Abstract

The Supreme Court in Janus v. American Federation of State, County, and Municipal Employees Council 31 upended public sector labor law by finding a novel First Amendment right of public employees to refuse to pay union fees and declaring unconstitutional scores of laws and thousands of labor contracts. This Article assesses the constraints on public sector labor law post-Janus, examines the variety of legislative responses, and proposes a path forward.

Janus makes it difficult to address the collective action problem facing all large groups. Although it is in the interest of every member of a group to engage in collective action to provide common goods, it is also in the each individual’s interest to let others incur the costs of doing so. The Janus Court misstated the nature of the collective action problem when it said the problem was free-riding on union-negotiated benefits. The problem is that, without some way to require all who benefit to share the costs, unions will not negotiate effectively for the benefits in the first place, so there will be no common goods to free ride on.

This Article explains public sector unions’ apparently surprising reluctance to respond to the collective action problem exacerbated by Janus in the way that some scholars and a number of legislatures have proposed. Most proposals and enacted legislation continue union financial solvency in the short-term but sacrifice the fundamental nature of unions as membership organizations governed by and for workers. Some adopt some form of members-only representation, thus abandoning the principles of majority and exclusive representation.

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Some have government employers subsidize the cost of union representation. Some treat union fees as being like health insurance subject to an annual open-enrollment period. Four major public sector unions have condemned many of these approaches, even as legislatures have considered or enacted them in the spring and summer of 2018. Close analysis of the unintended effects of these approaches to the collective action problem explains why they are problematic.

Returning to the economic theory of groups and public goods, the Article assesses legislation that seeks to give public employee unions some of the attributes of small groups in which a mix of social norms and individual benefits provide the incentives for individuals to incur the costs of providing public goods. The Article concludes by explaining why the options we propose could survive the inevitable post-Janus legal challenges and enable unions to be majoritarian democratic institutions that are accountable to those whom they represent.

I. Introduction

The spring of 2018 witnessed dramatic events for public sector unions and the workers they represent. On the one hand, teachers in six southern and southwestern states, most of which have no or only limited public sector bargaining, went on strike to protest the steady declines in education spending and endemic teacher shortages caused by years of tax cuts. On the other, the Supreme Court in Janus v. American Federation of State, County, and Municipal Employees Council 31, upended public sector labor law by finding a novel First Amendment right of public employees to refuse to pay union fees and declaring unconstitutional scores of laws and thousands of contracts in 22 states and the District of Columbia.¹ These two sets of cataclysmic events suggest both that collective action remains essential to an adequately trained and compensated public sector workforce and that the Supreme Court made it much harder for states to create the institutions to do so. This Article assesses the constraints on public sector labor law, examines the variety of post-Janus legislative responses that have emerged, and proposes a path forward.

The constraints are considerable because *Janus* makes it difficult to address the collective action problem facing all large groups. Economists since Mancur Olson have known that, although it is in the interest of every member of a group to engage in collective action to provide common goods (such as roads, schools, firefighters, or labor contracts guaranteeing fair wages and safe working conditions), it is also in the each individual’s interest to let others incur the costs of doing so.2 Olson explained: “If members of a large group rationally seek to maximize their personal welfare, they will not act to advance their common or group objectives” absent either compulsion or incentives that will benefit the members apart from the group benefits.3 Rational individuals realize that their own individual contributions will not likely have any significant impact on advancing the group effort to secure common goods and, therefore, decide not to incur the costs. As a result, large groups will not form effective organizations and all will be worse off.4 The *Janus* Court misstated the nature of the collective action problem when it said the problem was free-riding on union benefits. The problem is not that some employees will free ride on the benefits the union secures for all workers. The problem is that unions will not form and, if they do, they will not negotiate effectively for the benefits in the first place. There will be no common goods to free ride on.

This Article explores solutions to that collective action problem in a manner that is consistent with *Janus* and that enables unions to be majoritarian democratic institutions that are accountable to those whom they represent. For over a century, union relationships with employers and with unionized workers have operated on the model of electoral democracy. A union elected by a majority represents all workers in the unit,5 just as a legislative or executive official represents everyone. But a union, unlike a political leader, owes a duty of fair representation to *every* employee in the unit and cannot act arbitrarily

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3 Id. (emphasis in original).
4 Id.
5 29 U.S.C. § 159; Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1976) (holding that a union chosen by the majority represents all workers).
or discriminatorily in deciding whose interests to prioritize.\(^6\) And in enforcing a contract, the union must represent all workers – union members and nonmembers alike – adequately and without discrimination.\(^7\) Democracy is foundational to everything unions do, from the way they govern their internal affairs to their efforts on behalf of workers to create workplace democracy to their role in civil society.\(^8\) Their responsibility to respect the interests and rights of minorities is what makes unions different from political leaders and what has made the contemporary fight over how unions fund their work so significant. \textit{Janus} requires unions to continue to act like governments – indeed, to provide better representation to the minority than governments do by preventing elected leadership from advancing the interests of supporters over those of non-supporters\(^9\) – but denies them the tool that governments and all viable large organizations have to, as the Framers put it, “promote the general Welfare.”

Unions therefore face a choice among three legislative paths forward. First, they can abandon majoritarianism. Second, they can abandon independence. Or, third, they can enhance solidarity through a mixture of incentives and organizing. Several pieces of proposed legislation or proposals made in the academic and popular press advocate either the first or the second. The majority opinion in \textit{Janus} suggested the first: unions could abandon majoritarian


\(^7\) Vaca v. Sipes, 386 U.S. 171 (1967).


\(^9\) As the Seventh Circuit observed in upholding a Wisconsin law that stripped collective bargaining rights from those employees whose unions opposed Scott Walker’s candidacy for governor while allowing those employees whose unions supported Walker to continue to bargain, “political favoritism is a frequent aspect of legislative action. ... [T]here is no rule whereby legislation ... becomes constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign. ... Indeed one might think that this is what election campaigns are all about: ... the winners get to write the laws.” Wisconsin Educ. Ass’n Council v. Walker, 705 F.3d 640, 654 (7th Cir. 2013). Compare that with Barton Brands Ltd. v. NLRB, 529 F.2d 793 (7th Cir. 1976), and Teamsters Local 568 v. NLRB, 379 137 (D.C. Cir. 1967), both of which suggest or hold that elected union leaders violate the duty of fair representation by adopting policies to favor those who supported their election and punish those who opposed them.

\(^10\) U.S. CONST. preamble.
One scholar has proposed the second: union dues would be paid by employers directly to the union without the money ever being credited to the employees’ paycheck, thus abandoning independence. Some states are considering such amendments to their public sector labor laws. Four of the national organizations of public employee unions, however, joined in a statement in July 2018 rejecting both of these proposals. AFSCME, AFT, NEA, and SEIU unite in opposing members-only bargaining or any other incursion on the principles of majority-rule representation in both contract negotiation and contract enforcement. They unite in opposing authorization of representation of bargaining unit employees by attorneys or other representatives not appointed by the union. They also unanimously oppose creating fee-for-service arrangements for nonmembers, including the system of per-capita payment by the government to the union.

This Article explains many public sector unions’ apparently surprising reluctance to address the collective action problem in the way that some scholars and a number of legislatures have proposed. Both of the first two options continue union financial solvency in the short-term but sacrifice the fundamental nature of unions as membership organizations governed by and for workers. This, we show, is the basis for the unions’ belief that the only viable form of union security is the third. Close analysis of the variety of approaches taken by legislatures nationwide to address union security offers

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11 138 S. Ct. at 2467 (observing that no union is compelled to seek the designation of exclusive representation); id. at 2468-69 (suggesting that unions could refuse to represent nonmembers in grievance processing).

12 Aaron Tang, Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining, 91 N.Y.U. L. REV. 144, 183-190 (2016); Aaron Tang, Life After Janus, 119 COLUM. L. REV. __ (forthcoming 2019), available at https://ssrn.com/abstract=3189186. Tang’s proposal is not to be confused with the approach theorized by Benjamin Sachs, Agency Fees and the First Amendment, 131 HARV. L. REV. 1046 (2018), who argues that it has been a mistake to consider fair share or agency fees deducted from paychecks as being the employees’ money in the first place. Rather, according to Sachs, agency fees are state money that are paid to the union for services the state requests, such as collective bargaining and contract enforcement. Id. at 1075.

13 H.B. 923, Hawaii (introduced in January 2017, referred to committee).

14 These positions are spelled out in two documents issued jointly in July 2018 by the national offices of the NEA, AFT, AFSCME, and SEIU: “Together We Rise” and “Public Policy Priorities for Partner Unions.”

15 Id.
empirical evidence of the effects of various approaches to the collective action problem and explains why the proposals of some legislators and scholars might be harmful to the interests of public sector employees.

The structure of the Article is as follows. Part II explains the union collective action problem that Janus misunderstood and shows the difficulty of solving it in a way that is both consistent with Janus and that enables unions to remain majoritarian organizations accountable to the workers they represent. Part III assesses three approaches that have been proposed by scholars and in legislatures post-Janus: members-only representation, some form of cost-shifting to the employer, and treating union fees as being like health insurance subject to an annual open-enrollment period. Part IV considers various proposals that would more effectively address the collective action problem. First, it considers possible expansion of the way that the National Labor Relations Act (NLRA) and some states have treated religious objectors in fair share fee states. It finds some limited merit in that approach but explains why the limited analogy to the treatment of religious objectors should be coupled with addressing the collective action problem by enhancing solidarity. It returns to the economic theory of groups and public goods and assesses legislation that has been enacted in some states that seeks to give public employee unions some of the attributes of small groups in which a mix of social norms and individual benefits provide the incentives for individuals to incur the costs of providing public goods.

The Article provides tools for legislators and policymakers in states and municipalities across the United States to revise their public sector labor laws in ways that address the Janus Court’s concern about compulsion while also protecting the right of the majority to form an organization capable of delivering common goods.

II. The Collective Action Problem that Janus Misunderstood

Like other large groups, union employees face a collective action problem; indeed, theirs is the paradigmatic collective action problem – the one used by economists to explain the theory of
collective action. It is in the interest of every member of the group to engage in collective action to improve wages and working conditions. It is equally in the interest of every member of the group to let others incur the costs of engaging in the collective action. An economically rational worker would choose not to join the union and pay dues because the worker’s own dues (or lack thereof) are unlikely to have an appreciable effect on the union. But if every person acts rationally as an individual by free-riding on the efforts of others, all will be worse off because no one will get the benefit of collective action. Union security provisions were the ingenious contractual solution to this collective action problem: requiring everyone to support the collective representative prevents the individually rational decision to refrain from joining, thus promoting the economically optimal collective action.

Mancur Olson explained the problem at length in his seminal 1965 book, *The Logic of Collective Action: Public Goods and the Theory of Groups*. Large organizations form to further the interests of their members: labor unions to improve working conditions, corporations to obtain a favorable return on stockholders’ investments, and farm organizations to improve the situation of farmers through grain or dairy coops, government subsidies, or trade policies. They exist “primarily for the common interests of their members.” In contrast, Olson explained, “personal or individual interests can be advanced, and usually advanced most efficiently, by individual, unorganized action.” The nature of a common good is that no one in the group is excluded from the benefit of it. Fire protection is a common good because no one can be protected from fire if individuals can opt out. So, too, job protections for workers: all workers benefit from a system that curbs arbitrary supervisory authority, that provides health insurance to the group, and that ensures adequate safety protection. But the rational individual knows that “his own efforts will not have a noticeable effect on the situation of his organization, and he

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16 OLSON, supra note 2, 66-97.
17 Id. at 2.
18 Id. at 7.
can enjoy any improvements brought about by others whether or not he has worked in support of his organization.”19

Olson’s crucial theoretical insight is that organizations will never form, and the individuals who comprise them will never get the benefit of the common good that only an organization can provide, if there is no mechanism by which the organization can require those who benefit from the common good to share the cost of securing it. That is why, for as long as there have been governments, there have been systems of taxation, rules regulating fire safety, road safety, sanitation, and other compulsory requirements to secure the common good by sharing the cost among all those who benefit. The compulsory aspects of group governance, as the framers of the United States Constitution put it in the preamble, are designed to “insure domestic Tranquility, provide for the common defence, promote the general Welfare.”20 Courts long ago prevented unions from solving their collective action problem by requiring workers to actually join the union.21 Rather, the most that unions could do is require represented workers to share in the cost through payment of what was known as an “agency” or “fair share” fee.22 The Court eliminated fair share fees in Janus, with the result that public employee unions are prohibited from charging nonmember employees anything for the services the union provides.23

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19 Id. at 16.
20 U.S. CONST. preamble.
21 Even under section 8(a)(3) of the NLRA, which expressly authorizes unions and employers to require employees to become members after 30 days of employment, the most that can be required is so-called “financial core” membership, which is functionally the same as paying a “fair share” or “agency fee.” NLRB v. General Motors, 373 U.S. 734 (1963). See generally Catherine L. Fisk & Benjamin I. Sachs, Restoring Equity in Right-to-Work Law, 4 U.C. IRVINE L. REV. 857 (2014).
23 Private sector unions governed by the NLRA remain able to charge fair share fees, because there is no constitutional issue in a contract between a private employer and a union. Comm. Workers v. Beck, 487 U.S. 735 (1988). Under the Railway Labor Act (RLA), which governs railway and airline employees, fair share fees remain constitutionally permissible, although that rule may be vulnerable if the Supreme Court adheres to an old and dubious ruling that RLA preemption of state right-to-work laws makes union security provisions in railway collective bargaining agreements subject to constitutional scrutiny. See Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956); Int’l Ass’n of Machinists v. Street, 367 U.S. 740 (1961).
The Janus Court misstated the nature of the collective action problem. The problem is not simply that some employees will free ride on the benefits the union secures for all workers, i.e., that selfish employees will decide they need not pay for what they can get for free. The problem is that it is an economically rational decision for every employee to refrain from joining the union unless assured that everyone else will also join. Consequently, unless the collective action problem is dealt with, the union will never be able to negotiate for the benefits in the first place. As Justice Kagan explained in her dissent, citing empirical studies proving the Olson thesis,

Without a fair-share agreement, the class of union nonmembers spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.24

The Court’s responses to the collective action argument misunderstand economic theory. All assume that the union will exist and will effectively negotiate collective benefits even if only some workers incur the cost of maintaining the union and the contract, and the only interest that fair share fees serve is preventing nonmembers from free-riding on the existing benefits. The collective action problem, however, is that without the ability to compel support, the common benefits will never come into existence in the first place.

