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AGENCY FEES IN THE MIRROR OF LIBERALISM'S CONTRADICTIONS

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In the last of meeting places
We grope together
And avoid speech
Gathered on the beach of the tumid river
Sightless unless
The eyes reappear . . . .[1]

I. INTRODUCTION.

Unions have primarily derived their power and influence from two significant privileges granted to them—exclusive representation[2] and union security provisions (or agency fees)—despite the possibility that such privileging violates the Universal Declaration of Human Rights[3] and threatens First Amendment Rights. The prospect of

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[1] T.S. Eliot, *The Hollow Men*, (quoted in DIANA WEST, AMERICAN BETRAYAL: THE SECRET ASSAULT ON OUR NATION'S CHARACTER 250 (2013).

[2] Maxford Nelsen, *Freedom Foundation files brief in SCOTUS case seeking to end exclusive representation*, LABOR LITIGATION, Freedom Foundation, January 24, 2019. *See also*, Brief of Amicus Curiae, Freedom Foundation in Support of Petitioner, Teresa Bierman v. Mark Dayton, 139 S. Ct. 2043 (2019) https://www.supremecourt.gov/DocketPDF/18/18-766/80754/20190116144505087_Bierman%20Amicus%20Brief%20-%20FIN.pdf *See also*, Edwin Vieira, Jr. *Poltroons on the Bench: The Fraud of the "Labor Peace" Argument for Compulsory Public Sector Collective Bargaining,* 18 GOV'T UNION REV. 1, 22 (1998) [hereinafter Vieira, *Poltroons on the Bench*] (noting the Court misunderstood exclusive representation).

[3] Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values?* 14 WM. & MARY BILL RTS. J., 1309, 1315 (2006) [hereinafter Hutchison, *A Clearing in the Forest*] (citing Conor Cradden, *The Free-Rider Problem*, http://www.world- psi.org/Content/Content

coercion prompts questions regarding the force of First Amendment freedoms. First, in our increasingly fragmented republic, should the First Amendment be wielded as a sword that protects individual rights or, alternatively, be deployed by black-robed rulers to undermine democratic governance?[4] Second, is the Supreme Court prepared to supply an interrogation of the First Amendment as a mechanized liturgy without substance or is it prepared to hypostatize this abstraction as having a real, objective, and defendable existence?

Although rights of expression, undergirded by freedoms of thought and conscience, neither entirely exclude nor inviolably privilege arguments against compelled subsidies,[5] "[t]he constitutionality of the use of agency-shop fees for union political activities is an issue of particular sensitivity," which the Court on occasion has deliberately sidestepped.[6] Ever since the Supreme Court's 1956 Railway Labor Act (RLA) decision in *Railway Employees Department v. Hanson*[7] upholding private-sector union-shop arrangements, disputes contesting the permissibility of compulsory union dues regimes in both the public- and private-sector have ensued. The *Hanson* decision rotated on the plaintiffs' contention that the payment of periodic dues, initiation fees, and assessments to the exclusive bargaining representative violated the Due Process Clause of the Fifth Amendment rather than the workers' freedom of expression rights.[8] Conceding that with respect to the employees' freedoms of association, conscience, and

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Groups/English7/Focus2/Focus articles/The Free-Rider Problem.htm (last accessed Jan. 31, 2006) (quoting Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc A/810 at 71(1948)).

[4] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J. dissenting).

[5] Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 249 (2019).

[6] Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149, 190 (noting that the Court sidestepped this issue in its 1961 decision in *Machinists v. Street*).

[7] R. Emps' Dep't. v. Hanson, 351 U.S. 225, 233-235, 238 (1956) (upholding under the Commerce and Due Process Clauses the claim that the RLA permits employers and unions to require financial support for all persons who benefit from the union's services as bargaining representative, while dismissing a facial First Amendment challenge). *See also*, JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW 2303 (6th 2012).

[8] *See* Hanson, 351 U.S. at 230 (invalidating the Nebraska Supreme Court's holding that a union shop violated workers' freedom of association rights). However, despite plaintiffs' claim "that the union shop agreement forces [them] into ideological and political associations, which violate their rights to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights," the U. S. Supreme Court failed to find this problem in the record. *Id*. at 236, 238.

thought, wide-ranging problems under the First Amendment *could* surface, the Court agreed private rights were being invaded by state action in the form of federal law.[9] The Court did not address the constitutionality of whether compulsory dues payments compelled ideological conformity[10] because the plaintiffs, unlike plaintiffs in subsequent cases, failed to present evidence supporting such a claim.[11] Still, anticipating more direct conflicts between compulsory dues payments and the First Amendment in the future, the *Hanson* Court said that if "the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case."[12]

Regardless of whether the First Amendment issues raised by nonunion workers contesting compulsory dues schemes were properly avoided in *Hanson,* or in ensuing cases,[13] uncertainty regarding the benefits of unions has spread widely among workers.[14] Notwithstanding worker skepticism and despite evidence that workers remain unpersuaded by so-called fair share claims that may force them to subsidize labor union speech,[15] the Supreme Court, in reliance on its decision in *Abood v. Detroit Board of*

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[9] *Id*. at 232.
[10] Disputes regarding the constitutionality of compulsory dues payments are distinguishable from disputes regarding constitutionality of exclusive representation arrangements. *See, e.g.*, Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (holding that the issue of compulsory membership being used to impair freedom of expression is not a problem presented in the record, and accordingly, if compulsory membership was in fact used as a cover for forcing ideological conformity, the court's judgment will not prejudice the decision in that case). In *Street* unlike *Hanson* evidence that the union used dues to enforce ideological conformity was found in the record. *Street*, 367 U.S. 744.
[11] *See, e.g., Hanson*, 351 U.S. at 232 (holding that justiciable questions were presented under the First and Filth Amendments because Congress, through the union shop provision of the RLA sought to strike inconsistent laws in several states).
[12] *Id*. at 238. *See also*, Campbell *supra* note, at 256 (asserting that First Amendment law strictly separates compelled subsidies for private speech, which are constitutionally proscribed and compelled subsidies for governmental speech which raise no First Amendment problem at all).
[13] *See, e.g., Street*, 367 U.S. at 740 (affirming the lower court's holding that union-shop agreements do not give unions power to use individuals' dues over their objection, to support oppositional political causes).
[14] THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 228 (2007, 3rd ed.).
[15] *See, e.g.,* Aaron Tang, *Life After* Janus, 119 COLUM. L. REV. 1, 1-2 (2018), http://dx.doi.org/102138/ssrn3189186 (arguing that the fair share fee system ensures the financial vitality of public-sector union and prevents free riders, advances the interests of workers and state and local governments which bargain with exclusive bargaining representatives).

Education[16]—in spite of its wobbles[17]—has maintained that agency fee regimes are constitutionally permissible.

The Court's decades-old conviction regarding the legitimacy of enforced union subordination in the public-sector, in combination with applicable state law, has permitted labor unions to serve as the exclusive bargaining representative; therefore, labor organizations could demand that nonmembers pay fees to public-sector labor unions. Prompted by the possibility that nonmembers could, as a collateral consequence, be required to pay, indirectly, for campaign contributions and political initiatives as a condition of employment,[18] the Court observed that being required to pay money to a union or to a state bar is a serious burden on one's First Amendment rights, particularly when the money is used for political advocacy.[19]

Despite the Court's abortive caution regarding infringements on First Amendment rights, its overall approach toward agency fees has supplied opportunities for union corruption.[20] Moreover, public-sector unions have persistently charged nonmembers for the cost of collective bargaining per se but also for allegedly related activities.[21] That is, until the Court's recent *Janus v. AFSCME* decision, holding that forced subsidization—regardless of the public-sector union's purpose—violates the free speech rights of employees who choose not to join a union.[22] Noting that designating a union as the employees' exclusive representative restricts the rights of individual employees, meaning that neither individual employees nor a substantial minority group of employees may be represented by any agent other than the designated union nor may

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[16] Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).
[17] *See, e.g.*, Harris v. Quinn, 573 U.S. 616, 656 (2014) (determining that encroachments on the First Amendment should only take place in the rarest of circumstances); Knox v. SEIU, Local 1000, 567 U.S. 298, 310 (2012) (holding that agency fee provisions must comply with "exacting First Amendment scrutiny").
[18] Melanie Stallings Williams & Dennis A. Halcoussis, *Unions and Democracy: When Do Nonmembers Have Voting Rights?*, 9 J. BUS. & TECH. L. 213, 214-15 (2014).
[19] *See, e.g.*, William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171 (2018) (arguing that requiring people to pay money to private organizations or to the government, is not a First Amendment problem at all).
[20] Williams & Halcoussis, *supra* note, at 215.
[21] Janus v. AFSCME, Council 31, 138 S. Ct 2448, 2486 (2018).
[22] *Id.*

individual employees negotiate directly with their employer,[23] the Court found that public-sector unions' ostensible reliance interest was insufficient "to justify the perpetuation of free speech violations that *Abood* has countenanced" for decades.[24] Whether the underlying logic of its decision is self-evident[25] or not, the Court allowed the axe to fall on the practice of using other people's money to advance the ideological interests of groups or individuals, whose preferences are at variance with the preferences of union dues objectors.[26] Even if, indeed, public unions have suffered a death blow and irrespective of the veracity of the claim that dues payments are simply an accounting formalism that constitutes a fraction of the so-called union premium, which rightfully belongs to the collective and thus should be seen as a payment to the union by the employer,[27] the obligation by all represented workers to pay their "fair" share of the union's cost has now evaporated.[28]

Showing that the Supreme Court's public-sector analysis cannot be fully separated from its private-sector origins, this article—the first in a two-part series reassessing the viability of unions in our postmodern republic—answers four questions. First, I consider whether the *Janus* case was correctly decided. The answer to this question depends on the defensibility and scope of *Abood*. Second, since rank and file Americans are increasingly drawn to bowling through life alone without voluntary associational support despite simultaneous membership in several groups: can compulsory union dues regimes be justified within liberalism's often contradictory framework, irrespective of the merits or demerits of *Janus?* Third, answers to the first and second questions have implications for whether agency fee/union security regimes remain defensible within the domain of private-sector cases. Fourth, given the authoritarianism embedded in liberalism, and given modern liberalism's contradictions,

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[23] *Id*.
[24] *Id*.
[25] Campbell, *supra* note 5, at 250.
[26] *See, e.g.*, Tang, *supra* note 15, at 1-2 (explaining the aftermath following the Supreme Court's decision to prevent unions from requiring members to pay fees against their personal objections, thus funding the union's political position).
[27] Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1047-1050 (2019).
[28] Tang, *supra* note 15, at 1.

can *Janus* survive the state's thirst for control? This installment offers a comprehensive answer to the first question only while supplying speculative answers to the last three questions.

While the Supreme Court's jurisprudence in the domain of compelled subsidies may be mercurial and undertheorized,[29] and whilst it may be increasingly doubtful that *any* form of compulsory unionism can be justified inside of a liberal society that is currently unraveling, it is equally true that moves by nonmembers to disaffiliate will likely provoke a conservative reaction. Understanding this response provides a basis for a broader discussion because this conservative reaction is tied to the authority issuing forth from America's new aristocracy (liberalocracy) comprised of globalized elites. These elites, who—as the presumptive intellectual heirs of Locke's economic liberalism and Mill's lifestyle liberalism—decry tradition, custom, and genuinely shared values sufficient to sustain the republic[30] and who simultaneously support an expanding framework for control by experts located in the wealthiest region in the United States—Washington D.C. and its surrounding environs—continue to redefine and transform democracy so that the people do not rule but instead are satisfied with the material benefits of living in a liberal *res idiotica*.[31] While confusion reigns regarding how to properly define liberalism,[32] it is possible that the move toward a liberal consensus supporting unconstrained autonomy has paradoxically released conservative/reactionary forces; this signifies that liberalism and its gifts have been transmuted into a profoundly illiberal, repressive force—even though or precisely

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[29] Campbell, *supra* note 5, at 251.
[30] PATRICK J. DENEEN, WHY LIBERALISM FAILED 144-161 (2018) (describing liberalocracy's ascendance, which manifest itself in a new ruling class of wholly self-made individuals who have been freed from accident, circumstances and custom to live experimental lives accompanied by the belief that ordinary people must be controlled by experts and expert opinion because such people lack the expertise necessary to control their own lives, while leading a "revolt of the elite" in the secession of the successful from flyover country). *See also*, Sohrab Ahmari, *Giving the Boot*, FIRST THINGS, 47, 48-49 (April 2019) (reviewing MAX BOOT, THE CORROSION OF CONSERVATISM: WHY I LEFT THE RIGHT).
[31] DENEEN, *supra* note 30, at 154.
[32] For a variety of views *see, e.g.*, Gladden Pappin, *Toward a Party of the State*, 3 AMERICAN AFFAIRS 149, 149-160 (2019), Leontios Xenophilos, *Losing Momentum: A Warning from the Fracturing British Left* 3 AMERICAN AFFAIRS 161, 161-171 (2019) and Adrian Vermeule, *Liberalism and the Invisible Hand*, 3 AMERICAN AFFAIRS, 172, 172-197 (2019).

because it grants the autonomous individual wide berth to define what is good and true.[33] It follows that this liberal/conservative move poses a risk to a principled understanding of the First Amendment, which does not necessarily command respect from our incipient liberalocracy. They are instead drawn to the will to power and the exercise of such power to limit disaffiliation, thus signifying that the free world neither feels nor is free.[34] Consequently, liberalocracy's pursuit of heteronomy places the permanence of Mark Janus' victory in doubt.

Part II of the first installment offers a prologue that sets the stage for analysis. Part III revisits *Abood* and its correlative "labor peace" and "free rider" justifications for compulsory dues payments in the mirror of the First Amendment and the impossibility of interpersonal utility analysis in an increasingly fragmented society. Part III offers a deconstruction of two of the plinths on which compulsory unionism has been built: the free rider presumption and the labor peace argument. Framed by *Abood's* shadow, Part IV examines the *Janus* case by setting forth the facts, the majority opinion, and the principal dissent. Part V provides analysis which inspects the *Janus* opinion within the framework of the First Amendment and liberalism's various conceits and answers this article's four central questions.

This article's analysis and conclusions, ably assisted by scholarly contributions from Patrick Deneen, Thomas Kohler, and Larry Siedentop, do not issue forth from either political pole since liberalism, properly construed, encompasses both the left and right, liberal and conservative, and because both perspectives—however abrasive our contemporary politics may be—issue forth from the same ideological tree. Liberalism, as conceived here, is simply the globe's only remaining ideology after "the demise of fascism and communism," and it only has the faintest prospect of viability.[35] Moreover, suspicion surfaces regarding the presumption that human life should be held hostage to this or any other ideology because all efforts to remake society on an ideological basis

[33] Ahmari, *supra* note 30, at 50.
[34] *Id*.
[35] DENEEN, *supra* note 30, at 5, 29-31.

likely originate in a false anthropology.[36] Continuing efforts to ensure that workers and citizens live under the shadow of this ideology, within and without the labor arena, may ensure a future increasingly controlled by authoritarian elites. Perhaps like alchemists of old, cognitive elites are prepared to transmute the language of freedom and liberty into nothing less than the controlling captivity of the state.

II. Prologue: Setting the Stage for Analyzing *Janus*

Any comprehensive analysis of the *Janus* case and its implications must note that workers and citizens find themselves in a society that is anticipating something but does not know what it is waiting for.[37] This postmodern ecosystem generates workers who are drawn to self-referential individualism and isolation rather than collective action,[38] thus leading to heterogeneous preferences among workers. At the same time, within the private-sector, postmodern progressivism generates isolation as corporations embrace the progressive agenda precisely because it makes workers weaker, more vulnerable, more tractable, and more willing to work longer hours for lower pay.[39]

Politics and economics has been divided traditionally "by the types of questions they ask, the assumptions they make about individual motivation, and the methodologies they employ," but we can no longer presume a dichotomy between political man pursuing the public interest and economic man pursuing his private interest.[40] This is so because material advancement supplies only one of many motives propelling human activity in a world increasingly populated by humans who see themselves as ever-more autonomous individuals.[41] Additional difficulties surface because the Supreme Court, on Professor Kohler's account, has treated the First

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[36] *Id*. at 19.
[37] Hutchison, *A Clearing in the Forest, supra* note 3, at 1311.
[38] *See, e.g.*, Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline, in Employee Representation in* THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 41-49 (Samuel Estreicher ed., 1998).
[39] Helen Andrews, *Our Socialist Moment*, FIRST THINGS 57, 58 (August/September, 2019) (noting that corporations embrace subsidized abortion and contraceptives because they prefer that women put off childbearing and because workers without children are more tractable and willing to work longer hours for lower pay).
[40] DENNIS C. MUELLER, PUBLIC CHOICE II 1(rev. ed. 1989).
[41] Hutchison, *A Clearing in the Forest, supra* note 3, at 1312 (internal citations omitted).

Amendment as the outworking of individualism[42] and views union associations as a threat to individual sovereignty, so the Court constricts the reach of this affiliation to an association of otherwise unrelated individuals who share a binding but delimited interest in economic advancement.[43]

Complexity swells because increasing levels of ethnic and ideological diversity (heterogeneity) within contemporary society corresponds negatively with the trust and solidarity necessary to sustain viable and defensible associations in the absence of compulsion.[44] Complexity also intensifies, first, because the idea of individual rights and indeed the notion of the individual were both absent from the ancient cosmos and remain relatively new in human history,[45] and second, because these ideas and notions are now the subject of contestation. This is so because nations, in what Oxford Professor Siedentop calls a post-Christian world, have lost their moral bearings since they no longer have a persuasive story to tell about their origins and development.[46] Additional complexity arises because questions surface regarding whether the compelled-subsidy doctrine is defensible in terms of the First Amendment's original meaning.[47]

Against this backdrop, labor unions have seen a secular decline in the late twentieth century that has continued into the twenty-first, thus spurring a debate concerning whether union emphasis on liberal procedural rights and more accountability can combine to stem this decline.[48] Provoked by contemporary troubles indicating that the overall labor movement must deal with signs of entropy despite some evidence of stability fortified by a substantial commitment to ideology within the public-

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[42] Kohler, *supra* note 6, at 193-194.
[43] *Id*. at 193.
[44] *See*, *e.g.*, Kevin den Dulk, *Isolation and the Prospects for Democracy: the Challenge of the Alienated: Does pluralism have an answer to our social estrangement?*, COMMENT (May 24, 2018), https://www.cardus.ca/comment/article/isolation-and-the-prospects-for-democracy/ (quoting Robert Putnam's Skytte Prize Lectures).
[45] LARRY SIEDENTOP, INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM 33 (2014).
[46] *Id*. at 1.
[47] Campbell, *supra* note 5, at 251.
[48] *See*, *e.g.*, Jedidiah J. Kroncke, *The False Hope of Union Democracy*, 39 U. PA. J. INT'L L. 615, 615-16 (2018) ("The relative strength of unions saw a secular decline in the late twentieth century that has only continued in the early twenty-first century[,] . . . [d]ebates among sympathetic activists and scholars over the sources of this decline and how to reverse it have intensified alongside resurgent contemporary concern with economic inequality.").

sector,[49] one union president asks: "Where the hell is Moses when you need him? . . . I mean parting the Red Sea is nothing compared to the challenges we face as a movement."[50] In stark contrast with labor movement's hopes for a stirring *Risorgimento* perhaps tied to some version of union democracy,[51] this observation correlates with a steady decline in union penetration of the labor force,[52] the rise of an individual system of representation,[53] and the diminishing appeal of labor unions. This is so because individuals, consumed by their own unique conception of a singular as opposed to a collective identity shy away from binding associations,[54] which could possibly approach the position of a moral tribe or a moral community premised on a (mostly) shared interpretation of right and wrong and through which social norms are enforced.[55]

Although all observers ought to refrain from embracing such developments unless they are equally prepared to embrace anarchy, this reflection matches three others: (1) the rejection of any objective ordering principle or metanarrative for living life in our republic featuring fragmentation rather than unity, wherein the Supreme Court acts as our Chief Fragmentation Officer and presides over a tournament of competing narratives by offering ever-more liberalism as our unifying ideology, (2)

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[49] *See, e.g.*, LEO TROY, THE NEW UNIONISM IN THE NEW SOCIETY: PUBLIC SECTOR UNIONS IN THE REDISTRIBUTIVE STATE 1-7 (1994) [hereinafter TROY, THE NEW UNIONISM] (showing public-sector unionist in collaboration with other social and political forces attempt to transform the nation and prepare the way toward the achievement of the New Socialism).

[50] Harold Meyerson, THE AMERICAN PROSPECT (May 22, 2005), http://prospect.org/article/labors-civil-war (quoting Laborers president Terence O'Sullivan).

[51] *See, e.g.*, Michael J. Goldberg, *In the Cause of Union Democracy*, 41 SUFFOLK U. L. REV. 759, 762-66 (2008) (promoting union democracy as part of an effort to make the labor movement more responsive to its members as a vehicle to revive and expand unionization).

[52] *See, e.g., Vital Statistics*, UnionFacts.com, https://www.unionfacts.com/cuf/vitals (accessed May 23, 2018) (noting union membership as a whole has decreased from its peak); Jordan Yadoo, *Quicktake: U.S. Labor Unions*, BLOOMBERG (June 27, 2018), https://www.bloomberg.com/quicktake/u-s-labor-unions (showing that in 2017, 10.7 percent of wage and salary workers in the U.S. belonged to a union, which is almost half the rate in 1983).

[53] *See* LEO TROY, BEYOND UNIONS AND COLLECTIVE BARGAINING 3 (1999) hereinafter TROY, BEYOND UNIONS] (showing that an individual system of representation accounts for more than 90% of private-sector employment).

[54] Worker skepticism contributes to a decline in the proportion of the unionized labor force whereas the largest and most rapidly growing unions are those representing government employees. Sowell, *supra* note 14, at 228-29.

[55] James A. Lindsay & Mike Nayna, *Postmodern Religion and the Faith of Social Justice*, AREO MAGAZINE (December 18, 2018), https://areo magazine.com/2018/12/18/postmodern-religion-and-the-faith-of-social-justice/.

understood from the perspective of both public choice theory and postmodern identity construal and consistent with the first observation, there is an absence of preference convergence amongst workers and within the larger society, thus vitiating prevalent assertions that unions operate as a model of voluntary cooperation characterized by solidarity and shared values,[56] and (3) unions, which were ostensibly created for the protection of workers, and propelled by statutory law, operate in decidedly oligarchic[57] and undemocratic ways regarding members and nonmembers alike, an outcome that is consistent with, and propels, "elite" union bargaining.[58] This analysis supports the intuition that unions are a manifestation of bureaucratic managerialism justified by the contention that government, led by experts, possesses resources which rank and file citizens and workers lack.[59] Since bargaining unit workers often lack shared values and solidarity, and since contemporary unions are often led by an "elite" bargaining class of individuals, this forecloses democratic processes, thus providing workers with additional reasons to foreswear labor unions.

Beyond the speech interest of employees, beyond the issue of whether public-sector and private-sector bargaining units can be separated,[60] and, finally, beyond the issue of whether unions spend only a small fraction of their dues revenues "on collective bargaining and related activities,"[61] growing numbers of Americans are looking for liberation, whilst human choice assumes center stage as the preferred vehicle to find

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[56] Hutchison, *A Clearing in the Forest, supra* note 3, at 1309.
[57] *See* Stewart J. Schwab, *Union Raids, Union Democracy and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 371 ("Believing that oligarchy is inevitable, some labor scholars have insisted that unions should not be evaluated against a democratic ideal.").
[58] Williams & Halcoussis, *supra* note 18, at 213-14 (noting that normally unions are not required to let their members participate in negotiations or ratify contracts while those individuals who are represented by the labor organization but who are not members are not normally allowed to participate in the union at all). *But see* Kroncke, *supra* note 48, at 615-620, 705 (arguing that a union democracy focus hastens labor movement's decline and arguing that labor unions should focus on achieving their future by giving workers solidarity).
[59] Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?,* 26 QUINNIPIAC L. REV. 799, 800 (2008) [hereinafter Hutchison, *What Workers Want*].
[60] Separating public-sector from private-sector bargaining units is difficult because roughly one-half of a typical union's financial activity tends to occur at the national level. *See* Marick F. Masters & Robert S. Atkin, *Financial and Political Resources of Nine Major Public Sector Unions in the 1980s,* 17 J. LAB. RES. 183, 186 (1996).
[61] *See* LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS 12 (2004) ("Because so little of [the unions' annual $17 billion] is spent on collective bargaining or related activities . . . unions can devote substantial funds to politics.").

meaning in lives that confront never-ending possibilities.[62] Equally clear, compulsory unionism faces wide-ranging challenges because the tectonic plates underlying Western Civilization have shifted,[63] paired with evidence that the West is hastening toward suicide.[64] These developments proceed apace despite the surrender by leading hierarchs to the postmillennial belief that the arc of the moral universe is long, but bends toward justice wherein evolving expectations culminate in a pleroma as all of history meets all of destiny in an epoch of time.[65] On this transformational and revolutionary view, "[h]istory knows no scruples and no hesitation . . . [as] she flows towards her goal . . . [and] makes no mistakes."[66] Irrespective of the source and wisdom of this end-times eschatology, the realities of polarization and demonization that characterize our public discourse have come into view,[67] thus endangering both major political parties,[68] as well as labor unions, which are torn between emphasizing organizing and political action.[69]

This occurs as the nation reaps the fruit of civilizational moves defined by schismatic polarity and nonstop intensity, which accelerated during the cataclysmic

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[62] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1311.
[63] Mary Eberstadt, *The Zealous Faith of Secularism: How the Sexual Revolution Became a Dogma*, FIRST THINGS, https://www.firstthings.com/article/2018/01/the-zealous-faith-of-secularism (last accessed May 25, 2018).
[64] *See* JONAH GOLDBERG, SUICIDE OF THE WEST: HOW THE REBIRTH OF TRIBALISM, POPULISM, NATIONALISM, AND IDENTITY POLITICS IS DESTROYING AMERICAN DEMOCRACY 330-51 (2018) (arguing that social decline is a choice) [hereinafter JONAH GOLDBERG, SUICIDE OF THE WEST]; DOUGLAS MURRAY THE STRANGE DEATH OF EUROPE: IMMIGRATION, IDENTITY, ISLAM 1-9 (2017) (suggesting Europe's leaders have decided to commit civilizational suicide).
[65] *Letters*, Michael Doran Replies, FIRST THINGS, August/September 7, 8 (2018) (quoting Martin Luther King Jr. & Barack Obama for the proposition that the moral arc of justice bends through human effort).
[66] ARTHUR KOESTLER, DARKNESS AT NOON 43 (1941, 1968).
[67] *See*, *e.g.*, John Inazu & James K. A. Smith, *Pluralism, Difference, and the Dynamics of Trust: What's the likelihood of living together if we can't even trust our neighbours?*, COMMENT MAGAZINE (March 1, 2017), https://www.cardus.ca/comment/article/pluralism-difference-and-the-dynamics-of-trust/?_cldee=aGh1dGNoaXM0MTc1QGdtYWlsLmNvbQ%3d%3d&recipientid=contact-7733728a2551e81181023863bb341858-d36ffaa94fc145b3b4e8df780ec7b096&esid=dad3e99d-5e5f-e811-8108-3863bb2ec350 (discussing the realities of polarization that characterize current public discourse).
[68] *See*, *e.g.*, Christopher Caldwell, Frances Lee, David Karol & Michael Kazin, Roundtable, *Are the Parties Dying*?, 48 DEMOCRACY: A JOURNAL 87 (Spring 2018) (discussing the increasing internal divisions within the political parties over the last two decades).
[69] *See*, *e.g.*, Harold Meyerson, *Labor's Civil War,* THE AMERICAN PROSPECT (May 22, 2005), https://prospect.org/article/labors-civil-war (showing that AFSCME a public-sector union, supported by the United Steelworkers, lives and dies by political elections whereas the SEIU union is more concerned with organizing).

