the subject to be negotiated into an agreement.⁷³ The 1973 study also identified two collective bargaining laws that expressly authorized a union shop and two others allowed the negotiations of a maintenance of membership provision.⁷⁴ In contrast, the study found that most public sector bargaining laws and regulations permitted dues deduction checkoff.⁷⁵

Indeed, most early state and local laws replicated the policy under President John F. Kennedy's Executive Order 11491, which stated that negotiated agreements for federal employees shall not "require an employee to become or to remain a member of a labor organization, or to pay

right of employees to not participate in the union as well as the prohibition against discrimination against public employees for exercising their statutory rights; *Churchill v. S.A.D. No. 49 Teachers Ass'n*, 380 A.2d 186, 186, 191-93 (Me. 1977) (concluding that a mandatory agency fee constituted coercion in favor of membership or participation in a union in violation of the Maine Municipal Public Employees Labor Relations Law).

73. See JOYCE M. NAJITA & DENNIS T. OGAWA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: UNION SECURITY, 2-4, 8-22 (setting forth the small number of state and local laws that required an agency shop or permitted the negotiation of an agency fee and a list of states and localities that required or permitted an agency fee shop and other forms of union security.). Hawaii enacted Act 171, § 4 in 1970, mandating an agency shop without the need for negotiations. The provision stated:

The employer shall, upon receiving from an exclusive representative a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement and computed on a pro rata basis among all employees within its appropriate bargaining unit, deduct from the payroll of every employee in the appropriate bargaining unit the amount of service fees and remit the amount to the exclusive representative. A deduction permitted by this section, as determined by the board to be reasonable, shall extend to any employee organization chosen as the exclusive representative of an appropriate bargaining unit. If an employee organization is no longer the exclusive representative of the appropriate bargaining unit, the deduction shall terminate.

Joyce M. Najita, *The Mandatory Agency Shop in Hawaii's Public Sector*, 27 INDUS. LAB REL. REV. 432; 432-35. In 1973, Rhode Island amended its law concerning state government employees to require nonmembers to pay a fee concerning negotiations and the administration of contracts. The case was litigated and the court upheld the legality of an agency fee under that state's public sector statute; *See Town of North Kingstown v. North Kingstown Teachers Ass'n*, 297 A.2d 342, 345 (R.I., 1972) (concluding that the applicable statute was ambiguous concerning an agency shop and upholding an interest arbitration award mandating an agency fee provision "which neither requires a nonjoiner to share in expenditures or benefits he is not entitled to receive, nor exacts from him more than a proportionate share of the costs of securing the benefits conferred upon all members of the bargaining unit.").

74. See NAJITA & OGAWA, *supra* note 73 at 2.

75. *Id.* at 1-5.

money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.”⁷⁶

Many judicial and administrative rulings around the country concluded that the agency shop violated state statutory language granting public employees the right to refrain from joining or participating in union activity. For example, New Jersey courts ruled that a negotiated agency shop fee violated the right of public employees to refrain from engaging in union activity.⁷⁷ The New Jersey litigation stemmed from a 1970 collective bargaining agreement wherein the parties agreed to test the legality of an agency shop through the vehicle of a declaratory judgment action.⁷⁸ The legal uncertainty of the agency shop was reflected in the parties’ agreement to test the legality of the provision in court.⁷⁹

As Joseph A. McCartin has pointed out the prohibition against the agency shop “meant that public sector unions, like their private sector counterparts in ‘right to work’ states, faced the problem of ‘free riders’.”⁸⁰

The lack of union security protections under most of the originally enacted public sector statutes does not appear to have diminished the organizing by public workers that led to the massive unionization growth.⁸¹ The growth was the direct result of concerted organizing and militancy by public employees and their unions.⁸² In 1972, a negotiated agency fee provision in Michigan was found to be prohibited under that state’s Public Employment Relations Act.⁸³ The subsequent 1973 Michigan statutory amendment to permit negotiated agency fee procedures laid the groundwork for the decision in *Abood v. Detroit Board of Education*⁸⁴ four years later.⁸⁵

76. Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969). The federal sector experience without the agency shop was cited by Justice Alito in the majority opinion in *Janus*, at 2466.

77. *N.J. Tpk. Emps.’ Union, Local 194 v. N.J. Tpk. Auth.*, 303 A.2d 599, 604 (N.J. Super. Ct. App. Div., 1973) *aff’d* 319 A.2d 224, 225 (1974).

78. *Id.* at 601.

79. *Id.*

80. McCartin, *supra* note 71 at 126-27.

81. *Id.* at 127.

82. *Id.* at 123, 139.

83. *Smigel v. Southgate Cmty. Sch. Dist.*, 202 N.W.2d 305, 307-08 (Mich. 1972).

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

85. *Id.* at 214-15. The 1973 amendment stated:

[N]othing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative

C. A Closer Look: The Agency Shop History in New York

In 1966, the Governor's Committee on Public Employee Relations, appointed by New York Governor Nelson A. Rockefeller, issued a Final Report recommending legislation that would ultimately become the Taylor Law.⁸⁶ The Committee's recommendations included membership dues "check-off upon presentation by individual employees of dues deduction authorization cards."⁸⁷ The Final Report did not recommend other forms of union security such as a union or agency shop although they were discussed by witnesses who testified at the Committee's public hearing on March 4, 1966.

At the hearing, AFSCME District 37 Executive Director Victor Gotbaum referenced the existence of union shops and agency fees in other jurisdictions.⁸⁸ Two labor attorneys urged the Committee to recommend a union shop for New York's public sector to deter strikes and to ensure that unions had enough resources to provide representation.⁸⁹

The Committee's Report, however, recommended "a statutory declaration of public policy be made that public employees have the right to join or refrain from joining employee organizations of their own choosing for purposes of collectively negotiating the terms of their employment."⁹⁰ In the enacted Public Employees' Fair Employment Act, known as the "Taylor Law" after George Taylor, who headed the Committee, the dues deduction and the "refrain from" language were incorporated.⁹¹

Not only did the Taylor Law not provide for agency fees, but in 1970, the New York State Public Employment Relations Board (PERB) found that proposing an agency shop in negotiations was unlawful, "on the ground, [among others,] that an agency shop would infringe upon the right granted to all public employees by the State Legislature in [Taylor Law] § 202 wherein public employees were granted the right to refrain from forming, joining, or participating in any employee organization."⁹² In af-

86. GOVERNOR'S COMMITTEE ON EMPLOYEE RELATIONS, FINAL REPORT, 9 (1966).

87. *Id.* at 32.

88. Testimony of Victor Gotbaum, State of N.Y. Governor's Committee on Public Employee Relations Hearing at 217-18 (March 4, 1966) (on file with Kheel Center for Labor-Management Documentation and Archives, Cornell University Library, David Lawrence Cole Papers, box 14).

89. Testimony of Ernest Fleischman and David A. Simon, State of N.Y. Governor's Committee on Public Employee Relations Hearing at 249-50, 261-63 (March 4, 1966) (on file with Kheel Center for Labor-Management Documentation and Archives, Cornell University Library David Lawrence Cole Papers, box 14).

90. *Id.* at 31 (emphasis added).

91. See New York Public Employees' Fair Employment Act, *supra*, note 66.

92. Monroe-Woodbury Bd. of Education, 3 N.Y. PERB ¶ 3104 (1970).

firming PERB's determination, the Appellate Division, Third Department, explained that an employee "may not be compelled to form, join or participate in the petitioner's association. Therefore, any forced payment of dues or their equivalent would be in violation of the law as constituting, at the very least, participation in an employee organization."⁹³

The effort to permit an agency shop in New York State was initiated by New York's largest public employer, the City of New York.⁹⁴ It was uniquely situated to advocate for the agency shop based on its near decade-long experience with repeated strikes under a collective bargaining program that did not include union security.⁹⁵

Less than a year after the Taylor Law became effective, the New York City Office of the Corporation Counsel issued a memorandum examining a proposed requirement for non-union members in a municipal bargaining unit to pay a representation fee.⁹⁶ The proposed fee would have covered the costs associated with negotiating a contract, administering the agreement, and processing grievances.⁹⁷ The memorandum described the history, policy, and legal issues surrounding the agency shop in the private and public sectors.⁹⁸ It concluded that the agency fee in the public sector would be unlawful under New York law, based on the Taylor Law's right of public employees to refrain from joining or participating in a union, and the lack of union security provisions in the law.⁹⁹ In addition, it referenced another state law that mandated that dues deduction authorizations be revocable at any time.¹⁰⁰

In September 1968, the New York City Office of Labor Relations' General Counsel expressed support for changing the Taylor Law to permit an agency shop.¹⁰¹ At the time, the agency shop was a major bargaining demand of the Unified Federation of Teachers in negotiations aimed at

93. *Farrigan v. Helsby*, 42 A.D.2d 265, 267 (N.Y. App. Div. 3d Dep't).

94. Memorandum from the Office of the Corp. Counsel to the Labor Policy Comm., to the Office of the Mayor at 11-15 (July 9, 1968) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 58, Folder 1094 Labor Policy – Agency Shop 1968-1969).

95. See, Exec. Order No. 49, *supra*, note 66.

96. Memorandum from Office of the Corporation Counsel to Labor Policy Committee, *supra* at note 94.

97. *Id.* at 6.

98. *Id.* at 1-6, 11-12.

99. *Id.* at 11, 13.

100. *Id.* at 15.

101. Memorandum from Philip J. Ruffo to Herbert J. Haber on proposed changes to the Taylor Law at 4-5 (Sept. 23, 1968) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 59, Folder 1098 Labor Policy – Taylor Law 1968-1969).

ending the 1968 Ocean Hill-Brownsville strike that closed the New York City schools.¹⁰²

The 1969 legislative program of the New York Select Joint Legislative Committee on Public Employee Relations included a proposal to amend the Taylor Law to permit the negotiability of an agency fee for state and local government employees in an amount "attributable to the administration of representational rights."¹⁰³ The report reasoned that an agency shop would be an effective strike deterrent because it would be revocable, like the dues deduction checkoff, when a union engaged in prohibited strike activities.¹⁰⁴

Later that year, New York City Mayor John V. Lindsay submitted a report to the New York State Legislature setting forth New York City's support for legislation to permit the negotiability of the agency shop.¹⁰⁵ In his report, Mayor Lindsay stated: "Harmonious labor relations requires union security. We believe that the agency shop, a recognized form of union security, will promote labor harmony and responsibility. The City therefore supports legislation which will enable it to negotiate an agency shop."¹⁰⁶

PERB responded with comments to the State Legislature expressing general concurrence with Mayor Lindsay's agency shop proposal.¹⁰⁷ In its comments, however, PERB added that:

[I]t would be an error to enact special legislation permitting the negotiation of an agency shop for organizations representing employees of New York City only. Authorization for negotiation of an agency shop should be granted for all employee organizations which have been recognized as the exclusive negotiating unit anywhere in

102. Leonard Buder, *Most City Schools Shut; Shanker Defying a Writ, Refuses to End Walkout*, N.Y. TIMES, Sept. 10, 1968, at 36.

103. SELECT J. LEGIS. COMM. ON PUB. EMP. RELATIONS, 1969 REP at 74 (N.Y. 1969), <http://www.perb.ny.gov/wp-content/uploads/2018/04/1969TLR.pdf>.

104. *Id.* at 26-27.

105. Mayor John V. Lindsay, Report Designed to Bring New York City's Labor Relations Practice into Substantial Equivalence with the Public Employees' Fair Employment Act 3 (1969) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 59, Folder 1097 Labor Policy-Relations, Taylor Law 1969).

106. *Id.* at 9-10.

107. Robert D. Helsby et al., Comments of PERB Regarding the Employee Relations Report of the Mayor of the City of New York at 9-10 (1969) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 59, Folder 1098 Labor Policy-Relations-Taylor Law).

the state, or for none at all.¹⁰⁸

Without enabling legislation, the City of New York committed to enter into an agreement with an AFSCME local, representing 12,000 hospital workers and requiring non-union members to pay an agency fee.¹⁰⁹ In announcing the agreement, Mayor Lindsay stated that he would support proposed legislation to permit an agency fee for bargaining units subject to the New York City Collective Bargaining Law ("NYCCBL").¹¹⁰ In explaining his support for an agency shop, Lindsay stated "[b]ut if we are to have peaceful progress in the field of labor relations, penalties [for striking] must be matched by affirmative steps, and approval of the concept of the agency shop is clearly such an affirmative step."¹¹¹

On May 29, 1969, the City of New York signed a written contract with AFSCME, which represented a unit of municipal clerical employees, that included a provision stating the "parties agree to an agency shop to the extent permitted by applicable law, the provisions to be contained in a supplemental agreement. . ."¹¹² A supplemental agreement was reached on August 3, 1969, that provided that all non-member employees in the at-issue bargaining unit as a condition of employment shall pay a fee to the union that is equal to monthly dues paid by union members.¹¹³ However, New York City reneged on the supplemental agreement after the Corporation Counsel refused to approve it on the grounds that it conflicted with state law requiring a written authorization for the deduction of a fee.¹¹⁴

A 1972 New York Joint Legislative Committee study again examined amending the Taylor Law to permit the negotiability of an agency shop provision.¹¹⁵ The report found wide recognition among New York

108. *Id.* at 10.

109. Seth S. King, *Agency Shop Won By Municipal Union*, N.Y. TIMES, Mar. 1, 1969, at 1.

110. *Id.* at 19; see also New York City Collective Bargaining Law, 12 N.Y.C. ADMIN CODE §§ 12-301 to 12-316 (N.Y. Legal Pub. Corp. 1995).

111. King, *supra* note 109 at 19.

112. Zurlo v. Haber, Exhibit A Contract between City of New York and District Council 37, AFSCME, Article XXIII (May 29, 1969) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 59, Folder 1094 Labor Policy – Agency Shop 1968-1969).

113. Zurlo v. Haber, Exhibit B Supplemental Agreement between City of New York and District Council 37, AFSCME (Aug. 3, 1969) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 59, Folder 1094 Labor Policy – Agency Shop 1968-1969).

114. Zurlo v. Haber, Exhibit C Letter from Herbert Haber to Victor Gotbaum (Aug. 20, 1969) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 59, Folder 1094 Labor Policy – Agency Shop 1968-1969).

115. THE J. LEGIS. COMM. ON THE TAYLOR L., PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

employers and unions that an agency shop strengthens and stabilizes the incumbent union.¹¹⁶ The Joint Legislative Committee stated that certain "public employers are more or less willingly to go along with the agency shop," while others opposed it.¹¹⁷ Surprisingly, the report found a lack of unanimity among unions concerning an agency shop.¹¹⁸ A minority believed that an agency shop "would remove the pressure on an organization to press for goals with universal appeal to the employees in the unit," and "in the long run the support of the organization by the membership may decline or be less dependable and that such decline in support is likely to mean that the employer has a less responsible organization with which to negotiate."¹¹⁹

In the same year of the legislative study, the New York City Collective Bargaining Law was amended to permit negotiations over the agency shop between that municipality and the unions representing its workers.¹²⁰ Due to continuing legal uncertainties about the agency shop outside of New York City, New York's two university systems, SUNY and CUNY, negotiated reopener clauses in their faculty contracts in case the Taylor Law was amended to permit an agency shop.¹²¹

The Taylor Law, however, was not amended to include the agency shop until one month after the Supreme Court issued its decision in *Abood*¹²² upholding the constitutionality of a negotiated agency fee requirement for non-members. The agency shop fee bill was introduced in the New York State Legislature on June 29, 1977, by New York Republican State Senator John E. Flynn.¹²³ The bill was supported by various unions and the City of New York but opposed by other public employers.¹²⁴ The Taylor Law amendment mandated agency fee deductions to public sector unions representing state employees, and made an agency shop provision a mandatory subject of bargaining for all other public employees.¹²⁵ In 1992, it was again amended to mandate the agency shop in

1971-72 REP., 25, at 36 (1972), <http://www.perb.ny.gov/pdf/1971jlc.pdf>.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 44.

121. RONALD L. JOHNSTONE, *THE SCOPE OF FACULTY COLLECTIVE BARGAINING: AN ANALYSIS OF FACULTY UNION AGREEMENTS AT FOUR-YEAR INSTITUTIONS OF HIGHER EDUCATION*, at 141 (1981).

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

123. Legislative Bill Jacket to 1977 N.Y. Ch. 677, at 1-2, 38-66 (N.Y. 1977) (available at the New York State Archives, Box 64, Rolls 47-48).

124. *Id.*

125. 1977 N.Y. Sess. Laws. Ch. 677 (McKinney).

all public sector collective bargaining relationships.¹²⁶ The agency shop fee amendments in New York had the intended effect of improving public sector labor relations as demonstrated by the decline of strikes and threatened strikes.

D. The Court's Decisions Finding Agency Fees to be Constitutional

The Supreme Court's initial consideration of the agency shop, eventually extended to the public sector in *Abood*, arose in the private sector under the Railway Labor Act ("RLA").¹²⁷ In *Railway Employees Department v. Hanson*, the Court found constitutional an agency shop fee agreement entered into pursuant to the RLA against a First Amendment challenge brought by employees who did not wish to join the union.¹²⁸ In rejecting the claim that such fees violated the First Amendment as well as the Due Process Clause of the Fourteenth Amendment, the Court, in a unanimous opinion by Justice William O. Douglas, held that:

On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. . . . We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.¹²⁹

Justice Douglas's authorship of this opinion, as well as Justice Hugo

126. 1992 N.Y. Sess. Laws Ch. 606 (McKinney).

