PUBLIC SECTOR LABOR LAW

International Municipal Lawyers Association

Virtual Annual Conference

September 29, 2020

Presented by:



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AGENDA

1. History and Development of Public Sector Labor Law
2. Union Membership and Data Polling
3. Right to Union Membership; Right to Bargain Collectively
4. Union Security: Dues Checkoff, Union, and Agency Shop
5. SCOTUS' *Janus* Decision and Post-*Janus* Effects
6. Summary of Creation and Enforcement of CBAs
7. Conclusion

History and Development of Public Sector Labor Law



A Brief History of Public Sector Labor Relations

- ***McAuliffe v. City of New Bedford***, 29 N.E. 517 (Mass. 1892)
  - Government could condition employment on forfeiture of right to organize
- ***Taft Hartley Act*** (1947)
  - NLRA does not apply to public sector employees
- ***AFSCME Local 201 v. City of Muskegon***, 120 N.W.2d 197 (Mich. 1963)
  - Upheld constitutionality of municipal regulation prohibiting employees from joining labor union

Executive Order 10988 (1962)



Executive Order 10988 (1962)

- Gave Federal employees the right to join, form, or assist labor organizations
- Established a three-tiered system of recognition: exclusive representation, formal recognition, and informal recognition
- Scope of bargaining restricted by management rights clause

E.O. 10988 and its Progeny (cont.)

- *Presidential Review Committee on Employee-Management Relations in the Federal Service* (1967)
  - Examined preceding five years of impact of Executive Order 10988
- Executive Order 11491 (1969)
  - Established framework for labor-management relations in federal govt.;
  - Set forth specific unfair labor practices; and
  - Authorized use of binding arbitration of certain disputes
- Executive Order 11838 (1975)
  - Directed additional expansion of collective bargaining rights to include:
    - Agency regulations and mid-contract changes;
    - Enhancement of third-party dispute resolution procedures; and
    - Union recognition by secret ballot election

Civil Service Reform Act of 1978



Civil Service Reform Act (cont.)

- **Key Provisions of Title VII of the CSRA**
  - Granted federal employees the right to form, join or assist a labor organization, or refrain from doing
  - Created Federal Labor Relations Authority (similar to NLRB)
  - Established the Office of Labor Management
  - Provided for mandatory grievance procedure with binding arbitration
  - Granted right to engage in picketing, grade retention, authorized union time, and dues checkoff

Recent Labor-Management Executive Orders

Executive Order 12871 (1993)

Labor Management Partnerships

Executive Order 13203 (2001)

Revocation of Executive Order and Presidential Memorandum Concerning Labor Management Partnerships

Executive Order 13522 (2009)

Creating Labor-Management Forums to Improve the Delivery of Government Services

State Labor Law and Labor Relations History



A Brief History of Public Sector Labor Relations (State Laws)

- In 1959, **Wisconsin** was the first state to pass a public employee collective bargaining law.
- **New York** passed the Taylor Law in 1967.
  - Grants public employees right to organize and elect union representatives
  - Defines boundaries for public employers in negotiating and entering into agreements with public unions.
- In 1968, **California** passed the Meyers-Milias-Brown Act
  - Governs labor management relations in government employment fields;
  - Serves to promote full communication between public agencies and their employees.

A Brief History of Public Sector Labor Relations (State Laws) (cont.)

- In 2009, for the first time, public sector union members outnumbered private sector members.
- At the end of 2008 / beginning of 2009:
  - 26 states recognized collective bargaining rights for all state and local workers;
  - 12 states had limited bargaining for some workers; and
  - 12 states had no collective bargaining in the public; sector

Recent Changes in State Public Sector Labor Laws (Last Decade)

- **Wisconsin**
  - Then-Governor Scott Walker limited public sector collective bargaining, enacted a right-to-work law, and repealed the state's prevailing wage laws
- **Ohio**
  - Governor John Kasich signed a bill that curbed collective bargaining rights for public workers and banned strikes
- **Michigan**
  - Then-Governor Rick Snyder signed a law enabling gubernatorial appointed emergency financial managers to alter or terminate public sector contracts to avert fiscal crises

Recent Changes in State Public Sector Labor Laws (Last Decade) (cont.)

- **Massachusetts**
  - Then-Governor Deval Patrick signed legislation limiting public unions' ability to modify medical plans
- **New Hampshire**
  - Legislature approved legislation to eliminate negotiated employment terms; Senate also passed a right to work law
- **Alabama**
  - Passed a law making it a crime to arrange for public employee payments to organizations that use the money for "political activity"

Recent Changes in State Public Sector Labor Laws (Last Decade) (cont.)

