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Maria Hylton

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Cover Page Footnote
Professor of Law, Boston University School of Law. Thanks to Paul Vasiloff for being an excellent research assistance, to participants in the Labor Law Symposium at Belmont University College of Law, and to their staff for helpful comments of earlier drafts.

A COMMON-SENSE DEFENSE OF *JANUS*: FORTHCOMING CHANGES IN THE PUBLIC SECTOR

MARIA O'BRIEN HYLTON*

INTRODUCTION

In late June of 2018, *The Boston Globe* ran a front-page story with the headline "$432,000 Salaries Outrage Officials."[1] The story began, "In cash-strapped Methuen, where the average resident earns just under $32,000 a year, five police captains stand to each make a whopping $432,295 a year

* Professor of Law, Boston University School of Law. Thanks to Paul Vasiloff for being an excellent research assistance, to participants in the Labor Law Symposium at Belmont University College of Law, and to their staff for helpful comments of earlier drafts.

1. Michael Levenson, *$432,000 Salaries Outrage Officials*, BOS. GLOBE, June 25, 2018, at A-1.

under their new contract, according to an analysis by the city auditor that has outraged residents and officials."[2]

Methuen is not, by any measure, an affluent city by Massachusetts standards.[3] Yet, the *Globe* story describes expected payouts to the city's highest paid police officers that would exceed the salaries paid to the governor,[4] the Boston Police Commissioner,[5] and the Superintendent of the state police.[6] To further complicate matters, the Globe reported that Methuen recently "laid off [fifty-two] public school teachers, nine school administrators, and additional support staff as a result of a $6.5 million shortfall in the budget."[7]

Loyal readers rightly wondered how this could possibly have occurred—i.e., how could a small, struggling city agree to these extraordinary salaries for a handful of public safety officers as they were laying off teachers and contemplating a loan from the state in order to forestall municipal bankruptcy? Well, it turns out the mayor—one James Jajuga—has a police captain son who stands to benefit directly from the newly signed contract between the police union and the city.[8] Mr. Jajuga voted for the new contract while he was a city council member in 2017.[9] Jajuga now says he was assured by the previous mayor that the contract simply provided for 2% raises. While the former mayor "could not be reached for comment," he has said "that he blames his negotiating team and the auditor . . . for not alerting him to the full financial impact of the contract."[10]

A careful read of the contract (which it appears now-Mayor Jajuga never bothered with) does reveal that it provides for 2% increases; it also reveals "a complex formula requiring officers' benefits be calculated as part of their base pay, which means they are receiving a 2[%] increase on a much

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2. *Id.*

3. Settled in 1642, Methuen is a small city north of Boston that reported a population of 47,255 and a median household income of $61,822 in the 2010 census. *Methuen Town city, Massachusetts*, U.S. CENSUS BUREAU (2010) (available at https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml).

4. Levenson, *supra* note 1 (stating that Republican Charlie Baker earns $151,800 annually).

5. *Id.* (stating that William B. Evans earns a salary of $238,846). Evans is chief of the state's largest city with a population of 685,094. *Boston city, Massachusetts*, U.S. CENSUS BUREAU (July 1, 2017) (available at https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml); *See also* Stephen Beale, *Boston's Highest Paid City Employees Earn Approximately $300,000*, NEW BOS. POST (Oct. 18, 2016, 9:32 AM), http://newbostonpost.com/2016/10/18/bostons-highest-paid-city-employees-earn-300000/.

6. Levenson, *supra* note 1 (stating that Richard McKeon was earning $386,829 when he stepped down in 2018).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

higher salary."[11] This generous definition of base pay is then further amplified by a new requirement that

> each rank . . . must earn a certain percentage more than the one below it. So[,] the sergeants' base pay is increased to include their benefits, which is then used to calculate the base pay of the lieutenants, who then in turn would have their benefits added in when calculating the pay for captains.[12]

This is apparently common enough to be known as a "stacking effect,"[13] and it explains the enormous salaries of the highest ranking and longest serving members of the force. It is worth noting that the city council approved this contract on a nine to zero vote (three members of the council have family members who work for the police department and two others were planning to take jobs in the department).[14] To top it all off, Captain Gallant, president of the Methuen Police Superior Officers Association, noted that the contract "is quite clear in its language" and that the dispute could end in litigation.[15]

This story stands out for its shockingly large numbers and the crude, post-revelation efforts by irresponsible elected officials to distance themselves from their own decision making. However, the basic scenario is playing out in many small and large cities throughout the country—many of them struggling financially.[16] How these states and municipalities ended up

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11. *Id.*

12. *Id.*

13. For a more in-depth discussion of the "stacking effect," see Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 87 (2010).

14. Levenson, *supra* note 1.

15. *Id.*

16. *See, e.g.*, *Chicago's Financial Crisis by the Numbers*, CHI. SUN-TIMES (June 24, 2016, 11:10 AM), https://chicago.suntimes.com/opinion/chicagos-financial-crisis-by-the-numbers/ ("Because of the city's weak finances, driven by its massive pension debt, rating agencies over the last few years repeatedly have downgraded Chicago's bond rating. This drives up borrowing costs. Only Detroit has a worse rating. Moody's Investors Service rates Chicago two levels above junk status."); Erin Cox, *Md Officials Warn State Debt Threatens Construction Projects*, BALT. SUN (Dec. 11, 2015, 6:15 PM), http://www.baltimoresun.com/news/maryland/politics/bs-md-debt-threatens-projects-20151211-story.html ("Construction projects that would have been paid for in cash were instead financed with debt, the freed-up revenue used to support the ongoing expenses of running the state government."); Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles Into Insolvency*, N.Y. TIMES (July 18, 2013) ("Instead, numerous factors over many years have brought Detroit to this point, including a shrunken tax base but still a huge, 139-square-mile city to maintain; overwhelming health care and pension costs; repeated efforts to manage mounting debts with still more borrowing; annual deficits in the city's operating budget since 2008; and city services crippled by aged computer systems, poor record-keeping and widespread

in these straits, and what can and should be done to begin to ameliorate "stacking effect"-like contracts that result from a distorted relationship between public employers (Methuen) and their public sector unions is the subject of this paper.

Many scholars and others have, for some time now, been calling attention to the alarming growth in post-employment and other benefits for unionized employees in the public sector.[17] A fairly well-understood

dysfunction."); Judy Lin, *The Cost of California's Public Pensions is Rising Fast. But Efforts to Fix the Problem by Ballot Measure Have Fizzled*, L.A. TIMES (Apr. 7, 2017), http://www.latimes.com/projects/la-me-pension-crisis-initiatives/ ("Pension reform advocates say that achieving real relief in the near term will require reductions in benefits already granted to current employees."); Karisma Maheshwari, *Philadelphia Ranks 73rd Out of 75 Major U.S. Cities in Financial Health*, DAILY PENNSYLVANIAN (Mar. 22, 2018, 9:38 PM), http://www.thedp.com/article/2018/03/philadelphia-debt-report-upenn-penn-financial-health ("Truth in Accounting attributes much of Philadelphia's poor financial health to long-term debt and financial obligations in pension and retiree health care benefits."); Katharine Shilcutt, *Houston is in Bad Financial Shape, Says Fiscal Times*, HOUSTANIA (Jan. 11, 2017, 2:30 PM), https://www.houstoniamag.com/articles/2017/1/11/houston-is-in-bad-financial-shape-says-fiscal-times ("We don't normally put much stock in rankings or ratings, . . . [b]ut it's hard to argue against Houston's outstanding pension obligations."); David Smiley, *Miami Taxpayers Carry Outsized Debt Burden, Report Says*, MIAMI HERALD (Jan. 11, 2017, 6:30 AM), https://www.miamiherald.com/news/local/community/miami-dade/article125721849.html ("Repeated decisions by Miami city officials to kick long-term pension and healthcare obligations down the road to be paid by future generations of taxpayers have left city residents with an outsized debt burden, according to a new report by a financial watchdog agency."); Romy Varghese, *Even San Francisco, Flush with Wealth, Has Pension Problems*, BLOOMBERG (Mar. 20, 2017, 5:00 AM), https://www.bloomberg.com/news/articles/2017-03-20/even-san-francisco-flush-with-tech-wealth-has-pension-problems ("The technology industry has transformed San Francisco with a boom other cities can only envy. But it hasn't eradicated a problem well known to industrial-era towns: the rising cost of pensions."); Mary Williams Walsh & Karl Russell, *New York City Pensions Are Still in Crisis*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/interactive/2017/06/20/business/dealbook/new-york-city-pensions.html ("The Manhattan Institute, a research center focusing on urban affairs and domestic policy, prefers market values, which put the [unfunded pension] shortfall at about $142 billion, more than twice the city's shortfall estimate.").

17. *See, e.g.*, THOMAS J. FITZPATRICK & AMY B. MONAHAN, FED. RES. BANK CLEVELAND, WHO'S AFRAID OF GOOD GOVERNANCE? STATE FISCAL CRISES, PUBLIC PENSION UNDERFUNDING, AND THE RESISTANCE TO GOVERNANCE REFORM 1 (2012) ("If neither plan participants nor state taxpayers are able to effectively monitor and challenge a state's inadequate funding or improper investment decisions, public plans are very likely to remain underfunded."); JOSHUA D. RAUH, HOOVER INST., HIDDEN DEBT, HIDDEN DEFICITS: 2017 EDITION 2 (2017) ("What is in fact going on is that the governments are borrowing from workers and promising to repay that debt when they retire, but the accounting standards allow the bulk of this debt to go unreported through the assumption of high rates of return."); Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 6 (2013) ("While most public employers and employees in the United States set aside money each year to fund future projected pension obligations, many public pension plans are seriously underfunded either intentionally or due to unrealistic assumptions concerning investment performance and the amount that will be owed over time. This means that unless contributions are increased

phenomenon is thought to explain the inability of state and local governments to resist outsized demands from their public unions. As I[18] and others[19] have argued, the central problem with public sector unions is that they find it easy to capture their employers (taxpayers) in ways that private sector unions cannot. The role played by often eager and feckless elected officials in this process has also been well documented.[20]

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substantially, future pension payments to retired government workers will be made, at least in part, from current revenues. The problem is thought to be so serious that some local governments may be effectively insolvent."); Maria O'Brien Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413, 453–54 (2012) ("The astonishing debt figures that GASB 45 finally forced states to report are the logical result of years of rent-seeking by legislators and public sector unions. Well organized unions push hard for improved benefits. Politicians, who are legally obligated to negotiate with these unions on behalf of the taxpayers, understand that strong union support in the form of votes and dollars can be secured by increasing compensation to the union's membership."); Rhiannon Jerch et al., *Efficient Local Government Service Provision: The Role of Privatization and Public Sector Unions* 27 (Nat'l Bureau of Econ. Res., Working Paper No. 22,088, 2016) ("Strong union bargaining power in non-right-to-work states appears to increase the number of full time employees on pay roll, holding the service area constant. These effects are most pronounced for a city's largest transit agency, which suggests public sector unions shift their bargaining pressure toward the dominant transit agencies such as Chicago's CTA, New York's MTA, or Boston's MBTA."); Robert Novy-Marx & Joshua D. Rauh, *The Revenue Demands of Public Employee Pension Promises*, 6 AM. ECON. J.: ECON. POL'Y 193, 193 (2014) [hereinafter Novy-Marx & Rauh, *Revenue Demands*] ("Without policy changes, contributions would have to increase by 2.5 times [to achieve full funding of state and local pension systems in the United States over 30 years], reaching 14.1% of the total own-revenue generated by state and local governments. This represents a tax increase of $1,385 per household per year, about half of which [would go] to pay down legacy liabilities while half [would fund] the cost of new promises."); Robert Novy-Marx & Joshua Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1211, 1245-46 (2011) ("We find that the pension promises already made to state workers are worth at least $3.20 trillion as far as taxpayers are concerned, under the assumption that the state can default on these promises to the same extent that it can default on its general obligation debt. This is a conservative estimate because most state constitutions suggest that pension promises are higher in priority than general obligation debt."); Robert Novy-Marx & Joshua D. Rauh, *The Liabilities and Risks of State Sponsored Pension Plans*, 23 J. ECON. PERSP. 191 (2009) [hereinafter Novy-Marx & Rauh, *Liabilities and Risks*].

