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JANUS AND THE FUTURE OF COLLECTIVE BARGAINING: RHETORICALLY PREDICTING A FIRST AMENDMENT RIGHT TO NEGOTIATION

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ABSTRACT

The importance of the U.S. Supreme Court ruling in Janus v. American Federation of State, County, and Municipal Employees *has been widely recognized for its effect on reducing the power and influence of public unions. A close reading of the majority opinion provides a clue that compulsory collective bargaining itself may be settling into the court's crosshairs. Collective bargaining is an important tool, by which labor can reduce the often-inherent power imbalance it has with ownership and management. Yet as this Article outlines, the interests of individual workers can often be at odds with those other workers or even the union itself. When the law designates a union as the exclusive bargaining agent for a group of workers, it prohibits individual workers from advocating for their own interests. As the U.S. Supreme Court recognized in Janus, this results in a substantial reduction of the rights of*

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workers, particularly those who do not feel the union represents their interests. This Article will explore the history of unions and collective bargaining, the variety of worker rights that are affected by compulsory collective bargaining, why the Supreme Court might choose to eliminate compulsory collective bargaining via the First Amendment, and what may ultimately replace it.

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INTRODUCTION

The recent U.S. Supreme Court decision in *Janus*[1] was a game changer. The central question presented to the Court was whether public unions can charge non-members they nonetheless represent in collective bargaining. The Court held that public unions cannot require non-members to pay fees, often called "agency fees," even for services the union provides. The Court then went one step further and required that public employees must opt in to union membership, rather than being automatically enrolled as members and provided the opportunity to opt out.

Much attention has been paid to how the *Janus* decision will deplete the ranks and coffers of public unions, diminishing their political power, and hurting the Democratic Party, which derives much of its support from public unions.[2] Perhaps even more interesting than the political impact of the *Janus* decision however, is the effect of the Court's holdings on the future of mandatory collective bargaining itself. In many states, public unions are the sole bargaining agent for groups of employees, whether those employees are union members or not.[3] We believe that the *Janus* decision may have a tremendous impact on this practice, perhaps even culminating in the end of compulsory collective bargaining altogether.

This Article will focus on collective bargaining within public unions. Part I will briefly address the history and development of labor unions and collective bargaining. Part II will discuss the recent U.S. Supreme Court ruling in *Janus*. Finally, Part III will use rhetorical methodologies to examine the likely effects (legal, political, and economic) of the *Janus* decision's reframing of the

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

[2] James Feigenbaum & Alexander Hertel-Fernandez, *The Supreme Court just dealt unions a big blow in Janus. Here's what you need to know about the political fallout*, WASH. POST (June 27, 2018, 3:20 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/27/the-supreme-court-just-dealt-unions-a-big-blow-in-janus-heres-what-you-need-to-know-about-the-political-fallout/?utm_term=.7b31b07f59f6 [https://perma.cc/L32M-R9ZY]; Amanda Vinicky, *In Wake of* Janus *Decision, What's Next for Public Unions*, WTTW CHI. (July 2, 2018), https://news.wttw.com/2018/07/02/wake-janus-decision-what-s-next-public-unions [https://perma.cc/4BW5-4ZWW].

[3] ACLU, *Collective Bargaining and Civil Liberties*, https://www.aclu.org/other/collective-bargaining-and-civil-liberties [https://perma.cc/U9DX-DZFW].

First Amendment in the context of compulsory collective bargaining vis-à-vis public unions.

I. BRIEF UNION HISTORY: POWER IMBALANCES BETWEEN LABOR AND MANAGEMENT CREATED LOW WAGES AND POOR WORKING CONDITIONS

In the late nineteenth century, there existed a massive power imbalance between employers and employees.[4] Employers, particularly large companies like Standard Oil, Carnegie Steel, and others were worth vast sums of money. John D. Rockefeller, Jr. became the world's first billionaire in 1916, controlling a sum worth close to $30 billion today.[5] An even more telling measure of his power is that when Rockefeller died in 1937, his assets equaled 1.5 percent of America's total economic output, a feat that would require about $340 billion today.[6] While Rockefeller and his Standard Oil Empire represented the most extreme example at the time, other titans of industry such as Andrew Carnegie and Carnegie Steel (later U.S. Steel), Cornelius Vanderbilt and his railroad empire, J.P. Morgan and his financial and business empire, and others controlled vast swaths of American business.[7] The average worker could be overworked, underpaid, and forced to endure horrible working conditions, without recourse.[8]

Working conditions in the late nineteenth century and early twentieth century were frequently abysmal.[9] Authors like Upton Sinclair,[10] Charles Dickens,[11] John Steinbeck,[12] George Orwell,[13]

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[4] G. William Domhoff, *The Rise and Fall of Labor Unions In The U.S.,* WHO RULES AMERICA?, https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html [https://perma.cc/BU97-D5YV].

[5] Carl O'Donnell, *The Rockefellers: The Legacy of History's Richest Man*, FORBES (July 11, 2014, 11:52 AM), https://www.forbes.com/sites/carlodonnell/2014/07/11/the-rockefellers-the-legacy-of-historys-richest-man/#5e4410ca3c26 [https://perma.cc/KT4M-SBHG].

[6] *Id.*

[7] DIANE TELGEN, DEFINING MOMENTS THE GILDED AGE 45 (2012).

[8] *Working Conditions in the Industrial Revolution*, HISTORY CRUNCH, https://www.historycrunch.com/working-conditions-in-the-industrial-revolution.html#/ [https://perma.cc/AG9E-8RNR].

[9] *Id.*

[10] UPTON SINCLAIR, THE JUNGLE (1906).

[11] CHARLES DICKENS, HARD TIMES (1854).

[12] JOHN STEINBECK, THE GRAPES OF WRATH (James Lloyd, ed., 1939).

[13] GEORGE ORWELL, THE ROAD TO WIGAN PIER (Victor Gollancz, ed., 1937).

and countless others documented issues with workplace safety, cleanliness, long working hours, and other horrifying issues workers faced.[14] Incidents like the strike and ensuing violence at Carnegie Steel's Homestead plant also raised public awareness about the poor working conditions many people faced.[15] From this precarious economic moment, the modern American labor movement began to gain strength.

As the power of labor unions and workers grew, working conditions and inequities in compensation started to be addressed.[16] A variety of laws were passed during the twentieth century, which substantially enhanced the rights and working conditions for workers. These are a few examples:

- The *Fair Labor Standards Act (FLSA)*, initially passed in 1938, limited the number of hours children under 16 could work in non-agricultural positions, prohibited the hiring of those under 18 for certain high-risk jobs, and established a federal minimum wage.[17]
- The *Equal Pay Act of 1963* prohibits sex-based wage discrimination between men and women working for the same employer and performing substantially similar jobs.[18]
- *Title VII of the Civil Rights Act of 1964* made it illegal for businesses to discriminate based on "race, color, religion, sex, or national origin."[19]
- *The Age Discrimination in Employment Act of 1967* prohibits discrimination against workers 40 years of age or older.[20]

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[14] Joe Sommerlad, *Karl Marx at 200: Ten Left-Wing Writers Who Followed in the Footsteps of a Giant,* INDEPENDENT (May 4, 2018, 3:31 PM), https://www.independent.co.uk/arts-entertainment/books/features/karl-marx-200-years-anniversary-left-wing-novelists-george-orwell-hg-wells-john-steinbeck-a8333991.html [https://perma.cc/9NWG-CNDF].

[15] ARTHUR BURGOYNE, THE HOMESTEAD STRIKE OF 1892 (1979).

[16] Domhoff, *supra* note 4.

[17] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

[18] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963). *See also Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/brochure-equal_pay_and_ledbetter_act.cfm [https://perma.cc/Y8A8-3FCR] [hereinafter EEOC].

[19] Title VII, 42 U.S.C. § 2000e–2000e-17 (1964).

[20] The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–624 (2012).

- *The Occupational Safety and Health Act* established the Occupational Safety and Health Administration (OSHA) in 1970.[21] OSHA assures "safe and healthy working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance."[22] Since its passage, Congress has expanded OSHA's whistleblower authority 22 times to protect workers from discrimination.[23]
- *The Americans with Disabilities Act*, passed in 1990, provides broad protections against employment discrimination for those with qualified disabilities.[24]
- *The Family and Medical Leave Act of 1993* provides eligible employees with up to 12 weeks of unpaid leave per year to deal with the birth of a child, an adoption, or a personal or family member's medical condition.[25]
- *The Lily Ledbetter Fair Pay Act of 2009* prohibits wage discrimination against women and minorities. It was passed to overturn the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), which severely restricted the time period for filing complaints of employment discrimination concerning compensation.[26] Under the Ledbetter Act, each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began.[27]

A tremendous amount of thought and effort have gone into enacting laws that make workplaces safe and prohibit employers from treating their employees unfairly.[28] There is no doubt that

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[21] *Reflections on OSHA's History*, U.S. DEP'T OF LABOR (Jan. 2009), https://www.osha.gov/history/OSHA_HISTORY_3360s.pdf [http://perma.cc/8X2L-NM8J].

[22] *About OSHA*, U.S. DEP'T OF LABOR, https://www.osha.gov/aboutosha, [https://perma.cc/9T5V-RHVU].

[23] *The Whistleblower Protection Programs*, U.S. DEP'T OF LABOR, https://www.whistleblowers.gov/ [https://perma.cc/WY8Z-D6UT].