events of the 1960s,[70] a move that coincides with the inception of the "New Unionism."[71] This ongoing process has been deeply enriched by moral triumphalism and its corollary, virtue signaling.[72] This progression, more likely than not, reflects confusion regarding the nature of freedom propelled in part by a failure to abide by the distinction between *actuality* and *potentiality*, a philosophic difference, which provides crucial limitations on the scope of individual freedom.[73] In any case, the dismissal of any constraints on the notion of freedom culminates in the pursuit of disassociation, immaturity, and unreality.[74] Exacerbating this progression is the permanent adolescence of both the left and the right.[75] As Ross Douthat briskly observes:

> This overall process correlates with the forging of a society wherein human selfishness and solipsism have waxed and self-control, community, and self-reliance have waned, thus fostering a nation of narcissists who are unable to control their own impulses and desires. This nation of narcissists turns out to be one of Ponzi schemers, gamblers, and speculators, one wherein household debt rises alongside public debt as bankers, pensioners, automakers, and unions all compete to empty the public trough. This 'yields a nation wherein limitless appetites spur unlimited government.'[76]

Against this backdrop, the salvific power of human effort, as represented in liberalism, guided by experts largely unaided by reference to the past, and irrespective of its origins,[77] has been exposed as a bold political and social experiment that insists on

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[70] Daniel Henninger, *The Year Politics Collapsed,* THE WALL STREET JOURNAL (May 30, 2018,), https://www.wsj.com/articles/the-year-politics-collapsed-1527717224.
[71] LEO TROY, THE NEW UNIONISM, *supra* note 49, at 1-7.
[72] Henninger, *supra* note 70.
[73] *See*, *e.g.*, EDWARD FESER, ARISTOTLE'S REVENGE: THE METAPHYSICAL FOUNDATIONS OF PHYSICAL AND BIOLOGICAL SCIENCE 16 (2019).
[74] D. C. SCHINDLER, FREEDOM FROM REALITY: THE DIABOLICAL CHARACTER OF MODERN LIBERTY 185-188 (2017) (noting that the only way an individual can possess freedom in the sense that the *Planned Parenthood v. Casey* Court defines it is by dissociating it from any contact with reality).
[75] *See*, *e.g.*, Steve McCann, *The Permanent Adolescence of the American Left*, AMERICAN THINKER, May 31, 2018, https://www.americanthinker.com/articles/2018/05/the_permanent_adolescence_of_the_american_left.html (attacking the left even though some of his fire ought to be aimed at the right as well).
[76] Harry G. Hutchison, *Defending Religious Liberty in a Secular Age?*, 45 SOUTHWESTERN L. REV. 49, 72 (2014) [hereinafter Hutchison, *Defending Religious Liberty*] (notes omitted) (my debt to Ross Douthat should be obvious).
[77] HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM: FROM ANCIENT ROME TO THE TWENTY-FIRST CENTURY 1-7 (2018) (suggesting that liberalism is a basic and ubiquitous word despite the fact that it has a muddled

drawing down its preliberal inheritance suggesting it is far from certain that this philosophical viewpoint can succeed as the world's only remaining ideology.[78]

These trends, wherein liberal ideology, in contradistinction to John Dewey's claims,[79] creates a society comprised by private rights and individual choices,[80] where the market and the neoliberal state manage disconnected individuals who are seen as consumers,[81] produce a flurry of questions. Salient queries surface regarding the prospects of forging life in common, because we cannot trust our neighbors,[82] our fellow workers, our representatives, or our hierarchs (including "progressive" labor union leaders and academics) who congregate in wealthy cities rewarding highly-educated cognitive elites while losers gather bread crumbs in flyover country swamped by the global economy.[83] Issuing forth from our current epoch wherein moderns have insistently pursued their private interests at the expense of some shared and virtuous conception of the common good,[84] our postmodern world is floundering,[85] devolving into "consumerist cliques" and "warring tribal factions."[86] Concurrently, government regulation—both within and outside the labor and employment arena—has expanded so much that the "limited government" of the liberal state "would provoke jealousy" of "tyrants of old, who could only dream of such extensive"[87] capabilities. The establishment of ever-expanding control by liberal states under the guise of advancing positive freedom purchased by paternalism, which has become increasingly

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meaning, remains a highly contentious concept that, on one account, originated in Christianity or in the battle against Christianity, or, alternatively was generated by a cast of thinkers ranging from John Locke, Hobbes or Machiavelli, and was likely propelled, at least in part, by those who saw themselves as moral reformers and likely entered the American political vocabulary in the early twentieth century).

[78] DENEEN, *supra* note 30, at 29-30.

[79] ROSENBLATT, *supra* note 77, at 6 (insisting that liberalism stood for "liberality and generosity, especially of mind and character" rather than the "gospel of individualism").

[80] *Id.* at 7.

[81] Xenophilos, *supra* note 32, at 168.

[82] Inazu & Smith, *supra* note 67.

[83] DENEEN, *supra* note 30, at 149.

[84] The term self-interest encompasses more than avaricious greed or material gain in some strictly pecuniary sense. *See*, *e.g.,* Hutchison, *A Clearing in the Forest, supra* note 3, 1312.

[85] Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1197 (2005).

[86] Ahmari, *supra* note 30, at 49.

[87] DENEEN, *supra* note 30, at 7.

authoritarian,[88] elevates legitimate questions implying that there is a totalitarian demon in democracy.[89] This insidious possibility contradicts liberalism's promise of ever-increasing freedom, as paternalism led by our cognitive elites imperils individualism[90] and threatens to undermine principled constitutional adjudication in favor of expanding control over human life. The latter possibility lessens the likelihood that union dissenters can reliably depend on the Constitution as a permanent barrier to labor union coercion.

III. *ABOOD IN LIBERALISM'S SHADOW*

The centrality of *Abood* for purposes of understanding agency fees is inescapable. Subsection A examines the rise of compulsory unionism and considers the emergence of disparate preferences among workers, which provides a basis for conflict that arguably corresponds with the rise of the New Unionism and the increasing pursuit of political power by unions. Subsection B introduces *Abood* and its reasoning and advances the notion that union activity, including collective bargaining, should be recognized as inherently political. Subsection C examines the free rider presumption. Subsection D deconstructs the labor peace argument. Subsection E reemphasizes the shaky reasoning of *Abood* and its progeny.

A. Prolegomena: Placing Compulsory Unionism Within Liberalism's Domain

Abood arose during an era featuring rising human selfishness coupled with the ascent of liberalism as an ideology, which evidently spurred the rise in the size, power, and breadth of government at both the federal and state level. These facts, issues and intuitions, and accompanying labor history are important for purposes of understanding the rise of compulsory unionism within the public-sector. It is probable that the growth in both public- and private-sector unionism over the past century or so (despite signs of

[88] WEST, *supra* note 1 at 354.
[89] RYSZARD LEGUTKO, THE DEMON IN DEMOCRACY: TOTALITARIAN TEMPTATIONS IN FREE SOCIETIES 1-10 (Teresa Adelson trans. 2016).
[90] WEST, *supra* note 1 at 354 (quoting a 1934 New York Times report citing Joseph Ely).

a recent shrinkage in private-sector unionism) would have been highly unlikely but for the growth of the government sector itself.

In 1916, Samuel Gompers, the first president of the American Federation of Labor, observed that American workers have always been drawn to voluntary institutions rather than compulsory ones.[91] More recently, Professors McUsic and Selmi have argued that the previously dominant communal labor union ideology has disintegrated both culturally and within the workplace as the urge to move from some collective identity to a more defined individualized identity has come to the fore.[92] These claims signify that, although the goal of individual autonomy has now become increasingly fetishized,[93] labor unions have *always* faced headwinds in the United States. As noted elsewhere,[94] the warp and woof of compulsory unionism surfaces within a private-sector union model,[95] substituting compulsion for voluntarism in the formation and operation of labor unions.[96] In addition to undercutting the presumption that workers are united, this model betrayed Gompers' voluntarist ethic and challenged the principles of freedom of association and voluntary exchange tied to the Constitution.[97] As a consequence, this model implicates the boundaries of individual self-interest and the difficulty of forging an enduring community shaped by shared interest. Concomitantly, the insistent rise in individualism, preference heterogeneity, and independence among workers has become anathema to labor union leaders[98] who have increasingly sought to shape unions as a

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[91] CHARLES W. BAIRD, OPPORTUNITY OR PRIVILEGE: LABOR LEGISLATION IN AMERICA 1 (1984) (quoting Gompers) [hereinafter BAIRD, OPPORTUNITY OR PRIVILEGE].
[92] Molly McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1351 (1997) (showing that "[a] common response to the disintegration of the dominant ideology both in American culture and within the workplace has been the urge to move from integration, or a collective identity, to separation, or more defined individualizing identities").
[93] *See, e.g.,* Ahmari, *supra* note 30, at 48 ("The liberal consensus, then, has emerged as a profoundly illiberal, repressive force –precisely because it grants the autonomous individual such wide berth to define what is good and true.").
[94] *See, e.g.,* Hutchison, *A Clearing in the Forest, supra* note 3, at 1311-14, 1321 (examining compulsory unionism in the private-sector).
[95] *See, e.g.*, Tang,, *supra* note 15, at 9 (conceding that public-sector bargaining was grounded in a private-sector model tied to the National Labor Relations Act).
[96] BAIRD, OPPORTUNITY OR PRIVILEGE, *supra* note 91, at 1.
[97] *Id*.
[98] *Id*. at 2.

political rather than a merely economic force. Corresponding with the move to focus energy on the domain of politics rather than the domain of collective bargaining, and assuming such domains are truly distinguishable, the voracious pursuit of political goods by labor union hierarchs coincides with evidence that workers often fail to share meaningful attributes which would support cooperation.[99] Notwithstanding labor union movement fracture, "expenditures for political purposes per union member . . . continue to rise,"[100] thus supplying added reasons for additional intra-union conflict as well as added support for the notion that unions are political all the way down.

Given liberalism's fundamental teaching that individuals exist "prior to any sort of relation with others,"[101] and informed by the language of our "First Amendment discourse," which "has taught us to regard freedom as a form of monadic . . . individualism,"[102] collective bargaining turns liberalism's central teachings on its head. The quest for collective action is constrained because "[n]otions about groups, organizations, community, and the characteristics of human association . . . are tied directly to our ideas of the meaning of personhood."[103] Compulsory unionism within either the public- or private-sector must, accordingly, navigate strong headwinds issuing forth from liberalism's presumptions and the corresponding ideological presuppositions that undergird liberal societies such as ours. Liberalism's presumptions and suppositions place the value and necessity of labor unions as well as the subordination of the interests of workers to the interests of labor hierarchs in the dock.

Labor unionism and, particularly, the New Unionism face challenges because liberalism through commerce advances individualism and statism together at the expense of lived relations–a move that requires the state to undertake the role of actively liberating individuals so they see themselves as autonomous individuals, a

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[99] Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory,* 33 U MICH. J. L. REFORM, 447, 495 (2000) [hereinafter Hutchison, *Reclaiming the Labor Movement*].
[100] *Id*.
[101] Kohler, *supra* note 6, at 183.
[102] *Id*.
[103] *Id*.

process that operates in contradistinction to the ancient notion suggesting that liberty could only be achievable through vigorous self-government, which, as a consequence, gives rise to individuated individuals shorn of communal and familial ties who accordingly rely on the ever growing, ever ramifying state to protect them from their increasing vulnerability.[104] Liberalism thus appreciated is an ideology that, on Deneen's account, culminates in two ontological points: (1) the liberated, discontented, and increasingly vulnerable, individual seeking ever-more freedom who has accepted the invitation to flee from the self-governance necessary to attain true liberty, while (2) simultaneously seeking solace in the controlling captivity of the state.[105] Both points are related and reinforce one another.

Emphasizing the initial point first, if individuals are indeed liberated consistent with the modern isolationist understanding of the human self that values placelessness wherein individuals surface like Hobbesian mushrooms without obligation to each other,[106] then the employment relationship provides fertile ground for bourgeoning disagreements because it is unlikely that a majority of highly atomized workers in a diverse society share the same conviction about virtually anything, let alone the possibility "that conventional unions are the best vehicles" to advance their political ambitions or other interests.[107] This produces a challenging reality wherein workers propelled by self-will rather than self-abnegation are unleashed to reject union-sponsored heteronomy and, instead, pursue authenticity. This heralds intra-union conflict, which leads inexorably to the demand by members and nonmembers to disaffiliate. To be sure, labor union defenders allege that public-sector labor law represents a commitment by state and local governments to listen to and negotiate with a union representing workers' collective interest, a process—so the narrative goes—that cost-effectively advances the government's interest in augmenting worker satisfaction

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[104] DENEEN, *supra* note 30, at 46-63 (explicating this process).
[105] *See id.*
[106] *Id*. at 77-78.
[107] *See, e.g.,* Hutchison, *A Clearing in the Forest, supra* note 3, at 1313-14. ("Disagreements intensify because it is unlikely that a majority of workers share the conviction that conventional unions are the best vehicles for the advancement of their interests.").

when they speak through a single voice supplied by their exclusive bargaining representative.[108] Beyond such contentions, and clear of the fact that this paradigm raises legitimate questions about *whose* voice is actually being heard (workers or union hierarchs),[109] insights from public choice and postmodernism converge in the following complementary conclusions: (1) individual interest is distinct from group interest, and (2) there is an ill fit between collective bargaining regimes as workers[110] surrender to the importance of human identity grounded in expressive individualism by society as a whole.[111]

Individuals set free from community, tradition, custom, history, and family by liberty, understood as the condition in which one can act freely and in a wholly-unconstrained manner, will predictably pursue disaffiliation. Unionization can thus be viewed as a legitimate contingency only when and if consent (voluntary choice) is present. This claim resonates with workers who live in an era wherein autonomous liberty increasingly requires liberation from all forms of associations[112] even though the progression of this idea forecasts a future wherein extreme license coexists with extreme oppression.[113]

Virtually any form of affiliation impinges on one's individual sovereignty: "As such, human associations may be viewed as artificial, instrumental and temporary in character as well as a potential invasion of one's liberty interest."[114] For American labor unions, these possibilities have vast First Amendment implications because if individual consent—the default basis for legitimacy in liberal societies—is absent, and if

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[108] Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy,* 86 FORDHAM L. REV. 1727, 1758 (2018) ("Surveys have demonstrated that there is an unmet demand for employee voice (or participation) at work.").
[109] *See, e.g.,* CHAVEZ & GRAY, *supra* note 61, at 129 (showing that the National Education Association (NEA), spent $218 million to defeat school voucher initiatives even though an NEA internal poll showed that 61 percent of NEA members believed that it was "not very important" or "not at all important" for the union to take a stand on school choice).
[110] Margalioth, *supra* note 38 at 41-49.
[111] Hutchison, *A Clearing in the Forest, supra* note 3, at 1313-14.
[112] DENEEN, *supra* note 30, at 38.
[113] *Id*. at 42.
[114] Hutchison, *A Clearing in the Forest, supra* note 3, at 1313.

majoritarianism (authoritarianism?) is rejected, it becomes improbable that unions function consistently with customary explanations of First Amendment freedoms, including freedom of association.[115]

The second ontological point is provoked by and builds on the preceding analysis. Since the demand to disaffiliate from labor unions originates in dues objectors' pursuit of their own separate ideological identity, economic interest or values, stemming from rights, which presumably inhere within the First Amendment, this demand provides an occasion for the state, activated by some other conflicting interests, to step in to prevent disaffiliation. Whether such occlusion is grounded in dubious justifications designed to shrink the force of principled interpretations of the First Amendment, and irrespective of whether such intervention is legitimate, the second ontological point takes root in the following syllogism. On one hand, the state poses as the guardian of liberalism's most treasured possession: human autonomy in isolation. On the other hand, the ever-expanding state has an incentive to engage in a countervailing move that shrinks the autonomous liberty of dues objectors, which liberal ideology previously ratified consistent with the possibility that modern mass democracies have become instruments of control and plunder.

First, consider the emergence of state control, which Patrick Deneen comprehensively explains.

> Under liberalism, human beings increasingly live in a condition of autonomy in which the threatened anarchy of our purportedly natural condition is controlled and suppressed through the imposition of laws and the corresponding growth of the state. With humanity liberated from constitutive communities (leaving only loose connections) and nature harnessed and controlled, the constructed sphere of autonomous liberty expands seemingly without limit.[116]

"The more completely the sphere of autonomy is secured," the more we are liberated "from all forms of associations and relationships," from "schools to village and

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[115] *See* Kohler, *supra* note 6, at 182-86 (suggesting that language which informs our first amendment discourse has taught us to regard freedom in individualistic terms).
[116] DENEEN, *supra* note 30, at 38.

community," which "exerted control over behavior" and through which our vulnerability to the vagaries of life was diminished; the more need to regulate behavior, the more need to safeguard autonomous life, "through the imposition of positive law."[117] As social norms erode because "they are increasingly felt to be residual, arbitrary," capricious, "and oppressive," the more "calls for the state to actively work toward their eradication."[118] This self-contradictory process culminates in the following claim: individualism and statism advance together, always in mutually-supportive ways.[119] This move is fortified by virtue of the fact that both the right and the left cooperate in the expansion of both statism and individualism[120] as part of the outworking of John Stuart Mill's great claim advancing "compulsion over 'uncivilized' peoples in order that they might lead productive economic lives, even if they must be 'for a while compelled to it' including through the institution of 'personal slavery.'"[121] The pursuit of economic freedom, productivity, and efficiency as part of a deliberate calculus directed toward expanding liberty and transforming lives—perhaps illustrative of the capacity of liberalism to exact revenge on its subjects—has justifiably produced widespread discontent with the realization that liberalism has transformed human institutions (including labor unions) in the name of liberty so that the vehicles of our liberation, such as government and politics, have become the iron cages of our captivity.[122]

Next, I turn to the possibility that the state acts as an instrument of plunder. John Gray explains this flaring process. He shows that rather than provide (1) the pure public good of civil peace, and (2) a framework in which conflicting identities and identifications might flourish, the mission of "the modern state [is] . . . to satisfy the private preferences of collusive interest groups."[123] Modern labor unions, just like other rapacious interest groups acting as repositories of private interest, have an incentive to

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[117] *Id*.
[118] *Id*.
[119] *Id* at 46.
[120] *Id*.
[121] *Id*. at 50 (citing John Stuart Mill).
[122] *Id*. at 6.
[123] JOHN GRAY, POST-LIBERALISM STUDIES IN POLITICAL THOUGHT 11-12 (1996) [hereinafter GRAY, POST-LIBERALISM STUDIES].

portray their pursuit of power, influence, and money in language alleging that they are pursuing some pure public good even though they are after either their own interest or the specialized ideological (political) interest of the hierarchs who lead such organizations.[124] To be sure this process temporizes the actual conflict simmering below the surface, despite the probability that conflict and its accompanying social fragmentation rather than consensus, constitutes the heart of contemporary social structure.[125]

Given this conflictual environment, John Gray's analytical gifts yield the following fruit: unions, just like other interest (political) groups, compete with rival groups "to capture the government to seize and redistribute resources among themselves."[126] Rather than deliver us from predation, the controlling state, once captured, and once weaponized,[127] can be deployed to reify and advance labor unions, which may have originated as an effort, following Mill, to improve the bargaining power of workers vis-à-vis management so they could lead economically productive lives thus freeing workers from vulnerability. "Since labor unions are led by hierarchs whose interests differ sharply from the rank and file"[128] and because the absence of union democracy leaves represented workers subject to the manipulation of union leaders and negotiators with often opposing interests,[129] once the initial cost of organization has been overcome, unions turn their attention to other efforts that may benefit workers, union leaders who claim the mantle of majority support, and/or outside political interests or groups with whom union leaders share the same ideological and political

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[124] *Id*.
[125] ALASDAIR MACINTYRE AFTER VIRTUE: A STUDY IN MORAL THEORY 235 (Am. ed. 1981) (quoting Karl Marx). As more fully explained below, the prospect of conflict (political disagreement) finds traction in the concurring opinions offered in *Abood,* which found potential, if not actual political disagreement within the confines of labor unions. *Abood* 432 U.S. at 262-63 (Powell J. concurring).
[126] GRAY, POST-LIBERALISM STUDIES, *supra* note 123, at 4.
[127] *Id*.
[128] *Hutchison, What Workers Want*, *supra* note 59, at 816-17 (footnotes omitted).
[129] Schwab, *supra* note 57, at 371 (citing Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L. J. 793, 843 (1984)).

interest.[130] At the end of the day, labor union majoritarianism empowered by government does two things.

First, labor hierarchs seek to ensure that unions operate as vehicles of radical class consciousness and transformative liberation,[131] as a robust engine of class-based justice,[132] or as channels of uniformity and solidarity, values which not all workers share. Enforced uniformity of interests and preferences surfaces as an idea that operates in contradistinction to Madison's claim that "[t]he diversity in faculties" of humanity constitutes an "obstacle to [finding] a uniformity of interests" among citizens.[133] The absence of interest uniformity among citizens and workers suggest that the workplace should no longer be seen as a fount of solidarity. Against this backdrop, the deployment of majoritarianism as a vehicle of uniformity suppresses individual freedom,[134] thus signifying that compulsory labor unions operate as an engine of authoritarianism.

Second, the coercive imposition of unionism designed to suppress our natural and perhaps highest condition (autonomous and individuated freedom) through the imposition of legal regimes empowered by an ever-expanding state led by experts[135] may be increasingly seen by workers as a relic of our antiquated and disenfranchised past. Coercion deepens with the exponential growth arising from public-sector unionism, which accounted for only two percent of labor union membership in 1900 and now exceeds forty percent of union membership in the 21st century.[136] This transformative development (New Unionism) in the face of liberalism's advance and the ongoing decline in private-sector unionism, constitutes a dependent variable that is a consequence overridingly of a government policy, which favors public-sector unionism, accompanied, of course, by the rise in the size and scope of government itself.[137] "New

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[130] MUELLER, *supra* note 40, at 6.
[131] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1375.
[132] Hutchison, *What Workers Want*, *supra* note 59, at 801.
[133] THE FEDERALIST No. 10, 78 (James Madison) (Clinton Rossiter ed., 1961).
[134] Abood, v. Detroit Bd. of Educ., 431 U.S. 209, 221 n.15 (1977). *See also*, McUsic & Selmi, *supra* note 92, at 1340 (discussing the concerns of modern scholars in seeking commonalities among previously suppressed groups).
[135] DENEEN, *supra* note 30, at 38.
[136] TROY, THE NEW UNIONISM, *supra* note 49, at 31.
[137] *Id*.

Unionism" has, as its objective, the socialization of income and the redistribution of more of the national income from the private- to the public-sector, goals that require an ever-expanding public-sector,[138] and political goals that not all represented workers share.

This outcome provokes the following questions and answers: Firstly, "[w]hat changes led to the sudden organization of traditionally non-unionizable public-sector workers? [The answer is clear.] First and foremost were changes in laws regulating public-sector workers."[139] Secondly, given the objectives of the New Unionism, have courts adequately appreciated that economic as well as all other forms of self-interest, including ideological self-interest, "brood whenever unions engage in virtually any activity," including collective bargaining, thus making it difficult to place such goals into distinct compartments?[140] Again the following pattern makes the answer clear. Initially, courts routinely underestimate labor unions' pursuit of ideological goals which can range from leading the fight against social security reform to support for abortion rights or marijuana decriminalization, a pattern which provides self-interested benefits to some consistent with the knowledge that the pursuit of special-interest goods supplies concentrated (largely private) benefits to the few.[141] Next, framing labor unions as vehicles that pursue economic benefits exclusively, as benefits possibly available to all, provides cover for self-interested benefits that disproportionately accrue to others: union leaders and their ideological brethren located outside of the union itself. Finally, this process signifies the impossibility of successfully compartmentalizing economic and ideological benefits, which are often all part of the same self-interested calculus.[142] It is likely that an overemphasis on economic benefits and an under-emphasis on ideological or other benefits fuels an unpersuasive conception of free riding,[143] a crabbed conception of the First Amendment, and a failure to understand that labor union

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[138] *Id*. at 32.
[139] *Id*. at 33 (quoting Professor Richard B. Freeman).
[140] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1390.
[141] *Id*. at 1390-91.
[142] *Id*. at 1391.
[143] *Id*.

activity, whether such activity occurs in the private- or public-sector, is political all the way down.

Spurred by this incipient pattern of subordination, goaded by appeals to liberalism's ideological elevation of autonomy and workers' corresponding demand to disaffiliate and struggling to make sense of its own complicated constitutional adjudication, the Supreme Court has begun to respond by vindicating an individualistic approach to liberty rather than compulsory collectivization. Recently, the Supreme Court concluded in *Harris v. Quinn*[144] that labor union encroachments on the First Amendment (a basis of fundamental individual liberty) should only take place in the rarest of circumstances.[145] Union dissidents had reason to be buoyed by this decision. In practice, they found the opposite to be true.[146]

B. Abood: The First Amendment in the Mirror of Politics

Whether invasions of First Amendment rights must remain rare or not, authority for the imposition of agency fees on public-sector union dissidents emanates from rules that are tied to *Abood v. Detroit Board of Education*.[147] The *Abood* Court admits what appears to be beyond peradventure—the actions of a state employer surely constitute state action—but potentially equally important, the Court observed that the union shop authorized by private-sector labor law results from governmental action as well.[148] Commencing its review of the landscape, *Abood* turned to private-sector cases including *Hanson*. The Court observed the action by the plaintiffs in *Hanson* did not fail because of an absence of state action but because there was no First Amendment violation.[149]

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[144] Harris v. Quinn, 573 U.S. 616 (2014).
[145] *Id*. at 2644.
[146] Brief for the Petitioner, Mark Janus v. American Federation of State, County and Municipal Employees, Council 31 et al., On writ of certiorari to the United States Court of Appeals for the Seventh Circuit, LEXIS 4664 at *1, 1-12 (showing that approximately five million public employees are required, as a condition of their employment, to subsidize the speech of a third party that they may not support, namely government appointed exclusive representative).
[147] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232, 236 (1977) (enforcing the government's ability to compel its employees to pay fees to an exclusive representative for bargaining with the government and administering the resulting contract but not for activities deemed political or ideological).
[148] *Id*. at 226.
[149] *Id*.