127. See *Abood*, 431 U.S. at 217-18 n.12.

128. *Railway Emps.' Dep't v. Hanson*, 351 U.S. 225, 238 (1956).

129. *Id.* at 238.

L. Black's silent concurrence in it, is salient, in that Douglas and Black were the two self-described First Amendment absolutists in the Court's history, and both consistently advocated for broader protection of freedom of speech than their colleagues were willing to accept.¹³⁰

In *International Association of Machinists v. Street*, the Court, in an opinion by Justice Brennan, reaffirmed *Hanson*, but engaged in a "saving construction" of the relevant section of the RLA, reading it "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."¹³¹ Accordingly, the Court found that where employees have "made known to their respective unions their objection to the use of their money for the support of political causes," that "the respective unions were without power to use payments thereafter tendered by them for such political causes."¹³²

The Court allowed either of two remedies.¹³³ The first took the form of an injunction, at the dissenters' request, ordering the reduction of the union's political expenditures by the proportion of their agency fees that would be otherwise be used for political purposes to which the dissenter objected.¹³⁴ Alternatively, a "second remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed."¹³⁵ In sum, *Street* upheld *Hanson* to find the agency shop constitutional, but glossed the statute to also require the union, on request by the dissenters, to either not apply the portion of a

130. See generally JOHN F. WIRENIUS, *FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH* (2d ed. 2004) (working out implications for First Amendment jurisprudence of Douglas's absolutist refusal to support censorship, allowing only regulation of "verbal acts"); Lee Dennison, *Absolutism: Unadorned and Without Apology*, 81 GEO. L.J. 351, 362 (1992) (stating that "the members of the Supreme Court who have been the most 'liberal' in their understanding of the First Amendment's liberating possibilities—Justices William Brennan, Hugo Black, and William O. Douglas—have been understood to be 'absolutists,' despite the easily demonstrable fact that every one of them put substantial qualifiers into his interpretation of the First Amendment," while only giving an example regarding Brennan, who never claimed to be an absolutist); Justice Black's acceptance of a thin distinction between "speech" and "conduct" in *Cohen v. California*, 403 U.S. 15, 18 (1971) tends to support Dennison in deeming him a non-absolutist, but was an outlier in Black's jurisprudence. By contrast, when the majority essentially adopted Douglas's "verbal act" concept as the only justification for regulation of speech that did not fall within one of the categorical exclusions from the First Amendment, Douglas did not join the opinion, deeming it too narrow. *Brandenburg v. Ohio*, 395 U.S. 444, 450, 454-55 (1969) (Douglas, J., concurring).

131. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961).

132. *Id.* at 771.

133. *Id.* at 774.

134. *Id.* at 774-75.

135. *Id.* at 775. Interestingly, Douglas and Black split on this case, with Douglas concurring "*dubitante*," as he wrote, because of his concerns with the remedy and Black dissenting entirely, on the ground that the remedies were too narrow. *Id.* at 779.

dissenter's agency fee to political purposes, or to, upon request, refund it.

The rule in these cases was extended to public sector employees in 1977, in *Abood*.¹³⁶ The Court in *Abood* reaffirmed the constitutional findings in *Hanson* and *Street* that an agency shop did not violate the First Amendment, and, further, applied the same constitutional calculus to public sector employees, "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment."¹³⁷ In so doing, the Court acknowledged that "[t]o be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."¹³⁸ However, it found that "[t]he confusion and conflict that could arise if rival . . . unions, holding quite different views . . . , each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid."¹³⁹ The Court further found that the "desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller."¹⁴⁰

The Court rejected claims that the private sector employment at issue under the RLA was constitutionally different from public sector employees, and, significantly, expressly repudiated the notion that "in any event collective bargaining in the public sector is inherently 'political' and thus requires a different result under the First and Fourteenth Amendments."¹⁴¹

Likewise, the Court found that the First Amendment required the balance pitched by the Court on statutory grounds in *Street*: that members who dissented from expenditures not directly related to collective bargaining or provision of services could not be charged for such expenses, upon notification of their objection to their union. The *Abood* Court adopted a remedy laid out in yet another case under the RLA: "(1) the refund of a portion of the exacted funds in the proportion that union political expend-

136. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Notably, petitioner's attorney in *Abood* was Sylvester Petro, an ardent libertarian opponent of public and private sector bargaining laws, viewing them as leading to the impairment of individual rights. See Joseph A. McCartin, *The Radical Roots of Janus*, THE AMERICAN PROSPECT, (Feb. 27, 2018), <http://prospect.org/article/radical-roots-janus>.

137. *Abood*, 431 U.S. at 225-26.

138. *Id.* at 222.

139. *Id.* at 224.

140. *Id.*

141. *Id.* at 227, 229-30.

itures bear to total union expenditures, and (2) the reduction of future exactions by the same proportion."¹⁴² In particular, the Court urged the creation of a voluntary refund process by the union, as the legal process was ill-suited for remediating such disputes.¹⁴³

The constitutional minimum requirements of such procedures as applied to public sector unions was drawn into question in *Chicago Teachers Union v. Hudson*.¹⁴⁴ In *Hudson*, the Court found the fact that nonunion employees' rights are protected by the First Amendment requires that the union's procedures be carefully tailored to minimize an agency shop's infringement on those rights.¹⁴⁵ Additionally, the Court found, the nonunion employee "must have a fair opportunity to identify the impact [on those rights] and to assert a meritorious First Amendment claim."¹⁴⁶ The Court struck down the specific procedure before it on three grounds: First, the procedure failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, and then subsequently refunded, which it deemed inimical to the dissenter's rights.¹⁴⁷ Second, it failed to provide nonmembers with adequate "information about the basis for the proportionate share" from which the advance deduction of dues was calculated.¹⁴⁸ Finally, the Court found that the procedure "failed to provide for a reasonably prompt decision by an impartial decisionmaker."¹⁴⁹ The Court concluded that "[t]he nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner."¹⁵⁰

Finally, in terms of what expenses are chargeable, the Court provided some limited guidance. In *Lehnert v. Ferris Faculty Association*, the Court held that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees'

142. *Abood*, 431 U.S. at 240 (citing *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)).

143. *Abood*, 431 U.S. at 240.

144. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 (1986). The *Hudson* Court leaned heavily on yet another decision under the RLA, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

145. *Hudson*, 475 U.S. at 303.

146. *Id.*

147. *Id.* at 304-05.

148. *Id.* at 306.

149. *Id.* at 307.

150. *Id.*

bargaining unit.”¹⁵¹ The *Lehnert* Court conditioned this finding on a requirement that there be “some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.”¹⁵² Notably, in his concurrence in *Lehnert*, Justice Scalia addressed the free-rider problem, finding that it raised a “compelling state interest”; as he phrased it:

Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.¹⁵³

In *Locke v. Karass*,¹⁵⁴ the Court resolved the issue on which the *Lehnert* Court splintered, and thus left undecided—whether that payment of expenses for national litigation was properly chargeable. The *Locke* Court determined that:

[C]onsistent with the Court’s precedent, costs of that litigation are chargeable provided the litigation meets the relevant standards for charging other national expenditures that the *Lehnert* majority enunciated. Under those standards, a local union may charge a nonmember an appropriate share of its contribution to a national’s litigation expenses if (1) the subject matter of the national litigation bears an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local’s payment to the national affiliate is for “services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.”¹⁵⁵

Chief Justice Roberts and Justice Scalia joined in the concurring opinion of Justice Alito, who agreed with the Court’s opinion on the merits, but “note[d] that our decision, as I understand it, does not reach the

151. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991).

152. *Id.*

153. *Id.* at 556 (Scalia, J., concurring).

154. *Locke v. Karass*, 555 U.S. 207, 208 (2009).

155. *Id.* at 217-18.

question of what ‘reciprocity’ means,” as both parties had assumed reciprocity had been established.¹⁵⁶ The concurrence suggested that in a case where the issue was disputed, the First Amendment might require “a national union [to] bear the burden of proving that any expenditures charged to nonmembers of a local are made pursuant to a bona fide pooling arrangement.”¹⁵⁷ Neither the majority or concurrence questioned the holding in *Abood*. Thus, as recently as 2009, a unanimous Court, far from seeking to undermine the *Abood* rule, expanded the scope of what expenses are chargeable to nonmember dissentients under it.

E. Intimations of Mortality: The Erosion of Precedent

After over three decades, the stability of the basic regime of *Abood* seemed established; while there was room for tinkering about at the edges—what expenses would be deemed chargeable, what procedures would be deemed adequate—the basic parameters seemed to be settled law. Indeed, the Roberts Court’s 2009 resolution of the chargeability of national litigation, upon a proper showing of reciprocity, evinced a greater consensus in applying *Abood* than had existed in 1991, where the Court fragmented in *Lehnert*. The appearance of consensus and stability, however, was quickly shattered.

In 2012, the Court decided *Knox v. SEIU, Local 1000*, in which it found that a union’s “special assessment” to create a fund for “a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California” did not comply with the procedural requirements of *Hudson*.¹⁵⁸ This ruling, it is fair to say, was relatively uncontroversial; the procedure required nonmembers to pay the same portion of the special assessment, expressly dedicated to political purposes, as of annual dues, and did not provide a fresh *Hudson* notice stating how any portion of the special assessment was chargeable.¹⁵⁹ The Court went further, stating that the union was obliged to couch that fresh *Hudson* notice as requiring the nonmember to affirmatively agree to pay the assessment—that is, to “opt in” to the assessment—rather than, as in the context of annual dues, to “opt out” of nonchargeable expenses.¹⁶⁰ The Court stated that “there is no way to justify the addi-

156. *Id.* at 221 (Alito, J., concurring).

157. *Id.* at 222.

158. *Knox v. Serv. Emps. Int’l Union, Local 100*, 567 U.S. 298, 304, 322 (2012).

159. *Id.* at 318.

160. *Id.* at 317.

tional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires.”¹⁶¹

Beyond the new “opt-in” requirement of *Knox*, the Court’s opinion, written by Justice Alito, included several pieces of dicta designed to undermine *Abood* and its progeny, and implicitly invite First Amendment challenges to the agency shop.¹⁶² Thus, the Court wrote that “the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights,” adding that “[o]ur cases to date have tolerated this ‘impingement,’ and we do not revisit today whether the Court’s former cases have given adequate recognition to the critical First Amendment rights at stake.”¹⁶³

The *Knox* Court further undermined *Abood* by quoting an earlier case to the effect that “[t]he primary purpose of permitting unions to collect fees from nonmembers is to prevent nonmembers from free-riding on the union’s efforts, sharing the employment benefits obtained by the union’s collective bargaining without sharing the costs incurred.”¹⁶⁴ The Court then pivoted, flatly declaring without attribution that “[s]uch free-rider arguments, however, are generally insufficient to overcome First Amendment objections.”¹⁶⁵ The Court found that the acceptance of the free-rider interest “represents something of an anomaly—one that we have found to be justified by the interest in furthering labor peace.”¹⁶⁶

Finally, the Court stated that “requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions.”¹⁶⁷ The Court suggested that “acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.”¹⁶⁸

The Court included further dicta undermining *Abood* in *Harris v. Quinn*, which held unconstitutional an agency fee statute applicable to

161. *Id.*

162. *Id.* at 313.

163. *Id.* at 310-11 (quoting *Ellis v. Railway Clerks*, 466 U.S., 435, 455 (1984)).

164. *Id.* at 311 (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007)) (holding constitutional a state’s requirement that a union obtain a nonmember’s consent to use nonmember agency fees for non-chargeable purposes).

165. *Id.*

166. *Id.* (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986)) (“[T]he government interest in labor peace is strong enough to support an ‘agency shop’”).

167. *Id.* at 312.

168. *Id.*

non-member Medicaid-funded home care personal assistants, which it described as “quasi-public employees,” who were predominantly employed, the Court found, by the home care recipients, and not the State.¹⁶⁹ The Court’s opinion contained a detailed critique of *Hanson*, *Street*, and *Abood*,¹⁷⁰ which, at seven pages, was only slightly shorter than the entire discussion of the merits of the case before the Court. In the subsequent ten pages, the Court distinguished *Abood*, which it found limited “to full-fledged public employees,”¹⁷¹ found inapplicable to the “quasi-public employees” at issue the balancing test applied to public employees’ free speech claims under *Pickering v. Board of Education*,¹⁷² and found that the application of that framework would not support agency fees in any event. As the Court in *Harris* summarized the rule of *Pickering* and its progeny:

[E]mployee speech is unprotected if it is not on a matter of public concern (or is pursuant to an employee’s job duties), but speech on matters of public concern may be restricted only if “the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the [employee], as a citizen, in commenting upon matters of public concern.”¹⁷³

The Court then rejected the notion that “union speech that is germane to collective bargaining does not address matters of public concern and, as a result, is not protected.”¹⁷⁴ The Court, finding such speech to be a matter of public concern, due to the increased public expenditure entailed in increased employee wages, then moves on to the balancing test.¹⁷⁵ However, in applying the balancing test, it first found that the interest in labor peace was vitiated in the facts before it, because the “State is not like the closed-fisted employer that is bent on minimizing employee wages and benefits and that yields only grudgingly under intense union

169. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014).

170. *Id.* at 2627-34.

171. *Id.* at 2638. Interestingly, the Court did not address whether the State’s role in the creation of the employment relationship, like the RLA’s provision for the agreements at issue in *Hanson* and *Street*, had any bearing on the constitutionality of agency fee as applied to the home care personal assistants at issue in *Harris*. *Id.*

172. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

173. *Harris*, 573 at 2642 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, at 568).

174. *Id.*

175. *See id.* at 2653-54.

pressure.”¹⁷⁶ By contrast, the Court found, “[a]gency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees.”¹⁷⁷ Under such circumstances, based on its discounting of the role played by the union, and the Court’s prior dismissal of the “free rider” problem, the Court declined to find that the *Pickering* balance could, even if applied, tilt in favor of agency fees as applied to these employees.¹⁷⁸

Unsurprisingly, the Court’s less than subtle invitations for a case to overrule *Abood* led to the filing of *Friedrichs v. California Teachers Association*, a constitutional challenge to California’s agency fee statute.¹⁷⁹ After the death of Justice Antonin Scalia, the Ninth Circuit’s decision following *Abood* was “affirmed by an equally divided Court.”¹⁸⁰ The successor challenge, *Janus v. AFSCME*, was decided at the end of the October 2017 Term.

II. JANUS V. AFSCME

A. *The Opinion*

Mark Janus was, prior to his recent retirement, a child care specialist with the Illinois Department of Healthcare and Family Services.¹⁸¹ He didn’t join the union, but was required to pay an agency fee.¹⁸² Illinois’ Governor sued challenging the constitutionality of agency fees.¹⁸³ Janus

176. *Id.* at 2641.

177. *Id.* at 2643.

178. *See id.* at 2641-42.

179. *See Friedrichs v. Cali. Teachers Ass’n*, 136 S. Ct. 1083 (2016).

180. *Id.*

181. *See Mitchell Armentrout, Mark Janus Quits State Job for Conservative Think Tank Gig After Landmark Ruling*, CHICAGO SUN-TIMES (July 20, 2018), <https://chicago.suntimes.com/news/janus-afscme-illinois-policy-institute-job-ruling-fair-share-union-dues/> (supporting his litigation upon his retirement, Janus was hired by the Illinois Policy Institute); *see* Noam Scheiber and Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018) <https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html> (pertaining to background information concerning the Illinois Policy Institute); *see* DAN KAUFMAN, *THE FALL OF WISCONSIN: THE CONSERVATIVE CONQUEST OF A PROGRESSIVE BASTION AND THE FUTURE OF AMERICAN POLITICS* 121 (discussing the Illinois Policy Institute as an affiliate of the American Legislative Exchange Council (“ALEC”), which along with the State Policy Network has been responsible for drafting model state “right to work” laws and similar legislation); JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 346 (2016).

182. ILL. COMP. STAT. 5, 315/6 (2016).

183. Brief for the City of New York as Amicus Curiae in Support of Respondents at 16-17, *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466).

intervened.¹⁸⁴ The Governor's challenge was dismissed for lack of standing, but Janus and two other state employees filed the instant case.¹⁸⁵

The *Janus* Court, in a 5-4 decision, overturned *Abood* as violative of the First Amendment and eliminated agency fees for public sector employees in the United States.¹⁸⁶ The opinion was written by Justice Alito and joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Gorsuch.¹⁸⁷ As a matter of history, the opinion partially effectuates the early 20th Century goal of the National Association of Manufacturers to make the open shop a constitutional mandate.¹⁸⁸

The Court found that compelling a person to subsidize the free speech of private actors raises substantial First Amendment concerns that require more than rational basis scrutiny.¹⁸⁹ However, the Court left for another day whether exacting or strict scrutiny applies in this context.¹⁹⁰ Instead, the majority found that under the purportedly lesser "exacting scrutiny" applied in *Knox* and *Harris*, the agency shop in the public sector is unconstitutional.¹⁹¹

Assuming that labor peace is a compelling state interest, the Court found that it can be achieved with less restrictive means than agency fees given the examples of other states and the federal government, whose unions do not have agency fees and still enjoy labor peace.¹⁹² The Court's decision did not address the inherent differences between federal, state, and local governments, each of whom have distinct labor histories, experiences, and needs. In particular, the Court avoided referencing the extensive collective bargaining history described in the City of New York's amicus brief, which explained how the implementation of the agency shop in New York led to a dramatic decrease in public worker strikes.¹⁹³

The Court also found that "avoiding free riders is not a compelling interest."¹⁹⁴ In doing so, the majority determined that unions will still represent nonmembers.¹⁹⁵ Even though the Court conceded that requiring

184. Armentrout, *supra* note 181.

185. *Janus*, 138 S. Ct. at 2462.

