

2018

Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh

Catherine L. Fisk

Berkeley Law

Erin Chemerinsky

Berkeley Law

Follow this and additional works at: <https://scholarship.law.berkeley.edu/facpubs>



Part of the [Law Commons](#)

Recommended Citation

Catherine L. Fisk and Erwin Chemerinsky, Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh, 132 Harv. L. Rev. F. 42 (2018)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

EXAGGERATING THE EFFECTS OF *JANUS*: A REPLY
TO PROFESSORS BAUDE AND VOLOKH[†]

*Erwin Chemerinsky** & *Catherine L. Fisk***

By any measure, the Supreme Court’s decision in *Janus v. AFSCME*¹ is significant and is going to have major effects. The Court overruled *Abood v. Detroit Board of Education*,² a four-decades-old precedent, and held public employers can no longer require employees to pay for part of the costs unions incur in negotiating and administering labor contracts on the employees’ behalf.³ *Janus* invalidated thousands of public sector labor-management contracts involving millions of government employees,⁴ and may have a substantial adverse effect on union membership and union revenues in the twenty-two states that allowed government employers to collect fair-share fees from union-represented employees who chose not to join the union.

Professors William Baude and Eugene Volokh argue that *Janus* was wrongly decided because paying money for services is not compelled speech that violates the First Amendment.⁵ We agree.⁶

But Baude and Volokh then go much further. They argue that unions are likely retroactively liable for the agency fees that union-represented workers previously paid, something that would have a devastating effect on unions because that money already has been spent.⁷ They also contend that the invalidation of agency fees in the union context is likely to lead to the invalidation of other mandatory fees, such as bar dues and student activity fees.⁸ We disagree. Baude and Volokh

[†] Responding to William Baude & Eugene Volokh, *The Supreme Court, 2017 Term — Comment: Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171 (2018).

* Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law.

** Barbara Nachtrieb Armstrong Professor of Law, University of California, Berkeley School of Law.

¹ 138 S. Ct. 2448 (2018).

² 431 U.S. 209 (1977).

³ *Janus*, 138 S. Ct. at 2486.

⁴ *Id.* at 2487–88 (Kagan, J., dissenting) (“More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today.”).

⁵ William Baude & Eugene Volokh, *The Supreme Court, 2017 Term — Comment: Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171–72 (2018).

⁶ See Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439, 461–70 (2015) (arguing that compulsory payments are not speech protected by the First Amendment).

⁷ Baude & Volokh, *supra* note 5, at 172, 201–04.

⁸ *Id.* at 196–200.

greatly overstate the implications of *Janus*'s overruling of *Abood*. Their analysis is inconsistent with firmly established doctrines and is neither a necessary nor a desirable account of the implications of *Janus*.

In Part I, we explain why unions are not liable — under federal or state law — for agency fees collected prior to June 27, 2018, the day the *Janus* decision was announced. In Part II, we discuss why *Janus* does not place other mandatory fees in jeopardy.

I. WHY UNIONS ARE NOT LIABLE FOR FEES COLLECTED BEFORE *JANUS*

Both before and immediately after the Court's decision in *Janus*, unionized government employees and their representatives filed suits seeking repayment for fair-share fees and membership dues paid prior to June 27, 2018.⁹ The plaintiffs sue pursuant to 42 U.S.C. § 1983 and claim that their First Amendment rights were violated by being forced to pay fees prior to June 27, 2018. They seek money damages in the form of a refund of all the money they paid within the statute of limitations period for a § 1983 suit (between two and six years, depending on the state).¹⁰ The plaintiffs also present several state law claims seeking the same relief.¹¹ Baude and Volokh conclude the plaintiffs in these suits have a significant likelihood of success.¹²

We disagree with this conclusion for three separate reasons. First, the unions are private entities; they are not state actors bound by the First Amendment, were not acting “under color of law,” and therefore are not liable under § 1983. Second, if they are deemed to have acted under “color of law,” the unions are protected by qualified immunity

⁹ Cases seeking agency fee refunds are pending in district courts in most federal circuits. *See, e.g., Riffe v. Rauner*, 138 S. Ct. 2708 (2018) (mem.) (granting certiorari, vacating, and remanding *Riffe v. Rauner*, 873 F.3d 558 (7th Cir. 2017), in light of *Janus*); *Aliser v. SEIU Cal.*, No. 18-cv-02574 (E.D. Cal. filed Sept. 17, 2018); *Crockett v. NEA-Alaska*, No. 18-cv-00179 (D. Alaska filed Aug. 2, 2018); *Lee v. Ohio Educ. Ass'n*, No. 18-cv-01420 (N.D. Ohio filed June 25, 2018); *Akers v. Md. State Educ. Ass'n*, No. 18-cv-01797 (D. Md. filed June 18, 2018); *Hoekman v. Educ. Minn.*, No. 18-cv-01686 (D. Minn. filed June 18, 2018); *Diamond v. Pa. State Educ. Ass'n*, No. 18-cv-00128 (W.D. Pa. filed June 15, 2018); *Wholean v. CSEA SEIU Local 2001*, No. 18-cv-01008 (D. Conn. filed June 13, 2018); *Smith v. N.J. Educ. Ass'n*, No. 18-cv-10381 (D.N.J. filed June 11, 2018); *Babb v. Cal. Teachers Ass'n*, No. 18-cv-00994 (C.D. Cal. filed June 5, 2018); *Cruz v. UIA*, No. 17-cv-02261 (D.P.R. filed Oct. 26, 2017); *Berman v. Pub. Emps. Fed'n, AFL-CIO*, No. 16-cv-00204 (E.D.N.Y. filed Jan. 14, 2016).

