95 Theses on *Janus*

Thoughts on the End of Company Unionism

Often, the worst way to become prisoner of a system is to have a dream that things may turn better, that there is always the possibility of change. Because it is precisely this secret dream that keeps you enslaved to the system. - Slavoj Žižek

1. *Janus* was intended to be a death-blow to organized labor. Whether we survive depends on how maneuverable we are in the coming years.

2. *Janus* is the latest iteration of an old union-busting tactic: destroy labor's internal cohesion under the slogan "voluntary unionism."

3. *Janus* elevates anti-union objection to a full First Amendment right. This is ironic, because the original power of organized labor came from the First Amendment. Joining a union was an act of dissent and free association, a mutual-aid pact against the capitalist order.

4. Labor can turn *Janus*' First Amendment pretensions around, if we re-imagine our organizing models. If we go back to defending ourselves against hostile outsiders, instead of trying to claim state-sanctioned control over them, the First Amendment flips back in our favor.

5. *Janus* is one step in an ongoing attack on exclusive representation. We are used to thinking of exclusive representation in employer-based units as the only way labor can present itself to capital. But what if we had to choose between our Section 7 right of mutual aid and our Section 9 status as the employer's exclusive bargaining partner? Post-*Janus* law will force that choice soon enough.

6. This problem is illustrated by an apparent loophole in *Janus*. While the Court forbids public-sector unions from requiring objectors to pay for contract negotiation, Justice Alito surprisingly allowed that we *may* charge non-members

to act on their behalf in grievance arbitration. Nevertheless, the AFL-CIO and public-sector unions like AFSCME have discouraged efforts to charge non-members after *Janus*. The rationale is that these charges would complicate the uniform duty of fair representation, and so erode the union's exclusive status with the employer.

7. I argue that this is short-sighted. Exclusive representation is a valuable option, but holding onto it at any price abandons the original idea of worker self-organization. It elevates the union's relationship to the *employer* over its members' mutual-aid promise to each other.

8. In any case, after *Janus* the Roberts Court may take away exclusive representation whether we like it or not. The Court would have to defy logic and precedent to do that, but logic and precedent did not prevent *Janus*.

9. If that happens, state legislatures will be free to amend public-sector law to give enforceable bargaining rights for members-only unions.

10. *Janus* does not prevent this. *Janus* attacks the specific model of the agency shop governed by union security. It loses its force if membership precedes the employment relationship.

11. Membership-based models have existed since the old guild and craft unions. Unions have avoided members-only organizing because current law will not give it enforceable bargaining rights. But this can change. If members-only unions have bargaining rights, they can use the same tools unions have always used against erosion of work standards by non-members, like union-standards clauses and work preservation rules.

12. This changes the First Amendment dynamic of *Janus*. Non-union objectors may refrain from joining, but they cannot complain that union members win better deals than at-will employees. Unions can then assert the very Constitutional rights of free association that hostile outsiders now assert against us.

How Did We Get Here?

13. *Janus* attacks industrial unionism. This was originally a private-sector model that became the template in the public sector.

14. *Janus* punishes unions for relying on host employers to supply our members.

15. We live inside this model, because it is the legacy of the last era of Labor victory.

16. The CIO campaigns of the 1930s and 40s organized through employers, rather than by pooling separate reservoirs of labor. Like viruses, CIO unions wanted to take over capitalist firms from the inside, to gain a new member with every new hire. The watchwords of industrial unionism were "exclusive representation" and "union security."

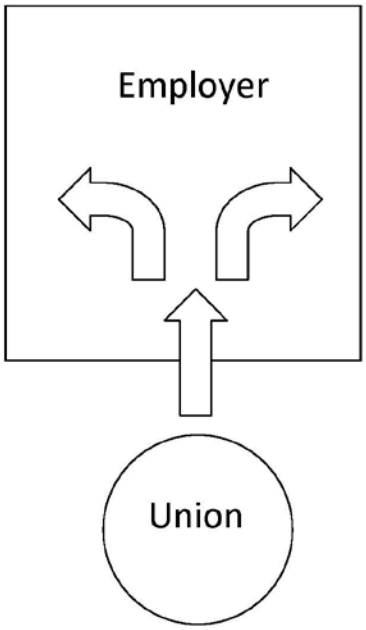
17. The CIO replaced the older model of labor unions as independent cartels of skilled labor, organized by trade, that contracted at arms' length with employers. In the older craft model, workers didn't necessarily become permanent employees of signatory employers. The center of their work lives was the hiring hall. The modern exponents of this craft model are the Building Trades.

