SCOTUS Wars: A New Beginning

An Analysis of Disorganized Labor Law & Janus v. AFSCME

Joseph A. Pickels
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Introduction[1]

In ancient mythology, Janus was the Roman god of beginnings and endings. Possessing two faces on his head – one facing forwards and one facing backwards – Janus could see into the past with one face and into the future with the other. In many respects, *Janus v. AFSCME* was destined to change United States labor law.[2]

For over forty years, the law of public-sector union representation has teetered on a single precedent; the notion that the government and unions may garnish wages from non-union members as a means for the unions' statutory privilege[3] of representing employees.[4]

In other words, under the holding set forward in *Abood v. Detroit Board of Education*, the Supreme Court has maintained that the government can require its employees – even those who do not want to join a union – to pay a union for representing them.[5] Such requirements, known as "agency-shop" agreements, have long been a point of contention in labor law and labor relations.

But in June 2018 the Supreme Court finally reigned in this financial boon for public-sector unions. Indeed, while the tide has been steadily shifting since *Abood*, the Roberts Court's decision in *Janus v. AFSCME* puts an end to labor law's radical interpretation of the First Amendment.[6]

Janus should come as no surprise to the casual legal observer. Since *Abood* the Court has incrementally reversed its faulty and legally dubious conclusion.[7] Yet many labor activists see the Court's shift on the issue as the result of corporate America's crusade against government workers. This article seeks to dispel that notion and provide a complete and concrete analysis of what led the Roberts Court to so effectively eradicate this "anomaly" of First Amendment jurisprudence.[8]

This article will begin with a brief history and overview of agency-fees and collective bargaining, culminating in *Abood* and its progeny. Part II will discuss *Janus*, analyzing the arguments from both the dissenting non-members and the unions and will discuss the Court's

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[1] The author is a Class of 2019 J.D. Candidate at Willamette University College of Law and holds a B.S. in Finance and Economics from Grand Canyon University. He is thankful to the Litigation Department at the Freedom Foundation, especially Christi C. Goeller, Esq., and Caleb Jon Vandenbos, Esq. for their guidance, comments, and continued support. Additionally, the author is thankful to the Policy Department at the Freedom Foundation, especially the Director of Labor Policy, Maxford Nelsen, for his comments and guidance through the structural nuance of disorganized labor.

[2] *Janus v. AFSCME*, _U.S._ 138 S.Ct. 2448 (2018).

[3] The authority of public employee unions to act as collective bargaining agents arise from statute; they possess no entitlement to the authority to bargain exclusively or collectively with a public employer. *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283 (1976).

[4] An "agency-shop" is defined as a "shop in which a union acts as an agent for the employees, regardless of their union membership. Non-union members must pay union dues because it is presumed that any collective bargaining will benefit non-union as well as union members." Agency-shop, Black's Law Dictionary (10th ed. 2014).

[5] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[6] *Janus v. AFSCME*, _U.S._ 138 S.Ct. 2448 (2018).

[7] *E.g.*¸ *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Knox v. SEIU*, 567 U.S. 298, (2012); *Harris v. Quinn*, 573 U.S._, 134 S. Ct. 2618 (2014).

[8] *Knox*, 567 U.S. 298, 311.

correct decision to eliminate agency fees and the dubious opt-out requirement. Lastly, Part III will briefly look to the future in a post-*Janus* era.

I. Agency-fees and Collective Bargaining: How *Abood* Led Us to *Janus*

Organized labor's role in American society has historically been contentious and controversial. To observers of the time, the rise of a permanent working class of unskilled workers, accompanied by strikes and various degrees of violence, posed a set of social problems to which there was no coherent solution. The response of the courts, undoubtedly at the behest of aggrieved employers, was to resort to civil injunctions.

Concerted activities in support of unionization, including strikes, picketing, and boycotts, were treated by courts as conspiracies in restraint of trade – a violation of the Sherman Antitrust Act of 1890.[9] Indeed, while the Sherman Act was designed to counter the abuse of power found in 19th Century corporations, courts frequently applied the Act to labor unions as well.

The most poignant example is the 1908 case of *Loewe v. Lawlor*, where a boycott by the hatters union of retail stores continuing to do business with the hat-manufacturer was determined to be a violation of the Sherman Act. As a result, each individual member of the union was punished; ordered by the courts to provide treble damages to the retailers.[10]

This isn't to say that actions weren't taken in an attempt to benefit organized labor. In 1898, the Erdman Act sought to resolve disputes in the railroad industry by third-party mediation and conciliation, and to protect for employees against discharge on account of their union membership.[11] Yet the Supreme Court struck down the Act as unconstitutional in 1908 as an infringement of the freedom to individually contract.[12]

It wasn't until the outbreak of World War I that the power balance between business and organized labor in the United States radically shifted. Supplies of new labor from Europe virtually dried up, the war fueled an economic boom, and the federal government expanded its role in the economy.[13] As a result, many labor organizations, which had previously floundered in relative obscurity, took advantage of the reconfigured supply and demand curve by calling strikes to gain union recognition. Such demands, and the pressure of war, led President Woodrow Wilson to support the right of unions to exist and bargain collectively in exchange for a no-strike pledge.[14]

However, in the time immediately after the war, labor unrest became paramount. The Great Railway Strike of 1922 involved 400,000 workers and resulted in multiple deaths, sabotage and

[9] 15 U.S.C. §§ 1–7. The Sherman Act declared illegal "every contract, combination or conspiracy, in restraint of trade or commerce among the several States."
[10] *Loewe v. Lawlor*, 208 U.S. 274 (1908).
[11] Erdman Act of 1898, June 1, 1898, ch. 370, 30 Stat. 424.
[12] *Adair v. United States*, 208 U.S. 161 (1908); *see also, Lochner v. New York*, 198 U.S. 45 (1905).
[13] G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.*
[14] Domhoff, *The Rise and Fall of Labor Unions in the U.S.*

kidnapping.[15] It also helped spur passage of the Railway Labor Act of 1926 (RLA).[16] The RLA granted collective-bargaining rights to railroad workers in exchange for preventing the disruption of interstate commerce caused by labor disputes. It was later amended to address the issue of "free riders" – non-union workers who unwillingly received union representation despite strong personal and philosophical opposition. The solution was to allow "union shop" security agreements requiring union membership as a condition of employment. As a result, federal law governs union security agreements and other labor related issues in the private-sector.[17]

Additional legislation followed. In conjunction with Franklin Roosevelt's New Deal legislation, Congress enacted a sweeping federal labor statute, the National Labor Relations Act (NLRA).[18] The NLRA established collective bargaining and promoted the rights of workers to unionize and organize by choosing representatives to negotiate with employers over terms and conditions of employment.[19] Under the NLRA, once employees certified a labor organization as its representative, employers were required to bargain collectively *only with* the certified bargaining agent – the union.[20] Indeed, for unions, the NLRA required that employers negotiate in good-faith and without undue coercion, providing a safety-net and statutory support for their organizing activities.

Section 8 of the NLRA also permitted three forms of union security agreements: the closed-shop, union-shop, and agency-shop. While the closed-shop was outlawed in 1947,[21] the union-shop and agency-shop remained points of contention long after the NLRA's enactment.[22]

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[15] Philip S. Forner, *History of the Labor Movement in the United States: Volume 9: The TUEL to the End of the Gompers Era*. New York: International Publishers. p. 174 (1991).