Then, the *Abood* Court dealt with appellants' second argument claiming that paying for collective bargaining in the public- rather than private-sector is an inherently political act, thus providing a basis for a different result than the one reached earlier in private-sector cases.[150]

The Court denied the appellants' claim, but problems plague the Court's analysis. First, *Abood* was issued without a fully developed record, and its remedy accordingly lacked enough documentation in contrast with *Machinist* v. *Street* an earlier private-sector case,[151] as Justice Stevens noted in his concurrence. *Abood's* failures in this regard positions the *Machinists v. Street*, as an implausible precedent for *Abood*. Second, Justice Stevens found it is difficult to defend an approach that on its face enables a labor union to exact service fees from nonmembers without first establishing a procedure for avoiding the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining, a process that threatens impartial First Amendment adjudication.[152] Third, despite these problems, the *Abood* Court maintained its agency shop analysis within the meaning of the First Amendment was bound by two prior private-sector cases—*Hanson* and *Machinists v. Street*—which, decided no First Amendment issues.[153]

Other problems—including the Court's struggle with the prospect that public-sector agency fees are intertwined with politics—surface as well. Consider the following: despite inescapable difficulties in drawing *Abood*-required lines between collective bargaining activities, for which contributions may be compelled, and ideological

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[150] *Id*. at 227.
[151] *See, e.g., id*. at 236-42 (discussing remedies within the meaning of *Street* and *Allen* including an injunction and restitution for union dues used for political purposes).
[152] *Id*. at 244 (Stevens J. concurring).
[153] Edwin Vieira, Jr. *Travesty, Tragedy, and Treason:* Abood v. Detroit Board of Education *and the Supreme Court's Betrayal of the Constitution in Public-Sector Labor Relations*, 19 GOV'T UNION REV. 7, (2016) [hereinafter Vieira, *Travesty, Tragedy, and Treason*] (noting that *Abood* upheld the constitutionality of the agency-shop in public-sector employment against a challenge under the First Amendment claiming to be bound by two private sector cases—*Hanson* and *Street*—that decided no First Amendment issues at all). *See also*, Kohler, *supra* note 6, at 190 (noting that the Court sidestepped the resolution of whether agency-shop fees for political activities were permissible in *Street*).

activities unrelated to collective bargaining for which compulsion is prohibited,[154] the Court found that a First Amendment right "prevent[s] the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."[155] This deduction is erected on the constitutional guarantee of freedom of association and freedom of expression[156] since "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[157] That conclusion is difficult to square with the actual decision in *Abood*.

After all, Justice Powell's concurring opinion observed "the ultimate objective of a union in the public sector, like that of a political party, is to influence public decision-making," thus indicating "public-sector union[s] are indistinguishable from traditional political parties" and the ideological baggage such organizations carry.[158] Indeed a large fraction of the *Abood* Court was inclined to the view that union dues are tied to politics. For instance, after accepting the persuasiveness of the *Abood* majority's analysis, Justice Rehnquist wrote a concurrence observing "that the positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concerns if the word 'political' be taken in its normal meaning."[159] The *Abood* majority failed to heed the cautionary claims of Justice Rehnquist and Justice Stevens, as well as Justice Powell's concurring opinion in *Abood,* in which the Chief Justice and Justice Blackmun joined. Justice Powell's concurrence showed (a) there is no "basis . . . for distinguishing 'collective-bargaining activities' from 'political activities' so far as the interests protected by the First Amendment are concerned;" (b) "[c]ollective bargaining in the public sector is 'political' in any meaningful sense of the word;" and (c) "[d]isassociation with a public-sector union and the expression of disagreement with its

[154] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236.
[155] *Id*. at 234-35.
[156] *Id*. at 233.
[157] *Id*. at 234.
[158] *See, e.g., id*. at 256-57 (Powell J. concurring).
[159] *Id*. at 243 (Rehnquist, J. concurring).

positions and [goals] . . . lie at the 'core of those activities protected by the First Amendment.'"[160] It follows, as Justice Powell argued, that "the burden [ought to be] on the government to show the existence of [some paramount interests] as a predicate to excluding minority (dissenting) employees from engaging in a meaningful dialogue with their employer, and the record in *Abood* was barren of evidence sufficient to sustain such an interest, the validity of the free rider effect, or the labor peace argument for purposes of imposing agency fees on public employees.[161]

Abood's tenuous claims and evident problems have forced the Court to repeatedly tussle with the union dues dispute in the years since issuing its opinion.[162] A fair reading of *Abood* implies the Court deserved this tussle. Consequently, before its *Janus* decision, diverse maneuvers by the Court produced a scaffold on which to construct potentially successful challenges to the legitimacy of enforced unionism culminating in a pattern of mounting judicial skepticism. Consider the following: the Court (a) has generally applied strict and exacting First Amendment scrutiny to instances of compelled speech and association outside of the agency fee arena;[163] (b) has recently held in *Knox v. SEIU Local 1000* that agency fee provisions are subject to "exacting First Amendment scrutiny," implying that mandatory associations must "serve a 'compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedom;'"[164] (c) has observed in *Knox* that *Abood's* "[a]cceptance of the free-rider argument as justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly," because, as *Harris* observes, such arguments "are generally insufficient to overcome First Amendment objections;"[165] (d) has expressed

[160] *Id.* at 256-58 (Powell, J. concurring).
[161] *Id* at 262-63.
[162] Harris v. Quinn, 573 U.S. 616, 636-37 (2014) (citing Ellis v. Railway Clerks, 466 U. S. 435 (1984); Teachers v. Hudson, 475 U. S. 292 (1986); Lehnert v. Ferris Faculty Assn., 500 U. S. 507 (1991); Locke v. Karass, 555 U.S. 207 (2009)).
[163] Brief for the Petitioner, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 U.S. S. Ct. Briefs LEXIS 4664, at *2 (citing several cases). *See also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 658–59 (2000) (applying strict scrutiny).
[164] Knox v. SEIU, Local 1000, 567 U.S. 298, 310 (2014).
[165] Harris, 573 U. S. 616, 617 (2014) (citing Knox v. SEIU, Local 1000 567 U.S. 298, 311).

the belief that even "exacting scrutiny" may be "too permissive,"[166] an inference that corresponds with the fact that the Court has become open to changing its views on the defensibility of compulsory union dues regimes within the public sector; and (e) has conceded "that collective bargaining may be ideologically offensive to some, and thus may implicate speech or associational interests."[167] This backdrop provides an opening to challenge *Abood's* central reasoning directly. Mark Janus provided such a challenge, but before examining the *Janus* case, it is useful to deconstruct two of the primary platforms on which both *Abood* and agency fees, as a component of compulsory unionism, have been grounded: the free-rider presumption and the labor peace argument.

C. Unmasking the Free-rider Presumption

As a preliminary matter, rights including rights of free expression at "the Founding were generally subject to regulation in promotion of the public good and the First Amendment itself 'left unresolved whether certain restrictions . . . promoted the public good.'"[168] Developing a coherent conception of the public good in a modern liberal society remains difficult if not impossible. Indeed, the pursuit of the "public good" remains freighted by a lack of evidence that associations and individuals are pursuing the public good and massive evidence showing that groups, subgroups, and individuals are in fierce pursuit of their private interests. Prevailing compelled-subsidy doctrine arguably "flows from a basic axiom of modern First Amendment law: the government cannot force people to express a particular view of the idea. Indeed constitutional protections in this field are especially robust because as the Supreme Court has explained 'when speech is compelled . . . individuals are coerced into betraying their convictions.'"[169] This conscience-based paradigm raises the vexed question whether free riding, if it exists at all, serves to justify infringements on nonmembers' First

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[166] *Id*. at 648.
[167] Jennifer Freisen, *The Costs of "Fee Speech,"—Restrictions on the Use of Union Dues to Fund New Organizing,* 15 HASTINGS CONST. L. Q. 603, 634 (1988) (internal citations omitted).
[168] Campbell, *supra* note 5, at 252 (internal footnotes omitted).
[169] *Id*. at 253 (internal footnotes omitted).

Amendment freedom. Of course, the preeminent question is whether there is a basis for asserting that free-riding intuitions translate into an actual as opposed to an imaginary issue.

Free-riding claims rest on the contention that all represented workers have unified and congruent goals, which are advanced by exclusive representation.[170] Supreme Court free-rider adjudication originated in *Machinists v. Street*, a private-sector labor case initiated in Georgia state courts.[171] "[D]issenting workers forced to pay 100 percent of regular union dues as a condition of employment," presented a documented record proving that a substantial part of union dues was used to pay for partisan political activities, thereby constraining their freedom of expression.[172] The labor union, recalling *Hanson*, argued that union security provisions had been previously approved by the Supreme Court. The *Machinists* Court properly disagreed, observing that in *Hanson* it had "[p]assed neither upon forced association in any other aspect nor upon the issue of exacted money for political causes which were opposed by the employees."[173] This conclusion corresponds with scholar Edwin Vieira's subsequent analysis.[174] Although First Amendment issues were not decided in *Hanson*, Justice Douglas's *Hanson* opinion, nonetheless, supplied speculative free-rider analysis. He asserted that requiring workers to contribute to the cost of trade unionism arises because "[o]ne would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work."[175] This sightless assertion, relying on an unsatisfactory understanding of history and economics, failed to notice that private-sector labor litigation had not settled

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[170] Williams & Halcoussis, *supra* note 18, at 216 (citing Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV., 1, 39 (2008).
[171] Charles W. Baird, *The Permissible Uses of Forced Union Dues: From Hanson to Beck*, THE NATIONAL RIGHT TO WORK FOUNDATION at 17, https://nrtw.org/the-permissible-uses-of-forced-union-dues-from-hanson-to-beck/ [hereinafter Baird, *The Permissible Uses of Forced Union Dues*].
[172] *Id*.
[173] Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961).
[174] Vieira, *Travesty, Tragedy, and Treason*, *supra* note 153, at 7 (showing that the approval of union security provision was presented neither as a constitutional issue nor otherwise to the *Hanson* Court.)
[175] Ry. Emps.' Dept't v. Hanson, 351 U.S. 225, 235 (1956).

the defensibility of union security provisions with legally admissible evidence,[176] including evidence of the existence of free-riding.

The *Machinists* Court reiterated its long-standing position that "[f]ederal statutes are to be so construed as to avoid serious doubt about their constitutionality."[177] Consequently, the federal statute, at issue, was interpreted to permit the exaction of forced dues from dissenting workers only for the purpose of avoiding the free-rider problem *without* deciding any First Amendment issues.[178] Of course, the free rider problem, had not been heretofore established as either a matter of law or fact. Quite the opposite. The best economic analysis available to the Court demonstrated that when unions achieve collective economic gains for workers they represent, they do so at the expense of other workers suggesting that collective bargaining redistributes wealth among workers themselves, a claim that hardly supports free-riding.[179] Professor Brubaker has shown in analysis published in 1975 (several years after *Hanson* and *Machinists*), the virtually universally accepted free-rider hypothesis in the realm of collective economic action had, and "has, little empirical scientific basis."[180] Building on analysis of private-sector compulsion by a number of scholars, it is possible to reach the conclusion that judicial acceptance of free-riding claims constitutes little more than a pretext.

> Although free rider claims have been used to maintain union coercion, Leef eviscerates such arguments by demonstrating that workers' interests are not uniform. Without consent or interest uniformity among workers, the free rider pretext collapses. Because only the individual can assess the subjective benefits of union membership, represented workers who prefer to remain independent of a union are likely to become forced riders via union security agreements. Further . . . Leef shows that unions have

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[176] Vieira, *Travesty, Tragedy, and Treason*, *supra* note 153, at 8.
[177] *Street*, 367 U.S. at 749.
[178] *Id*. at 767.
[179] Vieira, *Travesty, Tragedy, and Treason*, *supra* note 153, at 8 (citing W. H. HUTT, THE STRIKE-THREAT SYSTEM: THE ECONOMIC CONSEQUENCES OF COLLECTIVE BARGAINING (1973)) (representing Hutt's expansion of his seminal work, THE THEORY OF COLLECTIVE BARGAINING (1930) (republished 1954).
[180] Earl R. Brubaker, *Free Ride, Free Revelation, or Golden Rule?*, 18 J. OF L. & ECON. 147, 147 (1975).

> continued to exist in Right to Work law states despite the fact that workers can legally withdraw their support.[181]

"[O]pportunities for eliciting [a] more nearly voluntary economic expression of individual priorities for collective goods," including those pursued by labor unions, "may be far greater than [either] most of the contemporary orthodox literature [available during that time period, or the Supreme Court's analysis] suggests."[182] Hence, coercion may be unnecessary to support unionism despite ongoing claims that unions necessarily produce a wage premium which individual workers would never earn as individuals.[183]

The absence of proof as well as the failure to demand proof of the existence of the free-rider problem has enabled courts to construct a debased presumption, which has operated as a cudgel to diminish employees' constitutional rights and to support agency fee regimes. Still, Justice Douglas—who authored the *Hanson* decision—later provided readers with reason to doubt the persuasiveness of his own free-rider analysis. His dissent in *Lathrop v. Donohue* suggested *Hanson* was something of an outlier.[184] *Lathrop* faced the question of the constitutionality of compulsory membership in an integrated bar and Justice Douglas on later reflection saw *Hanson* as a "narrow exception," one that should be "closely confined."[185]

Neither Justice Douglas' revisionary caution nor the existence of available economic literature prevented *Abood's* majority opinion from succumbing to richly-falsifiable speculation concluding that "union shop arrangement[s] have been *thought* to distribute . . . the costs of [collective bargaining] activities among those who benefit [while] counteract[ing] the incentive that employees might otherwise have to become free riders."[186] This well-articulated guesswork fortifies the suspicion that the ostensible

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[181] Harry Hutchison, *Compulsory Unionism as a Fraternal Conceit?*, 7 U.C. DAVIS BUS. L.J. 125, 139 (2006) [hereinafter Hutchison, *Compulsory Unionism as a Fraternal Conceit*], (quoting GEORGE C. LEEF, FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT, Jameson Book (2006)).
[182] Brubaker, *supra* note 180, at 158.
[183] Sachs, *supra* note 27, at 1050.
[184] Lathrop v. Donohue, 367 U.S. 820, 879 (1961) (Douglas, J. dissenting).
[185] *Id*. at 884.
[186] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221-22 (1977).

free-rider problem is simply a less-than coherent presumptive justification of agency fees, despite the counterclaim by some that unionization produces an economic surplus for workers which is a consequence of collectivization, one that rightly belongs to the collective which putatively produced it.[187]

The *Abood* Court shrunk the First Amendment claims of Christine Warczak, D. Louis Abood,[188] and the other plaintiffs in the case without supplying deep and substantial analysis. Rather than place the burden of proof on the public-sector employer and the labor union as a predicate to the loss of First Amendment freedoms, the Court posited something that was neither supported by evidence in the record nor was clearly based on external evidence at the time the case was decided. This analytic lacuna achieves additional prominence today because our postmodern epoch shows that workers' preferences, beliefs, and objectives represent a progressively fractured stew signifying the impossibility of assuming that collective bargaining fortified by agency fees necessarily results in benefits to all workers, because free-riding among represented workers depends heavily on the utility or disutility of compulsory representation, which in turn depends on the existence or nonexistence of congruent preferences as a predicate within a bargaining unit.[189]

To be fair, many union dues payers may share with union leadership the common goal of attaining club goods, "collective goods, interest group goods," special interest

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[187] *See* Sachs, *supra* note 27, at 1050 (arguing that if unions are required to rely for their financing on workers' voluntary payments, then unions would face "extensive free riding by all those workers who would rather receive benefits for free than pay for them").

[188] Christine Warczak and a number of named nonunion teachers filed the original complaint asserting that the union carries on a number of activities and programs of which the plaintiffs disapproved, and in which they have no voice and sought to have the agency shop clause negotiated by the labor union and the Detroit Board of Education invalidated as a deprivation of the plaintiffs freedom of association protected by the First and Fourteenth Amendment. *Abood*, 431 U. S. at 212-13. D. Louis Abood and other named nonunion teachers filed a separate and virtually identical complaint. *Id*. at 214.The two cases were consolidated and the Michigan Court of Appeal, while disagreeing with trial court's decision on a state law issue, upheld the facial validity of the operative Michigan public-sector labor law upon which the contested agency shop agreement was grounded. *Id*. at 215-16.

[189] *See generally*, Hutchison, *Reclaiming the Labor Movement*, *supra* note 99, at 485-86 (using models and diagrams to show the diversity of viewpoints, combinations, and preferences among different free-riding individuals).

goods, or public goods,[190] all of which supply differing degrees of excludability and non-excludability and differing levels of benefits for workers in the bargaining unit. But in a postmodern epoch, many are not all, thus raising the question whether *all* dissenting workers should be presumed to be free-riders because such a conclusion makes sense, only in the unlikely event that congruence in interests and uniformity of benefits among and between *all* workers exists.[191] This contention assumes great prominence because leading labor experts, Freeman and Rogers, show workers, when surveyed, "were least satisfied with union involvement in political activit[y],"[192] yet "unions spend a disproportionate amount of . . . dues on political and other non-representational activit[y],"[193] a claim that likely applies to both the public- and private-sector. Such evidence undermines the plausibility that unions are a source of solidarity reinforced by interest congruence and uniformity of benefits among bargaining unit workers. Even if one concentrates on the assumed congruence between the economic interest of the worker and the labor union, such claims are dubious[194] because "it is plainly untrue that all workers share equally" in the economic gains attributable to union activity "at every stage of both the negotiating and grievance-processing activity, since the union must engage in "discrimination [ ] among workers and categories of workers."[195] "Some workers benefit, but only at the expense of others."[196]

Admittedly, public choice and group cooperation theory combine to confirm that if the collective good pursued by a union is conceived of in economic terms (as better wages for members of the group), some workers may defect, meaning this collective good could be undersupplied.[197] The following example illustrates classic free riding.

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[190] *See generally*, Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1334-35 n. 150-153 (describing the creation of club goods, distinguishing public goods from collective goods, and discussing the benefits of special interest goods).
[191] Hutchison, *Reclaiming the Labor Movement*, *supra* note 99, at 480.
[192] Hutchison, *What Workers Want, supra* note 59, at 815 (quoting Freeman & Rodgers).
[193] *Id*.
[194] Sylvester Petro, *Civil Liberty, Syndicalism, and the NLRA,* 5 U. TOL. L. REV. 447, 511 (1977).
[195] *Id*.
[196] *Id*.
[197] Hutchison, *Reclaiming the Labor Movement*, *supra* note 99, at 479.

Consider Individual A, who is in complete agreement with *all* collective aims of the union.[198] Accordingly, under such circumstances, there is a clear argument that in the absence of compulsory dues payments, she should be properly seen as a comprehensive free-rider because her preferences are uniform with those of the union, and this conclusion becomes particularly true if she shares *equally* in the benefits the labor organization provides.[199]

On the other hand, especially in an era that has drunk deeply from liberalism's elixir of limitless freedom and contrary to *Abood's* presumption, workers covered by a labor union contract are all potential forced riders rather than necessarily free-riders when they are required to subordinate their interests and preferences to the putative benefits of exclusive representation. Given the diversity of viewpoints and preferences among workers today, it is unimaginable to assert all individuals are necessarily potential free-riders in the absence of agency fees. Consider Individual C, a classic dissenter, who disagrees with both the core economic objectives of a labor union and the noncore (ideological) collective goods pursued by the union. He becomes a comprehensive "forced rider" when and if he is compelled to pay union dues because preference congruence is absent, and equality of benefits is impossible.[200]

This picture is even more complex for reasons I have explained elsewhere.[201] For present purposes, it is sufficient to note that an agency fee objector frequently cannot properly be characterized as a free rider because a sharp and incommensurable disjuncture exists between his preferences and the union's preferences regarding special-interest goods, economic goods (club goods), and interest group goods. While courts continue to accept the hypothesis that "all persons in the bargaining unit receive the benefits and [must accordingly] share the economic costs of union

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[198] *Id*. at 484.
[199] *Id*.
[200] *Id*. at 485-86.
[201] *See id*. at 477-95 (discussing the concept of free riding and the interplay between union dues, applying the free rider analysis, and discussing and refining the hypothetical model of free and forced riding).

representation,"[202] such claims are suspect for two reasons. First, the above-referenced analysis shows that the existence of heterogeneous preferences among bargaining unit workers and the reception of disparate benefits diminish the validity of such claims. Comprehensively understood, the defensibility of free-riding claims is imperiled by the absence of preference uniformity and the presence of unequal benefits regarding the bargaining unit's pursuit of economic and non-economic goods. Second, simple material gain supplies "only one of the many motives propelling economic [and other activity]."[203]

Moving beyond the realm of economics, more comprehensive analysis shows labor unions, just like any other political organization, seek to influence the distribution of special interest goods (ideological or political goods), such as marijuana decriminalization, that disproportionately benefit their leaders or some fraction of the membership.[204] If bargaining unit workers who disagree with the union's pursuit of such goods are nonetheless compelled to pay dues that fund the quest for such goods, they, of necessity, are exposed to the risk of forced riding because they are compelled to fund goods that are ideologically revolting and from which they receive no benefits. Since any compelled association runs the risk that some workers must associate with views which are repugnant, a thorough understanding of forced- and free-riding possibilities reveals "union dues objectors are motivated . . . by 'genuine philosophical reservations or fears that they will suffer economically.'"[205] Since "'[o]nly the individual can properly assess the subjective benefits of union membership,'"[206] agency fees become unnecessary because union representation "is unlikely to generate free riding among those who decline to support the union."[207] Additionally, free-riding claims are undermined because an inequality of benefits surfaces from collective representation,

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[202] United Food & Commercial Workers Union, Local 1036 v. NLRB, 307 F. 3d 760, 764 (9th Cir. 2002) (*en banc*).
[203] ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 12 (1975).
[204] Hutchison, *Reclaiming the Labor Movement*, *supra* note 99, at 478.
[205] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1376 (citing George Leef).
[206] John C. Moorhouse, *Compulsory Unionism and the Free Rider Doctrine*, 2 CATO J., 619, 629 (Fall 1982), cited in GEORGE C. LEEF, FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT, 34 (2006).
[207] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1376.

since the benefits of unionization flow disproportionately to some workers or labor hierarchs.[208] Against this background, the aggregate consequences of judicial enforcement of agency fees foster three consequences: (1) it would punish non-free riders (forced-riders) for assumed free-riding behavior thus suppressing the varied diversity of viewpoints that exist in a pluralistic society, (2) contrary to the axiomatic view of First Amendment law,[209] the government premised on non-axiomatic free-rider analysis would coerce individuals into betraying their conscience,[210] and (3) would provide a sturdy basis to dispute the ubiquitous claim that compelled subsidies for private speech are proscribed.[211]

These consequences would take center stage despite the defense of agency fees by some observers who argue that such fees are the sole means through which unions have been permitted to overcome an existential collective action problem generated because unions negotiate benefits that purportedly have the character of public goods and thus expose unions to the risk of extensive free riding by represented workers.[212] Two necessary predicates are missing in order to sustain this plea: preference congruence and equality of benefits thus rendering this plea highly dubious. Since *Abood* failed to struggle with virtually any of the above-referenced issues, it fell prey to inadequate free-rider analysis leaving the defensibility of its free-rider approach in tatters.

D. Deconstructing the Labor Peace Argument

The labor peace argument has been successfully weaponized against nonmembers for some time. Although Justice Douglas' majority opinion in *Hanson* did find coercive state action within the statutory parameters of the RLA,[213] he vindicated

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[208] For a discussion of this possibility showing how union hierarchs may come to believe that represented workers should be compelled to become forced riders, see generally *id*. at 1374-77 (discussing that union hierarchs, as "members of the philosophic vanguard, act as forerunners of an inevitable and devoutly desired future destination that workers' innate but still inchoate intellect guides them to").
[209] *See* Campbell, *supra* note 5, at 252 ("[A] basic axiom of modern First Amendment Law: the government cannot force people to express a particular view or idea.").
[210] *Id*.
[211] *Id*. at 256 (accepting this claim).
[212] Sachs, *supra* note 27, at 1047.
[213] Ry. Emps.' Dep't v. Hanson, 351 U. S. 225, 232 (1956).

such private-sector coercion by asserting that "[i]ndustrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained."[214] In confronting the claim that union security agreements are illegal per se, the *Abood* Court recognized that "legitimate constitutional question[s]" exist but said that the government's interest in labor peace was "sufficiently compelling to justify, infringement of the workers' freedom of association."[215]

On one account—at least since *Abood*—"the state interest in public sector unionization has been described using a single, encompassing phrase: 'labor peace.'"[216] Crowning "labor peace" with iconic status entails several interrelated contentions including: (1) "the state has a broad interest in fostering *worker satisfaction*" tied to workers having a "meaningful voice;" (2) public employers have a concern for "improving worker satisfaction *efficiently*," a proposition that culminates in a labor union being tasked with the responsibility of representing the interests of some body of workers through a single consolidated voice; and (3) "the achievement of the first two propositions requires a third: having a single union with which to negotiate is good but not quite good enough because the union must also be *independent* and *adequately funded*."[217]

Such claims have an undeniable surface appeal that dissolves on close inspection. Beyond John Gray's incisive inspection showing unions, just like other rivalrous groups, seek to capture government for their own ends, consistent with the notion that governments in liberal societies have become instruments of plunder rather than vehicles for insuring civil peace,[218] a blizzard of questions quickly surface: is worker satisfaction a function of having a meaningful voice?[219] Assuming voice is important,

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[214] *Id*. at 233.
[215] Baird, *The Permissible Uses of Forced Union Dues: From Hanson to Beck*, *supra* note 171, at 21(showing that the Court dealt with the constitutional question in *Abood* that it avoided in *Machinists v. Street*, 367 U.S. 740 (1961)).
[216] Tang, *supra* note 15, at 7.
[217] *See*, *e.g.*, *id* at 7-8 (arguing from the employer's perspective, holding that a single union must be "independent and adequately funded").
[218] *See supra* Part III A and accompanying text.
[219] *See*, *e.g.*, Hutchison, *What Workers Want*, *supra* note 59, at 815-24 (contesting the union voice model).

why is a labor union funded directly by workers and indirectly funded by taxpayers the best vehicle for supplying workers with a voice? Can a single consolidated voice, in actuality, represent all workers effectively in a postmodern world that gives rise to increasingly disunited workers, a problem which is compounded because labor unions are increasingly led by hierarchs whose interests differ sharply from the rank and file[220] and because union democracy scarcely exists? Are labor unions independent of government power a political tool of government or vice versa?[221] Alternatively put, will the union capture government hierarchs and its politicians or will the labor union be captured by government itself? Does the resulting stew actually serve the interest of workers or serve the goals and objectives of union hierarchs and their corresponding shared interest with outside groups?[222] While these questions will not be fully answered here, significant scholarly work on the voice-thesis within the private-sector specify that the voluminous effort to justify agency fees as subcomponent of the labor peace argument, grounded in the contention that unions provide workers' with a voice is a "seriously deficient" model, one that "neglects individual voice"[223] while failing to note data showing many workers prefer a voice approach that is shorn of its compulsory/collective bargaining methodology.[224]

Moreover, the contention that exclusive representation accompanied by compulsion produces peace and harmony is a widely accepted article of faith, even though the empirical basis for such claims is profoundly tenuous.[225] Irving Bernstein's

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[220] *Id*. at 816-17 (suggesting that the union voice model was grounded in a premise that may no longer exist presuming that the workplace was "seen as a place of conflict centered around the struggle for power between [employers] and workers and in that struggle, at least in the past, but not necessarily today, workers were bound together by common interests," a conclusion that no longer comports with today's workforce).
[221] *See, e.g., id* at 815-16 (explaining that the exact scope of the union's activities and voice is not completely defined).
[222] *Id*. at 816-17.
[223] *Id*. at 823 (citing Addison & Belfield). But see Brief of Professors Cynthia L. Estlund, Samuel Estreicher, Julius G. Getman, William B. Gould IV, Michael C. Harper & Theodore J. St. Antoine, as Amici Curiae in Support of Respondents, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), 2018 U.S. S. Ct. Briefs LEXIS 229 at *9 (arguing that public employees should be allowed to engage in collective bargaining, at their discretion, since this is consistent with the First Amendment). (arguing that public employees should be allowed to engage in collective bargaining, at their discretion, since this is consistent with the First Amendment).
[224] Hutchison, *What Workers Want*, *supra* note 59, at 816 (citing Addison & Belfield).
[225] *See, e.g.*, BAIRD, OPPORTUNITY OR PRIVILEGE, *supra* note 91, at 81-85.

account provides an example of such faith. He argues experience has shown that protection by law of the right of employees to organize and bargain safeguards commerce from injury and impairment, promotes the flow of commerce by removing sources of industrial strife and unrest by encouraging practices fundamental to friendly adjustment of industrial disputes.[226]

Reality is quite the opposite. Professor Baird shows in his 1984 study, the number and the mean duration of strikes in each year rose after the imposition of compulsory unionism through statutory innovation within the private-sector during the 1930s.[227] Public-sector compulsory unionism has also been defended because such laws ostensibly advance harmonious and cooperative relationships between government and workers.[228] On the other hand, evidence from public schools indicates that on average states with compulsory bargaining laws have almost twice as many public school teacher strikes as those without such laws.[229] After accounting for the different number of school districts in each state, states with compulsory bargaining laws have over five times the number of public teacher strikes as states without such laws.[230] "The record of peace in public sector labor relations is no different for public employees as a whole than it is for public school teachers."[231]

Baird's analysis supports two conclusions. First, the labor peace argument persists as a useful fabrication to justify the continuing intervention by the ever-expanding, controlling state in the voluntary exchange between workers and employees in both the public- and private-sector. Second, within the parameters of the public sector (a) since "matters that come under the scope of collective bargaining (e. g., wages and salaries, fringe benefits, working hours, workloads, work procedures, and working conditions) are, [rightfully]in the public sector, matters of public policy"; (b) the "U. S. Constitution and the constitutions of the individual states provide that public [policy] . .