The Court in Janus addressed several arguments about why fair share fees are necessary. The first was that fees are necessary to secure labor peace, by which the Court meant avoiding “dissension within the work force,” “conflicting demands from different unions,” and the “[c]onfusion that would ensue if the employer entered into and attempted to enforce two or more agreements specifying different

terms and conditions of employment.” To this, the Court responded with the evidence of unionization in the federal service and the Postal Service, both of which prohibit agency fees. The Court’s answer to the labor peace argument does not logically follow. Both the Federal Service Labor Management Relations Statute (FSLMRS) and the Postal Reorganization Act, as the Court recognized, make a union chosen by the majority the exclusive representative of all and neither allows members-only unions nor members-only contracts. Moreover, both (as discussed below) shift to the employer many of the costs a union would otherwise incur by, among other things, allowing union representatives to represent workers on government-paid time.

Assuming what the majority meant was not that members-only bargaining would address the collective action problem, but rather that the experience of federal government employment and the Postal Service show that agency fees are unnecessary, the empirical evidence suggests otherwise. As noted, both the FSLMRS and the labor law governing the Postal Service allow unions to negotiate contracts under which the union conducts most of its representational activities on paid time. This essentially shifts the cost of securing and administering the common goods to the employer. As explained below, this makes unions less accountable to their membership in ways that should concern both the Janus majority and union supporters. But here we will address the question whether it addresses the collective action problem. We will show that it does not.

Olson drew support for his theory from evidence of NLRB-supervised elections conducted when the Taft-Hartley Act required any compulsory union membership provision of a collective bargaining agreement to win a majority vote of the represented employees. This provision of the statute (which was in effect only from 1947 to 1951) required a majority vote of all the represented employees, not just a majority of votes cast. In the four years the statute was in effect, unions won 97 percent of the elections and nearly 45,000

25 138 S. Ct. at 2465 (internal punctuation omitted).
26 138 S. Ct. at 2466; 5 U.S.C. §§ 7102, 7111(a), 7114(a); 39 U.S.C. § 1203(a), 1209(c).
27 See infra Part III.B.2.
28 See infra Part III.B.2.
union shops were authorized. Yet, Olson pointed out, union members tended not to attend union meetings; the attendance figures he cited showed that fewer than ten percent of members attended meetings even though nearly one hundred percent supported compulsory union membership.

A large study (n=11,668) of the effects of union security provisions on state and local government workers published in 1993 which controlled for a number of confounding variables demonstrated that union security provisions had a significant positive effect on union status and wages. The study suggested not only that compulsory union fee contracts produced higher wages and greater union density but also that “group norms are important in determining the propensity of covered workers to join unions.”

A more recent piece of evidence comes from Indiana. In Indiana, public school teachers have statutory collective bargaining rights. Under a 2017 amendment to Indiana’s teacher collective bargaining statute, each year, exclusive bargaining representatives are required to certify to the employer the number of members of the bargaining unit who are members of the union. If less than a majority of bargaining unit members are members of the union, the employees are notified of their right to change representatives and their right to decertify their union. The 2017 report on teacher exclusive

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29 OLSON, supra note 2 at 85.
30 Id. at 86.
32 Id. at 91.
33 IND. CODE tit. 20, art. 29.
34 SEA 407, codified at Ind. Code §20-29-5.
35 Id. § 20-29-5-7(e).
36 Id. § 20-29-5-8(b); 560 IND. ADM. CODE § 2-2.1.20. Where less that a majority of the bargaining unit are union members, the employer provides the Indiana Educational Employment Relations Board (IEERB) with a list of all bargaining unit members and their work email addresses. The IEERB sends all bargaining unit members an email advising them of their right to decertify their union or to change exclusive representatives by filing a petition supported by 20% of the bargaining unit. IEERB, Guide to Exclusive Representative Affidavit and Teacher Letter, https://www.in.gov/ieerb/files/Guide%20to%20Exclusive%20Representative%20Affidavit%20and%20Teacher%20Letter.pdf
bargaining representatives shows membership density varying between 100% and 10% (Cowan Community School Corporation in Delaware County where only 10 of 50 teachers in the bargaining unit are members of the union). Many are below 50%. However, there is no evidence that teachers have ever decertified their union without replacing the union with a different union as their bargaining representative. This suggests that union-represented employees find it economically rational to refrain from joining the union but that they nevertheless have no desire to eliminate union representation. Indiana, in other words, is the latest piece of evidence that confirms the Olson thesis.

Finally, one other point should be noted about whether fair share fees are necessary for unions to be effective representatives. The Janus majority asserted that “millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees,” which makes it “undeniable” that agency fees are unnecessary to serve the legitimate interest in stable labor-management relations. What the majority failed to note is what labor officials know: union locals in those 28 states have long been subsidized by the national federation which collected dues from members in the states and territories that permitted fair share fees. Once those subsidies disappear because every state is now a right-to-work state for public sector employment, economic theory suggests that the quality of representation will decline everywhere.

The rest of the arguments that the Janus majority addressed concerned the problem of free-riding. As noted above, all of this assumes that unions will succeed in negotiating such benefits in the first place and that the problem is free-riding on existing benefits rather than the inability of the organization to form to secure the benefits in the first place. But assuming arguendo that the problem is free-riding on existing benefits, the Court’s account of the problem and its

38 138 S. Ct. at 2466.
responses to the arguments against the necessity of fair share fees are problematic.

As to free-riding, the Court made six responses. First, the Court observed that “[m]any private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers” and gave the examples of unnamed groups representing senior citizens, veterans, or physicians. Mancur Olson dealt with this argument at length in his analysis of collective action and public goods; indeed, he devoted an entire chapter to it. As he showed, “the large economic groups that are organized do have one common characteristic which distinguishes them from those large economic groups that are not. ... [They] obtain their strength and support because they perform some function in addition to lobbying for collective goods.” They either have the legal or de facto ability to compel membership or they offer inducements to members to join, as is the case of the AMA, AARP, or ABA, or a host of others that Olson studied. As Olson showed, the Chamber of Commerce provides considerable individualized benefits to those large business organizations that effectively control it, perhaps at the expense of other business groups on whose behalf they claim to speak but whose interests may not be served. There are, as Olson explained, any number of groups that exist on an entirely voluntary basis but that advocate for common goods. Perhaps the Janus majority’s example of veterans groups fit in that category. Others obviously exist: the National Rifle Association, the ACLU, and others. But none of these organizations, unlike labor unions, have a statutory obligation to represent the interests of all people on whose behalf they claim to speak, and their critics would surely agree they do not.

Second, the Court said that unions gain benefits from being designated the exclusive representative, such as the right to bargain with the employer, the right to obtain information about employees, and the right to have dues deducted from payroll. “These benefits,” the Court asserted, “greatly outweigh any extra burden imposed by the

39 Id.
40 OLSON, supra note 2 at 132.
41 Id. at 140-148.
duty of providing fair representation for nonmembers.” 42 The Court cited nothing for the proposition that the benefit of being able to represent all employees outweighs the cost, nor could it. As Justice Kagan pointed out in her dissent, the “key question” is “whether unions without agency fees will be able to (not whether they will want to) carry on as an effective exclusive representative.” 43 While of course employees benefit from being able to present a united front to the employer in contract negotiations, the greater bargaining leverage does not itself pay for the lawyers, accountants, economists, researchers, organizers, and other union staff and consultants who are necessary to make a union an effective negotiator and administrator of the contract. The union wage premium gained by presenting a united front does not go to the employees; it goes to the union staff. 44 When those who choose to join the union are required to pay higher dues to provide the same level of union staffing and research, and thus to secure the same contractual wage premium, than they would pay if all their coworkers paid, they are effectively subsidizing their nonunion co-workers. 45 That is not a benefit to the dues payers; it is a loss compared to the situation that would exist if all were required to share the cost of getting the wage premium. Moreover, the nonpayers enjoy the same union wage premium as the payers, but they actually get a higher premium because they do not pay dues. That unfair advantage is what creates the incentive to resign from the union, and once everyone responds to the incentive, the union collapses and the wage premium disappears. This fact may explain why corporate funders are behind the campaign of the Freedom Foundation to persuade workers to resign their union membership. The appeal is to individual self-interest (resign your union membership and give yourself a raise) but

42 138 S. Ct. at 2467.
43 Id. at 2490 (Kagan, J., dissenting).
44 The wage premium is the basis for Professor Sachs’ argument that courts erred in imagining that compulsory fees were the union property in the first place. Sachs, supra note __, at __. In his analysis, absent majority representation, the workers will be paid less. The small part of the wage premium that workers pay in the form of compulsory fees is not a loss to the employees compared to what they would be paid if there were no union.
the interest that will be served in the long term is that of companies that seek to eliminate unions and thereby lower labor costs.46

Third, the Court suggested that it is unnecessary to provide any financial incentive for the union to represent nonmembers because the duty of fair representation prohibits the union from discriminating against nonmembers in contract negotiation or contract administration.47 As with the Court’s other arguments, this one founders on the same problem: it assumes the union will exist and that it will succeed in negotiating the union wage premium and the only question is whether the nonpayers will enjoy the benefits without incurring the costs. Moreover, this argument is inconsistent with the Court’s fourth argument, which is that it is unfair for nonpayers to enjoy the same benefits as those who pay union dues.

As to that unfairness argument, the Court suggested that “whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated” by requiring nonmembers to pay for grievance handling or by the union denying nonmembers representation in the grievance proceeding.48 However, in the next paragraph the Court cast doubt on the viability of denying representation to nonmembers without some protection for their interests by noting that protection of nonmembers’ “interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected.”49

Fifth, the Court asserted that union members benefit from union grievance handling on behalf of nonmembers because “the

46 Group Funded by Conservative Billionaires Launches Anti-Union Campaign Following Supreme Court Ruling, L.A. TIMES, June 28, 2018. Shortly after the Court granted certiorari in Janus, the Freedom Foundation, anticipating a victory, sent out a fundraising letter seeking donations to fund a campaign to lobby workers to resign their union memberships. The letter urged that overturning Abood “should take unions out of the game for good – yet we know the unions won’t go away without a fight. . . . They won’t go away until we drive the proverbial stake through their hearts and finish them off for good.” Freedom Foundation fundraising letter, Oct. 2017 (emphasis in original).
47 Janus, 138 S. Ct. at 2468.
48 Id. at 2468-69.
49 Id. at 2469.
resolution of one employee’s grievance can affect others. This is a different way of saying the Court’s second argument: the dues-paying members gain benefits from the union being the exclusive representative, except here the Court is considering who should pay the fair share of the costs of contract administration as opposed to contract negotiation. The answer is still the same. The benefits that union members get by the union having the ability to participate in how the contract is interpreted does not pay the lawyers’ fees and the union’s share of the arbitrator’s fee, the arbitrator-appointing agency’s fee, the court reporter’s fee, or the rental of a hearing room.

Finally, the Court in a footnote referenced states that permit those with religious objections to unionization to contribute to other approved nonprofits. We address the possible expansion of the treatment of religious objectors to all who object to union membership. We show why it partly ameliorates the collective action problem but would be difficult to administer without raising the same constitutional problem as fair share fees.

Thus, Janus leaves unions in a quandary. The Court has offered no solution to the actual collective action problem that unions face (as opposed to the more limited problem of free-riding that the Court addressed). To the extent that unions respond to the collective action problem by abandoning their effort to seek common goods and instead to pursue only the narrow interests of their actual members, they abandon their long heritage as majoritarian democratic institutions. Alternatively, to the extent they address the collective action problem by shifting the costs of representation onto the employer (and, thereby, onto taxpayers or onto all workers in the form of lower wages), they abandon their independence. That leaves only the effort to address the collective action problem by assuring union supporters that most of their co-workers will also join and by trying to act more like small groups than large ones, in which unions undertake actions which will benefit more workers as individuals and also try to create social norms that make shirking unacceptable. We explore these various options in Parts III and IV below.

50 Id.
51 Id. at 2469 n.6 (citing Cal. Govt. Code § 3546.3; Ill. Comp. Stat. ch. 5, § 315/6(g)).
52 See infra Part IV.A.
III. Four Post-Janus Approaches to the Collective Action Problem

In the period since 2012, when the Supreme Court decided the first of the three recent cases calling any form of union security or fair share fees into constitutional doubt, union critics and union supporters have considered three alternatives to fair share fees that attempt to solve the collective action problem by altering the majoritarian democratic nature of union representation. All three have been implemented to one degree or another in the U.S. at some point, and there is by now evidence of their effects. We describe each below and describe what is known about the effects. None solves the collective action problem without fundamentally altering the nature of unions as majoritarian bargaining representatives.

A. Members-Only Representation

The first approach would abandon the majoritarian nature of unions by making a union the representative only of its members, at least to some extent. Members-only representation has existed or does exist in two forms. In one form, the union bargains only on behalf of its members and the contract it negotiates covers only its members. In the second, a union bargains on behalf of all employees in the unit, and the contract covers all, but employees who refuse to financially support the union cannot obtain individual representation services in enforcing the contract. We discuss each of these options below.54


54 There is a third option not discussed here, which is that a union represents its members only until it gains majority support and then becomes the exclusive representative of all. This third form of members-only representation has been proposed as a solution to the difficulties of organizing. CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005); Catherine L. Fisk & Xenia Tashlitsky, Imagine a World Where Employers Are Required to Bargain with Minority Unions, 27 ABA J. OF LAB. & EMP. L. 1 (2011). It is currently lawful in the private sector, although the employer has no duty to bargain with a minority union. Retail Clerks Int’l Ass’n v. Lion Dry Goods, 369 U.S. 17, 29 (1962) (holding that a members-only contract is enforceable under section 301 of the NLRA, just as is any other CBA); Consol. Edison v. NLRB, 305 U.S. 197, 237 (1938) (holding that “in the absence of … an exclusive agency, the employees represented by the Brotherhood, even if they were a minority,” had a statutory right to join a union and have it contract on their behalf “); Dana Corp., 356
The version of members-only representation that would produce a members-only contract would require lawmakers to decide whether the union is prohibited from negotiating contract terms covering any worker who chose not to join, or whether (as one of us has previously asserted\(^\text{55}\)), the union would have the option to engage in exclusive representation if it obtains majority status. We take no position on that now. For the moment, it suffices to observe that members-only representation allows employees to choose another union or no union at all, and it addresses the Janus concern that majority unionism compels those who oppose any or all union speech or association to be free of union representation without restricting the freedom of those employees and employers who favor collective bargaining. Such a regime would entail statutory change to the union selection process, to the employer’s duty to bargain, to the union’s duty of fair representation, and, significantly, to the law defining what is prohibited discrimination by a union and an employer. Under current law, it is unlawful for a union and employer to discriminate against any employee based on union membership. Where members-only bargaining is or has been allowed, it is not unlawful discrimination to negotiate different terms with the union than with non-union employees, or different terms with different unions, unless it can be shown that the employer did so for the purpose of encouraging or discouraging union membership.\(^\text{56}\)

The limited experience with members-only bargaining and with forms of bargaining that limit the subjects of union bargaining and allow individual contracting in addition to the collective agreements suggest that such systems are fraught with problems for both employers and employees. Members-only representation existed in California primary and secondary schools prior to 1976. Neither

\(^{\text{55}}\) Fisk & Sachs, supra note ___ at 872.

