ON UNIONS, RESISTANCE, AND THE SUPREME COURT: WHAT I LEARNED FROM BEING WRONG AFTER *JANUS*[*]

AARON TANG[**]

"Crippling." "Crushing." "Devastating." That's how progressive commentators described the Supreme Court's 2018, watershed ruling against organized labor in Janus v. American Federation of State, County, and Municipal Employees, Council 31*. I know, because I was one of them. Now, seven years later, anti-union groups are running a victory lap. One group recently boasted that* Janus *had caused public sector unions to lose over a million dues-paying members—a staggering figure that would represent more than twenty percent of their membership rolls.*

Drawing on a range of data sources, this Article shows that the percentage of union members who have quit their unions after Janus *is closer to two to three percent, which continues the pre-*Janus *trendline. Union budgets, too, have been largely stable. Far from the doomsday feared at first by progressives and claimed now by union opponents, the truth is that public sector workers have resisted* Janus *with surprising success. Seven years ago, in other words, I was wrong. And anti-union groups are wrong today.*

After identifying these errors, this Article explores three lessons worth learning. The first concerns the role of legal scholarship in social change: labor's resilience after Janus *reveals the value of a scholarly approach that attends to the experiences of the people who bear the brunt of judicial decisions. This is a lesson that is deeply personal; the fundamental error in my own, earlier work on* Janus *was my failure to engage in an inclusive, bottom-up process for thinking about the case and its consequences. A second lesson concerns how labor has maintained its strength. Put simply, union members took matters into their own hands. Teachers, nurses, firefighters, and other public employees held millions of conversations with their coworkers about the value of sticking with their unions.*

[**] Professor of Law, University of California, Davis, School of Law. For feedback, ideas, and helpful conversations in developing this Article, I am grateful to Will Baude, Craig Becker, Chris Brooks, Catherine Fisk, Lisa Ikemoto, Tom Joo, Martin Malin, Teague Paterson, Claire Prestel, participants at a University of San Diego School of Law faculty workshop, and the editors of the *North Carolina Law Review*.

And it worked. For those interested in revitalizing modern labor law, the takeaway is clear: any such effort must begin with labor's greatest strength—organizing. Finally, Janus*'s aftermath offers insights into progressive debates over the Supreme Court and constitutional theory. Rather than concentrating our responses to the rulings we abhor on the Constitution and the Court that issued them, perhaps we should center the things people are doing to resist—and bypass—the Constitution and Court altogether.*

INTRODUCTION

"Crippling."[1] "Crushing."[2] "Devastating."[3] That's how supporters of organized labor described the Supreme Court's decision seven years ago in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[4] *Janus* invalidated the "fair share fee" system that had ensured the stability of public sector union finances for decades. That system entailed a basic compromise—a union was legally required to represent all workers fairly, even those who objected to it.[5] In exchange, those objecting workers could be required to pay their fair share of the union's bargaining expenses (but not its political ones).[6] *Janus* struck down the latter half of the compromise, holding fair share fees to be a compelled subsidy of speech that violates the First Amendment.[7]

Writing in dissent, Justice Kagan worried that *Janus* would create a debilitating free-rider problem for unions.[8] After all, "economically rational actors . . . (including those who love the union) [will] realize that they can get the same benefits" even once they stop paying their union fees.[9] Many commentators thus predicted that *Janus* would cause a steep reduction in public sector union membership and budgets, perhaps on the order of fifteen to fifty percent.[10] I was one of them. In an article written immediately in *Janus*'s wake, I worried that without an aggressive policy response, the decision could spell

1. Gabriel Winant, *Will* 'Janus' *Prove to Be the Fatal Blow That Unions Have Long Feared?*, NATION (June 27, 2018), https://www.thenation.com/article/archive/will-janus-prove-fatal-blow-unions-long-feared/ [https://perma.cc/8NPY-LCMD].

2. Sarah Jaffe, *With* Janus*, the Court Deals Unions a Crushing Blow. Now What?*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/opinion/supreme-court-janus-unions.html [https://perma.cc/TMR6-P5NP (staff-uploaded, dark archive)].

3. Chris Maisano, *Labor's Choice After* Janus, JACOBIN (June 27, 2018), https://jacobin.com/2018/06/labors-choice-after-janus [https://perma.cc/MF7C-NRC6].

4. 138 S. Ct. 2448 (2018).

5. *Id.* at 2460.

6. *Id.* at 2460–61.

7. *Id.* at 2486.

8. *Id.* at 2488–89 (Kagan, J., dissenting).

9. *Id.* at 2491.

10. *See infra* Section I.A.

the "end of public sector unionism as we know it."[11] And I had what I thought was just the policy response to offer.[12]

Now that we are seven years removed from *Janus*, it is worth asking: What actually happened to union membership? The answer matters immensely because of the vital role that public sector unions play in modern American life. Public sector unions, after all, are a key force in our politics.[13] They are instrumental in efforts to preserve an embattled middle class.[14] Their popularity is at historic highs.[15] And yet they are under fire, not only from anti-union movement groups but from the Supreme Court.[16] If *Janus* has in fact substantially eroded public sector union membership, the implications would be profound across America's economic and political landscape.

At first blush, answering the question should not be difficult. Now that seven years have passed, have public sector union membership rolls and budgets been decimated, or not? For their part, anti-union groups have proudly declared victory. "[M]ore than 20% of workers nationwide have withdrawn from union membership," boasted the anti-union Mackinac Center for Public Policy in November 2023—a rate that equates to "1 million people . . . exercis[ing] their First Amendment right to decline union membership" after *Janus*.[17] The

11. Aaron Tang, *Life After* Janus, 119 COLUM. L. REV. 677, 680 (2019) [hereinafter Tang, *Life After* Janus].

12. *See id.* (advising states to reimburse unions directly for their bargaining costs).

13. *See, e.g.*, Jan E. Leighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in the U.S. Electorate, 1964–2004*, 69 J. POL. 430, 439 (2007) (finding that "union members are significantly more likely than nonunion members to vote").

14. *See, e.g.*, Jake Rosenfeld & Patrick Denice, *What Do Government Unions Do? Public Sector Unions and Nonunion Wages, 1977–2015*, 78 SOC. SCI. RSCH. 41, 49–51 (2019) (finding that "if each state's public sector unionization rate was as low as its private sector rate," the result would be an average annual loss of $2,964 for fulltime public sector employees and an annual loss of $1,612 for private sector employees).

15. Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022, https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/8RE3-VPZ5].

16. *See, e.g.*, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404, 1416 (2023); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465–69 (2018); *see also* Courtlyn G. Roser-Jones, *The Roberts Court and the Unraveling of Labor Law*, 108 MINN. L. REV. 1407, 1420 (2024) (describing this line of cases as an ongoing trend).

17. Jarrett Skorup, Janus *Had a Large Impact on Union Membership, Five Years Later*, MACKINAC CTR. PUB. POL'Y (Nov. 20, 2023), https://www.mackinac.org/blog/2023/janus-had-a-large-impact-on-

Freedom Foundation, a group that actively pressures public employees to opt out of their unions, announced that "in the years since *Janus*, membership in the four largest labor unions representing public employees has declined by a whopping 733,745."[18] A different group has likewise asserted that public sector union membership has "plummet[ed] post *Janus*."[19] But in a sign that things may be less clear-cut than these groups have let on, another anti-union think tank reached the opposite conclusion in 2022. According to the conservative Manhattan Institute, predictions that *Janus* "would severely erode public-sector union membership and, with it, union revenues" have been "wrong."[20]

Relying on a range of data sources—including previous research by the Mackinac Center itself—this Article shows that claims regarding the demise of public sector unions are overstated.[21] The evidence suggests that unions have lost a small percentage of their members, likely on the order of two to three percent, which continues (rather than breaks sharply from) the pre-*Janus* trendline.[22] Union budgets, too, are in stable condition and in some cases have even improved.[23] To put it simply, I was wrong in my prediction seven years ago.[24] And anti-union groups are wrong today. The battle over the future of organized labor in the public sector, it seems, is far from over.

How have public sector unions warded off major losses so far? In addition to correcting the factual record, this Article aims to lift up an under-appreciated explanatory narrative. Public sector employees have resisted *Janus* by going back

union-membership-five-years-later [https://perma.cc/WX9K-YGU5] [hereinafter Skorup, Janus *Had a Large Impact*]; *see also* JARRETT SKORUP, MACKINAC CTR. FOR PUB. POL'Y, THE JANUS EFFECT: THE IMPACT OF THE 2018 SUPREME COURT DECISION ON PUBLIC SECTOR UNIONS 7 (2023) [hereinafter SKORUP, THE *JANUS* EFFECT] (finding a 22.2% opt-out rate after *Janus*, which would mean "there are 1.2 million fewer public employees paying union dues than there otherwise would have been" after *Janus*).

18. Maxford Nelsen, Janus v. AFSCME *at Five: Government Union Membership at Record Lows*, FREEDOM FOUND. (June 19, 2023), https://www.freedomfoundation.com/labor/janus-v-afscme-at-five-government-union-membership-at-record-lows/ [https://perma.cc/U98R-ZDT3].

19. *Government Union Membership Plummets Post* Janus, COMMONWEALTH FOUND. (Sept. 28, 2022), https://commonwealthfoundation.org/2022/09/28/government-union-membership-plummets-post-janus/ [https://perma.cc/9YYZ-NKGS].

20. DANIEL DISALVO, THE MANHATTAN INST., BY THE NUMBERS: PUBLIC UNIONS' MONEY AND MEMBERS SINCE *JANUS V. AFCSME* 1 (2022).

21. *See infra* Section II.A.

22. *See infra* Section II.A.

23. *See infra* Section II.A.

24. *See* Tang, *Life After* Janus, *supra* note 11, at 680.

to organizing basics. Workers around the country held conversations with their colleagues about the value of their union. The American Federation of State, County, and Municipal Employees ("AFSCME") for example, launched an organizing campaign that led to more than a million conversations between members and their coworkers—all within a year of *Janus*.[25] State and local union leaders likewise prioritized one-on-one meetings with new employees and workers who were on the fence about membership.[26] As Andy Pallotta, the president of the New York State United Teachers ("NYSUT") explained: "Everyone is an organizer . . . . We've knocked on over 100,000 doors . . . . We're getting back to our roots."[27] So much so that even the former President of the American Federation of Teachers, Albert Shanker, "sat down with members at their kitchen tables."[28] The impact of these efforts was striking: just nine of NYSUT's thousands of members quit the union after *Janus*.[29]

Labor's ability to overcome *Janus*'s dire collective action problem is not only remarkable; it is instructive. This Article focuses on three lessons in particular. The first concerns the proper role of legal academics in social change. Part of my motivation in writing this Article is to own up to my prior mistakes. Labor's success in the years since *Janus* is of particular interest to me because I was one of the many commentators who did not see it coming. I openly predicted, for instance, that public sector unions would lose a significant percentage of their members without some kind of legislative intervention.[30] And that prediction justified what I believed to be a silver-bullet proposal: amending state labor laws so that government employers could reimburse unions directly for their bargaining costs.[31] My proposal may have been well-intentioned and technically plausible, but it was a top-down lawyer's move,

25. *See* Press Release, AFSCME, 'Workers Chose to Stick with Their Union': AFSCME Posts Strong Membership Numbers in New Filing with Department of Labor (Mar. 27, 2019) [hereinafter Press Release, Workers Chose to Stick with Their Union], https://www.afscme.org/press/releases/2019/workers-chose-to-stick-with-their-union [https://perma.cc/JKS4-TWEE].

26. *See infra* Section II.B.

27. Annette Licitra, *The Beating Heart of Our Union*, AM. FED'N TCHRS. (July 14, 2018), https://www.aft.org/news/beating-heart-our-union [https://perma.cc/BK4J-3G6U].

28. *Id.*

29. *Id.*

30. Tang, *Life After* Janus, *supra* note 11, at 699 (describing a potential free rider rate after *Janus* of anywhere from 15% to 65%).

31. *Id.*

divorced from any real effort to listen to the labor movement's own struggles and needs.

By contrast, a pair of eminent labor law experts, Professors Catherine Fisk and Martin Malin, wrote a key article calling on pro-labor states to respond to *Janus* with relatively modest statutory fixes that would increase unions' access to workers so as to build solidarity and educate them about the benefits of membership.[32] They rooted their suggestions in the feedback they received from union members and leaders who believed they could overcome *Janus* through a back-to-grassroots-organizing approach.

After seven years, it is clear to me that Fisk and Malin were right. Many states followed their recommendations, while none chose the more radical proposal I put forward. And as union membership and financial data show, nothing more was needed from lawmakers; workers have staved off *Janus*'s worst consequences so far. The upshot is a testament to the wisdom of what Professors Amna Akbar, Sameer Ashar, and Jocelyn Simonson have called "movement law," an approach that treats social movements as "partners of movement law scholars rather than their subject."[33] As Akbar, Ashar, and Simonson incisively argue, "[L]egal scholars and lawyers are not the protagonists in movement struggles for progressive social change."[34] Touché. By describing my own mistaken efforts after *Janus*, my hope is to lend one chagrined academic's support for movement law as a superior approach to legal scholarship and social change.[35]

A second lesson is about organized labor, the underappreciated sources of its strength, and how this strength ought to inform efforts to reform labor law. Put simply, commentators after *Janus* (myself included) miscalculated the response that working-class Americans would have when faced with barriers to their ability to join collectively in pursuit of better working conditions. Far from quitting their unions to save money on dues, workers have banded together to fight for union-generated wage premiums and benefits, overcoming a difficult

32. Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 CALIF. L. REV. 1821, 1872–74 (2020).

33. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021).

34. *Id.* at 883.

35. And in an effort to follow the movement law approach, I ground the labor law reform options discussed in the Article in a series of conversations with members of the labor movement in the public sector. *See infra* Section III.A.

collective action problem. The pandemic is a part of this story, as union-negotiated protections for workers in response to COVID-19 helped produce historic rates of public support—a striking seventy-one percent of Americans now approve of labor unions, up twenty-three percent from 2009.[36] But it is only a partial explanation; support for unions was already on the upswing before the pandemic.[37] The more important explanation is how working Americans have reacted to an era of pernicious economic inequality by communicating the value of unions to their coworkers, one conversation at a time.[38]

In emphasizing labor's strength, I do not mean to minimize the legal and political challenges that continue to plague unions in America. As others have argued, there is much about the law and our social institutions that hampers movement building among working-class Americans.[39] The need to build countervailing power is as acute as ever.[40] And the fight to offset *Janus* is ongoing; labor's success will last only so long as organizers can carry it. But there are feasible steps that public officials can take now to facilitate organizing that would empower more workers to advance their interests at the bargaining table. The Article presents and assesses several policy options that would accomplish this end.

Finally, attending to *Janus*'s aftermath can teach a meaningful lesson about the Supreme Court in this precarious time for progressives. The lesson is that if there is cause today for progressive optimism, it is likely to be found in the on-the-ground work being undertaken by the people themselves to offset the pain of the Supreme Court decisions they detest—rather than in lawyers'

36. McCarthy, *supra* note 15.

37. *Id.* (showing growth in public approval from forty eight percent to sixty four between 2009 and 2019).

38. *See infra* Section II.B.

39. *See, e.g.*, SHARON BLOCK & BENJAMIN SACHS, HARV. L. SCH. LABOR & WORKLIFE PROGRAM, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 16 (2020), https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984e5a8f2a8064_CleanSlate_Report_FORWEB.pdf [https://perma.cc/EB3A-WCJF]; Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1391–92 (2023); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 2 (2016) [hereinafter Andrias, *The New Labor Law*]; CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 3–5 (2010).

40. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 548–49 (2021); Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685, 686 (2021).

creative constitutional arguments, an unlikely about-face from the Court itself, or court reform plans dreamed up by legal academics.[41]

In suggesting as much, my goal is not to critique present-day efforts to persuade the Court to adopt different constitutional understandings or to wrest the Constitution away from the Court altogether.[42] There is much to be said about both of these approaches, which track a crucial debate within progressive circles.[43] I aim instead to highlight something that is often missing from the discourse: these are not the only responses available when the Court issues a major constitutional ruling. A third type of response is happening all around us, and it is worthy of attention. What is distinctive about it is how it operates on a subconstitutional register, thus enabling people to work around, rather than through or against, the Court they find so threatening. Sometimes, in other words, Americans respond to the Court's watershed constitutional decisions not by doing anything so lofty as contesting its understanding of the Constitution or fighting against judicial supremacy. Yet their responses can be meaningful nonetheless.

This Article aims to elevate this third form of response, which I refer to as "popular subconstitutionalism" because it operates through large numbers of Americans engaging in direct, popular action beneath the plane of constitutional contestation. Public sector workers, in other words, did not resist *Janus* by trying to convince the Court to overrule it or by fighting to take away the Court's interpretive power over the First Amendment or labor law. Their response was not jurisgenerative,[44] but rather juris-*avoidant*: through old-fashioned organizing, workers have successfully mitigated *Janus*'s effects. When

41. *See infra* Section III.C.

42. *See infra* Section III.C (describing these kinds of strategies). Indeed, I have written in support of both approaches in prior work. *See* Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 98 (2023) (emphasizing the crucial work that organizers are doing to shape public views on abortion); AARON TANG, SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT 242–43 (2023) [hereinafter TANG, SUPREME HUBRIS] (defending efforts to disempower the Court by stripping it of jurisdiction).

43. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1704 (2021) (framing this debate and arguing that progressives should fight to disempower the Court, rather than recapture it through personnel reforms).

44. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11–19 (1983) (describing the concept of "jurisgenesis," or "the creation of legal meaning").

the Court issues decisions that significant numbers of people do not like, our eyes may train naturally on the high constitutional questions—questions like how to change the justices' minds, or how to change our constitutional order to take power away from the Court. But we should not let this tendency overshadow what is happening on the ground, where people are fighting to protect their interests in the here and now, with the Court and constitutional law just the way they are. Rather than concentrating our responses to the judicial decisions we abhor on the Constitution and the Court that issued them, in other words, perhaps we might benefit by centering the things Americans are doing to bypass the Court altogether.

