JANUS V. AFSCME: TRIUMPH OF FREE SPEECH OR DOOM FOR UNIONS?

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ABSTRACT

On the last day of the last term the Court split 5-4 in a controversial and contentious Janus *decision with a dissent read from the bench. The dissent argued, in large part, that States should be free to permit public-sector unions to continue to assess employees who do not join the union agency fees, even if some of these employees object to associating with the unions' political objectives and strategies, in order to overcome the free-rider problem where nonmembers enjoy the collective bargaining benefits achieved without paying for them. The majority held that overcoming the free-rider problem was insufficient grounds for perpetuating an intrusion into First Amendment rights. Both sides overlooked a far larger free-rider problem. Public-sector labor unions are a well-defined and cohesive coalition that is organized to divert more taxpayer resources to their coalition. Due to the free-rider problem, taxpayers have difficulty organizing a strong defense against this coalition. This Article discusses some economic principles, some differences between historical labor unions in the private sector and modern public-sector labor unions, and the* Janus *decision.*

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INTRODUCTION

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[1] the Supreme Court voted five to four in favor of the plaintiff, Mark Janus, who sought to be excluded from mandatory union representation fees for employees of the State of Illinois.[2] The conservative majority hailed the result as a relatively simple and straightforward victory for the First Amendment.[3] Meanwhile, the liberal dissenting justices screamed that this was a gross injustice for the principle of stare decisis and asserted that the decision would wreck the important work of labor unions brought about by free-riders capturing the benefits of unionization without paying for them.[4]

This Article explores the development of unions while reviewing some basic economic principles, then it reviews the majority and dissenting opinions.[5] Afterwards, both legal and economic analysis are provided.[6] I argue that the conservative majority missed an important

1. 138 S. Ct. 2448 (2018).
2. *See id.* at 2459–60 (concluding that Illinois law violates free speech rights of union nonmembers).
3. *See id.* at 2486 ("This procedure violates the First Amendment and cannot continue.").
4. *See id.* at 2501 (Kagan, J., dissenting) (criticizing the majority for setting aside precedent and preventing "the American people, acting through their state and local officials, from making important choices about workplace governance").
5. *See infra* Parts II, III.
6. *See infra* Part IV.

economic argument and opportunity to turn the free-rider problem the other way.[7] In the early history of the American labor movement, an important objective of unionization was to capture, share, and redistribute part of the monopoly profits created by industry with the workers who helped create them.[8] However, in the context of public employees, there are no monopoly profits to capture.[9] Instead the unions capture a portion of the public's tax assessments,[10] and they are able to do this by virtue of the free-rider problem, which disincentivizes any particular taxpayer from complaining because they pay such a trivial share of the costs inflicted by the public unions that their marginal benefit of reducing their own tax burden is always greatly outweighed by their marginal cost of fighting the union for public employees.[11]

The Supreme Court's opinions in this case are divisive opinions about an economic issue written with little economic theory or facts. A little more economic analysis might lead to the same result with broader support and less hostile language. I hope to encourage use of more thorough economic theory in future decisions.

I. MONOPOLIES, CARTELS, AND LABOR UNIONS

One hundred years ago America was a very different environment.[12] There were no interstate highways.[13] The vast majority

7. *See infra* Section IV.B.

8. *See* RICHARD T. ELY, THE LABOR MOVEMENT IN AMERICA 46–50 (1886) (describing the history of American labor and noting that labor began to organize to curtail abusive practices by capitalists in the 1800s).

9. *See* DANIEL DISALVO, GOVERNMENT AGAINST ITSELF 27 (2015) ("In government it is harder to measure efficiency and productivity for agencies and workers because they often lack clearly defined goals and missions—to say nothing of the objective measurement of success used in the private sector, namely, profit.").

10. *See* MALLORY FACTOR, SHADOWBOSSES xii (2012) ("Unlike private sector unions, government employee unions grow our government at the expense of the taxpayers. . . . When these unions win, all taxpayers lose . . . .").

11. *See* DENNIS C. MUELLER, PUBLIC CHOICE III 473–75 (2003) (discussing the logic of collective action and concluding that large interest groups are less effective than small interest groups).

12. *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 2 (1999) ("[T]oday's business world is different in a myriad of ways from that of a century ago.").

13. *See, e.g.*, *The History of Interstate Highways in California*, CAL. DEP'T OF TRANSP., http://www.dot.ca.gov/interstate/CAinterstates.htm [https://perma.cc/Q6EY-FU7N] (last visited Nov. 11, 2019) (stating that the first interstate highway under the Federal Highway and Defense Act of 1956 opened in California in 1957).

did not own automobiles,[14] and the few automobiles around were not capable of long-distance, high-speed travel.[15] Workers worked within walking distance of home.[16] This frequently meant that they had only one employment choice.[17] There were no social safety nets, such as welfare.[18] Terms of employment were offered on a "take it or leave it" basis, and given the economic fact that declining the employment could mean starvation, workers would take employment under conditions that now seem unfair, harsh, and dangerous.[19]

Large and powerful firms did not merely exploit labor. They damaged small businesses and consumers too.[20] James May writes,

> [L]ate nineteenth-century American firms in large numbers sought protection and better returns through various forms of mutual cooperation, ranging from such "loose" combinations as simple cartels or pools, to such tighter combinations as trusts, holding companies, and mergers, entered into with willing or coerced partners. Such tighter combinations at least theoretically offered possibilities of new productive or managerial efficiencies not achievable through simple "loose" arrangements. At the same time, large firms, now increasingly organized as managerially run corporations, repeatedly employed at times ruthless predatory tactics to eliminate or undercut existing rivals or to exclude potential new entrants from their markets. With unsettling frequency during the Gilded Age and

14. *See* U.S. DEP'T OF ENERGY, https://www.energy.gov/eere/vehicles/fact-962-january-30-2017-vehicles-capita-other-regionscountries-compared-united-states [https://perma.cc/4E3V-6T7X] (last visited Nov. 11, 2019) (showing eleven motor vehicles, including trucks and buses, per 100,000 people in 1900).

15. *See* Christopher Klein, *The First Great American Road Trip*, HISTORY (June 29, 2012), https://www.history.com/news/the-first-great-american-road-trip [https://perma.cc/ZC9Y-B37J] (highlighting the first transcontinental automobile trip, which occurred in 1903 and took sixty-four days).

16. *See* Derek Thompson, *America in 1915: Long Hours, Crowded Houses, Death by Trolley*, THE ATL. (Feb. 11, 2016), https://www.theatlantic.com/business/archive/2016/02/america-in-1915/462360/ [https://perma.cc/BK4L-N2TU] ("Americans didn't drive: They walked, rode horses, and acrobatically dodged trolleys. In the last 100 years, perhaps nothing about daily life has changed more than the commute.").

17. *Cf.* HARDY GREEN, THE COMPANY TOWN 3 (2010) ("By one estimate, more than 2,500 single-enterprise towns once dotted the country.").

18. *See How Welfare Began in the United States*, CONSTITUTIONAL RIGHTS FOUND., http://www.crf-usa.org/bill-of-rights-in-action/bria-14-3-a-how-welfare-began-in-the-united-states.html [https://perma.cc/9574-NVXS] (last visited Nov. 11, 2019) ("In 1935, welfare for poor children and other dependent persons became a federal government responsibility, which it remained for 60 years.").

19. *See* GREEN, *supra* note 17, at 57–74 (describing conditions in company towns organized around coal mining).

20. *Cf.* JOSEPH E. STIGLITZ, PRINCIPLES OF MICROECONOMICS 401 (2d ed. 1997) (explaining that "[c]onsumer groups and injured businesses tend to support [antitrust policy]").

> the Progressive Era, powerful firms such as Standard Oil also sought to gain advantage over their rivals in the political realm, by bribing legislators or otherwise corrupting the political process in order to obtain new benefits or to establish new hurdles for would-be rivals.[21]

Although many Americans were impressed by the achievements of wealthy businessmen, such as Andrew Carnegie and John D. Rockefeller, "[a] great many other Americans, however, became alarmed at the spread of cartels, combinations, and apparently predatory behavior by firms possessing economic wealth and power on a scale undreamt of just a few short decades before."[22] Farmers and small businesses felt gouged and economically threatened.[23] There was growing public concern about anti-competitive behavior and political pressure to address it.[24]

In the old economy, workers were at a distinct disadvantage relative to employers.[25] The labor market was not exactly competitive.[26] In a competitive market, the factors of production earn their marginal return.[27] In the old economy, monopolistic industries, such as Carnegie's Steel, Rockefeller's Standard Oil, and Vanderbilt's New York Central Railroad, could exploit workers, paying them less than their labor was worth and subjecting them to other harsh terms.[28] No individual worker could bargain with the employer because there was no alternative employment and the employer knew that.[29] If a

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21. James May, *The Story of* Standard Oil Co. v. United States, *in* ANTITRUST STORIES 7, 10 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

22. *See id.* at 10–11.

23. *See id.* at 11 (describing farmers' anxiety over the growth of cartels).

24. *See id.* ("Growing public alarm prompted not only new state and federal legislative investigations of anticompetitive behavior, but also the passage of state antitrust laws beginning in the late 1880's.").

25. *See* GREEN, *supra* note 17, at 3 ("A company town seems necessarily to be a place where one business exerts a Big Brother-like grip over the population—controlling or even taking the place of government . . . .").

26. *See id.* at 59 (describing the practice of substituting convict labor for striking employees).

27. *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS 361 (8th ed. 2010) ("If the [competitive] firm is maximizing profits, then the value of the marginal product of each factor that it is free to vary must equal its factor price.").

28. *See* Robert McNamara, *Robber Barons*, THOUGHTCO, thoughtco.com/robber-barons-1773964 [https://perma.cc/NA5M-6PDB] (last updated Dec. 27, 2018) (stating that these men built enormous wealth through predatory and unfair practices that exploited workers and consumers).

29. *See* ELY, *supra* note 8, at 111–12 (describing "iron-clad oath[s,]"—without competition, employers could require these contracts as a condition of employment—as agreements not to join a union and creating a system of slavery).

worker complained, the worker would be fired.[30] The work of a single worker was largely irrelevant to the corporation.

The solution to the plight of the workers was collective bargaining.[31] Under common law, collective bargaining was illegal.[32] However, as workers accumulated voting rights and political powers, laws were passed to permit collective bargaining.[33] With collective bargaining, the workers banded together to negotiate as a single unit.[34] If acceptable wages and other terms of employment were not offered, the union representing the workers and negotiating a collective bargaining agreement could call a strike.[35] Then all employees would cease to work, and the corporation's business and profits would be brought to a halt as long as the union workers could prevent replacements from crossing the picket lines.[36] This tactic was successful in forcing corporations to pay better wages, offer safer working conditions, and provide more favorable benefits.[37] Unions are

30. *See id.* at 110–11 (documenting numerous cases of blacklisting for requesting increased wages).

31. *See id.* at 96 ("Trade-unions and labor organizations are, then, designed to remove disadvantages under which the great mass of workingmen suffer . . . .").

32. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2471 n.7 (2018).

33. In describing portions of the National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169, Dubofsky and Dulles write,

> It was to be an unfair labor practice for an employer to restrain or coerce his employees from exercising their rights, to try to dominate or even contribute financially to the support of any labor organization, to encourage or discourage union membership by discrimination in hiring and firing, or to refuse to bargain collectively. Moreover, representatives designated for collective bargaining by a majority of the employees in an appropriate unit, whether it was an employer, craft, or plant unit, were to have exclusive bargaining rights for all employees.

MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA 253 (8th ed. 2010).

34. *See id.* at 258 ("The protection given labor's right to organize and bargain collectively was the most important phase of the prolabor policy that was generally followed under the New Deal.").

35. *See* STIGLITZ, *supra* note 20, at 455 ("Labor unions are organizations of workers, formed to obtain better working conditions and higher wages for their members. The main weapon they have is the threat of a collective withdrawal of labor, known as a strike.").

36. *See id.* at 460 (observing that the possibility of replacement workers will limit a union's power).