\(^{\text{56}}\) Cf. Cal. Fed’n of Teachers v. Oxnard Elem. Schools, 272 Cal. App. 2d 514, 543 (1969) (describing operation of Winton Act and rejecting various legal challenges to it notwithstanding differences in the rights given to different employee groups; noting the absence of evidence that different treatment was based on invidious discrimination).
school districts nor teachers preferred the members-only system, as it created administrative difficulties for districts, dissension among employees, and perceptions that terms of employment were unfairly different among teachers in the same district. It was replaced by majority rule exclusive representation. Members-only representation of a sort similar to the Winton Act has been the only form of union negotiation for Tennessee school teachers since 2011. Each entity that receives more than fifteen percent of the votes gets proportional representation on a “collaborative conferencing committee” to meet with the school district. (Because the system allows the district to run out the clock on the time for agreement to a contract and then to set terms unilaterally, Tennessee does not have true collective bargaining even on a members-only basis.) Nevertheless, the Tennessee experience has not improved stability of labor relations, teacher working conditions, or the quality of education. Wisconsin retains exclusive representation but with such strict limits on the topics of negotiation that it led to an increase in individual bargaining. Some school districts began to offer signing bonuses and higher salaries to attract successful teachers from other districts and even to pay the “resignation fees” that districts charge teachers who leave mid-year. A leader of the Wisconsin Association of School Boards said, “It’s like the world of baseball economics hitting public schools,” as teachers with valuable skills or excellent performance evaluations sought out districts with more money. This exacerbates inequalities among

57 California abandoned members-only representation because neither teachers, students, nor school administrators benefited from the difficulty in negotiating fair and consistent terms of employment across schools or districts. See Ophelia H. Zeff, California’s Alternative to Collective Bargaining for Teachers: The Winton Act, 1965-1974, and Proposals for Change, 5 PAC. L. J. 698 (1974) (collecting cases interpreting Winton Act, assessing effectiveness of Act in peacefully resolving conflict between teachers and school districts and in improving teacher salaries, and recommending abandoning the proportional representation Winton Act system in favor of exclusive representation and collective bargaining); Catherine Fisk, Challenge to ‘Fair Share’ Union Fees Unfair and Unworkable, EDWEEK.ORG, Oct. 6, 2015 (explaining that California school districts found the proportional representation system of the Winton Act to be expensive and cumbersome, to be an obstacle to creating uniform policies across schools, and to generate rather than resolve conflict among different groups of teachers).


59 Id. § 49-5-609(d).

60 Edgar Mendez, Schools Try Different Pay Formulas, Teacher Compensation Models New After Act 10, MILWAUKEE J. SENTINEL, Aug. 18, 2014. Not surprisingly,
schools, making it much harder for states to improve education in the schools that most need to recruit and retain excellent staff. In short, the increased freedom of successful employees in a members-only or other regime that allows individual contracting comes at a considerable cost for employers, employees, and the consumers of public services.

An alternative form of members-only representation is majority bargaining but members-only grievance handling. This is an approach that the Court in Janus expressly suggested in rejecting the argument that, in the absence of agency fees, unions would refuse to represent nonmembers in the grievance procedure. The Court stated: “Individual nonmembers could be required to pay for that service or could be denied union representation altogether.”61 The Court also noted that in states that accommodated religious objections to paying an agency fee, religious objectors who had paid no fees could be charged for the reasonable cost of union representation in grievance handling. The Court explained, apparently with favor, that “[i]his more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.”62

Some unions have proposed a post-Janus legal order in which unions would be the exclusive representative of all employees in the bargaining unit for purposes of negotiating the contract but would represent their members only for purposes of administering the contract. International Union of Operating Engineers Local 150 has filed a lawsuit alleging that its duty to represent nonmembers who pay nothing toward its representation violates the union’s rights under the First Amendment.63 The suit alleges that “[i]f . . . it violates the First

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61 Janus, 138 S. Ct. 2468-69 (citation omitted).
62 138 S. Ct. at 2469 n.6 (quotations marks omitted) (citing Cal. Govt.Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016)).
Amendment right of a nonmember to be compelled to pay fees to the union that is required by law to provide representation and services, it equally violates the rights of the union and its members to require them to use their money to speak on behalf of the nonmember.” 64 Local 150 alleges that “[f]orcing unions to advocate on behalf of nonmembers who object to the very reasons they exist is a severe violation of the union’s First Amendment right to free association.” 65 It further maintains that compelling unions to expend funds to represent nonmembers drains money that the unions would otherwise spend on First Amendment protected activity, thus violating their rights to free speech. 66

There is a certain logic to the distinction Local 150 draws between contract negotiation and contract administration. Negotiation of the contract is something the union would do regardless of whether it is negotiating on behalf of the entire bargaining unit or only on behalf of its members. The time and resources required would likely be the same. Thus, serving as exclusive representative for contract negotiations does not compel the union to speak for or associate with nonmembers nor does it divert union resources that could otherwise be used to fund First Amendment protected activities.

Although the Janus majority focused on grievance processing, representation of individual employees during the term of a collective bargaining agreement can encompass a good deal more. For example, public employees protected by civil service statutes or collective bargaining agreements requiring cause for discharge have a constitutional due process right to a hearing before they may be discharged. 67 It is common for unions to represent employees in these pre-disciplinary hearings. Similarly, in many states, employees

64 Id. at ¶ 13.
65 Id. at ¶ 24.
66 Id. at ¶ 25. In linking the lawsuit to the union’s response to Janus, Local 150’s President wrote, “It isn’t fair for dues-paying members to subsidize the representation of those who want to cheat the system and save a buck, and our belief in fair treatment of members will be applied. If you have a right not to associate with us, we also have a right not to associate with you, and we will exercise that right. If a bargaining unit has multiple members exercise this choice, we will be forced to consider whether or not we can continue to represent the group at all.” James M. Sweeney, Fight Back (July 2018), http://local150.org/presidents-corner/.
questioned in investigatory interviews have a right to union representation if they reasonably believe that the interview could lead to disciplinary action. In New York, this right is expressly provided for by statute.\textsuperscript{68} In other states the right has been found to be part of the general right to engage in concerted activity for mutual aid and protection, with courts and labor boards following the analogous law under the National Labor Relations Act upheld by the Supreme Court in \textit{NLRB v. J. Weingarten, Inc.}\textsuperscript{69}

Although in the private sector under the NLRA, unions may not refuse to represent nonmembers in contract administration or require nonmembers to pay the costs of their representation,\textsuperscript{70} some states allow unions to refuse to represent non-payers or to charge them for representation services. These jurisdictions, which prohibited agency fees by statute before \textit{Janus} made fees unconstitutional, condition the union’s refusal to represent nonmembers on the nonmembers’ having the right to process their own grievances without union representation. For example, the Florida public sector collective bargaining statute expressly provides: “All public employees shall have the right to a fair and equitable grievance procedure administered without regard to membership or nonmembership in any organization, except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization.”\textsuperscript{71} Similarly, Nebraska’s statute provides that “[a]ny

\textsuperscript{68} N.Y. CIVIL SERV. LAW § 209-a(1)(g).
\textsuperscript{71} FLA. STAT. ANN. Tit XXXI, § 447.401 (emphasis added). In \textit{Sherry v. United Teachers of Dade}, 368 So.2d 445 (Fla. App. 1979), the plaintiff filed a grievance which the union refused to process unless Sherry, a nonmember paid a fee according to a fee schedule the union had for nonmembers. Sherry sued claiming that the union’s refusal to process her grievance violated the right to work provision of the Florida Constitution. The court appears to have held that Sherry lacked standing. It wrote, “It is clear that the gravamen of Sherry’s complaint is that the U.T.D. would not process her grievance free of charge, although she is not a dues paying member and could process the grievance by herself. We, therefore, conclude that in the posture of this case the issue of the constitutionality of Section 447.401, Florida
employee may choose his or her own representative in any grievance or legal action regardless of whether or not an exclusive collective-bargaining agent has been certified.” The statute goes on to state, however: “If an employee who is not a member of the labor organization chooses to have legal representation from the labor organization in any grievance or legal action, such employee shall reimburse the labor organization for his or her pro rata share of the actual legal fees and court costs incurred by the labor organization in representing the employee in such grievance or legal action.”

In Nevada, a similar result has been reached through court and administrative agency decisions. In *Cone v. Nevada Service Employees Union,* the Nevada Supreme Court considered SEIU’s policy that allows nonmembers to hire their own attorneys to handle their grievances but that requires any nonmember who wants union representation in a grievance to pay for it according to a stated fee schedule. The court held that the union did not violate Nevada labor law. The court reasoned that the policy did not violate the state law prohibiting compulsory union fees because paying the service fee was not a condition of employment, merely a condition of having the union represent the nonmember in a grievance. The court also rejected the non-payers’ argument that charging for individual services violated the union’s statutory obligation as exclusive representative. The court reasoned that the exclusive representative’s duty of fair representation does not require a union “to provide all services for free. We do not agree that the mere inclusion of the word ‘exclusive’ in and of itself prohibits a union from charging nonunion members service fees for individual grievance representation.” In addition, the court observed that Nevada law “explicitly authorizes a nonunion member to act on his own behalf ‘with respect to any condition of his employment.’” The individual right to refuse to pay fees and to forego union representation in a grievance, the court reasoned, allows the union to charge if the employee chooses to request union representation in the

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Statutes (1977) is not properly presented and Sherry lacks the requisite interest to bring the instant action under Section 86.011 et seq. Florida Statutes (1977).”

72 NEB. REV. STAT. § 48-838.
73 998 P.2d 1178 (Nev. 2000).
74 Id. at 1181.
In line with *Cone*, Nevada’s public sector labor board has held that where a member opts to proceed through the grievance procedure with her own attorney, the union may decline to represent her.\(^{76}\)

In anticipation of the Court’s ruling in *Janus*, New York decided to follow the example of Florida, Nebraska, and Nevada in part. New York amended its public sector collective bargaining statute, commonly known as the Taylor Law, to allow unions to decline to represent nonmembers in discipline grievance and administrative proceedings where nonmembers have the right to represent themselves. It also allows unions to decline to represent nonmembers in disciplinary interviews.\(^{77}\) The common theme in Florida, Nebraska, Nevada, and New York is that where employees can process their own grievances with their own counsel or other representative, the union may refuse to represent nonmembers or condition representation on the nonmember paying a fee for the representation.

Allowing unions to decline to represent nonmembers in contract administration or to condition their representation on the nonmember paying for it eliminates the free rider problem with respect to contract administration. No employee who is not paying dues can rely on the union to provide representation during the term of a collective bargaining agreement for free. At first blush, this would appear to go a long way to dealing with the collective action problem as well. At the heart of the collective action problem is that most services that the union provides are collective goods and it is economically rational for a union supporter to decide not to join the union so long as enough others do to secure the collective goods. Allowing unions to decline to represent nonmembers in grievance processing and other matters of contract administration converts a collective good into an exclusive good. However, even with unions’ ability to restrict representation in grievance and contract administration to members only, it remains an economically rational

\(^{75}\) *Id.* at 1181-82 (citing Nev. Rev. Stat. 288.140(2); footnote and citations omitted).


In Florida, there appear to be 13 teacher union locals where fewer than 50 percent of the bargaining unit members are members of the union.\textsuperscript{78} Many nonmembers support representation by their union. An amendment to Florida’s public sector labor relations statute that took effect July 1, 2018, requires teacher unions to certify the percentage of bargaining unit employees who are union members and to submit to recertification elections if fewer than half of the bargaining unit are dues-paying members.\textsuperscript{79} A group of Florida teachers who are represented by an exclusive bargaining representative but are not members of the union have sued alleging that the new requirement violates the right-to-work provision of the Florida Constitution by coercing those who support union representation into becoming members of the union.\textsuperscript{80}

There is even more compelling evidence from other Florida public sector employees. Patrick Wright, Vice President for Legal Affairs of the Mackinac Center for Public Policy, a conservative think tank that supports right-to-work legislation and litigation, gathered data showing that 74,266 Florida state government employees are covered by collective bargaining agreements but only 7,689 of them, or 10.4 percent, have authorized payment of membership dues by payroll deduction.\textsuperscript{81} There are likely additional state employees who are union members but pay their dues other than by payroll deduction. However, even assuming that the number of members paying dues directly rather than through payroll deduction equals the number paying by payroll deduction – a very generous assumption – membership density among state employees is very low. This is

\textsuperscript{78} See Leslie Postal, Florida Teacher Unions Sue Over Law. It Requires Unions to Reapply for Certification if Membership Falls Below 50% of Staff, ORLANDO SENTINEL, July 3, 2018 at 1.

\textsuperscript{79} Florida CS/HB 7055 , Ch. 2018-6 Laws of Florida, s 33.

\textsuperscript{80} Florida Educ. Ass’n et al. v. Poole, No. 74352318 (Fla. Circuit Ct. 2d Judicial Circuit filed July 2, 2018), Complaint Count IV. As recent evidence from Indiana shows, nonmembership in the union does not equate to opposition to union representation. See supra notes \_\_ and accompanying text.