18. *See* Maria O'Brien Hylton, *Friedrichs and the Move Toward Private Ordering of Wages and Benefits in the Public Sector* (Bos. Univ. Sch. of Law, Law and Legal Theory Working Paper No. 16-34, 2016); Maria Hylton, *Central Falls Retirees v. Bondholders: Assessing Fear of Contagion in Chapter 9 Proceedings*, 59 WAYNE L. REV. 525 (2013) [hereinafter Hylton, *Central Falls*].

19. *See* Jerch, *supra* note 17; Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 87, 87 (2010); Robert G. Valletta, *The Impact of Unionism on Municipal Expenditures and Revenues*, 42 INDUS. & LAB. REL. REV. 430, 430 (1989).

20. Jack M. Beermann, Professor of Law and Harry Elwood Warren Scholar, offers this analysis of the politician's role in extreme pension liability: "Unfunded pension promises benefit politicians in two ways. First, as in all deficit spending, they allow for current officials to provide services without requiring taxpayers to pay for them until much later, when they

This paper seeks to turn the focus from a now well-recognized problem toward the Supreme Court's recent decision in *Janus v. American Federation of State, County, and Municipal Employees*[21] and to consider changes we might expect to see in the short and medium term. The Court's conclusion—that its forty-year-old decision in *Abood v. Detriot Board of Education*[22] should be overturned on First Amendment grounds—did not come as much of a surprise.[23] Agency fees, the Court held, are inconsistent with the First Amendment in so far as they compel speech in a manner that cannot survive "exacting scrutiny."[24] Whether or not *Janus* and its view of

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may be out of office. Second, pension promises help politicians shore up support among government workers, or at least avoid opposition from government workers, which would be substantial if significant reductions in pension benefits were proposed." Beermann, *supra* note 17, at 27.

21. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018).

22. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

23. Adam Liptak, *A Supreme Court Showdown Could Shrink Unions' Power*, N.Y. TIMES (Feb. 22, 2018), https://www.nytimes.com/2018/02/22/us/politics/supreme-court-unions.html ("The Supreme Court is back to full strength with Mr. Trump's appointment of Justice Neil M. Gorsuch, and most observers believe the new justice will join the court's other conservatives to deliver a decision that will hurt public unions."); Jessica Levinson, *Supreme Court Decision on Janus v. AFSCME Likely to Permanently Weaken Public Unions*, NBC NEWS (Feb. 26, 2018, 4:36 PM), https://www.nbcnews.com/think/opinion/supreme-court-decision-janus-v-afscme-likely-permanently-weaken-public-ncna851376 ("Although we won't find out the court's decision until early summer, the cynical prediction that the court will vote five-to-four — with a decision that benefits Republicans and harms Democrats — is likely true."); David G. Savage, *Supreme Court Poised to Deal a Sharp Blow to Unions For Teachers and Public Employees*, L.A. TIMES (Sept. 28, 2017, 11:05 AM), http://www.latimes.com/politics/la-na-pol-court-unions-20170928-story.html ("Now, the court has agreed to hear a new case presenting the same issue. And this time, Justice Neil M. Gorsuch can — and most likely will — supply the fifth vote for a conservative ruling.").

24. In determining the proper level of scrutiny for agency fees, the majority in *Janus* sought to strike a balance between "strict scrutiny," advocated for by the petitioner, and rational-basis scrutiny, advocated for by the respondents. *Janus*, 138 S. Ct. at 2465. Under the "exacting scrutiny" standard, the agency fee arrangement must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (quoting Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 310 (2012)). In applying this standard to agency fees, the majority first considered whether "labor peace" is a sufficiently compelling state interest. *Id.* By "labor peace," the Court means the "avoidance of the conflict and disruption that . . . would occur if the employees in the unit were represented by more than one union." *Id.* Although the Court recognizes maintaining labor peace is a compelling government interest, it notes that the link between agency fees and maintaining labor peace is lacking, as in the private sector agency fees are not permitted, yet employees still choose to designate unions as exclusive representatives. *Id.* at 2465–66. Thus, even in the absence of agency fees, there is no "conflict or disruption" that comes about when agency fee arrangements do not exist, and the state can therefore maintain labor peace through means significantly less restrictive of associational freedoms. *Id.*

Next, the majority addresses the issue of "free riders," another state interest that the respondents would consider sufficiently compelling. "Free riders" are non-members of the union who, in the absence of agency fees, would continue to reap the benefits of collective

agency fees is compatible with the Court's own constitutional jurisprudence is not a subject about which an employee-benefits lawyer is qualified or eager to offer comment. The benefits perspective may be useful, though, in evaluating the likelihood of reforming some of the worst salary and post-employment excesses now common in parts of the public sector.

Janus, as many commentators have noted,[25] is at least partly about political activity and the financial engagement of public unions in the political process. And, no doubt, some supporters of the result are delighted that, with a bit of luck, donations to Democratic candidates from teachers'

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bargaining without having to contribute monetarily. *Id.* at 2466. The majority believes that such concerns are insufficient to overcome First Amendment objections. *Id.* The majority reasons that there are many private groups that speak out with the intention of gaining government support, the benefits of which will affect non-members; yet we do not think that just because a group advocates on behalf of a certain demographic (senior citizens, for example), that every member of that demographic should be forced to contribute to the costs of such advocacy. *Id.* Accordingly, the free rider rationale does not constitute a compelling state interest, and agency fees will fail exacting scrutiny. *Id.* at 2465–66.

25. *See, e.g.*, Philip Bump, *The Supreme Court's Anti-Union Decision Marks a Clear Shift in the Power of Working-Class America*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/27/the-supreme-courts-anti-union-decision-marks-a-clear-shift-in-the-power-of-working-class-america/?utm_term=.c5fd56914448 ("But unions and union members have been an important part of turning out voters on Election Day and a key force pushing for economic policies benefiting working-class Americans. There are a lot of asterisks that float around those sentences, certainly, but it's broadly the case that much of the institutional power of blue-collar America resided in the labor movement."); Editorial, *Unions and Democrats: The Janus Decision Rocks Illinois Politics*, CHI. TRIB. (June 27, 2018, 9:15 AM), http://www.chicagotribune.com/news/opinion/editorials/ct-edit-janus-court-raunerpritzker-20180627-story.html (noting the likely reduction in political contributions from labor leaders to the democratic party); Ian Millhiser, *Springtime for Union Busting?*, NATION (June 28, 2017), https://www.thenation.com/article/springtime-for-union-busting/ ("Unions provide much of the Democratic Party's political infrastructure, including thousands of volunteers. Though agency fees cannot lawfully be spent on political activity, *Janus* is likely to starve many unions for cash and could cause some unions to fail entirely. That places the party of Neil Gorsuch in a much stronger position each election year."); Douglas Schoen, *Unions and Dems Lost Big in Janus*, HILL (Jun. 29, 2018, 5:30 PM), http://thehill.com/opinion/judiciary/394907-unions-and-dems-lost-big-in-janus ("While public employees already had the ability to opt out of funding their union's political arm, the court ruling will reduce the ability of unions to influence national politics and to help give a leg up to Democratic candidates.")

unions[26] and the likes of The American Federation of State, Council, and Municipal Employees ("AFSCME")[27] may decline going forward.

This paper notes that there will likely be a decline in dues income, which may reduce the frequency and/or size of political donations.[28] Whether that will be a good or bad outcome is hard to predict and highly dependent on political perspective. In Wisconsin, for example, the decline in union membership and income has not been as catastrophic as some predicted following Governor Scott Walker's successful push for Act 10.[29]

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26. Teachers' unions, headed by the National Education Association and the American Federation of Teachers, contributed almost $27 million in the 2018 election cycle, 95% of which went to members of the Democratic Party. *Teachers Unions*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/industries/totals.php?cycle=2018&ind=L1300 (last visited Nov. 10, 2018). Since 1990, teachers' unions have made $178,019,174 in political contributions, 96% of which has gone to members of the Democratic Party. *Id.*

27. The American Federation of State, Council, and Municipal Employees contributed over $12 million in the 2018 election cycle, including over $1.7 million in lobbying. *American Fedn of State, County & Municipal Employees*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/orgs/summary.php?id=D000000061&cycle=2018 (last visited Nov. 10, 2018). The contributions have been overwhelmingly directed at Democratic candidates and organizations that support such candidates. *Id.*

28. It is important to be clear about the mechanics of the regime at issue in *Janus*. Under Illinois law, if a majority of employees in a bargaining unit vote to be represented by a union, the union becomes the exclusive representative of all employees in the bargaining unit. 5 ILL. COMP. STAT. ANN. 315/6 (West, current through P.A. 100-1114, of the 2018 Reg. Sess.). The employees are not required to join the union but are required to pay their "fair share" or "agency fee" to cover the costs of collective bargaining and other mandated union functions. *Id. Abood* blessed this arrangement on the grounds that it maintained "labor peace" and avoided free riding. 431 U.S. 209, 224 (1977). These arguments are taken up *infra* at note 24. Mark Janus is employed by the Illinois Department of Healthcare and Family Services. *Janus*, 138 S. Ct. at 2461. He objects to many of the positions taken by the union that serves as his exclusive representative, including its position on the ongoing Illinois state budget crisis. *Id.* Janus did not join the union but he was compelled to pay $535 per year in agency fees. *Id.* Justice Alito, writing for the majority noted that: "[a]s illustrated by the record in this case, unions charge non-members, not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities. Here, the nonmembers were told that they had to pay for '[l]obbying,' '[s]ocial and recreational activities,' 'advertising,' '[m]embership meetings and conventions,' and 'litigation,' as well as other unspecified '[s]ervices' that 'may ultimately inure to the benefit of the members of the local bargaining unit.' The total chargeable amount for nonmembers was 78.06% of full union dues." *Id.* (internal citations omitted).

29. In an effort to address mounting state debt, in 2011 Wisconsin Governor Scott Walker passed Act 10, which severely limited collective bargaining options for public sector unions in the state. Jake Lubenow, *Wisconsin Union Membership Plummets In Wake Of Worker Freedom Laws*, MACIVER INST. (Oct. 20, 2017), http://www.maciverinstitute.com/2017/10/wisconsin-union-membership-plummets-in-wake-of-worker-freedom-laws/. Massive protests ensued, mainly spearheaded by affected public sector unions. *Id.* According to data collected by the U.S. Department of Labor, statewide union membership has dropped 38.5% from 2011 to 2016, while statewide membership rates fell roughly 4% in the same span. *Id.* The Wisconsin Education Association Council, the state's largest teachers' union, saw its

However, the focus here is on finances for state and local governments and not on political activity. This paper argues that one of the direct benefits of *Janus* should be an almost immediate reduction in the kinds of conditions that give rise to Methuen-type situations. Specifically, this paper notes that a drop in income and/or membership should mean that public sector unions will bring less clout to the negotiating table, which should lessen the pressure elected officials feel to capitulate to financially irresponsible demands. In addition, public unions will now have to devote energy and resources to competing for dues-paying members. In the same way private sector businesses typically compete for customers, public unions will have to make the case for membership. If they cannot, it is hard to see why anyone would mourn the demise of an organization that lacks the support of its own membership.

