

# COMMUNITARIANISM AND THE ROBERTS COURT: THE SEQUEL

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Last July, Chief Justice John Roberts delivered a particularly skillful and nuanced commencement address at his son's middle school. He emphasized the essential contribution of community to an individual's success in a world that is not always easy, fair, or kind:

You are surrounded by friends that you call brothers, and you are confident in facing the next step in your education. It is worth trying to think why that is so. And when you do, I think you may appreciate that it was because of the support of your classmates in the classroom, on the athletic field and in the dorms. And as far as the confidence goes, I think you will appreciate that it is not because you succeeded at everything you did, but because with the help of your friends, you were not afraid to fail.<sup>3</sup>

It is difficult to imagine how a person who sincerely believes those words could maintain such an impermeable membrane between his personal morality and his professional life. Since the publication of *Communitarianism and the Roberts Court*,<sup>4</sup> the Supreme Court decided a few major cases with dire implications for the ability of American citizens to form the type of mutually supportive communities the Chief Justice believed to be so indispensable in his son's school. This Sequel illustrates the way the Court has, throughout the 2017 term, used tortured statutory interpretation and the whole cloth manufacture of new rights to prevent workers and voters from asserting community interests against actors (typically corporations) that require no such protection from the Court.

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4. Robert M. Ackerman, *Communitarianism and the Roberts Court*, 45 FLA. ST. U. L. REV. 59 (2017).

## I. A STATUTORY MISCONSTRUCTION OF *EPIC* PROPORTIONS

Building on its foundationless decisions in *Circuit City Stores, Inc. v. Adams*<sup>5</sup> and *AT&T Mobility LLC v. Concepcion*,<sup>6</sup> the Court held in *Epic Systems Corp. v. Lewis*<sup>7</sup> that employers may enforce adhesive arbitration clauses with class action waivers against employees who jointly attempt to assert long-held statutory rights under the Fair Labor Standards Act of 1938 (FLSA)<sup>8</sup> and the National Labor Relations Act<sup>9</sup> (NLRA).<sup>10</sup>

To take the advice of Chief Justice Roberts: “[I]f you’re going to look forward to figure out where you’re going, it’s good to know where you’ve been and to look back as well.”<sup>11</sup> It is worth a quick review of the process by which the Supreme Court has inflated the narrowly tailored language of the Federal Arbitration Act (FAA)<sup>12</sup> into a “liberal federal policy favoring arbitration agreements”<sup>13</sup>—i.e., a judicial gloss capable of smothering laws enacted by Congress and state legislatures to protect people who work together for a living.<sup>14</sup>

The FAA, passed in 1925 before the New Deal overhaul of the nation’s labor and employment regime, provides that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>15</sup>

5. 532 U.S. 105 (2001).

6. 563 U.S. 333 (2011).

7. 138 S. Ct. 1612 (2018).

8. 29 U.S.C. §§ 201-203 (2012).

9. 29 U.S.C. §§ 151-152 (2012).

10. *Epic Sys.*, 138 S. Ct. at 1619 (“In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees’ suggestion that the National Labor Relations Act (NLRA) offers a conflicting command.”).

11. Reilly, *supra* note 3.

12. 9 U.S.C. §§ 1-4 (2012).

13. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

14. See Brief of Amicus Curiae Sen. Sheldon Whitehouse in Support of Respondent, *New Prime, Inc. v. Olivera* (2018) (No. 17-340), 2018 WL 3584091, at \*8-9 (arguing that “[a] pro-corporate policy bent has been particularly evident in the aggressive judicial expansion of the Federal Arbitration Act of 1925 (“FAA”). The recent string of 5-4 arbitration decisions has provided the ‘more powerful and wealthy’ interests an avenue to systematically deny ordinary individuals, such as those who are their employees or customers, access to juries of their peers when wronged. This was not what Congress intended when it enacted the FAA.”).

15. 9 U.S.C. § 2 (2012). The language omitted above reads “or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal.” *Id.*

As numerous Supreme Court Justices and commentators have pointed out, the FAA's legislative history reveals that Congress originally intended the FAA to override the federal judiciary's hostility toward arbitration agreements between commercial actors and nothing more.<sup>16</sup> The Act arose from the business community's frustration with the refusal of federal courts to yield jurisdiction over disputes in which the parties had agreed to arbitrate according to industry custom.<sup>17</sup> Congress responded to labor movement concerns that the Act would be wielded against workers by expressly removing employment contracts from coverage; section 1 of the FAA clearly and explicitly provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>18</sup>

From a communitarian perspective, the original balance struck by the Act is ideal. That business communities should be able to construct their own efficient dispute resolution mechanisms in accordance with community norms is commendable from a communitarian point of view.<sup>19</sup> For businesses to impose on their employees and consumers

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16. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1635 (2018) (Ginsburg, J., dissenting); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125 (2001) (Stevens, J., dissenting); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36 (1991) (Stevens, J., dissenting); *Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984) (O'Connor, J., dissenting); see also Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795 (2012); Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249 (2018).

17. Stempel, *supra* note 16, at 795-96, 798.

18. 9 U.S.C. § 1 (2012). As Justice Stevens recounts the well-documented story, "[T]he original bill was opposed by representatives of organized labor, most notably the president of the International Seamen's Union of America, because of their concern that the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements. In response to those objections, the chairman of the ABA committee that drafted the legislation emphasized at a Senate Judiciary Subcommittee hearing that '[i]t is not intended that this shall be an act referring to labor disputes, at all,' but he also observed that 'if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' " Similarly, another supporter of the bill, then Secretary of Commerce Herbert Hoover, suggested that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.' " The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added to [section] 1, and the amendment eliminated organized labor's opposition to the proposed law." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 126-27 (2001) (Stevens, J., dissenting) (internal citations omitted); see also *Epic Sys.*, 138 S. Ct. at 1643 (Ginsburg, J., dissenting); *Gilmer*, 500 U.S. at 36 (Stevens, J., dissenting); *Southland*, 465 U.S. at 21 (O'Connor, J., dissenting); Stempel, *supra* note 16; Norris, *supra* note 16.

