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## The Other Janus and the Future of Labor's Capital

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# The Other *Janus* and the Future of Labor's Capital

David H. Webber\*

*Two forms of labor's capital—union funds and public pension funds—have profoundly reshaped the corporate world. They have successfully advocated for shareholder empowerment initiatives like proxy access, declassified boards, majority voting, say on pay, private fund registration, and the CEO-to-worker pay ratio. They have also served as lead plaintiffs in forty percent of federal securities fraud and Delaware deal class actions. Today, much-discussed reforms like revised shareholder proposal rules and mandatory arbitration threaten two of the main channels by which these shareholders have exercised power. But labor's capital faces its greatest, even existential, threats from outside corporate law. This Essay addresses one of those threats: the direct and indirect challenges posed to labor's capital by the Supreme Court's holding in Janus v. American Federation of State, County, and Municipal Employees, Council 31. These threats may have spillover effects in the corporate arena. This Essay discusses these developments in light of Randall Thomas's early and prescient work on labor as a shareholder.*

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## INTRODUCTION

When corporate lawyers and scholars discuss “the *Janus* case,” they usually mean *Janus Capital Group v. First Derivative Traders*, a 2011 U.S. Supreme Court opinion that limited who could be sued for making false statements in violation of Rule 10b-5.<sup>1</sup> But another *Janus*, a labor case, may have greater implications for the corporate world than its more familiar namesake.<sup>2</sup> In the 2017 decision *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Court overturned more than forty years of precedent to strike down “fair share fees” on First Amendment grounds.<sup>3</sup> “Fair share fees,” or “agency fees,” were required fees public employees paid to public-sector unions to compensate the unions for the benefits they secured for workers via collective bargaining.<sup>4</sup> Long-standing precedent held that workers could not be forced to join public-sector unions, or to support union political activities, but they could be required to pay “fair share fees.”<sup>5</sup> Under collective bargaining rules, unions were required to represent all workers in a unionized workplace, even those who chose not to join them.<sup>6</sup> In the absence of fair share fees, the requirement that unions represent all workers could have led to worker free riding, one of the express rationales for upholding such fees under long-standing Supreme Court precedent in 1977’s *Abood v. Detroit Board of Education*.<sup>7</sup>

Forty years later, Mark Janus brought suit to directly challenge *Abood* after Justice Alito invited such a challenge in *Harris v. Quinn*,

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1. 564 U.S. 135, 141 (2011); see 17 C.F.R. § 240.10b-5 (2019) (“It shall be unlawful for any person . . . [t]o make any untrue statement of a material fact . . . in connection with the purchase or sale of any security.”).

2. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (holding that “fair share fees” violate the free speech rights of nonunion members).

3. *Id.* at 2460, 2486 (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

4. *Id.* at 2461–66; *id.* at 2489 (Kagan, J., dissenting) (noting that “agency fees [are] now often called fair-share fees”).

5. *Abood*, 431 U.S. at 234 (approving nonunion members’ argument that “they may constitutionally prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative”).

6. *Right to Fair Representation*, NAT’L LAB. REL. BOARD, <https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/right-fair-representation> (last visited Nov. 8, 2019) [<https://perma.cc/7TWM-FLGC>] (“Your union has the duty to represent all employees – whether members of the union or not – fairly, in good faith, and without discrimination.”).

7. *Abood*, 431 U.S. at 221–24.

asking whether it was time to revisit that holding.<sup>8</sup> Janus was a child-support specialist who worked for the Illinois Department of Healthcare and Family Services.<sup>9</sup> He was not a member of the local American Federation of State, County, and Municipal Employees (“AFSCME”) union that represented him and workers like him in negotiating wages, benefits, and workplace conditions with the State of Illinois.<sup>10</sup> He objected to the forty-five-dollar-per-month “fair share fee” he was required to pay to the AFSCME local to compensate it for negotiating on his behalf, arguing that the fee violated his First Amendment rights.<sup>11</sup> Janus characterized union negotiations with the government over salaries, pensions and benefits as speech.<sup>12</sup> The Supreme Court agreed.<sup>13</sup> Writing for the 5-4 majority, Justice Alito stated: “In simple terms, the First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.”<sup>14</sup> Mark Janus’s negative-value legal claim was financed by the Liberty Justice Center (part of the conservative think tank Illinois Policy Institute) and funded by organizations like Donors Trust, the Charles Koch Institute, and the Ed Uihlein Family Foundation.<sup>15</sup>

The *Janus* holding has both direct and indirect implications for labor as a shareholder. The direct implication is that the reasoning in *Janus* might apply directly to public pension funds themselves. Just as public-sector workers were once required to pay fair share fees, so they are required to contribute to public pension plans.<sup>16</sup> Could the reasoning in *Janus* apply to these plans? In an era in which environmental, social, and governance investing has risen to prominence, at what point do a public pension’s investment choices implicate the First Amendment,

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8. See 573 U.S. 616, 635 (2014) (“The *Abood* Court’s analysis is questionable on several grounds. Some of these were noted or apparent at or before the time of the decision, but several have become more evident and troubling in the years since then.”).

9. Amy Howe, *Opinion Analysis: Court Strikes down Public-Sector Union Fees*, SCOTUSBLOG (June 27, 2018, 12:14 PM), <https://www.scotusblog.com/2018/06/opinion-analysis-court-strikes-down-public-sector-union-fees/> [<https://perma.cc/6VUV-U5XE>].

10. *Id.*

11. *Id.*

12. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2461–62 (2018).

13. *Id.* at 2486.

14. *Id.* at 2467.

15. Celine McNicholas, Zane Mokhiber & Marni von Wilpert, *Janus and Fair Share Fees: The Organizations Financing the Attack on Unions’ Ability to Represent Workers*, ECON. POL’Y INST. 1, 9 (Feb. 21, 2018), <https://www.epi.org/files/pdf/142063.pdf> [[perma.cc/8QJ9-UMMC](https://perma.cc/8QJ9-UMMC)].