To bolster the claim that the anticipated changes following *Janus* will be good for state and municipal finances and taxpayers, Section I reviews the key differences between government-provided services and those typically offered in the private sector. Additionally, this section provides a review of the economics and political science literature which supports the contention that public unions consistently raise the cost of running the government. Section II contains three miniature case studies which illustrate the catastrophic effects that public sector unions have had on incarceration rates in California following lobbying by unionized prison guards for a "three strikes and you're out" sentencing regime, public transit obligations in Massachusetts, and the budgets of a small city in Rhode Island.[30] In Section III, this paper addresses the "labor peace" and free riding claims raised by AFSCME in *Janus* and suggests that the former is inconsistent with rates of strikes observed in right-to-work ("RTW") states[31] and that the latter confuses coerced union support with authentic public goods such as military defense. Section IV concludes.

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membership decline from over 100,000 members in 2010 to roughly 36,000 in 2016. *Id.* Moreover, revenue for Council 24 of Wisconsin's AFSCME branch dropped from $5 million in 2011 to $1.5 million in 2013. Steven Verburg, *With dues depleted, Wisconsin's three AFSCME councils merge*, WIS. ST. J. (May 1, 2015), https://madison.com/wsj/news/local/govt-and-politics/with-dues-depleted-wisconsin-s-three-afscme-councils-merge/article_136e2e6e-c63a-503b-8aa5-ad4586ba9e1d.html. Lobbying efforts also took a hit, as AFSCME spent over $1 million on such efforts during the 2011 cycle, while spending only $166,495 in 2016. *See generally* Douglas Belkin & Kris Maher, *Wisconsin Unions See Ranks Drop Ahead of Recall Vote*, WALL STREET J. (May 30, 2012, 7:57 PM), https://www.wsj.com/articles/SB10001424052702304821304577436462413999718.

30. Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1223 (2008).

31. Right-to-work laws prevent unions from requiring employees who choose not to join the union to pay agency fees in lieu of the union dues. JEFFREY A. EISENACH, NERA ECON. CONSULTING, RIGHT-TO-WORK LAWS: THE ECONOMIC EVIDENCE 2 (2015).

I. SHARED AND DISTINCT FEATURES OF THE PRIVATE AND PUBLIC SECTORS AND THE COST OF GOVERNMENT

A. Government is a Monopoly Provider of Many Services (Education, Prisons, Roads, Fire, Police)

A common observation about the public sector is that it frequently offers services as a monopoly provider: there are no direct competitors to the police and fire departments, and drivers' licenses, automobile license plates, and inspections can only be obtained at a location and in a manner proscribed by the state.[32] Even public school teachers work under conditions that are typically quite different from those in private or religious schools.[33] More than a bit of the public school union fury[34] that has been directed at charter schools is due to the fact that charters are public (i.e., paid for with tax dollars) schools whose most remarkable feature is their lack of union contract constraints on teacher working conditions.[35] The importance of the

32. *See* Richard E. Wagner & Warren E. Weber, *Competition, Monopoly, and the Organization of Government in Metropolitan Areas*, 18 J. L. & ECON. 661 (1975).

33. *See* Sylvia A. Allegretto & Ilan Tojerow, *Teacher staffing and pay differences: public and private schools*, MONTHLY LAB. REV., BUREAU LAB. STAT. (Sept. 2014), https://www.bls.gov/opub/mlr/2014/article/teacher-staffing-and-pay-differences.htm.

34. In 2017, the National Education Association adopted a broad policy designed to limit the growth of charter schools. *See* Lauren Camera, *Teachers Union Adopts New, Anti-Charter School Policy*, U.S. NEWS (July 5, 2017, 12:37 PM), https://www.usnews.com/news/education-news/articles/2017-07-05/teachers-union-adopts-new-anti-charter-school-policy. For example, the policy dictates that charter schools must be authorized by the local school board and will be subject to close monitoring. *Id.* Charter schools must also adhere to the same regulations as public schools insofar as public meetings, record laws, and employment and labor practices are concerned. *Id.*

35. In defense of the policy discussed in the preceding note, National Education Association President Lily Garcia stated, "Handing over students' education to privately managed, unaccountable charters jeopardizes student success, undermines public education and harms communities. . . . This policy draws a clear line between charters that serve to improve public education and those that do not." *Id.* Charter schools have long been criticized for prioritizing profits over education. *See generally id.* Since they are not subject to many hiring regulations that public schools are, many commentators believe that charter schools hire unqualified teachers at a lower salary. *See generally* Elizabeth Lyon-Ballay, *How Asa Hutchinson Undermines Arkansas Teachers (But Campaigns on Raising Teacher Pay)*, MEDIUM (Aug. 16, 2018), https://medium.com/@erlyon/hutchinson-promises-teacher-raises-178c4e0c1388?sk=05b17f2fdea843a3ab606dc629652b3a. Charter schools have also been known not to hesitate to cut funding for arts-related programs and to sacrifice a wide education berth for a focus on standardized tests. *See generally* DAVID L. SILVERNAIL & AMY F. JOHNSON, ME. EDUC. POL'Y RES. INST., THE IMPACTS OF PUBLIC CHARTER SCHOOLS ON STUDENTS AND TRADITIONAL PUBLIC SCHOOLS: WHAT DOES THE EMPIRICAL EVIDENCE TELL US? (2014) (finding evidence that the presence of public charter schools results in lower per pupil expenditures in traditional public schools, but noting that the available data do not paint a clear picture of the overall effect charter schools have); James Forman Jr., *Do Charter*

observation about the provision of monopoly services is this: unlike private sector actors/employers, who must worry constantly about the behavior and strategy of competitors, government employers generally have no such concerns. The lack of competition, of course, when combined with voter apathy and distraction, explains why legislators often find it expedient to respond to public sector union demands.

A private employer cannot avoid a serious consideration of the cost of, for example, an improved vacation or health care plan. Should a private employer's cost of total compensation increase in the short term, e.g., over the life of a new, three-year contract, then that employer must figure out how to pass on that cost to consumers, absorb the cost, or increase demand for her product to offset the increase in expenses.[36] If it is not possible to pass on most or all of the increase to consumers, one would expect the employer to vigorously resist demands for additional, costly benefits. The end result should reflect a sincere effort by the employer to control costs.

In the public sector, a different dynamic governs the same scenario. The confluence of voter apathy/distraction and need for the employer/elected officials to worry not about cost but reelection distort the response to a demand for more generous benefits. The elected official is not spending *her* money, but the money belonging to taxpayers, who are notoriously over reliant on their elected agents.[37] Moreover, in return for more generous benefits, the union can offer direct help to the elected official—votes and

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Schools Threaten Public Education? Emerging Evidence From Fifteen Years of a Quasi-Market for Schools, 2007 U. ILL. L. REV. 839 (2007) (finding that the effects of charter schools on public education in general are not substantial, but emphasizing the need for further research in the field); Valerie Strauss, *A Disturbing Look at How Charter Schools Are Hurting a Traditional School District*, WASH. POST (Jan. 9, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/09/a-disturbing-look-at-how-charter-schools-are-hurting-a-traditional-school-district/?utm_term=.e7062d8c0b78 (explaining how local spending on charter schools in a Pennsylvania town detracts from programs designed to provide social and academic support for struggling students); Diane Ravitch, *When Public Goes Private, as Trump Wants: What Happens?*, N.Y. REV. OF BOOKS (Dec. 8, 2016), https://www.nybooks.com/articles/2016/12/08/when-public-goes-private-as-trump-wants-what-happens/ (characterizing the charter school movement as part of a larger political and economic agenda of privatization).

36. *See generally* Edward Ring, *The Ideology of Public Sector Unions vs. Private Sector Unions*, CAL. POL'Y CTR. (Feb. 20, 2012), https://californiapolicycenter.org/the-ideology-of-public-sector-unions-vs-private-sector-unions/.

37. For a deeper discussion of the principal-agent problem, see Sean Gailmard & Jeffrey A. Jenkins, *Agency Problems, the 17th Amendment, and Representation in the Senate*, 53 AM. J. POL. SCI. 324 (2009); Maria O'Brien Hylton, *Friedrichs and the Move Toward Private Ordering of Public Employee Wages and Benefits in the Public Sector*, 23 CONN. INS. L. J. 177 (2016); MARK PENNINGTON, CATO INST., PRINCIPAL-AGENT THEORY AND THE WELFARE STATE (2011); and Fred Smith, *The Political Principal/Agent Problem*, FORBES (Apr. 28, 2011, 12:39 PM), https://www.forbes.com/sites/fredsmith/2011/04/28/the-political-principalagent-problem/#35ee440c1bb1; Hylton, *Central Falls, supra note 18.*

assistance with obtaining votes as well as direct financial contributions to cover the expense of costly political campaigns—in exchange for support.[38]

Public sector union political contributions, like all political contributions, are designed to support and reward the elected official/employer in a manner that has no corollary in the private sector. It is facilitated by ever-present problems of agency and moral hazard: the public employer is spending other people's money, and the presence of endless distractions and noise make it hard even for attentive taxpayers to pay close attention. Only when taxpayers become disgusted and push back with propositions and other initiatives designed to control legislative spending[39] do legislators discover the limits of this approach. In the meantime, though, both the public official and the public union find that they can be very helpful to each other.

B. Evidence About Wages and Salaries Across the Two Sectors in Oklahoma and Elsewhere

In a fascinating paper, W. Robert Reed, a Professor of Economics at the University of Canterbury in New Zealand, looks at the effect of RTW legislation on wages in Oklahoma.[40] He finds that wages are higher in RTW

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38. *See* Veronique De Rugy, *Fourteen of America's 25 Biggest Campaign Donors Are Unions*, NAT'L REV. (Mar. 5, 2014, 7:17 PM), https://www.nationalreview.com/corner/fourteen-americas-25-biggest-campaign-donors-are-unions-veronique-de-rugy/.

39. As part of a "tax revolt" going on in the country in the late 1970's and early 1980's, both California and Massachusetts passed ballot measures designed to limit the state's ability to raise property taxes. *See* CAL. CONST. art. XIII A, § 1(a); MASS. GEN. LAWS ch. 59, § 21C (1980). In 1978, voters in California passed the famous Proposition 13, which amended the state constitution, limits the tax rate on real estate and subjects any future increase of any state tax rate to a two-thirds majority vote in both legislative houses. CAL. CONST. art. XIII A, § 1(a). Proposition 13 got national attention and helped inspire a Massachusetts version two years later in 1980, Proposition 2.5. Dennis Hale, *Proposition 2½ a Decade Later: The Ambiguous Legacy of Tax Reform in Massachusetts*, 25 ST. & LOC. GOV'T REV. 117, 117 (1993). Like Proposition 13, Proposition 2.5 limits the extent to which the state government can increase property taxes per year (the "2.5" represents the 2.5% limit on property tax increases), and any attempt to exceed this amount must have a majority backing (but not a two-thirds legislature vote). *See* MASS. GEN. LAWS ch. 59, § 21C. For a discussion on the larger context of the tax revolt in America, see Clyde Haberman, *The California Ballot Measure that Inspired a Tax Revolt*, N.Y. TIMES (Oct. 16, 2016), https://www.nytimes.com/2016/10/17/us/the-california-ballot-measure-that-inspired-a-tax-revolt.html; and Robert Lindsey, *Many States Moving to Limit Spending*, N.Y. TIMES (June 26, 1978), https://www.nytimes.com/1978/06/26/archives/many-states-moving-to-limit-spending-coast-vote-spurs-efforts-to.html.

