Executive Summary

Since the U.S. Supreme Court’s controversial 2018 decision Janus v. AFSCME, the legal and political landscape for America’s public-employee unions has changed significantly. The unions have lost members and money—but the impact of the decision has been blunted by new state laws to boost their fortunes.

The high court’s decision also sparked a wave of lawsuits seeking to extend the logic of Janus in state and local government or otherwise nail down some of its particulars. This report examines those legal cases. It finds:

• The concept of “exclusive representation” in public-sector collective bargaining has faced a serious challenge but has survived, for now. Nevertheless, a future Supreme Court could plausibly extend the logic of Janus and declare exclusive representation an unconstitutional First Amendment violation.

• Federal courts appear to have determined that Janus only applies prospectively and that non-union workers are not entitled to court-ordered restitution of fees paid before Janus.

• Courts have backed maintenance-of-membership provisions—especially those that allow workers to drop their union membership at any time—even if they must continue to pay dues until an escape period is reached.
Looking ahead, reformers might pursue three paths to continue to right-size the power and influence of public-sector unions to improve government performance, increase transparency, and ensure that workers’ genuine preferences are better gauged.

One reform would be to follow Wisconsin’s lead and enact legislation requiring more regular recertification elections; that is, asking workers on the job today whether they really want union representation.

Another reform would be to legislate greater transparency in the form of reporting requirements for public unions similar to what is required of private-sector unions at the federal level. Such reporting would provide greater clarity for workers, employers, and the public. Workers would be able to assess what the unions to which they belong are doing, employers would know the representativeness of the unions with which they are negotiating, and the public would know what their tax dollars are underwriting.

The final reform would be to inform workers and employers of their new rights under Janus. This would better enable current workers and new hires to make informed decisions about whether they want to be union members—and, if not, what they need to do to opt out of membership. Programs that help employers understand what they can and cannot do regarding union membership, as well as assist them in developing onboarding processes for new hires, also show promise. Such programs will slowly recalibrate union membership to the point where it more accurately approximates workers’ actual preferences.

Introduction

In June 2018, the U.S. Supreme Court handed down a landmark labor-relations decision in Janus v. American Federation of State, County, and Municipal Employees, Council 31. The high court ruled that state laws requiring nonunion public employees to pay “agency fees” to the unions that are their exclusive bargaining representatives were unconstitutional. The reason: they violate the First Amendment rights of such employees by “compelling them to subsidize private speech on matters of substantial public concern.”1 Provisions in the labor laws of 22 states, affecting 5.9 million public workers, were overturned. No longer could states require public employees to pay representation fees to unions that they had not joined. Unions were forced to stop deducting such fees from nonmembers’ paychecks, even though they continued to represent them in collective bargaining.

In the three years since the controversial decision, Janus has significantly altered the legal and political landscape for America’s public-employee unions. Unions lost money and members, and they were forced to adjust their policies. For example, by one estimate, New York State’s public-sector unions, which previously collected nearly $1 billion a year in dues and fees, lost almost $100 million in annual agency fee revenue.2 However, many states affected by the decision passed new laws to blunt the impact of the Court’s decision.3 A number of states, including New York, California, Maryland, and Washington, adopted laws to encourage union organizing efforts by providing unions with existing employees’ contact information and requiring new hires to meet with union representatives during worktime so that the unions can press their case for membership.4 One state, Virginia, even passed a law in 2021 that permits local governing bodies to engage in collective bargaining for the first time in the state’s history.

An unexplored consequence of the Court’s decision is that it sparked a major wave of litigation across the country. The cases fall into three groups. One group seeks to extend the logic of Janus and eliminate “exclusive representation”—legal rules requiring that only a single union
can represent all workers in negotiations with management—in state and local government. The second group, sometimes called “retroactive refund” or “clawback” suits, seeks to recoup the now-unconstitutional agency fees paid by public employees who were not union members but were compelled to pay them before Janus. The third group, sometimes called “windows cases” or “escape periods,” challenges state laws that allow public employees to exit the union and/or stop paying union dues only at specific times of the year.

