Winter 2019

Janus v. AFSCME Council 31: Judges Will Haunt You in the Second Gilded Age

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Janus v AFSCME, Council 31: Judges Will Haunt You in the Second Gilded Age

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The United States Supreme Court's June 2018 decision in *Janus v American Federation of State, County, and Municipal Employees, Council 31* ("*Janus*" or "*Janus v AFSCME*")[1] reversed four decades of precedent by holding that a statutory or a negotiated agency shop in public sector labour relations is unconstitutional under the First Amendment to the United States Constitution. This essay will place the *Janus* decision in historical and legal context, describe the judicial activism underlying the decision, and review measures being taken by unions and state legislatures to minimize the decision's adverse impact.

The Historical and Legal Context of *Janus*

The movement for an open shop in the United States began during the first Gilded Age, when employers and employer organizations challenged the growing power of labour. This era is remembered as a time when a Supreme Court majority overturned state labour law reforms as violations of constitutionally protected liberty and freedom of contract.[2]

The original purpose of the open shop movement was to prohibit the closed shop and undermine union efforts to modify the locus of workplace power. An early open shop supporter was President Theodore Roosevelt, who imposed it in a unionized federal agency.

During the 1920s, the open shop was rechristened the "American Plan" as part of a national campaign by employer organizations to challenge the strength labour gained during World War I. After passage of the *Wagner Act*[3] in 1935, the closed shop remained lawful and negotiable.

Early public sector collective bargaining agreements in the 1930s and 1940s negotiated by the CIO's State County Municipal Workers of America included

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1 (2018) 138 S Ct 2448.

2 (1905) *Lochner v New York*, 198 US 45.

3 (1935) 29 USC § 151, et seq.

exclusive representation, mandatory union membership, and/or provided for dues checkoff.[4] Those contracts were reached without the existence of public sector bargaining laws.

Beginning in World War II, union shop and maintenance of membership provisions became more common in the private sector. In 1947, open shop proponents scored a major victory with the enactment of the *Taft-Hartley Act*,[5] which banned the closed shop, granted employees the right to refrain from participating in union activities, and permitted States to prohibit union security through "right to work" laws.

Four years later, Congress amended the *Railway Labor Act* (RLA)[6] to allow negotiated union shop agreements. United States Supreme Court decisions interpreting the RLA determined that it was constitutionally permissible to mandate non-members to contribute to the cost of collective bargaining and grievance handling but not in aid of a union's political activities.[7]

Taft-Hartley shifted the fight over union security to the States, with employer groups and segregationists supporting "right to work" measures. The most prominent open shop organization formed after *Taft-Hartley* was the National Right to Work Committee (NRWC). Opposition to the new "right to work" efforts was led by labour and civil rights activists.

Beginning in the late 1950s, *de jure* collective bargaining programs were implemented for public sector labour relations. The grant of bargaining rights was an important victory, setting the stage for a massive growth in public sector unionization in later decades.

Union security was not part of the early measures, however, demonstrating the relative weakness of public sector unions at the time. New York City Executive Order 49 and President Kennedy's Executive Order 10988 emulated *Taft-Hartley* by granting the right to refrain from participating in union activities. Plans to add the agency shop to the federal sector in 1968 were stopped by anti-union forces.[8] Many subsequent bargaining laws did not mandate the agency shop. By

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4 E.g., *Agreement between City of Fairmont, WV. and SCMWA Local 93* (1937, December 1), §2; *Agreement between County of Carbon, UT and SCMWA Local 225*, §§1 and 12 (1942, March 5); *Agreement between Board of Education of Gloucester City, NJ and SCMWA Local 410*, (1943, July 1), Art II, *BLS Collective Bargaining Agreements*, Collection 6178-022, Reel 181, Catherwood Library, Kheel Center for Labor-Management Documentation and Archives, Cornell University.

5 (1947) *Labor Management Relations Act of 1947*, 61 Stat 136.

6 (1951) 44 Stat 577. 45, USC § 152, Eleventh.

7 See (1956) *Railway Employees Department v Hanson*, 351 US 225; (1961) *International Brotherhood of Machinists v Street*, 367 US 740.