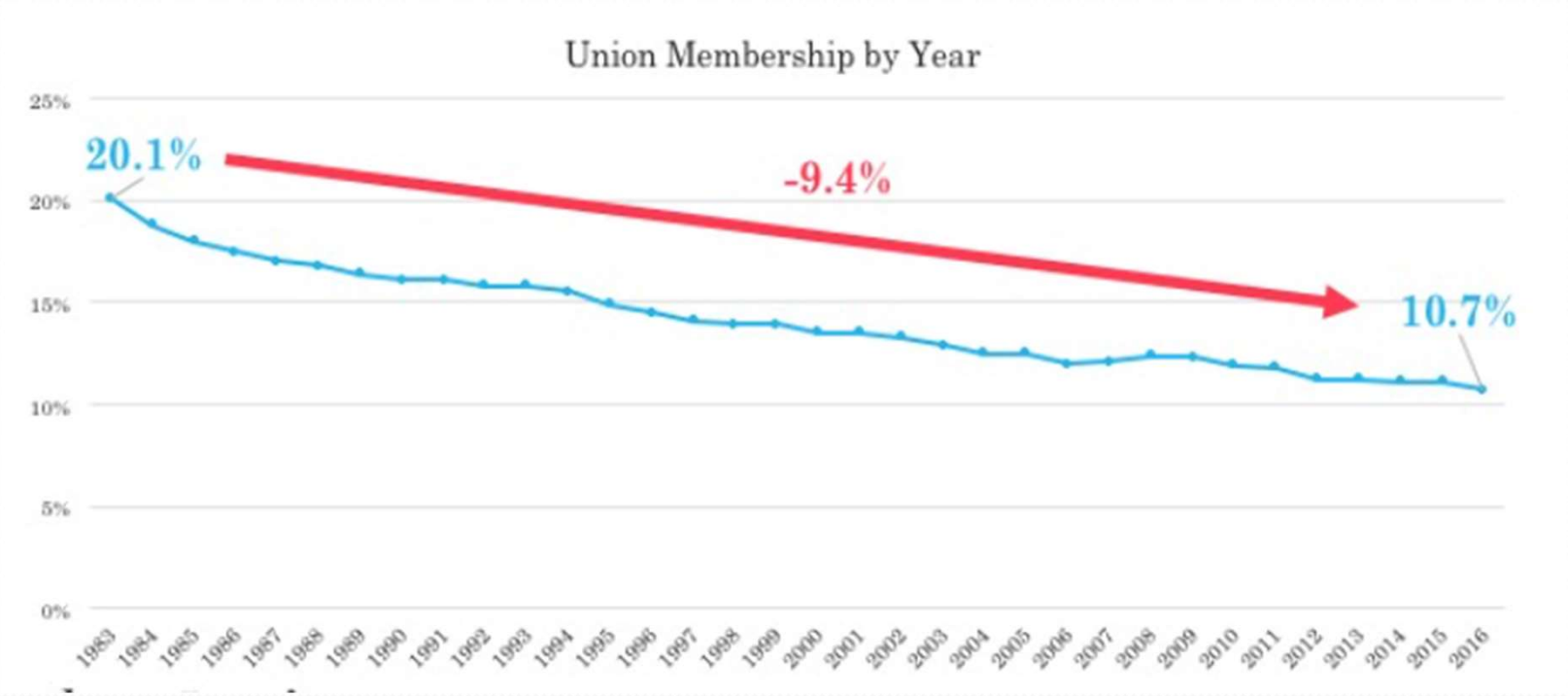
- **Oklahoma**
  - Repealed a 2004 law requiring large cities to bargain collectively
- **Alabama, Florida, Idaho, and Tennessee**
  - Restricted bargaining rights for teachers
- **Arizona**
  - Public entities in Arizona may not recognize an association or union as the *exclusive* representative of any group of employees
    - "Meet and Confer", however, is permissible means of gathering information about employees' working conditions
    - Legislation introduced in the last decade for an absolute ban on collective bargaining for employees of state and local governments and school districts

Union Membership: States and the Public Sector



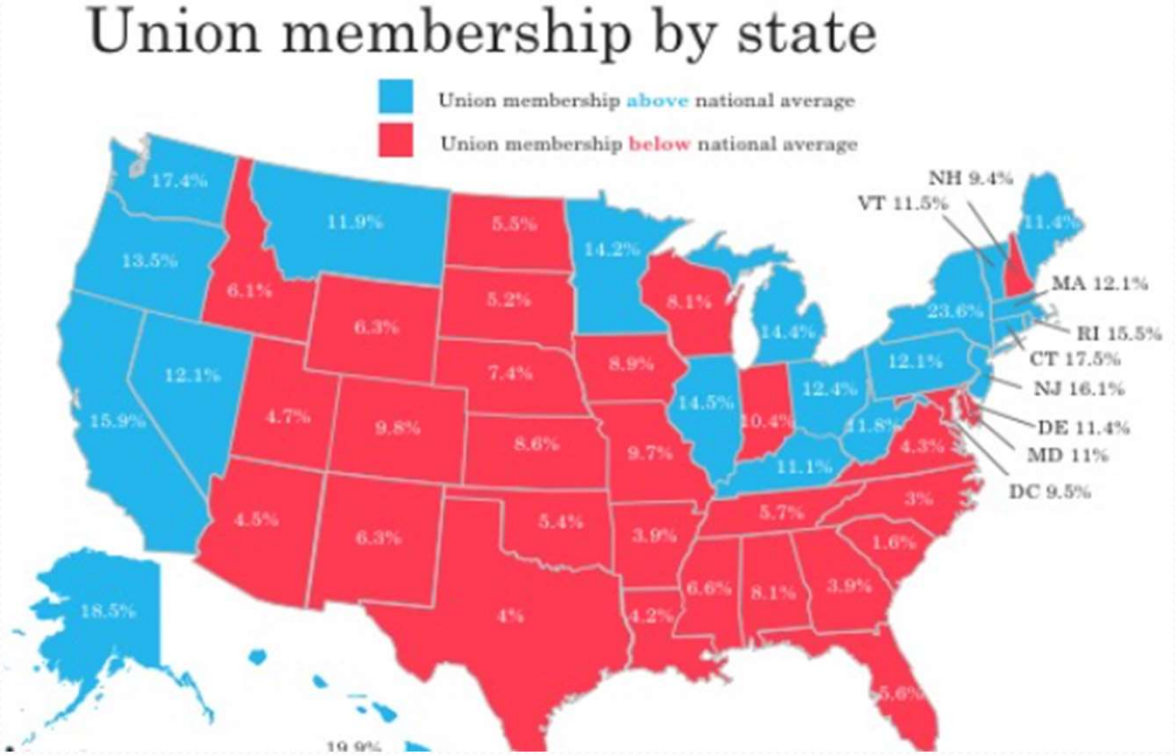
Union Membership Data And Polling

- In 2016, 10.7 percent of both private and public sector workers were members of unions.



