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ISSUE BRIEF



PUBLIC-SECTOR UNIONS AFTER JANUS: AN UPDATE

Daniel DiSalvo

Senior Fellow

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Executive Summary

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the U.S. Supreme Court ruled that state laws obliging nonunion employees to pay fees to the unions that are their “exclusive bargaining representative” are unconstitutional on First Amendment grounds. The decision applies to 5.9 million state and local public employees in 22 states and has shaken up public-sector labor relations. This paper assesses the fallout.

Key Findings:

- ✓ Unions have lost revenues from agency fees. However, membership in public unions has not declined dramatically, and some unions have even increased their membership.

- ✓ New state laws, executive orders, and court decisions have restricted the access and ability of outside groups to communicate with public employees about their legal rights.

- ✓ New state laws and union policies seek to limit union members’ ability to leave unions except during narrow periods of time during the year.

- ✓ New state laws allow unions to withhold employment benefits—such as life insurance or legal representation in grievance proceedings—from nonunion members, thereby making union membership more attractive.

- ✓ Lawsuits are pending in nearly all federal district courts to enable nonunion members to recover agency fees collected from their paychecks before the Court’s decision.

- ✓ Lawsuits are challenging a union’s power to be the exclusive bargaining representative of public-sector workers—which, if successful, would allow individual employees or groups of employees to directly negotiate with management.

- ✓ Proposals that governments directly fund unions could force unions to separate collective bargaining and political activity.



Introduction

On June 27, 2018, the U.S. Supreme Court delivered a 5–4 decision in its most controversial case of that term: *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. The high court ruled that the laws of 22 states that obliged public workers who were not union members to pay “agency fees” to these organizations violated the First Amendment rights of such employees by “compelling them to subsidize private speech on matters of substantial public concern.”¹ The decision overturned a 41-year-old precedent, *Abood v. Detroit Board of Education*.² No longer can a state or local government employee be forced, as a condition of employment, to pay anything to a union unless he “affirmatively consents” to do so.³

The *Janus* decision applies to 5.9 million state and local public employees covered by union contracts.⁴ For workers who are not members, unions must cease and desist from deducting fees from their paychecks. For example, in Connecticut, state public-employee unions have lost \$3.4 million in agency fee revenue from the 5,490 state employees who are not union members.⁵ In New York, by one estimate, public-sector unions will lose over \$100 million in agency fee revenue—out of a total of nearly \$1 billion in annual dues and agency fee revenue.⁶ The Court’s ruling allows union members to revoke their union membership and cease being dunned for fees. Following *Janus*, a series of lawsuits have sought to retroactively recoup the agency fees taken from nonunion members’ paychecks.⁷

Janus weakens public-sector unions economically, as they will lose revenue from agency fees. Furthermore, because government workers can now receive most of the benefits of union representation without paying for them, public unions are likely to lose some members (and their dues money) in the coming years. How many members and how much money remains to be seen.

Yet it is difficult to forecast the impact on union power at the bargaining table and in politics. It is unlikely that public-sector unions will be more effective at negotiating contracts, but how much less so is uncertain. The reason is that the costs of contract negotiations are hard to determine. Critics contend that unions overestimate them because most contracts change little on a contract-to-contract basis.⁸ In addition, the costs of negotiating a contract for 100 workers, for example, is not necessarily greater than the costs of negotiating one for 90 workers or 75 workers who perform the same duties.

Public unions in the 22 states affected by *Janus* are also starting from a position of strength—their membership is large and, in some cases, increased slightly in the wake of the decision.⁹ They do not need to increase their membership to be more powerful at the bargaining table; they need only to hold on to as many of their members as possible and do a respectable job in recruiting new hires. Most studies find that unionized public employees earn 10%–14% more in salary than comparable nonunion public workers.¹⁰ Even if those gains are eroded, it will be a long, slow process.

Nor is it obvious that *Janus* will decimate public unions politically or that it will hurt the Democratic Party, especially in the short run. One scholarly paper finds that the passage of right-to-work laws in some states, which eliminated agency fees for both public- and private-sector unions, reduced Democratic vote shares in presidential elections by 3.5%.¹¹ But *Janus* applies only to public-sector unions, so its impact on Democratic vote shares

in isolation would be even less. In addition, public unions can raise dues and devote more money to politics—a strategy taken by many private-sector unions as they have confronted declining membership in recent decades.