¹⁰ *See* cases cited *supra* note 9; Baude & Volokh, *supra* note 5, at 202 n.211 (collecting statutes of limitations).

¹¹ *See* cases cited *supra* note 9.

¹² Baude & Volokh, *supra* note 5, at 201 (“In holding unconstitutional the agency fees on which most public employee unions rely, *Janus* makes it likely that they can be sued for substantial damages under the federal civil rights statute, 42 U.S.C. § 1983.”).

under *Filarsky v. Delia*,¹³ the Supreme Court’s most recent decision concerning the liability of private actors sued under § 1983. Third, even if the unions are not protected by qualified immunity, they still have a “good faith” defense; they were acting in good faith following *Abood* until it was overruled. Finally, we explain why the plaintiffs may not recover from the unions on state law claims — an issue of union liability that Baude and Volokh do not address.

A. No State Action

Public employee unions are private membership organizations. They exist to negotiate with or against the government; they are not part of the government. Under the state action doctrine, the First Amendment applies only to government action.¹⁴ Therefore, the First Amendment and the Constitution do not apply to the activities of unions any more than they do to the activities of the ACLU, the NRA, the ABA, or any other organization to which government employees may belong.

State and local laws once authorized government employers to require payment of fair-share fees if employees unionized and negotiated to have payment of fees become a condition of employment. *Janus* invalidated these laws and the government contracts negotiated pursuant to them. But the Court did not hold or even suggest that the unions were violating the Constitution. As Baude and Volokh observe, it is the government, not the unions, that generally collects the money: “In Illinois, . . . as in many states, the state employer will automatically deduct agency fees from the employee paychecks.”¹⁵ It is the government that makes and enforces the employment conditions of government employees, and it was the government that made payment of fees a condition of government employment.

Unions obviously benefitted from the state laws requiring employees to pay agency fees that the state then collected. But under no theory of state action is benefiting from the government enough for the Constitution to apply or for a private actor to act “under color of law.”¹⁶ Receiving money collected by the government does not turn an entity into a state actor.

To be sure, public employee unions were contracting with government entities. But the law is clear that a private entity does not have to

¹³ 566 U.S. 377 (2012).

¹⁴ John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 573 (2005).

¹⁵ Baude & Volokh, *supra* note 5, at 201 n.203.

¹⁶ The Supreme Court has held that the test for “under color of law” is the same as the test for whether there is state action. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

comply with the Constitution by virtue of contracting with the government. In *Rendell-Baker v. Kohn*,¹⁷ the Supreme Court declared that “[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”¹⁸ *Rendell-Baker* rejected a § 1983 claim against an almost entirely publicly funded private school that fired a counselor because of her speech activities.¹⁹ Although the counselor was paid entirely with state money, the Court made it clear that government funding or government contracting, by itself, is not a basis for finding state action. The Court said that “the school’s receipt of public funds does not make the discharge decisions acts of the State.”²⁰ Therefore, unions did not turn into state actors when they exercised the power secured in collective agreements to receive fair-share fees collected by the government or when they asked the government to discharge an employee who refused to pay those fees. It was the government that required the fees as a condition of employment and the government that discharged the employees who refused to pay.

Baude and Volokh, however, argue that “unions collecting agency fees are acting under ‘color of law’ thanks to precedents like *Lugar v. Edmondson Oil Co.*”²¹ But Baude and Volokh read *Lugar* much too broadly. They say that “*Lugar* held that private debt collectors could be sued under § 1983 for making use of an unconstitutional state statute that allowed the attachment of property without due process,”²² but *Lugar* did not hold that “making use of an unconstitutional state statute” is enough to render a private actor a state actor under § 1983. *Lugar* found there was state action when a creditor obtained a writ of prejudgment attachment from a court and then had it executed by a sheriff.²³ The Supreme Court found the court’s involvement in issuing the writ and the sheriff’s enforcement of it was sufficient for state action. This is much more government involvement than that provided by a law which authorizes a government employer to adopt and enforce a labor contract making payment of fees a condition of employment.

The *Lugar* Court articulated a two-part test for state action analysis: “First, the deprivation must be caused by the exercise of some right or privilege created by the State or a rule of conduct imposed by the State or by a person for whom the State is responsible.”²⁴ The first prong of

¹⁷ 457 U.S. 830 (1982).

¹⁸ *Id.* at 841.

¹⁹ *Id.* at 834–37.

²⁰ *Id.* at 840.

²¹ Baude and Volokh, *supra* note 5, at 201 (citing 457 U.S. 922 (1982)).