8 Lawson, Reed (1969) "Public Employees and Their 'Right to Work'." In Robert E. Walsh (ed.), *Sorry…No Government Today: Unions vs City Hall*. Boston, MA Beacon Press, pp 373-6.

1973, two states required the agency shop and other states and localities permitted it to be negotiated.

In 1977, the Supreme Court in *Abood v Detroit Board of Education (Abood)*[9] ruled in a NRWC supported lawsuit that a negotiated public sector agency shop provision did not violate the First Amendment by requiring non-members to contribute to the cost of representation in negotiations and contract administration. At the same time, the Court ruled that non-members could not be required to financially support a union's political and ideological causes.

The *Abood* Court, relying on the earlier RLA cases and applying a deferential standard to state policies, concluded that an agency fee requirement fulfilled important government interests under the exclusive representational model of workplace democracy: stable labour relations and avoidance of free riders. The Court found that the government's interests outweighed the impact on associational freedom resulting from non-members having to pay a service fee.

Following *Abood*, more states amended their laws to permit or mandate agency fees, recognizing it as necessary for stable labour-management relations. By the time *Janus* was decided, more than 20 states permitted or mandated some form of agency shop.

The Road to *Janus*: Anti-Labour Judicial Activism at Work

For forty-one years, the Court applied *Abood* in a series of cases that determined what union notices and procedures were constitutionally required to permit challenges to a union's assessments and calculations of agency fees. Other decisions determined whether certain union activities were properly chargeable to non-members under the First Amendment. The *Abood* analysis was also applied in non-labour cases involving compelled fees such as mandatory bar association fees.

In 1991, Justice Antonin Scalia recognized the compelling state interest in the agency shop noting that non-members "are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests."[10]

As late as 2009, the Court unanimously applied *Abood* and its progeny in *Locke v Karass,*[11] where it ruled that a union did not violate the First Amendment

9 (1977) 431 US 209.

10 (1991) *Lehnert v Ferris Faculty Ass'n*, 500 US 507, 556 (Scalia, J., concurring) (emphasis in original).

11 (2009) 555 US 207.

by charging agency fee payers for a share of national litigation costs incurred primarily for other affiliated bargaining units. Neither the majority nor concurring opinions questioned the Court's prior constitutional analysis concerning the agency shop or the deference due government officials in labour policies. Instead, *Abood* was reaffirmed as setting forth "a general First Amendment principle."[12]

The road of *Janus* began in *Knox v SEIU*.[13] In *Knox,* the Court agreed to determine the narrow issues of whether non-members had to be sent new notices concerning an assessment to finance the defeat of ballot measures, and whether the assessment was chargeable. Review was granted shortly after Wisconsin and other Republican-controlled States imposed or attempted to impose limitations on public sector collective bargaining rights.

The June 2012 *Knox* opinion, authored by Justice Alito, did not limit itself to determining the merits of the issues briefed by the parties. After rejecting the union's argument that the case was moot, the decision proceeded to aggressively challenge *Abood's* reliance on the RLA cases and to label mandatory representational fees as compelled speech subject to an exacting form of judicial scrutiny rather than the lesser reasonable basis standard ordinarily applied in First Amendment claims involving public employment.

The decision also found that the First Amendment mandated an opt-in rather than an opt-out procedure for special assessments, the latter procedure being described by Justice Alito as being "a remarkable boon for unions."[14] The judicial activist handprint in *Knox* is visible by its mandate of an opt-in procedure like the one rejected by the voters, which was part of the case's factual background.

The timing and content of *Knox* demonstrate an ideological hostility toward public sector unionism and an activist agenda by the Court's conservative majority. This can be seen in its abandonment of the principle of judicial restraint and its commencement of a judicial crusade against *Abood* and its First Amendment principles. The *Knox* decision was crafted as a guidebook for overturning *Abood*.

The motivation behind *Knox* was not lost on other members of the Court. In a concurring opinion, Justice Sotomayor criticized the majority decision for breaking "our own rules, and, more importantly, [disregarding] principles of judicial restraint that define the Court's proper role in our system of separated powers."[15] Further, the New York Times addressed the agenda-driven *Knox* decision in an editorial that criticized the Court for using "this narrow case to insert itself" into

12 555 US at 213.