37. *See id.* at 456 ("[T]he unions were able to obtain for their workers substantial wage increases and improvements in working conditions.").

frequently credited with creating weekends and forty-hour work weeks.[38]

One early economist who was concerned with the plight of labor was Richard Ely. Describing some conditions in the nineteenth century, Ely wrote,

> The length of a day's labor varied from twelve to fifteen hours. The New England Mills generally ran thirteen hours a day the year round, but one mill in Connecticut ran fourteen hours, while the length of actual labor in another mill in the same State, the Eagle Mill at Griswold, was fifteen hours and ten minutes. The regulations at Paterson, New Jersey, required women and children to be at work at half-past four in the morning.[39]

Ely went on to describe many other harsh practices.[40] For example, firms would pay their workers at long intervals, necessitating the use of credit to survive between paydays.[41] The terms of the credit would be oppressive.[42] Companies would require workers to use their credit in company-owned stores, which charged excessive prices.[43] Companies also would exert control over employees' political choices.[44] Ely wrote, "I know a whole town, for example, whose inhabitants while free in certain elections, in others are marched like sheep to the polls, and ordered to vote in a manner well pleasing to a great corporation."[45]

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38. *See* Louis Jacobson, *Does the 8-Hour Day and the 40-Hour Week Come from Henry Ford, or Labor Unions?*, POLITIFACT (Sept. 9, 2015, 3:54 PM), https://www.politifact.com/truth-o-meter/statements/2015/sep/09/viral-image/does-8-hour-day-and-40-hour-come-henry-ford-or-lab [http://perma.cc/U537-UDXK] (inferring the widely held notion that unions played an integral role in helping to codify the forty-hour work week); *cf.* PAUL LE BLANC, A SHORT HISTORY OF THE U.S. WORKING CLASS 47–48 (1999) ("The AFL's [American Federation of Labor] immediate predecessor . . . initiated a nationwide campaign for the eight-hour workday.").

39. ELY, *supra* note 8, at 49.

40. *See id.* (providing some graphic examples of cruel and oppressive practices used to curtail employee union involvement).

41. *See id.* at 103.

42. *See id.* ("[D]ebt becomes chronic and the prospect of *escape* well-nigh hopeless.") (emphasis added).

43. *See id.* at 104 (explaining the use of the truck system which compelled employees to shop in stores of the employer's choosing and observing that the employees would be cheated in quantity, quality, and price).

44. *See id.* at 107 ("Employers [we]re able to influence the political and religious life of their employees.").

45. *Id.* at 107–08.

One tactic that Ely found particularly oppressive was the practice of blacklisting workers.[46] According to Ely,

> [a] man who for any reason, be it even whim, caprice, or personal spite, falls into disfavor with one employer, is placed on the black list, and his name, at times accompanied by a personal description, is sent to allied employers all over the country. Thirty-three men were black-listed in Fall River a few years ago because they had asked for an increase of wages, and they were compelled to seek work under assumed names. It is reported, on apparently good authority, that one railway corporation has a book containing names of a thousand black-listed persons, with a full description of each. The black list will pursue a man for years, will drive him out of an honest trade to rum-selling, and will follow him across the continent, and everywhere defeat his efforts to gain a livelihood.[47]

Ely perceived collective bargaining and strike tactics to be a useful device for fighting these labor-market conditions that existed in the nineteenth century.[48] He summarized the conditions of labor in three points:

> 1. The absence of actual equality between the two parties to the labor-contract, and the one-sided determination of the price and other conditions of labor.
>
> 2. The almost unlimited control of the employer over the social and political life, the physical and spiritual existence, and the expenditures of his employees.
>
> 3. The uncertainty of existence which, more than actual difference in possessions, distinguishes the well-to-do from the poor.[49]

Labor unions evolved into important institutions with concentrated political and economic power.[50] As political theory predicts, concentration of power attracts opportunities for corruption.[51] Paul LeBlanc writes that "the failure to acknowledge and explore the existence of corruption will also prevent us from grasping the realities

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46. *See id.* at 110 (referring to the black-list as one of "two refinements of cruelty").

47. *Id.*

48. *See id.* at 114–18 (describing "the manner in which trades-unions and labor organizations may operate to counteract these economic evils").

49. *Id.* at 100.

50. *See* DUBOFSKY & DULLES, *supra* note 33, at 243 ("Never before [the New Deal] had as much economic and political power seemed within the reach of organized labor."); *id.* at 262 ("Government had swung over to the support of the interests of labor, and so had the courts.").

51. *See* Rajeev Goel & Michael Nelson, *Corruption and Government Size: A Disaggregated Analysis*, 97 PUB. CHOICE 107, 107 (1998) ("[O]ur results show that government size, in particular spending by state governments, does indeed have a strong positive influence on corruption.").

of working-class history."[52] He further discusses corruption that occurs when union leaders become distant from the membership and work to attain personal benefits.[53] Another form of corruption is the effort of the unions to appropriate more benefits not from capitalists but from other workers that are not members of the union and from the general public interest.[54] Finally, he observes the reality that labor unions attracted significant elements of organized crime.[55]

It must be conceded that labor unions played an important historical role in fighting unfair employment practices used by wealthy and greedy monopolists.[56] Concurrently, the methods used by unions were not always honorable, and they sometimes worked against the public interest.[57] As the economy has changed, unions have become less relevant in the United States.[58]

In the words of Melvyn Dubofsky and Foster Dulles,

> [t]he prospects for the American labor movement at the end of the century appeared bleak. Unions again seemed on the defensive, unable to attract members in the growth industries, where employers successfully practiced human resources management and alternative industrial relations, and threatened by job losses in the declining mass-production industries. Once again the nation's rulers in politics and business looked at unions with jaundiced eyes and declared that the conditions and fate of workers should be left to the marketplace. Labor's few friends and advocates in office seemed unable to advance the interests of workers or to offer more than lip service to address their grievances. . . . Unions represented fewer than 8 percent of private sector employees, and barely over 12 percent of the total labor force. The tightening of the labor market, a concomitant decline in unemployment, rising real wages and incomes that benefited workers

52. LE BLANC, *supra* note 38, at 73.

53. *See id.* ("One form of corruption involves the growing distance between leadership and membership in many trade unions, as the leadership 'machine' becomes increasingly distinct from the membership.").

54. *See id.* at 74–75 (explaining that unions work to obtain resources for exclusive groups, not the entire working class, and often work against the interests of others).

55. *See id.* at 75–78 (discussing the history of organized crime and racketeering in the labor movement).

56. *See id.* at 110 ("The fact remained that a majority of U.S. workers experienced significant gains in their living standards and economic security. In some cases unions got them these things. In other cases companies gave them these things in order to persuade employees that they didn't need unions.").

57. *See id.* at 75 ("A more blatant form of corruption soon developed in some sectors of the labor movement. This flowed from the utilization by some unions of violence from organized criminals in order to secure advantages . . . .").

58. *See* DUBOFSKY & DULLES, *supra* note 33, at 412 ("Overall, however, the new unionism appeared to have a dim future.").

> clustered at the bottom of the occupation ladder that had marked the last years of the twentieth century reversed.[59]

One might conclude from this that the modern economy is very different from the economy that gave rise to powerful labor unions. We now have federal and state governments mandating better working conditions,[60] safer working conditions,[61] maternity and paternity leave,[62] minimum wages,[63] medical insurance,[64] and other terms that might have required collective bargaining to achieve in the past. We have antitrust laws that are enforced by the government to deter powerful monopolies, and markets are now more competitive.[65] We have an interstate highway system, inexpensive cars, mass transit, and daily shuttles connecting workers in Boston and Washington with New York by air transport.[66] We have teleworking through the internet.[67] Small businesses can set up shop in remote locations and compete nationally if they have broadband service, and a push is on to

59. *Id.* at 404–05.

60. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2018) (creating new labor condition requirements); The Playground Equipment Safety Act, MICH. COMP. LAWS § 408.681–408.687 (2019) (creating—an example of a state labor law—labor condition requirements to govern playground equipment installation); *see also* STIGLITZ, *supra* note 20, at 457 ("One explanation [for the decline in unions] is that . . . working conditions for workers have improved enormously. Workers see less need for unions.").

61. *See* STIGLITZ, *supra* note 20, at 459–60 ("Today, the Occupational Safety and Health Administration (OSHA) attempts to ensure that workers are not exposed to unnecessary hazards.").

62. *See, e.g.*, Maryland Healthy Working Families Act, MD. CODE ANN., LAB. & EMPL. § 3-1305 (West 2018) (mandating that companies with more than fifteen employees working in Maryland provide paid sick leave which can be used for maternity or paternity leave).

63. *See* Fair Labor Standards Act of 1938 § 203 (establishing a minimum wage).

64. *See* Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2018) (penalizing large employers who do not provide an employee group health insurance plan).

65. *See* STIGLITZ, *supra* note 20, at 405 ("Today antitrust laws are on the books at both state and federal levels [sic] and are enforced by both criminal and civil courts. The government takes action not only to break up existing monopolies but also to prevent firms from obtaining excessive market power.").

66. *See* Mark Potts, *Shuttle Shoot-Out: New York Air Zeros In on Eastern's Institution; Bagels and Buses Promotional Weapons in War Over Fares*, WASH. POST, July 8, 1984, at G1 (describing the history of the New York to Washington shuttle).

67. *See* Faiz Siddiqui, *At Metro, No Clear Plan to Win Back Riders*, WASH. POST, Oct. 1, 2018, at B3 (observing increasing trend toward teleworking).

expand coverage.[68] Employees have much more mobility, and the labor market is much more competitive.[69] Employers find it difficult to hire skilled workers, and as a result, skilled workers can hold out for wages that equal the value of their marginal product.[70] Unions are less important.[71]

II. SOME ECONOMIC PRINCIPLES

A. Theory of the Firm

It will be useful to review a few basic principles of economics. Economics is the study of decision making under conditions of scarcity.[72] Human wants are assumed to be unlimited in the sense that everyone will always prefer more goods to not having more.[73] Scarcity exists because resources are finite.[74] This implies that choosing more of one thing necessarily implies having less of some other thing.[75] Economics studies the allocation of resources under conditions of scarcity.[76]

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68. *See, e.g.*, Brian Fung, *Cities Given Freer Rein to Run Broadband Service*, WASH. POST, Feb. 27, 2015, at A10 (reporting on FCC action to assist smaller communities in providing faster internet service).

69. *See* Thompson, *supra* note 16 and accompanying text.

70. *See* STIGLITZ, *supra* note 20, at 210–11 (discussing the widening wage gap between skilled and unskilled workers).

71. *See* DUBOFSKY & DULLES, *supra* note 33, at 405 (describing the decline of the labor movement and union membership).

72. Mark Klock, *Contrasting the Art of Economic Science with Pseudo-Economic Nonsense: The Distinction Between Reasonable Assumptions and Ridiculous Assumptions*, 37 PEPP. L. REV. 153, 162 (2010) [hereinafter *Contrasting the Art of Economic Science with Pseudo-Economic Nonsense*].

73. *See* PAUL WONNACOTT & RONALD WONNACOTT, ECONOMICS 27 (3d ed. 1986) ("Our material wants are virtually unlimited or insatiable.").

74. *See* Mark Klock, *Are Wastefulness and Flamboyance Really Virtues? Use and Abuse of Economic Analysis*, 71 U. CIN. L. REV. 181, 187–88 (2002) ("[I]t is an undisputed fact that resources are in fact finite.").

75. *See Contrasting the Art of Economic Science with Pseudo-Economic Nonsense*, *supra* note 72, at 162 ("Economists are interested in the problem of choosing between alternatives—situations in which one must *sacrifice* one alternative in order to consume another alternative.").

76. *See* JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 16 (3d ed. 1984) ("The all-pervasive economic problem is that of *scarcity*.").

Microeconomics focuses on equilibrium states in particular markets.[77] Microeconomics has two main branches:[78] the theory of the firm and consumer theory.[79] I will briefly discuss the theory of the firm first.

The first assumption made about firms is that their goal is to maximize profits.[80] This enables us to express a firm's objective as a mathematical function subject to a constraint and use the tools of mathematics to solve the problem.[81] All profit-maximizing firms will select the level of output for which marginal revenue equals marginal cost.[82] If marginal revenue exceeds marginal cost then the firm can increase profits by increasing output.[83] If marginal costs exceed marginal revenue then the firm can increase profits by reducing output.[84]

The performance of the firm will depend on the industry structure.[85] There are two polar opposite structures as well as the continuum in between.[86] At one end of the spectrum we have perfectly competitive firms.[87] The polar opposite structure is monopoly.[88]

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77. *See id.* at 19 ("[M]icroeconomics concentrates mainly upon equilibrium states of particular markets.").

78. *See* VARIAN, *supra* note 27, at xx ("I have followed the standard order of discussing first consumer theory and then producer theory . . . .").

79. *See* R. GLENN HUBBARD & ANTHONY PATRICK O'BRIEN, MICROECONOMICS, 16 (4th ed. 2013) ("Microeconomics issues include explaining how consumers react to changes in product prices and how firms decide what prices to charge for the products they sell.").