[24] *Americans with Disabilities Act*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/disability/ada [https://perma.cc/73F4-L37Q].

[25] The Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611–2654 (2012).

[26] EEOC, *supra* note 18.

[27] *Id.*

[28] *See generally id.*

labor unions have played an important historical role in bringing about those changes. One of the most important tools unions have used is the power of collective action.[29]

A. The Rise of Unions and Development of Collective Bargaining

While employers have historically enjoyed a power imbalance vis-à-vis individual employees, that is not necessarily the case when the employees work together.[30] Even employers inclined to abuse or mistreat individual employees are forced to think twice if by doing so they might alienate their entire workforce and risk a strike or walkout.[31] Labor unions and the collective bargaining process were introduced in an attempt to increase the bargaining power of workers, better their working conditions, and increase their compensation.[32] Individual workers had almost no ability to negotiate with massive companies and were easily replaceable.[33] They banded together and formed unions, largely so they could institute the practice of collective bargaining and negotiate their compensation, benefits, working conditions, and other conditions of employment as a group.[34] When a company's entire workforce, or the workers in a particular industry, joined forces, they acquired much more power.[35] Unions could wield enormous power, mostly through the threat that the entire workforce would walk out or strike and shut down a company's business.[36] The union would negotiate on behalf of all the workers through collective bargaining.[37] This helped to end or at least mitigate the so-called "race to the bottom," where management could choose to employ the individual workers willing to endure the worst working conditions and receive the least amount of compensation.[38]

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[29] ACLU, *supra* note 3.

[30] Aditi Bagchi, Note, *The Myth Of Equality In The Employment Relation*, 2009 MICH. ST. L. REV. 579, 583–85 (2009).

[31] *Id.* at 625.

[32] *Id.* at 614–15.

[33] *See* JOHN P. FREY, CRAFT UNIONS OF ANCIENT AND MODERN TIMES 70–71 (1945).

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.*

The power of unions has declined as their membership has declined, both in raw numbers and as a percentage of the population.[39] The number of employed union members has declined by 2.9 million since 1983.[40] During the same time, the number of all wage and salary workers grew from 88.3 million to 133.7 million.[41] "Consequently, the union membership rate was 20.1 percent in 1983 and declined to 11.1 percent in 2015."[42] This drop in union membership has been felt far more sharply in the private sector than in the public sector.[43] "In 2015, public-sector workers had a union membership rate of 35.2 percent, more than five times higher than that of private sector workers (6.7 percent)."[44] "While the unionization rate for the public sector has remained relatively steady over time, the rate for the private sector has declined from 16.8 percent in 1983 to 6.7 percent in 2015."[45]

"Today, the United States has three distinct regimes of collective bargaining: one for the railroad and airline industries, one for the rest of the private sector, and one for the public sector."[46] This Article focuses on collective bargaining within public unions. The public sector regime is really fifty-one distinct systems, representing the federal system and then fifty different state systems.[47] Currently, thirty-one states permit collective bargaining for public employees to some level, while nineteen states prohibit the practice.[48] In states that permit collective bargaining, unions certified by the National Labor Relations Board (NLRB) serve as the exclusive bargaining agent for groups of employees.[49]

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[39] *See* Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU OF LABOR STATS. (Sept. 2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf [http://perma.cc/LQ3X-7Q5N].

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See id.*

[44] *Id.*

[45] *Id.*

[46] Lance A Compa, *An Overview of Collective Bargaining in the United States*, CORNELL UNIVERSITY ILR SCHOOL DIGITAL COMMONS (2014), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1925&context=articles [https://perma.cc/UX23-6K85].

[47] *Id.*

[48] *See id.* (citing Shimabukuro, *infra* note 50).

[49] *See id.*

In states that permit public unions to negotiate on behalf of public employees, those unions are required to represent all of the public employees within a bargaining unit, even those who choose not to join the union.[50] This creates what is commonly called a "free rider problem," where public employees who derive the benefits of collective bargaining contribute nothing to the union.[51] Many employees who choose not to join the union base their decisions on objections to positions those unions take and activities in which they engage.[52] Over time, a sort of uneasy compromise was reached, whereby those who chose not to join the union would not have to pay dues—nor support political advocacy by the union—but would be required to pay agency fees.[53] Those agency fees were attempts to measure the fair value of the benefits non-members of the union nonetheless derived from the union's activities, such as collective bargaining.[54] The non-member would not be required to support union activities or positions she disagreed with, and the unions would not be required to provide the benefit of its services to non-members for free.[55]

B. The Elephant (and Donkey) in the Room: Public Unions Play a Major Role in Politics

Public unions play a major role in local, state, and national politics, operating as "political machines."[56] Public unions have

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[50] *See* Jon O. Shimabukuro, *Congressional Research Service: Collective Bargaining and Employees in the Public Sector*, CONG. RES. SERV. (Mar. 30, 2011), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2241&context=key_workplace [https://perma.cc/G425-39XN].

[51] *See* Andrew Hanna & Caitlin Emma, *Supreme Court Could Cripple Public Unions in Run-up to 2018 Midterms*, POLITICO (Feb. 25, 2018), https://www.politico.com/story/2018/02/25/supreme-court-public-unions-2018-midterms-423436 [https://perma.cc/E4RP-ACKF].

[52] *See id.*

[53] *See* David Greene & Nina Totenberg, Transcript, *Supreme Court Rules Against Mandatory Union Dues for Public Employees*, NPR (June 27, 2018, 11:19 AM), https://www.npr.org/2018/06/27/623851752/supreme-court-rules-against-mandatory-union-dues-for-public-employees [https://perma.cc/SL7B-Y4TV].

[54] *See id.*

[55] *See id.*

[56] Horacio A. Larreguy, Cesar E. Montiel Olea & Pablo Querubin, *The Role of Labor Unions as Political Machines: Evidence from the Case of the Mexican*

deep coffers of money and a ready group of members and supporters they can mobilize to support or oppose a party, candidate, or issue.[57] The American Federation of State, County, and Municipal Employees (AFSCME) and its affiliates spent $26 million on the 2016 election cycle, according to federal election records, virtually all of which was spent trying to elect Democrats.[58] If spending by the National Education Association, the American Federation of Teachers, and the Service Employees International Union are added, the total for the 2016 cycle rises to about $166 million, still almost exclusively deployed to help Democratic candidates and causes.[59] An analysis of the spending by federal public employee unions reveals that some of these unions, including The American Federation of Government Employees, National Treasury Employees Union, National Association of Postal Supervisors, and National Postal Mail Handlers Union, made in excess of 90 percent of their political contributions to Democratic causes and candidates.[60] This pattern of spending has earned public unions favor and influence from Democrats and enmity from Republicans.[61] A Congressional Research Service report from 2014 estimated that depriving public unions of agency fees would reduce that figure to closer to $55 million, a difference of approximately $111 million for a single election cycle.[62]

One long-standing criticism of public unions is the apparent conflict of interest in having those unions negotiate the terms of a labor agreement with political leaders they may have helped to elect

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Teachers' Union, INST. FOR QUANTITATIVE SOC. SCI., HARV. UNIV., at 2 (Aug. 2013), http://www.iq.harvard.edu/files/iqss/files/updated_march_6_paper.pdf [https://perma.cc/ETZ5-UA3Z].

[57] *See id.*

[58] Hanna & Emma, *supra* note 51.

[59] *Id.*

[60] Ralph R. Smith, *Tallying Political Donations from Federal Employees and Unions*, FEDSMITH (Dec. 21, 2016), https://www.fedsmith.com/2016/12/21/tallying-political-donations-from-federal-employees-and-unions/ [https://perma.cc/2RCB-TW49].

[61] *See AP: Brown's Appointments Favor Democrats*, CBS SACRAMENTO (Aug. 28, 2011), https://sacramento.cbslocal.com/2011/08/28/ap-browns-appointments-favor-democrats/ [https://perma.cc/94TL-XR24].

[62] Hanna & Emma, *supra* note 51 (citing Benjamin Collins, *Right to Work Laws: Legislative Background and Empirical Research*, CONG. RES. SERV. (Jan. 6, 2014), https://fas.org/sgp/crs/misc/R42575.pdf [https://perma.cc/J6LW-99GP]).

and who may be counting on their support in the next campaign.[63] While private unions negotiate for a larger share of the profits of a business, public unions negotiate for more tax money.[64] If public workers strike, they strike against the taxpayers.[65] This is a notion that even President Franklin D. Roosevelt found "unthinkable and intolerable."[66] "The public-employee representatives are paid by the unions, and thus beholden to them, while the politicians across the table are also beholden to unions, for their campaign contributions or votes. The interests of the average nonunion American, the public, are not represented."[67]

These are facts, numbers, and arguments that both parties are acutely aware of.[68] Democrats have fought to strengthen the influence of public unions, while Republicans have sought to diminish them.[69] Research comparing the political effects of right-to-work legislation on counties straddling a state line where one county is affected by the legislation and the other is not show the profound effects of such legislation.[70] When Republicans have been successful in passing right-to-work laws, the power of unions has been reduced and Democratic candidates have suffered.[71] In presidential elections, for example, such right-to-work laws have cost Democratic candidates an estimated two to five percentage points.[72] That margin is more than that by which

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[63] *See* James Sherk, *F.D.R. Warned Us About Public Unions*, N.Y. TIMES (July 23, 2014), https://www.nytimes.com/roomfordebate/2011/02/18/the-first-blow-against-public-employees/fdr-warned-us-about-public-sector-unions [https://perma.cc/6YS9-WRBB].

