Hastings Business Law Journal

Volume 16
Number 1 *Winter 2020*

Article 6

Winter 2020

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INTRODUCTION

In order for a union to represent a group of workers, a petition to start the election process must first be filed with the National Labor Relations Board ("NLRB") and it must receive support from 30% of the employees.[1] Once the NLRB determines that the 30% threshold is met, the NLRB will conduct an election to determine if a majority of employees want union representation.[2] If the union is certified by the NLRB, through a majority vote, the union becomes the exclusive bargaining representative of the employees. That is, the union becomes the sole representative of the employees and may act on their behalves.[3] Thus, if an employer wants to make any changes in employment, the employer must work directly with the union, rather than directly with the employee.[4] Since unions have been granted the power of exclusive representation, they also have a duty to fairly represent all employees in good faith and without discrimination.[5] This duty of fair representation requires a union to act as an agent for each employee, regardless of whether the employee decides to join the union ("full members") or not ("statutory members").[6] Thus, as the exclusive bargaining representative, unions bear the burden of fair representation for all employees, regardless of whether they are classified as full or statutory members.[7]

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1. *Conduct Elections*, NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections (last visited Oct. 23, 2019).

2. *Id*.

3. U.S. FEDERAL LABOR RELATIONS AUTHORITY, https://www.flra.gov/exclusive_ representation (last visited Apr. 5, 2019).

4. *Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5))*, NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-section (last visited Oct. 23, 2019).

5. *Id*.

6. *Id*.

7. Gerald D. Wixted, *Agency Shops and the First Amendment: A Balancing Test in Need of Unweighted Scales*, 18 RUTGERS L.J. 833, 833 (1987).

When a union is recognized as the agent of employees, the employer can no longer negotiate with each individual employee about their terms and conditions of employment and must work directly with the union.[8] Within each of these negotiations, unions can opt for union-security agreements, which is a contract that binds employees to pay fees/dues to the union so that the union has the resources to conduct services on the employees' behalves.[9] Section 8(a)(3) of the National Labor Relations Act ("NLRA") permits an employer and a union to negotiate for and enter into a union-security agreement requiring all employees in the bargaining unit to pay periodic union dues as a condition of employment, regardless of whether an employee wants to become a union member.[10] Thus, union-security agreements, combined with the theory of exclusive representation, compel all employees to work under the terms negotiated by the union. All members must pay some form of dues should the union negotiate for such an agreement.

When unions negotiate for union-security agreements, they can negotiate for different type of fee provisions. One type of fee provision is a union shop fee provision.[11] A union shop compels all employees of a bargaining unit to become members and pay dues to the union, regardless of whether the employees support the union or agree with the way dues are spent.[12] Comparatively, an agency shop fee provision grants employees the option of becoming a full member or a statutory member.[13] As opposed to a union shop, agency shop statutory members can limit the amount they are required to pay as to their share of dues used directly for representation, such as collective bargaining and contract administration.[14] Despite only paying dues that are germane to representation, statutory members enjoy the same benefits as full members who pay all fees associated with union representation.[15]

However, when union-security agreements are implemented, First Amendment concerns are raised. By requiring employees to pay union dues, unions may be impinging on an individual's freedom to disassociate with the

8. NLRB, *supra* note 4, https://www.nlrb.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-section (last visited Oct. 23, 2019).

9. *Union Dues*, NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/union-dues (last visited Oct. 23, 2019).

10. 29 U.S.C. § 158(a)(3).

11. David H. Topol, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135 (1992).

12. *Id*.

13. Wixted, *supra* note 7, at 833-34.

14. *Employer/Union Rights and Obligations*, NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/rights-we-protect/rights/employer-union-rights-and-obligations (last visited Oct. 23, 2019).

15. *Id*.

union.[16] The First Amendment of the United States Constitution provides that the government cannot abridge an individual's freedom of speech.[17] In *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, the Court held that the freedom to associate is a liberty protected under the First Amendment.[18] Thus, the effect of restricting the right to associate, or disassociate, is subject to an exacting scrutiny review by the courts if the beliefs that an individual seeks to advance, either through association or disassociation, pertains to political, economic, religious, cultural matters.[19] Under this exacting scrutiny standard, "a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[20]

The main issue of this Note is whether unions violate an individual's free speech when they compel the payment of dues from their members.[21] Unions depend on the collection of member fees to carry out the essential functions required of them, which include contract negotiations and grievance processing.[22] However, if unions can no longer collect member fees from employees, unions will no longer be able to provide the services they currently do. Thus, jeopardizing union stability. Secondly, as the exclusive representative, a union is required to bargain on behalf of all employees, regardless of their member status.[23] If unions don't require all employees to pay union dues, a free-rider problem arises.[24] If an employee does not have to pay any fee, but is still able to receive the benefits of union representation, a majority of employees will opt-out of paying dues and instead rely on the payment of others.[25] Ultimately, the question is whether unions can negotiate for union-security agreements.[26]

In a recent groundbreaking decision, the Supreme Court overruled over 40 years of precedent. In *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, the Court ruled that in places of public employment, public-sector unions may no longer collect agency fees from nonconsenting

16. Janus v. Am. Fed'n of State, City, & Mun. Emp., Council 31, 138 S. Ct. 2448, 2460 (2018) [hereinafter *Janus*].

17. U.S. CONST. amend. I

18. Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 466 (1958).