80. *See* VARIAN, *supra* note 27, at 345 ("[W]e describe a model of how the firm chooses the amount to produce and the method of production to employ. The model we will use is the model of profit maximization: the firm chooses a production plan so as to maximize its profits.").

81. *Cf.* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 14 (6th ed. 2012) ("Economics is rife with functions: production functions, utility functions, cost functions, social welfare functions, and others. A function is a relationship between two sets of numbers such that for each number in one set, there corresponds exactly one number in the other set.").

82. *See* HIRSHLEIFER, *supra* note 76, at 183 n.6.

83. *See* Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 321 (2002) (describing profit maximization as marginal revenue equaling marginal cost).

84. *See id.*

85. *See* LYNNE PEPALL ET AL., INDUSTRIAL ORGANIZATION 9 (3d ed. 2005) (describing the structure-conduct-performance paradigm).

86. *See id.* at 10 ("[P]erfect competition and monopoly are usefully viewed as opposite ends of a spectrum of market structures along which all markets lie.").

87. *See id.*

88. *See id.*

With a perfectly competitive industry structure, each firm's output is such a small portion of the industry output that altering the firm's output will have no impact on the price of the commodity.[89] In this situation, firms behave as price-takers, meaning that they take the price as set by the market and something that is beyond their control.[90] In a perfectly competitive industry, not only does marginal revenue equal marginal cost for each profit maximizing firm in equilibrium, but marginal revenue also equals the price.[91]

Perfect competition also benefits workers as much as consumers.[92] Under perfect competition, each factor of production will earn its marginal revenue product.[93] This means that workers will be paid a wage equal to the value their last unit work contributes.[94]

For economists, perfect competition is the gold standard for performance.[95] This is because perfectly competitive equilibria will be Pareto efficient.[96] An allocation of resources is said to be Pareto efficient if no one can be made better off without making someone else worse off.[97] An allocation which is not Pareto efficient can be characterized as a situation in which resources are being transferred using a leaky bucket.[98] The wasted leakages represent an inefficiency

89. *See id.* at 22 ("Hence, to be a true perfectly competitive firm, the firm's output must not alter the going price.").

90. *See id.* at 21–22 ("A perfectly competitive firm is a 'price taker.' The price of its product is not something that the perfectly competitive firm chooses. Instead, that price is . . . beyond the influence of any one of the perfectly competitive firms.").

91. *See id.* at 23.

92. *See id.* at 36–37 (explaining that perfect competition maximizes the total surplus to consumers and producers).

93. *See* VARIAN, *supra* note 27, at 422 ("In a long-run equilibrium with zero profits, all of the factors of production are being paid their market price . . . .").

94. *See id.* (explaining that each factor is being paid exactly its market value).

95. *See* PEPALL ET AL., *supra* note 85, at 34–35 ("[I]t is time to try to understand why perfect competition is extolled and pure monopoly is guarded against by law.").

96. *See* Mark Klock, *A Raisin in Reserve:* Horne*, Takings, and the Problem of Government Price Supports*, 2016 MICH. ST. L. REV. 713, 723 [hereinafter *A Raisin in Reserve*] ("[E]very competitive equilibrium is Pareto efficient.").

97. *See id.*

98. *See* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 91 (1975) (drawing the analogy of the tradeoff to taking from the rich to give to the poor but carrying the money in a leaky bucket; the amount of leakage is the loss in efficiency).

which, if recovered, could be used to make people better off without costing anyone else.[99]

There are two fundamental theorems of welfare economics.[100] One is that every perfectly competitive equilibrium is a Pareto efficient allocation of resources.[101] The second is that every Pareto efficient allocation of resources can be achieved by a perfectly competitive equilibrium.[102] This explains why economists desire competitive markets. Concerns about the equity of an allocation of resources can be addressed through taxation and redistribution of resources as long as care is taken not to use a leaky bucket and create Pareto inefficiency.[103]

As mentioned, the polar opposite industry structure is monopoly. A monopoly is characterized by a single firm in the industry.[104] Being the only firm in an industry, the monopoly can easily impact the price by altering output.[105] Like all profit-maximizing firms, a monopolist sets marginal revenue equal to marginal cost.[106] But unlike a competitive firm, price will be greater than the marginal cost.[107] The result is a Pareto inefficient allocation or a deadweight loss.[108] Under

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99. *See A Raisin in Reserve*, *supra* note 96, at 743 ("[C]onsumers loose more than . . . producers gain.").

100. *See id.* at 723 ("[T]wo important theorems of welfare economics are first, that every competitive equilibrium is Pareto efficient, and second, that any Pareto efficient allocation can be achieved via a competitive equilibrium.") (footnotes omitted).

101. *See* RICHARD W. TRESCH, PUBLIC FINANCE 55 (2d ed. 2002) ("The first fundamental theorem of welfare economics states that . . . a perfectly competitive market system generates . . . pareto optimality.").

102. *See* EUGENE SILBERBERG, THE STRUCTURE OF ECONOMICS: A MATHEMATICAL ANALYSIS 481 (1978) ("The second 'theorem' of classical welfare economics is the statement that there is an allocation under perfect competition for any overall Pareto optimum.").

103. *See* STIGLITZ, *supra* note 20, at 325 ("With appropriate redistributions of wealth, the economy can achieve any desired distribution of income.").

104. *See id.* at 336.

105. *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 308 (1998) ("The key difference between a competitive firm and a monopoly is the monopoly's ability to influence the price of its output.").

106. *See* WILLIAM S. BROWN, PRINCIPLES OF ECONOMICS 291 (1995) (explaining that the fundamental rule for profit maximization—producing a quantity at which marginal revenue equals marginal cost—is the same for monopolists and competitive firms).

107. *See id.* at 292.

108. *See* PEPALL ET AL., *supra* note 85, at 39 (showing the deadweight loss as a measure of inefficiency under monopoly).

monopoly, profits will be higher, prices will be higher, and output will be lower than is socially optimal.[109]

There is a related concept called monopsony. Monopoly involves a single seller of a commodity.[110] Monopsony involves a single purchaser of an input.[111] An example is a company town where there is only one purchaser of labor.[112] Monopsony is considered unusual today, but it was more common during the development of the American labor movement.[113] As explained in one text,

> [w]e know that a firm with a monopoly in an output market takes advantage of its market power to reduce the quantity supplied to force up the market price and increase its profits. A firm that has a monopsony in a factor market would employ a similar strategy: It would restrict the quantity of the factor demanded to force down the price of the factor and increase profits. A firm with a monopsony in a labor market will hire fewer workers and pay lower wages than would be the case in a competitive market. Because fewer workers are hired than would be hired in a competitive market, monopsony results in a deadweight loss. Monopoly and monopsony have similar effects on the economy: In both cases, a firm's market power results in a lower equilibrium quantity, a deadweight loss, and a reduction in economic efficiency compared with a competitive market.[114]

Situations in between perfect competition and monopoly are generally referred to as oligopolies.[115] An oligopoly is an industry characterized by a small number of large firms.[116] Each firm controls a sufficiently large portion of output to be able to alter price by changing its output.[117] Oligopolies still create deadweight losses and

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109. *See* BROWN, *supra* note 106, at 295 (monopolies are not efficient because they produce less and charge more than competitive firms).

110. *See* HUBBARD & O'BRIEN, *supra* note 79, at 570 (explaining that monopsony is the case where there is only one buyer of a factor of production).

111. *See id.*

112. *See id.* (providing the example of "a firm in an isolated town . . . that is the sole employer of labor in that location").

113. *See id.* (noting that monopsony is relatively rare, but giving examples of monopsony from the nineteenth and early twentieth centuries).

114. *Id.*

115. *See* VARIAN, *supra* note 27, at 497 (explaining that the situation in between pure competition and monopoly is oligopoly).

116. *See id.* ("[With oligopoly,] there are a number of competitors in the market, but not so many as to regard each of them as having a negligible effect on price.").

117. *See* PEPALL ET AL., *supra* note 85, at 199 (discussing the fact that an oligopolist can impact market price).

earn some monopoly profits, though smaller.[118] In the late-nineteenth century, industries such as steel, oil, and railroad were organized as monopolies or oligopolies.[119] These firms used strong tactics to exploit workers and increase profits.[120]

B. Consumer Theory, Public Goods, and Free-Riders

The dissenting opinion in *Janus* rests heavily on arguments about preventing a problem of free-riders.[121] Before explaining the free-rider problem, it is useful to summarize a bit of consumer theory. Consumers are assumed to be interested in maximizing their own objective function.[122] This is normally called a utility function.[123] Consumers always have limited resources.[124] They cannot have more of everything.[125] In selecting what they will consume and what they will forgo, they make selections such that their marginal utility of

118. *Cf.* W. BRUCE ALLEN ET AL., MANAGERIAL ECONOMICS 334 (7th ed. 2009) ("As a general rule, you[] [would] like to manage as an oligopolist; they realize relatively high profits.").

119. *See* DUBOFSKY & DULLES, *supra* note 33, at 85–86 ("But the immediate driving force of industrial expansion came from a group of visionary, ambitious, and ruthless business leaders and financiers: Jay Gould, E. H. Harriman, and James J. Hill fashioned an empire of railroads, Andrew Carnegie an empire of steel, John D. Rockefeller an empire of oil. The corporation became the accepted form of business organization and, under the leadership of such men, mergers and consolidations were affecting the further nationalizing of business. Gigantic combinations sprang up in scores of industries—in oil, steel, sugar, linseed oil, stoves, and fertilizers. Monopoly was the goal of the industrialist, and a complacent government and complacent courts, wedded to the economic doctrine of laissez faire, gave free rein to policies that rapidly created a concentration of economic wealth and power that the country had never known before.").

120. *See id.* at 85 (calling the industrialists "ruthless").

121. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2490–91 (2018) (Kagan, J., dissenting) (explaining at length the economic incentives for public sector employees to free-ride off dues-paying union members).

122. *See* VARIAN, *supra* note 27, at 3 ("People try to choose the best patterns of consumption that they can afford.").

123. *See id.* at 55 ("The preferences of the consumer are the fundamental description useful for analyzing choice, and utility is simply a way of describing preferences.").

124. *See id.* at 21 (describing the budget constraint of the consumer).

125. *See* STIGLITZ, *supra* note 20, at 24 ("Having more of one thing requires giving up something else. Scarcity is a basic fact of life.").

commodity is equal to its marginal cost.[126] This is analogous to the profit maximization problem faced by firms.[127] If marginal utility exceeds marginal cost, the individual could increase utility by consuming more, and if marginal cost exceeds marginal utility, the individual could increase utility by consuming less.[128]

In a world in which all goods and services are private, this behavior by consumers will contribute to economic efficiency.[129] Examples of private goods and services are steaks, apples, haircuts, medical procedures, and transportation services.[130] However, in the real world we have something called public goods.[131] Examples of public goods are national defense, parks, scenic views, and space exploration.[132]

Public goods have two closely related characteristics.[133] One is non-rivalrous consumption, meaning that one individual's consumption of the good does not leave less available for others.[134] The other characteristic is non-excludability.[135] This means that once the good is provided to one person, there is no effective way of preventing others from consuming it.[136] The problem created by public goods is that the free market will fail.[137] Too little of the public good

126. *See* VARIAN, *supra* note 27, at 78 (explaining that the consumer's marginal rate of substitution will equal the price ratio when the consumer is optimizing).

127. *See* BROWN, *supra* note 106, at 278 (1995) ("[F]irms maximize profits by producing the quantity where marginal revenue equals marginal cost.").

128. *See* VARIAN, *supra* note 27, at 78 (explaining how the consumer can improve her position if the relationship between marginal utility and price is not in balance).

129. *See* TRESCH, *supra* note 101, at 55–56 (explaining that if all consumers behave this way the resulting allocation will be pareto efficient).

130. *See id.* at 156 (distinguishing private goods from public goods by "some person . . . [that] is affected by at least one other person's consumption (supply) of [the] good (factor)").

131. *See* STIGLITZ, *supra* note 20, at 157 (describing public goods).

132. *See* ALLEN ET AL., *supra* note 118, at 585 (describing the nature of public goods and using national defense as a core example).

133. *See* MUELLER, *supra* note 11, at 11 ("A pure public good has two salient characteristics . . . .").

134. *See* STIGLITZ, *supra* note 20, at 157 ("The consumption (or enjoyment) of a public good by one individual does not subtract from that of other individuals (consumption is accordingly said to be nonrivalrous).").

135. *See id.* ("Public goods also have the property of nonexcludability . . . .").

136. *See id.* ("[I]t costs a great deal to exclude any individual from enjoying the benefits of a public good.").