[16] 45 U.S.C. 8 § 151 et.seq. (1926). Unlike the National Labor Relations Act (NLRA), which adopts a less interventionist approach to the way the parties conduct collective bargaining or resolve their disputes arising under collective bargaining agreements, the RLA specifies both (1) the negotiation and mediation procedures that unions and employers must exhaust before they may change the status quo and (2) the methods for resolving "minor" disputes over the interpretation or application of collective bargaining agreements.

[17] The entirety of the RLA was upheld in *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

[18] National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935).

[19] 29 U.S.C. § 151.

[20] Such an agreement established the doctrine of exclusive representation. It is therefore an unfair labor practice for employers to bargain with employees who were not the chosen representative of a certified union. This exclusivity also established a duty of fair representation, meaning that the union is required to negotiate in good-faith will all represented employees. *See, e.g.*, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 194 (1944) (holding that the Railway Labor Act applied equally to the NLRA).

[21] Pub. L. 80-101, 61 Stat. 136 (1947). The "closed-shop" is illegal because it discriminates in hire or tenure of employment so as to encourage union membership but is not sheltered by the proviso to section 8(a)(3).

[22] The union-shop does not condition initial employment on union membership, but an employee is required to join the union after a grace period and remain a union member during the duration of their employment. The agency-shop required non-member employees to pay fees to a union for services the union provided in its role as exclusive bargaining agent. The NLRA permitted unions to establish such fees to promote "labor peace" and avoid the perception that non-members were "free-riding" on union representation without paying for it. To be fair, such a concern is not entirely without merit. However, this piece will not discuss free-riding concerns in any great detail. Numerous other scholarly work can provide an in-depth analysis. *See e.g.*, Cynthia Estlund, *Are Unions a Constitutional Anomaly?* Michigan Law Review Volume 114, Issue 2 (2015).

Yet, as the old adage goes, absolute power corrupts absolutely. In the years following the NLRA's enactment, the Roosevelt Government's overzealous regulation of employer conduct created massive government regulation in the labor industry. Thus, just twelve years after the enactment of the NLRA, Congress sought to reign in the rampant power labor unions had accumulated with the Labor Management Relations Act[23] (colloquially known as the Taft-Hartley Act), passed in 1947.[24]

The Taft-Hartley Act contained three critical principles of significance here. First, Section 7 established an employees' right to refrain from joining a union or engaging in collective bargaining activities.[25] Second, all forms of union security agreements except for the agency-shop – whereby the employee does not need to be an actual union member but may be required to pay fees - were prohibited.[26] Third, individual states were now free to restrict *all* forms of union security agreements, including agency-shop agreements, under state law.[27]

A. The Private-Sector Cases

Supreme Court cases scrutinizing the legality of unions abound. However, prior to *Abood* only three constitutional challenges to the agency-shop had been presented. Each case, *Railway Employees' Department v. Hanson*,[28] *International Ass'n of Machinists v. Street*,[29] and *Brotherhood of Railway & Steamship Clerks v. Allen*,[30] challenged the legality of the agency-shop based on the infringement of associational freedoms guaranteed by the First Amendment.

Yet to understand the Court's progression, one must understand the genesis of the agency-shop. In failing to eliminate the agency-shop, Taft-Hartley Section 8(a)(3) established two objectives: first, to eliminate the closed-shop – an agreement under which the employer agrees to hire and employ only union members and second, to permit an employer and union to agree to

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[23] Pub. L. 80-101, 61 Stat. 136 (1947). Section 8(a)(3) of the Taft-Hartley Act amended § 8(3) of the NLRA pertaining to agency-shop agreements.

[24] The tremendous gains labor unions experienced in the 1930s resulted, in part, from the pro-union stance of the Roosevelt administration and from legislation enacted by Congress during the early New Deal. The National Industrial Recovery Act and the NLRA required businesses to bargain in good faith with any union supported by the majority of their employees. Meanwhile, the Congress of Industrial Organizations split from the AFL and became much more aggressive in organizing unskilled workers who had not been represented before. Strikes of various kinds became important organizing tools of the CIO. *See Southern Labor Archives: Work n' Progress - Lessons and Stories: Part IV: Labor, the Depression, the New Deal, and WWII*, http://research.library.gsu.edu/c.php?g=115684&p=752252

[25] Pub. L. 80-101, 61 Stat. 136 (1947) Section. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

[26] *Id.* Taft-Hartley made the closed-shop illegal in the U.S. By association, the union-shop was also deemed to be illegal. *See Pattern Makers v. NLRB*, 473 U.S. 95 (1985). Furthermore, inasmuch as the union-shop permitted by the Taft-Hartley Act conditions continued employment only on the payment of union dues and fees, the agency-shop is the practical equivalent of the union shop. *NLRB v. GMC*, 373 US. 734, 744 (1963).

[27] 29 U.S.C. § 164(b). Eleven states passed Right-to-Work laws either before or in conjunction with the Taft-Hartley Act.

[28] 351 U.S. 225 (1956).

[29] 367 U.S. 740 (1961).

[30] 373 U.S. 113 (1963).

eliminate the "free-rider" by garnishing wages for the union's services as exclusive bargaining agent for all within the union.

Thus, federal law validated, as a stabilizing force in collective bargaining, the exaction of an agency fee from *all* bargaining unit employees. Indeed, at the time, it was well-settled that, by virtue of Section 8(a)(3) and Court decisions,[31] employees may not be required to join a union as a condition of employment or do anything more than pay an agency fee. But what about First Amendment concerns?

The *Hanson* court determined compulsory payments to a union were not a *per se* violation of the First Amendment's associational freedoms because requiring employees to finance union collective bargaining activities failed to "force men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought."[32] However, the *Hanson* court declined to take an affirmative stance on whether compulsory fees collected for purposes unrelated to collective bargaining were unconstitutional.

The Court was forced to rule on this issue five years later in *Street*. Writing for a divided court in *Street*, Justice Brennan noted that the RLA[33] was not established to vest "unions with unlimited power to spend exacted money" but, rather, established to eliminate free riders and equally distribute "the burden of maintenance by all of the beneficiaries of union activity."[34] Therefore, using such funds to promote "the propagation of political…concepts and ideologies" was outside the scope of the labor laws. In short, agency-shop fees could not be used for political expenditures.[35]

Street and *Allen* (affirming Justice Brennan's *Street* scrutiny) established a methodology that would be employed for future generations of union expenditure cases. Union expenditures fall into three categories: (1) those germane to collective bargaining, (2) those made in support of political ideology, and (3) all other expenses which are neither germane nor political. Because agency-shop fees support the government purpose of establishing collective bargaining, expenses which are germane to that purpose may be chargeable to an objecting fee payer. Expenses which are for politics, however, are not. Political expenditures, and the forced association to that speech, violated the free speech rights of non-members. This methodology – which parsed out types of expenses and categorized some as legitimate and others as not - effectively ended the debate as to the constitutionality of private-sector agency-shop fees. Yet still, the Court had yet to hear a challenge to the agency-shop in the public-sector.[36]

B. The Public-Sector Exception

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[31]Such as those found in *NLRB v. General Motors*, 373 U.S. 734 (1963) and *Retail Clerks, Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963).

[32] *Hanson*, 351 U.S. 225, 236.

[33]Courts often analogize the RLA to its better-known cousin, the NLRA. After all, the Court stated that "federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA." *See, Trans World Airlines v. IFFA*, 489 U.S. 426, 432 (1989).

[34] *Street*, 367, U.S. at 766-68.

[35] *Street*, at 769.