The Article proceeds in three parts. Part I briefly recounts the *Janus* decision and the virtually uniform consensus among progressives and conservatives alike that it would devastate public sector union membership rolls and budgets.[45] It then describes how anti-union groups have characterized *Janus*'s aftermath, with the vast majority pronouncing precisely the sort of union demise that commentators anticipated.[46]

Part II then investigates what has actually happened. Using three major data sources—the Bureau of Labor Statistics' ("BLS") Current Population Survey, annual financial reports submitted by unions directly to the Office of Labor-Management Standards ("OLMS"), and state-level responses to public records act requests collected by the conservative Mackinac Center—I explain how *Janus* has not materially changed pre-existing trends in public sector union membership rates.[47] Part II also describes how unions have managed to resist *Janus* with a level of success that even many progressives did not anticipate: through painstaking organizing efforts.

Part III considers how this unexpected success can teach important lessons about legal scholarship, labor, the Supreme Court, and constitutional theory. I conclude with a few observations on how these lessons may be generalized to other contentious areas beyond organized labor, such as guns, abortion, and the separation of church and state.

45. *See infra* Section I.A.
46. *See infra* Section I.B.
47. *See infra* Section II.A.

I. *JANUS* AND THE ANTI-UNION VICTORY LAP

This section describes the *Janus* decision and why commentators, including me, widely believed it would threaten the future of organized labor in the public sector. It then examines how anti-union groups have characterized *Janus*'s aftermath. To many of these groups, *Janus* has delivered on its union-busting promise, just as labor's proponents initially feared. Section II digs through the data to uncover the truth.

A. *Janus*

The question in *Janus* was whether Illinois violated the First Amendment when it permitted public employers and unions to include in their collective bargaining agreements a provision requiring nonunion members to pay a "fair share fee" to cover their costs of collective bargaining.[48] Like the nearly two dozen states with similar statutory provisions, Illinois lawmakers permitted such fair share fees (also known as "agency fees") as part of a grand bargain.[49] On one end of the deal, lawmakers required public sector unions to fairly represent all of the workers in their bargaining units, even workers who object to the union's very existence.[50] In exchange for the union's duty to represent these workers in bargaining and grievance procedures, pro-labor states permitted labor agreements requiring the objecting workers to pay their share of the union's bargaining costs (but not its political costs).[51]

Janus struck down exactly half of this bargain. Thus, even as public sector unions continue to owe a duty of fair representation to all workers, which prevents them from discriminating against or denying representation to nonunion members, the Court held that forcing unwilling workers to pay fair share fees violates the First Amendment because it compels them to "subsidize the speech" of others and "endorse ideas they find objectionable."[52] In doing so, the Court invalidated a system of public sector union financing that had

48. 138 S. Ct. 2448, 2459–61 (2018).

49. *See* Tang, *Life After* Janus, *supra* note 11, at 689–90, 689–90 & nn.60–63 (listing the twenty three jurisdictions permitting fair share fees).

50. *Janus*, 138 S. Ct. at 2460.

51. *Id.* at 2460–61.

52. *Id.* at 2486, 2493.

persisted since the Court's 1977 ruling in *Abood v. Detroit Board of Education*[53] and had protected the stability of union budgets for decades.

Writing in dissent, Justice Kagan worried that the majority's ruling would create "large-scale consequences" for unions.[54] Why? In a phrase: "basic economic theory."[55] *Janus* created a world in which every public worker represented by a union would be entitled to all of the benefits of that representation—from wage and benefit increases to union support in grievances with the employer—without any obligation to pay for them.[56] The result, as Justice Kagan explained in dissent, was that "[e]veryone—not just those who oppose the union, but also those who back it—ha[d] an economic incentive to withhold dues."[57] "[O]nly altruism or loyalty—as *against* financial self-interest," Kagan continued, could explain "why an employee would [continue to] pay the union for its services."[58]

Relying on this basic free-rider rationale, many commentators across the political spectrum predicted that *Janus* would cause a steep decline in public sector union membership. The *New York Times* editorial board predicted that public sector unions would lose "between a 10th and a third of their members" as "more workers decide to become free riders, enjoying raises, pensions and other benefits unions win through collective bargaining without having to bear any of the cost of those negotiations."[59] The *Wall Street Journal* noted the case's "far-reaching impact" in "dealing a severe blow to perhaps the strongest remaining redoubt of the American labor movement."[60] The conservative Mackinac Center for Public Policy predicted that between twenty and seventy-one percent of union members would quit after *Janus*, based on data from eight

53. 431 U.S. 209 (1977).

54. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

55. *Id.* at 2490.

56. *Id.*

57. *Id.*

58. *Id.*

59. New York Times Editorial Board, *After* Janus*, Unions Must Save Themselves*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/opinion/janus-supreme-court-unions.html [https://perma.cc/8WDM-XE9L (staff-uploaded, dark archive)].

60. Jess Bravin, *Supreme Court Deals Blow to Public-Sector Unions*, WALL ST. J. (June 27, 2018), https://www.wsj.com/articles/supreme-court-deals-blow-to-public-sector-unions-1530108179 [https://perma.cc/G5QH-D4P3]. *But see, e.g.*, Jeanne Allen, *In Public-Sector Union-Fees Case, SCOTUS Strikes a Blow for Freedom*, NAT'L REV. (June 27, 2018), https://www.nationalreview.com/2018/06/janus-decision-supreme-court-win-freedom/ [https://perma.cc/BTD2-SXNZ (staff-uploaded)].

jurisdictions that had forbidden fair share fees in the public sector as a matter of state law.[61] Even unions themselves reported reason for concern: AFSCME interviewed 600,000 of its own members and found that anywhere from fifteen to fifty percent would be at risk of leaving the union if the fair-share-fee system were invalidated.[62]

These dire predictions concerning union membership led to equally worrisome fears over union finances. Because member fee payments are the principal source of union revenues, the loss of a significant chunk of members would trigger corresponding budgetary losses.[63] The post-*Janus* landscape was thus filled with stories of unions cutting their budgets and staff. The nation's largest teachers' union, the National Education Association ("NEA"), trimmed its annual budget by $28 million after *Janus*—and laid off ten percent of its staff.[64] The Service Employment International Union ("SEIU") publicly discussed budget cuts on the order of thirty percent.[65] And given the economic chain of events that *Janus* threatened, these budgetary losses would be difficult to unwind: any attempt to offset shrinking membership rates by raising member dues payments or cutting services would cause more people to leave the union, exacerbating an already vicious cycle. Labor law scholars Benjamin Sachs and Sharon Block summarized the concern succinctly: "Unless something changes

61. *See* Brief for Mackinac Center for Public Policy as Amicus Curiae Supporting Petitioner at 15–18, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466) [hereinafter Mackinac Center Amicus Brief, *Janus*] (finding that in eight states with mandatory public sector bargaining but no fair share fees that payroll deductions reveal just 28.6% to be union members); Brief for Mackinac Center for Public Policy as Amicus Curiae Supporting Petitioners at 35–37, Friedrichs v. Cal. Tchrs. Ass'n, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 5461532 (finding based on the Bureau of Labor Statistics' Current Population Survey data that between twenty to twenty-five percent of workers have opted out of paying dues in the eight aforementioned states).

62. Josh Eidelson, *Unions Are Losing Their Decades-Long 'Right to Work' Fight*, BLOOMBERG BUSINESSWEEK (Feb. 16, 2017), https://www.bloomberg.com/news/articles/2017-02-16/unions-are-losing-their-decades-long-right-to-work-fight [https://perma.cc/WG2P-XS2D (staff-uploaded, dark archive)].

63. The loss of *member* dues would be in addition to the losses sustained after fair-share-fee payers—workers who have already refused to join the union—stopped paying the union after *Janus*.

64. Daniel DiSalvo & Michael Hartney, *Teachers Unions in the Post-*Janus *World*, EDUC. NEXT (2020), https://www.educationnext.org/teachers-unions-post-janus-world-defying-predictions-still-hold-major-clout/ [https://perma.cc/J8ZK-CHPK].

65. Nat Malkus, *The* Janus *Case and the Future of Teachers Unions*, AM. ENTER. INST. (Feb. 25, 2018), https://www.aei.org/spotlight-panels/malkus-janus/ [https://perma.cc/6TH6-ESG4].

in response to the Court's decision, public sector unions will face a funding crisis that threatens their very existence."[66]

Relying on all of the above data sources, I came to the same, dire conclusion in a law review article published shortly after *Janus* was decided.[67] "[U]nions should expect a significant reduction in voluntary membership ranging anywhere from 15 to 71%, with similar downstream impacts on their budgets," I wrote.[68] I noted that this "range of possible outcomes" was "vast," spanning the "weakening of union influence to the end of public-sector unionism as we know it."[69] But I left little doubt as to where on that scale my ultimate bet rested: I argued that without some significant legislative response in pro-labor states, "substantial membership losses" would be "inevitab[le]" after *Janus*'s "big bang."[70]

B. *The Anti-Union Victory Lap*

Given the apparent consensus seven years ago, it is perhaps unsurprising that many anti-union commentators today are declaring things to have turned out exactly how they predicted.

The leading voice in this respect belongs to the Mackinac Center for Public Policy, an anti-union think tank that was active in the *Janus* litigation (as well as earlier efforts to strike down fair-share-fee laws).[71] According to a November 2023 article headline published on the Mackinac Center's blog, "Janus had a large impact on union membership, five years later."[72] The article was aimed at refuting an earlier essay written by AFSCME's associate general counsel, which suggested that *Janus* had wrought only a minimal effect on union membership rolls.[73] According to the Mackinac Center, the truth was radically

66. Benjamin Sachs & Sharon Block, *How Democratic Lawmakers Should Help Unions Reeling from the* Janus *Decision*, VOX (June 27, 2018), https://www.vox.com/the-big-idea/2018/6/27/17510046/public-unions-janus-reforms-fees-decline-reform-supreme-court-hope [https://perma.cc/RTF9-ZX7Z].

67. *See* Tang, *Life After* Janus, *supra* note 11, at 677.

68. *Id.* at 695.

69. *Id.* at 680.

70. *Id.* at 700, 759.

71. *See supra* note 61 (listing amicus briefs Mackinac filed on behalf of anti-union challengers in *Janus* and *Friedrichs*).

72. Skorup, Janus *Had a Large Impact*, *supra* note 17.

73. *See id.* (discussing Michael Artz, *The Impact of* Janus *on the Labor Movement, Five Years Later*, 49 HUM. RTS. 22, 23 (2023) (describing "how weak the *Janus* impact has been")).

different: "Public records requests to government entities show that more than 20% of workers nationwide have withdrawn from union membership" after *Janus*.[74] Based on that rate of decline, the Mackinac Center concluded that "around 1 million people who work under collective bargaining agreements have exercised their First Amendment right to decline union membership."[75]

To support this claim, the November 2023 Mackinac Center article linked to an earlier report that it had issued in July 2023.[76] That report relied on an impressively thorough data-collection process involving state- and local-government responses to public records act requests that the Mackinac Center made to government employers in twenty-two states whose fair-share-fee laws were struck down by *Janus*.[77] More specifically, the Mackinac Center filed "more than 600 public records requests with the largest government entities in those states," seeking information on "[t]he number of people (union members) who are having dues withdrawn from their paycheck" and "[t]he total number of people covered by collective bargaining agreements."[78]

After compiling the responses to these requests, the Mackinac Center found that 2,563,270 workers had union dues withdrawn from their paychecks, compared to the 3,293,008 government workers who were covered by a collective bargaining agreement.[79] By dividing the former number over the latter, the Mackinac Center concluded that *Janus* had caused a "22.2% opt-out rate,"[80] which appears to be the source of its top-line claim that "[a] little more than one in five government workers have exercised their right to resign fully from their unions since the Janus ruling."[81] The report then extrapolates from that supposed opt-out rate to calculate a total, nationwide public sector union membership decline across the twenty-two states affected by *Janus*. Starting with the BLS's finding that there were approximately "5.6 million public sector workers covered by collective bargaining agreements in the 22 states" before *Janus*, the report concludes that a "22.2% opt-out rate means there are 1.2

74. *Id.*
75. *Id.*
76. *Id.*
77. *See* SKORUP, THE *JANUS* EFFECT, *supra* note 17, at 6.
78. *Id.*
79. *Id.* at 7–8.
80. *Id.*
81. *Id.* at 2.

million fewer public employees paying union dues than there otherwise would have been" but for *Janus*.[82]

Other anti-union advocacy groups have echoed the Mackinac Center's conclusion. The Freedom Foundation, for example, claimed in its own five-year *Janus* retrospective that "government union membership" is at "record lows."[83] Known best for its aggressive direct outreach efforts to persuade public sector workers to opt out of their unions,[84] the Freedom Foundation based its assertion on its assessment of annual financial reports that the nation's largest public sector unions file with the federal government.[85] And according to the foundation's analysis, "membership in the four largest labor unions representing public employees has declined by a whopping 733,745."[86] (Oddly, the Freedom Foundation included in its definition of union "members" not only actual members, but also nonmember fair-share fee payers who objected to their unions and were permitted to stop paying their fees after *Janus*—a point I will return to later.[87])

Additional anti-union organizations such as the Commonwealth Foundation and Empire Center have pushed similar narratives.[88] As the conservative State Policy Network summarized the point on *Janus*'s five-year anniversary, because of *Janus* and work by groups like the Mackinac Center, Freedom Foundation, and others, "hundreds of thousands of public workers"

82. *Id.* at 6.

83. Nelsen, *supra* note 18.

84. *See*, *e.g.*, Dave Jamieson, *Union Says Right-Wing Group Used 'Trickery' to Try to Get Teachers to Drop Membership*, HUFF POST (Nov. 6, 2023), https://www.huffpost.com/entry/freedom-foundation-teachers-unions_n_65493d79e4b01b258584d219 [https://perma.cc/A8WY-KFN4] (describing how the Freedom Foundation sent union members "Credit Due Notices" purporting to promise a refund from the union when, in fact, the mailers were part of an opt-out campaign).

85. Nelsen, *supra* note 18.

86. *Id.*

87. *See id.* ("For the purposes of this analysis, 'working members'" includes "[a]ctive professionals, active educational support professionals, and agency fee-payers").

88. *See Government Union Membership Plummets Post* Janus, *supra* note 19; Ken Girardin, *The* Janus *Effect*, EMPIRE CTR. (Feb. 21, 2023), https://www.empirecenter.org/publications/the-janus-effect/ [https://perma.cc/J95W-KKRY] ("[T]he rate of union membership among eligible workers initially rose after *Janus* but has since declined.").

have finally been "empowered to leave their union."[89] The next section scrutinizes the accuracy of these claims.

II. *JANUS* AND THE UNION RESISTANCE

Supporters of organized labor typically do not agree with anti-union groups about much. Yet as the previous section of this Article showed, both sides have at different times expressed the same view of *Janus*'s devastating aftermath. Is this view—that *Janus* would cause (or already has caused) massive numbers of public workers to leave their unions—correct?

It bears repeating why the answer to this question is so important. Recall how unions have been essential to efforts to increase participation in our democracy and to bolster the waning middle class at a time of mounting inequality.[90] Notice also the evidence that union membership plays a role in reducing racial conflict.[91] A social institution with the capacity to ameliorate racial conflict, economic inequality, and democratic backsliding is surely one worthy of our sustained attention. So, if public sector unions are really facing a *Janus*-induced existential crisis, that would be ominous news. Of all the facts to quibble over in this post-truth era in America, this one seems quite worth getting right.

This part takes up that task. It begins by presenting data from the BLS's Current Population Survey and financial reports filed by the unions themselves pursuant to federal law, before delving into the Mackinac Center's own previous research. Anti-union claims of a post-*Janus* member exodus, it will turn out, are overblown. And progressive predictions to the same effect—including my own—have been mistaken. The following subpart explores how unions have been able to resist *Janus* and basic economic theory so forcefully: through concerted, one-on-one organizing efforts.

89. *Celebrating the Historic* Janus *Decision Five Years Later*, STATE POL'Y NETWORK (June 27, 2023), https://spn.org/articles/celebrating-the-janus-decision-five-years-later/ [https://perma.cc/G6GG-PMAL].

90. *See supra* notes 13–14 and accompanying text.

91. Paul Frymer & Jacob M. Grumbach, *Labor Unions and White Racial Politics*, 65 AM. J. POL. SCI. 225, 225 (2021) ("[U]nion membership reduces racial resentment.").

A. *The Data*

If one is curious about changes to public sector union membership rolls over time, perhaps the most logical place to start is the BLS's Current Population Survey. Each year, the BLS asks respondents about their union membership status and then reports totals broken down by sector—including an aggregate figure for the nationwide total of public sector union members. Although there is some year-to-year noise in this data source given its sampling approach,[92] over a long-enough timeframe, trends should be discernible: if *Janus* really devastated public sector union membership to the tune of a million-plus members quitting, one would expect to see that kind of movement over time.

Our starting point is in 2017, the last full year before *Janus* was decided. As of the BLS's survey that year, 7.21 million workers belonged to public sector unions in the United States, a figure that amounted to 34.4% of the total public sector work force of 20.9 million.[93] If the post-*Janus* consensus concerning drastic membership losses was correct, one would expect to see substantial erosion in the most recent data, both in the absolute number of public sector union members and in membership rates. But the BLS reported similar numbers for 2023: 7.01 million workers belonged to public sector unions, at a membership rate of 32.5% of the nation's 21.6 million public workers.[94] The difference between 2017 and 2023 is an absolute, nationwide drop of roughly 200,000 members, or a decline of 2.8%—well short of the 1.2 million and 22.2% decline asserted by the Mackinac Center.[95] Or put in terms of union density, the public sector union membership rate has fallen by 1.9%.