Other factors also work in the unions' favor. A number of states with strong unions have already taken legal steps to buffer public-sector unions against the impact of the Court's ruling. And unions, aware that they might lose agency fees, have been working over the last few years to bolster their ranks. Nonetheless, few policy options on the table today would put public-sector unions in a position to grow and become stronger. Stability or decline are the realistic paths going forward.

From *Abood* to *Janus*

In *Janus*, the Supreme Court held that state laws allowing public-employee unions to negotiate “union security” clauses into contracts were unconstitutional First Amendment violations. Such clauses require all workers covered by a contract to pay at least the percentage of union dues devoted to collective bargaining, if not the entire due amount, unless they take steps to opt out of such payments.¹² For those who decline union membership and refuse to pay dues, these charges are called “agency fees,” insofar as the union acts as the employee's *agent* in negotiations with management.¹³ Unions claim that they deserve these fees because they are of a piece with the “duty of fair representation,” which requires a union to represent all the workers in a bargaining unit equally. This obligation derives from unions' statutory power to be the “exclusive representative” of all the workers in the bargaining unit. The union, in short, has monopoly bargaining rights: individual workers or other unions are forbidden from negotiating with management.

Abood constitutionalized the legal framework for public-sector union agency fees. That case was the first time the Supreme Court wrestled with the repercussions of requiring all workers in a collective bargaining unit to pay the union even if some of them did not agree with its activities. The Court sought to strike a balance between the state's desire to use collective bargaining to manage its workers with dissenting employees' constitutional rights. The resulting compromise was that unions could require all workers to pay for activities “related to collective bargaining” but they could not require workers to pay for their “political and ideological” activities.¹⁴

A line had to be drawn between union collective bargaining expenditures, which could be charged to all workers covered by a contract; and political expenditures, which were not. Drawing such a line proved difficult in practice.¹⁵ *Abood* did not detail what was a political expenditure and what wasn't. Nor did it spell out what procedures were required to allow dissenting employees to challenge unions' spending classifications. Unsurprisingly, unions interpreted political expenditures narrowly, so as to maximize agency fees, and put in place cumbersome procedures for workers to challenge these interpretations in order to prevent them from receiving refunds. Consequently, a number of cases reached the Supreme Court over the ensuing decades seeking to establish which expenses were related to collective bargaining and which were political, as well as how employees could object to union spending decisions.¹⁶

In recent years, the Supreme Court has grown increasingly skeptical that the *Abood* ruling offered sufficient First Amendment protections. Beginning with *Knox v. Service Employees International Union, Local 1000* (2012) and then in *Harris v. Quinn* (2014), the Court, led by Justice Samuel Alito, called *Abood* into question. Many observers thought that the Court would overrule *Abood* in *Friedrichs v. California Teachers Association* (2016), but Justice Antonin Scalia's death left the Court deadlocked 4–4.

Two years later, the Court overturned *Abood*. *Janus* endorsed the view of collective bargaining in the government context as *inherently political*, which the *Abood* court had abjured. The Court held that *Abood* underappreciated dissenting workers' First Amendment rights but overestimated the state's interest in allowing agency fees to empower a bargaining partner.

Writing for the Court, Justice Samuel Alito argued that it is impossible to draw a line in the public sector between union expenditures related to collective bargaining and those related to politics because both are directed at influencing the government. In *Harris*, Alito had previously noted that “the line,” between union expenditures on collective bargaining and those on politics, “is easier to see” in the private sector because “collective bargaining concerns the union’s dealings with the employer; political advocacy and lobbying are directed at the government.”¹⁷ If the two cannot be neatly separated, agency fee payers’ First Amendment rights are constantly in jeopardy.