[36] Under the NLRA as amended by the Taft-Hartley Act, private-sector unions are authorized by statute to collect an agency-fee from non-members. *See, Communications Workers of America v. Beck*, 487 U.S. 735 (1988).

Public employees are not covered under the NLRA. Indeed, the emergence of public-sector unions can largely be considered a societal afterthought and was by no means inevitable. Even President Roosevelt, who made private-sector unionism a focal point of the New Deal, drew a line when it came to government workers: "Meticulous attention," the president insisted in 1937, "should be paid to the special relations and obligations of public servants to the public itself and to the Government....[t]he process of collective bargaining, as usually understood, cannot be transplanted into the public service."[37]

To Roosevelt, "[a] strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action looking toward the paralysis of government by those who have sworn[38] to support it is unthinkable and intolerable."[39] Roosevelt was not alone. Other pro-labor stalwarts like New York City Mayor Fiorello La Guardia, noted that "the right to strike against the government is not and cannot be recognized.[40]

Yet by the 1960s, opinions had changed.[41] As public employee organizations continued to grow, Congress and several state legislatures enacted laws granting bargaining rights to public employees.[42] Indeed, by the time public-sector collective bargaining gained traction, states had a private-sector union model to mirror: the NLRA.[43] It was thus quite natural for states to look to this model when designing labor law to govern their public sectors as well.

By 1980, forty-two states had authorized collective bargaining for public employees.[44] Yet, without any federal mandates, the resulting state legislation was disorganized and often contradictory, reflecting, too, the Supreme Court jurisprudence on the matter.

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[37] *Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service* (August 16, 1937) http://www.presidency.ucsb.edu/ws/index.php?pid=15445

[38] Roosevelt, *Resolution*; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where President Harry S. Truman attempted to federalize private steel mills following a labor strike during the Korean War.

[39] Roosevelt, *Resolution*.

[40] Terry Moe, *Special Interest: Teachers Unions and America's Public Schools*, (2011).

[41] To a certain extent, this trend reflected a confidence in collective bargaining as a whole and sought to reduce labor-management strife in both the public and private sector. *See, e.g., Pennsylvania Labor Relations Bd. v. State College Area School Dist.*, 461 Pa. 494, 502-03, 337 A.2d 262, 266 (1975); 5 U.S.C. § 7101(a) (1982); N.J. Stat. Ann. § 34:13A-2 (West Supp. 1983-1984); O.R.S. § 243.656 (1981); *see also Abood v. Detroit Bd. of Educ*., 431 U.S. 209, 224 (1977) (observing that '[t]he desirability of labor peace is no less important in the public-sector').

[42] Developments in the Law – Public Employment, *Collective Bargaining in the Public Sector*, 97 Harv. L. Rev. 1676 (1984).

[43] In 1962, President John F. Kennedy signed Executive Order 10988, granting union recognition and procedure rights to federal employees. http://www.presidency.ucsb.edu/ws/?pid=58926

[44] E. Edward Herman & Alfred Kuhn, *Collective Bargaining and Labor Relations* 85, 87 (1981). ("Thus, by 1980, 38 states and the District of Columbia had collective bargaining statutes covering all or some categories of public employees. In addition, in Arkansas and Virginia, attorney general opinions authorize collective bargaining; in Illinois, state employees may bargain under a 1973 executive order issued by the governor; in New Mexico, the state personnel board has issued regulations authorizing collective bargaining."); *see also* While defining collective bargaining legislatively has proven difficult, most legislatures had adopted Section 8(d) of the National Labor Relations Act, which requires employers to bargain for "wages, hours, and other terms and conditions of employment." *See*, National Labor Relations Act, 49 Stat. 449; 29 U.S.C. 51 *et seq*. (1935); Though judicial interpretation of "conditions of employment" has varied, in the early years courts liberally defined the provision to be understood that unless a statutory provision explicitly prohibited its negotiation, the issue in question should be deemed mandatory to collective bargaining.

C. Much Abood About Nothing

Such ambiguity (and the failure by previous courts to take a firm stance on agency-fees for the public-sector) led a group of teachers who objected to the payment of agency-fees under a collective bargaining agreement to challenge its constitutionality. The petitioner's arguments in *Abood* were twofold. First, *Street* did not apply because agency-fees in the public-sector, and not just those utilized for strict political messaging, required a wholly separate First Amendment analysis. Second, even under *Street*, union costs for collective bargaining cannot be charged to agency-fee payers because all public-sector collective bargaining is political.[45]

Writing for the majority, Justice Stewart dismissed petitioner Abood's public-private distinction, reasoning that any differences between the two sectors "are not such as to work any greater infringement upon the First Amendment interests of public employees" because public employees were "not basically different from private employees; on the whole they have the same sort of skills, the same needs, and seek the same advantages."[46]

Justice Stewart then addressed the notion that all public-sector collective bargaining is political. It was here where *Abood* began to veer off course. It was also at this point *Abood* adopted the line of reasoning that the Court would take 41-years to rectify.

Though Justice Stewart correctly noted the "truism that because public employee unions attempt to influence governmental policymaking, [and] their activities…may be properly termed political," he incorrectly concluded that such political influence does not "raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees."[47]

This correlation does not follow. As other analysis has noted, "this seems to invert the reality; recognizing the political nature of public-sector unions does not elevate the views of dissenting public employees onto a higher plane, but rather acknowledges the possibility for dissenters to be uniquely oppressed in the public-sector context."[48] Nevertheless, Justice Stewart concluded that "the differences between public-and private-sector collective bargaining simply do not translate into differences in First Amendment rights."[49]

Unsurprisingly, Justice Stewart's misguided analysis prompted three separate opinions from Justices John Paul Stevens, William Rehnquist, and Lewis Powell. Yet only Powell's opinion truly appreciated the analytical misstep taken by the Court and only Powell's opinion transcends *Abood* and its progeny to *Janus.*

To Powell, the distinction between public-and private-sector unions is "fundamental."[50] The First Amendment draws a clear distinction between government and private actors; private parties may engage in any voluntary agreement without government interference. Rather than

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[45] *Abood*, 431 U.S. at 213-14; *see also* Brief for Appellants at 189-96, *Abood* 431 U.S. 209 (No.75-1153), 1976 WL 181666; Courtlyn G. Roser-Jones, *Reconciling Agency-fee Doctrine, the First Amendment, and the Modern Public-Sector Union*, 112 Nw. U. L. Rev. 597 (2018) (Ms. Roser-Jones' article provided excellent analysis of all substantive labor union cases, which provided an invaluable resource and fact-check for this piece).
[46] *Id*, at 230.
[47] *Id*, at 231.
[48] Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. CTA, Public Unions, and Free Speech*, 20 Tex. Rev. L. & Pol. 341.
[49] *Id*, at 232.
[50] *Id*, at 250 (Powell, J., concurring)

establish a connection, Powell correctly identified that public-sector unions have an inherently political cast and function much like a political party, whose incentive "is to influence public decision-making in accordance with the views and perceived interests of its membership."[51] In short, "collective bargaining in the public-sector is 'political' in any meaningful sense of the word."[52]

But Justice Powell was not done. Powell objected to placing the burden of policing intrusions on protected speech on the non-union employees themselves. The *Abood* decision meant a non-union employee protecting his First Amendment rights must initiate a proceeding to prove the union has allocated some portion of its budget to ideological activities unrelated to collective bargaining. In contrast, the burden should be on the union to show that it has complied with the First Amendment. Such an action would "give appropriate protection to First Amendment rights without sacrificing ends of government that may be deemed important."[53]

