2-2022

Janus v. AFSCME, Revisited

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A master's thesis submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Master of Arts, The City University of New York

2022

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This manuscript has been read and accepted for the Graduate Faculty in Political Science in satisfaction of the thesis requirement for the degree of Master of Arts.

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ABSTRACT

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In the days after the Supreme Court handed down its ruling in *Janus v. AFSCME (2018)*—a 5–4 conservative majority decision deeming the imposition of public union agency fees unconstitutional under the First Amendment—observers declared the end of public-sector unions. The *Times* called the ruling a "Sharp Blow "[1] to organized labor. A *Washington Post* headline deemed the decision a "major blow"[2] In the former piece, the *Time's* Supreme Court correspondent wrote that "most of the labor movement's strength these days is in the public sector. The [*Janus*] ruling contained a final blow for public unions, saying that workers must affirmatively agree to support them." In a similar assessment, the *Post's* legal reporter concluded that the decision was "a devastating if not unexpected, loss for public-employee unions, the most vital component of organized labor and a major player in Democratic Party politics."

In either case, there was a consensus among the papers of record that the case would have serious, adverse consequences for public-sector unionization. The expectation was that union

[1] Adam Liptak, *Supreme Court Ruling Delivers a Sharp Blow to Labor Unions* (The New York Times, 2018)

[2] Robert Barnes and Ann E. Marimow, *Supreme Court rules against public unions collecting fees from nonmembers* (The Washington Post, 2018)

members would stop paying union fees because they would benefit from the union's collective action whether they paid or not.

In three years since the decision, membership rates have not decreased significantly, and unions have not seen a steep decline in funds. While the worst has been avoided, it is not clear that we are out of the woods yet.

This paper is an effort to provide a deeper, more nuanced understanding of *Janus* and its implications—an understanding only possible when viewing the case through three distinct lenses: American political development, American political thought, and political theory.

This paper has three main contentions and is divided into three different subfields: (I) The workplace is a source of oppression—worker precarity is evident especially in the post-9/11 American economy. Collective action is a solvent, one still supported by both union members and non-union members alike as it is more important now than ever. We must first understand why unions are essential before we can understand either the threat the ruling in *Janus* posed or the responses of the unions who sought to blunt its effects. These responses may be considered at least partially responsible for why the decision had a far less intense effect than expected. (II) On the other hand, we must understand the *Janus* decision as part of a long history, and we must look at the development of the court's relationship with unions to understand how deeply ingrained unions are in the culture, which may also explain why the effects of the decision never materialized. This explanation suggests that inertia has not yet allowed change to be made evident but would suggest the ruling is more effectively understood as a signal for future action rather than an immediate change. (III) If the decision represents a signal for future, we must seek to clarify the ideology underlying the ruling to understand what the signal may foretell. The Roberts Court's in general and the *Janus* decision have primarily been understood through

comparison to the Lochner era in scholarship; the through lines are not as apparent as they seem, and a more nuanced comparison begets critical distinctions. I will include a collection of literature on the Lochner era, allowing scholars to see competing points of view laid out in a single chapter, to sharpen our understanding of exactly how different and dangerous the *Janus* decision is if not in direct effect, then in the implication of what future decisions may come from the Roberts Court.

The first chapter will consist of an analysis of the attitudes of public sector union members rooted in Judith Butler's ethics of precarity and Emmanuel Levinas's conception of "the face." I will use this text then as a basis to interpret the unions' responses to the *Janus* ruling to see how they effectively retained the great majority of their membership and dues.

In the second chapter, I aim to provide a history of and explain conservative backlash to public sector unionism in the United States. I will then zero in on *Janus* in particular, situating the decision and its impacts in the political and legal developments of the labor movement.

In the third chapter, I will explore the *Janus* case through the lens of American political thought. I will juxtapose the Freedom of Contract milieu of the Lochner era with the Roberts' Court pro-business track record in general and in *Janus* in particular. Comparisons have been made between the two. I will attempt to reframe the simplistic argument made by commentators that decisions like *Janus* represent a reintroduction of Lochner era jurisprudence. This view elides key distinctions; I hope to accentuate them here to reveal the full extent of the decision's departure from the court's past treatment of unions.

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Introduction

On June 27, 2018, the Supreme Court ruled that a tenet of the American public labor system was unconstitutional. Government employees who choose not to join unions, the majority justices concluded, are not required to help pay for union services. As a result, Justice Elana Kagan wrote in the dissenting opinion, "everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services."[3] Kagan has invoked the free-rider conundrum that has plagued unionization from its very inception and that was assumed to be the death knell of public sector unions post-*Janus*.

Given the expected, yet largely unmaterialized, mass implications of the labor case, a thorough review is necessary; a review consisting of the decision's newly reported material impacts situated in the ethics of unions and the broader American political development of public sector unions; a review rooted in an analysis of major concepts in American political thought and political theory.

This paper aims to provide the clearest and most intersectional picture yet of *Janus*.

[3] *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, 585 U.S. ___

Chapter I: Why Stay? Union Membership and the Ethics of Precarity

Political theory, according to the Oxford Handbook on the field, is a discipline whose widely varied traditions and approaches are "united by a commitment to theorize, critique, and diagnose the norms, practices, and organization of political action in the past and present."[4] A demand for justice and its fulfillment stand as a central concern in the field.

Janus was held by many to be the end of public sector unions adding to the precarity that has marked the post-9/11 American economic landscape. If a non-member did not have to pay agency fees, critics argued, droves would opt out and become the dreaded "free-riders." This was not what happened.

Judith Butler's ethics of precarity has been at the forefront of political theory discourse seeking to characterize the nature of our political present. By viewing *Janus* through this lens, we can see the importance of unions in terms of their direct material consequences and in terms of their ethics. Aided by this approach to understanding unions, we may also look at public unions and union members' response to the ruling as they shifted tactics in anticipation of a loss before the high court. Political theory then will help aid in understanding the worker's role—their "political action"—in blunting the adverse impacts of Janus.

First, I will conduct a content and language analysis of three recent union demonstrations alongside post-*Janus* strategy alongside concepts and themes from Butler's chapter "Precarious Life." This will firmly root our understanding of unions in a clear ethical framework that we can

[4] John Dryzek, Bonnie Honig, and Anne Phillips, *The Oxford Handbook of Political Theory.* (New York, NY Oxford University Press, 2006) 4

later use to better understand how unions and union members may approach the question posed by the *Janus* ruling.

I. Levinas, the Other, and the Face.

The Greek god Janus is often depicted as having two faces. This is an image in which bodily bifurcation easily comes to represent a division of interests. It is this division that is the core of ethics as French Philosopher Emmanuel Levinas illustrates in his metaphor of "the face." So, this two-faced deity is an appropriate symbol of the relationality at the core of *Janus* and all union cases. It is not that the case is defined by merely two faces, but rather by the moral implication with which Levinas imbues the face. In *Janus* there are two central dynamics—one of the worker himself in relation to his employer, and one of the worker himself in relation to his *fellow* worker—that can be viewed through the lens Levinas provides. Writing in "Precarious Life" on the interconnectedness of humanity, Butler quotes Levinas in full, and here I will too, for the selection serves as the basis of the content analysis.

> The approach to the face is the most basic mode of responsibility. As such, the face of the other is verticality and uprightness; it spells a relation of rectitude. The face is not in front of me (*en face de moi*) but above me; it is the other before death, looking through and exposing death. Secondly, the face is the other who asks me not to let him die alone, as if to do so were to become an accomplice in his death.
>
> Thus the face says to me: you shall not kill. In relation to the face I am exposed as a usurper of the place of the other. The celebrated "right to existence" that Spinoza called the conatus essendi and defined as the basic principle of all intelligibility is challenged by the relation to the face. Accordingly, my duty to

> respond to the other suspends my natural right to self-survival, *le droit vitale*. My ethical relation of love for the other stems from the fact that the self cannot survive by itself alone, cannot find meaning within its own being-in-the-world... To expose myself to the vulnerability of the face is to put my ontological right to existence into question. In ethics, the other's right to exist has primacy over my own, a primacy epitomized in the ethical edict: you shall not kill, you shall not jeopardize the life of the other.