\textsuperscript{81} Patrick Wright, Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Center’s Public Sector Unionism Data Sufficiently Reliable, 2017 U. CHI. LEGAL FORUM 563, 584.
consistent with the observation of a prominent Florida public sector labor lawyer that membership density across the board, except for law enforcement and firefighters, is very low in Florida and a union that has 30 percent membership is doing well.\(^{82}\)

In Nebraska, there is some evidence that teacher unions enjoy very high membership density because teachers want to protect against having to pay for union grievance representation if they do not join.\(^{83}\) An attorney who represents the Nebraska State Education Association (NSEA) explained that Nebraska teachers have come to regard legal assistance as “a privilege of membership” in the union, and not a right of all teachers in the state. NSEA policies, the lawyer explained, provide that members are entitled to representation by NSEA non-lawyer staff in grievances and lawyer representation in proceedings in which the teacher may be dismissed, in professional practices disciplinary proceedings, or in enforcing statutory or constitutional rights in a judicial proceeding.\(^{84}\) The lawyer concluded:

I do believe there is a perception that membership in the NSEA offers value in the area of job security, whether in the form of staff representation in grievances and performance issues, or legal representation in dismissals. The cost of legal fees to go it alone in a dismissal is intimidating

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\(^{82}\) Email from Don Slesnick, Slesnick & Casey and former Chair, ABA Section on Labor & Employment Law to Martin Malin, Oct. 13, 2017.

\(^{83}\) See Martin H. Malin, Does Public Employee Collective Bargaining Distort Democracy: A Perspective from the United State, 34 COMPARATIVE LAB. & POL’Y J. 277, 293 & n.91 (2013) (citing observations of University of Nebraska Professor Steven Willborn).

\(^{84}\) The lawyer said:

Provision of legal assistance in any proceeding is a privilege of membership in the NSEA and subject to the Legal Assistance Policies of the NSEA. Generally, those policies do not contemplate the provision of legal assistance in grievances. Any assistance provided a member in the presentation or administration of a grievance is typically handled by local association officers or NSEA non-legal staff. Legal assistance is generally limited to due process dismissals, professional practices disciplinary proceedings and judicial enforcement of statutory and constitutional rights. In Nebraska, educator disciplinary proceedings are not subject to grievance procedures. Grievances are typically limited in educational employment to disputes arising over economic terms of employment. Reprimands, suspensions and dismissals are subject to statutory criteria and procedures.

Email from Scott Norby, Norby & Wade, LLP, to Martin Malin, Dec. 15, 2017.
and is likely why the statute has never been used to access legal assistance by nonmembers.\textsuperscript{85}

Thus, among Nebraska teachers, the exclusive membership benefit is access to legal representation which is used primarily outside of the collective bargaining agreement’s grievance procedure.

Moving beyond teachers, the evidence from Nebraska is consistent with the evidence from Florida. Wright’s study found that of the 10,247 Nebraska state employees covered by collective bargaining agreements, only 1,573, or 15.4 percent pay union dues by payroll deduction.\textsuperscript{86}

It is understandable that members-only grievance representation may solve the free-rider problem but not solve the collective-action problem. Even when unions may exclude nonmembers from union grievance representation, it likely remains an economically rational decision for union supporters to not become union members. Essentially, union membership provides insurance for the need for grievance representation. The employer decision that is often grievable and poses the greatest threat to an employee’s economic security is the discipline or discharge of an employee. But most employees consider the likelihood that they will need grievance representation to be quite low because they do not perceive a significant risk that they will be disciplined or fired. This would be particularly true for those employees who receive satisfactory or higher performance evaluations. In such circumstances, it is economically rational to forgo paying union fees and, in effect, self-insure against the small risk of needing grievance representation.

Beyond offering at best limited help in dealing with the collective action problem, members-only contract administration has another potential drawback. The line between contract negotiation and contract administration is very blurry. The grievance and arbitration procedures are regarded generally as a continuation of the collective bargaining process.\textsuperscript{87} Having a grievance and arbitration procedure

\begin{thebibliography}{99}
\bibitem{85} Id.
\bibitem{86} Wright, \textit{supra} note \_, at 584.
\end{thebibliography}
enables parties to conclude contract negotiations with general language that will apply to a myriad of situations which defy specification in the collective bargaining agreement and to agree on language even though they disagree on what that language means. Parties defer the refinement of the general language into specific contractual rights to case-by-case negotiation through the grievance procedure with the understanding that if they cannot agree on what their contract means in a given situation they agree to be bound by the interpretation of their mutually selected arbitrator.  

By leaving nonmembers to process their own grievances, a union may be limiting its ability to protect the workers’ collective interests in shaping the refinement of general contact language into specific contract rights. For example, in a grievance over a promotion denial under a relative ability clause which provides that where qualifications of competing candidates are relatively equal seniority shall govern, the individual grievant’s interest is focused on receiving the promotion while the union’s collective interest is also focused on the relative mix of seniority and management-assessed qualifications. The Court recognized this in Janus. “Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate ‘the interests of [an] individual employee ... to the collective interests of all employees in the bargaining unit.”’ Even in Florida, unions will represent nonmembers in grievance processing without charge where a grievance impacts a larger population of the bargaining unit. Members-only contract administration can work a significant inroad on the basic concept of exclusive representation.

Exclusive representation is unique to United States and Canadian labor law. It grows out of the U.S. and Canadian approach

89 Janus, 138 S. Ct. at 2468 (citations omitted).
90 Slesnick email, supra note ___.
of business unionism, as opposed to social democratic approaches to unionism found in western Europe. It recognizes that the bargaining power of the collective is greater than the bargaining power of the individual and comes from the elimination of competition among workers, at least with respect to particular employers, that drives wages and working conditions down. In other words, the legal concept of exclusive representation implements the basic concept of worker solidarity that is at the heart of the union movement.91

Members-only contract administration thus presents a tradeoff between solving part of the free-rider problem and perhaps contributing marginally to solving the collective action problem, and maintaining worker solidarity. Evaluating the tradeoff is best conducted at the local level. Where worker solidarity is high,92 the tradeoff may be worthwhile. The party in the best position to make that decision is the union itself, either through its by-laws or in negotiations with the employer. The best approach for state legislatures is to allow but not mandate members-only contract administration.

B. Cost-Shifting to the Employer

A second approach to the collective action problem involves shifting some or all of the cost of union negotiation and contract administration to the employer. This does not attempt to solve the collective action problem. Rather, it ignores it and substitutes government for the workers as the funding source for the exclusive representative. Shifting costs to the employer already occurs in the federal sector and other open-shop environments. A much more radical version of employer subsidies for unions has been proposed by Professor Aaron Tang. We discuss the existing cost-shifting systems first and the more radical proposal thereafter.

91 Perhaps because of the significant inroad that members-only representation in contract administration may have on exclusive representation and worker solidarity, AFSCME, the American Federation of Teachers, the National Education Association and SEIU, which together represent the lion’s share of public employees, have eschewed it. See supra note ___ and accompanying text.

92 For example, solidarity is generally very high among firefighters because they literally live together at the fire house and because, in performing their job duties they are responsible for each other’s lives.
1. Official Time and Related Forms of Cost Shifting

In maintaining that the experience since *Abood* had demonstrated that agency fees were not required to achieve the state’s interest in labor peace, the *Janus* Court pointed to the experience in the federal sector. The Court posited that despite a prohibition on agency fees, approximately 28 percent of the federal workforce are union members. Professor Samuel Estreicher has estimated that 81 percent of federal government employees covered by collective bargaining agreements pay union dues, a remarkably high rate of membership density in an open shop environment. The Court’s estimate and Professor Estreicher’s are based on data from the Current Population Survey (CPS) and there is good reason to believe that in non-agency fee environments, CPS data greatly overstates union membership density. The Court also cited the number of union members in the Postal Service, where agency fees are prohibited, and alluded to union representation of employees in states which prohibited agency fees.

Conspicuously absent from the Court’s discussion is any recognition that in environments where agency fees are prohibited, many expenses otherwise borne by unions are absorbed by employers. Chief among these subsidies is the provision for employees to perform representation functions on official time, i.e. release time with pay from their regular duties. The Federal Service Labor Management Relations Statute (FSLMRS) requires that union representatives who are also employees of the agency be granted official time for negotiating a collective bargaining agreement, including participation in impasse proceedings. “The grant of official time allows the employee negotiators to be paid as if they were at work, whenever they

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93 *Janus*, 138 S. Ct. at 2466.
95 *Janus*, 138 S. Ct. at 2466 n.1.
96 Estreicher, *supra* note ___, at 286 n.10.
97 *See* Wright, *supra* note ___.
98 *Janus*, 138 S. Ct. at 2466 (citing 39 U.S.C. §§ 1203(a), 1209 (c)).
99 *Id.*
100 5 U.S.C. § 7131(a).
bargain during hours when they would otherwise be on duty.”

However, it does not require the employer to pay employee travel and per diem expenses, although unions may negotiate for that. The FSLMRS further empowers the Federal Labor Relations Authority to require official time for any employee appearing for or on behalf of a union in a proceeding before the Authority. It also authorizes the union and agency to agree on reasonable amounts of additional official time for representation functions.

A federal agency’s duty to bargain with the union representing its employees over official time extends to union proposals that a certain number of employees be granted 100 percent official time to perform representational functions. In large bargaining units, it is common for employees serving as union representatives to be on 100 percent official time. In such cases, employees working full-time representing coworkers, and who in other environments would be full-time employees of the union, perhaps on unpaid leave from the employer, remain active employees of the employer drawing their regular salaries and benefits.

The substantial financial subsidy provided by the employer to the union in the form of official time is not confined to federal agencies. In the Postal Service, unions have negotiated for significant amounts of official time for stewards and other representatives to perform representational functions. It is also common for public

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102 Id. at 449.
104 5 U.S.C. § 7131(c).
105 Id. § 7131(d).
107 See, e.g., Dept. of Labor and Local 12, Am. Fed’n of Gov’t Ees., 12 F.S.I.P. 104 (Jan. 8, 2013); Dep’t of Homeland Sec., Bureau of Customs & Border Protection and Nat’l Treas. Ees. Union, 2010 FSIP 010 (Jan. 10, 2011) (one of the authors – Malin – was the FSIP Panel member who decided this case).
employers in states that prohibit agency fees to agree to paid release time for employees serving as union representatives.109

At least in the federal sector, it is also common for the employer to provide the union with rent-free office space, office furniture and equipment and telephone and internet service.110 Additionally, whereas in most other sectors, collective bargaining agreements typically provide that each party bears its own costs of representation in grievance arbitration and awards of attorney fees are quite rare,111 under the federal Back Pay Act, where an arbitrator finds that an employee-grievant “has been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials of the employee is entitled . . . to receive . . . reasonable attorney fees related to the personnel action.”112


110 See, e.g., Dept. of Homeland Sec., U.S. Coast Guard and Local 3313, Am. Fed’n Gov’t Ees., 12 F.S.I.P 157 (Jan. 11, 2013); Dep’t of Veterans Affairs, 60 F.L.R.A. 479 (2004) (enforcing arbitration award which had found that agency breached its agreement with union concerning union office space); United States Geological Survey, Caribbean District Office, 53 F.L.R.A. 1006, 1039 (holding union office space to be a substantively negotiable condition of employment); Dept. of Health and Human Servs., Region IX and Chapter 212, Nat’l Treas. Ees. Union, 89 F.S.I.P. 157 (Mar. 26, 1990); Dept. of the Army Lexington – Blue Grass Army Depot, 34 F.L.R.A. 247 (1990) (holding that agency breached it duty to bargain by unilaterally terminating the union’s office space).


112 5 U.S.C. § 5596(b)(1)(A)(ii). The act requires that the award of attorney fees be made in accordance with the standards set forth in 5 U.S.C. § 7701(g) which governs attorney fee awards by the Merit Systems Protection Board (MSPB). That section requires that the employee be the prevailing party and that the adjudicator “determine[] that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency’s action was clearly without merit.” In Allen v. U.S. Postal Service, 2 M.S.P.B. 582 (1980), the MSPB detailed a list of situations
Shifting costs of representation from unions to employers does not deal with the collective action problem or the free rider problem. Instead, it ignores these problems and provides a level of financial support to the exclusive representative in spite of the collective action and free rider problems. This approach has many drawbacks. We focus on two of them.

First, shifting the cost of representation from unions to employers makes unions financially dependent on the employers with whom they negotiate and against whom they advocate. It also leaves their financial health vulnerable to changes in the political climate and to elected officials who are opposed to public employee collective bargaining for ideological or other reasons. Recent actions by the Trump Administration illustrate the concern.

Under the FSLMRS, when an agency and its union are at impasse in collective bargaining, either party or the parties jointly may petition the Federal Service Impasses Panel (FSIP) for assistance.\textsuperscript{113} FSIP consist of at least seven members appointed by the President.\textsuperscript{114} The President may remove FSIP members at any time without cause.\textsuperscript{115} FSIP assists the parties in resolving the impasse “through whatever methods and procedures . . . it may consider appropriate,”\textsuperscript{116} and has the ultimate authority to “take whatever action is necessary . . . to resolve the impasse.”\textsuperscript{117} As is common when there is a change in the party occupying the White House, President Trump removed all of the Obama-appointed FSIP members and replaced them with his own

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where an award of attorney fees would be in the interest of justice. The MSPB made clear that the list was illustrative and that awards of attorney fees could meet the interests of justice requirement in other circumstances. The MSPB opined that attorney fee awards would be in the interest of justice where the employer had committed a prohibited personnel practice, the employer’s actions were clearly without merit or wholly unfounded or the employee was substantially innocent of the charges, the employer’s action was brought to harass the employee or to pressure the employee to act in a particular manner, the employer committed a gross procedural violation which prejudiced the employee or prolonged the proceedings and the employer knew or should have known that it would not prevail on the merits. \textit{Id.} at 593.\textsuperscript{113} § 5 U.S.C. § 7119(b)(1). \textsuperscript{114} \textit{Id.} § 7119(c)(2). \textsuperscript{115} \textit{Id.} § 7119(c)(3). \textsuperscript{116} \textit{Id.} § 7119(c)(5)(A)(ii). \textsuperscript{117} \textit{Id.} § 7119(c)(5)(A)(iii).\
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appointees. The Trump appointees made clear their hostility to official time.

In United States Department of Agriculture, USDA Rural Development and AFSCME Local 3870,118 the parties were at impasse over, inter alia, official time. The agency proposed two days per week of official time and the union proposed three days per week. FSIP, however, awarded one day per week, i.e. half of what the agency was willing to provide. It is startling, and may well be unprecedented, that any third-party neutral would make an award outside the parameters of the parties’ final offers. It would have been just as startling had FSIP awarded four days per week. The clear message that FSIP has sent to unions is that, at least with respect to official time, unions should accept whatever the agency has offered because resort to FSIP could result in even less.