16. *NASRA Issue Brief: Employee Contributions to Public Pension Plans*, NAT’L ASS’N ST. RETIREMENT ADMINS. 1 (Sept. 2019), <https://www.nasra.org/files/Issue%20Briefs/NASRAContribBrief.pdf> [<https://perma.cc/JEW7-FBAY>] (discussing the mandatory nature of public pension fund payments).

thereby mandating opt-out rights to dissenters?<sup>17</sup> And if so, will *Janus* hasten the demise of the traditional defined-benefit pension in favor of the 401(k), following the path taken in the private sector decades ago?<sup>18</sup>

Even if the *Janus* holding does not directly apply to the financing and structure of public pension funds—and there are good reasons to believe it does not—the case is likely to have indirect effects on labor’s shareholder activism.<sup>19</sup> To the extent that the *Janus* holding reduces funding for public-sector unions, those unions will have fewer resources to deploy for shareholder activism and to defend public pensions from the unrelenting legal and political attacks they face from the same forces that financed *Janus*.<sup>20</sup>

Finally, I will discuss these new threats to labor’s capital in light of Randall Thomas’s early and prescient work on the subject more than twenty years ago. Thomas coauthored, with Stewart Schwab, the first empirical work on labor’s shareholder activism, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, published in the *Michigan Law Review* in February 1998.<sup>21</sup> That piece noted the tension such funds might face in navigating their interests as both workers and shareholders.<sup>22</sup> And it made several predictions, including that “the alignment of union and other shareholders will have profound effects on both corporate governance and long-term union goals”<sup>23</sup> and “[i]f unions can package the results of their research in proposals that emphasize to shareholders the ways in which the two groups’ interests are aligned, then union-shareholder activism could be here to stay.”<sup>24</sup>

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17. See Keyur Patel, *ESG Investing Moves to the Mainstream*, 74 FIN. ANALYSTS J. 39, 39 (2018) (“The number of companies worldwide that report environmental, social, and governance (ESG) data has grown exponentially over recent years, from fewer than 20 in the early 1990s to almost 9,000 in 2016.”).

18. See Alicia H. Munnell & Anqi Chen, *401(k)/IRA Holdings in 2016: An Update from the SCF*, CTR. FOR RETIREMENT RES. B.C. 2 (Oct. 2017), [https://crr.bc.edu/wp-content/uploads/2017/10/IB\\_17-18.pdf](https://crr.bc.edu/wp-content/uploads/2017/10/IB_17-18.pdf) [<https://perma.cc/9R29-NCUN>].

19. See, e.g., Da Lin, *Janus and Public Pension Funds*, HARV. L. REV. BLOG (Sept. 17, 2018), <https://blog.harvardlawreview.org/janus-and-public-pension-funds/> [<https://perma.cc/J6DR-AJ3E>] (discussing the differences between public pension funds and agency fees and questioning whether the *Janus* majority would apply its reasoning to public pension funds).

20. See McNicholas, Mokhiber & von Wilpert, *supra* note 15, at 8–12 (examining the organizations funding fair share fee litigation and noting that without these fees unions will be forced to operate with fewer resources).

21. See Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998) (investigating the consequences of new shareholder activism by unions).

22. *Id.* at 1020.

23. *Id.* at 1023.

24. *Id.* at 1025.

These predictions hold up after twenty-one years.<sup>25</sup> Hopefully, this discussion of *Janus* will help inform our view of whether they will continue to hold in the coming decades.

#### I. THE POTENTIAL DIRECT EFFECTS OF *JANUS* ON LABOR'S CAPITAL

The first threat posed by *Janus* to labor's capital is a direct one: the argument that struck down fair share fees as violating the First Amendment could potentially be applied to public pension funds, which also receive mandatory contributions from public-sector workers.<sup>26</sup> To what extent might public pension fund shareholder activism constitute coercive speech, and where might courts draw the line? In a separate writing project, I will offer a comprehensive analysis of the First Amendment implications of mandatory pension contributions by state and local government employees. Here, I will highlight some of the main arguments on both sides.

##### A. *The Debate Over Whether Pension Contributions Are Coercive*

Even before *Janus* was decided, some commentators argued that workers should be able to opt out of mandatory pension contributions on First Amendment grounds.<sup>27</sup> In *Shareholder Activism by Public Pension Funds and the Rights of Dissenting Employees Under the First Amendment*, Eric Finseth characterized environmental, social, and governance ("ESG") investing as political or ideological rather than commercial speech.<sup>28</sup> By engaging in ESG investing, Finseth argued, pensions depart from the economic goals that are supposed to be paramount, triggering heightened First Amendment concerns.<sup>29</sup> As such, public pensions must create opt-out rights for contributing workers.<sup>30</sup> There are multiple responses to Finseth's argument. First, ESG investing is not a departure from, but an enhancement of,

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25. See DAVID WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* (2018) (discussing the effects of labor's shareholder activism over the years and detailing the legal and political challenges this activism faces).

26. *NASRA Issue Brief: Employee Contributions to Public Pension Plans*, *supra* note 16, at 1 (discussing the mandatory nature of public pension fund payments).

27. See, e.g., Eric John Finseth, *Shareholder Activism by Public Pension Funds and the Rights of Dissenting Employees Under the First Amendment*, 34 HARV. J. L. & PUB. POL'Y 289, 293 (2011) (arguing that dissenting employees have a First Amendment right to object to their portion of shares being used to advance political or ideological goals).

28. *Id.* at 349–62.

29. *Id.* at 366.

30. *Id.* at 294.

economic criteria.<sup>31</sup> ESG advocates have argued that taking such factors into account represents an investment decision because, for example, global warming poses investment risks for a broad range of companies, including, most prominently, energy and insurance companies.<sup>32</sup> There is some (contested) empirical evidence that ESG investing has outperformed traditional investment portfolios.<sup>33</sup> Second, pension fund fiduciary duties bar trustees from investing for purely political reasons.<sup>34</sup> Still, it is true that pensions have, on occasion, taken explicitly political criteria into account in making investments.<sup>35</sup> The classic example was divestment from South African companies over Apartheid, in which many states adopted legislation changing their plans to require divestment.<sup>36</sup> Widespread revulsion against Apartheid,

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31. See, e.g., *Investment Governance and the Integration of Environmental, Social and Governance Factors*, ORG. FOR ECON. COOPERATION & DEV. 30 (2017), <https://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf> [<https://perma.cc/F676-HYF5>] (“[I]t is increasingly argued that integrating ESG factors – especially climate change factors – can help institutional investors avoid significant shocks to their portfolios related to physical and transition risks.”).

32. *Id.*; see, e.g., Meaghan Kilroy, *Environmental, Social Issues Big in Proxy Season*, PENSIONS & INV. (July 9, 2018, 1:00 AM), <https://www.pionline.com/article/20180709/PRINT/180709889/environmental-social-issues-big-in-proxy-season> [<https://perma.cc/DC4L-GA8D>] (noting that environmental and social concerns accounted for over half of shareholder proposals submitted at U.S. companies in 2018); Mike Scott, *Insurers Will Be Hard-Hit by Climate Change but They’re Not Investing in the Low-Carbon Economy*, FORBES (May 31, 2018, 10:00 AM), <https://www.forbes.com/sites/mikescott/2018/05/31/insurers-in-the-front-line-of-the-fight-against-climate-change-shoot-themselves-in-the-foot/#4cb1b6db40fa> [<https://perma.cc/4WSS-KAHQ>] (discussing the significant losses facing insurers as climate change hurts the companies they invest in).

