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To Speak or Not to Speak, That Is Your Right: *Janus v. AFSCME*

David F. Forte*

Some Supreme Court precedents go through extensive death spasms before being interred. *Lochner v. New York*,¹ *Plessy v. Ferguson*,² and *Austin v. Michigan Chamber of Commerce*³ come to mind.⁴ Others like *Chisholm v. Georgia*⁵ and *Minersville School District v. Gobitis*⁶ incurred a swift and summary execution. Still others, overtaken by subsequent cases, remain wraith-like presences among the Court's past acts: *Beauharnais v. Illinois*⁷ and *Buck v. Bell*,⁸ for example, remain "on the books."

I. *Abood*

*Abood v. Detroit Board of Education*⁹ falls into the first category. Over what turned out to be a prescient objection by Justice Lewis Powell—"Collective bargaining in the public sector is 'political' in any meaningful sense of the word"¹⁰—the majority in *Abood* held

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¹ 198 U.S. 45 (1905), effectively overturned by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

² 163 U.S. 537 (1896), effectively, though not explicitly, overruled by *Brown v. Board of Education*, 347 US 483 (1954).

³ 494 U.S. 652 (1990), overruled, *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴ One might say that, with the Civil War, the death spasms of *Dred Scott v. Sandford*, 60 U.S. 393 (1857), were quite literal. The case was superseded by U.S. Const. amend. XIII (1866) and amend. XIV (1868).

⁵ 2 U.S. 419 (1793), superseded, U.S. Const. amend. XI (1795).

⁶ 310 U.S. 586 (1940), overruled, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁷ 343 U.S. 250 (1952).

⁸ 274 U.S. 200 (1927).

⁹ 431 U.S. 209 (1977).

¹⁰ *Id.* at 257 (Powell, J., concurring).

that a union of public employees is no different from a union of private employees in its right to collect “agency fees” from nonunion members of the bargaining unit that the union represents. Acting as an “agent” of the nonunionized workers, the union could justifiably collect fees for the collective bargaining and dispute resolution services it provided to the nonunion employees.

Abood was originally seen as an advance in First Amendment freedoms. First Amendment casebooks seemed to categorize the case in that way.¹¹ The Court held that public employees could not have their union dues or nonunion agency fees used for political or ideological purposes. Thus, union assessments on workers fell into two categories: chargeable fees for services that the union provides, and nonchargeable fees subsidizing a union’s political activities, such as some forms of lobbying or electioneering (to the extent constitutionally permitted).

*Janus v. American Federation of State, County, and Municipal Employees*¹² put an end to *Abood* and its distinction between a union’s collective bargaining with a public employer and a union’s political activity. Justice Powell’s common-sense observation that everything that a union and a public employer agree upon is a political decision became the basis for the holding. Following recent Supreme Court First Amendment doctrine, the decision is based on the notion, as in *Citizens United v. FEC*,¹³ that money talks and the Constitution protects that kind of talk. Along with *National Institute of Family and Life Advocates v. Becarra*, decided this term, *Janus* continues to cast protections around citizens who object to being compelled by state action to speak out against their beliefs. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, also decided this term, sidestepped the issue in favor of deciding the case on religious discrimination grounds, but *Janus* will certainly have salience when that issue returns to the courts. Money as speech, public-union contracts as political decisions, and the prohibition on compelled speech are the three legs on which *Janus* stands.

¹¹ See, e.g., Kathleen M. Sullivan & Noah Feldman, *First Amendment Law* 494–95 (6th ed. 2016).

¹² 138 S. Ct. 2448 (2018).

¹³ 558 U.S. 310 (2010).

II. *Abood's* Confused Legacy

To the majority in *Janus*, *Abood's* legacy was wasteful and ambiguous. To the dissent, *Abood* was an “embedded” precedent upon which much law had been built. Following the *Abood* decision, the issues that bedeviled the courts included (1) whether public-sector unions had to ask permission from their members to spend a percentage of their dues on political activities, or whether it was up to the worker to find out the percentage so spent and ask for a refund or for it not to be withheld; and (2) how to determine the line between chargeable and nonchargeable expenses for calculating the agency fee for nonunion workers.