These declines are certainly something. But if anything, they represent the gradual *slowing* of a downward trajectory that preceded *Janus*. In the six-year period before 2017, for example, public sector unions lost roughly 350,000

92. *See* News Release, Bureau Lab. Stat., Union Membership (Annual) News Release: Union Members –– 2023 (Jan. 23, 2024) [hereinafter News Release: Union Members, 2023], https://www.bls.gov/news.release/archives/union2_01232024.htm [https://perma.cc/DM7Q-YBHZ] (describing sources of sampling error).

93. *See* News Release, Bureau Lab. Stat., Union Membership (Annual) News Release: Union Members –– 2017 (Jan. 19, 2018), https://www.bls.gov/news.release/archives/union2_01192018.htm [https://perma.cc/K5AE-8HFF].

94. News Release: Union Members, 2023, *supra* note 92.

95. *See supra* text accompanying note 81.

members and experienced a 2.6% decline in union density.[96] Far from triggering the kind of crippling losses that union supporters feared, then, *Janus* seems to have done little to change the status quo: a world in which public sector union membership is slowly dipping.[97]

Furthermore, reductions in absolute membership totals during this period also reflect the devastating effect that the pandemic had on public sector payrolls. Many people simply quit public employment as teachers or nurses. Even where the government hired new workers, the resulting high rates of turnover created a new kind of organizing challenge in that unions had to attract new employees to membership in the midst of an emergency—and remote work—environment. So, the declining membership totals and rates over the past several years may actually owe as much to an unparalleled public health crisis as much as the aftereffects of *Janus*.[98]

Other, more granular sources of data paint a similar picture of modest membership declines. UnionStats.com, a project run by economists at Georgia State University, breaks down the BLS data by state.[99] Based on 2021 data, the economists report that in some pro-labor states, public sector union membership rates actually went *up*, while in others it went down. Thus, for example, public-sector union membership in California increased from 50.3% to 54.5% between 2018 and 2021, although the total number of members decreased modestly due to reductions in overall public employment.[100] Other states experienced a decline in membership rates, such as Minnesota which saw its public sector union membership rate fall from 59.3% to 54.7%.[101] All told,

96. *See* News Release, Bureau Lab. Stat., Union Members—2011 (Jan. 27, 2012), https://www.bls.gov/news.release/archives/union2_01272012.pdf [https://perma.cc/VG4R-L2PT (staff-uploaded archive)] (showing 7,562,000 public sector union members in 2011, at a membership rate of 37.0%).

97. I do not want to undersell this point: this erosion is a worrisome trend for union supporters. I discuss below a set of potential policy and legal responses generated in conversation with members and leaders of public sector unions. *See infra* Section III.A.

98. *See* Ian Kullgren, *Unions Lost Members in 2020. Here's Where the Hits Were Hardest*, BLOOMBERG L. (Apr. 14, 2021), https://news.bloomberglaw.com/daily-labor-report/unions-lost-members-in-2020-heres-where-the-hits-were-hardest [https://perma.cc/P9J9-QE3L (staff-uploaded, dark archive)].

99. Barry Hirsch, David Macpherson & William Even, *Union Membership, Coverage, and Earnings from the CPS* (2025), https://unionstats.com/ [https://perma.cc/CVR8-34AR].

100. *See* DISALVO, *supra* note 20, at 5–6.

101. *Id.*

though, the data reflects modest changes around the margins—hardly the game-changing blow to membership that commentators expected.

Likewise, data collected by the OLMS show that *Janus* has not provoked dramatic changes to public sector union membership. The OLMS data are the product of the 1959 Labor-Management Reporting and Disclosure Act, which requires any union with any private sector members to file annual financial disclosures on an LM-2 form that also includes membership numbers.[102] Because some public sector unions also represent private sector employees, LM-2 forms can offer insight into public sector union membership trends. That insight is admittedly imperfect, though, given that any reported member numbers include private sector workers as well. Still, the trajectory between 2017 and 2023 is clear: the major public sector unions have experienced small losses in membership, which simply reflect longer-term macroeconomic trends.[103] The nation's largest public sector union, the NEA, reported a total membership of 2,987,077 in 2017; by 2023, that number had inched downward to 2,857,703.[104] Membership numbers from AFSCME are similar: the union reported 1,248,681 members in 2023, down slightly from the 1,299,644 reported in 2017.[105]

102. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519, 524–25 (codified at 29 U.S.C. § 431); 29 U.S.C. § 431.

103. Note that the global trend may mask differentiation among individual locals and among sectors. There is evidence that some unions, in particular those serving diffuse workers who do not possess a traditionally strong sense of occupational identity, have lost a relatively greater share of their membership ranks. *Compare, e.g.*, U.S. DEP'T LAB., FILE NO. 519-355, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2017), https://olmsapps.dol.gov/query/orgReport.do?rptId=659248&rptForm=LM2Form [https://perma.cc/6ESB-A4D3] (showing 58,384 members working across eight five different agencies and facilities, including homecare workers), *with* U.S. DEP'T LAB., FILE NO. 519-355, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2022), https://olmsapps.dol.gov/query/orgReport.do?rptId=850343&rptForm=LM2Form [https://perma.cc/CG3X-HDT6] (showing 45,038 members in 2022, a 22.9% decline).

104. *Compare* U.S. DEP'T LAB., FILE NO. 000-342, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2023), https://olmsapps.dol.gov/query/orgReport.do?rptId=875354&rptForm=LM2Form [https://perma.cc/U5LH-7PQ9], *with* U.S. DEP'T LAB., FILE NO. 000-342, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2017), https://www.optouttoday.com/wp-content/uploads/2018/12/NEA-LM-2-2017.pdf [https://perma.cc/P8JZ-26NY].

105. *Compare* U.S. DEP'T LAB., FILE NO. 000-289, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2023), https://olmsapps.dol.gov/query/orgReport.do?rptId=887833&rptForm=LM2Form) [https://perma.cc/RMK8-SSW8], *with* U.S. DEP'T LAB., FILE NO. 000-289, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2017), https://olmsapps.dol.gov/query/orgReport.do?rptId=669709&rptForm=LM2Form [https://perma.cc/Y4AN-6VTP].

What, then, can explain the different conclusions announced by groups like the Mackinac Center and Freedom Foundation? A close look at the figures reported by each organization reveals a basic mismatch between their claims of *membership* decline post-*Janus* and the actual numbers upon which the organizations rely. What the Mackinac Center and Freedom Foundation are claiming is that public sector workers who were once members of their unions have decided to quit in droves after *Janus*.[106] That would be a very troubling finding because it would suggest that even pro-union public employees were succumbing to the free rider problem, leaving their unions to save some money on dues while retaining the benefits of representation. This kind of problem would lead to the vicious cycle feared by even the most ardent union supporters, in which unions would eventually "face a funding crisis that threatens their very existence."[107] Yet what the Mackinac Center and Freedom Foundation are actually finding in their data is something much different: anti-union workers who were never members to begin with, but were required to pay "fair share fees" under the pre-*Janus* legal regime, have unsurprisingly stopped paying those fees.

To see how the anti-union boasts fall victim to this category confusion, start with the Mackinac Center's July 2023 report. Recall that the report calculated its 22.2% opt-out rate—which it says accounts for roughly 1.2 million public sector union members leaving their unions—using 2022 payroll data reported by government employers in response to public records requests. That data showed that 2,563,270 of 3,293,008 total government workers (77.8%) who were covered by a collective bargaining agreement had union membership dues deducted from their paychecks.[108] To conclude that the difference between these numbers (729,738 workers, or 22.2% of all covered public employees) is made up entirely of former members who quit their unions after *Janus* would require the Mackinac Center to make the implausible assertion that every single one of them was a union member when *Janus* was decided, and that none of them were nonmember fair-share-fee payers. But that is an improbable suggestion: in 2017,

106. *See, e.g.*, Skorup, Janus *Had a Large Impact*, *supra* note 17 (claiming that over "20% of workers nationwide have withdrawn from union membership"); Nelsen, *supra* note 18 ("[I]n the years since *Janus*, membership in the four largest labor unions representing public employees has declined by a whopping 733,745.").

107. Sachs & Block, *supra* note 66.

108. *See* SKORUP, THE *JANUS* EFFECT, *supra* note 17, at 7.

for example, SEIU alone—a single public sector union—reported more than 104,000 agency fee payers,[109] a number that declined (predictably) to just 6,142 in 2023.[110] Under the Mackinac Center's version of events, none of these roughly 100,000 agency fee payers ever existed.

If this obvious error were not enough, the Mackinac Center's 22.2% opt-out figure overstates the membership decline for the additional reason that it only counts as present-day union members those who have dues automatically deducted from their paychecks. Yet some workers pay dues via credit card, check, and bank autopay—points that were so obvious that the Center openly admitted as much in its own amicus brief in *Janus*.[111]

The Mackinac Center's sleight of hand—promising a percentage of former union members who quit after *Janus*, yet delivering a figure comprising both nonmember agency fee payers and public workers who actually *remain* members but pay dues other than via payroll deduction—is even more apparent when one consults the Center's own previous research. It turns out that the Mackinac Center ran an identical payroll deduction calculation before *Janus* based on 2015 data reported by the same twenty-two states.[112] And when it did so, the Center found that in 2015, only 80.0% of covered public workers paid member dues through payroll deduction—a figure the Mackinac Center rightly acknowledged did not represent an actual union membership rate.[113] This 80.0% pre-*Janus* figure is just 2.2% higher than the Center's more recent 77.8% finding, which reveals how the Center's current report makes a striking overclaim. What has changed in the years after *Janus* is not that 22.2% of public workers have

109. *See* U.S. DEP'T LAB., FILE NO. 000-137, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2017), https://olmsapps.dol.gov/query/orgReport.do?rptId=670471&rptForm=LM2Form [https://perma.cc/WBJ4-V3UB].

110. *See* U.S. DEP'T LAB., FILE NO. 000-137, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2023), https://olmsapps.dol.gov/query/orgReport.do?rptId=889436&rptForm=LM2Form [https://perma.cc/4E37-SCHN (staff-uploaded archive)].

111. Mackinac Center Amicus Brief, *Janus*, *supra* note 61, at 11 (observing that "members might pay their union dues by cash, check, or credit card" and that "while states may allow payroll deductions, there is no guarantee that those deductions will become part of every collective bargaining agreement"). Note that the ability of union members to pay via dues checkoff is *itself* something that anti-union groups have targeted, most recently in Florida. *See infra* note 223 and accompanying text.

112. Mackinac Center Amicus Brief, *Janus*, *supra* note 61, at 14; *see id*. at 11 (noting that the 80.0% figure was at best a "union membership floor" and a "lower-bound estimate" given that members pay dues in many other ways).

113. *Id*. at 14.

dropped their union membership. It is that the percentage of public workers covered by a union contract who pay their member dues via payroll deduction is now 2.2% lower than it was back in 2015, before *Janus*. Some of that 2.2% change, perhaps most of it, could be made up of former members who have since quit their unions.[114] But that modest decline would confirm, rather than refute, the data in the BLS current population survey and LM-2 reports: the actual post-*Janus* public sector union membership decline is much closer to two percent than twenty percent.

A similar problem plagues the Freedom Foundation's boast that "membership in the four largest labor unions representing public employees has declined by a whopping 733,745."[115] The key to the Freedom Foundation's claim is how it defines this "membership" decline to include a substantial number of *nonmembers* who have simply stopped paying their fair share fees after *Janus*.[116] A significant amount of the supposed membership decline is made up of these fair-share-fee payers who were never members of the union to begin with. To give just one example, the Freedom Foundation argues that the American Federation of Teachers has lost 9.5% of its "members" since *Janus*, an absolute decline of 125,182.[117] But a look at the federal financial report upon which the Foundation bases this claim reveals that roughly 83,000 of these former "members" were actually nonmember fair-share-fee payers who stopped paying those fees after *Janus*.[118] Once those fee payers are taken out of the calculation, the actual percentage of former AFT members who have quit the union after *Janus* is closer to 3%—a rate very much in line with the BLS Current Population

114. Though some of the 2.2% could also represent union members who are no longer able to pay their union dues via dues checkoff due to recent state efforts to prevent just that form of dues collection. *See infra* note 224.

115. Nelsen, *supra* note 18.

116. *See supra* note 87 and accompanying text.

117. Nelsen, *supra* note 18.

118. *See id*. (including in the AFT's 2017 membership total "agency fee payers"). *Compare* U.S. DEP'T LAB., FILE NO. 000-012, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2018), https://olmsapps.dol.gov/query/orgReport.do?rptId=684131&rptForm=LM2Form [https://perma.cc/AK86-WKNT] (listing 85,788 agency fee payers in 2018), *with* U.S. DEP'T LAB., FILE NO. 000-012, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2022), https://olmsapps.dol.gov/query/orgReport.do?rptId=844888&rptForm=LM2Form [https://perma.cc/R8RA-TAJZ] (listing 2,348 agency fee payers in 2023).

Survey and payroll records data received (and properly construed) by the Mackinac Center.[119]

The bottom line is that anti-union boasts of a post-*Janus* member exodus are unsupportable. What they show is that anti-union public sector employees like Mark Janus, who never wanted to pay fair share fees and were not union members to start with, have in fact stopped paying their fees after *Janus* announced a First Amendment right to do so. Yet that is a long way away from showing that *Janus* has created a public sector union death spiral in which even pro-union members are leaving. The data so far suggests instead that such a spiral has not begun: to the extent public sector unions are losing members, they are doing so at the same, gradual rate that predated *Janus*. And to its great credit, one anti-union advocacy group—the Manhattan Institute—has openly acknowledged this same conclusion. "The percentage of public employees belonging to unions has remained largely flat since the *Janus* decision," the Institute declared in 2022.[120]

Finally, publicly reported union financial data corroborates the minimal extent to which public sector union membership has declined after *Janus*. The data show that public sector union finances have largely been stable after *Janus*—an unlikely outcome if more than a million members had actually quit. For example, NEA's 2017 LM-2 filing indicated that the union held total assets of just over $369 million.[121] Predictions of a post-*Janus* apocalypse are belied by

119. A similar explanation undercuts the Mackinac Center's thinly-supported claim, elsewhere in its July 2023 report, that the "change in union membership since the Janus ruling" was 17.5% because "[t]here were 3,108,670 people paying union dues in the public entities surveyed before the Janus decision" and just "2,563,318 dues payers" in 2023. SKORUP, THE *JANUS* EFFECT, *supra* note 17, at 6. Because the Center includes in the 2017 figure both actual union members *and* agency fee payers, the reduction over time includes agency fee payers who were never union members to begin with. That number is quite substantial: Politico found, for example, after combing through data from the 10 largest public sector unions in 2019 that 309,612 agency fee payers quit paying agency fees in just the first year after *Janus*, even as the unions actually gained 132,312 members. Rebecca Rainey & Ian Kullgren, *1 Year After* Janus*, Unions Are Flush*, POLITICO (May 17, 2019), https://www.politico.com/story/2019/05/17/janus-unions-employment-1447266 [https://perma.cc/7NR6-D6PQ].

120. DISALVO, *supra* note 20, at 1.

121. U.S. DEP'T LAB., FILE NO. 000-342, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2017), https://www.optouttoday.com/wp-content/uploads/2018/12/NEA-LM-2-2017.pdf [https://perma.cc/P8JZ-26NY].

the union's 2023 filing, which declared total assets to $375 million.[122] AFSCME has experienced a sharper uptick; its current assets total $424 million, up substantially from the union's 2017 reported number of $206 million.[123] As the Manhattan Institute summarized public sector unions' financial trends in its evenhanded report, "the big story is not the loss of revenues for individual public unions," but rather that "union finances stabilized—and revenues have even increased, in some cases."[124]

B. *How Unions Resisted* Janus

It is far too soon to claim total victory for the labor movement. Things could certainly still change if organizing energy dissipates as *Janus* fades further into the rearview mirror. It is also possible that the pro-union turn in public sentiment has masked greater erosion caused by *Janus* than is apparent in the numbers.[125] But either way, the picture so far is not nearly as grim as union supporters feared—and not nearly as rosy as anti-union groups hoped. Seven years after the Supreme Court issued a ruling that many thought would cripple public sector unions, those same unions have largely maintained their memberships and financial stability.

How has labor resisted *Janus* thus far? The answer is important for all that it might teach us, not only about the strength and future of organized labor but also about law and the Supreme Court.[126] To that end, the first thing to notice is what labor did *not* do. Public sector workers avoided *Janus*'s worst consequences without persuading a single Supreme Court justice to reconsider his vote in *Janus* and without any kind of structural court reform. Instead, workers went around *Janus* through everyday acts well beneath the plane of

122. U.S. DEP'T LAB., FILE NO. 000-342, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2023), https://olmsapps.dol.gov/query/orgReport.do?rptId=875354&rptForm=LM2Form [https://perma.cc/U5LH-7PQ9].

123. *Compare* U.S. DEP'T LAB., FILE NO. 000-289, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2023), https://olmsapps.dol.gov/query/orgReport.do?rptId=887833&rptForm=LM2Form [https://perma.cc/RMK8-SSW8], *with* U.S. DEP'T LAB., FILE NO. 000-289, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2017), https://olmsapps.dol.gov/query/orgReport.do?rptId=669709&rptForm=LM2Form [https://perma.cc/Y4AN-6VTP].

124. DISALVO, *supra* note 20, at 13.

125. *But see* Reddy, *supra* note 39, at 1448 (flagging the distinct possibility that support for unions might be "high *because* unions are weak").

126. *See infra* Section III.C (drawing out these implications).

constitutional contestation: face-to-face conversations and organizing efforts with their coworkers. Some examples can help to tell this story.