33. See Gunnar Friede, Timo Busch & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 212 (2015) (“[W]e find that the business case for ESG investing is empirically well founded.”). *Contra* Frank J. Fabozzi, K.C. Ma & Becky J. Oliphant, *Sin Stock Returns*, 35 J. PORTFOLIO MGMT. 82, 84 (2008) (“The financial performance that underlies social responsibility has generated an obvious interest on the part of investors, but the empirical evidence that supports investment performance is far from conclusive.”); Christophe Revelli & Jean-Laurent Viviani, *Financial Performance of Socially Responsible Investing (SRI): What Have We Learned? A Meta-Analysis*, 24 BUS. ETHICS 158, 158 (2015) (“[G]lobally, there is no real cost or benefit to investing in SRI.”).

34. JOHN J. CANARY, U.S. DEP’T OF LABOR, FIELD ASSISTANCE BULL. NO. 2018-01, INTERPRETIVE BULLETINS 2016-01 AND 2015-01 (Apr. 23, 2018) <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01> [<https://perma.cc/E6CE-WDYM>] (“The Department has a . . . longstanding position that . . . fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.”).

35. See Richard M. Ennis & Roberta L. Parkhill, *South African Divestment: Social Responsibility or Fiduciary Folly?*, 42 FIN. ANALYSTS J. 30, 30–33 (1986) (discussing investment and divestment strategies directed at influencing the political situation in South Africa).

36. See Sandy Boyer, *Divesting from Apartheid: A Summary of State and Municipal Legislative Action on South Africa*, AM. COMMITTEE ON AFR. (Mar. 1983), <http://kora.matrix.msu.edu/files/50/304/32-130-CB5-84-al.sff.document.acoa000587.pdf> [<https://perma.cc/9KH8-DNC3>] (cataloging state and local legislation on divesting from South African companies and apartheid).

legislation protecting pension fiduciaries from claims for breach of fiduciary duty over Apartheid divestment, and the lack of legal challenges to fiduciaries over such divestment created precedents of uncertain value when it comes to adopting explicitly political criteria.<sup>37</sup> Even widespread scientific consensus over global warming has not translated into U.S. pension fiduciaries directly divesting from carbon-producing companies on political grounds alone.<sup>38</sup> Such choices are still largely rooted in debates about the business risk of investing in unsustainable businesses.<sup>39</sup> (In contrast, some European funds have divested on political grounds alone, such as when Norway's Government Pension Fund divested from oil and gas.<sup>40</sup> However, even these divestments can be considered business focused because Norway is massively exposed to the oil and gas business as an oil-producing country.<sup>41</sup> The Pension Fund is itself funded by the Norwegian government from oil revenues including taxes and licenses for oil exploration, and is therefore already significantly exposed to the oil and gas business.<sup>42</sup>) To the extent that investing or divesting on environmental grounds may be characterized as a political and not an investment choice—as Finseth seems to describe it—must states provide an opt-out right for individual employees in such circumstances, given the coercive nature of pension contributions?

Yet another First Amendment concern was raised by Jennifer Mueller.<sup>43</sup> Mueller argued in a *Slate* article, *How the Janus Ruling Might Doom Public Pensions Next*, that if a public employee “cannot be required to ‘subsidize private speech on matters of substantial public

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37. See Ennis & Parkhill, *supra* note 35, at 35–36.

38. See Umair Irfan, *The World's Richest Institutions Invest in Fossil Fuels. Activists are Changing That.*, VOX (May 15, 2019), <https://www.vox.com/2019/5/13/18282438/fossil-fuel-divestment-climate-finance> [<https://perma.cc/LR5V-Z24N>].

39. See, e.g., Stanley Reed, *Norway Moves to Sell Some Oil and Gas Shares From Wealth Fund*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/business/norway-fund-oil-gas.html> [<https://perma.cc/6RHG-BY92>] (discussing the Norwegian wealth fund's sale of oil and natural gas holdings).

40. *Id.*

41. *Id.* (“The Norwegian finance minister, Siv Jensen, said on Friday that the government aimed to ‘reduce the vulnerability of our common wealth to a permanent oil price decline.’”).

42. See *id.* (“The fund . . . was created with revenue from the country's oil and gas operations and is invested in securities and real estate outside Norway with the intention of providing for an aging population and for when oil revenues begin to decline.”); see also *Government Pension Fund Act*, NORGES BANK INV. MGMT. (Aug. 25, 2015), <https://www.nbim.no/en/organisation/governance-model/government-pension-fund-act/> [<https://perma.cc/NJ2Z-7QH8>] (establishing that the Pension Fund is funded in part by “the net cash flow from petroleum activities,” which includes revenue from certain taxes, dividends, and royalties).

43. Jennifer Mueller, *How the Janus Ruling Might Doom Public Pensions Next*, SLATE (July 18, 2018, 4:17 PM), <https://slate.com/news-and-politics/2018/07/how-the-janus-ruling-might-doom-public-pensions-next.html> [<https://perma.cc/X9W9-YHGK>].



concern,' as Justice Alito wrote in *Janus*, why does this protection stop with his union fee? Why does it not also extend to his pension?"<sup>44</sup> She amplified these arguments in a law review article, *The Paycheck Problem*.<sup>45</sup> To the extent that corporations themselves engage in political activity, workers are arguably forced to subsidize such activity through their mandatory contributions to pension funds that, in turn, invest in said corporations.<sup>46</sup> These companies regularly lobby the government on matters of public concern.<sup>47</sup> For example, pharmaceutical companies lobby the government over Medicaid reimbursement levels.<sup>48</sup> Can this kind of lobbying be analogized to lobbying the government over public employee wages and benefits, which the *Janus* majority characterized as speech? This concern raised by Mueller goes even further than the argument made by Finseth, which applied only to ESG investing.<sup>49</sup> It could potentially sweep almost all investment into the realm of the First Amendment.

In contrast, Da Lin has argued that public pension investing differs in a fundamental respect from collective bargaining by labor unions, and therefore *Janus* might not apply.<sup>50</sup> She pointed out that the *Janus* majority "stressed that fees supporting 'collective bargaining in the private sector' do not raise the same free speech problems as fees supporting 'collective bargaining with a government employer.'"<sup>51</sup> Lin notes that "[t]his is because '[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.'"<sup>52</sup> *Janus* only struck down public-sector agency fees and, in so doing, placed significant weight on the public-private sector distinction.<sup>53</sup> That seems to suggest that the court would leave private-sector union agency fees alone. In one post-*Janus* case, a federal district court declined to apply the holding to a

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44. *Id.*

45. Jennifer Mueller, *The Paycheck Problem*, 20 U. PA. J. CONST. L. 561 (2018) (examining the tensions in the Supreme Court's recent First Amendment jurisprudence and suggesting a new limiting principle to advance the operational purpose of the First Amendment).

