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Labor Unions, Solidarity, and Money

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BY
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I. INTRODUCTION

For labor, 2018 was a year of highs and lows. A wave of teachers' strikes organized at the grassroots level in "red" states traditionally hostile to public-sector labor unionism and collective bargaining garnered widespread support, obtaining wage increases for public school teachers and staff, shoring up health care benefits, and stemming the tide of disinvestment in public schools.[1] Some hailed the solidarity inspired by the strikes as indicia of the revitalization of a more militant labor movement.[2] The passions

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1. *See* Holly Yan, *Here's What Teachers Accomplished with Their Protests This Year*, CNN (May 29, 2018), <https://www.cnn.com/2018/05/29/us/what-teachers-won-and-lost/index. html> (cataloguing results achieved by public sector teachers' strikes in West Virginia, Oklahoma, Kentucky, Colorado, Arizona, and North Carolina).

2. *See, e.g.*, Sarah Jaffe, *The Rising Ghosts of Labor in the West Virginia Teacher Strike*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/opinion/west-virginia-teacher-strike.html>; Gregory Krieg, *Is the West Virginia Teachers' Strike the Future of American Labor*?, CNN

animated by the strikes were credited with inspiring a range of progressive political shifts, as well, including the rollback of a right to work law in Missouri[3] and new challengers running on education platforms aimed at increasing investment in public education.[4] Less than three months later, the Supreme Court issued its long-awaited decision in *Janus v. AFSCME, Council 31* invalidating agency fees that public sector unions relied on to cover costs related to collective bargaining, contract administration and grievance adjustment.[5] *Janus* was widely seen as a major blow to union coffers, to the Democratic Party (which has traditionally benefitted from contributions by labor unions), and to other progressive causes historically supported by labor.[6]

The legal arguments raised by unions, their amici, and proposals made before and after *Janus* shed light on the American labor movement's vision of solidarity. The dominant vision of labor solidarity in America is closely linked to the ideology of business unionism – the idea that unions exist as service organizations charged with negotiating and administering a labor contract that yields the maximum economic advantage for the majority of workers in a single bargaining unit. Solidarity in this kind of regime means that workers stand together as an economic unit to eliminate competition between workers that tends to drive wages, benefits and working conditions to their lowest levels. At bottom, it is a solidarity based primarily on common economic interests – on money.

Straining to salvage agency fees and union funding, the unions'

(Mar. 5, 2018), <https://www.cnn.com/2018/03/05/politics/west-virginia-teachers-strike-future-unions/index.html>.

3. Alexia Fernandez Campbell, *Missouri Voters Just Blocked the Right-to-Work Law Republicans Passed to Weaken Labor Unions*, VOX (Aug. 7, 2018), <https://www.vox.com/2018/8/7/17655690/missouri-election-proposition-a-right-to-work> (crediting teachers with leading "the revolt against such pro-business policies" like right to work laws); Noam Scheiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/07/business/economy/missouri-labor-right-to-work.html> (noting that the Missouri win for labor "aligns with other tentative signs of a labor revival [including] . . . polls showing rising popular support for unions and an uptick in membership in teachers' unions after walkouts in several states during the past school year").

4. Kevin Robillard, *An Attack from Teachers Unions Has the Colorado Governor's Race All Shook Up*, HUFFINGTON POST (June 25, 2018), <https://www.huffingtonpost.com/entry/an-attack-from-a-teachers-union-has-the-colorado-governors-race-all-shook-up_us_5b2fc8cce4b03 21a01d25d97>.

5. 138 S. Ct. 2448, 2461 (2018).

6. Noam Scheiber, *Supreme Court Labor Decision Wasn't Just a Loss for Unions*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/business/economy/unions-funding-political.html> (describing impact of *Janus* on advocacy groups that receive millions per year from public-sector unions in support of their advocacy for progressive causes, including immigrants' rights, civil rights, voter turn out, and producing ads supporting Democratic candidates; public-sector unions also provide substantial support for think tanks that produce economic data on workers, wages, and employment, including the well-respected Economic Policy Institute); *see infra* notes 113-14 and accompanying text.

arguments in *Janus* reaffirm the ideology of business unionism and the characterization of unions as economic agents rather than political entities. The unions argued that compelled subsidization via agency fees did not implicate workers' First Amendment interests because the union's speech at the bargaining table and in contract administration contexts dealt only with "prosaic" "'bread-and-butter' employment issues" rather than with significant matters of public concern.[7] Harvard law professor Benjamin Sachs presented an alternative argument, filing an amicus brief positing that because workers have no genuine choice but to pay fees under an agency fee arrangement, the fees should be treated as a payment directly by the employer to the union; only an accounting formalism places the amounts in workers' paychecks as "wages" before they are "passed through" to the union.[8] Sachs' brief built upon a law review article in which he had advanced a claim even more clearly consistent with a business unionism-influenced understanding of solidarity: agency fees ought to be treated as union property rather than as the property of individual workers, since they wouldn't exist at all but for the union's efforts to extract the wage premium out of which agency fees are paid.[9]

The arguments raised in *Janus* are, at a legal level, not surprising. American labor law reflects and reinforces the ideology of business unionism, and the agency fee doctrine approved by the Court in *Abood v. Detroit Board of Education* is perhaps the clearest illustration of that.[10] Under *Abood*, it was constitutionally permissible for unions to negotiate agency fee arrangements by which non-union members within the bargaining unit could be required to pay a service charge (agency fee) to the union to subsidize the cost of collective bargaining and contract

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7. Brief for Respondent AFSCME Council 31 at 32, 42-44, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), <https://www.supremecourt.gov/DocketPDF/16/16-1466/27640/20180112104519993_Resp%20Merits%20Brief%20Janus%20v%20AFSCME.pdf>; *see also* Brief of AFL-CIO as *Amicus Curaie* in Support of Respondents at 14-16, 18-19, *Janus*, 138 S. Ct. 2448 (No. 16-1466), <https://www.supremecourt.gov/DocketPDF/16/16-1466/28219/20180118094330743_16-1466%20bsac%20AFL-CIO.pdf> (arguing that the First Amendment is not implicated where a compelled subsidy is linked to a legitimate government purpose, such as promoting labor peace, and observing that negotiating a collective agreement does not involve public discourse where the subjects of bargaining are limited to the workplace).

8. Brief of Professor Bejamin I. Sachs as *Amicus Curaie* in Support of Respondent at 10-11, *Janus*, 138 S. Ct. 2448 (No. 16-1466), <https://www.supremecourt.gov/DocketPDF/16/16-1466/28399/20180119101926057_Sachs%20Amicus%20Brief.pdf>.

9. Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1048-50, 1062-63 (2018). AFSCME's brief in *Janus* also cited Sachs' law review article for the proposition that "[t]he Constitution is indifferent to whether the government finances its access to worker input through lower salaries, a surtax on all workers, or fair-share fees." Brief for Respondent AFSCME, Council 31, *supra* note 7, at 33.

10. 431 U.S. 209 (1977).

administration.[11] Chargeable fees were limited to expenditures "for the purposes of collective bargaining, contract administration, and grievance adjustment."[12] Thus, the unions were constrained by law to embrace a legal identity as service organizations engaged in transactional relationships with workers over a narrow range of economic subjects, but in exchange they received a significant financial subsidy.

Unfortunately, these arguments reinforce the public perception of unions as special interest groups focused exclusively on extracting money from the state to line union coffers and benefit public sector workers. While the public may not read legal briefs, the framing of the arguments influences media coverage and is now generating momentum for legislative reform Professor Sachs' argument has spawned post-*Janus* proposals that states supportive of public-sector unionism enact legislation requiring public-sector employers to pay directly to unions an amount equivalent to the agency fees previously paid by workers, thereby cutting workers out of the loop and eliminating the First Amendment compelled speech concern.[13]

These proposals are, in our view, short-sighted. By making worker engagement largely irrelevant to union survival, bringing back agency fee arrangements in another form risks encouraging unions to disinvest in mobilizing workers, eschewing the kind of solidarity that undergirds real power. The proposals also undermine incentives for internal union democracy and a participative culture. And they reinforce a narrow vision of transactional unionism in which unions function as service organizations focused only on money, rather than political entities that advocate for a more just, equitable, and democratic world. Finally, the reliance on law to secure union funding through compulsory fees ignores the lessons we should learn from labor's greatest successes in 2018 – that real power comes from grassroots mobilization of workers and citizens alike in a movement that transcends workplace boundaries and politicizes workers' struggles. Staking unions' future on law is a losing gamble, particularly in light of the

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11. *Id.* at 211.

12. *Id.* at 225-26.

13. *See, e.g.*, Daniel Hemel & David Louk, *How to Save Public Sector Unions*, SLATE (June 27, 2018, 12:23 PM), <https://slate.com/news-and-politics/2018/06/supreme-courts-janus-decision-how-blue-states-can-still-save-public-sector-unions.html> (suggesting that states re- place fair share fee laws with provisions that require or allow public sector employers to subsidize unions directly); Benjamin Sachs & Sharon Block, *How Democratic Lawmakers Should Help Unions Reeling from the Janus Decision*, VOX (June 27, 2018), <https:// www.vox. com/the-big-idea/2018/6/27/17510046/public-unions-janus-reforms-fees-decline-reform-supreme -court-hope> (advocating for enactment of state laws requiring direct payment of an amount equivalent to agency fees to unions); Aaron Tang, How to Undo Janus: A User-Friendly Guide (June 27, 2018) (unpublished manuscript available for download at <https://papers.ssrn. com/sol3/papers.cfm?abstract_id=3189206>) (proposing direct reimburse- ment scheme to avoid First Amendment challenges).

conservative sentiment that grips the United States in the Trump era. Instead, we should embrace a different vision of solidarity rooted in bottom-up mobilization, traditions of participative democracy, and appeals that engage the community. Activist Staughton Lynd dubbed this "solidarity unionism" – grounded in the affective bonds between persons and reflecting the simple insight that "an 'injury to one is an injury to all,'" he saw it as "the best and most important thing about the labor movement."[14]

This essay expands on why we believe that in some ways, the *Janus* Court got things right: public-sector unions are political entities, they do (and should) engage in advocacy for reform that transcends bread-and-butter employment issues, and funding should come from workers and others who support those agendas. It is time to divorce the need for funding from the meaning of solidarity and to relinquish the vision of unions as service organizations that has indirectly cabined labor's mission, undermined incentives to do vigorous internal organizing and to work toward members' full engagement, and contributed to an outsized reliance on law – particularly the exclusivity doctrine and the principle of majority rule – as the source of worker power.

Part II explains how labor law developed to cabin unionism in ways that have pulled it away from its social justice origins and made it less appealing to the public, to labor's potential allies, and ultimately to workers. Part III explores how the dominant understanding of unions as economic agents led to a battle over money in *Janus* and argues that a continuing defense of business unionism and exclusivity is misguided because it cedes too much power to a legal system that has been fundamentally hostile to labor. Part IV looks to the West Virginia teachers' strike of 2018 for inspiration and the basis for a more enduring solidarity.

Part V concludes. Our take-away is threefold: First, unions should not allow solidarity to be defined by money. Second, especially when under

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14. STAUGHTON LYND, SOLIDARITY UNIONISM: REBUILDING THE LABOR MOVEMENT FROM BELOW 23 (2d ed. 2015). Lynd explained in earlier work the distinctive meaning of labor solidarity, which extends well beyond an implied promise of reciprocal obligation. Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423 (1984). First, "the well-being of the individual and the well-being of the group are not experienced as antagonistic." *Id.* at 1426. In this tradition, one person's job security is neither separate from nor does it detract from another's. *Id.* Second, the bond between those who work together "is often experienced as a reality in itself." *Id.* at 1427. In many ways, labor solidarity is analogous to the experience of family, and is based on the affective bonds between persons. One person's discharge is thus experienced not only as happening to the individual, but to the collective. Finally, solidarity "can and must be individually exercised." *Id.* at 1428. A single worker's assertion of a right is intrinsically an expression of solidarity – the individual activity could not occur without the prior organizing efforts and support of the group, nor could group rights exist absent individual assertions of them. Neither is complete without the other. In short, group well-being and individual self-realization are mutually reinforcing. *Id.* at 1430.

siege, labor unions must stand for more, not less. We urge them to embrace their political identities rather than seeking to avoid or deny them. Third, unions should prioritize appeals for public support in the context of collective action designed to build solidarity. Law reform will follow the moral legitimation of labor's demands at the popular level, not precede it. Thus, rather than hunkering down and circling the wagons, the way forward involves full collaboration with labor's allies, both historical and emerging, and experimentation with new structural forms and funding mechanisms.