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Amity Shlaes, *The Great Public Union Divide*, STAR TRIBUNE (Dec. 26, 2012, 8:30 PM), http://www.startribune.com/the-great-public-union-divide/184858651 [https://perma.cc/3E8H-ZJ54].

[68] *See generally* James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *Right-to-Work Laws Have Devastated Unions—and Democrats*, N.Y. TIMES (Mar. 8, 2018), https://www.nytimes.com/2018/03/08/opinion/conor-lamb-unions-pennsylvania.html [https://perma.cc/592L-HYWR].

[69] *See generally* Sean McElwee, *How the Right's War on Unions Is Killing the Democratic Party*, THE NATION (Jan. 22, 2018), https://www.thenation.com/article/right-to-work-laws-are-killing-democrats-at-the-ballot-box/ [https://perma.cc/8ZWP-ER5V].

[70] *See* Feigenbaum et al., *supra* note 68; *see also* McElwee, *supra* note 69.

[71] Feigenbaum et al., *supra* note 68.

[72] *Id.*

Donald Trump prevailed over Hillary Clinton in Michigan and Wisconsin in 2016.[73] One hotly contested political battleground has been over whether public unions should be allowed to charge agency fees to non-members for the costs of collective bargaining.[74] Unsurprisingly, agency fees are far more common in so-called "blue states," traditionally controlled by Democrats who are more supportive of and reliant on unions.[75] The battle over the degree of compulsion unions can exert over non-members often reaches the courts, where the contours of that battle can be traced through a series of judicial decisions.

C. The Road from Abood *to* Janus

In 1977, the U.S. Supreme Court was asked in *Abood v. Detroit Board of Education* to find a workable solution that balanced the interests of the non-union workers and the unions.[76] The rule that emerged from *Abood* and the line of cases that followed ("the *Abood* Rule") stated that unions could not compel workers to join nor pay for their "political and other ideological activities," but they could charge those workers fees for the efforts the unions expended in collective bargaining on their behalf.[77] While the *Abood* Court readily conceded that this was a form of compelled speech, its narrow ruling attempted to navigate two complications.[78] First, the fact (conceded by the Court) that economic issues for public sector employees are always necessarily "political" (because they involve public tax dollars) and thus trigger First Amendment protections; second, the governmental interest in maintaining "peace" in industrial economic relations via collective bargaining's implementation of a single representative body

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[73] *See id.*

[74] *See* Robert Iafolla, *Some U.S. States Embrace Pro-Union Laws, with Key Fees Imperiled*, REUTERS (June 27, 2018), https://www.reuters.com/article/us-usa-court-unions-states/some-u-s-states-embrace-pro-union-laws-with-key-fees-imperiled-idUSKBN1JN2F4 [https://perma.cc/S3U3-JLA3].

[75] *See id.*; *see also* Alexander Russo, *Maps: Where The 21 "Agency Fee" States Are—For Now*, SCHOLASTIC (Sept. 28, 2015), https://scholasticadministrator.typepad.com/thisweekineducation/2015/09/maps-where-the-21-agency-fee-states-are-for-now.html#.XP8otohKjIV [https://perma.cc/VH6F-2M8N].

[76] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977).

[77] *Id.* at 209, 235–36.

[78] *See id.* at 235–36.

to advocate for diverse populations of employees.[79] Ultimately—and ever since *Abood*—compulsory agency fees were held to survive the scrutiny of a First Amendment violation because, while they were a form of "compelled speech," they served the state's compelling interest in preventing disruptions of the "peace" in labor and industrial relations.[80]

The *Abood* decision lasted for forty-one years: from the economic malaise of the 1970s, through the decline of American industry in the 1980s, and up to the height of the "disrupted" digital economy of the early twenty-first century.[81] In that time, twenty-two states enacted laws permitting unions and public employers to take agency fees from a worker's paycheck without his or her consent.[82] However, unions were required to separate their political or advocacy activities from collective bargaining activities.[83] As the Court repeatedly ruled: they could charge non-union members agency fees for the latter but could in no way require workers to support the former.[84] In 2018, the *Janus* decision ended this practice by overturning *Abood*.[85]

II. *JANUS*: ARGUMENTS, RULING, & IMMEDIATE REACTION

Mark Janus was a child support specialist from the State of Illinois.[86] He was represented for the purpose of collective bargaining by the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME).[87] Mr. Janus objected to a number of the union's political positions and activities—specifically, that AFSCME's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not

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[79] *See id.* at 219, 224–25, 228.

[80] *See id.* at 236.

[81] *See* Moshe Marvit, *The Legal Arguments of* Janus v. AFSCME *Explained*, CENTURY FOUND. (Feb. 15, 2018), https://tcf.org/content/commentary/legal-arguments-janus-v-afscme-explained/?session=1&agreed=1 [https://perma.cc/N49P-RXA2].

[82] *See id.*

[83] *See id.*

[84] *See Abood*, 431 U.S. at 222–23.

[85] *See* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2456 (2018).

[86] *Id.* at 2461.

[87] *Id.*

reflect his best interests or the interests of Illinois citizens"—and chose not to join the union.[88] Under the *Abood* Rule, Mr. Janus was nonetheless charged a fee of $23.48 per pay period (an "agency fee"), which could be used to fund the union's legally required mandate to represent all employees in collective bargaining, but not "political or ideological" views.[89] Mr. Janus's agency fee represented 78 percent of a union-member's dues.[90] He challenged this "agency fee"—and thus the *Abood* rule—by claiming that financial support for the union (via money withheld from his wages) violated his Constitutional right (as a government employee) to free political speech.[91]

Overturning *Abood,* the U.S. Supreme Court ultimately sided with Mr. Janus.[92] First, it held that the State's extraction of agency fees from non-consenting public employees violated the First Amendment because "no reliance interest [*on agency* fees] on the part of public sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years."[93] Second, following their decision in *Knox v. Service Employees* (2012), the Court held that no form of payment to a public sector union may be deducted or collected unless the employee affirmatively consents to pay.[94] Understanding the history of these legal debates—and the exact standard that the Court applies to "compelled" speech for government employees—is key to understanding how the *Janus* decision's conceptualization of the First Amendment could have larger consequences for the future of collective bargaining.[95]

To start, it must be understood that there is nothing legally novel about Mr. Janus's First Amendment claim, or the *Janus* decision recognizing that "agency fees" are a violation of a non-union employee's right to free political expression.[96] In fact, the entire *Abood* line of precedent on these agency fee cases presumes that

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[88] *Id.*
[89] *See* Marvit, *supra* note 81.
[90] *Id.*
[91] *See Janus*, 138 S. Ct. at 2462.
[92] *See id.* at 2486.
[93] *Id.* at 2460.
[94] *See id.* at 2486.
[95] *See id.* at 2464–65.
[96] *See id.*

the First Amendment rights of non-union workers are being violated through the government's administration and funding of collective bargaining, but allow this free speech violation because it serves a compelling state interest in the maintenance of "labor peace."[97]

Instead, what lies at the legal heart of *Janus* (and *Abood*) is a more practical question of economics and legislative implementation. If the AFSCME is legally required to collectively bargain and negotiate for all employees—whether they choose to join the union or not—at what point do free-riders (like Mr. Janus) make it financially impossible for the unions to carry out their legal duty? Should workers, like Mr. Janus, be required (despite clear First Amendment objections) to pay their fair share?

As Justice Kagan explained in her *Janus* dissent, the free-rider problem—and its potentially existential consequences for unions—is "basic economy theory."[98] If workers will benefit from the union's collective bargaining regardless of whether they choose to pay for it, there is, obviously, a diminished incentive to pay.[99] (Which only matters, constitutionally, because the union itself may become defunded to the point that it cannot conduct effective collective bargaining for all employees). The First Amendment question is thus fairly narrow: does the governmental interest in maintaining "peaceful" labor relations—via collective bargaining with a union—justify violating a non-union member's free speech rights in the collection of agency fees? In the cases preceding *Janus*, the Court concluded that the free-rider problem outweighed the Constitutional violation of public sector employee rights.[100] Or—to be more precise on this critical point—the Court deferred to Congress and state legislatures on the question of whether collective bargaining was key to peaceful labor relations and simply recognized that this was a compelling enough state interest to survive judicial scrutiny. In *Janus*, the Court implemented a new standard of First Amendment scrutiny without explicitly saying what exactly this new level of heightened judicial scrutiny would be.[101] After hypothetically

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[97] *See id.*

[98] *Id.* at 2490 (Kagan, J., dissenting).

[99] *Id.*

[100] *See id.* at 2489.