46. *Id.* at 566.

47. *Id.* at 567, 605.

48. *Id.* at 604.

49. Finseth, *supra* note 27, at 293.

50. See Lin, *supra* note 19 (distinguishing public pensions from unions on the basis that public pensions invest in private-sector companies, rather than in government entities).

51. *Id.* (quoting *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2480 (2018)).

52. *Id.* (quoting *Janus*, 138 S. Ct. at 2480).

53. See 138 S. Ct. at 2480 (criticizing *Abood* for failing to "take into account the difference between the effects of agency fees in public- and private-sector collective bargaining"); *id.* at 2486 (concluding that "[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees.>").

private-sector union.<sup>54</sup> Lin further characterized public pension “speech” as focusing on the internal governance of investees or the fees charged by investment managers, “private matters that affect neither government budgets nor important public policies.”<sup>55</sup> By an extension of this reasoning, Mueller’s argument is at best an indirect one.<sup>56</sup> Public pension investment in companies and shareholder activism at such companies are interventions in the private sphere.

Thus, one question at the heart of the doctrinal dispute between Finseth, Mueller, and Lin is whether public pension investment activity constitutes forced speech of the sort that would run afoul of the Court’s holding in *Janus*.<sup>57</sup> Rather than parse out that argument here, I will instead assume for the sake of argument that public pension fund investment does indeed implicate the First Amendment concerns raised in *Janus*. What effects would that have on public pensions and their investment behaviors? Briefly, it could require the funds to create opt-out rights, thereby putting even more pressure on funds to convert to a 401(k) model.<sup>58</sup> It could also lead to reductions in ESG activity, if any such ruling were to strongly suggest that such considerations deviated from value-maximizing activity. But it could additionally lead to minor structural changes that would have negligible effect. The devil is in the details, but some options are sketched out below.

### B. Structural Direct Effects

One potential workaround for the speech problem would be a system of direct employer payments, as Da Lin and Ben Sachs have

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54. See *Carter v. Transp. Workers Union of Am. Local 556*, 353 F. Supp. 3d 556, 576 (N.D. Tex. 2019) (“[T]he ruling in *Janus* applies to public-sector unions and workers, not private-sector unions and workers. . . . It remains to be seen if the Supreme Court’s ruling in *Janus* will be extended to private-sector unions; however, this is not the issue before the Court in the instant case.”).

55. Lin, *supra* note 19.

56. See Mueller, *supra* note 45, at 566–67, 605 (arguing that at a fundamental level, private pensions are not dissimilar to public ones).

57. See Finseth, *supra* note 27, at 293 (arguing that “dissenting public sector employees have a right to opt out of having their pro rata portion of shares of publicly traded corporations held by public pension funds voted with respect to political or ideological matters in a manner with which the dissenting employees disagree”); Lin, *supra* note 19 (arguing that although “mandatory employee pension contributions are [likely] unconstitutional under *Janus*’s framework,” other viable funding options exist); Mueller, *supra* note 45, at 567 (arguing that it is difficult “to identify constitutionally meaningful grounds to distinguish pension contributions from agency fees for the purposes of a compelled speech analysis”).

58. See, e.g., Finseth, *supra* note 27, at 294, 366 (arguing that employees have these rights under the First Amendment).

argued.<sup>59</sup> Rather than force workers to pay into the pension system via a paycheck deduction, employers could make a direct payment on behalf of workers to the pension. If the pension dollars are directly contributed by the employer on the worker's behalf, rather than by the worker herself, the First Amendment implications may be eliminated.<sup>60</sup> Thus, states and cities interested in largely preserving the current defined benefit could move to collectively managed pension funds, and these could largely continue operating as usual.

A second option would be the creation of opt-out rights. Public employees could opt out of the pension if they so desire.<sup>61</sup> The question is, what would they opt into? One possible answer is the 401(k). As I have argued in my book, *The Rise of the Working Class Shareholder: Labor's Last Best Weapon*, the greatest threat to labor's capital and labor's shareholder activism is the 401(k).<sup>62</sup> There is a concerted effort by many of the same entities that financed *Janus* to undermine public pension funds by "smashing and scattering" them into millions of individually managed 401(k)s that are then farmed out to mutual funds.<sup>63</sup> The success of that campaign will likely doom labor's shareholder activism, bringing to an end a significant chapter in the history of corporate governance.<sup>64</sup> That is because the necessary precondition for labor to exercise shareholder power is for it to have separately managed pools of assets like those that currently exist in public pension funds.<sup>65</sup> Mutual funds have shown an increasing willingness to be active, but they will never fill the void of public pensions, for structural business reasons that I have discussed in depth elsewhere.<sup>66</sup> Elimination of pensions and widespread conversion to the 401(k) is not unthinkable—it is exactly what has happened in the private sector, and a well-funded campaign to bring about the same conversion in the public sector is already underway, as detailed in *The*

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59. See Lin, *supra* note 19 (discussing the use of direct employer payments in the public pension fund context); Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1073–74 (2018) (discussing the use of direct employer payments in the union context).

60. Lin, *supra* note 19.

61. See Finseth, *supra* note 27, at 294, 366 (arguing that employees have these rights under the First Amendment).

62. WEBBER, *supra* note 25, at 213–21.

63. David Webber, *The Real Reason the Investor Class Hates Pensions*, N.Y. TIMES (March 5, 2018), <https://www.nytimes.com/2018/03/05/opinion/investor-class-pensions.html> [https://perma.cc/F9XR-7G8Z].

64. See WEBBER, *supra* note 25, at 213, 218–20 (discussing the practical difficulties of sustaining meaningful shareholder activism with a 401(k) plan, as opposed to a centralized, defined-benefit plan).

65. *Id.*

66. *Id.* at 220.

*Rise of the Working Class Shareholder*.<sup>67</sup> The result in *Janus* will only aid that campaign.<sup>68</sup>

Still, to the extent workers could retain the option to remain in traditional public pension funds, there are good reasons to believe that the majority of them would do so. First, as Lin, Sachs, and others have argued, there is no free-rider problem in the public pension context because workers do not get pension benefits if they fail to pay into the system.<sup>69</sup> This contrasts with nonunionized workers who may still benefit from wages, benefits, and working conditions negotiated by public-sector unions. The absence of a free-rider problem reduces the incentive to drop participation, since costs are not unfairly imposed on some workers to the benefit of all.<sup>70</sup> Thus, the main reason to opt out of a public pension would be if the pension's ESG investing so offended a worker that she preferred to opt out. Here, the cultural messaging around public pension funds might play a role in that worker's opt-out decision.