In sum, wrote Powell, the Court, working from the "novel premise that public employers are under no greater constitutional constraints than their counterparts in the private sector," held that public employees may be compelled by the state "to pay full union dues to a union with which they disagree, subject only to a possible rebate or deduction if they are willing to step forward, declare their opposition to the union, and initiate a proceeding to establish that some portion of their dues has been spent on 'ideological activities unrelated to collective bargaining." This is a "sweeping limitation of First Amendment rights" that is "unsupported by either precedent or reason."[54]

D. The Hudson Hold-Up

The backlash to *Abood* materialized almost immediately.[55] Nine years later, the Court again faced a public-sector union challenge in *Chicago Teachers Local v. Hudson.*[56] In *Hudson*, the Court established four procedural safeguards which the government and union must provide to non-members so that their First Amendment rights are protected.[57]

These safeguards are, as the Court noted:

> (1) the good-faith advance reduction of the fee to no more than that portion of the union's expenditures required for its execution of its duties as the non-members' exclusive bargaining representative; (2) financial disclosure given prior to any demand for or collection of the reduced fee adequate to allow non-members to gauge the propriety of the union's fee and to make an intelligent decision whether to challenge the fee calculation before an impartial decision maker; (3) an opportunity to challenge the fee calculation before an

[51] *Id*, at 257.
[52] *Id.*
[53] *Id.*
[54] *Id.*; *see also*, Buttaro at 350.
[55] *See e.g.*, Deborah A. Schmedemann, *Of Meetings and Mail Boxes*: *The First Amendment and Exclusive Representation in Public Sector Labor Relations*, 72 Va. L. Rev. 91 (1986); Martin H. Malin, *The Evolving Law of the Agency Shop in the Public-Sector*, 50 Ohio St. L.J. 855 (1989).
[56] *Chicago Teachers Local v. Hudson*, 475 U.S. 292 (1986).
[57] *Hudson*, 475 U.S. at 307 n.20 & 306.

> impartial decision maker; and (4) an escrow of the amounts reasonably in dispute pending such challenges, though escrow alone is insufficient to render collection of fees constitutional.[58]

In other words, because employees cannot be required to pay agency-fees that the union uses for ideological purposes, the union must adopt procedures that allow objectors to protect their rights. These procedures require the union to send a "*Hudson* notice" explaining how the union calculated its expenses.[59] If a non-union member disputes the fee calculation, the union is required to hold the money in escrow while resolving the dispute.[60]

The *Hudson* Court found it essential for unions to provide adequate, correct, and appropriate information about the portion of the financial cost charged for collective bargaining to employees who have objections to fee payments.

E. Leaping to Lehnert

Following *Hudson*, the Court ruled in *Lehnert v. Ferris Faculty Association*[61] that a public union may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation.[62]

In Justice Blackmun's majority opinion, the Court largely echoed *Hudson* and found that unions may only compel contributions from non-members for the costs of performing its duties as the exclusive bargaining agent.[63]

Further, the Court discovered that ninety percent of union fees being charged to objecting faculty members were spent on union activities completely unrelated to collective bargaining.[64] In a strong rebuke to the unions, the Court upheld the principle that objecting fee payers cannot be compelled to pay for a union's lobbying, organizing, image building, public relations activity, or any other activity which was not directly related to collective bargaining representation.[65]

However, the Court largely upheld the compulsory "service fee" requirement and affirmed some questionable uses of service fees. Though non-members may have First Amendment protections, according to the Court objecting non-members may be charged "their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates."[66]

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[58] *Id.* at 305-10.
[59] *Id.* at 306.
[60] Two goals are served by procedural safeguards. First, they insure that the fees demanded and/or collected include only the employee's pro rata share of constitutionally chargeable costs. Hudson's holding — setting forth "the constitutional requirements for the Union's collection of agency-fees" — insures against both misuse of collected funds and excessive collections. 475 U.S. at 310 (emphasis added). Second, procedural safeguards "facilitate a non-unin employee's ability to protect his rights." 475 U.S. at 303 & 307 n.20.
[61] *Lehnert v. Ferris Faculty Association,* 500 U.S. 507 (1991).
[62] *Lehnert,* 500 U.S. 507, 522, 111 S.Ct 1950, 1961 (opinion of Blackmun, J.); accord id. at 559 (opinion of Scalia, J.) (concurring as to "the challenged lobbying expenses").
[63] *Lehnert,* 500 U.S. at 524.
[64] *Lehnert,* 500 U.S. at 522.
[65] *Id.*
[66] *Id.*

This affirmed the notion that unions could compel contributions for various activities only dubiously related to bargaining.[67]

F. The School of Hard Knox

Thirty-five years passed, and not only did *Abood* remain, but unions continued to exert unparalleled power in non-right-to-work states. Arguably no state allows unions to accumulate such power quite like California.

In the mid-2000s, the Service Employees International Union (SEIU) represented California public-sector employees and required non-members to pay agency fees. In 2005, SEIU sent out its annual *Hudson* notice estimating that 56.35% of the union's total expenditures were germane to collective bargaining and could be charged to non-members.[68] After the *Hudson* notice had been distributed, the union made plans for a special mid-year assessment for expenses on a state political campaign. Non-members had thirty days to object to paying the special assessment, after which the union announced a 25% increase in collections for an "Emergency Temporary Assessment to Build a Political Fight-Back Fund" to halt Proposition 75, then-Governor Arnold Schwarzenegger's ballot measure pertaining to unions.[69]

As the name of the fund suggests, SEIU made clear that the assessment was intended to combat the objectionable ballot measures in the upcoming special election and would support "a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California."[70] The increase was *not* related to collective bargaining in any way.[71]

Because SEIU so pointedly ignored the procedures required of them to protect non-members, Justice Alito provided a scathing rebuke – and provided an opinion of great importance both pre and post-*Janus.*

Justice Alito first highlighted the significant First Amendment implications presented by the union arrangement: "Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups."[72] Moreover, this speech contains significant ideological content: "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . the

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[67] The Court also required the union to provide an audited accounting to objecting fee payers.

[68] *Knox v. SEIU*, 567 U.S. 298, 302 (2012).

[69] *Id.*

[70] *Id.*

[71] SEIU and other public-sector union allies spent $24 million against Gov. Schwarzenegger's policies. But most troublesome of all was the contribution of the California Teachers Association. Troy Senik, *The Worst Union in America*, City J., Spring 2012, in *The Beholden State: California's Lost Promise and How to Recapture It*, (Brian C. Anderson ed., 2013) ("And in 2005, with a special election called by Governor Arnold Schwarzenegger looming, the CTA came up with a colossal $58 million-- even going so far as to mortgage its Sacramento headquarters-- to defeat initiatives [favored by Schwarzenegger].").

[72] *Id.* at 308.

compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights."[73]

To accentuate his point, Justice Alito then questioned precedents requiring non-members to object ("opt-out") to forced union dues if they want to avoid subsidizing the unions' political speech. In so doing, the Court suggested, for the first time, that only "opt-in" procedures are consistent with the paramount First Amendment protections against forced speech. As expressed in *Knox*, the opt-out rule "represents a remarkable boon for unions," and "[c]ourts [should] not presume acquiescence in the loss of fundamental rights."[74]

Justice Alito then posed a series of questions appropriately pointing out the inconsistencies and questioning the validity of the opt-out scheme: "[W]hat is the justification for putting the burden on the nonmember to opt out of making such a payment... And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues?"[75]

Furthermore, Alito appropriately criticized precedent noting that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles"[76] and criticized *Street* for failing to consider the constitutional implications of an opt-out requirement.[77] Finally, in his final sentence of dicta, Alito hypothesized that the Court's prior opt-out cases "approach, if they do not cross, the limit of what the First Amendment can tolerate."[78]

Clearly, *Knox* went beyond anything the Court had previously determined with regards to union fees. Yet *Knox* applied only in a narrow situation; it involved a unique fact-pattern and was arguably more of an anti-union policy claim than a vehicle for changing long-standing precedent. The future ramifications of *Knox* were largely explained in the form of dicta[79] and the case itself did not gain much notoriety aside from academic pundits questioning the Court's reasoning for seeking far-reaching conclusions.[80] It would take a much more direct case to change the union landscape.