18. The early craft unions had a lot of limitations. They were typically skill-based brotherhoods that excluded anyone who wasn't white, male or native-born. They usually didn't have any interest in organizing the unorganized except within the narrow bandwidth of their trade.

19. But at least craft unions were independent of employers. When you joined the Bricklayers, you just joined, prior to getting hired by a capitalist, without asking the Government's or an employer's permission. There was no legalese on your membership card about how the Bricklayers would be "authorized as your exclusive bargaining agent to represent you for purposes of collective bargaining with your employer." You weren't "authorizing a representative"; you were joining a mutual-defense pact, all for one, one for all.

20. Industrial unionism came from the more radical elements. Instead of protecting craft jurisdiction, the CIO adopted the IWW's earlier insistence on organizing the unorganized across entire industries.

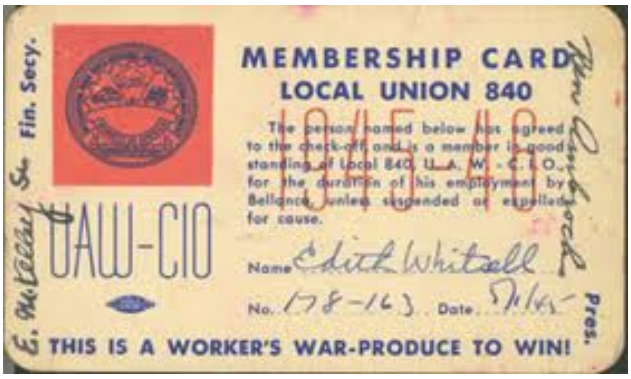
21. Industrial organizing is essentially a viral model. The Union does not administer a hiring hall or lease out its members. It takes over the Employer from within, using the Employer's own hiring to grow the Union as an embedded part of its business.



22. New Deal unions organized entire industries because they had weapons that were taken away in 1947. New Deal unions could lawfully run secondary picketing, boycotts and strikes. Hot-cargo clauses were still lawful. The closed shop was lawful, so that workers had to join the union first just to get hired.

23. "Members only" organizing and exclusive representation were not contradictory before 1947. In a closed shop, they were synonymous.

24. Union membership in the 1930s was driven by the benefits members got from mutual aid that non-members did not. This included the power of organizational cohesion. Anyone joining a union before 1947 knew that the group could discipline or exclude members who crossed picket lines. *What side are you on?* was a slogan that separated members from nonmembers. Join us or don't join us, but if you don't, don't come to us for the mutual aid you rejected.



Janus didn't cripple industrial unionism.
Taft-Hartley did.

25. The Taft-Hartley Act neutered industrial unionism. Overnight in 1947, industrial unions lost the secondary boycott and the closed shop. Members who crossed picket lines could simply resign with no consequences for their job. States could enforce right-to-work laws, invented in Southern states to prevent white workers from being "forced" to associate with black workers.

26. Taft-Hartley used the structure of exclusive representation to turn industrial unionism into employer-dependent unionism. Once they lost the power to turn an industry into an oligopoly of union-dominated companies, unions became company-based "representatives" that exist only as adjuncts of the employer oligopsony. The union became a conduit for purchasing labor efficiently rather than a vehicle for labor to appropriate capital.

27. The most damaging part of Taft-Hartley was § 9(c)(5): "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." The employer's operational needs control the contours of organizing. To a European union this provision would be intolerable. It declares that that *workers are not allowed to decide who they organize with*.

28. By accepting that organizing is a function of the employer's operation, we lost the right to complain when the employer shows up as an uninvited guest in the

NLRA representation case. Under current law, workers who want to organize have to accept the intervention of a hostile outside power as a full party. Far from prohibiting employer meddling, the law guarantees employers the right to require participation in its propaganda sessions, preside over the workers' vote, and litigate who is even eligible to be represented. Unions rightly see this as outrageous, but this is the necessary consequence of employer-based exclusive representation.

29. Union outrage often masks deeper unexamined problems that come from employer domination. For example, *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999) held that it is an objectionable "grant of benefits" for a union to file a wage-and-hour suit on behalf of unit workers during the election period. (It's only by the grace of a footnote that "organizing services" are not deemed such a bribe.) *Freund Baking* is appalling, in the first instance, because it refused to recognize wage litigation as protected activity. But this misses the more sinister element of the decision: *it assumes workers do not become members entitled to a union's mutual aid until the Government and the Employer say so*.