137. *See id.* at 157–59 (explaining that markets will not produce enough public goods).

will be provided in the sense that everyone will want and be willing to pay for more, but no one will want to be the sucker that actually pays.[138] Everyone will have a strong incentive to let someone else pay while consuming the good for free.[139] This is known as the free-rider problem.[140] The solution that economists typically provide for the free-rider problem is to have the government provide the public good and recover the cost of the good through taxes.[141] Note, however, that this can only partially mitigate the problem as all people will not place the same value on the public good.[142] To truly solve the problem in the sense of providing a Pareto efficient allocation, the government would need to know each individual's willingness to pay for the public good.[143] However, everyone will have a strong incentive not to reveal their true desire for the public good.[144] In private markets, consumers reveal their preferences through their purchases.[145] With public goods, there is no revelation of preferences.[146] Some people will want less money allocated to the good.[147] Others will want more money allocated to the good.[148] There is no market mechanism that equilibrates the divergent preferences.[149]

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138. TRESCH, *supra* note 101, at 171 ("If someone does play the 'sucker,' everyone immediately consumes its services as free riders.").

139. *See id.* ("The strategy of free riding is a viable, and preferred, option.").

140. *See* STIGLITZ, *supra* note 20, at 159 ("This is the free-rider aspect of public goods; because it is difficult to preclude anyone from using them, those who benefit from the goods have an incentive to avoid paying for them.").

141. *See* TRESCH, *supra* note 101, at 171 ("[T]he government is forced to purchase the good on behalf of society for there to be any hope of achieving the proper allocation of resources to the good, and perhaps to have any of the good at all . . . .").

142. *See* VARIAN, *supra* note 27, at 694–95 (describing problems that arise when individuals place different values on the public good).

143. *See id.* at 711 ("This would be easy if the decision maker knew the utility functions. Unfortunately, in any realistic situation, the decision maker won't know this. And, as we've seen, the agents may well have an incentive to misrepresent their true utility functions.").

144. *See* TRESCH, *supra* note 101, at 172 ("[C]onsumers have no more incentive to relate their true preferences to the government than they do to the marketplace.").

145. *See* HUBBARD & O'BRIEN, *supra* note 79, at 157 ("This difficulty does not arise with private goods because consumers must reveal their preferences in order to purchase private goods.").

146. *See id.* (stating that one difficulty of public goods is that the individual preferences of consumers are not revealed in the market).

147. *See* VARIAN, *supra* note 27, at 695 (asserting that some citizens might want less national defense).

148. *See id.* (asserting that some citizens might want more national defense).

149. *See id.* ("[T]he decentralized market solutions that economists are fond of don't work very well in allocating public goods.").

In the case under analysis, free riding is assumed to come about by public employees who do not pay union fees while obtaining a benefit from union representation.[150] However, it must be recognized that the modern union for public-sector workers is very different from the traditional union formed to combat exploitation of workers by monopolistic tycoons.[151] There are no profits in the public sector to capture a share of.[152] Public-sector unions merely seek to capture more tax revenue for an exclusive group—public workers.[153] To the extent that public-sector unions benefit those they represent, they are capturing above market wages, benefits, and conditions by taking more from the public purse.[154] The real free-rider problem is then those taxpayers who free-ride off of the activities of anti-tax groups working for more efficient government performance. No individual taxpayer receives much benefit from expending resources to fight tax collection as any one person's share of the tax burden is small.

III. *JANUS*

A. Background—*Abood*, the Case *Janus* Overruled

Janus overturns the 1976 decision made in *Abood v. Detroit Board of Education*.[155] In order to provide some context for *Janus*, it will be useful to review the decision in *Abood*.[156] The Detroit Board of Education entered into a collective-bargaining agreement with a union that gave the union the exclusive right to represent public teachers in

150. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2490 (2018) (Kagan, J., dissenting) (observing "the likelihood of free-riding when fees are absent").

151. *See* DISALVO, *supra* note 9, at 17 ("[U]nions representing government workers are different from those found in the private sphere.").

152. *See id.* at 19 ("[B]ecause government doesn't go out of business, once government workers are unionized, they usually stay unionized.").

153. *See id.* at 22 ("That [public sector unions] benefit government workers themselves by transferring resources to them is clear—that's what unionization is designed to do and it would be surprising if it didn't do it, at least in some measure.").

154. *See id.* at 21 ("Public sector unions can serve their own interests well but often at the cost of the public's interest in a government that costs less and does more.").

155. *See Janus*, 138 S. Ct. at 2486 (majority opinion) ("*Abood* was wrongly decided and is now overruled.").

156. *See generally* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 2448 (permitting public-sector non-union members to be charged union agency fees for specific, administrative purposes but not ideological or political purposes).

Detroit and contained an agency shop clause which required every public teacher that chose not to become a union member to pay a service charge equal to the amount of union dues.[157] Teachers who did not pay were subject to dismissal.[158] The plaintiffs objected, alleging that the union was involved in ideological activities which they objected to and contending that the agency shop clause thereby violated their constitutional rights of freedom of speech and freedom of association.[159] The trial court granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted.[160] The Michigan Court of Appeals reversed, holding that the agency shop clause could violate the Constitution but that the plaintiffs were not entitled to restitution because they did not provide sufficient detail about which of the union's political causes they objected to.[161] The Supreme Court of Michigan declined the appeal.[162]

On appeal, the U.S. Supreme Court vacated the judgment and remanded the case.[163] The Court held that the agency shop clause did violate the Constitution.[164] However, the Court also said that the non-union member teachers could be assessed a charge for a portion of the dues covering elements, such as the costs of representation in collective bargaining agreements and administration of arbitration proceedings.[165] Such compulsory charges by a union engaged in political activities are not unconstitutional under *Abood*.[166] But charges

157. *See Abood*, 431 U.S. at 211–12.

158. *See id.* at 212.

159. *See id.* at 212–13.

160. *See id.* at 213.

161. *See id.* at 215 ("Although recognizing that such expenditures 'could violate plaintiffs' First and Fourteenth Amendment rights,' the court read this Court's more recent decisions to require that an employee who seeks to vindicate such rights must 'make known to the union those causes and candidates to which he objects.' Since the complaints had failed to allege that any such notification had been given, the court held that the plaintiffs were not entitled to restitution of any portion of the service charges." (quoting Abood v. Detroit Bd. of Educ., 230 N.W.2d 322, 327 (Mich. Ct. App. 1975))).

162. *See id.* at 216.

163. *See id.* at 242.

164. *See id.* at 235–36 (stating that union expenditures on political and ideological activities not pertaining to its collective bargaining responsibilities cannot be financed with funds collected from employees who object to those causes).

165. *See id.* at 236 ("There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.").

166. *See id.*

that support lobbying and other political activities are unconstitutional.[167] The *Abood* Court wrote,

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.[168]

Six justices joined in the majority opinion.[169] There was no dissent, but the three justices that did not join the majority concurred in the judgment remanding the case, while expressing the view that even the administrative costs of collective bargaining should not be imposed on non-union members in the public sector unless the state establishes a compelling government interest in requiring employees to pay administrative costs associated with collective bargaining by an exclusive representative.[170] Justice Powell concluded this concurring opinion stating,

> I would adhere to established First Amendment principles and require the State to come forward and demonstrate, as to each union expenditure for which it would exact support from minority employees, that the compelled contribution is necessary to serve overriding governmental objectives. This placement of the burden of litigation, not the Court's, gives appropriate protection to first Amendment rights without sacrificing ends of government that may be deemed important.[171]

This provides the background for *Janus.*

B. Facts and Prior History

The Illinois Public Labor Relations Act (IPLRA) permits state employees to unionize.[172] If a majority of workers in a unit vote in favor of a union, that unit becomes the exclusive bargaining

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167. *See id.* at 234.

168. *Id.* at 235–36.

169. *See id.* at 210, 244; *Abood v. Detroit Board of Education*, JUSTIA, https://supreme.justia.com/cases/federal/us/431/209/ [https://perma.cc/K6M4-2RDC] (last visited Nov. 11, 2019) (indicating that Justices Brennan, White, Marshall, Rehnquist, and Stevens joined in Justice Stewart's majority opinion).

170. *See Abood*, 431 U.S. at 244–45, 264 (Powell, J., concurring).

171. *Id.* at 264.

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

representative for all employees in the unit regardless of whether they join the union.[173] Non-members cannot opt out of representation and must pay the union an agency fee, which is a percentage of the full dues paid by union members.[174] The majority summarized this practice as follows:

> Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."[175]

The Governor of Illinois filed an action in federal district court against the union (American Federation of State, County, and Municipal Employees) asking that the law be declared unconstitutional.[176] The petitioner, Mark Janus, is a child-support specialist employed by the Illinois Department of Healthcare and Family Services.[177] Janus and others moved to intervene in the Governor's action as additional plaintiffs.[178]

According to the Court,

> Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]."[179]

Under the collective bargaining agreement, Janus had to pay the union approximately $535 annually.[180]

The district court dismissed the Governor's complaint for lack of standing but allowed Janus and other employees to file their own complaint to be treated as the original complaint.[181] The employees clearly had standing as the assessment of agency fees created a clear injury.[182] Nevertheless, the district granted the Defendant's motion to

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173. *See id.*
174. *See id.*
175. *Id.* at 2460–61 (citations omitted) (quoting *Abood*, 431 U.S. at 235).
176. *See id.* at 2462.
177. *See id.* at 2461.
178. *See id.* at 2462.
179. *Id.* at 2461 (citations omitted).
180. *Id.*
181. *See id.* at 2462.
182. *See id.*

dismiss on the grounds that the claim was foreclosed by *Abood*.[183] In a short opinion written by Judge Posner, the Court of Appeals for the Seventh Circuit properly noted that it lacked the authority to overturn the Supreme Court's holding in *Abood*.[184] The Petitioners appealed to the U.S. Supreme Court asking that *Abood* be reversed.[185] The Court granted certiorari and did indeed overturn *Abood*.[186]

C. The Majority Opinion

1. *Holding and Critical Facts*

Justice Alito began the opinion with the following introduction:

> Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We concluded that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.
>
> We upheld a similar law in *Abood v. Detroit Bd. of Ed.*, . . . and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.[187]

There were some facts in *Janus* that the majority seemed to find especially important.[188] One is that the designation of a union as the sole representative of all employees significantly restricts the rights of an employee.[189] The employee may not be represented by anyone else and cannot even negotiate directly with the employer on her own initiative.[190] Another factor under the Illinois law is that the designated union is granted broad authority on "pay, wages, hours[,] and other

183. *See id.*
184. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 851 F. 3d 746, 749 (7th Cir. 2017), *rev'd*, 138 S. Ct. 2448 (2018).
185. *See Janus*, 138 S. Ct. at 2462.
186. *See id.* at 2486.
187. *Id.* at 2459–60 (citations omitted).
188. *See id.* at 2460.
189. *See id.*
190. *See id.*

conditions of employment."[191] This authority also reaches matters under the IPLRA called policy matters which include issues such as "merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies."[192] According to the majority (and not disputed by the dissent), "Illinois law does not specify in detail which expenditures are chargeable and which are not."[193] The majority wrote,

> As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." The total chargeable amount for nonmembers was 78.06% of full union dues.[194]

Unions are required to give nonmembers what is called a *Hudson* notice in order that the employees assessed agency fees may determine the propriety of the charges being assessed.[195] Nonmember employees have the fees deducted from their pay without their consent.[196] The majority provides examples of the information given in the *Hudson* notice, and it is only a list of total expenses and chargeable expenses by broad categories, such as "Salary and Benefits," "Postage and Freight," "Telephone," "Office Printing, Supplies, and Advertising," etc.[197] The majority asks, "How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures."[198]

Another important fact for the majority was the plaintiff's concern about the financial condition of Illinois and differences in the

191. *Id.*
192. *Id.*
193. *Id.* at 2461.
194. *Id.* (citations omitted).
195. *See* Chicago Teachers' Union, Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986) ("We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee.").
196. *See Janus*, 138 S. Ct. at 2461.
197. *Id.* at 2482.
198. *Id.*

fiscal solutions offered by politicians and unions.[199] Citing the poor condition of Illinois's financial health, the majority states,

> Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget problems. As of 2013, Illinois had nearly $160 billion in unfunded pension and retiree healthcare liabilities. By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills. We are told that a "quarter of the budget is now devoted to paying down" those liabilities. These problems and others led Moody's and S&P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U.S. state."[200]

The Governor had proposed partially addressing budget problems through collective bargaining with the Union "on matters such as health-insurance benefits and holiday, overtime, and promotion policies."[201] When these suggestions were presented, the Union countered with proposals for wage and tax increases.[202] This factual backdrop appears to have been important in the majority's recognition of the plaintiff's right to completely disassociate himself from the Union.[203]

There is another empirical fact that influenced the majority.[204] The majority notes that in twenty-eight states and the federal government, agency fees are not permitted, yet public employees in those jurisdictions receive exclusive representation by unions.[205] This is a strong empirical fact that indicates that the free-rider problem, whereby public-sector employees can get "benefits" of union representation without paying for it, does not threaten the existence of the union.[206] The majority explains,

> The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members. The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, and about 400,000

199. *See id.* at 2474–76 (discussing the poor financial condition of Illinois, the public concern over this, and the divergence between proposals by the Governor and American Federation of State, County, and Municipal Employees to address the situation).