²² *Id.*

²³ 457 U.S. at 924–26.

²⁴ *Id.* at 937.

the *Lugar* test is met in the fair-share-fee context because it is state law that authorizes government contracts that require the payment of fees. But second, “the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.”²⁵ In *Lugar*, state law provided for prejudgment attachment, meeting the first prong, and the sheriff carried out the attachment, meeting the second prong. By sharp contrast, the unions are not state officials, are not acting in concert with state officials, and are not engaged in conduct that is chargeable to the state.

That state law allowed the government to collect fees and transfer the money to unions does not make unions into state actors. If that theory were correct, every recipient of money collected by the government would be a state actor. In countless instances, laws permit private conduct; but that does not make the private conduct into government action. An easy example is the Federal Arbitration Act, which says that arbitration clauses in private contracts shall be enforced.²⁶ But that does not mean that every arbitration has to comply with the Constitution.

The Supreme Court’s decision in *American Manufacturers Mutual Insurance Co. v. Sullivan*,²⁷ a case not discussed by Baude and Volokh, is particularly apt. Pennsylvania law provided that an employer or insurer was permitted to withhold workers’ compensation payment for disputed medical treatment pending an independent review to determine whether the treatment was “reasonable and necessary.”²⁸ Workers whose payments had been withheld claimed that the insurance companies and employers were state actors because they were acting pursuant to authority created by state law and because there was extensive state regulation of the insurance industry. The Supreme Court, in an opinion by Chief Justice Rehnquist, rejected this argument and found no state action.²⁹

The plaintiffs argued that the state encouraged withholding of payments by enacting a law expressly authorizing it.³⁰ But the Court said that this authorization was insufficient to find that an employer withholding a payment was a state actor. Chief Justice Rehnquist explained: “We have never held that the mere availability of a remedy for wrongful

²⁵ *Id.*

²⁶ 9 U.S.C. § 2 (2012); *see also* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 601 (1997).

²⁷ 526 U.S. 40 (1999).

²⁸ *Id.* at 57.

²⁹ *Id.* at 43.

³⁰ *Id.* at 57.

conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it.”³¹ *Sullivan* explicitly held that the withholding of money pursuant to a state law does not make a private actor into a state actor; that withholding, of course, is nearly identical to the situation in *Janus*, where agency fees were collected pursuant to state law and government contracts.

Simply put, *Janus* held that the Illinois state law and government contracts violated the First Amendment. The union is a private entity and thus cannot be held liable under § 1983 because it does not act under color of state law.

B. Qualified Immunity

If a court were to accept the Baude-Volokh argument and find that the unions were acting under color of law, the unions then would have qualified immunity as a defense. The Supreme Court has explained that “[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”³² The Court has elaborated: “A Government official’s conduct violates clearly established law when, *at the time of the challenged conduct*, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would [have understood] that what he is doing violates that right.’”³³

There is no doubt that a government official sued under § 1983 for collecting agency fees before *Janus* would be protected by qualified immunity. The conduct did not violate the Constitution at the time the money was collected under the express holding of *Abood*.³⁴ The Court

³¹ *Id.* at 53.

³² *Ashcroft v. Al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

³³ *Id.* at 741 (alterations in original) (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). It is important to distinguish between the permissible retroactive application of new constitutional rules, under which conduct that was previously legal can be declared unconstitutional retroactively, and the qualified immunity rule. Under qualified immunity, the inquiry is the legality of the conduct *at the time it was done*. *Id.* at 735, 741. The Comment on which Baude and Volokh rely in their discussion of qualified immunity explicitly recognizes that “the qualified immunity rule bars the retroactive application of a new rule.” Huiyi Chen, Comment, *Balancing Implied Fundamental Rights and Reliance Interests: A Framework for Limiting the Retroactive Effects of Obergefell in Property Cases*, 83 U. CHI. L. REV. 1417, 1445 (2016). Even though a new constitutional rule may apply retroactively, government officials and private persons doing government work are entitled to qualified immunity for actions taken prior to the Court’s adoption of the new rule.

³⁴ 431 U.S. 209, 229 (1977). In considering “whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation,” the Court concluded: “We think he does not.” *Id.*

unanimously upheld the permissibility of charging fees for representation services in 2009.³⁵

Baude and Volokh say that “unions do not have the qualified immunity defense that is available to government § 1983 defendants. . . . Indeed, in *Wyatt v. Cole*, the Court specifically rejected a qualified immunity defense for private parties who had availed themselves of unconstitutional statutes.”³⁶ In *Wyatt*,³⁷ a cattle rancher filed a writ of replevin, the state court issued a prejudgment order, and the county sheriff executed the order by seizing another rancher’s cattle and tractor.³⁸ The Court held that the private plaintiff (the rancher who had filed the writ of replevin) was not entitled to qualified immunity.³⁹

The Court significantly narrowed *Wyatt* in *Filarsky v. Delia*⁴⁰ in 2012. In *Filarsky*, the Court accorded immunity to a private individual hired by a city to conduct an investigation.⁴¹ Chief Justice Roberts, writing for the Court, said that “the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.”⁴² The Court thus concluded that “immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.”⁴³

³⁵ *Locke v. Karass*, 555 U.S. 207, 221 (2009) (holding that nonmembers can be charged the local union’s share of national litigation expenses relating to collective bargaining and contract administration).