The thinking of Butler and Levinas—a language of dependence, precarity, and collective fates—underlies that of public union members who depend on collective action to find any stability in an otherwise precarious existence. Though union members may not speak with the complicated syntax of these theorists, it is these principles that animate their thinking. The parallels are found throughout interviews with public union members by the press at rallies and demonstrations. By centering Levinas and Butler's writing as a means of understanding unions, it is possible to understand how the public sector union members would approach the decision that the *Janus* ruling presented them with, namely whether to continue paying dues or not if they can benefit from union gains either way.

Take for example, an AFSCME (the American Federation of State, County, and Municipal Employee) protest at the University of Minnesota where, "...workers [made] a public push for higher wages and other demands in contract talks with the school."[5] Lei Simmons, a clerical worker at Masonic Cancer Research Center and member of AFSCME Local 3800, told

[5] Michael Moore, *AFSCME united for 'substantive change' in talks with U*, (Workday Minnesota 2021)

journalist Michael Moore: “The University of Minnesota has a history of turning [a] blind eye.” She added, “We have a history of managers rationalizing and justifying behaviors that demean people. Each person that is at the university as a student and as a worker has the right to be respected.” Moore then goes on to quote Sarah Vast, a transgender, nonbinary worker, who demanded that the university provide “safe, healthy and justice or workers of all identities, needs and abilities.”[6] Taken without evidence, I do not claim to know the truth of this history, though one must always read in such power relations a potential for abuse. What rings out from such an accusation is the imagery so profoundly employed by Levinas and Butler. Simmons accuses the University of turning a blind eye. In doing so, she levels the playing field between employee and employer: they are two faces, and in this case one has turned away from the other. Such an act is anathema to Levinas’s conception of ethics which promotes placing the other face above you, holding its interests above your own. In a relation with employers that do not seek an “ethical relation of love,” an employee is left only with the imperative to band together with their fellow worker whose face is still turned toward hers.

“Each person.” “...workers of all…” The language in the content of the union members’ interviews point toward a solidarity rooted in both the precarity of one’s own position as a worker and the precarity of the workers around them. Words of exclusion are few and far between. There is a recognition among public union members that, to quote Levinas, “the self cannot survive by itself alone.” The worker “exposes[s] [herself] to the vulnerability of the face” when she encounters the face of her fellow worker, and questions of the self arise. If she is able

[6] Michael Moore, *AFSCME united for ‘substantive change’ in talks with U*, (Workday Minnesota 2021)

to follow the dictate that Levinas provides—"in ethics, the other's right to exist has primacy over my own"—she is forced to put her fellow employees' needs before her own. This is the undergirding of the union structure and the opposite of the free-rider conundrum; one may adhere to this ethical directive by committing to collective security in the form of union membership. It is only in helping the other that one can help oneself. This is especially clear after the *Janus* ruling because it meant that a worker who seeks to put her own interests above all others has the new option of no longer paying union fees while still reaping the rewards of the union. But, in accordance with Levinas, by and large union members chose not to take this path because they understood that by abandoning their fellow workers, they are also weakening the collective power they yield as a union and thus endangering their own interests should too many others do the same.

This, of course, is a limited case study analysis and I urge other scholars to build on my work. Other patterns may be discernible, ones in which the public worker emerges as ambivalent toward the precarity of those around them. The refutation of my argument was on display recently in public workers' backlash against vaccination. The refusal to get a shot that would protect the physically vulnerable demonstrates a lack of concern directly in opposition to Levinas's conclusion that "you shall not jeopardize the life of the other." But by and large, Levinas's conception of "the face" is a helpful tool for approaching the ethics at the root of unions.

II. Mistreatment in the Public Workplace

Judith Butler has proposed a form of ethics rooted in "'a new bodily ontology' based on a rethinking of precariousness, vulnerability, injurability, interdependency and exposure."[7] The following section will focus on two aspects in particular: injurability and exposure, for both are central to understanding the workplace and the role of the public employee within it.

When unions are stripped of their power, the authority that employers wield in the workplace advances largely unchecked—there is little way to counter "personal coercion and repressive fear."[8] And chances of securing reliable bulwarks against physical injury and exposure to violence in the workplace—of which there is documented after documented instance (as will be explored below)—dissipate without collective action. This is especially detrimental to society at large in cases regarding the public realm, for if employees are subject to a harmful and/or hostile environment, the effect will adversely impact the implementation of essential state and city services rather than private interests. This set of claims underscores the importance of banding together and may provide theoretical insight into why the union members chose not to become the dreaded "free riders" expected to all but cripple unions after *Janus*.

Mentions of injurability and exposure abound in two recent union member demonstrations. Take for example, a group of paraprofessionals in Machesney Park, a small town in Illinois. The group of caretakers and educators held a protest demanding that their

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[7] Mari Ruti, *The Ethics of Precarity, Judith Butler's Reluctant Universalism* (Wits University Press, 2017) 1

[8] Corey Robin, *Fear: The History of a Political Idea* (New York, NY Oxford University Press, 2014) 228

employer, Easterseals, a city-affiliated non-profit serving the disabled, provide higher wages and safer working conditions. Sara Dorner, a staff representative for AFSCME Council 31 told local journalist Maggie Polsean that "paraprofessionals experience violence on a regular basis."[9] She goes on to add: "We also feel like the CEO [of Easterseals] ...has not recognized the violence and dangerous working conditions that these workers are in... their proposal in negotiations absolutely does not recognize that." These claims, like many other claims made by workers in protests, are hard to prove, but that is the power of the protest and of collective action in general: the accumulation of accusations in the form of bodies and faces serves as visual testimony. Each face is one you must turn away from if you deny their claims.

To the East of Illinois, in Maryland, university bus drivers are demanding similar changes based on the same underlying conditions: exposure to bodily harm. One protestor's sign emphasized the severity of the situation: "HEY DOT [Department of Transportation]: U [sic] KNOW IT'S RIDE OR DIE, NOT RIDE AND DIE."

The protest, according to student journalist Shifra Dyaak, "was the *second this month* [July] organized by the American Federation of State, County and Municipal Employees Local 1072, the union that represents this university's employees."[10] Nathan Sparks, a bus driver for the University of Maryland since 2013, spoke of sanitation concerns: "Despite contractors working to clean and disinfect Shuttle-UM buses, they are 'dirtier than ever,' said Sparks—an issue that has been especially concerning during the pandemic." The problems at hand, according

[9] Maggie Polsean, *Paraprofessionals at Easterseals protest working conditions* (2021)

[10] Shifra Dayak, *Underpaid and left behind': UMD bus drivers protest for better working conditions* (2021)

to other drivers, aren't confined to matters of cleanliness. Mechanical disruptions abound. Many of the buses' radios do not work properly, Vilma Diaz, also a Shuttle-UM driver, told Dyaak. Going without reliable communication devices presents safety risks for drivers and riders alike, because if a driver needs to get a hold of emergency services, and the radio fails, a speedy response may never arrive. "This has been an ongoing issue that we've been bringing back to [management] over and over again," Diaz added. "They're obviously not that concerned about the students. At the same time, they're not concerned about their workers." Dyaak goes on to write:

> In a survey of 34 Shuttle-UM staff conducted by the union in June, employees complained about faulty bus mechanisms, including horns that don't work, having to stand on brakes to get the bus to stop or slow down and mirrors that moved out of place while buses were in motion.

No one needs to have died for us to understand the danger of ill-equipped buses. One need only remember why those buses are outfitted with radios, horns, and brakes in the first place.

As is clear from an examination of both union demonstrations, Butler's ethics rooted in 'a new bodily ontology,' one based in part on injurability and exposure, gains added relevance in the workplace. Whether in a caretaking setting (as is the case for the Easterseals workers), or behind the wheel of a state vehicle (as is the case for the bus drivers), injury and the clear and present exposure to it, looms large for employees. This is true whether it is noticed before or after the accident. How many workers must die before the employers are held responsible? Do we look to nuclear power plants that slowly poisoned employees in the past? We already know the history of worker exploitation is the history of the civilized world. And the structural problems underlying said exposure—underfunding and negligence from higher-ups (to name just

a couple) —are too large for employees to tackle alone; collective bargaining via a strong and influential union is often the only route for substantive recourse, and that is exactly what the decision in *Janus* put at risk.