For example, in *Lehnert v. Ferris Faculty Association*,¹⁴ the Court had to weave through a number of disputed charges on nonunion workers and decide on which side of the line the following charges fell: activities of the union’s state and national affiliates, outside litigation, public relations expenditures, and expenses for carrying on an illegal strike. In *Ellis v. Brotherhood of Railway Employees*,¹⁵ the Court confronted differentiating expenses related to conventions, social activities, litigation, organizing, publishing, and death benefits. In *Locke v. Karass*,¹⁶ the Court approved a fee to nonunion members for the cost of litigation undertaken by the national union. In *Chicago Teachers Union, Local No. 1 v. Hudson*,¹⁷ the Supreme Court disapproved the idea of rebates for improper assessments, because the funds taken from the nonunion workers had already been improperly utilized. In that case, the Court did require unions to provide sufficient notice to union and nonunion members for assessments that were earmarked for political purposes. But the Court failed to address the “opt out” problem, which still left the onus on the worker to initiate his claim not to have a portion of his fees taken. In response, the state of Washington required a union to gain prior permission from nonunion members before assessing any fees for political purposes, a law that the Supreme Court ultimately upheld.¹⁸

¹⁴ 500 U.S. 507 (1991).

¹⁵ 466 U.S. 435 (1984).

¹⁶ 555 U.S. 207 (2009).

¹⁷ 475 U.S. 292 (1986).

¹⁸ *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177 (2007).

The Supreme Court's taxonomical quest was just the tip of the iceberg. There were hundreds of lower court decisions attempting to parse out *Abood's* imprecise formula, and the Court considered some when it finally questioned the basis of *Abood*. In particular, the Court recognized the nearly insurmountable obstacles facing a nonunion worker who sought a refund of his improperly charged agency fees.¹⁹

III. The Ticking Clock

By 2012, the Court began signaling that *Abood's* characterization of agency fees as collective bargaining service payments was mistaken. In *Knox v. SIEU, Local 1000*,²⁰ Justice Samuel Alito declared for the Court, "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'"²¹ Two years later, in *Harris v. Quinn*,²² the Court declared that persons who were not "full-fledged employees" of the state could not be assessed union imposed fees simply because they worked in a state-run program. In his opinion for the Court, Alito engaged in an extended critique of *Abood*, declaring that it paid insufficient attention to First Amendment concerns in the imposition of agency fees. He also expounded on the long list of cases attempting to deal with the chargeable/nonchargeable distinction and described the heavy burden on nonunion employees who sought to obtain their right not to contribute to causes they did not believe in.

But for the death of Justice Antonin Scalia, it is virtually certain that *Abood* would have fallen in 2016 in *Friedrichs v. California*

¹⁹ See *Jibson v. Michigan Ed. Assn.-NEA*, 30 F.3d 723 (6th Cir. 1994); *Price v. Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of Am.*, 927 F.2d 88 (2d Cir. 1991); *Andrews v. Educ. Assn. of Cheshire*, 829 F.2d 335 (2d Cir. 1987); *Am. Fed. of TV & Recording Artists, Portland Local*, 327 N.L.R.B. 474 (1999); *Calif. Knife & Saw Works*, 320 N.L.R.B. 224 (1995), all of which were cited by the Supreme Court in its attack on *Abood* in *Harris v. Quinn*, 134 S.Ct. 2618, 2636–38 (2014).

²⁰ 567 U.S. 298 (2012).

²¹ *Id.* at 310–11 (citing *Ellis v. Brotherhood of Ry. Emp.*, 466 U.S. 435, 455 (1984)) (holding that a union could not unilaterally increase fees for political purposes without notice to the employee).

²² 134 S. Ct. 2618 (2014).

Teachers Association.²³ In that case, public school teachers who had resigned their union membership protested paying *any* fees, citing their free-speech and associational rights under the First Amendment. Their complaint was dismissed at the district court level, a decision the U.S. Court of Appeals for the Ninth Circuit summarily affirmed.²⁴ At oral argument before the Supreme Court, most observers noted Scalia's hostile tone and expected a decision against *Abood*. With his passing, however, an evenly divided Court affirmed the Ninth Circuit per curiam. When Neil Gorsuch joined the Court in April 2017, Alito was at last able to drop the other shoe. With the predicted 5-4 vote in *Janus*, the Supreme Court overruled *Abood*.

IV. Employment Speech or Political Speech?

The central question separating the Court and the dissenters in *Janus* was whether compulsory agency fees constituted speech about the conditions of the workplace or instead was political speech dealing with public issues. Justice Elena Kagan's dissent centered on the *Pickering* test. She argued that because the speech in question was employment related, it did not matter if it also had political content. Thus, it was not a question of whether these fees were speech at all: The dissent did not contest the claim that personal financial expenditure can constitute political speech, and it accepted *Abood's* rule that nonunion employees could not be compelled to contribute to political causes. Instead, Kagan simply emphasized throughout that the speech was workplace related.