For decades, critics of public-sector unions have argued that they are bad for workers.<sup>71</sup> According to that argument, these unions collect fees from workers that benefit the unions themselves and their leadership at the expense of the rank and file.<sup>72</sup> The movement to deprive public-sector workers of the right to unionize has long been called "right to work," conveying the message that unions inhibit worker freedom and workers' ability to earn a living.<sup>73</sup> Thus, once legally liberated from the requirement of paying union dues, workers could keep more of their paychecks and rid themselves of useless, "job-killing" unions.<sup>74</sup> As discussed below, that has not happened yet, but antiunion organizations remain confident that it will.

In contrast, critics of public pensions have made almost the opposite argument. In such messaging, the victim of public pension

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67. *Id.*

68. *Id.* at 238–40.

69. *See, e.g.,* Lin, *supra* note 19 (contrasting public pensions with labor unions, with respect to the free-rider problem).

70. *See id.* (discussing why "a voluntary payment mechanism is more viable in the pension setting" than in the union setting).

71. *See, e.g.,* David Harsanyi, *Public-Sector Unions Deserve to Be Destroyed*, REASON (Mar. 2, 2018, 12:30 AM), <https://reason.com/2018/03/02/public-sector-unions-deserve-to-be-destro> [<https://perma.cc/74ZT-R9F8>] (highlighting the coercive nature of public-sector unions).

72. *See id.* (comparing the mechanics of public-sector unions to racketeering).

73. *See Right to Work Frequently-Asked Questions*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., <https://www.nrtw.org/right-to-work-frequently-asked-questions/> (last visited Nov. 8, 2019) [<https://perma.cc/HEL6-R5MZ>].

74. *See* Harsanyi, *supra* note 71 (challenging the notion that unions are helpful for workers—for example, through alleged benefits of collective bargaining negotiations).

funds is not workers but taxpayers.<sup>75</sup> According to this view, public employee pensions are so exorbitant, so rich and unaffordable, that they must be pared back or they will harm taxpayers.<sup>76</sup> For example, Americans for Prosperity, financed by the Koch brothers, ran a “Lifestyles of the Rich and Famous on A Government Pension” campaign in California, in which it hired a chauffeur to drive a white stretch limousine around the state to draw attention to what retirement was supposedly like for California state employees.<sup>77</sup> Whatever effect that message had on taxpayers, it would seem unlikely to discourage workers from participating in such pensions. If anything, it might have increased their gratitude for them.

Thus, in deciding whether to drop union membership, a worker might have strong cultural and economic reasons for doing so. But in dropping participation in a public pension fund, there is little or no economic reason to do so, and in fact, that worker may well think of that decision as one requiring her to give up a large benefit in exchange for greater ideological purity. She might still make that choice. Public pensions might be smaller without such dissenting participants, and that would correspondingly decrease their shareholder power, but it would not unfairly impose costs on some workers for the benefit of others, thereby incentivizing all workers to drop out.

## II. THE POTENTIAL INDIRECT EFFECTS OF *JANUS* ON LABOR’S CAPITAL

Even if *Janus* does not apply directly to public pensions, the indirect effects may be large. To the extent *Janus* harms public-sector unions, public pensions may be harmed too. It could reduce the funds available for activism or reduce the funds available to defend public pensions from attacks on their very existence.

*Janus* was financed by the Liberty Justice Center and the National Right to Work Legal Defense Foundation.<sup>78</sup> Their express

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75. See Monique Morrissey, *Understanding Cuts to Public Pensions*, ECON. POL’Y INST. 1, 1 (June 9, 2014), <https://www.epi.org/files/2014/understanding-cuts-to-public-pensions.pdf> [<https://perma.cc/B9Q8-B279>] (noting “fears that underfunded public pensions are a growing burden on taxpayers”).

76. See *id.*

77. WEBBER, *supra* note 25, at 221; Americans for Prosperity California (@AFPCalifornia), *Pension Reform Tour*, FACEBOOK, [https://www.facebook.com/pg/AFPCalifornia/photos/?tab=album&album\\_id=10150128290552318](https://www.facebook.com/pg/AFPCalifornia/photos/?tab=album&album_id=10150128290552318) (last updated Oct. 13, 2013) [<https://perma.cc/JA99-MKNY>].

78. See McNicholas, Mokhiber & von Wilpert, *supra* note 15, at 7–9 (using IRS Form 990 filings to determine that both nonprofits represented the plaintiffs in *Janus*); Spencer Sunshine, *Meet the Money Backing Mark Janus and His Case v. AFSCME*, UNIONIST (Mar. 5, 2018), <https://unionist.com/blogs/news/meet-the-money-backing-mark-janus-and-his-case-v-afscme>

purpose in bringing the lawsuit was to undermine public-sector unions.<sup>79</sup> The theory was that if *Janus* struck down fair share fees, funding for public-sector unions would collapse, an argument the unions themselves seemed to embrace.<sup>80</sup> In anticipation of the *Janus* ruling, major unions cut their budgets significantly.<sup>81</sup> The capital strategies groups of major unions were not spared these across-the-board cuts. For example, the Service Employees International Union (“SEIU”) merged its Capital Stewardship Program and its Research and Policy Programs into a new Strategic Initiatives Department designed to fulfill both functions.<sup>82</sup> Long considered the gold standard for labor’s shareholder activism, the SEIU’s Capital Stewardship Program was a prime mover, for example, in the California Public Employees Retirement System’s decision to divest from hedge funds, a four-billion-dollar divestment that sent a shockwave through the industry.<sup>83</sup> True, not all unions cut back as the SEIU did, but the anticipated net effect of *Janus* cut union resources in ways that at least indirectly impacted the corporate sphere. Unions reoriented scarce resources towards remarketing themselves to their own members to keep them from dropping the union or ceasing to pay their fair share fees in anticipation of an adverse ruling in *Janus*.<sup>84</sup>

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[<https://perma.cc/V7LH-WZQ5>] (stating that Mark Janus was represented by counsel from both nonprofits).

79. See McNicholas, Mokhiber & von Wilpert, *supra* note 15, at 9 (describing how the *Janus* plaintiffs argued “that public-sector unions should not be able to cover the cost of representing and negotiating on behalf of nonmembers who benefit from the union’s representation”).

80. See *id.* at 2 (“Because unions are legally required to represent all employees in a bargaining unit, not just union members, fair share fees are crucial . . . [E]liminating fair share fees defunds unions and goes a long way toward stripping workers of their ability to organize and bargain collectively.”).