The Interboro Education Association ("IEA") is a local affiliate of the NEA located in southeastern Pennsylvania. When *Janus* was decided, it had three hundred members. Not a single one of them left the union in the year after *Janus*. In explaining this success, a social studies teacher and former IEA President named Dan McGrath described how the local affiliate focused on "one-on-one conversations led by respected workplace leaders" who would ask their fellow teachers to stay in the union.[127] McGrath noted how these conversations "empowered some of our members" to ask questions and raise concerns about the union, which in turn shaped the union's priorities moving forward.[128]

United Teachers of Los Angeles ("UTLA") experienced similar organizing success, losing just fifty-six of its thirty-four thousand members in the year after *Janus*.[129] Again, the explanation is a return to organizing basics: the line-level workers who led the union held countless direct conversations with their coworkers and attended to their concerns. UTLA leader, Georgia Flowers-Lee, put it simply: the union's success depended on members "intentionally and deliberately go[ing] out and talk[ing] to" their fellow teachers.[130] And in those talks, workplace leaders like Flowers-Lee expressed to their colleagues a vision of their union as not merely a service provider but a "tool for collective action."[131]

Brenda Marks, a paraeducator at a public middle school in Pittsburgh, shares a similar story. After joining the campaign launched by her local union to recommit her coworkers to membership in the union, Marks anticipated that persuading her working-class colleagues to voluntarily contribute hundreds of dollars in union membership dues might be challenging. Yet Marks found that "it was surprisingly easy" to convince her coworkers to stick with the union.[132] "All it takes is a simple conversation," Marks recounted, because employees do

127. Heather Gies, *Disaster Averted: How Unions Have Dodged the Blow of Janus (So Far)*, IN THESE TIMES (Jan. 10, 2019), https://inthesetimes.com/article/public-sector-unions-response-to-janus [https://perma.cc/4BJM-Z9QP].

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Licitra, *supra* note 27.

not want to let their friends and fellow union members down.[133] What is more, Marks explained that by forcing teachers to have "conversations about what our dues pay for," the organizing campaign actually had the positive effect of "doubl[ing] our political contributions."[134] In the end, every single teacher in Marks's school agreed to retain their union membership, a fact that, in Marks's estimation, showed how "by sticking together, we can overcome anything."[135]

AFSCME locals worked to implement the same strategy, beginning their rededication to organizing even before *Janus* was decided. Heralded as a "major culture shift" within the union, the AFSCME Strong campaign "prioritize[d] one-on-one conversations and member-to-member engagement" resulting in "more than 1 million conversations between AFSCME members about the value of union membership."[136] Ana Meni, the President of AFSCME Local 809, explained that due to this commitment to member engagement, "[w]ith every new employee that was hired on, we have maintained 100% union membership."[137] Meni also noted her local's success with "solidifying the support of [] existing membership" by seeking out "100% new membership cards for [] previous existing members."[138]

Other local union members reported similar success stories. After participating in the Los Angeles County Federation of Labor's Organizing Institute, which brought union members together for training across public and private sector workplaces, the President of Teamsters Local 2010, Catherine Cobb, remarked on how the union "worked tirelessly and strategically to organize our members to action, making sure we maintained the integrity of our membership."[139] "We were well-aware of the potential for *Janus* to decimate our ranks," Cobb acknowledged, "but we mounted a defense by effectively communicating and organizing across the public sector, reminding members of all the hard-fought benefits we have acquired through standing together in our

133. *Id*.

134. *Id.*

135. *Id.*

136. Press Release, Workers Chose to Stick with Their Union, *supra* 25.

137. *One Year After* Janus *Decision, L.A. Labor Sees Revitalization, Not Apocalypse*, LABOR 411 (July 1, 2019), https://labor411.org/411-blog/los-angeles/one-year-after-janus-decision-l-a-labor-sees-revitalization-not-apocalypse/ [https://perma.cc/52XW-RQ8P].

138. *Id.*

139. *Id.*

Union."[140] These conversations proved effective. As Cobb put it, the lesson from *Janus* was that "our collective voices could not be silenced [if] we stood together as a unified, working-class front."[141] In short, many public sector unions have responded to *Janus* by revitalizing their organizational cultures. In the words of sociology professor Cedric de Leon, these unions have remembered "the first principle that organizing is the whole damn ball game."[142]

While face-to-face member organizing has been the crux of labor's successful post-*Janus* response, it is worth noting that unions were aided in some states by legislative efforts too. In the period immediately following the decision, several states (though far from all of those affected by *Janus*) enacted legislation providing public sector unions with contact information for new employees and permitting union contact at employee orientations, on the clock.[143] Some states went further, adopting additional measures such as privacy laws that protected public employee information from anti-union dissuader campaigns run by organizations like the Freedom Foundation.[144] A few states also enacted rules specifying particular windows during which employees may cease paying their dues so as to assist the unions' ability to plan their budgets prospectively.[145]

What stands out about these legislative reforms, however, is how modest they seem in comparison to the cataclysmic predictions labor proponents made about *Janus*. States did not try to circumvent *Janus* through creative union funding mechanisms[146] nor did they upset the longstanding system under which unions were legally obligated to represent nonmembers in grievance proceedings or bargaining. Instead, pro-labor states took smaller steps to ensure that union members would have access to the information, time, and space needed to communicate with their fellow workers about the benefits of union membership. These state legislative responses, in other words, merely

140. *Id.*

141. *Id.*

142. Gies, *supra* note 127.

143. *See* Tang, *Life After* Janus, *supra* note 11, at 717–18 nn.229–30 (listing states that enacted such laws).

144. *See id.* at 701 & nn.147–48.

145. *Id.* at 701 nn.141–42.

146. *Contra* Tang, *Life After* Janus, *supra* note 11, at 706 (arguing for direct government reimbursement).

facilitated the ongoing organizing campaigns that workers themselves were launching.

The efficacy of these worker-driven organizing campaigns, and their ability to counteract what was supposed to be a devastating Supreme Court ruling, suggests some important implications about legal scholarship, organized labor, constitutional theory, and debates over the Supreme Court. I turn to these lessons now.

III. LESSONS LEARNED

What might we learn from the mistakenly dire predictions that I and others offered concerning *Janus*'s aftermath? I sketch out three sets of possibilities in this part. First, *Janus*'s aftermath can inform the legal academy's views about the ideal role of scholars in social and policy change—lessons that will require some additional elaboration on what I got wrong personally in *Janus*'s wake. Second, labor's response after *Janus* can teach us meaningful lessons about the strength of the organized labor movement writ large, lessons that help point the way towards a plausible, social movement-driven policy agenda for advancing the cause of public sector workers in the years ahead. Finally, labor's success suggests an intriguing alternative to the Court- and Constitution-centric approaches that some progressives have advanced in response to a Supreme Court that has moved the law markedly to the right in recent years.

A. *Legal Scholarship*

Labor's response to *Janus* teaches an important lesson about the limits of legal academics in efforts to bring about societal change. Explaining this lesson will require me first to describe some painful mistakes I made in *Janus*'s immediate aftermath. Put simply, I succumbed to an inapt and self-aggrandizing vision of the part legal scholars should play in social and policy change. After recounting my mistakes, this section expresses support for a humbler, better approach to legal scholarship known as "movement law"—the very approach I sought to use in generating the foregoing labor law reform recommendations.[147]

147. *See* Akbar et al., *supra* note 33, at 825–28.

1. My (Mistaken) Response to *Janus*

Two major mistakes characterize my public writing after *Janus*. First, I incorrectly predicted that the ruling would precipitate a dramatic decline in union membership and finances.[148] This cynical view led me to a second error: a radical legislative proposal that I overconfidently believed would rescue unions from their dire straits.

The precise details of this proposal are unimportant given how poorly the idea has aged, but the rough idea is worth recounting so as to understand how I erred. The pre-*Janus* fair-share-fee system, I argued, was an oddity in that pro-labor state governments were funding a public good—union representation in the public sector—through untraditional means.[149] Usually, when states believe a service is beneficial to the public, they pay for it directly out of tax revenues.[150] The public sector union financial model differed in that it relied on a middleperson: the government would pay money to employees who would in turn transfer it (in the form of a small percentage of their wages) to the union. It was only this inclusion of the worker as middleperson that created the First Amendment problem identified in *Janus*, as the Court deemed it compelled speech to require a worker to fund a union to which they object.[151]

My proposal was thus to cut the middleperson out of the equation and have the government reimburse the union directly for its efforts bargaining on behalf of workers, thereby eliminating any First Amendment compulsion as to individual employees.[152] Doing so, I openly recognized, would lead to new concerns, most notably the possibility that unions would become beholden to government employers—and thus unable to bargain effectively on behalf of workers.[153] So I tried to grapple with that concern and provide a menu of institutional design options to ensure that unions would retain their ultimate allegiance to the rank and file.[154]

Early on, the direct reimbursement proposal was met with some interest. I had conversations about bill language and specific implementation questions

148. *See supra* notes 66–69 and accompanying text.
149. *See* Tang, *Life After* Janus, *supra* note 11, at 706.
150. *Id.*
151. Janus v. Am. Fed'n State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).
152. Tang, *Life After* Janus, *supra* note 11, at 706.
153. *Id.* at 706–07.
154. *Id.* at 718–55.

with the Teamsters in California, as well as discussions with a handful of other interested locals.[155] Labor law titans Benjamin Sachs and Sharon Block mentioned the approach in a widely read op-ed.[156] And elected officials in New York and Hawaii took action to introduce direct reimbursement legislation shortly after the *Janus* ruling.[157]

But the tide soon shifted. It became clear that many public workers were skeptical of their union receiving a direct payment from the very employer against whom they were negotiating. As Chris Brooks, an important labor commentator, forcefully argued in a rebuttal to my proposal, "A 'solution' to *Janus* that leaves out workers will only reinforce the problem that many unions have lost the understanding that our fight starts in the workplace."[158] Union leaders came to that view, too, culminating in the President of AFSCME, Lee Saunders, publishing an op-ed in *The American Prospect* rejecting direct reimbursement. "Some academics," Saunders wrote with an eye trained squarely on me, "have suggested that government employers fund the union directly rather than have employees make dues payments."[159] This idea, Saunders argued, was "wildly off the mark."[160] The better approach would be for lawmakers to give public workers more "opportunities to meet with their

155. Email discussions on file with author.

156. *See* Sachs & Block, *supra* note 66 ("[I]f public employers simply paid the 2 percent directly to the unions giving the same 15 percent raise to employees but not channeling the extra 2 percent through employee paychecks — then there would be no possible claim that employees were being compelled to do anything, and thus no constitutional problem."); *see also* Daniel Hemel & David Louk, *How to Save Public Sector Unions*, SLATE (June 27, 2018), https://slate.com/news-and-politics/2018/06/supreme-courts-janus-decision-how-blue-states-can-still-save-public-sector-unions.html [https://perma.cc/4K52-3TGF].

157. Max Parrott, *Gottfried's* Janus *Workaround Reopens Labor Debate*, CITY & STATE N.Y. (July 10, 2018), https://www.cityandstateny.com/articles/policy/labor/gottfried-janus-bill-constitutional.html [https://perma.cc/M5LG-9RW4] (reporting that New York Assembly Member Richard Gottfried was planning to sponsor a bill that would "reverse the effects of the Supreme Court's recent Janus decision" by "allow[ing] unions to collect reimbursement for the costs of collective bargaining from the state rather than from employees who opt out through agency fees"); S.B. 487, 30th Leg., Reg. Sess. (Haw. 2019) (proposing an amendment to Hawaii labor law to permit direct reimbursement).

158. Chris Brooks, *Viewpoint: Boss Can't Be* Janus *Fix*, LAB. NOTES (July 25, 2018), https://labornotes.org/blogs/2018/07/boss-can%E2%80%99t-be-janus-fix [https://perma.cc/AQ2Q-YAL7] (quoting Cherrene Horazuk, President of AFSCME 3800).

159. Lee Saunders, *A Union Response to the Supreme Court's* Janus *Decision*, AM. PROSPECT (July 9, 2018), https://prospect.org/justice/union-response-supreme-court-s-janus-decision/ [https://perma.cc/RHW8-7JAD].

160. *Id.*

union representatives to learn about collective bargaining and their unions' programs, functions, and operations" so that unions' "internal educational and organizing campaigns [can] build[] the organizational strength necessary for success in a hostile political and legal climate."[161]

Fortunately, other labor law scholars—and elected officials—were listening. Most notably, after consulting with members of the labor movement, Professors Catherine Fisk and Martin Malin wrote a prescient article defending the approach preferred by workers and advanced by Saunders. Correctly portraying my direct reimbursement approach as an ill-conceived attempt to "pursue short-term union financial solvency at the expense of sacrificing the fundamental nature of unions as membership organizations governed by and for workers," Fisk and Malin instead advocated legislative reforms that would "strengthen solidarity" among workers within each bargaining unit.[162]

In particular, Fisk and Malin argued that states should enact laws that "require that [public] employers notify exclusive bargaining representatives of new members of the bargaining unit and provide the opportunity to meet with new unit members on the clock."[163] Doing so, they argued, would offset the collective action problem created in *Janus*'s wake by turning bargaining units into "smaller organizations . . . where members have face-to-face contact" such that social norms against shirking can develop.[164] Importantly, Fisk and Malin maintained that contact with new employees "should come from a local union representative who is also a coworker," who can thus create greater solidarity while "educat[ing] the new employee about the importance of paying annual dues, the benefits of union membership, and why it is an economically rational decision to join."[165] If these proposals sound familiar, that is because these are the exact kinds of measures that some pro-labor states actually enacted after *Janus*.[166]

161. *Id.*

162. Fisk & Malin, *supra* note 32, at 1825, 1860.

163. *Id.* at 1873.

164. *Id.* As Fisk and Malin wisely explained, the economic puzzle unions faced after *Janus* was not actually a free rider problem, but a *collective action* puzzle because without voluntary action by workers to join the union and pay dues, *no union services would be provided at all*. *Id.* at 1827.

165. *Id.* at 1873–74.

166. *See* Gies, *supra* note 127.

2. Towards Movement Law

Rather than listening to the communities most affected by the ruling—public workers in the labor movement—and striving to identify pathways for change in keeping with their preferred forms of resistance, I proceeded in the opposite direction: I conjured up what I thought was an ideal policy response to *Janus* and then tried to convince union members and leaders to embrace it. Indeed, my mistaken top-down approach in *Janus*'s aftermath—and the comparative success of the proposals advanced by Professors Fisk and Malin—offer a useful case study in support of what Professors Amna Akbar, Sameer Ashar, and Jocelyn Simonson have termed "movement law," or a method by which legal academics can proceed "alongside social movements within scholarly work."[167]

Akbar, Ashar, and Simonson describe four key characteristics that typify this approach. First, "movement law scholars pay attention to organizing, social movements, and collective resistance by everyday people."[168] Second, movement law involves the study of "actually existing forms of social movement resistance," thereby "bring[ing] attention to the limits of formal political and legal processes to represent the needs and preferences of working-class people."[169] Third, "[m]ovement law shifts the focal point of legal studies by centering the epistemes and histories of social movements—their worldviews, source material, and intellectual traditions."[170] Fourth, and perhaps most

167. Akbar et al., *supra* note 33, at 825. Akbar, Ashar, and Simonson helpfully distinguish movement law, which is a method concerned with the production of legal *scholarship*, from movement lawyering, which is a method by which lawyers (rather than academics) approach their job in solidarity with social movements. *Id*. at 826; *see also* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1648 (describing movement lawyering as "an approach to [legal] representation in which [lawyers] collaborate with social movements but do not control them"); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENV. L.J. 687, 693–98 (1995) (describing different approaches to public interest lawyering in the environmental space).

168. Akbar et al., *supra* note 33, at 848.

169. *Id.* at 853, 854.

170. *Id.* at 859. For an important new contribution to this literature, see Rachel Lopez, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795 (2023) (describing an approach to legal scholarship grounded in the author's co-authorship with nonacademic activists, which aims to center their lived experiences in efforts to enact social change).

significant, "[m]ovement law asks scholars to engage in the scholarly project *in solidarity and in conversation with* social movements."[171]

One of the greatest strengths of Akbar, Ashar, and Simonson's intervention is how they explicate movement law's defining characteristics using powerful illustrations. They offer Professor Kate Andrias's pathbreaking exploration of the "Fight for $15" minimum wage campaign spearheaded by low-wage workers as a model of movement law scholarship, highlighting how Andrias undertook a "close study of these campaigns" to "demonstrate[] how contemporary workers' movements are reconceiving relationships between workers, employers, and the state."[172] In doing so, not only did Andrias join in solidarity with organizing efforts led by working people, she also "point[ed] to pathways for changing [societal conditions] that d[id] not rely centrally on courts or litigation."[173] Akbar, Ashar, and Simonson offer many other important illustrations as well.[174]

By contrast, my work after *Janus* is a prime example of the approach that Akbar, Ashar, and Simonson's article *Movement Law* was implicitly critiquing. Indeed, on each of movement law's four key moves, my approach after *Janus* was wanting. Rather than paying attention to what working Americans were doing to resist *Janus*—holding workplace conversations with their coworkers

171. Akbar et al., *supra* note 33, at 864 (emphasis added).

172. *Id.* at 853 (citing Andrias, *The New Labor Law*, *supra* note 39, at 7–8).

173. *Id.* at 853–54.