As for the state’s interest in creating an effective bargaining partner, Alito stated that in “right to work” jurisdictions (which includes the federal government), where agency fees are prohibited, unions are still able to represent their members effectively. Therefore, agency fee revenues and the incentives they create for larger union memberships are not a sufficiently compelling interest to override dissenting employees’ First Amendment rights.¹⁸

Janus creates a right-to-work environment for all state and local government employment across the country. Unions are no longer allowed to charge workers fees without their affirmatively consenting, presumably by signing a union card. Workers who are currently not union members can no longer be forced to pay unions anything—and some unknown number of current union members may renounce their union membership in order to receive the benefits of union membership without paying for them.

The Aftermath

Reaction to the *Janus* case broke along partisan and ideological lines.¹⁹ Democrats and liberals condemned it, and Republicans and conservatives cheered it. Pennsylvania governor Tom Wolf called it part of a “decades-long effort to destroy unions.”²⁰ President Donald Trump declared on Twitter that the ruling was a “big loss for the coffers of the Democrats!”²¹ Yet the organizational, political, and legal responses to the *Janus* case began before the decision was handed down.

Organizational Mobilization

Public-employee unions and their conservative adversaries launched major public-relations efforts. The former sought to bolster their memberships and the latter to erode them. Both sides had fair warning that agency fees were on shaky constitutional ground and mobilized accordingly. The Court’s decisions in *Knox* and *Harris*, along with the stalemate in *Friedrichs*, led New York City teacher union leader Michael Mulgrew to declare that the end of agency fees in the public sector was “inevitable.”²² AFSCME, SEIU, NEA, AFT, and other public-employee unions launched a major organizing campaign years ahead of the *Janus* decision that included updating their membership records, polling public workers to learn their concerns, and enlisting workers to sign “enhanced” union membership cards. (These cards include fine print authorizing the union to deduct fees from a worker’s paycheck and to limit the periods of time when a worker can revoke his or her union membership and stop paying dues.) For instance, prior to the *Janus* decision, AFSCME conducted 600,000 face-to-face meetings with workers it represents. Its efforts yielded a 12,000-member increase prior to January 2018.²³ Overall, the number of workers (public and private) belonging to unions increased by 96,000 from 2016 to 2017, according to the Bureau of Labor Statistics.²⁴

At the same time, conservative groups launched a campaign to inform public employees of their new rights, presumably with the hope that some would renounce their union membership. In *Harris*, the Court ruled that home-health aides paid by state Medicaid programs were not full-fledged public employees and, where unionized, could not be required to pay agency fees. In the wake of that ruling, the Freedom Foundation, a conservative nonprofit, began targeting workers in Washington State and Oregon. Activists sought to contact home-health

aides and explain to them that they could opt out of union membership and dues. The foundation made public-records requests to find the contact information for the health workers.²⁵ In response, public-employee unions successfully sued to block the Freedom Foundation from contacting the home-health aides.²⁶

The Freedom Foundation, along with other organizations affiliated with the State Policy Network, a collection of state-based right-of-center think tanks, went to work in Illinois, Michigan, Ohio, and Pennsylvania to inform workers of how to opt out of union membership and paying dues. The Mackinac Center for Public Policy, a Michigan-based organization, launched a “My Pay, My Say” website after *Janus* to inform public employees of their rights under the decision.²⁷ “Their employer isn’t going to tell them, and the union isn’t going to tell them,” said Maxford Nelsen of the Freedom Foundation. “So it falls to organizations like the Freedom Foundation to take up that mantle and make sure that public employees are informed of their constitutional rights.”²⁸

Legislative Response

Within two weeks of the *Janus* ruling (and, in some cases, anticipating the ruling), about a third of the 22 affected states passed laws to help shield unions from its full impact. The biggest public-sector union states led the charge. In New York, where nearly 70% of public employees are covered by union contracts, Governor Andrew Cuomo began with an executive order to prevent public entities from sharing public employees’ contact information with groups seeking to inform public workers of their newfound rights. While the point was to prevent public employees from hearing the message of groups like the Freedom Foundation, Cuomo framed his order as protecting workers from “harassment and intimidation.”²⁹