30. So when does a supporter become a member? When a worker signs a card during an organizing drive, is she joining the union with full LMRDA rights, or is she only an "applicant" whose membership isn't consummated unless her employer consents? This confusion is reinforced because unions typically don't charge dues until the employer agrees to a contract with dues checkoff. Unions who lose decertification elections usually don't treat their former members as having any ongoing status with the union. In both cases, the assumption is that membership doesn't exist without dues payment, and dues payment doesn't exist without the employer's administration.

31. After Taft-Hartley, if a worker isn't really our member until the Employer and the Government say so, what is left of our claim to independence? What's the difference between us and company unions?

32. This commits us to a tortured version of what a union is. A worker no longer joins a mutual-defense pact with all other members -- he or she "authorizes" an agent "to represent me in collective bargaining" in a government-fixed unit, only so long as the union's relationship with the employer remains intact.

33. This is a deeply alienated picture of union membership. A Yugoslavian joke under Tito: "Before the revolution, capitalists rode around in big black cars. But now, the workers do—through their representatives."

Where is the Court going after *Janus*?

34. *Janus* punishes this alienated model. It abolishes union security (for now, in the public sector.) Its logic puts exclusive representation under threat in both public and private sectors.

35. The *Janus* Court is shocked, *shocked*, that employees are "forced" to pay for their representation. This is selective libertarianism. The Roberts Court would never give public employees a Constitutional right to a job. Nor would it recognize "conscientious objection" as an excuse to avoid paying for economic benefits in any other context. This is not a coherent doctrine. *Janus* is a political act.

36. *Janus* widens the breach in the social contract. In 1935, labor agreed to confine its organizing to government-certified units – the exclusive representation system of Section 9. In exchange, the law recognized the right of mutual aid and protection in Section 7. *Janus* severs the two sides of this bargain. A union that wants to be the exclusive representative in an employer-based unit can no longer expect mutual aid from those it represents.

37. But this is nothing new. *Janus* only affected the 22 states where union security was still lawful. *Janus* had no effect in 28 states, including Michigan, Indiana and Wisconsin, which were already fully "right-to-work" in both public and private sectors.

38. The Court may go in one of three directions after *Janus*. It can declare victory and stop. It can wipe out all labor law, public and private. Or it can bring down the Apocalypse, but only on the public sector.

- **Scenario 1: Short-term political hit**

39. *Janus* may just be a short-term move to defund Democratic politicians. In this scenario, the Court was simply motivated to deny unions the political spending power that *Citizens United* gave corporations.

40. That was the tenor of Justice Kennedy's remarks at the *Janus* argument. After writing *Citizens United* as an even-handed protection of corporations and unions alike, Justice Kennedy dropped the pretense of even-handedness at the *Janus* argument. He expressed outrage that unions' political agenda created a feedback loop, where Democratic politicians reward union donors by entrenching them further in state and local employment. He mocked the State's argument that unions were the government's "partner": "It can be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion, for teacher tenure, for higher wages, for massive government, for increasing bonded indebtedness, for increasing taxes? That's the interest the state has?" Justice Kennedy implied that crippling unions was a sufficient reason for Janus to win: "If you do not prevail in this case, the unions will have less political influence; yes or no? Isn't that the end of this case?"

41. Of course, Justice Kennedy was unwittingly repeating the argument against *Citizens United*. It would have been interesting if the State respondents in *Janus* had frankly defended union-security as the First Amendment exercise of the electorate: "yes, the voters of Illinois like unions, and they have the right to elect governments that exercise that patronage in the same way that Republican politicians reward their corporate contributors. If that feedback loop didn't bother the Court in *Citizens United*, why should it bother you here?"

42. If *Janus* is only an effort to hurt public-union political spending, the Court may not be as interested in the next wave of Right to Work arguments against exclusive representation. Alito wrote ambiguously: "It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts." If "not disputed" means "beyond dispute," the Court will adhere to *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which rejected that First Amendment challenge.

- **Scenario 2: The *Lochner* Apocalypse**

43. On the other hand, *Janus* may be the next step in a full revival of *Lochner v. New York* in the guise of the First Amendment.

44. Justice Alito expressed longing for this golden past: "into the 20th century, every individual employee had the 'liberty of contract' to 'sell his labor upon such terms as he deemed proper,' *Adair v. United States*, 208 U.S. 161, 174–175 (1908). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders." He hastened to add "we are not in any way questioning the foundations of modern labor law." But it is hard to see how the foundations of modern labor law remain intact if "liberty of contract" is now a First Amendment right.

45. If that is coming, the Court will not need to focus on exclusive representation alone. If the First Amendment forbids any legislation that regulates employers' and employees' right to associate with each other, the Court will strike down the National Labor Relations Act, the Norris-LaGuardia Act, minimum wage laws, and any other New Deal constraint on "First Amendment rights of free economic association," in both public and private sectors.