The *Pickering* test, as developed in *Pickering v. Board of Education*,²⁵ *Connick v. Myers*,²⁶ and *Garcetti v. Cebellos*,²⁷ holds that an employee's private speech about a matter of public concern is protected by the First Amendment unless the speech causes harm to the efficiency or harmonious operation of the workplace. However, if the employer has a reasonable belief that the speech will cause disruption, even

²³ 136 S. Ct. 1083 (2016).

²⁴ *Friedrichs v. Cal. Teachers Ass'n*, No. SACV 13-676-JLS (CWx), 2013 U.S. Dist. LEXIS 188995 (C.D. Cal. Dec. 5, 2013); *aff'd* 2014 U.S. App. LEXIS 24935 (9th Cir. Cal., Nov. 18, 2014).

²⁵ 391 U.S. 563 (1968).

²⁶ 461 U.S. 138 (1983).

²⁷ 547 U.S. 410 (2006).

if the speech concerns a matter of public concern, the employee has no First Amendment protection. Kagan's argument was straightforward. Because unions are legally bound to represent the interests of all members of the bargaining unit, the employer may wish to agree to agency fees for the sake of harmony in the workplace. Removing compulsory agency fees threatens the network of relations built up between employer and union to the detriment of a smoothly functioning governmental enterprise.

Kagan cited *Abood's* view that permitting compulsory agency fees would alleviate the possibility of "inter-union conflict," for the *Abood* Court had feared that without compulsory union fees, workers might split into rival unions. But for the *Janus* majority, the idea that agency fees were necessary to avoid workplace disruption was chimerical. As Alito countered, no such disruption had ever occurred, either at the time of *Abood* or after.

Justice Alito used the example of the federal postal union. Under federal law, "a union chosen by majority vote is designated as the exclusive representative of all the employees."²⁸ Yet no agency fees are allowed under federal law. How then is harmony disrupted?, the majority asked. Twenty-eight states forbid agency fees. This is not a question of "inter-union conflict,"²⁹ as the dissent put it, for nobody disputes that a public employer can agree to a union's exclusive representation of the workers.

Kagan then tried another line. She offered examples of employee disruption that might happen under the majority's holding. "Suppose a government entity disciplines a group of (non-unionized) employees for agitating for a better health plan at inopportune times and places."³⁰ Would they claim that they were engaging in protected political speech? Or, "suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria." But the dissent undercut the force of the example by positing the disruptive circumstances of the protest itself. Alito easily disposed of the objections: A letter written by an employee to management asking for increased merit pay could hardly be seen to cause harm to the workplace, but a demonstration in the workplace could. He pointed

²⁸ *Janus v. AFSCME* 138 S. Ct. 2448, 2466 (2018).

²⁹ *Id.* at 2489.

³⁰ *Id.* at 2496 (Kagan, J., dissenting).

out that the facts of each case could show that the manner of protest would be disruptive, and hence the “political” nature of the protest would be outbalanced by the needs of the workplace.³¹ Compulsory agency fees do not prevent workers from being impolite.

Kagan’s main argument was that the speech in question did not reach even the first step of the *Pickering* analysis: namely, that agency fees were about supporting the union’s position on working conditions, and not about matters of general public concern. “[E]veryone knows the difference between politicking and collective bargaining,”³² she wrote, so there was nothing to balance. For the majority, however, collective bargaining with a public employer *is* politicking, and there is no way to lever them apart. It is a question of scale. When an individual asks for a raise, that is a matter of private concern. But when a public-sector union of thousands of employees asks for raises for its members, the effect on public policy can be enormous. And that only increases when, for example, teachers unions bargain over tenure, teacher assignments, descriptions of duties, and administrative arrangements.

Alito’s contrast between an individual and thousands of workers asking for a raise would have left him with a problem had he ended his analysis there, for it made the political nature of the speech dependent on its quantitative impact. In fact, he quotes his own majority opinion in *Harris* to that effect: “[I]t is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great concern.”³³ A quantitative test on whether a union’s activity affects public policy would require the courts to decide on a case-by-case basis whether the First Amendment applied or not.

On the other hand, later, Justice Alito made the more qualitative argument that public worker employment arrangements are by nature political. Where Kagan declared tautologically, “[a]rguing about the terms of employment is still arguing about the terms of employment,”³⁴ Alito noted that unions negotiate and “express

³¹ *Id.* at 2477 (majority op.).

³² *Id.* at 2498 (Kagan, J., dissenting).

³³ *Id.* at 2475 (majority op.) (citing *Harris*, *supra* note 22).