200. *Id.* at 2474–75 (footnotes omitted).

201. *Id.* at 2475.

202. *See id.*

203. *See id.*

204. *See id.* at 2466.

205. *See id.*

206. *See id.*

> are union members. Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees.[207]

Perhaps it should also be noted that the plaintiff in this case objects to the characterization of free-rider.[208] "He argues that he is not a free-rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[209] However, whether he is or is not shanghaied is not really important to the majority.[210]

With that background, the majority's legal analysis can be examined.[211] There are three major legal issues.[212] One is whether the IPLRA impinges on public employees' free speech rights.[213] Another legal issue is the level of scrutiny to be applied toward any government interest in restricting those rights.[214] The third is the conditions for overturning precedent.[215] However, before those issues are discussed, the Court did have to address a relatively trivial issue regarding jurisdiction under Article III of the Constitution.[216]

2. *Article III Jurisdiction*

The respondents argued that the district court lacked jurisdiction because the petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit."[217] The Court explains,

> This argument is clearly wrong. It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended

207. *Id.* (footnotes omitted) (citations omitted).
208. *See id.*
209. *Id.*
210. *See id.* ("Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest.").
211. *See id.*
212. *See id.* at 2460–62, 2463–69, 2478–86.
213. *See id.* at 2460–62.
214. *See id.* at 2463–69.
215. *See id.* at 2478–86.
216. *See id.* at 2462–63.
217. *Id.* at 2462.

> complaint as the operative complaint in a new lawsuit. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. Therefore, he clearly has Article III standing. It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.[218]

The respondents cited only one case to support their jurisdictional argument—*United States ex rel. Texas Portland Cement Co. v. McCord*.[219] "That case concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. One creditor filed suit before the 6-month starting date, but another intervened within the 6-to-12 month window."[220] The *McCord* Court held that the intervention did not cure the jurisdictionally deficient original complaint.[221] However, the *Janus* majority properly noted that this opinion actually works against the respondents because the Court had contemplated the possibility of treating an intervention as an original complaint when all of the conditions for an original complaint are met, "*e.g.*, filing a separate complaint and properly serving the defendants."[222] The Court noted that this actually happened in this case so it can properly address the merits.[223]

The dissent did not expressly concur with this part of the opinion.[224] However, the dissent was silent on the issue.[225] One can only conclude that all nine justices agreed on this point.[226]

3. *Infringing Free Speech*

The next issue addressed by the majority was whether the IPLRA interfered with the petitioner's First Amendment rights.[227] There is really no question that the agency-shop agreement impinges

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218. *Id.* (citations omitted).
219. *See id.* (citing U.S. *ex rel.* Tex. Portland Cement Co. v. McCord, 233 U.S. 157 (1914)).
220. *Id.* at 2463 (citations omitted).
221. *See id.*
222. *Id.*
223. *See id.*
224. *See id.* at 2487–502 (Kagan, J. dissenting).
225. *See id.*
226. *See id.*
227. *See id.* at 2460–62 (majority opinion).

on an individual's right to freely associate with whomever they wish.[228] The majority couches this discussion by questioning "whether *Abood*'s holding is consistent with standard First Amendment principles."[229] Before writing at length about First Amendment principles, the Court cites dicta from several recent cases disparaging *Abood.*[230] In *Knox v. Service Employees*, the Court said *Abood's* holding is "something of an anomaly."[231] In *Harris v. Quinn*, the Court said *Abood*'s "analysis is questionable on several grounds."[232] The *Janus* majority writes, "We have therefore refused to extend *Abood* to situations where it does not squarely control, while leaving for another day the question whether *Abood* should be overruled. We now address that question."[233] The majority then begins to make its most compelling case for overruling *Abood*.[234]

The majority begins this section writing, "The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[235] The justices then cite a laundry list of cases supporting free speech rights and quote several passages.[236] "Freedom of association . . . plainly presupposes a freedom not to associate."[237] "[F]orced associations that burden protected speech are impermissible."[238] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*"[239]

The majority continues to develop its arguments for overturning *Abood* writing,

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228. *See id.* at 2478.
229. *Id.*
230. *See id.* at 2483 (describing cases that refer to *Abood* as "anomal[ies]").
231. Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012).
232. Harris v. Quinn, 573 U.S. 616, 635 (2014).
233. *Janus*, 138 S. Ct. at 2463 (citations omitted).
234. *See id.*
235. *Id.* (citations omitted).
236. *See id.* (listing several United States Supreme Court cases supporting free speech).
237. *Id.* (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).
238. *Id.* (citing Pacific Gas & Elec. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 12 (1986)).
239. *Id.* (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

> Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.
>
> Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.[240]

The majority then discusses positive public policy objectives behind free speech, such as promotion of democracy and the search for truth.[241] "Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends."[242] The majority also observes that compelling speech forces individuals to betray their true beliefs, and this is demeaning.[243]

The majority then discusses the situation where a person is compelled to subsidize the speech of others.[244] Although it is not binding authority, the majority cites the opinion of Thomas Jefferson.[245] "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."[246] The majority again cites both *Knox* and *Harris* for the proposition that compulsory subsidization of others' private speech interferes with an individual's free speech rights.[247]

The government does have potentially legitimate interests in the agency-shop agreement. One cause that is advanced is the promotion of "labor peace."[248] The majority observes,

> In *Abood*, the main defense of the agency-fee arrangement was that it served the State's interest in "labor peace." By "labor peace," the *Abood* Court

240. *Id.* at 2463–64.
241. *See id.* at 2464.
242. *Id.*
243. *See id.* ("When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . .").
244. *See id.*
245. *See id.*
246. *Id.*
247. *See id.* at 2464–65.
248. *Id.* at 2465 ("We assume that 'labor peace,' in this sense of the term, is a compelling state interest . . . .").

> meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." And a settlement with one union would be "subject to attack from [a] rival labor organizatio[n]."[249]

A second government interest for the agency-shop clause that was advanced by the respondents is the elimination of free-riders.[250] Free-riders are the non-members of the union who could otherwise benefit from the union's collective bargaining activities without having to pay for them.[251]

4. *Level of Scrutiny*

Given that agency fees impinge on free speech but that the government might have interests in requiring agency fees, the majority next begins a discussion of the standard of review to be applied to the government interests.[252] The possibilities are rational basis, exacting scrutiny, and strict scrutiny.[253] The majority rejects the rational basis standard.[254] They do not decide the question of whether strict scrutiny is required, instead holding that the government's interests fail under even the less rigorous exacting scrutiny standard.[255]

The standard of review is critical in constitutional rights cases.[256] The government always or nearly always prevails when rational basis scrutiny is applied.[257] Rational basis scrutiny means the government

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249. *Id.* (citations omitted).

250. *See id.* at 2466.

251. *See id.*

252. *See id.* at 2464 ("Our free speech cases have identified 'levels of scrutiny' to be applied in different contexts . . . .").

253. *See id.* at 2465 (discussing rational basis, exacting scrutiny, and strict scrutiny).

254. *See id.* ("This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here.").

255. *See id.* ("[W]e again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard . . . .").

256. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 713–14 (4th ed. 2013) (describing the level of scrutiny as an important question).

257. *See id.* at 714 ("The rational basis test is enormously deferential to the government[,] and only rarely have laws been declared unconstitutional for failing to meet this level of review.").

must merely have a rational basis for connecting its means to its ends.[258] For a challenge to a law to prevail under rational basis analysis, the challenger must show that either the government's goal is not legitimate or that there is no rational basis between the law and the goal.[259] At the other extreme, strict scrutiny is often fatal to the government.[260] Under strict scrutiny, the government must show that it has a compelling interest and that the law is narrowly tailored to remedy the compelling interests.[261] Situations that provide compelling interests are typically when a state has passed a law interfering in a fundamental right, such as voting, or a law that discriminates against a suspect class, such as a racial minority.[262] In between, we have exacting scrutiny or intermediate scrutiny.[263] In this case the regulation must be substantially related to an important government interest.[264]

The dissent proposes the application of rational basis scrutiny, but the majority contends that "[t]his form of minimal scrutiny is foreign to our free-speech jurisprudence and we reject it here."[265] Petitioner Janus argues that the law should be subject to strict scrutiny, but the majority finds that it cannot withstand even exacting scrutiny.[266] The Court notes recent cases, particularly *Knox* and *Harris*,

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258. *See id.* ("Under rational basis review, a law will be upheld if it is rationally related to a legitimate government purpose.").

259. *See id.* ("The challenger has the burden of proof under rational basis review.").

260. *See id.* at 713 ("Strict scrutiny is [virtually always] fatal to the challenged law."); *see also* Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the strict scrutiny analysis emerging from the Supreme Court's aggressive approach to equal protection as "scrutiny that [is] 'strict' in theory and *fatal* in fact") (emphasis added).

261. *See* CHEMERINSKY, *supra* note 256, at 713 ("Under strict scrutiny, a law is upheld if it is proved necessary to achieve a compelling government purpose. The government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative.") (footnote omitted).

262. *See id.* at 746 ("[S]trict scrutiny is appropriate for race and national origin classifications."); *id.* at 938 ("If a right is deemed fundamental, the government must present a compelling interest to justify an infringement.").

263. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018) (noting that exacting scrutiny is a less demanding test than strict scrutiny).

264. *See id.* ("Under 'exacting' scrutiny, we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310 (2012))).

265. *Id.*

266. *See id.*

that have considered the level of scrutiny to be applied in assessing the constitutionality of agency fees.[267]

The first of these cases is *Knox v. Service Employees International Union, Local 1000*.[268] This case involved compulsory subsidies of commercial speech.[269] The union permitted nonmembers to object to charges just once per year.[270] After the union sent out its annual *Hudson* notice and the period for objecting expired, the union assessed a temporary increase in fees to support political campaigns and later permitted objectors to opt out and request a refund.[271] The majority held that this behavior could not withstand exacting scrutiny.[272] Justices Sotomayor and Ginsburg concurred in the judgment but wrote separately to express the opinion that the majority raised questions about prior agency fee jurisprudence, which were not necessary to resolve the case.[273] Justices Kagan and Breyer dissented, arguing that an opt-out provision to request a refund after fees were collected did not violate First Amendment rights.[274] The *Janus* Court stated, "Under 'exacting' scrutiny, we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"[275]

The second case cited by the majority on this point is *Harris v. Quinn*.[276] Here a state-run Medicaid program permitted participants to

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267. *See id.* at 2464.

268. 567 U.S. 298, 310 (2012) (discussing the level of scrutiny required in cases regarding agency fees).

269. *See id.* (discussing the application of a less demanding standard for laws affecting commercial speech).

270. *See id.* at 315 (mentioning the one opportunity per year).

271. *See id.* at 303–07 (describing the facts around the union's notifications).

272. *See id.* at 322 ("[W]hen a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent.").

273. *See id.* at 323 (Sotomayor, J., concurring).

274. *See id.* at 342 (Breyer, J., dissenting) ("[T]he Court, which held recently that the Constitution *permits* a State to impose an opt-in requirement, has never said that it *mandates* such a requirement. There is no good reason for the Court suddenly to enter the debate, much less now to decide that the Constitution resolves it.") (citation omitted).

275. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018).

276. *See id.* ("In *Harris*, the second of these cases, we again found that an agency-fee requirement failed 'exacting scrutiny.' But we questioned whether that test provides sufficient protection for free speech rights, since 'it is apparent that the speech compelled' in agency-fee cases 'is not commercial speech.'") (citation omitted).

hire a personal assistant.[277] Illinois law declared all personal assistants in the program to be employees of the State of Illinois solely for the purposes of the IPLRA and subject to the agency fee requirement of the public employees' union.[278] The majority distinguished these personal assistants from full-fledged public employees.[279] The majority then, without overruling *Abood*, went to great lengths to criticize *Abood* and declared that it would not expand *Abood* to cover situations where it was not directly controlling.[280] The majority then declared that the agency fee requirement as applied to physicians' assistants did not pass exacting scrutiny.[281] The same group of justices that dissented in *Janus* also dissented in *Harris*.[282] These justices expressed some relief that the majority did not overrule *Abood*, but they disagreed with the majority's dicta undermining *Abood*.[283] They further disagreed with the majority's attempt to differentiate between personal assistants working under the state-run Medicaid program and what the majority termed "full-fledged public employees."[284]

After citing these cases, the Court decided to revisit *Abood* and apply exacting scrutiny.[285] Obviously, the Court could not side with the petitioners without overruling *Abood* so they felt compelled to analyze the decision.[286] The Court was willing to assume that

277. *See* Harris v. Quinn, 134 S. Ct. 2618, 2623–24 (2014).