Here I assess the outcomes of these legal battles and offer a perspective on how public-sector labor law might be shaped by legislation and programmatic action rather than litigation.

Janus and the First Amendment

In Janus, the Supreme Court held that state laws allowing public-employee unions to negotiate “union security” clauses into contracts violated the First Amendment and were unconstitutional. Such clauses require all workers represented by a union and covered by a contract that it negotiated to pay at least the percentage of union dues devoted to collective bargaining—if not the entire dues amount—unless they affirmatively opted out of such payments. For those who forswear union membership, these charges are technically called “agency fees” because the union acts as the employee’s agent in negotiations with management.

Unions call these charges “fair share fees” because it is only reasonable, they contend, that all workers pay the costs of their representation. Furthermore, unions argue that they deserved these monies because they must comply with a “duty of fair representation.” This requirement stipulates that unions must represent all the workers in a bargaining unit equally—whether they are members of the union or not. It is an obligation that derives from unions’ statutory power to be the “exclusive representative” of all the workers. The duly elected union has a monopoly on the representation of workers to negotiate with management: individual workers or other unions cannot do so.

Although these legal concepts appear dry and technical, they have important implications for the structure of government labor relations in much of the United States. Janus significantly altered how these pieces of labor law interact by prohibiting the collecting of agency fees from nonunion workers in the public sector who are covered by collective bargaining agreements.

To do that, Janus overturned the reigning Supreme Court precedent, Abood v. Detroit Board of Education (1977). In Abood, the Court held that agency fees were constitutionally permissible based on a balance between the state’s desire to use collective bargaining to manage its workforce and dissenting employees’ constitutional rights not to be forced to pay for the political activities of an organization with which they disagreed. The compromise that the Court settled on was that unions had to divide monies they collected into those that were used to pay for their “political and ideological” activities and those that were used to pay for activities “related to collective bargaining.” Nonmember employees could not be charged for the former but could be charged for the latter. The unions themselves would be left to calculate and apportion the respective costs.
The *Janus* majority reversed *Abood* on the grounds that collective bargaining in the government context is “inherently political.” No division of monies collected by the union was plausible. Even paying for representation in collective bargaining was political and a form of compelled speech, the Court determined. In sum, the Court held that *Abood* played down dissenting workers’ First Amendment rights but played up the state’s interest in allowing agency fees to empower a bargaining partner. *Janus* overturned that position.

---

**The Impact of *Janus***

Before *Janus*, 22 states permitted agency fees (**Figure 1**). The rest usually had so-called right-to-work statues on the books, which prohibit unions from charging workers who choose not to join the union for the costs of union representation. Those allowing agency fees included some of the nation’s largest and most populous states with a majority of the nation’s state and local government employees, including New York, New Jersey, California, Massachusetts, and Illinois. The fact that public workers had to pay fees to unions in these states regardless of whether they joined the union provided a powerful incentive for all workers to join and pay full membership dues—because if they were nonmembers, they would be prohibited from voting in union elections, on contracts, and on whether to strike. These favorable labor laws enabled unions to boost their membership rolls. The percentage of unionized teachers, for example, was over 90% in most of the states that allowed agency fees—and had been since the 1990s. A larger membership also meant more dues revenue.

**Figure 1**

**Agency Fees Versus the Right to Work: 2018**

Members and money convert into political power. Again, take teachers unions. Stanford University political scientist Terry Moe, the leading scholar of teachers unions, posited that the National Education Association (NEA) and the American Federation of Teachers (AFT)—with nearly 5 million members between them—constituted one of the “most powerful interest groups of any type in any area of public policy,” exerting influence on education policy at all levels of government. Other scholarly research has shown that public-sector collective bargaining laws served as agents for the political mobilization of America’s teachers.