³⁴ *Id.* at 2497 (Kagan, J., dissenting). Perhaps Kagan was retaliating for Chief Justice John Roberts’ famous trope, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007).

opinions” over far wider issues, such as minority rights, school assignments for children, affirmative action, evolution, healthcare, and educational policy. These are, of their nature, central concerns of the polity, not just the workplace. This kind of qualitative definition of political action would cover all public-union activities, without the need to measure the extent of the impact in any particular instance.

In this debate, Justice Alito clearly has the more accurate perception of what happens in public-union negotiations. “When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, the dissent denies the obvious.” From their own experience, most Americans would likely agree.

V. *Stare Decisis*

It seems that whenever the Court moves in a different direction—no matter what the direction—the dissenters call out, “*stare decisis*”! And so, the *stare decisis* dance begins. The dissenters list the criteria for maintaining a precedent and argue that the majority has violated the criteria. The majority says that it has not really changed the law—it merely reinterpreted the issue (see, for example, the *Casey* plurality’s handling of *Roe v. Wade*, and Scalia’s response³⁵)—or that the criteria for maintaining the precedent no longer exist.

Justice Kagan vigorously defended the continuing validity of *Aboud* on the ground of *stare decisis*. Even if a decision is wrong, she intoned, it does not justify jettisoning it if the norms of *stare decisis* call for its retention. Above all, she concluded, the reliance factor compels adhering to *Aboud*: It has stood for 40 years. Not only courts, but legislatures and private and public actors had all channeled their conduct in light of its principles. The Court “wreaks havoc” on these “entrenched” arrangements.

Overruling *Aboud*, Kagan continued, will disrupt many states’ complex and interrelated labor law legislative schemes. Thousands of contracts with agency fee provisions will be changed (perhaps she could have rhetorically used the word “impaired”) and will have to be renegotiated in a legislative atmosphere of real uncertainty.

³⁵ Compare *Planned Parenthood v. Casey*, 505 U.S. 833, 853, 861, 871 (plurality), with *id.* at 882–84 (Scalia, J., dissenting) (1992).

Moreover, *Janus* affects contracts in key state service sectors such as police, health, and safety. Were Kagan an originalist, or even a judicial traditionalist, she could have bolstered her arguments with the Framers' understanding of the independent role of the states in social legislation, or the fact that these state-bound contracts were essentially local and not national in character. One suspects that Chief Justice William Rehnquist might have taken that line of argument.

Alito's response was methodical, but dismissive. Where Kagan cited numerous ways the Court had previously championed the importance and necessity of *stare decisis*, Alito retorted with quotes attesting to its disposability. Precedents can be overcome if there are "strong reasons for doing so," he wrote. "The doctrine 'is at its weakest when we interpret the Constitution.'" And it has "least force of all to decisions that wrongly denied First Amendment rights."³⁶

Alito then listed the factors that permitted an overruling and found them easily applicable to *Abood*: its reasoning was poor, the rule it created was unworkable, it was inconsistent with decisions in the allied field, and subsequent developments had made it irrelevant. Alito saved for last the factor that Kagan had most relied upon: reliance.

In the most detailed part of his analysis, Alito critiqued *Abood*'s reasoning, focusing on the manner in which *Abood* wrongly read two precedents that it had relied upon.³⁷ *Abood* used deferential scrutiny in a case replete with admitted free-speech interests, and consequently, it did not accurately evaluate the strength (or weakness) of the government's interests in allowing compulsory agency fees. The Court in *Abood* presumed but did not investigate whether agency fees did in fact contribute to labor peace. Nor did it recognize the differences in the effect that agency fees in the private sector had compared to the public sector. It thus failed to acknowledge how collective bargaining in the public sector had political ends. Lastly, it was blind to the administrative problems that would arise in distinguishing between chargeable and nonchargeable expenditures.

³⁶ *Janus*, 138 S. Ct. at 2476.

³⁷ The precedents were *R.R. Employees v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961).

Moreover, the rule announced in *Abood* was unworkable, Alito averred. He did not repeat the extensive history of line-drawing difficulties that he had made in *Harris v. Quinn*, satisfying himself with a brief summary. But he did emphasize the difficulties that non-union members would face in having their claims for their agency fees determined and adjudicated.

Subsequent developments had eroded the credibility of the *Abood* decision, he continued, stating again that exclusive representation was not tied to the institution of agency fees, and hence, labor peace was not threatened. *Abood* was dated. It was decided just when public-sector unions were beginning to expand and few saw how they would drive state expenditures.