III. Union Response

Before *Janus*, 22 states enacted an agency fee system, including some of the most populous (and most liberal): New York, New Jersey, California, Massachusetts, and Illinois.[11] The other states, (including a large swath of conservative-dominated areas in the South) fell under the regime of right-to-work laws, which outlawed mandatory fees for non-union members. Since the high court ruled, in the states with the agency fee structure in place, some "[u]nions lost money and members, and they were forced to adjust their policies."[12] For example, by one estimate, "New York State's public-sector unions, which previously collected nearly $1 billion a year in dues and fees, lost almost $100 million in annual agency fee revenue." At the same time, membership has not fallen to the predicted lows. As one report from the free-enterprise-oriented think tank, the Manhattan Institute, put it his way: "Although the unions lost agency fee revenue and even some members, the effects of *Janus* have, to date, been far less catastrophic than the dire consequences sketched by union advocates or as predicted by Justice Elena Kagan in her *Janus* dissent."

There have been other rosy assessments surrounding public-sector unionism post-*Janus*, from, among others, Alan Klinger, Stroock's Co-Managing Partner and Chair of Government

[11] Daniel DiSalvo, *The legal Aftermath of Janus v. AFSCME* (New York, NY Manhattan Institute, 2021) 4

[12] *Ibid.*, 01

Affairs & Regulatory Support, and outside counsel for the American Federation of Teachers (AFT). Klinger wrote a piece alongside Dina Kolker for the American Bar Association entitled, *Public Sector Unions Can Survive Janus*—outlining the ways in which public sector unions can and have overcome their predicted judicial downfall. "Unions have been reinvigorated by the challenge," Klinger and Kolker write, "and [have] worked to strengthen their relationships with members and improve their services and accessibility."[13]

In other words, preemptive organizing blunted some of the damage as the following quotations from leading policy experts demonstrate. The modern right's capture of the courts (which will be explored further in chapters II and III) and their signaled desire to deflate public-sector unionism played a role. "Unions were really prepared because, sadly, the outcome was really predictable,"[14] Sharon Block, a former Obama Labor Department official who now runs the Labor and Work life Program at Harvard Law School told the news site Politico. The sentiment was echoed in a quote, featured in the same piece, by NEA president Lily Eskelsen García: "We knew which Supreme Court justices would be with us and which ones would not be with us, and lo and behold we were right. We didn't just sit back and put our feet up."[15]

Some unions, for example, raised dues. Two statistics quoted in the Politico piece are worth sharing because they illustrate the dramatic changes enacted to offset an expected adverse court ruling:

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[13] Alan M. Klinger and Dina Kolker, *Public Sector Unions Can Survive Janus (*New York, NY American Bar Association, 2020) 287

[14] Rebecca Rainey and Ian Kullgren, *1 year after Janus, unions are flush* (Washington, D.C., Politico, 2019)

[15] *Ibid.*, 1

> AFSCME, which has raised its minimum monthly dues an average 25 cents over each of the past 10 years, bumped its minimum monthly dues by 50 cents in 2018, to $18.40, according to its filings with DOL. The United Food and Commercial Workers—one of the four surveyed unions that lost members in 2018 but still posted financial gains—raised its minimum monthly dues that year by $1, to $16.04. It was the first dues increase for the union since 2013, according to its filings with DOL.[16]

Other unions planned budget cuts in the run up to the decision. AFSCME, the defendant in the case, "in addition to bumping dues higher than in previous years, continued a trend of reduced political spending."[17] After *Janus*, more than ever, workers were seen to place the needs of their fellow workers above their own by committing to paying higher fees that were no longer necessary in order to reap the rewards of the unions, and in so doing, maintained the collective force they wielded. While a simplistic reading of Levinas would conclude that putting the face of the other above your own is a selfless act and one in opposition to the basis of the unions, it is the response to *Janus* that illustrates exactly the way in which it is not: "the self cannot survive by itself alone."

IV. Discussion and Conclusion

The Supreme Court's jurisprudence surrounding labor, speech, and unionization has been one of deference to unions and aversion toward overt political activity. A conservative shift in the Court unraveled one of the core tenets of effective unionization in the public sphere: the

[16] *Ibid.*, 1

[17] *Ibid.*, 1

agency shop fee. A mass exodus of union members was foretold with certainty in the popular press based on the long-held belief that if members did not have to pay agency fees while still reaping the rewards of the union, they would simply stop paying the fees. While the results of the decision were far less decisive than expected, the risk was clear.

Butler and Levinas offer us a way of understanding the public sector union members who chose not to leave their unions after *Janus* simply because they could. It is possible that by facing their fellow workers and the precarity they all experience—in the form of injurability and exposure—they have found that the only response ethically and practically is to continue to work together for collective security. The presented study shows the ability of actors to curb the supposed adverse impacts of a judicial ruling. This is particularly relevant considering the Court's upcoming decision regarding abortion—one that, like *Janus*, is expected to overturn precedent and have devastating effects.

Chapter II: *Janus* and American Political Development

American Political Development is defined by its breadth and scope—scholars of the discipline analyze institutions (Congress, the courts, etc.) through the wide and expansive lens of the past. "What APD counsels," Richard Vallely, Suzanne Mettler, and Robert Lieberman write in their handbook on the field, "is *putting history first.*"[18] In addition to prioritizing the past in order to better understand and fully contextualize the present, APD pushes scholars to "do history systematically and explicitly…and [to] question existing assumptions about what the facts actually are." I aim to do just that below, using the lens of and strategies central to APD to provide context for the decision that seemed to risk everything for public sector unions and to provide another possible reason that the decision had a much less intense impact than was expected: inertia.

I. A Brief History of Public-Sector Unionism

The temperature on the deck of a ship during a 19th-century South Carolina summer could, and often did, reach well over 95 degrees fahrenheit. The wood—trodden on by a parade of federal Navy workers—could heat to the point of splintering. So perhaps it was little to no surprise that amid overextended hours and grueling conditions, on the heels of a successful effort by fellow public employees to change the conditions in which they worked, the men aboard the government-owned ship decided to take collective action.[19] The action amounted to a repudiation

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[18] Richard Valley, Suzanne Mettler, and Robert C Liberman. *The Oxford Handbook of American Political Development (*New York, NY Oxford University Press, 2016) 11

[19] Richard C. Kearny et al, *Labor Relations in the Public Sector* (Oxfordshire, England, Routledge, 2014) 3–4

of labor standards that might have upset toiling men in the past but failed to spur meaningful political change.

One of their demands: an eight, as opposed to ten, hour workday. After negotiations, the employees received just that, and the federal government granted a reduction in labor time. The win was both tangible (men changed the material conditions of their workday) and symbolic (the state anointed itself a standard bearer in fair labor practice). As noted in Richard C. Kearny and Patrice M. Mareschal's *Labor Relations in the Public Sector,* "the drive for the 8-hour day led to the crystallization of the principle of the state as a model employer maintaining the highest possible working standards in its services as an example for others to follow."

The public sector unions of the mid-to-late 19th century were followed by "general purpose" federal and local state organizations in the 1910s–1930s. There were, of course, barriers—both logistical and political—along the way. The rise of postal unions in 1912, for example, garnered executive irritation. Persistent lobbying efforts by the mail service drove President Theodore Roosevelt to issue a gag rule, one "forbidding federal employees from seeking congressional legislation on their own behalf, directly or indirectly, individually or through their organizations."[20] Despite or perhaps because of obstacles at the highest level, the postal workers were militant in their unionization efforts—workers collaborated with the American Federation of Labor and partnered with a popular magazine, *The Harpoon,* to establish an anti-gag rule campaign. The collective toil resulted in governmental action; Congress passed the Lloyd Lafayette Act of 1912, a law guaranteeing federal employees the First Amendment

[20] Richard C. Kearny et al, *Labor Relations in the Public Sector* (Oxfordshire, England, Routledge, 2014) 3–4

Right[21] to organize and petition Congress for a redress of grievances. The material impacts were limited, but, as Kearny and Mareschal note,

> Although the Lloyd–Lafayette Act had only a small effect on federal union-busting activities (which continued), it did denote a positive direction in the development of postal and other federal labor organizations as they increasingly began to seek the full labor rights granted to private sector workers.

Two decades after the public worker banded together and the state begrudgingly recognized its right to do so, the American Federation of State, County, and Municipal Employee was born. What once may have seemed of only symbolic importance, served as encouragement to government workers seeking those same protections and a precursor to their successful organization.