186. *Id.* at 2460.

187. *Id.*

188. See Henry White, *The Issue of the Open and Closed Shop*, THE NORTH AM. REV. Vol. 180, No. 578, Jan. 1905, at 30 (quoting from the Pittsburgh convention of the National Association of Manufacturers).

189. *Janus*, 138 S. Ct. at 2465.

190. *Id.*

191. *Id.* at 2486.

192. *Id.* at 2466.

193. Brief, *supra* note 183 at 15-16.

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

195. *Id.* at 2468.

the representation of employees who do not pay any fees to the union is an added burden, the Court found that the special privileges conferred to the union—including being the exclusive representative, obtaining information about employees, and dues deductions—“greatly outweigh any extra burden imposed by the duty of providing fair representation for non-members.”¹⁹⁶

Next, the Court addressed the new originalist argument that *Abood* was correctly decided because “the First Amendment was not originally understood to provide any protection for the free speech rights of public employees.”¹⁹⁷ The Court seemed taken aback by this argument, asserting that the respondents probably did not actually mean that employees did not have free speech rights, only that it did not prohibit agency fees.¹⁹⁸ In any case, the Court opined that the concept of agency fees was nonetheless not supported by originalist logic, as the Founding Fathers abhorred and condemned compulsory speech laws.¹⁹⁹

The Court found that the *Pickering* test was inapplicable to agency fees, reasoning that *Abood* was not based on *Pickering* and the Court “see[s] no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.”²⁰⁰ Regardless, the Court found that the *Pickering* framework does not work in this context for three reasons. First, the Court found of constitutional relevance the fact that *Pickering* was based on one employee’s speech.²⁰¹ The Court acknowledged that “we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees,” but asserted that the more employees involved—as in the case when the union is bargaining for an entire unit—the more the category of speech at issue is a matter of public concern and the government is entitled to less deference.²⁰²

Second, the *Pickering* test does not work where the government is compelling an employee to subsidize third party speech.²⁰³ Finally, the Court found that the *Pickering* test could not be applied because it would change the *Abood* scheme.²⁰⁴

Despite its determination that *Pickering* is inapplicable, the Court nonetheless went on to examine the constitutionality of agency fees under

196. *Id.* at 2467-68.

197. *Id.* at 2469.

198. *Id.*

199. *Id.* at 2471.

200. *Janus*, 138 S. Ct. at 2472.

201. *Id.* at 2472-73.

202. *Id.* at 2472.

203. *Id.* at 2472.

204. *Id.* at 2473.

a modified version of the *Pickering* test, finding that even there agency fees could not survive.²⁰⁵ In applying the first step of that analysis, the Court declared that union speech is not the speech of employees pursuant to official duties and therefore the Court's decision in *Garcetti v. Ceballos* is inapplicable.²⁰⁶ The majority opinion did not analyze the fact that *Pickering* and its progeny, such as *Garcetti*, are based on a distinction between the government as employer and the government as sovereign, or the concomitant rule that "the government as employer indeed has far broader powers than does the government as sovereign."²⁰⁷ In collective bargaining, of course, the employer acts as employer, not sovereign.

Under the second step, the Court concluded that union speech in collective bargaining "is overwhelmingly of substantial public concern," predicated on its dicta in *Harris* that "it is impossible to argue that the level of [state spending for employee benefits] is not a matter of great public concern."²⁰⁸ Finally, the Court found that the State's proffered reasons for agency fees—labor peace, avoiding free riders, and bargaining with an adequately funded exclusive representative—are insufficient to overcome the burden placed on nonmembers' First Amendment interests through agency fees.²⁰⁹ Significantly, the substantial deference given public sector employers under *Pickering* and its progeny concerning the potential for workplace disruptions resulting from an individual employee's speech was not applied in *Janus* concerning employer predictions of disruptions caused by the elimination of the agency fee.²¹⁰

Although the Court generally follows its own precedent under the doctrine of stare decisis, the Court found that the application of stare decisis was not warranted in this case.²¹¹ As an initial matter, the Court stated that "stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights."²¹² The Court then found that five factors were important in this case.²¹³ First, the Court found that

205. *Id.* at 2474.

206. *Janus*, 138 S. Ct. at 2473-74, citing *Garcetti v. Ceballos*, 547 U.S. 410, 421-22, 425-26 (2006).

207. *See, e.g.*, *Engquist v. Oregon Dept of Ag.*, 553 U.S. 591, 598 (2008) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994)); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882) (alterations in original) (explaining that the government has a legitimate interest "in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service'")).

208. *Janus*, 138 S. Ct. at 2474, 2477.

209. *Id.* at 2478.

210. *Id.* at 2469-74.

211. *Id.* at 2472-73, 2478.

212. *Id.* at 2478.

213. *Id.* at 2478-79.

the quality of *Abood*'s rationale was poor and therefore weighed in favor of overruling it.²¹⁴ Second, the Court in *Janus* reached a factual conclusion that *Abood* was "unworkable" despite the lack of a factual record.²¹⁵ Specifically, the Court found that "*Abood*'s line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision."²¹⁶ The Court also found that employees wishing to challenge the expenses charged by a union face an uphill battle to do so.²¹⁷ Third, the increased public spending "and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate."²¹⁸ Fourth, the Court described *Abood* as an anomaly in First Amendment jurisprudence, as noted in *Harris* and *Knox*.²¹⁹ Fifth, "the uncertain status of *Abood*, . . . the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargaining all work to undermine the force of reliance as a factor supporting *Abood*."²²⁰

Finally, the Court found that statutes like Illinois', which provide automatic deductions of agency fees if a collective bargaining agreement includes an agency-fee provision, are unconstitutional.²²¹ These payments cannot be collected unless the employee affirmatively consents to such payment.²²² Unmentioned in the Court's majority decision are the democratic procedures available to dissenting bargaining unit members, including agency fee payers, to reject or change representatives, as it did with respect to procedures available to dissenting shareholders in the context of corporate political speech.²²³

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.²²⁴ First, Justice Kagan disagreed with the majority's statement that *Abood* was wrongly decided, and referenced the Court's "6-year campaign to reverse *Abood*."²²⁵ She found that there is a governmental interest in stable labor relations, and that agency fees can be determined

214. *Janus*, 138 S. Ct. at 2479-81.

215. *Id.* at 2482.

216. *Id.*

217. *Id.* at 2481-82.

218. *Id.* at 2483.

219. *Id.* at 2485.

220. *Janus*, 138 S. Ct. at 2485.

221. *Id.* at 2486.

222. *Id.*

223. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 361-62 (2010).

224. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

225. *Id.* (Kagan, J., dissenting).

by public employers to be necessary to achieve labor relations as stable funding is needed for unions to be effective representatives.²²⁶ She went on to note that the majority was wrong to not apply the normal deferential standard to speech restricted by an employer.²²⁷ The dissent also asserted that the majority opinion “subverts all known principles of stare decisis.”²²⁸ Specifically, the majority does not provide the special justification demanded “over and above the belief that the precedent was wrongly decided.”²²⁹ Justice Kagan ends her dissent warning of the majority’s “weaponization” of the First Amendment:

There is no sugarcoating today’s opinion. The majority overthrows a decision entrenched in this Nation’s law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy . . . Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority’s road runs long. And at every stop are black-robed rulers overriding citizens’ choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.²³⁰

Justice Sotomayor also separately dissented, finding that while she had joined the majority in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), she was troubled by the way the case has “allowed the courts to wield the First Amendment in an aggressive way just as the majority does today.”²³¹

226. *Id.* at 2489 (Kagan, J., dissenting).

227. *Id.* at 2493-94 (Kagan, J., dissenting).

228. *Id.* at 2497 (Kagan, J., dissenting).

229. *Id.* (Kagan, J., dissenting).

230. *Id.* at 2501-02 (Kagan, J., dissenting).

231. *Id.* at 2487 (Sotomayor, J., dissenting).

B. *Janus*' Scope

Despite the extensive news coverage foreshadowing the potential demise of public sector bargaining, *Janus* constitutes a return to the general legal regime that had existed prior to *Abood*.²³² Prior to that decision, there was a massive growth in public sector unionization and collective bargaining throughout the country despite the lack of the agency shop under many states and local collective bargaining laws. During the same period, there was also a substantial number of public sector strikes that dissipated following the introduction of the agency shop.²³³ While federal employees are not, and have never been, required to pay agency fees, one of the most significant strikes in public sector history took place in 1981 among federal air traffic controllers.²³⁴ Finally, not all state and local employees have a statutory right to bargain collectively, and only some of their unions could bargain agency fees prior to *Janus*.²³⁵

The difficulty of determining which state and local employees can bargain varies by jurisdiction.²³⁶ Some states, such as Virginia, prohibit public sector bargaining.²³⁷ Other states, such as New York, Massachusetts, and Washington, have comprehensive labor laws.²³⁸ The remaining states either explicitly allow or do not prohibit collective bargaining for some (but not all) state and local employees.²³⁹ In these states, one must piece together varying laws—or a lack thereof—to determine the bargaining rights or restrictions of different employee groups, such as state employees, municipal employees, teachers, firefighters, and police.

Indiana is an example of a state with differences in bargaining rights for different groups of employees.²⁴⁰ For state employees, the right to

232. See *supra* Part I.

233. Brief for Respondents at 1, *Janus v. Am. Fed'n of State, Cnty., and Municipal Emps., Council 31*, et al., (2018) No. 16-1466; see also JANET MCENEANEY & ROBERT P. HEBDON, COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 185 fig. 7.2 (Joyce M. Najita et al. eds., 2001).

234. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962); see also *Janus*, 585 U.S. ____ at 12; JOSEPH A. MACCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA (2011).

235. See Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 514 (2013); see also Hopfl, *supra* note 38, at 479-82.

236. Slater, *supra* note 235, at 511-12; see MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. AND POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 3 (2014).

237. See, e.g., VA. CODE ANN. § 40.1-57.2 (West 2018).

238. See SANES & SCHMITT, *supra* note 236, at 37, 48, 63.

239. JEFFREY H. KEEFE, ECON. POLICY INST., BRIEFING PAPER NO. 408, ELIMINATING FAIR SHARE FEES AND MAKING PUBLIC EMPLOYMENT "RIGHT-TO-WORK" WOULD INCREASE THE PAY PENALTY FOR WORKING IN STATE AND LOCAL GOVERNMENT 8, 14 n.3 (2015).

240. KEEFE, *supra* note 239, at 14 n.3.

bargain was granted and removed by executive order and is now prohibited by law.²⁴¹ Public safety employees (police and fire) only have the statutory right to meet and confer, under which the employer is required to meet with the exclusive representative, but is not obligated to enter into a collective bargaining agreement.²⁴² For the majority of the remaining local employees, there are no statutes requiring, allowing, or prohibiting bargaining.²⁴³

The most robust public sector bargaining in Indiana arguably involves K-12 teachers.²⁴⁴ Most public K-12 teachers have the right to bargain salary, wages, and fringe benefits.²⁴⁵ Teachers also have a right similar to meet and confer called discussion, which requires the superintendent to discuss certain enumerated items (e.g., school curriculum, student discipline, etc.) with the teachers' union prior to implementation.²⁴⁶ There are wrinkles within this framework. Some teachers, such as charter school teachers, have not sought to be represented by a union, despite their ability to do so.²⁴⁷ Other teachers—primarily in academically or financially troubled schools—have limited bargaining rights, such as a limited scope of bargaining or the ability to bargain only if the employer consents.²⁴⁸

Prior to *Janus*, whether agency fees were allowed varied by and within states.²⁴⁹ While some states explicitly allowed or mandated agency fees, others prohibited them, and still others had no relevant statute.²⁵⁰

241. IND. CODE ANN. § 4-15-17-5 (West 2018); Ind. Exec. Order 05-14, 28 Ind. Reg. 1904 (Mar. 1, 2005); Ind. Exec. Order 03-35, 27 Ind. Reg. 1007 (Dec. 1, 2003); Ind. Exec. Order No. 97-8, 20 Ind. Reg. 2222 (May 1, 1997); Ind. Exec. Order No. 90-6, 13 Ind. Reg. 1925 (July 1, 1990).

242. IND. CODE ANN. §§ 36-8-22-2, 22-8, 22-12 (West 2018).

243. IND. CODE ANN. § 36-9-4-37 (West 2018) (stating that there are bargaining rights for public transportation corporation employees).

244. See IND. CODE ANN. §§ 20-29-6-4(a), 6-7(11) (2018).

245. IND. CODE ANN. §§ 20-29-6-4(a) (1)-(4) (West 2018).

246. IND. CODE ANN. §§ 20-29-6-7 (West 2018).

247. IND. CODE ANN. § 20-24-6-3(a) (West 2018). For a list of teacher collective bargaining units in Indiana, see INDIANA GATEWAY, COLLECTIVE BARGAINING CONTRACT UPLOADS REPORT: 2018 REPORT, https://gateway.ifionline.org/report_builder/Default3a.aspx?rpttype=collBargain&rpt=contract_uploads&rptName=Collective%20Bargaining%20Contract%20Uploads.

248. See, e.g., IND. CODE ANN. §§ 20-23-18-3, -31-9.5-9.5(d) (West 2018) (stating that certain schools are not subject to bargaining unless there is voluntary recognition and the employer may authorize a school to opt out of bargaining allowable subjects or discussing discussion items); IND. CODE ANN. § 20-25.7-6-6 (West 2018) ("Employees who participate in the pilot program under this chapter are members of the bargaining unit of the innovation network school [if any]. However, salary increases may not be collectively bargained for employees who participate . . . but shall be determined according to the plan approved under section 5 of this chapter [of the code].").

249. KEEFE, *supra* note 239, at 2.

250. See *id.* at 2, 15, n.3.

Again, Indiana provides a representative example.²⁵¹ Agency fees were explicitly prohibited for Indiana teachers:

- (a) A school employee²⁵² may not be required to join or financially support through the payment of: (1) fair share fees; (2) representation fees; (3) professional fees; or (4) other fees; a school employee organization.²⁵³
- (b) A rule, regulation, or contract provision requiring financial support from a school employee to a school employee organization is void.²⁵⁴

Agency fees were also prohibited for Indiana state employees (in addition to bargaining) and public safety workers.²⁵⁵ There is no statute regarding the few municipal and non-teacher school employees who bargain; there are some employees that have had agency fees in their contract in the past, although it is unclear how many—if any—had agency fees at the time of *Janus*.²⁵⁶

Although there are exceptions and variations within individual states, generally the states that prohibit agency fees in the private sector also did so in the public sector.²⁵⁷

C. Direct Effects of *Janus*

The direct impact of *Janus* is already upon unions and employers with agency fee provisions. Effectively, any contract, contractual provision, or state law providing for agency fees in the public sector has been rendered void and unenforceable.²⁵⁸ Many contracts contain a severability or savings clause that would serve to save the validity of the contract absent the void agency fee provision.²⁵⁹ Even for those contracts without such clauses, most jurisdictions “employ a presumption of severability to

251. *Id.* at 14.

252. IND. CODE ANN. §§ 20-29-2-4, 29-2-13 (West 2018) (stating that a school employee is an employee whose employment with the school requires a permit or license from the Department of Education and does not include all employees of the school corporation).

253. IND. CODE ANN. § 20-29-4-2 (West 2018).

254. *Id.*

255. IND. CODE ANN. §§ 36-8-22-8, 4-15-17-5 (West 2018).

256. Olivia Covington, *Labor Laws Revisited: Unions Regroup after SCOTUS Ruling*, THE INDIANA LAWYER (Aug. 22, 2018), <https://www.theindianalawyer.com/articles/47928-labor-laws-revisited-unions-regroup-after-scotus-ruling?platform=hootsuite> (quoting labor attorney Jon Mayes who stated that he “is not aware of any Indiana municipality that compels agency fees”).

257. KEEFE, *supra* note 239, at 2.

258. *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 97-98 (1993).

259. *Janus*, 138 S. Ct. at 2485.

deal with isolated unconstitutional provisions.”²⁶⁰ Therefore, generally “if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect.”²⁶¹ Nevertheless, whether particular contracts are now unenforceable will depend on state contract law.²⁶² It is possible, as noted in Justice Kagan’s dissent, that “some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses.”²⁶³

The Supreme Court also found that no payments 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.”²⁶⁴ Therefore, any current statute, ordinance, or contract that allows or requires the employer to automatically deduct union dues without affirmative consent might be also void and unenforceable.²⁶⁵ Such deductions were allowed in several states, including Illinois.²⁶⁶

Although many collective bargaining agreements were affected, the substantive impact of *Janus* will rest on whether employees decide not to voluntarily pay an agency fee or become dues paying union members.²⁶⁷ The number of employees who will decide not to join or to drop their membership is difficult to predict, although it will likely vary by bargaining unit composition, geography, and local labor history.²⁶⁸ The impact of *Janus* on union membership will likely depend on the scope and quality of internal union organizing, and the success or failure of outside forces attempting to persuade employees to drop their membership.²⁶⁹

260. See *Janus*, 138 S. Ct. at 2485; C. Vered Jona, *Cleaning Up for Congress: Why Courts Should Reject the Presumption of Severability in the Face of Unconstitutional Legislation*, 76 GEO. WASH. L. REV. 698, 699 (April 2008).

