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Labor Law Illiteracy: *Epic Systems Corp. v. Lewis* and *Janus v. AFSCME*

Michael J. Yelnosky*

Labor law's profile has long been receding. Private sector union density, at 6.5 percent, is almost thirty percent below its high in 1954.¹ And the National Labor Relations Act (NLRA), which governs labor relations in the private sector, became law in 1935 and has been substantially amended only twice—the last time in 1959.² Cindy Estlund, a leading scholar of labor and employment law, has identified this statutory stasis as partly responsible for what she calls the “ossification” of American labor law.³ In *The Death of Labor Law?*, Estlund explored the related decline in the attention paid to the subject by legal scholars.⁴ “For much of the twentieth century,” she wrote, “labor law scholars were at the

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1. Drew Silver, American Unions Membership Declines as Public Support Fluctuates, Pew Res. Ctr. (Feb. 20, 2014), <http://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/> [https://perma.cc/8DGJ-298V]; see also U.S. Bureau of Labor Statistics, Economic News Release: Union Members Summary (Jan. 19, 2018, 10:00 AM), <https://www.bls.gov/news.release/union2.nr0.htm> [https://perma.cc/Z9RT-VR32] [hereinafter Economic News Release].

2. 29 U.S.C. §§ 151–169 (2012).

3. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1531 (2002) (“I know of no other major American legal regime—no other body of federal law that governs a whole domain of social life—that has been so insulated from significant change for so long.”).

4. Cynthia L. Estlund, *The Death of Labor Law?*, 2 ANN. REV. L. & SOC. SCI. 105 (2006).

forefront of the legal academy. The field drew leading figures in academic law Nowadays, by contrast, labor law is regarded as a virtual backwater in the legal academy.”⁵ Most contemporary labor law scholarship, she observed, is focused on explanations for the decline of private sector unionization.⁶

Estlund’s focus is federal labor law, which governs the rights and responsibilities of employees, unions, and employers in the private sector.⁷ Public sector labor law, by contrast, never even had its day in the sun. While there are examples of prominent legal scholars turning their attention to public sector labor law, the subject is mostly ignored in American law schools and, if not ignored, viewed as arcane and insignificant. A brief internet search did not turn up a single course in public sector labor law being offered in the fall of 2018 at any law school in New England.

One practical explanation for the fate of public sector labor law is that it is state law, unlike private sector labor law, which consists almost exclusively of one federal statute—the NLRA. The patchwork quilt of applicable state laws can be confounding. It is simply more difficult for interested observers to become experts. On the other hand, public sector unions are thriving as compared to their private sector counterparts. Union density in the public sector, at 34.4 percent, is more than five times higher than it is in the private sector.⁸ And changes to public sector labor law have found their way into the national consciousness from time to time.⁹ Nevertheless, the proposition that public and private sector labor law and labor unions do not occupy a significant place in the minds of academic or practicing lawyers is not controversial. Nor should the suggestion that labor law illiteracy—a knowledge gap among lawyers and judges about the content, purpose, operation, and significance of labor law—is increasing. In this Survey, I describe how the majority’s reasoning in two United States

5. *Id.* at 106.

6. *Id.* at 113.

7. *Id.* at 113–14.

8. Economic News Release, *supra* note 1.

9. See Noam Scheiber, *Can Weak Unions Get Teachers More Money?*, N.Y. TIMES (May 5, 2018), <https://www.nytimes.com/2018/05/05/sunday-review/unions-teachers-money-strike.html> [<https://perma.cc/GLM2-KMUC>]. Recent examples include the 2011 amendments to the public sector labor laws in Wisconsin championed by Governor Scott Walker as well as a series of teacher walkouts in Oklahoma, Arizona, and West Virginia in early 2018.

Supreme Court decisions from the 2017 term reflect notable labor law illiteracy. Specifically, it appears that a majority of the Justices do not understand basic principles of labor law under the NLRA.¹⁰ Moreover, the majority seems to know that collective bargaining in the public sector can increase the cost of government operations and has concluded that is a justification for interpreting that law to curtail the power of public sector unions. The majority finds the tendency of collective bargaining in the public sector to increase the cost of government operations *prima facie* unacceptable, even though a primary purpose of labor law, perhaps even its *raison d'être*, is to improve the bargaining power of individual employees, which is likely to result in better terms and conditions of employment for organized workers, including increased wages and benefits.¹¹ Reading these decisions makes one wonder whether some of the Justices are aware that in the NLRA, Congress—to whom the conservative majority regularly pledges fealty as the preeminent policy-making body under our constitutional structure—

[D]eclared [it] to be the policy of the United States to . . . encourage the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹²

The first of the cases is *Epic Systems Corp. v. Lewis*, where the Court faced a question about the scope of the NLRA.¹³ As a general matter, the NLRA prohibits employer interference with employee rights created by section 7 of the Act, including the right to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection”¹⁴ The specific question before

10. See *infra* pp. 110–13.

11. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619–32 (2018); see also *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

12. 29 U.S.C. § 151.