G. Hurrying to Harris

Harris,[81] a decision both narrow and significant, was handed down in June 2014. Like *Knox*, the Court was divided 5-4, and like *Knox*, *Harris* would serve as an important precursor to *Janus*.

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[73] *Id.* at 309.
[74] *Id.* (quoting *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 682 (1999)).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Justice Kagan criticized the majority's "potshots" at *Abood* in "gratuitous dicta."
[80] *See, e.g.*, Catherine L. Fisk, Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU Local, 1000*, 98 Cornell L. Rev. 1023 (2013).
[81] *Harris v. Quinn*, 134 S.Ct 2618 (2014)

In the early 2000s, Illinois passed a law allowing home-care providers, subsidized by the state, to unionize.[82]Accordingly, SEIU was chosen to be the exclusive representative and, under its agreement with the state, roughly 20,000 home-care workers paid $3.6 million in dues each year to SEIU.[83]

However, in 2010, a group of home-care providers challenged the government's actions in a class-action lawsuit contending the First Amendment prohibited them from being required to support a government-designated bargaining representative. After nearly four years of litigation, the Court granted certiorari in *Harris v. Quinn* and took the most definitive step in public-sector jurisprudence since *Abood*.[84]

The Court concluded that, while statutorily allowing unions to collect representative fees from non-members was designed to avoid the "free-rider problem" of non-members benefitting from exclusive representation, such "free rider" arguments are "generally insufficient to overcome First Amendment objections."[85] In the Court's view, *Abood*, which had sanctioned such agreements for schoolteachers in Michigan, was a distinguishable case.[86]

Again, Justice Alito, writing for the majority noted that upholding such agreements as constitutional would provide "a very significant expansion of *Abood*--so that it applies, not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency-fee."[87] *Abood* doesn't cover "quasi-government employees," like home-care workers, and as workers – in many cases family members compensated by Medicaid for looking after a loved one – they were more like contractors than regular employees.[88]

Agency-fee agreements imposed a "heavy burden" on the rights of dissenting non-members and the promotion of labor peace and free-rider concerns simply could not sustain the constitutional infringements that forced association presented.[89]

And yet, the majority opted to maintain all aspects of *Abood*. Rather than declaring that no public employee could be compelled to join a union, or in this instance, pay a representative, the Court applied its ruling to only partial-public employees. Though *Abood* continued to be "an anomaly"[90] resting on "questionable foundations,"[91] *Harris* was simply too narrow a fact pattern to be the vehicle for monumental change.

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[82] Lyle Denniston, Argument preview: *Is Abood in trouble?*, SCOTUSblog (Jan. 18, 2014, 12:06 AM), http://www.scotusblog.com/2014/01/argument-preview-is-abood-in-trouble/
[83] *See* Denniston, Argument preview: *Is Abood in trouble?*, SCOTUSblog
[84] *Harris v. Quinn*, granting certiorari 570 U.S. 948 (2013).
[85] *Harris*, 134 S.Ct 2618, 2627.
[86] *Harris*, at 2627.
[87] *Id.*
[88] *Id.*
[89] *Harris* at 2643.
[90] *Harris*, at 2637
[91] *Harris*, at 2638

II. *Janus v. AFSCME* and Why Justice Alito is Correct

As professor Aaron Tang eloquently summarized: "Although the disagreement between opponents and defenders of public-sector [agency] fees may be fierce, one important element of the debate is largely without dispute: [Agency] fees impose a substantial First Amendment burden on objecting workers."[92] This objection to agency-fees was no different for Mark Janus. A government worker for the State of Illinois, Janus was upset about deductions from his paycheck, specifically the $1,000-year that goes to the local branch of the American Federation of State, County, and Municipal Employees (AFSCME), the union which represents him and with which he vehemently disagrees.

As a result, Mark Janus filed suit.[93] The Court's steady shift since *Abood* was on full display when it asked each party to argue and brief one specific question: "Should *Abood* be overruled and public-sector agency-fee arrangements declared unconstitutional under the First Amendment?"[94]

The answer, according to the Court, was yes.[95]

A. Janus

Justice Alito issued his 49-page opinion in June 2018, the last day of the October 2017 Term. His analysis came to five conclusions: (1) that the agency-shop violates the First Amendment; (2) that because the agency-shop violates the First Amendment, only intermediate scrutiny is required; (3) that the union's reliance on *Pickering v. Board of Education* is without merit; (4) that *Abood* was wrongly decided; and (5) that the current opt-out system is unconstitutional.[96]

i. Agency-Shop Agreements Violate the First Amendment

Justice Alito first addressed whether *Abood*'s holding was consistent with standard First Amendment principles, specifically its prohibition on abridging the freedom of speech.[97] Compelling individuals to support views with which they disagree "violates [the] cardinal constitutional command" that individuals have the right to speak and the right to refrain from speaking.[98] Forcing non-members under an agency-shop to subsidize labor unions and their political ideology is in direct conflict with the First Amendment.

Though prior free speech jurisprudence has involved restrictions on what can be said, to the Court, measures compelling speech are just as problematic.[99] Indeed, as Justice Alito noted,

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[92] Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 New York University Law Review 144 (2016).
[93] It should be noted that the original challenge was presented by Governor Bruce Rauner. After it was determined that Rauner did not have standing to bring the case forward, Janus, who had made a motion to intervene, was determined the only possible Plaintiff.
[94] *Janus*, 138 S.Ct 2448 (2018).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *See Janus*, 138 S.Ct 2448, 2464; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).
[99] *Id.*

"[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning."[100] As a result, laws which involve "involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence."[101]

Such laws are against the country's founding principles. As Thomas Jefferson once wrote, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."[102] Thus, the agency-shop rests on a tyrannical premise because a "significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining" that a non-member may disagree with.[103]

ii. Because Agency-shop Agreements Compel Speech, Only Intermediate Scrutiny is Required

After establishing that agency-shop agreements generally violate the First Amendment, the Court determined the level of scrutiny which should be taken to review their validity.[104] Under both *Knox* and *Harris*, the Court noted a fee assessment and an agency-fee requirement failed under the Court's intermediate scrutiny standard.[105]

But because *Knox* and *Harris* failed to completely outlaw the agency-fee, the petitioner in *Janus* sought the heightened "strict scrutiny" standard.[106] Yet while the petitioner sought the heightened review and the dissent argued the lower "rational basis review" was all that was necessary,[107] the Court determined that the agency-shop could not survive even intermediate scrutiny because any justification for the agency-shop could not satisfy an important government interest, thus reaffirming the *Knox* and *Harris* review standards.