19. See Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 46 (2002).

adhesion contracts denying them access to the courts to protect fundamental rights is quite another matter. For decades, the Court's understanding was that an array of other statutes—such as those protecting workers' rights to organize and bargaining collectively<sup>20</sup> and those protecting individuals from racial discrimination<sup>21</sup>—more appropriately addressed disputes involving employees and consumers.

That balance between arbitration enforcement and statutory rights remained in place for more than fifty years until the Supreme Court—“act[ing] in derogation of mainstream legal analysis as well as their own asserted long-time jurisprudence of adjudication and correct construction of positive law”—formed what Professor Jeffrey Stempel has called an irrational “infatuation with arbitration.”<sup>22</sup>

In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>23</sup> the Court extended the FAA's coverage into the employment realm for the first time, holding that an arbitration clause was enforceable against a stock broker's claim under the Age Discrimination in Employment Act.<sup>24</sup> Because the arbitration clause was contained in an agreement between Gilmer (the employee) and the New York Stock Exchange (NYSE) and not in a traditional employment contract, the Court declined to consider the scope of the employment contract exemption contained in section 1 of the FAA.<sup>25</sup>

In *Circuit City Stores, Inc. v. Adams*,<sup>26</sup> the Court finally addressed section 1 with a wrested construction of the exemption's scope. That clause, Justice Kennedy wrote, “is limited to transportation workers, defined, for instance, as those workers actually engaged in the movement of goods in interstate commerce.”<sup>27</sup> In a strained attempt to squeeze blood from a textual stone, the Court reasoned that section 1's use of the phrase “engaged in . . . commerce,” as opposed to section 2's

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20. 29 U.S.C. §§ 158-160 (2012).

21. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that racial discrimination claim under Title VII of the Civil Rights Act of 1964 is not foreclosed by an arbitration clause in a collective bargaining agreement).

22. Stempel, *supra* note 16, at 799, 803.

23. 500 U.S. 20 (1991).

24. *Id.* at 26. In doing so, the Court effectively overruled its decision in *Alexander v. Gardner-Denver Co.*, *supra* note 21, by characterizing the *Alexander* result as driven by the unique contractual language at issue in that case rather than by an exception to the FAA's coverage.

25. *Id.* at 24 n.2. As Justice Stevens's dissent points out, the Court's distinction between “contracts of employment” and the agreement between Gilmer and the NYSE, which affected the employment relationship and was enforced by the employer, is merely expedient formalism. *Id.* at 40. (Stevens, J., dissenting) (“Given that the FAA specifically was intended to exclude arbitration agreements between employees and employers, I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled ‘Contract of Employment.’”).

26. 532 U.S. 105 (2001).

27. *Id.* at 112 (internal quotations omitted).

“involving commerce,” presented an “insurmountable textual obstacle” to the argument that the employment exception coverage should be coextensive with Congress’s modern commerce clause power<sup>28</sup>—a quality with which the Court had already imbued the FAA’s primary operative provision (section 2) in *Allied Bruce v. Terminex*.<sup>29</sup> Justice Souter’s dissent highlighted the paradox at the center of the majority’s interpretation: section 2 is elevated to an exercise of plenary power while section 1 is reduced to irrelevance by a supposed difference in “terms of art” that had not been established as such at the time the Act was drafted.<sup>30</sup> Reprising his dissent in *Gilmer*, Justice Stevens again forcefully argued that the FAA’s legislative history is uncommonly clear and inconsistent with the majority’s “textualist” reading.<sup>31</sup>

This term’s *Epic Systems* case combined three actions alleging that employers had willfully misclassified employees as overtime exempt in violation of the FLSA.<sup>32</sup> Each employee had signed, as a condition of employment, an agreement providing for individualized arbitration of all disputes arising from the employment relationship and precluding any class remedy.<sup>33</sup> In one of the cases below, *Morris v. Ernst & Young LLP*,<sup>34</sup> the Ninth Circuit reversed the District Court’s order to compel individualized arbitration after Mr. Morris brought a nationwide class action on behalf of junior accountants, who were allegedly misclassified as professional employees.<sup>35</sup> The panel reasoned that the NLRA and the Federal Arbitration Act’s “saving clause”—which states that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”<sup>36</sup>—barred enforcement of the class action waiver.<sup>37</sup> The NLRA, aside from creating employee rights to union formation and collective bargaining, creates

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28. *Id.* at 114.

29. *Id.* at 112; see *Allied Bruce v. Terminex*, 513 U.S. 265, 268 (1995).

30. *Id.* at 133-40 (Souter, J., dissenting) (“But none of the cited cases dealt with the question here, whether exemption language is to be read as petrified when coverage language is read to grow. Nor do the cases support the Court’s unwillingness to look beyond the four corners of the statute to determine whether the words in question necessarily ‘have a uniform meaning whenever used by Congress.’”).

31. *Id.* at 124-33 (Stevens, J., dissenting) (“Playing ostrich to the substantial history behind the amendment, see *ante*, at 1311 (“[W]e need not assess the legislative history of the exclusion provision”), the Court reasons in a vacuum . . .”).

32. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619-20 (2018).

33. *Id.*

34. 834 F.3d 975 (9th Cir. 2016).

35. *Id.* at 979.

36. 9 U.S.C. § 2 (2012).

37. *Morris*, 834 F.3d at 984-85.

a right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>38</sup> Anyone remotely familiar with the New Deal era would reason, as the Ninth Circuit did, that Congress chose this broad language to prevent hairsplitting formalist rulings that certain collective actions are unprotected by the Act.<sup>39</sup> It seemed undebatable (at least prior to *Epic Systems*) that a class action is a “concerted activity for the purpose of . . . mutual aid or protection,”<sup>40</sup> and consequently, that class action waivers in employment contracts are unenforceable under the FAA’s saving clause due to illegality.

Instead, the Supreme Court majority went to extraordinary lengths to reach the opposite conclusion. Justice Gorsuch reasoned that even if the “concerted activities” protected by the NLRA include class actions,<sup>41</sup> illegality is no defense under the FAA’s saving clause because “the saving clause recognizes only defenses that apply to ‘any’ contract. . . . [The employees] don’t suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable.”<sup>42</sup>

That reading of the statute does not even make sense as mechanical jurisprudence.<sup>43</sup> Did Congress really intend to subordinate all past and *future* statutes to the FAA without an express statement to that effect, simply by use of the word “any”? Did Congress intend for a strained

38. 29 U.S.C. § 157 (2012).

39. *Cf. Morris*, 834 F.3d at 980-82. “Concerted action is the basic tenet of federal labor policy, and has formed the core of every significant federal labor statute leading up to the NLRA.” *Id.* at 982.

40. 29 U.S.C. § 157 (2012). Justice Ginsburg, in dissent, illustrates that a contrary reading is just plain poor textualism. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1637 (2018) (Ginsburg, J., dissenting) (“‘Concerted’ means ‘[p]lanned or accomplished together; combined.’” (citing AMERICAN HERITAGE DICTIONARY 381 (5th ed. 2011))).

41. Justice Gorsuch relies on the canon of *eiusdem generis* to argue that section 257 of 29 U.S.C. lists “other concerted activities” after expressly listing union formation and collective bargaining. As such, he reasons that “other concerted activities” must be read narrowly to include activities similar to union formation and collective bargaining—“things employees ‘just do’ for themselves in the course of exercising their right to free association in the workplace, rather than ‘the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.’” *Epic Sys.*, 138 S. Ct. at 1625. It is difficult to see a clear distinction in complexity or formality between forming a union or collective bargaining and a lawsuit. *Id.* at 1683 (Ginsburg, J., dissenting) (“It is far from apparent why joining hands in litigation would not qualify as ‘things employees just do for themselves.’”).

42. *Id.* at 1622 (majority opinion).

43. Justice Gorsuch reads the phrase “that *would* [certainly] render any contract unenforceable” as “that *could* [potentially] render any contract unenforceable,” which is identical to the mistake of reading “will” as “can.” If Congress intended a court to be certain that a contract was unenforceable before applying the saving clause, that court *would* have to examine the *certain* contract at bar—not whether an asserted defense *potentially* applies to all contracts regardless of subject matter, as Justice Gorsuch would have it.

interpretation of the FAA—which somehow requires that class arbitration be regarded as antithetical to the very concept of arbitration<sup>44</sup>—to swallow all of its *subsequent* efforts to encourage collective action on the part of working men and women? Where in the FAA does Congress say that illegality is a subject matter-specific defense that is consequently excluded from the saving clause?

As Justice Ginsburg points out in dissent, those questions have an uncommonly easy answer:

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as “an implied repeal” of the FAA, to the extent of any genuine conflict. Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment.<sup>45</sup>

*Epic Systems*’ explosion of the word “any,” like the other elaborate trick plays it is derived from, is nothing more than a “textualist” attempt to distract attention from the actual text of the FAA.

Justice Gorsuch additionally states that the NLRA illegality defense is defeated by the FAA because, rather than attacking the validity of the arbitration agreement’s formation, the defense attacks “the traditionally individualized and informal nature of arbitration” itself.<sup>46</sup> This is another line of reasoning nowhere to be found in the FAA; it was conjured whole cloth from (1) *Concepcion*’s baseless assertion that class procedures are inimical to arbitration (discussed in our original article)<sup>47</sup> and (2) Justice Thomas’s baffling insistence that only traditional common law defenses of improper formation can invalidate terms of an arbitration agreement.<sup>48</sup>

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44. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348-50 (2011).

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

46. *Id.* at 1622-23 (majority opinion).

47. Ackerman, *supra* note 4, at 112 (citing THE COLL. OF COMMERCIAL ARBITRATORS, GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 445-65 (4th ed. 2017)). Ironically in *Gilmer*, Justice White’s majority opinion acknowledges that the NYSE arbitration rules “provide for collective proceedings,” 500 U.S. 20, 32 (1991), in response to *Gilmer*’s objection that arbitration does not provide for class actions.

48. *Epic Sys.*, 138 S. Ct. at 1632-33. In his single-paragraph concurrence, Justice Thomas merely points to his concurrence in *Concepcion* in which he declares: “There must be some additional limit on the contract defenses permitted by [section] 2,” and proceeds to read the language “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,” into section 2 to provide such a limit. *Concepcion*, 563 U.S. at 353-55 (2011) (Thomas, J., concurring) (“Reading [sections] 2 and 4 harmoniously, the ‘grounds . . . for the revocation’ preserved in section 2 would mean grounds related to the making of the agreement.”).