40. Nearly forty years after narrowly failing to pass right-to-work legislation in 1964, in 2001 Oklahoma became the twenty-second state to enact a right-work-law. W. Robert Reed, *How Right-To-Work Laws Affect Wages*, 24 J. LAB. RES. 713, 713 (2003). The state constitutional amendment limits the ability of employers and labor unions from forcing employees to join the union or pay money to the union as a condition of employment. OKLA. CONST. art. 23, § 1A.

states, controlling for the initial economic conditions of the state.[41] He also points to other studies which have concluded that RTW is positively correlated with plant location, the rate of business formation, and manufacturing employment.[42]

Given the recent and quite dramatic organized activity by teachers in Oklahoma (and elsewhere)[43] to demand wage increases and budget increases for public education, it makes no sense to dismiss the possibility that non-agency fee environments might well lead to improved outcomes for public employees, at least under certain conditions. Due to state law limitations on the state's ability to raise taxes, the Oklahoma legislature had not raised taxes since 1990, leading many to believe that public funding for education was severely lacking. Frustrated by low and stagnant wages, teachers in Oklahoma gave the state legislature until April 1, 2018, to provide new funding.[44] When that deadline passed, thousands of teachers and labor

41. Reed, *supra* note 40, at 713.

42. *Id.*

43. Teacher walkouts in Oklahoma were inspired by similarly staged walkouts in West Virginia two months earlier, which yielded a $2,000 salary increase for teachers. Jess Bidgood & Campbell Robertson, *West Virginia Walkouts a Lesson in the Power of a Crowd-Sourced Strike*, N.Y. TIMES (Mar. 8, 2018), https://www.nytimes.com/2018/03/08/us/west-virginia-teachers-strike.html ("Experts say the West Virginia teachers may foreshadow the future of organized labor, especially in the public sector, at a time when its power has been eroded in much of the country by anti-union legislation and by court challenges like the *Janus* case, now before the Supreme Court, which threatens the financial viability of collective bargaining."). Indeed, the trend started in West Virginia spread to Arizona (20% pay raise for teachers), Kentucky (override of Governor Matt Bevin's proposed bill, which would have put spending on education at a historic low), and Colorado (2% raise for teachers). *See* Anita Snow & Terry Tang, *Arizona Teachers End Walkout After Governor Signs Off on 20% Raise*, CHI. TRIB. (May 3, 2018, 8:44 PM), http://www.chicagotribune.com/news/nationworld/ct-arizona-teacher-protests-20180503-story.html ("[Governor Doug] Ducey said the teachers had earned a raise and praised the legislation as a real win for both teachers and students. The pay increases will cost about $300 million for the coming year alone.") (internal quotes omitted); Shannon Van Sant, *Kentucky Governor Apologizes for Comments on Teachers' Strike*, NAT'L PUB. RADIO (Apr. 15, 2018, 7:20 PM), https://www.npr.org/sections/thetwo-way/2018/04/15/602671694/kentucky-governor-apologizes-for-comments-on-teachers-strike ("More than 30 Kentucky school districts closed Friday for the rallies. Teachers also protested Bevin's plan to overhaul the state pension system, among the worst-funded in the nation. Bevin's pension-reform bill, which he signed on Tuesday, requires new teachers to enter a cash-balance plan, and not a traditional pension. Teachers groups say these changes to the pension system could discourage people from pursuing a career in education."); Danika Worthington, *Pueblo Teachers Launch Colorado's First Teachers' Strike in 24 Years*, DENVER POST (May 7, 2018, 10:48 PM), https://www.denverpost.com/2018/05/07/pueblo-teacher-strike/ ("The district said a 2 percent increase for teachers would cost roughly $1.2 million annually. The district had a $3.6 million deficit this year. Additionally, the district needs $173 million next year for building renovations and repairs to aging infrastructure.").

44. Dana Goldstein & Elizabeth Dias, *Oklahoma Teachers End Walkout After Winning Raises and Additional Funding*, N.Y. TIMES (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html.

organizers engaged in a nine-day strike that ended when the legislature agreed to a $6,000 salary increase for teachers and a $1,250 salary increase for support staff.[45] Although not the desired outcome for teachers, President of the Oklahoma Education Association Alicia Priest called it a "victory for teachers."[46]

Additionally, Sarah F. Anzia, an Associate Professor at the University of California, Berkley, Goldman School of Public Policy, and Terry M. Moe, a Professor of Political Science at Stanford University, have looked at the effect of public sector unions on the cost of government operations and found that unions and the collective bargaining process increase the costs of government in "substantially significant" ways.[47] While the results are mixed,[48] there is certainly enough evidence to suggest that the model pursued by RTW states is neither irrational nor necessarily

45. *Id.*

46. *Id.* ("To fund the measures, as well as some limited new revenues for schools, the Republican-controlled Legislature and Gov. Mary Fallin instituted new or higher taxes on oil and gas production, tobacco, motor fuels, and online sales. The state will also allow ball and dice gambling, which will be taxed."); *see also* Dana Goldstein, *Their Pay Has Stood Still. Now Oklahoma Teachers Could Be the Next to Walk.*, N.Y. TIMES (Mar. 20, 2018), https://www.nytimes.com/2018/03/20/us/oklahoma-teachers-strike.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer ("But most instructional costs are covered by the state, where laws and politics make it difficult to raise taxes. And it is inside the classroom that students and parents have noticed the impact of depressed state budgets.").

47. Sarah F. Anzia & Terry M. Moe, *Public Sector Unions and the Costs of Government*, 77 J. POL. 114, 124–25 (2015) ("In sum, the cities where public sector employees secured collective bargaining have progressed along a markedly different path than the cities whose employees never pursued or won bargaining rights. Municipal police and fire departments with collective bargaining spend significantly more on their employees' salaries than similar departments without collective bargaining. In police departments, that salary premium has come with slightly lower per capita employment levels. But most important, we find that the biggest gap between bargaining and nonbargaining cities is in the area of health benefits expenditures. When it comes to health benefits for police- and fire-protection employees, cities with collective bargaining are spending 15 to 25% more than cities without collective bargaining.").

48. *See* FRANK MANZO ET AL., UNIV. ILL. URBANA-CHAMPAIGN, LAB. EDUC. PROGRAM, THE ECONOMIC EFFECTS OF ADOPTING A RIGHT TO WORK LAW: IMPLICATIONS FOR ILLINOIS 16 (2013) ("By and large, as a policy prescription, RTW would generate harmful effects to Illinois' economy, lower its capacity to provide essential public services, and degrade the quality and condition of the state's labor force."); EISENACH, *supra* note 31, at 18 ("Economists have been studying the economic effects of RTW laws for more than four decades, and while it is inherently difficult to isolate the effects of a single policy on economic performance, the weight of the evidence strongly and increasingly suggests that RTW laws improve economic performance overall. The evidence on recent economic performance in RTW and non-RTW states presented in this study provides further support for this finding."); Walter J. Wessels, *Economic Effects of Right to Work Laws*, 2 J. LAB. RES. 55, 68 (1981) ("The general results showed that the effects of RTW laws appear to be insignificant, with no negative effects on wages, union membership, or union problems. On the other hand, RTW laws do have a significant and positive effect on job satisfaction, particularly for non-union workers.").

inconsistent with either reasonable government expenditures or positive compensation.

In fact, a pair of articles published by *The Economist* calls into question the economic efficacy of public unions in general.[49] While the effects of unions on state and municipal economies are difficult to isolate, there are several economists that see unions as "localized monopolies on labor," which generate "deadweight losses."[50] Moreover, as the number of unionized employees rise, the incentive to maintain a high-quality standard of work decreases, as there is less competition for well-paid union positions.[51] Accordingly, if union sizes were to shrink, logic dictates that quality and productivity from unionized employees would increase.[52]

C. Is Every Decision in the Public Sector Political?

The failure of major labor disruptions to emerge in states that do not permit the payment of agency fees, combined with an imperfect free rider claim, led the majority in *Janus* to constitutional analysis that favors freedom of association (or freedom not to associate[53] in the case of the *Janus* petitioners) and the right to be free of compelled speech. *Abood* drew a distinction between political speech and expenses associated with collective bargaining.[54] In the years after *Abood*, as its detractors mounted a long attack on its free riding justification,[55] another argument emerged in support of the

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49. *See How the Decline of Unions Will Change America*, THE ECONOMIST (July 19, 2018), https://www.economist.com/united-states/2018/07/19/how-the-decline-of-unions-will-change-america; *Do Unions Increase Productivity?*, THE ECONOMIST (Feb. 22, 2007), https://www.economist.com/free-exchange/2007/02/22/do-unions-increase-productivity.

50. *How the Decline of Unions Will Change America*, *supra* note 49.

51. *Do Unions Increase Productivity?*, *supra* note 49.

52. This is not to say that economists are anywhere near agreed on the issue of union productivity and effects on state and local economies. Economist Richard Freeman, famous for his literature on unions in the United States and in Europe, has often suggested that unionization increases overall productivity, which in turn has a positive economic impact. Richard B. Freeman & James L. Medoff, *Trade Unions and Productivity: Some New Evidence on an Old Issue*, 473 ANNALS AM. ACAD. POL. SOC. SCI. 149, 150 (1984).

53. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

54. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977) ("We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

55. *See* Trevor Burrus, Harris v. Quinn *and the Extraordinary Privilege of Compulsory Unionization*, 70 N.Y.U. ANN. SURV. AM. L. 283 (2015); Andrew Buttaro, *Stalemate at the Supreme Court:* Friedrichs v. California Teachers Association*, Public Unions, and Free Speech*, 20 TEX. REV. L. & POL. 341 (2016); Jacob Huebert, Harris v. Quinn*: A Win for*

elimination of agency fees. The claim is that everything that happens in the public sector—irrespective of the actor but including actions and speech by public unions—is inherently political.[56] If this is true, opponents of *Abood* note, then a distinction between union political activity and any other union function is impossible.

It is certainly true that any wage increase or change in benefits, working hours, or other conditions of employment is certain to have financial consequences for taxpayers and their elected representatives. Indeed, it is hard to imagine any discussion between an employer and a public union that has no financial or political ramifications. The American Federation of Teachers ("AFT") has, for example, taken positions on a variety of issues that are a bit distant from the classroom but intensely political.[57] Abortion rights, for example, seems unlikely to affect the day-to-day work environment of most teachers, but is probably of intense interest to at least some of the female dominated membership.[58]

Ironically, it may be just this kind of political, but not strictly workplace focused, activity that generated growing support over four decades for the repeal of *Abood*. The biggest dissonance between unions and their membership appears to be over intractable political questions and not

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Freedom of Association, 2013-2014 CATO SUP. CT. REV. 195 (2013–2014); Mark S. Pulliam, *Union Security Clauses in Public Sector Labor Contracts and* Abood v. Detroit Board of Education*: A Dissent*, 31 LAB. L. J. 539 (1980); Edwin Vieira, *Travesty, tragedy and treason:* Abood v. Detroit Board of Education *and the Supreme Court's betrayal of the constitution in public-sector labor relations*, 19 GOV'T UNION REV. 27 (2000).

56. *See, e.g.*, Amie Nolan-Needham & Adama K. Wiltshire, *Bargaining with the Government vs. Lobbying the Government – A Distinction Without Difference*, 58 ORANGE CTY. LAW. 41 (2016).