The now largest state and local union organization found its roots at a 1932 State Employees Association meeting in Wisconsin. The group was one of "30 independent local unions of state and municipal employees located in various parts of the nation,"[22] and its de facto leader, Arnold Zander, a civil engineering expert, would become AFSCME's first and longest-serving president.

At its inception, the unions in general and Zander in particular, focused on the "twin issues of job security and civil service protection." As membership interest swelled, the mass of

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[21]The use of the First Amendment as a tool to bolster collective action is worth noting; Generations later in the *Janus* case, the Court would do just the opposite, using speech rights in an attempt to deflate employees' collective influence.

[22] Merrick F. Masters, *AFSCME As a Political Union* (New York, Springer, 1998) 316

disparate unions sought a binding institutional backbone. The array of locals merged with the existing American Federation of Government Employees (AFGE), "a primarily federal sector union, in the mid-1930s." But, as Merrick F. Masters writes in *AFSCME As a Political Union*, "[r]ecognizing the dissimilarities between federal workers and state and local employees, the American Federation of Labor (AFL) chartered AFSCME as a distinct union affiliate on October 8, 1936."[23]

AFSCME's original philosophy was one of devotion to the civil service—leaders and members alike emphasized the value of civic reform. Good government, their argument went, one unmarred by patronage and backroom dealing, could beget improvements in wages and working conditions (two of their ultimate goals). This position arose as a clearsighted acknowledgment of their inability to affect change in a broken system. In struggling to improve their wages and working conditions, they simultaneously strategized to strike beneficial deals with the current government while fighting for an improved future government more open to negotiation and less corrupted by city machines.

In the 1950's there was a transition in both ideology and methodology. Around the end of the decade, "AFSCME began shifting its philosophical predisposition to collective bargaining and labor representation akin to the private sector model."[24] Two major American political events—citywide and national, respectively—turned AFSCME'S tide. The first: Mayor Robert Wagner's 1958 Executive Order 49, recognizing New York City employees' unions. The order

[23] Merrick F. Masters, *AFSCME As a Political Union* (New York, Springer, 1998) 316

[24] Merrick F. Masters, *AFSCME As a Political Union* (New York, Springer, 1998) 316

granted the "privilege of collective bargaining which labor in private industry enjoyed."[25] The second: President Kennedy's 1962 E.O. 10988, "promulgating a labor relations framework for the federal sector."[26] Both orders acted as executive solvents for a legislative failure. When Congress passed the Wagner Act of 1935—establishing the National Labor Relations Board, setting the institutional framework for collective bargaining—they left out public sector employees. Wagner and Kennedy filled the vacuum.

V. Public Sector Unions and the Court

Public sector unions at large and AFSCME secured a litany of rights in the early-to-mid twentieth century; legislative and executive action improved the material impacts of the working lives of their members. But it was still largely unclear how the movement for the public worker would fare in the judicial realm. Three major union cases, all dealing with agency shop fees, *Railway Employees v. Hanson* (1956), *Machinists v. Street* (1961) and *Railway Clerks v. Allen* (1963) concerned the speech of *private* workers.[27] However, the decisions bore influence on future public sector union jurisprudence and merit attention.

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[25] Raymond D. Horton, *Municipal Labor Relations in New York City* (The Academy of Political Science, 1970) 72

[26] Merrick F. Masters, *AFSCME As a Political Union* (New York, Springer, 1998) 316

[27] Courtlyn G. Rosner Jones, *Reconciling Agency Fee Doctrine, The First Amendment and the Modern Public Sector Union* (Chicago, Il. Northwestern University Law Review)

For one to understand the Court's first "interaction with mandatory fees,"[28] a brief history of the agency fee is warranted. Prior to Congress's first two major actions on unionism—the Labor Relations Act (1926) and the National Labor Relations Act (1935)—employer unions were commonplace.[29] In order to forestall the rise of what came to be known as "dummy" unions, the NLRA (along with the state public sector labor laws that followed) barred employers from paying any monies directly to unions. "Instead, labor law establishes an accounting regime under which employers pay wages to workers, who then must pay fees to the union."[30]

The legislative language amounted to a repudiation of employers' attempts to dilute their employees' collective bargaining power. Years later, a conservative, reactionary piece of legislation known as the Taft–Hartley Act aimed to curb labor's increasing leverage. This was accomplished, in part, through the prohibition of the "closed shop" system that made union membership a condition of employment. The proliferation of non-unionized workers in a unionized workplace birthed the ever-relevant free-rider conundrum. The drafters of the bill recognized this problem and gave states two options: they could enact "right to work" statutes, endangering unions' power by allowing free-riders, or, in contrast, issue "agency fees" in which those who did not want to join a union, yet still reaped the group's benefits, would pay their fair share.

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[28] Benjamin I. Sachs, *Agency Fees and the First Amendment* (Boston, Mass. Harvard Law Review) 2018, 1052

[29] *Ibid.*, 1070

[30] *Ibid.*, 1048

In the first major case challenging this regime, *Railway Employee' Department v. Hanson* (1956)[31], plaintiffs argued for the removal of a provision in their collective bargaining agreement, one that required them, "as a condition of employment, to pay dues and fees to the union."[32] These mandatory payments, the employees argued, violated the First Amendment. "The *Hanson* Court agreed that the dues requirement raised a justiciable question under the First Amendment, but it ultimately rejected the employees' challenge on the merits."[33] The justices argued that a collective bargaining unit's interest in forestalling a free-rider, mass exodus of workers, justified the dues, "at least when it came to the union's economic functions."[34] And, because there was no proof at hand that the union was spending those dues for political activity, "the Court declined to find a First Amendment violation."[35]

William O. Douglas, writing for the majority, employed comparison to explain the ruling. "On the present record," Douglas writes, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."[36] In fact, Douglas maintains, Congress made sure to bar funds for political use. The legislative body "endeavored to safeguard against that possibility by

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[31] *Railway Employee' Department v. Hanson* (1956)

[32]Benjamin I. Sachs, *Agency Fees and the First Amendment* (Boston, Mass. Harvard Law Review) 2018, 1052

[33] *Ibid.*, 1052

[34] *Ibid.*, 1052

[35] *Ibid.*, 1052

[36] William O. Douglas, Majority Opinion, *Railway Employee' Department v. Hanson* (1956)

making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.'" Douglas goes on:

> If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.

Four years later, in *International Assn of Machinists v. Street*, the Court was presented with a case "in which the union *clearly was* spending mandatory dues for political purposes."[37] And, according to the *Street* Court, the political use of mandatory dues did present a First Amendment question of "the utmost gravity."[38] But instead of ruling on the constitutional merits, the Court found that the Railway Labor Act, the law underlying the facts of the case, authorized mandatory dues agreements to fund the "negotiation or administration of collective agreement," and prevented the union from using those funds for political activity, and the lower courts had already ruled in favor of the complaint. As Justice Brennan writes in the majority opinion:

> The regulatory scheme created by the Railway Labor Act to determine whether a construction is "fairly possible" denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. We conclude that such a construction is not only "fairly possible" but entirely reasonable, and we therefore find it unnecessary to decide the correctness of the constitutional determinations made by the [lower] courts.

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[37] *Ibid.*, 1053

[38] *Ibid.*, 1053

The Supreme Court mapped the affected labor jurisprudence onto the public sector when they handed down their decision in *Abood v. Detroit Board of Education* (1977)[39] [40], the ruling that *Janus* would overturn decades later. The case concerned agency fees, specifically, whether their imposition on non-union members in the public sector violated the First and Fourteenth Amendment.[41]

The facts of the case concerned the Detroit Federation of Teachers (DFT), the teachers' union representative, and the Detroit Board of Education. Both parties signed a collective bargaining agreement "requiring nonunion teachers to pay a DFT service charge."[42] Two groups of teachers filed suit, claiming that the DFT was using the agency fees "for activities not required by its role as exclusive representative." This was, the plaintiffs argued, a violation of the First Amendment.

The Supreme Court, in a unanimous decision, sided with the Board of Education. Service fees, Justice Potter Stewart wrote, withstand constitutional muster so long as the funds are not used for overt political action. This cut against the plaintiffs' argument that collective bargaining

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[39] *Abood v. Detroit Board of Education* (1977)

[40] Deborah A. Schmedemann, *Of Meetings and Mailboxes: The First Amendment and Exclusive Representation in Public Sector Labor Relations* (Virginia Law Review, Feb., 1986, Vol. 72, No. 1 (Feb., 1986), pp. 91–138: "The legal issues posed by public sector unionism cannot always be answered by quick reference to rules developed for the private sector. The policy judgments may differ when the employer is the government."