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[226] *Id*. at 81 (quoting IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 153 (1953)).
[227] *Id*.
[228] *Id*.
[229] *Id*. at 82.
[230] *Id*. at 82-83.
[231] *Id*. at 85.

. can only be determined by the legislative branch of government with the concurrence of the executive"; (c) all "citizen taxpayers have access to government in the deliberations that lead up to the adoption of public laws and budgets"; and (d) "[n]o private citizen or private group of citizens is supposed to have special access to government as it sets public policy"; it is clear that public-sector labor unions—as private clubs under the compulsory union model—are granted special access to government in the determination of public policy and in agreements to spend the public fisc, thus confirming that unions diminish citizen democracy.[232] It follows that labor union compulsion not only contributes to labor unrest but potentially contributes to citizen unrest as well. As public choice theory and John Gray's analysis show, unions, just like other interest groups, compete with rival groups to "capture the government in order to seize and redistribute resources among themselves."[233] Acceptance of the labor peace rationale by courts in the face of this background provides credible evidence that, rather than reduce unrest in the workplace, this acceptance incentivizes the opposite response, thus suggesting that labor unions have captured government power for purely private aims that fail to represent the interests of all workers equally thus rendering *Abood's* labor peace rhetoric defective.

E. Abood and its Progeny Supply a Shaky Foundation for Agency Fees

Constructed upon unwarranted speculation and less-than comprehensive analysis, the credibility of *Abood's* reasoning is highly questionable. This raises the question whether *Abood,* offered by the Court as a defense of exclusive-representation-majoritarianism tied inextricably to agency fees is the result of a principled understanding of economics, political theory, the Constitution or alternatively a creature of an ever-expanding state looking to justify compulsion by any means necessary. Given the credulousness of *Abood's* reasoning, it becomes ever-more doubtful that compulsory unionism is constitutive of some endogenous and organic demand surfacing from within the labor force calling forth a common law solution, one that supplies a logical

[232] *Id*. at 65-66.
[233] GRAY, POST-LIBERALISM STUDIES, *supra* note 123, at 4.

foundation for sustainable free-rider analysis or a defendable basis to reduce strife in labor's streets.

To repeat, *Abood* first came before the U.S. Supreme Court from a Michigan Court of Appeals opinion upholding summary judgment of the trial court below.[234] Consequently, no developed record was available for purposes of appeal to the United States Supreme Court regarding constitutional issues within the meaning of the First Amendment. Second, the constitutionality of the agency shop clause, contested by the plaintiffs in *Abood*, was upheld on the authority of the Court's private-sector *Hanson* decision, which had earlier upheld the constitutionality—under the Fifth Amendment—of a union-shop clause authorized by the RLA while declining to examine First Amendment concerns.[235] *Hanson's* holding, denying relief to union dissenters, was connected to the hypothesis that the RLA beneficially contributed to industrial peace, stabilized labor management relations while eliminating free-riding, since all workers were presumed to benefit from collective bargaining.[236] *Hanson*, as a basis for *Abood*'s free-riding reasoning was undermined by Justice Douglas's imperfect road to Damascus experience in *Lathrop,* noting that "[i]n the *Hanson* case we said, to be sure, that if a lawyer could be required to join an integrated bar, an employee could be compelled to join a union shop. But on reflection the analogy fails."[237]

Third, the *Abood* case can be viewed as an attempt to further justify exclusive representation in public-sector employment without facing the constitutional issues that might otherwise undermine the permissibility of such representation.[238] After all, "the unconstitutionality of exclusive representation was [neither] decided, nor . . . addressed [by the *Abood* Court] because the issue was not raised."[239] Instead, the nonunion employees affirmatively stated that their "appeal . . . does not raise the question of the

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[234] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 216 (1977).
[235] Ry. Emps.' v. Hanson, 351 U.S. 225, 236-38 (suggesting the issue of ideological conformity was not presented by the plaintiffs).
[236] *Id*. at 233-34, 238.
[237] Lathrop v. Donahue 367 U.S. 820, 879 (1961) (Douglas, J. dissenting).
[238] Vieira, *Travesty, Tragedy and Treason*, *supra* note153, at 3 (citing several cases).
[239] Vieira, *Poltroons on the Bench*, *supra* note 2, at 20-21.

unconstitutionality of exclusive representation in public employment" and hence they refrained from addressing the merits of this issue.[240] Of course the union agreed with this assessment.[241]

Fourth, *Abood*'s errors were multiplied by its progeny. Illustrations of such errors can be found in Justice Stevens' highly deficient contentions in *Chicago Teachers Union v. Hudson* with respect to the Court's understanding of its exclusive representation analysis [242] and his failure to apply traditional due process to the union's fee assessments to nonmembers.[243] This move required nonmembers to "opt out of paying the nonchargeable portion of union dues rather than exempting them unless they opt in."[244] This constitutes a remarkable boon to unions and a remarkable shrinkage in First Amendment freedoms. Another error involves the *Lehnert* Court's decision erected on *Abood* and adopting a less-than workable three-part test for the chargeability and non-chargeability of union expenditures in the public sector,[245] enabling agency fee collections for purposes of aiding workers outside their own bargaining unit without requiring an affirmative showing that such dues exactions produce actual rather than

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[240] *Id*. at 21 (citing Brief for Appellants in *Abood v. Detroit Board of Education*, No. 75-1153 (U.S. Supreme Court), ____at *148).
[241] *Id*. (citing Brief for Appellees in *Abood v. Detroit Board of Education*, No. 75-1153 (U.S. Supreme Court), __at *34) (internal citations omitted).
[242] Chicago Teachers Union v. Hudson, 475 U.S. 292, 301 (1986) (Writing for the majority, Justice Stevens asserted the *Abood* Court did the following: "… We … rejected the claim that it was unconstitutional for a public employer to designate a union as the exclusive collective bargaining representative of its employees …"). The facts of the case and the force of the *Abood* opinion are contrary to Justice Stevens' claims because neither the litigants nor the Court itself considered the constitutionality of exclusive representation in *Abood*. Vieira, *Poltroons on the Bench*, *supra* note 2, at 21.
[243] Vieira, *Travesty, Tragedy, and Treason*, *supra* note 153, at 4 (showing how the *Court "*refused to apply traditional requirements of procedural due process" to the collection of agency fees by unions but instead "mired nonunion employees in litigation over the union's assessment of [such] fees"). *See also, Knox v. SEIU*, Local 1000, 567 U.S. at 300 (observing that "requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues … represents a … boon for unions, creating a risk that the fees nonmembers pay will be used to further political and ideological ends with which they do not agree").
[244] Maria O'Brien Hylton, Friedrichs *and the Move Toward Private Ordering of Wages and Benefits in the Public Sector*, 23 CONN. INS. L.J. 177, 179 n. 2 (2017).
[245] The Court adopted a three-part test requiring that chargeable expenses (1) be germane to collective bargaining, (2) be justified by the government's labor peace and free-rider interests, and (3) not add significantly to the burden on free speech. The Court split over the application of this test. Lehnert v. Ferris Faculty Assn. 500 U. S. 507, 519-22 (1991*)* (plurality opinion); *Lehnert* 500 U.S. at 533-34 (Marshall, J., concurring in part and dissenting in part).

imaginary benefits for nonmembers of the union.[246] Moreover, *Lehnert's* decision to allow the union to spend up to 90 percent of its dues on nonrepresentational activities, despite the Court's ostensible concern for free-riding tied largely to economic considerations,[247] generates an unsteady platform that likely sustains "forced-riding."

Fifth, uniform with Part III C's analysis, because free riding likely surfaces as a possibility only within the realm of compulsory unionism, free riding as a defense to infringements on workers' First Amendment rights constitutes an endogenous creation of the institution of labor law itself, within both the private- and public-sectors. Without the institution of positive law thought to expand positive freedom, the possibility of free riding, and even forced riding, disappear thus raising the probability that the institution of labor law itself amounts to a self-justifying exercise of expansionary government power unmoored to some constitutional principle.

IV. *JANUS*

A. Janus and the Demand to Disaffiliate: The Factual Record.

Fusing politics, economics, and First Amendment norms, Mr. Janus—a state employee-nonmember[248] caught in the middle of a struggle between AFSCME (Union) and the Governor of Illinois, then forced to subsidize the union's position on this dispute, despite his personal opposition to the union's position—contested the imposition of fees that benefit the labor union.[249] The factual record connected to his challenge is straightforward.

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[246] Vieira, *Tragedy, Travesty and Treason*, *supra* note 153, at 4 (showing that the Court permitted the union to collect nonunion teachers' agency fees in order to support activities of unions in bargaining units distinct from the one in which the complaining teachers actually worked and without requiring a showing that dissenting workers received any causal benefits, a move that is suggesting of force riding).

[247] *See, e.g.*, Robert P. Hunter, Paul S. Kersey, & Shawn P. Miller, *The Michigan Union Accountability Act: A Step Toward Accountability and Democracy in Labor Organization*, The Mackinac Center for Public Policy, 4-5 (2001) (observing that the *Lehnert* Court evidently allowed the union to spend 90% of its dues revenue on nonrepresentational activities).

[248] Janus v. AFSCME Council 31, 138 S. Ct. 2448, 2461-62 (showing Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist).

[249] Employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 and "Janus refused to join the Union because he opposes 'many of the public policy positions that [it] advocates.'" *Id.* at 2461.

Illinois Public Labor Relations Act (IPLRA) permits employees of the State and its political subdivisions to unionize.[250] The law specifies that "if a majority of employees in a bargaining unit" vote in favor of the labor union, then the union is "designated as the exclusive representative of all . . . employees," but "[e]mployees in the unit are not obligated to join the union selected by their co-workers."[251] "Once [the] union is so designated, [this private party] is vested with broad authority" to "negotiate with the employer on matters relating to 'pay, wages, hours, and other conditions of [work].'"[252] The union's exclusive bargaining authority extends to "policy matters" such as "merit pay, the size of the work force, layoffs, privatization, promotion methods, and [nondiscrimination]."[253]

Corresponding with the union's designation as the bargaining representative, the rights of individual employees shrink because "they may not be represented by any agent other than the designated union [,] nor may individual employees negotiate directly with their employer," although the union is required to provide "fair representation [to] all employees."[254] "Employees who decline to join the union are not assessed full union dues but must . . . pay . . . an agency fee [amounting] to a percentage of . . . union dues."[255] *Abood* limits the amount nonmembers are required to pay to a fraction of dues, an approach that ostensibly excludes nonmembers from funding "the union's political and ideological projects."[256]

Illinois law does not supply a detailed specification of expenditures which are chargeable to nonmembers and which are not, but "[t]he IPLRA provides that an agency fee may compensate a union for the costs incurred in 'the collective bargaining process, contract administration, and pursuing matters affecting wages, hours and conditions of employment.'"[257] Coextensive with Illinois law, AFSCME "categorizes its expenditures as

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[250] *Id*. at 2460.
[251] *Id*.
[252] *Id*.
[253] *Id*.
[254] *Id*.
[255] *Id*.
[256] *Id*. at 2460-61 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)).
[257] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2461 (2018).

chargeable or nonchargeable and [then] determines [nonmembers'] 'proportionate shares.'"[258] Nonmembers are neither asked nor required to consent before fees are deducted.[259] Illinois law requires nonmembers to pay for "'lobbying, social and recreational activities,' advertising, membership meetings and conventions, and litigation" plus other unspecified services that ostensibly inure or "may . . . inure to the benefit of the members of the . . . bargaining unit."[260] AFSCME bargaining unit nonmembers were charged 78.06 percent of full union dues on annual basis.[261]

Mr. Janus asserted that AFSCME's bargaining objectives appreciate neither the state's current fiscal crises, nor "his best interests nor the interests of Illinois citizens."[262] If allowed to choose, Janus, "'would not pay any fees or otherwise subsidize [the Union].'"[263] Janus's conscience impels a concern for the state's fiscal position, a perspective he shared with the Governor of Illinois.[264] The salience of this concern for the state's fiscal position—one that is consistent with the recognition by scholars of the onset of government sclerosis or demosclerosis[265]—cannot be overstated.[266]

"Respondents moved to dismiss the Governor's challenge for lack of standing" because the imposition of agency fees "did not cause him any personal injury."[267] "The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and other individuals who had moved to intervene had standing because the agency fees unquestionably injured them."[268] The petitioner and other individuals who

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[258] *Id*.
[259] *Id*.
[260] *Id*.
[261] *Id*.
[262] *Id*.
[263] *Id*.
[264] *Id*. at 2462.
[265] JONAH GOLDBERG, SUICIDE OF THE WEST, *supra* note 64, at 198 (quoting Jonathan Rauch, who defines demosclerosis as government's progressive loss of the ability to adapt).
[266] Ted Dabrowski and John Klingner, *The history of Illinois' fiscal crisis*, ILLINOIS POLICY (2018) https://www.illinoispolicy.org/reports/the-history-of-illinois-fiscal-crisis/ (showing "[t]hat the state's fiscal collapse is the culmination of years, even decades, of budget gimmicks that papered over Illinois' structural spending problems").
[267] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2462 (2018).
[268] *Id*.

moved to intervene were allowed to file their complaint and they did so.[269] The amended complaint alleged "that all 'nonmember fee deductions are coerced political speech' and the 'the First Amendment forbids coercing any money from the nonmembers.'"[270] Respondents moved to dismiss the amended complaint because the asserted claims and contentions were "foreclosed by *Abood*."[271] The District Court and the Seventh Circuit Court of Appeals agreed with the respondents' conclusion.[272] Provoked by this determination, Mark Janus sought Supreme Court review asking the Justices to overrule *Abood* and hold that public-sector agency-fee arrangements were unconstitutional.

B. Mark Janus's Challenge to Abood

Offering arguments implicating the Supreme Court's holding in *Madison Joint School District v. Wisconsin Employment Relations Commission,*[273] Mr. Janus's challenge went beyond merely disputing the funding of certain union activities—an issue that had already been the subject of Supreme Court constraints.[274] The crucial importance of this challenge included the following possibilities: (a) all union activities including dues collection for collective bargaining and representational purposes are political/ideological, thus providing a basis to revivify the First Amendment's application to the union dues/agency fee debate, and (b) a favorable ruling could have implications for potentially all unions, including private-sector labor organizations that have been thus far spared of exacting First Amendment scrutiny. Whether public-sector labor unions act in the interest of or at expense of workers,[275] and whether the logic of

[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976) (holding that the State could not require the board of education to prevent a nonunion teacher from speaking at a public meeting on a matter that was then the subject of collective bargaining).
[274] Several cases make clear that union dues objectors could not be required to fund certain, "non-germane" union activities. HIGGINS, *supra* note 7, at 2294 (citing *Street, Allen, Abood, Ellis*, and *Lehnert*).
[275] *See, e.g.*, JONAH GOLDBERG, SUICIDE OF THE WEST, *supra* note 64, at 204 (noting the tendency of some unions to act at the expense of workers they claim to represent).

the *Janus* case could be extended to the private-sector,[276] this case provided reasons why labor union proponents, already in despair and prepared to start over,[277] had additional cause for concern even before this case was decided.

Mr. Janus placed agency fees in the crosshairs of a contentious constitutional debate, arguing that forced exactions—afford workers in the twenty-five states that allow them, a Hobson's choice—of either sacrificing your First Amendment rights by funding political advocacy you dislike or find another job.[278] The First Amendment made applicable to the States by the Fourteenth Amendment forbids abridgment of speech including the right to speak freely, the right to refrain from speaking at all, and the right to eschew association for expressive purposes.[279] After disposing of a threshold issue,[280] the Supreme Court, which earlier split 4-4 on the issue of whether to overturn *Abood* outright,[281] turned its attention to the question of whether the First Amendment liberties of public sector workers require the termination of forced subsidization of, and forced association with, private parties' speech.

C. Can Agency Fees Withstand First Amendment Scrutiny?

Recalling its decisions in *Knox* and *Harris*, holding that agency fees were an anomaly within the domain of First Amendment freedoms, the Supreme Court focused its attention first on whether *Abood's* decision making was consistent with standard First Amendment principles.[282] Since freedom of speech '"includes both the right to speak freely and the right to refrain from speaking at all,'"[283] and since the "right to

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[276] *See, e.g.*, James Langford, *Extending Supreme Court's Janus decision to private-sector unions an uphill battle*, THE WASHINGTON EXAMINER (July 17, 2018), https://www.washingtonexaminer.com/business/extending-supreme-courts-janus-decision-to-private-sector-unions-an-uphill-battle.
[277] Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 60-65 (1993).
[278] Ilya Shapiro, Trevor Burrus & Aaron Barnes, *Much Ado Abood the First Amendment*, Cato At Liberty, CATO INSTITUTE, https://www.cato.org/blog/much-ado-abood-first-amendment.
[279] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463 (2018).
[280] *Id*. at 2462 (discussing the threshold question of whether the "District Court lacked jurisdiction under Article III of the Constitution because petitioner moved to intervene in [the Governor's] jurisdictionally defective lawsuit").
[281] Friedrichs v. Cal. Teachers Ass'n 136 S. Ct. 1083 (2016).
[282] *Janus*, 138 St. Ct. at 2463.
[283] *Id*. (citations omitted).

eschew association for expressive purposes is likewise protected,"[284] the Court found that forced associations impinging on a realm of protected speech are impermissible.[285] This is so because "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[286] On the Court's view, "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most context, any such effort would be universally condemned."[287]

"Free speech serves many ends" including "our democratic form of government" as well as "the search for truth."[288] Compelled speech incurs further damage because "individuals are coerced into betraying their convictions,"[289] thus demeaning their personhood.[290] Equally evident, "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns."[291] Quoting Thomas Jefferson, the Court observed that it has previously acknowledged that a "'significant impingement on First Amendment rights'" ensues when public employees are required to provide financial support for a union that "'takes many positions during collective bargaining that have powerful political and civic consequences.'"[292] The force of this observation remains vibrant despite the labor union's attempt to rely on *stare decisis* to defeat Janus's challenge.[293]

Before explicating *stare decisis*,—an issue, more fully discussed in subsection D—the Court recounted its progression toward deep doubts regarding the permissibility of compelled subsidization, a process commenced by its analysis in *Knox*, *Harris,* and

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[284] *Id*. (citations omitted).
[285] *Id*.
[286] *Id*. (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)) (internal emphasis omitted).
[287] *Janus*, 138 S. Ct. at 2463.
[288] *Id*. at 2464.
[289] *Id*.
[290] *Id*.
[291] *Id*. (citing Knox v. SEIU, Local 1000, 567 U.S. 298, 309 (2012)).
[292] *Id*. (citing *Knox*, 567 U.S. at 309 (2012) (quoting Ellis v. Ry. Clerks, 466 U.S. 435, 455 (1984))).
[293] Shapiro, Burrus & Barnes, *supra* note 278. This is so because, "*stare decisis* is [arguably] at its weakest when constitutional rights are being violated." *Id*.

Friedrichs.[294] In *Knox*, the Court found that the challenged conduct was unconstitutional under even the test typically used for compulsory subsidization of commercial speech notwithstanding the fact that commercial speech has been generally thought to enjoy a lesser degree of protection.[295] Under the exacting scrutiny deployed in *Harris*, to be permissible a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[296] The *Harris* Court found that the agency-fee requirement failed to comply with exacting scrutiny but also questioned whether such a test provides sufficient free speech protection since the speech at issue in agency-fee cases is *not* commercial speech.[297] In *Friedrichs,* the Court apparently welcomed a challenge to *Abood* but, after Justice Scalia's death, the Court upheld *Abood* on a per curiam basis by an equally divided Court.[298]

Building on this background, the petitioner in *Janus* proffered a strict scrutiny test for purposes of assessing invasions of his First Amendment rights,[299] whereas the dissent essentially argued government power should displace First Amendment concerns, and accordingly proposed what amounts to rational-basis review that "ask[s] only whether a government employer could reasonably believe that the exaction of agency fees serves its interests."[300] Because this form of minimal scrutiny was foreign to the Court's free speech jurisprudence the *Janus* Court rejected the dissent's proposal.[301] The Court found it unnecessary to decide the petitioner's claim that the challenged speech must withstand "strict scrutiny" because the Court determined it was unnecessary to go that far,[302] as Illinois's scheme could not survive scrutiny under the even more permissive standard applied in *Knox* and *Harris*.[303] Next, the Court

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[294] *Janus*, 138 S. Ct. at 2464-65.
[295] *Id*.
[296] *Id*. at 2465.
[297] *Id*.
[298] *See* Hylton, *supra* note 244, at 179-181; Friedrichs v. California Teachers Association, 136 S. Ct. 1083 (2016).
[299] *Janus*, 138 S. Ct. at 2465.
[300] *Id*. (quoting the dissent).
[301] *Id*.
[302] *Id*.
[303] *Id*.

considered whether "the justifications for agency fees adopted . . . in *Abood"* or the "alternative rationales proffered by respondents and their *amici* could pass constitutional muster."[304]

One of *Abood*'s primary arguments favoring agency-fee arrangements is grounded in the "State's interest in labor peace" or, alternatively phrased, "the avoidance of conflict and disruption[s] that could occur if employees in a unit were represented by more than one union."[305] The *Janus* Court observed that *Abood* cited zero evidence for the proposition "that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood's* fears were unfounded."[306] In reaching this conclusion, the *Janus* Court determined the presumption "that designation of a union as the exclusive representation of all the employees in a unit and the exaction of agency fees are inextricably linked"[307] was untenable. Even though the *Janus* Court's analysis ultimately reached a defensible result, virtually anyone instructed by Professor Baird's examination of the "labor peace" proposition[308] should be prepared to contest the *Janus* Court's intermediate assumption—at least for the sake of argument—that "labor peace" is a compelling state interest.[309] Ultimately, of course, the *Janus* Court demolished the applicability of *Abood's* "labor peace" rationale citing empirical evidence from federal employment and the Postal Service. To wit, "[u]nder federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees."[310] Yet "nearly a million federal employees—about 27% of the federal work force—are union members."[311] Similarly, though "Postal Service employees are not required to pay an agency fee and about 400,000 are union members."[312] This pattern holds true "in the 28

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[304] *Id*.
[305] *Id*. (citing Abood v. Detroit Bd. of Educ. 431 U.S. 209, 224 (1977)).
[306] *Id*.
[307] *Id*.
[308] *See supra* Part III. D.
[309] *Janus*, 138 S. Ct. at 2465.
[310] *Id*. at 2466 (citing 5 U.S.C. §§ 7102, 7111(a), 7114 (a)).
[311] *Id*.
[312] *Id*. (internal citations omitted).

States that have laws prohibiting agency fees:" public-sector unions succeed in having workers join the union without the compulsory exaction of fees.[313] This signifies that labor peace—whether a compelling state interest or not—is achievable "'through means significantly less restrictive of associational freedoms' than the assessment of agency fees."[314] As a consequence, the opposing contention, claiming that exclusive representation would collapse without agency fees and that labor peace would be shattered, became an imaginary as opposed to an empirically-viable claim[315] that did not support AFSCME's contention that the destruction of union dissenter's free speech rights is warranted.

In addition to labor peace assertions, the Court inspected the line of reasoning which insists that compulsory subsidization of union speech is justified on the now familiar ground that it reduced "the risk of 'free-riders.'"[316] Responding to the latter claim, the Court observed that Mr. Janus objected to being labelled a free-rider "on a bus headed for a destination that he wishes to reach."[317] Instead, he is a "person shanghaied for an unwanted voyage."[318] Whichever description fits, the Court noted that it had previously decided "avoiding free riders is not a compelling [state] interest," because, such claims are insufficient to overcome First Amendment objections.[319] Although "'[p]rivate speech often furthers the interest of nonspeakers' . . . 'that does not [allow] the state to compel the speech to be paid for'"[320] because the "First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay" for it.[321]

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[313] *Id*.
[314] *Id*. (citing Harris v. Quinn, 573 U.S. 573 616, 618) (2014).
[315] *Id*.
[316] *Id*.
[317] *Id*.
[318] *Id*.
[319] *Id*.
[320] *Id*. at 2466-67 (quoting Lehnert v. Ferris Faculty Assn., 500 U.S. 507, 556 (Scalia, J. concurring in the judgment in part and dissenting in part). *But see id*. at 2494-95 (Kagan, J. dissenting) (arguing that the First Amendment does not guarantee that individual's hard-earned dollars will never be spent on speech they disapprove of).
[321] *Id*. at 2467 (footnote omitted).