A central thrust of the new laws is to help public-sector unions organize and recruit new members. For example, New York facilitates union organizing by giving unions access to existing employees’ contact information and requiring new hires to meet with union representatives for up to an hour so that the unions can persuade them to join.³⁰ Similarly, California,³¹ Maryland, and Washington State now assure unions access to new employees so that they can make the case for union membership.³² California’s public employers must also share their employees’ contact information with unions. Conversely, California, Washington, and New Jersey prohibit public employers from discouraging membership, which may imply that they cannot tell workers how to opt out of union membership.³³ In New Jersey, public employers who violate this provision will be required to reimburse unions for lost dues. Such measures are designed to allow unions to intensify their communications with public employees, while preventing workers from hearing clear statements of their rights under law or any other perspectives on the costs and benefits of public-union membership.

Some of the new state laws stipulate that government-employee unions can now offer services exclusively to members and limit those provided to nonmembers. The aim is to make membership more attractive. For example, New York State United Teachers has stripped all workers they represent of the life insurance, eye and dental coverage, and other goods it provides, unless they join the union. New York also now allows unions to refuse to represent nonmembers covered by union contracts in grievance and arbitration proceedings.³⁴ Legislation in Rhode Island allows police unions to stop representing nonmembers in grievance cases.

Whether such provisions will hold up in court remains to be seen. Justice Alito’s *Janus* opinion implied that states could alter requirements that all workers in a bargaining unit be represented equally, which would allow unions to charge employees they represent who do not pay dues for certain goods and services they provide.³⁵ Whether that provision can be read to apply to excluding nonmembers from life insurance and other services will likely be settled in future litigation.

Finally, many of the new state laws make it harder for union members to revoke their membership. Statute or public unions now explicitly set the terms by which members can exit. Those terms, sometimes enshrined in new “enhanced” union cards, include specific windows of time each year when workers can opt out and the steps they

must follow to do so.³⁶ New Jersey passed similar legislation prior to the *Janus* decision. It limits government employees who previously joined the union, or at their time of their initial employment, to just 10 days a year following their date of hire to leave.

Battle in the Courts

The new state laws favoring public unions have been challenged in state and federal court. Lawsuits brought by the National Right to Work Legal Defense Foundation and others seek to end restrictions created by union officials to block workers from opting out of unions. In Ohio, a case is being brought by a group of workers who resigned from AFSCME Council 8 but the union continued deducting dues. AFSCME defends its actions on the basis of a union policy that limits revocation of dues deduction to a 15-day window before a new contract takes effect.³⁷

Similar cases are being litigated in California, New Jersey, and elsewhere. In California, a Superior Court employee of Contra Costa is suing AFSCME Local 2700 because the union continued to deduct his dues after he renounced his union membership. The suit challenges the post-*Janus* California law, which requires public employers to deduct dues from workers at the union's request, not that of the employee.³⁸

In New Jersey, two public school teachers are suing the New Jersey Education Association for refusing to allow them to stop payment of union dues when they resigned after the *Janus* decision. The teachers are challenging the New Jersey law that limits workers from revoking their union membership except during an annual 10-day window.³⁹ These cases, and others like them, will determine whether, and to what extent, union policies and state laws can restrict workers' ability to resign their union membership and stop paying dues.

The *Janus* decision promoted another sort of class-action lawsuit, which demands the retroactive refund of agency fees taken from state employees who were not union members.⁴⁰ In Ohio, one such case was filed against AFSCME Local 11, whose contracts cover more than 30,000 state government employees.⁴¹ Similar suits have been filed in California, New Jersey, Connecticut, Pennsylvania, and Minnesota.⁴² If these lawsuits are successful, they could cost public unions an estimated \$150 million.⁴³

The legal theory underpinning these suits is that even though the agency fees were legal when they were collected, Supreme Court decisions that overrule precedents in civil cases are retroactive because these decisions do not change the law but announce the true law. Therefore, every public employee forced to pay an agency fee in violation of his or her rights would be eligible for a refund.⁴⁴ The only limit on these retroactive claims is state statutes of limitations, which are generally two or three years.⁴⁵ Unions are thus being sued for damages under the federal civil rights statute.⁴⁶

A number of legal scholars think that the retroactive refund lawsuits are unlikely to gain traction in the federal courts. The unions were acting in "good faith" under a prior Supreme Court ruling. Scholars also point to arguments over the civil retroactivity doctrine, tort cases in common law, and issues of class-action certification that, they claim, should lead to the failure of these suits.⁴⁷ One district court in Washington State has already ruled that *Janus* has no retroactive effect.⁴⁸ Yet a number of suits are currently pending, and it remains to be seen if any will be successful in federal court or reach the Supreme Court.