Of course, the FAA plainly means that arbitration clauses are not unconscionable per se, as many courts had held prior to the Act's passage, but petitioners made no such argument. Their illegality defense was directed at the class action waiver, not the arbitrability of the dispute.<sup>49</sup> The Court, hellbent on ruling for the employers, was left pointing at *Concepcion*—a decision similarly based on its desire to unburden big business rather than any reasonable interpretation of Congressional intent or real-world arbitration practice.<sup>50</sup>

As Justice Ginsburg's dissent points out, such a tortured interpretation—lacking any discoverable justification except the Court's preference for employers—channels the ghost of *Lochner*.<sup>51</sup> Justice Gorsuch dismisses that criticism as a “false alarm”: “‘*Lochnerizing*’ has become so much an epithet that the very use of the label may obscure attempts at understanding.”<sup>52</sup> Unfortunately for American workers, it is hard to think of a case in which the “epithet” is more apt. *Epic Systems* echoes *Lochner* from its first sentence: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?”<sup>53</sup> Just like the bakers in *Lochner* who so desperately wanted to work over sixty hours per week in noxious conditions, in Justice Gorsuch's world, contemporary employees possess bargaining power equal to that of employers, and the former are just as likely as the latter to demand arbitration clauses with class action waivers. Justice Gorsuch seems determined to match Justice Roberts' formalism step for step.<sup>54</sup>

*Epic Systems* can be viewed as weaving together three strands of the Roberts Court's worst anti-communitarian impulses. It expands corporate privileges without extracting an equal and opposite obligation to the public. It ignores some of Congress's best impulses to en-

49. *Epic Sys.*, 138 S. Ct. at 1636 (Ginsburg, J., dissenting). As the Ninth Circuit observed in one of the cases below, “[t]he illegality of the ‘separate proceedings’ term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes in court and in ‘separate proceedings.’” *Morris v. Ernst & Young LLP*, 834 F. 3d 975, 985 (9th Cir. 2016).

50. Professor Stempel slyly hints that the Court's arbitration jurisprudence might just be pro-business rather than pro-arbitration: “In fact, it seems that the only time the Court does not make figurative goo-goo eyes about the wonder of arbitration is when the Court thinks that arbitration has become too close to litigation by seeking class-wide treatment of disputes, which is something largely opposed by the business community with which the Court is arguably even more infatuated.” Stempel, *supra* note 16, at 796-97.

51. *Epic Sys.*, 138 S. Ct. at 1634-35 (Ginsburg, J., dissenting).

52. *Id.* at 1630 (citing Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 435 (1978)).

53. *Id.* at 1619.

54. See Ackerman, *supra* note 4, at 117-20 (discussing the Chief Justice's exaggerated formalism in *Parents Involved in Cmty. Sch. Dist. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (citing Steven L. Winter, *John Roberts' Formalist Nightmare*, 63 U. MIAMI L. REV. 549 (2009))).



courage coordinated efforts of workers for mutual support and protection.<sup>55</sup> It uses procedural devices to deny workers access to the courts, and consequently, frustrates private enforcement of federal and state measures that have long shielded employees from the worst abuses of unequal bargaining power. And it does so by ignoring that inequality and offering a *Lochnerian* straw man in its place.

## II. A JANUS-FACED ATTACK ON LABOR UNDER THE GUISE OF THE FIRST AMENDMENT

The *Epic Systems* errors, and those of other abominations like *Concepcion* and *Circuit City*, being mere statutory interpretations, may at least someday be reversed by an act of Congress. Not so *Janus v. American Federation of State, County, and Municipal Employees*.<sup>56</sup> In that case, the Court embedded an attack on government workers in an unwarranted expansion of the First Amendment, foreclosing the possibility of a legislative remedy in the near future.

In *Janus*, a state employee challenged the provisions of the Illinois Public Labor Relations Act (IPLRA) that allowed employees to elect a union as the exclusive bargaining representative for members and nonmembers alike.<sup>57</sup> Under the long-standing balance struck by *Abood v. Detroit Board of Education*,<sup>58</sup> employees who decline full union membership cannot be compelled to pay the portion of dues the union uses for political activities such as electioneering.<sup>59</sup> However, the state may assert an interest in consolidated labor relations by requiring such employees to pay *agency fees*—monies that support “activities that are ‘germane to [the union’s] duties as collective-bargaining representative,’”<sup>60</sup> from which even nonmembers benefit, as the union is bound by law to serve the best interests of the entire bargaining unit.<sup>61</sup>

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55. During a recent Senate Judiciary Committee hearing on the confirmation of Judge Brett Kavanaugh for the Supreme Court, Sen. Ben Sasse (R-Neb) complained of a Congressional “self-neuter” in which Supreme Court Justices had become “super-legislators” engaged on a “substitute political battleground,” doing the work that Congress is supposed to do. *The Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 4, 2018). But in *Epic Systems* and previous cases construing the FAA, a supposedly “conservative” Supreme Court appointed itself to run roughshod over clear statutory instructions enacted by Congress so as to advance the Court majority’s political objective of curtailing worker rights.

56. 138 S. Ct. 2448 (2018).

57. *Id.* at 2461 (citing ILL. COMP. STAT., ch. 5 § 315/6(a) (West 2016)).

58. 431 U.S. 209 (1977).

59. *Id.* at 233-34.