13 (2012) 567 US at 298.

14 567 US at 312.

15 567 US at 323 (Sotomayor, J., concurring).

the political controversies concerning the open shop, "when there was no reason to do so."[16]

Two years later, in *Quinn v Harris*,[17] Justice Alito, again writing for the majority, applied the reasoning in *Knox* to strike down the agency shop as unconstitutional when applied to home care workers, which the Court deemed "quasi-public employees."

Although the *Quinn* majority ruled that *Abood* was inapplicable because of the employees' unique status, Justice Alito used *dicta* again to undermine *Abood.* Justice Alito criticized the RLA decisions and attacked *Abood* for relying on that precedent, for failing to recognize the agency shop as a form of compelled speech, and for failing to appreciate the distinction between private and public sector labour relations.

In *Quinn,* Justice Alito asserted that the distinction drawn in *Abood* between chargeable expenditures for collective bargaining and expenses related to political or ideological purposes, was "questionable," alleging that the Court "has struggled repeatedly" over the distinction, and referenced a purported "heavy burden" on non-members when objecting to a chargeable expense.[18] The judicial "struggles" over applying doctrines and engaging in line-drawing in other areas of First Amendment jurisprudence went unmentioned.

The dissent, written by Justice Kagan, criticized the majority's "gratuitous *dicta"* disparaging *Abood* and noted that thousands of existing public sector contracts have been negotiated based on the *Abood* holding. The dissent went on to cite the long line of First Amendment precedents recognizing that government "has wider constitutional latitude when it is acting as employer than as sovereign" and that it needs a significant degree of control over its workforce to provide effective governmental services [19] In fact, deference to public employers' need for "control over their employees' words and actions" formed the basis of an earlier decision creating a bright line exclusion from First Amendment protections of all public employee speech pursuant to official duties.[20]

Knox and *Quinn* set the stage for reversing *Abood*. Only the death of Justice Scalia in 2016, following oral arguments in *Friedrichs v California Teachers Association*,[21] delayed the imposition of a constitutionally mandated "right to work" regime.

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16 Editorial, "The Anti-Union Roberts Court," *New York Times*, June 22, 2012, available at https://www.nytimes.com/2012/06/23/opinion/the-anti-union-roberts-court.html (last accessed on September 20, 2018).

17 (2014) 134 S Ct 2618.

18 134 S Ct at 2632-2633.

19 134 S Ct at 2653-2655.

20 (2006) *Garcetti v Cebalos* 547 US 410, 418.

21 (2016) 136 S Ct 1083 (Mem.).

The Agency Shop's Demise and the Weaponization of the First Amendment

It was only a question of time before anti-labour forces presented another case before the Court to give the conservative majority an opportunity to reverse *Abood*. The opportunity came in *Janus v AFSCME*. The lawsuit was pursued by state employee Mark Janus, challenging the constitutionality of Illinois' agency shop legislation. After the dismissal of his amended complaint was affirmed, the Supreme Court granted review to determine whether *Abood* should be reversed.

The *Janus* decision was issued on June 27, 2018 with Justice Alito writing for the majority. The result was expected, particularly after Justice Kennedy lowered the veil of neutrality during oral argument with sarcastic comments about public sector bargaining.[22]

In *Janus*, the Court overturned *Abood* and held that all agency shop arrangements in public employment violate the First Amendment because they compel non-members to subsidize speech on matters of substantial public concern. The Court ignored the federalism principle dating back to *Taft-Hartley*, which recognizes that union security regulation should be left to the States.

The decision relied heavily on the reasoning in *Knox* and *Harris*: *Abood* erred in relying on the RLA precedent; all public sector bargaining is political; agency fees constitute compelled speech subject to an exacting level of scrutiny; and the distinction between expenditures for collective bargaining and for political purposes is purportedly unworkable.

At the outset, the majority framed the issue as being about non-members who "strongly object" to a union's positions and who are required to contribute to representation costs. The decision, however, went beyond that group. It prohibits mandatory fees being charged to any non-member, even those who fully agree with the union's bargaining positions, but don't want to contribute. Moreover, the decision imposes a new requirement of clear and affirmative consent by a non-member before an agency fee or any other payment to a union can be deducted.