FSIP’s apparent hostility to official time is shared by the current President. In Executive Order 13837, President Trump directed that agencies should negotiate official time such that the “union time rate,” defined as the total number of hours of official time in a fiscal year divided by the number of employees in the bargaining unit,119 not exceed one, including official time mandated by the FSLMRS.120 If an agency proposes or agrees to official time that will exceed a union time rate of one, the agency head must report to the President “explain[ing] why such expenditures are reasonable, necessary, and in the public interest, describe the benefit (if any) the public will receive from the activities conducted by employees on such taxpayer-funded union time, and identify the total cost of such time to the agency.”121 The Executive Order prohibits any employee from being on more than 25 percent official time.122 It also prohibits union representatives from using official time to prepare or pursue grievances, including arbitration.123 It prohibits free or discounted use of office space and other government property by the exclusive representative unless the same is available on the same terms to other non-federal organizations.

118 17 FSIP 060 (Jan. 2, 2018).
120 Id. § 3(a).
121 Id. § 3(b)(i).
122 Id. § 4(a)(ii).
123 Id. § 4(a)(v).
for non-agency business, and prohibits reimbursement of employee expenses (such as travel and per diem) incurred in union representation duties. Following the executive order, some agencies evicted unions from offices that they had used for many years. The United States District Court for the District of Columbia enjoined most of the executive order, including the restrictions on official time and office space, as violating the FSLMRS. But many agencies, taking their cue from the executive order, may still bargain for significant reductions in official time and other agency subsidies of union representation, and if they do so, they will bargain with confidence knowing that the FSIP will likely back them up or go even further than they had proposed in limiting official time.

Second, shifting the costs of representation to the employer can substantially diminish the motivation for union officials to engage the workforce and involve them in the union. One of us (Malin) saw evidence of this when he served by appointment of President Obama as a member of FSIP. A few local unions had very low membership density and it appeared that the local leadership liked it that way. Low membership density disenfranchised the bulk of the bargaining unit, leaving the local leaders accountable only to a small number of employees, often their friends, who they could count on to continuously reelect them to their positions where they enjoyed large amounts (sometimes 100 percent) of official time and use of an agency-provided union office with furniture, telephone, computer and other office equipment. By disincentivizing local union leadership from engaging the workforce, shifting the costs of representation to employers can impede workplace democracy and worker solidarity.

124 Id. §4(a)(iii).
125 Id. § 4(a)(iv).
129 See supra note ___ and accompanying text.
A similar criticism has been voiced against agency fees. It is true that the membership density rate is higher in agency shops than it is in the absence of agency fees. In agency shops, the marginal cost of becoming a member, i.e. the difference between full dues and agency fees, is small enough that it is usually a rational economic decision to join and receive the benefits of membership. Agency fees thus enfranchise many workers by leading them to become members and obtain a voice and a vote not only for union officers but also on such important matters as contract ratification. Experienced mediators of collective bargaining negotiations know that concern over whether a particular contract proposal would pass a union membership ratification vote arise frequently in bargaining units in which agency fees are required because the negotiating committee is accountable to the membership. Experience in federal sector mediation, however, suggests that negotiators in the federal sector never worry about whether contract proposals will be ratified by the membership, presumably because so few workers are union members with the right to vote on contract ratification.

2. Collective Bargaining Funds

Professor Tang proposes allowing unions to negotiate that public employers will pay the union directly for the costs incurred in administering a collective bargaining agreement. This alternative, according to Professor Tang, eliminates First Amendment concerns even under strict scrutiny, which appears to be substantially identical to the form of “exacting scrutiny” that the Court applied in

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131 See Hundly, supra note __, at __.


133 Id. at 188-190.
Janus.\textsuperscript{134} Tang addresses concerns that direct reimbursement would lead unions to be less effective in representing employees because of their financial dependence on the employer. He notes that government employers already provide significant benefits like access to workspace, employee time, contact information, and, most significantly, agency fee clauses, which are all financially significant forms of cooperation, so he believes there is no reason to worry that additional support would jeopardize the union’s role as an independent advocate for employee interests. Most importantly, Tang insists that even in a direct reimbursement scheme, the union’s members still direct the union’s activity, so a union would not risk decertification to soft-pedal negotiations.\textsuperscript{135}

Direct reimbursements present possibilities for both more and less funding for unions. But whatever the sum is, it will not be set by the union but by the union and employer jointly or by some third party. Government employers could be expected to insist on reimbursing only certain activities by adopting a narrow definition of “bargaining expenses.”\textsuperscript{136} Tang proposed to address this problem by creating an independent board that reviews union expenses and resolves questions whether they qualify for employer reimbursement or delegate the question to an arbitrator.\textsuperscript{137} That system will only be as good as the independent board, and experience in the federal sector addressing disputes over how much official time union officials may have suggests that it is difficult to depoliticize the amount of money the

\textsuperscript{134} 138 S. Ct. at 2464 (adopting an “exacting scrutiny” test to just the permissibility of compelled subsidies, and under this level of scrutiny “a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms”). Although the Court said this is a “more permissive standard” than strict scrutiny, it is unclear how, as it is a “compelling interest” test. \textit{Id.}

\textsuperscript{135} Tang, \textit{Public Sector Unions} at 215

\textsuperscript{136} Daniel Hemel and David Louk, \textit{Is Abood Irrelevant}, 82 Chi. L. Rev. Dialogue 227, 236 and n. 51. In Executive Order 13837, President Trump attempted to restrict federal sector unions use of official time to exclude grievance processing. \textit{See supra} note \textsuperscript{136} and accompanying text.

\textsuperscript{137} Hemel & Louk, \textit{supra} note \textsuperscript{136} at n. 67 and accompanying text.

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union will receive. Boards would be under significant pressure to reduce payments to unions, especially during budget austerity times.  

A direct reimbursement model would, in essence, turn unions into a form of government contractor. Ethics rules would need to be created to address the obvious possibility of corruption or compromised loyalties. Professor Tang suggests the best analogy is that of indigent criminal defense lawyers who are paid by the government to handle criminal defense, i.e., to oppose the very government that is funding them. The obvious question, which readers will have to consider for themselves, is whether the professional socialization of lawyers and the ethics rules demanding client loyalty could be replicated for public employee union leaders.

A direct reimbursement model suffers from the same drawbacks as the current system of official time and related subsidies. It leaves exclusive bargaining representatives’ financial health vulnerable to changes in the political climate and it can substantially diminish the motivation for local union officers to engage the workforce and involve them in the union, thereby decreasing worker solidarity and workplace democracy. Direct reimbursement has

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138 See supra note ___ and accompanying text (discussing USDA Rural Development and AFSCME Local 3870, 17 FSIP 060 (2018)). Although some statutes provide that one labor board member represents labor and one represents management and another represents the public, all are appointed by the governor. Although it is common for appointees to serve fixed terms and for the governor to be prohibited but firing them (but not always, the President has statutory authority to remove FSIP members at will), there are ways around that. For example, in Illinois it is common for a new governor to get the legislature to amend the statute by abolishing the existing board and then creating a new board which the governor gets to fill completely with his appointees. See 5 ILL. CONSOL. STAT. 315/5(a-5),(b); id. 315/5.1(a), (b)
139 Tang, Life After Janus, supra note ___ at __.
140 Professor Tang might argue that his proposal encourages workers’ engagement with their union much like agency fees as both reduce the marginal cost of union membership. Under Tang’s proposal, unions are reimbursed for their costs of collective bargaining and contract administration, i.e., they are reimbursed in approximately the same amount as they were able to charge non-members under agency fee regimes. Unions may then rebate to their members each member’s pro rata share of the reimbursement, thereby reducing the member’s dues to the difference between dues and agency fees under the agency-fee regime. Arguably, this reduced marginal cost of membership will motivate most workers to pay dues similar to agency fees. But there is a difference. In an agency-fee regime, every employee was required to choose to be a member or a fee payer. Confronted with that choice, most employees opted for full membership. They did so because the
additional drawbacks not present in the official time and related subsidy systems that currently exist.

The history of private sector union corruption and quiescence when unions became dependent on employer payments is not encouraging. It was that history that prompted Congress, to enact section 302 of the Labor Management Relations Act prohibiting employers from paying, lending, or giving money or anything of value to any labor organization. Many states have analogous statutes. While it is clear, as Professor Tang points out, that federal labor law allows an employer to cooperate with a labor organization to some degree, it does not appear to allow for direct payment to a union. Section 302 specifically exempts dues check-off systems from the ban on employer payments, but it does not likewise exempt direct and complete financial support of a union. Professor Sachs concludes that section 302 forbids direct employer payments.

Even states that do not have provisions like section 302 have labor law provisions that prohibit employer domination of or assistance to labor organizations. The NLRA has such a provision in section 8(a)(2), which prohibits employer financial support of any labor organization. Professor Tang cites to a few employer-domination decisions under section 8(a)(2) that differentiate between unlawful support of the union on the one hand and permissible cooperation on the other. But these are cases under section 8(a)(2) where the employer allows union members to use company space and

marginal cost of full membership was low and because that low marginal cost assured them that most of their coworkers would do the same. Under Janus, employees are not required to make any choices. The default is non-membership and employees must affirmatively opt to become members. For that to happen, local union leaders will have to engage workers and educate them about the benefits of union membership and the importance of solidarity. But, experience with official time and other employer subsidies in the federal sector suggests that some, perhaps many, local union leaders, assured of their union’s financial viability due to employer subsidies, will not engage the workers they represent and may see it in their personal interest to keep membership levels low.

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143   Sachs, Agency Fees, supra note ___ at 1056.
resources. Section 302, however, explicitly prohibits employers from paying, lending, or delivering money or anything of value to any labor organization.

In states that forbid employer domination, interference, and assistance (as section 8(a)(2) does) but do not explicitly outlaw direct payments to unions (as in section 302), unions and public employers could bargain for this regime without statutory change if they avoid impermissible employer intrusion in the governance or priority-setting of the labor organization. Tang and Sachs note that member participation is a cure for the possibility of employer domination. It is true that authorities look to a totality of the circumstances to determine whether the employer’s assistance (the lowest level of intrusion of the three categories of influence) threatens the independence of the union, and that some level of cooperation is allowed. But even the inclusion of a direct reimbursement clause in a collective bargaining agreement negotiated at arms-length will not be enough to protect against a claim of impermissible support.

One solution to the section 302 problem is for the state to create a fund that does not constitute a direct payment to the union, but is instead a state fund from which unions may draw. This is the approach that Hawai‘i may take if H.B. 923 becomes law. The Hawai‘i bill would establish a collective bargaining fund that would have allocated to it a minimum amount based on a percentage (not stated in the bill) of the total compensation to public employees. The fund would be disbursed to the union according to the terms of a contract between the union and the state department of budget and finance. The amount would be based on the share of total number of public employees represented by that union, and any money left over in the fund would

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145 Tang at 215 n. 293.
146 Tang at 216 (Tang argues that in both the agency fee and reimbursement systems the employer has the power to threaten the union’s financial security during negotiations, so there is no greater threat for domination in a reimbursement system).
147 Sachs at 1075 (as discussed above, there are other ways to encourage worker participation).
149 Lee v. NLRB, 393 F.3d 491, 497 (4th Cir. 2004) (finding that requiring workers to wear uniforms showing the union and employer logo side-by-side violated the NLRA even though the CBA required both logos).
150 H.B. 923 was introduced in January 2017 and has not made it out of the labor and finance committee.
go to the state’s general fund. The Hawai‘i bill would allow unions to provide other services (not paid by the collective bargaining fund) to employees and would allow unions to charge nonmembers for such services. The bill explicitly states that unions selected by a majority will represent all workers (that is, it retains exclusive representation) but would allow unions to adopt members-only representation at the union’s election.

The creation of a collective bargaining fund likely would draw a constitutional challenge in which the National Right to Work Legal Defense Foundation or similar organizations might argue that the money paid into the fund would otherwise have been paid to the employees as wages and, therefore, the money is still a compelled subsidy by employees to the union. The issue is whether the employee ever had a legal entitlement to the fund payments. Fair share fees are included in wages that in theory are paid to the employee before being immediately deducted from the employee’s paycheck. Professor Tang argues that employees never had “a legitimate claim of entitlement” to the fund payments, unlike the fees deducted from payroll, and therefore there is no compelled subsidy. It would be important, therefore, for the government employer not to offset the cost of reimbursement with reductions in either current employee wages or future increases specified in a collective bargaining agreement. But it would allow the employer to reduce other future pay raises and cut benefits like “turning down the thermostat or putting limits on employee phone usage.”