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

61. *Abood*, 431 U.S. at 235. The union is required to separate its expenditures into “chargeable” collective bargaining activities and “nonchargeable” political activities. The un-

Mark Janus, a fiscally conservative public employee who ostensibly believes he and his coworkers are paid too well, argued that because public sector unions bargain with the state and not a private entity, the bargaining is itself “political” speech that he cannot be compelled to subsidize.<sup>62</sup> The Court agreed, holding that agency fees “violate[] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”<sup>63</sup>

In doing so, the Court overruled its unanimous decision in *Abood*, which provided a communitarian’s ideal interpretation of the First Amendment in the public employment context.<sup>64</sup> As Justice Kagan points out in her dissent, it has long been the Court’s position that when the government acts as an employer, efficiency demands that it be granted administrative latitude similar to that of a private employer, and the Court has recognized as much in every prior case concerning public employee speech directed at the employment relationship.<sup>65</sup> No one doubts that the government can restrict an employee from refusing to implement a policy she disagrees with.<sup>66</sup> That same deference has consistently been granted to the government in regulating the terms and conditions of the employment relationship. It is for the State of Illinois, not the Court, to decide whether collective bargaining supported by agency fees is the most efficient way to manage its workforce.<sup>67</sup>

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ion’s calculations are then audited by a third-party accountant and sent to the state for approval. *Janus*, 138 S. Ct. at 2461.

62. *Janus*, 138 S. Ct. at 2461-62. *Abood* had already dismissed this argument, reasoning that the differences between public sector and private sector collective bargaining do not warrant additional First Amendment protection for public employees. *Abood*, 431 U.S. at 231 (“There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political. But that characterization does not raise the ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees.”).

63. *Janus*, 138 S. Ct. at 2640.

64. Narrowly tailored solutions that address each side’s greatest concerns while tempering the residual ideological strife are the very essence of Communitarianism. See Ackerman, *supra* note 4, at 65 (“We wonder whether sometimes the assertions of ‘rights’ or ‘principles’ are bloated assertions of what are really interests, the reconciliation of which might advance the public good.”).

65. *Janus*, 138 S. Ct. at 2493 (Kagan, J., dissenting) (“And so government employees are . . . just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.”).

66. See Ackerman, *supra* note 4, at 85 (discussing the 6th Circuit’s dismissal of county clerk Kim Davis’s claim that her refusal to issue marriage licenses to same-sex couples was protected by the First Amendment).

67. *Janus*, 138 S. Ct. at 2439 (Kagan, J., dissenting) (“And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment

*Janus* violates a central tenet of communitarianism—the exercise of caution in the creation of new rights. Constitutional protection is unnecessary when the plaintiff's interest can be asserted through extant means.<sup>68</sup> *Abood* required nothing more of *Janus* than to compensate the union for benefits he received. He is not the member of an oppressed minority who has been denied political participation in any way. If he disagrees with the fiscal impact of the union's actions in collective bargaining, agency fees do not prevent him from banding together with other fiscal conservatives at the ballot box. That is exactly what has occurred in the twenty-eight states that have passed public sector “right to work” laws. If he believes the union has failed to represent his personal interests in collective bargaining or otherwise, he may sue it for breach of fiduciary duty. And if he can convince a majority of his fellow employees, Mr. *Janus* can organize them to oust the union as their representative in collective bargaining.

The Court's decision elevates Mr. *Janus*'s voiced opposition to the union's position in collective bargaining into a First Amendment “right,” sweeping away the democratic decision of his fellow workers. This individual right cancels out what should be an equally inviolable right of his fellow employees to organize and assert their views collectively—a right not only implied in the First Amendment but enshrined in a series of state and federal statutes. In the “formalist nightmare”<sup>69</sup> that is the Roberts Court, the theoretical and the individual cancels out the real and the collective.<sup>70</sup> The only *effective* means of giving voice to workers is of no import.

Despite Mr. *Janus*'s relief from any obligation to pay for its services, his union presumably remains obligated under Illinois law to represent him (and his fellow employees) in collective bargaining and in any grievance proceeding he might bring under the agreement the union has negotiated. That is the ultimate absurdity of *Janus*: the

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relationship—the government really cannot lose.”) One gets the sense from Justice Alito's majority opinion that he simply does not buy the argument that a state may find it in its own best interest to have a well-represented workforce. *E.g., id.* at 2477 (“Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, ample experience, as we have noted, shows that this is questionable.”) (internal citations omitted).

68. See Ackerman, *supra* note 4, 82-86.

69. See Winter, *supra* note 54.

70. Compare the reality of workplace democracy with the myth of “shareholder democracy” extolled in the majority opinion in *Citizens United v. FEC*, 558 U.S. 310 (2010). See, e.g., Robert Ackerman and Lance Cole, *Making Corporate Law More Communitarian*, 81 BROOK. L. REV. 895, 933-45 (2016) (discussing the Court's unrealistic assertion in *Citizens United* that shareholders who are displeased with their company's political spending can exercise “ultimate shareholder democracy” by voting for corporate directors, amending articles of incorporation and bylaws, or simply selling their shares).

Court is so focused on its “money is speech” doctrine<sup>71</sup> that it leaves intact the actual speech that supposedly constitutes a violation.<sup>72</sup> “Right-to-work”—essentially, the right to freeload—becomes enshrined not just in statute (as in twenty-eight states) but in the United States Constitution. The Court has installed a constitutionally-mandated regime of representation without taxation.