174. *See, e.g.*, *id.* at 854 (discussing Professor John Whitlow's research on the right to counsel in New York City eviction proceedings) (citing John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1082–87 (2019); *id*. at 856 (describing work by Professors Catherine Fisk and Sameer Ashar on worker centers as a site for organizing outside traditional unions) (citing Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 LAW & CONTEMP. PROBS. 141, 168–76 (2019)); *id.* at 857 (describing Jocelyn Simonson's work on bottom-up efforts to combat the carceral state) (citing, among other works, Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 811–13 (2021)); *id.* at 858 (discussing Professor Dean Spade's examination of mutual-aid networks as an alternative to law reform in efforts to provide material relief to vulnerable communities) (citing Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, 38 SOC. TEXT 131, 131 (2020) and DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 1–5 (2020)); *id*. at 864–67 (first citing V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 747; and then citing Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1083–112 (2021)) (describing the work of Veena Dubal and Angelica Chazaro as scholars who write in deep solidarity with social movements).

about the value of their unions—I looked for a top-down, legal fix. That fix relied on the formal political process to instigate change instead of "imagin[ing] new possibilities . . . and building new horizons for social-change projects."[175] My proposed fix was also rooted in the narrow episteme of a single legal scholar, far removed from the labor movement's worldview. And most damningly, my approach was self-regarding instead of in solidarity with social movements; it was a lawyer's "technocratic fix" instead of a proposal grounded in conversation with social movements.[176]

Fortunately, not every legal academic approached labor's post-*Janus* environment in this top-down way. Some started in solidarity with public sector workers, viewing their forms of resistance to *Janus* as a valuable source of knowledge in its own right. And from that perspective, scholars like Fisk and Malin were able to see what others could not: the collective action problem wrought by *Janus* is a problem that working people could solve themselves through the tireless work of face-to-face communication with their coworkers about the value of a union.[177] Creative statutory fixes and law reform weren't the answer; the workers themselves were.

That is not to say that legislative changes were irrelevant—Fisk and Malin rightly called on states to make it easier for union members to meet with their new coworkers at employee orientations to build solidarity at the earliest opportunity, and some states did so.[178] But notice just how different their movement-law-generated proposal was than my own: whereas my direct reimbursement regime would have taken public sector workers out of the equation, Fisk and Malin viewed workers as the solution. To Fisk and Malin, law reform was needed only to the extent that it could empower workers to organize effectively. And as the data on union membership and finances since *Janus* suggests, they were right.[179]

B. *Organized Labor*

A second set of lessons concerns the labor movement itself. *Janus* might have spelled disaster for public sector unions if the rank and file had done little

175. Akbar et al., *supra* note 33, at 854.
176. *See id.* at 864.
177. *See* Fisk & Malin, *supra* note 32, at 1873–74.
178. *Id.*
179. *See supra* Section II.A.

in response. But that is the opposite of what happened: public sector workers instead rose up collectively in answer to *Janus* and to mounting economic inequality by holding millions of conversations with their colleagues about the value of membership. This strong response offers reason for hope in an otherwise difficult climate for working class Americans, which I discuss in the first section. The second section explores what law might do to further aid labor's organizing efforts from the movement law stance discussed in the preceding section[180]—that is, suggestions for law reform that are rooted in the actual experiences of members of the labor movement.

1. Labor's Strength

We live in a moment of profound inequality along economic, racial, social, and political dimensions. The wealth gap, in particular, has exploded: since 1979, the top 1% of earners in America have increased their real wages by 138%, whereas the bottom 90% have experienced an increase of just 15%.[181] Low-wage workers, in particular, have suffered; their real wages have actually fallen by 5%.[182] The global pandemic exacerbated the divide between the haves and have-nots, as front-line workers in health care and other industries literally faced life-or-death choices at the directive of their employers.[183] With more Americans coming of age with high student loan burdens at a time when opportunity feels constrained, conditions are ripe for workers to be angry—and to want to fight against a system they sense is broken.

By offering a mechanism to join collectively with others in that fight, unions are a natural place for workers to turn.[184] Evidence of this pro-union turn

180. *See supra* Section III.A.2.

181. LAWRENCE MISHEL, ELISE GOULD & JOSH BIVENS, ECON. POL'Y INST., WAGE STAGNATION IN NINE CHARTS 5 fig.3 (2015), https://files.org/2013/wage-stagnation-in-nine-charts.pdf [https://perma.cc/WZ5N-A9MA].

182. *Id.* at 6 fig.4.

183. *See, e.g.*, Adam Dean, Jamie McCallum, Simeon D. Kimmel & Atheendar S. Venkataramani, *Resident Mortality and Worker Infection Rates from COVID-19 Lower in Union than Nonunion US Nursing Homes, 2020–21*, 41 HEALTH AFFS. 751, 759 (2022) (finding that unionized nursing homes were safer both for workers and nursing home residents than nonunionized shops).

184. They are not the only place, alas. Another option for disaffected Americans is to embrace authoritarianism and nativism rather than band together with other working-class people to effectuate change. *See generally* Gregg Robinson, *The White Working Class, Authoritarianism, and Unions*, 46 J. POL. & MIL. SOC'Y 190 (2019) (finding that nonunionized status among white working-class persons in San Diego County predicted support for Donald Trump).

is everywhere around us. Record levels of Americans now support labor unions: the seventy-one percent who approved of unions in August 2022 represented the highest level of public support since 1965.[185] This high level of support is especially remarkable given that as recently as 2009, a majority of Americans felt otherwise.[186] The shift in public sentiment is especially pronounced among young workers, who express greater support for unions than their older counterparts: whereas sixty-nine percent of 18-to-29 year-olds believed unions have a "positive effect on the way things are going in the country" in 2021, just forty-nine percent of those aged 50-to-64 held the same view.[187]

Recent, worker-led organizing successes show that this pro-labor turn has real teeth; it is more than a blip in surveys. Fight for $15's success in winning significant increases to the minimum wage was largely the product of a concerted campaign organized by the SEIU—a campaign that shows the power of worker movements to deliver major legislative victories.[188] Public sector unions have flexed too. When rank-and-file West Virginia teachers went on strike for two weeks in early 2018, the result was a statewide five percent pay raise that would have been nearly unthinkable beforehand.[189] Similar educator organizing efforts followed in states around the nation.[190] And private sector workers have encountered success as well, including in high-profile campaigns from Starbucks to Amazon to a Tennessee Volkswagen plant.[191]

185. Jaclyn Diaz, *Support for Labor Unions in the U.S. Is at a 57-Year High*, NAT'L PUB. RADIO (Aug. 31, 2022), https://www.npr.org/2022/08/31/1120111276/labor-union-support-in-us [https://perma.cc/H9KG-355C].

186. *See* McCarthy, *supra* note 15 (finding just forty-eight percent approval of unions in 2009).

187. John Gramlich, *Majorities of Americans Say Unions Have a Positive Effect on U.S. and that Decline in Union Membership Is Bad*, PEW RSCH. CTR. (Sept. 3, 2021), https://www.pewresearch.org/short-reads/2021/09/03/majorities-of-americans-say-unions-have-a-positive-effect-on-u-s-and-that-decline-in-union-membership-is-bad/ [https://perma.cc/JYJ9-Y8B4].

188. *See* Andrias, *The New Labor Law*, *supra* note 39, at 7–8.

189. Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html [https://perma.cc/P8EH-KJHB (staff-uploaded, dark archive)].

190. Madeline Will, *Teacher Strikes Are Heating Up in More States*, EDUC. WK. (Sept. 7, 2018), https://www.edweek.org/policy-politics/teacher-strikes-are-heating-up-in-more-states/2018/09 [https://perma.cc/EC25-DQQ8].

191. *See* Neal E. Boudette, *VW Workers in Tennessee Vote for Union, a Labor Milestone*, N.Y. TIMES (Apr. 19, 2024), https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html [https://perma.cc/XZP6-K72J (staff-uploaded, dark archive)]; Karen Weise & Noam Scheiber, *Amazon*

What is more, these organizing victories have largely come without public blowback against unions. That is somewhat surprising. After all, the right has long painted unions as self-interested, rent-seeking institutions that detract from the public good.[192] One might have expected that the substantial wage concessions won by unions would anger a swath of the public that is more interested in fiscal responsibility than worker well-being. Yet public support for unions has grown even as teachers and low-wage workers succeeded in their demands for fair wages.[193]

These successes, and the growth of public support for unions writ large, suggest a strong counterpoint to commentators' concerns that *Janus* would cause a massive member exodus. The guiding rationale that underpinned those concerns was the assumption that an economically rational worker should prefer to save the one to two percent of their wages that they previously paid to the union in member dues given that the union would be required to represent them fairly no matter what. What that assumption missed, however, is the fact that an economically rational worker could see their union as more than some top-down, technocratic legal representative in grievance procedures and bargaining. When the union *is* the workers, a worker could rationally conclude that quitting is not, in fact, an option. For in a world where unions are responsible for a wage premium that can make the difference between a livable and nonlivable wage,[194]

Workers on Staten Island Vote to Unionize in Landmark Win for Labor, N.Y. TIMES (Apr. 1, 2022), https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html [https://perma.cc/945Q-GG47 (staff-uploaded, dark archive)]; Noam Scheiber, *Starbucks Union Campaign Pushes On, with at Least 16 Stores Now Organized*, N.Y. TIMES (Apr. 8, 2022), https://www.nytimes.com/2022/04/08/business/economy/starbucks-union-new-york-vote.html [https://perma.cc/LA9T-3YZX (staff-uploaded, dark archive)].

192. *See* Reddy, *supra* note 39, at 1424–27 (describing this line of thought); Richard A. Epstein, *Labor Unions: Saviors or Scourges?*, 41 CAP. U. L. REV. 1, 7–8 (2013) ("[F]rom the perspective of social welfare, labor unions have proved not a savior but a scourge.").

193. *See* McCarthy, *supra* note 15. Alternatively, it may be that growing public support for unions *masks*, rather than reflects, the public's true feelings about union demands for wage increases. To this point, consider Professor Diana Reddy's compelling argument that union popularity today reflects not support for unions' bread-and-butter work at the bargaining table, but rather how unions have "effectively emphasized [their] intersectional benefits" as "social movements" that are concerned with "ameliorat[ing] society-wide inequality [and] redress[ing] racial and gender inequalities." Reddy, *supra* note 39, at 1432, 1435.

194. Estimates of the union wage premium run from eleven percent to twenty-two percent depending on the sector and demographic. *See* Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1048 n.11 (2018) (describing evidence of this wage premium).

or for health protections that can save lives,[195] what would be rational about quitting? And that is especially so when quitting would make it likelier that others would do the same, decimating the union's power to fight.

Smart unions have gotten this message. They've listened to and empowered workers, trusted them to organize, and gotten out of the way. In the private sector, the Amazon Labor Union is just one example, as the union's success at a Staten Island warehouse "relied almost entirely on current and former workers rather than professional organizers."[196] As the President of the American Postal Workers, Mark Dimondstein, admitted, worker-led successes like these are "sending a wake-up call to the rest of the labor movement," that we "have to be homegrown —we have to be driven by workers —to give ourselves the best chance."[197]

Put another way, at their best, unions are not top-down organizations whose leaders cajole members into paying dues in exchange for a variety of services.[198] Unions instead thrive when driven from the bottom-up, when workers themselves take the lead in organizing and identifying the issues most in need of concerted action—and union staff then follow suit. To the extent public sector unions have outperformed expectations after *Janus*, it is largely because they have successfully followed this bottom-up playbook.[199]

195. *See* Dean et al., *supra* note 183, at 759.

196. Noam Scheiber, *Amazon Workers Who Won a Union Their Way Open Labor Leaders' Eyes*, N.Y. TIMES (Apr. 7, 2022), https://www.nytimes.com/2022/04/07/business/economy/amazon-union-labor.html [https://perma.cc/6WT6-WN55 (staff-uploaded, dark archive)] [hereinafter Scheiber, *Amazon Workers Who Won a Union*]; *see also* Chris Brooks, *We Are in a Unique Moment of Labor Upsurge That Requires Rethinking the Old Organizing Rules*, JACOBIN (June 27, 2022), https://jacobin.com/2022/06/worker-led-union-organizing-upsurge-starbucks-amazon-momentum [https://perma.cc/7WWA-8VZQ].

197. Scheiber, *Amazon Workers Who Won a Union*, *supra* note 196.

198. *See, e.g.*, Gies, *supra* note 127 (quoting Chris Brooks's criticism of union responses aimed at trying to entice workers with additional services: "'We have to go back to unions' roots . . . . We win when we fight, not when we provide better services.'"); *see also* HERMAN W. BENSON, DEMOCRATIC RIGHTS FOR UNION MEMBERS: A GUIDE TO INTERNAL UNION DEMOCRACY 204 (1979) ("The history of the labor movement [shows] that there is always the need to defend workers' democracy . . . . The difficulties of union democracy [arise] from life, from the contrasting, sometimes antagonistic, interests of workers and their own leaders."); Joel Seidman, *Democracy in Labor Unions*, 61 J. POL. ECON. 221, 221 (1953) (analyzing the "deterioration of democracy within [ ] unions").

199. *See supra* Section II.B.

2. Labor's Future

From a certain vantage point, the future has never looked so bleak for labor in America. Income inequality is rising.[200] Union density is at all an all-time low.[201] Labor law is anachronistic and ill-suited to modern challenges.[202] Anti-labor advocacy groups and think tanks are aggressively targeting unions.[203] And the conservative Supreme Court smells blood in the water, striking blow after blow to labor's causes.[204]

Labor's ability to win recent victories in the face of these headwinds is a testament to its strength.[205] Yet *Janus*'s aftermath also shows that workers are not at it alone; there are things policymakers, advocates, and scholars can do to support those who seek to join together in pursuit of better working conditions.[206]

In an effort to take to heart the teachings of movement law scholarship discussed above,[207] I interviewed individuals affiliated with several public sector unions, asking them how they responded to *Janus* and what they see as their greatest challenges and opportunities moving forward.[208] The interviews focused in particular on what law might do to help build worker power from the perspective of the workers themselves. By and large, these interviews revealed a cautious sense that public sector unions have weathered *Janus* better than anticipated. But they also revealed a shared sense that the current landscape for

200. *See supra* notes 181–82 and accompanying text.

201. *See* News Release: Union Members, 2023, *supra* note 92 (identifying union membership rate of 10.0%, which was just lower than 2022's already record-low level).

202. *See* Reddy, *supra* note 39, at 1403 (describing scholarly consensus that "labor law has failed to keep pace with structural economic change"); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002).

203. *See, e.g.*, *About Freedom Foundation*, FREEDOM FOUND., https://www.freedomfoundation.com/about-freedom-foundation/ [https://perma.cc/UT93-D4LD] ("The Freedom Foundation is . . . battering the entrenched power of left-wing government union bosses."); *About*, NAT'L RIGHT TO WORK, https://www.nrtw.org/about/ [https://perma.cc/J86F-THGQ] ("[Our] mission is to eliminate coercive union power.").

204. *See supra* note 16 and accompanying text.

205. *See supra* Section II.B.

206. For academics in particular, I explain below how I've come to see the ideal role as far more modest than I thought years ago; the teachings of movement law make clear that scholars work best when they ideate *in conversation with* social movements rather than apart from them. *See infra* Section III.B; *see also* Akbar et al., *supra* note 33, at 847.

207. *See supra* Section III.A; Akbar et al., *supra* note 33, at 847.

208. *See* interview notes on file with author.

public sector collective bargaining is far from satisfactory: law remains an impediment in significant ways. What follows accordingly are three types of legal reforms that could facilitate union organizing, each generated in conversation with the labor movement: expanding the public sector bargaining map, increasing worker access to their fellow employees, and exploring labor-management cooperation conditions in state and local grants. Each reform idea builds on the playbook of union organizing success experienced after *Janus*. That is to say, just as some pro-labor states enacted laws to ensure unions would have access to new employee information and orientations in *Janus*'s wake, so too can law create additional space and access for public employees to join together to secure greater voice, pay, and benefits.[209]

Expanding the Public Sector Collective Bargaining Map. Any discussion of the law governing public sector unions in the United States must begin with what federal labor law does *not* cover. Whereas the National Labor Relations Act ("NLRA") generally guarantees private sector employees the right to "form, join, or assist labor organizations [and] to bargain collectively" with their employers,[210] the statute specifically excludes public sector employees from its coverage.[211]

The result is a complicated web of state public sector labor laws that diverge along at least three key dimensions. First, states differ as to whether public sector bargaining is altogether prohibited, permitted at the will of a given city or county, or a mandatory statewide duty.[212] Second, some states have enacted different rules for different occupations: public school employees sometimes hold a right to collective bargaining that is broader than the right

209. These suggestions focus on public sector unions insofar as they were the ones affected by *Janus*. For important suggestions on private sector labor law reforms that were generated in conversation with a range of workers and union leaders, see BLOCK & SACHS, *supra* note 39, at 2.

210. 29 U.S.C. § 157.

211. *Id.* at § 152(3) (defining the term "employee" to exclude "any individual employed by . . . any other person who is not an employer as herein defined"); *id*. at § 152(2) (defining "employer" to exclude the "United States . . . or any State or political subdivision thereof").

212. *See* Monique Morrissey & Jennifer Sherer, *Unions Can Reduce the Public Sector Pay Gap*, ECON. POL'Y INST. (Mar. 14, 2022), https://www.epi.org/publication/public-sector-pay-gap-co-va/ [https://perma.cc/MUM5-BQAS].

enjoyed by public safety employees and other local government workers.[213] Third, states have also taken different approaches to the scope of bargaining rights. Whereas some allow public sector unions to bargain over wages, benefits, and other terms and conditions of employment, a few states have limited bargaining to wages alone, while still others require public employers only to "meet and confer" with unions in nonbinding negotiations.[214]

The convoluted, state-by-state patchwork of public sector labor laws has certainly affected worker power, at least when compared to the bargaining rights that private sector workers enjoy under the NLRA. Reflecting this disparity, the Economic Policy Institute has found that states with the strongest public sector collective bargaining laws experienced a far smaller gap between government and private sector wages than states with moderate or restrictive public sector bargaining laws.[215] One major improvement at the federal level, then, would be to guarantee public employees collective bargaining rights as a matter of federal statutory law. Democrats introduced such a bill in the last session of Congress, but it died on the vine without ever receiving a vote.[216]

That said, it remains possible to expand the map for public sector union organizing on a state-by-state and occupation-by-occupation basis. Such an approach may feel marginal in the context of a nation where roughly two thirds of our 21.6 million government employees do not belong to a union.[217] But the public sector union members and leaders I spoke with uniformly agreed that such incremental progress would be worth pursuing.