The important interest sought by the government was the promotion of labor peace. By incorporating concerns about labor peace, *Abood* sought to temper labor management strife and dissension, and provide government a less-confusing option than attempting to "enforce two or more agreements specifying different terms and conditions of employment."[108] Yet *Abood* cited no evidence that such labor unrest would result without agency fees. *Abood* simply rested on an

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[100] *Id.*
[101] *Id.* quoting *Riley v. National Federal of Blind of N.C. Inc.*, 487 U.S. 781 (1988)
[102] A Bill for Establish Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950); *see also Janus*; *Hudson*, 475 U.S., at 305 n. 15.
[103] *Id. see also, Knox, supra,* at 310-311.
[104] There are three levels of scrutiny conducted by the Court: Strict Scrutiny requires the government to establish the violation of a fundamental right satisfies a compelling state interest; Intermediate Scrutiny requires the government to establish that the regulation satisfies an important government interest; and Rational Basis Review requires the challenger to prove that the government has no interest in the law or policy.
[105] Justice Alito uses the term "exacting scrutiny." For simplicity, the author chooses the synonymous "intermediate scrutiny." *See Knox*, 567 Y.S at 309-10; *Harris*, 134 S.Ct 2618.
[106] Brief for Petitioner Mark Janus, *Janus v. AFSCME*, 585 U.S. _, at 36.
[107] *Janus*, 138 S.Ct,, at 2489 (Kagan, J., dissenting).
[108] *Abood*, at 220.

assumption that the "designation of a union as the exclusive representative…and the exaction of agency-fees are inextricably linked,"[109] but as Justice Alito noted "that is simply not true."[110]

The Court then compared the current state-by-state agency-fee system to that of the relationship between the federal government and their employees.

Federal law does not require unions to represent non-members; unions are only required to represent every worker if they choose to invoke federal law giving them the right to exclusive representation.

Thus, when the federal government has an exclusive representation arrangement where the representative is entitled to national consultation rights, the right to review and comment on decisions regarding conditions of employment, and authorization to speak on behalf of all federal employees within a bargaining unit, federal law applies.[111]

Regardless of any theories, even if one believes that a public employer prefers to deal with one union, "that can hardly justify legislation forcing all public employees to support that appointed union."[112]

The compulsory-fee provision is not sufficiently tailored to that interest because, even as Justice Kagan acknowledged in both *Janus* and *Harris*, "a union's status as exclusive bargaining agent and the right to collect an agency-fee from non-members are not inextricably linked."[113]

Therefore, because the agency-shop cannot satisfy an important government interest, its application is an invalid government overreach infringing employees' free speech protections.

iii. <u>The Union's Main Contention</u>

The Court found only one[114] argument from the respondent union to have merit: the Court's decision in *Pickering v. Board of Education.*[115] In *Pickering*, the Court held that in the absence of proof of a teacher knowingly or recklessly making false statements, a teacher had a right to speak on issues of public importance without being dismissed from his or her position.[116] Indeed, under *Pickering*, employee speech is unprotected "if it is part of what the employee is paid to do or if it

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[109] *Janus*, 138 S.Ct., at 2466; *Harris, supra*.
[110] *Id.*
[111] *See* 5 U.S.C. § 7102 et seq.
[112] Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. California Teachers Association, Public Unions, and Free Speech*, 20 Tex. Rev. L. & Pol. 341.
[113] *Harris*, 134 S. Ct at 2640 (Kagan, J., dissenting). Justice Kagan sharply criticized the Court's main opinion for "its gratuitous dicta critiquing *Abood*'s foundation." She defended that precedent as "deeply entrenched," and as "the foundation for not tens or hundreds, but thousands of contracts between unions and governments across the nation."
[114] The Union also presented an originalism argument to the Court, reasoning that *Abood* is supported by the original understanding of the First Amendment – that public employees were understood to lack any free speech protections. Justice Alito summarily dismissed that argument is implausible.
[115] *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Pickering* involved a high school teacher who was dismissed after writing a letter to a local newspaper which criticized how the local school board and the district superintendent had handled past proposals to raise new revenue for the schools.
[116] *See Pickering*, 391 U.S. 563.

involved a matter of only private concern."[117] *Pickering* was at the forefront of the union's defense in both *Abood* and *Harris*, yet in both instances and in the intervening years, the argument was unpersuasive. So too was it in *Janus*.

The main reasoning for this lack of persuasion was that *Abood* was simply not based on *Pickering* and incorporating *Pickering* into *Janus* would be inappropriate as both cases are fundamentally different.[118] *Pickering* involved public employees' speech and its coinciding effect on their public responsibilities.[119] Moreover, under *Pickering*, employee speech is unprotected if it is not expressed on a "matter of public concern."[120]

But in *Janus*, as in *Harris*, the Court concluded that agency-fee agreements *were* public and thus subject to First Amendment restrictions, simultaneously noting that "[i]t is impossible to argue that the level of … state spending for employee benefits … is not a matter of great public concern."[121] The speech conducted by the union, on behalf of the entire collective bargaining unit, where matters such as statewide budgeting and pension decisions, is clearly a matter of public concern and wholly separate from *Pickering* where one employee spoke out about his individual salary.

Such a distinction is necessary because in the collective-bargaining context the agency-fee agreements impose a heavy burden on the rights of dissenting non-members. Such dissention coupled with the inherently public nature of the speech itself outweighs any government proffered justification offered in *Abood* or by the respondents.[122]

iv. *Abood* Was Wrongly Decided

In a final effort to save *Abood*, the respondent union claimed that *stare decisis* counseled against its reversal. In brief, "[i]t does not."[123]

The doctrine provides that Court's should defer to their prior decisions "because it promotes …[a] predictable and consistent development of legal principles."[124] The Court will not overturn past decisions unless there are strong grounds for doing so.[125] However, when the Court is convinced of an error, it is not constrained to follow precedent and the Court "throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[126]

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[117] *Janus*, at 2469 referencing *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *Connick v. Myers*, 461 U.S. 138 (1983)
[118] *Janus*, at 2472. "The *Abood* majority cited the case exactly once – in a footnote – and then merely to acknowledge that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." Citing *Abood*, at 230, n.27.
[119] *United States v. Treasury Employess*, 513 U.S. 454 (1995).
[120] *Pickering*, 391 U.S. at 568.
[121] *Janus*, at 2472, quoting *Harris*, supra.
[122] *See*, William B. Gould IV, *Organized Labor, The Supreme Court, and Harris v. Quinn: Déjà vu All Over Again?*, 2014 Sup. Ct. Rev. 133.
[123] *Janus*, at 2478.
[124] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).
[125] *United States v. International Business Machines Corp*., 517 U.S. 843 (1996).
[126] *Smith v. Allwright*, 321 U.S. 649, 665 (1944)

The *Janus* decision is no different and the Court noted several critical factors in determining why *stare decisis* should not save *Abood*. The most pertinent, in the author's opinion, is that *Abood*'s reasoning is fundamentally flawed making the decision itself an anomaly and incorrect.

"*Abood* went wrong at the start when it concluded that two prior decisions, [*Hanson*] and [*Street*] appeared to require the validation of the agency-shop agreement."[127] It applied a private-sector fact-pattern to a public-sector problem and it "failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency-fees."[128]

Indeed, neither *Hanson*, which interpreted the RLA under the Commerce Clause, or *Street*, which primarily consisted of a matter of statutory construction, gave much credence to the First Amendment in their analysis.[129] As a result, *Abood* "judged the constitutionality of public-sector agency-fees under a deferential standard that finds no support" in the Court's other free speech cases.[130]

Rather than focus on a government interest in analyzing the agency-fee agreement, the *Abood* court deferred to "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[131] But as Justice Alito points out, *Hanson* deferred to the legislature because the case primarily involved the Commerce Clause – a legislative action. *Abood*, on the other hand, dealt exclusively with a constitutional question which had no bearing on the legislative deference.[132]

As the above analysis details, if *Abood* had considered the validity of the preferred state interest, "it might not have made the serious mistake of assuming that one of those interests – labor peace – demanded, not only that a single union be designated as the exclusive representative…but also that non-members be required to pay agency-fees."[133]

When *Abood* doubled-down, noting that public employees do not have "weightier First Amendment interests" than private employees,[134] it "missed the point."[135] Issues such as wages, pensions, and benefits are political issues in the public-sector, though not in the private-sector. Similarly, private-sector retirement plans are not funded using public financing the same way public-sector pensions are.