Many observers predicted that the Janus decision would swiftly erode teachers’ and other public-employee unions’ political power. The argument was straightforward. Once public workers were no longer compelled to pay dues, unions stood to lose both agency fee revenue from non-members and dues revenue from some additional percentage of members who would opt out of their union. With fewer members and less money, these unions would be less politically potent.

However, the unions’ fortunes have not fluctuated nearly as much as many predicted. Although the unions lost agency fee revenue and even some members, the effects of Janus have, to date, been far less catastrophic than the dire consequences sketched by union advocates or as predicted by Justice Elena Kagan in her Janus dissent. The majority’s decision, Kagan held, would unleash “large-scale consequences” and did so “with no real clue of what will happen next—of how its action will alter public-sector labor relations.” Disruption of those relations, she argued, might disturb “government services … that affect the quality of life of tens of millions of Americans.” On the contrary, membership has not fallen precipitously or wreaked havoc on the delivery of public services. That said, the Court’s decision, along with new laws adopted in more than a third of the affected states, has reshaped the political and policy landscape. And litigation after Janus has sought to give the Court’s decision greater effect by extending its logic into certain corners of public labor relations. These lawsuits centered on exclusive representation, retroactive refunds, and membership opt-out periods.

---

**Exclusive Representation**

In this country’s labor laws, exclusive representation refers to the right of a union, once it is chosen by a majority of the employees in an “appropriate bargaining unit” (consisting of similarly situated workers in a business, plant, department, or agency), to represent all employees in that unit in negotiations with management, whether they are union members or not. When an exclusive representative is in place, other unions or individual workers cannot negotiate with management.

The Janus decision did not directly challenge exclusive representation, but Justice Samuel Alito’s opinion introduced a note of skepticism about it. While the Court did not dispute “that the State may require that a union serve as exclusive bargaining agent for its employees,” he noted that it was “a significant impingement on associational freedoms that would not be tolerated in other contexts.” In short, Justice Alito suggested that exclusive representation was in tension with freedom of association.

In an earlier case, Minnesota Board for Community Colleges v. Knight (1984), the Supreme Court held: “Appellees’ speech and associational rights . . . have not been infringed by Minnesota’s restriction of participation in ‘meet and confer’ sessions to the faculty’s exclusive representative. The state has in no way restrained appellees’ freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative.”
But *Janus* opened a potential conflict with the *Knight* precedent. If collective bargaining in the public sector is inherently political and workers cannot be forced to pay unions to engage in it on their behalf, the question arises as to whether the requirement that unions represent all workers itself violates a nonmember's First Amendment freedom of association. Is it a form of forced association when nonunion employees are governed by the terms of a collective bargaining agreement negotiated on their behalf by union leaders whom they are prevented from having a hand in selecting?

Fast on the heels of *Janus*, lawsuits challenged exclusive representation in the public sector. These lawsuits sought to extend *Janus*'s reading of nonmember employees' constitutional rights. The argument was that the compelled association involved in the principle of exclusive representation is at odds with the conception of the First Amendment pronounced in *Janus*.

By my count, 36 lawsuits have challenged the principle of exclusive representation ([FIGURE 2](#)). All but one were filed in federal courts, and 14 have been appealed to the U.S. Supreme Court. The Court has declined to hear nine of those appeals. Five are still pending, but none of them appears to have a strong chance of being heard by the high court.

![Figure 2](#)

**Figure 2**

**Lawsuits Challenging Exclusive Representation**

In the meantime, *Knight* remains the law. The most important recent decision appears to be *Thompson v. Marietta Education Association*. "*Knight*'s reasoning," Judge Amul Thapar's opinion noted in *Thompson*, "conflicts with the reasoning in *Janus*. But the Supreme Court did not overrule *Knight* in *Janus*." He explained that "when an earlier Supreme Court decision has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." Thapar did suggest that there are constitutional issues of unresolved importance; but for now, *Knight* remains the controlling precedent regarding exclusive representation.