[41] *Ibid.*, 92

[42] *Ibid.*, 93

in the public sector, unlike collective bargaining in the private sector, is inherently political and therefore shall require a different, tailored-to-the-circumstance rule. The majority refuted the notion with the observation that while the role of a public employee is inherently political, "the employer-employee relationship in the public sector is essentially no different from that in the private sector. Public employees as citizens retain the same rights as other citizens vis-a-vis the government."[43]

The model at hand, one in which the union issues agency-fees to nonmembers in order to avoid "free-riders," now affirmed by the court, became the model of unions across the country. In fact, *Abood* stood as a guide for union logistics—chapters "calculated agency fees as the Court directed and sent nonmembers notices of how much to pay."[44] This structure, according to the *Abood* court, promotes "labor peace" and forecloses any disruption that would occur if employees were represented by multiple, disparate collective bargaining units.

Public sector unions have been on the rise since Abood, which provides a striking contrast to the dismal state of private unions. The groups have been integral in electing liberal candidates and pushing liberal causes. Conservative activists, recognizing this trend, have made a concerted effort to rollback public unions.[45] More so, as Alexander Hertzel Fernandez, a scholar at Columbia University, has observed:

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[43] *Ibid.*, 123

[44] *Ibid.*, 213

[45] Alexander Hertzel Fernandez, *New Conservative Strategies to Weaken America's Public Sector Unions* (Scholars Strategy Network 2015)

> Even at their heyday, most private sector unions struggled to have much impact in state politics, so by undercutting unionized public employees, conservatives can weaken their most powerful adversary, clearing the way for legislatures and governors to achieve right-wing priorities such as tax cuts, sharp reductions in social spending, and the elimination of regulations.

There is merit in a critique of public-sector unionism. But said merit lies not in electoral consequences, but rather in the consequences of certain procedures and actions of public unions. Certain civil service workers, for example, perform vital day-to-day functions—cleaning wastewater, extinguishing fires—and any interruption in their work may cause a major disruption to the public at large. “Concerns about strikes have long been used as a reason to discourage public sector employees from unionizing and obtaining collective bargaining rights…” This is in large part because of a massive 1919 police strike that took place in Boston after the police commissioner prohibited members of the force from joining unions. “It led to anarchy in Boston,” says Martin Malin, director of the Institute for Law and the Workplace at the Kent College of Law in Chicago. “There was a massive crime wave. The specter of the Boston police strike has dominated public policy on labor relations ever since." President Ronald Reagan referred to the Boston Police Strike when he famously fired 11,345 striking air traffic controllers in1981.”[46]

Conservative groups hostile to unions found the votes to overturn *Abood* decades after the decision was handed down. With the introduction of Justice Samuel Alito on the newly

[46]Melissa Maynard, *Public Strikes Explained: Why There Aren't More of Them* (Stateline, Pew, 2012)

minted Roberts Court, anti-union groups found a set of ideological allies on the bench. The time was soon ripe for strategic litigation—statehouse action signaled just that. Around 2011, Republican-controlled legislatures introduced a laundry-list of anti-union measures. Wisconsin enacted a law making it harder for public employees to engage in collective bargaining. Indiana adopted a "right-to-work" law, the first state to do so in the last decade.[47] The laws were relevant to *Janus*, in-so-far as they were legislative precursors to a similar judicial outcome.

Two cases challenging *Abood* were granted a writ of certiorari. In *Harris v. Quinn (2013),* the Court said home health care aides in Illinois didn't have to pay union representation costs for a public workers' union they didn't belong to. The Court also said the workers weren't 'full-fledged public employees,' subsequently upholding *Abood*, at least in principle[48]

Then in 2016, the Court was asked in *Friedrichs v. California Teachers Association* to decide if a contract requiring public school teachers to pay mandatory dues for union activities violated the First Amendment.[49] The death of Justice Antonin Scalia disrupted what would have likely been an outcome unfavorable for public sector unions. A 4–4, liberal, conservative split sent the case back down to the lower courts.

With a shift in the ideological bent of the Court in play, a bitter confirmation battle ensued. Senate Republicans blocked the consideration of then-President Obama nominee

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[47] *Ibid.*, 214

[48] Scott Bomboy, *A landmark Supreme Court decision faces extinction* (Washington, D.C. The National Constitution Center, 2018)

[49] Scott Bomboy, *A landmark Supreme Court decision faces extinction* (Washington, D.C. The National Constitution Center, 2018)

Merrick Garland, a moderate (they refused to hold even a hearing on the matter). The maneuver paved the way for the confirmation of President Donald Trump's pick for the high court: Neil Gorsuch, a conservative jurist from the Tenth Circuit Court of Appeals. The Roberts Court had the votes to overturn *Abood*. (I am not suggesting Trump appointed Gorsuch with direct intention to gut *Abood*, but given the justice's past decisions regarding labor, legal commentators pointed out at the time that Gorsuch would be a deciding vote in undoing the 1970s labor case.)

VI. *Janus* and its Aftermath

And within a year *Abood* was overturned. The Court decided to hear a case brought on behalf of the National Right to Work Legal Foundation; the group was representing Mark Janus, a child-support specialist in the Illinois Department of Healthcare and Family Services, who chose not to join AFSCME and refused to pay its $44.58-a-month agency fee.

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31,* the Court deemed the imposition of agency fees on non-union members unconstitutional under the First Amendment. "We conclude that this arrangement [of agency fees]," Alito writes in his majority opinion—the arrangement that underpins the funding models of countless unions—"violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[50] Private speech, Alito contends, can and often does further "the interest of non-speakers." But, he adds, that fact alone "does not empower the state to compel the speech to be paid for."[51] He went on to quantify the effects of agency fees in terms of monetary penalties. "It is hard to estimate," Alito writes, "how many billions of dollars have

[50] *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) 1

[51] *Ibid.*, 1

been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment."[52]

Alito first moves to "address the proper level of scrutiny to apply to agency fee arrangements."[53] Rational basis, the lowest form of review, Alito argued, would not be appropriate here as it is "foreign to our free-speech jurisprudence."[54] He considered whether "strict scrutiny, (the Court's most stringent test) or exacting scrutiny (a "less demanding test") should apply."[55] In the end, Alito chose the latter, for he reasoned, Illinois's public-sector agency fee arrangement "cannot survive under even the more permissive [exacting scrutiny] standard," under which a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[56]

Alito also directly addresses the state interests at hand in *Abood*, labor peace and the "free rider issue," and deems them insufficient. In terms of labor peace, Alito argues that while there may be a compelling state interest at hand, "it need not rely on agency fees to achieve this end, because a state can authorize exclusive representation (thus allowing the government employer

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[52] *Ibid.*, 47

[53] Victoria L. Killion, Supreme Court Invalidates Public-Sector Union Agency Fees: Considerations for Congress in the Wake of Janus (Washington, D.C. Congressional Research Service, 2018) 2

[54] *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018), Samuel Alito, Majority Opinion

[55] *Ibid.*, 2

[56] *Ibid.*, 2

to bargain collectively with only one entity) without also authorizing agency fees." In terms of the supposed "free-rider" problem "the majority...surmised that a union that seeks and secures the position of exclusive representative enjoys sufficient benefits and privileges to alleviate the free-rider concerns raised in *Abood*."[57]

It has been three years since the decision, and aside from a set of law review articles and mentions in practice journals, coverage on the effect of the case has been sparse. Minutes after *Janus* was decided, grim prophecies surrounding public sector unionism abounded. The papers of record employed different adjectives preceding the same word. *The Times* declared the ruling a "crushing blow"; for *The Post,* the decision was a "big blow." In either case, it appeared public sector unions were approaching a serious decline, but data display a more nuanced headline. Rather than delivering a death knell to public collective bargaining units, *Janus* (for now) presented an interruption. While unions surely did all they could to prevent membership from falling, it is also helpful to look at just how long unions have wielded power in order to understand why that power cannot be expected to fade overnight. The decision seems perhaps akin to the Lloyd–Lafayette Act but in the opposed ideological direction. Although the Lloyd–Lafayette Act had relatively little immediate material impact, it served to signal a change in the thinking of the court. I hold that the ruling in *Janus* represents another signal, and though its impacts have not yet arrived, they will come as the result of future rulings in which the court continues to follow its line of thinking and thus undo the many decisions that led to the public sector union power *Janus* sought to compromise.

