

Solidarity, Legitimacy, and the *Janus* Double Bind

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ABSTRACT. In *Janus v. AFSCME*, the Supreme Court effectively allowed a conscience-based plea for an exemption to undermine the public-sector labor regimes of over twenty states, the District of Columbia, and Puerto Rico. This sort of phenomenon is increasingly common under the Roberts Court, which seems eager to allow conscience-based exemptions to undermine antidiscrimination, public-health, and labor regulations nationwide. *Janus*'s failure to recognize a compelling state interest in labor organizing has extra bite. Labor organizing—along with other forms of political association like political parties, churches, NGOs, and debtors' and tenants' organizations—plays a crucial role in developing civic trust and solidarity. A background culture of civic trust is a prerequisite for legitimate state efforts at accommodating conscience-based exemptions claims because only in such a culture will citizens accept the sort of rights-balancing approach essential to accommodation. Put differently, the state has a legitimacy-based duty to seek accommodations where it can, but citizens can only accept accommodations under conditions of civic trust or solidarity. The state therefore must promote such conditions. Recognizing a state interest in promoting labor organizing reframes labor legislation and litigation. In addition to promoting industrial peace and equal bargaining, states pursue a vital goal of legitimacy by promoting labor organizing. When that goal conflicts with individual rights rooted in conscience, the state must seek an accommodation, but one which does not externalize excessive costs of accommodation onto third-party workers.

INTRODUCTION

On President Biden's first day in the Oval Office, he gave labor something no president had before: he fired the antagonistic general counsel of the National Labor Relations Board, a move many regarded as a bright sign for workers under

the new Administration.¹ A few months into office, President Biden voiced support for the Protecting the Right to Organize (PRO) Act,² which expands the definitions of “employee,” “employer,” and “supervisor”; protects secondary strikes; and increases penalties on employers for antiunion unfair labor practices.³ The Act has since been passed by the House of Representatives, and enjoys widespread support among the general public.⁴

Organizing efforts by workers themselves have similarly escalated in recent years. High-profile teacher strikes in 2019, for example, have contributed to a rise in industrial activity at levels not seen in decades.⁵ Industrial activity picked up again in the second half of 2021, leading commentators to speak of a strike wave across the country.⁶ Recently, labor unions have responded to the intersectional challenges of low-wage workers through what scholars have termed “common-good unionism,” which seeks “positive change not just for the benefit of union members but for all people who are similarly situated.”⁷ Additionally, labor activity has generally been met with increased public sympathy.⁸ While

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1. Ian Kullgren & Josh Eidelson, *Biden Fires NLRB General Counsel After He Refuses to Resign*, BLOOMBERG (Jan. 20, 2021, 9:42 PM), <https://news.bloomberglaw.com/daily-labor-report/biden-moves-to-oust-top-labor-board-attorney-robb> [<https://perma.cc/6JBD-4A5E>].
 2. Press Release, The White House, Statement of President Joe Biden on the House Taking up the PRO Act (Mar. 9, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/09/statement-by-president-joe-biden-on-the-house-taking-up-the-pro-act> [<https://perma.cc/6Y64-AA49>].
 3. Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. §§ 101, 104, 109 (2021).
 4. Gabby Birenbaum, *Poll: A Majority of Voters Support the PRO Act*, VOX (June 16, 2021, 12:00 PM), <https://www.vox.com/2021/6/16/22535274/poll-pro-act-unionization-majority-bipartisan> [<https://perma.cc/HXC4-XCAY>].
 5. In 2019, strike activity hit its highest rate since 1986. Scott Horsley, *‘It’s Time to Get Something Back’: Union Workers’ Voices Are Getting Louder*, NPR (Oct. 23, 2019, 5:46 PM), <https://www.npr.org/2019/10/23/772760183/it-s-time-to-get-something-back-union-workers-voices-are-getting-louder> [<https://perma.cc/R9KM-PQ4S>].
 6. Hamilton Nolan, *American’s Strike Wave Is a Rare—and Beautiful—Sight to Behold*, GUARDIAN (Oct. 19, 2021, 6:25 AM), <https://www.theguardian.com/commentisfree/2021/oct/19/america-strike-wave-john-deere-iatse> [<https://perma.cc/A2BV-GXCC>]; Jennifer Alsever, *What’s Behind Striketober: Unions Representing More than 100,000 Workers Are on Strike*, FORTUNE (Oct. 14, 2021, 5:33 PM), <https://fortune.com/2021/10/14/whats-behind-striketober-unions-representing-more-than-100000-workers-are-on-strike> [<https://perma.cc/NB56-73UP>].
 7. Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers’ Identities Are Shaping Labor Law*, 126 YALE L.J.F. 503, 505–06 (2017); *About Us*, BARGAINING FOR COMMON GOOD, <https://www.bargainingforthecommongood.org/about> [<https://perma.cc/CAH6-6FUK>].
 8. Shiva Maniam, *Most Americans See Labor Unions, Corporations, Favorably*, PEW RSCH. CTR. (Jan. 30, 2017), <https://www.pewresearch.org/fact-tank-2017/01/30/most-americans-see-labor-unions-corporations-favorably> [<https://perma.cc/6L2A-5CTR>].

labor-rights observers are a naturally cautious bunch, these developments may warrant more optimism than has seemed fitting for a generation.⁹

But there are two faces to labor’s fight to organize, and appropriately enough the other is named *Janus*. The Supreme Court’s holding in *Janus v. AFSCME* that there is no compelling state interest in protecting labor-union organizing from free riders has been, and will continue to be, a burr in the foot of any envisioned march of labor toward progress.¹⁰

In *Janus*, the Court overruled *Abood v. Detroit Board of Education*, and with it a delicate compromise that had governed collective public-sector labor relations for decades.¹¹ Under the regime established by *Abood*, a union that had been selected by a majority of the workers in a workplace enjoyed an exclusive right to represent all workers at that workplace, including those who chose not to become union members.¹² Under *Abood*, those nonmembers could be compelled, consistent with the Constitution, to pay an “agency” or “fair-share” fee – typically calculated as the base union dues, less whatever percentage of dues the union uses for “ideological” or “political” activity, such as lobbying, activism, or campaign contributions.¹³ Under this compromise, ideologically opposed workers could opt out of contributing to a union’s political activity, but would still be required to compensate unions for providing representation, negotiation, and arbitration services.¹⁴ *Janus*, however, held that fair-share fees violate the First Amendment’s protections against compelled political speech.¹⁵ It thus upended a decades-long compromise, and threatened to cut off an important source of public-sector union revenue.

The fact that *Janus* poses a threat to labor organizing is well-known.¹⁶ This Essay, however, identifies a particularly bedeviling structural feature of *Janus*: its “rightsist” approach to rights. According to Jamal Greene, a “rightist” approach to rights involves arbitrary and pernicious discrimination: some rights are said

9. See, e.g., Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 *YALE L.J.F.* 685, 686–87 (2021) (“Hope is manifest in the BLM protests, and in the upsurge of labor protest, including teachers’ strikes in 2019, and the 2020 strikes, protests, and whistleblowing by Amazon [workers] . . .”).

10. 138 S. Ct. 2448, 2460 (2018).

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

12. *Id.* at 223–26.

13. *Id.* at 211, 235–36.

14. Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 *U. CHI. LEGAL F.* 513, 514 (2018) (describing the compromise as “roughly even-handed”).

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

16. See, e.g., Kate Andrias, *Janus’s Two Faces*, 2018 *SUP. CT. REV.* 21, 22 (2019); Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 *COLUM. L. REV.* 2057, 2062–63 (2018).

to exist and enjoy robust protections, while others are said not to exist at all.¹⁷ As a result, a losing litigant is told that she never had a leg to stand on in her case—that she was, essentially, defending a phantom right.¹⁸ This approach to rights litigation threatens to undermine state legitimacy by rendering judicial decision-making unduly opaque and alien. Losers in such a system have little reason to believe that they received a fair shake.

The alternative to rightsism would recognize a wider range of legitimate rights, and understand that the existence of a right does not necessarily settle a case in favor of the litigant invoking it. In other words: rights are not always trumps.¹⁹ But this approach to rights—which treats them as if they can be traded off and balanced—requires a considerable amount of trust from and between citizens.

Accordingly, *Janus*'s failure to recognize a state's right to ensure that labor unions have a reasonable chance of success in their organizing is additionally harmful because it fails to foster that trust. The right to organize—and more generally the right to pursue solidaristic associations—is essential for sustaining the sort of political community required in a large, diverse, pluralistic constitutional democracy. A polity without such a community, and with a rightsist approach to rights, will, as Greene and others have argued, lead to the disaffection of many with democracy and sap the spirit of commitment to repeat play—to accepting short-term defeat while organizing to compete in the next political contest—essential to a functioning democracy.²⁰ The Court in *Janus* thus exhibited a deeper failure to appreciate the conditions necessary for American democracy to flourish—or simply survive.