³⁶ Baude & Volokh, *supra* note 5, at 202.

³⁷ 504 U.S. 158 (1992).

³⁸ *Id.* at 160.

³⁹ *Id.* at 169. The Court left open the possibility that the plaintiff was entitled to a good faith immunity defense, an issue we address below in section I.C, pp. 50–52.

⁴⁰ 566 U.S. 377 (2012).

⁴¹ *Id.* at 393–94.

⁴² *Id.* at 387.

⁴³ *Id.* at 389. The government relied throughout the nineteenth century not only on private *individuals* to do work for the government (as in policing) but also on private *groups*. Guilds, which were the predecessors of modern craft and trade unions, played crucial governmental and quasi-governmental roles regulating the quality of goods and services going back to the Middle Ages in England and Europe. G.D.H. Cole, *Introduction* to GEORGES RENARD, *GUILDS IN THE MIDDLE AGES*, at ix, xii (G.D.H. Cole ed., Dorothy Terry trans., 1918). There are other examples as well. As Professor Nicholas Parrillo explains, “[b]ecause the early U.S. government was willing to build only a small permanent navy, it supplemented the force, when facing a superior navy foe, with privately owned ships (privateers) that were licensed to capture enemy merchant vessels and cargo.” NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 307 (2013). The system lasted until 1899, when Congress abolished the prize money system by which privateers (as well as regular naval officers) were paid by the proceeds of enemy ships and cargo they captured. *See id.* at 309. Similarly, as Professor Rebecca McLennan shows, states contracted with companies to use prison labor and the private contractors became, by 1870, an essential feature of prison management and discipline. REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, at 120 (2008). In a sense, the privateers and contractors provided services to the government just as labor organizations do today. Unions,

The Court explained that all of the justifications for qualified immunity for government actors apply to private actors working for the government as well. The Court declared: “Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to ‘ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.’”⁴⁴ The Court continued: “Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag — facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity.”⁴⁵ Of course, that is exactly the situation here. State governments cannot be sued for money damages because of sovereign immunity, which would leave the unions “holding the bag” for the system that the states adopted and enforced in reliance on the Supreme Court’s long series of decisions holding fair-share fees to be constitutional.

The Court distinguished *Wyatt*, stating: “*Wyatt* is plainly not implicated by the circumstances of this case. . . . Put simply, *Wyatt* involved no government agents, no government interests, and no government need for immunity.”⁴⁶ That makes sense; private litigants who institute court proceedings for malicious reasons are not entitled to qualified or good faith immunity simply because they set the wheels of government in motion and, thereby, act with the government in depriving another of rights. But unions received fair-share fees entirely and only because statutes and government contracts authorized the government to collect such fees and remit them to the union. That relationship between the government and unions is the very reason Baude and Volokh think there is state action. Under the reasoning and holding of *Filarsky*, unions have qualified immunity from liability when sued for a refund of the fees the government collected. Of course, it might be argued that *Filarsky* is distinguishable from the situation of unions because the unions were not “working alongside” the government in negotiating for fair-share fees — they were negotiating across the table from the government.⁴⁷ The union, unlike the investigator in *Filarsky*, was not hired by the government to do the government’s business. But if that distinction makes a difference, it is a reason why unions are not state actors and, therefore, not liable under § 1983 in the first place. In other words, it can’t be both that unions were equivalent to state actors when they

like these private groups of the mid-nineteenth century, work in “close coordination with public employees,” *Filarsky*, 566 U.S. at 391, and qualified immunity should extend to the organization as well as to its individual agents.

⁴⁴ *Filarsky*, 566 U.S. at 390 (alterations in original) (quoting *Richardson v. McKnight*, 521 U.S. 399, 408 (1997)).

⁴⁵ *Id.* at 391.

⁴⁶ *Id.* at 392–93.

⁴⁷ *See id.* at 391.

worked with the government to create the fair-share fee system and then not equivalent to state actors when it comes to paying damages for state action for which the government officials have qualified immunity.

*C. At the Very Least, Unions Are
Protected by Good Faith Immunity*

Even if unions were acting under color of law and are denied qualified immunity, the unions still are not liable because of a separate good faith immunity. In the two cases dealing with suits against private individuals before *Filarsky — Wyatt v. Cole*⁴⁸ and *Richardson v. McKnight*⁴⁹ — the Court denied qualified immunity to private defendants sued under § 1983, but recognized that the individuals could have good faith immunity. There is a compelling rationale for good faith immunity, as one court explained:

It would be manifestly unfair to hold that the state actor — whose participation is required for there to be a section 1983 violation at all — is entitled to qualified immunity, but hold the private actor, who did not subjectively believe that he was acting unconstitutionally, liable for the plaintiff's damages.⁵⁰