Possible Futures

Looking ahead, two areas of contestation in public-sector labor relations are apparent. One is whether government should directly fund public-employee unions with tax dollars. Another is whether such unions should retain their rights to be the exclusive representative in a bargaining unit.

Government Funding of Unions

In response to *Janus*, a number of sympathetic legal scholars and state legislators have proposed that government directly pay unions rather than funnel money through employee paychecks and then into union coffers.⁴⁹

Harvard Law professor Benjamin Sachs has argued that the passage of dollars through workers' paychecks was simply a "formal matter."⁵⁰ Sachs contends that even though agency fee money passed through workers' paychecks on its way to the union, that revenue was really just a payment from government employers to their union bargaining partners. Granting unions the power to collect agency fees was not, as Justice Scalia put it in *Davenport v. Washington Education Association*, the power "to acquire and spend other people's money."⁵¹ Rather than the agency fee money belonging to workers and being transferred to the union, Sachs argues that it is better understood as "union property."⁵²

Consequently, such claims, it was the Court's misunderstanding of the agency fee as the worker's property that created the free-speech problem. Once the fees are seen as a direct transfer from employer to union, and as the union's property, the First Amendment problem "disappears."⁵³ Sachs claims that going forward, it is constitutional for public employers to pay unions directly. He argues that government employers should simply pay unions for the cost of collective bargaining and contract administration to cover all workers in a bargaining unit.

Whether this arrangement would offend the First Amendment is unknown—but it raises a number of peculiar questions. If government employers control the union's revenue, can what happens next under this arrangement be characterized as "bargaining"? What would citizens say about the disbursement of their tax dollars to private parties—in this case, a union whose activities increase the costs of government?

Direct payments to unions ultimately put the existence of public unions into question. If government employers want to pay their employees more, they are free to do so. Why also pay a union substantial sums to underwrite the salaries of its leaders and employees to negotiate with the employer to force it to pay more?⁵⁴ While some method of expressing employees' preferences, especially on more technical work-rule issues, may be useful, it is far from clear that it should cost the hundreds of millions of dollars that unions have been collecting in dues and agency fees. Why not simply do away with public-sector collective bargaining and have elected officials acting as employers—employers who represent and are accountable to the entire citizenry—unilaterally set the terms of employment?

There is yet another issue to arise from direct government funding of public-sector unions—that of contributing taxpayer dollars to an entity that has the unlimited right to donate some undefined portion of the money almost exclusively to one political party.⁵⁵ Of course, that issue could be addressed if the unions, like some firms that contract with state governments, are prohibited from donating to political campaigns. Or for workers who wish to contribute to a political organization, a separate one could be formed for that purpose. In short, to get paid directly by government employers, unions might have to forgo their ability to engage in political activity. No longer could collective bargaining and political activity be conducted by the same entity.

Exclusive Representation

In light of *Janus*, conservative legal groups are challenging the authority of unions to act as the exclusive representative of all workers in a bargaining unit. A number of lawsuits have been filed in the federal courts.⁵⁶ For instance, the Buckeye Institute filed suits on behalf of a high school teacher in Ohio and a college professor in Minnesota challenging the authority of their respective unions to represent them.⁵⁷ The plaintiffs seek to represent themselves rather than be represented by the union. Nearly every state allows unions to serve as the exclusive representative.

It is not clear that unions will want to retain exclusive representation if all workers cannot be forced to pay for such representation.⁵⁸ This raises the question of whether unions want to be organizations that provide individualized services or a broader social movement.⁵⁹ It also raises the prospect that if unions got rid of exclusive representation, they would also forgo duty of fair representation, which could result in discrimination against some groups of employees—say, women or minorities. Consequently, many unions may be reluctant to give up on exclusive representation.