Abood was also inconsistent with Court precedents dealing with political action by government employees. While the Court has protected government workers from being forced to support a particular political party, *Abood* permits the forced subsidy of political action (i.e., collective bargaining with governmental agencies) by the same governmental employees. Finally, Alito turned to reliance interests.

Here his position was far less potent, which, of course, is why he put the stronger arguments first. He dismissed the effect that overruling would have on extant union contracts containing agency fees. They were of short duration, and anyway, such contracts usually severed provisions dealing with agency fees. He tried a distracting rhetorical flourish: “[I]t would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years’ time.”³⁸ Besides, he said problematically, unions were on notice since 2012 that the Court had doubts about *Abood*.

Kagan pounced. She proclaimed the Court’s arguments on *stare decisis* “the worst part” of the opinion. The majority, ignoring 40 years of settled law, embedded *dicta* into two previous cases (*Knox* and *Harris*), ready to be used for the final *coup de grace*. “Relying on them is bootstrapping—and mocking *stare decisis*. Don’t like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as ‘special justifications.’”³⁹

³⁸ Janus, 138 S. Ct. at 2485.

³⁹ *Id.* at 2499 (Kagan, J., dissenting).

There is a predictable irony in the battle over *stare decisis*. Beginning in the late 1930s, the Supreme Court overturned decades of precedents protecting contractual and other economic liberties. In the 1960s and 1970s, the Court jettisoned precedents in many other areas, such as criminal procedure, apportionment, and social traditions. In those cases, many justices in the minority bemoaned the loss of respect for *stare decisis*. In recent years, however, where there is a reversal of some of those judicial decisions, or when the present Court strikes out in a new direction, the new minority grieves over the loss of “long-standing precedent,” most of which were born in those previously activist decades. Nor is the idea of salting opinions with *dicta* for later use new. Justice William Brennan famously used the technique.⁴⁰ And so, the *stare decisis* dance continues.

VI. Compelled Speech

We now return to the core arguments of the Court: money as speech, public-union contracts as political decisions, and the prohibition on compelled speech. The dissent did not contest that money can be expression for First Amendment purposes, nor could it. Whatever restrictions have been permitted by campaign finance laws or judicial decisions since the time of *Buckley v. Valeo*,⁴¹ the Supreme Court has made clear that money is not only a means of expression, it is an indispensable element of political expression:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.⁴²

⁴⁰ In *Eisenstadt v. Baird*, Brennan issued the following *dictum*, knowing that *Roe v. Wade* was soon to be decided: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” 405 U.S. 438, 453 (1972).

⁴¹ 424 U.S. 1 (1976).

⁴² *Id.* at 19.

The second element that the majority needed to show was that collective bargaining issues in the public sector were ineluctably political. To do so, the majority had to demonstrate that the development of public-sector unions had made their actions essentially political in contrast to private-sector unions. Without recent history to back it up, the majority may have had a more difficult time freeing itself from the grasp of *Abood*. And that is why the majority's reliance on recent history left an opening for the dissent to claim that the Court was making up new law in defiance of *stare decisis*.

There is no doubt that public-sector unionization has had a major effect on the direction of public policy, particularly in education. In 1972, when *Abood* was decided, public-sector unionization had only begun its growth following the passage of collective bargaining statutes by most states. Wisconsin had been the first in 1959. By 2017, unionization was 34.4 percent public-sector workers, five times greater than in the private sector, in which only 6.5 percent were members of unions. States with a high percentage of public-sector workers, such as California (53 percent), New York (70 percent), and Illinois (52 percent), had granted them significant benefits, including pensions, creating economic stress that has had major effects on their state budgets in other areas.⁴³

In *Janus*, Justice Alito noted that the “ascendance of public-sector unions has been marked by a parallel increase in public spending.” In constant 2017 dollars, state and local government spending had risen from \$4,000 per capita in 1970 to \$10,238 per capita in 2014. He brought up Illinois’ embarrassing underfunded pension obligations, spoke of “multiple municipal bankruptcies,” and concluded that today, collective-bargaining issues have a high degree of “political valence.”⁴⁴

One might ask whether this constitutional doctrine is dependent on political and economic conditions that might vary from time to time? If public-sector unions’ influence on public spending drastically contracted, would the unions still be barred by the Constitution from obtaining agency fees, even though their “political valence” had become marginal? Is there an argument that even today, some

⁴³ See Daniel DiSalvo, *The Trouble with Public Sector Unions*, 5 Nat’l Aff. 3 (Fall 2010).