The Court also determined that agency fee supporters' claims "that the situation here is different because unions are statutorily required to represent[t] the interests of all public employees' . . . whether . . . they are union members" or not cannot pass First Amendment muster.[322] Conceivably, two arguments support the opposite position—(1) "unions would otherwise be unwilling to represent nonmembers" or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers in the absence of a payment—but neither argument was found convincing.[323] This is so because the benefits conferred on unions acting as the exclusive representative far outweigh the corresponding duty of providing fair representation to nonmembers.[324] Unpersuaded by Justice Kagan's economic analysis to the contrary,[325] the *Janus* majority found that it was unlikely "the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements"[326] or that unions are disadvantaged by representing nonmembers in grievance proceedings.[327] "In any event, [the Court determined that] whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated 'through means significantly less restrictive of associational freedoms' than the imposition of agency fees."[328] Cumulatively, this analysis yields the following: there is no reason "to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context" and, accordingly, "agency fees cannot be upheld on free-rider grounds."[329]

But as Part III's inspection of widely-accepted free rider claims shows, the case against relying on such contentions to justify agency fees is much stronger than the *Janus* Court admits. This is so because unproven free-riding claims enable "forced-riding" within the context of a fragmented polity that increasingly exists without

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[322] *Id*.
[323] *Id*. (observing that exclusive representation confers many benefits without agency fee designation).
[324] *Id*. at 2467-68.
[325] *See id*. at 2490-91 (Kagan, J. dissenting).
[326] *Id*. at 2468 (majority opinion).
[327] *Id*.
[328] *Id*.
[329] *Id*. at 2469

preference congruence as part of liberalism's ever-more assertive domain. This domain includes a disparate and fragmented workplace comprised of workers who neither share united preferences nor receive equal benefits.

Turning next to AFSCME's "originalist defense of *Abood*," which included the assertion that this case was correctly decided by the court below because "the First Amendment was not originally understood to provide any protection for . . . free speech rights of public employees,"[330] the Court found this argument unconvincing. First, "[t]aking away free speech protection from public employees would mean overturning decades of landmark precedent" including the *Pickering* case, which would paradoxically undermine the respondent union's primary *stare decisis* defense of *Abood*.[331]

Second, as scholars Baude and Volokh show, eviscerating public employee speech rights is probably unconstitutional even within the meaning of *Pickering*. Baude and Volokh explain that *Pickering* stands for a distinct proposition: "speech on a matter of public concern (and not part of one's official job duties) can be restricted only if 'the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees' *outweighs* 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.'"[332] Harmonious with this analysis, the *Janus* Court found that *Pickering* and its progeny stand for the proposition that "employee speech is largely unprotected if it is part of what the employee is paid to do," but of course, the Court could find zero evidence that *Abood* was based on *Pickering*.[333]

Third, the union's contention that the original meaning of the First Amendment stood for the proposition that public employees lack free speech protection constitutes a claim without any "persuasive founding-era evidence," thus leaving the union's halfway

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[330] *Id*.
[331] *Id*.
[332] Baude & Volokh, *supra* note 19, at 176-77 (emphasis added).
[333] *Janus*, 138 S. Ct. at 2471-72.

originalism without a discernible set of clothing.[334] In addition, if Baude and Volokh's analysis is sound, despite their disagreement with the Court's framing,[335] the *Janus* decision can withstand critical examination because Mr. Janus's interest as a citizen commenting on matters of great public concern arguably *outweighs* the interests of the State as an employer in promoting management efficiency.

To be clear, the Court found the speech that concerned Mr. Janus was not simply a matter of private concern.[336] Rather it was undeniably a matter of public concern and clearly Mr. Janus's voice matters since Illinois, like other states and municipalities, suffered from "severe budget problems" as "[t]he Governor, on one side and the public-sector unions, on the other, disagreed sharply about what to do about these problems."[337] Obvious cost-saving targets include wages and benefits covered by collective bargaining, whereas obvious sources of additional revenue include tax increases designed to sustain additional employee compensation.[338]

Responding to the dissent's demurrals, suggesting that the state's budgetary crises, taxes, wages, and benefits are not matters of public concern, the *Janus* majority found it difficult to believe that when the union speaks on such matters it is not speaking on matters of public concern that implicate Mr. Janus's objection to being coerced to subsidize objectionable speech. Since "'[i]t is impossible to argue that . . . state spending for employee benefits . . . is not a matter of great public concern'"[339] to all citizens, it follows that this deduction gives rise to the demand by (a) all citizens to have a seat at the bargaining table and (b) to be shielded from the forced subsidization of an opposing voice at the table even when such citizens are employed by the government.

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[334] *Id*. at 2470 (showing that rather than rely on founding-era evidence, the union is content to cite dictum from *Connick v. Myers, 461 U.S. 138* and even such dictum fails to support the union's claims).
[335] Baude & Volokh, *supra* note 19, at 171-75 (contesting the Supreme Court's analytical chops as well as how it frames the issue while conceding the Court's analysis is correct if its framing is correct, a claim the authors deny).
[336] *Janus*, 138 S. Ct. at 2474-2475.
[337] *Id*. at 2474-2477.
[338] *Id*. at 2475.
[339] *Janus*, 138 S. Ct. at 2474.

Having shown that the state budgetary crisis is a matter of urgent public concern, the *Janus* Court turned its attention to the contention by the union and the dissent that the state's compelling "interest in bargaining with an *adequately funded* exclusive bargaining agent" constitutes sufficient grounds to invalidate First Amendment objections to offensive union speech.[340] Evidently, "the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government *operations*."[341] Put another way, Justice Kagan argued that collusive arrangements between the employer and the union are a "but for" necessity for purposes of advancing efficiency or, alternatively phrased, government employers cannot achieve efficiency without the assistance of "adequately" funded unions. This is a highly dubious proposition for two reasons. First, experience has rendered this variation on the labor peace claim questionable.[342] Second, empirical research within the private-sector has shown that this contention is suspect.[343]

The *Janus* Court found the dissent's employment-relations-efficiency approach could not withstand exacting scrutiny and also determined "[n]othing in the *Pickering* line of cases require[d] us to uphold every speech restriction the government . . . as an employer" imposes on its employees.[344] Even though "the State may require that a union serve as the exclusive bargaining agent for its employees . . . a significant impingement on associational freedoms that would not be tolerated in other contexts . . . [—the Court drew] the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views."[345] *Pickering* may be a

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[340] *Id*. at 2477. (emphasis added) (quoting Harris v. Quinn, 573 U.S. at 662) (Kagan, J., dissenting)).
[341] *Id*. (emphasis added).
[342] *Id*.
[343] *See*, *e.g.*, Barry T. Hirsch, *Unionization and Economic Performance,* SAMUEL ESTREICHER AND STEWART J. SCHWAB, FOUNDATIONS OF LABOR AND EMPLOYMENT LAW, 79, 79-80 (2000) (observing that the thesis that unions significantly increase productivity has not held up well and that some studies show that unions had negative as opposed to positive effects upon productivity and once one controls for age and size of the firm, union status appears to have little effect on firm failure rates and finally notably absent are the positive effects of unions upon productivity in the public-sector).
[344] *Janus*, 138 S. Ct. at 2478.
[345] *Id*.

particularly weak pedestal for purposes of sustaining *Abood's* analysis because, for present purposes, its reasoning likely overstates the government's power under the employee speech doctrine.[346]

Having undermined respondents' efficiency and *Pickering's* employee-speech restriction contentions offered in defense of the status quo, the Court's analysis provides a sturdy basis for determining that public-sector agency-shop arrangements fail to comply with exacting scrutiny, thus violating the First Amendment. *Abood* erred in concluding otherwise. Nor could agency fees be successfully defended on grounds of either labor peace or free riding concerns that had bedeviled *Abood* leading to the *Abood* Court's credulous conclusions on such issues. Neither could *Abood* be plausibly defended by reference to the constitutive *subcomponents* of the labor peace/management efficiency argument, which includes the necessity of union voice, the necessity of an adequately funded union, and the necessity of excluding the contrary voice of labor union dissenters from the bargaining table.

Indeed, respondents' contentions in support of agency fees are severely compromised by incoherence. The Court lays bare this confusion, observing the following syllogism issuing forth from respondents: (1) "that union speech in collective-bargaining and grievance proceedings should be treated [as] employee speech . . .

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[346] Baude & Volokh *supra* note 19, at 176-77 (offering the following explanation:

> Supporting a union is not exactly what state employees are 'employed to do,' nor are their communications to the union 'official communications' or 'official business.' As for 'public concern,' public-sector unions negotiate over many big-ticket issues that affect government budgets and important government policies, as well as individual grievances that are sometimes of private concern and sometimes not. But the question is how to characterize compelled support for the union itself. We could either try to split support for a union into its 'private concern' and 'public concern' portions—a split that would place a lot in the 'public concern' category, given the public significance of union actions—or we could conclude that all decisions to support or not support a union are matters of public concern if they relate in part to the big ticket issues. And to the extent that these threshold tests are met, agency fees would likely fail the balancing test in light of the direct payment alternative. Perhaps for these reasons, the dissent in *Janus* tried to argue that something even weaker than *Pickering* was the law: 'If an employee's speech is about, in, and directed to the workplace, she has no possibility of a First Amendment claim.' And elsewhere the dissent argued that the 'public concern' test from *Pickering* 'is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square.' But this overstates the government's power under the employee speech doctrine.).

'pursuant to [an] official dut[y],'"[347] (2) that "union speech funded by agency fees forms part of the official duties of union officers [when they] engage in . . . speech,"[348] and (3) notwithstanding the fact that "when a union negotiates with the employer . . . the union speaks [or claims to speak] for the *employees*, not the employer,[349] . . . the union's speech is really the employer's speech."[350] If true, the soft plaster of respondents' argument fashions the following paradox: the employer can dictate what the union says, thus undercutting the need for a union or at least an independent and adequately funded one.

Although the *Janus* Court's observations may be less definitive than those reached in Part III B, C, D, and E of this Article, with regard to the free-rider premise, labor peace claims, and other issues, the Court's overall analysis and conclusions move on a parallel track, thus providing ground for the Court to tackle the question whether *stare decisis* operates an impediment to overruling *Abood*. The next subsection tackles this issue.

D. Stare Decisis: The Remaining Hurdle to Overruling Abood.

Stare decisis constitutes a substantial hindrance to altering the status quo *if* certain principles are present. *"'Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"[351] The Supreme Court, as a rule, declines to overturn past decisions unless strong grounds for doing so exist.[352] But since *stare decisis* (a) is not an inexorable command, (b) remains at its weakest when the Court interprets the Constitution because its interpretation can be altered only by constitutional amendment or overruling prior decisions, and (c) it operates with the least amount of force when it wrongly denies First Amendment rights, the *Janus* Court determined that the Supreme

[347] *Janus*, 138 S. Ct. at 2474. (quoting Garcetti v. Ceballos, 547 U.S. 410 (2006)).
[348] *Id*.
[349] *Id*.
[350] *Id*.
[351] *Id*. at 2478 (quoting Payne v. Tennessee, 501 U.S. 827 (1991)).
[352] *Janus*, 138 S. Ct. at 2478.

Court should not hesitate to overrule decisions which are offensive to the First Amendment, particularly when grounded in poor reasoning among other factors.[353]

In order to uphold *Abood*, *stare decisis,* as a principle of adjudication, must traverse an imposing gauntlet that includes (a) the likelihood that *Abood* was fractured by questionable analysis,[354] (b) evidence that during the past few years Justices have submitted nontrivial arguments indicating *Abood* was wrongly decided,[355] (c) the possibility that all bargaining in the public sector is inherently political,[356] (d) the deduction that consent is liberalism's default principle thus indicating that unions operate as defensible institutions only if they represent workers who join and agree to pay dues freely and voluntarily,[357] and (e) the probability that liberalism, as an ideology, is inherently riven with overlapping contradictions leading to swelling government control on one hand while undermining the basis of all associations (including labor unions) on the other.[358] Lurking in the background of this debate of pressing current interest are eternal questions regarding whether one generation can bind another, how changeable should law be, and particularly in the domain of constitutional adjudication, whether strict adherence to the Constitution should be permitted to stifle democracy.[359] Entrenchment issues are arrayed against the *Janus* Court's determination that

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[353] *Id*. at 2478-86 (identifying five important factors that should be accounted for in deciding whether to overrule a past decision including "*Abood's* reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down and reliance on the decision").
[354] Shapiro, Burrus & Barnes, *supra* note 278 (suggesting that *Abood* was mistaken because: (1) "it improperly used the concept of 'labor peace' to justify the infringement on public employees' First Amendment rights … [since] [b]efore this case, 'labor peace' was completely unrelated to the First Amendment;" (2) "*Abood* represents an anomaly in First Amendment jurisprudence;" and (3) "[f]inally, when courts have attempted to apply the *Abood* standard, it has proven to be simply unworkable." *Id*.
[355] Hylton, *supra* note 244, at 178-79 n. 2 (noting Justice Alito's opinions in *Knox v. SEIU Local 1000,* and in *Harris v Quinn* indicating that *Abood* was wrongly decided and that agency fee arrangements by nonmembers amount to state coerced speech, which cannot withstand strict scrutiny required under the First Amendment, and further that acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents an anomaly).
[356] *Id*. at 177.
[357] For a contrary view, *see* George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law,* 15 BERKELEY J. EMP. & LAB. L. 187, 193 (1994) (arguing that "a broad definition of unions' societal function …require[s] … limiting individual rights" and choices).
[358] *See infra* Part V. A. and accompany text.
[359] Michael D. Gilbert, *The Law and Economics of Entrenchment,* GA. L. REV. 3 (forthcoming Mar. 2019), https://ssrn.com/abstract=3366287.

"compelled subsidization of private speech seriously impinges on First Amendment rights [and therefore] cannot be casually allowed,"[360] and also the question of whether agency fee opponents must now seek to amend the U.S. Constitution, in order to return the Constitution to its original meaning?

The *Janus* Court offered a detailed explanation for its decision. First, it determined that *Abood* went awry from the start by concluding that two prior decisions, *Hanson* and *Street,* "require[d] validation of the agency-shop agreement[s]"[361] when consistent with Vieira's decades-old analysis, [362] "those decisions did no such thing."[363] "Both cases involved Congress's '*bare authorization'* of *private-sector* union shops under the Railway Labor Act."[364] After *Hanson* "dismissed . . . a facial First Amendment challenge [to the RLA], noting that the record did not substantiate the challengers' claim,"[365] and after "*Street* was decided as a matter of statutory construction, and . . . did not reach any constitutional issue," the *Janus* Court concluded that *Abood* took the baseless "view that *Hanson* and *Street* 'all but decided' the . . . free speech issue that was before the Court."[366] Unwarranted reliance on *Hanson, Street* and analysis derived from the RLA, led to another error: "*Abood* judged the constitutionality of public-sector agency fees under a deferential standard that [found] no support in [the Court's] free speech cases."[367] To wit, *Abood* failed to make a dispassionate evaluation of "the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well [agency fees] promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers."[368] By following *Hanson* and *Street*, *Abood* accepted an assessment tied to the RLA, thus setting the stage for its unrestrained deference to the legislative

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[360] *Janus*, 138 S. Ct. at 2464.
[361] *Id*. at 2479 (quoting *Abood*, 431 U.S. 209)
[362] Vieira, *Travesty, Tragedy and Treason*, *supra* note 153, at 3.
[363] *Janus*, 138 S. Ct. at 2479 (internal citations omitted)
[364] *Id*.
[365] *Id*.
[366] *Id*.
[367] *Id*. 2479-80.
[368] *Id*. at 2480.

judgment that the union shop makes an "important contribution . . . to the system of labor relations established by Congress" within the meaning of the Commerce Clause and connected to substantive due process questions that were the focal point of such cases, even though such deference is inappropriate in deciding pure free speech issues.[369]

Assuming the *Janus* Court correctly distinguished substantive due process and Commerce Clause questions on one side from pure First Amendment issues on the other, it follows that *Abood* did not decide the actual constitutional case brought by the plaintiff in *Janus*. Rather, *Abood* was propelled by prudential considerations tied to private-sector unions within the meaning of the RLA that were not necessarily before the Court. These blunders paved the way for still another misstep: failing to consider whether agency fees were actually needed to serve the asserted state interest. *Abood* presumed "that one of those interests—'labor peace'—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees."[370] In sum, *Abood's* deferential surrender to legislative judgment—a move which is unsuitable in First Amendment cases—generated three analytical gaps that vitiated its defensibility: (1) "*Abood* did not independently [gauge] the strength of the government interests that [allegedly] support[ed] the challenged agency-fee provision; nor did it ask how well [agency fees] actually promoted those interests or whether [those interests] could have been adequately served without impinging so heavily on the free speech rights of nonmembers,"[371] (2) it "failed to see that the designation of a union as [an] exclusive representative and the imposition of agency fees by the labor union are issues that are not inextricably linked,"[372] and (3) it failed to account sufficiently for "the difference between the effects of agency fees in public- and private-sector collective bargaining."[373]

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[369] *Id*.
[370] *Id*.
[371] *Id*.
[372] *Id*.
[373] *Id*. at 2480.

Although it may seem obvious that a government employer's spending and revenue decisions as well as a public-sector union's collective bargaining expenditures are matters of public concern, it is worth noting that *Abood* did not dispute the notion that collective bargaining either in the private-sector or public-sector implicates political speech.[374] Instead, *Abood* concluded that the "differences between public- and private-sector bargaining do not translate into differences in First Amendment rights," thus signifying that union security/agency fees represent "fundamentally the *same* issue" in either sector.[375] On the other hand, the *Janus* Court intimates that collective bargaining expenditures by private-sector unions are *less* obviously matters of public concern and accordingly, claims that there are substantive *differences* between agency fees in the public- as opposed to private-sector.[376] *Janus* offered an explanation for distinguishing *Abood* from the private-sector cases that preceded it: "[t]he challengers in *Abood* argued that collective bargaining with a government employer, *unlike* collective bargaining in the private sector, involves 'inherently "political" speech' and the *Abood* Court conceded that "'decisionmaking [sic] by a public employer is above all a political process' driven more by policy concerns than economic ones."[377] Hence the *Janus* majority disagreed with *Abood's* determination "that public employees do not have 'weightier First Amendment interest[s]' against compelled speech than do private employees."[378] On the *Janus* majority's account, *Abood's* determination misses an important distinction, even if one believes the First Amendment applies to private-sector agency-shop arrangements: "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector."[379]

Whether the *Janus* Court is correct regarding the assumptive distinction between the political implications of private- and public-sector collective bargaining

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[374] Abood v. Detroit Bd. of Educ. 431 U.S. 209, 226-32 (1977).
[375] *Id*. at 232 (emphasis added).
[376] *See infra* Part V. D and accompanying text (disputing such contentions).
[377] *Janus*, 138 S. Ct. at 2480 (emphasis added).
[378] *Id*.
[379] *Id*. (quoting Harris v. Quinn 573 U.S. 616 (2014)). *But see*, Hutchison, *What Workers Want*, *supra* note 59, at 801 (contesting such claims).

arrangements or concerning its assumption (at least for the sake of argument) that the First Amendment could apply to private-sector agency-shop arrangements,[380] the Court offers a fuller explanation for its observations undermining *Abood's* workability within the public-sector. It concludes that it is more difficult to properly classify public-sector union expenditures as either chargeable or nonchargeable in comparison with private-sector union expenditures, even if the line between the two types of expenditures has proven to be difficult to draw.[381] From the *Janus* Court's perspective, developing a defensible algorithm for drawing this line is problematic in public-sector cases, because, more likely than not, *all* expenditures by public sector unions have political implications.[382] Partially consistent with this analysis, suggesting public-sector unions are subject to more obvious difficulties in line-drawing, even the *Janus* "[r]espondents agree that *Abood's* chargeable-nonchargeable [expenditure] line suffers from 'a vagueness problem,' [meaning] that it sometimes 'allows what it shouldn't allow,'" a concession that undergirds the reality that *Abood* has proven to be impractical.[383] Moreover, additional problems impair the reliability and workability of *Abood* as an agency-fee bulwark, including the fact that developments since the issuance of the decision have eroded its underpinning and left it an outlier as well as an anomaly among the Court's First Amendment jurisprudence.[384]

Beyond the workability issue, because the *Abood* Court failed to do its job thoroughly, it could not advance convincing analysis confirming collective bargaining in the public sector is not political and therefore did not impinge on nonmembers' First Amendment freedoms. Nor could the Court advance persuasive analysis affirming the sufficiency of its free-rider and/or labor peace justification for imposing agency fees and

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[380] *Janus*, 138 S. Ct. at 2480.
[381] *Id*. at 2481 (quoting *Lehnert's* "three-part test requiring chargeable expenses (1) be 'germane' to collective bargaining activities, (2) be justified by the government's labor peace and free-rider interests; and (3) not significantly burden free speech"). After adopting this test, the Court splintered over its application. *Id*. The Supreme Court has *particularly struggled with the chargeability or nonchargeability of lobbying expenses. See, e.g.*, Knox v. SEIU, Local 1000, 567 U.S., 298, 32-21 (rejecting the argument that objecting nonmembers who were required to pay union fees, actually received a "windfall").
[382] *Janus*, 138 S. Ct. at 2480.
[383] *Id*. at 2481-82.
[384] *Id*. at 2482-2483.

thus abridging nonmembers' constitutional freedoms. *Abood,* accordingly*,* fails to withstand careful analysis, thus destabilizing *stare decisis* as a defendable basis for sustaining compulsory subsidization of objectionable speech.[385] Nor was the union's reliance interest enough to overcome *Abood's* difficulties. The *Janus* Court found that all the above-referenced reasons provide special justification for overruling *Abood*[386] signifying that States and public-sector unions may no longer extract agency fees from nonconsenting employees.[387] *Janus* determined that *Abood* was wrongly decided and *stare decisis* could not prevent it from being overruled.[388] Second, *Janus* decided that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay," thus waiving her First Amendment rights.[389]

E. Justice Kagan's Dissent

Justice Kagan (joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor) doggedly disputes the majority's opinion. In order to sustain *Abood's* potency, Justice Kagan relies heavily on the notion "that government entities have substantial latitude to regulate their employees' speech" in the interest of efficiency.[390] Mounting a campaign to elevate inertia and promote the reliance interest of public sector unions and employers as part of her support for the status quo,[391] Justice Kagan minimized the First Amendment freedom of nonmembers. Implicitly, Justice Kagan accepted George Feldman's invitation to endow unions with a broad societal definition and thus limit individual rights and choices[392] as part of her indifference to the plight of agency fee objectors. Despite the likelihood that her approach could leave nonmembers prisoners

[385] *Id* (noting as detailed in *Harris,* that *Abood* was not well reasoned), *id*.at 2481 n.25 (disputing the dissent's claims).
[386] *Id*. at 2486.
[387] *Id*.
[388] *Id.*
[389] *Id*.
[390] *Id*. at 2487-2502 (Kagan, J. dissenting).
[391] *Id*. at 2487-88.
[392] Feldman, *supra* note 357, at 193.

of union subordination for another generation, she argued that for over 40 years *Abood* "struck a stable balance between public employees' First Amendment rights and government entities' interest in running their workforces as they thought proper."[393]

Justice Kagan's approach was grounded in the principle of exclusive representation advanced during FDR's New Deal.[394] Although the New Deal richly advanced human subordination fortified by racial exclusion in its own right,[395] Justice Kagan accepted as whole cloth and without skepticism, *Abood's* New Deal based analysis including its labor peace and free rider pretext, and the elevation of the employer's and the labor union's interests in efficiency and voice, as opposed to the interests of nonmembers.[396] As such, she was disinclined to recognize the possibility that so-called fair payment—agency fees—may be entirely political[397] and utterly repressive, thus leaving nonmembers captive to labor unions' ideological goals. Justice Kagan observed that *Abood* stood for the proposition that the government could compel fair-share payments covering the cost unions incurs when negotiating on the workers' behalf over the terms of employment.[398]

Predictably, the acceptance of this proposition by the Supreme Court would signify approval of the transmutation of government power from being a guardian of the public interest and a supplier of public goods and civil peace into an active interventionist actor

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[393] *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).
[394] *Id*. at 2488.
[395] *See*, *e.g.*, Harry G. Hutchison, *Waging War on the* "*Unfit*"*? From* Plessy v. Ferguson *to New Deal Labor Law*, 7 STAN. J. C.R. & C.L. 1, 31-34, (2011) (showing that progressive reformers believing race determined human worth judged an impressive array of humans, male Anglo-Saxon heads of households excepted, unworthy of work coupled with evidence that the architects of the New Deal knew that labor law innovation would create disproportionate unemployment for African Americans and others as the federal government facilitated the imposition of inequality during the New Deal); *id* at 40 (showing that innovative reform efforts led by progressives relied on eugenics, "racelology, labor legislation ostensibly in pursuit of the "public interest" and "social justice" as part of a less than enlightened effort to transform the nation"). *But see* Herbert Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947 (2017) (offering an unpersuasive attempt to reclaim Progressives' impressive racist history).
[396] *Janus*, 138 S. Ct. at 2488 (Kagan, J., dissenting).
[397] *See*, *e.g.*, Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1373-94 (suggesting that no union expenditures, whether germane to collective bargaining or not, can be separated from the political content associated with such exactions since labor unions led by labor hierarchs often become vehicles of political transformation that seek to enlist workers as the means to achieve labor's ideological ends).
[398] *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

bent on redistributing power and wealth to favored hierarchical organizations that have increasingly influenced the nation's allocation of government influence.[399] This proposition has become more alluring in the face of special pleading by proponents of the New Unionism, which corresponds with an upsurge in public-sector unionism and the meteoric increase in public spending.[400] Reifying majoritarianism and overlooking the possibility that her adjudicatory preferences would facilitate an even greater and largely unprincipled expansion of government power and a corresponding shrinkage of individual rights, Justice Kagan argued that *Abood's* holding should be sustained. Although this proposition operates in sharp contrast with the individuated liberty that liberalism has promised us, she argued that governments have substantial latitude to regulate employees' speech when it advances important managerial interests in "ensuring the presence of an exclusive employee representative to bargain with."[401]

Relying on a confined conception of economics, Justice Kagan determined that basic economic theory sustains respondents' argument showing why "a government would think that agency fees are necessary for exclusive representation to work."[402] She insisted that the prospect of free riding surfaces when agency fees are absent, leading to nightmarish collective action problems because all represented workers will be subject to the incentive to withhold dues in the absence of compulsion.[403] But of course her analysis—including her reliance on *Machinists* for purposes of highlighting the duty of unions to represent all workers (members and nonmembers alike) and the corresponding necessity of agency fees[404] —assumes something that has not yet been exhumed from the evidence: that all workers benefit equally from exclusive representation by the collective and share the same preferences. More comprehensive economic analysis shows such claims are dubious.