Conclusion

State and local governments will confront important choices about how to effectively manage their workforces in the coming years. Some governors and state legislators will attempt to preserve the pre-*Janus* status quo of union strength and undertake steps, like those described above, to facilitate that outcome. They will seek to create one-sided environments where public employees hear messages from unions only about the benefits of membership but nothing from employers or outside groups about their rights under law. In a similar vein, new policies will try to restrict some benefits, such as legal representation in grievance and arbitration proceedings, to union members, which will induce workers to become or remain union members. Some politicians may propose that government employers pay unions directly.

Other governors and state legislatures will want to see the logic of the *Janus* decision carried forward—allowing outside groups or government employers themselves to be able to inform public employees of their legal right not to become union members and pay dues or revoke such membership. They may also want to find ways to negotiate with nonunion employee groups, perhaps in exchange for providing all employees the same package of benefits, such as life insurance and dental and vision health coverage. Finally, they may seek to hold the line on union revenues by opposing efforts to fund unions directly through tax dollars and do more to separate unions' collective bargaining from their political activities.

For now, the status of public-sector unions in some of America's largest states remains in flux. Public-sector unions are likely to remain important political players in the states where they were strong prior to *Janus* for the foreseeable future. Elsewhere the future will be settled largely in state and federal courts. *Janus*, however, has likely put to rest any plans for public-sector union expansion or growth.