57. *See Statement by AFT President Randi Weingarten on U.S. Policy Separating Children from Parents*, AM. FED'N TCHRS. (May 30, 2018), https://www.aft.org/press-release/statement-aft-president-randi-weingarten-us-policy-separating-children; *Stand With Planned Parenthood*, AM. FED'N TCHRS. (2016), https://www.aft.org/resolution/stand-planned-parenthood.

58. A number of these positions are taken up directly on the AFT website. *See id.* For example, under a "resolutions" section of its website, the union states: "WHEREAS, the American Federation of Teachers has had a long history of support for reproductive rights and for Planned Parenthood; and WHEREAS, attacks by extremist groups and politicians on reproductive rights and women's health and economic well-being are a major part of the ongoing war on women in the United States; and WHEREAS, those opposed to safe, legal abortions for women have demanded an end to federal funding to Planned Parenthood and even threatened a government shutdown to get it. They have made outrageous allegations to attack Planned Parenthood. Their goal is to ban all abortions and cut women off from needed healthcare." *Stand With Planned Parenthood*, *supra* note 57. AFT president Randy Weingarten also recently attacked President Trump's immigration policy, denouncing the separation of children from their families and calling out the Trump administration. *Statement by AFT President Randi Weingarten on U.S. Policy Separating Children from Parents*, *supra* note 57.

whether a raise or more vacation time would be desirable. For example, in 2016, 51% of union members said they would support Democratic candidates in the next election cycle, and 29% said they would support Republican candidates, compared to 47% for Democrats and 34% for Republicans in 2018.[59]

II. BARGAINING DISTORTIONS, WAGES, AND POST-EMPLOYMENT BENEFITS: CASE STUDY SUMMARIES

A. California Prison Guards

Although Justice Kagan's dissent emphasizes the ostensibly positive contributions of public unions to the workplace,[60] a balanced assessment of

59. Tim Reid & Joseph Ax, *Democrats Target Union Workers Who Regret Trump Vote*, REUTERS ((May 4, 2018, 6:10 AM), https://www.reuters.com/article/us-usa-election-unions-insight/democrats-target-union-workers-who-regret-trump-vote-idUSKBN1I5181.

60. Justice Kagan's dissent was largely concerned with the practical consequences that public employees will face in overturning *Abood* and ruling agency fees unconstitutional. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448 (2018) (Kagan, J., dissenting). She writes: "[The majority's] decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways." *Id.* at 2487 (Kagan, J., dissenting). She further emphasized that both the state and the union have considered the agency-fee arrangement as necessary for maintaining an adequate quality of collective bargaining, specifically because of the free rider and labor peace rationales that the majority deemed inadequate to overcome First Amendment concerns (a more in depth analysis of the majority's reasoning can be found *infra*, note 24). *Id.* at 2489 (Kagan, J., dissenting) ("First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others.") (internal citations omitted). Justice Kagan's concern is grounded in the fact that judging by the number of government entities that bargain with unions that act as exclusive representatives, eliminating agency fee arrangements subverts the labor relations landscape that state and local governments believe are best. *Id.* at 2491 (Kagan, J., dissenting) ("Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that

the post-*Janus* landscape requires a little focus on some of the egregious behavior those same unions have demonstrated. A little known, but useful, example may be found in the California Correction Peace Officers Association ("CCPOA").[61] The CCPOA represents prison guards throughout California, and its consistent support for harsher penalties and other initiatives designed to increase the number of prisoners has, by almost any measure, been extraordinarily effective.[62]

In 2013, the CCPOA raised on average about twenty-three million dollars per year via dues payments from members.[63] The union devoted resources in support of the state's "three strikes" law[64] and expended funds to defeat a proposition designed to reduce sentences for nonviolent crimes.[65] Whether sentences ultimately lead to a reduction in crime and/or recidivism is, of course, the subject of some debate.[66] What is certain is that the union

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thinks a strong exclusive-representation scheme will promote stable labor relations.") (internal citations omitted).

61. The CCPOA signed its first contract in 1982 and has since become one of the most influential unions in the state. CAL. CORRECTIONAL PEACE OFFICERS ASS'N, http://www.ccpoa.org/ (last visited Nov. 15, 2018). The CCPOA annually gives twice as much money to political contributions than does the California Teachers Association despite being one-tenth its size. Volokh, *supra* note 30, at 1221–22. Although many of its contributions are difficult to trace explicitly to a political agenda, it has made a number of clearly pro-incarceration efforts. For example, it gave over $100,000 to the Three Strikes policy, and $75,000 to opponents of Proposition 36, which would have substituted incarceration for substance abuse programs. *Id.* at 1222. Further, from 1998 to 2000 it contributed $120,000 to crime victims' groups in order to foster a tough-on-crime atmosphere. *Id.* Prison guard unions in Florida, Michigan, and New York have followed similar trajectories, albeit on a smaller scale, by endorsing candidates that are tough on crime and that will enact sentencing policies that will keep prisoners in prison for longer periods of time. *Id.* at 1223.

62. Volokh, *supra* note 30, at 1223.

63. Sagar Jethani, *Union of the Snake: How California's Prison Guards Subvert Democracy*, MIC (May 14, 2013), https://mic.com/articles/41531/union-of-the-snake-how-california-s-prison-guards-subvert-democracy#.ZE6QPyRKi.

64. Volokh, *supra* note 30, at 1222.

65. *Id.*

66. *See, e.g.*, WILLIAM H. PRYOR ET AL., U. S. SENTENCING COMM'N, THE PAST PREDICTS THE FUTURE: CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS 14 (2002) ("Overall, an offender's total criminal history score is a strong predictor of recidivism. Rearrest rates range from a low of 30.2[%] of offenders with zero criminal history points to a high of 85.7[%] for offenders with 15 or more criminal history points. Each additional criminal history point is generally associated with a greater likelihood of recidivism."); Anne Larason Schneider, *Recidivism Rate of Juvenile Offenders*, 1 JUST. Q. 107, 123 (1984) ("If the reform system strengthened the confidence of law enforcement officers, consequently increasing the contact and referral rates while simultaneously decreasing "true" recidivism, the net effect would be one of "no change" in recidivism, similar to what was observed here."); Symposium, *Accomplishing the Purposes of Sentencing—Criminal History and Recidivism*, 15 FED. SENT'G REP. 185 (2003) ("The preliminary data show that the percentage of recidivating offenders correlates generally with the criminal history score: the higher the criminal history score, the higher the rate of recidivism. In addition, the early results suggest that the lowest

spends in order to directly influence state public policy in a way that increases the demand for the work its members do.[67]

According to Sagar Jethani, an economy and business analyst,[68] prison guards in California are the "number one" source of cell phone smuggling for prisoners.[69] When the prison administration attempted to initiate a requirement that guards go through metal detectors and remove shoes, belts, etc., the union responded by citing a work requirement that requires guards be paid for so called "walk time" which would include time going through the detectors.[70] Thus, the cell phone smuggling led directly to increased compensation as the state attempted to tamp down on illegal union member activity.[71] This small, yet depressing, instance of union members' own misbehavior leading directly to increased compensation reflects a view of the employment relationship that is fundamentally abusive and indifferent to legitimate taxpayer interests.

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recidivism rates are found among offenders with no prior arrests or convictions. The on-going research will evaluate the contribution to recidivism prediction from computational factors included in the criminal history score."); Chad R. Trulson et al., *Blended Sentencing, Early Release, and Recidivism of Violent Institutionalized Delinquents*, 91 PRISON J. 255, 274 (2011) ("Blended sentencing in the state under study allowed extremely serious and violent delinquents one more chance to change their ways by giving 1,804 of them the benefit of the doubt. Fortunately, the overall level of recidivism for this risky group of offenders appears lower than that found in the literature for samples of state committed delinquents. Unfortunately, the risk was that roughly one half of the recidivists continued to perpetrate felony-level crimes post release. While this study cannot definitively answer what would have happened with continued adult incarceration of these offenders, blended sentencing was the catalyst for their juvenile system release when such offenders were eligible for continued adult incarceration."); Yan Zhang et al., *Indeterminate and Determinate Sentencing Models: A State-Specific Analysis of their Effects on Recidivism*, 60 CRIME & DELINQ. 693, 711 (2009) ("In sum, our analyses suggest that the effects of different sentencing models on reoffending may be largely contingent on the implementation and operation of state programs. Differences observed may be attributable to various supervision approaches within the states, differing expertise of state parole boards, or differing crime categories that are legislatively mandated. Because each state has very different approaches to parole, when parole may occur, and for what crimes offenders are eligible for parole, different classes of criminals have different propensities for recidivism.").

67. *See* Volokh, *supra* note 30, at 1222.
68. Jethani, *supra* note 63.
69. *Id.*
70. *Id.*
71. *Id.*

California's prison system is marked by high recidivism rates,[72] the steady dismantling of rehabilitation programs, and overcrowding.[73] The courts have intervened routinely and found that "medical, mental health, dental care, juvenile incarceration practices, treatment of physically and developmentally disabled inmates and due process for parolees have all been found to be unconstitutional."[74] While some of the blame surely belongs to the administrators, the CCPOA plays a crucial role.

It is critical to understand that as the prison population in California is huge, so is the CCPOA. Indeed, the California Department of Corrections is the single largest employer in the state.[75] In 2009 the budget for adult corrections was about $9.5 billion, or 9% of the state's budget.[76] Between 1984 and 2006, though, expenditures for corrections increased by 1094%, even as overall state expenditures rose by only 294%.[77] Salary increases for corrections officers account for a substantial portion of these costs.[78]

The CCPOA has "emerged as one of the state's most powerful unions and has used its lobbying and political activities to influence elections and legislation."[79] A good comparison with respect to political activity is this: In spite of having only one-tenth of the membership of the California

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72. California's recidivism rate is roughly 65%, according to data collected by the California Innocence Project. *Recidivism Rates*, CAL. INNOCENCE PROJECT, https://californiainnocenceproject.org/issues-we-face/recidivism-rates/ (last visited Nov. 15, 2018). Notably, the three states most comparable in population to California (Texas, New York, and Florida) have recidivism rates of 21.4%, 42%, and 33%, respectively. Letter from Policy Analyst Douglas Smith to Texas Senate Committee on Criminal Justice (May 2016) (on file with Texas Criminal Justice Coalition); Samantha House, *New York DOCCS: Recidivism Rates for Ex-Inmates Hits 28-Year Low*, CITIZEN (Nov. 28, 2014), https://auburnpub.com/news/local/new-york-doccs-recidivism-rates-for-ex-inmates-hit-/article_c765fdb9-3bcd-59c0-9c11-6cfe217fcd62.html; *Help Reduce the Recidivism Rates in Florida*, CHANGE.ORG, https://www.change.org/p/ken-detzner-help-reduce-the-recidivism-rates-in-florida (last visited Nov. 15, 2018).

73. *See California's Continuing Prison Crisis*, N.Y. TIMES (Aug. 10, 2013), https://www.nytimes.com/2013/08/11/opinion/sunday/californias-continuing-prison-crisis.html ("California's prison population is consistently among the largest in the country. While it presents an extreme case, its problems are representative of what is happening in prisons and jails in other states. If California would redirect its energy from battling the federal courts to making the needed long-term reforms, it could once again call itself a leader.").

74. *See* Brown v. Plata, 563 U.S. 493 (2011) (finding that overcrowding in California prisons was so severe as to constitute an Eight Amendment violation for affected prisoners).

75. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 224 (2008).

76. *Id.* at 222.

77. *Id.*

78. Seventy percent of the corrections budget goes towards spending on staff salaries and benefits. *Id.* at 224. By 2006, the average correctional officer in California earned $73,248, over $13,000 more than the average assistant professor with a PhD at the University of California. *Id.* at 225.