II. THE NATURE OF UNIONS

Unions today are seen as special interest groups whose primary goal is to obtain money – money for their members at the bargaining table and dues to stoke the union bureaucracy. This public image is based on the dominant understanding of unions as service organizations engaged in a transactional relationship with workers that is fundamentally economic, an implicit bargain in which unions take money from members (dues) in exchange for negotiating with employers for higher wages and better benefits. Employers, in return, receive a promise of labor peace and uninterrupted commerce. In this vision, the union appears almost as a parasite, collecting money from one entity and transferring it to another after taking its cut. Indeed, the public perception of labor unions today is probably best captured by AFL President Samuel Gompers' oft-quoted response at an 1893 labor Congress in Chicago to the question, "What does labor want?" Gompers responded, "more . . . more . . . more."[15] In short, more money.

But this is far from the whole story. While unions certainly seek money as part of an agenda of wealth redistribution and a challenge to income inequality, they have also been a force for social justice – for workers, and for human flourishing more broadly. They have advocated for a legal regime that benefits all workers, organized and unorganized; supported social justice movements like the civil rights movement; and partnered with other progressive groups to seek reform at local and national levels.[16] The remainder of Gompers' response, less frequently quoted, offers fuller insight:

> What does labor want? It wants the earth and the fullness thereof. There is nothing too precious, there is nothing too beautiful, too lofty, too

15. Samuel Gompers, Address Before the International Labor Congress in Chicago, Illinois: What Does Labor Want? (Aug. 28, 1893), *available at* <http://www.gompers.umd.edu/1893%20more%20speech.htm>.

16. *See* Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TUL. L. REV. 193 (2013) (documenting how union participation in litigation has influenced American government and American society well beyond the spheres of labor law).

> ennobling unless it is within the scope and comprehension of labor's aspirations and wants. We want more school houses and less jails; more books and less arsenals; more learning and less vice; more constant work and less crime; more leisure and less greed; more justice and less revenge; in fact, more of the opportunities to cultivate our better natures . . . .[17]

How, then, did we arrive at the present-day impoverished vision of unionism?

A. Labor's Historical Identity: Overtly Political[18]

Although the American labor movement has rarely regarded itself as the revolutionary proletariat, it has always been animated by idealism and hope for a better, more democratic society in which every citizen can achieve her full human potential. At its inception, it was unabashedly political. Consider, for example, the nineteenth century American labor movement, the Knights of Labor. The Knights sought to transform society in a direct challenge to capitalism fomented by an organization of all workers across sectors and occupations.[19] The Knights envisioned an America where "wage slavery" had been abolished, replaced by a cooperative commonwealth."[20] The Knights had many other noble and overtly political goals: the Knights endorsed land and currency reforms, an end to child labor, public ownership of the railroads, and economic parity between male and female workers.[21] The Knights created labor parties to run political candidates in thirty-four states and succeeded in having candidates elected at the state and local level.[22] The Knights wanted "more," but not just more money. They wanted a better world, a just, democratic society, and redistribution of wealth.

The Industrial Workers of the World (IWW or the Wobblies) espoused an even more radical agenda: the abolition of capitalism and the emancipation of the working class. At the IWW's convention in 1905, its leader Bill Haywood minced no words in describing the Wobblies' aims:

> We are here to confederate the workers of this country into a working class movement that shall have for its purpose the emancipation of the working

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17. Gompers, *supra* note 15.

18. For a more complete discussion of labor's historical identity and the struggle for a unifying ideology, see Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1770-87 (2001).

19. *See* MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA: A HISTORY 114-15 (8th ed. 2010).

20. *Id.* The Knights enjoyed some success, establishing 135 worker cooperatives in areas as diverse as coal mining, cooperage, printing, and shoe-making.

21. PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 124 (2010).

22. CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 14 (1993).

> class from the slave bondage of capitalism . . . . The aims and objects of this organization should be to put the working class in possession of the economic power, the means of life, in control of the machinery of production and distribution, without regard to capitalist masters . . . . This organization will be formed, based, and founded on the class struggle, having in view no compromise and no surrender, and but one object and one purpose and that is to bring the workers of this country into the possession of the full value of the product of their toil.[23]

The IWW's main tactic was the strike, and it refused to enter into contracts with employers where the contracts would inevitably curtail workers' right to strike.[24] After all, absent the strike, class struggle in that era would have had difficulty gaining purchase, and "without ongoing class struggle there could be no revolution."[25]

With the advent of World War I, however, the legislature, the White House, and the judiciary worked to suppress collective action by unions and shore up the power of the business/capitalist class to support the war effort. By the 1920s, business dominated government, and unions were in decline.[26] From 1921 to 1929, union membership fell from over five million to about 3.4 million, less than in any year since 1917.[27] Powerful business combinations, such as the National Association of Manufacturers, the National Metal Trades Association, and the League for Industrial Rights condemned unions as expressions of subversive, "foreign" concepts of collectivism and extolled the true American virtues of "rugged individualism."[28] The Supreme Court upheld yellow dog contracts requiring employees to agree not to join a union as a condition of employment,[29] declared peaceful picketing to be a "sinister" activity that could be properly enjoined,[30] and applied the Sherman Act to crush collective action by unions, reviving the criminal conspiracy doctrine from older common law cases.[31] Totally demoralized, the AFL tried to keep the labor movement alive by encouraging labor-management cooperation.[32] The lofty dreams of the

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23. MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD 46 (Abridged ed. Joseph A. McCartin ed., 2000) (quoting William D. Haywood, Address before the Industrial Workers of the World Convention (June 27, 1905)).

24. *Id.* at 94.

25. *Id.*

26. *Id.* at 221.

27. *Id.* at 224.

28. *Id.* at 225.

29. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (finding such agreements to be constitutional).

30. Truax v. Corrigan, 257 U.S. 312, 336-42 (1921).

31. DUBOFSKY & DULLES, *supra* note 19, at 164 (stating that "[t]he old conspiracy laws had, in effect, been revived by the application to unions of the Sherman Act's ban on combinations in restraint of trade").

32. *Id.* at 237.

Knights of Labor and the Wobblies were replaced by the AFL's willingness to cooperate in the exploitation of its members in an effort merely to survive.[33]

In many ways the 1920s bear striking similarities to twenty-first century America. Economic inequality grew. The weakness of the labor movement facilitated the flow of wealth from the producers to the very rich.[34] The result was a crisis of underconsumption, which according to Nelson Lichtenstein, "explains the very nature of the Great Depression itself."[35] In 1928 and 1929, "sales lagged, inventories rose, factories cut their output, and unemployment rose."[36] The workers who produced the nation's products could no longer afford to buy those products, and in 1929, the economy collapsed. Destitution, child labor, wages below subsistence level, and even starvation affected workers in the hardest hit areas of West Virginia, Ohio, and Kentucky.[37] For three years, the Hoover administration waited for the invisible hand of the free market to get the country going again. No hand, visible or invisible, appeared. Instead, America's gross national product fell by 29 percent between 1929 and 1933.[38]

On March 4, 1933, Franklin Delano Roosevelt became president of the United States. Twenty-five percent of the workforce was unemployed; millions more were involuntarily working reduced hours; men abandoned their families and trudged from one state to another seeking work; crime, prostitution, and alcoholism rose at an alarming rate.[39] Roosevelt did not owe his election to organized labor. On the contrary, the AFL maintained "an official silence."[40] John L. Lewis, president of the nearly extinct United Mineworkers of America, endorsed Hoover.[41]

Despite the lack of support from what remained of organized labor, Roosevelt needed a labor policy. In 1934 the Democrats won huge majorities in both houses of Congress. The demoralized American workforce, perhaps sensing that there was hope with a president who was not hostile to the goals of working Americans, became more militant.[42] Meanwhile, New York

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33. For an excellent discussion of the state of organized labor in the 1920s and early 1930s, see IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933 (Reissue ed. 2010).

34. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 23 (2002).

35. *Id.* at 21.

36. *Id.* at 22.

37. BERNSTEIN, *supra* note 33, at 358-90.

38. LICHTENSTEIN, *supra* note 34, at 24.

39. BERNSTEIN, *supra* note 33, at 506-07.

40. *Id.* at 511.

41. MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS: A BIOGRAPHY 126 (1986).

42. IRVING BERNSTEIN: THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-

Senator Robert F. Wagner, a staunch advocate for workers' rights, was hard at work on what would eventually become the Wagner Act. At first Wagner's Act received no support from Roosevelt and was met with extreme hostility from the business community and the corporate-dominated media.[43] However, under pressure from strikes that interrupted railroad service and halted production, Wagner's bill passed both houses of Congress by overwhelming majorities and was signed into law by Roosevelt on July 5, 1935. A wave of worker militancy followed from 1936 to 1938, including over 500 sit-down strikes involving over 500,000 workers.[44]

B. Business Unionism: Unions as Service Organizations[45]

The Wagner Act appeared to be a tremendous victory for American workers, and to some extent it was. Senator Wagner was committed to legislation that would enhance worker bargaining power and foster democracy in the workplace that would ultimately support the larger political democracy by encouraging participation in and consent to governance by workers.[46] Critical to this agenda was a legal regime of exclusivity and majority rule: once a union attains majority status in a bargaining unit, the union becomes the exclusive, collective voice for the workers; employers may not strike bargains with individual employees that undermine the collective interests of all.[47] This legally enforced "united front" avoided internecine competition among employees that would undermine the efforts of the collective, and from labor's perspective it was essential to the union's control of bargaining and contract formation.[48] With support from the exclusivity principle, unions that prevailed in a majority election could effectively harness the power of all.

However, the Act also emphasized eliminating obstructions to the free flow of commerce and removing sources of industrial strife and unrest; collective bargaining was a means to an end rather than an end in itself.[49]

1940, at 323 (1970) (noting that the number of strikes in 1933 was the highest since 1921).

43. *Id.* at 338-39.

44. *Id.* at 499-500.

45. For a full treatment of the ways in which the NLRA came to circumscribe union identity, see Crain & Matheny, *Labor's Identity Crisis, supra* note 18, at 1788-96.

46. *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423-27 (1993) (describing Wagner's vision of labor unionism and collective bargaining as a countervailing force to the autocracy of the administrative state designed to secure real consent from workers to the new political order).

47. *See* 29 U.S.C. § 159(a) (2012); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

48. Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 788 (1992).

49. National Labor Relations Act, § 1, 29 U.S.C. § 151.

Although labor had always wanted "more," Congress wanted peace. The federal courts soon began to chip away at the sweeping protections the Act appeared to guarantee, giving primacy to the goal of labor peace.[50] The right to strike was one of the chief casualties of the judicial retrenchment.[51] Ultimately, the labor movement retreated from its visionary goals and high ideals and focused on the narrow scope of what was left to it in the Act as interpreted by the Supreme Court: wages, hours, and the terms and conditions of employment.

American labor unions adopted a philosophy of business unionism that was a far cry from the Knights' and the IWW's political idealism. Unions would focus on organizing members and collectively bargaining to obtain economic benefits for them – gains which came to be known as "the union wage premium" – and then defend those gains through arbitration under the labor contract. Consider this un-inspiring description of business unionism:

> [U]nions exist in order to address the immediate and practical concerns of unionized workers. The objective of unions is to protect their members economically, primarily by negotiating and enforcing the union contract. Unions are seen essentially as service organizations, whose task is to insure fair wages, increase job security, protect against victimization, improve the conditions of work, and provide additional economic benefits
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> . . . .
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> In the arena of politics, unions are concerned only with those issues that have a direct or indirect impact on unions, their members, and the industries in which they function.[52]

This philosophy was aligned with an ideology that linked unions with business and government in a quest for shared prosperity in which "a rising tide [would] lift all boats," conferring both economic security for workers and increased profits for business.[53] Ultimately unions made a bargain with capital: Give us money, and we'll give you peace. This deal was validated in *Teamsters v. Lucas Flour C*o., in which the Court ruled that even if a labor contract did not contain an explicit no-strike clause, a promise by the union not to strike would be implied as long as the agreement provided that disputes over its meaning would be settled exclusively through the grievance

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50. For classic discussions of how the courts weakened the Wagner Act, see JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

51. *See* NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-46 (1938) (stating in dictum that employers have the right to permanently replace economic strikers); James Gray Pope, *How Americans Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

52. Gregory Mantsios, *What Does Labor Stand For?*, *in* A NEW LABOR MOVEMENT FOR THE NEW CENTURY 51, 53-54 (Gregory Mantsios ed., 1998).