278. *See id.* at 2626.

279. *See id.* at 2627 ("[T]he State of Illinois now asks us to sanction what amounts to 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.").

280. *See generally id.* (criticizing the foundations of *Abood* but concluding that it does not apply to the petitioners).

281. *Id.* at 2639.

282. *Compare id.* at 2644 (Kagan, J., dissenting), *with* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting) (identifying Justices Breyer, Ginsburg, and Sotomayor who joined in Justice Kagan's dissenting opinions in both *Harris* and *Janus*).

283. *See Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting) ("[O]ne aspect of today's opinion is cause for satisfaction, though hardly applause.").

284. *See id.* at 2648 ("But this Court's cases provide no warrant for holding that joint public employees are not real ones."); *id.* at 2634 (majority opinion) (fleshing-out the concept of a "full-fledged public employee").

285. *See Janus*, 138 S. Ct. at 2465 ("In the remainder of this part of our opinion . . . we will apply this [exacting scrutiny] standard to the justifications for agency fees adopted by the Court in *Abood*.").

286. *See id.* (deciding that Illinois's regulatory scheme cannot survive a permissive standard of review and finding assumptions made in *Abood* to be unfounded).

maintaining peace between the state and its employees is a compelling state interest, but the majority wrote,

> *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood's* fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true.[287]

The Court's reasoning that agency fees and exclusive representation are not linked is based on the fact that in the federal government and the twenty-eight states that prohibit agency fees, public-sector unions still thrive.[288] The Court suggests two possible justifications for compelling agency fees for non-members.[289] One is that unions would not be willing to provide representation without agency fees.[290] The other is that it would be unfair to require unions to represent employees who do not pay agency fees.[291] The Court rejects both of these as unsound.[292]

With respect to the first argument, the Court writes,

> First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought. Why is this so?
>
> Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union.[293]

The Court also observes in a footnote that unions aggressively campaign for the right to represent employees in jurisdictions prohibiting agency fees.[294]

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287. *Id.*
288. *Id.* at 2466.
289. *Id.* at 2467.
290. *See id.*
291. *See id.*
292. *See id.* ("Neither of these arguments is sound.").
293. *Id.* (citations omitted).
294. *See id.* at 2467 n.5.

As for the second argument, the Court cites many additional benefits of a union's right to exclusively represent public workers.[295] The only duty that the union must provide in exchange is the duty not to "act solely in the interests of [the union's] own members."[296] According to the Court, "[t]hese benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers."[297]

After concluding that shop-clause agreements do not substantially serve an important government interest and agency fees cannot be justified to prevent free-riding, the Court discusses alternative arguments presented.[298] The most significant discussion here is about an idea that employers can place some restrictions on speech.[299] The case cited in support of this proposition is *Pickering v. Board of Education of Township High School District 205*.[300] In *Pickering*, a teacher claimed that his constitutional rights were violated when he wrote a public letter criticizing the school board about school spending decisions.[301] Although the Court sided with the teacher, it did acknowledge that the state has strong interests in regulating the speech of employees as employees which differs from regulating the speech of employees as members of the public.[302] The Court held that a balance must be struck.[303] Defenders of agency fees would contend that compelling employees to support collective bargaining costs balances in favor of the state.[304]

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295. *See id.* ("Even without agency fees, designation as the exclusive representative confers many benefits.").

296. *Id.* at 2467–68.

297. *Id.* at 2467.

298. *See id.* at 2469 ("Implicitly acknowledging the weakness of *Abood*'s own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.").

299. *See id.* at 2469–78 (discussing possible limits on speech for public employees).

300. *See id.* at 2471 ("The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering* . . . ." (citing Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968))).

301. *See Pickering*, 391 U.S. at 564–65.

302. *See id.* at 568 ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

303. *See id.* ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

304. *See Janus*, 138 S. Ct. at 2471.

The majority was not impressed with this line of argument.[305] The Court observed,

> As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 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." That aside has no bearing on the agency-fee issue here.[306]

The Court went on to discuss that even if it were to apply *Pickering*, it would not work in favor of the labor union.[307] This is because the matters negotiated in collective bargaining involve matters that are of clear public concern.[308] Issues such as tenure for teachers, measurement of student performance, and merit pay over seniority are matters taken up in collective bargaining, which individuals asserting free speech rights might sincerely desire not to support.[309] Citing a variety of union positions, the Court observes,

> Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound "value and concern to the public." We have often recognized that such speech "occupies the highest rung of the hierarchy of First Amendment values" and merits "special protection."
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> . . . .
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> . . . In short, the union speech at issue in this case is overwhelmingly of substantial public concern.[310]

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305. *See id.* at 2472.

306. *Id.* (citations omitted).

307. *See id.* at 2474 ("Even if we were to apply some form of *Pickering*, Illinois'[s] agency-fee arrangement would not survive.").

308. *See id.* at 2477 ("In short, the union speech at issue in this case is overwhelmingly of substantial public concern.").

309. *See id.* at 2475 ("In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. What unions have to say on these matters in the context of collective bargaining is of great public importance.") (citations omitted); *id.* at 2475–76 (continuing with the example of educational policies by noting that education is usually the largest element of state and local government expenditures).

310. *Id.* at 2476–77 (footnotes omitted) (citations omitted).

The Court concludes that interference with First Amendment rights inflicted by agency fees cannot be justified by the State's interests.[311]

5. *Stare Decisis*

The final question to be addressed by the majority is whether stare decisis should prevent them from overruling *Abood*.[312] Quoting from *Payne v. Tennessee*, the Court observes, "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[313] The majority states that Court precedent can only be changed when there are strong reasons to do so and that stare decisis is "not an inexorable command."[314] The Court writes,

> The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."
>
> Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.[315]

The Court then began with a discussion about the quality of the reasoning in *Abood*.[316] Much of the majority's opinion parallels the majority opinion in the 2014 case of *Harris*.[317] In *Harris*, the majority interpreted the *Abood* Court as having thought itself bound by two prior cases—*Railway Employees v. Hanson* and *Machinists v.*

311. *See id.* at 2478 ("[W]e conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise.").

312. *See id.* ("There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*.").

313. *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

314. *Id.* (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

315. *Id.* at 2478–79 (citations omitted).

316. *See id.* at 2479.

317. *See id.* ("We will summarize, but not repeat, *Harris*'s lengthy discussion of the issue.").

Street.[318] *Hanson* had upheld a provision in the Railway Labor Act (RLA) that permitted a private union to negotiate a union-shop agreement requiring all employees of the private enterprise to join the union.[319] There was no real First Amendment issue in *Hanson*; however, the employees made a "facial constitutional challenge" claiming a "union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights."[320]

The *Harris* majority contended that Hanson's First Amendment analysis was inadequate because it dismissed the employees' argument with a single sentence.[321] That sentence read, "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."[322] According to the majority in *Harris*,

> [t]his explanation was remarkable for two reasons. First, the Court had never previously held that compulsory membership in and the payment of dues to an integrated bar was constitutional, and the constitutionality of such a requirement was hardly a foregone conclusion. Indeed, that issue did not reach the Court until five years later, and it produced a plurality opinion and four separate writings.
>
> Second, in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment *did not permit* compulsory membership in an integrated bar.[323]

In *Street*, the second case which the *Abood* Court relied on, the Court found it unnecessary to address constitutional questions.[324] Instead, the Court interpreted the RLA "as not vesting the unions with

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318. *See id.* ("*Abood* went wrong at the start when it concluded that two prior decisions, [*Hanson* and *Street*,] 'appear[ed] to require validation of the agency-shop agreement before [the Court].'" (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226 (1977))).

319. *See id.* ("In *Hanson*, the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses." (citing Railway Emps. Dep't v. Hanson, 351 U.S. 225, 233–35 (1956))).

320. *Hanson*, 351 U.S. at 236.

321. *See* Harris v. Quinn, 134 S. Ct. 2618, 2629 (2014).

322. *Id.* (quoting *Hanson*, 351 U.S. at 238).

323. *Id.* (citations omitted).

324. *See Janus*, 138 S. Ct. at 2479 ("For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue." (quoting Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749–50, 768–69 (1961))).

unlimited power to spend exacted money."[325] The *Street* Court stated that the RLA "is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[326] The *Harris* majority summarized its criticism of the *Abood* Court's reasoning in the following paragraph:

> The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union. As we have explained, *Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years later. Surely a First Amendment issue of this importance deserved better treatment.[327]

The majority believes that there is a difference between a union-shop agreement in the private sector and one in the public sector.[328] The majority continues their criticism of *Abood*, noting that it did not anticipate the conceptual difficulty of separating and adequately reporting chargeable and nonchargeable expenses.[329] Perhaps most importantly to the majority is that "a critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop. As we will explain . . . this assumption is unwarranted."[330]

The *Janus* majority summarizes without fully repeating the lengthy discussion in *Harris*.[331] The *Janus* majority does provide additional, lengthy discussion of the empirical fact that agency fees are not required and are not manageable.[332] The Court concludes that there are good reasons to overturn *Abood*, calling the case an "anomaly" in First Amendment jurisprudence.[333] The Court juxtaposes

325. *Street*, 367 U.S. at 768.
326. *Id.* at 768–69.
327. *Harris*, 134 S. Ct. at 2632.
328. *See Janus*, 138 S. Ct. at 2483 ("It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977.").
329. *See id.* at 2480 ("*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' . . . or nonchargeable." (quoting *Harris*, 134 S. Ct. at 2632)).
330. *Harris*, 134 S. Ct. at 2634.
331. *See Janus*, 138 S. Ct. at 2479.
332. *See id.* at 2480.
333. *Id.* at 2483–84.

Abood with cases outlawing requirements to compel public employees to join a political party.[334] The Court states,

> It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. . . . By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.[335]

Next, the majority discusses whether other arguments for reliance on precedent could be a sufficient basis for upholding *Abood*.[336] In the view of the majority, there are several reasons that it does not. One argument advanced by the dissent is that many contracts were negotiated with agency fees in place.[337] To this the majority states, "[I]t would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time."[338]

The Court also contends that *Abood*'s distinction between chargeable and non-chargeable expenses does not provide a clear standard, "so arguments for reliance based on its clarity are misplaced."[339] Additionally, the Court contends that "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*."[340] The idea that economic actors should anticipate Supreme Court decisions overturning Court precedent is a weak one, but the Court does provide some mitigation against this criticism by pointing out that in this case the union contract contained the typical severability clause so that entire contracts are not voided by this decision.[341]

The Court concludes this line of argument:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to

334. *See id.* at 2484.
335. *Id.*
336. *See id.* ("In some cases, reliance provides a strong reason for adhering to established law . . . .").
337. *See id.* 2499 (Kagan, J., dissenting) ("The Court today wreaks havoc on entrenched legislative and contractual arrangements.").
338. *Id.* at 2484 (majority opinion).
339. *Id.* (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2086 (2018)).
340. *Id.*
341. *See id.* at 2485.

> estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.
>
> All these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "special justification[s]" for overruling *Abood*.[342]

D. The Dissenting Opinion

The dissenting opinion was very harsh, writing, "[M]aybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."[343] The dissent expressed polar opposite views on *Abood*.[344] Their strongest argument is stare decisis, and they pitch it at the ending of their introduction:

> Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today.[345]

One major difference between the majority and the dissenters is that the majority casts the case as one of interference in individuals' private rights of free speech in matters of public concern whereas the dissent casts the case as one of the government regulating employees' free speech "in aid of managing its workforce to effectively provide public services."[346] The dissent argued that *Abood* struck a stable balance between these conflicting rights.[347] "Far from an 'anomaly,'

342. *Id.* at 2485–86.
343. *Id.* at 2501 (Kagan, J., dissenting).
344. *See id.* at 2487–88 (disagreeing with the entirety of the majority opinion).
345. *Id.*
346. *Id.* at 2497. *Compare id.* at 2477 (majority opinion) ("In short, the union speech at issue in this case is overwhelmingly of substantial public concern."), *with id.* at 2498 (Kagan, J., dissenting) ("*Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech.").
347. *See id.* at 2487.

the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer."[348]

The dissent takes strong exception to the majority's contention that *Abood* was poorly reasoned.[349] The dissent bases its constitutional analysis of *Abood* on three initial points:

> First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. And third agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others.[350]

According to the dissent, the majority hangs everything on the third point.[351] The dissent observes authoritatively that the majority does not take issue with the first point.[352] They also cite support in the majority opinion that the majority is willing to assume the second point for argument's sake.[353] Interestingly, the dissent does not dispute the majority's empirical observation that agency fees are not required to maintain effective exclusive representation.[354] Instead, it appears that the dissent believed the law should stand if it is reasonable for the government to believe that agency fees are necessary to maintain a single-labor representative for public employees.[355] The dissent writes,

> But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of

348. *Id.*

349. *See id.* at 2489 ("Unlike the majority, I see nothing 'questionable' about *Abood*'s analysis.").