17. JAMAL GREENE, HOW RIGHTS WENT WRONG 58-59 (2021).

18. *Id.*

19. See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998). Pildes's pithy formulation is meant as a reply to Ronald Dworkin's influential view that the rights of the individual should be held sacrosanct, often termed "rights as trumps." See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977). It is debatable whether Pildes's article rightly captures Dworkin's view of rights. See Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 302 (2000). I leave that debate aside and simply borrow Pildes's formulation.

20. See GREENE, *supra* note 17, at xxxii. For discussions linking proportionality review with the maintenance of a democratic culture, see Bernhard Schlink, *Proportionality (I)*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718, 734-37 (Michel Rosenfeld & András Sajó, eds., 2012); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 141, 163 (2010); Wojciech Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, in REASONABLENESS AND LAW 129, 137-41 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009); and Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

The central argument of this Essay is that a balancing approach to rights only makes sense in a society where there are adequate reserves of trust, and where that trust is developed through the widespread flourishing of solidaristic associations. In other words, only a state that enjoys widely recognized legitimacy can realize the benefits of rights-balancing litigation, but only widespread experience among the citizenry with solidaristic organizing can produce that legitimacy.

Thus arises the *Janus* double bind: the *Janus* opinion reflects an unwillingness to recognize the importance of the state's legitimacy-based interest in promoting solidaristic organizing, and thus has the potential to contribute to American democracy's path toward a vicious, downward spiral.²¹ Without a commitment to facilitating solidaristic organizing, American society will struggle to develop the reserves of trust that would otherwise allow for the development of a balancing approach to rights adjudication. And without such a sensitive approach to rights adjudication, more and more people will react to the denial of their rights as a reason to take their leave of the great democratic experiment.

This Essay proceeds as follows. Part I outlines calls by legal scholars for a more sensitive balancing approach to rights, rather than the sort of rights absolutism that has prevailed in the courts. Focusing on conscience-based claims to exemptions, it shows how a rightsist approach may be unjust and undermine state legitimacy. Part II explains the background social conditions that are necessary to facilitate a regime based on the balancing of rights. It introduces the idea of a compelling state interest in promoting solidaristic organizing and briefly explores how that interest can be pursued in the United States's constitutional democracy. Finally, Part III returns to *Janus* itself and details how that decision has created a serious double bind. It argues that, by failing to recognize a state's legitimate interest in promoting effective labor organizing, the *Janus* Court undermined the conditions under which a more sensible and democracy-promoting approach to rights of any kind could possibly flourish. Accordingly, *Janus* should be understood as a conflict between a conscience-based exemption claim and a compelling state interest in solidaristic organizing. The Essay concludes by showing how this way of conceiving of the stakes of labor legislation and litigation may facilitate both solidaristic organizing and a political culture characterized by civic friendship and civic trust.

21. This downward spiral can be thought of in terms of what Aziz Huq and Tom Ginsburg have termed "constitutional retrogression." See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 92-99 (2018) (distinguishing rapid "authoritarian reversion" from a more gradual decline of democratic norms, institutions, and practices); see also Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 8-11 (2020) (tracing the assault on and decline of American democratic institutions).

I. EXEMPTIONS, LEGITIMACY, AND RIGHTSISM

In *How Rights Went Wrong*, Jamal Greene diagnoses American legal and political discourse with a bad case of “rightsism.”²² Rightsism, in Greene’s telling, is a practice of discrimination among rights: some rights are held to be fundamental and deserving of paramount judicial protection while others are said not to exist at all—leaving a wide berth for government to act against them.

This apartheid of rights is the result of a confluence of two factors: first, the post-*Lochner* judicial commitment to judicial minimalism except in a narrow range of cases implicating enumerated rights, the political process, or racial, gender, or religious minorities;²³ and second, the explosion of rights claims beginning in the 1960s in the wake of the civil-rights movement and under the relatively amenable Warren Court.²⁴ Many of these rights claims fit awkwardly into the framework of 1930s judicial minimalism. But the moral and political imperative to acknowledge civil rights forced courts to shoehorn them into available categories—and thus into the binary of rationality review or strict scrutiny.

Greene argues that rightsism foments social division and hinders cooperation.²⁵ His primary case study is the polarization of abortion politics in the United States after *Roe v. Wade*, which he contrasts with the relatively consensus-driven and civil politics around abortion in Germany.²⁶ Unlike the United States Supreme Court in *Roe*, the West German courts in 1974 acknowledged that fetuses and mothers both have constitutionally relevant rights and proceeded to strike a balance between them. “Germany’s highest court,” Greene explains, “sought to put abortion into politics instead of trying to take it out.”²⁷ By contrast, “American rightsism is designed to avoid such conflicts by pretending that one right or another is not of constitutional significance,” which is “both wrong and dangerous.”²⁸ In doing so, Greene draws our attention to the possibility that the failure to recognize the existence of rights can produce substantive injustice and contribute to state domination over individuals.

22. GREENE, *supra* note 17.

23. *Id.* at 65–67 (explaining the approach of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). This approach is also the one famously defended by John Hart Ely. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing in favor of an approach to judicial review that is based on participation and representation).

24. See GREENE, *supra* note 17, at 69–86.

25. *Id.* at 89.

26. *Id.* at 90.

27. *Id.* at 137.

28. *Id.* at 114.

While this is true of many rights, this Part focuses on rights claims to exemptions from general government policy. Section I.A offers a brief history of the development of exemptions claims. Section I.B then explores the relationship between exemptions and state legitimacy. It argues that there is a reciprocal relationship between a state's legitimacy and its ability and willingness to grant exemptions.

A. Brief Overview of Exemptions Claims

In a large, diverse society with a highly intrusive administrative apparatus, the possibility of “exit” is vital for minimizing domination.²⁹ “Domination” refers to circumstances under which an individual is subject to the power of a state that does not robustly track her preferences.³⁰ It can be thought of as an injustice either because it signals an objectionable lack of democracy or because it is a violation of an individual's basic freedom. “Exit” counteracts domination by allowing the individual to address or avoid the circumstances under which she is exposed to arbitrary power—she can either avail herself of that exit opportunity or exploit it as a bargaining tool to compel the powerful actor to heed her wishes.³¹

Federalism and the possibility of “voting with your feet” represent one way to exit. Simply put, if someone does not like the rules of a jurisdiction, or finds them unduly burdensome, she can escape them by moving somewhere else.³² If a resident of a state finds the abortion laws to be too restrictive, she may prefer to move to a state with more expansive protections. Or if the regulatory or tax burden on small businesses is thought too great in one state, a business owner may move the company to a more laissez-faire state. Heather K. Gerken and Maggie Blackhawk have both explored the ways in which formal separation of jurisdiction also allows minorities to exercise power within separate jurisdictions to protect their own interests against unfavorable majority rulemaking.³³

29. See ROBERT S. TAYLOR, *EXIT LEFT: MARKETS AND MOBILITY IN REPUBLICAN THOUGHT* 3 (2017).

30. See PHILIP PETTIT, *ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 26 (2012).

31. The classic statement of this position is in ALBERT OTTO HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 21-25 (1970).

32. See Mark E. Warren, *Voting with Your Feet: Exit-Based Empowerment in Democratic Theory*, 105 *AM. POL. SCI. REV.* 683 (2011).

33. Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 *DUKE L.J.* 1349, 1365 (2013); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 *HARV. L. REV.* 1787, 1863-65 (2019).

But it is not always possible to vote with your feet. Sometimes the only way to “exit” is to stay put and plea for an exemption. For example, in cases where a problematic policy is federal, there is no way to exploit an internal exit opportunity by moving to another jurisdiction within the polity. In other cases, moving to a new location may be infeasible because the policy at issue is one that burdens an entire community. For example, a law may burden a religious practice common to all members of a religious community. There may be no point in moving away, as an individual, without one’s community. Moreover, a community may have specific geographic ties that make it impossible for its members to move away as a collective, and most are unable to secure their own autonomous jurisdiction.

The traditional conception of an exemption is the conscientious objector’s claim to refuse to enlist or be drafted. Quaker pacifism in the Revolutionary War provided the United States with this early example of the potential conflicts between deeply held beliefs of conscience and citizenship.³⁴ It also provided an example of the need to seek accommodation and raised the difficult question of whether an accommodation would – or should – be provided as a matter of beneficence or right.³⁵ Congress has forestalled the constitutional question of whether there is a right to accommodation by including a conscientious-objector provision in every draft authorization since the Civil War.³⁶

Observing a recent proliferation of controversial exemption claims, some commentators argue that a “new generation of conscience-based objections differs sharply from its predecessors” because it “involves claims that are interventionist and intrusive.”³⁷ Rather than simply seeking to withdraw, new-

34. See VINCENT PHILLIP MUÑOZ, *GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON* 61–66 (2009); KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE* 117–18 (2015).

35. MUÑOZ, *supra* note 34, at 65 (“Washington did not treat the Quakers’ religious pacifism as a right. He was inclined to accommodate the Quakers’ sincere religious exercises and at times he was inclined to permit the Quakers not to fight. But he never acted under the presumption that the right to religious freedom entitled the Quakers to preferential treatment because of their religious beliefs.”).