53. JOHN J. SWEENEY, AMERICA NEEDS A RAISE: FIGHTING FOR ECONOMIC SECURITY AND SOCIAL JUSTICE 5-6, 32 (1996).

and arbitration process set out in the agreement.[54]

As union bureaucracy grew to support the bargaining and enforcement of labor contracts with employers, the emphasis on obtaining higher wages at the bargaining table intensified. Union bureaucracy depended upon dues, and dues in turn were linked to wages as a percent of pay.[55] Unions therefore had a strong incentive to focus on wages at the bargaining table in order to maximize union revenue.[56] These incentives resulted in a tendency for union negotiators to over-estimate members' desire for additional cash, even where members might have preferred other collective goods (such as health and safety protections).[57]

Other aspects of labor law contributed mightily to unions' constrained identity as economic agents, undermining their ability to frame workers' struggles broadly in ways that engage the public. Labor organizations covered by the NLRA are limited to those which exist for the purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" – matters of direct and immediate importance to union members.[58] Section 8(d) of the Act imposes a bargaining obligation only "with respect to wages, hours, and other terms and conditions of employment."[59] Section 7 protection applies only to concerted activity for mutual aid or benefit, meaning that the activity must benefit workers in the workplace as employees, and be connected to wages, hours, or working conditions.[60] This doctrine prevents workers from seeking protection for appeals to the public's interest in quality service, including patient care (lower patient-to-nurse staffing ratios, the elimination of patient-per-hour quotas for hospitalists), safe passage on public transportation, and other areas where the public's interest intersects directly with the conditions under which work is performed. It also imposes a severely cabined interpretation of which activities are examples of actions for mere personal gain, as opposed to mutual benefit. Conservative Labor Boards have taken this doctrine to extremes, as seen in struggles over whether sexual

54. 369 U.S. 95, 105 (1962).

55. Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENV. UNIV. L. REV. 1, 25 (2010).

56. *Id.* at 26.

57. *Id.*

58. NLRA § 2(5), 29 U.S.C. § 152(5) (2012).

59. *Id.* § 158(d). Although the phrase "terms and conditions of employment" might have been susceptible to a broad interpretation, the Court chose to interpret the phrase as "words of limitation." Fibreboard Paper Products v. NLRB, 379 U.S. 203, 220 (1964) (Stewart, J., concurring).

60. NLRA § 7, 29 U.S.C. § 157; *see* Eastex, Inc. v. NLRB, 437 U.S. 556 (1977). For a powerful critique of the Court's narrow interpretation of mutualism under section 7, see Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989).

harassment complaints to administrative agencies are for mutual aid or merely personal griping.[61] Perhaps it should not surprise us that unions were largely absent in the public debate over #MeToo.[62]

Similarly, labor law blocks unions from advocating directly for interests of workers outside the bargaining unit. Mandatory subjects of bargaining are defined as wages, hours, and working conditions for current employees, and on these topics unions may insist at the bargaining table.[63] Employers may make unilateral changes on topics outside these boundaries (permissive subjects) without bargaining with the union, and the union may not insist upon permissive subjects.[64] Thus, strikes to protest the termination of retirees' health care coverage or pension entitlements – non-mandatory subjects because they don't pertain to current employees[65] – are unprotected, and strikers protesting the deprivation of their parents', grandparents', neighbors', former coworkers' and friends' benefits could be terminated.[66]

Finally, business unionism impedes alliances with social justice organizations seeking community-based or national reforms that sweep beyond the particular workplace or across an entire sector (geographical or industry-based). Where present, such alliances have been predicated on tit-for-tat exchanges ("you support us on this issue now, we'll support you on that one later") rather than true collaborations involving a blending/merger of interests. Yet such alliances are critical, not only for what they can accomplish beyond the workplace, but also because the labor law provides scant protection for union protest. In picketing and boycott cases, labor speech is frequently categorized as economic, not political, and therefore of

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61. See Holling Press, Inc., 343 N.L.R.B. 301 (2004) (finding that actions of individual complaining of workplace sexual harassment in support of her discrimination claim before a state agency were not protected by section 7 because they were not made to accomplish a collective goal, but instead were "purely individual" efforts to advance her "personal" claim), overruled by Fresh & Easy Neighborhood Market, 361 N.L.R.B. 151 (2014). The Court's recent decision in Epic Systems Corp. v. Lewis, 584 U.S. ___, 138 S. Ct. 1612 (2018) reflects a similarly limited view of the scope of protection offered by section 7. See id. at 1624-25 (finding scope of section 7 coverage for concerted activities limited to those listed in the statute or those that employees "'just do' for themselves in the course of exercising their right to free association in the workplace," and excluding "the highly regulated, courtroom-bound 'activities'" of class arbitration and collective litigation).

62. *See* Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. __ (forthcoming 2019).

63. Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964).

64. *Id.*

65. Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (because retirees were outside the bargaining unit, employer was not required to bargain with the union over its decision to cancel a retiree health insurance policy).

66. *Cf.* NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 347 (1938) (stating in dicta that employer's right to continue business operations during a strike permits it to permanently replace economic strikers).

low (or no) First Amendment value, or not even speech at all, but conduct.[67] Partnerships with allies can generate joint protests that are more likely to gain First Amendment protection and garner broad public support.[68]

The labor laws reinforce the divide between business unionism and a broader social justice agenda, providing significant disincentives for union partnerships that stray too far into social justice territory by engaging workers' rights groups on initiatives with applicability beyond a single workplace. Too close an alliance with union economic agendas potentially exposes workers' rights organizations to categorization as "labor organizations" subject to the reporting and disclosure requirements and restrictions on secondary boycotts imposed by labor law.[69] For example, the SEIU's decision to bankroll the Fight for $15 risked branding its allies – workers' centers and other nonprofits dedicated to workers' rights – as "labor organizations." Thus, the union had to be careful not to play too public a role in the struggle, limiting its role to financial support and behind-the-scenes coordination.

C. The Agency Fee Doctrine

Perhaps the most powerful constraint imposed by law on the nature of unions is the fair share/agency fee doctrine. "Agency fee" provisions require workers within the bargaining unit who choose not to be union members to nevertheless pay their "fair share" for the benefits that the union gains for them through collective bargaining. Endorsed first in the private sector in *Railway Employees' Department v. Hanson,*[70] and *Machinists v. Street*,[71] and subsequently in the public sector in *Abood v. Detroit Board of Education*,[72] the agency fee doctrine further entrenched business unionism by protecting the portion of union dues attributable to the union's costs in negotiating and

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67. James Gray Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST L.Q. 189 (1984).

68. *See* James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991).

69. On the risks of a close alliance with traditional labor organizations for workers' rights organizations, see Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U.L. REV. 837 (2014); David Rosenfeld, *Worker Centers: Emerging Labor Organizations – Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469 (2006).

70. 351 U.S. 225 (1956) (upholding union shop agreement requiring financial support from all who receive the benefits of the union's work against a First Amendment challenge under the Railway Labor Act).

71. 367 U.S. 740 (1961) (upholding union shop agreement under Railway Labor Act but limiting compelled payments by non-members to matters pertaining to collective bargaining and contract administration).

72. 431 U.S. 209 (1977).

enforcing the labor contract – but nothing more.[73] Because they could still require payment of fair share fees attributable to collective bargaining and contract administration, unions became complacent and tended to neglect outreach to workers within their own ranks.[74] AFSCME President Lee Saunders observed that when the agency fee doctrine insured financial viability, "we took things for granted. We didn't communicate with people, because we didn't feel like we needed to."[75]

Over time, workers became increasingly disengaged from their unions, and union democracy withered. Many workers internalized the notion of the union as service organization, an entity separate from the members that served solely as their economic agent. This perception in turn left unions vulnerable to one of the most powerful arguments that employers are able to make during anti-union campaigns: that unions are a "stranger" to the employee-employer partnership whose intrusion will make communication more difficult, introduce inflexibility and burdensome rules, and extract money from workers to finance (fill in the blank) excessive salaries for union leaders, union conventions in fancy locales, union corruption, and political manipulation. Said one worker after participating in an activist training that was part of internal outreach initiated after the *Abood* doctrine came under fire in the Court, "I learned that *we are* the union. . . . I never thought of it like that before."[76] Thus, while the agency fee doctrine provided a major source of union revenue, it also cabined the scope of union influence and distanced unions from the historical source of their power: members and the personal connections that built solidarity.

III. IT'S ALL ABOUT THE MONEY

The labor movement's support for Democratic candidates and progressive legislative initiatives made it an irresistible target for conservative forces. Conservative groups operating through the National

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73. *See, e.g.*, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (delineating purposes for which agency fees can be charged to dissenting non-members); Commc'ns Workers of Am. v. Beck, 487 U.S. 73 (1988) (limiting agency fees to matters germane to collective bargaining, contract administration, and grievance adjustment); Ellis v. Ry. Clerks, 466 U.S. 435 (1984) (limiting agency fees to expenditures linked to collective bargaining and contract administration).

74. Lydia DePillis, *The Supreme Court's Threat to Gut Unions Is Giving the Labor Movement New Life*, WASH. POST, (July 1, 2015), <https://www.washingtonpost.com/news/wo nk/wp/2015/07/01/the-supreme-courts-threat-to-gut-unions-is-giving-the-labor-movement-new-li fe/?noredirect=on&utm_term=.80b0be1a9551>; *see also* Casey Berkovitz, *What's Next for the Labor Movement After Janus?*, CENTURY FOUND. (July 2, 2018), <https://tcf.org/content/comm entary/whats-next-labor-movement-janus/?agreed=1> (describing workers' surprised reactions to internal organizing efforts by unions post-*Janus*).

75. DePillis, *supra* note 74.

76. *Id.*

Right to Work Committee's Legal Defense Fund brought a series of cases seeking to strike at the union pocketbook by attacking the agency fee doctrine.[77] *Janus v. AFSCME* was the fourth case to come before the Court in the last six years challenging the agency fee arrangements sanctioned by *Abood*. In the first two cases, the Court avoided the question but sent clear signals that *Abood* was in danger. In *Knox v. Service Employees*, the Court characterized *Abood* as "something of an anomaly" and described positions taken by public sector unions during collective bargaining as having "powerful political and civic consequences" that significantly infringe on First Amendment rights.[78] In *Harris v. Quinn*, the Court repeatedly suggested that *Abood's* analysis was "questionable," had "seriously erred" and "rest[ed] on an unsupportable empirical assumption."[79] And in *Friedrichs v. California Teachers Ass'n*, the Court appeared to be on the verge of deciding that agency fee agreements were compelled speech violating the First Amendment, but Justice Scalia's untimely death prevented the Court from achieving a majority to accomplish that result.[80]

A. Janus v. AFSCME

On June 27, 2018, the Court handed down its long-awaited opinion in *Janus v. AFSCME, Council 31*.[81] Mark Janus, a child support worker for the state of Illinois, refused to join the union, arguing that he opposed many of the union's public policy positions and the positions it took in collective bargaining.[82] Specifically, Janus believed that the union's collective bargaining objectives did not take into account Illinois' fiscal crises and therefore were not in the best interests of the citizens of the state.[83] Accordingly, he asserted, the fair share fees he was required to pay as a non-member to support the union were a form of coerced political speech that violated the First Amendment.[84]

At issue was an Illinois law that authorized the state to require public employees who are part of a bargaining unit that benefits from union

77. *See* Moshe Z. Marvit, *For 60 Years This Powerful Conservative Group Has Worked to Crush Labor*, THE NATION (July 5, 2018), <https://www.thenation.com/article/group-turned-right-work-crusade-crush-labor/> (describing history of resistance to union shop arrangements by the business community and detailing the critical role played in mobilizing the right's forces by the National Right to Work Legal Defense Foundation).

78. 567 U.S. 298, 311 (2012).

79. 134 S. Ct. 2618, 2634 (2014).

80. 136 S. Ct. 1086 (2016) (per curiam).

81. 138 S. Ct. 2448 (2018).

82. *Id.* at 2462.