19. *Id*. at 460–61.

20. *Janus*, 138 S. Ct. at 2465.

21. 29 U.S.C. § 158(a)(3).

22. *Why Do I Pay Union Fees?*, http://ufcwlocal1546.org/faq/why-do-i-pay-union-dues/ (last visited Apr. 5, 2019).

23. *Janus*, 138 S. Ct. at 2466.

24. *Id*.

25. *Id*.

26. *Id*.

employees.[27] In essence, public-sector unions may no longer collect *any* fees from *any* employee who does not wish to be a part of the union. However, even employees who support unions may choose to opt-out as a full member, and opt-in as a statutory member, for the sole purpose of obtaining union benefits without having to pay union fees.[28] Since unions rely on member fees to operate, *Janus* raises the question of how public-sector unions will be able to sustain themselves and overcome the free-riding issue.

Today, political groups who prefer extending *Janus* to the private sector remain. Because the Court has left this question unaddressed, this Note examines whether the Supreme Court's *Janus* decision can be extended to the private sector, and if so, in what ways the decision will be extended.[29] First, this Note will analyze the litigation buildup of the *Janus* decision and the decision itself. Second, this Note will examine existing law for private-sector unions and the ambiguity it has left in the language of the Supreme Court's decisions that may allow right-to-work organizations to extend *Janus* to the private-sector. Third, this Note looks at what is currently precluding *Janus* from extending to the private-sector and if there is a work around for the known obstacle called the state action doctrine. Lastly, this Note will provide insight into the possible strategy of right-to-work organizations, while offering countering views as to why such a strategy may not apply.

THE BUILD UP AND OUTCOME OF THE JANUS DECISION

THE ONGOING CAMPAIGN TO WEAKEN UNIONIZATION

In a calculated move, the Illinois Policy Institute found a viable plaintiff, Mark Janus ("Janus"), to challenge the constitutionality of mandatory public-sector union fees.[30] In coordination with The Liberty Justice Center and the National Right to Work Legal Defense Foundation, Janus and the Illinois Policy Institute began the battle against the mandatory payment of union fees.[31]

Janus and earlier cases are not isolated incidents, but rather, are part of a long strategic campaign to weaken unions.[32] Despite being able to trace the

27. *Id*. at 2486.

28. Wixted, *supra* note 7, at 833-34.

29. *Janus*, 138 S. Ct. at 2486.

30. Noam Scheiber & Kenneth P. Vogel, *Behind a Key Anti-Labor Case, a Web of Conservative Donors*, N.Y. TIMES (Feb. 25, 2018), https://www.nytimes.com/2018/02/25/business/economy/labor-court-conservatives.html.

31. *Id*.

32. *Id*.

beginnings of *Janus* to 2015, the fact is, that the war against unions began long before then.[33] Many of these right to work organizations received their funding from conservative philanthropists who wanted to see the end of unionism.[34] The *Janus* case is illustrative of how right to work organizations have sought to destabilize unions, not just in recent years, but in previous decades.[35] Thus, it is highly likely that future conservatives and right-to-work organizations will utilize the *Janus* decision to take on current law governing private-sector unions.

THE CONTROLLING LAW BEFORE JANUS: ABOOD

In its *Janus* ruling, the Supreme Court overturned precedent that governed union dues in the public-sector for 41 years.[36] In 1977, in *Abood v. Detroit Bd. of Ed.*, the Court upheld the constitutionality of an agency shop agreement within the public-sector.[37] The Court's rationale in deciding *Abood* was two-fold: the State's interest in labor peace and the free-rider problem.[38] First, the labor peace argument centered around avoiding conflict and disruption that would inevitably occur if unions would no longer be able to collect member fees.[39] With regards to labor peace, the Court reasoned that if employees could opt-out of a union, they could also opt-in to another union.[40] The repercussions of allowing more than one union would result in inter-union rivalries, dissension within the workforce, and demands from conflicting unions to the employer.[41]Second, agency fees prevent free-riding. Employees who did not want to join the union would not be able to reap union benefits if they were not paying dues.[42] Therefore, in order to avoid the consequences related to labor peace and the free-rider problem, the State had a compelling interest to justify the payment of agency fees, regardless of whether an employee wants to join the union or not.