261. *Janus*, 138 S. Ct. at 2485.

262. 16A Am. Juris. 2d *Constitutional Law* § 205 (May 2018) (establishing the effect of the severability clause and citing to the various case decisions arising out of different states).

263. *Janus*, 138 S. Ct. at 2499, n. 5 (Kagan, J., dissenting); see generally Board of County Com’rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 678 (1996).

264. *Id.* at 2486.

265. *Id.*

266. *Id.*; see also 5 ILL. COMP. STAT. 315/6(e) (2013).

267. See Katherine Barrett & Richard Greene, *How States Are Making it Harder to Leave Unions*, GOVERNING.COM (July 16, 2018), <https://www.governing.com/topics/workforce/gov-janus-protection-unions-states.html>.

268. See generally BARRY EIDLIN, *LABOR AND THE CLASS IDEA IN THE UNITED STATES AND CANADA*, 10, 55-57, 61 (2018) (analyzing data concerning the relationship between “right to work” legal regimes and union density).

269. See Erica L. Green, *Teachers Unions Scramble to Save Themselves After Supreme Court’s Blow*, N.Y. TIMES (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/politics/teachers-unions-supreme-court.html>; Ed Pilkington, *Exclusive: How Rightwing Groups Wield Secret ‘Toolkit’ to Plot Against US Unions*, THE GUARDIAN (May 15, 2018), <https://www.theguardian.com/us-news/2018/may/15/rightwing-thinktanks-secret-plot-against-unions>.

Early data show that although most fee payers have stopped paying fees and did not join the union, union membership did not decline precipitously, and in some cases went up.²⁷⁰ Specifically, while AFSCME and SEIU saw a 98% and 94% drop, respectively, in fee payers, they both reported small changes in membership. Overall state and local union membership declined in 2018, but only slightly.²⁷¹ However, depending on the time of membership drives, this data likely does not give an accurate picture of the *Janus* impact—it is likely that there will still be some additional drops.

Information from states that previously prohibited agency fees sheds relevant light on the potential of *Janus*' aftermath. The decline of dues and membership after the loss of agency fees in Wisconsin and Michigan resulted in fluctuating drops.²⁷² In Indiana, over twenty years after the end of agency fees, teacher union membership varies by school district from 12%–100%.²⁷³ Despite the disparate membership rates, however, most (over 60%) of Indiana teachers are members of their union.²⁷⁴

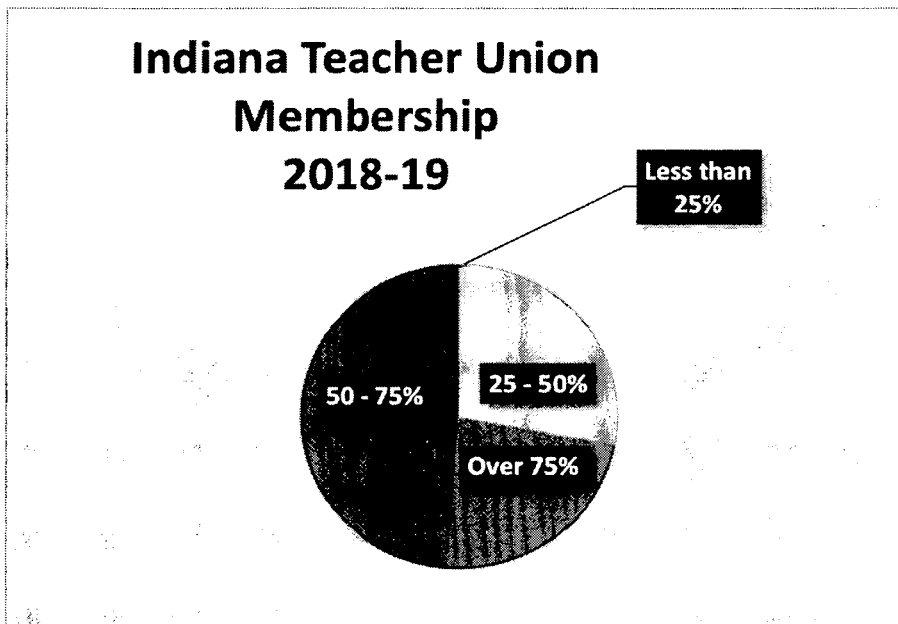
270. See Katherine Barrett and Richard Greene, *Defying Predictions, Union Membership Isn't Dropping Post-Janus*, *Governing.com* (Dec. 10, 2018), <https://www.governing.com/topics/work-force/gov-janus-impact-union-membership.html>; Robert Iafolla, *Mass Exodus of Public Union Fee Payers After High Court Ruling*, *Bloomberglaw.com* (Apr. 5, 2019), <https://news.bloomberglaw.com/daily-labor-report/mass-exodus-of-public-union-fee-payers-after-high-court-ruling>.

271. See Table 3 Union Affiliation of employed wage and salary workers by occupation and industry 2018, Bureau of Labor Statistics, <https://www.bls.gov/news.release/union2.t03.htm>; see also Irina Ivanova, Union membership in the U.S. hit record low in 2018, *CBS News* (Jan. 21, 2019), <https://www.cbsnews.com/news/union-membership-declined-in-2018/>.

272. See RUTH MILKMAN & STEPHANIE LUCE, *THE STATE OF THE UNIONS 2017: A PROFILE OF ORGANIZED LABOR IN NEW YORK CITY, NEW YORK STATE, AND THE UNITED STATES* 1, 5 (The Joseph S. Murphy Inst. for Worker Educ. and Labor Studies ed. 2017); see also Jason Hart, *State, Local Laws Force Public Employees to Pay Labor Unions*, *WATCHDOG.ORG* (Sept. 24, 2014), https://www.watchdog.org/kentucky/state-local-laws-force-public-employees-to-pay-labor-unions/article_502aecf1-141a-58f2-b83c-6ee2d94599f4.html [<https://www.sayanythingblog.com/entry/state-local-laws-force-public-employees-to-pay-labor-unions/>].

273. INDIANA GATEWAY, EXCLUSIVE REPRESENTATIVE ORGANIZATIONS (ERO) UPLOAD REPORT: 2018 REPORT, https://gateway.ifionline.org/report_builder/Default3a.aspx?rpttype=collBargain&rpt=ero_uploads_public&rptName=ERO%20Upload%20Report, (last visited Jan. 26, 2019).

274. *Id.*



Beyond simple membership numbers, the authors could not find any unit in Indiana that has ever voted to decertify an exclusive representative without replacing it.²⁷⁵ In the most recent teacher election, only 2 of 955 possible votes were for no representation.²⁷⁶

In addition to the loss of income from fee payers and likely some former union members, some unions are also contending with lawsuits.²⁷⁷ Lawsuits have been filed in several states, including Illinois, Maryland, Minnesota, New Jersey, New York, Ohio, and Washington, in which employees are requesting refunds of agency fees.²⁷⁸ Typically, such lawsuits would be unsuccessful given the long-standing dictum that, as Justice Scalia phrased it, “reliance upon a square, unabandoned holding of the

275. See IEERB SEARCH, <https://ieerbsearch.ieerb.in.gov/default.aspx> (last visited Apr. 18, 2019).

276. Final Order Certifying Exclusive Representative, Carmel Clay Schools *Carmel Clay Schools*, R-16-04-3060 (IEERB H.O. 2017).

277. Robert Iafolla, *Supreme Court Revives Lawsuit Seeking Union Agency Fee Refunds*, REUTERS (June 28, 2018, 8:16 PM), <https://www.reuters.com/article/usa-employment-unions/supreme-court-revives-lawsuit-seeking-union-agency-fee-refunds-idUSL1N1TV00P>.

278. Complaint, *Pellegrino v. New York State United Teachers*, No. 2:18-cv-C3439-JMA-GR8 (E.D.N.Y. June 13, 2018); Iafolla, *supra* note 277.

Supreme Court is always justifiable reliance.”²⁷⁹ And “[a]t the time the fair share fees were deducted and paid they were lawful under four decades of Supreme Court authority.”²⁸⁰ The *Janus* majority does mention these payments, lamenting about how much money has “been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment,” and finding that this “cannot be allowed to continue indefinitely.”²⁸¹ Indeed, the first courts to have heard these cases have dismissed them on the basis of good faith reliance on Supreme Court precedent, including a suit filed by *Janus*.²⁸²

However, the final outcome of these suits is not so clear. The *Janus* majority’s rebuke of the reliance interest in analyzing the issue of stare decisis hinges on the fact that after *Friedrichs* was issued on March 29, 2016, “any public sector union seeking an agency-fee provision in a collective bargaining agreement must have understood that the constitutionality of such a provision was uncertain.”²⁸³ And the United States Supreme Court recently granted a writ of certiorari in one such case, *Riffe v. Rauner*,²⁸⁴ and sent it back to the Seventh Circuit Court of Appeals for reconsideration in light of *Janus*.²⁸⁵ In *Riffe*, the Seventh Circuit had affirmed the denial of class certification of home health care assistants on the grounds that a highly individualized inquiry on the support of the union and injury occurred.²⁸⁶ Additionally, some of the class actions consist of employees who claim that they only joined the union because they would have had to pay agency fees regardless.²⁸⁷ However, in requiring employers to receive affirmative consent to deduct dues from employees’

279. *Quill Corp. v. North Dakota By & Through Heitkamp*, 504 U.S. 298, 319, 321 (1992) (Scalia, J., concurring) *overruled other grounds by* *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098-99 (2018); *but see* *Rodriguez de Quijoas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 485 (1989).

280. *Iafolla*, *supra* note 277 (statement of Martin Malin).

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

282. *See, e.g., Lee v. Ohio Educ. Assoc.*, ___ F.Supp.3d ___, 2019 WL 1323622 (N.D. Ohio Mar. 29, 2019); *Janus v. AFSCME*, 2019 WL 1239780, (N.D. Ill., Mar. 18, 2019); *Crockett v. NEA-Alaska*, ___ F.Supp.3d ___, 2019 WL 1212082 (D. Alaska Mar. 14, 2019), *Carey v. Inslee*, ___ F.Supp.3d ___, 2019 WL 1115259 (W.D. Wa. Mar. 11, 2019).

283. *Janus*, 138 S. Ct. at 2485. Certainly, any argument regarding unjust enrichment could not be made prior to *Locke*, where the Court unanimously expanded the scope of chargeable agency fees. *See Locke v. Karass*, 555 U.S. 207, 210 (2008). Moreover, the statute of limitations applicable to personal injury actions in the state in which an action is venued would apply. *Owens v. Okure*, 488 U.S. 235, 249-50 (1989). In New York State, for example, that statute is three years. *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002); *Ying Li v. City of New York*, 246 F. Supp.3d 578, 600-01 (E.D.N.Y. 2017).

284. *Riffe v. Rauner*, 873 F.3d 558 (7th Cir. 2017) *vacated*, 138 S. Ct. 2708 (2018).

285. *Riffe v. Rauner*, 138 S. Ct. 2708 (2018).

286. *Riffe*, 873 F.3d at 566.

287. *Id.* at 561-62.

wages, the Court also implies that once the employee provides consent, they have waived their First Amendment rights in this regard.²⁸⁸

An important consequential effect of *Janus* is the reenergizing that is taking place among public employees and their unions, including an increase in strikes.²⁸⁹

The need for organizational and strategic change by public employee unions is nothing new, and *Janus* has become a catalyst for that change. Efforts toward adopting the “organizing model” date back to the late 1980’s.²⁹⁰ Those efforts included proposals for massive changes in union priorities and membership mobilization.²⁹¹ Two decades ago, an AFL-CIO official declared that it was then “focused on building membership strength through organizing—and on transforming unions at every level into institutions with the will, the skill, and the resources to organize effectively.”²⁹²

Frequently omitted from discussions about the agency shop is the numbing effect it had on internal organizing efforts. It must be recalled that in 1972 some New York unions expressed concerns to the State Legislature about the adverse effect the agency shop had on union goals and the scope of union membership.²⁹³ While agency fees became an important part of the financial underpinning of the exclusive representation model, it was also a material disincentive for unions to invest time and

288. *Janus*, 138 S. Ct. at 2486 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Curtis Publishing Co. v. Butts*, 388 U.S.130, 145 (1967)).

289. See, e.g., Alia Wong, *America’s Teachers Are Furious: From West Virginia to Los Angeles, educators are ushering in a new era of labor activism*, *The Atlantic* (Jan. 22, 2019), <https://www.theatlantic.com/education/archive/2019/01/teachers-are-launching-a-rebellion/580975/>; Noam Scheiber, *Labor Unions Will be Smaller After Supreme Court Decision, But Maybe Not Weaker*, *N.Y. TIMES* (June 27, 2018), <https://www.nytimes.com/2018/06/27/business/economy/supreme-court-unions-future.html>; see also Alana Semuels, *Is This the End of Public Sector Unions in America?*, *The Atlantic* (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/>; Bradley Marianno, *Analysis: From the High Court to the Picket Line – How the Janus Case Emboldened Teachers Union & Make Strikes Key to Their Survival*, *The 74*, (Jan. 16, 2019), <https://www.the74million.org/article/analysis-from-the-high-court-to-the-picket-line-how-the-janus-case-emboldened-teachers-unions-made-strikes-key-to-their-survival/>.

290. See Richard Hurd, *The Failure of Organizing, the New Unity Partnership, and the Future of the Labor Movement*, 8 WORKINGUSA: J. OF LAB. & SOC’Y 5, 7, 9 (2004).

291. *Id.* at 10-12.

292. See Robert W. Welsh, *Building and Changing: A New Beginning at the AFL-CIO*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 73, 83 (Steven Fraser and Joshua B. Freeman eds., 1997).

293. See THE J. LEGIS. COMM. ON THE TAYLOR L., PUBLIC EMPLOYEES’ FAIR EMPLOYMENT ACT 1971-72 REP., 25, at 36 (1972), <http://www.perb.ny.gov/pdf/1971jlc.pdf>.

resources into persuading alienated or philosophical dissenters and passive non-joiners into becoming active union members.²⁹⁴ The reemergence of coordinated internal organizing campaigns and labor activism in the face of *Janus* highlights the prior union passivity toward empowering all bargaining unit members through union membership and activism.²⁹⁵ The success or failure of those campaigns may have a substantial role in determining the long-term impact of the open shop that has been imposed by the Court in *Janus*.²⁹⁶

III. THE ECLIPSE

States have the ultimate power over state and local bargaining—they can create, shape, or eliminate the right or ability to bargain.²⁹⁷ This principle, premised on federalism, has been undermined by the holding and rationale in *Janus*.²⁹⁸ Indeed, the normally pro-federalism conservative Justices, as Justice Kagan notes in her dissent, have reversed their usual stance, compelling uniformity among the states, with evident satisfaction: “the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, ‘can follow the model of the federal government and 28 other States.’”²⁹⁹

Furthermore, the majority’s decision is in tension with the Court’s prior decisions holding that the First Amendment does not exempt individuals from financially supporting government speech initiatives (even if in conjunction with private entities) through their taxes generally or direct compelled subsidies, or from requirements to limit their speech on matters of public concerns when operating pursuant to government grants.³⁰⁰

Nevertheless, another primary influencer of *Janus*’ ultimate impact

294. Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1053-54 (2018).

295. Justin Miller, *Janus: A New Attack Presents Old Challenges for Unions*, THE AMERICAN PROSPECT (Oct. 24, 2017), <https://prospect.org/article/janus-new-attack-presents-old-challenges-unions>.

296. *Id.*

297. *See, e.g.*, Slater, *supra* note 235, at 512-13.

298. *Janus*, 138 S. Ct. at 2487, 2501 (Kagan, J., dissenting).

299. *Id.* at 2501.

300. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-469 (2009) (holding that municipalities are free to spend taxes to promote its own message); *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 556 (2005) (holding compelled subsidization of government message devised by “Beef Board” including private beef producers in favor of beef consumption via special assessment constitutional); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588 (1998); *Rust v. Sullivan*, 500 U.S. 173, 192, 203 (1991).

will be state legislative action to enhance or ameliorate the loss of compelled agency fees, and how the Court will treat those actions on review.³⁰¹ Meanwhile, states will continue to pass legislation whose impact on the local level, combined with increased organization, may eclipse that of compelled agency fees.³⁰²

A. The Power of State Legislation

1. The Potential Impact of Janus

The concerns expressed by unions and scholars in the wake of the Supreme Court's decision in *Janus* are not illusory.³⁰³ As Benjamin Sachs has phrased it,

[a]gency fees are the sole means through which unions have been permitted to overcome what otherwise would be an existential collective action problem. In brief, unions have a legal obligation to provide benefits to all workers in a given workplace or bargaining unit. Union-negotiated benefits therefore have the character of public goods: if a union negotiates a wage increase, or better benefits package, or enhanced safety and health protections, these improvements must be extended to all the workers covered by the collective agreement. If unions are required to rely for their financing on voluntary payments from these workers, then unions would face extensive free riding by all those workers who would rather receive benefits for free than pay for them.³⁰⁴

However, this constitutionalization of "right to work" differs in a highly significant way from the legislatively enacted "right to work" regimes currently extant in the states that have adopted them.³⁰⁵ In such states, the statutory regime presents the "existential collective action problem" described by Benjamin Sachs: the unions are both required to equally represent the interests of all employees in the defined bargaining units, whether they are members of the union or not, but are only permitted to receive voluntary dues from members, that is, employees who elect

301. *Janus*, 138 S. Ct. at 2499 (Kagan, J., dissenting).