83. *Id.*

84. *Id.* at 2463.

representation to pay agency fees representing the fair share of the benefits all bargaining unit members enjoy from union representation. Twenty-two states and the District of Columbia had enacted similar public-sector bargaining laws that permit fair share fee arrangements based on their view that public employee collective bargaining promotes good government and is in the public interest. The states relied upon two compelling interests justifying the requirement that non-members pay agency fees: promoting labor peace and avoiding free-rider problems.[85]

The Court held that agency fee provisions amount to a form of compelled speech which requires non-members "to subsidize private speech on matters of substantial public concern," implicating the First Amendment.[86] The majority rejected the labor peace objective as a compelling interest because it could be achieved through less restrictive means than the assessment of agency fees.[87] Further, the Court also rejected the free rider problem as a compelling state interest.[88] Reasoning by analogy that the government could not compel senior citizens to pay for the efforts of the AARP to secure legislation benefitting seniors, or veterans to pay for the efforts of veterans' advocacy groups to improve health care for veterans, or doctors to pay for the efforts of the AMA,[89] the Court dismissed the free rider argument, ignoring the distinctive obligation that unions have to represent all workers in the bargaining unit. Ultimately, the Court concluded, requiring non-members of a public sector union to pay agency fees is an evil so great that "no reliance interest on the part of public-sector unions is sufficient to justify the perpetuation of free speech violations" that federal law had countenanced for over forty years.[90]

The unions argued that agency fees were necessary in order to fund compliance with the judicially imposed duty of fair representation, which applies to union members and non-members alike. The Court flatly denied any logical connection between agency fees and the union's duty to provide representation for all employees in the bargaining unit.[91] The Court explained that the duty of fair representation is a corollary of the NLRA's

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85. The Court applied the "exacting scrutiny" to evaluate the constitutionality of agency fees. *Id.* at 2466: "Under 'exacting scrutiny' . . . 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, 311 (2012)).

86. *Id.* at 2461-62. The crucial phrase "matters of substantial public concern" is never clearly defined.

87. *Id.* at 2466.

88. *Id.* at 2467.

89. *Id.* at 2466-67.

90. *Id.* at 2461.

91. *Id.* at 2468-69.

grant to the union of status as exclusive bargaining representative. Thus, as long as unions reap the benefit of exclusive status, they must bear the burden of fair representation. According to the majority, the "'tremendous increase in the power of the union'" stemming from the imposition of a duty on the employer "to listen to and bargain in good faith with only that union" – justifies the imposition of a duty to provide fair representation for non-members.[92] Further, the Court reasoned, unions incur no greater expense in contract negotiations when they represent non-members as well as members, and union efforts to enforce the collective bargaining agreement through grievance processing redound to the benefit of the union and all employees, not just the individual non-member who advances the grievance, since the union thereby maintains control over contract administration and advances the interests of all employees.[93] Thus, requiring unions to continue to bear the burdens of fair representation of non-members in contract negotiations and contract administration is constitutionally permissible: the union's duty as exclusive representative to fairly represent all the employees in the bargaining unit continues regardless of whether employees pay a fee for the services the union provides, or not.

At the risk of alienating readers with strong union sympathies (and we count ourselves among this group), Mark Janus was quite correct that public sector collective bargaining is inherently political, and we agree with the Court's conclusion that the First Amendment is therefore implicated. For decades the Court has attempted to draw distinctions between political expenditures not chargeable to dissenting non-members, and those sufficiently linked to the union's performance of its role as exclusive bargaining representative and thus chargeable. As the *Janus* Court noted, these distinctions have become increasingly tenuous and unworkable.[94]

Indeed, the Court might have taken its analysis further and determined that *all* collective bargaining is inherently political. After all, wages, benefits, and the terms and conditions of work negotiated by private-sector unions affect the wages, benefits, and conditions of work of *all* employees in the private sector, either through operation of the union threat effect or because union contracts establish norms that are widely adopted throughout the sector.[95] Private sector collective bargaining also affects prices, the health

92. *Id.* at 2468 (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 401 (1950).

93. *Id*. at 2469.

94. *Id.*

95. *See* LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POL'Y INST., BRIEFING PAPER: HOW UNIONS HELP ALL WORKERS (2003), <https://www.epi.org/files/page/-/old/briefingpapers/143/bp143.pdf> (explaining union effect on wages and benefits in nonunion firms); JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 74-79 (2014) (high union density is correlated with reduced pay gap between workers and their managers, and support for fair pay norms); Susan Dynarksi,

and well-being of the communities where businesses are located, the standard of living in the community, medical costs, the financial stability of states and communities, and many, many other matters that substantially affect the public interest. The Court in *Janus* avoids the implications of its decision for the private sector, stating only that there is a significant difference, for First Amendment purposes, between private-sector collective bargaining and public-sector collective bargaining.[96] Further, the Court reasoned, "Congress' *'bare authorization'*" of *private-sector* union shops under the Railway Labor Act"[97] (at issue in *Railway Employees' Department v. Hanson*[98] and *Machinists v. Street*,[99] upon which the Court relied in *Abood v. Detroit Board of Education*[100]) did not raise First Amendment issues; First Amendment issues arise, only when the state in its role as employer "requires its employees to pay agency fees."[101] According to the Court, this was *Abood's* original error – it assumed that *Hanson* and *Machinists* controlled the analysis of public sector labor law, when in fact they did not.[102]

The Court did not, however, take its First Amendment analysis further in the public sector. It is unclear, for example, why individual employees but not public-sector unions would receive First Amendment protection against compelled speech. Does requiring unions to represent non-members violate unions' First Amendment rights by compelling unions to speak for persons whose views they disagree with? Alternatively, does requiring unions to represent non-members violate unions' First Amendment freedom of association[103] or assembly?[104] The Court left these questions untouched. One union has already raised this argument in the course of challenging its obligation to provide representation to free-riding non-members.[105] Some

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Fresh Proof that Strong Unions Help Reduce Income Inequality, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/business/labor-unions-income-in equality.html> (reporting that unions constrain income inequality at nonunion firms).

96. The Court specifically rejected the idea that collective bargaining in the private sector has political implications. *Janus*, 138 S. Ct. at 2481.

97. *Id.* at 2480 (quoting Machinists v. Street, 367 U.S. 740, 749 (1961)).

98. 351 U.S. 225 (1956).

99. 367 U.S. 740 (1961).

100. 431 U.S. 209 (1977).

101. *Janus*, 138 U.S. at 2480.

102. *Id.* at 2480-81.

103. *Cf. Id.* at 2464 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) for the proposition that freedom of association implies a freedom not to associate).

104. *See* Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 ILL. L. REV. 1791 (considering historical origins of freedom of assembly in labor cases); Ken Matheny & Marion Crain, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561 (2014) (discussing freedom of assembly and its implications for challenging some aspects of labor law, including exclusivity and majority rule).

105. Complaint, Sweeney v. Rauner, No. 1:18-cv-01362 (N.D. Ill. Feb. 22, 2018), <http://www.local150.org/wp-content/uploads/2018/02/cmplt.ex_.A.02-22-18.pdf>.

commentators expect the same forces that pressed for the demise of *Abood* to pick up on these implications and to challenge the constitutionality of the exclusivity doctrine.[106]

Anticipating that the First Amendment might be used in this way to undermine unions' duty of fair representation – and ultimately, the principles of exclusivity and majority rule themselves – the four largest public sector unions quickly took a stand recommitting to exclusivity and majority rule.[107] More specifically, they signaled lack of support for proposals advancing members-only unionism, fee-for-service arrangements, and limiting the union's obligation to represent non-members in grievance proceedings under the labor contract.[108]

B. Money Matters

The financial impact of *Janus* on union finances is likely to be nothing short of disastrous. Even the majority in *Janus* acknowledged that "the loss of payments from nonmembers may cause unions to experience unpleasant transitions costs in the short term."[109] But the potential loss is far greater than the loss of agency fee payments. First, the *Janus* decision is expected to result in a dramatic loss of dues-paying members, since in the absence of an agency fee clause workers will choose between paying full dues or nothing at all.[110] If economists are correct that people make economic decisions rationally, the impulse to free-ride on the collective is likely to be irresistible. Many will understandably choose to pay nothing. Frank Manzo, the policy director of the Illinois Economic Policy Institute, and Robert Bruno, professor of labor and employment relations at the University of Illinois, estimate that Illinois' public sector unions alone will lose 726,000 dues-paying members.[111] Second, the National Right to Work Committee's Legal Defense Foundation is now working to claw back past dues paid under now-

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106. *See* Marvit, *supra* note 77 (quoting law professor Charlotte Garden, who commented: "Before Janus, I would have said that First Amendment challenges to exclusive representation were dead in the water. . . . Now I'm not sure at all").

107. *See* AFSCME et al., Public Policy Priorities for Partner Unions, <http://nashtu.us/wp-content/uploads/2018/05/Maryann-Parker-Partner-Unions.pdf> (last visited Oct. 6, 2018) (statement by SEIU, AFSCME, AFT and the NEA characterizing state and local policy proposals that weaken the duty of fair representation attached to exclusive representation as counterproductive).

108. *Id.*

109. 138 S. Ct. at 2485-86.

110. Previously, many workers would choose to be full members and pay full dues, since the agency fee payments averaged roughly two-thirds the cost of full dues. *Is This Supreme Court Decision the End of Teachers' Unions?*, NPR (June 27, 2018, 10:39 AM ET), <https://www.npr.org/templates/transcript/transcript.php?storyId=617893848>.

111. Alana Semuels, *Is This the End of Public Sector Unions in America?*, THE ATL. (June 27, 2018), <https://www.theatlantic.com/politic/archive/2018/06/janus-afscme-public-sector-unio ns/563879>.

illegal agency fee agreements, resulting in a potentially enormous bill for public sector unions.[112]

The financial impact is likely to be quite significant for the Democratic Party, as well. In a tweet dated June 27, 2018, President Trump stated the obvious: *Janus* is a "big loss for the coffers of Democrats!"[113] The media presented the empirical evidence that on this, Trump is unavoidably correct.[114] Further, union efforts at state-building through pressure for investment in government programs and get-out-the-vote efforts have been critical to the Democratic Party, and weaker unions means lower levels of union political efforts, as well.[115] It is no accident that the National Right to Work Legal Defense Committee targeted labor unions. The American labor movement and its emphasis on collective action has historically existed in an uneasy tension with the vision of "economic liberty" that has become the dominant ideology of the Republican Party.[116] In particular, wealthy corporate interests, right-wing think tanks, and right-wing foundations have worked to destroy public sector unions precisely because of their support for the Democratic party.[117] Among these groups are the State Policy Network, the American Legislative Exchange Council, and the Koch brothers' Americans for Prosperity. Nor is it any accident that the attack focused on teachers' unions. An assault on public schools and the educated citizenry they produce is a core element of a strategic plan to convert government to the ends of the wealthy by undermining democracy of and for the people.[118]

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112. *See* Marvit, *supra* note 77.

113. @realDonaldTrump, TWITTER (Jun. 27, 2018, 9:11 AM), <https://twitter.com/realDonaldTrump/status/1011975204778729474>.

114. *See, e.g.*, Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), <http://inthesetimes.com/features/janus_supreme_court_unions_investigation.html> (reporting that unions contributed $602 million to state and federal elections and ballot initiatives in 2016; $319 million came from public sector unions); Jess Bravin, *Ruling on Public Sector Unions Strikes at Labor Finances*, WALL ST. J., June 28, 2018, at A1, A4B (reporting that during the 2016 election cycle more than 90 percent of public-sector union political contributions went to Democrats; the largest contributors were AFSCME and teachers' unions).

115. Scheiber, *supra* note 6; *see also* Sean McElwee, *How the Right's War on Unions is Killing the Democratic Party*, THE NATION (Jan. 22, 2018), <https://www.thenation.com/ article/right-to-work-laws-are-killing-democrats-at-the-ballot-box/> (describing study that found that right to work laws decrease Democratic presidential vote share by 3.5 percent).

116. *See* NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA 46-47 (2017) (discussing the right-wing's disdain for labor unions, civil rights organizations, and others who band to together to work for social justice).

117. Marvit, *supra* note 77; Bottari, *supra* note 114.

118. *See* STEVEN K. ASHBY & ROBERT BRUNO, A FIGHT FOR THE SOUL OF PUBLIC EDUCATION: THE STORY OF THE CHICAGO TEACHERS STRIKE 2 (2016) (noting that teachers' strikes occur within the context of political struggles between probusiness forces and teachers' unions for control over public education; at stake is not only the continued prosperity of the country, but "the democratic means for allowing any citizen, rich or poor, to live a prosperous life"); *id*. at 5 (describing the views of Margaret Haley, a founding mother of teachers' unions, who argued that "teachers must 'assume the role of educating citizens about their political responsibilities'").