46. After a revival of *Lochner*, employers and anti-union employees would have a First Amendment right not to associate with union members. This would make Norris-LaGuardia's ban on yellow-dog contracts, and § 8(a)(3) of the NLRA, unconstitutional. The First Amendment doctrine of *Janus* would simply replace the substantive-due-process doctrine of 1905.

47. Ironically, a revival of *Lochner* would also wipe out anti-labor legislation, including right-to-work laws themselves. The closed shop could not be prohibited. If an employer decided that it only wanted to associate with union members, right-to-work laws could not constitutionally prevent it.

48. The *Janus* Court's discovery of the First Amendment also undermines older doctrines restricting pro-union speech and assembly. For example, laws forbidding peaceful secondary picketing, like § 8(b)(4) of the NLRA, had been justified on the theory that the First Amendment is irrelevant to labor disputes. That distinction can no longer be defended after *Janus*. Picketing and boycotts that would be protected if conducted by the Westboro Baptist Church or Operation Rescue can no longer be denied to unions because they express a disfavored viewpoint.

49. In *Janus*, the State and AFSCME relied heavily on anti-First Amendment cases like *Pickering* and *Garcetti* to argue that speech about the workplace isn't really speech on a matter of public concern. This may have been a necessary position, but there are reasons to be glad that argument failed. The modern labor movement would have been crushed in its infancy if union speech about the workplace had not enjoyed full First Amendment protection. *Schneider v. State*, 308 U.S. 147 (1939); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945). The more recent inroads against secondary boycott law, in *DeBartolo* and the bannering cases. would have been wiped out if the Court had agreed that labor speech is outside the First Amendment.

50. *Janus* also unwittingly undermines state laws prohibiting public employee strikes. If Mark Janus cannot be forced to work against his conscience, then neither can the teachers of West Virginia. The fact that they speak, assemble and cease work in voluntary association may or may not be *protected* by state law, but it cannot be *criminalized* if the First Amendment defines their grievances as a matter of public concern.

Scenario 3: Ban exclusive representation in public sector only

51. The Court may also take *Janus* to an extreme, but only in the public-sector. It may take Justice Alito's description of exclusive representation ("a significant impingement on associational freedoms that would not be tolerated in other contexts") to mean that, once it *is* disputed, the Court will *not* tolerate it, at least among government employees.

52. The Right to Work Committee is currently arguing that exclusive representation is "coerced speech," because anti-union workers have a right not to have a union speak for them at all, even in contract negotiation. If the Court accepts this argument, it will effectively hold that all federal and state public-sector labor law, including the FLRA, is unconstitutional.

53. In the alternative, the Right to Work Committee is arguing that exclusive representation is unconstitutional so long as nonmembers are excluded from voting on contract ratification, officer elections or any other internal union decision-making. In other words, anti-union objectors will try to squeeze exclusive representation into oblivion by demanding that unions surrender their internal democracy as its price.

54. If the Court accepts this argument, public-sector unions will have to choose whether they will abandon any pretense of being a democratic membership organization, in order to cling to exclusive representation.

55. The attack on exclusive representation is nothing new. For decades, the Right to Work Committee have been squeezing this pressure point: exclusive representation means the union has "members" who didn't choose to be but for their employer's compulsion.

56. This has already forced decades of debilitating litigation over free-riders' rights to *Beck* and *Hudson* rebates, resignation and dues checkoff revocation. Courts tell us that organizing the unorganized isn't legitimately a "chargeable activity" for servicing a unit.

57. In a sense, the defeat in *Janus* was inflicted long ago. The mere fact that unions must now present themselves as service providers attached to an employer, rather than independent mutual-aid societies, means that we are no longer the same organizations that built the movement.

58. If organized labor is now a universal service provider, it's no different than Public Broadcasting. It's funded by voluntary contributions, but its duty is not to its members. It must permit anyone to enjoy its benefits and allow anyone to weigh in. This changes "membership" from citizenship to altruism. If this is the future, it's hard to see why labor organizations would not simply dissolve into 501(c)(3) advocacy groups, which could then be funded by liberal billionaires without bothering with dues, officers or elections.

Janus* doesn't overrule *Boston Harbor.

59. *Janus* loses its force if labor recruits capital differently.

60. Like many constitutional cases, *Janus* assumes a background of state law that must exist before the First Amendment kicks in. You have a First Amendment right to handbill in a public park, but no First Amendment right to have a park in the first place. If the City converts a park to a private shopping mall, you have no further First Amendment right to leaflet there.