[101] *See id.* at 2465.

applying exacting and strict scrutiny, the Court only concluded that agency fees did not pass even the more "permissive" of tests.[102] After *Janus,* all that is known is that agency fees are constitutionally protected political speech that cannot be violated by merely demonstrating that "a government employer could reasonably believe that the exaction of agency fees serves its interests."[103]

The effects of the *Janus* holdings are likely far-reaching. As the arguments from the AFSCME (and the press prognostications before and after *Janus*) attest, the removal of agency fees will likely reduce the funds available to public sector unions, which may then reduce those unions' efficacy in collective bargaining, and (because the issues of politics and economics are always intertwined with labor issues) may sap unions of their political influence.[104] This process has already started, with the American Federation of State, County and Municipal Employees (AFSCME) and the Service Employees International Union (SEIU) losing ninety-eight percent and ninety-four percent of their agency fee-paying members respectively in the year following the *Janus* decision.[105]

As a practical matter, since many legislative bodies mandate collective bargaining as a management strategy to maintain "labor peace" (i.e., they prefer to negotiate with a single union rather than individual employees or competing unions), logistical and accounting proposals to circumvent the *Janus* ruling have

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[102] *Id.*

[103] *Id.*

[104] For instance, see *A Bogus Free Speech Argument at the Supreme Court is Union Busting in the Name of the 1st Amendment*, L.A. TIMES (Feb. 27, 2018), https://www.latimes.com/opinion/editorials/la-ed-scotus-unions-20180227-story.html [https://perma.cc/6GBK-HDWE]; Garret Epps, *The Bogus Free Speech Argument Against Unions*, THE ATLANTIC (Feb. 14, 2018), https://www.theatlantic.com/politics/archive/2018/02/the-bogus-free-speech-argument-against-unions/553205/ [https://perma.cc/2JDQ-DKZ6]; Eric Levitz, *Democrats Paid a Huge Price for Letting Unions Die*, N.Y. INTELLIGENCER (Jan. 26, 2018), http://nymag.com/intelligencer/2018/01/democrats-paid-a-huge-price-for-letting-unions-die.html [https://perma.cc/96AX-LB9P]; Adam Liptak, *Supreme Court Ruling Delivers a Sharp Blow to Unions,* N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html [https://perma.cc/B7LE-X6PX].

[105] Eric Boehm, *After the Supreme Court Said Unions Can't Force Non-Members to Pay Dues, Almost All of Them Stopped*, REASON MAGAZINE (Apr. 9, 2019), https://reason.com/2019/04/09/janus-211000-workers-fled-seiu-afscme/ [https://perma.cc/G4JE-8FKJ] (citing filings with the U.S. Dep't of Labor).

already emerged from legal academics.[106] For instance, Eugene Volokh argues that rather than forcing employees to pay unions, states could simply reduce employee salaries and then pay that money to the unions directly.[107] Benjamin Sachs argues that the fact that "agency fees" pass through the hands of employees at all—rather than being paid directly from the state to the unions—makes this First Amendment quagmire a mere accounting issue.[108]

While these predictions on the political and policy implications of *Janus* are intriguing, a significantly more interesting—and potentially revolutionary—part of the *Janus* decision has received scant attention: how the Court views collective bargaining in relation to free speech and the consequences of this view for how the First Amendment is applied to governmental employees. We believe that the current U.S. Supreme Court is moving toward holding that the act of negotiating with one's employer is a protected form of expression. To better see the Constitutional implication of this reframing—and the arguments that the Supreme Court is likely to rely on to make labor negotiations a form of protected political speech in the public sector—we turn to the rhetorical dimensions of *Janus* to analyze the potential consequences (legal, political, and economic) of the decision.

III. THE FIRST AMENDMENT ROAD FROM *JANUS* TO THE ELIMINATION OF COMPULSORY COLLECTIVE BARGAINING: A RHETORICAL ANALYSIS

While the right to economic self-expression in employee negotiation may seem like "common sense," the legal fact is that applying First Amendment protections to employees' economic speech in the public sector is not straightforward. A bit of dicta from Justice Alito's majority opinion in *Janus* makes the connections between individual liberty and labor negotiation clear:

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[106] *See* Eugene Volokh & Mark Janus, *The Limited Effects of the Supreme Court's Janus Decision, The Volokh Conspiracy*, REASON MAGAZINE (June 27, 2018), https://reason.com/2018/06/27/the-limited-effects-of-the-supreme-court [https://perma.cc/7TYV-S94B].

[107] *Id.*

[108] Benjamin I. Sachs, Agency Fees and the First Amendment (Harv. Public Law, Working Paper No. 17-48, Sept. 22, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041341 [https://perma.cc/B3B6-6DGJ].

> Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer.[109]

The right to negotiate is closely intertwined with the right to contract.[110] If workers have the right to sell their time and skills to an employer, then they likewise have the right to bargain for the most favorable possible terms for that exchange. Historically, some liberals and union advocates have maintained that an individual right of contract weakened the power of labor and unions, to the detriment of workers generally.[111] Roscoe Pound, the former Dean of Harvard Law School railed against:

> The currency in juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of lawmaking to be the ideal.[112]

The current conservative majority on the U.S. Supreme Court, led in this case by Justice Alito, seemed to take a different view.[113] The Court seemed inclined to revive the doctrine of economic substantive due process associated with the Lochner era.[114] In *Allgeyer v. Louisiana*, the Court unanimously held that:

> [T]he right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[115]

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[109] Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018).

[110] *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

[111] *See id.* at 470.

[112] *Id.* at 457.

[113] *See Janus*, 138 S. Ct. at 2484.

[114] *See id.* at 2479.

[115] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

The *Allgeyer* decision was based on reading the word liberty in the Due Process Clause of the Fourteenth Amendment to include a liberty of contract.[116] It is possible but unlikely that the Supreme Court will simply revive this way of thinking. There are significant divisions on the Court with respect to the very concept of substantive due process.[117] The same conservative Justices who are likely to be sympathetic to strengthening the individual right to contract have often been critical of their liberal colleagues using substantive due process to achieve their desired results.[118] Rather than risk charges of hypocrisy on that issue, it seems more likely that Court's conservative majority will approach this issue as one implicating the First Amendment rather than the Fourteenth.

While there may be a Due Process right inherent to labor negotiation, it must be remembered that the *Janus* opinion—beyond Alito's dicta—does not rule on that novel question, but rather the issue of First Amendment protections.[119] Which means if Justice Alito is to successfully hold his coalition of five votes from *Janus* together and continue to chip away at compulsory collective bargaining, a more persuasive argument will have to be constructed to explain how exclusive representation "substantially restricts the rights of individual employees" in the context of the Court's free speech precedents.

We believe the *Janus* decision is likely to be followed by a series of decisions, made over the course of years, which gradually limit the practice of compulsory collective bargaining in the name of a First Amendment right to negotiation. Given the complexities of this paradigm (which only applies to the narrow case of governmental employees, but could be understood more broadly as an affirmation of free speech rights for all public and private workers), what follows are a variety of principles—legal and rhetorical—the Court is likely to rely on for such an effort and some of their possible consequences for both the shaping of public workers'

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[116] *Id.*

[117] *See* Sol Wachtler, *Dred Scott Raises Its Ugly Head Again*, N.Y. L.J. (Mar. 12, 2019), https://www.law.com/newyorklawjournal/2019/03/12/dred-scott-raises-its-ugly-head-again/?slreturn=20190421140942 [https://perma.cc/78MG-AVVE].

[118] *Id.*; *see also* Gilad Edelman, *John Roberts Has a Point*, LIFE OF THE LAW (July 2, 2015), https://www.lifeofthelaw.org/2015/07/john-roberts-has-a-point/ [https://perma.cc/SJ7X-S2RJ].

[119] *See Janus*, 138 S. Ct. at 2480.

understanding of free speech and the nature of "labor peace" in the post-digital era of economic and political disruption.

A. Principle One: Negotiation Is Protected Expression

Negotiation is a discussion with another, aimed at reaching an agreement.[120] It is logically—and in the public imagination—a form of inherently expressive conduct, where a party advocates for his needs or interests. In a 2008 case from Seattle that struck down a rule aimed at limiting housing discrimination, the King County Superior Court described negotiation as a "valuable speech activit[y]" that *trumps other governmental interests*.[121] Forcing someone—through mandated collective bargaining—to acquiesce to a negotiating position she disagrees with (or to remain silent while someone purportedly advocating for her takes a position with which she disagrees) is, as the Court has long understood, constitutionally problematic. Additionally, as *Janus* makes clear, wage negotiations between a public worker's union and a governmental entity involve how much the public will be required to pay (via taxes), making these conversations inherently a matter of public political concern.[122]

For many Americans, particularly those of a libertarian bent, these principles seem straightforward: labor negotiations with governmental entities are an important form of economic speech, deserving of the same First Amendment protections as other political discourse.[123] But in the context of government employees and public workers, First Amendment claims always trigger other complications. While the First Amendment, extended to the states through the Fourteenth Amendment, prohibits the federal government from abridging the freedom of speech, employees that are truly in the private sector, by definition, have no First Amendment protections.[124] But while the federal government

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[120] *Negotiation*, OXFORD ADVANCED LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/english/negotiation?q=negotiation [https://perma.cc/5W3J-2UU4].

[121] Yim v. City of Seattle, No. 17-2-05595-6 SEA, 2018 WL 10140201, at *5 (Wash. Super., King County Mar. 28, 2018) (emphasis added).

[122] *Janus*, 138 S. Ct. at 2474.

[123] *See* Volokh & Janus, *supra* note 106.