There is no doubt that money matters. Without a stable source of funding, even the best-intentioned, most democratic union effort will be challenging. Accordingly, union advocates, scholars and allies heeding the Court's signals that *Abood's* demise was imminent[119] have been scrambling to come up with an alternative source of funding. Two years before the Court issued its decision in *Janus*, Aaron Tang proposed avoiding First Amendment compelled speech issues inherent in agency fee arrangements by requiring the state as employer to reimburse unions directly for fees associated with collective bargaining and contract administration, financed through a reduction in the union wage premium.[120] Daniel Hemel and David Louk independently suggested the government payer alternative.[121] Ben Sachs made a related argument that even the pre-*Janus* system of fair share fees should be treated, for constitutional purposes, as "a system of direct payments from employers to unions."[122] Only because of "an accounting formalism required by labor law" do the payments pass through individual employees' paychecks en route from employers to unions. Because the union produces the union wage premium from which the fees are paid, he argued, both the premium and the fees out of which they are paid should be treated as the property of the union that secured them.[123]

Following the Court's ruling in *Janus*, Sachs and former NLRB member Sharon Block echoed the theme in proposals for legislative reform: they urged states friendly to public sector unions to enact legislation that would permit public employers to pay directly to unions an amount equivalent to union dues (set presumptively at around 2 percent of the union wage premium, the pre-Janus average for agency fees), avoiding the constitutional dilemma of compelled speech.[124] Tang, Hemel, and Louk

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119. *See* Friedrichs v. Cal. Teachers' Ass'n, 136 S. Ct. 1083 (2016) (per curiam) (affirming judgment below by an equally divided court in appeal seeking reversal of *Abood*); Harris v. Quinn, 134 S. Ct. 2618, 2638 (2014) (criticizing *Abood* for its "questionable foundations" and refusing to extend it to Illinois home health care workers as "partial" or "quasi" public employees); Knox v. SEIU, Local 1000, 567 U.S. 298, 314 (2012) (suggesting that the Court's prior cases, including *Abood*, "approach if they do not cross, the limit of what the First Amendment can tolerate").

120. Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 150, 218 (2016) [hereinafter Tang, *Public Sector Unions*]; *see also* Aaron Tang, *Whose Money Is it Anyway: Have We Been Wrong About Agency Fees all Along?,* 131 HARV. L. REV. F. 154 (2018) [hereinafter Tang, *Whose Money*] (reiterating argument post-*Janus* in response to Sachs, *supra* note 9). Justice Sotomayor may have been the first architect of the idea, as she raised the question during oral argument in *Friedrichs*. *See* Tang, *Public Sector Unions, supra*, at 150 n.28 (citing Transcript of Oral Argument at 23, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915)).

121. *See* Tang, *Public Sector Unions*, *supra* note 120, at 150 n.28 (citing Daniel Hemel & David Louk, *Is Abood Irrelevant?,* 82 U. CHI. L. REV. DIALOGUE 227 (2015)).

122. Sachs, supra note 9, at 1048, 1052 n.23.

123. *Id.* at 1048-50.

124. Sachs & Block, *supra* note 13.

made similar proposals.[125] The *New York Times* took up the idea in an op-ed, and several state legislatures began considering bills to this effect.[126]

We understand well the need to construct new, stable sources of union funding, but we disagree with the philosophy that animates this strategy, creative though it is. The argument that unions' primary function is to obtain a union wage premium rings of instrumentalism. It doesn't reflect the passion for economic and social justice that animated unionism at its highest points and is most likely to draw new converts, and it leaves unions vulnerable to the argument that if the fight is all about money, workers could spend the dues they pay to unions in other ways while the employer provides the wage increase gratuitously.[127] Writing employees out of the equation for dues purposes and seeking labor law reform to legitimate that will only exacerbate the conception of unions as money-grubbing, third-party institutions that intervene in the employer-worker relationship. It is also likely to discourage union investment in internal organizing and undermine efforts to democratize unions. In the end, unions are only as strong as their engaged, militant, and passionate base. The everyday hard work of member-to-member organizing is critical.[128]

C. Letting Go of Exclusivity: Members-Only Unionism

In the wake of *Janus*, public-sector unions have joined hands to reiterate their support for exclusive representation, rejecting proposals that have the potential to undermine exclusivity or limit representation to dues-paying members.[129] While we applaud unions' instinct to reject a fee-for-services model as inconsistent with the solidarity principle that animates unionism, we worry that the embrace of exclusivity is simply an effort to substitute the

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125. *See, e.g.*, Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. ___ (forthcoming 2019), *draft available for download at* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189186> (detailing how direct payment systems could be accomplished either by requiring employers to reimburse unions for the same universe of costs for which unions could charge non-members pre-Janus, or by requiring employers to reimburse unions for all bargaining-related costs approved by union members); Hemel & Louk, *supra* note 13 (noting that states would also need to modify existing laws prohibiting public employers from making direct contributions to labor unions); Tang, *supra* note 13 (offering a model bill).

126. *See* Chris Brooks, *Beware the Quick Fix*, JACOBIN MAG. (July 2018), <https://www.jacobinmag.com/2018/07/janus-direct-reimbursement-union-organizing> (noting that New York and Hawaii were both considering bills that would permit direct reimbursement from employer to public sector union); Editorial Board, *After Janus, Unions Must Save Themselves*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/janus-supreme-court-unions.html> (citing and crediting Benjamin Sachs with the idea).

127. Nelson Lichtenstein, *How Missouri Beat "Right to Work,"* DISSENT (Aug. 14, 2018), <https://www.dissentmagazine.org/online_articles/how-missouri-beat-right-to-work>.

128. Brooks, *supra* note 126 (urging unions not to be seduced by the quick technical fix that Sachs and others propose, and instead to get down to organizing).

129. *See supra* notes 107-08 and accompanying text.

power of coerced solidarity at law for the power of solidarity unionism in its true sense. We urge unions to relinquish their grip on the doctrine of exclusive representation and majority rule and experiment with new forms of unionism, including members-only arrangements. We and others have made this case for this more fully in previous work.[130]

Alan Hyde explained the distinction between the legal rights of majority unions and nonmajority unions most succinctly.[131] A majority union has only three legal rights that a nonmajority union lacks: the right to force the employer to bargain with it (but not to reach agreement); the right to block an election by a challenging union; and the right to require payment of fees through a union shop clause in the labor contract.[132] All of these rights, however, depend in turn upon the union's fundamental strength: the right to force an employer to the bargaining table is worth very little if the union lacks the strength to bring pressure in support of its demands; the right to

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130. Our argument has been predicated on the propensity of the united front ideology and the exclusivity/majority rule principles that advance it to subordinate the interests of women and people of color within the union's ranks. *See, e.g.*, Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999) [hereinafter Crain & Matheny, *Labor's Divided Ranks*]; Marion Crain & Ken Matheny, *Making Labor's Rhetoric Reality*, 5 GREEENBAG 2d 17 (2001) [hereinafter Crain & Matheny, *Labor's Rhetoric*]; Matheny & Crain, *supra* note 104. Other scholars have made the case for nonmajority representation for different reasons. *See, e.g.*, Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 208 (1993) (pointing out the advantages of eliminating the need for the NLRA's burdensome election machinery and the delays it promotes); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 926 (1975) (questioning the doctrine and the assumption that a united front confers power); Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U.L. REV. 791, 795-801 (1998) (noting the all-or-nothing nature of the exclusive representation system and its majority rule counterpart).

Prior to *Janus*, a number of commentators had also urged the NLRB to relax the exclusivity principle and relieve unions of their duty of fair representation in states with right to work laws, since the libertarian philosophy underlying the right to work regime prohibiting cost-sharing is fundamentally at odds with the federal rule of exclusive representation. *See, e.g.*, Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 859 (2014) (arguing that the confluence of the labor law doctrines of exclusivity, majority rule and the judicially created duty of fair representation are unjust when applied in states with right to work law: "If state law is to allow workers to decline union membership *and* to decline to pay for union representation, federal law ought not require that the union nonetheless provide equal representation to the nonpaying nonmember"). Fisk and Sachs suggested that the law should protect members-only unionism in right to work states, or at least permit unions to charge a fee for representation services provided directly to the non-paying nonmember. *Id.* at 861-62. *See also* Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers are Required to Bargain with Minority Unions*, 27 ABA J. LAB. & EMP. L. 1 (2011) (discussing the pros and cons of members-only unionism and urging the NLRB to solicit feedback and undertake rulemaking in the area); Catherine L. Fisk, *Labor at a Crossroads: In Defense of Members-Only Unionism*, AM. PROSPECT (Jan. 15, 2015), <http://prospect.org/art icle/labor-crossroads-defense-members-only-unionism> (reversal of *Abood* should lay the legal groundwork for relieving unions of their duty of fair representation and protecting members-only unionism).

131. Alan Hyde et al., *After Smyrna: Rights and Powers of Unions that Represent Less than A Majority*, 45 RUTGERS L. REV. 637 (1993).

132. *Id.* at 639-40.

block an election by a challenger is worth little if the union can only cling to its majority status for a limited period by virtue of a legal presumption of continuing majority status; and a union shop clause is unnecessary if representation is linked to union membership and dues payment.

Why, then, do unions cling so tightly to exclusivity? Unions defend exclusivity primarily on the basis that it concentrates worker power and presents a united front against the employer at the bargaining table.[133] In particular, unions worry that members-only unions won't be able to bring effective economic pressure against employers. The reality, however, is that majority unions rarely use the strike weapon,[134] and it has become less and less effective with the jurisprudential overlay of employer rights added by the Court and the National Labor Relations Board to continue the operation of the business in the face of a strike.[135] Under the NLRA, a nonmajority union has all the same rights that a majority union does to use strikes, pickets, and boycotts,[136] and it may be easier for a nonmajority union to mobilize its membership to pressure the employer.[137] Further, "improvisational" tactics (spontaneous, decentralized but coordinated efforts) have been used with considerable success in the modern realm by worker advocacy organizations that are not unions.[138] These tactics would be just as effective if used by members-only unions, as the teachers' strikes of 2018 have demonstrated in the context of public-sector employee associations.[139]

Not only are majority rule and exclusive representation not essential to union strength, they may in fact undermine it by encouraging over-reliance on law as the source of union power. Indeed, as Hyde observed,

> Perhaps the most important benefit to [members-only unions] is that their status at the workplace would rest entirely on their own efforts and the voluntary support of their members. The government, the NLRB, will

133. Crain & Matheny, *Labor's Divided Ranks*, *supra* note 130, at 1558.

134. In 2017, there were only seven major work stoppages in the United States, the second-lowest number in history; the lowest was five, in 2009. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Major Work Stoppages in 2017 (Feb. 9, 2018), <https:www.bls.gov/news/ release/pdf/wkstp.pdf>. The BLS defines a major work stoppage as one that involves at least a thousand workers and lasts at least one shift.

135. *See supra* note 51 (describing judicial retrenchment on right to strike conferred by the Wagner Act).

136. Hyde et al., *supra* note 131, at 651-56.

137. *Id.* at 640-41.

138. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1, 47-57 (2016) (describing the strategies of the Fight for $15); Michael Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 602-03 (2016) (describing how the Fight for $15, one of labor's most impactful initiatives in recent years, "rewrote organized labor's playbook" using one-day strikes, short-term walkouts, pickets, and boycotts to highlight workplace injustice).

139. *See infra* Section IV.A.

have given them nothing and will have nothing to take away.[140]

Ann Hodges made this argument powerfully in a more general labor law context, arguing that over-dependence on labor law is risky and fundamentally limiting; the real source of union power is self-help.[141]

Further, members-only unions might be leaner, but they would also be more engaged with their membership and potentially more militant.[142] Clyde Summers pointed out years ago that "[t]he economic strength of a union is not determined by its majority status, or even by the numbers of its members, but by how many employees will support its economic action."[143] Some commentators also believe that unions will have more efficacy in the political realm through member education and engagement than they have historically had through large campaign contributions.[144] For example, the SEIU conducted an aggressive membership campaign in the wake of *Harris v. Quinn*,[145] which abolished mandatory fees for home-based workers who serve private individuals but are compensated through government programs. The campaign not only achieved its goal of offsetting the loss of membership stemming from the abolition of agency fees, but also fortified members' engagement in the union's political activities by strengthening the union's personal relationships with its members.[146]

A second argument raised by union advocates against members-only unionism is that nonmajority unions would spend most of their time and funds fending off challenges from business-backed worker representation groups (effectively company unions), undermining their strength.[147] While there is certainly truth to this concern (indeed, it was part of Senator

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140. Hyde et al., *supra* note 131, at 642.