⁴⁴ *Janus*, 138 S. Ct. at 2483.

small public-sector unions do not have enough public-policy clout to be called political rather than economic actors? Are large teachers unions “in” but small parking enforcement unions “out” of constitutional limitations here? Alito did distinguish between an individual’s complaint regarding pay, which would not rise to a matter of public interest under *Pickering*, and the same complaint by a union of many thousands. But where to draw the line? If *Abood* had problems in line-drawing, *Janus* may not be any better.

Elsewhere in his opinion, as noted above, Alito pointed to the other kinds of social and political issues that unions have become engaged with, issues that might stir the disagreement or even ire of many workers. They include issues such as climate change, the civil war, sexual orientation, and sexual identity. These are by nature political issues, where the size of the union matters not. If a union tries to argue that no agency fees are assessed for such position taking, the question reduces again to *Abood*’s unenforceable chargeable/nonchargeable distinction.

On either count, then, Justice Alito is justifiably confident that the new doctrine of union public speech will stand. Either the union affects policies by its economic demands or, on noneconomic issues, it is impossible to make an accurate division between appropriate chargeable fees and nonchargeable fees.

On the third prong, compelled speech, the Court’s argument is strongly persuasive. But it depends on the dissent’s reliance on *Pickering* not being applicable, for under *Pickering*, not only may employee speech be silenced or punished if it is disruptive to the workplace—no matter what its “public” content—an employee may legitimately be compelled to speak in putting forth the policy of the government entity. But once Alito disposes of the *Pickering* objection, the result cannot be gainsaid: state action that compels a person to speak against his beliefs is patently contrary to the notion of a republican government based on the consent of free individuals.

The facts of this case illustrate the majority’s position clearly. Illinois law permitted agency fee deductions from a worker’s pay without any form of consent. By doing so, the state violated the worker’s First Amendment rights, Alito emphatically declares, “unless the employee affirmatively consents to pay. By agreeing to

pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed."⁴⁵

In a tight argument, Alito calls on a run of precedents including, among others, *Wooley v. Maynard* ("freedom of speech 'includes both the right to speak and the right to refrain from speaking at all'").⁴⁶ He quotes the famous pronouncement of Justice Robert Jackson in *West Virginia v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁴⁷

Recall how pernicious forced affirmation can be. In 1860, Abraham Lincoln, speaking to the people of New Haven, described those positions of the North that alone would satisfy the South of the North's good faith: "[W]hat will convince them? This, and this only; cease to call slavery wrong, and join them in calling it right. And this must be done thoroughly—done in acts as well as in words. Silence will not be tolerated—we must place ourselves avowedly with them."⁴⁸

In the most eloquent portion of his opinion, Justice Alito expressed the centrality of freedom of speech to the "search for truth" and "to our democratic form of government." If state action compels people "to voice ideas with which they disagree, it undermines these very ends." He warms to a point that will have salience when the next *Masterpiece Cakeshop* dispute reaches the Court: "When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions."⁴⁹

In the face of Alito's extensive arguments, Kagan's only objection to the compelled speech doctrine was the tepid observation that it had not been often used by the Supreme Court. It is certain that the compelled speech doctrine has a future.

⁴⁵ *Id.* at 2486.

⁴⁶ *Id.* at 2463 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

⁴⁷ *Id.* (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

⁴⁸ Abraham Lincoln, Speech at New Haven, Mar. 6, 1860, <http://www.historyplace.com/lincoln/haven.htm>.

⁴⁹ *Janus*, 138 S. Ct. at 2464.

VII. Level of Scrutiny

Having established that collective bargaining in the public sector is a form of political speech and hence is covered by the First Amendment, one might expect that the Court would apply a strict scrutiny test to the government's attempt to limit that speech by the device of compulsory agency fees. But Justice Alito takes a different route. In the preview cases to *Janus* (*Knox* and *Harris*), Alito speculated on the appropriate test that should be used. In *Knox*, he noted that the Court had previously voided a federal compulsory contribution requirement for marketing mushrooms that had been levied on a mushroom farmer and that such schemes should be subject to "exacting First Amendment scrutiny."⁵⁰ This was different both from strict scrutiny and from the traditional *Central Hudson* intermediate scrutiny test for commercial speech.

The formal strict scrutiny test demands that, for a statute that infringes on a protected fundamental right to pass muster, the government must demonstrate that the end sought to be achieved is "compelling," and that the means are "narrowly tailored" to achieve that end (a recent and somewhat more relaxed means/ends standard than the previous "least burdensome alternatives" test). In contrast, as set by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission* (the "*Central Hudson*" test), governmental restrictions on commercial speech are tested by a form of intermediate scrutiny:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁵¹

As restated in *Janus*, the new *Knox* formulation would be an amalgam of strict and intermediate scrutiny. The compelled agency fee must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."⁵²

⁵⁰ 567 U.S. 298, 310 (citing *United States v. United Foods, Inc.*, 533 U.S. 405 (2001)).