33. *Id.*
34. *Id.*
35. Scheiber & Vogel *supra* note 30.
36. Janus v. Am. Fed'n of State, City, & Mun. Emp., Council 31, 138 S. Ct. 2448, 2460 (2018).
37. 431 U.S. 209, 211 (1977) [hereinafter *Abood*], *overruled by Janus*, 138 S. Ct.
38. *Janus*, 138 S. Ct. at 2465-66.
39. *Id.* at 2465.
40. *Id.* at 2466.
41. *Id.*
42. *Id.*

THE FIRST AMENDMENT CONCERNS OF DECISIONS AFTER *ABOOD*

In *Knox v. Serv. Employees Int'l Union, Local 1000* and *Harris v. Quinn*, however, the Supreme Court recently limited the usage of *Abood's* rationale by refusing to extend the decision to situations where it does not directly control.[43]

In 2012, the Court decided *Knox*, which involved the Service Employees International Union, Local 1000, that wanted to collect a special assessment fee from California state employees to pay for a political Fight-Back Fund.[44] This fund would be used for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California.[45] The Court conducted a strict scrutiny analysis, explaining that mandatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.[46] When the employer, the State, "exacts compulsory union fees as a condition of employment, the employee is forced to support financially an organization with whose principles and demands he may disagree."[47] Writing for the majority, Justice Alito reasoned that when a public-sector union takes certain positions during collective bargaining, union dues constitute a form of compelled speech because the employee becomes associated with the stance the union takes simply by being a member.[48] Since union dues are a form of compulsory speech, then the State must have a compelling enough interest to collect member fees. The State's interest in allowing unions to collect fees from statutory members was to prevent members from free-riding on union services.[49] However, the Court held that the free-rider argument was not a compelling enough interest to justify infringing on an individual's First Amendment rights because less restrictive means are available.[50] Instead of requiring employees to opt-out of union dues, unions could require employees to affirmatively opt-in.[51] Thus, the Court concluded that employees who choose not to join a union have a First Amendment right and that the prevention of free-riders rationale was generally not sufficient to

43. *Id*. at 2463; Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298 (2012) [hereinafter *Knox*]; Harris v. Quinn, 573 U.S. 616 (2014) [hereinafter *Harris*].

44. *Knox*, 567 U.S. at 303-05.

45. *Id.*

46. *Id*. at 310.

47. *Id.*

48. *Id*. at 310-11.

49. *Id.* at 311.

50. *Id.*

51. *Id*. at 317.

overcome First Amendment protections.[52]

In 2014, the Court decided *Harris*, which involved personal health care assistants who were employed by customers of the Illinois Department of Human Services Home Services Program, who claimed that the Service Employees International Union's ("SEIU") collection of fees violated their First Amendment right.[53] In *Harris*, the Court did not piece apart the levels of analysis for strict scrutiny because it determined that such a detailed analysis was not necessary.[54] Although the State asserted an interest of promoting labor peace, the Court held that this argument missed the point because the employees did not assert that they had a First Amendment right to form a rival union, nor did the employees challenge the authority of the SEIU as their exclusive representative.[55] Rather, what the employees wanted was the right to not associate with the union.[56] Thus, the State's asserted interest of promoting labor peace had no merit and was not an interest at all.[57] However, Justice Alito took it a step further and stated that even if the State had an interest in labor peace, any threat was diminished because the personal assistants did not work in a single place, but instead, were spread out within each respective customer's private home.[58] This, diminished the possibilities of labor conflicts. Hence, the State's interest in labor peace was not a compelling enough interest to justify infringement on First Amendment rights.[59]

In both *Knox* and *Harris*, the Court refused to extend *Abood*'s free-rider prevention and promotion of labor peace rationale, stating that "*Abood* was something of an anomaly."[60] With each subsequent year following *Abood*, the Court has become majorly critical of *Abood* by stating that its rationale has become troubling and problematic over time.[61] However, despite the hostility the *Abood* decision has received over the years, the case was never overturned until *Janus*, 41 years later.[62]

52. *Id*. at 322.
53. Harris, v. Quinn, 573 U.S. 616, 624-26 (2014).
54. *Id*. at 648-49.
55. *Id*. at 649.
56. *Id.*
57. *Id.*
58. *Id.* at 649-50.
59. *Id*. at 649.
60. *Id*. at 627.
61. *Id*. at 635, 656.
62. Janus v. Am. Fed'n of State, City, & Mun. Emp., Council 31, 138 S. Ct. 2448, 2463 (2018).

THE CURRENT LAW FOR PUBLIC-SECTOR UNIONS: JANUS

The Illinois Department of Healthcare and Family Services employed Mark Janus as a child support specialist.[63] Janus was one of many public employees in Illinois that was represented by the American Federation of State, County, and Municipal Employees ("AFSCME").[64] Janus refused to join the union because he opposed many of the public policy positions the union advocated for.[65] If Janus had a choice, he would choose not to pay any fees or otherwise subsidize the union.[66] Despite Janus' opposition to the union, he was required to pay an agency fee of $535 per year.[67] Pursuant to Illinois law, even if a public employee chose not to join a union as a full member, the employee was still required to pay union fees.[68] In short, Illinois law authorized AFSCME to collect agency fees from employees like Janus, even if they objected to joining the union.