302. *See id.* at 2499-50.

303. INT'L BHD. OF ELEC. WORKERS: MEDIA CTR., *supra* note 286.

304. Sachs, *supra* note 294, at 1047.

305. *Janus*, 138 S. Ct. at 2499 (Kagan, J., dissenting).

to join the union.³⁰⁶ The construction in *Janus* of the First Amendment to prohibit mandatory agency fees imposes on every public sector workplace the first prong of a “right-to-work” regime.³⁰⁷

The second prong, the scope of the union’s duty to represent all of the employees in a bargaining unit, is a creature of state law, and extension of that duty to non-members is neither explicitly compelled by the *Janus* ruling, nor inherent, or even supported, by its logic.³⁰⁸

In *Harris v. Quinn*,³⁰⁹ a direct antecedent of *Janus*,³¹⁰ the Court found “unwarranted” what it called an “unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop.”³¹¹ To the contrary, the Court opined, “[a] union’s status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked.”³¹² That being so, exclusivity, like the duty of fair representation, remains a matter of state law entirely separate from the “compelled speech” and “compelled association” found to be imposed by agency fee statutes and even collective bargaining agreements in *Janus*.³¹³ As a matter of history, virtually all state collective bargaining statutes have imposed the exclusive collective representation model to ensure harmonious labor relations, thereby rejecting as unsound the earlier plural representation system that existed prior to collective bargaining.³¹⁴

In the majority opinion in *Janus*, the Court argues that unions do not have a reasonable reliance interest in adhering to *Abood*.³¹⁵ This contention could play a key role in how the Court answers claims to apply *Janus* retroactively, and its fundamental unsoundness is therefore all the more problematic. The argument is strikingly premised on prognostication of future action that *might* be taken by the Court, in that it casts upon the unions the burden of predicting whether the expressions of disagreement with the rationale of *Abood* will lead the Court to overrule it:

306. Sachs, *supra* note 294, at 1047.

307. See Brief for the City of New York as Amicus Curiae in Support of Respondents, *supra* note 190, at 24-25; see also *Janus*, 138 S. Ct. at 2458, 2459.

308. *Janus*, 138 S. Ct. at 2467-68.

309. *Harris v. Quinn*, 134 S. Ct. 2618, 2634 (2014).

310. *Janus*, 138 S. Ct. at 2464-65.

311. *Harris*, 134 S. Ct. at 2634.

312. *Id.* at 2640.

313. *Janus*, 138 S. Ct. at 2465-66, 2468.

314. William A. Herbert and Joseph A. McCartin, *Janus's Progeny? A Supreme Court Threat to Majority Rule Looms*, The American Prospect, (Mar. 21, 2019) <https://prospect.org/article/januss-progeny-supreme-court-threat-majority-rule-looms>.

315. *Janus*, 138 S. Ct. at 2460, 2484.

[P]ublic-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood's* many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. During this period of time, any public sector union seeking an agency-fee provision in a collective bargaining agreement must have understood that the constitutionality of such a provision was uncertain.³¹⁶

Leaving aside the fact that many of the unions affected by *Janus* did not negotiate agency fee provisions in their contracts, but operated in states in which state law mandated agency fees be deducted, the Court's delineation in *Janus* of what constitutes reasonable reliance interests both contravenes logic and invites chaos.³¹⁷ The *Janus* Court's analysis attributes to the "Court" dicta the majority expressed in an opinion that reflects a closely split bench, and requires the unions to predict future litigated outcomes. It does so while glossing over factors that would, in fact, be dispositive of that very issue, that is, the effect of the change in the Court's membership after *Knox* and *Harris*.³¹⁸ In sum, the Court's reliance argument requires a prediction, but one divorced from the realities that might make it a meaningfully accurate prediction.

As a threshold matter, while the Court did criticize the rationale of *Abood* in *Knox* and *Harris*, neither case purported to overrule *Abood*, but rather refused to extend it to analogous circumstances.³¹⁹ The assumption that the accompanying criticism of *Abood's* reasoning should have put unions on notice that *Abood* was clearly doomed, and that they were obligated to presume that result and take action by waiving agency fees (even if only where state law permits) flips the normal analysis.³²⁰ As Chief Justice Roberts wrote in his dissent in *South Dakota v. Wayfair*,

316. *Janus*, 138 S. Ct. at 2484-85.

317. *Id.*

318. *Id.* at 2483.

319. *Id.*

320. *Janus*, 138 S. Ct. at 2484.

Inc., “[w]hatever salience the adage ‘third time’s a charm’ has in daily life, it is a poor guide to Supreme Court decisionmaking.”³²¹

The Chief Justice’s logic applies with especial force to *Janus*, as both *Knox* and *Harris* were decided by the same 5–4 majority, and that majority was broken by the death of Justice Antonin Scalia on February 13, 2016.³²² As a result of Justice Scalia’s death, the majority that had criticized, refused to extend, and might possibly have overruled *Abood*, ceased to exist. Subsequently, the Ninth Circuit decision following *Abood* was “affirmed by an equally divided Court” in *Friedrichs v. California Teachers Association*, decided on March 29, 2016.³²³

By that time, of course, D.C. Circuit Chief Judge Merrick Garland, had already been nominated to the Supreme Court, and Senate Majority Leader Mitch McConnell had announced his refusal to consider the nomination.³²⁴ From that time through the expiration of Judge Garland’s nomination, the confirmation of Justice Neil Gorsuch to the Court on April 7, 2018, and the oral argument in *Janus* (at which Justice Gorsuch was entirely silent), no indication existed as to how either Judge Garland (had he been confirmed) or Justice Gorsuch would vote.³²⁵

Subsequent to the breaking of the *Knox-Harris* majority, the only factor upon which unions could have based any prediction of the outcome of *Janus* was the fact that Justice Gorsuch was appointed by a Republican President, Donald J. Trump.³²⁶ However, unanimity among conservative scholars did not exist concerning the merits of *Janus*’s First Amendment argument, as demonstrated by the amicus brief submitted by Professors Eugene Volokh and William Baude.³²⁷ Moreover, requiring unions to base their predictions solely on party affiliation rejects the Court’s long-held ethos, recently reasserted by Chief Justice Roberts, that “[w]e do not

321. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2102 (2018).

322. Adam Liptak, *Justice Scalia, Who Led Court’s Conservative Renaissance, Dies At 79*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>. According to Justice Scalia’s obituary, he was found dead on the morning of February 13, 2016; whether he died that day or on February 12 is unclear. *Id.*

323. *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016).

324. Michael D. Shear, Julie Hirschfeld Davis and Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 17, 2016) <https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html>.

325. Adam Liptak, *Key Voice Is Silent in Supreme Court Case on Unions*, N.Y. TIMES (Feb. 27, 2018) <https://www.nytimes.com/2018/02/26/us/politics/supreme-court-unions-gorsuch.html>.

326. *Id.*

327. *Janus v. AFSCME*, Council 31, Brief of Professors Eugene Volokh and William Baude as Amici Curiae in Support of Respondents, http://www.supremecourt.gov/DocketPDF/16/16-1466/28495/20180119145640767_16-1466_Janus%20v.%20American%20Federation%20of%20State%20et.%20al..pdf.

have Obama judges, Bush judges or Clinton judges.” For the unions affected by the ultimate outcome in *Janus* to be required to assume the overruling of *Abood* after the death of Justice Scalia, would require a complete abandonment of faith in the judicial process and the legitimacy of judicial review itself. Nor should prescient complex political calculations based on unfolding, rapidly shifting facts be the prerequisite of demonstrating reasonable reliance on non-overruled, albeit controversial, precedent.

2. *Ameliorating the Janus Effect*

A non-frivolous reverse-*Janus* argument could be constructed, pursuant to which the Court’s free association and free speech cases would require the application of strict scrutiny to justify any regime that mandated a union to provide advocacy services to non-members.³²⁸ Similarly, the recognition in *Janus* that collective negotiations constitutes political speech under the First Amendment can form the basis for an argument that prohibitions or restrictions on public sector collective bargaining are unconstitutional.³²⁹

With the Court’s new recognition of public sector collective bargaining as inherently political speech, statutorily required advocacy on behalf of specific individuals who are inimical to the union would present questions of both compelled association and compelled speech, although the Court suggests that exclusivity is a sufficient “boon” to unions to warrant the imposition of the duty of fair representation to non-members.³³⁰ The corollary then would be that if a successor case invalidates exclusivity, then the imposition of *any* duty of fair representation toward non-members would constitute compelled speech.³³¹ In a similar vein, a state’s banning or the restriction of the political speech inherent in negotiations,

328. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (explaining that forced inclusion of an unwanted person in a group infringes on the group’s freedom of expressive association if presence of that person affects, in a significant way, the group’s ability to advocate public or private viewpoints); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 32 n. 4 (2d Cir. 2018) (noting continued validity of *Boy Scouts of Am. v. Dale*); *State Emps. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 132 (2d Cir. 2013) (explaining that it is well-settled that, apart from applicable statutory rights to union organization and membership, “[i]ncluded in th[e] [Constitutional] right to free association is the right of employees to associate in unions,” and that it “cannot ‘be questioned that the First Amendment’s protection of speech and associational rights extends to labor union activities.’”) (citing *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Conn. State Fed’n of Teachers v. Bd. of Educ. Members*, 538 F.2d 471, 478 (2d Cir.1976)).

329. See *Janus*, 138 S. Ct. at 2460, 2462.

330. *Id.* at 2467-68.

331. See *id.* at 2469 (“[The duty of fair representation] 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.”).

as found in *Janus*, would logically constitute unlawful prior restraint.³³²

The Court itself suggested two forms of ameliorating the effect of *Janus* in forcing unions to shoulder the burden of providing individual representation to non-members in disciplinary and other individualized grievances. The Court stated that less restrictive measures than requiring all non-members to pay an agency fee were available. It gave as examples that “[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether.”³³³

Any reasonable reading of *Janus* suggests that the Court will be exacting in its scrutiny of legislative or state judicial response to the decision that goes beyond the scope of the duty of fair representation.³³⁴ The heavy weight given by the majority opinion to the economic cost of public employee wages and benefits³³⁵ suggests that Justice Kennedy’s dismissal of the description of the State’s interest in collective bargaining by the Solicitor General of Illinois may be reflective of the views of other members of the Court:

MR. FRANKLIN: You know, the state’s interest here, if I can spend just a few moments talking about that, is, first, we have an interest in dealing with a single spokesman for the—for the employees. Second, we have an interest in imposing on that spokesman a legal duty to represent everyone. But as regards [sic] agency fees, they are complementary to those first two interests. They serve our managerial interests in two ways. First, they allow us to avoid a situation where some employees bear the cost of representing others who contribute nothing. That kind of two-tiered workplace would be corrosive to our ability to cultivate collaboration, cohesion, good working relationships among our personnel. Second, independent of that, we have an interest at the end of the day in being able to work with a stable, responsible, independent counterparty that’s well-resourced enough that it can be a partner with us in the process of not only contract negotiation—

332. See *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 471 (1995).

333. *Janus*, 138 S. Ct. at 2468-69.

334. *Id.* at 2464.

335. *Id.* at 2483 (“Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies.”).

JUSTICE KENNEDY: It can be a partner with you 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?³³⁶

Against this backdrop, then, any legislative effort to ameliorate the effect of *Janus* would be much less susceptible to Supreme Court review to the extent that it modifies the scope of the duty of fair representation, and it would be more subject to constitutional challenge to the extent that it makes it more difficult for those employees who wish to not pay dues or other fees to the union.³³⁷

In the former area, *Janus* does nothing to suggest that states are not free to either permit member-only unions, allowing unions the freedom to refuse requests for representation from non-members, or, in the alternative, to charge non-members for union representation services provided to such non-members who require discrete individual representation, whether in individual (as opposed to group or unit-wide) grievances or statutory disciplinary procedures.³³⁸ Indeed, this last possibility finds support in *Janus* itself, in which the Court expressly stated that “[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether.”³³⁹ This finding of the Court appears to have originated in Justice Scalia’s concurrence in *Lehnert*, in which he found that “[w]here the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.”³⁴⁰

These judicial observations relate to what options may be permissi-

336. Transcript of Oral Argument, *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_i425.pdf.

337. See *Janus*, 138 S. Ct. at 2468-69 (noting that unions owe a duty of fair representation to all employees, members and non-members alike, and that unions may not intentionally discriminate against non-members based on their choice to not join the union).

338. See FLA. STAT. § 447.401 (2018) (a statutory exception which allows unions to refuse to process grievances of non-members); *Janus*, 138 S. Ct. at 2468-69 (stating that a union may require compensation from non-members should the union represent them, or that the union may deny to represent the non-member outright in a grievance).

339. *Janus*, 138 S. Ct. at 2468-69.

340. *Lehnert v. Ferris Fac. Ass’n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part).

ble under the First Amendment. The determination concerning public policy choices in a post-*Janus* world will be left to state legislatures. Inevitably, stakeholders including unions and public employers will present their views to those legislative bodies.

Public policy, like flowers, does not grow in a vacuum. In developing ameliorative legislative responses to *Janus*,³⁴¹ the states would be well advised to consider the views of unions and public employers concerning whether proposed measures will create greater divisions between members and nonmembers in a bargaining unit, and whether permitting non-exclusive grievance representation might adversely impact the substantive terms of the negotiated agreements.³⁴² If so, lawmakers must consider if the ameliorative effect compensates for such division and effect on the collective bargaining agreements, if any. Whether proposed legislation makes public policy sense will vary based on the context of each state.

It is important for policy makers to recognize that natural tensions can arise between the majority and the minority within a bargaining unit.³⁴³ Such tensions can be an outgrowth of the representational election, or can stem from differing interests and perspectives of employees within a bargaining unit. The potential for the latter-type of tensions formed the basis for criticism of majority rule collective bargaining prior to the enactment of the National Labor Relations Act.³⁴⁴

Prior to *Janus*, the only outlier to the exclusive representation model was the open shop state of Florida, where its public sector labor law statute

341. See Sarah Cudahy & John Henry, *Figuring Out the Future Fee Fallout: An Indiana-Centric Insight into Public Sector Agency Fees*, N.Y. ST. B.A., May 11, 2018, at 10, <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82110> (discussing how state legislatures largely affect collective bargaining and other union practices).

342. See *Janus*, 138 S. Ct. at 2468 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58, n. 19 (1974) (noting that, by controlling the grievance process, a union may “effectively subordinate ‘the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit’” and that the “resolution of one employee’s grievance can affect others”)); SCHILLER, *infra* note 343, at 121 (discussing how, when unions voted for the statutory repeal of California’s Fair Housing Act, tension was caused between African American members and the rest of the union).

343. See REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 121 (2015).

344. See CLETUS E. DANIEL, *THE ACLU AND THE WAGNER ACT: AN INQUIRY INTO THE DEPRESSION-ERA CRISIS OF AMERICAN LIBERALISM* 34 (1980) (citing the concerns by the ACLU’s Roger Baldwin that exclusive representation would substantially impair the rights of a dissenting faction); CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 69 (2005) (“On the other side of the debate [over the NLRA], the employer lobby advocated plurality bargaining, opposed the majority rule as a denial of the rights of minorities, and asserted that the Board’s authority to determine the bargaining unit would lead to a closed shop.”).

states that a certified union is not “required to process grievances for employees who are not members of the organization.”³⁴⁵ Florida’s partial statutory exception to exclusive representation has been interpreted to permit a union to refuse to process an individual’s grievance concerning an issue that predates his or her membership.³⁴⁶

While *Janus* was pending, New York State anticipated the decision’s potential effects, and sought to ameliorate them through legislation.³⁴⁷ The New York State Legislature enacted, and, on April 12, 2018, Governor Andrew Cuomo signed, legislation intended to stabilize collective bargaining from its effect, by enacting into law new provisions that: (1) facilitating dues collection from members, by requiring that dues are promptly collected by employers and promptly forwarded to the unions; (2) allowing the deduction of dues to continue unless revoked by the member “in accordance with the terms of the signed authorization,” and resuming such deductions upon the members return from any leave, voluntary or involuntary, or upon separation for a year or less; (3) facilitating union enrollment of new members, allowing dues authorizations through electronic signatures, and making sure unions are aware of and able to reach new hires, and further providing that union representatives have an opportunity to meet with new employees at the worksite during worktime; (4) addressing in part the “free rider” problem by amending the law so that

345. FLA. STAT. § 447.401 (2018).

346. 19 F.P.E.R. ¶ 24111 (1993); see Dennis O. Lynch, *Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida’s Public Sector Labor Law*, 37 U. MIAMI L. REV. 573, 574 intro. (1983) (providing an extensive critique and analysis concerning Florida’s exception to the exclusive representation model).