The motive behind *Janus* is revealed when its treatment of compelled speech is compared with how the issue was approached in *Citizens United v FEC*.[23] In *Citizens United,* the same Court majority did not apply exacting scrutiny to compelled speech in the corporate context and found that "corporate democracy"

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22 *Janus v AFSCME*, No. 16-1466, Oral Argument Transcript, pp 45-47 (Feb. 26, 2018), archived at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_i425.pdf (last visited on January 24, 2019).

23 (2010) 558 US 310.

was an adequate remedy for dissenting shareholders compelled to fund political speech. In *Janus*, however, the majority did not make any reference to the availability of state regulated decertification procedures as a remedy for non-members who object to a union's positions.

The *Janus* majority acknowledged that labour peace might be a compelling interest but found insufficient evidence to justify the agency shop. This was accomplished by narrowly defining labour peace and cherry picking the evidence, which led it to conclude that it was "undeniable" that labour peace can be achieved through less intrusive means.

The majority limited the definition of labour peace to avoiding inter-union rivalry through exclusive representation, something referenced in *Abood,* rather than avoidance of strikes and other workplace disruptions. The evidence cited by the *Janus* majority was limited to the general federal sector labour relations experience, without referencing the national 1970 postal strike and the 1981 PATCO strike, and NRWC data identifying 28 "right to work" states, many of which, in fact, prohibit or substantially limit public sector bargaining.

The evidence and experience presented by dozens of state and local governments in amicus briefs were ignored by the *Janus* majority. Those briefs described the agency shop's key role in avoiding strikes and maintaining stable collective bargaining by ensuring unions had the resources necessary to fulfill their representational responsibilities. The Court's disregard of such evidence contradicts the maxim that it will grant "greater deference to government predictions of harm" stemming from employee speech.[24]

Next, the Court found the free rider problem to be not a compelling justification despite a union's duty to fairly represent non-members. The majority speculated that unions would not abandon seeking exclusive representation after the loss of the agency shop because the benefits of such representation purportedly outweigh its burden. Concerning the costs associated with representation of non-members, the majority speculated that there could be less intrusive means than the agency shop to fund such representation.

Absent from the *Janus* opinion is any concern about the damage to the constitutional rights of union members who are now compelled to carry the representational costs of co-workers unwilling to contribute. The lack of discussion concerning the impact on union member rights underscores the ideology underlying the decision.

An aspect of the decision with future ramifications is the majority's challenge to exclusive representation. In *dicta*, the majority treated that republican form of democratic governance to be a substantial restriction of individual rights because

24 (1994) *Waters v Churchill*, 511 US 661.

it precludes an employee from being represented by others and from the employee negotiating directly with the employer.[25]

The majority's gratuitous attack on exclusive representation was another cue to anti-union forces for a case that would provide the Court with an opportunity to overrule precedent and find exclusive representation unconstitutional.[26] Six months after *Janus*, a petition was filed with the Supreme Court seeking that result.[27]

Justice Kagan's strong dissenting opinion in *Janus* criticized the majority's reasoning, motivation, and activism, characterizing the majority decision for "turning the First Amendment into a sword and using it against workaday economic and regulatory policy." Justice Kagan emphasized:

> 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.[28]

In rejecting the majority's reasoning, Justice Kagan referenced the "basic economic theory" justifying the agency shop: it is necessary for exclusive representation to insure the union has enough resources to satisfy its duty to fairly represent the entire bargaining unit. The dissent explained that the elimination of mandatory fees creates "a collective action problem of nightmarish proportions" because it incentivizes employee refusal to pay for representational services, resulting in the disabling of unions' financial ability to represent.

The dissent described the "significant anomaly" created by the Court's decision by applying exacting scrutiny to strike down workplace-related mandatory fees. Justice Kagan cited two pillars of constitutional doctrine at odds with the majority's decision: employee speech about workplace issues is generally outside

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25 The Court's statement reflects ignorance of public sector labour history in which jurisdictions like New York tried and then rejected systems of plural representation. See, New York City Department of Labor (1957) "Report on a Program of Labor Relations for New York City Employees," pp 57-63, 77, 94.