In overturning over 40 years of precedent, the Supreme Court held that public sector employees cannot be required to pay *any* union dues, regardless of what the dues are used for, on the basis of their First Amendment right.[69] Similar to *Knox* and *Harris*, the *Janus* Court underwent an exacting scrutiny review whereby "a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[70] Like the defendant in *Abood*, the State provided two state interests: the promotion of labor peace and the prevention of free-riding.[71]

In addressing the labor peace interest, the *Janus* Court articulated that its fears of disruption to labor peace in *Abood* were unfounded; as time revealed that labor peace could be achieved through less restrictive means, it would not infringe on an individual's First Amendment right.[72] The Court cited to the fact that there are millions of public employees in 28 states that all have state laws that prohibit agency fees, but the employees are still represented by unions who serve as their exclusive representative.[73] Thus, by looking at other states, labor peace could still be achieved through other methods without requiring employees to pay a fee and associate with a union.

63. *Id*. at 2461.
64. *Id*.
65. *Id*. at 2461-62.
66. *Id*.
67. *Id*.
68. 5 ILL. COMP. STAT. ANN. 315/6 (1984).
69. *Janus*, 138 S. Ct. at 2461 (2018).
70. *Id*. at 2465.
71. *Id*. at 2465-66.
72. *Id*. at 2448.
73. *Id*.

Secondly, the Court refused to uphold agency fees on the free-rider argument.[74] It reasoned that the State may have two possible compelling interests in the payment of agency fees because (1) unions would be unwilling to represent statutory members, or (2) it would be fundamentally unfair to require unions to provide fair representation for statutory members if those members were not required to pay.[75]

In addressing both arguments, the Court reasoned that since the union *chooses* to be an exclusive representative, it must bear the cost of representing all employees in a bargaining unit.[76] The Court further explained that unions derive significant benefits from being an exclusive representative, such as obtaining information about employees and having dues and fees deducted directly from employee wages.[77] The benefits conferred upon the union significantly outweigh the burden of exclusive representation for statutory members.[78] Moreover, any unwanted burden imposed by representation of statutory members can be eliminated through less restrictive means than the requirement of agency fees, such as denying individual members union representation altogether.[79] Thus, the argument that unions were unwilling to represent statutory members was not a compelling interest, and the imposition of agency fees was not a less restrictive means to satisfy the exacting scrutiny standard. Thus, the Court ultimately held that public-sector agency fees are unconstitutional because the frameworks that upheld *Abood* were unfounded as the decision played out overtime.[80]

THE POSSIBILITY OF THE *JANUS* DECISION BEING EXTENDED TO THE PRIVATE SECTOR

THE CURRENT LAW FOR PRIVATE-SECTOR UNIONS

As opposed to recent law holding that the collection of agency fees in the public sector is unconstitutional, current law for private-sector unions still allow unions to collect member fees. In *NLRB v. General Motors Corp.*, the Supreme Court decided the issue of whether an agency shop constitutes an unfair labor practice under section 8(a)(3) of the NLRA.[81] The Court recognized the free-rider problem in alignment with the public sector

74. *Id*. at 2469.
75. *Id*. at 2448.
76. *Id*. at 2448.
77. *Id*.
78. *Id*.
79. *Id*.
80. *Id*. at 2460.
81. NLRB v. General Motors Corp., 373 U.S. 734, 735 (1963) [hereinafter *General Motor Corp.*].

rationale in *Abood*.[82] In upholding agency fees under the NLRA, the Court restricted the type of dues that may be collected from employees; it provided that "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues."[83] The Court ultimately held that "membership as a condition of employment is whittled down to its financial core."[84]

Roughly 25 years later, in *Commc'ns Workers of Am. v. Beck*, the issue of agency fees appeared yet again.[85] The issue was whether agency fees permit a union, despite the objections of statutory members, to spend the fees on activities that are unrelated to collective bargaining, contract administration, or grievance adjustment.[86] More specifically, the *Beck* Court discussed the potential violations of employees' First Amendment Right, an issue not raised in *General Motors Corp*. In *Beck*, 20 employees, who chose not to become full members of the union, challenged the union's expenditure of their fees on activities unrelated to collective bargaining.[87] The employees alleged that the union used their fees on activities such as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political work, which violated their First Amendment rights.[88] Reiterating the reasoning in *General Motors Corp*., the *Beck* Court provided that membership must be "whittled down to its financial core."[89] The Court resolved the ambiguity of "financial core" in *Beck*, holding that "financial core" only includes the obligation to support union activities that are germane to collective bargaining, contract administration, and grievance adjustment.[90] Any activities outside of this purview violates Section 8(a)(3) of the NLRA.[91] The Court again reasoned that Congress' intent of allowing union-security agreements was to prevent free-riding by employees who did not want to be in the union.[92] Importantly, the Court did not reach the First Amendment issue raised by the employees.[93] Thus, under *General Motors Corp*. and *Beck*, private sector unions may continue to collect agency fees from statutory members, but must limit their expenditure of fees to activities that are germane to the bargaining unit.

82. *Id*. at 740-41.
83. *Id*. at 742.
84. *Id*.
85. Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 738 (1988) [hereinafter *Beck*].
86. *Id*. at 738.
87. *Id*. at 739-40.
88. *Id*.
89. *Id*. at 745.
90. *Id*.
91. *Id*.
92. *Id*. at 750.
93. *Id*. at 763 (Blackmun, J., concurring in part and dissenting in part).