61. *Janus* assumes that the public employer hires workers first, and only then compels them to pay a union. But in other models, like the craft and guild systems, the employer recruits labor from private contractors or a hiring hall at arms-length. In § 8(f) arrangements, copied by temp agencies in the gig economy, workers come from a labor pool independent of the employer. They do not even become permanent employees.

62. Of course, privatization and temp labor are anathema to public-sector unions, for good reason. Full-time employment has always been a basic right that public-sector unions must defend. But the battle against outsourcing and casual labor is successful only where unions have political sway with public employers, absent a right to strike. If that leverage is present, those governments will protect worker interests. If it is absent, union opposition will be powerless to stop privatization and casual labor anyway.

63. *Boston Harbor* holds it is perfectly permissible for a State to prefer unionized private contractors with no-strike guarantees when it is acting in a proprietary role. Remarkably, *Boston Harbor* is not mentioned anywhere in *Janus*, either by the majority or the dissent.

64. So say the State of Illinois decided to privatize its prison system, by contracting with Prison Industries, Inc. to run facilities formerly staffed by AFSCME

members who had been employed directly by the State. Would those AFSCME members have a *Janus* right to stop the privatization, because that might interfere with their right to support their chosen union? Would they have a First Amendment right to be retained by Prison Industries, Inc., to preserve AFSCME's successorship rights? Of course not! You may have a First Amendment right to support a union once you have a State job, but you have no Constitutional right to a State job to begin with.

65. So suppose Prison Industries, Inc. is then organized through a private-sector NLRB election by the Teamsters. It reaches a state-wide contract with union security (legal in Illinois). As a result, in order to work in Illinois prisons, a guard has to be employed by Prison Industries, Inc., which means the guard has to pay dues to the Teamsters. Does this violate the guard's *Janus* rights? Is the State of Illinois constitutionally compelled to terminate any privatization contract with an employer once its employees organize? Of course not! The State is contracting, not employing. If AFSCME members aren't entitled to a guaranteed job, then neither are anti-union workers. *Higgins Electric, Inc. v. O'Fallon Fire Protection Dist*., 813 F.3d 1124, 1130 (8th Cir. 2016) ("a governmental preference for union labor in the construction industry ... does not 'directly or substantially interfere' with the rights of laborers to refrain from joining a union." (*quoting Lyng v. UAW*, 485 U.S. 360, 366 (1988)).

66. Suppose the State of Illinois is entertaining bids for state-wide prison operation. The State wants to protect itself by requiring bidders to have a no-strike contract binding on its employees. The only way a private contractor can do this is through a collective-bargaining agreement. Suppose further that the State imposes union-scale labor standards on any contractor under prevailing wage laws. Could non-union contractors invoke their employees' *Janus* rights, to say these conditions violate the First Amendment? Of course not! The State has the same right as any private proprietor to choose its contractors according to its business needs. If AFSCME members can't complain that prisons are now operated by a Teamster signatory, non-union objectors can't complain either.

67. Suppose the State of Illinois chooses to staff some public functions through a gig-economy model, using a temp agency like Labor Ready. The temp workers do not become permanent public employees. Does this violate Mark Janus' or AFSCME members' First Amendment rights? Of course not! So suppose the State

of Illinois uses a labor cooperative owned by the very workers it leases out, and this cooperative is affiliated with AFSCME. This is just a modern revival of craft union hiring halls. Can the courts intervene to prohibit this contracting? Of course not! Unless the Court were to exert Constitutional supervision of all public contracting, *Janus* cannot reach this model.

68. This is not to say that craft organizing is preferable in the public sector. But it illustrates that *Janus* becomes irrelevant if we can maneuver between different organizing models.

Justice Alito leaves a loophole

69. One of the most aggravating things about *Janus* is the degree to which the right wing of the Court was willing to repudiate its core beliefs (*e.g.*, the Constitution does not guarantee anyone a job, there is no such thing as a free lunch.) In effect, the Court approved the very free-riding it condemns in Takings cases (*see Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), or in other First Amendment cases *(see Hurley v. Irish-American Gay and Lesbian Group*, 515 U.S. 557, 573-575 (1995).)

70. Justice Alito was unable to suppress his normal conservative instincts completely. In a momentary departure from the Right to Work Committee's agenda, Justice Alito made an important concession in footnote 6. To answer the dissent's complaints about free-riding, he drew an arbitrary distinction between paying for contract negotiation and paying for one's own grievance arbitration: "Individual nonmembers could be required to pay for that service or could be denied union representation altogether. [footnote 6: Some States have laws providing that, if an employee with a religious objection to paying an agency fee 'requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure.' This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.]" *Janus*, 138 S.Ct. at 2468-69 & n.6.