79. *Id.* at 224

Teachers Association ("CTA"), CCPOA makes annual political contributions at twice the rate of the CTA.[80]

B. The Massachusetts Bay Transit Authority Pension Debacle

While there are many examples of public employee retirement systems that are underfunded and/or poorly managed,[81] the Massachusetts Bay Transit Authority's ("MBTA") pension gap stands out. Since 2010, the MBTA has had more retirees drawing pensions than active workers contributing to the fund.[82] As recently as 2007, the MBTA plan was 92% funded, which was excellent.[83] Since then, the fund has deteriorated badly. Estimates for 2016 showed that the MBTA fund would drop below 50% funded by 2021 without an emergency infusion of cash.[84] How did this crisis develop in such a short period of time?

At least part of the problem stems from the contract between the MBTA and its employees' exclusive representative—the Boston Carmen's Union. Although the Carmen's Union has suggested that the MBTA is exaggerating in order to cut retirement benefits,[85] the evidence is overwhelming that the shortfall is real and a result of several factors including poor management and exceptionally generous early retirement options.

MBTA Chief Administrator Brian Shortsleeve noted that the structure of the MBTA plan may need to change in order for it to remain solvent.[86] He noted, "[T]he plan provides an incentive for [MBTA] employees to retire younger, and half of MBTA employees retire and begin to draw on their pension while in their 50s."[87] He also noted that MBTA retirees "earn significantly more in post-retirement pension benefits than state employees and teachers at all ages."[88]

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80. Volokh, *supra,* note 30, at 1221–22.

81. *See* Beermann, *supra* note 17; FITZPATRICK & MONAHAN, *supra* note 17; Novy-Marx & Rauh, *Revenue Demands*, *supra* note 17; Novy-Marx & Rauh, *Liabilities and Risks*, *supra* note 17; RAUH, *supra* note 17.

82. Colin A. Young, *Ballooning MBTA Pension Gap Forces Officials to Weigh Options*, BOS. BUS. J. (May 22, 2017, 7:20 PM), https://www.bizjournals.com/boston/news/2017/05/22/ballooning-mbta-pension-gap-forces-officials-to.html.

83. Beth Healy, *MBTA Pension Fund Needs $1 Billion, Report Says*, BOS. GLOBE (May 22, 2017),https://www.bostonglobe.com/business/2017/05/21/mbtapension/bUtQQmpyps6sADWqBPOKPL/story.html.

84. Young, *supra* note 82.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

The numbers and role of the Carmen's Union are both critical here. The fund, which reported about $1.5 billion in assets in 2017, has 5,786 bus drivers, track workers, and other employees.[89] It supports 6,685 retirees.[90] In addition, the MBTA's head of the retirement fund, Michael Mulhern, took home $2.2 million in compensation in the eight years following the great recession, including a salary of $216,329 in 2016 during which he worked for only seven months.[91] This compensation included pay for unused vacation time of about $50,000.[92] Mr. Mulhern stepped down as the fund's executive director "after a tumultuous period during which the retirement board came under fire for its lack of transparency and for controversial accounting practices."[93]

The MBTA's retirement fund problems are unquestionably the result of poor management and unorthodox practices that seem to be implicitly premised on the expectation that, one day, the legislature will bail the underfunded plan out. MBTA employees "contribute less toward their pension, retire earlier[,] and receive richer benefits" in spite of union claims to the contrary.[94] Union officials have consistently overestimated the fund's performance: Officials estimated 4% returns for ten years and then 7% thereafter, when in reality it has been 3.9% and then 5.8% for the past decade.[95]

Greg Sullivan of the Pioneer Institute has focused on the MBTA's pension woes for some time, and his work suggests that, contrary to the Carmen's Union narrative, the MBTA is not underfunded relative to other transportation systems around the country.[96] On the contrary, "as measured by both passenger miles traveled and vehicle revenue hours, the [MBTA] received the most capital funding of any of the nation's [ten] largest transit systems between 1991 and 2013."[97] From 1991 to 2013, the MBTA actually ranks first in total capital spending, which includes federal funding, among the top ten.[98]

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89. Healy, *supra* note 83.

90. *Id.*

91. Beth Healy, *Former MBTA Pension Chief Earned $2.2 Million Since 2009*, BOS. GLOBE (Feb. 21, 2017), https://www.bostonglobe.com/business/2017/02/21/mbta-pension-chief-earned-million-since/zKG61M8EuraKL7pQqw4WJI/story.html?event=event12.

92. *Id.*

93. *Id.*

94. Greg Sullivan & Charles Chieppo, Commentary, *MBTA Pension: A Ticking Time Bomb*, WGBH NEWS (July 5, 2017), https://www.wgbh.org/news/2017/07/05/local-news/mbta-pensions-ticking-time-bomb.

95. *Id.*

96. Greg Sullivan, *The Myth of the Underfunded MBTA*, PIONEER INST. (Mar. 16, 2015), https://pioneerinstitute.org/better_government/the-myth-of-the-underfunded-mbta/.

97. *Id.*

98. *Id.*

In addition to first place in state and local operating funds[99] and total operating funds,[100] the MBTA has resulted in "Massachusetts residents . . . pay[ing] more than twice as much per capita as the average for residents served by the MBTA's five peer transit systems when both capital and operating funds are considered."[101] General mismanagement and growing pension costs appear to account for most of the cost distortions.[102]

The Carmen's Union and other unions that do business with the MBTA have consistently opposed calls to revamp or privatize the MBTA's operations.[103] The ongoing financial woes of the MBTA can only be understood as the fallout from a dynamic between the Carmen's Union and the state that prioritized unusually generous benefits for early retirement (and concomitant long payout periods). The present bleak picture is a direct function of the MBTA board's morally hazardous, kick-the-problem-down-the-road view of its role as employer. This failure to negotiate at arms' length with the Union will now force taxpayers and communities to absorb large cost increases in order to provide ongoing service.

C. Central Falls Rhode Island and Bankruptcy Fall Out

The painful, albeit not entirely unexpected, municipal bankruptcy in the small city of Central Falls, Rhode Island, has been the subject of several studies[104] that likewise highlight the disastrous connection between

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99. *Id.*

100. *Id.*

101. Gregory W. Sullivan, *The MBTA's Problem is Not Lack of Funding*, PIONEER INST. 8 (Mar. 25, 2015), http://pioneerinstitute.org/download/mbtas-problem-is-not-lack-of-funding/.

102. *See id.*

103. Christian M. Wade, *MBTA union blasts Baker's plan for privatization*, EAGLE-TRIBUNE (Aug. 15, 2017), https://www.eagletribune.com/news/haverhill/mbta-union-blasts-baker-s-plan-for-privatization/article_2ca6a3a7-f151-5f41-9919-61bd531abe1f.html (quoting Carmen's Union President James O'Brien as saying that privatization of the MBTA "isn't good for the hardworking employees of the MBTA, and it isn't good for the system, and it certainly isn't good for our riders."); Antonio Caban, *At rally, union workers resist MBTA privatization*, NEW BOS. POST (Sept. 23, 2015, 1:17 PM), https://newbostonpost.com/2015/09/23/ at-rally-union-workers-resist-mbta-privatization/; *MBTA Workers Speak Out Against Plans To Privatize Services*, WBUR NEWS (Feb. 10, 2016), http://www.wbur.org/news/2016/02/10/mbta-privatization-plan.

104. *See* Jack M. Beermann, *Resolving the Public Pension "Crisis"*, 41 FORDHAM URB. L. J. 999 (2014); Beermann, *supra* note 17; David A. Skeel, Jr., *What is a Lien? Lessons from Municipal Bankruptcy*, 2015 U. ILL. L. REV. 675 (2015); Mary Williams Walsh & Abby Goodnough, *A Small City's Depleted Pension Fund Rattles Rhode Island*, N.Y. TIMES (July 11, 2011), https://www.nytimes.com/2011/07/12/business/central-falls-ri-faces-bankruptcy-over-pension-promises.html; Mary Williams Walsh, *Cuts for the Already Retired*, N.Y. TIMES (Dec. 19, 2011), https://www.nytimes.com/2011/12/20/business/pension-deal-in-rhode-island-could-set-a-trend.html; Hylton, *Central Falls*, *supra* note 18.

compliant elected officials that over-commit, often over many decades, to very generous benefits in the process of bargaining with their public unions.

Central Falls filed for bankruptcy in 2011—the second U.S. city to do so[105]—following the depletion of its pension fund. The bankruptcy resulted in the closure of the city's only public library and community center, a reduction in the city's workforce of almost one-third and triggered a sharp increase in property taxes in spite of an average annual household income of only about $34,000.[106]

Robert Flanders, Central Falls' receiver during the bankruptcy process, noted that the crisis was a result of pensions promised by city officials that were overly generous, collective bargaining agreements which permitted employees to retire after only twenty years irrespective of age, and rules that allowed retirees to obtain other jobs that also accrued benefits while drawing a pension.[107]

Municipal bankruptcy essentially pits the claims of bondholders against those of retirees as both groups scramble to get the city to honor promises made to them. As Amy Monahan and others[108] have noted, "[m]illions of teachers, police officers, firefighters and other government workers have long believed that their pensions were untouchable, thanks to provisions in state laws and constitutions. But some of those promises are unclear or untested."[109]

In the case of Central Falls, bondholders prevailed, and significant cuts were made to many retirees.[110] Taxpayers were also forced to absorb 4% increases in property taxes.[111] Specifically, workers who retired at a

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105. Prichard, Alabama, has the honor of being first. *See* Douglas J. Watson et al., *Financial Distress and Municipal Bankruptcy: The Case of Prichard, Alabama*, 17 J. PUB. BUDGETING ACCT. & FIN. MGMT. 129 (2005); Hannah Heck, *Solving Insolvent Public Pensions: The Limitations of the Current Bankruptcy Option*, 28 EMORY BANKR. DEV. J. 89 (2011); Michael Cooper & Mary Williams Walsh, *Alabama Town's Failed Pension Is a Warning*, N.Y. TIMES (Dec. 22, 2010), https://www.nytimes.com/2010/12/23/business/23prichard.html.

106. Walsh & Goodnough, *supra* note 104.

107. Richard Simon, *Rhode Island's Central Falls Reeling From Underfunded Pension*, L.A. TIMES (Aug. 03, 2013), http://articles.latimes.com/2013/aug/03/nation/la-na-adv-central-falls-20130804.

108. *See* Skeel, *supra* note 104; Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029 (2012); Walsh, *supra* note 104.

109. Mary Williams Walsh & Michael Cooper, *Faltering Rhode Island City Tests Vows to Pensioners*, N.Y. TIMES (Aug 13, 2011),https://www.nytimes.com/2011/08/13/us/13bankruptcy.html.

110. Hylton, *Central Falls*, *supra* note 18, at 526 ("Current retirees' pension payments were reduced by approximately 55% and cost of living adjustments (COLAs) were eliminated.").

111. Jess Bidgood, *Plan to End Bankruptcy in Rhode Island City Gains Approval*, N.Y. TIMES (Sept. 6, 2012), https://www.nytimes.com/2012/09/07/us/central-falls-ri-to-emerge-

young age saw their pension benefit cut by 55% and cost of living adjustments were eliminated.[112] Those whose pensions were worth $10,000 per year or less were unaffected.[113] Employees who survived the job cuts had to contribute more to their pension and work longer before they could retire.[114]

The Central Falls story, while painful, was not especially surprising to anyone who had been paying attention to the city's finances. The promises city officials made to police, firefighters, and other municipal workers were simply more generous than the city could afford. Well-organized public unions demanded these long-term financial expenditures, and elected officials complied. Basically, both the unions and the politicians decided it was mutually beneficial to borrow from future taxpayers in order to satisfy present day wants. Wealthier cities may be able to play this game for some time; moderate income and poor locales cannot overspend for very long. And, when the bondholders are first in line, as maybe they should be,[115] the overpromising ends with painful adjustments and to some who are least able to absorb them: the elderly and others whose return to the labor market is likely difficult or impossible.