⁵¹ 447 U.S. 557, 566 (1980).

⁵² *Janus*, 138 S. Ct. at 2465.

By ginning up the (formerly) intermediate scrutiny test closer to strict scrutiny, Alito paralleled Justice Ruth Bader Ginsburg's enhancement of the intermediate test on issues of sex discrimination: "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action,"⁵³ though Alito increased the ends component of the test he was using while Ginsburg strengthened the means component.

Previously in *Harris*, Alito had inserted a doubt whether even a strengthened intermediate scrutiny test was appropriate. After all, if agency fee "expression" is, in its nature, political speech, then only strict scrutiny would suffice. Yet, despite the unquestionable grounding of the decision on the premise that public union collective bargaining *is* political action, Alito did not take that final step in *Janus* and call for strict scrutiny. The Court finds "it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive even under the more permissive standard applied in *Knox* and *Harris*."⁵⁴

Perhaps, Alito (along with the other four justices in the majority) was considering that collective bargaining in the public sector is both commercial and political and that it does not fit into either category entirely. If so, we should likely expect that the "*Janus* test" will be yet another arcane intermediate scrutiny test that will take its place in First Amendment jurisprudence along with Time, Place, and Manner,⁵⁵ the *O'Brien* test,⁵⁶ and the *Central Hudson* test.

VIII. Due Process

As noted, Justice Alito found *Abood* wanting on every asserted ground. It was "poorly reasoned" and "inconsistent with other First Amendment cases," there have been new developments since *Abood*

⁵³ United States v. Virginia, 518 U.S. 515, 531 (1996).

⁵⁴ *Janus*, 138 S. Ct. at 2465.

⁵⁵ Restrictions on speech are constitutional if (1) they are content neutral (2) they are narrowly tailored to serve a governmental interest; and (3) they leave open ample alternative means of expression. See *Cox v. New Hampshire*, 312 U.S. 569 (1941).

⁵⁶ Where expression has both verbal and nonverbal elements, the regulation at issue must (1) be within the constitutional power of the government to enact, (2) further an important or substantial government interest, (3) ensure that interest is unrelated to the suppression of speech, and (4) prohibit no more speech than is essential to further that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

was issued, and there were insufficient justifications for maintaining the holding on the grounds of *stare decisis*.

But throughout the opinion, Alito takes pains to emphasize the essential arbitrariness in distinguishing between chargeable and unchargeable fees, as well as the lack of effective notice to nonunion members as to what fees are being deducted and the justifications for their deductions. In sum, without saying it in so many words, Alito found that compulsory agency fees violate due process.

As long tradition, precedents, and academic discourse have revealed, “procedural” due process has two prongs: to be legally valid, (1) a governmental action must accord with the “Law of the Land,”⁵⁷ and 2) its enforcement must comport with fair judicial procedures.⁵⁸ The first prong has expanded into the “Principle of Legality”. Laws that cannot be understood are void for vagueness. Laws that lack any rational connection between means and ends are “arbitrary” and invalid. Laws that lack any public purpose and are instituted merely to advance one group’s interest over another’s (taking from A and giving to B) are also void. And, of course, laws or governmental actions that do not come from a legitimate lawgiver lack authority (Law of the Land).⁵⁹

⁵⁷ The Law of the Land is often, though not incontestably, associated with the Magna Carta. “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” Magna Carta, § 39 (1215).

⁵⁸ The scholarly consensus is that its source is the Statute of Edward III, which declared, “That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.” Statute of 1354 (Edw. III). Another opinion holds that the principle of fair judicial process can be found, or is at least prefigured, in Section 39 of the Magna Carta or in Section 40: “To no one will we sell, to no one deny or delay right or justice.”

⁵⁹ The provenance of the principle of legality reaches back to many sources including the Magna Carta, as well as the philosophy of St. Thomas Aquinas. “Now laws are said to be just, both from the end, when, to wit, they are ordained to the common good—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good.” *Summa Theologiae*, I-II, q. 96, art. 4.

A famous more modern jurisprudential expositor was Lon Fuller. See Lon L. Fuller, *The Morality of Law* (1964).