In *Wyatt*, as noted above, a private individual was sued for instituting a replevin action that ordered a sheriff to seize property.⁵¹ The Supreme Court held that qualified immunity was available only to government officers sued under § 1983. But the Court said:

In so holding, however, we do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.* could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens. Because those issues are not fairly before us, however, we leave them for another day.⁵²

Importantly, though, five Justices — Justice Kennedy, joined by Justice Scalia, concurring, and Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissenting — said that these defendants were protected by good faith immunity. All five Justices agreed that reliance on a statute prior to a judicial determination of unconstitutionality is reasonable as a matter of law. In his concurrence, Justice Kennedy wrote:

[T]he existence of a statute thought valid ought to allow a defendant to argue that he acted in subjective good faith and is entitled to exoneration no matter what the objective test is.

⁴⁸ 504 U.S. 158 (1992). See text accompanying notes 36–39.

⁴⁹ 521 U.S. 399 (1997).

⁵⁰ *Franklin v. Fox*, No. C 97-2443, 2001 WL 114438, at *5 (N.D. Cal. Jan. 22, 2001).

⁵¹ 504 U.S. at 160.

⁵² *Id.* at 169 (citing *Yee v. City of Escondido*, 503 U.S. 519, 534–38 (1993)).

The distinction I draw is important because there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; and therefore under the circumstances of this case, lack of probable cause can *only* be shown through proof of subjective bad faith.⁵³

Chief Justice Rehnquist, writing for the three dissenters, was similarly explicit: “[O]ur prior precedent establishes that a demonstration that a good-faith defense was available at the time § 1983 was adopted does, in fact, provide substantial support for a contemporary defendant claiming that he is entitled to qualified immunity in the analogous § 1983 context.”⁵⁴ The dissent pointed out that the Court had appeared to insist that a good faith defense would be available to the defendants.⁵⁵

In *Richardson v. McKnight*, the Court ruled that prison guards at privately operated prisons do not have qualified immunity, but again left open the possibility of a good faith defense.⁵⁶ The Court noted that the Court of Appeals “said specifically that it ‘may be that the appropriate balance . . . here is to permit the correctional officers to assert a good faith defense, rather than qualified immunity.’”⁵⁷ However, the Court continued, the case was on interlocutory appeal, and the Court of Appeals had not addressed the good faith immunity. Therefore, the Court said: “Like the Court in *Wyatt*, and the Court of Appeals in this case, we do not express a view on this last-mentioned question.”⁵⁸

Although the Supreme Court has not returned to the issue of good faith immunity for private individuals sued under § 1983, lower federal courts have done so, including in the context of suits against unions for collecting agency fees. In fact, *every* federal court of appeals and federal district court to consider the issue has accorded good faith immunity to private individuals sued under § 1983.⁵⁹ Not a single federal court has rejected according good faith immunity to private individuals or entities sued under § 1983.

⁵³ *Id.* at 174 (Kennedy, J., concurring).

⁵⁴ *Id.* at 177 (Rehnquist, C.J., dissenting).

⁵⁵ *Id.* On remand, the Fifth Circuit held that the five Justices had answered the good faith immunity defense and, therefore, that private actors could be liable “only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional.” *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993).

⁵⁶ 521 U.S. 399, 401, 413–14 (1997).

⁵⁷ *Id.* at 413–14.

⁵⁸ *Id.* at 414.

⁵⁹ See *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008); *Pinsky v. Duncan*, 79 F.3d 306, 311–12 (2d Cir. 1996); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699–700 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1275–78 (3d Cir. 1994).

After *Harris v. Quinn*⁶⁰ held that home health care workers could not constitutionally be required to pay agency fees,⁶¹ workers who had paid these fees brought suits identical to those being brought now after *Janus*. Every federal court to rule on the issue found that the unions were protected by good faith immunity.⁶²

It is hard to imagine a stronger case for good faith immunity. Unions were receiving agency fees collected by the government pursuant to state laws that the Supreme Court expressly upheld in *Abood* and numerous other cases, including a unanimous holding as recently as 2009.⁶³ That is why every court rejected union liability to recover agency fees after *Harris* and why they must reject such claims now after *Janus*.

D. Unions Are Not Liable on Equitable Theories

Baude and Volokh briefly suggest:

As an alternative, plaintiffs may also be able to pursue claims for restitution and unjust enrichment, somewhat analogous both to claims for the refund of unconstitutional taxes and to payments under a judicial order that has since been reversed. The exact boundaries of these claims are complex, but they could well lead to some liability.⁶⁴

Qualified immunity is a defense only to claims for damages arising under federal law, and good faith immunity likewise applies to claims for damages. For this reason, the plaintiffs in the post-*Janus* and post-*Harris* fee recovery litigation have alleged state law claims, and have styled their claims as equitable, with the goal of eliminating the qualified and good faith immunity defenses.

The easiest solution to this is for states to enact laws preventing unions from being held liable under state law causes of action. California has recently enacted such a law.⁶⁵ Although state law cannot extinguish

⁶⁰ 134 S. Ct. 2618 (2014).

⁶¹ *Id.* at 2644.