13. See 138 S. Ct. at 1619.

14. 29 U.S.C. § 157. This statute provides: “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

the Court in *Epic Systems* was whether provisions in employment contracts prohibiting employees from joining as plaintiffs in arbitration to enforce their rights to appropriate compensation under state and federal law were unenforceable under the NLRA.¹⁵

Epic Systems was a group of consolidated cases, and the Court described one in some detail.¹⁶ The plaintiff, a junior accountant at Ernst & Young, believed that his position had been misclassified as exempt from the overtime pay requirements of federal and state law. He sued Ernst & Young in federal court for overtime pay on behalf of a class of Ernst & Young junior accountants.¹⁷ Ernst & Young moved for an order compelling individual arbitration of the plaintiff's claim.¹⁸ Ernst & Young relied on an agreement the plaintiff signed as a condition of employment, which provided he would arbitrate any employment disputes he had with Ernst & Young and that he would assert claims only on his own behalf with claims "pertaining to different [e]mployees [to] be heard in separate proceedings."¹⁹

The district court granted the motion, relying on the Federal Arbitration Act (FAA) and the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion* for support.²⁰ The FAA, enacted by Congress in 1925, provides:

[A] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²¹

And in *Concepcion*, the Court concluded that the FAA preempted

other concerted activities for the purpose of collective bargaining or other mutual aid or protection" *Id.* Further, section 158(a)(1) protects those rights by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* § 158(a)(1).

15. See *Epic Sys. Corp.*, 138 S. Ct. at 1619.

16. *Id.*

17. *Id.* at 1620.

18. *Id.*

19. *Id.*

20. See 9 U.S.C. §§ 1–16 (2012); 563 U.S. 333 (2011); *Morris v. Ernst & Young*, No. C-12-04964, 2013 WL 3460052, at *2 (N.D. Cal. July 9, 2005).

21. 9 U.S.C. § 2.

California law making a class action waiver in the arbitration provision of a consumer contract unenforceable.²² The Court explained that because class arbitration was inconsistent with the fundamental attributes of arbitration, a state law requiring class arbitration was inconsistent with the FAA.²³

The Ninth Circuit reversed the district court's arbitration order in *Epic Systems* because it concluded the NLRA's protection of concerted activity trumped the FAA's directive to enforce arbitration agreements.²⁴ The Ninth Circuit majority explained that the class action waiver in the arbitration agreement prohibited employees from engaging in concerted activity for mutual aid or protection, a right expressly protected by the NLRA.²⁵

The Supreme Court reversed, 5–4, holding that nothing in the NLRA rendered the class arbitration waiver unenforceable.²⁶ Justice Gorsuch, writing for his conservative brethren, went so far as to assert that “as a matter of law the answer is clear.”²⁷ Even granting that the winners get to write history, this is an astonishing assertion.

Almost as astonishing was the articulated basis of the Court's conclusion—that the NLRA could not possibly have anything to do with the FAA and arbitration agreements because it “secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.”²⁸ Assuming the majority opinion was not intentionally misleading, the majority's reasoning is clear evidence of labor law illiteracy.

On one hand, the majority in *Epic Systems* was correct when it explained that, under *Concepcion*, state law prohibiting enforcement of an arbitration agreement “just because it requires bilateral arbitration” must give way to the FAA's general command to enforce arbitration agreements.²⁹ However, that misses the point entirely. *Concepcion* involved an arbitration agreement

²² *Concepcion*, 563 U.S. at 343.

²³ *Id.*

²⁴ *See Epic Sys. Corp.*, 138 S. Ct. at 1620.

²⁵ *Id.*

²⁶ *Id.* at 1631.

²⁷ *Id.* at 1618.

²⁸ *Id.* at 1619.

²⁹ *See id.* at 1623.

between consumers and their wireless network provider.³⁰ *Epic Systems*, by contrast, involved an agreement between employees and their employer.³¹

Because of the NLRA that makes all the difference. The NLRA gives *employees* the right, as the majority acknowledged, to form unions and engage in collective bargaining, but also “to engage in other concerted activities for . . . other mutual aid or protection.”³² It is hornbook labor law that the NLRA’s “protection of ‘other concerted activities for mutual aid or protection’ extends beyond . . . efforts to form a union and engage in collective bargaining.”³³

Indeed, a unanimous Supreme Court held in 1962 in *NLRB v. Washington Aluminum Co.*, that an employer committed an unfair labor practice under the NLRA when it disciplined seven non-union employees for engaging in a spontaneous walkout to protest what they considered to be an unacceptably cold workplace.³⁴ The employees did not walk out to form a union or to engage in collective bargaining.³⁵ The Court nevertheless found the walkout protected because the employees were acting in concert to protest their conditions of employment.³⁶ Employees, the Court explained, do not “lose their right to engage in concerted activities under § 7 [of the NLRA] merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.”³⁷ The Court continued:

The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers’ decisions to engage in

30. *Concepcion*, 563 U.S. at 333.