Union Membership Data And Polling (2016) (cont.)

- In 2016, states higher union membership tended to be in the Northeast and West; lower membership tended to be in the Midwest and South.

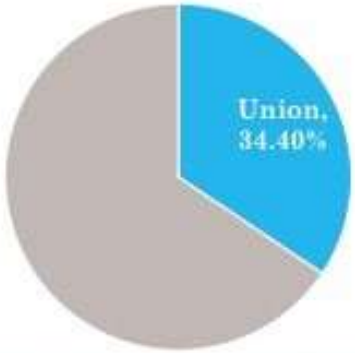


Union Membership Data And Polling (2016) (cont.)

- Public vs. Private Sector Union Membership (2016)

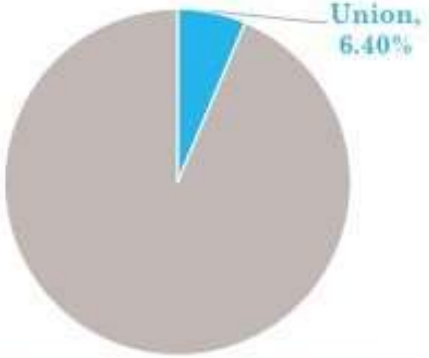
Public v. private sector union membership

Public Sector Union Membership



Most unionized groups	
Local government	40.3%
(this includes teachers, police officers and firefighters)	

Private Sector Union Membership

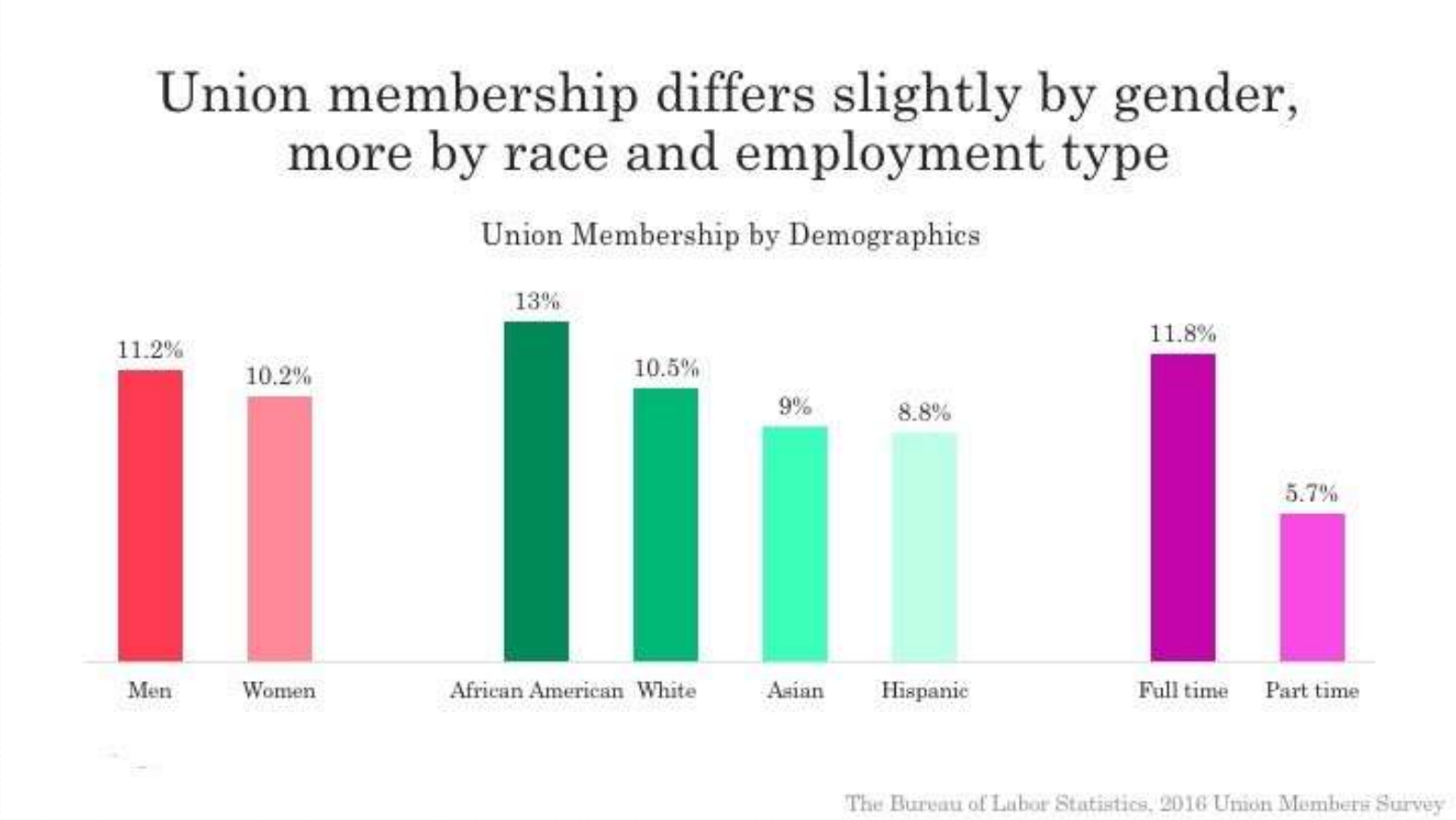


Most unionized private sector groups	
Utilities	21.5%
Transportation and warehousing	18.4%
Telecommunications	14.6%
Construction	13.9%
Educational services	12.3%