71. This passage is intuitively satisfying. A religious objector like Kim Davis is free to declare that God has forbidden her to have anything to do with the union. But if she gets fired, and then decides that God has changed His Mind, the Union has every right to make her pay for her newfound demand for union protection.

72. To be sure, charging non-members would raise a lot of issues. Does the Union charge market rate for lawyers? Once it accepts the objector's money, does the Union lose its discretionary control over the grievance? Is the Union's paid representation subject to a deferential *Vaca v. Sipes* standard, or a more demanding malpractice standard?

73. These are all serious problems. But they will have to be solved unless the labor movement decides that it will *never* treat non-members differently. If unions yield on that, there is no limit to how far the Right to Work Committee will go: it will demand voting rights, contract ratification rights, even the right of objectors to assume office in the union they want to destroy.

74. These are problems that come up even outside of *Janus*. Exclusive representation faces another DFR-related threat, potentially more dire than *Janus*. After *14 Penn Plaza*, employers are using exclusive representation to demand that individual statutory rights be arbitrated. Hostile courts will then tell employees who don't get the relief they want to sue the *union* for failing to prevent the employer's discrimination. A growing number of courts now refuse to let unions rely on *Vaca v. Sipes* discretion, on the theory that their direct Title VII liability is not insulated by a DFR standard.

75. In response, unions may have to decide whether to open up their grievance procedures in EEO cases, to allow discrimination claimants to proceed on their own, if the Union chooses not to proceed. This inflicts the damage of loosening union control over the grievance procedure. But eventually it may be the only alternative to defending Title VII actions over every grievance where the union has not won full relief.

Labor is already moving on from the industrial model.

76. The romantic memory of the 1930s obscures the reality that the labor movement has already been moving away from the industrial model for decades.

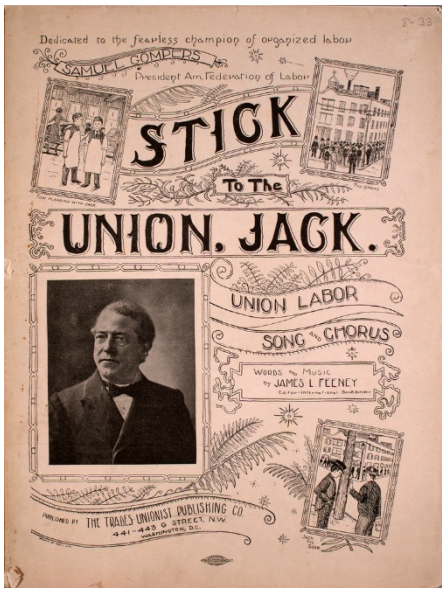
77. The watchword in the 1930s was "wall-to-wall" organizing; anything less was backward craft unionism that would allow the employer to divide and conquer. But now it is a truth universally acknowledged that employers want big units and unions want smaller ones.

78. Under *Specialty Healthcare*, unions moved to make representation conform to the specific classifications the Union had organized, rather than a larger unit that would dilute the organizing drive with non-members. Under *Specialty Healthcare*, the union is still the exclusive representative of the micro-unit. But defining the unit to be more congruent with union support means that we are already distinguishing between members and nonmembers in the same workplace.

79. All of the objections to members-only organizing could be raised against the micro-units of *Specialty Healthcare*. If the shoe department in a department store organizes alone, the employer may raise wages in the unrepresented remainder around the micro-unit, to undermine the union. Other unions are also free to raid adjacent parts of the workplace. If labor now wants to organize in less than all of the workplace, it is already abandoning exclusive representation as industrial unions understood it in the 1930s.

80. Post-*Janus* litigation is already forcing public-sector unions to argue that members must be treated differently from nonmembers based on the member's voluntary choice. Unions like AFSCME are correctly arguing that a full member is not entitled to retroactive refund of dues after *Janus*. Unlike an involuntary agency-fee payer, a full member voluntarily *chose* the right to join a democratic organization, to vote on contracts and officers. As long as the full member had notice of the option to be a fee-paying non-member, he can't demand a refund for dues he voluntarily paid in return for the benefits of membership.