THE FIRST AMENDMENT AS A SWORD

Despite the Court's holdings in *General Motors Corp*. and *Beck*, *Janus'* extension to the private sector is not completely outrageous. One labor law expert, Cesar Rosado, pointed out that the current barrier preventing courts from extending *Janus* to the private sector is the idea that the First Amendment does not afford the private sector the same protections as it does in the public sector.[94] This is primarily due to the fact that there is no government action to trigger First Amendment protections in the private sector.[95] However, Rosado argues that private sector employees are governed under a federal statute, the NLRA, that compels employers to bargain with unions, which ultimately could be sufficient to trigger government action.[96]

Rosado's theory is not unfounded because there is ambiguity even within the Supreme Court as to whether *Janus* may one day extend beyond the public sector. In *Janus*, Justice Alito intentionally avoided the applicability of agency fees' to the private sector.[97] He explicitly reserved the question of whether Congress' enactment of a provision allowing, but not requiring, private parties to enter into union-security agreements was sufficient to establish government action.[98] Thus, the majority constructed a barrier which leaves the question of *Janus*' extension to the private sector, namely through *Beck*, unanswered.[99]

Even within the Fourth Circuit Court's decision in *Beck*, the majority refused to answer the question of whether the First Amendment was implicated.[100] By using the rules of statutory interpretation of constitutional avoidance to dodge applicability of the First Amendment, the court ultimately decided the case on statutory grounds.[101] The canon of constitutional avoidance states that if courts are able to decide an issue by a construction of the statute, they will prefer avoiding a constitutional issue.[102] Thus, in the Fourth Circuit's decision in *Beck*, the court determined that the issue of agency fees could be resolved by interpretation of the NLRA and

94. Cesar Rosado is the co-director of the Institute for Law and the Workplace at Chicago-Kent College of Law. Alexia Elejalde-Ruiz *Supreme Court's Janus Ruling Could Undercut Private Sector Unions Too*, CHICAGO TRIBUNE (July 11, 2018), https://www.chicagotribune.com/business/ct-biz-janus-private-sector-ramifications-20180709-story.html.

95. Janus v. Am. Fed'n of State, City, & Mun. Emp., Council 31, 138 S. Ct. 2448, 2479 n.24 (2018).

96. Elejalde-Ruiz *supra* note 94.

97. *Janus*, 138 S. Ct. at 2479. n.24.

98. *Id.*

99. *Id.*

100. Beck v. Commc'ns Workers of Am. (C.W.A.), 776 F.2d 1187, 1196 (4th Cir. 1985), *on reh'g*, 800 F.2d 1280 (4th Cir. 1986), *aff'd sub nom. Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

101. *Id.*

102. *Id.*

ultimately declined to answer the First Amendment issue before it.[103] Despite deciding the case on statutory grounds, the majority provided dictum which stated, in their opinion, there was sufficient government action to trigger First Amendment claims.[104] The court explained that the authority of the union to collect union fees is derived directly from the power given to the union as a result of its status as a bargaining representative under the NLRA. When the union carries with it the power to extract fees against an individual's will, and does so under the warrant of federal authority, it is difficult for the court to find that government action is not implicated.[105] The court provided that "the union wears the cloak of the government; in making its demands it acts under authority vested in it by the federal government."[106] Thus, there is ambiguity as to whether there is sufficient government action to trigger First Amendment claims in the private union-security agreements.

After the Fourth Circuit's decision in *Beck*, the court conducted an en banc hearing to determine the primary issue of whether the court had jurisdiction to hear the case in the first place.[107] One of the sub-issues the court addressed was whether a First Amendment issue could be sustained.[108] Two of the same five judges opined that jurisdiction could be sustained through a constitutional claim, implying that in the *Beck* decision, there was sufficient government action for respondents to bring a First Amendment claim.[109]

With the ambiguity surrounding whether union-security agreements provide sufficient government action to trigger the First Amendment, it appears that the state action doctrine is the current barrier preventing *Janus* from being extended into the private sector. As Justice Kagan stated in her dissenting opinion in *Janus*, "the majority has chosen the winners by turning the First Amendment into a sword and using it against workaday economy and regulatory policy."[110] The majority aggressively used the First Amendment to overturn over 40 years of precedent and weaponize the First Amendment for judges to intervene in economic and regulatory policy.[111] Thus, Kagan's words of "weaponizing the First Amendment" may be the forewarning of the inevitable extension of *Janus* to the private sector.

103. *Id.*
104. *Id.* at 1208.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).
111. *Id.*

OVERCOMING THE OBSTACLE OF THE STATE ACTION DOCTRINE

THE STATE ACTION DOCTRINE

In order for right-to-work organizations to extend *Janus* beyond the realm of the public sector, these organizations must overcome the state action doctrine hurdle. Although it may seem fairly obvious when the government acts and when it does not, there are certain instances when even the action of private parties can constitute as state action. The Supreme Court has set out two different tests, the *Lugar* test and the "nexus" test, for evaluating whether state action is implicated.[112] Both of these tests are analyzed below.