The Bureau of Labor Statistics, 2016 Union Members Survey

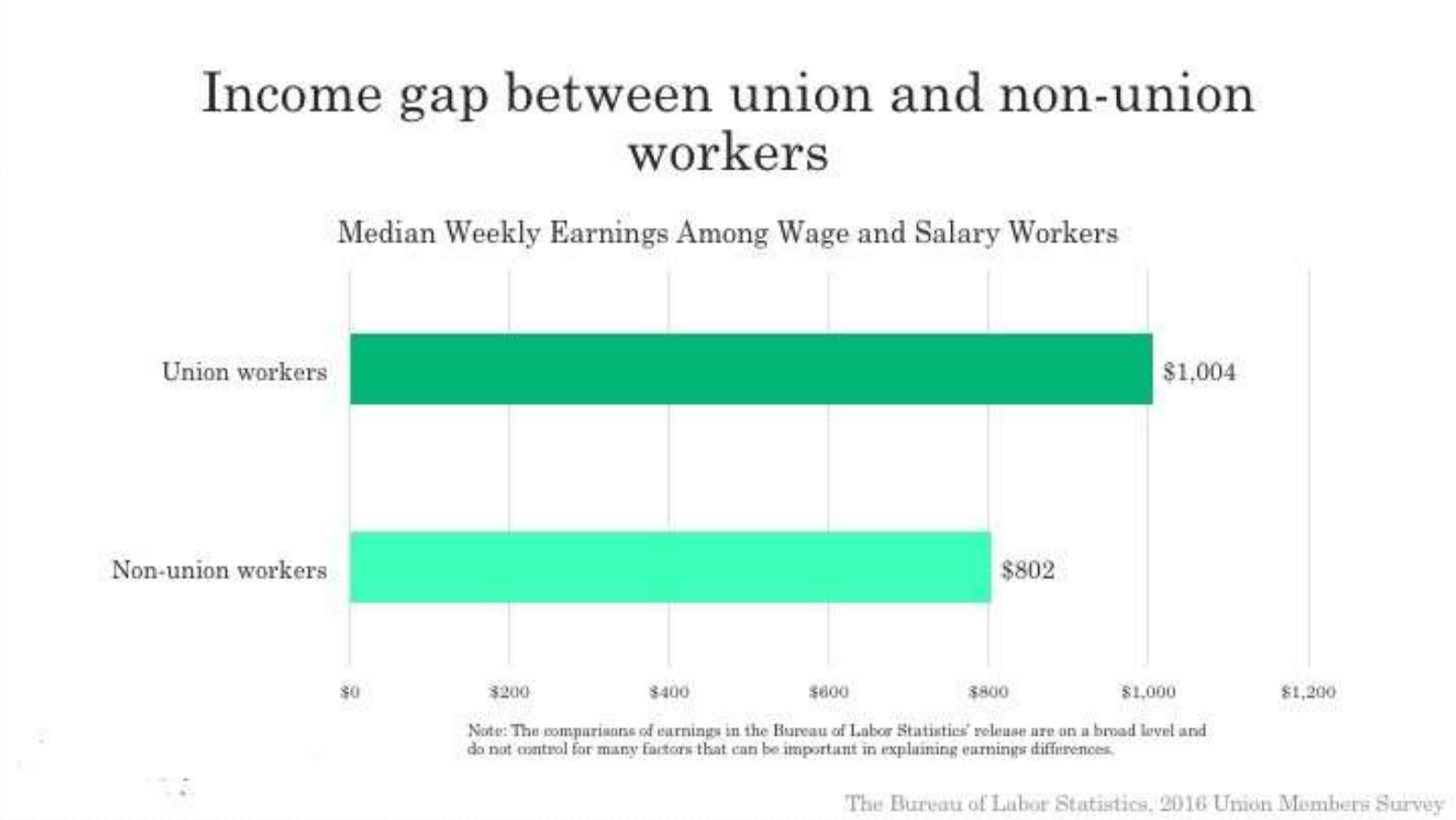
Union Membership Data And Polling (2016) (cont.)