Apart from the legal obstacles discussed above, there are a number of drawbacks to the direct payment model. One is the possibility that in difficult negotiations the employer could have greater leverage with direct payments rather than with fair share fees and dues checkoff. In part this could be the case because the cognitive distance between a worker and her support for the union is greater when the employer pays, even if the funds originate from future raises

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151 Hawaii HB 923 § 5.
152 Id. at § 6 (stating that a union “need not represent employees who do not pay reasonable costs of representation”).
153 Tang at 207.
154 Id. at 208.
or other discretionary benefits. Tang acknowledges that this arrangement could lead to members being less vigilant about union spending, which could require negotiating annual caps on budget increases based on growth.\footnote{Id. at 218} But it could also be that workers who are not paying dues have less personal economic and psychological investment in maintaining the union and might not be inclined to start paying dues when the employer plays hardball.\footnote{Professor Benjamin Sachs has addressed these concerns in part by suggesting that the alignment of union goals with member values generates union commitment, and that it is possible mandatory fees generate as much resentment as commitment. A direct payment, on the other hand, eliminates the free rider problem along with disgruntled non-supporters, and the union is, of course, still free to charge some level of voluntary dues. Sachs, \textit{Agency Fees, supra note} \_ \_ at 1075.}

Another drawback of government payment is the risk that the fund would be perceived as a political payback to the union that supported the election of the political leaders who decide whether or how much money the government should pay the union. In states in which public support of unions is precarious, a perception that the public is now directly paying for unions could be fodder for legal and political attacks on the system.\footnote{See Hemel & Louk at 243 (framing the political challenge in terms of “political salience” where the perception of who pays a tax has a strong effect on the acceptability of policy proposals despite two regimes being functionally identical).}

Moreover, the argument that taxpayer funds are supporting union activities could be exacerbated by the lack of transparency in how unions govern themselves and fund their operations. Of course, the creation of a government funding system might apply to unions the same kind of transparency and financial accountability rules that are applied to any other government contractor. Alternatively, state equivalents of the federal Labor Management Reporting and Disclosure Act (LMRDA), which are intended to protect members from union corruption, could aid in preventing both actual and perceived union corruption in a government-funding regime. However, only about ten states have enacted laws like the LMRDA.\footnote{Corey Fine & Paul Baktari, \textit{Public Sector Union Democracy: A Comparative Analysis}, 22 J. OF LABOR RESEARCH 391, 392 (2001) (stating that ten states have union democracy statutes like LMRDA, but only Iowa, Montana, Ohio and}
Although not every state has enacted full equivalents to the LMRDA, many have adopted some protections. California is an example. Its several statewide public labor relations laws do not, for the most part, share the transparency, democracy, and anti-corruption provisions of the LMRDA.\(^{159}\) Public employee unions are not required by state law to adopt particular rules governing the election of union officers or dues increases; these are left to union constitutions and bylaws. An important missing protection in the context of direct employer reimbursement is the LMRDA prohibition on the use of union or employer funds for officer election campaigning.\(^{160}\) To the extent this is allowed by public employee union bylaws, an employer under a direct reimbursement model would be directly funding that candidacies of officers they will be negotiating against. California does, however, require financial disclosure from its public employee unions, although the particular requirements vary.\(^{161}\) Organizations affiliated with exclusive representatives are not required to disclose their finances.\(^{162}\)

In sum, any system of direct financial support of unions makes unions dependent on employers rather than on members, with the attendant vulnerability to cost-cutting and corruption. They also can

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Wisconsin statutorily guarantee equal rights to nominate officers, vote in elections and on union business, attend meetings, and participate in decision making. However, every state except South Dakota prohibits both unions and employers from using force or coercion against union members.).

\(^{159}\) See Kristen L. Zerger, et al., CAL. PUB. SECTOR LAB. RELS. Chs. 30-31 (2017) (chapters on organizational rights and obligations under California public sector labor relations laws reveal absence of any laws regulating union financial disclosure, elections, secret ballot, trusteeship, or fiduciary duties analogous to LMRDA).

\(^{160}\) Section 401(g), 29 U.S.C. § 481(g).

\(^{161}\) Under EERA (public school employees), HEERA (higher education employees), and TEERA (transit employees) “employee organizations” that are certified or otherwise recognized must maintain and disclose annually to PERB and employees a report of its financial transactions. Gov. Code § 3546.5 (EERA), § 3587 (HEERA); Pub. Util. Code § 99566.3 (TEERA). Under the Dills Act (civil service employees) and remaining statutes only unions that have in place an agency fee agreement are required to report their spending. Gov. Code § 3515.7(e) (Dills Act), § 3502.5(f) (MMBA), § 71632.5(f) (Trial Court Employees, TCEPGA), § 71814(f) (Trial Court Interpreters, TCIELRA).

\(^{162}\) California Teachers Association, (1981) PERB Order Ad-123, 6 PERC Para. 13020, p. 43 (finding that petitioner could not access the financial information of the California Teachers Association and the National Education Association even though his local chapter is affiliated with those organizations).
reduce incentives for union leadership to engage bargaining unit members in their representation and thereby reduce internal union democracy. We do not recommend it as an answer to the collective action problems engendered by the decision in *Janus*.

**C. The Open-Enrollment Model of Restricting Resignations**

Public sector unions are currently struggling with the question whether *Janus* means that any union-represented employee can join or, more important, resign from, the union at any time. The possibility that employees will resign at any time makes budgeting extremely difficult because a union requires a predictable budget to gauge staffing, and staffing dictates the kinds of services the union can offer to its members and represented nonmembers. Moreover, to the extent that unions respond to the collective action problem by providing financial incentives to members that are not available to nonmembers (such as additional health insurance or disability insurance or, as suggested by *Janus*, free representation in grievances), if employees can join and quit the union at any moment, there will be a huge adverse selection problem. People will join the union only when they need the service it provides and will resign the union whenever the need for services ends. This kind of adverse selection problem has been known to insurance companies for decades and explains why they, and employers that contract with insurers, restrict the ability to enroll in or drop life, health, accident, and other kinds of insurance.

The proponents of the *Janus* rule insist that *Janus* means employees can resign at any time.163 That approach appears to have been adopted in some jurisdictions.164 But other jurisdictions have

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164 For example, in Memorando Especial Conjunto Num. 2018-02, dated July 18, 2018, the Puerto Rican government determined that *Janus* requires public employee union members to be able to resign their membership at any time by completing and
borrowed from the model of insurance and are treating resigning from union membership like open enrollment: people get a window once a year to elect coverage. Once they make their election, they cannot opt out of coverage.

New Jersey amended its public sector labor relations law in May 2018 in anticipation of Janus. The New Jersey statute takes two approaches to the collective action problem. One is discussed in Part IV below: it enhances union access to employees to discuss the benefits of unionization. The other approach is intended to promote financial stability of unions by regulating when and how employees can revoke their authorization for dues deduction.

The New Jersey statute repeals a provision allowing employees to revoke their authorization of payroll deduction at any time and instead provides a ten-day window each year during which revocations may be made. The law provides: “Employees who have authorized the payroll deduction of fees to employee organizations may revoke such authorization by providing written notice to their public employer during the 10 days following each anniversary date of their employment. Within five days of receipt of notice from an employee of revocation of authorization for the payroll deduction of fees, the public employer shall provide notice to the employee organization of an employee’s revocation of such authorization. An employee’s notice of revocation of authorization for the payroll deduction of employee organization fees shall be effective on the 30th day after the anniversary date of employment.” N.J.S.A. 52:14-15.9e (eff. May 18, 2018)

The New Jersey approach is financial stability and predictability. As noted above, it applies to unions the same rules that are applied to health insurance and other employee filing a “Solicitud de Desafiliacion del Representante Sindica,” which will terminate the payroll deduction of union dues or agency fees.

165 Hawai’i adopted a similar approach, requiring notice 30 days before the anniversary of an employee’s dues deduction authorization to revoke the authorization. HI H.B. 1725HD2 (signed by the Governor Apr. 24, 2018). California, Delaware and New York allow the union to specify in the dues deduction authorization the window during which it may be revoked. Cal. S.B. 866 (signed by the Governor June 27, 2018); Del. H.B. 314 (signed by the Governor May 19, 2018) (amending DEL. CODE tit. 19 § 1304); N.Y. CIV. SERV. L. §208(b)(i).
benefit plans: workers get a once a year opportunity to make an election about whether to sign up and then they cannot change their mind during the year. The once-a-year open enrollment rule is a mandate of the Affordable Care Act, Medicare, and other benefits programs. If the courts were to treat compelled payments to employee benefits plans or Affordable Care Act plans as being speech as it treats fair share fees as speech, presumably treating a union dues election like an employee benefits election would raise no more or fewer First Amendment issues.

But the New Jersey law is vulnerable to the same argument about compelled speech and association that brought down fair share fees. As critics of the Supreme Court’s fair share fee jurisprudence have observed, the Court has perceived more First Amendment content in union membership and union fees than it has in compulsory bar membership and dues for lawyers or student activity fees for public university students. And it has not yet determined whether compulsory payments of other sorts – such as health insurance and other employee benefits, homeowners association dues – raise any First Amendment issues at all.

The open enrollment approach to union membership does not solve the collective action problem. For example, it does not give new employees any reason to join the union. Indeed, by making exit difficult, it may deter employees from joining in the first instance.

IV. Strategies to Address the Collective Action Problem that Rely on Strengthening Solidarity

As discussed previously, the free-rider problem arises when an employee declines to join the union to get something valuable (union representation) for nothing. The collective action problem, in contrast, arises because an employee who supports the union makes a rational decision not to join because the impact of the individual employee’s membership on the union’s activities that the employee supports will

168 See McCahon v. Penn. Turnpike Comm’n, 491 F. Supp. 2d 522, 527 (M.D. Pa. 2007) (granting preliminary injunction against enforcement of a maintenance of membership provision in a CBA that allowed members to resign from union only during a 15-day window prior to expiration of a three-year CBA, reasoning that the term compelled membership in violation of the First Amendment).
be minimal. Membership becomes economically rational when the employee is assured that most coworkers will also join the union. Here we explore several systems that might address the collective action problem by removing the incentive not to join and creating incentives to join.

A. Treating Fee Objectors Like Religious Objectors

Agency fees solved the collective action problem by assuring union supporters who joined the union that their coworkers would have no financial incentive not to join so that any refusal to join was limited only to matters of conscience, not cost savings. Janus found the agency fee to be compelled speech because of the political nature of public employee bargaining. But what if employees were free to make their payments to another organization that engaged in speech they favored? That would eliminate the financial incentive not to join while also not compelling employees to subsidize the speech of an organization they oppose. The NLRA and many states already have such arrangements for people who have religious objections to unions.169

Agency fees deal with the free-rider problem by preventing employees from getting something for nothing. However, they also deal with the collective action problem by making the marginal cost of union membership small,170 such that it becomes an economically rational decision for an employee to decide to join the union, as the benefits of union membership outweigh the low marginal cost. Economically rational employees are assured that if they join the union their economically rational coworkers will likely also join. After Janus, the marginal cost to a State of Illinois employee of joining AFSCME is approximately $56 per month, the full amount of union

169 In an op.ed. anticipating the outcome in Janus, Professor Samuel Estreicher suggested unions consider such an approach. Samuel Estreicher, How Unions Can Survive a Supreme Court Defeat, BLOOMBERG OPINION (May 2, 2018), https://www.bloomberg.com/view/articles/2018-03-02/how-unions-can-survive-a-supreme-court-defeat. We analyze this approach in detail below and reject it.
170 In Janus, the agency fee was 78.06% of union dues, 138 S. Ct. at 2461, which amounted to $44.58 per month. Id. Thus, the marginal cost of union membership was $12.43 per month.
dues, making it an economically rational decision again for even union supporters to refrain from joining.

The question arises whether, after Janus, there are ways to reduce the marginal cost of union membership. The treatment of religious objectors to union fee payments provides one approach worth exploring.

Under Section 19 of the NLRA, added in 1974, employees who have bona fide religious objections to joining or financially supporting a labor organization may not be required by a collective bargaining agreement to pay a union fee. The exemption extends to “any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations.” Employers and unions may agree to require such religious objectors “to pay sums equal to such dues and initiation fees to a nonreligious nonlabor organization” that is a tax exempt organization under section 501(c)(3) of the Internal Revenue Code. The organization can be chosen from a list of at least three agreed upon by the union and the employer or, if there is no such list, to any such organization chosen by the employee. As the majority in Janus observed, apparently favorably, religious objectors can be required to pay the union’s cost of handling their grievances.

Congress added section 19 in 1974 when it amended the NLRA to cover health care employers, many of which were affiliated with the Catholic Church or other religions. As the amendment was originally written, only health care employees could be religious objectors. When Congress extended the religious exemption in 1980 to apply to all employees, it added the language about charging for grievance

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172 NLRA section 19 says “If such employee requests the labor organization to use the grievance-arbitration procedure on the employee’s behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure” The Janus majority quoted similar language from California public sector labor law and also cited a similar provision in Illinois’ public sector law. 138 S. Ct. at 2469 n.6 (citing Cal. Govt.Code Ann. § 3546.3 (West 2010); Ill. Comp. Stat., ch. 5, § 315/6(g) (2016)).
174 A court has suggested that Congress extended the religious objector exemption to all employees in order to reconcile it with the employer’s duty to accommodate
handling. An earlier version of what became Section 19 did not include the sentence about paying the union for the cost of using the grievance-arbitration process.

The religious objector system solves the collective action problem. Because religious objectors still have to pay an amount equal to dues it remains a rational economic decision for employees to become union members. The religious objector system removes the financial incentive to shirk while not forcing an employee to subsidize an organization of which the employee disapproves. In a sense, it is like obtaining conscientious objector status from military service; the objector is not forced to engage in conduct that violates his conscience but also does not get off without having to do something. Because the employer does not dictate what speech the nonmember must subsidize, it avoids the constitutional problem of Janus. May it be expanded to require that any employee who opts not to join the union to pay an amount equal to union dues to a tax-exempt charitable organization?

One option for consideration is to require nonmembers to contribute an amount equal to union dues to a 501(c)(3) organization that the nonmember would select from a list agreed to by the union and the employer, as is done under the NLRA for religious objectors.
Would this requirement avoid the constitutional problem of *Janus*? Nonmembers might object to every organization on the list but compelling persons to financially support speech with which they disagree does not always violate the First Amendment. Such was the holding in *Board of Regents v. Southworth.*\(^{179}\)

In *Southworth*, the Court held constitutional a mandatory student activity fee imposed by the University of Wisconsin even though the fee subsidized student groups who presented speakers and programs with political and ideological content that the fee payers found offensive. As with agency fees, the complaining students were forced to subsidize the expressive activities of third parties with whom they disagreed. The Court found the fees constitutional, provided that funds were allocated to student groups in a manner that was neutral with respect to the viewpoints expressed by those groups.\(^{180}\) If the organizations eligible to receive the nonmembers’ payments are selected in a viewpoint-neutral manner, the required payments might be considered constitutional by analogy to *Southworth*.

But the analogy may not hold. In *Southworth*, the student groups had to apply for funding and the university evaluated their applications without regard to political or ideological viewpoint.\(^{181}\) In the approach discussed here, the union and employer jointly would select the organizations from which the nonmembers would choose the recipients of their payments. There may not be a practical way to assure that the selections are done in a viewpoint-neutral fashion.\(^{182}\) And even if the selections are made in a viewpoint neutral fashion, they may still result in a list of organizations all of which are opposed by the nonmember. This concern could be resolved by allowing nonmembers to designate any 501(c) (3) organization to receive their payments. Under that approach, nonmembers are not compelled to subsidize any organizations with which they disagree.

\(^{179}\) 529 U.S. 217 (2000). The opinion was written by Justice Kennedy who was part of the majority in *Janus*.

\(^{180}\) *Id.* at 233-34.

\(^{181}\) *Id.* at 223-24.