By overlooking this distinction, *Abood* failed to conceptualize the inherent differences between cases in the private-sector and cases in the public-sector. "Nor did *Abood* foresee the

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[127] *Id.* at 2479.
[128] *Id.*, at 2479.
[129] *Id.*
[130] *Id.* Justice Alito further points out that the Kagan dissent makes a similar mistake.
[131] *Abood*, 431 U.S. at 222.
[132] *Id.*
[133] *Id.*
[134] *Abood*, at 229
[135] *Janus*, at 2480.

practical problems" that not making this distinction presented to objecting non-members.[136] Because its analysis is so flawed, continuous adherence to *Abood* was incorrect and unnecessary.

v. Why the Opt-Out Scheme is Unconstitutional

As the Opinion came to a close, Justice Alito reached one final, critical conclusion: Opt-out schemes are unconstitutional.

Knox was the first case to dissect the constitutional implications of opt-out systems. As Justice Alito there noted, "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree."[137] Indeed, the *Knox* court was dissatisfied by the upholding of opt-out requirements in the past.[138] Opt-out schemes should be plainly contradictory to the First Amendment, as "[c]ourts 'do not presume acquiescence in the loss of fundamental rights."[139]

This was echoed in *Harris*, where the Court reaffirmed the "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party [e.g. a union] that he or she does not wish to support."[140]

The opt-out scheme has long established the very risk of overinclusion *Hudson* and *Knox* declared unacceptable; namely, that some employees' monies will be seized and used, even temporarily, to fund ideological activities they do not support.[141] The Court's failure to overrule the opt-out system before allowed rampant abuse of non-members and largely negated the impact of both *Knox* and especially *Harris*.[142]

The Court finally acknowledged that "this procedure violates the First Amendment and cannot continue."[143] By agreeing to pay, via the agency-shop agreement, non-members have been waving their First Amendment rights, and "such a waiver cannot be presumed."[144] Instead, and going forward, all employees must give their consent to the fee deduction, rather than have such deductions automatically occur.[145]

vi. The Kagan Dissent

Justices Sotomayor and Kagan each offered a dissent in *Janus*, however, only Justice Kagan's dissent is worth summarizing. Kagan's dissent largely acknowledges that the agency-fee arrangement implicates employees' First Amendment rights, though she concludes the employers'

[136] *Id.*
[137] *Knox*, 567 U.S. 298, 312; *see also*, Buttaro, *Stalemate*, 20 Tex. Rev. L. & Pol. 341.
[138] To be sure, no court before *Knox* had gone into much detail about their legitimacy. *See, e.g.*, *Street.*
[139] *Knox*, at 312. (quoting *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 682 (1999)).
[140] *Harris*, 134 S. Ct. at 2644
[141] *Knox*, 567 U.S. at 312. *Hudson*, 475 U.S. at 305.
[142] Brief of Amics Curiae *Freedom Foundation* in Support of Petitioner, *Janus v. AFSCME*, 138 S.Ct. 2448.
[143] *Janus*, at 2486
[144] *Id.*
[145] *Id.*

interests justify that compulsion, just as government employer interests often justify speech restrictions.

As Justice Kagan writes, "the majority misunderstands the threshold inquiry set out in [the government employee speech rights cases]. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square."[146] Such a reasoning was shot down by Justice Alito, noting the differences between the *Abood* progeny and *Pickering*, which Justice Kagan heavily relies upon.

However, Justice Kagan's reasoning is also in contrast with the Court's 1983 decision in *Connick v. Myers.*[147] In *Connick*, the Court concluded that the First Amendment might protect speech by government employees to coworkers (i.e., directed to the workplace) at the office (in the workplace) about alleged pressure by supervisors to work on political campaigns (about the workplace).[148]

The employees in *Connick* ultimately lost on this point only because the Court concluded that their speech was, on the facts of the case, disruptive of workplace relationships. The Court expressly declined to take the view that such speech was just categorically unprotected against the government as employer.[149]

Furthermore, the Court has never suggested that "speech about the terms and conditions of employment—the essential stuff of collective bargaining" is categorically unprotected against the government as employer, even when said to colleagues at work.[150] Moreover, under *Pickering*, employee speech is unprotected if it is not expressed on a "matter of public concern."[151] The majority in *Janus* goes to painstaking length in solidifying that public-sector union speech is inherently political. Kagan's dissent may be well articulated, but its application is fundamentally different than the issues presented in *Janus*.

III. The Aftermath

It is unsurprising that the holding in *Janus* caused public outcry among those ideologically committed to public-sector unionism; the outcome is likely to significantly affect the capital of unions going forward.[152] However, such outcry and the divisive rhetoric directed towards the Majority, and specifically Justice Alito, is misplaced. *Janus* is the logical outgrowth and conclusion of the Court's First Amendment rulings.

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[146] *Janus*, at 2487 (Kagan, J., dissenting).
[147] *Connick v. Myers*, 461 U.S. 138 (1983).
[148] *Id.*
[149] *Id.*
[150] *Janus*, at 2492 (Kagan, J., dissenting).
[151] *Pickering*, *supra*, at 568, 88 S.Ct. 1731
[152] Aaron Tang, *Life After Janus*, at 27 June 1, 2018 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189186 "The right-to-work default that exists after Janus threatens the loss of anywhere from 15% to 70% of the union's membership and funding stream."

One critical aspect of the Court's reasoning in *Janus* is its conclusion that a system of union financing based on dues voluntarily paid by members would be an adequate alternative for achieving the state's interests in labor peace.[153] Fair share fees are unnecessary, in other words, because unions can function just fine within a right-to-work legal regime.[154]

Therefore, going forward, labor unions will have to adjust their tactics. While other commentary is sure to take a deeper dive into the aftermath of *Janus*, a few ideas are presented below for consideration.[155]

A. Members Only Contracts

Some views argue that unions could now devise a "members only" bargaining structure.[156] Indeed, "where unions are unable to require objecting workers to pay fees," states should "get rid of the rule of exclusive representation."[157] If applied, this would mean that workers who opt-out of the union altogether would not pay the union any fees and would no longer be covered by the terms of the union-negotiated collective bargaining agreement. Members only contracts would also protect workers who wish to remain in their union even if they fail to establish the union as the representative of all employees in the workplace. If thirty percent of workers wish to be unionized and have an exclusive representative, the employer can recognize the representative for that thirty percent.

Objecting workers would then be free to negotiate with the employer over terms and conditions of employment individually though they could not use the union's personnel for the purposes of pursuing grievances or defending disciplinary actions with the employer.[158] Such a policy makes logical sense. Once a worker is permitted to opt-out of paying for the union's services, the "consistent and fair conclusion" is to permit the union to stop providing them.[159]

Yet even such pragmatic solutions may require changes in state labor law.[160] Such an action could cause a seismic rift in both private and public-sector union jurisprudence. The question of

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[153] *Janus*, at 2480 ("Whatever may have been the case 41 years ago when Abood was handed down, it is now undeniable" in view of union activity in the federal work force and 28 right-to-work states that "'labor peace' can be readily achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees.").