141. *See* Ann C. Hodges, *Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power*, 94 MARQ. L. REV. 889, 890-91 (2011) (arguing that the seductive influence of the law has drawn labor unions too closely into its net and urging a return to the tools that built the movement).

142. Shaun Richman, *If the Supreme Court Rules Against Unions, Conservatives Won't Like What Happens Next*, WASH. POST (Mar. 1, 2018), <https://www.washingtonpost.com/news/post everything/wp/2018/03/01/if-the-supreme-court-rules-against-unions-conservatives-wont-like-what-happens-next/?utm_term=.8b41b57bec02>; Noam Scheiber, *Labor Unions Will Be Smaller After Supreme Court Decision, but Maybe Not Weaker*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/business/economy/supreme-court-unions-future.html>.

143. Summers, *supra* note 130, at 801.

144. *Id.*

145. 134 S. Ct. 2618 (2014).

146. Scheiber, *supra* note 142.

147. *See* Brooks, *supra* note 126 (explaining that Tennessee has experimented with members-only unionism through reforms to the state's collective bargaining law for public school teachers; the reforms, supported by the Republican party, served only to produce further fragmentation of the labor movement by generating challenger organizations aligned with business); *see also* Chris Brooks, *The Danger of Members-Only Unionism*, JACOBIN MAG. (July 12, 2018), <https://www.jacobinmag.com/2018/07/member-only-unions-open-shop-janus>; Shaun Richman, *The Promise and the Peril of Members-Only Unions*, IN THESE TIMES (Nov. 4, 2015), <http://inthesetimes.com/working/entry/18562/members-only-minority-unions>.

Wagner's original justification for exclusivity and section 8(a)(2), the prohibition on company unions),[148] exclusivity also inhibits efforts to innovate and bring new concerns to the table. If exclusivity were abolished, it would create breathing space for new worker organizations that might emphasize issues of particular concern to groups of workers, for example women and people of color.[149] Endorsing competition between unions would also provide a foothold for internal union reform movements to flourish – like the one that produced the Chicago teachers' strike of 2012 and revitalized the union – ultimately enhancing internal union democracy and insuring an engaged membership.[150]

Finally, exclusivity significantly exacerbates the collective action and free rider problems in the labor context. It prevents unions from gaining a foothold in workforces before they command a full majority, and it forces established unions to represent workers who are hostile to the union's goals, creating a fifth column within the union's ranks and imposing the costs of representing those dissenters on the rest of the group. It is important, then, to disaggregate concerns about solidarity and power from concerns about collective action and funding. Creative and promising alternatives for addressing collective action and funding have sprung up already in the wake of *Janus*. Catherine Fisk and Martin Malin have proposed a number of strategies designed to make membership more attractive to workers and to address the funding concern, including treating grievance arbitration as we do other employment benefits like health insurance where employees and employers cost-share; offering members-only benefits that layer on top of the basic provisions of the labor contract, such as free legal services; and enhancing union access to new members to promote early socialization into the norms of solidarity.[151] Other promising alternatives for funding have the potential to expand unions' reach beyond the narrow economic realm to which they have been traditionally relegated. For example, New York City enacted a Fast Food Empowerment Bill that creates an optional program for fast food employees to contribute through payroll deduction funds to nonprofit organizations that advocate on behalf of fast food workers and register with the city's Department of Consumer Affairs.[152] Unions could

148. *See* Barenberg, *supra* note 46, at 1453.

149. *See* Crain & Matheny, *Labor's Divided Ranks*, *supra* note 130.

150. Richman, *supra* note 147 (explaining that Chicago Teachers' strike grew out of a dissident book club that morphed into a workers' caucus, ultimately unseating established union leadership and revitalizing the union); *see infra* notes 172-73 (discussing 2012 Chicago teachers' strike).

151. Catherine L. Fisk & Martin H. Malin, *After Janu*s, 107 CALIF. L. REV. ___ (forthcoming 2019).

152. N.Y.C. Admin. Code 20-1301; *see also* Cora Lewis, *Fast Food Worker Groups Could Get a Big Financial Boost in NYC*, BUZZFEED (Dec. 5, 2016, 5:34 p.m.), <http://www.buzzfeed.com/coralewis/fast-food-worker-groups-could-get-a-big-financial-boost> (describing the original

work with these "alt-labor" groups at the local and state level to enact ordinances that would require employers to deduct fees from workers' paychecks and direct them to alt-labor groups of workers' choice.[153] By partnering with alt-labor groups, unions could advocate for political change and workers' rights reforms beyond the workplace on issues with powerful resonance.[154]

IV. BACK TO THE FUTURE: SOLIDARITY UNIONISM

At its inception, the labor movement had more democratic and radical potential than it does today.[155] The source of its power was solidarity, including a commitment to common goals, allegiance to a community, traditions of participatory democracy and consensus-style decision making.[156] The rise of large corporate firms and their virulent resistance to unionism pressed labor to abandon its communal form of action with its "glue" of solidarity, in favor of a bureaucratic, top-down, command-and-control operation that mirrored the organization of capital and could be more easily mobilized in the struggle for power.[157] The perceived need for a militaristic operation existed in considerable tension with the commitment to active participation by membership and consensus-based decision making.[158] At the same time, unions came to rely upon the newly recognized

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bill); Michael Saltsman, *New York City Wants to Supersize the "Fight for $15,"* WALL ST. J. (May 19, 2017), <https://www.wsj.com/articles/new-york-city-wants-to-supersize-the-fight-for-15-1495235426>.

153. *See* Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <http://prospect.org/ article/alt-labor> (coining the term "alt-labor" to describe workers' centers and advocacy groups that work to empower workers but don't seek a conventional collective agreement).

154. *See* Jonathan Timm, *A Labor Movement That's More About Women*, THE ATL. (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/the-womens-labor-movement/ 497294/> (describing how alt-labor groups like Restaurant Opportunities United and the National Domestic Workers United can work in partnership with traditional unions to achieve gains for working women).

155. *See supra* notes 18-25 and accompanying text.

156. Staughton Lynd, *Prospects for the New Left*, *in* STAUGHTON LYND & GAR ALPEROVITZ, STRATEGY AND PROGRAM: TWO ESSAYS TOWARD A NEW AMERICAN SOCIALISM 1, 23-24 (1973).

157. Marion Crain, *Feminism, Labor and Power*, 65 S. CAL. L. REV. 1819, 1831-32, 1835 (1992).

158. *Id.* at 1832-33, 1836. The oppositional culture of labor-management relations placed unions in the internally contradictory posture of being "associations trying to act like organizations." CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 26 (1988). As voluntary associations reliant for their power on the active participation of their membership, they were pressed into a more disciplined bureaucratic mold in an effort to manage an all-out war with employers. *Id.* at 16. Historian Melvyn Dubofsky described the situation this way:

> [U]nions have to be understood as peculiarly contradictory institutions. They are . . . simultaneously town meetings and military formations. In one guise, unions are marked by rank and file participation where policy decisions are reached only after open democratic debate. In the other guise, they are fighting machines struggling for survival or victory through discipline, absolute loyalty to command and unbroken solidarity.

Melvyn Dubofsky, *Legal Theory and Workers' Rights: A Historian's Critique*, 4 INDUS. REL. L.J. 496, 500 (1981).

legal rights enshrined in the Wagner Act and achieved through decades of struggle and to conform their organizing, bargaining and resistance strategies to the rights protected at law.[159] In the process, many unions sacrificed the solidarity and commitment to participatory engagement that had characterized them during the initial struggle for legal recognition, embracing exclusivity and majority rule and treating member-employees as fungible soldiers in the hierarchy of the union ranks in the war against employers.[160] Lacking a sense of personal connection with others in the union, members lost faith and trust in their unions. Solidarity withered.[161]

If the labor movement in America has a future, and we believe it does, the future will be based on affective bonds characteristic of solidarity, its model will be democratic, and its power will flow upward, not downward, from the rank and file to leaders who serve their interest. Labor activist and scholar Staughton Lynd called this democratic, transformative movement solidarity unionism.[162] Lynd believed that the unions of the future would not be legal monopolies, and he eschewed exclusivity and compulsory unionism:

> As part of building more democratic labor organizations, we must be able to question the whole idea of unions as legal monopolies. In England, Spain, or Poland, to the best of my knowledge, the workers in a particular plant or office elect a workplace committee. The committee may be wholly made up of members of one union, or may include members of different unions, in proportion to the strength of those unions in that place of work, and bargains for that place of work until the next workplace elections. We should consider this system. We should also question whether we wish to require workers to belong to a union whether they want to or not, and whether it might not be better to have stewards collect dues on the shop floor, rather than have the employer deduct dues from everybody's paychecks.[163]

Solidarity unionism has flourished in communities outside the protective regime of labor law. Some of the most impressive wins in recent times have been achieved without the support of law, demonstrating once again that formal legal rights are no substitute for self-help.[164] Nowhere is

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159. Crain, *supra* note 157, at 1837-49 (describing union reliance upon the blitz model of organizing in preference to bottom-up organizing, reliance on union elections and card check to obtain legal status as the bargaining representative, tendency toward zero-sum adversarial bargaining postures, and reliance on the strike weapon to the exclusion of more creative forms of self-help and shop-floor resistance).

160. *Id.* at 1837.

161. *Id.* at 1822.

162. LYND, *supra* note 14.

163. *Id.* at 22. We have argued previously that exclusive representation ultimately hurts the labor movement and have proposed a system based on multiple representatives. Crain & Matheny, *Labor's Divided Ranks*, *supra* note 130, at 1608-24 (arguing that exclusive representation is not in the best interest of workers or the labor movement and arguing for a system based on multiple representatives).

164. *See, e.g.*, Jennifer Gordon, "*We Make the Road by Walking," Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. CIV. RTS.-CIV. LIB. L. REV. 407, 435-

this lesson more visible than in the West Virginia teachers' strike of 2018 and its ripple effects in southern states lacking legal protection for public sector collective bargaining.

A. Bottom-Up Solidarity: Lessons from West Virginia

On February 22, 2018, West Virginia teachers began a strike that lasted nearly two weeks and included workers in all fifty-five counties in West Virginia.[165] The strike focused on defending the public education system in the state against the incursion of charter schools and systematic disinvestment in public education by a Republican-controlled legislature. The legal environment was not particularly friendly to public sector unions: West Virginia has no public sector bargaining statute, and state law prohibits strikes by public employees.[166] Nevertheless, by appealing to the public's interest and demanding investment in the state's children, the strikers garnered widespread public support and were successful in shutting down all schools state-wide.[167] By most accounts, the strike was an impressive success: the state shored up its public health insurance system and awarded strikers and other public sector workers laboring in the educational structure a 5 percent raise.[168] The strikers' success served as a beacon of hope and a model for other public-sector teachers' unions, promoting a wave of strikes and protests in states historically hostile to unionization and collective bargaining in the public and private sectors.

Three factors contributed to the strikers' success. First, the strike had strong public support. The teachers framed their struggle as a moral crusade, aligning their concerns as workers with the public interest in educating children in the state.[169] The strike was overtly political, presented as a demand for democracy in the form of investment in public education. As a

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41 (1995) (describing program developed at the Workplace Project to build leadership skills and empower workers to act collectively to address workplace injustice without relying solely on law, because law did not address the difficulties they faced, because enforcement was uneven and often nonexistent or ineffective, because conditions on the ground shifted more rapidly than law could evolve, and because reliance on law alone evoked passivity and a victim-like frame not consistent with active engagement).

165. *See* Alia Wong, *The Ripple Effect of the West Virginia Teachers' Victory*, THE ATL. (Mar. 7, 2018), <https://www.theatlantic.com/education/archive/2018/03/west-virginia-teachers-victory/555056/>.

166. Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n, 393 S.E.2d 653, 655-59 (W. Va. 1990).

167. Wong, *supra* note 165.

168. Feyi Lawoyin, *Teachers' Strikes: An Explainer*, ON LABOR (May 8, 2018), <https://onlabor.org/teachers-strikes-an-explainer/> (characterizing the West Virginia teachers' strike as a "resounding success").