\(^{182}\) In *Southworth*, the Court remanded for consideration of whether an alternative approach to the application procedure whereby a student organization could obtain finding through a student referendum operated without in a viewpoint neutral manner. *Id.* at 235.
But the analogy to Southworth still may not hold. The nonmember may complain about being compelled to subsidize any organization. The answer to such a complaining student in Southworth was the overall purpose of the student fee program, which was to give “students the means to engage in dynamic discussions of philosophical, religious, scientific and political subjects in their extracurricular campus life outside the lecture hall.” The answer to a complaining nonmember of the union is that the purpose of the compelled payment is to make it an economically rational decision to join the union, i.e. to encourage membership in the union. The Janus majority was transparent in its hostility to public sector collective bargaining.

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183 Id. at 233.
184 For example, the majority opinion described Illinois’ budget problems, poor credit rating, and allegedly unsustainable pension and healthcare costs at considerable length, attributing them to public employee collective bargaining agreements and suggesting that “employment-related debt is squeezing core programs in education, public safety, and human services, in addition to limiting the State’s ability to pay its bills.” 138 S. Ct at 2474 (internal punctuation omitted).

During oral argument, Justice Kennedy made clear that his antipathy to public employee collective bargaining drove his thinking about the case:

MR. FRANKLIN [Solicitor General of Illinois]: You know, the state’s interest here, if I can spend just a few moments talking about that, is, first, we have an interest in dealing with a single spokesman for the -- for the employees. Second, we have an interest in imposing on that spokesman a legal duty to represent everyone. But as regards agency fees, they are complementary to those first two interests. They serve our managerial interests in two ways. First, they allow us to avoid a situation where some employees bear the cost of representing others who contribute nothing. That kind of two-tiered workplace would be corrosive to our ability to cultivate collaboration, cohesion, good working relationships among our personnel. Second, independent of that, we have an interest at the end of the day in being able to work with a stable, responsible, independent counterparty that’s well-resourced enough that it can be a partner with us in the process of not only contract negotiation—

JUSTICE KENNEDY: It can be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion, against – for teacher tenure, for higher wages, for massive government, for increasing bonded indebtedness, for increasing taxes? That’s – that’s the interest the state has? . . . Does it blink reality to deny that that is what is happening here?

Janus v. AFSCME, No. 16-1466, Oral Argument Transcript, pp. 46-47 (Feb. 26, 2018), archived at
Even if a requirement that nonmembers pay an amount equal to union dues to whatever 501(c)(3) organization they wish survives constitutional attack, it may not solve the collective action problem. Nonmembers could simply pay the money to charitable organizations to which they would have donated anyway. Any employee who would have donated an amount equal to or greater than union dues to a charitable organization may thus avoid paying dues by making the donation the employee would have made anyway. Under these circumstances, it may remain a rational economic decision for even a union supporter to decide not to join the union and pay dues.

A variation on the religious objector analogy comes from Portsmouth, New Hampshire. Even when agency fees were lawful, the Portsmouth School Board and the Portsmouth Association of Teachers did not require them. Instead, their collective bargaining agreement required nonmembers to make a contribution equal to union dues to a fund which provided scholarships for Portsmouth high school graduates in the name of the union.185

The Portsmouth provision might be subject to constitutional challenge under Janus because it arguably discriminates against nonmembers by requiring only them to contribute to the scholarship fund.

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185 The Agreement between the Portsmouth School Board and the Association of Portsmouth Teachers (effective July 1, 2014 – June 30, 2018) provides in Article 3:

It is recognized that the negotiations for, and administration, of the AGREEMENT entails expenses which appropriately should be shared by all employees who are beneficiaries of this AGREEMENT. To this end, if an employee in the bargaining unit does not join the ASSOCIATION, such employee will, as a condition of employment by the BOARD, execute an authorization for the deduction of a "representation fee" which shall be a sum equivalent to membership dues and assessments required to be paid by members of the ASSOCIATION, which sum shall be retained for a scholarship fund. The committee to award the scholarship shall be made up of two administrators, two members of the ASSOCIATION, and one member of the "representation fee" group. The scholarship shall be given in the name of the ASSOCIATION OF PORTSMOUTH TEACHERS. The ASSOCIATION agrees to indemnify and defend the BOARD, the Portsmouth School District and SAU, the City of Portsmouth and any employee, official, agent, representative or attorney of any such entity from any claim arising out of or in any way connected with the "representation fee."
fund and because the scholarships are given in the name of the union, thereby, arguably, compelling nonmember association with the union. But this problem could be addressed if the provision were modified very slightly. Rather than requiring only nonmembers to support the scholarship fund, the parties could agree to create an independently administered scholarship fund. The fund could, for example, provide scholarships to any eligible graduate of the district’s high school, and require all employees, not just nonmembers, to support the scholarship fund. The union as a benefit of membership could reimburse its members for the required contributions.

Compelled subsidization of a scholarship fund is not compelled subsidization of expressive activity. Thus, this variation on the Portsmouth approach may have a better chance of surviving post-\textit{Janus} constitutional attack. It may still be vulnerable, however, because its purpose remains to encourage membership in the union. Nevertheless, a school district certainly has a legitimate interest in providing scholarships for its graduates to further their education and requiring teachers to fund those scholarships sends a positive message to students and parents that the teachers are personally invested in their students’ success. The encouragement of union membership stems not from the requirement that all teachers contribute to the fund but from the union’s decision to reimburse its members as a benefit of membership. This approach still has its limitations. Extending it beyond teachers will be a challenge and extending it to employers other than school districts will be particularly challenging as the parties will have to come up with a purpose for the charitable fund to which employees will be required to contribute that is related to the particular employer’s mission.

B. Arbitration Process Fees

Another alternative would not completely solve the collective action problem, but would ameliorate it. Collective bargaining agreements provide employees with numerous benefits. One of those benefits is access to a grievance procedure that culminates in arbitration. Arbitration is not a free forum. In every arbitration, the parties incur the costs of the arbitrator’s fee and, where applicable, travel expenses. Other costs depend on how the parties proceed. If they
select their arbitrator by obtaining a list from an outside organization, such as the American Arbitration Association or the Federal Mediation and Conciliation Service, they may have to pay a fee for the organization’s services. Depending on where they hold the hearing, they may incur costs for renting the hearing room. If they decide to use a court reporter, they will incur court reporter fees. Typically, the collective bargaining agreement will provide that the employer and the union will be equally responsible for these costs of the proceeding.186

We suggest that the parties treat grievance arbitration as they do other employment benefits by having the employer and the employees share in the costs. For example, health insurance is an employee benefit that in most cases has cost sharing, with the employer paying a certain percentage and each employee paying the rest. When an employer self-insures, as most other than very small employers do, each year costs are projected, based in large part on the experience in prior years, and “premiums” are derived from these projections.187 Public employers who self-insure maintain separate funds into which the employer’s share and the employees’ share of the “premiums” are deposited. Money is taken from these funds to pay claims.

Similarly, the employer could project anticipated arbitrator fees and related costs for the coming year and deposit 50 percent of that amount into a separate fund. Employees in the bargaining unit would be assessed their pro rata share of the other 50 percent with, like health insurance premiums, the money withheld from their pay and deposited into the fund. As arbitrators’, court reporters’ and other bills are submitted, they would be paid from the fund. Each year the costs will be projected and new assessments made based on those

186 See Elkouri & Elkouri, supra note ___, at 1-14 to 1-15. Occasionally, an agreement will provide that the losing party pays the entire fee of the arbitrator. Id. There are other variations as well. See, e.g., Internal Revenue Service and National Treasury Employees Union, 2016 National Agreement Art. 43, § 4(A)(1) (providing for each party to pay 50% of the arbitrator’s fees and expenses unless the grievant substantially prevails in which case the employer pays 75%).

187 We placed premiums in quotation marks because these are not payments made to an insurance company; instead they represent each employee’s pro rata cost of the projected costs of the benefit for the coming year.
projections. The union, as a benefit of membership, could reimburse its members’ payments to the arbitration fund.

Alternatively, employers could charge all employees who resort to arbitration an arbitration process fee. The union would pay the fee for its members, and those employees who choose not to join would have to pay the fee themselves.\(^{188}\)

We believe this approach is likely to survive constitutional challenge under *Janus*. Arbitrators, court reporters, hearing room providers and arbitrator-appointing organizations are not engaged in First Amendment protected expressive activity, regardless of whether the advocates representing the union and the employer may be. We discuss unions’ providing members-only benefits below, but we believe there is no basis for attacking the union’s reimbursement of member payments as a benefit of union membership just as there

\(^{188}\) There has been considerable controversy in the non-union sector where some employers have, as a condition of employment, required their employees to agree to arbitrate any claims they may have arising out of the employment relationship and to be responsible for half of the arbitrator’s fee. The Supreme Court has recognized that such fee-splitting requirements could act as a barrier to an employee’s ability to effectively vindicate statutory rights in the arbitral forum and, when it does, such fee-splitting requirements will not be enforced. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000). At one time, the D.C. Circuit held that to be enforceable, employer-imposed arbitration mandates must provide that the employer would be responsible for the entire arbitrator fee. Cole v. Burns Int'l Protective Servs., 105 F.3d 1465 (D.C. Cir. 1997). Although the holding of *Cole* has been superseded by the decision in *Randolph*, the American Arbitration Association requires that employers using its services agree to pay the entire arbitrator fee. See American Arbitration Ass’n, Employment/Workplace Fee Schedule § v (Oct. 1, 2017), [https://adr.org/sites/default/files/Employment_Arbitration_Fee_Schedule.pdf](https://adr.org/sites/default/files/Employment_Arbitration_Fee_Schedule.pdf).

Our proposal differs significantly from non-union employer-imposed mandates that employees share the costs of arbitration of their individual claims. We do not propose that individual grievants be assessed half of the arbitrator’s fee and related costs. Rather, we propose that all employees in the bargaining unit be assessed their pro rata share of one-half the projected costs of the negotiated benefit of access to grievance arbitration. The union would cover the assessments made on its members by direct payment or reimbursement. For example, assume in a bargaining unit of 500 employees, the parties project that there are likely to be ten arbitrations in the coming year with arbitrator fees and related costs estimated to be $6,000 each, for a total projected cost of $60,000. Each employee in the bargaining unit would be assessed a pro rata share of half the cost, in other words $30,000 ÷ 500 = $60.00, with the union covering the $60.00 assessment for each of its members. Our proposal does not provide for the ten grievants whose cases are arbitrated to be responsible for $3,000 each, i.e. half of the fees incurred in each grievance.
would be no basis for nonmembers to attack a union should it decide as a benefit of membership to reimburse some of each member’s hearth insurance premiums.\footnote{Treating the arbitration process the same way as other employee benefits with cost sharing between the employer and the employees may facilitate a system of members-only grievance representation. In such a system, non-members would have access to the grievance and arbitration procedures but would have to pay the union to represent them or provide, and pay for, their own representation and related costs, including their share of the arbitrator’s fee. Arbitrators may be reluctant to accept appointments in such cases because of insecurity concerning eventual payment by the non-member. Having the arbitrator paid from a fund to which the employers and employees contribute solves that problem and makes the arbitration procedure more accessible for self-funded non-members.}

The degree to which this approach will ameliorate the collective action problem will vary depending on the size of the bargaining unit and the number of grievances generated in the unit. In small bargaining units with few grievances the employee’s assessed costs will be minimal, perhaps even zero. However, the collective action problem is least likely to arise in small groups.\footnote{See OLSON, supra note 2, at 22.} In larger bargaining units, which can have thousands and in some state-wide units tens of thousands, of employees and many grievances, the arbitration costs are likely to be substantial and assessing employees their pro rata share of half of those costs with the union reimbursing its members for those assessments will contribute to making union membership a rational economic decision.

An arbitration process fee addresses the collective action problem by assessing each individual employee for the pro rata share of the costs of a collective good for which the union negotiated and providing a members-only benefit of reimbursement of that assessment. On a more general level, unions may provide members-only benefits that will further incentivize workers to join and assure them that because membership is an economically rational decision, their coworkers will also join. We address this in the next section.

C. Members-Only Benefits

One way to deal with the collective action problem is for unions to provide benefits that increase the value of union membership and thereby make it a rational decision for employees to join and pay
dues. The suggestion above that employers assess employees their pro rata share of one-half the costs of the arbitration forum and unions reimburse their members for the assessment is one way of increasing the value of union membership.

Unions provide a range of benefits to their members funded through union dues and, presumably where costs warrant, by additional individual contributions to defray the cost of the benefits. These include supplemental benefits such as disability insurance, free legal representation, liability insurance, maternity benefits, and so forth. Indeed, many of the benefits that are now provided by nonunion employers unilaterally, or in unionized sectors through jointly-trusteed Taft-Hartley funds, were once provided by unions only to their members, including health and death benefits, funeral costs, and so forth. One possible strategy for unions in a post-Janus world would be to go back to that, and to do more of it. For example, the California Teachers Association (CTA) provides a wide array of benefits to its members only.

In Bain v. California Teachers Association, four dues-paying members of CTA sued, alleging that their First Amendment rights were violated because they were coerced to become members because the union provided benefits directly to members only, rather than through collective bargaining.191 Those benefits included “disability insurance, free legal representation, life insurance, death and dismemberment benefits, and disaster relief,” as well as “maternity benefits.”192 They also challenged the union rules that limited voting in union elections to members. The court dismissed the case for want of state action.193

The First Amendment argument seems weak, under current law, because many membership organizations – automobile clubs, health clubs, and so forth -- provide benefits only to those who join and pay dues or other fees to defray the cost of service. A more substantial argument might be that a union breaches the duty of fair

191 156 F. Supp. 3d 1142 (C.D. Cal. 2015), appeal dismissed as moot, 891 F.3d 1206 (9th Cir. 2018).
192 Id. at 1147.
193 Id. at 1153.
representation by choosing to provide benefits only to dues-paying members rather than to negotiate with the employer to provide benefits to all represented workers. The duty of fair representation (DFR) is "coextensive with the statutory powers" of a union as the exclusive representative of an employee unit. Because this system of representation necessarily subordinates some interests of an individual employee, the duty protects workers under a collective bargaining agreement from arbitrary or discriminatory decisions. Among the impermissible bases of discrimination are distinctions based on union-membership. But the duty is applicable only to matters in which the union "uses a power which it alone can wield," meaning it does not extend to matters where the employee can elect her own representative.