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[399] GRAY, POST-LIBERALISM STUDIES, *supra* note 123, at 12.
[400] *Janus*, 138 S. Ct., at 2483 (majority opinion).
[401] *Id*. at 2487 (Kagan, J. dissenting).
[402] *Id*. at 2490.
[403] *Id*.
[404] *Id*.

Moreover, virtually anyone familiar with the notion of radical individuated human autonomy realizes Justice Kagan's assumptions cannot withstand examination within the tangible world that liberalism has bequeathed to us, in contradistinction to the illusory world judges and Justices have imagined. After all, the liberal world celebrates diversity rather than uniformity and propels ontological individualism[405] rather than the collective interest. In contradistinction with the analysis supplied in Part III of this article and liberalism's embedded implications, Justice Kagan fails to understand that basic economic theory indicates agency fees expose dissenting workers, as economically and politically rational actors, to the prospect of "forced-riding." Though such analysis eludes her grasp, Justice Kagan admits that not all public employers share the same view about exclusive representation.[406] Nevertheless, failing to recognize the strength of her concession, one that verifies the preference diversity of the bargaining unit, she valorizes government preferences, stating that its preference for stable labor relations requires the compulsory imposition of fees on nonmembers thus vitiating opposing preferences held by nonmembers.[407]

Having failed to show that economic theory necessitates agency fees and apparently propelled by the scent of presumption, Justice Kagan overlooks a raft of countervailing evidence and arguments that make her claims contestable. After ignoring evidence from the majority opinion showing that the principle of exclusive representation in the public sector is not necessarily dependent on the existence of a union or agency shop,[408] and Mark Janus' contention that the Court has generally applied strict and exacting First Amendment scrutiny to instances of compelled speech and association outside of the agency fee arena,[409] Justice Kagan also overlooked

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[405] Kohler, *supra* note 6, at 193.
[406] *Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting).
[407] *Id*. (adverting to the difference in how the First Amendment applies when the government is acting as employer rather than sovereign).
[408] *Id*. at 2483 (majority opinion).
[409] Brief for the Petitioner Janus v. AFSCME, *supra* note 163, at *11-*12 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 658-59 (2000); Rutan v. Republican Party, 497 U.S. 62, 74 (1990); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 800 (1988); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). *See also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 658–59 (2000) (ruling that intermediate scrutiny did not apply, and that strict scrutiny applied to traditional First Amendment analysis).

evidence from federal employment, which does not permit agency fees or similar countervailing evidence from the U.S. Postal Service showing unions can and do exist in the absence of compulsion.[410] Instead, Justice Kagan submits a consequentialist claim, which enables government employers and unions to channel subordination. She argues that the Supreme Court's rejection of *Abood* will

> have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.[411]

Snubbing unmistakable benefits associated with reversing the Supreme Court's forty-one-year-old assault on the First Amendment and disregarding evidence that before *Abood* state intrusions upon protected speech compelled the State to shoulder the burden of proving its impingement was justified by overriding state interests, Justice Kagan's cost-benefit calculus culminates in the conclusion that no special justifications exist for reversing *Abood*. This is so, she argues, because it has proven to be so workable and so deeply entrenched as states have built statutory schemes on its foundation.[412] Ignoring the concession by respondent labor union admitting *Abood's* unworkability,[413] Justice Kagan offered a parade of horrors, which culminates in the contention that unions, in the absence of agency fees, would lack sufficient resources to effectively perform the responsibilities of exclusive representation, thus frustrating the government's interests.[414] Still, the quintessential question remains: is *Abood* workable and for whom? Workers? Dues objectors? Union hierarchs? The public?

Relying on a balancing, Justice Kagan observed that *Abood* looked to the example provided by the private-sector, and in reliance on the "labor peace" argument,

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[410] *Janus*, 138 S. Ct. at 2466.
[411] *Id*. at 2487 (Kagan, J., dissenting).
[412] *Id*. at 2488.
[413] *Id*. at 2481-82 (majority opinion).
[414] *Id*. at 2491 (Kagan, J., dissenting).

concluded the "'designation of a single [union] representative' for all similarly situated employees in a workplace" would produce a number of positive benefits, as noted below.[415] Constant with this contention, *Abood* cited with favor Justice Brennan's concurring opinion in *Madison School District V. Wisconsin Employment Relations Commission* for the proposition that the "desirability of labor peace is no less important in the public sector nor is the risk of 'free rider' any smaller."[416] Acceptance of *Abood's* labor peace claims originating in private-sector case law provided a springboard to justify the necessity of exclusive-bargaining arrangements, which, in turn, legitimated agency-fees premised on free-rider claims. Taken together, this paradigm "presumptively support[ed] the impingement upon associational freedom."[417] Whether private-sector labor peace claims on which she depends for analytical purposes resonate within that sector or not, Justice Kagan's labor peace analysis has not been substantiated within the public sector. Quite the opposite. Professor Baird and others have debunked such claims.[418] Equally true, her free-rider analysis is dubious as well.[419]

Justice Kagan's analysis remains suspect for other reasons too. After all, as Justice Powell's concurring opinion in *Abood* noted: "[b]efore today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests . . . . The Court, for the first time in a First Amendment case, simply reverses this principle."[420] Grounded in the logic of Justice Powell's analysis, it is doubtful that the State of Illinois has met its burden as a predicate for impinging on Mark Janus's First Amendment freedoms. Nonetheless, Justice Kagan was content to place the burden of

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[415] *Id*. at 2488 (Kagan, J. dissenting) (quoting *Abood* for the proposition that designation of a single representative "[would] 'avoid [ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment'; 'prevent[ ] inter–union rivalries from creating dissension in the work force'; 'free [ ] the employer from the possibility of facing conflicting demands from different unions'; and 'permit [ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.'").
[416] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).
[417] *Id*. at 225.
[418] *See supra* Part III. D and accompanying text.
[419] *See supra* Part III. C and accompanying text.
[420] Abood, 431 U.S. at 263-64 (Powell, J. concurring) (internal citations omitted).

proof on nonmembers. Her approach would place individual freedoms guaranteed by the Constitution at risk for four reasons.

First, accepting the claim that managerial efficiency is paramount, Justice Kagan's analysis would permit labor peace claims and the free rider hypothesis, however pretextual they may be, to void individual rights. Offering efficiency as a unifying principle for labor unions and as an antidote to our fragmented age arising out of ontological individualism and the Court's oscillating First Amendment discourse, Justice Kagan avoids evidence that Mr. Janus's interest as a citizen commenting on matters of great public concern arguably *outweighs* the interests of the State as an employer in promoting management efficiency.[421] In addition, she no longer subscribes to the notion that First Amendment freedoms are subject to adjudication grounded in any fixed star in our constitutional constellation.[422] On the contrary, Justice Kagan, joined by a substantial fraction of the Supreme Court, effectively agreed that government officials in concert with private parties can indeed "prescribe what shall be orthodox in politics . . . or other matters of opinion"[423] so long as this prescription supplies more managerial efficiency and societal advancement.

Second, even though taxes and cost-saving targets, including wages and benefits, are directly tied to collective bargaining and seem to be matters of unavoidably public concern, Justice Kagan offered a demurral.[424] But the suggestion that such matters are immaterial to public concern amounts to a denial of reality that has one effect: diminishing First Amendment concerns for union speech in this arena. Notably, Justice Kagan, dissenting in an earlier public-sector agency fee dispute, offered a highly imaginative argument in defense of *Abood*, alleging that "union speech in collective bargaining, including speech about wages and benefits is basically a matter of private interests."[425] The dissent's credulousness continued in *Janus* despite contemporaneous

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[421] *See, e.g.*, *Janus*, 138 S. Ct., 2491-97 (Kagan, J. dissenting).
[422] *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis omitted).
[423] *Id*.
[424] *Janus*, 138 S. Ct. at 2475 (majority opinion) (noting Justice Kagan's demurral).
[425] *Id*. at 2474 (citing Harris v. Quinn, 573 U.S. 616, 657 (Kagan, J. dissenting)).

evidence showing "[labor] unions express views on a wide range of subjects [including] education, child welfare, healthcare, and minority rights,"[426] and older evidence, which established unions frequently issued utterances in support of marijuana decriminalization and abortion rights.[427] This pattern of union involvement in matters of public concern that are either endogenous or exogenous to collective bargaining issues has been previously observed and remains consistent with claims by labor union advocates and leaders that unions' societal function, broadly conceived, cannot be limited to pecuniary concerns.[428] These observations confirm public choice insights showing that economics cannot be separated from politics. Justice Kagan's reliance on a rational basis standard for purposes of constitutional review of matters of public concern favors the expansion of government power and fails to acknowledge public choice's important contribution to the literature suggesting wide-ranging difficulties in the carving up of human interests into highly-compartmentalized and highly-separate elements.[429]

Third, relying on *Pickering*, Justice Kagan emphasized the proposition that subsidization of majoritarian speech coupled with extirpation of nonmembers' speech constitutes a necessary ingredient for state governments to efficiently manage employment relations, because bargaining could not be effective in the absence of an adequately-funded opponent with a stable source of funding.[430] Alternatively phrased, employers need a well-funded collective bargaining antagonist to give voice—a highly contestable proposition[431]—to employee concerns and to thus achieve otherwise unachievable efficiencies. Such claims are suspect,[432] unless Justice Kagan's quest for

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[426] *Id*. 2475.
[427] *See*, *e.g.*, Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1390-91(explaining analogies that illustrate the fact that unions are not able to support every ideal that each of its members support).
[428] Feldman, *supra* note 357, at 193.
[429] *See*, *e.g.*, MUELLER, *supra* note 40, at 6.
[430] *Janus*, 138 S. Ct., at 2489 (Kagan, J., dissenting).
[431] Such claims are contestable because many workers prefer cooperative relations with management as opposed to adversarial relations and are open to various paths for increasing their participation at the workplace. *See*, *e.g.*, RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 1-2 (Updated ed. 2006).
[432] *See*, *e.g.*, Hirsch, *supra* note 343, at 79-80 (stating that unions are not as efficient or effective as have been claimed by their supporters).

efficiency cures rather than magnifies *Abood*'s failure to "independently evaluate the strength of the government['s] interests" combined with an assessment of whether those interests could be achieved without impinging on First Amendment freedoms.[433]

Finally, and consistently with Patrick Deneen analysis showing liberalism inevitably culminates in the controlling captivity of the state, Justice Kagan and the *Janus* dissenters, just like the dissenters in *Burwell v. Hobby Lobby*, exhibited a distinctive preference for positive freedom emanating from statism as a bulwark against individual vulnerability. Controlling captivity, thus embraced, signifies the rejection of freedom and liberty arising from voluntary associations and their correlative imprescriptible rights and responsibilities leading toward virtue.[434] This move corresponds with the contention that "[t]he more individuated the polity, the more likely that a mass of individuals would inevitably turn to the state in times of need," suggesting "that individualism is not the alternative to statism, but its very cause."[435]

Properly appreciated, agency fee objectors are members of a distinct minority with distinct values and interests which are opposite to the majority's interest. Hence, the continued validation of compulsory dues extraction likely constitutes more than an instance of forced riding and an encroachment of nonmembers' First Amendment interests. This is so because many Supreme Court decisions operating on a parallel track with Justice Kagan's approach supply a sturdy basis to entrench the status quo and thus signify the Court's willingness to place government power at the disposal of a preferred entity selected by the majority.[436] This maneuver is best understood as serving the

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[433] *See Janus*, 138 S. Ct. at 2480 (arguing that Kagan's dissent made a mistake by employing a deferential standard for assessing the permissibility of agency fees).
[434] Harry G. Hutchison, Hobby Lobby, *Corporate Law, and Unsustainable Liberalism: A Reply to Justice Strine,* 39 HARV. J. L. & PUB. POL'Y 703, 756-65 (2016) [hereinafter Hutchison, *Unsustainable Liberalism*] (observing that Justice Ginsburg's *Burwell v. Hobby Lobby* dissent impinges on First Amendment freedoms of the few while favoring "Big Government" programs that purportedly provide positive freedom).
[435] DENEEN, *supra* note 30, at 61.
[436] *See, e.g.*, Harry G. Hutchison, *Affirmative Action: Between the* Oikos *and the* Cosmos *Review Essay*: RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT, 66 S. CAROLINA L. REV. 119, 185-187 (2014) (cataloguing a variety of cases favoring majoritarian interests including institutional selectivity at elite institutions that disfavor racial and other minorities while favoring or exploiting racial capitalism).

"veiled majoritarian function of promoting popular preferences at the expense of minority interests."[437] Maintenance of this approach would place majoritarianism ahead of principled constitutional adjudication. Against this foreground, *Abood's* errors could be seen well before the Court's *Janus* decision, thus exposing Justice Kagan's reasoning as both counterintuitive to liberalism's promises and mostly brummagem and increasingly indefensible.

V. ANALYSIS

This section provides analysis and supplies answers to this article's four central questions. In turn, I consider whether the *Janus* Court's decision overruling *Abood* can withstand scrutiny. A comprehensive answer to this question is provided. Then, I mull whether agency fee regimes, independent of the merits of *Janus,* can be justified within liberalism's framework promising ever-more autonomy and ever-more isolation. I then reflect on arguments for extending the logic of the answers reached regarding the first and second questions to the legitimacy of private-sector agency fees. The fourth question considers whether *Janus*, despite its merits, can withstand the state's thirst for control. Answers to the last three questions are necessarily tentative and speculative. I will offer more comprehensive answers to such questions in the second installment of this article.

A. Did Janus Rightly Overturn Abood?

In the absence of the Supreme Court's decision favoring Mark Janus "[nearly] five million public employees would be required, as a condition of employment, to subsidize the speech of a third party . . . they [do] not [necessarily] support, namely, a government-[approved labor union]," and to engage in self-censorship.[438] By overturning *Abood*, the *Janus* Court freed public-sector workers from the prospect of

[437] Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1974 (1990) (focusing on racial minorities and judicial review).
[438] Brief for the Petitioner at 15, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 U.S. S. Ct. Briefs LEXIS 4664, at *10.

subsidizing abhorrent political positions. But the question remains: can *Janus'* approach withstand scrutiny by *Abood's* defenders?

Any examination of *Abood's* validity should observe that public-sector unions sprung from a New Deal pattern, reflecting familiar doctrines underlying the NLRA wherein FDR ushered in a number of heavy-handed policies in the private-sector, and promised human progress through the reconstruction of labor for the "forgotten man."[439] Prompted by public-sector union activists in collaboration with other social and political forces who sought to transform the nation and prepare the way forward for the ostensible achievement of human progress in the form of the New Socialism achievable through New Unionism,[440] public-sector collectivism, mirroring FDR's objectives, was fashioned as an edifice elevating exclusive representation and majoritarianism and putative human progress. Whether human progress is achievable through state-sanctioned compulsion or not, arguments favoring public-sector agency fees and the *Abood* decision itself face several hurdles.

Majority rule, as a critical element, for example, of *Abood's* chief defense of agency-fee arrangements triggered labor peace contentions centering on the necessity of "avoiding the imaginable conflict and disruption that could erupt if workers were represented by more than one union."[441] Consistent with this proposition, the IPLRA specifies that "if a majority of employees in a bargaining unit vote in favor of the labor union, the union is designated as the exclusive representative of all employees."[442] This gave rise to a collective bargaining agreement between AFSCME and the Illinois Department of Healthcare and Family Services incorporating exclusive representation premised on majority rule and implicating *Abood*.

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[439] *See, e.g.*, Harry G. Hutchison, *Racial Exclusion in the Mirror of New Deal Responses to the Great Crash*, 15 NEXUS: CHAPMAN'S J. L. & POL'Y 5, 6-9 (2010) [hereinafter Hutchison, *Racial Exclusion in the Mirror of New Deal Responses*] (explaining that NLRA created the NRA which allowed government bureaucrats to write codes which they could then enforce in the name of the less fortunate).
[439] Troy, THE NEW UNIONISM, *supra* note 49, at 1–7.
[440] *Id*.
[441] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2465 (2018).
[442] *Id.* at 2460.

Striving to avoid pandemonium, the *Abood* Court argued "that the designation of a union as the exclusive representative of all employees in a unit and the exaction of agency fees" were inextricably linked.[443] Unbounded faith in the existence of this linkage led to overreliance on the labor peace argument to justify the exclusion of the voice of dissenting workers from the bargaining table.[444] Even though *Janus* assumed that "labor peace" is a compelling state interest, the value of this assumption was muted because *Abood* cited zero evidence that pandemonium would ensue in the absence of agency fees.[445] Indeed, before *Janus*, the empirical record showed that "labor peace" claims were not credible.[446] The weakness of the labor peace thesis was validated by evidentiary submissions received by the *Janus* Court refuting AFSCME's contention that agency fees are necessarily a dependent variable for purposes of ensuring the labor union's survival as the exclusive bargaining representative selected by a majority of bargaining unit workers.[447]

It is also notable that the selection of an exclusive bargaining representative, through simple democratic majoritarianism, has failed, thus far, to prove either a commonality of group interest or consent (choice) by all members to support the union's defined goals.[448] Overvaluing majoritarianism contributes ineluctably to the devaluation of fundamental liberties presumably embodied in the notion of choice.[449] Overvaluing majority rule inevitably contracts Irving Berlin's understanding of liberalism wherein modern liberals are captivated by the opportunity to invent, through the "exercise of the powers of choice [,] a diversity of natures, embodied in irreducibly distinct forms of life containing goods (and evils) that are sometimes incommensurable, and . . . rationally

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[443] *Id.* at 2465.
[444] *See*, *e.g.*, *id.* at 2488 (Kagan, J., dissenting).
[445] *Id.* at 2465 (majority opinion).
[446] *See*, *e.g.*, BAIRD, OPPORTUNITY OR PRIVILEGE, *supra* note 91, at 81-85.
[447] Brief for Mackinac Center for Public Policy as Amici Curiae Supporting Petitioner, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 U.S. S. Ct. Briefs LEXIS 2439, at *4–*7.
[448] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1317.
[449] Hutchison, *Unsustainable Liberalism*, *supra* note 434, at 747.

incomparable"[450] and overlooks the actual diversity of employee interest present in the workforce and presumably present in the bargaining unit.

Furthermore, overvaluing majoritarianism, undervaluing diversity of interests, and overlooking the incommensurability of bargaining unit members' goals undermines attempts to fashion a defensible approach to free-riding. In the absence of a showing of common interest and congruent preferences within the bargaining unit, it should be pointless to consider whether free-riding claims—cited by Justice Kagan as grounds to sustain *Abood*—are convincing. This is so because indispensable predicates for such a claim—congruent preferences, shared interests, and equally shared benefits—are missing. Nevertheless, courts and commentators have accepted the proposition that majority rule is a substitute for proof of the bargaining unit's common interest. But (1) assuming that enough evidence of common interest is adducible to raise the specter of free-riding, and (2) assuming the validity of *Janus* Court's observation that even if free riding exists such a claim cannot withstand exacting First Amendment scrutiny, then the burden of proof on this issue ought to remain on defenders of agency fees constant with Justice Powell's concurrence in *Abood*. He noted the record in *Abood* was barren of evidence sufficient to sustain the free rider effect,[451] a claim that likely applies to virtually all agency-fee cases. Coherent with this pattern, neither *Janus'* dissent nor the respondent labor union adduced proof that bargaining unit commonality of interest exists or that free riding itself, necessarily exists even if core membership is stripped down to a focus on economic advancement. On the contrary, the *Janus* dissent was content to substitute the commonplace presumption of free riding for adducible proof. Hence, courts, in rendering decisions on agency-fee disputes, should accept the deduction that forced riding rather than free-riding ought to remain the default view unless proof is adduced to the contrary.

Moreover, agency-fee defenders ignore what is obvious: union speech, which concerns nonmembers in public-sector cases, is inescapably a matter of public concern

[450] JOHN GRAY, ISAIAH BERLIN 15 (1996).
[451] Abood, v. Detroit Bd. Of Educ. 431 U. S. 209, 262-63 (Powell, J. concurring).

even when it is tied directly to collective bargaining. This determination directly implicates politics and the First Amendment within the parameters of agency-fee disputes. Reliably, with the presence of this implication, four of the Justices on the *Abood* Court found no basis for differentiating collective bargaining activities from political activities as far as the interests of the First Amendment are concerned. It is clear that disassociation from a public-sector union and the expression of disagreement with its positions lie at the core of activities protected by the First Amendment.[452] This analysis provides a sound basis for concluding that agency fees ought to trigger substantial First Amendment concerns and warrant substantive scrutiny before passing constitutional muster.

Reinforcing the force of this conclusion, the pursuit of political heft is a principal goal of labor unionists, giving rise to the allusion that the presumptive differentiation between unions and political parties constitutes a distinction without a difference.[453] In a society committed to diversity, such a goal—speaking on ideological matters on behalf of all workers within the bargaining unit—should be seen as controversial. Likewise, as the concept of opportunity costs illustrates, when a labor union concentrates its bargaining or political resources on one goal or set of goals, this inevitably constricts its capacity to offer speech in favor of contrary goals. Given the likely presence of preference heterogeneity among workers, it is implausible to claim that organized workers necessarily represent a unified, as opposed to a heterogeneous political grouping. This conclusion complements another: the observation that in a highly-divided society such as ours, it is doubtful that agency fee objectors are necessarily free-riders as opposed to forced-riders with respect to the union's political goals and objectives.[454]

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[452] *Id*. at 256-59.
[453] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1362.
[454] *See*, *e.g.*, John T. Addison & Clive R. Belfield, *Union Voice 2* (Institute for the Study of Labor (IZA), Discussion Paper No. 862, 2003), available at http//www.ssrn.com/abstract=446243 (quoted in Hutchison, *What Workers Want*, *supra* note 59, at 823).

Furthermore, the assertion by agency-fee defenders that unions, operating as exclusive bargaining agents, must be adequately funded to give voice to the concerns of the collective group in order to achieve management efficiency faces headwinds.[455] Even if it were true that exclusive representation and the corresponding imposition of agency fees improves bargaining efficiency, the efficiency hypothesis cannot prove that collective bargaining necessarily improves labor/management productivity and taxpayers' return on their investment. Even if adequate funding is seen as required, compulsion is not. Available empirical evidence indicates that agency fees are not necessary to adequately fund a labor union because state and local public-sector employees maintain a union membership rate of 80 percent in right-to-work environments.[456] Even if empirics fails, the claim that the existence of an adequately funded labor union is required to articulate the concerns of employees to management unnecessarily conflates union voice with employee voice, despite private-sector survey evidence showing the union voice model is deficient because it neglects individual voices and uncritically equates collective voice with autonomous unionism.[457] Indeed, persuasive evidence surfaces showing that workers may be open to alternative workplace options including some form of participatory management/employee voice that operates *independently* of a union.[458] This analysis implies that union voice claims allegedly grounded in advancing employees' voice and interest are largely illusory. Acceptance of such claims by *Janus'* principal dissent duplicates *Abood*'s failure to independently evaluate the strength of the government's interests coupled with an assessment of whether those interests could be achieved without impinging on First Amendment freedoms.[459]

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[455] *See, e.g.*, *supra* Part III D and accompanying text.
[456] Brief for Mackinac Center for Public Policy as Amici Curiae Supporting Petitioner, *supra* note 447, at 2–3. (citing certiorari brief filed in the Friedrichs v. California Teachers Association, 138 S. Ct. 1083 (2016)).
[457] John T. Addison & Clive R. Belfield, *Union Voice 2*, IZA DP No. 862 (2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=446243, (quoted in Hutchison, *What Workers Want*, *supra* note 59, at 823).
[458] Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. L. 117, 118 n. 2 (1996).
[459] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2480 (2018) (saying that the court should not grant deference to the legislature in cases that concern free speech issues).

Skepticism toward union voice claims are elevated because the *Janus* Court observed that nothing in the *Pickering* line of cases requires it to uphold every speech restriction, which the government imposes on its employees in order to stifle employees' dissenting voices. Mark Janus's employer and AFSCME, pursuant to their collective bargaining agreement, sought to smother his voice as well as the voices of all nonmembers who refuse to share the labor organization's views on what is best for them. If that were not enough, the collective bargaining agreement demanded Mark Janus subsidize and therefore promote AFSCME's contrary voice, "leaving his interest subject to the manipulation of union leaders and negotiators with interest sharply different from his."[460]

While management efficiency claims tied to unionism await an independent evaluation of the strength of such claims, conflation distorts union voice claims, the presumed necessity of adequately funded union voice has been found wanting, and the facilitation of an exclusive bargaining representative is achievable through means less restrictive of nonmembers' associational freedoms,[461] a substantial fraction of the Supreme Court favors state sanctioned agency fees. This fraction maintains its position despite the lack of evidence supporting AFSCME's position, despite the dearth of credible evidence justifying *Abood*, and despite doubts that agency fees regimes can withstand a rational-basis review that "ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests."[462] This is not a surprising development. As we have already seen, when pressed to choose between the application of government power and individual freedom, liberals effusively choose government power as their preferred vehicle to insure positive freedom. Nor is this an isolated move that is confined to the domain of agency fees.[463] Whether the reification of

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[460] Schwab, *supra* note 57, at 371 n. 19.
[461] *Janus*, 138 S. Ct. at 2466.
[462] *Id*. at 2465 (quoting Kagan, J. dissenting).
[463] Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) (claiming to support the rights of employees to contraceptives as against the rights of a for-profit corporation seeking an exemption from generally applicable law). Justice Ginsburg's claims are consistent with liberals' penchant to elevate the power of Big Government and shrink the power of small corporations or dissenting individuals signifying that once the state grants positive benefits (reproductive health) to workers, the fundamental liberties held by employers must give way

state power is legitimated through balancing, efficiency claims, or weak economic analysis, it is probable that such moves are advanced by linguistic legerdemain implicating the Court's liberals' ostensible commitment to ontological individualism, even if the results are predictably the same: advancing our captivity to the controlling state.

This observation recalls Sohrab Ahmari's intuition that the move toward a liberal consensus has been paradoxically transmuted "into a profoundly illiberal, repressive force—even though or precisely because it grants the autonomous individual such wide berth to define what is good and true."[464] This move, which increasingly characterizes modern liberalism, has consequences as John Gray crisply shows:

> The sphere of free individual activity, the sphere of contractual liberty, has waned as the sphere of hierarchical organizations [including government and favored organizations] . . . has waxed . . . It is the process—well advanced in all modern states but reaching its terrifying completion in the totalitarian states— . . . whereby the free subjects of civil society are transformed into dependent functionaries or vassals of the state.[465]

Since liberalism has increasingly transformed itself into authoritarianism, it should startle no one that the dissenting members of the *Janus* Court were quite prepared to countenance an assault on the workers' First Amendment rights despite the fact that a principled understanding of the First Amendment was arguably available,[466] thus limiting the state's power to "compel [] individuals to mouth support for views they find objectionable."[467]

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to the demands of progress. *See, e.g.*, Hutchison, *Unsustainable Liberalism*, *supra* note 434, at 747, 728 (arguing that the dissenters in Hobby Lobby wanted to expand the rights of workers to obtain healthcare at the expense of the First Amendment).