- Union Membership Demographics (2016)

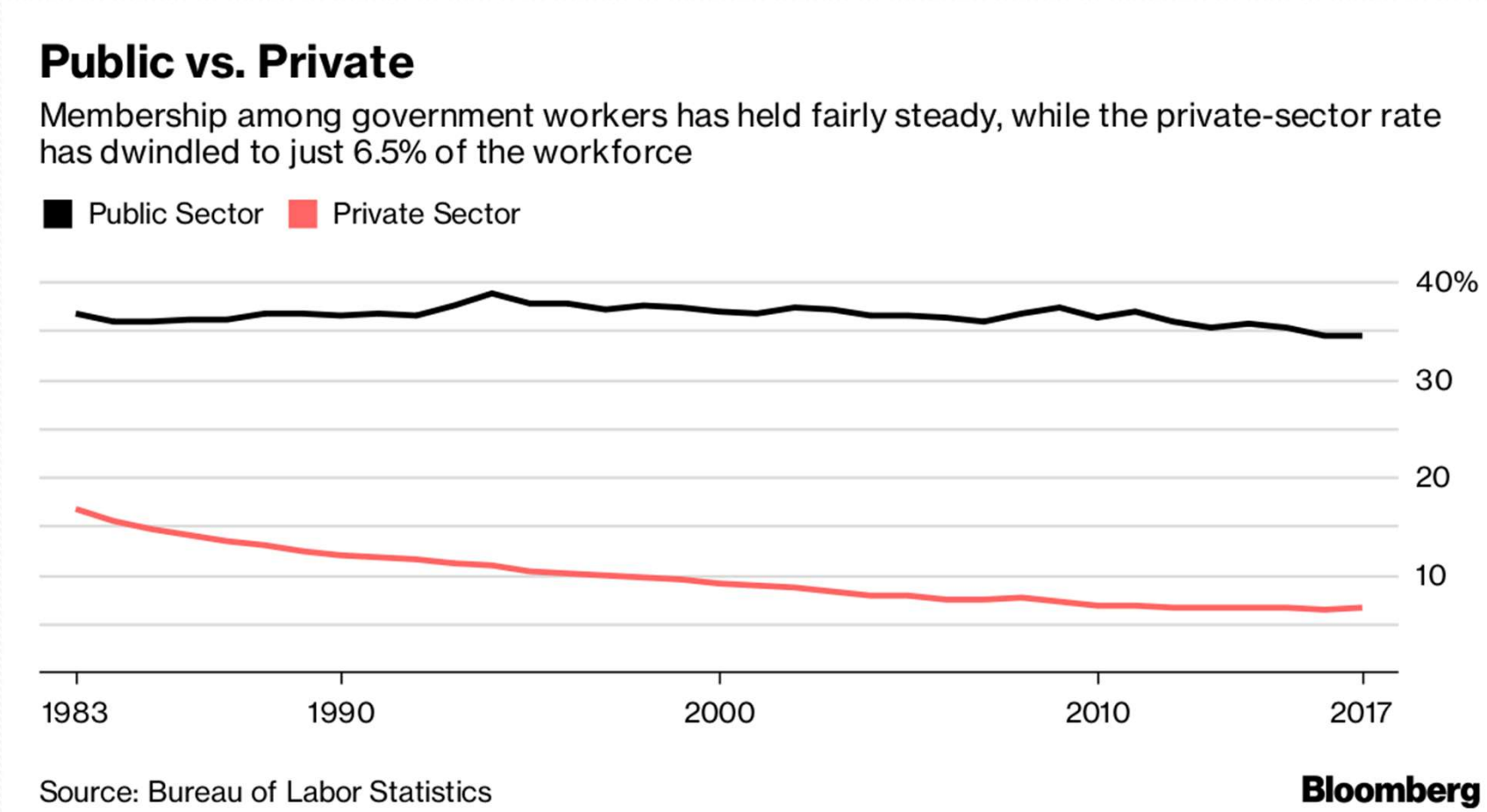


Union Membership Data And Polling (2016) (cont.)

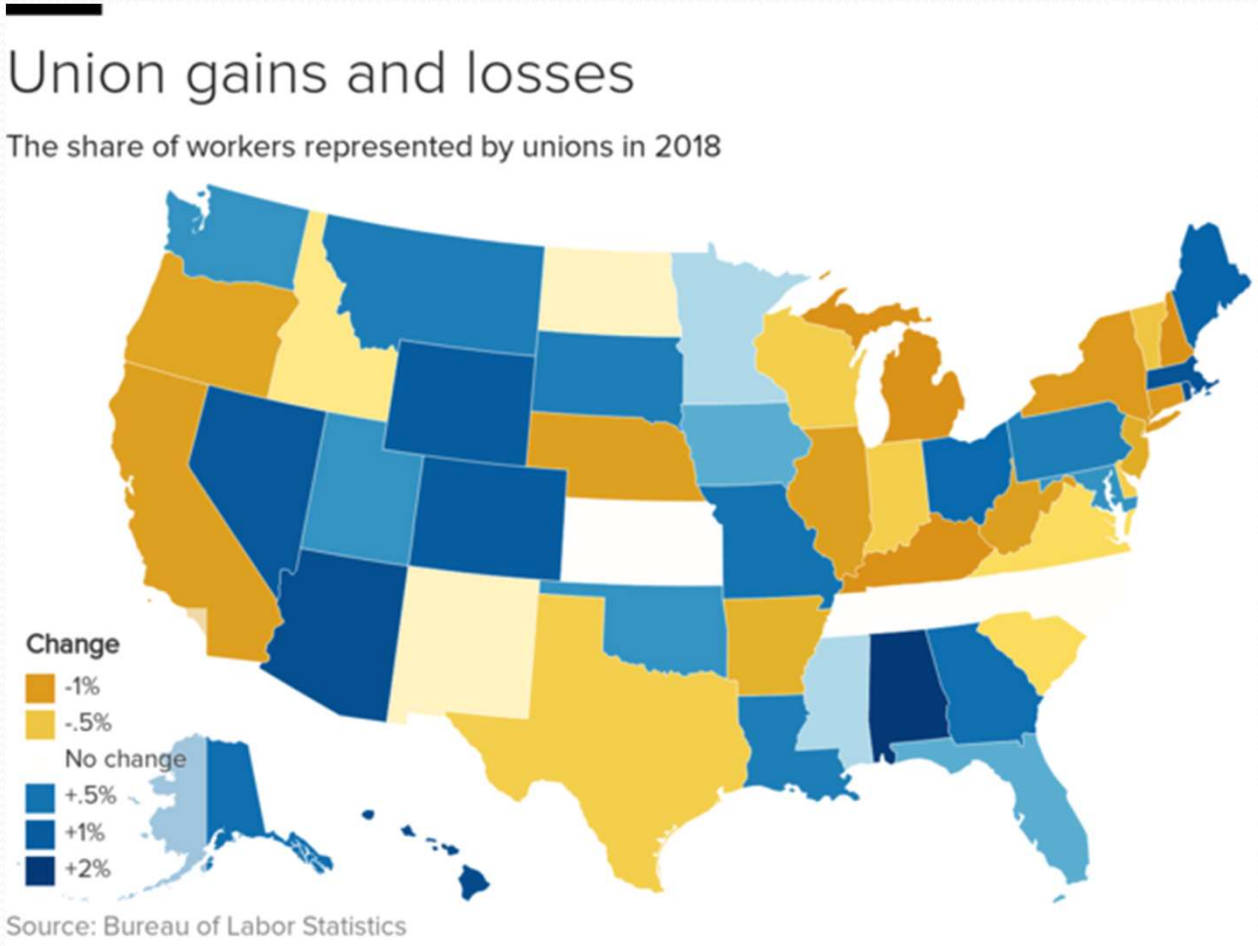
- Union vs. Non-Union Income Gap (2016)