350. *Id.* (citations omitted).

351. *See id.* at 2489–90 ("So the majority stakes everything on the third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees.").

352. *See id.* at 2489.

353. *See id.*

354. *See id.* at 2480 (majority opinion).

355. *See id.* at 2487–502 (Kagan, J., dissenting).

> nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold duties; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood*'s rule allowing fair-share agreements. That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.[356]

This analysis appears to be a concession that the IPLRA can only survive under rational-basis scrutiny because the dissent is arguing that it is only the government's reasonable belief that matters, not empirical evidence. Under exacting scrutiny, the law must have a substantial relation to an important interest.[357] If empirical evidence demonstrates that agency fees are not necessary, the substantial relationship is broken.[358]

The dissent places much weight on what it calls "*Abood*'s economic insight."[359] The dissent argues that without agency fees, unions will not want to provide effective representation due to the free-riding of non-members.[360] To this point the dissent writes,

> [T]he majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.[361]

In the eyes of the dissent, the theoretical possibility that free-riding will frustrate the government's interest in having employees effectively represented by a single negotiator is a sufficient interest to impose some First Amendment infringement.[362] The dissent then turns

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356. *Id.* at 2490.

357. *See* Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2283 ("[M]easures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than necessary to serve that interest.").

358. *See Janus*, 138 S. Ct. at 2467–69.

359. *Id.* at 2448.

360. *See id.* at 2490 (Kagan, J., dissenting).

361. *Id.* at 2491 (footnote omitted) (citation omitted).

362. *See id.*

to minimizing that level of infringement.[363] The dissent argues that compelled speech does not necessarily create greater harm than restricted speech.[364] They observe that the majority cites only one case in support of this proposition and that it is "possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs."[365] The dissent argues that the standard rule is that there should be no significance to the difference between compelled speech and compelled silence.[366] They write,

> So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force.[367]

The dissent advocates for a much more deferential treatment toward the government's interest in regulating speech of employees.[368] The dissent cites *Pickering* for the proposition that a public employer can curtail employees' expressions.[369] The dissent asserts there must be a balance, "enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests."[370]

Having made their arguments that *Abood* was neither wrongly decided nor poorly reasoned, the dissenting justices made an independent argument that stare decisis should control.[371] Justice Kagan writes,

> *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective

363. *See id.* at 2494.

364. *See id.* ("[T]he majority's distinction between compelling and restricting speech also lacks force.").

365. *Id.*

366. *See id.*

367. *Id.* at 2495.

368. *See id.* at 2492–97.

369. *See id.* ("The [*Pickering*] Court could not have cared less whether the speech at issue was 'important.' It instead asked the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.") (citation omitted).

370. *Id.* at 2493.

371. *See id.* at 2495.

> bargaining (which the government can charge to all employees) and those of political activities (which it cannot).[372]

The dissent also takes exception to the Court's characterization of *Abood* as "an outlier among our First Amendment cases."[373] Justice Kagan asserts that that claim fails and accuses the Court of waging a six-year campaign to overturn *Abood*.[374] In particularly harsh language she writes,

> Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."[375]

The dissent continues with a discussion of the Court's questioning the workability of *Abood*.[376] Conceding that the line-drawing between a union's political activities and collective-bargaining activities is not crystal clear, she asserts that "as exercises of constitutional linedrawing go, *Abood* stands well above average."[377] She also notes that there has been tranquility with respect to this issue because few cases have been brought challenging the line-drawing.[378] But the majority countered this noting that due to the difficulty in unravelling *Hudson* notices, "it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases."[379]

The dissent concludes with accusations that the Court has weaponized the First Amendment and trivialized stare decisis.[380]

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372. *Id.* at 2497.

373. *Id.* at 2482 (majority opinion); *see also id.* at 2491 (Kagan, J., dissenting) ("In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its worker's speech. . . . *Abood* fits neatly with that caselaw, in both reasoning and result.").

374. *See id.* at 2498 ("That claim fails most spectacularly . . . ."); *id.* at 2487 ("Today, the Court succeeds in its 6-year campaign to reverse *Abood*.").

375. *Id.* at 2498.

376. *See id.*

377. *See id.*

378. *See id.*

379. *See id.* at 2482 n.26 (majority opinion).

380. *See id.* at 2501 (Kagan, J., dissenting).

IV. PUBLIC CHOICE AND ANALYSIS

A. Public Choice

Two important fields of economics relating to law and policy analysis are public finance and public choice. Public finance, also known as public sector economics, deals with government intervention in the economy under conditions of market failure.[381] It assumes the existence of a benevolent and idealistic entity intervening.[382] Public choice, on the other hand, is simply the application of economic analysis to political science.[383] Public choice has some relevant insights for *Janus*, so I will provide a little background.

A good summary is provided by Professor Richard Tresch:

> [James] Buchanan described the foundations of the public choice perspective in his Nobel lecture delivered in Stockholm, Sweden, in 1986. The disagreements with the mainstream view begin at the most basic level, with the assumptions about how people behave. According to Buchanan, the mainstream theory assumes that people are essentially schizophrenic. They are self-interested in their economic lives, but when they turn to the government in their political lives they suddenly become other-interested and consider the broader social or public interest in efficiency and equity. Nonsense, say the public choice advocates. People do not change their stripes; they remain self-interested in their political lives as well. They turn to government only because they cannot get what they want for themselves in the marketplace, and they view the government as just another venue for seeking their own objectives. Buchanan refers to individuals' interactions with the government as fiscal exchanges, to mirror the self-interested motivations of standard market exchanges. Using the government in the pursuit of self-interest is seen as entirely appropriate and legitimate.[384]

In the view of a leading public choice scholar, Dennis Mueller, the difference between public finance and public choice is that the literature of the first pertains to how governments should behave in a world of nirvana and the later literature deals with how governments

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381. *See* TRESCH, *supra* note 101, at 8 ("Government activity gains its legitimacy through market failure.").

382. *See id.* at 12 ("The government is not supposed to have a will of its own, in the sense that government officials are not permitted to interject their own preferences into the design of policy. Instead, the proper role of the government is that of an agent acting on behalf of the citizens.").

383. *See* MUELLER, *supra* note 11, at 1 ("Public choice can be defined as the economic study of nonmarket decision making, or simply the application of economics to political science.").

384. TRESCH, *supra* note 101, at 26 (footnote omitted).

actually behave.[385] In the real world, special interest groups and politically powerful interests exploit the government to capture resources for themselves.[386] A paper supporting this reality was written by another Nobel Laureate while working as the chief economist at the World Bank.[387] Joseph Stiglitz observed that policy changes that would improve efficiency frequently could not get negotiated because government officials acted in their self-interest rather than the public interest.[388]

One of the important insights that comes out of public choice is that well-defined constituencies with common interests are more easily able to utilize the government to work for their interests or capture benefits.[389] There is an implicit free-rider problem in organizing a large group to defend itself against a concentrated interest.[390] For example, gun owners are a self-selecting group who are highly motivated to maintain their ownership of guns. Non-gun owners are clearly a less cohesive group. Although a majority of them might favor more regulations pertaining to guns, they will not be motivated and incentivized to expend their own resources organizing an effective opposition to gun owners. Another example frequently

385. *See* MUELLER, *supra* note 11, at 4 ("[T]he economics literature has often made the implicit assumptions that these [market] failures could be corrected at zero cost. The government is seen as an omniscient and benevolent institution dictating taxes, subsidies, and quantities so as to achieve a Pareto-optimal allocation of resources. In the sixties, a large segment of the public choice literature began to challenge this 'nirvana model' of government. This literature examines not how governments may or ought to behave, but how they do behave. It reveals that governments, too, can fail in certain ways.").

386. *See id.* at 62 ("There are many forms of redistribution in the industrial democracies that benefit middle and upper income groups, and are difficult to reconcile with the various voluntary-redistribution hypotheses discussed . . . , so many in fact that some scholars regard *all* government activity as selfishly and redistributively motivated . . . .").

387. *See* Joseph Stiglitz, *Distinguished Lecture on Economics: The Private Uses of Public Interests: Incentives and Institutions*, 12 J. ECON. PERSP. 3, 3 (1998).

388. *See id.* at 21 ("In this lecture, I have stressed the difficulties of achieving Pareto improvements. What I have really shown is how hard it is to construct these Pareto improvements amidst the problems of commitment and the dynamic bargaining games that characterize the political process.").

389. *See* MUELLER, *supra* note 11, at 347 ("The legislature takes from those who are least capable of resisting the demands for wealth transfers and gives to those who are best organized for pressing their demands.").

390. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1971) ("[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*.").

given in the public choice is the capture theory, where government regulators are captured by the powerful industries they attempt to regulate in order to benefit the industry over the public.[391] In another paper, I referred to the Food and Drug Administration as "Apologists for Carcinogens, Teratogens, and Adulterated Drugs."[392] In yet another, I discuss how agricultural interests organize to create price supports at a great cost to consumers.[393]

The relevance of public choice to *Janus* should be apparent. Unionized public sector employees are clearly a highly cohesive interest group.[394] Their self-interest is in obtaining better than market wages, health insurance, pensions, leave, and every other type of compensation.[395] They differ from private sector unions in many ways, but one important difference is that they get "two bites at the apple."[396] They can negotiate with their employer through collective bargaining, but they can also exert influence on their employer through the political process.[397] Furthermore, their employer is not under the same economic pressure that private employers are.[398] Private employers must make a profit or go out of business and are at increased risk during economic downturns.[399] Public employers have access to tax

391. *See* Mark Klock, *Dead Hands—Poison Catalyst or Strength-Enhancing Megavitamin? An Analysis of the Benefits of Managerial Protection and the Detriments of Judicial Interference*, 2001 COLUM. BUS. L. REV. 67, 126 (2001) ("The capture theory of regulation posits that the regulated have the incentives and ability to capture control of the regulator and use the regulator to protect them.").

392. Mark Klock, *A Modest Proposal to Rename the FDA: Apologists for Carcinogens, Teratogens, and Adulterated Drugs*, 36 ARIZ. ST. L.J. 1161, 1161 (2004).

393. *See A Raisin in Reserve*, *supra* note 96, at 754 ("Agricultural interests, seeking to obtain prices above the free market level for their produce, spend resources to obtain government subsidies or price supports and collect monopoly rents.").

394. *See* DISALVO, *supra* note 9, at 5 (suggesting that organizing tenured government employees into interest groups makes it difficult to maintain fiscal integrity).

395. *See* FACTOR, *supra* note 10, at 4–5 (discussing reports that federal government workers are overcompensated relative to private sector peers).

396. DISALVO, *supra* note 9, at 20 ("[P]ublic sector unions get to collectively bargain with their employers (the first bite) and then they get to influence those on the other side of the bargaining table through electioneering and lobbying (the second bite).").

397. *See id.* at 21 ("Public sector unions . . . can win things at the bargaining table through political activity.").

398. *See id.* at 186 (discussing the fact that continued existence in the private sector is constantly threatened by competition).

399. *See id.*

revenue and inexpensive credit markets.[400] All of this makes it difficult for the public to defend itself against public sector employee unions. One commentator observes, "These unions are cynical exploiters of the taxpayer buck for their own advantage. When these unions win, all taxpayers lose—including members of private sector unions, who suffer higher taxes along with the rest of us when government grows."[401]

B. Commentary and Analysis

In another paper, I wrote that in introductory economics students are taught that there are no free lunches, everything involves a cost—a sacrifice of an alternative choice.[402] But I also wrote that in advanced economics we teach that free-rides are abundant.[403] These are not inconsistent. What happens in the case of free-riding is that the cost is borne by someone else. Nevertheless, just because free-riding can create problems that are difficult for laissez-fair markets to solve, we do not necessarily improve social welfare by devising methods to prohibit all free-riding. If Canadians feel safer because of the nuclear deterrence capabilities of the United States, what is the harm in that?