Lugar v. Edmonson Oil Co., decided in 1982, is the landmark case where the Supreme Court laid out a two-step inquiry for determining when state action exists in the presence of a non-obvious government actor.[113] In *Lugar*, the petitioner brought a claim alleging that in attaching his property, the private company, respondent, had acted jointly with the State to deprive him of his rights without due process of law.[114] While acting on an *ex parte* petition, a Clerk of the state court issued a writ of attachment which was then executed by the County Sheriff, eventually resulting in petitioner's property being sequestered.[115] In evaluating whether Edmonson Oil Company's action constituted state action, the Court followed a two-step approach.[116] First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible."[117] Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."[118] The Court held that state action was present because state officials were statutorily required to attach property at the request of Edmonson Oil Company, a private party, and Edmonson's joint participation with state officials was sufficient to characterize them as state actors.[119] Thus, in *Lugar*, the Court found state action because a private

112. Topol, *supra* note 11, at 1144; Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (creating the nexus test).

113. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) [hereinafter *Lugar*].

114. *Id*. at 925.

115. *Id*.

116. *Id*. at 937.

117. *Id*. at 937.

118. *Id*.

119. *Id*. at 941; *see* generally Topol, *supra* note 11, at 1145.

party was acting jointly with state officials.

The second test used for determining whether there is sufficient state action is the "nexus" test, which was laid out in 1974, in *Jackson v. Metro. Edison Co*.[120] The *Jackson* "nexus" tests asks whether there was a sufficiently close nexus between the government and the challenged action of the regulated entity so that the action of the regulated entity may be fairly treated as that of the state.[121] In *Jackson*, the Court determined that there was not a sufficient nexus between a privately owned and operated utility corporation, that delivered electricity to service areas, and a state public utility commission, that issued the certificate empowering the corporation, to constitute state action.[122] In making this determination, the Court struck down all of petitioner's arguments that, because Metropolitan Edison Company was heavily regulated by the government, it enjoyed at least a partial monopoly.[123] Further, there was a sufficient nexus for state action because the state commission granted permission to Metropolitan Edison Company to terminate electrical services to petitioner.[124]

Thus, although the Supreme Court has set out the *Lugar* two-part test for evaluating whether state action exists in the presence of a nonobvious government actor, the Court has utilized a second test, the "nexus" test, to aid in the understanding of the second prong of the *Lugar* test.[125] In essence, the "nexus" test is particularly helpful to understanding when a private party's conduct is chargeable to the State.[126]

STRATEGIES OF RIGHT TO WORK ORGANIZATIONS: DOES THE PRINCIPLE OF EXCLUSIVE REPRESENTATION CONSTITUTE AS GOVERNMENT ACTION?

In challenging the constitutionality of union-security agreements in the private sector, right-to-work organizations can potentially argue that unions, through the empowerment of a federal statute, compel private parties to associate by requiring employees to join unions and pay member dues.[127] One sub-argument is that by enacting the NLRA, Congress is pushing its agenda and hiding behind the union-negotiated agreements, which are

120. Topol, *supra* note 11, at 1144.
121. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) [hereinafter *Jackson*].
122. *Id*. at 346-47.
123. *Id*. at 358.
124. *Id*.
125. Topol, *supra* note 11, at 1144.
126. *Id*.
127. *Id*. at 1148.

sufficient to constitute government action by the union.[128] In an article by David H. Topol, he argued that there is sufficient state action to trigger First Amendment claims and in determining so, he evaluated the two-part test set out in *Lugar*.

First, "the deprivation [by the union] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible."[129] Here, the argument goes, that the deprivation of an employee's First Amendment right is caused by the exercise of collective bargaining because the NLRA, a federally created statute, confers two rights upon unions: the power to negotiate exclusively and the power to negotiate union shop provisions.[130] By conferring these powers to the union, coupled with the principle of exclusivity, dissenting members are now compelled to pay union fees.[131] Thus, dissenting members are required to "support" the union, depriving them of their freedom of expression and association; the requirement to "support" the union is empowered by a federal statute which was created and imposed by the government.

Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."[132] Here, the union is obviously not a state actor, but because the union has obtained significant aid from state officials, the union has effectively become a "state actor[.]"[133] Topol argued that in *Lugar*, the NRLA provided significant aid to the union by granting the union the power to negotiate on behalf of all employees—even the members who did not want to join the union—by enabling it to negotiate union-security agreements that compel employees to paying fees.[134] If the unions did not have the support of the NLRA, unions would not be in a position to negotiate for union-security agreements and bind employees to pay their agency fees.[135] Incorporating the "nexus" test from *Jackson*, Topol distinguished the facts in *Jackson* from those surrounding union-security agreement by arguing that it is not just the presence of heavy regulation in labor law by the government, but the sufficiently close nexus between the government and the union's

128. *Id.*
129. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
130. Topol, *supra* note 11, at 1149.
131. *Id.*
132. *Lugar*, 457 U.S. at 937.
133. Topol, *supra* note 11, at 1152.
134. *Id.* at 1153.
135. *Id.*

implementation of union-security agreements.[136] That the NLRA governs these specific functions of the union, the "right to negotiate exclusively and the power to negotiate union-security agreements[.]"[137] Thus, according to Topol, the second prong of *Lugar* is met, which in turn meets the state action requirement.[138]