### III. MASTERPIECE CAKESHOP: AN INCOMPLETE RECIPE

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,<sup>73</sup> Jack Phillips, a devout Christian baker, challenged the state’s ruling that he had unlawfully discriminated against a same-sex couple by refusing to sell them a wedding cake.<sup>74</sup> The Court’s majority opinion, authored by Justice Kennedy, opens by acknowledging the difficulty of reconciling the state’s strong interest in protecting the dignity and equal treatment of gay persons with the free speech and free exercise rights of religious persons.<sup>75</sup> Any number of minute factual distinctions could potentially change the First Amendment analysis.<sup>76</sup>

The Court ruled narrowly that the state violated the First Amendment on the facts of *this* case, in which a member of the Colorado Civil Rights Commission disparaged Phillips’ religious beliefs on the record at a public hearing:

The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the

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71. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (establishing the doctrine that political expenditures are speech protected by the First Amendment).

72. See *Janus*, 138 S. Ct. at 2478 (“It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.”). The union still gets to *speak* for Janus—he simply does not have to pay for it.

73. 138 S. Ct. 1719 (2018).

74. *Id.* at 1723-24.

75. *Id.*

76. *Id.* Justice Kennedy describes the predicament: “A baker’s refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.” *Id.* at 1723.

part of the State itself would not be a factor in the balance the State sought to reach.<sup>77</sup>

This seems “clear” enough—there will be no new First Amendment carve-out from general anti-discrimination principles.<sup>78</sup> But later on, Justice Kennedy muddies the waters by focusing on the state’s supposedly disparate treatment of Phillips compared to three other bakers whose secular beliefs were protected against a complaint by a religious customer.<sup>79</sup> In three other cases before the Colorado Civil Rights Commission, William Jack filed religious discrimination claims upon being denied service when he requested cakes inscribed with anti-gay marriage messages.<sup>80</sup> The state ruled for the bakers, holding that Jack’s request was not protected by the Colorado Anti-Discrimination Act. The Colorado Court of Appeals affirmed, reasoning that “the Division found that the bakeries . . . refuse[d] the patron’s request . . . because of the offensive nature of the requested message.”<sup>81</sup> The Supreme Court majority noted that, under the First Amendment, “[a] principled rationale for the difference in treatment of [Phillips and Jack] cannot be based on the government’s own assessment of offensiveness.”<sup>82</sup>

As with other cases this term, the 7-2 vote in *Masterpiece Cakeshop* belies deeper fault lines in the Court that are revealed by mutually antagonistic concurrences in an ambiguous majority opinion.<sup>83</sup> Justice Kagan’s concurrence, joined by Justice Breyer, shares its substantive reasoning with Justice Ginsburg’s dissent, joined by Justice Sotomayor, and differs only in Kagan’s agreement with the majority that the commission had displayed constitutionally impermissible hostility

77. *Id.*

78. “[I]t can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. . . . Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.” *Id.* at 1727.

79. *Id.* at 1730.

80. *Id.* at 1730-31. Jack requested cakes “made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red ‘X’ over the image. On one cake, he requested [on] one side[,] . . . ‘God hates sin. Psalm 45:7’ and on the opposite side of the cake ‘Homosexuality is a detestable sin. Leviticus 18:2.’ On the second cake, [the one] with the image of the two groomsmen covered by a red ‘X’ [Jack] requested [these words]: ‘God loves sinners’ and on the other side ‘While we were yet sinners Christ died for us. Romans 5:8.’” *Id.* at 1749 (internal citations omitted).

81. *Id.* (internal citation omitted).

82. *Id.*

83. See *infra* Part IV.

to religion.<sup>84</sup> Both Justice Kagan and Justice Ginsburg argue that general public accommodations principles should survive this case unscathed, gainsaying the concurrences of Justice Gorsuch and Justice Thomas, which foreshadow an expansion of the First Amendment at the expense of those principles.<sup>85</sup>

According to Justice Kagan, the problem was not that the state reached the wrong result in ruling for the same-sex couple; it was the state's failure to reach that result by clearly distinguishing the Phillips case from the Jack case in the correct manner, with long-accepted principles of anti-discrimination law.<sup>86</sup> The dispositive question to ask, according to both Justice Kagan and Justice Ginsburg, is whether the vendor would have sold the same object to the customer but-for that customer's membership in a *protected* class.<sup>87</sup> The bakers in the Jack case did not refuse to serve him because he was a Christian; indeed, they would have sold him a cake with any Christian message he liked—just not the vitriolic anti-gay message he requested. The point is that the bakers would not have sold a gay-bashing cake to *anyone*, religious or not.<sup>88</sup> In contrast, Phillips is in the business of selling wedding cakes; he would have sold the customers the same cake they requested but-for their membership in the protected class of gay persons.<sup>89</sup>

Justice Gorsuch disingenuously tries to run an end-around the dictates of long-established anti-discrimination jurisprudence by characterizing the item requested of Phillips as a “cake celebrating a same-sex wedding,” which he would not have sold to a heterosexual person.<sup>90</sup> Therefore, in Justice Gorsuch's mind, the Phillips case and the Jack case are identical.<sup>91</sup> But, as Justice Kagan explains in a lengthy footnote, that reasoning is flawed:

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84. *Masterpiece Cakeshop*, 138 S. Ct. at 1732-34 (Kagan, J., concurring) (“I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation [to accord religious views neutral and respectful consideration].”); *contra id.* at 1748-52 (Ginsburg, J., dissenting) (“There is much in the Court's opinion with which I agree. . . . I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case.”).

85. *Id.* at 1734-40 (Gorsuch, J., concurring); *Id.* at 1740-48 (Thomas, J., concurring).

86. *Id.* at 1732-34. (Kagan, J., concurring).

87. *Id.* at 1733; *Id.* at 1749 (Ginsburg, J., concurring).