169. Wong, *supra* note 165 (stating that the strike was aimed in part "at demonstrating that kids' learning and long-term outcomes suffer when educators are stretched too thin).

part of their demands, the teachers sought specifically to turn back a proposal to eliminate seniority, to defeat a proposal to ban the automatic deduction of dues from members' paychecks, to fix the financially ailing public health insurance system, and to secure a 5 percent raise for teachers to help keep qualified teachers in the state.[170] The strike was successful because it aligned the teachers' interest in adequate funding for textbooks and school supplies and ensuring that qualified teachers were available to teach the state's children, with the interests of the state's populace, both as parents and as citizens.[171] The strike effectively rendered teachers' working conditions and wages topics of public interest, politicizing the bargaining process.

Second, the strikers did not rely on a centrally controlled union war machine. Instead, teachers mobilized themselves and the public through a grassroots organizing campaign. The teachers were represented by the West Virginia Education Association (affiliated with the NEA), which boasted 15,000 members including custodians, school bus drivers, school staff, and even college students preparing to be teachers.[172] The WVEA is not a union, but instead an overtly political entity based in the state's capitol, Charleston. Membership is opt-in, and members can choose to have dues deducted from their pay. Nor is membership limited to current employees – students studying to be teachers and retirees can join, as well.[173] The campaign was coordinated on social media, where a Facebook page garnered 24,000 followers and generated a powerful Twitter banner, #55Strong.[174] Through school-by-school and community organizing, the teachers mobilized thousands, organizing picketing and rallies across the state and at the state capitol to call attention to the struggle.

Third, the strikers did not rely upon law. Quite the contrary: West Virginia has no public-sector bargaining law, and state law prohibits public sector worker strikes.[175] Nor did the WVEA wield command-and-control

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170. *See id.*

171. Even though the mainstream media focused primarily on the demand for higher pay, the teachers made it clear from the beginning that the strike was about defending public education against cuts in state spending, and highlighting "the deterioration of the conditions students face – aging textbooks, crumbling buildings, and reductions in actual teaching time." E.J. Dionne, Jr., *What Striking Teachers Teach Us,* WASH. POST (Apr. 4, 2018), <https://www. washingtonpost.com/opinion/what-striking-teachers-teach-us/2018/04/04/92e744e-3842-11e8-49f e3c675a89_story.htm?utm>.

172. *About WVEA*, W. VA. EDUC. ASS'N, <https://www.wvea.org/content/about-wvea> (last visited Oct. 7, 2018).

173. *Membership Categories*, W. VA. EDUC. ASS'N, <https://www.wvea.org/content/mem bership-categories>.

174. Dave Jamieson, *The West Virginia Teachers' Strike Was Rare, Militant, and Victorious*, HUFFINGTON POST (Mar. 7, 2018), <https://www.huffingtonpost.com/entry/what-makes-the-west-virginia-teacher-strike-so-powerful_us_5a9db476e4b0a0ba4ad6f723>.

175. Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n, 393 S.E.2d 653, 655-59 (W. Va. 1990).

power over its members. Indeed, to the surprise of onlookers, the striking teachers held firm even in the face of a tentative deal to increase teachers' wages reached between WVEA leadership and the Governor on March 1.[176] Not trusting the Governor to make good on his initial promise and not satisfied with raises limited to teachers, the strikers continued the strike as a wildcat action until March 7, when the strikers' demands were finally met. According to the Huffington Post, "[i]t was clear then that rank-and-file members were steering their unions, not the other way around."[177] Nevertheless, according to one activist/leader, the demand for increased wages and a solvent health insurance system was "almost a distraction" from the more fundamental shift toward support for public education the workers were seeking.[178]

All in all, the West Virginia teachers' strike demonstrated the power of a grassroots democratic process that an unshakable commitment to stand up and demand state investment in public education infrastructure, including improving public education workers' wages and benefits. Teachers in other states – particularly those hostile to unions and to public sector bargaining – took heart. One lesson they drew from the West Virginia strike was that favorable law was not essential to success. Teachers in Oklahoma, Kentucky, Arizona, Colorado, and even North Carolina mobilized teacher strikes and/or other actions, emphasizing their concern both for teacher pay and for the future of public education in their states.[179] These efforts produced varying degrees of success, although long-term efficacy remains a question mark at this writing.[180]

B. A Recipe for Public Sector Union Solidarity?

The West Virginia teachers' strike was the most recent illustration of

176. Jamieson, *supra* note 174.

177. *Id.*

178. Jane McAlevey, *The West Virginia Teachers Strike Shows that Winning Big Requires Creating a Crisis*, THE NATION, (Mar. 12, 2018), <https://www.thenation.com/article/the-west-virginia-teachers-strike-shows-that-winning-big-requires-creating-a-crisis/>.

179. *See* Wong, *supra* note 165; Maria Young, *WV Teacher Strike Helped Spark Similar Movements in Oklahoma, Beyond*, THE CHARLESTON GAZETTE-MAIL (Apr. 6, 2018), <https// www.wvgazettemail.com/2018_wd_teachers-strike/wv-teachers-spark-similar-movement-oklaho ma-beyond/article_1b987>.

180. *See* John Aguilar, *Pueblo Teachers Strike Officially Ends After Union Ratifies Agreement with District*, DENVER POST (May 13, 2018, 7:52 PM), <https://www.denverpost.com /2018/05/13/pueblo-teachers-strike-officially-ends-after-union-ratifies-agreement-with-district/> (describing strike by teachers in Pueblo, Colorado, "the first action of its kind by teachers in nearly 25 years in Colorado"); Grace Donnelly, *North Carolina Teachers Strike, Demanding Higher Pay and Better Funding*, FORTUNE (May16, 2018), <http://fortune.com/2018/05/15/nor th-carolina-teachers-strike/> (describing teachers' strike in North Carolina); Lawoyin, *supra* note 168 (describing the outcomes in the teachers' strikes in West Virginia, Oklahoma, Kentucky and Arizona).

the power of sustained grassroots mobilization around an issue that engaged the passions of the community, but it is certainly not unique. In 2012, the Chicago Teachers' Union mobilized 26,000 teachers in 580 schools for a week-long strike in September 2012.[181] Like the West Virginia teachers, the Chicago teachers created a bottom-up solidarity that engaged the community in a challenge to a national "education reform" movement that they argued was systematically destroying public education.[182] Although the Chicago teachers had the benefit of a public sector bargaining law legitimating their actions, they relied most heavily on the first two strategies used in West Virginia: framing the teachers' concerns as a political question that engaged the public and utilizing bottom-up grassroots organizing strategies rather than relying on command-and-control centralized strategy.

How generalizable are the strategies used by the teachers in West Virginia and Chicago? It seems obvious that their strategies should have significant traction in the public sector. Public-sector unions are well-situated to appeal to the public because their demands align more naturally with the public interest. Paul Johnston explains:

> [P]ublic workers' movements are constrained to frame their demands as public policy – rational, universalistic, and, purportedly at least, in the public interest. They depend for power less on their market position and on coalitions in their labor market than on their political position and involvement in the coalitions that govern public agencies. These movements are involved not only in public sector bargaining and lobbying over wages, benefits, and working conditions but also in broader political conflicts over the public agendas that guide and fund public sector work.[183]

Indeed, public sector workers that engage in political mobilization on behalf of the functions they perform – like teachers – effectively become state-builders through their unions and movements.[184] In this way they are fundamentally threatening to the political right, with its agenda of minimizing government and reducing democratic engagement. Thus, it should not surprise us that they generate virulent opposition.

Are the success stories in West Virginia and Chicago unique to teachers? Are they able to mobilize the public in ways that other public sector workers could not? We don't believe so. Public-sector teachers' working

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181. For an analysis of the strike and the mobilization that led up to it, see ASHBY & BRUNO, *supra* note 118. The book is insightfully reviewed in Marcia L. McCormick, Book Review, *Changing What They Cannot Accept: Teachers Unions Fighting for Education "Reform" From Chicago to Oklahoma*, 22 EMP. RTS. & EMP. POL'Y J. __ (2018).

182. *See* ASHBY & BRUNO, *supra* note 118, at 1-2.

183. PAUL JOHNSTON, SUCCESS WHILE OTHERS FAIL: SOCIAL MOVEMENT UNIONISM AND THE PUBLIC WORKPLACE 4 (1994).

184. *Id.* at 9.

conditions may be easier to frame as aligned with the public interest, but strikes by educators are also vulnerable to attack because they don't take the moral high road of enduring and suffering for the good of the children. Indeed, they advocate a breach of the cultural boundary between the "crass world of the market" and "the sacred world of education."[185] Like the demands of graduate students and faculty for unionization and collective bargaining rights, public school teachers' strikes in support of demands for higher pay or better benefits are easily framed as selfish and fundamentally inconsistent with their higher calling to educate students and promote student welfare. That is why teachers and the unions that represent them are more typically cast as villains and obstacles to education reform than as forces for positive change.[186] Media coverage of the West Virginia strike played into this trope: labor's opponents emphasized the disruption of children's education and the harm that the West Virginia strike visited on children left at home due to lack of supervision (e.g. vulnerability to sexual predation, mishaps, etc.)[187] Supporters and sympathetic media emphasized West Virginia teachers packing lunches for students so that those who relied upon school lunch programs for sustenance would not go hungry.[188]

As sociologist Viviana Zelizer has explained, the split between education and the market is a false dichotomy. Education is both integrally connected with the market and is at the same time more than simply a commercial transaction between school and student.[189] Ultimately, the West Virginia teachers found ways to illustrate this, weaving together their interests and those of the students they educate in a compelling message, waving picket signs that said, "You can't put students first if you put teachers last," and "I'd take a bullet for your child, but PEIA [the West Virginia public sector health insurance carrier] won't cover it."[190]

Moreover, a demand for higher wages and better benefits *is* about money, but it is also more fundamentally a demand for respect. For many professionals, the drive to organize is a demand for respect for their skill, expertise, and investment in the profession that is core to the mission or higher calling that they serve, which ultimately improves society.[191]

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185. Viviana A. Zelizer & Lauren Gaydosh, *The University as Students' Workplace?*, HUFFINGTON POST (June 1, 2014, 4:40 PM), <https://www.huffingtonpost.com/entry/university-student-unions_b_5066331.html>.

186. McCormick, *supra* note 181, at (TAN 7).

187. *See, e.g.*, *id.* at ___ (TAN 3-5).

188. *Id.* at ___ (TAN 8).

189. Zelizer & Gaydosh, *supra* note 185.

190. Krieg, *supra* note 2.

191. Noam Scheiber, *When Professionals Rise Up, More than Money Is at Stake*, N.Y. TIMES (Mar. 25, 2018), <https://www.nytimes.com/2018/03/25/business/economy/labor-professionals. html>

Teachers, doctors, nurses, journalists, and graduate students all fall into this group. Such professionals see themselves as the last line of defense between the public they serve and those who threaten the professionalism of their work or subvert their professional mission (educating students, healing and caring for patients, accurately reporting news).[192] A demand for higher wages is also, in a time of staggering economic inequality, a political demand for wealth redistribution. And that is the traditional province of unions.

Are the strategies described above limited to professionals? Clearly not. Perhaps nowhere has the demand for respect been linked more visibly and more effectively to demands for higher pay than in the partnership between labor and the civil rights movement.[193] The Reverend Martin Luther King joined the Memphis sanitation workers' movement in 1968, characterizing an alliance between Blacks and organized labor as "the linchpin of a broad-based social change movement."[194] The movement's slogan, "I am a Man" protested the treatment of black sanitation workers as less than human – a legacy of slavery – and appealed to the public for support.[195] The success of that movement, more than anything else, shows the power of framing. Alliances between social justice movements and the labor movement have the potential to engage the passions of community members and bring to bear pressure for change that cannot be ignored – regardless of the nature of the jobs that the workers hold.

But the most important lesson to draw from the West Virginia teachers' strike is that the power of the unions did not emanate from law. Instead, it came from the mobilization process itself.[196] In the private sector, by contrast, the NLRA supports collective bargaining and pays at least lip service to protection for the right to strike. Could private-sector unions utilize the public interest framing and solidarity building tactics that were successful for the West Virginia teachers, or does the very law that supports them also constrain them? Again, we look to West Virginia for insights.

C. Lessons in Solidarity-Building for the Private Sector: The Pittston Coal

(describing how teacher uprising in West Virginia is illustrative of a trend toward white collar professionals' anger at the devaluation of their training and credentials).

192. *Id.*

193. JOHNSTON, *supra* note 183, at 10.

194. *See* Marion Crain & Ken Matheny, *The "New" Labor Regime*, 126 YALE L. J. FORUM 478 (2017) (describing how civil rights and labor struggles intertwined during the Memphis sanitation workers' strike that was the occasion of King's assassination).