36. See Spencer E. Davis, Jr., *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exemptions*, 19 FLA. ST. U. L. REV. 191, 191 (1991); see also Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 291, 296, 298 (2010) (describing the civil disobedience of Henry David Thoreau in protest of slavery and the Mexican-American War; the Jehovah’s Witnesses’ refusal to salute the American flag; and refusals to fight in the Vietnam War as examples of people claiming a right to exemptions).

37. Susanna Mancini & Michel Rosenfeld, *Introduction: The New Generation of Conscience Objections in Legal, Political, and Cultural Context*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 1, 1 (Susanna Mancini & Michel Rosenfeld eds., 2018); see also Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based*

generation claims tend to extend controversial culture-war debates and threaten to undermine nascent legal regimes.³⁸ Among these more recent and controversial examples are religious groups' pleas to exit employment and antidiscrimination regulations,³⁹ a Colorado baker's plea to exit a provision of an antidiscrimination scheme,⁴⁰ a Kentucky county clerk's plea to be exempt from enforcing same-sex marriages,⁴¹ and a committed antiunionist's plea to exit mandatory-contribution requirements that served to finance the union representing his workplace, as in *Janus*.⁴²

B. The Relationship Between Legitimacy and Rightsism

Under some circumstances, denying the right to exit from a general scheme may be substantively unjust. But spelling out those circumstances and articulating the moral, political, and constitutional principles that should guide our judgment and practices is, of course, no easy feat.

There are deeply held liberal views about equal protection, social cooperation, and the rule of law that seem to weigh heavily *against* granting accommodations.⁴³ Adopting John Rawls's influential approach, for example, political society could be conceived as a "cooperative venture for mutual advantage" that

Conscience Claims in Religion and Politics, 124 YALE L.J. 2516, 2538 (2015) (tracing an increase in accommodations from activities relating to the termination of pregnancy or the provision of contraceptives).

38. Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS*, *supra* note 37, at 187, 203. See generally *id.* (collecting cases).
39. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373-76 (2020); Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696-700, 703 (2014).
40. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724-25 (2018).
41. Miller v. Davis, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015).
42. Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 138 S. Ct. 2448, 2461 (2018).
43. These views led many liberals to espouse deep skepticism about conscience-based exemptions. See, e.g., BRIAN LEITER, WHY TOLERATE RELIGION? 132-33 (2013) ("Sometimes those with claims of religious conscience may be quite correct to resist the law, but that is wholly independent of the question of whether the law ought to exempt them from its application. It has been the argument of this book that principled toleration does not require that we do so."); BRIAN BARRY, CULTURE AND EQUALITY (2001) ("[J]ustice . . . and freedom of religion do not require exemptions from generally applicable laws simply on the basis of their having a differential effect on people according to their beliefs, norms, compulsions or preferences."); Louise Melling, *Religious Exemptions and the Family*, 131 YALE L.J.F. 275, 286 (2021) ("[R]eligious exemptions threaten the promise, both in law and in culture, to diverse families that they will no longer be punished for who they love, whether they marry, or whether and how they have children.").

produces both benefits and burdens, which ought to be fairly spread across members.⁴⁴ Once a fair constitutional framework is established, citizens may have a duty to accommodate themselves to that structure—not the other way around.⁴⁵

But many other scholars have argued that exemptions from general policies can be consistent with the rule of law and equal protection, and in some cases may be demanded by those values.⁴⁶ Deep liberal commitments to the freedoms of conscience and religion, for example, may demand exemptions.⁴⁷

When the state does not allow the possibility of exit and thus increases the likelihood of domination, its legitimacy is imperiled in the eyes of its disparately impacted citizens. This is what Greene means when he refers to the American approach to rights as “dangerous.”⁴⁸ He points to the antiabortion zealot Scott Roeder, who, convinced that “he had no leverage” in law or politics, “took politics into his own hands and killed Dr. George Tiller,” a prominent abortion provider and advocate.⁴⁹ Recent polling suggests that the majority of Republican voters today feel so existentially threatened by liberal legislation and supposed cultural hegemony that their primary criterion in selecting politicians is whether they will fight for the survival of their way of life.⁵⁰ The religious right in particular, despite the presence of sympathizers on the Supreme Court, has shown itself to be increasingly willing to challenge the liberal democratic foundations of

44. JOHN RAWLS, *A THEORY OF JUSTICE* 4 (rev. ed. 1999).

45. ALAN PATTEN, *EQUAL RECOGNITION: THE MORAL FOUNDATIONS OF MINORITY RIGHTS* 139-40 (2014).

46. See JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 69-73 (Jane Marie Todd trans., 2011) (interpreting conscience-based exemptions as possible demands of equality); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 112-14 (2007) (defending an equal-protection approach to conscience-based exemptions); Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 *WASH. & LEE L. REV.* 3 (2002) (arguing that accommodations can be consistent with the rule of law).

47. See CÉCILE LABORDE, *LIBERALISM’S RELIGION* 197-238 (2017); MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* 19-20 (2008); Alexander Dushku, *The Case for Creative Pluralism in Adoption and Foster Care*, 131 *YALE L.J.F.* 246, 246 (2021) (“Today, it is clearer than ever that we need a ‘negotiated truce’ that can be wrought only by a creative, gritty pluralism that reasonably protects both LGBTQ civil rights and longstanding religious liberties.” (quoting Douglas Laycock, *Afterword* to *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 191 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008))).

48. GREENE, *supra* note 17, at 114.

49. *Id.* at 137.

50. See *The Ezra Klein Show: Ezra Klein Interviews Kristen Soltis Anderson*, *N.Y. TIMES* (Mar. 26, 2021), <https://www.nytimes.com/2021/03/26/podcasts/ezra-klein-podcast-kristen-soltis-anderson-transcript.html> [<https://perma.cc/9RCM-HUE6>].

the polity.⁵¹ As Greene observes, explaining this anxiety on the right, when confronted with people whose politics pose existential threats, “[y]ou don’t negotiate with such people; you destroy them.”⁵²

The tragic case of Dr. Tiller may be an extreme example. But there is considerable evidence that political competition is increasingly experienced as zero-sum.⁵³ Jan-Werner Müller, for example, has described populist leaders as treating politics as a “permanent campaign” and attempting to “prepare the people for nothing less than what is conjured up as a kind of apocalyptic confrontation.”⁵⁴ Müller is concerned with the ways in which demagogues and populist leaders undermine the *legitimacy* of a political order by convincing their followers that political decisions that deviate from their preferred outcomes are impure, evil, or undeserving of allegiance.⁵⁵

Legitimacy is the characteristic of a state that renders it authoritative and worthy of allegiance even when it deviates from (a particular individual’s or group’s view of) the demands of substantive justice.⁵⁶ A legitimate state may effectuate injustice or uphold unjust conditions, but those injustices must be met by an attempt to reform them within the structures provided by the legitimate state itself. When an individual or group views a state as illegitimate, they will believe that they are entitled to pursue their vision of justice *outside* of the available legal channels. In a legitimate state, the people serve as invigilators; in a state viewed as illegitimate, they become vigilantes.⁵⁷

51. See, e.g., PATRICK DENEEN, *WHY LIBERALISM FAILED* (2018) (arguing that liberalism as an ideology has failed to support the conditions required for continued civic engagement); ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* (2017) (arguing that religious conservatives should withdraw from public life in America); Sohrab Ahmari, *Against David French-ism*, *FIRST THINGS* (May 29, 2019), <https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism> [<https://perma.cc/FZ69-P9LH>]; Daniel W. Drezner, *Are American Conservatives Facing an Extinction-Level Event?*, *WASH. POST* (Apr. 5, 2021, 7:00 AM EDT), <https://www.washingtonpost.com/outlook/2021/04/05/are-american-conservatives-facing-an-extinction-level-event> [<https://perma.cc/2NK4-XPR9>]; Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, *N.Y. TIMES* (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html> [<https://perma.cc/V26U-HRLV>]. For an overview of so-called “postliberals” on the right, see Elisabeth Zerofsky, *How the American Right Fell in Love With Hungary*, *N.Y. TIMES MAG.* (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/magazine/viktor-orban-rod-dreher.html> [<https://perma.cc/T6D6-Z7SY>].

52. GREENE, *supra* note 17, at 151.

53. See Samuel Issacharoff, *Democracy’s Deficits*, 85 *U. CHI. L. REV.* 485, 486 (2018).

54. JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 42-43 (2016).

55. Müller identifies this with the antipluralist component of pluralism. See *id.* at 19-40.

56. See PETTIT, *supra* note 30, at 136-40.

57. Many of those who joined the mob that stormed the U.S. Capitol on January 6, 2021 apparently believed their actions were justified by a (wrongly) perceived illegitimacy of the 2020

Populist leaders and other demagogues are not the only sources of a state's decline toward illegitimacy in the eyes of its citizens. Samuel Issacharoff—who argues that both committing to repeat play and taking a longer view of political competition are essential to the health of a democracy—discusses how political parties, stalled legislatures, hollowed-out social institutions, and state incompetency undermine it.⁵⁸ Greene's discussion of rightsism brings out the additional fact that legal and political culture can also contribute to undermining the legitimacy of a state in the eyes of those who lose certain legal or political contests.