⁶² See *Jarvis v. Cuomo*, 660 F. App'x 72 (2d Cir. 2016); *Winner v. Rauner*, No. 15 CV 7213, 2016 WL 7374258 (N.D. Ill. Dec. 20, 2016); *Hoffman v. Inslee*, No. C14-200, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016).

⁶³ *Locke v. Karass*, 555 U.S. 207 (2009). Justice Alito, joined by Chief Justice Roberts and Justice Scalia, concurred in *Locke* simply to note that the Court was not deciding what showing employees need to make to establish that national litigation fees are chargeable because they benefit the local union. *Id.* at 221–22 (Alito, J., concurring).

⁶⁴ Baude & Volokh, *supra* note 5, at 203.

⁶⁵ This law sets forth, in pertinent part, that “a public employer, an employee organization, or any of their employees or agents, shall not be liable for, and shall have a complete defense to, any claims or actions under the law of this state for requiring, deducting, receiving, or retaining agency or fair share fees from public employees, and current or former public employees shall not have standing to pursue these claims or actions, if the fees were permitted at the time under the laws of this state then in force and paid, through payroll deduction or otherwise, prior to June 27, 2018.” CAL. GOV'T CODE § 1159 (West 2018). The statute provides that it applies to claims and actions pending on its effective date, which was September 14, 2018, and to claims and actions filed thereafter. *Id.*

constitutional claims, it can create or eliminate state law claims, even retroactively. For example, in *Usery v. Turner Elkhorn Mining Co.*,⁶⁶ the Court held that retroactive legislation without criminal effects would be upheld so long as it was rationally related to a legitimate government purpose.⁶⁷

There certainly is a legitimate, if not a compelling, purpose in protecting unions from ruinous liability and even potential bankruptcy when all they did was comply with Supreme Court precedent and state law. This is also why, even without protective state legislation, unions are not liable under equitable theories: it would be fundamentally unfair to require that they pay agency fees collected prior to *Janus*.

Baude and Volokh acknowledge that this would be “massive liability.”⁶⁸ This money already has been spent and imposing the liability could have a devastating effect, far beyond the loss of agency fees in the future. But it is the nature of all equitable relief that the primary focus is on fairness.⁶⁹ As the Supreme Court has explained, “equitable remedies are a special blend of what is necessary, what is fair, and what is workable.”⁷⁰ The Court declared in *Hecht Co. v. Bowles*⁷¹:

The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.⁷²

The Supreme Court frequently has declared that “[i]t is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy.”⁷³ The reliance interests of the unions in collecting agency fees prior to *Janus* were compelling: they relied on a decades-old Supreme Court precedent and state laws enacted pursuant to them.⁷⁴ Moreover, in considering the equitable claims, it is enormously important that union-represented workers benefited from the

⁶⁶ 428 U.S. 1 (1976).

⁶⁷ See *id.* at 15; see also *United States v. Carlton*, 512 U.S. 26, 35 (1994) (a retroactive tax law will be upheld so long as the law is rationally related to a legitimate government purpose).

⁶⁸ Baude & Volokh, *supra* note 5, at 172.

⁶⁹ See, e.g., Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (1997) (“[E]quity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules.”).

⁷⁰ *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).

⁷¹ 321 U.S. 321 (1944).

⁷² *Id.* at 329–30.

⁷³ *Lemon*, 411 U.S. at 203; see also *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam).

⁷⁴ Baude and Volokh repeat Justice Alito’s comment in *Janus* that “public-sector unions have been on notice for years regarding this Court’s misgivings about *Abood*.” *Janus v. AFSCME*, 138 S. Ct. 2448, 2484 (2018); Baude & Volokh, *supra* note 5, at 204. But *Abood* was the law, and it was

agency fees they paid through the representation they received that affected their wages, their hours, and their working conditions. After the Supreme Court held in *Lemon v. Kurtzman*⁷⁵ that public funding of private religious schools violated the Establishment Clause, the Court ruled that it would be inequitable to force schools to refund the money they had received before the statutory program was declared unconstitutional.⁷⁶ The Court explained, “state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.”⁷⁷

It is for exactly these reasons that after *Harris* declared certain agency fees to violate the First Amendment, courts rejected equitable claims to recover these funds.⁷⁸ The result should be the same for those who bring equitable claims after *Janus*. It would be manifestly unfair to impose ruinous liability on unions for acting under state laws that had been repeatedly upheld as constitutional by the Supreme Court.