Union Membership Data And Polling (2017)



Union Membership Data And Polling (2018)



Union Membership Data (2019): Public and Private Sector



Union Membership Data And Polling (2019)

- Union Membership Rate: 10.3 percent (2019)
- Union Member Wage & Salary Workers: 14.6 million (2019)



Statistical Highlights and Information Summary (2019)

- 16.4 million workers were represented by a union
- Union membership rate of public sector workers was five times their private sector counterparts
- Highest unionization rates in protective service and in education, training, & library occupations
- Median weekly earnings for non-union workers was 81 percent of union workers
- HI and NY had highest union membership rates; SC and NC had the lowest rates

Industry and Occupation of Union Members (2019)

PUBLIC SECTOR	PRIVATE SECTOR
7.1 million employees belonged to unions	7.5 million employees belonged to unions
Union Membership Rate: 33,6 percent	Union Membership Rate: 6.2 percent
Union membership rate highest in local government (39.4 percent)	High unionization rates among: utilities (23.4 percent); transportation and warehousing (16.1 percent); and telecommunication (14.1 percent)

Union Affiliation of Public Sector Wage and Salary Workers (2019)

(*numbers in thousands*)

Industry	2018					2019				
		Members of Unions(1)		Represented by Unions(2)			Members of Unions(1)		Represented by Unions(2)	
	Total employed	Total	Percent of employed	Total	Percent of employed	**Total employed**	Total	Percent of employed	Total	Percent of employed
PUBLIC SECTOR	21,131	7,167	33.9	7,868	37.2	21,023	7,066	33.6	7,821	37.2
Federal govt.	3,707	977	26.4	1,128	30.4	3,798	974	25.6	1,158	30.5
State govt.	7,109	2,035	28.6	2,259	31.8	6,958	2,043	29.4	2,249	32.3
Local govt.	10,315	4,155	40.3	4,481	43.4	10,267	4,050	39.4	4,414	43.0

Median Weekly Earnings (2019)

(full-time wage and salary workers)

INDUSTRY	2018				2019			
	TOTAL	Members of unions(1)	Represented by unions(2)	Non-union(3)	**TOTAL**	Members of unions(1)	Represented by unions(2)	Non-union(3)
PRIVATE SECTOR	861	999	989	848	893	1,025	1,013	881
PUBLIC SECTOR	999	1,099	1,094	936	1,043	1,147	1,141	973
Federal government	1,166	1,076	1,112	1,228	1,222	1,151	1,183	1,241
State government	967	1,074	1,058	916	1,015	1,138	1,126	959
Local government	969	1,114	1,106	859	999	1,150	1,136	888

Right to Union Membership (Public Sector)



Right to Union Membership

- The right of a public employee to join and participate in a labor union is protected by the First Amendment.
- Local government enactments must:
  1. Serve a substantial, legitimate governmental interest;
  2. Serve those interests in fact; and
  3. Impose a limit on First Amendment activities which is the least drastic restriction serving those interests.
- Affiliation between police and nonpolice unions may be forbidden in order to further a city's policy of law enforcement neutrality in labor disputes.

Right to Union Membership (cont.)

- Many states authorize collective bargaining where public employees are accorded:
  - Right of self-organization;
  - Right to form, join, or assist labor organizations
- Unfair labor practices:
  1. Interfering with, restrain, or coerce public employees in the exercise of these rights;
  2. Dominating or interfering with forming or administering employee organizations;
  3. Discriminating in hiring or employment to encourage or discourage membership in any employee organization

Right to Union Membership (cont.)