[124] *See* U.S. CONST. amends. I, XIV.

cannot generally prohibit an individual from expressing his beliefs, the corollary to that proposition is found in the Compelled Speech Doctrine, which prohibits the government from requiring a person or organization to engage in speech or expression they disagree with or find objectionable *except* when the government proves that the compelled speech acts "are narrowly tailored to a compelling state purpose."[125]

In considering how—via *Janus*—future courts could attempt to extend free speech protection to negotiation, three legal and policy questions then emerge: (1) what constitutes the outside parameters of "employee speech" (in a public workplace) that are deserving of First Amendment protections; (2) does negotiation (as a free speech right for governmental employees) always outweigh the compelling state interest in promoting labor peace; and (3) what is the connection between government employees' First Amendment rights and management's ability to maintain stable relations within its workforce?

Questions (1) and (2) are ultimately issues of communication with potentially far-reaching consequences for the management (and information management) of governmental workers. As Justice Kagan's dissent in *Janus* makes clear, "The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively."[126] What becomes complicated after *Janus* is that by equating Mr. Janus's withheld wages (via agency fees) with protected public speech, the distinction between government employees speaking "as citizen[s] on matters of public concern" (which was often protected) and employees speaking on issues of "merely private employment matters" (which was often unprotected) collapses.[127] Instead of examining the specific content of a government employee's speech, Kagan argues, the Court's pre-*Janus* focus was historically a rhetorical analysis of the communicative audience an employee was trying to reach: "whether the speech was truly *of* the workplace—addressed *to* it, made *in* it

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[125] Andrew Jensen, *Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 13 DUKE J. CONST. L. & PUB. POL'Y 147, 150 (2018).

[126] *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

[127] *Id.* at 2495 (citations omitted).

and (most of all) *about* it."[128] Anticipating the (potentially enormous) First Amendment complications that would arise from reading *Janus* as constitutionally equating all governmental employee speech about labor issues as political matters of "public concern," Kagan writes:

> But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggest, the mass of public employee's complaints (about pay and benefits and workplace policy and such) *would* become 'federal constitutional issue[s].... And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do.[129]

While Supreme Court opinions are notoriously impenetrable for laypeople—and ignorance of the law is never an excuse—*Janus'*s "labor peace" standard opens up a unique legal (and rhetorical) relationship between workers' understanding of their free speech rights and First Amendment precedent.[130] Supreme Court cases do not—as decades of research in legal rhetoric have demonstrated—occur in a vacuum.[131] As the final, and most public and publicized arbiter of rights, Supreme Court opinions do not merely control legal doctrine but also, rhetorically, create and shape the civic fabric of what citizens perceive to be their Constitutional rights.[132] (Creating what communication theorist Gerald Hauser calls the "vernacular" public understanding of Constitutional protections.[133]) Already, in recent years, First Amendment rulings (even beyond public union cases) have woven a new regime—in the public imagination—of what constitutes one's free speech rights vis-à-vis their capital, taxes, and labor.[134]

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[128] *Id.*

[129] *Id.* at 2496.

[130] *See id.*

[131] For a literature overview, see THE RHETORIC OF THE LAW (Austin Sarat & Thomas R. Kearns eds., 1996).

[132] GERALD HAUSER, VERNACULAR VOICES: THE RHETORIC OF PUBLICS AND PUBLIC SPHERE 57 (1999).

[133] *Id.*

[134] Case in point, in *Masterpiece Cakeshop*, the Court, while reversing the Colorado Supreme Court on narrow grounds, nonetheless recognized that requiring a devoutly Christian baker to design a cake for a same-sex wedding correctly triggered his claim that "using his artistic skills to make an expressive

What has been underreported about the *Janus* decision, however, is that by equating a government employee's taxpayer-funded wages with free speech (i.e., equating money with ideological expression), the Court has eroded the firewall distinction between labor (e.g., what one "does" at work) and politics (e.g., how we debate and argue about what a governmental employee does, or does not do, at work).

While a seemingly esoteric point—and also, ironically, a fairly purebred Marxist interpretation of the symbolically political nature of all labor—the practical (i.e., management) consequences of collapsing the difference between what is a "workplace" issue and what is a "public concern" could have significant legal consequences for continuing to apply *Janus*'s First Amendment standard to employee labor issues.[135] If, to meet the *Janus* test, the Court has to weigh the compelling state interest in promoting "peaceful" labor relations and "industrial" labor stability, what happens when everything a governmental employee does (or says or is paid) at work becomes a matter of protected political free speech?[136] In the 2006 *Garcetti* case, Justice Kennedy already predicted the practical consequences (for governmental managers and the courts) of extending *Janus*-esque First Amendment protections to public sector workers, arguing that it would "commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[137] Such a "displacement of managerial discretion by judicial supervision finds no support in our precedents."[138]

An absurd—but legally logical—hypothetical outlines the potential future contours of *Janus*'s free speech paradigm and its consequences for smooth labor relations: a worker, caught in the 2018–2019 government shutdown, could argue that his First Amendment rights were violated because he and his coworkers

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statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs." Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1721 (2018); *see also* Nat. Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368, 2378 (2018); Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988).

[135] *See Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting).

[136] *Id.* at 2488 (Kagan, J., dissenting).

[137] Garcetti v. Ceballos, 547 U.S. 410, 411 (2006).

[138] *Id.* at 423.

were not being paid.[139] Just as Mr. Janus's case ultimately rested on his pre-paycheck wages being legally funneled to the AFCME (which constitutes "political speech" because it involves the public debate over the distribution of tax dollars) our "Shutdown Worker's" pre-paycheck wages are withheld (entirely) because of a management decision to suspend the federal government for budgetary negotiation purposes.[140] In both cases, wages and labor are construed—practically via taxes, politically via their symbolic power—as ideological discourse meriting First Amendment protection.[141] If working and having some portion of your pay diverted (via agency fees) to a state-mandated union is an unlawful violation of free speech (because, according to *Janus*, the betrayal of your political viewpoint outweighs the state's interest in "peaceful labor relations" via particular management tactics), then working and having all of your pay diverted (via a shutdown imposed by management in the Executive Branch or legislature as part of a political strategy of negotiation) is a similarly unlawful violation.[142] Or maybe it only *seems* to be (to a confused governmental employee looking for cues in *Janus* to exercise their First Amendment rights). Ordinarily, how a worker might read a First Amendment case wouldn't have constitutional bearing, but *Janus*'s labor peace standard—which was the controlling standard in *Abood*—allows this sort of rhetorical speculation on what workers *might do* (and how disruptive it might be) to be relevant legal evidence.[143] Justice Alito's majority opinion made clear that in the Court's view, there was simply no evidence beyond speculation that supported the Court's reasoning in *Abood* that exclusive representation and agency fees were necessary to maintain labor peace.[144]

While an extreme case, our government shutdown example illustrates the more fundamental point: the end-game political consequences of extending free speech rights to labor issues in government employment contexts is uncertain at best. And, because the *Janus* test continues to uphold stable labor relations as a compelling state interest, these political and economic predictions about governmental management strategy (and the political reaction

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[139] *See Janus*, 138 S. Ct. at 2486.
[140] *See id.* at 2462.
[141] *See id.*
[142] *See id.* at 2488.
[143] *See id.* at 2477 n.23.
[144] *Id.* at 2465.

to it) have potential legal consequences for the First Amendment.[145] In other words, after Alito opens up the "labor peace" Pandora's box by weighing in on what legislative policies (in the *Janus* case, agency fees) best allow for labor stability (by claiming that declining union power has not, empirically and as a matter of evidence, created economic "pandemonium"), any policy that could hypothetically disturb the economic "peace" now has hypothetical merit that has to be judicially considered. In the next Section, we see how the traditional critiques of unions could also be implicated, as legal arguments, in attempts to extend First Amendment protection to negotiation.

B. Principle Two: Mandatory Collective Bargaining Creates a Principal-Agent Problem

Mandatory collective bargaining requires a union to act as the exclusive bargaining agent for an entire class of employees.[146] Workers often generally benefit from collective bargaining, both in terms of salary and compensation and employment benefits.[147] The portion of a worker's salary that goes to pay the union in the form of agency fees will often be a small percentage of that benefit.[148] If an employee receives a salary increase of $5000 a year but pays $1000 to the union as an agency fee, can she really claim to be damaged while netting a benefit of $4000?[149] Yet the analysis of whether an individual employee benefits from union representation is not that simple.

Collective bargaining gained favor and became a bargaining tactic based on the logic that—by uniting employees through their trade similarities versus their individual differences—it provided workers with more power and resulted in those workers receiving more in compensation and better working conditions.[150] But, as with political representation in a two-party system, the interests of a union and its particular (and particularly disaffected)

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[145] *Id.* at 2465.

[146] Sachs, *supra* note 108, at 1047.

[147] *See* AFL-CIO, *Collective Bargaining*, https://aflcio.org/what-unions-do/empower-workers/collective-bargaining [https://perma.cc/3RTP-EWW2].

[148] Sachs, *supra* note 108, at 1068.

[149] *Id.* (citing JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 493 (1894 ed.)).