Endnotes

- ¹ *Janus v. AFSCME, Council 31, et al.*, 138 U.S. (2018), p. 1.
- ² *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).
- ³ *Janus v. AFSCME*, pp. 48–49.
- ⁴ Bureau of Labor Statistics (BLS), “Economic News Release, Table 3,” Jan. 18, 2019.
- ⁵ Mark Pazniokas, “Lamont to Labor: ‘We’re Going to Be Fighting for You,’” *CT Mirror*, Nov. 2, 2018.
- ⁶ Ken Girardin, “The Janus Stakes,” Empire Center for Public Policy, Jan. 9, 2018.
- ⁷ Such cases are being litigated in most of the nation’s district courts. See, e.g., *Aliser v. SEIU Cal.*, No. 18-cv-02574 (E.D. Cal., filed Sept. 17, 2018); *Crockett v. NEA-Alaska*, No. 18-cv-00179 (D. Alaska, filed Aug. 2, 2018); *Lee v. Ohio Education Association*, No. 18-cv-01420 (N.D. Ohio, filed June 25, 2018); *Akers v. Maryland State Education Association*, No. 18-cv-01797 (D. Md., filed June 18, 2018); *Hoekman v. Education of Minnesota*, No. 18-cv-01686 (D. Minnesota, filed June 18, 2018); *Diamond v. Pennsylvania Education Association*, No. 18-cv-00128 (W.D. Pa., filed June 15, 2018); *Smith v. New Jersey Education Association*, No. 18-cv-10831 (D. NJ, filed June 11, 2018); *Wholean v. CSEA SEIU Local 2001*, No. 18-cv-01008 (D. CT, filed June 13, 2018); *Babb v. California Teachers Association*, No. 18-cv-00994 (C.D. Cal., filed June 5, 2018); *Cruz v. UIA*, No. 17-cv-02261 (D. PR, filed Oct. 26, 2017).
- ⁸ Sam Wikers and Bob Coleman, “How Are the LAUSD Contract Negotiations Going? We’re in the Dark. Collective Bargaining Needs Some Sunshine,” *Los Angeles Times*, Jan. 17, 2019.
- ⁹ Katherine Barrett and Richard Greene, “Defying Predictions, Union Membership Isn’t Dropping Post-Janus,” *Governing.com*, Dec. 10, 2018; Greta Kaul, “The Janus Decision Was Supposed to Hurt Public-Employee Unions. In Minnesota, Their Membership Is Up,” *MinnPost*, Dec. 19, 2018.
- ¹⁰ Jake Rosenfeld, *What Unions No Longer Do* (Cambridge, MA: Harvard University Press, 2014). For the evidence that collective bargaining in government drives up costs through increased salaries and benefits, see Sarah F. Anzia and Terry Moe, “Public-Sector Unions and the Costs of Government,” *Journal of Politics* 77, no. 1 (January 2015): 114–27.
- ¹¹ James Feigenbaum, Alexander Hertel-Fernandez, and Vanessa Williamson, “From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws,” NBER Working Paper no. 24259, January 2018.
- ¹² *Abood*, p. 237.
- ¹³ Unions typically call agency fees “fair share” fees to indicate that all workers must pay their fair share for the benefits the union is providing. This put opponents of such fees in the position of saying that they are against paying something that is “fair.”
- ¹⁴ *Abood*, nn. 9 and 16, and p. 232.
- ¹⁵ As Justice Potter Stewart’s majority opinion stated: “There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.” *Abood*, p. 237.
- ¹⁶ *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 465 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).
- ¹⁷ *Harris v. Quinn*, p. 18.
- ¹⁸ See also National Conference on State Legislatures, *Right-to-Work Resources*.
- ¹⁹ Lisa Milam-Perez, “Reaction Is Swift to Supreme Court’s *Janus* Decision,” *Employment Law Daily*, Wolters Kluwer Legal & Regulatory U.S., July 2, 2018.
- ²⁰ Tom Wolf, “Statement in Support of Pennsylvania Workers as Supreme Court Hears JANUS case,” Office of the Governor of Pennsylvania, Feb. 26, 2018.
- ²¹ Donald Trump, Twitter, June 27, 2018.
- ²² Mike Antonucci, “NYC Teacher Union President Says Right-to-Work Inevitable,” Education Intelligence Agency, Feb. 10, 2018.
- ²³ Justin Miller, “Janus: A New Attack Presents Old Challenges for Unions,” *American Prospect*, Oct. 24, 2017.
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- ³⁰ Andrew Cuomo, “Governor Cuomo Signs Legislation to Protect the Rights of New York’s Working Men and Women,” Office of the Governor, Apr. 12, 2018; New York State Assembly, Bill No. A09059; New York State Senate, Bill No. S5778A.
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- ³⁵ See *Janus*, pp. 15–17. Justice Alito notes that “whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated.”
- ³⁶ Marc E. Fitch, “AFSCME Defies *Janus*, Tells Members They Can’t Leave,” Yankee Institute, Nov. 28, 2018.
- ³⁷ Marc Kovac, “Two Lawsuits Challenge Automatic Dues for Public Employee Unions,” *Columbus Dispatch*, Oct. 16, 2018; “Ohio Public Employees File Two Class-Action Lawsuits Against AFSCME Unions to Enforce *Janus* Supreme Court Decision,” National Right to Work Legal Defense Foundation, Oct. 15, 2018.
- ³⁸ “California Court Worker Sues State of California and AFSCME Union for Blocking Him from Exercising *Janus* Rights,” National Right to Work Legal Defense Foundation, Sept. 11, 2018. See *Smith v. Superior Court, County of Contra Costa et al.*, 3:2018-cv-05472, filed Sept. 6, 2018.