Part of Greene's objection to rightsism is that it unnecessarily mistreats the loser in constitutional litigation by publicly declaring that they were simply mistaken in claiming that they had a constitutionally recognized right.⁵⁹ Leading philosophical accounts of state legitimacy agree that the process by which a state reaches its legal and political decisions, and the way it communicates those decisions to members of the polity, has serious consequences. For example, according to the Liberal Principle of Legitimacy advanced by John Rawls and other public-reason liberals, government action is only legitimate when it is decided upon and carried out based on principles that all reasonable members of society can accept.⁶⁰ In the words of Jeremy Waldron, “intelligible justifications in social and political life must be available for everyone.”⁶¹ It is one thing to lose a particular legal or political contest. It is quite another to lose on the basis of considerations and values that one cannot help but see as fundamentally opposed to one's own ethical, moral, or political identity.

Neorepublican philosopher Philip Pettit has a similar view about “[t]he point of legitimacy,” namely that it “is to ensure that you and your fellow citizens are not subject to an alien, controlling will, despite that fact that there may be a good deal of discretion exercised by those in power.”⁶² That discretion may be

presidential election. See Glenn Kessler, *The Jan. 6 Attack on the Capitol: A Guide to What We Now Know*, WASH. POST (Jan. 6, 2022 3:00AM), <https://www.washingtonpost.com/politics/2022/01/06/january-6-attack-capitol-guide-what-we-now-know> [<https://perma.cc/3GFM-WR25>].

58. See Issacharoff, *supra* note 53, at 488. Repeat play is the idea that despite losing one political contest, there will be more fair contests in the future where one can continue to advocate one's interests. *Id.*; see also Samuel Issacharoff & J. Colin Bradley, *The Plebiscite in Modern Democracy*, in *THE ROUTLEDGE HANDBOOK OF ILLIBERALISM* 505, 509-11 (András Sajó, Renáta Uitz & Stephen Holmes eds., 2021) (tracing the decline of “intermediary institutions” and the subsequent degeneration of democratic governance).

59. GREENE, *supra* note 17, at xxxii.

60. See JOHN RAWLS, *POLITICAL LIBERALISM* 50 (expanded ed. 2005); see also JONATHAN QUONG, *LIBERALISM WITHOUT PERFECTION* (2011); RAINER FORST, *CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM* (John M. M. Farrell trans., 2002).

61. Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *PHIL. Q.* 127, 135 (1987).

62. PETTIT, *supra* note 30, at 177.

exercised in ways that are antithetical to one's own vision of the just polity. However, so long as the state can still be seen as something other than an "alien" will, its decisions can be accepted as legitimate – though perhaps deeply regrettable. On Pettit's view, the crucial distinction is whether a losing citizen can view the unfavorable outcome as just a matter of "tough luck," or whether they will see it as a hostile imposition or form of domination.⁶³

A state that fails to publicly acknowledge the values and principles upon which pleas for exemptions are based risks becoming illegitimate in just this way. Indeed, conscience-based claims for exemptions are more likely to lead to decreases in legitimacy than are other sorts of disagreements with state policy. Not all disagreements are equal: conscience-based claims for exemptions are typically rooted in values that individuals feel they must uphold as a matter of deep integrity. For this reason, Cécile Laborde refers to such claims as "integrity-protecting claims."⁶⁴ Strikes against these claims are therefore especially likely to precipitate feelings of alienation, and to lower citizens' estimation of the state's legitimacy.

Recognizing this problem, Greene argues that American courts can help promote legitimacy by changing their approach to rights adjudication.⁶⁵ Recognizing a wider range of rights – including rights claims to exemptions – while balancing those rights against each other – could shore up the legitimacy of American democracy. Losers would be far less likely to be driven to the extremes of Scott Roeder. Other scholars have similarly argued that a major advantage of proportionality review as a method of judicial reasoning is that it can improve political discourse. Mattias Kumm, for example, has argued that proportionality review can have a "disciplining effect on public authorities and help[] foster an attitude of civilian confidence among citizens."⁶⁶ The open-ended balancing of proportionality review has also been lauded for its "relative accessibility and transparency" over American-style judicial review.⁶⁷ Indeed, proportionality review is said to exhibit a transparency of practical reasoning as way of creating "understanding," which Wojciech Sadurski notes is "a very important factor in the legitimacy of a constitutional judge."⁶⁸ This is in large part because it sustains the willingness of the loser of a particular legal dispute to maintain "hope that it

63. *Id.* at 177-79.

64. Cécile Laborde, *Egalitarian Justice and Religious Exemptions*, in *THE CONSCIENCE WARS*, *supra* note 37, at 109, 110.

65. See GREENE, *supra* note 17, at xxii-xxiii.

66. Kumm, *supra* note 20, at 163.

67. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3142 (2015).

68. Sadurski, *supra* note 20, at 139.

may win in the future, and that today's decision does not entrench its loss forever."⁶⁹

But the causal story here is likely to be far more complex than Greene suggests. *Roe v. Wade* does plausibly provide a case where a specific approach to legal reasoning seeped into broader political discourse: what was perceived as judicial erasure of a legitimate rights claim led to a political movement that contains some currents that consequently view the state as illegitimate. Still, Greene neglects the possibility of the contrary causal arrow: that political culture can seep into legal reasoning. Writing several decades before Greene, Mary Ann Glendon made this very point.⁷⁰ Glendon shared Greene's criticism of rights absolutism, but suggested that rights absolutism was a *result* of a divided political culture. Glendon argued that a society that is already too divided and uncooperative may not have the resources to sustain the sort of fact-sensitive, careful accommodation of competing rights that she and Greene envisage as necessary for a well-ordered society.⁷¹

The suggestion that there is a mutually reinforcing relationship between rights absolutism, on one hand, and a divided political culture, on the other, seems inescapable. The rightsism exhibited by American courts is *both* a result, *and* a cause, of a divided political culture in which citizens are quick to take defeat as existential. This presses the question: what characteristics render a society amenable to ditching rightsism?

II. POLITICAL CULTURE, ORGANIZING, AND SOLIDARITY

Conscience-based rights claims to exemption from general government policy strike at the heart of what holds political society together. On one hand, for the reasons mentioned above, accommodating sincere conscience-based exemptions seems like part of the duty of a legitimate and just state wielding power in a pluralistic society. Such claims are rooted in fundamental liberties of conscience, speech, and religion. Denying them may not only be unjust, but because of the centrality of such claims to the integrity and identity of citizens, it may also undermine state legitimacy.

On the other hand, the granting of exemptions may undermine vital government prerogatives. For this reason, rights claims as pleas for exemptions from

69. *Id.* at 141.

70. MARY ANN GLENDON, RIGHTS TALK 3-5 (1991). The connection between Greene's argument and Glendon's argument is also made by Samuel Moyn. Samuel Moyn, *Why Do Americans Have So Few Rights?*, NEW REPUBLIC (Mar. 9, 2021), <https://newrepublic.com/article/161561/americans-rights-jamal-greene-book-review> [<https://perma.cc/D6MQ-255C>].

71. GLENDON, *supra* note 69, at 14-16.

general government policies are often greeted with hostility from progressives and conservatives alike. For example, progressive scholar Robin West has argued that the “new generation of exit rights” developed under the Rehnquist and Roberts Courts threatens to “unravel civil society” by hamstringing all attempts by government to pass sweeping—and in many cases vital—health care, labor, civil-rights, and environmental measures.⁷² Reaching a similar conclusion from the opposite ideological starting point, Justice Scalia, in his monumental opinion for the Court in *Department of Human Resources v. Smith*, maintained that allowing assertions of religious conviction to authorize opt-outs from neutral legislation would be “courting anarchy.”⁷³

Such worries are well-founded. Under the Roberts Court, claims of First Amendment rights to freedom of speech, freedom not to associate, and freedom to exercise one’s religion have undermined antidiscrimination law,⁷⁴ public-health measures,⁷⁵ campaign-finance regulations,⁷⁶ economic regulation,⁷⁷ and public-sector unions.⁷⁸

Resolving this tension requires recognizing a distinction between two different ways that rights claims to exemptions can operate. The first invokes an absolute conception of rights and contends that the state has overstepped its legitimate legislative scope in enacting a policy that threatens to impinge on that right. The second recognizes that the government may itself be attempting to implement rights when enacting policy, and thus conceives of the alleged conflict as a conflict between rights. Such a conflict requires accommodation and compromise.

72. Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 911 (2014) (“The new generation of exit rights the courts have fashioned . . . have the potential to unravel civil society, depending on the extent to which they are embraced.”).

73. 494 U.S. 872, 888 (1990).

74. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1732 (2018).

75. See *Tandon v. Newsom*, 141 S. Ct. 1294, 1294-98 (2021) (majority opinion) (striking down California’s COVID-19 regulations limiting gatherings—including for religious purposes—in private homes); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2370-76 (2018) (finding that California disclosure requirements for clinics offering family planning services likely violated the First Amendment); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (finding that a state law regulating the transmission and sale of information on medical prescriptions violated First Amendment protections of commercial speech).

76. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366-72 (2010) (striking down campaign-finance restrictions on corporate and union-electioneering speech).

77. See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1147 (2017) (finding that a New York law regulating credit-card surcharges is a potential violation of commercial-speech rights).

78. See *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2466 (2018) (holding that public-sector agency-fee arrangements violate the First Amendment).

But accepting a compromise involving one's own rights is not an easy thing to do. As Justice Scalia asserted in *District of Columbia v. Heller*, a right subject to balancing and compromise is “no constitutional guarantee at all.”⁷⁹ Part of what Justice Scalia might have in mind is a specific conception of what it means to possess a right. As Ronald Dworkin has emphasized, treating a right as something that can be traded off against other interests and policy objectives is to treat it as just another interest or policy objective.⁸⁰ But to invoke that conception of a right in this context would be misleading, because, as we will see, rights claims to exemptions often involve a conflict between rights themselves. In that case, trade-offs and balancing are unavoidable.

A better gloss on Justice Scalia's worry is the recognition that certain background conditions must be in place in order to accept the outcome when a balancing test comes down on the side of limiting your right. Part I canvassed philosophical accounts of legitimacy according to which a state is legitimate to the extent that it can explain its decisions in a way that will be intelligible and non-alien to those affected by them.⁸¹ But those accounts neglect to explain that whether a reasonable person accepts a proffered justification of state action depends not only on the *justification* offered to support it, but also on the political and cultural *context* in which it is offered.⁸²

This Part argues that a background culture of civic trust is required to facilitate exemptions claims, and that the state has a duty to develop such civic trust. To that end, Section II.A discusses the importance of civic friendship, which refers to the condition where citizens value cooperation on equal and reciprocal terms. Section II.B then explains that civic friendship can be cultivated by political organizing in general, and labor organizing in particular. The fact that organizing plays such a core role in promoting civic friendship grounds a legitimacy-based duty for the state to facilitate such organizing.

A. *The Importance of Civic Friendship*

An analogy can illuminate the importance of the context in which a justification is offered. Some rights claims to exemptions can be understood as what this Essay terms “authoritative requests.” These are, in fact, requests, rather than

79. 554 U.S. 570, 635 (2008) (“A constitutional guarantee subject to future judges’ assessment of its usefulness is no constitutional guarantee at all.”).

80. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 197–200, 353–57 (1977).

81. See *supra* text accompanying notes 49–69.

82. This point can be captured by the distinction in moral and political philosophy between the mere justification of an obligation, and the *interpersonal* justification of an obligation. See Johann Frick, *What We Owe to Hypocrites: Contractualism and the Speaker-Relativity of Justification*, 44 *PHIL. & PUB. AFFS.* 223, 240–42 (2016).

commands. But they are authoritative in the sense that they create a prima facie reason for the requestee to comply.⁸³

A paradigmatic example is someone asking their spouse to pick up their dry cleaning on their way home from work. The force of the request depends on the nature of the relationship and the surrounding circumstances. Consider, first, the nature of the relationship. If I invited my *boss* to my house for dinner, I could ask her to bring wine or dessert, but I could not ask her to swing by the dry cleaners on her way over. Generally, something we can loosely describe as “friendship” seems to be a necessary prerequisite to issuing authoritative requests. The friendship element is present in a spousal relationship, but not a supervisory one. I thus have a basis to ask my spouse to pick up my dry cleaning, but not my boss. However, even when an element of friendship exists, we must pierce the veil of the relationship and ask about the particular circumstances under which a request is made. It might not always make sense to ask my spouse to pick up my dry cleaning. For example, if I know that they are in a rush, had a bad day, or were relying on me to pick up the dry cleaning, the surrounding circumstances might suggest that I should not ask them – that it would be *unfair* of me to ask them.

In some circumstances, a claim to an exemption operates like an authoritative request from an individual to the polity or the polity’s representative. What makes an authoritative request a *request* is the fact that the general regime from which an exemption is sought is suitably justified.⁸⁴ But what makes such a request *authoritative* is if the specifics of the relationship and circumstances render the denial of the request unfair.

Comparative constitutional-law scholars who advocate proportionality review⁸⁵ recommend it in part on the grounds that it is well-suited for investigating the particulars of a rights claim.⁸⁶ In the above example, proportionality

83. For philosophical discussion of how requests can impose obligations, see David Enoch, *Giving Practical Reasons*, 11 PHILOSOPHERS’ IMPRINT 1 (2011); Geoffrey Cupit, *How Requests (and Promises) Create Obligations*, 44 PHIL. Q. 439 (1994).

84. Its justification could be rooted either in the fact that it promotes the common good or that it protects the rights of others. Without this caveat, it may be misleading to think of an exemption claim by analogy to authoritative requests. This is because if the regime is not suitably well justified, then the claimant has an unopposed right. An unopposed right is something a claimant can stand on by *demanding* its recognition, rather than *requesting* its recognition.

85. As Vicki C. Jackson describes a characteristic approach to proportionality review, the key step – “proportionality as such” – asks “whether the intrusion on the challenger’s rights can be justified by the benefits towards achieving the important public goal. This step calls for an independent judicial evaluation of whether the reasons offered by the government, relative to the limitation on rights, are sufficient to justify the intrusion.” Jackson, *supra* note 67, at 3099.

86. See MATTHIAS KLATT & MORITZ MEISTER, *THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY* 28-29 (2012).

review allows us to determine whether the request to pick up the dry cleaning is fair by considering whether the spouse is in a rush or had a bad day. Proportionality review thus allows us to assess the circumstances under which a request is made in order to determine if it is reasonable, and whether denying it would be unjust.

What proponents of proportionality review typically overlook is the necessary predicate to a request: the existence of friendship. Of course, we must take some license in referring to “friendship” on a national scale. But some notion of “civic friendship” or “civic trust” is not unfamiliar.⁸⁷ Sometimes it is called “fraternity,” or in the modern gender-neutral version: “solidarity.”⁸⁸ The value of civic friendship derives from the value of “cooperation on mutually appreciable terms” between citizens who make manifest their commitment to such cooperation.⁸⁹

When civic friendship and civic trust have been established, citizens are positioned to feel “confidence, or a lack of fear, during a moment of vulnerability before other citizens.”⁹⁰ One specific manifestation of such “confidence” may be the ability understand and identify with a judicial decision that limits one’s claimed right in order to expand the claimed right of another citizen. Against a background condition of civic friendship, Justice Scalia’s contention that a right subject to balancing is “no constitutional guarantee at all” might not register as a serious objection because one has the confidence to live without guarantees.

The work of philosopher Tommie Shelby provides another example of the centrality of civic friendship. Shelby rejects the calls of a group of thinkers he terms the “new integrationists” who argue that Black Americans living in ghettos have a moral obligation to voluntarily move to racially integrated neighborhoods.⁹¹ Shelby agrees that, considered as an ideal, Black people may in general

87. See, e.g., ROBERT TALISSE, *OVERDOING DEMOCRACY: WHY WE MUST PUT POLITICS IN ITS PLACE* 131 (2019) (describing an ideal of civic friendship). Talisse is concerned with a similar set of issues to those addressed in this Essay, but he advocates for increasing social participation in nonpolitical institutions and organizations. See *id.* (“Politics must be put in its place, and we can do this by participating together in cooperative social endeavors that are fundamentally nonpolitical in nature.”).

88. See, e.g., AXEL HONNETH, *THE IDEA OF SOCIALISM* 11-12 (Joseph Ganahl trans., 2017) (arguing that solidarity should be understood as a coequal value along with equality and liberty); STEINAR STJERNØ, *SOLIDARITY IN EUROPE: THE HISTORY OF AN IDEA* 16-19 (2014).

89. R.J. Leland, *Civic Friendship*, *Public Reasons*, 47 *PHIL. & PUB. AFFS.* 72, 75 (2019).

90. DANIELLE S. ALLEN, *TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE BROWN V. BOARD OF EDUCATION*, at xvi (2004).

91. TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 59-65 (2016). The primary “new integrationist” Shelby discusses is Elizabeth Anderson. See ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 21-22 (2010).

be better off if they live in racially integrated neighborhoods.⁹² However, he argues that the obligation to voluntarily integrate cannot be justified to Black Americans, in light of the background historical, cultural, and political context in which the demand would be made. In particular, Shelby argues that Black Americans could reasonably perceive a “lack of goodwill and weak commitment to racial justice” among white Americans.⁹³ Against that background, it would be unreasonable to take the risk and accept the costs of giving up the valuable relationship and connections to a current neighborhood. Shelby implies, however, that if white Americans could provide “assurances that [they] oppose and seek to rectify ideological, institutional, and structural racism and are committed to bringing about fair equality of opportunity,” then it *would* be reasonable to ask Black Americans to play an active role in bringing about integration.⁹⁴ In other words, white Americans would have to make efforts to establish a background condition of civic friendship and civic trust, against which sacrifices are more reasonably requested.⁹⁵

Let us take stock. It is important to find a way to accommodate rights claims to exemptions. But in doing so, we must avoid letting these claims act as “exit rights” that undermine important social programs. So, we need to implement a form of rights accommodation that offers the claimant recognition and dignity—and sometimes even a meaningful material concession—without undermining the legitimate rights-conferring or rights-protecting will of the majority. But to do *that*, we need to have first cultivated a condition of civic friendship or solidarity.⁹⁶ The question then becomes: how do we develop a condition of civic friendship or solidarity?