81. Post-*Janus* litigation is also forcing unions to recognize that the payment of dues is an act of individual choice, not collectively-bargained compulsion. Public-sector unions must now fight off demands to cancel all dues authorizations, on the presumption that no rational worker would ever voluntarily pay dues if she didn't have to. The important change in post-*Janus* litigation is that unions are finally defending their members' support as First Amendment-protected exercise. Once the union-security compulsion is lifted, a worker who nevertheless sticks with the union is entitled to the same First Amendment protection as Mark Janus.



82. The end of union security also forces creative strategies to organizing. For example, a union in a right-to-work state is free to tell workers that it will disclaim interest, and void the contract, unless the unit achieves X % membership. This is lawful in the private sector. *Production and Maintenance Union, Local 101 (Bake-Line Products, Inc.)*, 329 NLRB 247 (1999). The union is also allowed to publicize members and nonmembers by name, *Letter Carriers v. Austin*, 418 U.S. 264 (1974). This organizing strategy tells workers that the union does not exist apart from their voluntary choice -- it will not carry on as a bureaucratic relic if they refuse.

Members-only organizing:
the brave new world

83. Since 1947, unions outside the Building Trades have been skeptical of "members only" models, for good reason. The NLRB and most public-sector agencies currently refuse to enforce any bargaining duty against employers unless the union claims exclusive representation. This makes a "members only" union dependent on the employer's good will to exist.

84. As the offensive against exclusive representation continues, however, the distinction between "members only" and "exclusive representation" is a distinction without a difference. The main objection to members-only organizing is that it cannot be enforced against an unwilling employer. But this is already a

problem in the public sector. Absent a right to strike, political goodwill is the only protection public-sector unions have.

85. In any event, this objection is circular. The lack of enforceable bargaining rights for members-only unions is a defect that be cured if the law recognizes them.

86. That is not a fanciful possibility. In 2007 and 2008, fourteen major unions signed off on rulemaking petitions asking the NLRB to hold the § 8(a)(5) duty to bargain does not require the union to be a § 9(a) exclusive representative. Prof. Charles Morris wrote the lead petition, based on his *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (2005). Morris marshalled extensive historical proof that the NLRA was originally intended to give unions an option between members-only and unit-wide exclusive representation. The petition was brought by the Steelworkers, IBEW, CWA, UAW, IAM, CNA and UE, and supported by a second petition by Change to Win, on behalf of the Teamsters, the Laborers, SEIU, the Carpenters, the UFW, the UFCW, and UNITE HERE.

87. As Morris argued, the danger of a fragmented unit can be addressed by keeping some aspects of majority rule. A members-only union might still be required to show majority support in a given unit. Once recognized, however, the union could elect whether it will bargain for all workers in the unit or only for its voluntary members. A members-only union resembles an FLSA collective action. As long as membership remains open to all, the contract would only cover those workers who opt in by joining.

Image: Seth Tobocman, in solidarity

88. Non-union objectors would have no obligation to join, but no ground to complain if the members-only union won better wages and benefits. Under the NLRA, it is well settled that an employer may offer different wages and benefits to its represented and unrepresented employees, without violating §8(a)(3). *Dallas Morning News*, 285 NLRB 807, 808 (1987). This applies to non-union employees not covered by a members-only agreement, as in *NLRB v. Reliable Newspaper Delivery*, 187 F.2d 547, 549-550 (3d

Cir. 1951): "Unquestionably there was a difference between the treatment of the members of the [members only] union and the non-union employees with respect to the pay increase. Nevertheless the non-union men were not deprived of anything that was rightfully theirs. . . If they had been members of the union they would have been within the contract and would have received the extra money."

89. Members-only organizing is also immune to DFR-based attacks that presume exclusive representation. The Union has no duty of fair representation as to workers it does not represent, even if the employer chooses to mirror union-negotiated terms in its dealings with non-unit employees.

90. The members-only model is also criticized because employers might erode its strength by manipulating wages and work assignments to nonmembers. In a post-*Janus* future where exclusive representation is abolished, that horse has already left the barn. It is also a problem now whenever the employer can assign work to subcontractors or outside facilities. Unions already have the tools to demand most-favored-nations clauses (any benefits given nonmembers must be given to members), union-standards clauses (any work that can be done by members must be done at union scale) or work preservation (defining what work can be done outside the unit.) We don't represent these outside employees, but that doesn't prevent us from contractually defining how our members' rights dovetail with theirs.

91. It is also urged that members-only might permit rival unions to raid the workplace. The problem can be met if the members-only union is required to show majority support as a condition for recognition. Company unions can still be attacked with proof of employer domination under § 8(a)(2) and its state analogues. In a legal landscape where unions face outright decertification from non-union objectors, the threat from competing unions is the least of our worries.