213. *See Public Sector Union Policy in the United States, 2018-present*, BALLOTPEDIA, https://ballotpedia.org/Public-sector_union_policy_in_the_United_States,_2018-present [https://perma.cc/8P2U-Q2HW] (showing maps of different bargaining rights held by miscellaneous government employees, public school employees, and public safety workers). A few states, however, provide greater bargaining rights to public safety workers than teachers. *See id*. (noting Texas and Arkansas as two states that permit collective bargaining for public safety employees but not public school teachers).

214. *See* Morrisey & Sherer, *supra* note 212; *see also* William S. Koski & Aaron Tang, *Teacher Employment and Collective Bargaining Laws in California: Structuring School District Discretion Over Teacher Employment*, POLICE ANALYSIS FOR CAL. EDUC. 1, 1–5. (Feb. 2011) (describing different laws governing public school teacher bargaining).

215. *See* Morrisey & Sherer, *supra* note 212 (finding a -10.5% wage gap in states with mandatory public sector bargaining laws, a -16.6% gap in states with permissive bargaining laws, and a -22.9% gap in states where public sector bargaining is prohibited).

216. *See* Public Service Freedom to Negotiate Act of 2021, H.R. 5727, 117th Cong. (2021).

217. *See supra* text accompanying note 94.

Indeed, this crucial work is in many respects already underway. Since 2019, state lawmakers in five states—California, Colorado, Maryland, Nevada, and Virginia—have expanded public sector bargaining rights in various ways. Nevada and Colorado enacted the most far-reaching amendments, extending collective bargaining rights to statewide employees.[218] More recently, Colorado amended its law to also grant county employees the right to collective bargaining.[219] Previously, bargaining had been permitted, but not required, at the county level—a legal regime under which only four of Colorado's sixty-four counties agreed to bargain collectively with workers.[220] Virginia took a more modest step, amending its law to permit, but not require, collective bargaining between some local government employers and workers.[221] And California and Maryland extended new bargaining rights to previously excluded public sector occupations (childcare workers in California and community college employees and county library staff in Maryland).[222]

To be sure, some states have gone in the opposite direction. Oklahoma and Indiana have shifted their states from requiring collective bargaining for local employees to merely permitting it.[223] Wisconsin's Act 10, enacted during the administration of Republican Governor Scott Walker, famously limited public sector bargaining to the topic of wages with increases capped at inflation.[224] In 2021, Arkansas prohibited collective bargaining by certain state

218. *See* S. B. 135, 80th Leg. (Nev. 2019) (extending bargaining rights to Nevada State employees); Morrissey & Sherer, *supra* note 212 (describing same change in Colorado in 2020).

219. *See* S. 22-230, 75th Gen. Assemb., Reg. Sess. (Colo. 2022).

220. *See* Nick Voutsinos, *Colorado Legislature Passes Historic Bargaining Bill*, AFSCME (May 13, 2022), https://www.afscme.org/blog/colorado-legislature-passes-historic-collective-bargaining-bill [https://perma.cc/EJG8-FBVD].

221. Morrissey & Sherer, *supra* note 212.

222. *See id.* (describing Maryland changes); *see also* Katie Orr, *Newsom Signs Law to Let Thousands of Child Care Workers Unionize*, KQED (Oct. 1, 2019), https://www.kqed.org/news/11777328/newsom-signs-bill-letting-thousands-of-child-care-providers-unionize [https://perma.cc/JAP7-GX2V] (describing CA AB378).

223. Morrissey & Sherer, *supra* note 212.

224. *Id.*

employees, including teachers.[225] And in 2023, Florida passed a controversial bill prohibiting dues checkoff for public employees.[226]

The march towards a more favorable public sector bargaining map is thus far from inevitable. For each state where labor may go on offense, it may have to play defense in another. For example, Republican lawmakers in Virginia have recently tried to repeal the 2020 state amendment permitting collective bargaining by local government employers.[227]

Still, the bottom line is that labor has been able to win some important statewide victories to meaningfully expand the public sector bargaining map. The recent labor law amendments for statewide and local government employees in Colorado alone, for instance, have expanded worker power for more than 60,000 public employees.[228] Similar legislation is under consideration to expand the existing, limited bargaining rights available to Colorado public school and university employees.[229] As efforts to give a voice to previously excluded workers who wish to join together in the fight for better wages and workplace conditions, these proposals deserve the fullest support of labor law advocates and scholars.

225. Jerrick Adams, *Union Station: Arkansas Enacts Bill Prohibiting Collective Bargaining by State Public-Sector Employees*, BALLOTPEDIA NEWS (Apr. 16, 2021), https://news.ballotpedia.org/2021/04/16/union-station-arkansas-enacts-bill-prohibiting-collective-bargaining-by-state-public-sector-employees/ [https://perma.cc/R7F8-EDLV].

226. *See* Jim Saunders, *DeSantis Signs Off On Bill, Restricting Teacher Union* Dues, WLRN (May 9, 2023), https://www.wlrn.org/south-florida/2023-05-09/desantis-signs-off-on-bill-adding-more-restrictions-on-unions [https://perma.cc/Q4J8-AXPT]. "Dues checkoff" refers to the system by which employers automatically deduct union dues from employee paychecks and remit them directly to the union.

227. *See Panel Kills Bill That Would End Public Sector Bargaining*, AP NEWS (Jan. 31, 2022), https://apnews.com/article/virginia-226e575668121e68fea2178b5bea3030 [https://perma.cc/9HRS-DHVN].

228. *See* Voutsinos, *supra* note 220 (noting that Colorado's amendment creating a duty to bargain collectively with all county employees would expand bargaining rights to 36,000 county workers); Thy Vo, *The Colorado Capitol's Next Big Labor Fight: Whether to Let Local Public Workers Unionize*, COLO. SUN (Jan. 20, 2022), https://coloradosun.com/2022/01/20/colorado-local-government-employee-collective-bargaining/ [https://perma.cc/9H8D-TUUH] (noting that the 2020 Colorado law recognizing state employee bargaining extended the right to bargaining to roughly 28,000 workers).

229. Jason Gonzales, *Colorado K-12, Higher Education Workers Would Get State Workplace Protections in Bill*, CHALKBEAT COLO. (Mar. 1, 2023), https://co.chalkbeat.org/2023/3/1/23621238/public-employee-workers-protection-bill-colorado-school-higher-education-workplace-rights [https://perma.cc/J5PC-SXWL].

Increasing Access to Public Employees Through Executive Action. Even in states and localities where public sector bargaining is permitted or required, certain barriers may still impede unions' ability to organize, in turn suppressing union membership.[230] Public officials may express disapproval of unions, union members may lack access to the contact information for their colleagues and new hires, and organizers may be barred from using public spaces to present information about the union.[231] There are, however, discrete steps that pro-labor governors and mayors may take to facilitate public workers' ability to organize. For a model, one need look no further than the Biden Administration's efforts to enhance worker power among employees of the federal government—a point multiple union representatives mentioned in our conversations.[232]

The self-styled "most pro-union President" in American history,[233] Joe Biden oversaw a stunning increase in the size of the unionized Federal employee workforce: in 2022, more than 80,000 new federal workers joined a union, a nearly twenty percent increase in a single year.[234] The rules governing federal employee collective bargaining are, to be fair, *sui generis*.[235] But some of the key Biden Administration moves that enabled unionized federal workers to add so significantly to their ranks involved surprisingly modest rule changes implemented by the Office of Personnel Management (OPM)—the federal government's Human Resources Department. Thus, OPM issued a new directive "strongly encourag[ing]" all federal agencies to permit union access to

230. *See, e.g.*, *supra* notes 100–01 (describing public sector union density in California and Minnesota).

231. *See generally* Olina Banerji, *Teachers' Unions Are Gaining Ground in a State that Once Forbade Them*, EDUC. WK. (June 10, 2024), https://www.edweek.org/teaching-learning/teachers-unions-are-gaining-ground-in-a-state-that-once-forbade-them/2024/06 [https://perma.cc/4KJ3-933T] (describing some challenges that face union organizing efforts in Virginia).

232. *See* interview notes on file with author.

233. *Remarks by President Biden in Honor of Labor Unions*, WHITE HOUSE (Sept. 8, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/ [https://perma.cc/63P9-26KE].

234. *The White House Task Force on Worker Organizing and Empowerment: An Update on Implementation of Approved Actions*, WHITE HOUSE (Mar. 17, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/the-white-house-task-force-on-worker-organizing-and-empowermentupdate-on-implementation-of-approved-actions/ [https://perma.cc/M38T-V79R].

235. For instance, although federal employees have the right to bargain, that right does not extend to bargaining over wages. *See* 5 U.S.C. § 7102 (2) (granting federal employees the right to bargain "with respect to conditions of employment" but not wages).

bulletin boards and employee-only intranets so that they may "post information about the union including representatives' contact information."[236] OPM likewise encouraged agencies to "revise policies that restrict the ability of unions and/or bargaining unit employees from soliciting membership and disseminating educational materials" about the union, to "[p]rovide union officials periodic listing of the names of bargaining unit employees along with their work email address and assigned organization," and to "[a]llow local union officials to communicate with bargaining unit employees via agency email during nonduty time."[237] OPM also instructed agencies to invite union organizers to participate in new employee orientations.[238]

These seemingly minor steps should sound familiar: they are in many ways the federal workforce analog to the public sector employee access rules that some pro-labor state legislatures enacted after *Janus*.[239] But what is most notable about the federal workplace is how these improved access rules were implemented: not through new legislation that would have encountered predictable veto-gates in Congress but rather through unilateral (yet ordinary) administrative action managing the nuts and bolts of the executive branch workforce.

The takeaway for pro-labor mayors and governors who face inhospitable local and state legislatures is that some kinds of labor law reforms may be within their grasp without the need for new legislation because they are run-of-the-mill actions to manage their own workforces. When pro-labor mayors (or governors) act unilaterally to ensure that local (or state) workplaces are open to union organizers and that employee contact information is freely shared, that is the kind of under-the-radar, politically feasible access reform that can help move the needle for public employee organizing.

236. *See* Memorandum, Kiran A. Ahuja, Dir. for the U.S. Off. of Pers. Mgmt., Memorandum for Heads of Executive Departments and Agencies (April 12, 2022) [hereinafter Memorandum for Heads of Executive Departments and Agencies], https://chcoc.gov/content/guidance-implementation-eo-14025-highlighting-union-rights-access-and-communicate-bargaining [https://perma.cc/XK4M-Z57W]; *see also* Sharon Block, *What Can We Learn From Growing Federal Sector Unions? (Hint: Maybe Clean Slate Works)*, ON LABOR (Mar. 23, 2023), https://onlabor.org/lessons-from-federal-employee-unions/ [https://perma.cc/7THA-X3ZN].

237. Memorandum for Heads of Executive Departments and Agencies, *supra* note 236.

238. *Id.*

239. *See supra* note 141 and accompanying text.

Requiring Labor-Management Cooperation as a Condition of State Contracts and Grants. A final type of labor law reform that public sector union representatives advocated in our conversations involves the power of the purse. Government employers expend huge sums of money in the form of contracts for work (think: public construction projects) and grants for public services (think: state grants to local governments for education or transportation). The federal government alone, for example, spends "more than $1 trillion every year to deliver essential goods and services."[240] These contracts and grants come with all sorts of conditions, such as compliance with particular anti-discrimination rules.[241] So, the idea goes, a pro-labor government should include as one such condition a requirement that funds recipients must satisfy certain rules for labor-management cooperation.

The proposal has its strongest roots in the private sector context. In their pathmarking report proposing a "Clean Slate for Worker Power," for example, Professors Block and Sachs advise that the federal government should "[r]equire all federal contractors and recipients of federal funds and their subcontractors to comply with policies that support worker voice."[242] Such a rule would impact union density in the private sector, insofar as federal contractor counterparties are private entities. That is a goal surely worth pursuing. But the idea need not be limited to that sphere: governments *also* impose conditions on grants to other government entities[243]—conditions that could in theory include a requirement for labor-management cooperation by the relevant public sector grant recipient.

There are, however, potential obstacles to using government grants as a tool for enhancing worker power in the public sector. For one thing, Supreme Court precedent limits the process by which the federal government may impose grant conditions on states. Notably, "if Congress intends to impose a condition on the grant of federal moneys" under the Spending Clause, "it must

240. BLOCK & SACHS, *supra* note 39, at 94.

241. *See, e.g.*, Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965) (prohibiting certain federal contractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin).

242. BLOCK & SACHS, *supra* note 39, at 94–95; *see also 11 Things State and Local Governments Can Do To Build Worker Power*, CTR. FOR AM. PROGRESS (Feb. 9, 2021), https://www.americanprogress.org/article/11-things-state-local-governments-can-build-worker-power/ [https://perma.cc/D97P-FCAJ] (advancing similar proposal).

243. *See* South Dakota v. Dole, 483 U.S. 203, 203 (1987) (announcing test for permissible conditions on federal grants to state governments).

do so unambiguously."[244] The upshot is that Congress would have to specify the pro-labor grant condition at issue.[245] That, in turn, renders the federal grant conditions approach a politically unlikely solution. After all, if Congress was sufficiently in favor of expanding public sector union collective bargaining to enact pro-labor terms as a condition on the receipt of federal funds, why would it not just act directly to create an NLRA-like right to public sector bargaining?

State grants to cities and counties may be a different story. Such grants are common and financially significant.[246] And although state courts often impose a similar clear statement requirement for conditions to be valid,[247] one can imagine state lawmakers satisfying that standard in more pro-labor political climates such as California and New York. That is to say, lawmakers in such states might enact grant conditions that require certain ideal forms of labor-management cooperation by local government recipients.[248] In point of fact, California did something akin to this in 2013 when it enacted a statute conditioning certain cities' receipt of state construction funds on their compliance with a prevailing wage law.[249]

Ultimately, the use of grant conditions to facilitate public sector union organizing is the least developed of the ideas generated in conversation with movement members. Yet it remains an idea worthy of further consideration precisely because it has its genesis in labor's own experience and thinking.

244. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

245. *But see* State v. Dep't of Just., 951 F.3d 84, 118 (2d Cir. 2020) (upholding certain grant conditions imposed by the Department of Justice, not Congress, as satisfying the Spending Clause because the statute Congress enacted conferred the power to set those conditions upon the agency).

246. *See, e.g.*, *Funding Available to Local Governments*, CAL. CLIMATE INVS. (2023), https://static1.squarespace.com/static/55a6b117e4b002796fd89798/t/63ec178cd8950471d3383d0c/1676416909758/CCI_Local_Governments_02.10.23.pdf [https://perma.cc/B96Y-XMWC] (identifying dozens of state grants available to local governments in the climate change space alone).

247. *See, e.g.*, City of El Centro v. Lanier, 245 Cal. App. 4th 1494, 1509 (2016) ("[A] funding condition must be unambiguous so a knowing choice can be made on what needs to be done to satisfy the funding condition.").

248. For instance, the state might condition receipt of a grant on the existence of a collective bargaining providing for a certain wage rate or particular conditions of employment that may not be appropriate or feasible on a statewide basis.

249. *Lanier*, 245 Cal. App. 4th at 1501–02; Cal. Lab. Code § 1782.

C. *The Supreme Court & Constitutional Theory*

Finally, labor's ability to resist *Janus* offers important insights into emergent progressive debates over how best to respond to a Supreme Court that has lurched the law radically—and rapidly—to the right. The first subsection explores the conventional wisdom on how groups respond to blockbuster Supreme Court constitutional rulings with which they disagree. These conventional responses, I will argue, can be fairly criticized for being overly Constitution- and Court-centric. The second subpart argues that union resistance to *Janus* is promising precisely because it shows how adversely affected groups can bypass the Constitution and Court altogether. When everyday Americans take direct, popular action beneath the plane of constitutional argument, they can sometimes render irrelevant the Supreme Court rulings they detest.

1. Conventional Responses to the Supreme Court

When large numbers of Americans believe the Supreme Court has issued a deeply incorrect and harmful constitutional ruling, how do they respond? For decades, legal scholars have fruitfully explored the question. Some have described the powerful ways that social movements contest the Court's understanding of the Constitution, persuading it ultimately to change its view. Exemplifying this democratic constitutionalist tradition, Professor Reva Siegel argues that "if the constitutional law that [the Justices] pronounce diverges too far," the people know how to "hold [them] to account" through "confirmation hearings, ordinary legislation, failed amendments, campaigns for elected office, and protest marches."[250] Others in the popular constitutionalist camp have focused on how Americans have responded by fighting to reclaim some of the Court's power to interpret the Constitution for themselves. "For most of our history," Professor Larry Kramer writes, "American constitutionalism assigned ordinary citizens a central and pivotal role in implementing the Constitution,"

250. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1324–25, 1419 (2006); *see also* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–75 (2007).

such that "the people themselves" had "[f]inal interpretive authority."[251] This subsection describes these two camps before noting some potential weaknesses.

Democratic constitutionalism. One natural reaction to a judicial interpretation of the Constitution that many people find disagreeable is to try to persuade the Court to see things differently. In *Roe Rage: Democratic Constitutionalism and Backlash*, Professors Robert Post and Reva Siegel describe this kind of reaction, and the many forms of contestation that result, as playing an important legitimating role in our constitutional order.[252] "Americans have used a myriad of different methods to shape constitutional understanding," Post and Siegel write, including "sit-ins, protests, political mobilization, congressional use of section five powers, ordinary federal and state legislation, state court litigation, and so on."[253] And the target of these efforts is clear: how the Supreme Court understands our fundamental law. "Through these struggles," Post and Siegel argue, "Americans have consistently sought to embody their constitutional ideals within the domain of *judicially enforceable constitutional law*."[254]

Post and Siegel's account shares deep roots with other important works on how the American people respond to unpopular Supreme Court rulings. Professor Bruce Ackerman, for example, has famously argued that, in special moments of higher lawmaking that transcend ordinary politics, a mobilized citizenry can actually prevail upon the Supreme Court to accept its views as acts of constitutional lawmaking entitled to judicial deference.[255] Professor Bill Eskridge has also described how organized social movements can translate their understandings of the Constitution into new judicial rules, in particular through

251. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004). Speaking in the normative register, Professor Mark Tushnet has argued in line with this view that Americans should eliminate judicial review and "return all constitutional decision-making to the people" acting through the ordinary democratic process. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154 (1999).