D. Political and Financial Distortions

The purpose of providing these three short case studies is to demonstrate some of the consequences of concentrated union power in the public sector. To the extent that some observers are disappointed by *Janus* and worry that it is little more than an attempt to strip public unions of the funds they have been supplying to Democratic and left leaning political causes,[116] the behavior of the CCPOA should provoke a careful re-think. An analysis of the behavior of police unions, especially with respect to the use of deadly force and the punishment of officers, suggests that a similar

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from-bankruptcy.html ("The plan imposes a 4 percent property tax increase in each of the next five years while the number of city employees has fallen.").

112. *Id.*

113. *Id.*

114. Hylton, *Central Falls*, *supra* note 18, at 526.

115. Skeel, *supra* note 104, at 687; *see generally* Walsh & Goodnough, *supra* note 104.

116. *See* Vince Courtney, *U.S. Supreme Court's* Janus *Decision: Pure Unadulterated Politics*, BAY CITY BEACON (July 23, 2018), https://www.thebaycitybeacon.com/politics/u-s-supreme-court-s-janus-decision-pure-unadulterated-politics/article_6dd04560-8ead-11e8-9fab-2f3665e90ff6.html; Sean McElwee, *How the Right's War on Unions is Killing the Democratic Party*, NATION (Jan. 22, 2018), https://www.thenation.com/article/right-to-work-laws-are-killing-democrats-at-the-ballot-box/. *See also* Millhiser, *supra,* note 25; Schoen *supra,* note 25.

dynamic is at work.[117] Aside from the policy stances, the MBTA and Central Falls examples bring into sharp relief the financial consequences for taxpayers once the years of profligate spending and mismanagement come to light and it is no longer possible to ignore the fact that the long run has, at last, arrived.

To the extent that *Janus* results in a decline in public sector union political activity, policy discourse and prudent financial decision making might well improve. Without the strong distorting effects of the union's financially self-interested voice, it might be possible to focus on initiatives that will provide suitable policy results at a reasonable cost.

Public unions may be forced, as Rob Weil, director of field programs for the American Federation of Teachers, noted, "to spend larger amounts of time and money on membership maintenance instead of other more progressive union activities."[118] Given that there is some evidence that teacher-members are less liberal than their union,[119] the post-*Janus* pressure to be as responsive to members as possible could result in a moderation of some unions' views toward broad member consensus. And, with fewer dollars to spend, the tendency to support policy initiatives that are focused

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117. In a 2017 piece, the *New York Times* noted that of fifteen of the most high-profile wrongful shootings by police officers over the previous three years, only one police officer actually faced the possibility of jail time. Jasmine C. Lee & Haeyoun Park, *15 Black Lives Ended in Confrontations With Police. 3 Officers Convicted.*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html. As of November 10, 2018, there had been 830 people in the United States shot and killed by police officers. *Fatal Force*, WASH. POST https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.3adb83f85f54 (last updated Oct. 1, 2018). Naturally, the American people have called for more transparency and accountability for police officers, yet police unions have lobbied extensively to stagnate such efforts. *See* Hector Villagra, *Police Union Lobbying Stymies Police Reform*, L.A. PROGRESSIVE (July 24, 2016), https://www.laprogressive.com/police-union-lobbying/ ("So why isn't public opinion enough – why are California politicians doing or attempting to do the exact opposite of what the public wants? It's because the police lobby wields an inordinate amount of power, and too few politicians are willing to challenge it. The efforts to make body cam video and investigations into police misconduct accessible to the public – and seemingly all major police reforms – have been vehemently opposed by police unions and law enforcement organizations, which work excessively to promote secrecy and avoid scrutiny and criticism."). Police unions have also been an under-the-radar proponent of laws that make it more difficult to publicly protest by enacting deeper economic penalties and even possible jail time for those who engage in particularly "disruptive" behavior. *See* Katherine Krueger, *Police Unions are Quietly Trying to Make it Harder to Protest All Over America*, SPLINTER NEWS (Apr. 17, 2018, 12:15 PM), https://splinternews.com/police-unions-are-quietly-trying-to-make-it-harder-to-p-1825321943.

118. Larry Sand, *The Political Aftermath of* Janus v. AFSCME, CAL. POL'Y CTR. (Nov. 7, 2017), https://californiapolicycenter.org/political-aftermath-janus-v-afscme/.

119. *See, e.g.*, Johnathan Rauch, *The Conservative Case for Unions*, ATLANTIC (July 2017), https://www.theatlantic.com/magazine/archive/2017/07/the-conservative-case-for-unions/528708/.

only on union job creation might be reduced as well. With respect to the CCPOA and the development of a policy about the incarceration of non-violent offenders, one can only hope that best practices with respect to reducing crime and recidivism will one day predominate over feather-bedding for guards.[120]

III. "LABOR PEACE" AND FREE RIDING

A. The Foundations of *Abood*

The Court in *Abood* cited the maintenance of "labor peace" and the avoidance of free riding in support of its decision permitting the collection of agency fees.[121] The majority in *Janus* noted that twenty-eight states and the federal government do not permit agency fees.[122] And, in the many cases

120. "Featherbedding" is the practice of hiring more employees than are necessary to do a job, or implementing an unnecessary policy for the sole purpose of hiring more staff. E.D. HIRSCH ET AL., THE NEW DICTIONARY OF CULTURAL LITERACY 456 (3d ed. 2002). Featherbedding is most classically associated with railway workers, whose unions have historically negotiated agreements that prohibit certain classes of employees from engaging in work designated for a different class of employee, even though the work is similar and could easily be accomplished by fewer people than the agreement calls for. *See* J.A. Lipowski, *Featherbedding on the Railroads: By Law and by Agreement*, 8 TRANSP. L. J. 141, 150 (1976).

121. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977). Writing for the majority, Justice Stewart states: "The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law. The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller." *Id.* at 224 (internal citations omitted). In promoting the efficacy of agency fees in the public sector, Justice Stewart further notes: "A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 221-22. The majority in *Janus* takes great care to undermine these justifications for agency fees, noting the tenuous link between agency fees and the maintenance of labor peace, as well as the implications were free rider arguments taken to their logical extensions. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2457 (2018).

122. *Janus*, 138 S. Ct. at 2457 ("In *Abood*, the main defense of the state agency-fee arrangement was that it served the State's interest in 'labor peace.' By 'labor peace,' the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicated, 'inter-union rivalries' would foster 'dissension within the workforce,' and the employer could face 'conflicting demands from different unions.' . . . [I]t is now clear that *Abood*'s fears were unfounded. The *Abood* Court assumed that designation of a union as the

where a union remains the exclusive representative of the employees, the chaos and dissension the *Abood* Court so feared never materialized.[123]

The "free riding" argument is the more interesting of the two claims and was promoted by AFSCME and its supporters in many of the briefs filed in the case.[124] The gist of this claim is that no employee should enjoy the benefit of union representation without bearing some of the costs. Justice Kagan explicitly noted that agency fees "prevent[] employees from reaping all the 'benefits of union representation'—higher pay, a better retirement plan, and so forth—while leaving it to others to bear the costs."[125]

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exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true." *Id.* at 2465 (internal citations omitted).

123. *Id.* at 2466.

124. Brief for ACLU as Amicus Curiae Supporting Respondents at 13–14, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (No. 16-1466) ("The free rider problem is not merely that nonmembers will benefit from the union's services without bearing their fair share of the cost, but that this cost-shifting would be *compelled by law.* This makes it materially different from the more general issue of free riders in the private sphere. . . . That free ridership, more critically, would directly undermine the associational interests of union members. Under Petitioner's rule, even employees who favor the union's positions or any benefits it conveys will have every incentive to shift the costs of their representation to members - as they will be able reap the same benefits without spending a dime. As the Internet has repeatedly shown, individuals who get something for free cannot be counted on to voluntarily pay for it. A decision rejecting agency fees would thus deal a severe blow to the interests of those who choose to associate with unions. *Abood*'s compromise, by contrast, respects both members' and nonmembers' associational interests."); Brief for Labor Law & Labor Relations Professors as Amici Curiae Supporting Respondents at 21–22, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (No. 16-1466) ("Employee free riding undermines states' interests in equitable workforce policies and risks sowing dissent in the workplace. Moreover, to the extent states adopt public sector collective bargaining statutes because they prefer that method of setting pay rates and other working conditions, that interest is also undermined: research shows that right-to-work laws make it less likely that public sector bargaining units will form.") (internal citations omitted); Brief for Economists and Professors of Law and Economics as Amici Curiae Supporting Respondents at 20, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (No. 16-1466) ("In sum, it is well established that free riding follows from individual economic self-interest in the context of collective goods, even when everyone agrees that they benefit from those goods. If individuals are not required to contribute, many who undisputedly benefit will nevertheless withhold their contributions out of simple self-interest, and others will withhold their contributions to avoid being taken advantage of by the free riders. A committed core may be able to sustain itself and provide some amount of the collective good, but even if some contributors persevere, the amount of the collective good will be sub-optimal, and will tend to decrease further and further below the optimum as the contagion of free riding spreads, resulting in increasing exploitation of the dwindling contributors."); Brief for Respondent at 35, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (No. 16-1466) ("Free-riding is indeed *precisely* what economic theory predicts when members of a bargaining unit may choose independently whether to vote for *and* whether to pay for a bargaining agent. Even if a non-member believes she benefits from the union's representation, she may vote *for* the union as representative (and reap the benefits of bargaining representation and assistance in grievance proceedings) yet opt *not* to join the union to avoid paying dues.").

125. *Janus*, 138 S. Ct. at 2488–89 (Kagan, J., dissenting).

As Professor Moorhouse has noted, analysis of the free rider doctrine first requires attention to the theory of public goods.[126] The central idea behind the free rider claim is that union benefits are comparable to public goods and that the agency fee is an appropriate response to a market failure exhibited by free riders—i.e., those who enjoy benefits while declining to contribute to their cost.[127] Public goods can be distinguished from private goods by their non-excludability and joint consumption.[128] Non-excludability simply means that the supplier of the good in question cannot exclude others from consumption, and joint consumption means "the benefits obtained by any single individual in consuming the good in no way reduces the consumption benefits available to others. . . ."[129] The classic example of a public good is national defense, although there are other examples as well.[130]

Professor Moorhouse argues that, with respect to non-excludability, union political activity in the form of political contributions does not meet the criteria in spite of superficial similarities to public goods:

> Suppose, for example, union support of a lobbying effort leads to a more favorable legal environment within which the union operates. Presumably all union members would benefit, contributors and non-contributors alike. Several observations are in order: (1) in most cases, the thread from the individual's contribution through the union to the recipient organization and finally through the benefit generating process seems tenuous in terms of concrete benefits to an individual; (2) such benefits may not be perceived as beneficial by every union member; and (3) any externalities arising here have nothing to do with *union* administration of such donations. Many private organizations rely on voluntary contributions, which in turn are used to influence legislation. Unions are hardly unique in this respect. Thus, these externalities do not justify mandatory assessments for political causes. . . . Not only is exclusion feasible, there is evidence that many union members object to union involvement in political activities.

126. John C. Moorhouse, *Compulsory Unionism and the Free-Rider Doctrine*, 2 CATO J. 619, 620 (1982).

127. *Id.*

128. *Id.*

129. *Id.* at 620–21.