195. *Id.*

196. For a good discussion of this lesson from the strike, see Stephen Greenhouse, *Making Teachers' Strikes Illegal Won't Stop Them*, N.Y. TIMES (May 9, 2018), <https//:www.nytimes.com/2018/05/09/opinion/teacher-strikes-illegal.html> (discussing the long history of defiant, illegal strikes by public employees).

Strike

West Virginia has been the site of some of the most hard-fought and bloody labor struggles in American history. Abundant natural resources have drawn mining operations to the state, and corporations allied with a corrupt state government have ruthlessly exploited the state's workers and its natural resources since the state's formation in 1863. West Virginia workers resisting exploitation have often battled not only the corporate powers aligned against them, but the government and law itself.[197] The West Virginia teachers' strike appealed to the popular appetite for resisting the historical rape of the state's natural resources and workforce by outside interests, including especially coal and natural gas barons.[198] Seeing this connection, commentators compared the popular support inspired by the West Virginia teachers' strike to the popular response to the strike by Pittston coal miners almost two decades earlier.[199]

In the widely publicized struggle with Pittston Coal in 1989-1990, miners mounted a multi-state strike against Pittston. They defied federal court injunctions and harnessed the power of civil disobedience in a struggle for their way of life and a social compact that respected the sacrifices they had made to survive and to give their children a better future.[200] The strike was triggered by Pittston's termination of health care benefits for retirees, widows, and disabled miners. Although these persons were not considered employees covered by the collective bargaining agreements or fully relevant to the employer-labor bargain, they meant everything to the miners. Standing up for people who were literally their brothers and sisters, cousins and grandparents, and neighbors and community members was a natural thing in a place where the individual and the community welfare were so closely intertwined. The miners also saw their own futures in the challenges faced

197. *See* MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS: A BIOGRAPHY 311 (1986) (characterizing wildcat strikes by West Virginia miners as "against the United States government itself" when undertaken in defiance of a prohibition on strikes during World War II designed to advance the war effort).

198. For an excellent description of how absentee corporate interests acquired and exploited West Virginia's land, timber, mineral rights, and people during the period of rapid industrialization and the long-term effects on West Virginia's social culture and environment, see Nicholas F. Stump & Anne Marie Lofaso, *De-Essentializing Appalachia: Transformative Socio-Legal Change Requires Unmasking Regional Myths*, 120 W.VA. L. REV. 823, 825-28, 835-40 (2018).

199. *See, e.g.*, Jaffe, *supra* note 2; Michael Mochaidean, *The Other West Virginia Teacher Strike*, JACOBIN MAG. (Apr. 9, 2018), <https://www.jacobinmag.com/2018/04/west-virginia-teachers-strike-1990-unions>; Benjamin Wallace Wells, *The New Old Politics of the West Virginia Teachers' Strike*, NEW YORKER (Mar. 2, 2018), <https://www.newyorker.com/news /news-desk/the-new-old-politics-of-the-west-virginia-teachers-strike>.

200. RICHARD A. BRISBIN, JR., A STRIKE LIKE NO OTHER STRIKE: LAW AND RESISTANCE DURING THE PITTSTON COAL STRIKE OF 1989-90, 11-13, 190-207 (2010) (discussing the miners' conscious decision to break the law, and to engage in civil disobedience).

by retirees and disabled miners, whose physical health had been part of the price they paid for a middle class way of life.[201] Along with higher health care costs, miners were forced to work longer hours because Pittston decided to keep its mines open twenty-four hours a day, seven days a week. Pittston also abolished successorship clauses, which meant that miners lost seniority and other protections for mines that Pittston sold or leased to other companies.[202]

The United Mine Workers of America (UMWA) initially chose a strategy of peaceful disobedience, including sit-down strikes and road blockages, but the frustrated miners defied the union leadership and engaged in various acts of violence and sabotage, resulting in more than 4000 arrests.[203] Taking matters into their own hands, 37,000 miners were involved in wildcat strikes.[204] After working fourteen months without benefits, the UMWA declared a strike against Pittston in April 1989, which lasted until February 1990 and affected miners in West Virginia, Virginia, and Kentucky.[205] Despite the violence, the strike inspired widespread local and national support.

Although neither side could declare total victory when the strikes were finally settled, the miners won back health and retirement benefits for retirees and others.[206] But the strikes were about more than just health and retirement benefits. The unilateral, arrogant manner of Pittston's treatment of people who had spent their lives and often ruined their health to enrich the coal companies was an affront to the dignity of the miners, their families, and the community.[207] Generations of workers, proud of their coal mining heritage, had dedicated their lives to their profession, and Pittston greatly underestimated the pride that the people of this region take in their coal mining heritage and the strength of their connections with one another. The union and the workers were successful because they were able to frame the

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201. For excellent and poignant insights into the strikers' perceptions, see the documentary, JUSTICE IN THE COALFIELDS (Appalshop 1995).

202. For a good discussion of the causes of the strike and the parties' strategies, see Adrienne M. Birecree, *The Importance and Implications of Women's Participation in the Pittston Coal Strike of 1989-1990*, 30 J. ECON. ISSUES 187 (1996).

203. Richard P. Mulcahy, *A Strike Like No Other Strike: Law & Resistance During the Pittston Coal Strike of 1989-90* 91 J. AM. HISTORY 342, 342-43 (2004) (reviewing BRISBIN, *supra* note 200).

204. *Coal Strike: First the Calm, Now the Storm*, TIME, July 24, 1989, at 41.

205. Greg Henderson, *Tentative Settlement Reached in Pittston Coal Strike*, UPI (Jan. 2, 1990), <https://www.upi.com/Archives/1990/01/02/Tentative-settlement-reached-in-Pittston-coal-strike/5064631256400/>.

206. For a discussion of the agreement that ended the strike see BRISBIN, *supra* note 200, at 240-48.

207. *Id.* at 126 ("The miners understood Pittston's action to be an assault on their dignity. Probably without truly recognizing the normative significance of these actions and of its proposed adaptation of managerial power in a new contract, Pittston upset the equilibrium in relations with a UMWA still locked into the norms of the 1950 accord.").

strike as an effort to enforce the social compact under which they had exchanged their health and bodies for job security and relative prosperity in a state where few other options to earn a livelihood existed, and because the bonds between the workers and the community were so strong. The Pittston strike was one of those inspiring moments in American history when ordinary people "spoke truth to power," and power was forced to listen.

V. CONCLUSION: A WAY FORWARD

There is no doubt that *Janus* will result in significant monetary loss for public-sector unions in the short term. A similar loss of revenue is occurring in the private sector, as right to work laws proliferate. But fears that the labor movement in America may simply die for lack of funds miss an important point: historically, it has never been money that was the power of collective action by workers. The labor movement's power comes from solidarity, not money. We do not wish to pretend that money does not matter because it does. But, if the struggle between workers and employers ultimately comes down to a matter of money, workers will always lose because they cannot match the economic power of their employers. Far from being the death of the labor movement in America, *Janus* can be the signal that it is time to embrace a new model of unionism, one that reflects the views of Staughton Lynd, the idealism of the Knights of Labor, the radicalism of the IWW, and the demands for "more" made by Samuel Gompers.

Both history and the successes of 2018 demonstrate that the most enduring source of power stems from bottom-up mobilization. People become engaged in acting against injustice in large part because of the collective dynamic, perceived first at a very personal level. Individuals make decisions to join based on connections to others and concerns about reputation and status in the community – within the workplace and beyond it. Thus, community-based and member-to-member organizing to nurture a culture of solidarity is critical. Public-sector unions have already begun this process. In the run-up to the Court's decision in *Janus*, many public-sector unions undertook a massive organizing drive aimed at persuading members to re-commit to the union.[208] Some have had tremendous success.[209] This will

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208. Robert Bruno, *After Janus, 3 Ways Unions Can Stay Strong*, CHICAGO SUN-TIMES (July 2, 2018), <https://chicago.suntimes.com/working/janus-supreme-court-unions-public-sec tor/>; Kris Maher, *Unions Court Own Members Ahead of Ruling*, WALL ST. J., June 2, 2018, at A3; Alana Semuels, *Is This the End of Public-Sector Unions in America?,* THE ATL. (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/ 563879/>.

209. *See, e.g.*, Louis C. LaBrecque, *Union Seeks New Members Ahead of High Court Ruling on Fees*, BLOOMBERG LAW (June 12, 2018), <https://www.bna.com/union-seeks-new-n730 14476420/> (reporting on efforts by the International Federation of Professional and Technical Engineers, and observing that one local in the Bay area that grew its membership from the low-80-percent range to 91

be even more important post-*Janus*, as conservative groups campaign to educate public-sector workers on their rights to refuse to pay agency fees and to press for refunds of fees already paid.[210]

How can the public be engaged in the struggle? Union actions must be framed as a moral and political crusade – one that makes society better for everyone, not just for individual workers or even groups of workers. Partnerships with community groups, state enforcement agencies, and others to advance shared platforms that benefit workers and the community will be critical to this framing. This fundamentally local strategy, called variously "bargaining for the common good"[211] or social bargaining,[212] fully embraces unions' political identity, permits direct appeals for popular support, mobilizes the public to legitimize demands for legal reform, and brings pressure directly on the larger financial forces that set the agenda. It replaces the fundamentally transactional relationship that labor has historically pursued with community allies and social justice organizations with new, more creative and broad-based solutions to problems that span entire industries or sectors.

The Chicago teachers were among the first to develop the concept of bargaining for the common good during the strike of 2012. They intentionally connected the financialization of the economy, the political disinvestment in the public sector, and the rise of income inequality with collective bargaining in a way that avoided "pitt[ing] government workers against beleaguered taxpayers for the benefit of the '1 percent.'"[213] Through framing and alignments like this, unions can simultaneously redefine the scope of bargaining and engage groups with common interests to more directly link labor negotiations with the larger market and political economy with which they are intertwined.[214]

In short, the most effective unionism is both personal and political – and it should be. Senator Wagner envisioned a mutually reinforcing link between labor unionism, collective bargaining, and democracy when he proposed the Wagner Act in 1935. In his view, the expression of the

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percent).

210. Maher, *supra* note 208, at A3.

211. *See* Ned Resnikoff, *Bracing for a Supreme Court Attack, Labor Unions Make Plans to Survive*, THINKPROGRESS (Jan. 18, 2018, 8:58 AM), <https://thinkprogress.org/supreme-court-unions-f1dc972f8c51/>. This approach has been popularized through the Kalmanovitz Initiative for Labor and the Working Poor at Georgetown University. *See* Joseph A. McCartin, *Can Labor Still Use the Wagner Act*, DISSENT MAG. (Fall 2017), <https://www.dissentmagazine. org/article/can-labor-still-use-wagner-act-janus-right-to-work>.

212. Andrias, *supra* note 138.

213. McCartin, *supra* note 211.

214. Bruno, *supr*a note 208; McCartin, *supra* note 211.

democratic impulse had to be nurtured at the shop floor level in day-to-day work:

> For the masses of men and women, the expression of the democratic impulse must be within the industries they serve – it must fall within the ambit of their daily work. That is why the struggle for a voice in industry through the processes of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America. Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship.[215]

At their best, unions capitalize on the possibilities for democratic engagement in the workplace[216] and encourage "habits of citizenship and norms of deliberative and democratic decision-making" that migrate into the larger political arena.[217]

The most important lesson that we should draw from both the public-sector teacher strikes and from *Janus* is that law cannot be the source of worker power. Law, after all, "is a tool of the powerful."[218] Workers' strength lies in solidarity, not in law. As feminist Audre Lorde famously cautioned:

> *[T]he master's tools will never dismantle the master's house*. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those . . . who still define the master's house as their only source of support.[219]

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215. Robert F. Wagner, "*The Ideal Industrial State" – As Wagner Sees It*, N.Y. TIMES, May 9, 1937, at 23.

216. *See generally* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003) (arguing for the prospects of democratic engagement across diverse social identities at work).

217. Dorothy Sue Cobble, *The Intellectual Origins of an Institutional Revolutio*n, 26 A.B.A. J. LAB. & EMP. L. 201, 207 (2011); Marion Crain, *An Imminent Hanging*, 26 A.B.A. J. LAB. & EMP. L. 151, 155 (2011).

218. Hodges, *supra* note 141, at 894.

219. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* THIS BRIDGE CALLED MY BACK: RADICAL WRITINGS BY WOMEN OF COLOR 108, 109 (Cherie Moraga & Gloria Anzaldua eds., 1981).