252. Post & Siegel, *supra* note 250, at 379.

253. *Id.* at 380; *see also, e.g.*, *id.* at 381–83, 389–90 (describing how citizens challenge the Court's constitutional understandings through a process of norm contestation that can involve litigation, presidential rhetoric, state court litigation, appointments politics, and significantly, backlash aimed at pressing the Court to embrace "what those citizens believe to be the correct understanding of the Constitution").

254. *Id.* at 380 (emphasis added).

255. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

litigation and the creative legal theories of movement lawyers.[256] His thesis is that the legal claims advanced by these social movements have "been critical to the evolution of constitutional doctrine."[257]

Professors Lani Guinier and Gerald Torres, by contrast, tell a story of social movement-driven constitutional change that focuses less on "legal professionals" and more on "the mobilization of ordinary people willing to play a significant role in shifting the law."[258] By reminding us of stories in which movement actors in the Montgomery Bus Boycott, Mississippi Freedom Democratic Party, and the United Farmworkers worked to challenge prevailing norms, Guinier and Torres show that "courts alone are not the voice of change"; it is "social movement activists—through their political mobilization and their transformation of the culture—[who] made the actions of the Supreme Court seem appropriate and long overdue."[259]

Another example comes from Reva Siegel's work on the fight for women's equality.[260] Siegel shows how social actors used public protests, litigation, and ordinary lawmaking to challenge the Court's pre-1970s approach to women's rights, which licensed state laws favoring men over women.[261] But as Siegel demonstrates, the movement's most impactful strategy was its effort to enact the Equal Rights Amendment ("ERA") through the Article V amendment process, which exerted a strong hydraulic effect on the shape of equal protection law. As Siegel recounts, "[a]dvocates understood that even without completed acts of constitutional law making, the Article V process offered a vehicle for

256. William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2192 (2002). Importantly, Eskridge recognizes that these lawyers' arguments are hardly the only mechanism through which the movements brought about change. *See, e.g.*, *id.* at 2072 (noting with respect to the civil rights movement that his project "focuses on the dialogue between civil rights lawyers and judges," while also recognizing that the other operations of the movement "are of overriding importance to the larger history of the civil rights movement").

257. *Id.* at 2194.

258. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward A Demospruduence of Law and Social Movements*, 123 YALE L.J. 2740, 2743 (2014).

259. *Id*. at 2796.

260. Siegel, *supra* note 250, at 1323–24.

261. *Id.* at 1373–75 (describing how the Women's Strike for Equality represented contestation of existing constitutional norms); *id.* at 1368 (arguing that social movement actors wrought "new constitutional understandings" through "efforts to enforce new forms of federal civil rights legislation [and] from litigation claiming rights under the Fourteenth Amendment").

influencing the constitutional judgments of judges and elected officials."[262] The end result was precisely that: although the ERA was defeated, the Court "began to interpret the Fourteenth Amendment in ways that were responsive to the amendment's proponents—so much so that scholars have begun to refer to the resulting body of equal protection case law as a 'de facto ERA.'"[263]

The foregoing works are by no means exhaustive of the literature on how disaffected groups respond to an unsolicitous Supreme Court through efforts to reshape its constitutional understandings.[264] And of course social movements on the right have successfully pursued constitutional change through similar pathways (in particular the appointment of movement jurists),[265] with profound success in fields such as abortion and guns.[266] But the takeaway is straightforward. For groups confronted with adverse Supreme Court rulings, it often pays to contest them in the realm of constitutional argument. Through public protests, litigation, appointment politics,[267] lawmaking, and failed Article V amendments, a social movement that complains loudly enough can shift the constitutional terrain, and in doing so, convince a future Court to remake constitutional law.

262. *Id.* at 1339.

263. *Id.* at 1324; *see also* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 985 (2002) (using the phrase "de facto ERA").

264. *See, e.g.*, Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1000 (2024) (arguing how the labor movement can "reshape the understandings of the big-C Constitution"); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 774 (2004) (describing the dual litigation and amendment strategy that brought together movement actors from the women's, labor, and civil rights movements); Jack M. Balkin & Reva B. Siegel, *Essay, Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928 (2006) ("[P]olitical contestation plays an important role in shaping understandings about the meaning and application of constitutional principles."). *See generally* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (documenting movement responses to the Court's affirmative action jurisprudence).

265. *See* Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2157 (2024).

266. *See generally* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE (2015) (describing the complex development of the anti-abortion movement and its pursuit of constitutional change); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2013) (exploring the rise of the gun rights social movement and its impact on Second Amendment doctrine).

267. On judicial appointment politics and democratic constitutionalism in particular, see Jack M. Balkin & Sanford Levinson, *The Constitutional Revolution*, 87 VA. L. REV. 1045, 1065–66 (2001).

Popular constitutionalism. There is a second kind of reaction to a seemingly intransigent Supreme Court. Rather than contesting its rulings with the goal of persuading it to take a different view of the law, mobilized citizens can cut more deeply. They can deny the Court's ultimate interpretive power over the Constitution to begin with—and seek to recover it for themselves. A number of important scholars have written in this popular constitutionalist vein.

The leading descriptive account comes from Professor Larry Kramer's magisterial book, *The People Themselves*. "Neither judges nor legislators were responsible for interpreting and enforcing" the Constitution at the founding, Kramer contends.[268] Instead, "the community itself had both a right and a responsibility to act when the ordinary legal process failed, and unconstitutional laws could be resisted by community members who continued to profess loyalty to the government and to follow its other laws."[269] Those pathways of resistance included some uncontroversial forms of action like voting, petitioning, and assembling in protest.[270] But they included more controversial responses, too, such as mob action and jury nullification. Mobs throughout the eighteenth century, Kramer explains, "organized to uphold community values against . . . illegal or unconstitutional government action."[271] Jurors likewise "rendered verdicts based on their own interpretation and understanding of the constitution."[272]

In short, Kramer's arresting claim is that, for much of America's early history, debates over constitutional meaning "could be authoritatively settled only by 'the people' expressing themselves through the[se] popular devices"—and not by the courts or legislatures.[273]

It may be difficult to wrap one's mind around Kramer's insistence on an American tradition in which judges, and the Supreme Court in particular, do

268. KRAMER, *supra* note 251, at 24; *see also id.* at 58 ("[Legislative supremacy] would have been inconsistent with the whole framework of popular constitutionalism . . . . In fact, neither branch was authoritative because interpretive authority remained with the people.").

269. *Id.* at 25.

270. *Id.*

271. *Id.* at 27.

272. *Id.* at 28.

273. *Id.* at 31; *see also id.* at 58 ("In suggesting that the constitutionality of legislation was not a matter for judicial cognizance, no one was saying that the authoritative interpreter of the constitution was the legislature rather than the judiciary . . . [Instead,] interpretive authority remained with the people.").

not have the final power to interpret the law. Certainly, it is difficult to square with *Marbury v. Madison*'s[274] declaration that it is the judiciary's duty to "say what the law is,"[275] as well as later pronouncements by the Court that neither a state nor Congress is free to ignore its prior decisions.[276]

But the winds are changing. Leading commentators and officials have recently issued calls to reject the Court's final authority over our higher law, effectively embracing the rhetoric of popular constitutionalism. "The Court does not have the sole power to interpret the Constitution, nor the power to strike down any law it chooses," writes Ryan Cooper, the managing editor of the *American Prospect*, "and it's time to say so."[277] Jamelle Bouie has likewise criticized the current Court in a *New York Times* editorial with a provocative (and decidedly popular constitutionalist) headline: "The Supreme Court is the final word on nothing."[278] Prominent lawmakers have joined the chorus, including Congresswoman Alexandria Ocasio Cortez, who called on the Biden Administration to ignore a judicial order invalidating the FDA's decades-old decision to approve mifepristone, a drug used for medical abortions.[279]

The notable rise in popular constitutionalist rhetoric builds on normative critiques of judicial supremacy previously advanced in several important scholarly works. In 1999, Professor Mark Tushnet issued a forceful call for Americans to wrest back constitutional interpretive authority from the Supreme

274. 5 U.S. 137 (1803).

275. *Id.* at 177.

276. Cooper v. Aaron, 358 U.S. 1, 4 (1958) (rejecting the "claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution"); Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding "that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.").

277. Ryan Cooper, *The Case Against Judicial Review*, AM. PROSPECT (July 11, 2022), https://prospect.org/justice/the-case-against-judicial-review/ [https://perma.cc/BQT7-AMDU]; JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 30 ("[T]here is no judicial monopoly on constitutional authority.").

278. Jamelle Bouie, *The Supreme Court Is the Final Word on Nothing*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/dobbs-roe-supreme-court.html [https://perma.cc/K765-PHXX (staff-uploaded, dark archive)].

279. Alice Mirand Ollstein, *Ignore the Courts? Some Democrats Say Texas Abortion Pill Ruling Demands It.*, POLITICO (Apr. 8, 2023), https://www.politico.com/news/2023/04/08/biden-appeals-abortion-pill-ruling-texas-mifepristone-00091105 [https://perma.cc/9EDZ-PTQW (staff-uploaded archive)].

Court.[280] In July 2023, Tushnet formally renewed this call in an open letter to the Biden Administration that explicitly asked it to embrace popular constitutionalism on the view that "courts do not exercise exclusive authority over constitutional meaning."[281]

More recently, Professors Ryan Doerfler and Samuel Moyn have written a thoughtful critique of the Court that includes "a fundamental distinction among two kinds of imaginable means" by which progressives might seek to reform it.[282] One kind includes "personnel reforms" that would change who is on the Court.[283] A second type includes "disempowering reforms," which would reduce the amount of power the Court has—consistent with the popular constitutionalist tradition.[284] Proposals in this vein include jurisdiction stripping[285] and instituting a supermajority vote requirement to strike down laws.[286] Doerfler and Moyn argue that progressives ought to find disempowering reforms more normatively appealing because returning authority to the democratic process is more likely to secure progressive aims in the long run.[287]

This last point underscores the common thread across each of these accounts. To the popular constitutionalist, a mobilized citizenry's best shot at overriding unpopular constitutional rulings announced by the Supreme Court is not to tinker with the Court's composition or to hope that the Court will change its jurisprudence after an arduous effort to contest societal norms. It is

280. TUSHNET, *supra* note 251.

281. Mark Tushnet, *An Open Letter to the Biden Administration on Popular Constitutionalism*, BALKINIZATION (July 19, 2023), https://balkin.blogspot.com/2023/07/an-open-letter-to-biden-administration.html [https://perma.cc/75FT-DHY3]. *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (criticizing the judiciary's preeminent role in our constitutional system).

282. Doerfler & Moyn, *supra* note 43, at 1707.

283. *Id.* at 1721–25.

284. *Id.* at 1725–28.

285. *See generally* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020) (describing Congress's power to strip federal courts of jurisdiction in particular disputes); *see also* Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 13–15, 22–27 (2018) (discussing Congress's power over state court jurisdiction).

286. Doerfler & Moyn, *supra* note 43, at 1725–28 (canvassing these proposals).

287. *Id.* at 1728–53.

instead to shift interpretive power over our fundamental law back to the people.[288]

* * *

Democratic constitutionalism and popular constitutionalism both have lengthy historical pedigrees and a rich set of normative justifications. But there is reason to wonder whether either is up to the challenges presented in the current moment. Democratic constitutionalism's greatest difficulty today is that the Court is more polarized—and thus less open to persuasion and moderation—than at any point in modern history.[289] Contesting the Court's constitutional understandings, in other words, may have felt like a promising strategy when the median justice was Anthony Kennedy, a jurist who was famously open to revisiting his personal views on difficult topics in light of evolving societal norms.[290] But for the foreseeable future, the prospect of moving *two* conservative justices who are well to Kennedy's right on big issues such as voting rights, abortion, and gun safety seems exceedingly unlikely.

Democratic constitutionalism may be unsatisfying for an additional reason: it remains highly juriscentric in the sense that it views the Court as the ultimate target of social movement organizing. The Court is certainly important, and there is good reason to advance bold legal arguments with the aim of altering constitutional meaning. But pitching our battles in the realm of constitutional law can have downsides, too. All of the talk about contesting constitutional norms may not resonate with the day-to-day experience of

288. Professors Post and Siegel are explicit that this anti-Court stance is what distinguishes popular constitutionalism from their democratic constitutionalist alternative. *See* Post & Siegel, *supra* note 250, at 379 ("Unlike popular constitutionalism, democratic constitutionalism does not seek to take the Constitution away from the courts.").

289. *See* Amelia Thomson-DeVeaux & Laura Bonner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIVETHIRTYEIGHT (July 5, 2022), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/ [https://perma.cc/8NDJ-4Q6S] (presenting data showing the Court's historic rates of partisanship).

290. *See, e.g.*, Rowl Evans & Robert Novak, *Justice Kennedy's Flip*, WASH. POST (Sept. 4, 1992), https://www.washingtonpost.com/archive/opinions/1992/09/04/justice-kennedys-flip/17eb4e0b-72f6-4678-b5bb-7a3e8f79b395/ [https://perma.cc/8SZJ-C7FL (staff-uploaded, dark archive)] (describing Justice Kennedy's decision to change his vote to reaffirm the right to abortion in *Planned Parenthood v. Casey*); Daniel Hemel, *Justice Kennedy: A Justice Who Changed His Mind*, SCOTUSBLOG (June 29, 2018), https://www.scotusblog.com/2018/06/justice-kennedy-a-justice-who-changed-his-mind/ [https://perma.cc/5YRR-LSQB].

Americans who, under the existing legal landscape, may be grappling with threats to their physical, medical, and economic well-being or that of their loved ones and communities. As Professor Robin West has wisely observed, "[t]here may be better ways to reach out, to establish community, and to improve our collective lives than by th[e] continual construction of constitutional meaning."[291]

In theory, popular constitutionalism offers an answer to this concern to the extent that it advocates direct, popular interpretive authority over the Constitution instead of efforts to change constitutional law that rely on the Supreme Court. Yet theory is one thing and practice is another. As Professors Larry Alexander and Lawrence Solum famously argued in a review of *The People Themselves*, "The notion of a popular court of last resort with true interpretive authority is almost incoherent . . . . From the founding era to today, the people have been too numerous and diverse to speak with a single voice."[292] As Alexander and Solum point out, "[T]he idea of one big national popular assembly is silly," and to the extent popular constitutionalists envision "hundreds or thousands of regional popular assemblies," such a mechanism would "produce divergent constitutional interpretations without supplying any mechanism for resolving conflicts."[293] Even if one has in mind a milder form of popular constitutionalism that entails stripping the Court of jurisdiction over certain issues or instituting a supermajority voting rule to invalidate legislative acts, those kinds of reforms face substantial political obstacles of their own, not least of which are the Senate filibuster and uncertain public sentiment.[294]

291. Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1466, 1485 (2006). *See generally* MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022) (criticizing the emergence of an approach to constitutionalism that treats judicial interpretation as the touchstone for social progress).

292. Lawrence B. Solum & Larry Alexander, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1621 (2005).

293. *Id.* at 1622. Mobs can also serve decidedly illiberal constitutional ends, a point Professor Farah Peterson has argued with searing urgency. Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1558 (2022).

294. On the latter point, consider the public uproar after proposals to disempower the Israeli Supreme Court. *See, e.g.*, Patrick Kingsley, *Protestors Throng Israeli Airport After Government Moves to Rein In Judiciary*, N.Y. TIMES (July 11, 2023), https://www.nytimes.com/2023/07/11/world/middleeast/israel-protests-judicial-overhaul.html [https://perma.cc/53UM-R82H (staff-uploaded, dark archive)] (describing public protests after proposals to limit the Israeli Supreme Court's power to overrule parliamentary decisions under reasonableness review).

Recognizing these weighty challenges, the next section sketches the contours of a third form of response based on the successful efforts organized labor undertook after *Janus*. It is a method of response that turns on direct popular action by concerned Americans. But it does so without the Court or Constitution as its target.

2. Labor's Response to *Janus* as Popular Subconstitutionalism?

Public sector workers' surprising ability to counteract *Janus* poses something of a puzzle for constitutional theory. When public sector employees solved *Janus*'s collective action problem through renewed organizing efforts, was that democratic constitutionalism or popular constitutionalism? And if it wasn't either, what exactly was it? For understandable reasons, constitutional law scholarship tends to focus on how the Supreme Court has interpreted (or should interpret) our Constitution. But that focus has left us without a vocabulary for talking about the ways people sometimes respond to the Court with acts that have nothing to do with the Constitution at all.

As an initial matter, it is worth considering the possibility that unions' success in response to *Janus* might actually be just one variant of the broader project of democratic constitutionalism. From this perspective, efforts by public employees to convince their colleagues to stick with their union were actually efforts to contest the norms on which the Supreme Court relied in *Janus*'s constitutional interpretation. Indeed, some union organizers even explicitly criticized the Court's ruling in *Janus* in the course of persuading their coworkers to recommit to union membership.[295]

Labor's post-*Janus* response differs from democratic constitutionalism on a fundamental level, however, because union organizers were playing *within* the rules that *Janus* announced, rather than contesting or opposing it. Democratic constitutionalism is by definition a model that seeks to understand how our constitutional system functions when "interpretive disagreement" exists between the public and the Supreme Court.[296] Yet it is not at all apparent that public sector workers talking to their colleagues about the importance of sticking with their union were expressing any kind of interpretive position on

295. *See* Duncan Hosie, Janus *and the Movement Dissent*, 65 B.C. L. REV. 371, 376 (2024) (identifying how some union leaders used *Janus* as a mobilizing device).