92. SHELBY, *supra* note 91, at 64. His central idea is that white-controlled social capital is often helpful for increased economic opportunity, and that social capital can be best accessed by integrated residential neighborhoods.

93. *Id.* at 71.

94. *Id.* at 73-74.

95. Cf. Meena Krishnamurthy, *Democracy Needs Discomfort and Distrust Is a Political Virtue*, PSYCHE (June 30, 2021) (chronicling a similar dynamic between white and Black activists during the civil-rights movement of the 1960s), <https://psyche.co/ideas/democracy-needs-discomfort-and-distrust-is-a-political-virtue> [<https://perma.cc/7DRK-FTNT>].

96. Cf. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 103 (2003) (“The success and vitality of the democratic project depends on some sense of interdependence and common fate and some ability to empathize, cooperate, and communicate among citizens from different families, neighborhoods, and communities.”).

B. Cultivating Civic Friendship Through Labor Organizing

It is incumbent upon a state to adopt the goal, on pain of undermining its own legitimacy, of cultivating civic friendship. In a pluralistic liberal democracy, the state can only pursue this goal indirectly, by fostering the opportunities for individuals to organize and protecting the resulting organizations. The goal of solidarity cannot be pursued without regard to the risks it may pose to individual liberty: one cannot be forced to be solidaristic.⁹⁷

The American tradition, however, provides a perfectly good model for government support of solidaristic organizing via the Bill of Rights. First Amendment protections of petitioning and association are obvious sources for an American commitment to facilitating joint and collective action among the citizenry.⁹⁸ Indeed, it is possible to read the Bill of Rights as a whole as a mechanism for providing, not individualistic rights, but protections for organizations that foster collective action: churches, militias, state and local assemblies, juries, and media organizations.⁹⁹ There is, it seems, a compelling state interest in protecting the freedom of association,¹⁰⁰ and more generally in providing and protecting the conditions that allow for collective, solidaristic endeavors.

Political parties are, of course, perhaps the most obvious manifestation of a constitutionally recognized state interest in promoting collective action and organization.¹⁰¹ In addition, churches, temples, mosques, and other religious institutions not only enjoy constitutional protection under the Religious Clauses of the First Amendment, but also maintain a long tradition of organizing constituencies for political and social reform.¹⁰²

97. *Contra* JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 53 (Victor Gourevitch ed. & trans., Cambridge Univ. Press 1997) (1762) (claiming that one can be “forced to be free”).

98. See DANIEL CARPENTER, *DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790-1870*, at 44-45 (2021) (chronicling the use of petitions as an organizing tool for benevolent societies, trade unions, temperance societies, antislavery societies, farmers’ and tenants’ organizations, and Indigenous lobbies).

99. See, e.g., AKHIL AMAR, *THE BILL OF RIGHTS*, at xiv-xv (1998) (providing such an interpretation of the Bill of Rights and arguing that the individualistic interpretation of constitutional rights only developed after Reconstruction); Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 *YALE L.J.* 1652, 1727 (2021) (interpreting the Assembly Clause as protecting state and local efforts at self-government); GREENE, *supra* note 17, at 30 (arguing that “the rights to be protected [in the Bill of Rights] were themselves grounded in political participation and self-governance via local community institutions”).

100. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

101. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (articulating a strong vision of autonomous political parties).

102. See, e.g., JEFFREY STOUT, *BLESSED ARE THE ORGANIZED: GRASSROOTS DEMOCRACY IN AMERICA* 42 (2010) (exploring the role of religious institutions in facilitating political organizing).

Labor organizing is yet another solidaristic endeavor through which multi-ethnic coalitions of citizens are forged. As Cynthia Estlund argues, “The workplace stands virtually alone in its capacity to foster [democratic] ties,” and unionization is a “particularly dramatic expression of the solidarity that sometimes arises out of working together.”¹⁰³ Indeed, “[l]abor unions are among the few civil society organizations with national reach and deep policy and political expertise at the local, state, and national levels.”¹⁰⁴ Historically, passage of labor-protective legislation like the National Labor Relations Act and the Fair Labor Standards Act has been followed by massive surges of organizing activity.¹⁰⁵

The centrality of labor as a form of cooperation, and as a site of solidaristic activity, has led theorists to argue that solidaristic labor activity like strikes, pickets, and boycotts should be protected as fundamental rights.¹⁰⁶ For the purposes of this Essay, it is sufficient to make a related, but complementary point: facilitating the emergence and fostering the continuance of the sort of political community presupposed by liberal and republican theories is foundational to the legitimacy of a state. Consequently, it is a proper object of liberal democratic policy making.

Kate Andrias and Benjamin I. Sachs have recently explored ways in which the law can foster collective organization across a number of groups, particularly the poor, including workers, debtors, and tenants.¹⁰⁷ They argue that law has an important role to play in enabling organizations to develop, thrive, and protect substantive standards of pay, workplace conditions, housing conditions, and so on. Law plays this role by framing the issues in an authoritative way,¹⁰⁸ facilitating the funding of those organizations,¹⁰⁹ providing free spaces,¹¹⁰ and removing barriers to participation.¹¹¹

Andrias and Sachs do mention that large, membership-based organizations may “giv[e] Americans a chance to practice democracy on a more regular

103. ESTLUND, *supra* note 96, at 104, 126.

104. Fisk, *supra* note 16, at 2092.

105. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 582 (2021).

106. See, e.g., Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, in PHILLOSOPHICAL FOUNDATIONS OF LABOUR LAW 229, 229-30 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018); James Gray Pope, Ed Bruno & Peter Kellman, *The Right to Strike*, BOS. REV. (May 22, 2017), <https://bostonreview.net/forum/james-gray-pope-ed-bruno-peter-kellman-right-strike> [<https://perma.cc/995U-JWVD>].

107. Andrias & Sachs, *supra* note 105, at 555.

108. *Id.* at 592-95.

109. *Id.* at 599-607.

110. *Id.* at 613-20.

111. *Id.* at 620-23.

basis.”¹¹² But their main focus is on the “instrumental role” such organizations have played and could continue to play in the development of policy that promotes the interests of poor people, tenants, and workers.¹¹³ Andrias and Sachs are thus interested in how law-facilitated organizing can promote their conception of substantive justice. This Essay, however, focuses instead on how solidaristic organizing supports state legitimacy—no matter one’s theory of justice. In doing so, this Essay builds on their arguments about how the state *can* facilitate organizing by providing part of the argument for why the state *must* facilitate organizing.

There is, however, an important objection to the liberal model of state-fostered solidaristic action and organizing: isn’t this kind of solidarity partial rather than universal?¹¹⁴ Aren’t the groups that are formed under these conditions just looking out for themselves, at the expense of all other groups? This was the view that emerged from the post-*Lochner*-Era courts.¹¹⁵ The New Deal settlement and the National Labor Relations Act similarly saw labor as a partisan interest and sought simply to enable it to serve as an equal bargaining power against the firm.¹¹⁶ Doesn’t this simply reinforce the “us versus them,” winner-take-all perversity that is at the heart of rightsism?

This is a deep objection, but there are several responses to it. For one, even the New Deal and subsequent pluralistic interest-group models anticipate bargaining—that is, developing a relationship that ultimately results in compromise and agreement. Secondly and more importantly, the sort of solidarity required as part of the background conditions of a society that wants to allow rights claims to exemptions does not necessarily have to be a *universal* solidarity. Instead, what we need is a society where people have the experience of give and take in

112. *Id.* at 579.

113. *Id.*

114. *Cf.* TALISSE, *supra* note 87, at 132–33 (considering a similar objection).

115. This vision of public lawmaking as a reflection of the outcomes of competition among interest groups is well-stated by Justice Holmes’s famous *Lochner* dissent. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

116. National Labor Relations Act, 29 U.S.C. § 151 (2018) (stating the goal of the legislation as correcting “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association”); see also James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 26 (2002) (“Following Oliver Wendell Holmes, the lawyers argued that the solution . . . was to avoid fundamental rights thinking altogether and to investigate facts and balance the interests of capital and labor instead.”); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 193–205 (2015) (outlining the conception of labor as an interest group and the quid pro quo conception at the heart of the National Labor Relations Act).

nonfamilial group relationships, and between groups themselves.¹¹⁷ People who have had such experiences do not see defeat as an existential threat.¹¹⁸

Finally, workplace solidarity has a unique tendency to crosscut other traditional categories.¹¹⁹ We each have multiple identities. We are not just teachers or technicians, but also Baptist or Jewish, Black or Asian American, Midwestern or Southern, Mets fans or Dodgers fans, poker players or birdwatchers. Workplace solidarity unites people from all of these and countless other groups, ironically converting the coercion of the labor market into a glue that holds people with these otherwise disparate identities together.¹²⁰

III. THE *JANUS* DOUBLE BIND

The previous Part provided a novel articulation of the centrality of freedom of association and, more specifically, the freedom to engage in solidaristic activity like labor organizing to fundamental state legitimacy. A legitimate state must be able to accommodate claims for exemptions, which requires a background condition of civic friendship and trust. A state must therefore protect and promote the practice of solidaristic activities that build up a reservoir of trust among the citizenry.