One barrier that opponents of exclusive representation must still surmount is making the case that eliminating it will have welcome practical consequences. While they have made a strong principled case, it is not clear that doing away with it would change matters on the ground. Unions might welcome no longer having to represent workers who do not pay for such representation. It also seems unlikely that major competition between unions to represent workers would arise in the current context. Nor is it clear how much exclusive representation helps public unions retain members.

Those seeking to challenge exclusive representation on constitutional grounds have mostly had their claims dismissed in the federal courts. That is to be expected because this doctrine has a long history in American labor law. Courts are therefore merely following precedent. The Supreme Court could overturn exclusive representation, but the high court has, to date, declined a number of petitions to hear such a case.
The Legal Aftermath of Janus v. AFSCME

Retroactive Refunds

Another area of legal controversy after Janus is the status of agency fees paid to unions before the decision. The Court’s opinion did not specify whether it applied retroactively or only prospectively. If monies were taken—unconstitutionally before Janus—from nonunion workers’ paychecks, did the workers then have a right to a refund? Or were state and local government employers and unions following, in good faith, Supreme Court precedent, and thus not to be held liable?

If public-sector unions were to be found liable and required to return agency fees—even going back only three to five years, as most cases stipulated—they would owe millions of dollars, and some of them would perhaps be bankrupted and put out of business. The Liberty Justice Center estimated that public-employee unions could lose up to $120 million if they lost such cases. But if they were not found liable, it might also be said that public-sector unions would receive something of a windfall for violating employees’ constitutional rights. In short, the stakes are high on both sides.

To date, some 83 retroactive refund lawsuits have been filed in federal district and appeals courts across the country, usually under 42 U.S.C. §1983 of federal law, which gives individuals the right to sue state governments and others for civil rights violations, or state common law. Eleven have been appealed to the Supreme Court, nine of which the Court declined to hear. Two of them, Belgau v. Inslee and Wenzig v. SEIU Local 668, are still pending. Advocates of retroactive refunds are also keen on Brown et al. v. AFSCME Council No. 5, which is currently before the Eighth Circuit Court of Appeals. If the court rules in favor of the plaintiffs and overrules the district court, the case might have a better chance for review by the U.S. Supreme Court.

While refunds remain a live legal issue, those seeking them have not done well in court. Most courts have endorsed the good-faith defense offered by unions and government employers and dismissed claims that plaintiffs have a retroactive claim on union treasuries.

Beyond the legal niceties, many observers believed that those hostile to public-employee unions saw a collateral benefit to filing suit for retroactive refunds. As long as the unions spend money defending such claims, they could not spend more on their political and ideological activities. So even if few plaintiffs won, the unions’ money and lawyers would be tied up in court. There is, as yet, no public accounting of how much money public-employee unions have had to devote to their defense.

Opt-Out Windows

A final area of legal dispute in the wake of Janus has been the constitutionality of “maintenance of membership” provisions. Sometimes called “opt-out windows” or “escape periods,” these provisions usually say that union members can renounce their membership at any time but can stop paying dues only during a specific time of year—typically, a two-week period tied to their date of hire or the beginning of the fiscal year. Some maintenance of membership provisions hold that both membership and dues can be stopped only during those specific periods. Many states allow such opt-out windows to be negotiated into collective bargaining agreements. Six states—Connecticut, Pennsylvania, Iowa, Tennessee, Washington, and Wisconsin—have enshrined such provisions into state law.
Plaintiffs in lawsuits challenging maintenance of membership argue that once they have decided to renounce their union membership, they should no longer be required to pay—as such payment is a version of forced association that funds political activity with which they disagree. Defendants argue that by signing the union card—many new ones contain fine print laying out the details of opting out—employees have signed a contract to pay the union, whether they retain their membership or not (see sidebar, Maintenance of Membership).