[464] Ahmari, *supra* note 30, at 50.

[465] GRAY, POST-LIBERALISM STUDIES, *supra* note 123, at 12.

[466] *See, e.g.*, W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.").

[467] *Janus*, 138 S. Ct. at 2463-64.

These overlapping conclusions coupled with the absence of adducible evidence showing that *Abood's* approach is workable incapacitate the force of *stare decisis* to constrain the boundaries of the *Janus* Court's adjudication and render respondents' defense of *Abood's* reasoning unconvincing. Although *Janus* may not have answered all of the questions raised by the respondent union or the principal dissent, observers should note that the Supreme Court said in *Adkins v. Children's Hospital*,[468] a case decided almost one hundred years ago: "[a] wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other."[469]

The *Adkins* Court's deduction advances two propositions. First, it underscores the reasoning of the *Janus* majority regarding the necessity of overruling *Abood's* forty-one-year-old conviction depriving public-sector workers of their First Amendment freedoms. As a result, *Janus* shrinks but does not necessarily terminate *Abood's* influence on future adjudication. Second, given liberalism's ongoing descent into postmodernism and the state's correlative pursuit of more power tending toward authoritarianism, observers ought to note that *Janus* could, sometime in the future, be reversed, suggesting that First Amendment freedoms, viewed in the proper context, are hanging by a thread.[470] This possibility will be more fully fleshed-out in the second installment of this article. Against this backdrop, of course, the Supreme Court's decision making in *Carter v. Carter Coal*[471] and *A. L. A. Schechter Poultry Corporation v. United States*[472] could potentially provide a firmer legal basis for its *Janus* opinion. Despite liberalism's advance under the cover supplied by an all-encompassing ideology—an advance proceeding in derogation of genuine liberty—this article concludes that the Court's *Janus* decision is more than defensible, and *Abood* cannot stand as an

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[468] 261 U.S. 525 (1923).
[469] *Id*. at 561.
[470] *See infra* Part V. D.
[471] Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the conferral of power to the majority to regulate the affairs of an unwilling minority was questionable).
[472] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (finding that the government had impermissibly delegated what was essentially legislative power to private organizations).

obstacle to ending the practice of forcing nonmembers to subsidize and associate with repugnant speech. The next subsection considers whether agency-fee regimes, as an essential component of compulsory unionism, can be justified within liberalism's boundaries irrespective of the merits of *Janus*.

B. Can Agency Fees be Justified Irrespective of the Merits of Janus?

Professor Kohler rightly argues that labor unions have existed before their state-sanctioned advancement and, indeed, unions, like many groups preexisted the state and could continue without state sanctions.[473] Quite possibly, commentators, including Mark Janus, and nonmembers represented by labor organizations in both the Postal Service and federal sector would be inclined to concur in Kohler's view of union history. After all, Janus's litigation was grounded in opposition to state sanctioned agency fees paid to AFSCME.

On the other hand, Kohler, noting that the First Amendment intersects with agency-fee disputes, also argues that First Amendment doctrine and the thought that informs it is deficient because it "fail[s] to recognize that community forms the basis for . . . self-determination."[474] This narrative proceeds by asserting that the application of First Amendment doctrine to labor unions culminates in conditions that corrode rather than enhance labor unions as vehicles of self-rule.[475] Kohler observes that community is prior to the individual and flourishing communities are a precondition to the achievement of one's full human potential, including authentic freedom whereas "[t]he absence of community diminishes one's potential, one's humanity and one's ability to engage in self-government."[476] Although this approach shows promise, overlapping difficulties and questions impair the effectiveness of Kohler's analysis. These difficulties culminate in the deformation of community in our modern liberal state.

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[473] Kohler, *supra* note 6, at 197.
[474] *Id* at 150.
[475] *Id*.
[476] *Id*. at 152.

First, by rejecting Hobbes, Rousseau, and Locke,[477] and then by accepting Burke's opposing conception of associations,[478] Kohler hopefully grounds labor associations in individual choice (consent), and love of community, society, and humanity as a step toward the creation of a partnership between those who are living, those who are dead, and those not yet born.[479] Such a grounding, while raising questions regarding what constitutes a community, if predicated on consent and love, may be consistent with our preliberal inheritance on some level but, oddly enough, Kohler intuits that this hopeful grounding is consistent with the imposition of the Wagner Act,[480] wherein compulsory labor associations are imposed via majority rule.

Kohler's intuition is far from convincing for at least three reasons. Firstly, he fails to reconcile the notion of Burkean associations with majoritarianism. Secondly, Kohler acknowledges what is incontrovertible: that New Deal unionism (on which public unionism is based) has been constructed on state sanctions involving substantial restrictions on individual freedom[481] rather than expressions of love. This outcome, including the passage of the Wagner Act, operates consistently with Progressive ideology—the hypothesis that the placement of human life in the controlling hands of regulatory experts yields human progress—even though this move leads inexorably to catastrophe and exclusion[482] that may have adverse effects on the notion of community. Finally, and directly connected to the second point, since the rise in the size and scope of government reflects the fact that the "State has permeated civil society to such an extent that the two are mostly indistinguishable,"[483] the odds that Burkean civil associations can survive this maneuver remain low. Despite these counterclaims, Kohler embraces the Wagner Act as a potential basis for community, when it is clear this statute, like

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[477] *See id*. at 152-53 and 182-83 (citing Thomas Hobbes, John Locke, Jacques Rousseau, and James Madison).
[478] *Id*. at 185-86.
[479] *Id*. at 185 (quoting Burke's contention: "To be attached to the subdivision, to love the little platoon, we belong to in society.").
[480] *Id*. at 186.
[481] *Id*. at 188-90 (conceding the exclusivity doctrine and agency-shop or union-security arrangement can be seen to pose substantial restrictions on individual freedoms).
[482] Hutchison, *Racial Exclusion, supra* note 439, at 6.
[483] JAMES DAVISON HUNTER, TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD 154 (2010) [hereinafter JAMES DAVISON HUNTER].

other progressive legislation enacted during the New Deal, drained power and authority from mediating institutions and centralized power in the hands of the controlling state. So, if Kohler is correct in his claim that community forms the basis of self-determination and self-rule, state sanctions emanating from the Wagner Act and its progeny should correspond with the shrinkage rather than the accretion of self-governing communities. This so because state sanctions are the outgrowth of the controlling state and its expansion in the face of the nation's pursuit of ever-more autonomous liberty and its correlative ideological assumptions, which enable individualism to culminate in the habit of thinking of oneself in isolation[484] rather than in community. The presence of state sanctions embedded within liberalism's expanding footprint corresponds with the conclusion that liberalism's triumph requires authoritarianism and repression rather than flourishing communities emphasizing self-government and the pursuit of virtue.

Risking repetition, it seems clear that Kohler's analysis must also surmount difficulties and consequences arising out of liberalism's genealogy. Liberalism—conceived of as autonomous rights-bearing individuals freed up as much as possible to pursue their own preferences—is permeated by loneliness,[485] signifying that community and association have lost their luster and have been replaced by the quest for isolation. Nor is this a recent insight, as Tocqueville has shown.[486] While Martha Nussbaum argues we should engage in the often lonely cosmopolitan enterprise of becoming citizens of the world,[487] abstracted from place and particular communities,[488] the process of devaluing community and its organic customs presents hurdles for attempts to re-unify society thus fragmented, because liberalism is an attempt to create societies

[484] Kohler, *supra* note 6, at 201-02 (quoting Alexis de Tocqueville).
[485] Christine Emba, *Liberalism is loneliness*, THE WASH. POST (April 6, 2018), https://www.washingtonpost.com/opinions/liberalism-is-loneliness/2018/04/06/02a01aec-39ce-11e8-8fd2-49fe3c675a89_story.html?utm_term=.99af76930c1e (reviewing Why Liberalism Failed (2018)).
[486] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 508 (J.P. Mayer ed., George Lawrence trans., 1969) (suggesting that the advance of liberal "democracy make[s] men forget their ancestors [and] clouds their view of their descendants" while isolating them from their contemporaries).
[487] Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY 4, 15 (Joshua Cohen ed., 2002).
[488] *Id*.

and people without memory or history.[489] Put differently, if the community is the aboriginal fact from beginning to end of society richly coupled with interdependence and suffused with a unifying ideal, then liberalism's resultant isolation contributes to the collapse of mediating institutions, thus signifying that the memorial conscience of individuals no longer serves as a repository of authoritative or persuasive moral understandings applicable to the larger society.[490]

This is so because even the barest forensic examination of modern liberalism freed from the constraints tied to antiquarian norms notes that this ideology has turned sources of authority upside down by locating authority in human agency and conscience rather than in some enduring ideal.[491] Issuing forth from this progression, liberalism is a form of cosmopolitanism promoting a "rich menu of ways of life" that encourages diversity in society advanced by diverse ideas, people, and identities stripped bare of unifying values.[492] Propelled by dual and often dueling forces—capitalist commodification and social scientific critique ("Big Business" and "Big Lobbyist" on one hand and Progressivism ("Big Government") and its complementary emphasis on rich suite of controls on the other)—liberalism demands the suspension of all previously-ascendant normative ordering principles as a prelude to the creation of highly-contingent value and meaning by autonomous human subjects.[493] Locating meaning and authority within human agency and conscience sets the stage for falling prey to two seductive temptations: (a) a reductionist conception of life condensable to the satisfaction of wants or preferences that leaves claims of justice in the dark[494] and (b) a form of "individuated individualism" best described as a retreat into the private sphere

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[489] John Shelton, *Stanley Hauerwas: Modern American Puddleglum*, MERE ORTHODOXY 2 (May 3, 2018), https://mereothodoxy.com/stanley–hauerwas/ (quoting DISPATCHES FROM THE FRONT, 228 n.9).
[490] OLIVER O'DONOVAN, THE DESIRE OF THE NATIONS: REDISCOVERING THE ROOTS OF POLITICAL THEOLOGY 80 (2003).
[491] SIEDENTOP, *supra* note 45, at 359.
[492] LARRY ALEXANDER, IS THERE A RIGHT TO FREEDOM OF EXPRESSION? 169 (2005).
[493] CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT xvii (rev. ed 2006).
[494] *See* MACINTYRE, *supra* note 125, at 240 (showing that any move toward a shared understanding of justice, surfaces only within the framework of a tradition and community whose primary bond is a shared understanding of the good for man and for community, wherein individuals identify their primary interest with reference to those goods).

at the expense of a civic spirit that includes political participation.[495] This vitiates the possibility of finding responsible citizens, making it unlikely that responsive representatives can be found outside the perimeters of our own imagination, despite Siedentop's winsome observation following St. Augustine that the invention of the individual person is not simply an exercise leading to isolation but rather a recognition of human frailty and dependence in the context of others.[496] This progression leads to an imperative (1) implying that individuals no longer respond to commands outside of their autonomous selves, nor should they and (2) confirming no unifying principle exists on which to reconnect and reunify individuals into coherent groups that form an enduring association.

Furthermore, on my reading of Kohler, he fails to offer a comprehensive vision of authentic freedom and thereby exposes the notion of freedom to the risk of sliding into unreality, a risk the Supreme Court has already embraced. Often, freedom assumes that the political agent/citizen—the subject of property rights, contracts, and in short, freedom—is rendered unreal, an embodied abstraction.[497] The Supreme Court's most comprehensive definition of the liberty of political agents issued forth from *Planned Parenthood v Casey*.[498] There the Court sought to define the reality that lies at the foundation of modern liberalism, which can be summarized as the delineation of the scope of one's power to choose as one wishes, unobstructed by the power of the will of others.[499] On my reading of Schindler's account of Locke, Lockean liberty implies a complete disassociation from both reality and community,[500] pretending to grant man the gargantuan power to determine the meaning of the universe.[501] This form of freedom signifies that to be free only means to have a purely subjective feeling of liberty

[495] SIEDENTOP, *supra* note 45, at 363.
[496] *Id*. at 105-07.
[497] SCHINDLER, *supra* note 74, at 184.
[498] *Id*. at 185 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1993)).
[499] SCHINDLER, *supra* note 74, at 185-86.
[500] *Id*. at 186-87.
[501] *Id*. at 186.

and having a limited reality outside of that feeling, which produces negative consequences for the notion of community.[502]

Moreover, Kohler's analysis fails to confront the observation that modern liberals have made progress toward the realization of a therapeutic culture and the creation of a "psychological man," indifferent to the ancient question of legitimate authority, so long as the powers that be preserve social order and manage an economy of abundance[503] thus mirroring the Supreme Court's prior resolution of agency fee disputes, wherein membership has generally been stripped down to its economic core, culminating in a focus on chargeable and nonchargeable union expenditures.[504] Capitulation to the demands of a therapeutic culture (defined as the pursuit of a form of life that is distinct from a more robust conception of community), leads to an emphasis on a conception of self-fulfillment that erodes the civic, and the individual thus fashioned, is consumed with the notion that she only identifies with associations that are formed on a voluntary basis and which foster self-advancement narrowly conceived, wherein people of similar interest or situation cluster.[505] Beyond this domain are associations formed within the province of strategic relations, in which instrumental considerations reign supreme.[506] But once the group loses its capability to foster self-fulfillment in some expressive sense or loses its instrumental (pecuniary) value, it crumbles.[507] Taken together, this analysis—some of which finds common cause with Kohler[508]—poses a threat to classical conceptions of community.

Additionally, Kohler traverses ground which has been recently and comprehensively plowed by Professor Siedentop. Siedentop, as part of his examination

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[502] *Id*. at 187.
[503] PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD 20 (40th Anniversary ed. 2006).
[504] *See*, *e.g.*, Williams & Halcoussis, *supra* note 18, at 215-216 ("[U]nions must segregate costs associated with employment representations from funds used for other union activities including political advocacy and must notify nonmembers of the ability to 'opt out' of union membership.").
[505] *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY, 508 (1989) [hereinafter TAYLOR, SOURCES OF SELF].
[506] *Id*.
[507] *Id*.
[508] Kohler, *supra* note 6, 184-86.

of the origins of Western Liberalism, offers a luminous exposition of the world preceding the onset of liberalism, a world very remote from our own, reflecting antiquated norms and customs manifesting exclusively the claims of the family, its memories, rituals, and roles rather than claims of individual conscience that motivated Mr. Janus.[509] On Siedentop's account, family and the family's gods preceded both the invention of the individual and the possibility that individuals could indeed associate with one another. It was only since the 16th century, with the advent of the nation-state, that people in the West came to understand society as an association of individuals.[510] Thence only through democracy, capitalism, and globalization did it become "easier to project an individualized model of society—one that privileges individual preferences and rational choice—onto the whole world."[511] On Siedentop's account of history and the ancient world dominated by paterfamilias, there was neither space for associations of individuals nor individual conscience, choice and preferences or individual rights,[512] which came to characterize modern liberalism's challenge to family and family gods. While it is doubtful that society should re-impose the tyranny of family gods, Professor Kohler's attempt to reimagine labor unions as self-governing institutions without the putatively corrosive effects of First Amendment doctrine must deal with the fact that the prevailing boundaries of liberalism threaten human association and may combine to support disaffiliation as the null hypothesis and thus hamper his objectives.

Despite Professor Kohler's worries about the necessity of setting the proper conditions for reflection and choice, he grounds the notion of defensible associations of workers on some form of individual choice as a predicate to self-government leading to authentic liberty.[513] Yet, if one assumes that individual choice operates as a component of authentic, as opposed to tyrannical, self-rule, he fails to explain why state sanctions—agency fees—are necessary or how self-government is achievable through its opposite:

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[509] SIEDENTOP, *supra* note 45, at 7.
[510] *Id*.
[511] *Id*.
[512] *Id*. at 33.
[513] Kohler, *supra* note 6, at 211.

compulsion. In reality, of course, the leading opponent of self-government and the possibility of forging an enduring community in our current age is modern liberalism, which contributes to isolation and vulnerability. Modern liberalism then responds to the state of affairs it has produced by extending governmental power (state and federal statutes as well as bureaucratic fiat).

Furthermore, Kohler's analysis must now deal with the fact that a new and destructive form of tribalism has taken root—as race has split America's poor and class has split America's white majority—particularly as wealth and elite opinion have become "extraordinarily concentrated in the hands of a relatively small number of people."[514] This move corresponds with the fact that wealthy Americans, most of whom live on the West or East Coast,[515] increasingly "gravitate to gated enclaves in and around select cities," while most of the rest of us live in regions populated by the "Exercrables" and the "Unfit," as "growing numbers of Christians compare our times to that of the late Roman Empire," ravaged by the ruffians.[516] Meanwhile, in contrast with the ruffians who overthrew Rome, our new barbarians, surfacing from the darkness of modern liberalism, feature designer suits, smartphones, and widely-followed social media footprints[517] while widely contesting the validity of any normative ordering principle other than liberal ideology and all of its embedded substantive meaning. The potency of this claim is sharpened by noting that "barbarism is not a primitive form of life . . . but [rather] a pathological development of civilization"[518] that arguably implicates both the left and the right with their devotion to abstract rights, majoritarian governance, and perpetual growth.[519] As the "social fabric" of the nation dissolves and division along various fault lines increases, "deep disagreement[s] persist over America's role in the

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[514] *See, e.g.*, Amy Chua, *The Destructive Dynamics of Political Tribalism*, THE NEW YORK TIMES, (February 20, 2018), https://www.nytimes.com/2018/02/20/opinion/destructive–political–tribalism.html (explaining the tension between democracy and capitalism as the main factor causing political and ethnic divisions in America).
[515] *Id*.
[516] DENEEN, *supra* note 30, at 2.
[517] Rod DREHER, THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION 15 (2017).
[518] JOHN GRAY, THE SILENCE OF ANIMALS: ON PROGRESS AND OTHER MODERN MYTHS 9-10 (2013).
[519] Daniel McCarthy, *What Would Burke Do? Rediscovering "high church" conservatism,* THE AMERICAN CONSERVATIVE (May 4, 2009), https://www.theamericanconservative.com/articles/what-would-burke-do/.

world."[520] At the same time, impelled by the will to power, these new aristocrats (cognitive elites), following their authoritarian forbears, urge us to abandon reason, learning, and memory[521] on one hand and pursue upward mobility on the other hand, while exercising outsized influence on the economy, public school systems, and the fate of rank and file citizens, have become firmly committed to disdain for individuals who are less well off, despite their oft repeated commitment to equality, inclusion and diversity.[522] The poor have returned the favor with interest. Fragmentation and disunity proceed apace.

Lastly, if self-determination and authentic freedom are goals that bargaining unit workers share, Kohler fails to provide persuasive reasons why such goals must surface within union associations rather than charitable, religious, or ethnic associations, or any other group tending toward self-rule ungrounded in economic advancement or purely instrumental considerations. He fails to identify *which* associations and *which* communities ought to provide us with enough self-government for purposes of attaining the goals he catalogues.

In the past, the workplace was generally seen as a place of conflict centered on the struggle between management and workers, a struggle in which it was assumed that workers were bound together by their common interest.[523] Today, the focal point of conflict is no longer confined to disputes between management and employees but among the diverse interests of workers.[524] Against this backdrop, liberalism leads inexorably to a demand to disaffiliate from both voluntary and involuntary associations as fragmentation has become part of the air we breathe. Although no sane person should fully embrace such developments, it is doubtful that the demand by Mark Janus and others to pursue disassociation should surprise anyone. After all, Mark Janus's litigation, at least in part, is a natural outcome of an ideology grounded in individual

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[520] DENEEN, *supra* note 30, at 2.
[521] DREHER, *supra* note 517, at 93(quoting Václav Benda's description of how authoritarians maintain their grip on power by isolating people from their natural bonds).
[522] DENEEN, *supra* note 30, at 132.
[523] McUsic & Selmi, *supra* note 92, at 1339.
[524] *Id*.

consent, choice, preference, and taste. Within liberalism's framework, which celebrates authenticity, diversity, and devours spontaneously-created self-governing moral communities, it would be profoundly-puzzling for nonmembers of a labor organization to celebrate an involuntary association with an organization that defies individual authenticity and favors collective solidarity. This observation is remarkably true in an age wherein many citizens have been captured by the ideal of individual authenticity made perceptible by the claim that there is a certain way of being that is my way, since to do otherwise means that individuals will "miss the point of [their] li[ves]."[525] If Charles Taylor's prescient understanding of our current age rings true, it would be overwhelmingly incoherent for nonmembers captured by liberal ideology to embrace the opportunity to engage in a nonconsensual affiliation with a labor union in order to establish some form of community. Instead, agency-fee objectors, even if they have not embraced the sort of self-creating authenticity and autonomy which Nietzsche, Derrida or Foucault sought,[526] nonetheless demand the opportunity to join a voluntary rather than a state-sanctioned compulsory association based on their own individual choice, an outcome which complements rather than contradicts modern liberalism. In Lockean terms, nonmembers, as individuals arguably existing prior to the state, want little more than the right to decline to join a union.

Partially consistent with the demand to disaffiliate, the Supreme Court has treated union associations as threats to individual sovereignty.[527] Nonmembers have followed suit, declining to recognize the authority or the legitimacy of associations formed by their fellows.[528] At the end of the day, litigation has forced the Supreme Court to resolve conflicts that are internal to labor unions and reflect an absence of unanimity within the bargaining unit. This adjudicative pattern corresponds with the outworking of Kohler's observation that the Supreme Court has responded to the demand to disaffiliate by

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[525] Charles Taylor, *The Politics of Recognition, in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 30 (Amy Gutmann ed., 1994).
[526] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 65 (993)
[527] Kohler, *supra* note 6, at 193.
[528] *Id*.

severing union representation into two basic components: its economic component (i.e. wages, working conditions and benefits) and its noneconomic component,[529] perhaps grounded in the view that economic advancement and economic efficiency constitute unifying goals. Before *Janus*, the Supreme Court's perspective situated labor unions in the notion of economic self-interest, which presumptively bounds the purpose of the union as an institution wherein unrelated individuals associate for one limited purpose: more pecuniary benefits.[530] *Janus* may represent the full outworking of the rejection of this dichotomous view, a conclusion that implicates Dennis Mueller's claim that economic man can no longer be separated from political man and culminates in the intuition that agency fees can no longer be separated, like unrelated and unaligned molecules in the universe, into their economic as opposed to noneconomic elements. After the Court's decision in *Janus*, it may no longer make sense to separate out the economic component of agency-fees from non-economic ones, because *all* fees may be stubbornly ideological and politically repugnant to nonmembers.

After *Janus*, it makes sense to analyze the constitutionality of agency fees/union dues as a whole, indivisible cloth rather than refracting this issue through a lens that divides agency fees into its various nonchargeable, chargeable, noneconomic, and economic subcomponents. Even though the analysis in this subsection remains tentative if not speculative, if I am right, the legitimacy of agency fees and the demand for state-sanctioned community rising from the ashes[531] of *Abood* makes little sense irrespective of the merits or demerits of *Janus*. Hence, the emergence of Mark Janus or some other litigant challenging the status quo ante should have been perceived as a predictable event, one that may have implications for the viability of agency fees in the private-sector. The next subsection considers this issue.

C. Janus's Implications for the Private-Sector Agency-fee Debate

[529] *Id*. at 190-94.
[530] *Id*. at 194.
[531] *See*, *e.g.*, Sachs, *supra* note 27, at 1077-78 (offering a defense of agency fees).

Charles Baird argues that private-sector unions are private organizations that have received an unconstitutional grant of power in the form of exclusive representation of workers through majority-rule democracy.[532] Nevertheless, it goes without saying that up to now, the Court has rebutted all invitations to find private-sector agency-shop provisions unconstitutional,[533] even though the Court's repeated efforts to resolve the tension between the First Amendment and the NLRA have trailed off into intelligibility.[534] But that may not be the end of the story.

After all, why should agency fees in the private-sector be treated differently than such fees in the public-sector, particularly since the *Abood* Court declined to distinguish between the public- and the private-sector for purposes of determining First Amendment rights of employees,[535] concluding "that *Hanson* and *Street* were controlling insofar as the agency fees were applied toward costs associated with the union's bargaining and contract administration activities"?[536] This determination was consistent with the Court's elevation of majoritarian exclusivity paired with the contention that the governmental interests in labor peace and the stability of bargaining in *both* sectors were equal.[537] Equality, of course, is a two-edged sword. *Abood* applied private-sector adjudication and experience to further governmental goals in the public-sector thus raising the question whether the Court, on the basis of equality, or on Justice Kagan's claim of symmetry between the two sectors,[538] or some other basis, ought to look to *Janus* and apply public-sector analysis, adjudication, and experience, to disable the government's power in the private-sector to compel the payment of fees to a private party (union) that pursues goals that are orthogonal to the interests of nonmembers. To be sure, such claims assume two things. First, that *Abood,* despite its errors, retains some persuasive power. Second, that a pathway can be discovered to overcome the

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[532] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1376 (quoting Charles W. Baird).
[533] *See*, *e.g.*, Kohler, *supra* note 6, at 193 (discussing leading private-sector cases).
[534] *Id*. at 149.
[535] *Id*. at 192.
[536] *Id*.
[537] *Id*.
[538] *See*, *e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2488 (2018) (Kagan, J., dissenting).

