As a lawyer who primarily represents labor unions, I worry about what the Supreme Court’s decision in Janus v. AFSCME will mean for my clients, for the workers they represent, and for me. But I have hope that Janus can be the catalyst for the reinvention and reinvigoration of the labor movement and labor unions.

The Court ruled that mandatory union services fees paid by public-sector employees violate the First Amendment. Service fees, also known as fair-share fees or agency fees, are paid to labor unions by those who are not members of the union but who are members of “bargaining units” that the union is obligated to represent.

These fees cover the cost of collective bargaining activities but not the unions’ political activities. “Right-to-work” laws are laws that make such services fees illegal. At this writing, twenty-eight states have right-to-work laws that prohibit mandatory service fees in the private sector.

Service fees are a bit of an anomaly of the U.S. labor system. In Canada, all members of the bargaining unit may be required to pay full dues, even though they may not be compelled to join the union. Generally, though, in the rest of the world, the costs and benefits of union representation go only to union members. Service fees are justified in the context of the American labor model, which is based on the premise that the union is the exclusive representative of everyone in the bargaining unit. American unions are obligated to provide fair representation to even those members of the bargaining unit who are hostile to the union’s existence.

That model only works if most everyone chips in. Otherwise, unions may be hard pressed to represent the people they are obligated to represent, let alone expand representation. It’s no surprise...
that in right-to-work states, union density is lower (about 5.6 percent in right-to-work states and 15 percent in what I’ll call union-security states).

It’s worth noting that most other Western industrialized countries have stronger unions (or at least higher union membership) than the United States despite the fact that, except for Canada, they are essentially right-to-work jurisdictions. About 26 percent of Canadian workers belong to a union; 25 percent of U.K. workers are union members; 18 percent of German workers are union members; and just under 11 percent of U.S. workers are union members, according to 2015 OECD data. Even Japan (17.4 percent) and Mexico (13.1 percent, although this may include many in “company unions”) have higher union density than the United States.

Conservative donors and corporate interests have funneled money into right-to-work efforts, not hiding their goal of crippling America’s unions because of the labor costs associated with unionization and because of the money that unions contribute to Democratic candidates (for which they get little in return, but more on that later).

And so that brings us to Janus, which was heard by the Supreme Court on February 26, 2018, in litigation funded by the National Right to Work Legal Foundation and the Liberty Justice Center. Unions are girding themselves for an adverse decision. They’ve had some advance warning that has given them the chance to prepare and engage in outreach to their members and the nonmembers they represent, in order to stem their losses. But they know there will be losses. And they know that the same forces that are behind Janus are also pushing to expand right-to-work in the private sector through efforts at the national, state, and local levels.

Now what?

First, despite the difficulties that expanded right-to-work presents, unions may be more resilient than their enemies anticipate. Polling data show that public support for unions is at its highest level in years, especially among young people—Pew polling data show that 75 percent of Americans under age 30 have a positive view of labor unions. Unions can and are working to preserve their strength and to leverage that public support.

For a while, it seemed that there was nothing but bad news about unions, but that hasn’t been as true in the last several years. We’ve seen successful organization of newspaper and digital-media employees and of graduate students. Unions have broken out of traditional organizations and in doing so have seen success with the Fight for $15 and in other social and economic justice initiatives.

But let’s imagine that union opponents get their wish and right-to-work becomes the law of the land in both the private and public sectors—and as a result unions shrink to the point that they can no longer effectively represent workers. It’s still a good bet that unions eventually will re-emerge with regained strength, especially if enormous income inequality persists. The question is whether this will happen with or without an extended period of labor chaos, disruption, and possibly violence.

Unions give workers a way to work together to seek recognition and redress, and to bargain with management in an orderly manner. In doing so, they promote labor peace. In fact, labor peace motivated the enactment of laws allowing collective bargaining.

In the decades before the NLRA gave most private sector workers the right to organize, there were many big strikes that lasted for months, involved hundreds of thousands of workers, and sometimes came with significant casualties. Win or lose, workers crippled the railroads, the steel industry, coal mining, and textile mills for weeks and months.

Later, from the 1960s into the 1980s, there were major public sector strikes—transit workers, municipal workers, postal workers, firefighters, and even police disrupted life in New York, Memphis, Philadelphia, and Chicago. The nation as a whole felt the effects of the 1970 postal workers’ strike.

Maybe today’s American workers are too polarized, too distracted, too indifferent, too wedded to the concept of their own independence, or too afraid to fight that hard anymore . . . or maybe not. This year we have seen statewide teachers’ strikes in the red states of West Virginia, Oklahoma, and Arizona.
In the face of income inequality, employment insecurity, rising student debt, high housing costs, and a shrinking middle class, the need for employees to work together to improve their economic and working conditions hasn’t gone away. As teachers have shown us, it turns out that collective action still works—and can be empowered by social media and other means of electronic communication unknown to previous generations.

As noted previously, there are actions unions can take now to stem the loss of members and remain effective in a right-to-work environment. Good, innovative internal organization that engages the membership is key. In the face of Janus, many public sector unions are focusing on just that.

Down the road, depending how the situation evolves, unions may want to reconsider the exclusive-representation model. There is power in being the exclusive representative of a group of workers, but only if those workers are engaged and financially supportive of the union’s work. As fewer workers support the union, it is less able to provide effective representation, leading to more dissatisfaction and less support from workers. A formula for growth might be to serve only those workers who support the union, allowing for more effective and powerful unions that attract members. Clearly, as we see in other countries, unions can survive and thrive without the exclusive-representation model.

Yet there is only so much that unions can do to help themselves when the legal deck is stacked against them. Private sector unions exist in a labor law system that makes it hard to unionize and easy to fire workers for organizing. In theory it’s an unfair labor practice to fire an employee for union activity, but if the penalty is merely reinstatement, limited back pay, and the posting of a notice months or years later, it’s a small price to pay for scaring workers away from the union. Intimidating and coercive captive-audience meetings before an election are completely legal. Many workers have no right to organize at all (the farm and domestic workers excluded from the NLRA, those who are deemed independent contractors rather than employees), and others, such as temps, face extra-high hurdles to organization. In the public sector, union rights are given or taken away by the same government with which the union bargains.

A solution would be to make it a civil right for workers to organize or unionize, with all the protections and
remedies available under Title VII of the Civil Rights Act. Maybe that seems like a wild fantasy, but maybe it’s time for Democrats to do something for the unions that have supported them faithfully and often thanklessly for decades.

While we’re dreaming, let’s consider some of the features of the labor system in Germany and other high-income countries where unions are strong and workplaces are relatively egalitarian. Bargaining by sector or industry eliminates the race to the bottom in wages and benefits. Works councils are made up of employees who work with management to resolve day-to-day issues at the workplace.

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Co-determination is the right of employees to vote for representatives on a corporate board of directors, giving workers a voice in corporate governance.

Some Democrats seem at least dimly aware of such concepts. For example, this year, Senator Tammy Baldwin (D-Wisconsin) introduced the Reward Work Act, which would both limit stock buybacks and require publicly traded companies to allow employees to elect one-third of the board of directors, bringing co-determination to the United States.

We certainly need not do things the German way, but neither should we assume their ideas can’t work here. We should also look to Canada for ideas on how unions can be stronger in a culture very similar to our own. We are certainly free to think up our own innovations suited to our own culture. The most important thing is not to be resigned to the idea that American unions have outlived their usefulness and are now doomed. Instead, we should be invested in empowering unions and avoiding a return to the bad old days of labor strife.