**Maintenance of Membership: Sample language**

All members of the bargaining unit who are members of the Union as of the effective date of the Agreement or who subsequently voluntarily become members of the Union shall continue to pay dues, or the equivalent, to the Union during the term of this Agreement. This section shall not apply during the 30-day period prior to the expiration of this Agreement for those employees who, by written notice sent to the Union and the Employer, indicate their desire to withdraw their membership from the Union. The Union shall indemnify and hold the Agency [the government employer unit] harmless against any and all claims, damages, suits or other forms of liability which may arise out of any action taken or not taken by the Agency for the purpose of complying with the provisions of this section.

Source: Law Insider, “Maintenance of Membership Sample Clauses.”

The main arguments in favor of maintenance of membership provisions are that they provide greater predictability in unions’ financial planning—and government employers want stable entities with which to negotiate. These provisions also prevent employees from joining the union for short-term reasons—such as to vote on a strike or collective bargaining agreement—and then dropping their membership.

To date, the courts have rejected challenges to maintenance of membership clauses. Yet at least one case, *Troesch et al. v. Chicago Teachers Union, Local 1 American Federation of Teachers, AFL-CIO et al.*, has been appealed to the Supreme Court. And two cases, *O’Callaghan v. Napolitano* and *Ramon Baro v. Lake County Federation of Teachers*, challenge the constitutionality of opt-out windows entirely.

For the most part, courts have sided with the union defense that employees signed the union membership agreement voluntarily—and thus knew, or could have known, that a maintenance of membership provision was included. Therefore, the employee’s First Amendment rights were not violated. Such cases are also diminishing in importance as more time has elapsed since the *Janus* decision. By now, nearly all workers have had a window to opt out. Many have taken the chance to exercise their new rights. It can at least be said to those who have not done so that they have had a chance. This makes the issue not so much a national concern but more a small, localized concern.
The Legal Aftermath of Janus v. AFSCME

Implications for Public-Sector Labor Law

The results of these legal battles are threefold. First, it appears that exclusive representation in public-sector labor relations has survived, for now. But the Supreme Court could, at some point, plausibly extend the logic of Janus and declare exclusive representation an unconstitutional First Amendment violation.

Second, federal courts appear to have determined that Janus applies only prospectively, and non-union workers are not entitled to court-ordered restitution of fees paid before Janus. The unions thus received a large sum of money in a way now deemed unconstitutional. But since that money has already been spent, unions cannot be forced to return it to the workers who provided it.

Third, courts have backed maintenance of membership provisions, especially those that allow workers to drop their union membership at any time, even if they must continue to pay dues until the escape period is reached. Fending off these challenges has clearly cost the unions considerable money (and time), although there are no reliable estimates of how much.

To date, right-to-work states in the South and the West have largely left their existing policies concerning public-sector collective bargaining in place. A few states—most notably, Alaska, Indiana, and Texas—have taken administrative steps to inform public employees of their rights under Janus and to ensure that there is evidence that employees of the state have agreed to infringements on their free-speech rights by joining the union. So with the passage of a number of new state laws, along with a few executive orders from governors meant to strengthen public-employee unions in the wake of Janus, it appears that the law governing public-sector labor relations is finding a new equilibrium.

What’s Next

Looking ahead, it appears that right-sizing the power and influence of public-sector unions in some of the nation’s largest and most populous states will require strategies other than litigation.

What has become clear in the wake of Janus is that workers’ genuine preferences are not clearly reflected in current union membership rates or political activities. While those preferences are admittedly hard to know, the desire for union membership is probably lower than current membership rates in many states. Most workers joined the union with limited information—or, arguably, pro-union information—at the time they were hired. Few know much about their legal rights—a year after the 2018 Janus decision, only 48% of public school teachers surveyed knew the outcome of the case. Studies show that notions of solidarity are what most public-employee union members like about their unions, rather than their political or legal activities. Other surveys show that 30% of teachers union members say that unions are important but not essential; or that unions are something they could do without.