Janus Court's observation that one of *Abood's* errors was its failure to account sufficiently for the difference between the effects of agency fees in public- and private-sector collective bargaining arenas.[539] This claim relies heavily on the contention that public employer decision-making is "'above all a political process' driven more by policy concerns than economic ones."[540]

The implications of the above-referenced questions and analysis should be seen as an opening salvo in a lengthy and difficult campaign to convert such analysis into a comprehensive argument that commands support from a majority of the Supreme Court. This campaign faces numerous hurdles. Initially, proponents of applying *Janus's* reasoning to private-sector unions must deal with the question of whether sufficient state action exists to trigger constitutional scrutiny,[541] even though *Hanson* agreed private rights were being invaded by state action in the form of federal law.[542] *Abood* agreed with this assessment,[543] and the *Harris* and the *Janus* Court simply assumed this possibility for sake of argument.[544] Lower courts have refused to explicitly tie judicial decision-making to the First Amendment in private-sector cases[545] or provide a clear

[539] *Id.* at 2480 (majority opinion).
[540] *Id.* (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228 (1977)).
[541] *See, e.g.*, David H. Topol, Note, *Union Shops, State Action and the National Labor Relations Act*, 101 YALE L. J. 1135, 1135 (1992); Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 740-42 (1988) (noting that the lower courts diverged on their application of what state action triggered constitutional scrutiny).
[542] *See* R. Emps' Dep't. v. Hanson, 351 U.S. 225, 233–35 (finding that, although private rights were being infringed upon by state action, Congress has the ability to allow, or prohibit, unions or closed shops); but see Price v. Auto Workers of Am., 927 F.2d 88, 91 (2d Cir. 1991), cert. denied, 502 U.S. 905 (1991) (finding that the challenged union–shop clause was a product of private negotiations and not attributable to government).
[543] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226 (1977).
[544] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2480 (citing *Harris* with approval and observing that even assuming, for the sake of argument, that the First Amendment applies at all to private-sector agency shop arrangements, the individual interests at stake still differ because in the public-sector, *core* issues such as wages, pensions, and benefits are important political issues but that is generally not so in the private-sector).
[545] *See, e.g.*, Beck v. Commc'ns Workers of Am., 776 F.2d 1187, 1205–09 (4th Cir.1985) (finding sufficient governmental action to sustain jurisdiction of the plaintiff's First Amendment claim, but essentially deciding the case on grounds of the union's duty of fair representation, even though the labor union's use of agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration was unconstitutional). *See also Price*, 927 F.2d at 91, cert. denied, 502 U.S. 905 (1991) (finding that the challenged union–shop clause was a product of private negotiations and not attributable to government).

standard in such cases to determine whether sufficient state action exists to trigger constitutional scrutiny.[546] This issue will not be settled here.

Second, the *Janus* Court's contention that the putative distinction between the pursuit of core issues in the public- as opposed to the private-sector provides a basis to differentiate what is at stake in private-sector agency-fee disputes as opposed to public-sector ones, should be skeptically considered if not disputed. More likely than not, the Court's determination should be found unpersuasive for several reasons. Consider first the Court's decision in *Communications Workers v. Beck*, implying that almost 80 percent of union dues were nonchargeable and therefore likely political.[547] Next, consider evidence indicating that private-sector unions can be "understood as a 'robust engine of collective insurgency against globalization, hierarchy, unwarranted management power, class-based injustice, and [putative] disparities in income.'[This signifies that] . . . labor organizations can be seen as part of the philosophic vanguard of an inevitable, historically driven movement catalyzed by hierarchs that produces human progress in the form of egalitarianism and solidarity."[548] This indication reinforces the conclusion that core issues concerning private-sector unions just like those that consume public-sector unions, are inherently political.[549] This evidence should concern all public-spirited nonmembers of private-sector unions. To the extent that dues are extracted for political and ideological purposes, through a state-sanctioned process, a case can be fashioned which implicates First Amendment freedoms. The force of this observation is advanced because public-sector and private-sector bargaining units are indissolubly linked since roughly one-half of a typical union's financial activity tends to occur at the national level representing a combination of public- and private-sector units at the regional and industrial levels.[550] Taken together, this analysis indicates that the

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[546] *See, e.g.,* Topol, *supra* note 541, at 1135("The Supreme Court has yet to articulate a clear standard for determining whether state action exists in union shop provisions and, therefore, whether a constitutional challenge can be brought against such provisions.").
[547] *See, e.g.,* Hunter et al., *supra* note 247, at 4-5 (explaining that unions in Michigan can create political power through campaign finance laws).
[548] Hutchison, *What Workers Want*, *supra* note 59, at 801.
[549] *Id*.
[550] *See* Masters & Atkin, *supra* note 60, at 186.

acclaimed dissimilarity between the public- and private-sector may be a distinction without a difference.

The third question becomes: what level of adjudicative scrutiny ought to apply to private-sector agency-fee agreements within the meaning of the Constitution: rational basis, exacting scrutiny, or strict scrutiny? Since evidence can be amassed indicating that private- and public-sector unions mirror one another and may be indistinguishable from one another, the Court should deploy the same level of scrutiny irrespective of whether First Amendment objections issue forth from either sector, but certainly more than rational-basis review. This signifies that agency-fees in the private-sector, like those in the public-, should be subject to exacting scrutiny within the meaning of the First Amendment.

Fourth, since private-sector labor agreements have enjoyed federal sanctions for substantially longer than public-sector agreements, the Supreme Court must answer the question whether such agreements are safeguarded by *stare decisis* and deal with possibly decisive arguments tied to the reliance interests of employers and unions. Given such questions, I can only offer a tentative conclusion regarding the fate of agency fees in the private-sector going forward: corresponding with (1) the individualistic discourse embedded in the First Amendment and (2) the fiery pursuit of ontological individualism by more and more workers, the *Janus* case, more likely than not, should trigger increasing amounts of litigation that are calculated to undermine private-sector agency-fee arrangements, even if the Supreme Court has failed to commit itself to an explication of infrangible interpretive principles with regard to the First Amendment in the private-sector. Any effort to extend *Janus* to the private-sector will face strong political headwinds because it appears that labor unions are strongly embedded in at least one political party. Nonetheless, the analysis supplied in this subsection indicates that a case can be made to extend the logic of *Janus* to the private-sector.

D. Can the Janus Decision Withstand the State's Thirst for Control?

To state the obvious, *Janus* did not take place in a vacuum. On the contrary, it took place against a backdrop corresponding with several troubling developments

implicating the origins and consequences of liberalism itself. These developments create a challenging environment for First Amendment freedoms, which make it difficult to enshrine Mark Janus's victory with permanence. Vexed questions regarding *Janus's* sustainability arise because public-sector unionism issues forth from a politics and a political philosophy that conceived a society premised on a footing quite different than what preceded it.[551] Rather than bearing witness to tablets of stone or bronze handed down from prior generations, and irrespective of whether its ideals could be actualized in the world outside our heads, this idea envisioned humans as "rights-bearing [abstractions] who could fashion and pursue for themselves their own version of the good life."[552] To guarantee the liberty thought necessary to insure this outcome, a "limited government devoted to 'securing rights'" coupled with free-market economics emerged to give space for "individual initiative and ambition."[553] Within the boundaries of this idealized new republic, political legitimacy was underwritten by the putatively "shared belief in an originating 'social contract' to which . . . newcomers could subscribe," a move that was ratified by "free and fair elections of responsive representatives."[554] And yet, despite evidence that this idealized order has been wildly successful, "[e]very institution of government shows declining levels of public trust by the citizenry," as "deep cynicism toward politics [propels] an uprising on all sides of the political spectrum," while elections, once regarded as legitimate, "are increasingly regarded as evidence of an impregnably rigged . . . corrupt system."[555]

Concurrently, modern liberalism, "[i]n contrast to its crueler competitor ideologies, . . . is more insidious: as an ideology, it pretends . . . neutrality, claiming no preference and denying any intention of shaping the souls under its rule."[556] "At its inception, liberalism promised to displace an old aristocracy in the name of liberty; yet as it eliminates every vestige of an old order, the heirs of their hopeful antiaristocratic

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[551] DENEEN, *supra* note 30, at 1.
[552] *Id*.
[553] *Id*. To be sure, other aspects of this ideal surfaced including an independent judiciary. *See id.*
[554] *Id*.
[555] *Id*. at 2.
[556] *Id*. at 5.

forebears regard its replacement as a new, perhaps even more pernicious, kind of aristocracy."[557] "The liberties that liberalism was brought into being to protect—individual rights of conscience, religion, association, speech, and self-governance—are extensively compromised by the expansion of government activity into every area of life."[558] Despite threatening fundamental liberties, the force of this abstract ideology continues to march forward, "largely as a response to people's felt loss of power over the trajectory of their lives in so many distinct spheres—economic and otherwise—leading to demands for further intervention by the one entity even nominally under their control."[559] Hence, as government enlarges its reach in "response to . . . grievances, [this leads] to citizens' further experience of distance and powerlessness."[560] The ongoing rise in labor union political activism (the pursuit of government power) despite the decline in private unionism coupled with the rise in public-sector union penetration may be congruent with this pattern. Compulsory unionism's status in contemporary America arguably reflects deep distrust by workers and rising labor union influence, sustained by collusive political arrangements with public employers sheltered by claims that collective bargaining "neutrally" (1) gives voice to workers grievances, (2) represents the pursuit of economic advancement for workers and society, and (3) advances management efficiency for public employers by creating happier, more satisfied workers. As we have seen, courts and some Justices have found such claims appealing, regardless of whether workers' desire what unions and public employers claim to offer.

If true, despite the fact that the *Janus* decision applies to millions of employees, and despite the fact that unions have suffered the loss of agency-fee payers, as nonmembers have begun to disaffiliate in response to the new freedom they have been granted,[561] Mark Janus's victory may be short-lived. Evidence surfaces showing that new state laws, new executive orders, new court decisions, and new union policies have made

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[557] *Id*. at 7.
[558] *Id*.
[559] *Id*. at 7-8.
[560] *Id*. at 8.
[561] Daniel DiSalvo, *Issue Brief: Public–Sector Unions After Janus: An Update,* MANHATTAN INSTITUTE 1 (February 14, 2019), https://www.manhattan–institute.org/public–sector–unions–after–janus.

it difficult for "outside groups to communicate with public employees about their newfound legal rights."[562] Some "[n]ew state laws allow unions to withhold employment benefits—such as life insurance or legal representation in grievance proceedings from nonunion members, thereby making union membership more attractive" and undercutting the notion that unions are prepared to comply with their formerly sacrosanct duty of fair representation.[563] Provoked by rising activity designed to minimize the impact of *Janus*, nonunion members have filed lawsuits "in nearly all federal district courts to enable . . . members to recover agency fees collected from their paychecks before the Court's decision."[564] This activity suggests that government hierarchs in collusion with union leaders and their political allies are in fierce pursuit of actions constraining the ability of public-sector workers to permanently escape from the coerced subsidization of offensive speech.

This backdrop raises the possibility that the entire apparatus of the state, including a large fraction of the Supreme Court, is unwilling to permit the permanent liberation of workers from vassalage initiated and enforced through the inception of the long night of the watchman state.[565] Advanced by the three pillars of liberal anti-culture,[566] this possibility confronts any interpretation of *Janus* and any attempt to arbitrate the entire compulsory union dues controversy. Given liberalism's ongoing march toward state hegemony in virtually all aspects of our lives, any re-evaluation of the sustainability of *Janus* gives rise to daunting difficulties indicating that Mark Janus's victory may not be sustainable. This possibility rings true for three overlapping reasons that have already been alluded to, but which demand emphasis for present purposes.

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[562] *Id*.
[563] *Id*.
[564] *Id*. at 2.
[565] My debt to Václav Benda should be obvious. *See* VÁCLAV BENDA, THE LONG NIGHT OF THE WATCHMAN: ESSAYS BY VÁCLAV BENDA (F. Flagg Taylor, ed., 2017).
[566] *See* DENEEN, *supra* note 30, at 65-66 (suggesting liberal anti-culture rests on three pillars, including the conquest of nature, a new experience and understanding of time, and lastly, an order rendering place fungible and bereft of meaning).

Firstly, doubt afflicts Mr. Janus's victory because liberalism—to repeat—has separated us from mediating institutions, thus exposing citizens to an ever-expanding arc of vulnerability. This separation is fortified because liberal ideology advances tribalism through commerce, including the enhanced monetization of human relations and human identity, often led by Big Business and the policing of identity grounded in immutable or changeable characteristics.[567] Hence even more corrosive forms of individualism are promoted, at the expense of lived relations, as the state takes on the role of actively liberating individuals, so they see themselves as autonomous, isolated individuals. Liberated from communal and familial ties springing forth from local markets and cultures, individuals must rely on an ever-ramifying Leviathan to protect them through ever-more government intervention, signifying that the destruction of local cultures and norms achieves not liberation but powerlessness and bondage.[568] While liberalism propels the pursuit of freedom, it equally advances a statist paradigm wherein tradition and culture must be eliminated as arbitrary and unjust, thereby fostering an absence of norms conducing to anarchy but finding the ensuing anarchy unbearable, society turns to the central sovereign led by cognitive elites as its sole protector.[569] Elites, whether judges, union hierarchs, or members of the academy, suitably armed by an existing labor law edifice of "stunning complexity"[570] and richly equipped with flexible language, seem quite prepared to interpret the text of the Constitution in increasingly fluid ways that enhance the power of favored groups against the weak.[571] Consistent with the emergence of law and compulsion as an ordering principle and the rejection of the norm-shaping power of custom, this outcome, however

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[567] Libby Emmons, *How Identity Politics Plays Right Into The Hands Of Big Business,* THE FEDERALIST (April 16, 2019), https://thefederalist.com/2019/04/16/identity–politics–plays–right–hands–big–business/?utm_source=The+Federalist+List&utm_campaign=f51252596a–RSS_The_Federalist_Daily_Updates_w_Transom&utm_medium=email&utm_term=0_cfcb868ceb–f51252596a–83911141.
[568] DENEEN, *supra* note 30, at 87-88.
[569] *Id*.
[570] Hutchison, *What Workers Want*, *supra* note 59, at 800.
[571] Hutchison, *Unsustainable Liberalism*, *supra* note 434, at 725-733 (showing how paternalistic labor policies propelled by racism and sexism harmed the "weak" (African Americans and other disfavored groups) and how Obamacare enriched "Big Pharma" at the expense of small firms).

dystopian, has become ever-more possible, thus providing a facially legitimate ground for government encroachments on individual rights.

Secondly, reconsider Leo Troy's analysis exposing the political nature of the New Unionism. He shows (a) the character of organized labor has changed over time with the onset of public-sector unionism which began in the 1960s and marks "a fundamental shift in what unions do" and (b) this move represents a change in "origins, character, goals and future prospects," that produces a more far-reaching, substantial impact on the economy and society than the Old unionism characterized by blue collar workers in the manufacturing sector, as public-sector unionists in collaboration with other social and political forces attempt to transform the nation and prepare the way toward the achievement of the New Socialism.[572] If Troy is correct, labor unions are political thus reifying John Gray's analysis implying that labor unions have either captured or become captives of government even though transformation remains highly contingent.

Thirdly, the yen for societal transformation is furthered by liberalocracy's ascendance during the 20th and 21st centuries. Liberalocracy manifest itself in a new ruling class of wholly self-made individuals who have been freed from accident and circumstances to live experimental lives accompanied by the belief that ordinary people must be controlled by experts and expert opinion because such people lack the expertise necessary to control and direct their own lives.[573] Liberalism is arguably the first regime to put into effect a version of the 'Noble Lie' proposed by Plato in the REPUBLIC, which claimed not only that the ruled would be told a tale about the nature of the regime but more important the ruling class would believe it as well."[574] Consistent with such deep self-deception, liberalocrats have been taught that they were not a new aristocracy but the very opposite, through education premised on the supple veneer and language of social justice keenly offered at the very educational institutions most responsible for

[572] TROY, THE NEW UNIONISM, *supra* note 49, at 1-7.
[573] DENEEN, *supra* note 30, at 131-153.
[574] *Id*. at 152.

their elevation into the elite.[575] Liberalocracy's ascent corresponds with a "revolt of the elite" as part of the secession of the successful from flyover country.[576] Secession is purchased by elite education, as "[e]lite universities engage in the educational equivalent of strip mining: identifying economically viable raw material in every city, town and hamlet, they strip off that valuable commodity, process it in a distant location and render the products economically useful for productivity [and control] elsewhere."[577]

Secession, as an indispensable step toward societal transformation and control, thus creates a renewable resource: a new cadre of cognitive elites that includes academics, union hierarchs, members of the expert class of consultants and bureaucrats, and judges, including all the Justices of the Supreme Court. The completion of this architecture creates globalized elites who readily identify with and welcome other members who are galvanized to live an autonomous life committed to an abstraction assuaged by calls for "social justice," while populating wealthy and highly-exclusionary zip codes common to our new aristocrats.[578] Reinforcing the potency of Deneen's analysis, Ahmari contends liberalism is grounded in a focus on liberal norms and procedures and an absence of "a substantive vision of the common good" other than ratification, as a paramount value, of individual autonomy, which is, nonneutrally, treated as an end in itself as part of "a secular-liberal-technocratic consensus that has come to dominate the West including the United States."[579] Hence, a quasi-substantive vision of the good surfaces, despite liberalism's denial that it has such an objective: the maximization of freedom coupled with the surfacing of a global culture in which individuals are atomized to reject tradition, culture, and previously-agreed upon notions of community, as well as an increased cognition of human vulnerability that conduces

[575] *Id*. at 152-153.
[576] *Id*. at 131-134.
[577] *Id*. at 132.
[578] *Id*. at 134-135.
[579] Ahmari, *supra* note 30, at 48-49.

toward a rise in the size and scope of government led by a cavalcade of experts. These moves do not necessarily favor agency-fee objectors.

Consistent with the core of this thesis, labor unions, whether public or private, are pursuing transformation even if the scope of this move is obscured and the effect of this pursuit remains toxic.[580] Unsurprisingly, as ever-more union leaders and labor advocates pursue goals mandating that unions should operate as vehicles of transformative liberation,[581] this quest is merged with the secession of the elites from the rest of us. These maneuvers promise more freedom as elites masterfully polish the quest for societal transformation with a patina of benevolence, but the promise of freedom and the mission to makeover society actually fails to translate into the freedom that Mark Janus and other nonmembers prefer. Instead, such moves produce a paradox. The ongoing pursuit of transformation in four arenas—politics and government, economics, education, and science and technology[582] —propelled by a triumvirate of Big Business, Big Labor, and Big Lobbyist, who take advantage of times of crises in order to redistribute power and wealth to themselves[583]—has distorted human institutions, including government, in the name of expanding liberty and increasing individual mastery and control of our lonely fates.[584] In each case, however, widespread anger and discontent have arisen with the realization that the vehicles of our liberation[585]—despite being safeguarded by the facade of social justice and highly-convenient intimations of shared meaning by leading avatars of the "people"[586]—have become the iron cages of our

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[580] SCHINDLER, *supra* note 74, at 148 (suggesting that the pursuit of transformation, rather than necessarily acting as a universal acid that dissolves, destroys the valuable essence of things or words and transmutes them into some version of gold enriched by toxicity).
[581] Hutchison, *A Clearing in the Forest*, *supra* note 3, at 1375.
[582] DENEEN, *supra* note 30, at 6.
[583] Harry G. Hutchison, *Achieving Our Future in the Age of Obama?: Lochner, Progressive Constitutionalism, and African American Progress*, 16 J. Gender, Race & Just. 483, 491–92 (2013) (quoting Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 Wm & Mary L. Rev. 595, 599 (2003) (footnotes omitted)).
[584] DENEEN, *supra* note 30, at 6.
[585] *Id*.
[586] Bernard Yack, *Liberalism without Illusions: An Introduction to Judith Shklar's Political Thought* in LIBERALISM WITHOUT ILLUSIONS 1, 8 (Bernard Yack, ed., 1996).

captivity.[587] While the pursuit of liberty has proven to be mythical, it has been sturdily defended, thus corroborating Goerges Sorel's century's old observation that the advantage of a political/ideological myth is it "cannot be refuted since it is, at bottom, identical with the conviction of a group [the cognitive elites], being the expression of these convictions in the language of movement."[588]

Given its current trajectory, the liberal state managed and controlled by elites remains a clear and present danger to authentic liberty. Whether this danger takes the form of new state laws, new collective bargaining agreements, new judges at the state and federal level, or new Justices confirmed to sit on the U.S. Supreme Court, it appears that all of these moves are designed to converge in a transformative impulse that has become a dominant component of the air properly educated, cognitive elites breathe. This move ignores Richard Rorty's warning that when the thirst for social transformation advances the demand that our autonomy proceed beyond simply the individual and become embodied in our institutions, this maneuver risks slipping into a disturbing political attitude.[589] Still, union hierarchs are prepared to unify with other elites in the highly politicized pursuit of transformation. Hence, even though it is difficult to make predictions, especially about the future, an answer to this subsection's central question surfaces: it is unlikely that Mr. Janus's victory can be plausibly seen as an enduring one. Given liberalism's plausibility structures regulated and controlled by liberalocrats thoroughly marinated in politically correct language, it is likely that *Abood* will be reinstated at some point in time. The following allegory, largely focused on Supreme Court jurisprudence, explains why this possibility remains vibrant.

From an adjudicative perspective—one that may follow newly justified legislative efforts issuing forth from the States and embodying the necessity of advancing and funding the political goals of public-sector unionism—the likely re-instantiation of *Abood* will be grounded in doctrine that reifies balancing, efficiency, and collaborative

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[587] DENEEN, *supra* note 30, at 6.
[588] JAMES DAVISON HUNTER, *supra* note 483, at 134.
[589] RORTY, *supra* note 526, at 65.

arrangements between public-sector employers and unions. It is possible that some future Supreme Court could be found that is prepared to prowl the perimeters of evolving constitutionalism, in order to maintain that "a broad definition of unions' societal function . . . require[s] limiting individual rights [and choices]."[590] While proof of cause and effect remain difficult, it is probable that this Court could be persuaded to deny the commonplace assertion that "[f]ree speech, serves many ends . . . [including our] search for truth."[591] Denial would be eased by Justices—exclusively selected from the cognitive elite—who would couch their decision in language, which recognizes the diminishing importance of First Amendment values and the rising need for state control of its workforce. To be sure, this Court would abstain from articulating any pre-commitment to any all-encompassing metanarrative. As a central player in the controlling state, this Court would presumably obfuscate the actual bases of its decision rather than acknowledge the inexpungible truth of its surrender to a particular metanarrative: the end-state of liberalism and the end-purpose of unlimited autonomy requires subordination that diminishes both our vulnerability and liberty.

This foreseeable result would fuse individual autonomy and the unslaked thirst for transformation and politics and thus pump oxygen into the barbarism embedded in John Stuart Mill's great claim whereby compulsion is offered as a positive good that advances management efficiency and our productivity, thus ensuring the material wealth and advancement of the state as the source of our abundance.[592] Equally likely, this result would advance Kant's proposition "that a proper political order ought not to depend on the virtue of its citizens but should be able to keep peace in the case of a 'society of devils.'"[593] These maneuvers would represent the revivification of Václav Benda's interpretation of the totalitarian phenomena rooted in the modern philosophic and scientific project that is designed to master nature and render the individual free

[590] Feldman, *supra* note 357, at 193.
[591] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463 (2018).
[592] DENEEN, *supra* note 30, at 50 (citing John Stuart Mill).
[593] SCHINDLER, *supra* note 74, at 8 (quoting Immanuel Kant).

from limits and conditions outside of his control.[594] These authoritarian moves would also verify contemporary liberalism's increasing resort to imposing the liberal order by fiat either through the apparatus of the administrative state run by bureaucrats or judges who exhibit disdain for democracy and populist discontent and a preference for expert opinion.[595] These moves would likely issue forth from a closely-knit cohort of elites operating as a new moral social justice tribe evincing its own sacred commitments and faith traditions.[596] Given that "[o]n the politically active left and the politically rising right, the state now occupies a much greater role than it has heretofore,"[597] this analysis, however apocryphal, signifies that keeping peace amongst a society of highly-autonomous devils within liberalism's scrofulous domain requires a controlling state that is prepared to coerce citizens into betraying their conscience.

VI. CONCLUSION

> Show us not the aim without the way,
> For ends and means on earth are so
> Entangled that changing one, you change the other too;
> Each different path brings other ends in view.[598]

A recapitulation of this article's principal claims and contentions shows that it is difficult for labor unions to represent the locus of shared values in our contemporary society, a society that is committed to liberal ideology and which correspondingly expands individual autonomy and state control in the shadow of rising individual vulnerability. While the "quest for community" still lives, and whilst some commentators still cling to the hope that the proper and defensible objective of liberty is

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[594] F. Flagg Taylor, *INTRODUCTION* in LONG NIGHT OF THE WATCHMAN, *supra* note 565, at xiv.
[595] DENEEN, *supra* note 30, at 181 (showing that this end run around democratic and populist discontent has been backstopped by the ever-more visible power of a massive "deep state," with extensive powers of surveillance, legal mandate, police power, and administrative control, thus defying liberalism's claims that rest on the consent and popular support).
[596] Lindsay & Nayna, *supra* note 55.
[597] Pappin, *supra* note 32, at 160.
[598] FERDINAND LASALLE, FRANZ VON SICKINGEN, A TRAGEDY IN FIVE ACTS (quoted by KOESTLER, *supra* note 66, at 247.

the construction of societal conditions so that goods, such as peace and harmony, might yet emerge,[599] open questions remain on the scope, content, and limits, if any, of modern liberalism. These questions are particularly poignant in the face of evidence that modern liberalism is, in sum, a deceptive and an ultimately self-destroying illusion, which cuts us off and indeed sets us in opposition to society, nation-state, and community as a whole and perhaps against ourselves.[600] Such questions, in combination with liberalism's fundamental teachings enabling this ideology to reach its apogee in two ontological points—the liberated individual seeking solace in the controlling captivity of the state—may have negative implications for agency-fee objectors going forward.

Against this backdrop, *Janus*—despite its merits and despite the fact that compulsory labor unions can be seen as an anachronism within a postmodern world that has capitulated to liberal ideology—has potentially struck an electrifying, but inconsequential, blow against liberalism's tendency to confer coercive power on the majority enabling private organizations to regulate the affairs of an unwilling minority in both the private- and public-sector. If so, union dissenters seeking authentic liberty must join with others who have recognized modern liberalism's incapacity to foster self-governance,[601] as well as its inability to justify its own existence.[602] Prompted by the onset of the age of modern barbarism and darkness,[603] these individuals, subgroups, and communities, have turned aside from the task of shoring up liberalism's imperium.[604] Consequently, they are prepared, through fits and starts, to construct new forms of community within which individual conscience as a form of moral life thrives and freedom and goodness properly appropriated survive,[605] and from which a better

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[599] Vermeule, *supra* note 32, at 174.
[600] DENEEN, *supra* note 30, at 188.
[601] *Id*. at 83.
[602] Christopher Howell, *Seraphim Rose and David Bentley Hart: Two Orthodox Response to Modernity*, PUBLIC ORTHODOXY (May 10, 2019) https://publicorthodoxy.org/?mailpoet_router&endpoint=view_in_browser&action=view&data=WzEyMCwwLDc1LCI1NTc4ZjE4Yjg2MmVkYTEyNmUwMzliMjliZGMxOGQ5MSIsMTEwLDBd.
[603] MACINTYRE, *supra* note 125, at 263.
[604] *Id*.
[605] *See*, *e.g.*, SCHINDLER, *supra* note 74, at 9 (providing some examples).

theory of politics and society might yet emerge.[606] Fragmentation, isolation, radical individualism, and disaffiliation are richly consistent with liberal ideology and richly corrosive of the human spirit. Even though liberalism's achievements ought to be acknowledged and the desire to return to some preliberal age should be muted,[607] it is unlikely that ideology alone can sustain authentic life as we await what lurks beyond the tumid frontiers of coercion advanced through malleable language that has been mastered and reconstructed by our cognitive elites.[608]

[606] DENEEN, *supra* note 30, at 183.
[607] *Id*. at 182.
[608] My debt to MacIntyre should be obvious. *See* MACINTYRE, *supra* note 125, at 263.