- The First Amendment precludes state action that exclusively promotes pro-union views.
- Certain states grant the right to form unions / associations to only certain groups of employees (e.g., teachers).
- The National Labor Relations Act (NLRA) does not apply to local governments …
  - … but courts have found private sector precedents under the NLRA to be persuasive in interpreting state law or municipal regulations.

Right to Bargain Collectively (Public Sector)



Right to Bargain Collectively

- 40 states authorize some form of collective bargaining
- Four general types of statutes in defining public sector collective bargaining:
  1. "Meet and confer" with the recognized bargaining agent;
  2. Recognized bargaining agent is exclusive representative;
  3. Duty of bargaining in good faith;
  4. Permission to strike
- Questions posed by statutory schemes:
  1. Is the employer a "public employer"?
  2. Is the employee afforded collective bargaining rights?
  3. Is an entity a recognized "employee organization"?

Right to Bargain Collectively (cont.)

- States have adopted public employee bargaining statutes modeled on the NLRA frequently invoke NLRB precedent …
  - … but some jurisdictions (IL, IN, NY) recognize differences which makes reliance on federal labor law precedent doubtful
- States impose a duty to bargain collectively in "good faith," the elements of which are developing by reference to
  - State PERB decisions
  - Statutory language concerning the scope of permissible bargaining
  - Federal administrative and judicial interpretations of NLRA
  - Legal constraints under which local government employers operate

Right to Bargain Collectively (cont.)

- In general, public entities may not recognize an association or union as the *exclusive* representative of any group of employees
  - Doing so would infringe employees' First Amendment rights
- "Meet and Confer" is a permissible means of gathering information about employees' working conditions:
  - A public employer has the right to enter purely informational "meet and confer" arrangements with associations …
  - … as long as there are alternative means for employees to communicate with management

National Labor Relations Act

vs.

Meet and Confer



NLRA vs. Meet and Confer

NLRA	Meet and Confer
Union is employees' exclusive representative	Association must not be exclusive, other voices must be heard
Good faith bargaining is required	Information gathering process only
Results of bargaining is a binding contract	Results are suggestions for leadership
NLRB administers and enforces	Political leaders are the final decisionmakers

Union Security: Dues Checkoff, Union, and Agency Shop



Union Security:
Dues Checkoff, Union, and Agency Shop

- Local government entities are not mandated by the U.S. Constitution to provide for dues check-off …
  - … but ordinarily have discretion to do so, with employee consent
- The First Amendment forbids requiring nonunion members to pay a service charge equivalent in amount to union dues…
  - … to the extent that such fees are used to finance ideological activities unrelated to collective bargaining.

Fair Share Union Fees and *Janus*

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, 585 U.S. ___, 138 S. Ct. 2448 (2018)

- Struck down Illinois law requiring collection of union dues or agency fees from non-members
- Requiring payment of agency fees from non-union members absent clear & affirmative consent violates First Amendment
  - Requirement was compelled speech
  - Justifications could not survive an exacting scrutiny standard of review
- Overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)

Brief History of "Fair Share" Fees

- *Abood v. Detroit Board of Education*
  431 U.S. 209, 97 S.Ct. 1782 (1977)
- *Communications Workers of America v. Beck*
  487 U.S. 735, 108 S.Ct. 2641 (1988)
- *Harris v. Quinn*
  573 U.S. 616, 134 S.Ct. 2618 (2014)
- *Friedrichs v. California Teachers Association*
  136 S.Ct. 1083 (Mem.) (2016)

Background of *Janus*

- Under the Illinois Public Relations Act, public sector employee unions could collect dues from members, but only fair share fees from non-members on whose behalf the union negotiates.
- Mark Janus was a state employee represented by AFSCME but not a union member union. Janus argued forcing him to pay agency fees violated his First Amendment rights.
- Illinois' governor also challenged the collection of fair share fees, arguing that the statute violated the First Amendment.
- The Supreme Court granted certiorari to decide whether *Abood* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

The Supreme Court's *Janus* Decision

- Compelled subsidization of private speech seriously impinges on First Amendment rights
- Rejected unions' justifications for agency fees, such as the promotion of "labor peace" and the risk of "free riders"
- Imposing fair share fees violated First Amendment
- Overruled *Abood*
- States and public-sector unions may no longer extract agency fees from nonconsenting employees