130. Examples of public goods range from language and mathematics, to clean air, the internet, and light from lighthouses. *See Public Goods: A Brief Introduction*, LINUX INFO. PROJECT (Feb. 16, 2006), http://www.linfo.org/public_good.html.

> [citation omitted] Such activities can hardly be thought of as collective goods to those employees who object to them.[131]

The reasons unions do not charge a grievance procedure fee is not that the service represents a public good, but because it allows the union to discriminate among employees and to discipline those out of favor with the union leadership.[132]

Moorhouse also notes that non-excludability assumes that the benefits of collective bargaining are distributed equitably among union members.[133] He points out that super seniority and the use of seniority to determine job assignments, bumping rights, job security, and access to overtime opportunities all suggest the opposite—i.e., that benefits are doled out in a highly uneven manner and often depend upon longevity and support of union leadership.[134]

As for the issue of joint consumption, Moorhouse argues that union membership fails to satisfy this criterion as well:

> Worker A's insurance policy protects himself and his beneficiaries; Worker B's moving into a union retirement home means another worker cannot occupy that suite; and the attention given Worker C by a nurse in the plant infirmary means that her services are not available to other workers during that period. The individuals appropriating the benefits of these services are readily identifiable and can be made to bear the costs of the services.[135]

Moorhouse's arguments about free riding are, ultimately, unpersuasive. It is true that unions do not distribute all benefits equally; however, it cannot be denied that wage increases, improvements in health care, and workplace safety are shared widely enough to qualify as public goods.

The answer to the free rider problem, as Justice Alito seemed to recognize, is not that it is not pertinent, but that constitutional considerations simply override it.[136] The free rider problem does not evaporate because of the failure to satisfy perfectly the non-excludability and joint-consumption criteria in every instance. The core conclusion of *Janus* is that, in spite of the free rider problem, the rights of dissenting employees trump the issue of

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131. Moorhouse, *supra* note 126, at 623.
132. *Id.*
133. *Id.* at 624.
134. *Id.* at 624–25.
135. *Id.* at 625.
136. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., 138 S. Ct. 2448, 2469 (2018).

how to get them to contribute toward the cost of workplace gains they will almost certainly enjoy. An employee who detests her union's political speech, but likes new safety protocols, wage increases, and additional personal leave time, now cannot be forced to pay for the perks while distancing herself from the union's political activity.[137]

Additionally, Justice Alito's opinion in *Janus* flatly states that "free rider arguments . . . are generally insufficient to overcome First Amendment objections."[138] Justice Alito proposes that free rider arguments, taken to their logical conclusions, are untenable.[139] He rhetorically asks whether it would seem fair to charge nonmembers of any organization that seeks government support for a specific group of people to cover the costs of benefits received, using groups that support veterans or the elderly as an example.[140] However, he also acknowledges the argument that public sector unions are statutorily required to bargain on behalf of nonmembers, which puts them in a unique position.[141] Justice Alito deals with this argument by noting that there are two reasons the payment of agency fees might amount to a compelling state interest in the context of the free rider argument: (1) without agency fees, unions might be unwilling to represent nonmembers entirely; and (2) there is something fundamentally unfair about an arrangement in which nonmembers get to reap the benefits of collective bargaining without contributing.[142]

To the first point, Justice Alito notes that unions continue to represent nonmembers in the twenty-eight states that do not allow agency fees. That is because exclusive representation confers a number of benefits to a public union such that even if nonmembers could "free ride," unions would continue to seek the designation.[143] For example, exclusive representation not only forces the government employer to bargain in good faith, but allows unions special access to employee information and allows them to deduct dues directly from wages. "Representation of nonmembers

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137. *Id.* at 2491 (Kagan, J., dissenting) ("[T]he majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.") (internal citations omitted).

138. *Id.* at 2466 (quoting Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 311 (2012)).

139. *Id.*

140. *Id.*

141. *Id.* at 2467.

142. *Id.*

143. *Id.*

furthers the union's interest in keeping control of the administration of the collective bargaining agreement, since the resolution of one employee's grievance can affect others."[144]

In other words, this is free riding; *Janus* simply privileges employee free speech over the pragmatic, budgetary concerns of public sector unions.

B. A Word About Labor Peace

As noted, more than half of the states and the federal government operate without agency fees.[145] This has not destroyed public unions, but it appears to have left them substantially less powerful than their counterparts in places like Massachusetts,[146] California,[147] and Illinois.[148] The number of strikes, for example, is not higher in states that forbid agency fees than in those that permitted them.[149] I have not been able to locate any data that suggests workplaces in these twenty-eight states or the federal government are more chaotic or prone to major disruptions than comparable workplaces in the rest of the country.[150]

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140. *Id.* at 2468. To the second point, Justice Alito notes: "Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious 'constitutional questions [would] arise' if the union were *not* subject to the duty to represent all employees fairly." *Id.* at 2469 (internal citations omitted). As such, the statutory requirement of a union to represent the interests of nonmembers is not sufficient to raise the free rider concern to the level of a compelling state interest. *Id.*

145. *Id.* at 2466.

146. As of 2017, 12.4% of public workers in Massachusetts were members of a union, according to the Bureau of Labor Statistics *Table 5. Union affiliation of employed wage and salary workers by state*, BUREAU LAB. STATS., https://www.bls.gov/news.release/union2.t05.htm (last visited Nov. 16, 2018).

147. As of 2017, 15.5% of public workers in California were members of a union, according to the Bureau of Labor Statistics. *Id.*

148. As of 2017, 15.0% of public workers in Illinois were members of a union, according to the Bureau of Labor Statistics. *Id.*

149. Indeed, of the seven biggest strikes of 2017, all seven occurred in states that permitted agency fees prior to *Janus*, according to the Bureau of Labor Statistics. *Major Work Stoppages in 2017*, BUREAU LAB. STATS. (Feb. 9, 2018, 10:00 AM), https://www.bls.gov/news.release/pdf/wkstp.pdf.

150. Not one *amicus* brief filed in support of AFSCME pointed to data that establishes a connection between right-to-work laws and a disruption of labor peace. *See, e.g.*, Brief for American Civil Liberties Union Supporting Respondents, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (No. 16-1466) (noting that the *Abood* Court recognized labor peace as a compelling

Wisconsin, after Act 10,[151] has seen significant drops in union membership (down from about 47% to 19% in the public sector since 2011[152]) and comparable drops in union political expenditures.[153]

The Wisconsin numbers suggest that at least some states can expect a comparable response after *Janus*.[154] How unions will manage the free rider problem—if indeed it can be managed—remains to be seen. Massachusetts is contemplating changes that would permit unions to deviate from the traditional requirements of exclusive representation, although it is too early to tell whether this will become law.[155]

IV. CONCLUSION

In spite of the media attention it generated, *Janus* is essentially irrelevant in more than half of the states in the U.S. Those places in which public sector unions have played a large role since *Abood* are likely to see losses in union membership, a reduced role for public unions in the political

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state interest, but failing to link the collection of agency fees to the maintenance of labor peace).

151. Act 10, or the Wisconsin Budget Repair Bill, essentially prohibits unions from bargaining over pensions, health coverage, employee safety, hours, sick leave or vacation time. Steven Greenhouse, *Wisconsin's Legacy for Unions*, N.Y. TIMES (Feb. 22, 2014), https://www.nytimes.com/2014/02/23/business/wisconsins-legacy-for-unions.html. Base pay can be negotiated but cannot exceed a cap set by the Consumer Price Index. *Id.* Public employees have been required to contribute 6% of their salary towards their pension, and 12% of their salary towards health care plan costs. *Id.* For a number of employees, this constituted a 12% pay cut. *Id.* The Act also eliminated Wisconsin's agency fee arrangement, largely incentivizing public workers to either stop paying dues, or simply not join a union with fewer resources and far more limited collective bargaining options. *Id.* While union membership has indeed dropped, there are a number of examples in which public sector services have seen benefits. *Id.* For example, the Mequon-Thiensville School District saved $560,000 after freezing teacher salaries for two years, and an additional $400,000 by raising employee contributions for health care. *Id.* Similarly, the school district in West Bend, a city north of Milwaukee, was forced to cut class sizes and course offerings prior to Act 10, whereas now the school district has been able to raise the retirement age for teachers and restructure the health plan, saving $250,000 per year. *Id.*

152. Lubenow, *supra* note 29.

153. Between 2000 and 2013, the Wisconsin Education Association Council, the state's largest teachers' union, spent nearly $13 million on political expenditures. *See Hijacking Campaign 2016 – Information on WEAC PAC*, WIS. DEMOCRACY CAMPAIGN (June 2, 2017), http://www.wisdc.org/ind16-500189.php. However, the union reported no independent spending in 2014 and spent less than $300 supporting democratic candidates in 2016. *Id.*

154. *See* Maria Hylton, *A Few Observations About the Curious State of Massachusetts Labor Law: Public Sector Unions After* Janus, U. CHI.-KENT L. REV. (forthcoming).

155. *Id.* at 3 (under a proposed bill to the Massachusetts Legislature, "[U]nions will no longer be obliged to represent fairly all employees in the workplace although their enhanced access to all employees' home addresses, emails, and other contact information should allow them ample opportunity to make the case for dues' paying membership.").

process, and a renewed emphasis on better aligning members' views with those of the union leadership. Elected officials in states like California, New York, Massachusetts, and Illinois may find that reduced financial support from public unions is offset by increased freedom to evaluate expenditures in a more rational manner akin to the approach of private sector employers.

I remain cautiously optimistic, although Massachusetts' initial reaction to *Janus* has been disappointing, as I have described elsewhere,[156] and in California, the governor recently signed a bill that protects public unions from lawsuits demanding return of agency fees that were collected prior to *Janus*.[157] For those worried about the loss of "labor peace," the data strongly suggest that this was never a legitimate concern. Those who abhor free riding have more reason to be concerned as it appears that the requirement to represent all employees—even those that do not want representation and, now, do not have to pay for it—will result in some public unions' members bearing the costs for all. One possible outcome of this free riding may be that public unions will have to find a way to attract (not compel) more dollars by engaging in activity that members and would-be members will support voluntarily. This should mean that the political positions adopted by the leadership will more closely align with those of the members. It is hard to see how that is anything but a positive development.

If the lessons of Central Falls, Rhode Island, and the California prison guards teach us anything, it is that incentives always matter. Unchecked spending by near-poor municipalities is just a catastrophe in waiting—once the long run arrives and the elected officials and union leaders who knew that the cost increases were unsustainable have long since retired or moved on to higher office, the taxpayers and their dependents will have to figure out how to live with reduced services and larger tax bills.

Similarly, the California prison guards have acted with ruthless self-interest: more draconian penalties such as "three strikes"-type laws increase incarceration rates and thus the demand for the work the guards perform. It makes no real difference whether or not the public is actually safer, and the public, relying on the presumably superior knowledge of law enforcement and legislators, is not well positioned to investigate these matters in any event.

Public sector unions should probably be banned altogether as antithetical to the proper functioning of state and local governments. In the

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156. Maria O'Brien Hylton, *A Few Observations About the Curious State of MA Labor Law: Public Sector Unions After* Janus, 22 EMP. RIGHTS & EMP. POL. J. (forthcoming 2019).

157. Adam Ashton, *State Workers Looking To Recover 'Fair Share' Fees Must Overcome New California Law*, SACRAMENTO BEE (Sept. 19, 2018), https://www.sacbee.com/news/politics-government/the-state-worker/article218615695.html.

meantime, the elimination of a compelled subsidy to entities whose role is so problematic is a good first step.