A Comprehensive Analysis of Proposed Union Strategies to Deal With *Janus*

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Catherine Fisk and Martin Malin, *After Janus*, 107 Cal. L. Rev. __ (forthcoming 2019), available at SSRN.

Have you ever had an idea for an article, but then somebody else beat you to writing it and did a better job than you would have with the topic? A*fter Janus* is my first experience with that, and not surprisingly, its co-authors are scholars I respect immensely.

Janus v. AFSCME held that all union security clauses (contract provisions requiring members of union bargaining units to pay their share of the costs of union representation) in the public sector violate the First Amendment. This constitutionally imposed "right to work" rule will cause unions significant financial damage, mainly because under "duty of fair representation" (DFR) rules, unions generally must represent members of union bargaining units without regard to whether or not they pay any dues. Scholars have been working on ways unions could get around some or all of the negative effects of *Janus*. Current ideas include getting rid of the "majority exclusive representative" model, adjusting DFR rules, or requiring employers to pay for unions' collective bargaining costs. *After**Janus* responds to these proposals with what I believe is appropriate skepticism. Further, it creatively reframes the union's financial dilemma as a collective action problem, as opposed to the more common framing of a free-rider problem. It also makes some potentially very useful alternative suggestions. Because it addresses so many topics, the summary below barely hits the highlights. Anyone interested in labor law and policy should read this article in full.

First, the article stresses that "right to work" rules create *collective action*, not free rider, issues. The problem is that, without a way to require everyone who benefits from union representation to pay for it, it becomes economically rational for more and more employees simply not to pay for the benefits. This means, crucially, that the union will be increasingly unable to provide common goods on which bargaining unit members could "free ride." The article gives examples of bargaining units in "right to work" jurisdictions whose members vote by substantial majorities to unionize or to remain unionized, while only a minority pay any dues.

The article then critiques several proposals union supporters have made, showing that they do not solve the collective action problem and detailing other flaws. In one of my only quibbles with the article, it largely combines the "eliminate exclusive majority" idea with the "alter DFR rules in grievance/arbitration handling" idea under the general rubric of "Members Only Representation." I think these ideas are more conceptually separate, but the article deals well with both.

Getting rid of majority/exclusive representation is popular among some labor law scholars, and it would solve the problem of forcing unions to represent those who don't pay dues. However, there are at least two reasons this is not a way around *Janus*. First, it is unrealistic politically. As the article shows, among other things, the U.S. labor movement, including major public sector unions such as AFSCME, AFT, NEA, and SEIU, do not want to get rid of it. Second, and more controversially, the article argues that the limited experience with members-only bargaining in the U.S. shows that "such systems are fraught with problems for both employers and employees" (*e.g.* a system in California schools prior to 1976).

A less radical and more feasible solution would be to adjust DFR rules such that unions either did not have to represent workers who don't pay dues in grievance/arbitration proceedings, or could require workers to pay the costs of arbitrations or other disciplinary hearings. *Janus* explicitly left the door open for that, although the opinion stressed that

unions would still have to represent all members of bargaining units in contract negotiations. Again, this has some appeal at first glance, and a few states (Florida, Nebraska, Nevada, and New York) already have modified their DFR rules along these lines.

There are complications, however. What about other types of representation? Public-sector unions traditionally represent employees in, *e.g.*, civil service hearings, in suits under employment laws and state and federal constitutional provisions. Moreover, the article shows that states that have adopted this option often have low union density rates. This is partly because most employees don't think they will need a union in a discipline cases. It does not solve the collective action problem because it turns union membership into a form of last-minute insurance policy. Also, letting individual members handle arbitrations would limit the union's ability to refine general contract language into specific rights in the interest of all bargaining unit members.

The article also analyzes the proposal that employers should, in some way, pay the costs of contract negotiation. Problems here include making unions financially dependent on employers, leaving union financial health vulnerable to political change, possibly impeding union democracy and lessening motivation for local unions to engage employees, and creating a perception that the public is paying for unions.

Malin and Fisk have some creative alternative suggestions. First, unions could compel employees to make contributions equal to the cost of agency fees to some other 501(c)(3) organization, as is done with religious objectors; this would lessen employees' incentives to refrain from paying union fees for economic reasons, while still allowing ideological objectors an alternative to supporting a union. Second, unions could assess employees a pro-rata share of estimated total arbitration fees for a year. So, for example if a union spent a total of $25,000 in a given year on arbitrations, and the bargaining unit had 250 members, a bargaining unit member who refused to pay dues could be charged a $100 share of the total arbitration fees. Third, unions could add more "members-only" benefits, such as insurance, free legal representation, and voluntary shift-trading or leave banks. Fourth, unions can engage in more member education – a route that many unions are taking, assisted by state laws designed to facilitate union-worker contact.

A "Jot" can only scratch the surface of this sophisticated, multi-faceted article. It is a must-read for all labor scholars. I liked it a lot.

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