31. *Epic Sys. Corp.*, 138 S. Ct. at 1616.

32. 29 U.S.C. § 157.

33. See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 397 (2d ed. 2004).

34. 370 U.S. 9, 18 (1962).

35. See *id.* at 15–16.

36. *Id.* at 14.

37. *Id.*

concerted activity is irrelevant.....³⁸

Remarkably, the *Epic Systems* majority concluded that this seminal Supreme Court case on the breadth of section 7 warranted a simple citation, where it was characterized as a case involving efforts of a group of employees “related to organizing and collective bargaining.”³⁹

That characterization patently misunderstands *Washington Aluminum* and the support it gives to the proposition that employees wishing to join together as plaintiffs in a Fair Labor Standards Act proceeding are engaging in concerted activity for mutual aid or protection.⁴⁰ The protection of that right by the NLRA, which was enacted thirteen years *after* the FAA, justifies an exception to the general command of the FAA. Moreover, as Justice Ginsburg noted for the dissenters, the NLRA is specific about the rights it creates for employees, while the FAA says nothing about collective proceedings in arbitration.⁴¹ Her dissent is simple and direct—conditioning employment on an agreement to refrain from engaging in section 7 activity is an unfair labor practice, and that makes enforcement of such an agreement unlawful as a matter of federal law.⁴²

In short, my critique of *Epic Systems* is that the majority never really joins the issue because of what appears to be its fundamental misunderstanding of a basic tenet of American labor law—that collective employee action in support of improved wages and working conditions is protected even if that action is not related to unionization or collective bargaining.

The trouble with the majority opinion in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, is different but related: the opinion displays a hostility to the concept of unionization and collective bargaining in the public

³⁸ *Id.* at 16.

³⁹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1628 (2018) (citing *Washington Aluminum Co.*, 370 U.S. at 13).

⁴⁰ Moreover, as early as 1942 the National Labor Relations Board found that three employees who joined as plaintiffs in a lawsuit asserting violations of the Fair Labor Standards Act were engaged in concerted activity for mutual aid or protection. *In re Spandisco Oil & Royalty*, 42 N.L.R.B. 942 (1942). And many federal courts continued to do so. *See, e.g.*, *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (1991).

⁴¹ *Epic Sys. Corp.*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting).

⁴² *Id.* at 1641–42.

sector, which is a policy choice the Court obviously understands that states are permitted to make for themselves.⁴³ The *Janus* majority declared unconstitutional collective bargaining provisions that required public employees who were represented by but opposed to joining a union to pay for the costs of union representation.⁴⁴ Requiring the payment of these so-called “agency fees,” the majority held, was a compelled subsidy of speech that violated the First Amendment rights of employee objectors.⁴⁵

The union argued, among other things, that the Court should characterize the speech being subsidized—arguments made by union representatives in negotiations over wage increases, for example—as speech about matters of private concern, speech that is generally entitled to less First Amendment protection in public sector employment.⁴⁶ The *Janus* majority rejected that argument and concluded that all speech connected to collective bargaining in the public sector involves matters of public concern.⁴⁷

In so doing, Justice Alito revealed a hostility toward collective bargaining in the public sector when he went beyond explaining why First Amendment rights were genuinely at stake in public sector agency fee arrangements.⁴⁸ He could have made this First Amendment point by simply explaining that collective bargaining in the public sector involves speech that has an impact on the cost and operation of government, core matters of public concern. Instead, he piled on by describing, in some detail, massive budget deficits and unfunded pension liabilities plaguing states, counties, and municipalities—deficits that he attributed to public sector collective bargaining.⁴⁹

He went on to describe bargaining between AFSCME and the State of Illinois in a way that suggested the union was irresponsible

43. *See* 138 S. Ct. 2448 (2018).

44. *Id.* at 2460.

45. *Id.*

46. *Id.* at 2474.

47. *Id.* at 2460.

48. *See id.* at 2474–76.