81. See Noam Scheiber, *Supreme Court Labor Decision Wasn’t Just a Loss for Unions*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/business/economy/unions-funding-political.html> [<https://perma.cc/4S9L-FWQE>] (“Mary Kay Henry, the president of the Service Employees International Union, said that her union had cut its budget by about 30 percent in anticipation of the decision . . .”); Mike Antonucci, *Exclusive: Ahead of a Key Supreme Court Decision, America’s Largest Teachers Union Slashes Budget by \$50 Million, Projects That 300,000 Members May Leave*, 74 MILLION (May 21, 2018), <https://www.the74million.org/article/exclusive-largest-union-to-slash-budget-by-50-million-in-advance-of-supreme-court-decision-300000-members-will-leave-within-2-years-leaders-predict/> [<https://perma.cc/GR5J-M7TE>] (reporting that the National Education Association planned to cut its budget by fifty million dollars, an estimated thirteen percent reduction).

82. The Author received this information in an off-the-record email from an individual with knowledge of the restructuring.

83. WEBBER, *supra* note 25, at 101–03; Mary Williams Walsh & Alexandra Stevenson, *With Pension Fund Giant Calpers Quitting Hedge Funds, Other Investors Reflect*, N.Y. TIMES: DEALBOOK (Sept. 16, 2014, 9:31 PM), <https://dealbook.nytimes.com/2014/09/16/with-calpers-quitting-hedge-funds-other-investors-reflect/> [<https://perma.cc/SBS2-H3FG>].

84. See Katherine Barrett & Richard Greene, *How Unions Are Already Gearing Up for a Supreme Court Loss*, GOVERNING (Oct. 5, 2017, 3:00 AM), <https://www.governing.com/topics/mgmt/gov-janus-afscme-right-to-work-states-unions.html>

From the perspective of the unions, the short-term reaction to *Janus* has been a best-case scenario. So far, there has been almost no drop in union membership nationwide, and there is some evidence that union membership has actually grown slightly.<sup>85</sup> For example, Pennsylvania, Oregon, California, and Chicago have all reported slight increases in union membership since *Janus*.<sup>86</sup> Some have attributed that relative success to the unions' remarketing campaigns.<sup>87</sup> Others point to public-sector unions' still-formidable ability to flex their political muscles in certain states, some of which have adopted legislation designed to dampen the negative effects of *Janus*.<sup>88</sup> For example, New Jersey adopted legislation that narrowed the time frame within which workers must decide to leave their unions,<sup>89</sup> and New York adopted legislation to ban disclosure of public employee contact information that could enable antiunion groups to contact public employees and encourage them to stop paying their fees.<sup>90</sup> California, Washington, and New Jersey "now prohibit public employers from discouraging union membership."<sup>91</sup> Still others attribute this short-term, post-*Janus* success to high-profile teacher strikes and the increasing popularity of unions in a time of growing concern about economic inequality and unequal bargaining power.<sup>92</sup>

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[<https://perma.cc/N3KA-5PNZ>] (noting unions' efforts to convince employees of the benefits of union membership, and to reiterate the problems with employees who do not pay dues yet receive benefits from the union).

85. See Katherine Barrett & Richard Greene, *Defying Predictions, Union Membership Isn't Dropping Post-Janus*, GOVERNING (Dec. 10, 2018, 3:00 AM), <http://www.governing.com/topics/workforce/gov-janus-impact-union-membership.html>

[<https://perma.cc/L8KN-85BY>] (noting that, post-*Janus*, "most [union members] are staying put" and membership has increased for certain unions, such as AFSCME).

86. *Id.*

87. See *id.* (describing the membership drives unions ran in anticipation of the *Janus* ruling, which unions predicted would be unfavorable).

88. See *id.* (noting how "some Democratically controlled states have recently made it harder for public employees to leave unions").

89. Barrett & Greene, *supra* note 85; Pauline M.K. Young, *Union Members May Opt-Out of Paying Dues*, N.J. LAW. BLOG (Nov. 8, 2018), <https://www.newjerseylawyersblog.com/union-members-may-opt-out-of-paying-dues/> [<https://perma.cc/RH4K-2X8J>] (discussing New Jersey's Workplace Democracy Act).

90. Barrett & Greene, *supra* note 85; Katherine Barrett & Richard Greene, *How Much Privacy Do Public Employees Actually Have?*, GOVERNING (Sept. 24, 2018, 3:00 AM), <https://www.governing.com/topics/workforce/gov-government-public-employee-privacy.html> [<https://perma.cc/5ZAE-2QFK>] (discussing an executive order signed by Governor Cuomo).

91. Barrett & Greene, *supra* note 85.

92. See Bradley D. Marianno, *Analysis: From the High Court to the Picket Line—How the Janus Case Emboldened Teachers Unions & Made Strikes Key to Their Survival*, 74 MILLION (Jan. 16, 2019), <https://www.the74million.org/article/analysis-from-the-high-court-to-the-picket-line-how-the-janus-case-emboldened-teachers-unions-made-strikes-key-to-their-survival/> [<https://perma.cc/E6U9-BWMY>]; Lydia Saad, *Labor Union Approval Steady at 15-Year High*,

But others view these short-term victories as the last gasp of public-sector unions. Conservative groups are rallying to launch a campaign to convince workers to stop paying their fair share fees and drop their union memberships.<sup>93</sup> They predict that union membership and fair share fees will fall once employees become informed about their right to leave,<sup>94</sup> with most of the decline coming from future employees never signing up in the first place.<sup>95</sup>

As noted above, such declines could lead to reduced assets available for unions to engage in shareholder activism and reduced capital strategies staffs, as has occurred at SEIU and AFSCME. Declining membership and fee payment also have implications for the drive to 401(k)s noted earlier. As I document in *The Rise of the Working Class Shareholder*, there is a coordinated campaign to convert these public pension funds into 401(k)s that are managed by mutual funds.<sup>96</sup> The Koch brothers, the Arnold Foundation, and others have utilized almost every available tool of civil society to bring about this result, including state- and citywide ballot initiatives, proposed legislation, litigation, and electoral strategies.<sup>97</sup> The only cohesive opposition to that drive has come from organized labor.<sup>98</sup> For example, the Arnold Foundation has repeatedly financed statewide ballot initiatives in California that would prospectively convert entities like the California Public Employees' Retirement System ("CalPERS") and the California State Teachers' Retirement System ("CalSTRS") into defined-contribution funds.<sup>99</sup> The prime mover in opposing such initiatives has

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GALLUP (Aug. 30, 2018), <https://news.gallup.com/poll/241679/labor-union-approval-steady-year-high.aspx> [<https://perma.cc/SR43-KUS2>] (noting recent strong support for unions).