II. JANUS DOES NOT ENDANGER OTHER MANDATORY FEES

Baude and Volokh speculate that *Janus* will endanger other mandatory fees imposed by the government. They suggest that mandatory bar dues and mandatory student activity fees likely will be declared unconstitutional. They write: “Now that public employees can’t be required to pay money at all to unions, we think the Court will say that they

unanimously followed as late as 2009. In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court did not overrule it. In *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (mem.) (per curiam), the Court reaffirmed *Abood* by an evenly divided Court. The widespread perception was that the future of *Abood* would depend on whether the Senate voted to confirm President Obama’s nominee to replace Justice Scalia. Daniel Fisher, *How Scalia’s Death Affects 9 Big Cases at Supreme Court*, *Forbes* (Feb. 14, 2016, 1:07 P.M.), <https://www.forbes.com/sites/danielfisher/2016/02/14/scalias-death-scrambles-all-the-calculations-on-big-cases/> [<https://perma.cc/KF8R-4TV9>]. When the Senate declined to conduct hearings on Chief Judge Garland’s nomination, it seemed that the fate of *Abood* perhaps depended on who won the November 2016 election and who the new President nominated. The argument would need to be that relying on *Abood*, a forty-year-old precedent, was unjustified because the Republicans could win the 2016 election and appoint a Justice to be the fifth vote to overrule the case. We doubt that a court would accept that argument and find that it was improper to rely on a Supreme Court decision before it was overruled. Cf. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (admonishing lower courts to follow existing Supreme Court precedent rather than anticipate a possible overruling).

⁷⁵ 411 U.S. 192.

⁷⁶ *Id.* at 204–07.

⁷⁷ *Id.* at 209; see also *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir. 1989) (holding it would be inequitable to order refund of fees because “the union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things The plaintiffs do not propose to give back the benefits that the union’s efforts bestowed on them.”).

⁷⁸ See *Winner v. Rauner*, No. 15-CV-7213, 2016 WL 7374258, at *6 (N.D. Ill. Dec. 20, 2016); *Hoffman v. Inslee*, No. C14-200, 2016 WL 6126016, at *4 (W.D. Wash. Oct. 20, 2016) (amended order on motions for summary judgment).

can't be required to pay them to state bars either."⁷⁹ Likewise, as to student fees, Baude and Volokh write: "Applying the same logic to student activity fees, then, all such fees would need to be held unconstitutional."⁸⁰ But in saying this, Baude and Volokh ignore the Supreme Court's explicit language in *Harris*, its reasoning in *Harris* and *Janus*, and its underlying concern in *Janus*.

In *Keller v. State Bar of California*,⁸¹ the Court said that compulsory bar dues could be used only for expenses "reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'"⁸² The Court explained that bar dues could be collected from all members to pay for bar-related activities. But the Court said:

Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.⁸³

In *Harris*, the Court expressly rejected the argument that invalidating agency fees for unions put mandatory bar dues in constitutional jeopardy.⁸⁴ The Court explained that mandatory bar dues serve a compelling government purpose. Justice Alito, writing for the Court in *Harris* as he did in *Janus*, stated:

Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld [in *Keller*] served the "State's interest in regulating the legal profession and improving the quality of legal services." States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.⁸⁵

Likewise, the Court in *Harris* also reaffirmed the constitutionality of public universities requiring students to pay money for a fund that subsidizes student activities.⁸⁶ The Supreme Court had rejected a constitutional challenge to compulsory student activity fees in 2000, and *Harris*

⁷⁹ Baude & Volokh, *supra* note 5, at 196.

⁸⁰ *Id.* at 198.

⁸¹ 496 U.S. 1 (1990).

⁸² *Id.* at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).

⁸³ *Id.* at 16.

⁸⁴ *Harris v. Quinn*, 134 S. Ct. 2618, 2643–44 (2014).

⁸⁵ *Id.* (quoting *Keller*, 496 U.S. at 14).

⁸⁶ *Id.* at 2644 (discussing *Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000)).

reaffirmed that holding, emphasizing the government's compelling interest in collecting student activity fees to provide a diversity of speakers and events.⁸⁷

By sharp contrast, in *Janus*, the Court rejected the arguments that agency fees serve a compelling purpose. The primary arguments advanced in favor of requiring employees to pay agency fees are the government's interests in preserving labor peace by bargaining with a single union rather than a multiplicity of individual employees and employee groups and administering its labor relations system with a union whose finances are not crippled by free riders. But the Court rejected both of these justifications as insufficient to meet First Amendment scrutiny.⁸⁸ Justice Alito, writing for the Court, rejected as not "sound" both the idea that unions would be unwilling to represent nonmembers if they cannot charge fees for their services and the notion that "it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay."⁸⁹

Taken together, *Harris* and *Janus* held that the government has a compelling interest in requiring bar members to pay bar dues to fund the admission and discipline system and in requiring that students pay student activity fees to fund diverse campus activities, but has no compelling interest in requiring employees to share in the cost of the labor relations system. Whether others agree with the Court's judgment about what is or is not compelling is irrelevant because the Court has explicitly spoken.

Scholars have been observing at least since *Knox v. SEIU, Local 1000*⁹⁰ in 2012 that governments (as employers and otherwise) compel employees and others to subsidize speech in ways that have long been regarded as noncontroversial. Government employee pension plan investments fund the speech of corporations, including political speech.⁹¹

⁸⁷ *Id.* ("Public universities have a compelling interest in promoting student expression in a manner that is viewpoint neutral. This may be done by providing funding for a broad array of student groups. . . . Our decision today thus does not undermine *Southworth*.").

