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Joseph E. Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?*, **96 Neb. L. Rev. 62** (2017).

Late last year, in *Janus v. AFSCME*, the Supreme Court held unconstitutional all union-security clauses in public-sector collective-bargaining agreements. Union-security clauses are contractual provisions that oblige union bargaining unit members to pay agency fees – that portion of union dues that pays for collective-bargaining-related activities such as contract negotiations and grievance-arbitration. In finding that such clauses violate the First Amendment, the Court, in a 5-4 decision, overturned *Abood v. Detroit Board of Education*, a 41-year old precedent with no dissenting opinion. Many labor scholars (including Joseph Slater) and activists predict that *Janus* will have a large economic impact on unions because, under a doctrine known as the duty of fair representation, unions must represent employees whether those employees pay full dues, agency fees, or no dues. These thinkers thus predict that unions won't be able to collect as much money to represent all employees. As a corollary, diminished union treasuries will foreseeably harm the Democratic Party insofar as unions tend to give more to the Democrats than to other political parties.

For these reasons, Professor Slater's thoroughly researched, brilliantly analyzed, and well-written article, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?*, presents an important question: Given that the Court has unceremoniously disturbed stare decisis to declare all public-sector union-security clauses unconstitutional, will it find a way to declare all private-sector union-security clauses unconstitutional by adopting a broad theory of state action? Professor Slater correctly concludes that such a conclusion would be incoherent in theory and unworkable in practice. This is because to conclude that all such clauses in private-sector contracts are unconstitutional, the Court would have to adopt an unbounded theory of state action, which would effectively erase the state-action requirement from constitutional analysis and obliterate the public-private law distinction that is so fundamental to our constitution.

Why then is this such an important article? As Slater points out, there have been only two areas of private-sector law with which the Court has experimented in broadening the catchment area of state action: racial discrimination qua *Shelley v. Kramer* (finding state action in private, racially restrictive covenants) and union-security clauses qua *Railway Employees' Department v. Hanson* (holding that union security clauses under the Railway Labor Act implicated the First Amendment, but failing to find a First Amendment violation).[1] Until recently, courts had shut down both areas from further expansion. The concern then is this: Will a conservative court, which is hostile to unions, use this expansive theory of state action to declare private-sector union security clauses unconstitutional?

Slater's argument is cogent in its simplicity: "union security clauses in the private sector do not implicate the First Amendment because there is no state action." This is true under modern theories of state action, which are restrictive, and some historical but experimental theories suggested under *Hanson*, grounded in the National Labor Relations Act's (NLRA) and Railway Labor Act's (RLA) exclusive representation model, and under *Keller v. State Bar of California*. *Hanson*'s theory – that the RLA involved state action because it preempts state right-to-work laws – is incorrect because "federal preemption of state laws, regarding voluntary provisions in employment or other private contracts, does not create state action." If this were true, then Title VII preemption of discriminatory contract clauses, for example, would create constitutional as well as statutory causes of action. Similarly, exclusivity – the NLRA and RLA principle that majority unions represent all employees in the bargaining unit, not only those who voted for the union – does not implicate state action because those labor statutes do not mandate union formation, require union-

security clauses, or reward parties for adopting such clauses. In other words, there is no forced-association problem. This argument was articulated most prominently in Justice Black's dissent in *Machinists v. Street*, where the majority avoided the constitutional issue by deciding the case on statutory grounds. Finally, in *Keller*, where the Court analogized attorney bar association fees to union dues and bar activities to union activities, the Court held that compulsory bar dues may not be used for political expenditures but may be spent on "activities connected with disciplining members of the bar or proposing ethical codes for the profession." Slater also debunks the corollary to this argument, that unions are state actors insofar as the state grants them monopolistic powers. Slater not only explains that unions have limited power[2] but also points out that "a government grant of monopoly powers to an otherwise private party does not make that party into a state actor even if the government also heavily regulates that party" (P. 84.)

Once again, if these arguments are so obvious, then why is this article so important? Slater suggests that the cases that might be used as precedent – *Shelley* and *Steele*– are better understood as occurring at a time when advocates and courts were willing to "ben[d] state action theory beyond any bounds that were previously recognized or would be recognized later, in an attempt to address the fundamental evil of racism in private economic transactions before statutes barred such discrimination" (P. 90). Accordingly, in these highly polarized times, were conservatives tempted to "ben[d] state action theory beyond any bounds that were previously recognized or would be recognized later, in an attempt to address [what they view as] the fundamental evil of [forced unionism] in private economic transactions," Slater's extensive research lays bare all the reasons that private-sector union-security clauses do not amount to state action. Accordingly, if an anti-union plaintiff attempts to put forward these arguments, reviewing courts will not be tempted to follow plaintiffs down this path, for fear of creating a greater evil – the elimination of state action once liberals recapture the Court. For example, an affirmative-action clause such as the one at issue in *Steelworkers v. Weber*, might not only create a statutory cause of action under Title VII but also a constitutional cause of action under the Fifth and Fourteenth Amendments.

In any event, Slater's argument is important because the National Right to Work Foundation and other conservative or anti-union groups continue to argue that union-security clauses in the private sector are unconstitutional. In short, these cases remind us to be careful for what we wish. We might get it and much more.

1. Subsequent cases under the Railway Labor Act (*Machinists v. Street*) and National Labor Relations Act (*Beck*), do not find state action, but do engage in something akin to a constitutional avoidance analysis to arrive at their result. Only once, in *Hanson*, has the Supreme Court found that union security clauses under the RLA are covered by the First Amendment. The court later backed off that conclusion in *Street*, a statutory interpretation case, using constitutional avoidance type language. Further, as Slater explains, not only has the rationale for finding state action in *Hanson* not been repeated in any other case, that rationale, on its face, would not apply to the NLRA. Specifically, *Hanson* found state action because the RLA does not allow right-to-work rules. Even if that were a good reason for finding state action, which it is not, it would not apply to the NLRA because the NLRA expressly allows states to adopt right-to-work rules.
2. "NLRA gives unions the power to make contract proposals and requires employers to bargain in good faith over them, but unions do not have the power to unilaterally implement their proposals or to require the employer to adopt any of their proposal" (P. 84.)

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