347. 2018 N.Y. Laws, ch. 59, Part RRR. In part, this action was impelled by the part-time nature of the State Legislature. See *New York State - Legislative Session Calendar*, NEW YORK STATE ASSEMBLY, <https://nyassembly.gov/leg/calendar/> (last visited Feb. 2, 2019). The decision in *Janus* was widely (and correctly) expected to issue at the end of the current term, that is, in “late June or early July.” See *The Court and Its Procedures*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/procedures.aspx> (last visited Jan. 2, 2019). Although it was theoretically possible that the decision might issue earlier, controversial decisions such as *Janus* tend to be “issued in June . . . and mostly in the last week or two of June.” Lee Epstein, William M. Landes & Richard A. Posner, *The Best for Last: The Timing of U.S. Supreme Court Decisions*, 64 DUKE L.J. 991, 993 (2015). The New York State legislative session, however, normally runs from January through June, with the last session day of the 2017-2018 session scheduled to fall on Wednesday, June 20, 2018. See *New York State - Legislative Session Calendar*, NEW YORK STATE ASSEMBLY, https://nyassembly.gov/leg/docs/sessioncalendar_2018.pdf (last visited Feb. 2, 2019). Thus, the Governor and the Legislature had to assume that the opinion in *Janus* might very well not issue before the end of the session, requiring either (1) acting during session, in advance of knowing the actual outcome; (2) convening a special session in a heatedly contested election year; or (3) waiting until the next session, beginning in January 2019, with no guarantee that the political coalitions favorable to such action would still be in place. See *id.*; see also *The Court and Its Procedures*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/procedures.aspx> (last visited Feb. 2, 2019).

unions do not have to represent non-members during questioning by the employer or in disciplinary cases “where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate”; and (5) further addressing the “free-riding” problem by amending the law to make clear that unions have the right to provide legal services, or economic benefits or services outside of a collective bargaining agreement, and that they have the right to limit those services or benefits to members only.³⁴⁸ A review of various bills adopted or introduced in other states is useful to demonstrate additional possible ameliorative paths.³⁴⁹

Shortly after the enactment of the New York statute, New Jersey passed its “Workplace Democracy Enhancement Act,” which was signed into law on May 18, 2018.³⁵⁰ The New Jersey Act, like the New York statute, requires public employers to provide information relating to new hires and opportunities for union representatives to meet with such new hires at the worksite during business hours.³⁵¹ It further provides that a “public employer shall not encourage negotiations unit members to resign or relinquish membership in an exclusive representative employee organization and shall not encourage negotiations unit members to revoke authorization of the deduction of fees to an exclusive representative employee organization.”³⁵² Finally, the Act preserves exclusive representation by including part-time employees with full time employees performing the same work, and accretes any part-time employees previously excluded from a unit due to the limited number of hours to the appropriate unit. Previous similar access-based statutes had been enacted on March 27, 2018, by the State of Washington,³⁵³ April 5, 2018, by Maryland,³⁵⁴ and in 2017 by California, which makes impasses relating to union access to bargaining unit members subject to interest arbitration.³⁵⁵

348. *Id.* In 2019, the New York Legislature also extinguished any state law claims based on agency fee deductions that occurred prior to the issuance of *Janus*. NY Laws 2019, Ch. 56, Part. DD. The provisions endeavoring to redress the “free-rider” problems are consonant with the Court’s finding that with respect to individual representation of nonmembers, “[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether.” *Janus*, 138 S. Ct. at 2468-69.

349. S.B. 2137, 218th Leg., Reg. Sess. (N.J. 2018).

350. *Id.*

351. *Id.* (providing for time limits for such meetings and encouraging negotiation regarding the times and places of such meetings, with resort to the New Jersey Public Employment Relations Commission to resolve any issues the parties cannot agree upon).

352. *Id.*

353. 2018 Wash. Sess. Laws 1467-68.

354. H.R. 1017, Gen. Assemb., Reg. Sess. 2018 (Md. 2018).

355. Assemb. B. 119, Gen. Assemb., Reg. Sess. 2017 (Cal. 2017) (enacting similar access rights

Effective January 1, 2019, California also requires public employers to grant reasonable leaves to employees to serve as union officers and stewards to provide representation.³⁵⁶

A broader approach, one that was raised during the pendency of *Friedrichs*, and may also be reconsidered, is the limitation of the union's duty of fair representation solely to members.³⁵⁷ However, this option raises significant concerns as well.³⁵⁸ Having two classes of employees in a workplace would undermine the core concept of exclusivity, by which employers only have to reach agreement with one bargaining agent for a title or cluster of titles.³⁵⁹ Self-represented non-union employees would either problematically have different rights than union members or could, if allowed to pursue their own personal cases, such as disciplinary cases, effectively take control of a contract to which they are neither a party nor a beneficiary.

A bill in Massachusetts introduced in 2017, but neither passed nor rejected, would take a sterner tack than even that of severing the duty of fair representation to nonmembers; it provides simply that:

If an agency service fee is not negotiated in the collective bargaining agreement the fair share provision shall apply to any employee who chooses not to join the union by paying to the union a percentage equal for negotiations for wages, benefits and working conditions and grievance and arbitration rights. Failure of an employee to pay the fair share provision shall exclude him from any and all relief of the collective bargaining agreement with the exception of the negotiated COLA increases.³⁶⁰

to new employee orientations and rights to obtain contact information). Likewise, similar access and informational requirements are contained within Senate Bill No. 238, which has, as of this writing, not yet passed the Vermont General Assembly.

356.S.B. 1085, Gen. Assemb., Reg. Sess. 2018 (Cal 2018); CAL. GOV'T CODE § 3558.8 (2018).

357. *Friedrichs*, 136 S. Ct. 1083. Such a provision already exists in Florida's Section 447.401, which provides "that certified employee organizations shall not be required to process grievances for employees who are not members of the organization." FLA. STAT. § 447.401 (2018). Under this section, the Florida Public Employment Relations Commission ruled that a union did not violate its duty of fair representation by revoking an employee's membership, returning his dues, and refusing to process a grievance with respect to events that preceded the employee joining the union. *Id.*; Polk Educ. Assn., 19 F.P.E.R. ¶ 24111 (1993); see also Lynch, *supra* note 346, at 573.

358. Lynch, *supra* note 346, at 573.

359. *Id.* at 576.

360. H.R. 1335, 190th Gen. Assemb., Reg. Sess. 2017-2018 (Ma. 2017). According to the tracking information, the bill has neither been passed nor rejected. *Id.*

An alternative approach drafted but not enacted by the Hawaii Legislature during the pendency of the *Friedrichs* case³⁶¹, would require the State and/or other public employers to appropriate a “Public Employees’ Collective Bargaining Fund” to directly replace the lost revenue to unions.³⁶² This public option seems unrealistic and unworkable, based on state budgetary limitations.³⁶³ Moreover, the perceived resultant dependence of the unions on the State or other public employers could delegitimize the very unions the proposal seeks to support. In fact, the idea was considered and rejected 50 years ago by the City of New York.³⁶⁴ Finally, the potential unconstitutionality under *Janus* itself of a public employer seemingly seeking to recoup from employees via payroll deductions (in the Hawaii bill) or in negotiations (in academic support of such a proposal) the monies expended by the Fund poses a significant difficulty.³⁶⁵ So too does the effect of mandatorily negotiable terms and conditions of employment created by unilaterally imposed recouping methods.³⁶⁶

The Vermont General Assembly has neither adopted nor rejected another option, one that provides that “a nonmember who avails himself or herself of the unit representative in grievance proceedings shall be required to reimburse the unit representative for the actual cost of representing the employee in relation to the grievance proceedings.”³⁶⁷

While the question of reimbursement for union costs in representation cuts to the heart of the challenge posed by *Janus*—a union’s ability to remain an effective collective bargaining agent, and to provide services, limiting the funds to actual costs could be read narrowly, in such a way as to exclude ongoing costs (staffing legal departments, providing expert and experienced grievance representatives).³⁶⁸ Such a narrow reading could

361. H.R. 1886, 28th Leg., Reg. Sess. 2016 (Haw. 2016).

362. H.R. 923, 29th Leg., Reg. Sess. 2017 (Haw. 2017).

363. See generally STATE OF HAW. DEP’T OF BUDGET & FIN., THE FY 2019 EXECUTIVE SUPPLEMENTAL BUDGET: BUDGET IN BRIEF at iv (2017).

364. Memorandum from the Office of the Corp. Counsel to the Labor Policy Comm., to the Office of the Mayor (July 9, 1968) (on file with City of New York Department of Records & Information Services, Municipal Archives, John V. Lindsay Files, Box 58, Folder 1094 Labor Policy – Agency Shop 1968-1969).

365. Tucker Higgins, *In a Blow to Public Sector Unions, Supreme Court Overturns 40-Year-Old Precedent*, CNBC (June 27, 2018, 4:14 PM), <https://www.cnbc.com/2018/06/27/supreme-court-rules-in-janus-labor-union-case.html>.

366. See Haw. H.R. 1886; see generally Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144 (2016) (advocating for such a system, with recouping through withdrawal of non-bargained benefits, and negotiating lower future wages).

367. S.B. 238, Gen. Assemb., Reg. Sess. 2017-2018 (Vt. 2018).

368. Bob Hennelly, *Federal Unions Show How to Survive Even Without Agency Fees*, THE CHIEF (Mar. 5, 2018), http://thechiefleader.com/news/open_articles/federal-unions-show-how-to-

lead to the union continuing to subsidize nonmembers.³⁶⁹ While not a straightforward panacea, the reframing of this notion as a “fee for services” model could be useful but could also undermine traditional concepts of unionism.³⁷⁰

The questions of how non-members would access the process if they choose not to retain the union at a fee, and, conversely, of determining what limits, if any, should apply to a union’s discretion to set fees, would need to be fleshed out. Any fee imposed would be subject to challenge, just as the amount of agency fees were litigated prior to *Janus*.³⁷¹ A potential workable “fee for services” model, to avoid constitutional and state statutory problems would most likely be effective only if it: (1) allows for nonmembers to voluntarily opt in to pay an agency fee (possibly minus the political component under *Hudson*) as a form of insurance entitling the non-member to personal representation on the same terms and conditions as members; (2) allows the union to charge a reasonable fee to any non-agency fee paying non-member who receives individual representation services from the union (e.g., representation for a grievance, or disciplinary procedure); (3) defines a “reasonable fee” through adaptation of the well-established “lodestar” criteria applied by the federal and state courts with respect to attorneys and other professional fees, allowing hourly compensation for all work reasonably performed in the representation, with the hourly rate set by criteria based on the local market, qualifications of the individuals providing service, and other specified criteria; and (4) requires that the union shall not discriminate against non-members in determining whether, to what extent, and how to provide representation. Extensive litigation, however, could result that challenges both the model and its application.

While the aftermath of *Janus* in the states that favor collective bargaining is unclear, these states have multiple policy options open to them, should they choose to continue to protect the institution of collective bargaining.³⁷² Some of these options include aspects that may generate fur-

survive-even-without-agency-fees/article_9a78c582-1663-11e8-a65a-53ccb6e62108.html.

369. Don Gonyea, *Labor Clout Takes a Hit in Supreme Court Ruling on Dues*, NPR (June 30, 2018, 7:00 AM), <https://www.npr.org/2018/06/30/624513403/labor-clout-takes-a-hit-in-supreme-court-ruling-on-dues>.

370. Sue Carney, *We’re Not a Fee-for-Service Organization*, AMERICAN POSTAL WORKERS UNION, <http://www.apwu.org/news/deptdiv-news-article/we’re-not-fee-service-organization> (last visited Feb. 2, 2019).

371. CELINE MCNICHOLAS ET. AL., JANUS AND FAIR SHARE FEES: THE ORGANIZATIONS FINANCING THE ATTACK ON UNIONS’ ABILITY TO REPRESENT WORKERS 3 (Econ. Policy Inst. 2018).

372. Daniel Hemel & David Louk, *How to Save Public Sector Unions*, SLATE (June 27, 2018,

ther constitutional litigation by burdening or penalizing an employee's exercise of her or his right to not join a union.³⁷³ These options will be, most likely, subject to exacting or strict scrutiny.³⁷⁴ Those options which center on the state law duty of fair representation, and particularly embrace individual choice, are most likely to face and withstand less searching review but raise public policy considerations that will differ based upon the political context of each state.

3. Recent Non-Agency-Fee Labor Legislation

Janus has overshadowed other recent labor legislation that has the potential to have a greater impact on unions and employees.³⁷⁵ Indeed, some states have proposed to, or have, changed the coverage of collective bargaining laws.³⁷⁶ California extended collective bargaining rights to various court employees and student employees.³⁷⁷ In Nevada, school administrators, including principals, can now bargain regardless of salary.³⁷⁸ Bills to expand collective bargaining have been introduced in New Hampshire (state legislative and judicial branches), New York (farm laborers), and North Dakota (public safety employees).³⁷⁹ Other laws have sought to restrict bargaining. Iowa limited collective bargaining rights for non-safety public employees.³⁸⁰ A Kansas bill proposed to significantly narrow the scope of bargaining for school employees.³⁸¹ Indiana expanded the subjects for which employers can pay non-bargained bonuses for

12:23 PM), <https://slate.com/news-and-politics/2018/06/supreme-courts-janus-decision-how-blue-states-can-still-save-public-sector-unions.html>.

373. Lisa Guerin, *Right to Work, Union Shops, and Union Dues: Can Employees Be Required to Join A Union or Pay Dues?*, NOLO, <https://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter15-5.html> (last visited Feb. 2, 2019).

374. Cornell University School of Law, *First Amendment: Freedom of Association*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/supct/cert/supreme_court_20132014_term_highlights/first_amendment_freedom_of_association (last visited Feb. 2, 2019).

375. See *Collective Bargaining and Labor Union Legislation Database 2018-2019*, NAT'L CONF. OF ST. LEGISLATURES (2019), <http://www.ncsl.org/research/labor-and-employment/collective-bargaining-legislation-database.aspx>.

376. Hemel & Louk, *supra* note 372.

377. Assemb. B. 83, Gen. Assemb., Reg. Sess. 2017 (Cal. 2017) (providing collective bargaining rights to court employees); S.B. 201, Gen. Assemb., Reg. Sess. 2017 (Cal. 2017) (providing collective bargaining rights to student employees).

378. S.B. 493, Gen. Assemb., Reg. Sess. 2017 (Nev. 2017) (providing collective bargaining rights to school administrators).

379. H.R. 1432, Gen. Assemb., Reg. Sess. 2016 (N.H. 2016); S. 1291, Gen. Assemb., Reg. Sess. 2015-2016 (N.Y. 2015); H.R. 1401, 65th Leg., Reg. Sess. 2017 (N.D. 2017).

380. H.R. DOC. NO. 291, 87th Gen. Assemb., at 1-2 (Iowa 2017).

381. S.B. 176, Kan. Leg., Reg. Sess. 2015 (Kan. 2015).

teachers, and in a special legislative session eliminated collective bargaining rights for teachers in one financially distressed school corporation.³⁸²

Another area of increased legislation requires that unions recertify to remain the exclusive representative, instead of allowing the exclusive representative to continue as such until being decertified in a representation election or voluntarily relinquishing their position. These laws typically require recertification either for all unions after certain time frames, or for unions whose membership is below a majority of unit members.³⁸³ For example, in Iowa, unions must now receive votes from a majority of unit employees in an election prior to negotiating a new contract.³⁸⁴ Legislation requiring unions to win elections at regular intervals to remain the exclusive representative have been introduced in Washington, Maine, New Jersey, Missouri, Florida, Oklahoma, and Illinois.³⁸⁵ In Indiana, teachers' unions must certify membership numbers annually.³⁸⁶ If the number of union members is less than a majority of unit members, a letter is sent to every bargaining unit member explaining a teacher's right to representation and to change representatives or decertify their exclusive representative.³⁸⁷

Although these laws and proposed laws only impact the employees and unions in their states, together they impact many employees and in a more significant way than agency fees.³⁸⁸ They also highlight trends that are likely to continue.³⁸⁹

382. See H.R. 1315, 120th Gen. Assemb., 1st Special Sess. 2018 (Ind. 2018); see also IND. CODE ANN. § 20-28-9-1.5(a) (2018).

383. See *Union Recertification Act: Summary*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 18, 2018), <https://www.alec.org/model-policy/union-recertification/>.

384. Iowa H.R. DOC. NO. 291.

385. See, e.g., H.R. 1607, 65th Leg., Reg. Sess. 2017 (Wash. 2017); S.B. 544, 128th Leg., Reg. Sess. 2017 (Me. 2017); Assemb. B. 3692, 217th Leg., Reg. Sess. 2016 (N.J. 2016); S.B. 806, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2015); H.R. 11, Fla. Leg., Reg. Sess. 2017 (Fla. 2017); S.B. 597, 56th Leg., 1st Reg. Sess. (Okla. 2017); H.R. 1767, 56th Leg., 1st Reg. Sess. (Okla. 2017); H.R. 3219, 100th Gen. Assemb., Reg. Sess. 2017-2018 (Ill. 2017).