93. See Barrett & Greene, *supra* note 85.

94. See *id.* ("[M]embership may also be sustaining or thriving because people aren't aware of the *Janus* decision or because of actions taken by states to protect unions.").

95. See *id.* (quoting Ken Girardin of the conservative Empire Center for Public Policy as saying, "Based on what we've observed, you will likely see a multi-year drop in membership, driven chiefly by the fact that people aren't going to join in the first place").

96. WEBBER, *supra* note 25, at 213.

97. *Id.* at 212–35.

98. See *U.S. Congress and Retirement Security*, LABORERS' INT'L UNION N. AM., <http://www.liuna.org/retirement-security> (last visited Nov. 8, 2019) [<https://perma.cc/ED4J-RBP8>] (discussing how the Laborers' International Union of North America "has been pushing for changes to the Pension Reform Act that would strengthen pensions and retirement security for working Americans").

99. See WEBBER, *supra* note 25, at 221–23; Allysia Finley, *California Pension Fight*, WALL ST. J. (Oct. 16, 2013, 11:21 AM), <https://www.wsj.com/articles/california-pension-fight-1381936845> [<https://perma.cc/B9HL-2RPH>] (noting that Action Now Initiative, an organization associated with The Arnold Foundation, donated \$200,000 in a year to support reforms); *Action Now Initiative*, BALLOTPEdia, [https://ballotpedia.org/Action\\_Now\\_Initiative](https://ballotpedia.org/Action_Now_Initiative) (last visited Nov. 8, 2019) [<https://perma.cc/7F9C-PQDM>] (reporting that Action Now Initiative "was active in researching and advocating for public pension reform in California").



been the California Teachers Association (“CTA”).<sup>100</sup> Not coincidentally, the CTA was the defendant in a precursor case to *Janus, Friedrichs v. California Teachers Association*.<sup>101</sup> Prior to *Janus*, the CTA collected agency fees.<sup>102</sup> Any reduction in those fees, or reduction in unionization itself, will necessarily reduce the CTA’s resources, potentially reducing both the resources it can bring to defending defined benefit pensions in California and the resources it might directly bring to capital strategies.

The CTA is just one example of a national phenomenon. It has now been forced to remarket itself to its own membership. Other unions have retained members and dues because of similar efforts to remarket themselves to their members.<sup>103</sup> These costs are defensive in nature and are diverted from efforts to organize new workers or advance a labor agenda along other dimensions.<sup>104</sup>

### III. SCHWAB-THOMAS AND THE NEXT TWENTY YEARS OF LABOR’S CAPITAL

As noted, twenty years ago, Schwab and Thomas brought some of the first empiricism to the study of labor’s shareholder activism.<sup>105</sup> The focus of that paper was primarily private-sector union activism, although there has always been overlap between public- and private-sector unions.<sup>106</sup> For example, the Service Employees International Union and the International Union of Operating Engineers, both of which feature in Schwab-Thomas, represent both public- and private-sector workers.<sup>107</sup> Still other unions featured in that paper, like the

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100. *The Truth About Teachers’ Retirement*, CAL. TCHRS. ASS’N (May 2017), <https://www.cta.org/en/Issues-and-Action/Retirement.aspx> [https://perma.cc/Y8TE-6GFC].

101. *Friedrichs v. Cal. Teachers Ass’n*, No. SACV 13-676-JLS (CWx), 2013 U.S. Dist. LEXIS 188995, at 3 (C.D. Cal. Dec. 5, 2013).

102. *How Teachers Can Opt Out of the California Teachers Association*, OPT OUT TODAY, <https://www.optouttoday.com/california-teachers-association> (last visited Nov. 8, 2019) [https://perma.cc/YHR2-SNP7].

103. 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/AP5W-3HBD] (quoting one union leader as saying, “*Janus* was seized on by us and other parts of the labor movement as an opportunity to re-educate and activate our members in a much bigger fight . . .”).

104. See *Organizing In A Post-Fair-Share World*, CAL. TCHRS. ASS’N, <https://www.cta.org/leaderresources/Preparing-for-Janus-Decision.aspx> (last visited Nov. 8, 2019) [https://perma.cc/KP2R-2WTT] (sharing resources for local CTA chapters to promote membership).

105. See Schwab & Thomas, *supra* note 21 (discussing private-sector union activism).

106. *Id.*

107. *About IUOE*, INT’L UNION OF OPERATING ENGINEERS (last visited Nov. 8, 2019), <https://www.iuoe.org/about-iuoe> [https://perma.cc/TN4N-Q62L]; *What Type of Work do SEIU Members Do?*, SERV. EMPs. INT’L UNION, <https://www.seiu.org/cards/these-fast-facts-will-tell-you-how-were-organized/> (last visited Nov. 8, 2019) [https://perma.cc/2CD2-UAVE] (“SEIU . . . is the

United Food and Commercial Workers (“UFCW”), represent only private-sector workers but have often played (then and now) a large role in public pension funds. For example, one of the most controversial and effective CalPERS Presidents, Sean Harrigan, was a UFCW leader, and at least one current board member (Ron Lind) has served as a UFCW officer.<sup>108</sup>

The Schwab-Thomas paper enables us to see how the challenges to labor’s capital have shifted over time. And it helps us to see how labor’s success in meeting earlier challenges planted the seeds of the challenges they face today. The main challenge Schwab and Thomas (accurately) foresaw for labor as shareholder was whether it could convince other shareholders that it was acting in their interests too vis-à-vis corporate management.<sup>109</sup> They also showed how labor answered that challenge.<sup>110</sup> The Schwab-Thomas paper illustrated the overwhelming governance focus of labor’s early shareholder activism.<sup>111</sup> Documenting the 1996 and 1997 proxy seasons, the paper identified the types of shareholder proposals filed by unions, proposals that would sound eerily familiar to ones we observe today.<sup>112</sup> They also addressed what we today view as bread-and-butter governance concerns. Topics included: linking director pay to performance, repealing classified boards, redeeming poison pills, requiring directors or director candidates to attend annual shareholder meetings, capping executive compensation, voting on future golden parachutes, separating board chair and CEO, creating a shareholder nominating committee, limiting relatives on the board, and prohibiting director conflicts of interest.<sup>113</sup> A small handful of proposals revealed an arguably more “special interest” labor focus, resembling topics that have only recently reappeared on the national and corporate agendas. For example, the Oil, Chemical, and Atomic Workers Union proposed that Ashland

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largest healthcare union in North America . . . [and] the second largest union of public service employees . . .”).