[57] *Ibid.*, 2

VII. Conclusion and Discussion

The scorching deck of a navy ship. A circle of chairs in a Wisconsin State Employees' meeting. The counsel's dais in front of the highest court. The public sector labor movement's players, settings and scenes are diverse, spanning decades of American political change and development. Employees of the government—state, federal and local—fought for their right to organize amongst an ever-shifting backdrop of governmental and legal realities.

When *Janus* came before the Court, observers predicted the end of collective bargaining in the public sector. Upon a closer examination of the case and its aftermath, a more nuanced, less fatalistic picture emerges. Public sector union membership, in fact, has remained relatively steady. Leading policymakers on the left of the aisle claim that this is thanks, in part, to strategic organizational tactics on behalf of union leadership concerned over a conservative majority and their anti-labor views. The other factor likely responsible for muted effects is inertia: change takes time and public sector unions' power is too deeply ingrained in the political system to be done away with so easily, but *Janus* may be the beginning of that process.

The third and final chapter of my thesis is reserved to understand the political and ideological impulse behind the court's ruling to understand it's possible implications for the future of public unions.

Chapter III: *Janus,* a Ghost of *Lochner's* Past*?* Toward a more Nuanced Comparison—American Political Thought

"The history of American political thought," Professor Keith Whittington writes in his seminal book on the field, "is the record of the struggle to define the fundamental principles that should guide political decision making." The discipline provides key insights into the arguments that ultimately shape policy and governance, for "contemporary politics rests on an inheritance of political traditions and values that have been built up (and sometimes torn down) across generations."[58] Understanding the regime of the old, often aids in fully understanding the regime of the new. Situating *Janus* in the subfield and literature of American Political Thought will provide scholars with a clear, comprehensive, and chronological[59] account of the fundamental events, principles and traditions surrounding public-sector labor politics and the court, and current scholarship doing just that mischaracterizes the nature of the ruling in such a way that does not do the Court's radical departure from precedence justice.

"*Janus* is the culmination of several recent 5–4 decisions in which the court's conservatives laid the groundwork for a fatal blow to public sector unions," writes the legal writer Mark Joseph Stern in *Slate*. He adds: "But its true predecessor is *Lochner v. New York*, the

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[58] Keith Whittington, *American Political Thought, Readings and Materials* (New York, Oxford University Press, 2017) 25

[59] *Ibid.*, 29. As Whittington writes: "Contemporary American political thought is the product of numerous arguments and decisions made by historical actors working within the political, legal, and intellectual constraints of their political eras. *American Political Thought* is organized historically to better reveal the nature of those constraints and how they have evolved over time."

notorious 1905 decision that turbocharged the Court's pro-business interventions into health, safety, and economic regulation." Stern's piece is one of many in a line of recent works, both academic and journalistic, comparing the Court of the *Lochner* era to the Court of today.

Some comparisons are apt. Some—*not all*—cases decided during the *Lochner* and Roberts era both materially disadvantage(d) the worker, resulting in reduced leverage and scant protection. But a direct comparison without proper scrutiny begets false, or at best, uninformed, conclusions. I will juxtapose the jurisprudence of the *Lochner* Era (with a focus on its titular case) with the Roberts' Court pro-business track record in general and in *Janus* in particular. I will attempt to reframe the argument made by scholars and journalists that decisions like *Janus* stand neatly alongside *Lochner*-era jurisprudence. This view elides key distinctions that render *Janus* a far more alarming decision, and I hope to accentuate them here.

This chapter is divided into two parts: in the first, I present and analyze scholarship arguing that the *Lochner* Court was guided not by a blind allegiance to business and laissez-faire principles, but rather more nuanced, hegemonic political principles of the time concerning Jacksonian-era conceptions of equality. This approach was coupled with, or rather, morphed into, a strict adherence to the constitutional principle of Freedom of Contract—class protections and distinctions were discouraged. "The Justices of the *Lochner* Court", Howard Gillman writes in *The Constitution Besieged...*, "brought about a crisis in American constitutionalism by stubbornly adhering to this constitutional ideology—which was hyper antagonistic toward 'class' politics and legislation—despite the rapid industrialization and transformation of American

capitalist relations in this period."[60] (I draw on the work of Gillman and David Bernstein, another prominent Lochner-era scholar, extensively in this section). I also scrutinize contradicting scholarship such as that of Paul Kens. Presenting the major thinkers on *Lochner* in one concentrated analysis will aid other scholars focused on the period.

In the second section, I make the case that unlike the *Lochner* era Court, the Roberts Court in general and the modern conservative legal movement have direct, strategic, and longstanding ties to big business.[61] This is where *Janus* comes into play, for it is a decision that bears the marks of said conservative legal apparatus, which is totally opposed in principle to the *Lochner* Court, and so, more radical than any previous actions taken by the court in relation to unions.

I. Founders' Anti-Faction Sentiment and Jacksonian-Era Principles of Equality

"A century before *Lochner*-era judges worked to block certain kinds of government interference in the market," writes Gillman, "another group was directing its efforts to the promotion and protection of commerce": the founders. The group of men drafting the Constitution were faced with the task of structuring the governmental mechanisms of a nascent society centered around certain republican values. Those values included, but were not limited

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[60] Howard Gillman, *The Constitution besieged: the rise and demise of Lochner era police powers jurisprudence* (North Carolina, Duke University Press, 1993) 214

[61] While on its face, a connection to private business suggests that the Court would be more hostile to private unions, in reality, big business often works to gut public sector unions for their historic connection with and support of the Democratic party—a party whose platform (higher taxes, regulation etc.) runs diametrically opposed to the interest of amassing capital.

to, "self-reliance" and "autonomy." The realization and promotion of civic virtue required the founders to grapple with the intersection of land, manufacturing, business, class, and governmental regulation (or lack thereof).

Thomas Jefferson, for example, balanced the competing set of factors with the weight—both physical and imaginative—of the American frontier. To Jefferson, the sprawling land provided a space in which man would find self-sufficiency. "His faith in the harmonizing qualities of the market and the liberating potential of a vast frontier," Gillman writes, led Jefferson to advocate a limited governmental role in economic affairs, "a role restricted to actions designed to broaden people's opportunities to find *their own* social independence and personal autonomy, 'in a market that allowed even the humblest…person to take care of himself.'"[62]

A certain kind of freedom existed in this sphere for Jefferson and other elites— freedom from a centralized force. "Many at the time of the founding" considered the exercise of public power an interference—at the benefit of one group over another—in a "liberty loving"" common law regime of contract and property. In this system, market competitors scoffed at governmental mediation; neutrality was preferred. Public power was a permissible mechanism only when it served to provide for the common good, not particular interests.

When the delegates met in Philadelphia to begin the drafting of the Constitution, there was a strong push to "delegitimize those conceptions of republicanism that encouraged class politics and create a truly 'disinterested and dispassionate umpire in disputes between different

[62] Howard Gillman, *The Constitution besieged: the rise and demise of Lochner era police powers jurisprudence* (North Carolina, Duke University Press, 1993) 214

fashions in the United States.'"[63] Doing so would allow for a sort of self-governing between the "factions," what Madison referred to in Federalist No. 10 as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[64] Madison's writing stands in line with what Gillman describes as the "basic goal" at the time of forestalling schismatic politics and governmental power. In the Founders' idea of a fair, just and republican-value oriented society, "no single interest would be able to dominate."[65]

Interbranch actors had a role in building and sustaining a polity consisting of balanced factions. Alexander Hamilton made specific mention of the judiciary's role in Federalist No. 78:

> It is not with a view to infraction of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no further than to the inquiry of the private rights of classes of citizens, by unjust and partial laws.[66]

This third branch of government entered center stage later in the 19th century, when, as Gillman explains, Jacksonian Democracy was a dominant ideology—a time animated by a revulsion toward special privileges.