Another approach to evaluating how *Janus* can be extended, is looking beyond the academic and theoretical application of the *Lugar* test and into the actual arguments by right to work organizations in the past. When *Beck* was litigated in the Fourth Circuit, amicus curiae briefs, filed on behalf of the employees challenging the union's usage of their fees, addressed the state action trigger. With each brief focusing on a different aspect of the test, they serve to supplement Topol's *Lugar* analysis by making the same arguments Topol made in his research note: that state action is present because a federal statute compels employees to pay a fee.[139]

In the first amicus curiae brief, filed by former senators at the time, the focus was on the first prong of the *Lugar* test; the former senators argued that the deprivation of a member's First Amendment right is circularly caused by a privilege that was created by the State and then delegated to unions.[140] The former senators argued that state action was implicated because of a federal law, the NRLA.[141] They stated that "private decisions will be attributed to the state when a federal statute is the source of the power and authority by which any private rights are lost or sacrificed."[142] Although both the union and the employer are private actors, the NRLA had given unions the power to force employers to the bargaining table to negotiate agreements.[143] Hence, the government, in essence, encourages collective bargaining by playing an active and significant role in the creation of a collective bargaining agent.[144]

In a second amicus brief by the Landmark Legal Foundation, it focused on the second prong of the *Lugar* test and the most contentious part of the state action doctrine. That is, whether the union had obtained sufficient aid from state officials so that the union may fairly be said to be a state actor.[145] The Landmark Legal Foundation argued that the union derived its authority

136. *Id*. at 1154.

137. *Id*.

138. *Id*.

139. Topol, *supra* note 11, at 1157-58.

140. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

141. Brief for Harry E. Beck Jr. et al. as Amici Curiae Supporting Respondents at 16, Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988) (No. 86-637), 1987 WL 881079.

142. *Id.* at 18.

143. *Id*. at 17.

144. *Id*. at 19.

145. *Lugar*, 457 U.S. at 937.

to compel the payment of dues from the NLRA and this compulsion constituted government action because a federal statute was the source of power that infringes on private rights.[146] By enacting the NLRA, the government encouraged compulsory payment within collective bargaining agreements, which was enough to implicate state action.[147]

Diverging from the focus of the *Lugar* test in determining the existence of state action, a different approach is used that argues because the Railway Labor Act ("RLA") and the NLRA are similar statutes, so similar in fact, that the Supreme Court's holdings regarding the RLA should be applicable to the NLRA.[148] The RLA, like the NLRA, is a federal labor statute, but exclusive to railway workers that authorizes the inclusion of union-security agreements in collective bargaining agreements.[149] In the amicus brief by the former senators, it argued that because the *Ry. Emp. Dep't v. Hanson* Court determined that there was sufficient state action, it should give that same interpretation and hold that there is state action when unions compel employees to pay union dues.[150] In *Ry. Emp. Dep't v. Hanson*, the Court also acknowledged the existence of state action, despite ultimately holding that the requirement of union dues did not violate the First Amendment.[151] In finding state action, the Court explained that the "RLA was the source of power and authority by which private rights are lost or scarified" and "the enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates."[152] Despite the Court ultimately holding that no First Amendment rights were violated, it also "emphasized that its ruling was confined to the facts before it and did not preclude future considerations of challenges to the use of members' dues for purposes other than collective bargaining."[153] Thus, it is possible that in future challenges to the constitutionality of union-security agreements, we may see the use of a RLA and NLRA comparison to establish the presence of state action.

146. Brief for Harry E. Beck Jr. et al., *supra* note 141, at 14.
147. *Id.*
148. Topol, *supra* note 11, at 1137.
149. *Id.*
150. Brief for Harry E. Beck Jr. et al., *supra* note 141 at 14.
151. Ry. Emp. Dep't v. Hanson, 351 U.S. 225, 238 (1956) [hereinafter *Hanson*].
152. *Id.* at 232.
153. Topol, *supra* note 11, at 1139.

THE COUNTERARGUMENT ON THE ISSUE OF THE STATE ACTION DOCTRINE

Firstly, the Court's holding in *Lugar*, that union-security agreements combined with the principle of exclusive representation satisfies the two-part test, differs in outcome from its holding in *Blum v. Yaretsky*, that the *Lugar* test was performed incorrectly.[154] Returning to the *Lugar* two-part test, the first part of the inquiry is whether the state has created some right or privilege that has led to a deprivation of rights.[155] Arguments made in favor of state action suggests that the NLRA grants a privilege to unions to collect union dues, which in effect, deprives First Amendment rights. However, this argument ignores the historical background of unions. In actuality, unions have been in existence long before the enactment of the NLRA, and since union-security agreements are simply contracts, unions have always had the power to negotiate for and implement union-security agreements.[156] The State did not create the unions' power to implement union-security agreements or collect member fees; this authority was already created by the unions through private contract negotiations with employers.