92. Five years after the Morris petition was filed, the Obama Board summarily dismissed it, saying it had better things to think about: "we have decided to deny the above petitions, without passing on the merits of the arguments set out therein. . . The petitions call for a significant reinterpretation of the National Labor Relations Act, and would require the dedication of substantial Board resources to study the issues raised by the petitions and the significant legal and policy considerations presented thereby. We have determined that the resources that would be required to address the petitions are better allocated to the

adjudication of cases and to the rulemaking proceedings currently in progress at the Board." NLRB Unpublished Order, August 26, 2011.

93. This was a missed opportunity. As the progressive reforms of the Obama Board and its public-sector equivalents are being systematically dismantled, the labor movement can no longer avoid thinking about the "significant reinterpretation" the petitions demanded.

94. To bewail *Janus* as the Apocalypse is to concede that we are already helpless. But we are not helpless. If the law takes exclusive representation away, let's demand the right to bargain for those who *want* to be our members. If we are worried that public-sector wages and benefits will go down as a result of *Janus*, then let's start organizing strikes. It worked in West Virginia. If someone says such strikes are illegal, let's throw *Janus* back at them: union support is now a First Amendment right.

95. The challenge after *Janus* is not whether the New Deal system of exclusive representation remains desirable. The challenge is to be ready if it is taken away.

- Michael Anderson

Notes

1. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018)

27. 29 U.S.C. § 159(c)(5)

39. *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 318 (2010) repeatedly describes the regulations it struck down as an impingement on "corporations and unions" suggesting that both labor and capital would benefit from the ruling.

40. Oral argument transcript in *Janus*, at 46-47 https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_bocf.pdf

43. *Lochner v. New York*, 198 U.S. 45 (1905).

49. Oral argument transcript in *Janus*, at 40-44, 62, citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968) and *Garcetti v. Ceballos*, 547 U.S. 410, 421–422 (2006). The cases limiting secondary boycott prohibitions to avoid First Amendment conflict include *DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568 (1988); *Sheet Metal Workers' Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007), and *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010),

52. *See., e.g, Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (rejecting Right to Work attack on exclusive representation, following *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984); plaintiffs argue that *Knight* is no longer good law after *Janus*).

53. See Appellants' Post-Janus Replacement Brief in *Branch v. Department of Labor Relations*, Case 2017-P-0784 (Mass. App. Ct., filed August 27, 2018)

56. *Teachers v. Hudson*, 475 U.S. 292 (1986); Communications Workers v. Beck, 487 U.S. 735 (1988) were the pre-*Janus* vehicles for requiring unions to pay rebates to agency fee payers for union expenditure that were not "germane" to the unit. *Ellis v.*

Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 453 (1984)*; Scheffer v. Civil Service Employees Ass'n, Local 828*, 610 F.3d 782 (2d Cir. 2010) and *Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008) held that union organizing outside the objector's unit was not "germane", *but cf. United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002).

63. *Building & Constr.Trades Council v. Assoc. Builders & Contractors of Mass./R.I., Inc. (Boston Harbor),* 507 U.S. 218, 229 (1993)

72. *Vaca v. Sipes*, 386 U.S. 171 (1967)

74. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) holds that individual statutory discrimination claims may be subject to collective-bargaining arbitration if the parties agreed to make the union grievance procedure exclusive. Employers after *14 Penn Plaza* have a strong incentive to bargain for that exclusivity. A union's failure to win adequate relief may no longer be judged under the deferential *Vaca v. Sipes* standard if the plaintiff alleges that the union's failure to remedy the employer's discrimination itself violated Title VII. *Green v. AFT/Illinois Federation of Teachers Local 604*, 740 F.3d 1104 (7th Cir. 2014).

78. *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) had liberalized unit definitions to permit unions to exclude classifications unless the excluded classification has an "overwhelming community of interest" The Trump Board overruled *Specialty Healthcare* in *PCC Structurals,* 365 NLRB No. 160 (2017).

86. In the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining, Petition of Steelworkers Union and other labor organizations, seeking Rulemaking before the National Labor Relations Board (Aug. 14, 2007) http://www.nlrb.gov/nlrb/about/foia/documents/PetitionRequestingRulemaking.pdf.

89. Unions have no duty of fair representation to workers they do not represent. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n. 20 (1971); *Bensel v. Allied Pilots Association*, 387 F.3d 298, 312 (3d Cir. 2004); *Allen v. CSX Transp., Inc.*, 325 F.3d 768, 774-775 (6th Cir. 2003); *Dycus v. NLRB*, 615 F.2d 820, 827 (9th Cir. 1980).