[150] *See* AFL-CIO, *supra* note 147.

employees are often not aligned: the union's negotiating posture will necessarily have to favor certain employees at the expense of others. This—in essence—was Mr. Janus's complaint, which he explained in *The Chicago Tribune* before filing his lawsuit:

> I don't see my union working totally for the good of Illinois government. For years it supported candidates who put Illinois into its current budget and pension crisis. Government unions have pushed for government spending that made the state's fiscal situation worse. How is that good for the people of the state? Or, for that matter, my fellow union members who face the threat of layoffs or their pension funds someday running dry? The union voice is not my voice. The union's fight is not my fight.[151]

In his opinion supporting Mr. Janus's First Amendment rights to political speech—while still upholding that "labor peace" was a compelling state interest—Justice Alito concluded that it was "now clear that *Abood*'s fears" about instability without collective bargaining were "unfounded."[152] Not only was there "no pandemonium" in our labor relations since that decision back in 1977 but that "[w]hatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that 'labor peace' can be achieved 'through means significantly less restrictive ...' than the assessment of agency fees."[153] While Supreme Court decisions typically do not involve the evaluation of these sorts of policy questions, *Janus*—by following the longstanding "labor peace" standard (but forgoing deference to the legislature on it)—opens up a complicated and atypical economic question for judicial review: what state policies designed to create "labor" and "industrial" stability can warrant violations of the First Amendment? And what does this "stability" look like in practice after *Janus*?

As Justice Kagan foresaw in her *Janus* dissent, "State and local government that thought [collective bargaining] provisions

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[151] Mark Janus, *Why I Don't Want to Pay Union Dues*, CHI. TRIBUNE (Jan. 5, 2016), https://www.chicagotribune.com/opinion/commentary/ct-union-dues-supreme-court-afscme-perspec-0106-20160105-story.html [http://perma.cc/D2NR-MP8J].

[152] Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2248, 2465 (2018).

[153] *Id.* at 2457.

furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways."[154] And as the post-*Janus* Court contemplates the extension of free speech protections to cover "negotiation" in the public sector (and thus eliminate collective bargaining), we turn our rhetorical analysis—ironically—to three traditional critiques of unions to help clarify (as matters of future management policy for governmental workers) why they were so preferred by some legislatures as to be a "compelling" state interest.[155] At the heart of each critique is the "Principle-Agent" problem.

C. Principle Three: Unions Are Less Attractive Options for Workers than They Once Were

For a variety of reasons, union membership has dropped over the past several decades.[156] Federal and state laws have improved working conditions and enshrined worker protections into law.[157] Federal minimum wages have risen and many states have minimum wages that are higher than that mandated by federal law.[158] Employees have more rights and power than they have historically.[159] The nature of work has changed with workers changing jobs more frequently.[160] The plethora of benefits that

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[154] *Id.* at 2487 (Kagan, J., dissenting).

[155] *See id.* at 2464–65; *see also supra* note 97 and accompanying text.

[156] Quoctrung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015, 11:04 AM), https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map [https://perma.cc/99YX-HF55].

[157] Graham Boone, *Labor Law Highlights, 1915–2015*, U.S. BUREAU LABOR STATS., 1–4 (Oct. 2015), https://www.bls.gov/opub/mlr/2015/article/pdf/labor-law-highlights-1915-2015.pdf [https://perma.cc/P5H3-7QTV].

[158] U.S. Dep't of Labor, *Changes in Basic Minimum Wages in Non-Farm Employment Under State Law: Selected Years 1968 to 2019*, https://www.dol.gov/agencies/whd/state/minimum-wage/history [https://perma.cc/4NBT-QRFL].

[159] Press Release, Economic Policy Institute, *Today's labor unions give workers the power to improve their jobs and unrig the economy* (Aug. 24, 2017), https://www.epi.org/press/todays-labor-unions-give-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/ [https://perma.cc/7ZL6-BGBH].

[160] Jean Chatzky, *Job-hopping is on the rise. Should you consider switching roles to make more money?*, NBC (Apr. 24, 2018, 2:15 PM), https://www.nbcnews.com/better/business/job-hopping-rise-should-you-consider-switching-roles-make-more-ncna868641 [https://perma.cc/QS5S-WM5F].

have become available from maternity/paternity care, health benefits, tuition reimbursement, retirement accounts, paid time off, etc. have made it more difficult for negotiators to represent the interests of large groups of employees.[161] As more workers perceive their interests to be different from those the union advocates, union membership has declined.[162]

1. Individual Interests of Employees in a Workplace Are—By Definition—Unreconcilable

The "Principal-Agent" problem that is inherent in any political or economic representation helps us to see the future challenges of the post-*Janus* world.[163] Central to agency law is the principle that the interests of the principal and the agent must be aligned.[164] Yet some public sector employees and their unions, necessarily, view the goals of negotiating very differently. For example, if the union pushes for higher pay for longer-tenured employees, that may come at the expense of workers who are more-qualified or higher-performing.[165] If the union pushes for better retirement benefits, that may come at the expense of health care benefits or higher pay.[166] For employees who disagree with the union's negotiating posture, forcing them to accept the union's representation and prohibiting them from negotiating for themselves creates a principal-agent problem. If an employee believes she can negotiate a better deal for herself than the union has, should she be allowed to negotiate for herself? To take the classic example: what if she does not intend to have children, so maternity benefits are worthless to her. Should she permitted to try to negotiate a deal for herself that removes that benefit, to the extent allowable by law, and replaces it with increased compensation, vacation, or some other benefit?

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[161] FRANK BURCHILL, LABOUR RELATIONS 83 (4th ed. 2014).

[162] *See* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2248, 2491 (2018).

[163] Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677 nn.38–41 and accompanying text (2019).

[164] Pinar Akman, *Online Platforms, Agency, and Competition Law: Mind the Gap*, 43 FORDHAM INT'L L.J. 209, 230 (2019).

[165] *See id.*

[166] *See id.*

For employees in this situation—like Mr. Janus—the appeal of making your personal economic negotiations part of protected First Amendment speech are obvious.[167] That said, the principle-agent problem is actually one of the reasons why Congress (and many states) prefer to use collective bargaining in the management of labor, and why it was constitutionally protected as a compelling state interest.

Unions, as representative bodies, are not neutral but instead controlled by one group of employees.[168] The common critique of unions is that mandatory representation is irreconcilable with the fair treatment of at least some and often a substantial number of employees.[169] Additionally, as is typically reasoned, " ... conflicts created by individuals' need for fair treatment at the hands of their union could be greatly reduced if exclusivity were abandoned and employees were allowed to be represented by their own individually chosen agents."[170] We agree. But the stated governmental interests in *Janus*, *Abood*, and the preceding agency fee cases all presumed both of these points.[171] While representative forms of government are always unfair to particular individuals, from a management perspective Congress and state legislatures preferred dealing with one actor representing their labor force versus a phalanx of individualized and competing claims.[172] Extending *Janus* free speech protections may, indeed, empower individual rights. But it also—necessarily—moves the burden of managing "conflicts created by individuals' need for fair treatment" from unions to (similarly taxpayer funded) governmental managers.[173] Whether this empowerment of workers is desirable or not is an open question. But it certainly seems to

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[167] *See Janus*, 138 S. Ct. at 2461–62, 2468.

[168] George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897, 902 (1975).

[169] *Id.*

[170] *Id.* at 903.

[171] *Janus*, 138 S. Ct. at 2450–51, 2468; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221–22, 220 n.13 (1977).

[172] *See* Josh Bivens et al., *How Today's Unions Help Working People*, ECON. POL'Y INST. 1–2 (Aug. 24, 2017), https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy [https://perma.cc/JW2G-58XH] (discussing the advantages of union in better representing individual voices collectively).

[173] Schatzki, *supra* note 168, at 903.

trigger *Janus*'s standard for evaluating the effects of "internal" labor peace in a workplace.

2. The Changing Nature of the Workforce Makes Union Membership Less Attractive

An oddity of unionization is that once a workplace votes to unionize, the union becomes the exclusive representative for the employees in perpetuity.[174] In some states, the unionizing elections occurred so long ago that no current employees voted for the union that represents them.[175] And yet, the nature of the workforce has also changed substantially since the dawn of collective bargaining. While it once was not unusual for a worker to spend his entire career with one company, that is far less common today.[176] In January of 2016, the Bureau of Labor Statistics found that the median number of years a worker had been with his current employer was 4.2 years, down from 4.6 years just two years prior in January of 2014.[177] According to the Future Workplace "Multiple Generations @ Work" survey of 1,189 employers and 150 managers, 91 percent of millennials expect to stay in a job less than three years.[178] That means those workers would have 15–20 jobs over the course of their working lives.[179]

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[174] Trey Kovacs, *House Committee Examines How to Modernize Labor Laws*, COMPETITIVE ENTERPRISE INST. (Apr. 26, 2018), https://cei.org/blog/house-committee-examines-how-modernize-labor-laws [http://perma.cc/TUJ4-3VVG].

[175] James Sherk, *Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives*, HERITAGE FOUND. (Aug. 27, 2012), https://www.heritage.org/jobs-and-labor/report/unelected-unions-why-workers-should-be-allowed-choose-their-representatives [http://perma.cc/K78A-FN34].

[176] Jean Chatzky, *Job-Hopping Is on the Rise. Should You Consider Switching Roles to Make More Money?*, NBC NEWS (Apr. 24, 2018), https://www.nbcnews.com/better/business/job-hopping-rise-should-you-consider-switching-roles-make-more-ncna868641 [https://perma.cc/9NYM-HZM5].

[177] Bureau of Labor Statistics, *Employee Tenure in 2018*, U.S. DEP'T LABOR (Sept. 20, 2018), https://www.bls.gov/news.release/tenure.nr0.htm [http://perma.cc/6TXH-8H6F]; Bureau of Labor Statistics, *Employee Tenure in 2014*, U.S. DEP'T LABOR (Sept. 18, 2014), https://www.bls.gov/news.release/archives/tenure_09182014.pdf [http://perma.cc/2EDB-2YN3].