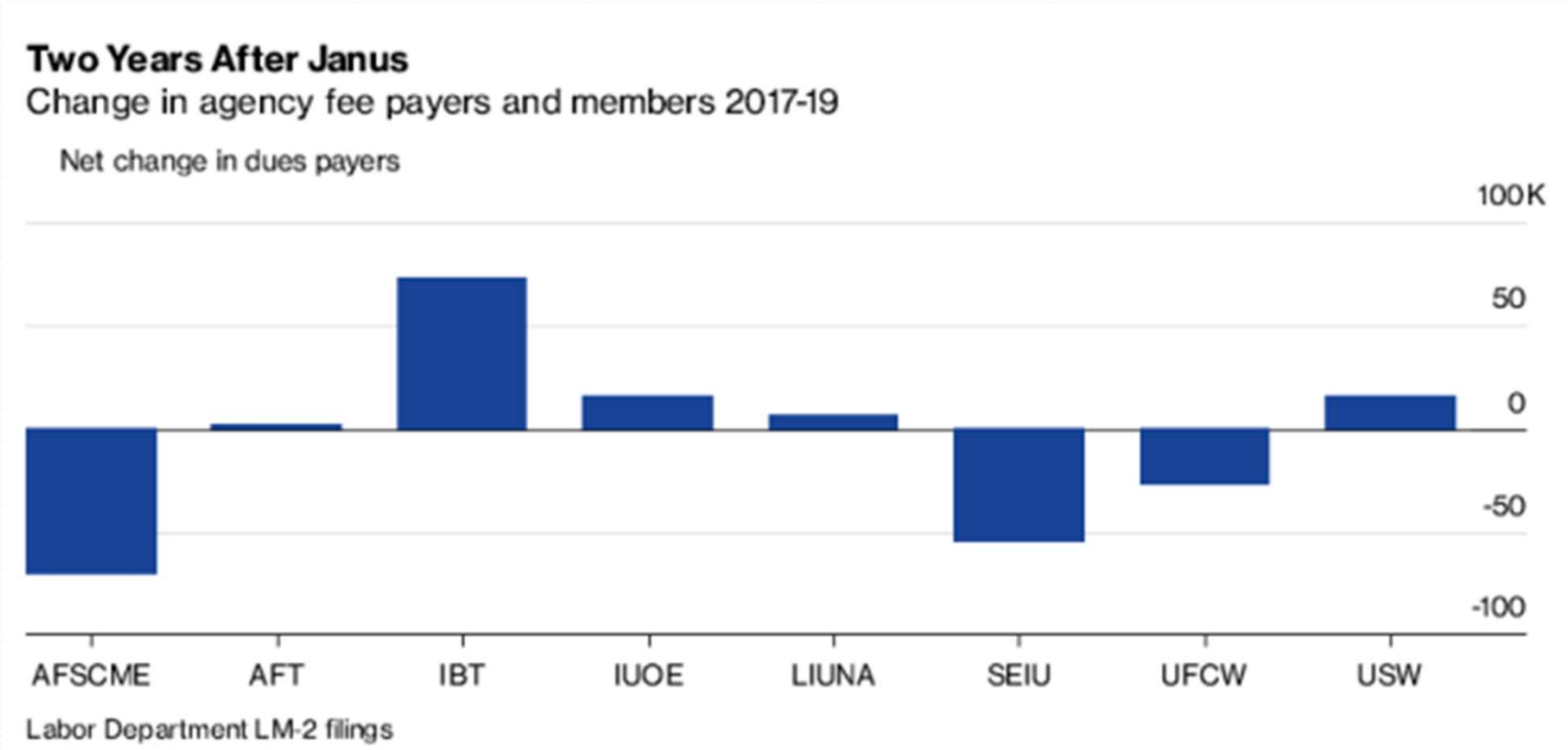
Key Points from the *Janus* Decision

- States and public sector unions may no longer extract agency fees from nonconsenting employees
- First Amendment is violated when money is taken from nonconsenting employees for a public-sector union
- Employees must choose to support the union before anything is taken from them
- Agency fees or other forms payments may not be deducted, without employee's affirmative consent
- Extraction of agency fees from nonconsenting public sector employees violates First Amendment

The Post-*Janus* Effect: An Update on Public Sector Unions and Labor Relations



Public Sector Unions Post-*Janus*: Update



Dues Checkoff Clauses: Post-*Janus*

- Public employer considerations: drafting *Janus* notices:
  - Explains agency hop holding
  - Explains checkoff language
  - Appropriate questions to ensure free and affirmative consent to checkoff
- Distributing *Janus* notices:
  - All new hires in the bargaining unit
  - Unit members who have been paying agency dues to the union via checkoff; and/or
  - All bargaining unit members who have been paying full membership dues to the union via checkoff

Post-*Janus* Affirmative Defense

- 90+ *Janus*-related lawsuits from public sector employees, with many seeking recovery of union fees
- Unions may invoke good faith affirmative defense to retrospective monetary liability under Section 1983
  - Acted in reliance on then-binding SCOTUS precedent and presumptively-valid state law
  - Applies as a matter of law; union was not required to anticipate the overturning of then-binding precedent.
- Decisions from Ninth and Seventh Circuits
  - *Danielson v. Inslee*, 945 F.3d 1096, 1099 (9th Cir. 2019)
  - *Mooney v. Ill. Educ. Ass'n*, 942 F.3d 368 (7th Cir. 2019)
  - *Janus v. AFSCME, Council 31*, 942 F.3d 352 (7th Cir. 2019) (*Janus* II)

Best Current Practices Post-*Janus*

- Consult with counsel to see if you are relieved of duty (in terms of CBA, checkoff card, etc.) to discontinue withholding of dues for employees who are no longer members
- Neither public employers nor unions should refund fair share fees deducted prior to *Janus* absent retroactivity
- Consult with counsel when presented with demand to bargain *Janus* decision effects
- Monitor payroll and identify employees with fair share fees withheld
- Use best efforts to work cooperatively and respectfully with unions

Creation and Enforcement of Collective Bargaining Agreements



Creation and Enforcement of CBAs: Summary

- Does the statute authorize the making of binding agreements and, if so, what kinds of agreements does it authorize — constitutive agreements, grievance arbitration agreements, or both?
- Is the statute applicable to the specific group of public employees who are parties to the agreement?



Creation and Enforcement of CBAs: Summary (cont.)

- Does applicable law, either expressly or by implication, forbid making the agreement either as a whole or as it applies to certain subject matter areas?
- Does the statute either compel or forbid the enforcement of the agreement by a particular means or procedure?



Thank You!