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[63] *Ibid.*

[64] James Madison, *Federalist* no. 10

[65] Howard Gillman, *The Constitution besieged: the rise and demise of Lochner era police powers jurisprudence* (North Carolina, Duke University Press, 1993) 32

[66] Alexander Hamilton, *Federalist* no. 78

Other scholars, Paul Kens the most prominent among them, have a different interpretation of how the battling factions would serve the country. Kens writes that "social Darwinism and laissez-faire ideas" were dominant on the Lochner court; that the strongest interests would survive, *not* that they would all balance each other out. This is not a new idea, for "Kens is following in the footsteps turn-of-the-century Progressives (and historians such as Charles Beard and Robert McCloskey) who accused the Court of grafting the ideas of Herbert Spencer and William Graham Sumner (two prominent Darwinists) onto the Constitution.[67]" The view remains popular today. As for their purported concern for Jacksonian democracy, Kens maintains it was one of empty promises. The justices of the *Lochner* court, Kens explains, were more concerned with protecting, rather than tearing down, economic privilege. It is here that Gillman's argument takes hold and Kens' withers.

If, as Kens writes, social Darwinist interests and laissez-faire values guided the court, why did a decision like *Lochner*, [68] the case from which this period draws its name, include little to no language related to a "survival of the fittest" ideology and the protection of capital?

Although there was a series of decisions handed down during the Lochner era, this text will focus on one case: the titular opinion, *Lochner v. New York* (1905). I aim to show, through the defining case of the time, how the thought guiding the Founders—that competing factions would balance each other out and thus guarantee equality—translated into a majority judicial opinion.

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[67] Michael A. Ross, *Law and History Review* (American Society for Legal History 2000), pp. 707–708

[68] *Ibid.,* 708

In the year 1905, in the city of Utica, New York, there stood a biscuit, bread, and cake bakery. Its owner, Joseph Lochner— tall, mustachioed—took pride in and vehemently enforced the bakery's mission statement of uniformity and cleanliness. Reaching such a high standard required great manpower and extended labor. The roadblock for Lochner took the form of a New York State law prohibiting employees of bakeries from working more than ten hours per day, or sixty hours a week.

Lochner violated and was convicted under the statute known as the Bake Shop Act, which passed by wide margins in both the New York House and Senate. He appealed the conviction and the case eventually moved up to the Supreme Court. Justice Rufus W. Peckham wrote the majority opinion siding with Lochner, striking down the statute.

Gillman's close examination of the opinion, portions of which I will highlight and review below, reveal not a bench driven solely by moneyed interest, but rather by conceptions of state power and equality enshrined in the Founding Era. The jurisprudence clashed with state courts' upholding of regulation in the face of rapid industrialization.[69]

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[69]Melvin Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Reevaluation* (New York, Oxford University Press 1985) 65: "Writing during the growth of demands for greater legislative involvement in the marketplace, Tiedeman [a prominent legal writer of the time] explicitly set out to prove that the police power, on which reformers relied to legitimate their proposals, could not go beyond the ancient legal maxim *sic utere tuo, ut alienum non laedas*—'use your own property in such a way as to not injure another's property.' In the new industrial age, however, property extended far beyond its traditional physical manifestations. In 1902 Judge Peter Grosscup declared that property 'is not, in its modern sense,

While, as Gillman notes, Peckham's majority decision "does not explicitly rely on the language of unequal, partial or class legislation," in striking down the law, "the authority and interpretive elements" that were central to anti-class distinction jurisprudence "are in evidence."[70]

Peckham begins his opinion with an acknowledgment that the New York statute at hand "interferes with the right of contract between the employer and the employees." This was not, as the popular narrative has suggested, a blanket license for business to act with laisse-faire impunity. The State, Peckham reasoned, "has power to prevent the individual from making certain kinds of contracts." "In fact," Gillman writes:

> Peckham pointed out that the court had upheld many interferences with rights to contract…including hours legislation for men working in underground mines and smelters, compulsory vaccination laws, and in general "legislation that was enacted to conserve the morals, the health or the safety of the people."

In Lochner's case, Peckham saw not a question of public health, but rather one of labor law. "We think that a law like the one before us", Peckham wrote, "involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest

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confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life, a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment.' The 'underlying life' included the policies adopted by entrepreneurs to carry out their business goals and encompassed the terms on which they hired their laborers."

[70] *Ibid.*, 128

degree affected[71] by such an act." Anticipating detractors, Peckham acknowledged the connection between hours worked and one's health but stopped at offering a judicial solvent. A more pressing issue was at hand: "the possibility that legislatures might begin to use this pretext as an open-ended excuse to pass class legislation." Justice Oliver Wendell Holmes wrote a dissent, now famous for its "anti-Interest," "for the People" position. But, upon closer examination, the opinion "serves a far less radical legal position than is sometimes supposed."[72] Rather than simply excoriating laissez-faire dominance on the bench, as the dissent is often remembered, Gerald Leonard points out:

> In the end, he [Holmes] disagreed with the majority only on the question whether the New York statute really was a plausible health regulation, and with [Justice] Harlan only on the question whether discussion of available empirical research was called for in deflating the majority's assumptions. Although Holmes wielded a terribly sharp rhetorical knife, he used it to defend a traditional and conventional theory of constitutional review.

David Bernstein's text, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform,* runs nearly parallel with Gillman's vision of a court bent on nuanced principles of the time. Bernstein, "sets out to turn the traditional account of *Lochner* on its head by demonstrating that central assumptions about the case may not, in fact, have been true." He argues that "the substantive due process and liberty-of-contract doctrines were rooted in

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[71] Peckham majority

[72] Gerald Leonard, *Holmes on the Lochner Court,* (Boston, MA, Boston University Law Review) 2005, 1003

American principles and traditions that had developed long before *Lochner*." He also works to undo critics' assessment that liberty of contract "sprang ex nihilo out of the Supreme Court justices' minds in the 1890s with the intent to favor the interests of big business and suppress the working class," and instead "points out that, by 1857, multiple state constitutional decisions had relied on the Due Process Clause to prevent legislatures from unjustly meddling with property rights."[73]

As is clear from a brief review of work analyzing the jurisprudence of the *Lochner* court alongside Peckham's dissent, the *Lochner* decision and the era in general did not stem from an unquestioned loyalty to unregulated industry, but rather a strict adherence to the guiding thought of the past as it pertains to equality.

When scholars make comparisons between the Roberts Court and the *Lochner* era, they lend too much cover to the former. *Lochner*-era judges were adhering to long-standing constitutional principles in the face of shifting material realties. Today, the conservative justices of the Roberts Court advance pro-business decisions as a result of strong ties to "Free Enterprise" not an inability to adjust their constitutional interpretation to fit contemporary material realities.

VIII. The Powell Memo and The Roberts Court

In March of 2008, just three years into the tenure of Chief Justice John Roberts, Jefferey Rosen, a law professor at The George Washington University published a *New York Magazin*e piece under the headline: Supreme Court Inc. In it, he writes,

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[73] *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Harvard Law Review, Book Review 2011)

> [There has been] an ideological sea change on the Supreme Court. A generation ago, progressive and consumer groups petitioning the court could count on favorable majority opinions written by justices who viewed big business with skepticism or even outright prejudice…. Today, however, there are no economic populists on the court, even on the liberal wing. And ever since John Roberts was appointed chief justice in 2005, the court has seemed only more receptive to business concerns. Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years.
>
> Other analyses have led to new scholarly attempts to quantify the Roberts Court's pro-business leanings.

The piece underscores the Roberts Court's deference to corporate power—a deference that originated in a memo, was developed by a conservative movement, and enshrined into law by the current court. Where the guiding political thought of the *Lochner* Court stemmed from concepts presented in the Federalist papers, the guiding political thought of the Roberts Court found parts of its roots in one document: The Powell Memo. A content analysis of the text alongside the *Janus* decision will reveal apparent through lines—ones between business interests and conservative legal groups.

Lewis. F Powell Jr. was appointed to the United States Supreme Court in December of 1971 by Republican president Richard Nixon. Less than two months before that, Powell postmarked a confidential memo and sent it off to Eugene B. Sydnor, Jr., a friend and the Chair of the Education Committee of the U.S. Chamber of Commerce.

The report, entitled "Attack on American Free Enterprise System,"[74] laments the tearing down of big business and suggests ways in which powerful forces—such as the courts and the media—may forestall the rise of anti-corporate sentiment.