⁸⁸ One of the puzzling things about Justice Alito's majority opinion in *Janus* concerns the level of scrutiny the Court was using. The Court said that it did not matter whether it used strict scrutiny or a "less demanding . . . exacting scrutiny." *Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018). Justice Alito wrote: "Under 'exacting' scrutiny . . . a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012)). But under both strict scrutiny and "exacting scrutiny" there must be a compelling government purpose and there must not be a less restrictive alternative. What's the difference? The Court does not say, but concludes that agency fees are unconstitutional under either approach. *Id.* ("At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.")

⁸⁹ *Id.* at 2467.

⁹⁰ 567 U.S. 298 (2012).

⁹¹ Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 867 (2012).

Government-mandated health insurance premiums subsidize speech of health insurance companies. Public utility companies receive money by operation of a government-granted monopoly and use it to fund speech.⁹² Special assessments levied with property taxes in vector control districts subsidize speech relating to (and eradication of) animals and insects that some regard as pests and others may regard differently.⁹³ None of these has troubled the Court. The Court apparently sees public employee unions to be different because, as the tone and substance of the *Janus* opinion revealed, the majority sees their speech as problematic. *Janus* blamed the “ascendance of public-sector unions” for a “substantial” share of the “increase in public spending” since 1970 and even the underfunding of public pension funds.⁹⁴ The opinion ominously intoned, strategically using the passive voice: “Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies.”⁹⁵ Apart from unions, and one case involving mandatory assessments on agricultural producers,⁹⁶ the Court has rejected every First Amendment challenge to compulsory payments that subsidize speech, and the obvious hostility to public employee unions in *Janus*, *Harris*, and *Knox* suggests the field is not going to be a growth area.⁹⁷

⁹² See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

⁹³ See, e.g., ALAMEDA CTY. VECTOR CONTROL, ANNUAL REPORT 2016, at 15 (2017), http://acvcsd.org/wp-content/uploads/2017/10/ACVCS_AR_2016_Web.pdf [<https://perma.cc/Q4EY-U49L>] (explaining that assessments for the vector control district are “levied and collected at the same time and in the same manner as the general county property taxes”); *id.* at 2 (noting that the vector control district “[p]rovide[s] educational presentations to schools, civic groups, property managements, homeowner associations and the public” and “[d]isseminate[s] educational materials on vector-borne diseases to residents and interested groups”); Alameda Cty. Vector Control, *The Negative Effects of Feeding Wildlife* (May 2016), <http://acvcsd.org/wp-content/uploads/2016/05/The-Negative-Effects-of-Feeding-Wildlife-with-new-letterhead.pdf> [<https://perma.cc/BY48-NN4U>] (warning about the harm done to wildlife when fed by humans); Alameda Cty. Vector Control, *Bed Bugs: Facts, Prevention, and Control* (May 2016), <http://acvcsd.org/wp-content/uploads/2016/05/Bed-Bugs-Facts-Prevention-and-Control.pdf> [<https://perma.cc/Q9F6-ETED>] (offering instructions for eradicating bed bugs); Alameda Cty Vector Control, *A Guide to House Mouse* (July 2016), <http://acvcsd.org/wp-content/uploads/2016/07/House-Mouse.pdf> [<https://perma.cc/NV9L-X6V5>] (suggesting methods of preventing and eradicating house mice); PETA, *Living in Harmony with House Mice and Rats*, <https://www.peta.org/issues/wildlife/living-harmony-wildlife/house-mice/> [<https://perma.cc/442J-DBZ7>].

⁹⁴ 138 S. Ct. at 2483.

⁹⁵ *Id.*

⁹⁶ *United States v. United Foods, Inc.*, 533 U.S. 405, 408–09 (2001) (invalidating mandatory assessments on mushroom producers). *But see* *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 477 (1997) (rejecting constitutional challenge to mandatory assessments on tree fruit producers). The challenges to agricultural assessments ended when the Court in *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005), held that mandatory assessment on beef producers fund government speech and, therefore, are constitutional, *id.* at 553.

⁹⁷ We also agree with Baude and Volokh that there are other reasons not to fear for bar dues or student fees. They write: “We thus think that the restructured California bar should be viewed as a fully governmental speaker for First Amendment purposes, and thus outside the constraints of

CONCLUSION

In evaluating any legal argument, it is important to consider its consequences. Baude and Volokh spin out what they see as the consequences of *Janus*, a decision they sharply criticize, with little regard to the real world impact of their arguments. They assert that *Janus* will mean ruinous liability on unions and perhaps the end of mandatory state bar dues and student fees. But a closer examination of the law in these areas suggests that these apocalyptic predictions are unfounded. Courts presented with the post-*Janus* suits that Volokh and Baude describe should reject their analysis as contrary to well-settled law.

Keller.” Baude & Volokh, *supra* note 5, at 198. Also, they say: “Yet public universities that want to keep funding student groups can easily avoid this problem, simply by folding student activity fees into the tuition, and then funding the student group out of that tuition.” *Id.* at 200. We agree.

Recommended Citation: Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42 (2018), <https://harvardlawreview.org/2018/11/exaggerating-the-effects-of-janus/>.