If overcoming free-riders to promote labor peace is sufficient grounds to compel public employees to subsidize unions, then the government could compel senior citizens to join the American Association of Retired People to promote peace with seniors.[404] And it could compel gun owners to join the National Rifle Association to promote peace with the gun owning citizenry.[405] It does not seem that

400. *See id.* at 17 ("Another difference [between public and private sector unions] is that governments are able to borrow more cheaply—think of tax-free municipal bonds—and can access new revenue through taxation.").

401. FACTOR, *supra* note 10, at xii.

402. *See* Mark Klock, *The Virtue of Home Ownership and the Vice of Poorly Secured Lending: The Great Financial Crisis of 2008 as an Unintended Consequence of Warm-Hearted and Bond-Headed Ideas*, 45 ARIZ. ST. L.J. 135, 136 (2013).

403. *See id.*

404. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2466 (2018) ("Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object?").

405. *See id.* at 2467 ("In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.").

preventing free-riding in and of itself is a sufficient justification for interference with First Amendment rights—there must be more.[406]

At the time of the *Abood* decision, there were two alternative, possible results. The Court could have permitted the union to continue to assess full union dues to nonmembers, or the Court could have prohibited all assessments against nonmembers. The Court did neither of these and adopted an intermediate approach attempting to draw a line between costs of collective bargaining and costs of political activity.[407] The fact that the *Abood* Court rejected the union position clearly indicates that a First Amendment problem exists with compelling individuals to pay an association that they do not wish to associate with.[408] So the relevant question is whether or not the Court's line-drawing was sufficient to overcome the constitutional issue.

The answer to this question turns on the level of scrutiny applicable—rational basis or exacting scrutiny. But the *Abood* Court did not consider this question, having concluded that such an inquiry was unnecessary based on the rulings in *Hanson* and *Street*.[409] In a lengthy concurring opinion written by Justice Powell and joined by Chief Justice Burger and Justice Blackmun, it was stated, "[T]he Court avoids such an inquiry on the ground that it is foreclosed by this Court's decisions in [*Hanson* and *Street*]. With all respect, the Court's reliance on these cases, which concerned only congressional authorization of unionshop agreements in the private sector, is misplaced."[410] This concurring opinion proceeds to argue that there should be a high level of scrutiny in authorizing agency fees.[411] It should be so high that "the State should bear the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests."[412] Justice Powell

406. *See id.* (stating that merely benefiting from a group's action does justify the government compelling people to join the group).

407. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) ("There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.").

408. *See id.* at 235–36 (stating that the Constitution prohibits financing political activities with funds compelled or coerced from objecting employees).

409. *See* Harris v. Quinn, 134 S. Ct. 2618, 2631 (2014) ("This [*Abood*] Court treated the First Amendment issue as largely settled by *Hanson* and *Street*.").

410. *Abood*, 431 U.S. at 245 (Powell, J., concurring).

411. *See id.* at 259 ("[E]ven in public employment, 'a significant impairment of First Amendment rights must survive exacting scrutiny.'" (quoting Elrod v. Burns, 427 U.S. 356, 362 (1976) (plurality opinion))).

412. *Id.* at 255.

argues that nothing less than exacting scrutiny can be used to assess the constitutionality of a significant impairment of First Amendment rights.[413]

One can make an argument that the *Abood* Court did not know it was wrong at the time because it believed that agency fees were necessary to promote a government interest in labor peace, but that in hindsight it was wrongly decided given that millions of public-sector employees have been effectively represented by unions in the absence of agency fees. Then the next legal question is whether stare decisis should prevail.

Obviously, stare decisis is not rigid.[414] If it were, we would still have segregated schools under *Plessy v. Ferguson*,[415] and Thurgood Marshall would have lost the case of *Brown v. Board of Education*.[416] As both sides agree, there must be compelling grounds to reverse precedent.[417] The two sides differ strongly as to whether those compelling grounds exist.[418] The dissent perceives the plaintiff's First Amendment interests to be smaller and the state's interests larger.[419] However, the state's interests are premised on what has proven to be an unfounded assertion that agency fees are necessary to maintain a single negotiator for employees.[420]

As the majority notes, even where agency fees are not allowed, unions aggressively campaign for the right to be the exclusive

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413. *See id.* at 260 ("The justifications offered by the Detroit Board of Education must be tested under this settled standard of review.").

414. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) ("But as we have often recognized, *stare decisis* is 'not an inexorable command.'" (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009))).

415. 163 U.S. 537, 550–51 (1896) (holding that the Louisiana requirement of separate railway cars for different races does not violate the Constitution).

416. 347 U.S. 483, 495 (1954) (overruling the separate but equal doctrine).

417. *Compare Janus*, 138 S. Ct. at 2478 ("We will not overturn a past decision unless there are strong grounds for doing so."), *with id.* at 2501 (Kagan, J., dissenting) ("Departures from *stare decisis* are supposed to be 'exceptional action[s]' demanding 'special justification[]' . . . ." (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984))).

418. *Compare id.* at 2486 (majority opinion) ("All these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the 'special justification[s]' for overruling *Abood*."), *with id.* at 2497 (Kagan, J., dissenting) ("And the majority does not have anything close.").

419. *See id.* at 2489 (Kagan, J., dissenting) (discussing the state's interests).

420. *See id.* at 2483 (majority opinion) (noting that experience has shown agency shop agreements are unnecessary to support exclusive representation in the public sector).

negotiator for public employees.[421] The dissent's image of the world is inconsistent with reality.[422]

On some level, the case comes down to beliefs about the relative importance and balancing of the individual's right to disassociate herself from anything to do with a labor union and the government's interest in creating a stronger and more powerful union to negotiate on behalf of public employees. For an economist, it is difficult to imagine that the government has any legitimate interest in this. A public-sector labor union creates monopoly and monopsony conditions. It is the sole provider of a permanent labor force to the government, and the government is the only purchaser of this labor. These organization forms are inefficient.[423]

The dissent believes that the underlying economic problem is the financial hardship that public-sector labor unions will face if they cannot compel free-riders to pay for representation.[424] This view assumes that public-sector unions fulfill the same role as private-sector unions negotiating with large companies with monopoly power. That is an incorrect view.[425] Public-sector unions work to divert public resources to public employees in the form of higher wages, better benefits, more job security, and similar perks.[426] One way to promote

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421. *See id.* at 2467 n.5.

422. *See id.* ("[I]t is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees."); *id.* at 2477 ("[A]mple experience [about agency shops] . . . shows that this is questionable."); *id.* at 2480 ("[D]esignation of a union as exclusive representative and the imposition of agency fees are not inextricably linked."); *id.* at 2483 ("But, as already noted, experience [around agency shops] has shown otherwise.").

423. *See* HUBBARD & O'BRIEN, *supra* note 79, at 570 ("Monopoly and monopsony have similar effects on the economy: In both cases, a firm's market power results in a lower equilibrium quantity, a deadweight loss, and a reduction in economic efficiency compared with a competitive market.").

424. *See Janus*, 138 S. Ct. at 2490 (Kagan, J., dissenting) (arguing that the absence of agency fees "creates a collective action problem of nightmarish proportions").

425. *See id.* at 2483 (majority opinion) (discussing differences between public-sector union growth and private sector unionism and the fiscal problems created by the public-sector unions); DISALVO, *supra* note 9, at 17 ("[U]nions representing government workers are different from those found in the private sphere[, and] . . . [t]he economic, legal, and moral case for the two species of unions is very different.").

426. *See* FACTOR, *supra* note 10, at xvi ("Outrageous concessions to the unions don't drive the government out of business and make you lose your job, like they do in the private sector. The government will *always* be in business. Unwieldy union contracts just make the government immensely bigger and more expensive—and more burdensome to the taxpayer.").

job security is to utilize a system that rewards seniority over performance.[427] One way to rapidly increase seniority is to expand the bureaucracy and hire more new workers to do more jobs, even if the work being done is not that valuable.[428] We end up with workers whose job is merely to watch other people work.[429] Public-sector unions are not remedying some unfair advantage held by evil monopolistic tycoons. It is reasonable to grant some deference to the sovereign states and assume they will treat their employees fairly in the absence of a collective bargaining representative. Public-sector unions are not working for the public interest.[430] They are working for the self-interest of public-sector employees.[431] This is where the more significant free-rider problem comes into play. The interests of public-

427. *See* DISALVO, *supra* note 9, at 35 (discussing how public-sector unions oppose pay-for-performance and other accountability measures and instead fight for rules favoring seniority and entrenchment).

428. *See* MUELLER, *supra* note 11, at 523 ("Government may grow not only because increasing expenditures are demanded by citizens, interest groups, or legislators, but also because they are demanded by the bureaucracy supplying government programs. The government bureaucracies are an independent force, which possibly may lead to increasing government size.").

429. Kimberly Kraweic, *Building the Basic Course Around Intra-Firm Relations*, 34 GA. L. REV. 785, 790–91 n.18 (2000) (noting in the footnote that this tendency—the trend toward having people watch other people for a living—was observed long ago by Theodore Geissel, better known as Dr. Seuss: "Oh, the jobs people work at! Out west, near Hawtch-Hawtch, there's a Hawtch-Hawtcher Bee-Watcher. His job is to watch . . . [and] to keep both his eyes on the lazy town bee. A bee that is watched will work harder, you see. Well . . . he watched and he watched. But, in spite of his watch, that bee didn't work any harder. Not mawtch. So then somebody said, 'Our old bee-watching man just isn't bee-watching as hard as he can. He ought to be watched by another Hawtch-Hawtcher. The thing that we need is a Bee-Watcher-Watcher.' WELL . . . The Bee-Watcher-Watcher watched the Bee-Watcher. He didn't watch well. So another Hawtch-Hawtcher had to come in as a Watch-Watcher-Watcher. And today all the Hawtchers who live in Hawtch-Hawtch are watching on Watch-Watcher-Watchering-Watch, Watch-Watching the Watcher who's watching that bee. You're not a Hawtch-Hawtcher. You're lucky, you see." (quoting DR. SEUSS, DID I EVER TELL YOU HOW LUCKY YOU ARE? 26–29 (1973))); *see also* Ronald Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 35 STAN. L. REV. 819, 833–44 (1981).

430. *See* DISALVO, *supra* note 9, at 34 ("Unlike unions in the private sector, government unions have incentives to push for more public employment, which increases their ranks, fills their coffers with new dues, and makes them more powerful. Therefore, they consistently push for higher taxes and more government activity. Over the long term, this can stifle economic growth and pit public and private sector unions against each other.").

431. *See* FACTOR, *supra* note 10, at xxi ("It is important to realize that government employee unions, like all unions, are private organizations. Unions feed off the largesse of government for the benefit of their members and union bosses.").

sector employees are relatively cohesive and easy to coordinate, while the interests of the taxpaying public are not. No individual member of the public will find it worth their time and money to campaign against better job security for public-sector employees.

CONCLUSION

Justice Kagan asserts that the majority has dictated an end to some great "energetic policy debate" where some jurisdictions elect to allow agency fees where others do not.[432] This is a laughable idea that could only be formed inside an ivory tower perspective. Anyone who does not have their head buried in the sand would anticipate that where agency fees are allowed it is the result of some level of corruption in the political process where unions effectively lobbied and supported (if not bribed) sympathetic candidates.[433]

One can think of monitoring inefficiency in the public sector as a public good.[434] This is a public good that no one will pay for in the private market because their costs exceed their private benefit and they cannot exclude the nonpaying members of the public from the benefit.[435] So unless the government can be trusted to provide unbiased monitoring of its own performance, we will have a socially suboptimal level of effort expended to reduce inefficiency in government. This is the real free-rider problem that should be concerning. The gloom and doom of devastation brought on public-sector unions that is predicted by the dissent is simply fantasy, as the majority pointed out with the empirical fact that millions of public-sector employees are effectively represented by unions in the absence of agency fees.

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432. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

433. *See* DISALVO, *supra* note 9, at 57–59 (discussing how public-sector unions work to elect their own managers who will treat them favorably); FACTOR, *supra* note 10, at xv (discussing corrupt system of government employee unions channeling campaign contributions to elected officials in exchange for favorable legislation).

434. *See* DISALVO, *supra* note 9, at 211 ("Getting government to be responsible, accountable, and reasonably effective is hard.").

435. *See id.* at 164 ("Public sector unions are mobilized to defend the benefits that have accrued to their members, while comparatively unorganized taxpayers see little benefit from taking on these issues.").