For Powell, and by extension the conservative network that placed him on the bench, there was a new moment in history at hand, one where "the assault on the enterprise system is broadly based and consistently pursued. It is gaining momentum and converts."[75] The 70s were a time of conservative backlash aimed at the gains made by the poor and people of color in the 1960s. Powell's memorandum was a key mechanism in ushering in that backlash. This was, in part, due to the clear instructions regarding who should take up the mantle of Free Enterprise and how.

"Under our constitutional system, especially with an activist minded Supreme Court," Powell writes in a reference to the liberalism of the Warren Court, "the judiciary may be the most important instrument for social, economic and political change." Leftists, he claims, were utilizing the power of the court, so why weren't conservatives? "Other organizations and groups have been far more astute in exploiting judicial action than American business."

He goes on to call one of the groups out by name—the American Civil Liberties Union—and praises them for a specific tactic: the filing of amicus, or "friend of the court" briefs. "It [the ACLU] initiates or intervenes in scores of cases each year." Other groups drew his ire (and laudation) as well. "Labor unions, civil rights groups and now the public interest law firms are extremely active in the judicial arena," all to the detriment of business interests.

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[74] Lewis Powell, *Attack on American Free Enterprise System* (Washington, D.C., 1971)

[75] *Ibid.*, 1

The Chamber of Commerce, Powell suggests, has a role to play in bolstering the Free Enterprise system before the court as do other powerful interest groups. He suggests that the Chamber should employ "a highly competent staff of lawyers,"[76] and "in special situations it [The Chamber] should be authorized to engage, to appear as counsel amicus in the Supreme Court, lawyers of national standing and reputation." This strategy requires, according to Powell, strategic litigation—litigation centered around the interests of big business and free markets.

After the memorandum was written, Nixon placed Powell on the nation's highest court (there is no evident proof of the memo's direct impact on Nixon's pick) and strategically installed two more conservatives on the bench. In the decades after, a conservative legal network emerged.

The conservative legal movement's buds sprang from Powell's suggested ground—in this case a call to rival the left's utilization of the judiciary. As Steven Teles writes in his comprehensive study of the rise of the right's legal movement, "[c]hanging legal culture required shaking the self-confidence of liberal lawyers by challenging their perception that they had a monopoly on serious legal thought."[77] The uprooting of such a monopoly was aided in part by groups such as The Federalist Society.

The once obscure group, started in the early 1980s by conservatives at Yale Law, is now a considerable legal force. Of the nine justices on the bench, six (Brett Kavanaugh, Neil Gorsuch, Clarence Thomas, John Roberts, Samuel Alito, and Amy Coney Barrett) are current or

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[76] *Ibid.*, 27

[77] Steven Teles, *The Rise of The Conservative Legal Movement: The Battle for Control of the Law* (William Street, Princeton, New Jersey, Princeton University Press, 2008)

former members of the Federalist Society. The organization's stated goals, collected from their website, parallel those of Powell's suggestions for the courts. Where Powell derides the prominence of liberal legal circles, The Federalist society acknowledges that "law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Where Powell complains of judicial activism on the part of the left, The Federalist Society, claims "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."

What's more, conservatives have established a judicial-strategy network, like that of the ACLU, an organization Powell cited and derided. Powell wished for a web of elite lawyers and amicus-brief drafters aimed at advancing pro-business decisions in the law, and he received a society devoted to doing just that.

Once it has been established that the *Lochner* Court was pro-business only in effect rather than in intent, it is clear in what way the Roberts Court, which has direct ties to pro-business advocacy groups, differs in its aims. Having come to this conclusion, we may revisit Justice Kagan's dissenting opinion, for she recognizes that the court is headed in an unprecedented direction. For example, Kagan writes,

> The worse part of the [*Janus* decision] is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong. But even if that were true (which it is

not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions."[78]

It seems nothing can stop the court from pursuing its aim of bolstering big business, and *Janus* is just the start.

IX. Discussion and Conclusion

Justices on the *Lochner* Court strictly *adhered to* principles such as Freedom of Contract and Jacksonian era concepts of equality that suggested differing factions would balance each other out. They held fast to these concepts even as they proved inapplicable to the shifting material realities in which the worker was more dependent than ever on the often abusive employer; individuals no longer toiled in the fields that Jefferson envisioned holding a place for everyone in order to supply for themselves and their families but rather put their faith in the technological advances by moving to the growing cities and getting jobs on assembly lines with unregulated hours and conditions which resulted in less control over their work and further alienation from the product of their labor. Nearly seventy years later, the material realities were clear: factions do not simply balance each other out and the fields that once held a place for everyone are now covered in highways and gas stations. Society has developed such that power is not distributed evenly, and it is no longer possible to expect that a laissez-faire approach would result in an equitable result. The Roberts Court did not rule, as the *Lochner* Court had, in good faith that equality would prevail but rather in accordance with tactics from conservative thinkers and legal groups that favored big business over collective agency (an explicitly anti-equality

[78] *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, 585 U.S. ___

position) and emerged from the mold and methods of Lewis Powell and his pro-business memorandum.

The distinctions between the jurisprudence—and the thought underlying it—matters, for if scholars make direct comparisons between the *Lochner* Court and the Roberts Court, it lends institutional cover to the latter while misinterpreting the former. If it is made clear in the popular imagination that the current court is not akin to, but a divergence from the Jacksonian era democratic principles of the *Lochner* Court, perhaps those with interest before the current court, public union members among them, will continue to act with a greater sense of urgency to offset adverse decisions. If the ruling in *Janus* was merely symbolic of change to come as Chapter II asserts, it is important that we understand what change the court is envisioning, and by comparing the Roberts Court to the *Lochner* Court we can see that it is in fact a more extreme ruling than it has been given credit for, and so a more startling signal.

Conclusion

Janus v AFSCME was expected to be the death knell for public sector unions. When the Supreme Court handed down its decision, rendering the implementation of agency fees in the public sector unconstitutional under the First Amendment, the papers of record predicted devastation, calling the ruling a "sharp blow" and using words such as gutted.

But, upon a multi-disciplinary, comprehensive examination, a far different picture emerges. Rather than crippling public collective bargaining units, *Janus* (for now) presented a signal of what is to come.

The aim of this thesis was to explore a set of answers as to why the widely expected outcome of *Janus*—the gutting of public sector union power, in both governmental labor and electoral politics— did not materialize. The goal was not to do so in a definitive manner, but

rather an initiative one, for the project was also an interdisciplinary collection of literature on the subjects at play in the *Janus* case: labor jurisprudence, the thought underlying it, and the response from those it impacts.

The first section used theory as a guide to understand the ethics of unions and to seek an answer for how public sector unions were able to blunt their all-but-foretold-institutional downfall? Rather than focus on policy or jurisprudence, the section zeroed in on the rhetoric of public sector union members and drew on the work of Judith Butler. What emerged was a near-axiomatic recognition on behalf of state, local, and municipal employees of the factors that make collective action not only desirable, but necessary: dependence, precarity and collective fates.

The second section looked at the case through the lens of American Political Development. The interaction between the courts and labor culminating in *Janus* is only one case in a set of long-standing conflicts between the state, government employees, and unions, and those conflicts have all built on one another over time. With the long view in mind, it is easy to see *Janus* as only the signal of a new direction the court is taking.

The third section viewed the case in terms of the jurisprudential and political thought underlying *Janus* in order to more fully understand what the decision is signaling. It has become commonplace to compare the ruling in *Janus* to decisions handed down in the Lochner era. While some comparisons are appropriate, a more nuanced comparison unveils key distinctions. For example, the decisions of the *Lochner* era, including the titular case, dealt more with an aversion to special privileges in the ideological light of Jacksonian Democracy, equality, and self-sufficiency than it had to do with the popular charge of unhinged, laisse-faire, business-first, social Darwinist attitudes. Today, the Roberts Court is the more appropriate target of such pro-business claims. Decisions such as *Janus*—which aimed, but ultimately failed, to upend a key

force in progressive political organizing—are the consequences of a federal bench made in the right's image and are unprecedented in their radical acceptance of big business's interests. Knowing which forces (and ideologies) shaped the current bench and their jurisprudence may allow for those with interest before the court—such as union members—to continue crafting a competing network and rival vision and to understand the extremity of the situation at hand.

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