[178] Jeanne Meister, *The Future of Work: Job Hopping is the 'New Normal' for Millennials*, FORBES (Aug. 14, 2012), https://www.forbes.com/sites/jeannemeister/2012/08/14/the-future-of-work-job-hopping-is-the-new-normal-for-millennials/#262df6ba13b8 [http://perma.cc/F44E-MM67].

[179] *Id.*

An employee with the expectation that she will only work at the company for a few years obviously has different compensation interests than someone who expects to be employed there for his entire career. The union representatives cannot zealously represent both groups, which have very different economic interests in that negotiation.[180] Moreover, the very concept of the "labor peace" standard has its roots in the notion—accepted by the Courts in *Abood*—that the "principle of exclusive union representation ... is a central element in the congressional structuring of industrial relations."[181] In 2020, "industrial relations" hardly seems like the economic ecosystem in which we live and work.[182]

The challenges of the twenty-first century gig economy—and the new labor force's beliefs about what constitutes a living wage, fair work-life balance, and protections against discrimination in the workplace—are the economic policy issues that will determine the next American century.[183] How extending First Amendment protections to the negotiations of governmental employees would affect this question is uncertain. However—again, ironically—Marxist labor theory offers one prediction: the opening up of unions—across workplaces—to organize employees and independent contractors of similar trades.[184] If compulsory collective

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[180] *See* Adrienne L. Saldaña, *Conflicting Interests in Union Representation: Should Exclusivity be Abolished?*, 6 GEO. J. LEGAL ETHICS 133, 133 (1992).

[181] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

[182] *Id.*

[183] Vice Chair's Staff of the Joint Economic Committee and Amy Klobuchar, *The Economic Consequences of Discrimination Based on Sexual Orientation and Gender Identity*, U.S. CONG. JOINT ECON. COMM., at 2–3 (Nov. 2013), https://www.jec.senate.gov/public/_cache/files/42dc59a0-6071-46d0-8ff2-9bd7a6b0077f/enda---final-11.5.13.pdf [https://perma.cc/UF5S-D9HJ]; *see* Aspen Institute Staff, *Better Work-Life Balance Doesn't Just Help Employees; It Helps the Whole Economy*, THE ASPEN INST. (Mar. 15, 2016), https://www.aspeninstitute.org/videos/better-work-life-balance-doesnt-just-help-employees-it-helps-the-whole-economy/ [https://perma.cc/ZNG9-SESM]; John Frazer, *How the Gig Economy is Reshaping Careers for the Next Generation*, FORBES (Feb. 15, 2019), https://www.forbes.com/sites/johnfrazer1/2019/02/15/how-the-gig-economy-is-reshaping-careers-for-the-next-generation/#4bb321ab49ad [https://perma.cc/UQW8-5FKK]; Eric Ravenscraft, *What a 'Living Wage' Actually Means*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/smarter-living/what-a-living-wage-actually-means.html [https://perma.cc/MP68-96NF].

[184] *See* George Fishman, *Capitalist Development and Class Capacities: Marxist Theory and Union Organization*, 15 LAB. STUD. J. 101, 101 (1990) (book review).

bargaining is ultimately found to be unconstitutional, one solution is to permit employees the choice to form and join unions which collectively bargain or negotiate directly with their employers, as they do in the private sector. The likely outcome is that workers with aligned interests may choose to collectively bargain, while others will choose to negotiate for themselves. A typical workforce will be comprised of a number of unions representing different constituencies and their interests, as well as a few employees who choose not to join any union and to go it alone. Such an arrangement will provide employees with the right to choose whether or not to bargain collectively. But it will also lead to precisely the instabilities in labor relations that *Abood* warned of: "'inter-union rivalries' [that] would foster 'dissension within the work force'"; employers facing "'conflicting demands from different unions'"; "'confusion'" as employers attempt to "'enforce two or more agreements specifying different terms and conditions of employment'"; and unions under attack from "'rival labor organization[s].'"[185]

3. Grievance Procedures Are Bureaucratic and Slow Moving

Whether and how employees will be afforded due process in the workplace is also subject to mandatory collective bargaining.[186] Placing a union in the role of exclusive bargaining agent affects how employee rights are defined, the types of employer behavior subject to the grievance process, and when, how, and whether the union will choose to assist an employee with a grievance. This arrangement obviously benefits some employees to the detriment of others as workers are often:

> ... substantially boxed in between two massive institutions. On one side is a large corporation with employees numbering in the hundreds of thousands. On the other, a labor organization with a million members and an inevitably formidable organizational structure of officialdom and appeals. Relations between the two are governed by collective 'agreements' running into

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[185] Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018) (quoting *Abood*, 431 U.S. at 220–21).

[186] *See* Richard Wallace*, Union Waiver of Public Employee's Due Process Rights*, 8 INDUS. REL. L.J. 583, 584 (1986).

> the hundreds of pages, looking more like complex statutory enactments than contracts, and containing a quasi-judicial enforcement machinery, access to which is denied the employee when the bargaining representative declines to act.[187]

It is not difficult to imagine a case where older, female, disabled, or minority employees may be more concerned about how issues related to sexual harassment or workplace discrimination are dealt with in a grievance process than other workers. Those employees may understandably believe they have different interests than other employees, which the union as the sole bargaining agent does not do enough to protect. Unions have a duty of fair representation, but the tension between some employees and the union raises questions about how hard the union will fight for a grievance it doesn't believe in or support, or which the union may even view as contrary to its own interests.[188] The result—as is often the case in representative politics—is a tyranny of the majority, where a simple majority of those who vote within a workplace can certify a union, which is then the exclusive bargaining agent on behalf of that workforce.[189]

As our new economic paradigms create unprecedented challenges—and reconfigurations of what it means to be a fairly treated and compensated worker in the global economy—these issues must be carefully addressed. That said, the pre-*Janus* court was careful to reject "all attempts" at making a "federal constitutional issue out of basic 'employment matters, including working conditions, pay, discipline, promotion, leave, vacations, and terminations.'"[190] *Janus*—by collapsing the distinction between workplace and public issues—sets up a potentially unprecedented (and costly and possibly destabilizing) number of legal, economic, and management issues for government officials (versus union officials) to handle regarding workplace claims of

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[187] Kurt L. Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L. REV. 25, 31 (1959).

[188] *See* Beth A. Levine, *Labor Law-Bargaining Orders Absent Showing of Majority Support for Union*, 47 TENN. L. REV. 418, 420 (1979).

[189] *Id.*

[190] *Janus*, 138 S. Ct. at 2495 (Kagan, J., dissenting) (quoting Borough of Duryea v. Guarnieri, 564 U.S. 379, 391 (2011)).

discrimination on the basis of race, religion, gender, sexuality, and ability.[191]

IV. *JANUS* IS ALREADY AFFECTING ORGANIZATIONS THAT COMPEL MEMBERSHIP OR PARTICIPATION

The *Janus* decision will also hit close to home for many attorneys, affecting the operations of state mandatory bar associations. In the case of *Fleck v. Wetch*, attorney Arnold Fleck filed suit in 2015 to challenge a law that requires North Dakota attorneys to not only pass the state's bar exam, but also to join the state bar association and pay member dues, a portion of which support political activities.[192] Fleck had volunteered time and money to support a ballot measure to "establish a presumption that each parent is entitled to equal parental rights."[193] Fleck discovered that the North Dakota State Bar Association was using his compulsory fees to oppose that same ballot measure.[194] The Supreme Court had established minimum safeguards to prevent this sort of forced subsidy of political or ideological activities.[195] Fleck filed suit, claiming his First Amendment rights were being violated.[196] The Eighth Circuit Court of Appeals held that a state bar association was permitted to charge dues to non-members as "a means of providing regulation in, and oversight of, the legal profession."[197] The U.S. Supreme Court disagreed and vacated that decision, remanding it to the Eighth Circuit Court of Appeals for further consideration in light of *Janus*.[198] A similar lawsuit to *Fleck* is now pending in federal court

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[191] *See Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting).

[192] Fleck v. Wetch, 868 F.3d 652, 653 (8th Cir. 2017).

[193] *Id.* at 652–53.

[194] *Id.* at 653.

[195] Keller v. State Bar of Cal., 496 U.S. 1, 16 (1990); Chicago Tchrs. Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); *see also* Josh Taylor, *Bar Association on Shaky Ground After Supreme Court's Summary Disposition*, SMOKEBALL (Dec. 4, 2018), https://www.smokeball.com/blog/bar-association-fees-on-shaky-ground-after-supreme-courts-summary-disposition/ [https://perma.cc/VP7C-XVSE].

[196] *Fleck*, 868 F.3d at 653.

[197] Noell Evans, *Courts weighing impact of Janus decision on state bar associations*, CENTER SQUARE (Dec. 11, 2018), https://www.thecentersquare.com/national/courts-weighing-impact-of-janus-decision-on-state-bar-associations/article_605974ec-fc9e-11e8-a3ca-f33c65b24d51.html [https://perma.cc/UV3R-4B7T].