There are three ways that employees’ actual preferences could be better gauged. Each one would have the added benefits of increasing transparency for government employers and the broader public as well as protecting workers’ constitutional rights.
One is legislation to require more regular voting on whether workers want union representation at all. Admittedly, this is very difficult in deep blue states such as New York and California. But if opportunities arise, reformers should be ready. For example, they should consider Wisconsin’s example. An important, but underappreciated, piece of Governor Scott Walker’s signature Act 10 (2011) was the requirement that public-employee unions hold annual recertification elections.25 In most cases across the country, there was a one-time vote decades ago on the question of whether to unionize. Few, if any, current workers have ever been asked if they wanted union representation or representation by the particular union in place. It was simply a reality when they joined the public workforce.

Act 10 required public-sector unions to hold annual elections to retain their status as exclusive collective bargaining agents. Although rarely discussed, this was the most difficult piece of Walker’s new law for unions to swallow—they disliked the time and expense required to engage in these annual elections. The democratic requirements were also strong. In order to win a certification election, a union in Wisconsin needs a majority of all workers eligible to vote, not just those who actually vote. Union democracy proved cumbersome. Some local unions lost certification elections and thereby their rights to bargain collectively. Other unions, such as the Wisconsin State Employees Union, gave up their status as collective bargaining agents and converted themselves into associations that lobby on behalf of their members.26

Requiring annual elections is likely to be a political nonstarter in many blue states, but reformers in red or purple states might find windows of opportunity to push for such elections—if not every year, perhaps every five or even 10 years. This would have the benefit of being more democratic, especially given that turnout in union leadership elections is very low. It would also enhance workplace democracy, in the sense that nonunion members would get to vote, as they are currently excluded from union leadership elections, contract ratification votes, and strike authorizations. Finally, it would be a powerful tool for assessing the actual preferences of public employees regarding union representation.

Another legislative strategy would be for states to require public unions to file information about their membership and finances, similar to what private-sector unions are required to file with the U.S. Department of Labor. Ohio has such a provision on the books and might serve as a model for other states.27 This would be an important step toward transparency—enabling workers to better understand the organizations to which they belong and pay dues. It would also provide public employers with a view of the organizations with which they must negotiate. Finally, the public could have access to more accurate data on powerful interest groups in their state.

A third path forward is to continue to pursue informational campaigns mounted by activist organizations to assist workers and employers. Many public workplaces have been one-sided, pro-union environments for decades. Current employees and new hires need new sources of information to decide whether they want to be union members, and how to opt out of union membership.

Helping employees understand and exercise their Janus rights is only one piece of the puzzle; public employers also need to understand their rights and responsibilities under the law. Programs that help these employers understand what they can and cannot do about union membership, as well as assist them in developing onboarding new hires, will create a more open environment in public employment. Public employers are often unsure as to how to explain to new employees what their rights are under Janus. Over the last three years, efforts by activist organizations to inform workers of their rights and assist employers have already shown results in moving the needle to a point where union membership is lower and more closely reflects workers’ genuine preferences.
One of the broad critiques of public-sector unions is that they induce bureaucratic sclerosis, diminishing the performance of government agencies. The hard, slow task that lies before reformers is to extend the logic of Janus in ways that promote less costly and more effective government, rather than trying to kill off public unions.
About the Author

Daniel DiSalvo
Senior Fellow

Daniel DiSalvo is a senior fellow at the Manhattan Institute and a professor of political science in the Colin Powell School at the City College of New York–CUNY.

Endnotes


15. Thupar’s opinion carries significant weight in legal circles. He is a potential candidate for the Supreme Court in a future Republican administration. President Donald Trump considered him as a replacement for Justice Antonin Scalia in 2016.

Brown et al. v. AFSCME Council No. 5, United States District Court, District of Minnesota, No. 20-cv-01127, Feb. 12, 2021.


Wisconsin Employment Relations Commission, “Annual Recertification Elections.”


Ohio State Employment Relations Board, “Union Filing Requirements.”