26 (1984) *Minn Bd Commun. for Colleges v Knight*, 465 US 271.

27 (December 4, 2018) *Uradnick v Inter Faculty Organization*, United States Supreme Court Docket No. 18-719, Petition for Writ of Certiorari, p 1 available here: https://www.supremecourt.gov/DocketPDF/18/18-719/74002/20181204095722857_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf (last visited on February 1, 2019). William A. Herbert and Joseph A. McCartin (2019) "Janus's Progency? A Supreme Court Threat to Majority Rule Looms." *American Prospect*, March 21, available at https://prospect.org/article/januss-progeny-supreme-court-threat-majority-rule-looms.

28 134 S Ct at 2501.

of constitutional protections; and government regulation of employee speech is subject to substantial deference because of the need for significant employer control over public sector workers. The Court's break from that precedent to meet its goal of mandating the open shop led Justice Kagan to predict that the decision will be understood as having been "crafted [as] a 'unions only' carve-out to our employee-speech law."[29]

Lastly, the dissent criticized the subversion of *stare decisis* as the worst part of the Court's decision. Justice Kagan emphasized that, after four decades, *Abood* had become embedded in First Amendment jurisprudence and applied in many other contexts beyond public sector labour relations.

Union and State Responses

The Court's aggressive anti-labour agenda, which emerged during the Great Recession, has been an important wake-up call to public sector unions requiring the reworking of their modes of operation, relationships with bargaining unit employees, and presence in the workplace.

After the *Knox* and *Harris* decisions, and particularly while the *Friedrichs* case was pending, unions began to refocus their energies on internal organizing. That effort continued before and after *Janus* was decided with training in basic organizing skills needed for member recommitment campaigns, and to persuade former agency fee payers and new employees to become members.

During the pendency of *Janus*, four national unions, AFSCME, AFT, NEA and SEIU, issued a joint statement outlining their policy priorities. They identified statutory, regulatory, and/or contractual modifications to enable membership recruitment: union access to new employee orientations; periodic receipt of information about new employees and unit membership; improved procedures for dues check-off; and enhanced access to the workplace. The unions also expressed strong opposition to any changes to exclusive representation and the duty of fair representation.

States including California, New York, and New Jersey have amended their public sector statutes. California law was changed to mandate union access to employee orientations, to require public employers to provide unions with contact information for all bargaining unit employees, and to allow for reasonable leaves with pay for union representatives.[30]

In New York, public employers are now required to deduct and transmit membership dues within a specific period. The law also mandates an employer to provide unions with new employee contact information and to permit a union to meet

29 134 S Ct at 2496.

30 (2017) *Cal Gov Code* §§ 3557 and 3558; (2018) *Cal Gov Code* § 3558.8.

with a new employee. The most significant change in New York was the modification of the duty of fair representation, which eliminated a union's obligation to represent non-members beyond collective bargaining and contract grievances.[31]

New Jersey's law was changed to require union access to represented employees including the right to hold meetings at the workplace during non-working hours and to meet with new employees during orientations or in individual or group meetings. The law also grants a union the right to use the employer's email system to communication with bargaining unit members concerning collective barraging and contract administration.[32]

Conclusion

The Court's six-year campaign to judicially impose the open shop is an extraordinary example of judicial activism. To reach its goal, the Court rejected well-established precedent and doctrines, and abandoned principles of judicial restraint, deference to state policymakers, and federalism.

In *Knox*, *Quinn*, and now *Janus*, the conservative majority utilized the First Amendment to reach anti-labour outcomes. In doing so, they have emulated the activist Court of the Gilded Age, which used a different constitutional means to reach similar results.

The agency shop was a core component of public sector collective bargaining for decades. It helped stabilize government labour-management relations, ensured enough resources for unions to exclusively represent unit members, and eliminated the divisiveness caused by free riders receiving benefits at no cost.

The *Janus* decision is a major blow to the system of collective bargaining in many states and localities. It requires public employers and unions to develop new practical means for ensuring that the latter have the resources to effectively provide exclusive representation. Recent state statutory changes point toward public policies that can lessen the decision's damage.