386. IND. CODE ANN. § 20-29-5-7 (West 2018).

387. See IND. CODE ANN. §§ 20-29-5-7, 5-8 (West 2018); 560 IND. ADMIN. CODE 2-2.1-20 (West 2019); 560 IAC 2-2.1-20 (2018).

388. See Jacquie Lee, *Will Iowa's Union Recertification Law Create a Domino Effect?*, BLOOMBERG (Sept. 12, 2017), <https://www.bna.com/iowas-union-recertification-n57982087768/>; see also Alexander Hertel-Fernandez & Ethan Porter, *How Teachers Unions Can Survive*, VOX (Jul. 17, 2018, 9:40 AM), <https://www.vox.com/the-big-idea/2018/7/17/17578832/teachers-unions-janus-strategy-labor-movement-agency-fees>; Caroline Glenn, *New Law Could Jeopardize Brevard Teachers Union – If They Don't Scrounge Up More Members*, FLORIDA TODAY (Mar. 15, 2018, 2:15 PM), <https://www.floridatoday.com/story/news/2018/03/15/new-law-could-jeopardize-brevard-teachers-union/421860002/>.

389. See Lee, *supra* note 388; see also Caroline Glenn, *New Law Could Jeopardize Brevard Teachers Union – If They Don't Scrounge Up More Members*, FLORIDA TODAY (Mar. 15, 2018, 2:15

Another trend to watch for will be the ways used to externally pressure state legislatures.³⁹⁰ As recent teacher unrest in a half-dozen states shows, statewide protests can result in statutory changes.³⁹¹ And since *Janus*, there has been an increased number of teacher strikes in previously agency fee states.³⁹² However, striking is often illegal for public sector unions and can carry severe penalties, such as being prohibited from representing employees for at least 10 years.³⁹³ Where available, some unions are using ballot measures to achieve state action.³⁹⁴ In August 2018, 67.5% of Missouri voters overturned the private right-to-work law passed in 2017.³⁹⁵ Although the purpose of protests and ballot measures is to change the laws of that state, the more places that external pressure is applied make it more likely that other legislatures will feel the pressure and act, even if there is no protest or ballot in their state. For example, after the wave of teachers strikes in 2018 and 2019, teacher compensation became one of the—if not the—biggest topic for the 2019 Indiana General

PM), <https://www.floridatoday.com/story/news/2018/03/15/new-law-could-jeopardize-brevard-teachers-union/421860002/>.

390. See Michelle Exstrom, *Teacher Pay Is a Problem*, 44 ST. LEGISLATURES: NAT'L CONF. OF ST. LEGISLATURES, no.6, June 2018, at 22, 22 (demonstrating that pressure to raise salaries, support pensions and restore education funding to pre-recession levels are pressures that lawmakers have been faced with).

391. Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>; Elizabeth Behrman, *Strike Averted After Pittsburgh Public Schools, Teachers Union Reach Tentative Deal*, PITTSBURGH POST-GAZETTE (Feb. 27, 2018, 11:57 PM), <http://www.post-gazette.com/news/education/2018/02/27/Pittsburgh-Public-Schools-Federation-of-Teachers-contract-negotiations-strike-agreement-union/stories/201802270201>; Dana Goldstein, *Their Pay Has Stood Still. Now Oklahoma Teachers Could Be the Next to Walk*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/us/oklahoma-teachers-strike.html>; Robert Gebeloff, *The Numbers That Explain Why Teachers Are in Revolt: After A Quarter Century of Steady Growth On Education Spending, A Shock to the System*, N.Y. TIMES: THE UPSHOT (June 4, 2018), <https://www.nytimes.com/2018/06/04/upshot/school-funding-still-lags-after-recession-ended.html>; Anya Kamenetz, *NPR/IPSOS Poll: Most Americans Support Teachers' Right to Strike*, NPR (Apr. 26, 2018, 5:01 AM), <https://www.npr.org/sections/ed/2018/04/26/604117045/npr-ipsos-poll-most-americans-support-teachers-right-to-strike>.

392. Alia Wong, *America's Teachers Are Furious: From West Virginia to Los Angeles, educators are ushering in a new era of labor activism*, The Atlantic (Jan. 22, 2019), <https://www.theatlantic.com/education/archive/2019/01/teachers-are-launching-a-rebellion/580975/>.

393. See SANES & SCHMITT, *supra* note 236; IND. CODE ANN. § 36-8-22-15(d) (West 2018) ("An exclusive recognized representative that engages in or sanctions a strike loses the right to represent the employees for at least ten (10) years after the date of the action").

394. See Liz Farmer, *In States With Teacher Strikes, Voters Refuse to Raise Education Funding*, GOVERNING (Nov. 7, 2018, 3:49 AM), <http://www.governing.com/week-in-finance/gov-finance-roundup-teacher-raises-ballot.html>; Mich. Proposal 2-12.

395. Hallie Detrick, *Missouri Voters Rejected the "Right to Work" – Here's Why That Matters*, FORTUNE (Aug. 8, 2018) <http://fortune.com/2018/08/08/missouri-right-to-work-referendum-unions/>.

Assembly.³⁹⁶

B. Executive Branch Actions

Although presidents and state governors cannot stray beyond the bounds of any relevant statute or constitution, executives still hold substantial authority over bargaining, both as the chief of the executive branch and as the elected official who oversees the operation of administrative agencies in charge of enforcing the law.³⁹⁷

1. Executive Orders

Executive orders are powerful tools in shaping the law, particularly when the legislature cannot or will not act.³⁹⁸ Presidents have used executive orders to unilaterally create, eliminate, expand, and limit labor rights within their respective spheres of governance.³⁹⁹ For example, the first formal system of public sector collective bargaining was instituted by Executive Order 49 in 1958 by New York City Mayor Robert F. Wagner, Jr.⁴⁰⁰ Similarly, the right of federal government employees to bargain collectively was originally the product of an executive order signed by President John F. Kennedy in 1962; several other executive orders on bargaining rights followed.⁴⁰¹ Those rights for federal employees were ultimately enshrined in the Federal Service Labor-Management Relations Statute, demonstrating the shaping force of the executive order as a tool to ultimately influence legislative action.⁴⁰²

396. See, e.g., Dylan Peers McCoy, *Indiana education advocates demand boost to school funding, teacher pay at Statehouse rally*, Chalkbeat (Apr. 16, 2019), <https://www.chalkbeat.org/posts/in/2019/04/16/indiana-education-advocates-demand-boost-to-school-funding-teacher-pay-at-statehouse-rally/>; Arika Herron, *Teacher walkout possible in Indiana if General Assembly ignores pay issue. 'We expect action in 2019.'*, Indianapolis Star (Dec. 10, 2018), <https://www.indystar.com/story/news/education/2018/12/10/indiana-general-assembly-teachers-keep-close-pay-plan/2266994002/>.

397. See generally 16A AM. JUR. 2d Constitutional Law § 308 (2009); 16A AM. JUR. 2d Constitutional Law § 250 (2009).

398. *Id.* (Discussing Executive powers under the Constitution).

399. See Joe Davidson, *Administration Defends Labor-Law Executive Order Against Court Decision*, WASH. POST (Nov. 1, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/11/01/administration-defends-labor-law-executive-order-against-court-decision/?utm_term=.7d398e378d56; see also Daveante Jones, *A Review of President Trump's Executive Orders Impacting Labor & Employment Law*, HR PROFESSIONALS MAGAZINE, <http://hrprofessionalsmagazine.com/a-review-of-president-trumps-executive-orders-impacting-labor-employment-law/> (last visited Feb. 2, 2019).

400. Exec. Order No. 49, *supra*, note 66.

401. Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962); Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 31, 1969); Exec. Order No. 11838, 40 Fed. Reg. 5743 (Feb. 7, 1975).

402. 5 U.S.C. § 7101 (2012).

The Trump White House has continued the trend of trying to use executive orders to address federal employee bargaining matters.⁴⁰³ On May 25, 2018, the White House issued two executive orders related to federal employee collective bargaining.⁴⁰⁴ The first imposed swift timelines for negotiations and sought to limit, to some extent, the scope of bargaining.⁴⁰⁵ The second order limited the paid hours spent on union related matters, imposed agency approval requirements for deviations from those limits, and instructed the Office of Personnel Management to assess whether regulatory changes may be necessary to implement the rules set forth in the order.⁴⁰⁶ On August 25, 2018, a majority of the provisions in the order were declared invalid by a D.C. District judge.⁴⁰⁷ The judge found that the enjoined portions reduced the scope of protected collective bargaining rights and “hampered good faith bargaining.”⁴⁰⁸

The use of executive power to implement labor policy is not confined to the White House.⁴⁰⁹ As noted above, Indiana governors both granted and revoked the right of state employees to bargain by executive order.⁴¹⁰ Indeed, *Janus* itself was brought against the backdrop of a 2015 executive order by former Illinois Governor Bruce Rauner ending mandatory agency fees for state employees.⁴¹¹ There also have been more recent executive orders from governors. In 2017, Oregon Governor Kate Brown signed an order that required the Department of Administrative Services to conduct market studies of state employee wages to ensure that funds appropriated for state employee salary increases are sufficient to support market level wages.⁴¹² Also in 2017, Hawaii Governor David Ige signed

403. See Gregory Korte, *Judge Rules Against Trump's Attempt to Weaken Federal Unions*, USA TODAY (Aug. 25, 2018, 3:55 PM), <https://www.usatoday.com/story/news/politics/2018/08/25/donald-trump-labor-unions-court-strikes-down-three-executive-orders/1098451002/>.

404. *2018 Donald Trump Executive Orders*, OFF. OF FED. REG. (last visited Feb. 2, 2019), <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2018>; see also Jones, *supra* note 399.

405. Exec. Order No. 13836, 83 Fed. Reg. 25329 (May 25, 2018) (Developing efficient, effective, and cost-reducing approaches to federal sector collective bargaining).

406. Exec. Order No. 13837, 83 Fed. Reg. 25335 (May 25, 2018).

407. *Am. Fed'n of Gov't Employees, AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 381 (D.D.C. 2018) (Determining that the only parts of the orders that remain are Executive Order 13,836 § 5(c); Executive Order 13,837 §§ 2(j), 4(c); and Executive Order 13,839 §§ 2(b), 2(c), 4(b)(iii), 7).

408. *Id.* at 440.

409. *After Janus: Blue States Move to Protect Public Workers*, Int'l Bhd. of Elec. Workers: Media Ctr. (July 16, 2018), <http://www.ibew.org/mediacenter/Articles/18Daily/1807/180716>.

410. Ind. Exec. Order No. 90-6, 13 Ind. Reg. 1925 (July 1, 1990); Ind. Exec. Order No. 97-8, 20 Ind. Reg. 2222 (May 1, 1997); Ind. Exec. Order No. 03-35, 27 Ind. Reg. 1007 (Dec. 1, 2003); Ind. Exec. Order No. 05-14 (Jan. 11, 2005).

411. Ill. Exec. Order No. 13-15 (Jan. 14, 2013).

412. Or. Exec. Order No. 17-08 (Apr. 27, 2017).

Executive Order 17-06, which adjusted the terms and conditions of employment for certain civil service employees excluded from the state's public employee bargaining unit to bring them in line with those of their unionized counterparts.⁴¹³ Amid reports in the wake of *Janus* of individuals and organizations harassing union members or prospective union members, New York Governor Andrew Cuomo issued Executive Order No. 183, which prohibited State entities from disclosing personal contact information for state employees.⁴¹⁴ Subsequently, the New York State Legislature codified the terms of Executive Order No. 183 and made it applicable to all public employers.⁴¹⁵

While legislative bodies must sometimes wait several months to a year for a legislative session before making changes in law, an executive order can be drafted, signed, and issued quickly.⁴¹⁶ Therefore, look for more executive orders to be issued by governors as a response to *Janus*,⁴¹⁷ or orders similar to President Trump's, in the event that legislatures cannot or will not pass relevant legislation.

2. *Administrative Agencies*

While the bulk of power lies with state legislatures to determine public policy in response to *Janus*, state administrative agencies will play an important role in interpreting and enforcing existing and new laws.⁴¹⁸ Specifically, through rule-making and adjudication, administrative agencies and adjudicators will have the opportunity to neutralize or enhance the impact of *Janus*.⁴¹⁹

Janus and the ameliorative statutes discussed above are so recent that there are not many rules to discuss. There are also only a few administrative agency decisions related to *Janus*.⁴²⁰ However, there has been some speculation that there will be an increase in claims filed in administrative agencies against employers after the end of agency fees.⁴²¹ This does not

413. Haw. Exec. Order No. 17-06 (Oct. 31, 2017).

414. N.Y. Exec. Order No. 183 (June 27, 2018).

415. NY Laws 2019, Ch. 55, Part E.

416. Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L. J. 987, 1021 (1999); Aaron Blake, *What is an Executive Order? And How Do President Trump's Stack Up?*, WASHINGTON POST (Jan. 27, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/27/what-is-an-executive-order-and-how-do-president-trumps-stack-up/?noredirect=on&utm_term=.3ceae01ad751.

417. Barret & Greene, *supra* note 267.

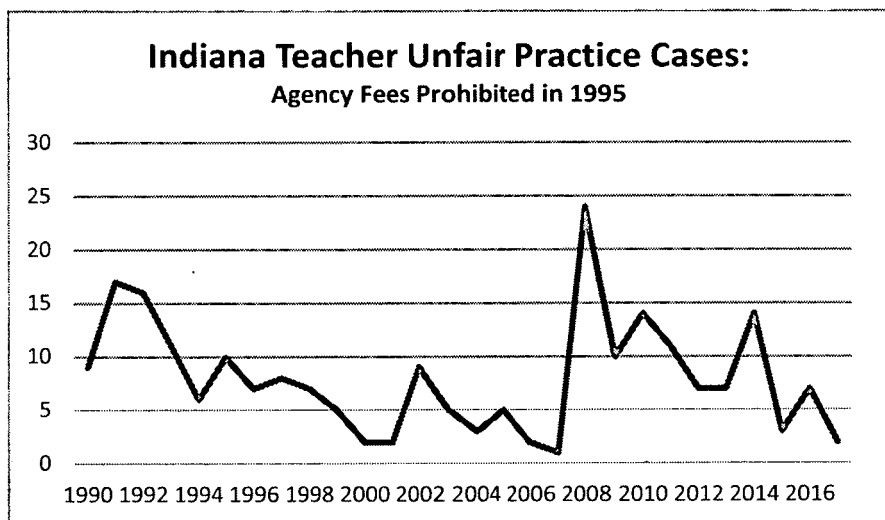
418. See Benjamin Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 397-98 (2007).

419. See Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1913 (2013).

420. See, e.g., SEIU Healthcare Minn. and Chippewa County Montevideo Hosp., BMS 18-HN-0415, 2018 WL 7569662 (MN BMS Oct. 8, 2018).

421. Sarah Cudahy, Kate Luscombe, James Roemer & John Wirenius, *Strategies for Adapting*

appear to have occurred in Indiana, Wisconsin, or Michigan, where union pursuit of unfair labor practice claims or other enforcement actions before administrative agencies continued at the same or lower trajectory following the prohibition of agency fees.⁴²²



States with a political divide between the executive branch and legislatures may prove to be particularly fertile ground for administrative agency actions. Administrative agencies serve to demonstrate that the ultimate impact of *Janus* hinges on the multiple tiers of state and local government and the interplay between them.⁴²³

C. The Courts' Continuing Role: Interpreting Janus & Beyond

The courts' role in *Janus* does not end with the decision; in the wake of *Janus*, challenges to new state laws and regulations promulgated in response to *Janus* are likely.⁴²⁴ The court also left questions to be answered

to a Post-*Janus* World, in John F. Wirenius, ed., *THE TAYLOR LAW AT 50: PUBLIC SECTOR RELATIONS IN A SHIFTING LANDSCAPE*, 183-211 (2019).

422. *Id.* at 187-189; Data collected or provided by the Indiana Education Employment Relations Board on Mar. 20, 2018.

423. See Lisa Milam-Perez, *Reaction Is Swift to Supreme Court's Janus Decision*, *EMPLOYMENT LAW DAILY* (July 2, 2018), <https://lrus.wolterskluwer.com/news/employment-law-daily/reaction-is-swift-to-supreme-court-s-janus-decision/54835/> (discussing how state legislatures are to respond to the decision).

424. See Daniel Wiessner, *Right-to-Work Group Says It Will Sue States That Defy Ruling*, *REUTERS* (July 5, 2018, 7:54 AM), <https://www.reuters.com/article/labor-righttowork/right-to-work-group-says-it-will-sue-states-that-defy-janus-ruling-idUSL1N1U10AB> (discussing challenges to

another day. The courts will also have to decide whether to extend the rationale of *Janus*—and the reversal of *Abood*—to other entities than unions and to other areas of the law.⁴²⁵ And the day *Janus* was handed down also was the day Justice Kennedy—often described as the court’s swing vote—resigned.⁴²⁶ The fate of many of the cases described below may well be determined by the new Justice, Brett Kavanaugh.