[198] Fleck v. Welch, 139 S. Ct. 590, 590 (2018).

in Oregon.[199] Other lawsuits have also been filed in Oklahoma, Wisconsin, and Texas.[200]

The *Fleck* case provides a preview of how the effects of *Janus* will go well beyond public unions and affect all manner of other professional organizations.[201] In any organization where 1) members are forced to join, pay dues, contribute money, or in any way support the organization and 2) the organization participates in any form of political activity, *Janus* will force some serious changes.[202] Those organizations will need to figure out a way to create a sort of firewall between any degree of compulsion, whether to join, pay money, or participate in activities and any type of activity that could arguably implicate the First Amendment rights of dissenting members. It seems clear that the U.S. Supreme Court will be closely scrutinizing those relationships and looking for anything that looks like compelled speech.[203] By focusing on how bar associations may respond to *Janus*, we can see some pragmatic paths forward for organizations that could illuminate solutions for public-sector unions and the future of labor negotiations for government employees.

There is a wide division on a state-to-state basis as to how bar associations are organized.[204] The solution for bar associations may be as simple as dividing the traditional role of the state bar association into mandatory and voluntary functions. The Nebraska State Bar Association has adopted that sort of hybrid structure.[205] Members are required to pay a basic membership fee, currently $98.00, in order to practice law. Those fees are used

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[199] Gruber v. Or. State Bar, 3:18-cv-1591-JR, 3:18-cv-2139-JR, 2019 WL 2251282, at *1 (D. Or. 2019).

[200] Mark Pulliam, *Bar Wars: Extending Janus to Bar Associations*, MISRULE OF LAW (May 6, 2019), https://misruleoflaw.com/2019/05/06/bar-wars-extending-janus-to-bar-associations/ [https://perma.cc/6MY4-FSCA].

[201] *Id.*

[202] Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

[203] Pulliam, *supra* note 200.

[204] *State Bar Ass'ns*, LAW. LEGION, https://www.lawyerlegion.com/associations/state-bar/ [https://perma.cc/UF37-5UQZ].

[205] Margery A. Beck, *State Bar Sees Drop in Dues in Wake of Ruling*, LINCOLN J. STAR (Sept. 13, 2014), https://journalstar.com/news/state-and-regional/nebraska/state-bar-sees-drop-in-dues-in-wake-of-ruling/article_65077d74-7834-5c74-b8e4-8281e507b2e0.html [https://perma.cc/NB8Y-M83Z].

to support the administration and enforcement of the regulation of the practice of law by the Court.[206] Members may also choose to pay additional voluntary dues "to analyze and disseminate to its members information on proposed or pending legislative proposals and any other nonregulatory activity intended to improve the quality of legal services to the public and promote the purposes of the Association."[207] This arrangement is intended to avoid requiring attorneys to support political activities they may disagree with as a condition of practicing law.[208] In light of the U.S. Supreme Court's treatment of the *Fleck* appeal, any remaining state bar associations who have not organized themselves this way, separating mandatory membership from political activities, may be forced to do so.[209]

It is possible, but far less likely, that *Janus* could also affect private unions. Courts have routinely recognized the sovereign-like power of unions.[210] "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents...."[211] This was not a new concept. In analyzing a previous case where minority employees felt they lacked fair representation, then Supreme Court Chief Justice Harlan Stone wrote:

> [f]or the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.[212]

With these inherent powers authorized by the National Labor Relations Act, unions control the destiny of their employees, in similar fashion to the authority granted to state and federal legislatures to control the destinies of the citizens it represents.[213] By contracting with employers to force membership dues or agency fees on employees as a condition of employment, the union (as

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[206] NEB. SUP. CT. R. 3-803(D).
[207] NEB. SUP. CT. R. 3-803(H).
[208] NEB. SUP. CT. R. 3-803(D).
[209] *See* Fleck v. Welch, 139 S. Ct. 590, 590 (2018).
[210] Steele v. Louisville & N.R. Co., 323 U.S. 192, 202 (1944).
[211] *Id.*
[212] *Id.* at 198 (citing Virginian R. Co. v. Sys. Fed., 300 U.S. 515, 545 (1937)).
[213] *Id.* at 202.

sovereign authority) is essentially taxing its employees for public services.[214] If an employee wishes to not be bound to union membership or its taxation, the employee must move to a state where unions have less legislative authority, much like a citizen must move to a different state if he or she does not want to be bound to the laws of his or her land. If those organizations then participate in political activity, that could implicate the First Amendment rights of members who disagree with the positions taken by the union.[215] As the case for private unions being state actors and thus implicating the First Amendment is a difficult one to make, the focus of this Article is on public unions.

Post-*Janus*, courts will be placing increasing scrutiny on bar associations and other similar organizations to ensure that mandatory dues are not being used for anything that could conceivably be considered a political activity.[216] This raises some interesting and problematic questions. Are there positions on issues that are so closely related to the functioning of an organization that the organization should be permitted to advocate for those positions? For example, families with children have been recently crossing into the United States from Mexico to seek asylum.[217] Some of those children are not being provided with counsel during court hearings related to their claims for asylum or immigration status generally.[218] If a state bar association in a border state wants to take the position that the government should ensure those children are provided with counsel to protect their interests, is that permitted under *Janus*? Would the bar association be advocating for due process, right to counsel, and other fundamental legal rights, or would they be seen to be wading into a political issue? If members of that bar association opposed to illegal immigration, objecting to their mandatory dues being used to support a position they disagree with, how would

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[214] Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2495 (2018).

[215] *Id.* at 2467.

[216] *Id.* at 2486.

[217] Caitlin Dickerson, *Border at 'Breaking Point' as More Than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. TIMES (Mar. 5, 2019), https://nyti.ms/2SMMwHk [https://perma.cc/9U4K-XRWB].

[218] *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, AMERICAN IMMIGRATION COUNCIL (June 26, 2015), https://www.americanimmigrationcouncil.org [https://perma.cc/NTN5-VV3R].

the U.S. Supreme Court view that dispute? There are countless conceivable examples where arguments can be made on one side that the position is important or consequential (if not essential) to the goals, values, etc. of the profession itself, while an equally persuasive argument can be raised on the other side that the dispute is political in nature and mandatory dues should not be spent taking sides on the issue.

Another option is for membership in state bar associations to be completely voluntary. Many bar associations in states such as New York operate this way, essentially as trade organizations.[219] Making membership and the paying of dues completely voluntary eliminates the tension between compulsory dues being paid to the organization and the organization engaging in political advocacy that some members may object to.[220] But then the question becomes—as it was with *Janus*—can a bar association (or our contemporary understanding of law as a profession)—survive, existentially, without compulsory fees? To comply with *Janus*, bar associations and other trade organizations may have to find a way to divorce any degree of compulsion to join or contribute to the organization from any political or ideological advocacy the group may engage in.[221]

Many of the principles implicated in these lawsuits involving attorneys who do not want to join or contribute to their state bar associations are the same as when public employees like Mr. Janus have no wish to be a member of or pay fees to a union.[222] If an individual is compelled to join or pay fees to an organization and thus subsidize speech she disagrees with, the Court in *Janus* made clear that is a First Amendment violation.[223] An individual has a basic constitutional right to speak on or remain silent about an issue.[224] Forcing a person to endorse a position he disagrees with is just as much a violation as preventing him from voicing his views on an issue.[225] Just as agency

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[219] *State Bar Ass'ns*, *supra* note 204.
[220] Pulliam, *supra* note 200.
[221] *Janus*, 138 S. Ct. at 2486.
[222] *Id.* at 2456
[223] *Id.* at 2486.
[224] U. S. CONST. amend. I.
[225] *Id.*

fees represent compelled speech, so, by its very nature, does compulsory collective bargaining.[226]

Unions and trade organizations should also see the writing on the wall and realize that compulsory collective bargaining is under threat. They should find ways to more effectively represent the interests of the workers they represent. One option would be to let workers express their employment interests and then divide them into smaller bargaining units based on those. Younger employees who value increased salary over retirement benefits could be represented by a union employee who pushes for higher pay, while older employees could choose to push instead for more generous pensions, better health care, etc. Such an arrangement would better align the interests of the workers and their union representatives and at least reduce the principle-agent problem. As the Supreme Court continues to make clear that compulsory collective bargaining is compelled speech, the perceived gap between what workers want and what those purporting to represent them focus on in negotiating is going to be critical. To the extent that unions can reduce that gap, by providing more effective representation, they may be able to stay out of the Court's crosshairs.

CONCLUSION

If an employee is required as a condition of employment to accept a deal he may not approve of and which is negotiated by person(s) he has not chosen or elected, then the *Janus* decision recognized that this arrangement substantially restricts that employee's rights.[227] Unions and trade associations that participate in collective bargaining should be working to increase the engagement of, the choices made available to, and the percentage of the organization's business that is voted on by the group's members.

Unions and other professional organizations will need to figure out ways to create a sort of Chinese wall between any degree of compulsion, whether to join, pay money, or participate

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[226] Valerie C. Brannon, *Bar Dues or Bar Don't? Compelled Fees and the First Amendment*, CONG. RES. SERV. (Dec. 19, 2018), https://fas.org/sgp/crs/misc/LSB10233.pdf [https://perma.cc/8EKB-PCRX].

[227] *Janus*, 138 S. Ct. at 2484.

in activities and any type of activity that could arguably implicate the First Amendment rights of dissenting members. Those organizations will likewise need to find ways to make the processes of choosing representatives and enacting policies more representative. Only by implementing these types of measures will unions and other trade organizations be able to withstand the heightened scrutiny they will increasingly face.