We can now see more clearly how the *Janus* Court erred. In a majority opinion written by Justice Alito, the Court held that Illinois did not have a compelling interest in protecting the financial integrity of public-sector labor unions.¹²¹ The Court first found that plaintiff Mark Janus, a child-support specialist in the Illinois Department of Healthcare and Family Services, had a First Amendment right against compelled political speech, and that his mandatory agency fees to the union constituted such speech.¹²² Janus asserted that he opposed “many of the public policy positions” that the union representing his workplace advocated.¹²³ The Court recognized that the implication of a fundamental free-speech

117. Cf. FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY*, 40-51 (2014) (describing the tension between familial solidarity and broader social solidarity and attributing political progress to the moments when the latter overtakes the former).

118. Cf. Issacharoff, *supra* note 53, at 486 (emphasizing the centrality of “repeat play” to democratic cooperation).

119. See ESTLUND, *supra* note 96, at 9-11.

120. Cf. *id.* (arguing that the coercive pressures of the labor market provide a better incentive for working people to participate in integrated social practices at work than they otherwise face in their voluntary associations).

121. *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2466-67 (2018).

122. *Id.* at 2464.

123. *Id.* at 2461.

right triggers heightened First Amendment scrutiny.¹²⁴ Accordingly, the Court then asked whether Illinois had asserted a compelling interest in defending its public-sector labor laws and the specific requirement that nonunion members pay agency fees. Startlingly, the Court found that it had not.¹²⁵

From the perspective advanced by this Essay, the question of whether Illinois had a compelling interest in protecting public-sector unions should have been an easy one. The state has an overwhelming interest in ensuring that all citizens have an opportunity to pursue solidaristic activity. As argued above, labor organizing is one of the several traditionally vital venues for solidaristic organizing. Indeed, courts had long recognized the state's compelling interest in protecting labor unions for the sake of promoting "industrial peace," and that this interest could overpower countervailing First Amendment rights.¹²⁶ The argument here is that in addition to the state interest in maintaining industrial peace, there is a further state interest – rooted in the demands of democratic legitimacy – in facilitating the health of solidaristic organizing.

But, as Jamal Greene argues, recognizing rights on both sides need not have settled the issue. Even if the *Janus* Court had recognized what this Essay recognizes to be a compelling state interest in promoting solidaristic organizing – in this case, by authorizing fair-share fees in an attempt to keep unions adequately well-funded – it would have needed to continue the inquiry to discover whether it could have accommodated Mark Janus's challenge against the backdrop of Illinois's interest. Specifically, the Court could have treated Janus's challenge as a conscience-based plea for an exemption from a general regulatory regime.¹²⁷ In doing so, it could have adopted the approach taken by the Court just a few years earlier in a high-profile case involving a conscience-based claim to exemption from a popular healthcare regime: *Burwell v. Hobby Lobby*.¹²⁸

The *Hobby Lobby* Court had to decide whether closely held – that is, small, usually family-owned – private corporations whose owners asserted a religious objection were entitled to an exemption from the Affordable Care Act's (ACA's)

124. *Id.* at 2465. The Court did not decide whether strict scrutiny or the "exacting scrutiny" standard from commercial-speech cases provided the appropriate standard. *Id.*

125. Specifically, the Court rejected Illinois's contention that it had a compelling interest in avoiding free-riders. *Id.* at 2466 ("[A]voiding free-riders is not a compelling interest.").

126. See, e.g., *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455-56 (1984) ("It has long been settled that . . . interference with First Amendment rights is justified by the governmental interest in industrial peace.").

127. This could have been accomplished had the Court taken more seriously what it would mean to ask whether Illinois could have achieved its goals using "means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. The *Janus* majority tentatively adopted the language of "exacting scrutiny," a tier slightly below strict scrutiny. *Id.*

128. 573 U.S. 682 (2014).

mandate that they provide insurance coverage for certain forms of contraception to their employees. Hobby Lobby's owners are devout Christians who "believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."¹²⁹ They sued the U.S. Department of Health and Human Services (HHS), protesting the Department's regulation under the ACA requiring employers to provide employees insurance covering four contraceptive methods that violated their religious tenets.¹³⁰

After deciding that it makes sense to say that at least some corporations can have religious objections,¹³¹ the Court engaged in a reasonable balancing inquiry. It recognized compelling interests on both sides. On one side, it recognized a statutorily protected interest in complying with the core tenets of one's religious beliefs.¹³² On the other side, the Court recognized a compelling state interest in providing "cost-free access" to contraceptive healthcare to women.¹³³

The only remaining question in *Hobby Lobby* was whether the government had adopted the "least restrictive means of furthering that compelling government interest."¹³⁴ The majority concluded that it had not, reasoning that HHS could have easily adapted the ACA's exemptions scheme for religious nonprofits to accommodate religious corporations.¹³⁵ The existing exemptions scheme for nonprofits allowed a nonprofit to "self-certify that it opposes providing coverage for particular contraceptive services."¹³⁶ Once it did so, it could simply shift the costs of covering the challenged contraceptives to the insurance provider, which was similarly mandated by the ACA and HHS regulations to provide contraceptive coverage at no cost to the plan participant or beneficiary. This arrangement, the Court found, "[did] not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violate[d] their religion, and it serve[d] HHS's stated interests equally well."¹³⁷

129. *Id.* at 703.

130. *Id.*

131. *Id.* at 706-07.

132. Although the plaintiffs also raised a Free Exercise Clause claim, *Hobby Lobby* was decided under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). *Id.* at 694-96. The Court acknowledged, however, that RFRA and RLUIPA compel what is essentially constitutional reasoning. *See id.* at 696 n.5.

133. *Id.* at 728. Once a burden on the exercise of religion is established, RFRA requires a government showing that the burden "is in furtherance of a compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (2018).

134. *Hobby Lobby*, 573 U.S. at 728.

135. *Id.* at 730-31.

136. *Id.* at 731.

137. *Id.*

In *Hobby Lobby*, the Court sought a way to accommodate competing rights claims without placing a constitutionally relevant burden on either party. The Court explicitly noted the requirement that an accommodation not go too far in burdening the rights of those conferred or protected by the challenged statutory scheme.¹³⁸ This principle forced the Court to look relatively closely at the available and practicable accommodation options. The fact that granting a conscience-based exemption from the law wouldn't force the law to collapse was not enough; the Court also needed to be sure that the exemption would not shift constitutionally relevant burdens onto other protected parties. As Douglas NeJaime and Reva B. Siegel have shown, “[c]oncern with third-party harm appears intermittently across both constitutional and statutory decisions as a limit on religious accommodation.”¹³⁹

The *Hobby Lobby* Court may have been too Pollyannish in its assessment that granting an exemption would not result in third-party harm. After all, it took one year from the end of the litigation for the Obama Administration to implement the proposed compromise, and in the meantime some women employees of Hobby Lobby may have suffered serious harm.¹⁴⁰ Nevertheless, in principle and ultimately in practice, cost-free contraception would remain available to workers without requiring the owners of a closely held family corporation to violate the tenets of their sincere religious faith.

This Essay suggests that the Court's reasoning in *Janus* should have tracked its reasoning in *Hobby Lobby*. There are moments in the *Janus* opinion when the Court did engage in sensitive balancing and fact-based analysis. But it only did so in the context of asking whether the state had a compelling interest in protecting public-sector unions from the free-rider problem.¹⁴¹ In examining this question, the Court considered the benefits and the burdens associated with exclusive representation. It concluded that even without agency fees, the benefits to the union outweigh the costs of representing nonmembers who do not pay fees.¹⁴² This is a debatable conclusion, to say the least. But the Court's engagement with the question was thorough and honest.

The problem, however, is that once this balancing was resolved against the existence of a compelling state interest, all that remained was the conclusion that

138. *Id.* at 729 n.37 (“It is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’” (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (an Establishment Clause case))).

139. NeJaime & Siegel, *supra* note 37, at 205; *see also id.* at 205 n.5 (collecting cases).

140. Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS*, *supra* note 37, at 328, 336-37.

141. *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2466-69 (2018).

142. *Id.* at 2467 (“These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers.”).

the challenged law could not survive. In other words, all of the factors that weighed in favor of finding a state interest in protecting labor organizing vanished into thin air. Once the initial question of whether there was a compelling interest was settled, there was nothing left for the Court to do but to say that the violation of Janus's right was unjustified. But this is nothing more than a sort of normative hocus pocus. Performing the balancing in the service of deciding whether or not there is a compelling interest, rather than finding such an interest *and then* conducting the balancing inquiry, is an unhelpful and ultimately confused doctrinal approach. The interests on the other side of the ledger should not disappear simply because the state lost the Court's balancing contest.