- ³⁹ See *Fischer et al. v. New Jersey Education Association et al.*, 3:18-cv-15628 (NJ District Court, filed Nov. 2, 2018).
- ⁴⁰ Noam Scheiber, “Trump Nominee Is Mastermind of Anti-Union Legal Campaign,” *New York Times*, July 18, 2018.
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- ⁴² *Aliser v. SEIU Cal.*, No. 18-cv-02574 (E.D. Cal., filed Sept. 17, 2018); *Hoekman v. Education of Minnesota*, No. 18-cv-01686 (D. Minnesota, filed June 18, 2018); *Smith v. New Jersey Education Association*, No. 18-cv-10831 (D. NJ, filed June 11, 2018); *Wholean v. CSEA SEIU Local 2001*, No. 18-cv-01008 (D. CT, filed June 13, 2018); *Babb v. California Teachers Association*, No. 18-cv-00994 (C.D. Cal., filed June 5, 2018).
- ⁴³ Robert Iafolla, “Union Finances Could Take Beating in Fee Refund Lawsuits,” *Bloomberg Law*, Oct. 15, 2018.
- ⁴⁴ William Baude and Eugene Volokh, “Compelled Subsidies and the First Amendment,” *Harvard Law Review* 132, no.1 (November 2018): 171–204.
- ⁴⁵ See, e.g., California Civil Procedure Code 335.1 (two years); New York C.P.L.R. 214 (three years).
- ⁴⁶ 42 U.S. Code 1983.
- ⁴⁷ Aaron Tang and Fred O. Smith Jr., “Can Unions Be Sued for Following the Law?” *Harvard Law Review Forum* 132, no. 2 (November 2018): 24–41; Erwin Chemerinsky and Catherine L. Fisk, “Exaggerating the Effects of *Janus*,” *Harvard Law Review* 132, no. 2 (November 2018): 42–58.
- ⁴⁸ Daniel Wiessner, “Judge Says SCOTUS Ruling on Agency Fees Has No Retroactive Effect,” Reuters, Nov. 30, 2018.
- ⁴⁹ Benjamin I. Sachs, “Agency Fees and the First Amendment,” *Harvard Law Review* 131, no. 4 (February 2018): 1046–77; Benjamin Sachs and Sharon Block, “How Democratic Lawmakers Should Help Unions Reeling from the *Janus* Decision,” *Vox*, June 27, 2018. See also Daniel Hemel and David Louk, “Is *Abood* Irrelevant?” *University of Chicago Law Review Online* 82, no. 1 (2016): 227–50; Aaron Tang, “Public-Sector Unions, the First Amendment, and the Costs of Collective Bargaining,” *New York University Law Review* 91, no. 1 (April 2016): 144–226; Baude and Volokh, “Compelled Subsidies and the First Amendment.”
- ⁵⁰ Sachs, “Agency Fees.” The “formal” payment of unions through paychecks arose because the National Labor Relations Act of 1935 sought to eliminate the company unions that existed in the 1930s. Therefore, the law prohibited employers from directly paying unions. The public-sector labor laws passed by the states some 30 years later mimicked this provision.
- ⁵¹ *Davenport v. Washington Education Association*, 551 U.S. 177 (2007), p. 177.
- ⁵² Sachs, “Agency Fees,” p. 1050. His argument is as follows. It is a union’s collective action that allows workers to win higher compensation, such that all compensation gains are really the property of the entity that produced them, insofar as workers negotiating individually with management could never have produced such a large wealth transfer from the employer to themselves. The agency fee is then just a percentage of that pay premium that the union won and that is its property.
- ⁵³ *Ibid.*, p. 1051.
- ⁵⁴ One scholarly article, albeit an outlier in the literature, finds that unionizing public education did not increase education spending. The author finds that unionizing teachers gave the Democrats more political power but did not improve the economic standing of teachers. She suggests that Republicans were right to target public-sector unions for political but not economic reasons. See Agustina S. Paglayan, “Public-Sector Unions and the Size of Government,” *American Journal of Political Science* 63, no. 1 (January 2019): 21–36.
- ⁵⁵ Such action might also be unconstitutional under the Supreme Court’s “political patronage” cases. See Tang, “Public-Sector Unions.”
- ⁵⁶ Sean Higgins, “Conservatives Take Another Swing at Public Sector Unions,” *Washington Examiner*, Jan. 4, 2019.
- ⁵⁷ Carl Horowitz, “Ohio and Minnesota Teachers Challenge Public-Sector Union Monopoly Representation,” National Legal and Policy Center, Oct. 24, 2018; Lisa Needham, “After ‘*Janus*’: Anti-Union Forces Target Representation Structure in New Suit,” *Rewire.News*, Aug. 9, 2018.
- ⁵⁸ Kate Bronfenbrenner, Chris Brooks, and Shaun Richman, “After *Janus*, Should Unions Abandon Exclusive Representation?” *In These Times*, May 25, 2018.
- ⁵⁹ Thomas Geoghegan, *Only One Thing Can Save Us: Why America Needs a New Kind of Labor Movement* (New York: New Press, 2016); Chris Brooks, “The Cure Worse than the Disease: Expelling Freeloaders in an Open-Shop State,” *New Labor Forum* (August 2017).