[154] Aaron Tang, *Life After Janus*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189186

[155] *See, e.g.*, Tang, *Life After Janus*, Eugene Volokh, *The Limited Effects of the Supreme Court's Janus Decision*, Volokh Conspiracy Blog (June 27, 2018).

[156] Catherine Fisk and Benjamin Sachs, *Restoring Equity in Right to Work*, 4 UC Irvine L Rev 859, 879-880 (2014)

[157] Fisk and Sachs, *Restoring Equity*, 4 UC Irvine L Rev 859, 879-880 (2014).

[158] Tang, *Life after Janus*, at 23. "Fisk and Sachs provide the following concrete example for how members-only bargaining would work for public school teachers: 'We would argue that teachers should . . . be permitted to opt out of the union's collective agreement and negotiate individually (or through a nonunion group) for different wages, performance standards or other terms of employment. The teacher's union would be responsible for negotiating contracts and handling employment disputes only for its dues-paying members. The district could not treat nonunion teachers worse or better than their union counterparts in order to encourage or discourage unionization, but there might nevertheless be different contracts and work conditions depending on whether a teacher was represented by the union."' Quoting Fisk and Sachs, *Restoring Equity*, at 858.

[159] Tang, *Life after Janus*, at 23, quoting Fisk and Sachs, *Restoring Equity*, at 867.

[160] *Dick's Sporting Good*, Advice Memorandum, Case 6-CA-34821 (2006); *but see* Charles Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace.*

whether exclusive representative status is the only representative structure mandated by the NLRA has never been addressed by the Court, "the fact of the matter is that numerous decisions decided by the Court rest upon the idea of exclusivity."[161]

B. Right-to-Work Legislative Action

Other experts, such as Eugene Volokh, point out that *Janus* may require changes to state labor law.[162] Such a solution makes legal sense; if state legislatures are adamant about the importance of public-sector labor unions, they are free to enact laws which alter, and in some cases limit, the scope of *Janus*, so long as those laws don't violate the core principles of the decision.

States such as California, Oregon, and Washington will have some guidance in their approach. Since 2000, eight states (Florida, Idaho, Iowa, Kansas, Nebraska, Nevada, North Dakota, and South Dakota) have implemented a statutory framework that is materially similar to the statutory regime that the 23 (now former) agency-shop jurisdictions will find themselves subject to following *Janus*. These states have employed a comprehensive system of collective bargaining in which a single union is granted the right to exclusively represent all workers in a unit subject to a duty of fair representation, but where agency-shop fees were prohibited by right-to-work legislation.[163]

The practical aspect of such legislation cannot be understated and was the exact holding in *Janus*. The authority of public employee unions to act as collective bargaining agents arises from statute; they possess no entitlement to bargain exclusively or collectively with a public employer.[164] Nor do they possess an entitlement to non-member subsidization.

Therefore, subjecting dissenting non-members, who have chosen a career in public-service, to financially support the union based on this statutory gift is unconstitutional. If unions are adamant about maintaining their statutory authority over public employees, those who do not wish to be apart of the union cannot be obligated to support it.

C. Unions Will Have to Become Better Advocates

The *Harris* Court noted that "a critical pillar of *Abood*'s analysis rests upon an unsupported empirical assumption, namely, that the principle of exclusive representation in the public-sector is dependent on a union or agency-shop."[165] The fact that the federal government and numerous right-to-work states have continued to maintain an exclusive-representation arrangement without compulsory fees lends credible support to this notion.

As noted above, right-to-work states also maintain exclusive representation without compulsory fees. Generally, in states without compulsory-fee provisions, public-sector union

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[161] Gould, *Organized Labor* 2014 Sup. Ct. Rev. 133.
[162] Eugene Volokh, *The Limited Effects of the Supreme Court's Janus Decision*, Volokh Conspiracy Blog (June 27, 2018).
[163] Tang, at 17; Brief of Amicus Curiae Mackinac Center for Public Policy in Support of Petitioners in *Friedrichs v. California Teachers Association*, No. 14-915, at 7-8.
[164] *City of Charlotte v. Firefighters Local 660*, 426 U.S. 283, 96 S.Ct. 2036 (1976).
[165] *Harris*, 134 S. Ct. at 2634.

membership remains steady at approximately 68%.[166] And among the states that affirmatively banned compulsory fees, union membership is uniformly higher in states that have exclusive representation compared to those that do not.[167] These figures suggest that the primary benefit to unions comes from exclusive-representation provisions, not from agency fees, further reinforcing the conclusion that the former is not tied to the latter.

Automatic dues are a mixed blessing for any union, since they relieve leaders of the responsibility to persuade rank-and-file members of the union's value.

A recent survey by AFSCME of its 1.6 million members found that only 35 percent of them would pay dues if not required to do so.[168] For example, paid union membership plunged in Wisconsin after Governor Scott Walker's public-sector reforms.[169]

Public unions have lost touch not only with their own members but also with many in the larger body politic, who wonder about paying taxes so public workers can get better pensions and health care than they do, or why it's near-impossible to fire bad teachers. A consensus has been building nationwide to enable individuals to choose whether or not they want union representation.

If unions wish to continue representating public employees and maintain their financial stability, they are now forced to become consistent and effective advocates. Gone are the days in which labor unions can advocate for positions which have no bearing on employer-employee relations. Instead, public-sector unions will now have to provide results which benefit their members, otherwise members will simply choose to opt-out of the union. This accountability is undoubtedly a net-benefit for current union members; if unions provide as great of services as they claim, members will remain, however if they fail, members will seek better opportunities.

IV. Conclusion

Janus v. AFSCME is truly a new beginning for public-sector labor relations. Over the past forty years, the Court's decision in *Abood* has been slowly eroded.

The 5-4 decision in *Janus* is simply the logical conclusion of the Court's prior decisions. But *Janus* is not the death knell for labor unions; unions will still exist and advocate for their members.

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[166] *See* Andrew Buttaro, *Stalemate at the Supreme Court: Friedrichs v. California Teacher's Association, Public Unions, and Free Speech*, 20 Tex. Rev. L. & Pol. 341, 385 (2016).
[167] Chris Edwards, *Public-sector Unions and Rising Costs of Employee Compensation*, 30 Cato J. 87, 96-99 (2010).
[168] Josh Eidelson, "Unions Are Losing Their Decades-Long 'Right-to-Work' Fight" Bloomberg Businessweek (Feb. 16,2017) https://www.bloomberg.com/news/articles/2017-02-16/unions-are-losing-their-decades-long-right-to-work-fight
[169] Charles Lane, "Government unions are in deep trouble. And they have themselves to blame" Washington Post (Feb. 14, 2018) https://www.washingtonpost.com/opinions/government-unions-are-in-deep-trouble-and-they-have-themselves-to-blame/2018/02/14/a317d396-11a8-11e8-8ea1-c1d91fcec3fe_story.html?utm_term=.4f6fddd122f7

While labor unions will undoubtedly seek to limit the scope of Justice Alito's decision, the fact remains that *Abood* has always hinged on flawed analysis: the Court's decision to subject private-sector precedent on a public-sector fact pattern.

As Justice Alito noted at the end of his *Janus* opinion, "*Abood* was wrongly decided and is now overruled."[170]

[170] *Janus*, at 2479.