88. *Id.*

89. *Id.* There is nothing in the record to suggest that the customers asked Phillips to place two grooms on the top of the cake or to inscribe a pro-gay marriage message on it.

90. *Id.* at 1735 (Gorsuch, J., concurring). Justice Gorsuch tries to obfuscate by noting that Phillips refused to sell the “cake celebrating a same-sex wedding” to the groom's heterosexual mother. This does not solve the problem, as the mother was acting as an agent for a protected individual. *Id.*

91. *Id.* at 1739.

The cake requested was not a special “cake celebrating same-sex marriage.” It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 1724–1725 (majority opinion) (recounting that Phillips did not so much as discuss the cake’s design before he refused to make it). And contrary to Justice Gorsuch’s view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with “religious significance.”<sup>92</sup>

Justice Gorsuch’s response is unsatisfying:

[S]liding up the generality scale [from cake that celebrates marriage to a generic wedding cake] . . . risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government’s preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers’ secular beliefs in *Mr. Jack’s* case.<sup>93</sup>

It is unclear from this passage the extent to which Mr. Phillips’ sincerely held religious beliefs must be allowed to override broadly applicable anti-discrimination law. Is the override limited to the gay marriage context? Under Justice Gorsuch’s reasoning, could a baker refuse to sell a cake that celebrates Jewish marriage if he sincerely adheres to the teachings of an anti-Semitic religious sect? Would his refusal be legally indistinguishable from a baker who refuses to inscribe an anti-Semitic message?

In the final analysis, communitarians would tend to support Justice Kagan’s view. One Colorado commissioner is quoted as saying, “[I]f a businessman wants to do business in the state and he’s got an issue with the . . . law’s impacting his personal belief system, he needs to look at being able to compromise.”<sup>94</sup> From a communitarian perspective, it is hard to find fault with this statement.

However, members of the Commission displayed impermissible bias in reaching a defensible result. Communitarianism recognizes that devout Christians opposed to same-sex marriage are a non-negligible community in this country. The commissioner who compared Phillips’ actions to slavery and the Holocaust and disparaged his religious beliefs as “one of the most despicable pieces of rhetoric that people can use”<sup>95</sup> exceeded the bounds of propriety for a public official charged with enforcing state

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92. *Id.* at 1733 n.\* (Kagan, J., concurring).

93. *Id.* at 1739 (Gorsuch, J., concurring).

94. *Id.* at 1729 (majority opinion).

95. *Id.*

law in a neutral and equitable manner—not exactly the pluralistic approach encouraged by communitarians.

Nonetheless, Justice Kennedy’s opinion still contains a narrowly tailored communitarian solution, even if it is mentioned only in passing.<sup>96</sup> Even if it would violate his religious conscience and therefore, the First Amendment, to inscribe a message in support of gay marriage or to attend the wedding to set up the cake, any number of compromises on Phillips’ part suggest themselves. If he can make a generic cake and have the customer inscribe the message or set up the cake, what’s the big deal? Has the state really put words in his mouth or prevented him from practicing his religion by requiring such a compromise?

Phillips was not compelled to make a pro-gay statement in the content of the cake. He felt that a statement was compelled through the cake’s use by a certain class of customers. Whether or not the sale of a wedding cake<sup>97</sup> is expressive or not misses the point. Phillips holds himself out to the public as a vendor. He cannot exclude customers based on membership in a class protected by public accommodations law. All possible justifications for holding that classes defined by sexual orientation are slightly less protected than those defined by color or creed reflect not established principles of civil rights law, but cultural inexperience with treating gay persons as citizens.

#### IV. *GILL V. WHITFORD*: A DEMOCRATIC DREAM DEFERRED<sup>98</sup>

This term, the Court once again declined to issue a definitive ruling on the constitutionality of partisan gerrymandering. In *Gill v. Whitford*,<sup>99</sup> a class of Wisconsin Democrats challenged the “packing and cracking”<sup>100</sup> of Democratic voters under the electoral map drawn by the state’s Republican majority legislature.<sup>101</sup> The findings of the three-

96. Justice Kennedy describes where the lines might be drawn: “If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. . . . A baker’s refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.” *Id.* at 1723.

97. A wedding cake, as inadvertently revealed by Justice Thomas, is not a timelessly sacred Christian object, but rather a cultural artifact of Victorian England. *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring).

98. See Langston Hughes, *Harlem* (1951) (“What happens to a dream deferred?”).

99. 138 S. Ct. 1916 (2018).

100. “Packing” refers to concentrating a voting bloc in a single district, resulting in “wasted” votes for the bloc’s preferred candidate. “Cracking” refers to spreading a voting bloc over multiple districts, preventing it from gaining a majority in any of them. *Id.* at 1924.

101. *Id.* at 1923.



judge district court panel below revealed that “[i]n 2012, Republicans won 60 Assembly seats [out of 99] with 48.6 [percent] of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52 [percent] of the statewide vote.”<sup>102</sup> The record also showed that these results were intentional; the legislature had used sophisticated computing methods to ensure that Republicans maintained a majority under any likely voting scenario.<sup>103</sup>

The Supreme Court unanimously held that the plaintiffs’ statewide evidence failed to prove that any of them lived in a packed or cracked district.<sup>104</sup> As such, they failed to establish the personalized injury required for Article III standing. Seven justices declined to dismiss the case and remanded to give the plaintiffs an opportunity to prove standing.<sup>105</sup> Justice Thomas and Justice Gorsuch rejected the majority’s ruling that special circumstances<sup>106</sup> warranted remand rather than dismissal—the standard outcome when plaintiffs fail to prove standing.<sup>107</sup>

Despite the Court’s consensus in delaying a final disposition on the merits, there are substantial tensions between the majority opinion, authored by Chief Justice Roberts, and the liberal wing’s concurrence, authored by Justice Kagan.