Legal and contractual changes are important, but they are largely irrelevant without significant changes in union culture aimed at building a sense of community and sustained employee mobilization. After *Janus,* there is a need for permanent campaigns of internal organizing. Such campaigns require imagination, innovation, and less bureaucracy. Unions must work to maximize solidarity by empowering unit members, and prioritizing issues based on worker perspectives, unit composition, and geography. Passivity and acquiescence to worker apathy and alienation are no longer options.

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31 (2018) *NY Civ Serv Law* §§ 208 and 209–a(2).

32 (2018) *NJ Employer-Employee Relations Act* § 34:13A-5.13.

It is premature for unions to declare victory during the first year following *Janus,* based on reports of high-level membership recommitments. Additional statistics are necessary to determine the decision's impact including the number of former agency fee payers who are now members and the effectiveness of recruiting new employees.

Finally, there is another aspect of *Janus* that should not be overlooked: its potential value in challenges to restrictions to public sector unionism. Now that public sector bargaining is understood to involve matters of substantial public concern, prohibitions of and limitations to negotiations and strikes can be challenged as impermissible prior restraints subject to an exacting standard of review. Those challenges, however, will not be successful if Justice Kagan's prediction comes true and the *Janus* constitutional doctrine is found to be applicable to "unions only."

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SUMMARY

Janus v AFSCME, Council 31: Judges Will Haunt You in the Second Gilded Age

This essay examines the United States Supreme Court's 2018 decision in *Janus v AFSCME, Council 31,* which concluded that agency shop provisions violate the First Amendment rights of public sector workers who are not union members but receive the fruits of the representation. This decision reversed over 40 years of precedent and imposed "right to work" as a new federal constitutional mandate, fulfilling the dream of anti-union forces since the first Gilded Age.

The essay begins with a brief history of the open shop movement and the development of the agency shop as a constitutionally permissible form of union security in the private and public sectors. It then describes how an activist Supreme Court majority undermined the constitutionality of the agency shop, which set the stage for the *Janus* decision. The essay summarizes the majority and dissenting opinions in *Janus*, and describes how unions, employers, and some state legislatures are responding to the decision's immediate impact.

KEYWORDS: *Janus* case, public sector, labour relations, collective bargaining, union fees, United States, First Amendment, rights and freedoms.

RÉSUMÉ

Janus v AFSCME, Conseil 31: Les juges viendront vous hanter dans ce second Âge d'or

Cet article analyse l'arrêt rendu par la Cour Suprême des États-Unis en 2018 dans l'Affaire *Janus* v *AFSCME* (*American Federation of State, County and Municipal Employees*), *Conseil 31*, selon lequel le « précompte syndical généralisé » (appelé communément *Formule Rand* au Canada) compromet les droits que garantirait le Premier Amendement aux travailleurs du secteur public qui bénéficient de la représentation du syndicat accrédité, tout en refusant d'y adhérer. Cette décision renverse un précédent établi il y a plus de 40 années et, en reconnaissant un caractère constitutionnel à la doctrine du « droit au travail » (*right to work*), réalise un rêve que le mouvement antisyndical américain entretenait depuis cette période particulière, à la fin du 19e siècle aux États-Unis, surnommée « l'Âge doré » (*Gilded Age*).

L'article commence par un bref historique de la doctrine de « l'atelier ouvert » (*open shop*) et du développement du « précompte syndical obligatoire » (*agency shop*) comme forme de sécurité syndicale autorisée par la Constitution américaine dans les secteurs privé et public. Il décrit, ensuite, comment une majorité de juges activistes de droite au sein de la Cour Suprême a miné la constitutionnalité de cette mesure au fil des ans, ouvrant ainsi la voie à la décision *Janus*. L'article résume les opinions des juges majoritaires et des juges dissidents dans *Janus* et décrit comment les syndicats, les employeurs et les assemblées législatives de certains États réagissent aux conséquences immédiates de cette décision.

MOTS-CLÉS: Affaire Janus, secteur public, relations de travail, négociation collective, précompte syndical obligatoire, États-Unis, premier amendement, droits et libertés.