Unions and their supporters have argued that it is unfair for the union to be required to pay to represent nonmembers who do not pay agency fees or otherwise pay for representations.⁴²⁷ However, state courts to date have disagreed, finding that charging fees or refusing to process grievances for nonmembers violates the exclusive representative’s duty of fair representation.⁴²⁸

The Wisconsin Court of Appeals held that exclusive representatives are required to represent members and nonmembers under the duty of fair representation regardless of the existence of agency fees.⁴²⁹ The union argued that the obligations imposed by the duty of fair representation, in the absence of obligatory agency fees, constituted a taking of the union’s property for the benefit of other private actors without just compensation.⁴³⁰ The Wisconsin Court of Appeals found that the union failed to overcome a “beyond a reasonable doubt” standard when challenging the state constitutional compliance of the state’s right to work law.⁴³¹ It held that the duty of fair representation is an obligation that the unions voluntarily assume when they accept the role of exclusive representative.⁴³² The NLRB has also recently reaffirmed that even when employees do not pay agency fees “a union may not charge nonmembers for processing of grievances or other related services.”⁴³³

state laws passed in response to *Janus*).

425. See VICTORIA L. KILLION, PUBLIC SECTOR UNION DUES: GRAPPLING WITH FIXED STARS AND STARE DECISIS (PART II) 1-2 (Cong. Res. Serv. ed. 2018).

426. See John Cassidy, *As Kennedy Retires, The Supreme Court’s Attack On Labor Unions Is A Sign of Things to Come*, THE NEW YORKER (June 27, 2018), <https://www.newyorker.com/news/our-columnists/as-kennedy-retires-the-supreme-courts-attack-on-labor-unions-is-a-sign-of-things-to-come> (explaining that Justice Kennedy handed in his resignation on the same day that *Janus* was decided).

427. Int’l Ass’n of Machinists Dist. 10 & Its Local Lodge 106 v. State, 903 N.W.2d 141, 144 (Wis. Ct. App. 2017).

428. *Id.* at 149-50.

429. *Id.* at 149.

430. *Id.* at 148.

431. *Id.* at 143.

432. *Id.* at 150.

433. *United Steel Workers Local 1192*, 12-CB-109657 (NLRB 2015).

Similarly, the Supreme Court in *Janus* opined that unions voluntarily assume the duty of fair representation.⁴³⁴ Further, it may be in a union's best interest to represent nonmembers in grievance proceedings, in spite of the costs of doing so, on the grounds that it "furthers the union's interest in keeping control of the administration of the collective bargaining agreement"⁴³⁵ Nonetheless, as already noted, the *Janus* majority suggested that states could legislate a change in the duty of fair representations, finding that "nonmembers could be required to pay for [union representation services] or could be denied union representation altogether," noting that precedent for such an approach already exists in some states.⁴³⁶ It seems then that the Justices recognize that the duty of fair representation is not constitutionally mandated, but almost purely a creature of state law.⁴³⁷ However, as not being a member is a constitutional right, parties should be careful in negotiating as they may not negotiate a collective-bargaining agreement that discriminates in terms and conditions of employment other than individual representation in discipline and grievances, against nonmembers—and the public employer must be careful not to adopt such an agreement.⁴³⁸

Laws, rules, or union policies making it more difficult to revoke union membership are also likely to be challenged.⁴³⁹ The NLRB has interpreted the National Labor Relations Act to "prohibit categorically union policies that 'delay or otherwise impede' a member's right to resign or revoke."⁴⁴⁰ However, some states have adopted a different public policy.⁴⁴¹ In New York, the Taylor Law was amended to make revocation subject to the terms set forth in the dues deduction authorization.⁴⁴² The Michigan Court of Appeals recently addressed the financial implications of membership resignation.⁴⁴³ In affirming a decision of the Michigan Employment Relations Commission the court found that, while the em-

434. *Int'l Ass'n of Machinists*, 903 N.W.2d at 150.

435. *Janus*, 138 S. Ct. at 2468.

436. *Id.*

437. *Id.* ("It is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers.")

438. *Id.*

439. *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 106-08 (1985).

440. *Local 58, Int'l Bhd. of Elec. Workers v. NLRB*, 888 F.3d 1313, 1318-19 (D.C. Cir. 2018) (quoting *Int'l Ass'n of Machinists, Local Lodge 1414*, 270 NLRB 1330, 1333 (1984)); see also *Pattern Makers' League*, 473 U.S. at 106-08 (finding that, under the NLRA, unions do not have the right to "make rules restricting the right to resign").

441. GOVERNOR'S COMMITTEE ON EMPLOYEE RELATIONS, FINAL REPORT, 7 (1966).

442. *Id.*

443. *Teamsters Local 214 v. Beutler*, No. 330854, 2017 WL 3441394, at *1 (Mich. Ct. App. Aug. 10, 2017), *perm. app. denied*, 908 N.W.2d 301 (Mich. Sup. Ct. 2018).

ployee had a right to immediate revocation of union membership, the employee was still responsible for previously agreed-upon dues until the end of the dues period.⁴⁴⁴

The *Janus* decision has disrupted core First Amendment principles concerning public employment. On the one hand, the *Janus* Court endorsed the *Pickering-Connick* test and rationale that individual employee grievances are not constitutionally protected, even when those employment related grievances may relate to a matter of public concern because the interest of the governmental employer in effective administration often outweighs the employee's right to speak.⁴⁴⁵ However, *Janus* distinguishes *Pickering-Connick* from *Abood*, by drawing an arguably tenuous distinction between the nature of the speech involved.⁴⁴⁶ Specifically, the Court notes the private nature of individual employee grievances or issues as juxtaposed by union speech in regard to collective bargaining, which the Court notes as "overwhelmingly of substantial public concern."⁴⁴⁷

The Court did not provide any test for this category of speech or the appropriate level of scrutiny placed on government actions regulating it.⁴⁴⁸ Rather, the majority leaves wholly unanswered when the scales tip between the private concern of an individual seeking a 5% raise and the public concern of a union's request for a 5% raise for all employees it represents.⁴⁴⁹ Nor does the Court set forth what would be a narrowly tailored restriction on the individual right to abstain from or the collective right to speak in the context of public bargaining, salaries, and payment.⁴⁵⁰ This ambiguity leaves governmental employers with limited flexibility or guidance on what actions or limitations are permissible in the new universe of protected labor⁴⁵¹ speech, beyond an individualized *Pickering-Connick* analysis. Moreover, the Court's *dicta* will likely lead to legal challenges against prohibitions or limitations regarding bargaining as constituting unlawful prior restraint in violation of the First Amendment.⁴⁵²

444. *Id.* at *1; see also *Edwards v. Ind. State Teachers Ass'n*, 749 N.E.2d 1220, 1220 (Ind. Ct. App. 2001) (Fk-12upholding a teacher union's membership contract provision limiting members' right to revoke to one month per year based on *Abood*).

445. See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 383 (2011); *Garcetti v. Ceballos*, 547 U.S. 410, at 411; *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, at 568.

446. *Janus*, 138 S. Ct. at 2457.

447. *Id.* at 2477.

448. *Id.* at 2477-78.

449. *Id.* at 2472-73.

450. *Janus*, 138 S. Ct. 2943-47 (Kagan, J., dissenting).

451. *Id.* at 2494-96 (Kagan, J., dissenting).

452. *Janus*, 138 S. Ct. at 2457.

As to extending *Janus*, there is already pending litigation that may be primed to extend the holding in *Janus* to the private sector, which would eliminate agency fees entirely.⁴⁵³ Whether or not that effort is successful may turn on the threshold issue of whether the RLA regulatory scheme and private sector agreements containing agency fee provisions meet the requisite level of state action needed to implicate the First Amendment.⁴⁵⁴ To date, union security clauses in a private sector collective bargaining agreement have not been held to be a state action.⁴⁵⁵ Nor does the Court give any indication that it would find private sector fees unconstitutional.⁴⁵⁶ In finding that *Abood* was wrongly decided, the Court recognized that Congress authorized *private-sector* agency shops and that “*Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees.”⁴⁵⁷

Janus has implications that could reach far beyond the payment of fees or the level of scrutiny for public sector work speech and down to the very basis of collective bargaining itself.⁴⁵⁸ Given the Court’s findings regarding public-sector employee rights to free speech and that negotiations involve matters of substantial public concern, it is possible that the realignment of the First Amendment under *Janus* could be construed broadly to establish a constitutional right to bargain collectively.⁴⁵⁹ However, a constitutional right to collectively bargain may necessarily imply a constitutional right to refrain from collectively bargaining, a conclusion that could eviscerate the notion of exclusive representation and the end of the twentieth century model of United States labor law that is premised on a democratic form of governance.⁴⁶⁰ In fact, the *Janus* majority, in rejecting the union’s originalist argument for preserving *Abood*, included a footnote noting that collective bargaining under the common law had been treated as an unlawful infringement on an employee’s liberty of contract.⁴⁶¹ The Court, however, did not seem poised to further disturb the collective bargaining status quo.⁴⁶² The Court noted that its intent was not to question

453. See e.g., *United Nurses and Allied Professionals*, 359 NLRB 469 (2012).

454. *Id.* at 471.

455. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 184 (2015).

456. *Janus*, 138 S. Ct. at 2459.

457. *Id.*

458. See Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 534-36 (2017).

459. Complaint for Declaratory Relief at 28, *Sweeney v. Rauner*, 1:18-CV-01362 (N.D. Ill. Feb. 22, 2018). Complaint for Declaratory and Injunctive Relief at 25, *Operating Engineers of Wisc. v. Walker*, (E.D. Wisc. Feb. 23, 2018).

460. See Estlund *supra* note 455, at 232.

461. *Janus*, 138 S. Ct. at 2471, n.7 (citing *Teamsters v. Terry*, 494 U.S. 558, 565–566 (1990)).

462. See *id.* at 2485.

the foundations of labor and that aside from eliminating agency fees “[s]tates can keep their labor-relations systems exactly as they are.”⁴⁶³ And so far, the Eighth Circuit, the Massachusetts Supreme Judicial Court, and other courts have dismissed the argument that exclusivity is unconstitutional.⁴⁶⁴

Although the Court did not indicate an intention to eliminate collective bargaining, it did indicate some hostility to it, at least to public sector bargaining.⁴⁶⁵ Much like the policy aims of the executive branch, judicial policy goals and predilections will similarly shape whether judicial outcomes are favorable or unfavorable to organized labor.⁴⁶⁶ As an example, prior to *Janus*, Wisconsin’s 2011 changes in its public collective bargaining mandated recertification of unions annually.⁴⁶⁷ In February 2018, the Wisconsin Supreme Court upheld a new rule of the Wisconsin Employment Relations Commission’s, under which the failure to timely file paperwork for a recertification election results in decertification of the exclusive representative for the next year.⁴⁶⁸

The *Abood* rationale has been relied upon in many cases other than public sector agency fees.⁴⁶⁹ By overruling *Abood* entirely, rather than merely narrowing its scope as *Harris* did, *Janus* may have future consequences for the underlying rationale supporting other instances of compulsory payment required by law, like state bar association dues, university student activity fees, and compelled advertising.⁴⁷⁰ Although *Harris*

463. *Id.* at 2485, n.27.

464. *See, e.g.,* *Branch v. CERB*, 2019 WL 1522991 (Mass. Apr. 9, 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018), *cert. denied*, 2019 WL 2078110, (May 13, 2019); *Crockett*, ___ F.Supp.3d., 2019 WL 1212082, at *8 (D. Alaska Mar. 14, 2019).

465. *Id.* at 2483 (“Unsustainable collective bargaining agreements have also been blamed for multiple municipal bankruptcies.”); *see also id.* at 2486 (“It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.”).

466. Lawrence Hurley & Robert LaFolla, *Conservative Supreme Court Justices Take Aim at Union Fee*, REUTERS (Feb. 26, 2018, 9:42 AM), <https://www.reuters.com/article/us-usa-court-unions/conservative-supreme-court-justices-take-aim-at-union-fees-idUSKCN1GA1VB>.

467. *See* WIS. STAT. § 111.70(4)3.(d)3.b. (2017); *see also* WIS. STAT. § 111.83(3)(b) (2015).

468. *Wis. Ass’n of State Prosecutors v. Wis. Emp’t Relations Comm’n*, 907 N.W.2d 425, 439-40 (Feb. 28, 2018).

469. *Harris*, 134 S. Ct. at 2638; *see also* *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 533 U.S. 217, 221 (2000) (finding compulsory student activity fees implicated the First Amendment, but that viewpoint neutrality in dispersing the compulsory fees insulated the fees; therefore the content neutrality element is more likely to remain unaffected by *Janus* and continue as reaffirmed in *Harris*); *Keller v. State Bar of Cal.*, 496 U.S. 1, 13 (1989) (finding compulsory dues constitutional because the regulation of the practice of law is a competing governmental interest); *but see* *United States v. United Foods*, 533 U.S. 405, 415 (2001) (holding that compelled fees for mushroom producers to pay for advertising unconstitutional under *Abood* and *Keller* will presumably remain unaffected by *Janus*’ more stringent standard).

470. *See Harris*, 134 U.S. at 2638; *see also Southworth*, 533 U.S. at 221; *Keller*, 496 U.S. at 13;

found both instances of fees to continue to satisfy compelling governmental interests, the majority in *Janus* does not address compelled fees beyond the specific case, while the dissent notes repeatedly that the cases involving compelled fees all rely foundationally on *Abood*.⁴⁷¹ Nevertheless, it would appear that the government interest in regulating certain industries, such as attorneys, may continue to justify the imposition of mandatory fees.⁴⁷²

Both the majority and the dissent discuss *stare decisis* at length.⁴⁷³ And although both the majority and dissent discuss the same five factors, they come to opposite conclusions on every one.⁴⁷⁴ The first factor discussed by the majority is whether the opinion at issue is well reasoned.⁴⁷⁵ However, relying on whether the opinion is well reasoned potentially “dilutes the constraining, stabilizing effect of precedent and increases the chances that constitutional law will ebb and flow with shifts in judicial personnel—and attendant shifts in the interpretive methodologies that enjoy primacy at any given moment.”⁴⁷⁶ Such argument was noted in the dissents of both *Janus* and *Citizens United*.⁴⁷⁷ Indeed, President Reagan’s former solicitor general agrees, finding that looking back at the Roberts’ Court’s failure to invoke *stare decisis* in such cases as *Janus* and *Citizens United*, as well as other cases including voter suppression and affirmative action, means that the Court has reversed “settlements that work tolerably well.”⁴⁷⁸ It also means that we cannot know how far the reverberations of *Janus* will go.

CONCLUSION

For the last 40 years, agency fees have been considered a constitutionally permissible limitation on employees’ First Amendment rights on

but see *United Foods*, 533 U.S. at 415.

471. *Janus*, 138 S. Ct. at 2497-98.

472. *Keller*, 496 U.S. at 13.

473. *Janus*, 138 S. Ct. at 2497-2501 (Kagan, J., dissenting).

474. *Id.* at 2499 (Kagan, J., dissenting).

475. *Id.* at 2497-98, 2497, n.4 (Kagan, J., dissenting).

476. Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 824-25 (2018).

477. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 408-09 (2010) (Stevens, J., dissenting) (“[If *stare decisis*] is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. ‘[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.’”).

478. Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018), <https://blog.harvard-lawreview.org/not-conservative/>.

the basis that the government maintains a compelling interest in promoting harmonious labor relations.⁴⁷⁹ With *Janus*, the Court reversed course and declared that agency fees no longer met the compelling interest threshold and therefore are a violation of the First Amendment.⁴⁸⁰ *Janus* is important, not merely because of its prohibition of public sector agency fees, but because of the responses it will progenerate from stakeholders and governmental units throughout the country.

The immediate impact of *Janus* is not the end of public sector collective bargaining. Indeed, the number of contracts impacted are fewer than one might think, as many states had already prohibited agency fees pre-*Janus*. The durability and longevity of public sector collective bargaining will likely remain with the executive and legislative branches of the state and federal governments as impacted by the activism of public employees and their unions. The decline in revenue for unions, however, could likely undermine the effectiveness of labor representation at the bargaining table, in the workplace, and before legislative bodies.

Janus has brought public sector bargaining back squarely into the public debate.⁴⁸¹ A number of states have passed or are in the process of passing ameliorative legislation attempting to soften the impact of the agency fee prohibition and redefining the duties of exclusive representatives.⁴⁸² Other states will likely follow this trend, with legislation as well as executive orders, administrative rules, administrative decisions, and ballot measures. Still, other states will follow the opposite path, restricting the scope of bargaining or adding recertification requirements for exclusive representatives.

Courts will likely be asked to determine the role of the exclusive representative, the unions' duty of fair representation, or interpret the aforementioned new laws, rules, and orders impacting bargaining. Aside from the collective bargaining arena, state and federal courts will also have to decide how to address cases that previously relied upon *Abood*.⁴⁸³

In sum, like other seminal cases, the impact of *Janus*' ripple effects may very well comprise a total eclipse of the opinion itself.

479. See *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

480. See *Janus*, 138 S. Ct. at 2487.

481. Daniel DiSalvo, *Janus Barely Dents Public-Sector Union Membership*, WALL ST. J. (FEB. 13, 2019), <https://www.wsj.com/articles/janus-barely-dents-public-sector-union-membership-11550100582>.

482. *After Janus: Blue States Move to Protect Public Workers*, *supra* note 409; see also Barrett & Greene, *supra* note 267.

483. See generally *Harris*, 134 S. Ct. at 2638; *Keller*, 496 U.S. at 13.