With respect to public teachers, the structure of California statutes allows unions to provide members-only benefits while avoiding DFR claims in some cases. For example, it may not violate the duty of fair representation if a union declines to represent a nonmember in a proceeding under statutory just case protection because the protection does not arise under the contract and the union does not control access to the proceeding.

Certain disability benefits present a closer question because of the structure of the state paid disability leave insurance regime. The California Unemployment Insurance Code section 710.4 allows a school district to elect whether to become an employer covered by the paid family leave law. The plaintiffs in Bain alleged that the California Teachers Association and its affiliates decided not to negotiate for school districts to elect to become covered under the state system so that the unions could provide the benefits directly to their members only. The statutory regime, they alleged, "gives unions a veto over

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194 Am. Fed’n of Gov’t Ees. v. FLRA, 812 F.2d 1326 (10th Cir. 1987).
196 Am. Fed’n of Gov’t Ees, 812 F.2d at 1328; see also Nat’l Treas. Ees Union v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986) (holding the union did not violate the duty of fair representation in declining to represent an employee seeking statutory relief under the Civil Service Reform Act for an adverse employer action); cf. Del Casal v. Eastern Airlines, 634 F.2d 295 (5th Cir. 1981) (holding the union violated the duty of fair representation by not representing a non-union member in his dismissal grievance).
teachers’ participation” in state disability insurance and paid family leave programs.198 Although the plaintiffs in Bain did not bring a duty of fair representation claim, their First Amended Complaint allegations regarding the union’s decision to provide benefits itself rather than negotiate for the school district to provide them has the same theory – the union is discriminating against nonmembers.199 Framed as a duty of fair representation claim, their theory might fail on the grounds that a union’s decision to negotiate for benefits that protect some more than others is generally subject to the deferential “wide range of reasonableness” standard, even when the line the union draws benefits union supporters more than opponents.200 The Bain plaintiffs argument may prove too much as any union could negotiate for an employer to provide a benefit (such as a legal services plan or life insurance, or death and dismemberment insurance) that the union could also provide itself. Indeed, the history of unions reveals that unions once provided almost all benefits directly to their members and only began to negotiate for employer-provided benefits in the mid-twentieth century. On the other hand, if the focus is on the ability of the union to prevent all teachers from accessing certain state programs and choosing instead to provide those benefits itself only to union members for the purpose of inducing teachers to join, a court might find the decision unreasonable. The CTA could certainly argue, though, that teachers can still access disability and paid family compensation through other means.

To sum up, in most cases it appears that unions can provide significant benefits without fear of violating the DFR. But when it alone is the gatekeeper to a particular service, courts may feel more pressure to forgo deference and scrutinize the unions’ decisions.

Unions negotiate benefits which individual employees are unable to enjoy on their own. An example is firefighter duty trades. Firefighters usually work 24-hour shifts followed by 48 hours off. In a given firehouse, there will be three shifts that rotate the days that they work. A benefit that firefighter unions frequently negotiate for is the

198 2015 WL 5968435 at ¶ 45, 69.
199 2015 WL 5968435 at ¶ 69.
200 See, e.g., Air Line Pilots Ass’n v. O’Neill, 499 U.S. 65, 66 (1991) (finding that a union has a “wide range of reasonableness” in which to act).
right to trade shifts with a fellow firefighter of equal rank. Of course that benefit is worthless unless a firefighter desiring a particular day off is able to find another firefighter to trade with. Firefighter union leaders with whom we have spoken have said that it is likely if a firefighter resigns from the union or a new firefighter declines to join, the other firefighters will refuse to trade shifts with the nonmember. Although the union does not coordinate such duty trades, the operation of duty trades in the fire service suggests possible analogous benefits where unions may provide a coordination role for their members only.

One such benefit is sick leave banks. In a sick leave bank, employees may donate their unused sick leave to the bank. In exchange, they get the ability to draw sick leave from the bank if they face a lengthy illness and have insufficient personal sick leave to cover it. Many employers are reluctant to agree to sick leave banks because of the costs to the employer of coordinating them. But what if the parties agreed to sick leave banks provided that the employer did not have to administer them. They could provide for sick leave banks administered by groups of employees and set a minimum number of employees for a group to have, setting it at whatever number they determined is necessary for the group to be viable. Unions could then offer coordinated sick leave banks as a benefit of membership. Alternatively, they could offer participation in their sick leave banks to all employees but charge an administration fee to nonmembers who wish to participate. Such administrative fees would be consistent with the Janus Court’s apparent approval of union’s conditioning grievance representation of nonmembers on the nonmember paying for the costs of such representation. They would also be consistent with the service fees that unions charge nonmembers for use of their hiring hall referral services which have been uniformly upheld.

Depending on the type of employee, unions may find other benefits to offer their members which will contribute significantly to making membership an economically rational decision. In

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201 See Janus, 138 S. Ct. at 2468-69.
202 See Simms v. Local 1752, Int’l Longshoremen Ass’n, 838 F.3d 613, 619 (5th Cir. 2016) (stating that “it is settled law that hiring halls can require non-union members to pay a reasonable fee.”).
203 For example, a coalition of the Chicago District Laborers Council, IUOE Locals 150 and 399, the Chicago Regional Council of Carpenters, and International
Nebraska, it appears that free legal services for members plays a role in Nebraska teacher unions’ membership density.204 Free legal services also plays a role in law enforcement union membership density. Unlike typical employees who likely discount the value of free representation in grievance proceedings,205 law enforcement officers face the peril of needing legal representation every day on the job. For example, they cannot predict when they may become involved in an officer-involved shooting which leads to an automatic investigation. Officers facing such investigations are exposed not only to potential discipline or discharge but also civil and criminal liability. They need legal representation in such investigations and law enforcement unions generally provide it as a benefit of membership. Law enforcement union leaders with whom we have spoken cite this benefit as contributing to their high levels of membership density.

D. Addressing the Collective Action Problem Through Solidarity and Educating New Employees as to Why It is an Economically Rational Decision to Join the Union

As detailed in Janus, a new State of Illinois employee can save more than $600 per year by deciding not to join AFSCME. Unless educated about the benefits of membership and the level of membership solidarity in the bargaining unit, most will make what will appear to them to be an economically rational decision and elect to not join and save the money. Recognizing this, several states have reacted to Janus by amending their public employee collective bargaining laws by requiring employers to notify exclusive bargaining representatives promptly of the names and contact information for new members of the bargaining unit (either new hires or transfers).206 They also require


204 See supra notes ___ and accompanying text.

205 See supra notes ___ and accompanying text.

206 See, e.g. CAL. GOV’T CODE § 3558; Md. H.B. 811 (eff. July 1, 2018); Md. H.B. 1017 (eff. Oct. 1, 2018); N.J. STAT. ANN. 34:13A-5.13(c); N.Y. CIV. SERV. L. § 208(4)(a).
employers to afford union representatives time to meet with new bargaining unit members during the members’ regular working time, i.e. on the clock.207

These statutes deal with the collective action problem by enabling exclusive bargaining representatives to emulate, in some respect, smaller organizations. Collective actions problems are less likely to arise in small organizations. Individuals are more likely to perceive their contributions to small organizations as having a noticeable effect. Additionally, small organizations are likely to develop social norms against shirking and supporting group solidarity. As Olson recognized, social pressures and social incentives work best in small groups where members have face-to-face contact.208

As discussed previously, firefighter unions tend not to have collective action problems because firefighters literally live with each other in the same firehouse, their lives depend on each other when they are performing their job duties and they enjoy benefits that require group solidarity, such as duty trades and meal pools. The combination of social norms and incentives felt at the level of the individual firehouse accounts for the high level of solidarity even in large urban fire departments. Large fire departments with social incentives felt at the level of the individual firehouse exemplify what Olson referred to as a “‘federal’ group – a group divided into a number of small groups, each of which has a reason to join with others to form a federation representing the large group as a whole.”209 Olson urged that federal groups were the one type of large organization where special incentives could overcome the collective action problem because “small constituent organizations . . . may be induced to use their social incentives to get the individuals belonging to each small group to contribute toward the achievement of the collective goals of the whole group.”210

207 See, e.g. CAL. GOV’T CODE § 3556; Md. H.B. 811 (eff. July 1, 2018); Md. H.B. 1017 (eff. Oct. 1, 2018); N.J. STAT. ANN. 34:13A-5.13(b)(3); N.Y. Civ. Serv. L. § 208(4)(b); Rev. Code Wash. § 41.56.037.
208 Olson, supra note 2, at 61-62.
209 Id. at 63.
210 Id.
Statutes that require that exclusive bargaining representatives be notified of new members of the bargaining unit and be afforded the opportunity to meet with new unit members on the clock can afford those unions the opportunity to develop some of the attributes of small organizations even in statewide bargaining units with thousands of members. Indeed, they can help turn such large bargaining units into federal groups. Contact with the new employee should come from a local union representative who is also a coworker. The representative/coworker can educate the new employee about the importance of his $600 in annual dues, the benefits of union membership and why it is an economically rational decision to join. Such meetings at the start of employment and regularly thereafter will socialize employees into the local group with its norms of solidarity so that the new employee does not perceive that $600 is going to a large faceless organization where it has virtually no impact.\(^{211}\)

It is likely that these new statutory provisions will be challenged by opponents of public sector collective bargaining. Those challenges should be summarily rejected.

The *Janus* Court recognized that the status of exclusive bargaining representative confers benefits including “obtaining information about employees” which the Court cited favorably in explaining why the duty to represent nonmembers did not justify charging nonmembers agency fees.\(^{212}\) Moreover, the Court has already upheld against constitutional challenge an analogous benefit accorded to exclusive bargaining representatives.

In *Perry Education Association v. Perry Local Educators’ Association*,\(^{213}\) the school district allowed the teachers’ exclusive bargaining representative access to teacher mailboxes and the interschool mail system but denied such access to other organizations. A rival union claimed that the denial of such access to it violated its rights under the First and Amendment. The Court rejected the challenge. It


\(^{212}\) 138 S. Ct. at 2467.

held that the school mail facilities were not a public forum. It determined that the access policy was based on the organization’s status as exclusive bargaining representative and not on the viewpoints it expressed. The Court reasoned, “Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. . . . The touchstone for evaluating these distinctions is whether they are reasonable in light of the purposes which the forum at issue serves.” The Court held that the access granted to the exclusive bargaining representative was reasonable because it enabled the union to perform its obligation to represent all of the district’s teachers.

*Perry Education Association* should control challenges to recent state enactments requiring employers to provide exclusive representatives names and contact information for new bargaining unit members and the opportunity to meet with new unit members during working time. As with access to the school’s mail system, this privilege is accorded based on the union’s status as exclusive representative and not based on the viewpoints it espouses. Meeting with employees during working time is not a public forum and the grant of access facilitates the exclusive representative’s ability to represent all employees in the bargaining unit. Relying on *Perry Education Association*, courts should dismiss challenges to these provisions summarily.

**Conclusion**

In *Janus*, the Supreme Court stripped public sector labor unions and employers of a key tool in dealing with the collective action problem inherent in large organizations providing collective goods by holding that agency fees are unconstitutional. The Court did not understand the collective action problem but instead focused its attention on the free-rider problem. In the wake of *Janus*, numerous strategies have been offered to fill the void.

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214 *Id.* at 47-48.
215 *Id.* at 49.
216 *Id.*
217 *Id.* at 50-51.
Some strategies erode the concept of exclusive representation by allowing unions to opt to limit their representation to dues-paying members, either completely or in administering the collective bargaining agreement. We find these approaches wanting. Members-only representation would require a significant overhaul of public employee collective bargaining laws, allowing parties to discriminate on the basis of union membership. Members only representation was tried in California until 1976 when it was replaced by majority exclusive representation. Reviving it will not solve the collective action problem.

A variation on members-only representation is members-only representation in contract administration. This approach will solve the free-rider but is highly unlikely to solve the collective action problem. It also runs a significant risk of impeding worker solidarity. We recommend that evaluation of the risks and benefits of members-only contract administration be made at the local level. States should amend their public sector labor relations acts to allow for members-only contract administration conditioned on nonmembers being able to process their own grievances with their own representatives, but states should not mandate it. Where the collective bargaining agreement does not give individual employees a right to pursue their own grievances, all the way to arbitration if necessary, unions should remain under a duty of fair representation to all members of the bargaining unit.

Some strategies ignore the collective action problem entirely and seek to ensure the solvency of exclusive bargaining representatives with heavy subsidies from public employers or the state in general. We recommend against such strategies because they erode worker solidarity and workplace democracy. They create union financial dependence on political bodies, which makes unions vulnerable to government cost-cutting, and they reduce the accountability of union leadership to the workers whom they represent.

A potentially promising strategy is to expand the approach in many jurisdictions which allows religious objectors to donate an amount equal to union dues to a charitable organization. A significant drawback to this approach is that specifying a group of organizations from which a nonmember may choose for nonmembers’ donations is
vulnerable to attack under *Janus*, while allowing nonmembers to donate to any charitable organization they select impedes the usefulness of the scheme in solving the collective action problem. With some employers, such as school districts, there may be mandatory contributions for all employees to funds that are not expressive and that further the employer’s mission (such as scholarship funds) with the union reimbursing its members contributions as a benefit of membership.

More generally, we advocate a multi-prong strategy for ameliorating the collective action problem. First, we urge that employers and unions treat the availability of grievance arbitration as they treat other employee benefits, with employers and their employees sharing in the costs. Employees may be assessed, through payroll deduction, their pro rata share of half of the forum costs, such as arbitrator and court reporter fees, arbitrator appointing agency fees, and hearing room rentals. Unions may then reimburse their members’ payments as a benefit of membership. Second, unions should provide, and employers should facilitate, members-only benefits that will incentivize workers to join or continue their membership. These benefits can include, in appropriate instances, legal defense services, insurance benefits, and coordination of sick leave banks, among others. Third, unions should strive to emulate smaller organizations where member understanding of the impact of their dues and norms of solidarity and mutual support guard against collective actions problems. States can facilitate this by mandating that employers provide exclusive representatives with contact information for new members of the bargaining unit and the opportunity to meet during working time with new unit members shortly after their hire or transfer into the unit. Such statutory mandates have been enacted in California, Maryland, New Jersey, New York, and Washington and are very likely to survive constitutional attack. Although our recommended multi-prong strategy may not solve the collective action problem as well as agency fees did, it will go a long way to ameliorating the problem and preserving the system of majority rule and exclusive representation that is the foundation for many states’ public sector labor relations statutes.