The more reasonable approach would have been for the *Janus* Court to recognize the compelling interest in facilitating the solidaristic activities of public-sector unionism, and then take seriously the balancing of rights – Janus's conscience-based claim to be exempt from supporting the union on one hand, and Illinois's interest in conferring and protecting the rights of other workers to organize under its public labor-law regime on the other. Doing so would have allowed the Court to look for ways to accommodate both rights, and to consider third-party costs, as it did in *Hobby Lobby*.

The major obstacle to this way of conceiving of the conflict in *Janus*, perhaps, is that *Janus* is not seen as an accommodation case. Because Janus's claim was framed as a free-speech right against compelled political speech, one could argue that it simply belongs in a different conceptual framework than a religiously framed objection like the one in *Hobby Lobby*.¹⁴³ But *Janus* relies on *Wooley v. Maynard*, the case in which a Jehovah's Witness objected to displaying the New Hampshire state motto on his license plate because it was inconsistent with his religious beliefs.¹⁴⁴ While *Janus* cites that case for the free-speech principle that freedom of speech entails the freedom not to speak,¹⁴⁵ it could just as well be read as an example of a conscience-based claim for an exemption.

Another apparent wedge between *Janus* and accommodation cases might arise from the fact that religious accommodation cases are often litigated as statutory claims, while *Janus* was decided under the First Amendment. But of course, plaintiffs bring religious claims under the Free Exercise Clause where possible and are deterred only in the state context by *Employment Division v. Smith*.¹⁴⁶ As a result, free-exercise claims have been reformulated as either Religious Freedom Restoration Act claims against the federal government, or, as in

143. *Id.* at 2463.

144. 430 U.S. 705, 713 (1977).

145. *Id.* at 714-15.

146. 494 U.S. 872, 878-82 (1990) (holding that neutral and generally applicable laws that incidentally burden religion are not subject to strict scrutiny under the Free Exercise Clause).

Fulton v. City of Philadelphia, free-speech claims against states.¹⁴⁷ After *Fulton*, it is likely that free-exercise claims will be more viable.¹⁴⁸

Ultimately the most likely reason why *Janus* is not understood as an accommodation case is because the Court failed to see the two sides as being on equal footing—at least initially. On one side, it saw a rights claim against compelled political speech; on the other, it saw a bland interest in “industrial peace.” This political-economic framing of the state’s interests in protecting labor is a consequence of the fateful decision of New Deal labor lawyers and politicians to ground the new labor regime in the Commerce Clause rather than the Guaranty Clause or the Thirteenth Amendment.¹⁴⁹ This decision has put labor regulation in an uneasy and perhaps “anomalous” constitutional space.¹⁵⁰ Taft-Hartley restrictions on labor-union speech, for example, have been treated as economic regulations and thus subject to rationality review.¹⁵¹ But the Court’s recent recognition that the right to opt out of supporting unions is protected *political* speech puts pressure on the idea that highly regulated labor speech—for example, picketing and secondary boycotts—is merely economic.¹⁵² The argument advanced in this Essay helps explain why the state may have a compelling interest in protecting not only these particular forms of labor speech, but also the activity of labor organizing more generally.

If the Court could take the compelling interest in promoting solidaristic organizing more seriously, then it would also have to take seriously the obvious fact that its *Janus* decision imposed huge costs on third parties. For this reason, it runs afoul of important principles governing attempts to seek accommodations in conscience-based exemptions cases. In *Hobby Lobby*, the Court recognized that the Establishment Clause places a hard cap on the externalization of the costs of accommodation onto third parties.¹⁵³ But this Essay suggests the Establishment Clause embodies a more general principle that no accommodations of conscience-based pleas for exemptions should shift undue constitutionally relevant costs onto others. For as soon as they do so, they undermine the

147. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871 (2021) (majority opinion). The plaintiffs in that case raised a conscience-based exemption to state antidiscrimination regulations, framing the challenge as both a Free Speech claim, and a Free Exercise claim asking the Court to reconsider *Smith*. *Id.*

148. *Id.* at 1882-83 (Barrett, J., concurring).

149. See Pope, *supra* note 116, at 46-59.

150. See generally ESTLUND, *supra* note 96 (describing the anomalous place of labor in constitutional law).

151. Fisk, *supra* note 16, at 2059-60.

152. *Id.* at 2060.

153. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2781 n.37 (2014).

very sort of pluralism that granting accommodations is supposed to protect in the first place.¹⁵⁴

Janus completely neglected this analysis. It invalidated collective-bargaining agreements in more than twenty states, the District of Columbia, and Puerto Rico – “wreak[ing] havoc on entrenched legislative and contractual arrangements.”¹⁵⁵ It also forced unions to refocus efforts away from organizing new workers and new workplaces and towards finding ways to collect dues from existing members in order to prevent a massive surge in free riders and litigate against efforts to claw back the agency fees that had been collected under the pre-*Janus* regime.¹⁵⁶ This is a wildly disproportionate response to a conscience-based plea by one public employee.

Had the Court taken *Janus* more seriously as an accommodation case, and therefore carried out its obligation not to shift undue costs of accommodation onto third parties, it could have seen more obvious solutions. Perhaps the most obvious solution would have been to require public-sector unions to allow sincere objectors to opt out of paying agency fees. On this approach, dissenters like Mark Janus could simply self-certify an ideological opposition to unionism or collective bargaining. On one version of this approach, unions simply could not collect objectors’ agency fees at all. On another, unions could collect agency fees but must redirect them to some different organization, which would discourage merely opportunistic opt-outs. This sort of accommodation would not be without cost: unions would still lose revenue from those who decide to opt out based on their conscientious objection. But the burden would be placed on objectors to initiate their withdrawal. While there are certainly cases in which it is plausible that the very act of seeking an accommodation or exception in the first place risks violating sincere beliefs, whatever the nature of a principled objection to collective labor organizing, it is not imperiled by a bureaucratic application for an exemption.

154. See Douglas NeJaime & Reva Siegel, *supra* note 38 (arguing that third-party harms from accommodation undermine the pluralism that accommodation is supposed to promote in the first place).

155. *Janus v. Am. Fed’n of State, Cnty & Mun. Emps.*, 138 S. Ct. 2448, 2499 (2018) (Kagan, J., dissenting).

156. Unions have been widely successful in so-called “post-*Janus*” cases, relying on a “good faith” defense to protect the validity of agency fees collected in reliance on *Abood*. See, e.g., Daniel Wiessner, *Unions’ ‘Good Faith’ Defense Applies in Public Workers’ Post-Janus Cases – 6th Circuit*, REUTERS (Mar. 5, 2020, 4:02 PM), <https://www.reuters.com/article/labor-janus/unions-good-faith-defense-applies-in-public-workers-post-janus-cases-6th-circuit-idUSL1N2AY23A> [<https://perma.cc/C2UZ-BCW6>].

CONCLUSION

Janus contains two mistakes: first, a failure to recognize a compelling state interest—rooted in the demands of legitimacy—to foster solidaristic organizing; and second, a failure to engage in the sort of balancing and accommodation such recognition would require. This Essay suggests that the juxtaposition of these two errors is especially perverse. *Janus* undermined a robust state-sponsored regime of supporting solidaristic organizing among public-sector employees in over twenty states, the District of Columbia, and Puerto Rico. In doing so, it also undermined an important opportunity for developing the sort of political culture—characterized by civic friendship and trust—which in turn facilitates the vital legislative and judicial tasks of accommodating conscience-based claims for exemptions from general policies.

But like the Roman deity Janus, we must look not only to the past, but also to the future. The *Janus* Court did not reject a compelling state interest in promoting solidaristic organizing, leaving several viable paths open to labor supporters. Labor legislation need not be framed as rooted in the narrow economic goal of promoting industrial peace. As we have seen, the fiction that labor regulation is narrowly economic is exposed by the reasoning of *Janus* itself. One possible way to frame labor legislation is in terms of a state's interest in facilitating solidaristic organizing—whether by protecting political parties, churches, tenants' organizations, debtors' unions, immigrant groups, or labor unions. The legislative paths recommended by Andrias and Sachs can thus be framed in terms of the state's compelling interest in maintaining its own legitimacy by supporting a democratic culture.

This legislative framing could also apply to subsequent litigation. It would be easy to see conscience-based challenges to such laws in terms of the accommodations framework that is more frequently invoked in the context of religion. Approaches to proportionality analysis developed by courts and scholars could be used to seek fair accommodations of sincere conscience-based claims. By taking seriously the requirement of controlling the externalities of accommodations, such an approach would honor exemptions without converting them into weapons for nipping nascent legal reforms in the bud. It is not too utopian to hope that these accommodations could be accepted by both sides, if widespread experience with organizing develops a democratic culture in which citizens can enjoy their rights without guarantees.

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