Moving to the second part of the *Lugar* inquiry—the main point of contention—it provides that "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be due to the party being a state official because he/she has acted together with, or has obtained significant aid from, state officials, or because his/her conduct is otherwise chargeable to the State."[157] Thus, the question is whether the union is a "state official."

The argument in previous sections has been that a private union's conduct is chargeable to the state because the NLRA provides unions with the authority and ability to compel workers into paying union dues by allowing them to negotiate for union-security agreements. However, in *Blum*, the Court stated that the fact that a business is subject to state regulation does not automatically convert its conduct into state action.[158] State action is invoked only when the state is *responsible* for the specific conduct complained of by the plaintiff.[159] The Court's precedent over the years indicates that state action is only implicated in private decisions where the state exercised coercive power or provided significant encouragement,

154. Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) [hereinafter *Blum*].

155. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

156. *Pre-Wagner Act Labor Relations*, NATIONAL LABOR RELATIONS BOARD, (Oct. 23, 2019), https://www.nl rb.gov/about-nlrb/who-we-are/our-history/pre-wagner-act-labor-relations.

157. *Lugar*, 457 U.S. at 937; *see also*, *Blum*, 457 U.S. at 1005.

158. *Blum*, 457 U.S. at 1004.

159. *Id*.

either overtly or covertly, that the choice must be that of the State's.[160] It is important to recognize that the NLRA does not *require* employers and unions to contract for a union-security agreement, but rather only *allows* for employers and unions to enter into one.[161] The discretion of whether to have a mandatory fee provision is entirely negotiated and dictated by two private parties, something that the state is not responsible for.

The NLRA does not compel these private individuals to actually have union-security provisions in their collective bargaining agreement.[162] This scenario is similar to *Blum* which involved a state law that required private nursing homes to decide the appropriate level of care by using utilization review committees.[163] In *Blum*, a private nursing home transferred two patients to a lower level of care because state law mandated the nursing home to make such assessments.[164] The Court held that there was not sufficient state action to trigger the Due Process clause because private individuals, physicians and nursing home administrators, made the decision to transfer and discharge patients based on professional and medical judgments.[165] The state did not influence the transfer and discharge decisions in any degree.[166] Thus, the state law that mandated the assessments in *Blum*, and the NLRA that mandates negotiations for union-security agreements, do not equate to government responsibility for the employee's deprivation of choice.

Secondly, the argument that the NLRA implicates state action because the RLA does as well, is rebutted in that the NLRA and the RLA are not in fact the same. The RLA is more compelling because it preempts all state laws that ban union-security agreements.[167] The Court in *Beck* addressed these comparisons made between the NLRA and the RLA.[168] The petitioners in *Beck* argued that, in *Hanso*n, the Supreme Court found government action not because a federal statute allowed for the negotiation of union-security agreements, but because the RLA is supreme to any contrary state law.[169] The NLRA is different from the RLA because the NLRA explicitly allows states to ban union-security agreements.[170] In *Hanson*, the critical element of federally preempting a finding of state action was missing from the NLRA.[171]

160. *Id.*
161. NLRB, *supra* note 13.
162. *Id.*
163. Blum, 457 U.S. at 995.
164. *Id.*
165. *Id.* at 1004-05.
166. *Id.* at 1008.
167. Brief for Respondents, Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 761 (1988).
168. Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 754 (1988).
169. *Id.* at 761.
170. *Id.*
171. *Id.*

Thus, *Hanson* is distinguishable because there is a different, and more compelling, level of intensity to the RLA than the NLRA.[172]

CONCLUSION

Currently, the Court has provided two separate laws governing union-security agreements for the private and public sector. The first is the *Beck* decision, which held that private sector unions may continue to collect agency fees from statutory members, but must limit their expenditure of fees to activities that are germane to the bargaining unit.[173] The second is the *Janus* decision, which held that public sector employees cannot be required to pay *any* form of union dues on the basis of their First Amendment rights.[174] The reason for the two separate laws is due the state action doctrine. In order for the First Amendment to be implicated, there must be sufficient government action. In essence, in order for both public and private sector employees to forego paying union dues, there must be state action by the union.

This Note has analyzed the arguments both sides would make in deciding whether to extend the *Janus* decision to the private sector. More specifically, this Note analyzes whether or not the state action doctrine can be applied to private sector unions. The argument made by right to work organizations is that state action is present because a federal statute compels employees to pay a mandatory union fee. The other side of the argument states that there is not sufficient state action because the NLRA merely provides an opportunity for private parties to negotiate for a union-security provision but does not mandate one in the collective bargaining agreement. Thus, while both sides make compelling arguments, the likelihood that state action is implicated by unions is fairly low because no federal statute compels employees, but rather, a private party does. However, if the Supreme Court decides to extend its holding in *Janus* to the private sector, unions would no longer be able to collect member fees through union-security agreements. Nothing could, or would, prevent employees from free-riding. In the end, unions may not be able to sustain themselves off what little funding they can collect—should this hold true, we may one day see the end of unions altogether.

172. *Id.*
173. *Id.* at 745.
174. Janus v. Am. Fed'n of State, City, & Mun. Emp., Council 31, 138 S. Ct. 2448, 2461 (2018).