296. Post & Siegel, *supra* note 250, at 374.

Janus. A more accurate portrayal may be that union organizers were working to protect their interests *inside Janus*'s new legal order, not that they were working to contest the order itself. To this point, consider what *Janus* said about what unions might need to do after the fair-share-fee system was invalidated: "We recognize that the loss of payments from nonmembers . . . *may require unions to make adjustments in order to attract and retain members*."[297] The unions' organizing campaigns seem like precisely this kind of "adjustment" that was aimed at attracting and retaining members. If losing groups doing exactly what the Supreme Court invites them to do in an adverse ruling constitutes interpretive *disagreement* under the aegis of democratic constitutionalism, then that label may be so capacious as to evade analytical scrutiny.[298]

In my view, the millions of face-to-face conversations that union members have held with their fellow workers after *Janus* are better understood as an example of popular *sub*constitutionalism.[299] They are not democratic

297. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2485–86 (2018) (emphasis added).

298. That said, I ultimately see little reason to take on the role of referee for democratic constitutionalism's outer boundaries. So, a second response to the view that democratic constitutionalism encompasses labor's response to *Janus* is to concede the point and ask, what then? To my mind, the answer is that some democratic constitutionalist responses may be different than others in ways that matter. On one end of the spectrum, the case of the de facto ERA may be proof that efforts to explicitly contest constitutional meaning through strategies like a failed Article V amendment can succeed ultimately in reshaping constitutional law through the Supreme Court's decisions. *See* Siegel, *supra* note 250, at 1324. Such efforts are both democratic (in the sense that they involve public responses to the Court using the ordinary political process) and constitutionalist (in the sense that they have as their goal changes to judicially-enforced constitutional law). What happened after *Janus* would be an example of democratic constitutionalism that is neither: losing groups chiefly responded through organizing efforts that amounted to private ordering, and they did so without any intention of changing constitutional law. If one wants to describe both forms of response as democratic constitutionalism, that is fine; it just means we should be clear about the different ways in which the two responses function.

299. In using the term "subconstitutionalism," I should be clear that I mean something different than what Professors Tom Ginsburg and Eric Posner were describing in *Subconstitutionalism*, 62 STAN. L. REV. 1583 (2010), which was about the phenomenon of subnational constitutional law, or the fact that federalist nation-states often have a constitutional landscape occupied by both national-level and lower-level constitutions. Nor do I mean "subconstitutional" in the sense of legal doctrines that operate at the plane of statutory interpretation, cf. Gillian Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2050 (2008) (describing subconstitutional federalism doctrines, or rules the Court has used to protect federalism values through "federalism-inspired canons of statutory construction"); Shawn Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. 1023, 1082–83 (describing the

constitutionalist responses because they neither operated through democratic channels (i.e., a dialogue between mobilized groups and their public officials) nor spoke in constitutional frames. And they are not popular constitutionalist responses because public sector workers made no effort to reclaim interpretive authority over the underlying constitutional question. Importantly, however, labor's response to *Janus* does share the "popular" aspect of popular constitutionalism insofar as public employees have answered *Janus* directly through their own individual actions, rather than mediating their efforts through elected officials.

Recognizing this commonality with popular constitutionalism may provide proponents of that theory a helpful rejoinder to some difficult scholarly critiques. Recall that one of the leading critiques of popular constitutionalism is that it does not provide a workable mechanism by which ordinary Americans can bring about their preferred constitutional understandings.[300] Some scholars, like Mark Tushnet, have thus openly called for replacing judicial supremacy with legislative or executive supremacy, thereby leaving the power of constitutional interpretation not with the people themselves *directly*, but rather acting via their elected officials.[301] At times, Larry Kramer seems to make a similar move. "The Constitution," he writes, "leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court's budget can be slashed, [and] the President can ignore its mandates."[302] But as Alexander and Solum incisively note, this "list of political checks deserve[s] attention, precisely because [it] include[s] no mention of direct popular action."[303]

If there is one moral from the story of organized labor's experience after *Janus*, though, it is that direct popular action *is* possible when the people wish to respond to an adverse Supreme Court decision. That is to say, the problem that the Supreme Court created in *Janus* was a classic collective action challenge

possibility of subconstitutionalism in Fourth Amendment law, whereby the Court would view statutory or administrative positive law constraints on police activity as sources of Fourth Amendment meaning). I instead use the term "subconstitutionalism" to describe efforts by the American people to respond to Supreme Court constitutional rulings they disagree with that do not entail persuading the Court to adopt a different interpretation or taking the Court's interpretive power away.

300. *See supra* notes 291–92 and accompanying text.

301. *See* TUSHNET, *supra* note 251.

302. KRAMER, *supra* note 251, at 249.

303. Solum & Alexander, *supra* note 292, at 1600.

for public sector unions: everyone would be better off if the union existed, but no single individual worker had the economic incentive to pay their share of member dues given their entitlement to the benefits of union representation either way.[304] And the way that members of the labor movement have responded to this problem is through quintessential direct, popular action. Teachers, public safety officers, and nurses around the country held face-to-face conversations with their coworkers to convince them of the value of sticking with their union.

So Professors Alexander and Solum could be right that popular constitutionalism is incoherent as a way of doing constitutional *interpretation*. But *Janus*'s aftermath suggests that the people themselves can sometimes respond to harmful Supreme Court rulings without the need for high constitutional interpretation at all—and without the need for intervention by their elected officials. When confronted with constitutional decisions they disagree with, ordinary Americans can sometimes go low: popular subconstitutionalism is a way of acting in direct answer to adverse rulings that can be as tangible as talking with one's coworkers at the water cooler.

Indeed, what is perhaps most promising for progressives about labor's post-*Janus* success is how little it depended on democracy or the benevolence of legal and policy elites. Threatened with a new legal regime in which their ability to bargain collectively was at risk, working-class Americans took matters into their own hands, convincing their fellow employees about the need to stick together, voluntarily join the union, and pay the membership dues needed to keep the union alive.[305] Workers were aided on the margins by some state laws that made it easier to access new employees' contact information and to speak with them at employee orientations. But it was workers themselves, acting through popular subconstitutionalist strategies like member organizing, who were chiefly responsible for their own success.

In prior work I have described this kind of strategy for mitigating the harms of an adverse Supreme Court ruling as "private avoidance," by which I mean a strategy that does not require changes to public law.[306] Private avoidance strategies will not always succeed in countermanding harmful Supreme Court

304. Fisk & Malin, *supra* note 32, at 1826.

305. *See supra* Section II.B.

306. *See* Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1883 (2021) [hereinafter Tang, *Harm-Avoider Constitutionalism*].

rulings,[307] of course, and even where they can make a difference, there could still remain ample reason for movement actors to criticize the Court with an eye towards longer-term jurisprudential change or structural reform. But *Janus*'s wake suggests that even as we engage in these higher forms of critique, we should not lose sight of the actions groups can take to go around the Court in much less esoteric ways.

Indeed, one benefit of casting greater attention on the private avoidance responses that disaffected groups may employ is that it recenters the members of our body politic who matter most: the very people who are injured by court rulings that burden their economic, social, and political well-being. Attending to losing groups' popular subconstitutional responses enables us to see these movement actors as the very change they wish to see in the world, not the nine lawyers on the Supreme Court.[308]

* * *

Organized labor's success after *Janus* is cause for some optimism. But it is important not to overstate the case. Efforts to counteract the Supreme Court's most consequential decisions through subconstitutional means will not always succeed.[309] Where that is true, democratic and popular constitutionalist strategies may prove to be essential. I thus want to conclude this subsection

307. *See infra* notes 311–12, 317–19 (discussing the limits of private avoidance in the context of the abortion and gun rights debates).

308. Attention to *Janus*'s aftermath also suggests a potential lesson for the Supreme Court in this moment of uncertain institutional legitimacy: perhaps the availability of popular subconstitutionalist responses ought to inform the Court's own decision-making process in difficult cases. I've previously written about how this dynamic is actually a recurrent theme across a surprising body of Supreme Court cases in moments where the Court's public legitimacy is at its apex. Thus, in constitutional cases, the Court has sometimes decided difficult legal questions by ruling against whichever group would be best able to avoid the harms of an adverse decision, thereby ensuring that losing groups have better responses than assailing the Court. *See* Tang, *Harm-Avoider Constitutionalism*, *supra* note 306, at 1860–69. The Court has protected its credibility by doing the same thing in some statutory and administrative law disputes as well. *See* Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971, 1009 (2023). I've called this the "least harm principle" of judicial decision-making, and to the extent the Court wishes to preserve its faltering legitimacy, *Janus*'s aftermath shows that such an approach may be worthy of consideration in the difficult times ahead. *See* TANG, SUPREME HUBRIS, *supra* note 42, at 256.

309. *See* Aaron Tang, *Who's Afraid of* Carson v. Makin*?*, 132 YALE L.J.F. 504, 528 (2022) (identifying cases where losing groups have no plausible post-defeat options) [hereinafter Tang, *Who's Afraid of* Carson v. Makin*?*].

with a few reflections on popular subconstitutionalism's uncertain generalizability to other contexts.

One useful setting for exploring this question is abortion. No Supreme Court ruling in modern history has provoked as much public resistance as *Dobbs*. People committed to the cause of reproductive autonomy have channeled their anger through multiple avenues, including protest marches,[310] attempts at ordinary lawmaking,[311] appointment politics,[312] and statewide constitutional amendment campaigns[313]—the quintessential forms of norms contestation that characterize democratic constitutionalism.[314] Statewide amendment campaigns have proven particularly effective, with the pro-abortion position prevailing in seven of seven such votes since *Dobbs*.[315]

One could argue that popular subconstitutionalist responses have been less impactful. The primary means through which individuals have tried to directly answer *Dobbs* using subconstitutional strategies has been to aid low-income pregnant people who seek abortion care but live in states where it is now illegal.[316] Yet there are obvious limits on this form of response. Some anti-abortion states have enacted laws that would subject persons to criminal

310. *Supreme Court Rules on Abortion: Thousands Protest End of Constitutional Right to Abortion*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/live/2022/06/24/us/roe-wade-abortion-supreme-court [https://perma.cc/8883-ZM6B (staff-uploaded, dark archive)].

311. *See, e.g.*, Christine Fernando, *House Democrats Introduce Bill That Would Enshrine Federal Abortion Rights*, USA TODAY (Mar. 30, 2023), https://www.usatoday.com/story/news/nation/2023/03/30/house-democrats-introduce-bill-restore-federal-abortion-rights/11570943002/ [https://perma.cc/ZM4J-U3HM].

312. *See, e.g.*, Julia Mueller, *House Democrats Tout Bill to Add Four Seats to Supreme Court*, HILL (July 18, 2022), https://thehill.com/homenews/house/3564588-house-democrats-offer-bill-to-add-four-seats-to-supreme-court/ [https://perma.cc/F8VM-VSX8] (noting that House Democrats called for consideration of court-packing in response to *Dobbs*).

313. *See, e.g.*, Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, AP NEWS (Nov. 7, 2023), https://apnews.com/article/abortion-ohio-constitutional-amendment-republicans-courts-fb1762537585350caeee589d68fe5a0d [https://perma.cc/JG8S-8644 (staff-uploaded archive)].

314. *See supra* Section III.C.1 (describing democratic constitutionalist responses).

315. Amanda Terkel & Jiachuan Wu, *Abortion Rights Have Won in Every Election Since Roe v. Wade Was Overturned*, NBC NEWS (Aug. 9, 2023), https://www.nbcnews.com/politics/elections/abortion-rights-won-every-election-roe-v-wade-overturned-rcna99031 [https://perma.cc/TY3T-9A46].

316. *See, e.g.*, Rosemary Westwood, *Despite Historic Indictment, Doctors Will Keep Mailing Abortion Pills Across State Lines*, KFF HEALTH NEWS (May 6, 2025), https://kffhealthnews.org/news/article/medication-abortion-by-mail-doctor-indictment-fear-shield-laws-mifepristone-misoprostol-pills/ [https://perma.cc/LT77-T97U].

prosecution if they aid and abet an abortion.[317] Even setting legal exposure aside, there are substantial financial costs associated with providing care to low-income patients, including the cost of the procedure and travel.[318]

But there is also evidence that direct, popular responses to *Dobbs* have made a difference. Individuals living in states where abortion remains legal have obtained abortion pills and mailed them to their friends in anti-abortion states.[319] Doctors in states with shield laws have prescribed and shipped abortion pills to pregnant people in states where abortion is illegal.[320] Abortion travel funds have met the surge in the demand for their services, in large part due to a surge in the amount of donations they've received.[321] None of this conduct is in the register of constitutional argument. Yet by some estimates, it has made a material difference in increasing access to abortion care after *Dobbs*.[322]

One setting in which popular subconstitutionalism has been met with less success is gun safety. The very nature of the gun violence epidemic is that any one individual can do so little to avoid a mass shooting—a fact exemplified by the surge in parental demand for bulletproof backpacks after the Uvalde mass shooting.[323] So after the Supreme Court curtailed the power of state and local governments to regulate firearms in *Bruen v. New York State Rifle & Pistol*

317. *See, e.g.*, Doha Madani, *Texas Man Sues Ex-Wife's Friends, Alleging They Helped Her Get Abortion Pills in Violation of State Law*, NBC NEWS (Mar. 12, 2023), https://www.nbcnews.com/news/us-news/texas-man-sues-ex-wifes-friends-allegedly-helping-get-abortion-pills-v-rcna74541 [https://perma.cc/49JN-5TVU].

318. *See* David S. Cohen & Carole Joffe, *Ending* Roe v. Wade *May Have Had the Opposite Effect That Conservatives Had Hoped for*," SLATE (Nov. 7, 2023), https://slate.com/news-and-politics/2023/11/ohio-vote-abortion-access-is-growing.html [https://perma.cc/7UHZ-KUJB].

319. *See id.*

320. Caroline Kitchener, Blue-State Doctors Launch Abortion Pill Pipeline into States with Bans, WASH. POST (July 19, 2023), https://www.washingtonpost.com/politics/2023/07/19/doctors-northeast-launch-abortion-pill-pipeline-into-states-with-bans/ [https://perma.cc/DS6M-AC28 (staff-uploaded, dark archive)].

321. *See* Susan Buttenwieser, Abortion Funds: 'Out Loud and Proud About Aiding and Abetting Abortions, WOMEN'S MEDIA CTR. (May 18, 2023), https://womensmediacenter.com/news-features/abortion-funds-out-loud-and-proud-about-aiding-and-abetting-abortions [https://perma.cc/ZT4K-689T].

322. *See* Amy Schoenfeld Walker & Allison McCann, Abortions Rose in Most States This Year, New Data Shows, N.Y. TIMES (Sept. 7, 2023), https://www.nytimes.com/interactive/2023/09/07/us/abortion-data-bans-laws.html [https://perma.cc/UXY9-BXNU (staff-uploaded, dark archive)].

323. Mark Lungariello, Bulletproof Backpack Sales Soar in Wake of Texas School Shooting, N.Y. POST (June 7, 2022), https://nypost.com/2022/06/07/bulletproof-backpack-sales-soar-in-wake-of-texas-school-shooting/ [https://perma.cc/G3GT-LH6F].

Association,[324] individuals have predictably struggled to protect themselves from gun violence.[325] If change is going to come on this front, it may well require action by the Supreme Court itself, perhaps in the form of decisions reining in the Second Amendment's reach as in *United States v. Rahimi*.[326] So much, then, for popular subconstitutionalism in the gun safety context.

But there are other areas in which popular subconstitutionalism may play a meaningful role in efforts to respond to adverse Court decisions. After the Court struck down a Maine law forbidding use of public tuition aid funds at religious schools, for example, supporters of church-state separation employed an effective answer that did not contest the Court's constitutional reasoning: they required all schools that received public funds to comply with prohibitions against sexual orientation discrimination.[327] Thus far, no religious school has accepted public funds.[328]

In short, if any broader takeaway can be gleaned from these examples, it is that the question whether popular subconstitutionalism can effectively respond to a given Supreme Court ruling is likely to be highly case-specific and fact-bound. Yet it is a question that matters immensely—and my hope in this Article has been to draw attention to it. For at a minimum, workers' ability to respond after *Janus* shows that sometimes, the Court does not have the last word on the major legal battles of our time. Sometimes, organized movements of everyday Americans can write their own endings.

CONCLUSION

There is a temptation to view labor's ability to overcome the crippling blow so many expected *Janus* to deliver as little more than a welcome surprise for progressives.[329] That would be a mistake. Upon closer reflection, what workers have achieved can inform how we think about a number of bigger picture issues, including the future of organized labor, the role of legal

324. 142 S. Ct. 2111 (2022).

325. *See, e.g.*, John Donohue, The Supreme Court's Gun Decision Will Lead to More Violent Crime, WASH. POST (July 8, 2022), https://www.washingtonpost.com/outlook/2022/07/08/guns-crime-bruen-supreme-court/ [https://perma.cc/ZXW2-MA6M (staff-uploaded, dark archive)].

326. U.S. v. Rahimi, 144 S. Ct. 1889 (2024).

327. *See* Tang, *Who's Afraid of* Carson v. Makin*?*, *supra* note 309.

328. *Id.* at 507 & n.22.

329. *See, e.g.*, Rainey & Kullgren, *supra* note 119 (observing that public sector union budgets were "surprisingly flush" one year after *Janus*).

scholarship in social change, and debates over the Supreme Court and its frayed relationship with the public.

The first step to seeing these lessons, however, is to push the Supreme Court and the Constitution into the background. What matters most about *Janus* is not what the Court held or how it interpreted the First Amendment. What matters most is what working-class Americans have done after *Janus*—largely out of the limelight, in public schools, hospitals, and government offices across the Country—to keep their unions strong.