108. Reuters, *Calpers Elects Labor Leader as President*, N.Y. TIMES (Feb. 21, 2003), <https://www.nytimes.com/2003/02/21/business/calpers-elects-labor-leader-as-president.html> [<https://perma.cc/Y5R6-CUHW>]; *CalPERS' Board Elects Committee Chairs, Vice Chairs*, CALPERS (Feb. 21, 2017), <https://www.calpers.ca.gov/page/newsroom/calpers-news/2017/board-elects-chairs-vice-chairs> [<https://perma.cc/USAJ-FHEQ>].

109. See Schwab & Thomas, *supra* note 21, at 1090 (discussing the need for labor unions to “adopt a platform of maximizing long-term growth for shareholders and other stakeholders, as well as themselves”).

110. *Id.* (“[Unions] are already becoming sophisticated players in corporate-governance battles.”).

111. *Id.* (“Labor unions are aggressively using their ownership power to push corporate-governance reforms.”).

112. See *id.* at 1091–94.

113. *Id.*

Company allow an employee on its board.<sup>114</sup> The International Association of Publishers' Employees proposed that Dow Jones allow a union member on the board.<sup>115</sup> These early proposals are echoed today in Senator Elizabeth Warren's proposed Accountable Capitalism Act<sup>116</sup> and Senator Tammy Baldwin's proposed Reward Work Act.<sup>117</sup> And in an interesting precursor to today's reporting of the CEO-to-worker pay ratio, the Communication Workers of America proposed that Sprint "[c]ap executive pay [increases] to employee pay increase[s]."<sup>118</sup> One proposal, brought by the Amalgamated Bank of New York Longview Collective Investment Fund, called for Limited to "[l]ink executive pay to overseas labor standards."<sup>119</sup>

This invaluable work serves to demonstrate that past is prologue when it comes to labor's capital. Fringe issues that seemed to attract little support are today mainstream, widely debated, and to some extent even widely embraced. Moreover, the core challenge Schwab and Thomas identified—labor wielding its capital in its own interests while balancing those of other shareholders—remains as much a challenge today as it was then.<sup>120</sup> Today, because of *Janus* and the systematic campaign against defined-benefit pension plans more generally, labor's capital faces a new existential threat.<sup>121</sup> It is also more powerful than ever, having created a generation of activists that understand how to wield shareholder power and have more of it to wield than ever before.<sup>122</sup> It will be interesting to see, twenty years from now, whether labor's capital will still be able to meet the challenges it has successfully coped with over the past two decades.

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114. *Id.* at 1093.

115. *Id.* at 1091.

116. See Press Release, U.S. Senator Elizabeth Warren, Warren Introduces Accountable Capitalism Act (Aug. 15, 2018), <https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act> [<https://perma.cc/TA37-AKLR>] ("There is an urgent need to end the grip of shareholder value maximization and return to the era when American corporations produced broad-based growth that helped workers and shareholders alike.").

117. See Press Release, U.S. Senator Tammy Baldwin, U.S. Senator Tammy Baldwin Reintroduces Legislation to Rein in Stock Buybacks and Give Workers a Voice on Corporate Boards (Mar. 27, 2019), <https://www.baldwin.senate.gov/press-releases/reward-work-act-2019> [<https://perma.cc/W8TR-ZJEF>] (proposing "legislation to rein in corporate stock buybacks and empower workers to have a say in how their company's profits are spent").

118. See Schwab & Thomas, *supra* note 21, at 1093.

119. See *id.* at 1093.

120. See *id.* at 1052.

121. See generally WEBBER, *supra* note 25 (discussing the coordinated attacks against labor's capital by political advocacy groups like Americans for Prosperity and the Arnold Foundation).

122. *Id.*

## CONCLUSION

The Supreme Court's holding in *Janus* may threaten public pension fund and labor fund shareholder activism.<sup>123</sup> Those threats are both direct and indirect. If *Janus*'s reasoning were to apply to mandatory employee contributions to public pensions, then it could require the creation of an opt-out right for public employees.<sup>124</sup> True, given how attractive these pensions have been as retirement vehicles, at least from the perspective of workers and the potentially limited number of dissenters, such opt outs might be small in number. But even small numbers of opt outs would reduce the capital that pensions can bring to bear in the shareholder arena.<sup>125</sup> More worrying, opt-out rights could create more pressure for pensions to move to 401(k)-style retirement funds, which eliminate shareholder voice.<sup>126</sup>

The indirect effects of *Janus* are already making themselves felt. To date, these effects have been smaller than feared.<sup>127</sup> Still, if the long-term effect of *Janus* is to reduce resources for public-sector unions, that will in turn reduce resources for the capital strategies divisions of such unions and reduce the unions' ability to defend defined-benefit public pension funds from comprehensive and well-funded efforts to convert them into 401(k)s.<sup>128</sup> In other work, I have argued that collective defined contribution funds, effectively collective 401(k)s, could preserve some of the shareholder voice that pensions wield now.<sup>129</sup> Still, *Janus* nudges the public sector one step closer to the fate that has long since prevailed in the private sector, namely, the elimination of traditional pensions in favor of 401(k)s.<sup>130</sup>

Thus, just over twenty years after Schwab and Thomas first documented labor's growing influence as a shareholder, the future of labor's capital remains uncertain.<sup>131</sup> Labor has passed many of the tests

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123. *Id.* at 239 ("The bigger, more indirect threat to pensions and shareholder activism stemming from the loss of collective bargaining [after *Janus*] is that unions will have fewer resources to invest in shareholder activism, or to defend pensions when they are assaulted in legislatures or statewide ballot initiatives.").

124. See Finseth, *supra* note 27, at 293–94.

125. See Lin, *supra* note 19.

126. See WEBBER, *supra* note 25, at 220.

127. See Barrett & Greene, *supra* note 85 ("The court's decision also led many to predict that massive defections of union members would follow. But so far, even as antiunion organizations wage campaigns to convince members to drop out, most are staying put. Some unions have actually increased their numbers since the *Janus* verdict.").

128. See, e.g., Webber, *supra* note 63 (describing campaign to undermine pension funds); see also WEBBER, *supra* note 25, at 212–58 (discussing "the [f]uture of [l]abor's [c]apital").

129. WEBBER, *supra* note 25, at 213–21.

130. *Id.* at 220.

131. See Schwab & Thomas, *supra* note 21.

Schwab and Thomas identified for it decades ago, enhancing its own effectiveness as a capital steward by earning the trust of other shareholders.<sup>132</sup> Today, the challenges of labor's capital come not from other shareholders, but from legal and political threats to its ongoing existence.<sup>133</sup> Labor may successfully navigate those threats. The outcome of this struggle will have profound effects in the world of corporate governance and corporate law, given the critical role labor's capital funds have played in this arena in the past two decades.<sup>134</sup>

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132. *See generally* WEBBER, *supra* note 25.

133. *Id.*

134. *Id.*