49. *Id.* (explaining that: (1) Illinois’s credit rating has been downgraded to near junk status because of unfunded pension and retiree healthcare liabilities; (2) the nationwide cost of state and local employees’ wages and benefits is nearly \$1.5 trillion—more than half of those jurisdictions’ total expenditures; and (3) many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues).

in responding to the State's demands to reduce its employment-related expenses:

But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending “to Wall Street financial institutions,” and reforms to Illinois’ pension and tax systems (such as closing “corporate tax loopholes,” “[e]xpanding the base of the state sales tax,” and “allowing an income tax that is adjusted in accordance with ability to pay”).⁵⁰

Skepticism about the social value of collective bargaining in the public sector can be seen in another aspect of the majority's opinion. The majority cited favorably to an amicus brief submitted by two former general counsels to the Governor of Illinois, both of whom regularly advised the Governor on how the State should proceed in public sector labor negotiations.⁵¹ The majority cited the brief for details about the finances of the State of Illinois, but the narrative of the brief is clear—collective bargaining in the public sector is bad public policy.⁵² The following excerpt from the brief is a good example:

The causes of Illinois's financial woes are longstanding and bipartisan. Yet much of the State's current financial condition results from the conflation of public sector union bargaining and legislative lobbying.....Unlike private sector unions, which pit labor against management in meaningful negotiations, public sector unions permit labor and management to sit on the same side of the table. There they purport to bargain with the taxpayers' money.⁵³

While there is little dispute that private and public sector collective bargaining are different, with the outcome of the former determined more by market forces and the latter by political forces,

50. *Id.* at 2475.

51. *Id.* at 2475 nn.12–13.

52. *Id.* at 2475.

53. Brief for Jason R. Barclay & James S. Montana, Jr., Former General Counsel to Governors of the State of Illinois, as Amicus Curiae Supporting Petitioners at 4, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 WL 6311777.

there is genuine and good faith disagreement about whether facilitating collective bargaining in the public sector is bad public policy. For example, Professor Clyde Summers, one of the leading labor law scholars of his generation, wrote that with regard to monetary issues like wages, public sector collective bargaining helps level the playing field for public employees who will often be dramatically outnumbered by citizens opposed to tax increases.⁵⁴

At oral argument, Justice Kennedy seemed positively dismissive of the argument made by the Solicitor General of the State of Illinois, David L. Franklin, who explained that agency fee agreements furthered the State's interest in having well-funded and stable public sector unions to serve as partners in management of the State's workforce and the effective provision of public services.

MR. FRANKLIN: [W]e have an interest at the end of the day in being able to work with a stable, responsible, independent counterparty that's well-resourced enough that it can be a partner with us in the process of not only contract negotiation.

JUSTICE KENNEDY: It can be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion, against—for teacher tenure, for higher wages, for massive government, for increasing bonded indebtedness, for increasing taxes? That's—that's the interest the state has?⁵⁵

Of course, justices often play “devil's advocate” during oral argument, but I am willing to bet that is not what Justice Kennedy was doing when he conveyed to the State's lawyer that he views public sector collective bargaining largely, if not completely, as a

⁵⁴ Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441, 446–47 (2003). Other arguments in favor of public sector collective bargaining include: (1) that it reduces workplace conflict by creating regular avenues for dialogue between labor and management; (2) that it facilitates workplace democracy; and (3) that it facilitates worker engagement in the political process. Martin H. Malin, *Does Public Employee Collective Bargaining Distort Democracy? A Perspective from The United States*, 34 COMP. LAB. L. & POL'Y J. 277, 281 (2013).

⁵⁵ Transcript of Oral Argument at 46–47, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466).

means to transfer wealth from taxpayers to public employees.

* * * * *

Supreme Court justices are not immune from the social, academic, and political trends that have made labor law less salient. Indeed, as the professional backgrounds of the Justices become more homogeneous, it might be even more likely that the Court will not have a labor law expert among its number. But it does not take an expert to see that something is amiss in *Epic Systems* and *Janus*. Indeed, I would be disappointed if one of my Labor Law students did not see the deficiency in Justice Gorsuch's opinion in *Epic Systems*.

However, I should acknowledge that perhaps I am seeing something that is not there. The approach in *Epic Systems* could be explained by the Court's capacious interpretation of the FAA, which at this point essentially requires enforcement of any form of covered arbitration agreement.⁵⁶ And in *Janus*, the majority may have been laser-focused on explaining why it was rejecting the argument that public sector collective bargaining did not involve genuine issues of public concern. It may have simply gotten carried away.

Still, at the end of the day, I am struck by the lack of sophistication and rigor in the *Epic Systems* and *Janus* majority opinions. Perhaps it should not come as a surprise that the Court's facility with labor law is, like the field in general, in decline.

⁵⁶ See Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How The Supreme Court Flaunts and Flunks Contracts*, 75 L. & CONTEMP. PROBS., 129, 131–32 (2012).