The Chief Justice’s opinion emphasizes the supposed powerlessness of the Court in the face of Article III standing requirements and deemphasizes the Court’s role as guardian of the democratic process. For Chief Justice Roberts, only individual injuries are judicially cognizable, and a statewide remedy is to be avoided if possible: “Remedying the individual voter’s harm, therefore, does not necessarily require restructuring all of the State’s legislative districts. It requires revising only such districts as are necessary to reshape the voter’s district—so that the voter may be unpacked or uncracked, as the case may be.”<sup>108</sup>

The Chief Justice also suggests that, even if the standing requirement is met, the Court may maintain that partisan gerrymanders are

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102. *Id.*

103. *Id.* at 1925.

104. *Id.* at 1923.

105. *Id.*

106. Chief Justice Roberts wrote for the majority: “In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff’s claims. This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs’ allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.” *Id.* at 1933-34.

107. *Id.* at 1941 (Thomas, J., concurring in part and concurring in the judgment).

108. *Id.* at 1931 (majority opinion).

nonjusticiable.<sup>109</sup> He thoroughly reviews the Court's fractured opinions in *Davis v. Bandamer*<sup>110</sup> and *Vieth v. Jubelirer*,<sup>111</sup> noting that Justice Kennedy, in his *Vieth* concurrence, "rejected the principle advanced by the plaintiffs—that 'a majority of voters in [Pennsylvania] should be able to elect a majority of [Pennsylvania's] congressional delegation'—as a 'precept' for which there is 'no authority.'"<sup>112</sup>

Justice Kagan's concurrence is written in a different key—one far more pleasing to the communitarian ear. In contrast to the Chief Justice's characterization of standing doctrine as an unyielding leash that prevents the Court from addressing anything but strictly individualized rights, Justice Kagan emphasizes the Court's role as the ultimate protector of democracy:

Partisan gerrymandering, as this Court has recognized, is "incompatible with democratic principles." More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.<sup>113</sup>

In addition to forcefully asserting a communitarian interest in equal access to the democratic process, Justice Kagan highlights a quite different portion of Justice Kennedy's *Vieth* concurrence from that quoted by the Chief Justice. Our previous article commended Professor Aderson François's conception of the *individual's* First Amendment right of association; namely, that "the right to connect with members of a larger community is as deep and innate a part of human nature as the right to be left alone."<sup>114</sup> Justice Kagan, drawing on Justice

109. *Id.* at 1929 ("In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.")

110. 478 U.S. 109 (1986).

111. 541 U.S. 267 (2004).

112. *Gill*, 138 S. Ct. at 1928 (quoting *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring)).

113. *Id.* at 1934-35 (Kagan, J., concurring).

114. Ackerman, *supra* note 4, at 120-21 (quoting Aderson Bellegarde François, *Only Connect: The Right to Community and the Individual Liberty Interest in State-Sponsored Racial Integration*, 112 PENN. ST. L. REV. 985, 1019 (2008)).

Kennedy's suggestion in *Vieth* that partisan gerrymandering interferes with "the ability of citizens to band together,"<sup>115</sup> examines the right of association in detail, noting that the plaintiffs in *Gill* mentioned the theory but did not sufficiently develop it.<sup>116</sup> The right of association theory would hold that the First Amendment prevents unjustified state interference with the political party an individual supports, and consequently, the individual's right to expression and representation through that party.<sup>117</sup> How can a party possibly express its views to the same degree when volunteers, voters, donors, and candidates are deterred by the state's effectual consignment of that party to legislative irrelevance? Justice Kagan suggests that the associational theory may offer an additional strategy against future attempts by the Court to individualize what is, for all practical purposes, a statewide claim about the integrity of the democratic process:

But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects.<sup>118</sup>

Justice Kagan thereby abandons the Chief Justice's individualized rights/formalistic approach in favor of an analysis that recognizes what is truly going on in partisan redistricting: an organized effort to dilute the impact of adherents to a political party exercising the rights they have in association with one another—in other words, the right to community. Stay tuned for further developments—the gerrymander issue is not going away.

## V. A SUPREME DEPARTURE

The end of the October 2017 term was marked by Justice Anthony Kennedy's announcement of his retirement from the Court. Our *Communitarianism and the Roberts Court* article concluded with an appreciation of Justice Kennedy's service as the Court's ideological fulcrum and often its conscience, with an extended quotation from his opinion in *Obergefell*. One only wishes that Justice Kennedy's voting pattern

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115. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

116. *Id.* (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring)). See Daniel P. Tokaji, *Voting is Association*, 43 FLA. ST. U. L. REV. 763 (2016); *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159 (2018).

117. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring).

118. *Id.* at 1939.

during his last term had been more consistent with the communitarian spirit of the gay marriage decision. Now, at his curtain call, it is difficult to reconcile the often mercurial but sincere sense of fairness with the dissonant tones of complicity. Cases that seriously undermine the ability of workers to assert their rights collectively do not bode well for a communitarian future.

This term's cases clearly position Justice Elena Kagan as the Court's communitarian voice. In the trying years ahead, communitarians can only hope that Justice Kagan continues to strive toward Justice William Brennan's exemplar of the Supreme Court Justice as seeker of common ground, finding space for community on a Court in the grips of *Lochnerian* formalism.