First, concerning the principle of legality prong of procedural due process, Alito notes the essential arbitrariness in the distinction between chargeable and nonchargeable fees. The very list that the union made illustrates the problem. “Nonmembers were told that they had to pay for lobbying, social and recreational activities, advertising, membership meetings and conventions, and litigation, as well as other unspecified services that may ultimately inure to the benefit of the members of the local bargaining unit.”⁶⁰ Each term is difficult to parse as either workplace related or political.

The Court found that the “line between chargeable and non-chargeable union expenditures has proved to be impossible to draw with precision.”⁶¹ The Court had previously attempted to give that line some definition in *Lehnert v. Ferris Faculty Association*,⁶² but decades of litigation over the issue of lobbying expenses, for example, not only showed that the standard was “unworkable” (and not just for *stare decisis* purposes), but trenched into due process vagueness territory. In fact, AFSCME agreed at oral argument that the “chargeable–non-chargeable line suffers from ‘a vagueness problem.’”⁶³

The second prong of procedural due process is the guarantee of fair adjudicative procedures. Its application has expanded greatly over the decades but the principle remains the same: lack of fair notice and of access to effective remedies is a violation of due process. In *Chicago Teachers Union v. Hudson*,⁶⁴ the Court directed unions to send an adequate notice as to the basis of the chargeable assessments so the nonunion members would have the ability to challenge the categorization. But the Court in *Janus* concluded that experience has taught that, not only have notices been inadequate, but nonunion members “face a daunting and expensive task if they wish to challenge union chargeability determinations.”⁶⁵

A much discussed example of the principle of legality is Justice Samuel Chase’s opinion in *Calder v. Bull*, and it may be significant that the examples he gives of invalid laws were also prohibited by the positive law of the Constitution. 3 U.S. 386, 387–89 (1798).

⁶⁰ *Janus*, 138 S. Ct. at 2461 (cleaned up).

⁶¹ *Id.* at 2481.

⁶² 500 U.S. 507 (1991).

⁶³ *Janus*, 138 S. Ct. at 2481.

⁶⁴ 475 U.S. 292 (1986).

⁶⁵ *Janus*, 138 S. Ct. at 2481.

The Court reproduced in the body of its opinion the notice of chargeable and nonchargeable fees that the union had made in this case:⁶⁶

| Category | Total Expense | Chargeable Expense |
|---|---------------|--------------------|
| Salary and Benefits | \$14,718,708 | \$11,830,230 |
| Office Printing, Supplies, and Advertising | \$148,272 | \$127,959 |
| Postage and Freight | \$373,509 | \$268,107 |
| Telephone | \$214,820 | \$192,721 |
| Convention Expense | \$268,855 | \$268,855 |

The Court then asked rhetorically how a nonunion member could ever determine what constitutes these categorizations and whether they were properly attributed without his incurring enormous expense in hiring lawyers and experts. It then noted that chargeability issues rarely surfaced at the court of appeals level simply because the nonunion members did not have the wherewithal to determine if they had a case.

The union answered that a nonunion member could still obtain justice through arbitration, which the union pays for, and he would not even have to attend the arbitration. But Alito pointed out that the nonunion member still has to pay for “attorneys and experts to mount a serious challenge.” He concludes that the union’s “suggestion that an objector could obtain adequate review without even showing up at an arbitration” is simply “farfetched.”⁶⁷ In sum, under the Court’s analysis, the nonunion member lacks due process protections.

IX. Originalism

In what would seem to be an unnecessary aside, Alito took a diversion in his opinion to answer an originalist argument that the union had put forward in its brief. Out of its 59 pages, the brief spent but three in proposing that the originalist understanding would not

⁶⁶ *Id.* at 2482.

⁶⁷ *Id.*

have accorded workplace speech any First Amendment protection.⁶⁸ But those three pages were enough to raise Alito's ire.

That the proponents of maintaining the constitutionality of compulsory agency fees would resort to an originalist argument—however brief—is of crucial moment. It signals that even those who do not espouse originalism as a valid interpretive methodology believe themselves compelled to present it to the Court, many of whose members understand and utilize originalism. It is also of significance that Kagan did not deal with her side's originalist argument. One speculates that she held back because she thought the argument foolish, or futile, or, more likely, that she did not want to validate a method of interpretation that she opposes.

But Alito did think that the union's argument was foolish; he wanted to show its futility; and he did want to validate an appropriately rigorous method of originalism. It was as if he were saying to the respondents, "You want to make an originalist argument? Let me show you how it's really done." With raised eyebrows, Alito begins, "The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*."⁶⁹

First of all, he writes, if the union wants to make an originalist argument, then why does it emphasize *stare decisis* in its brief? *Stare decisis* is not supposed to trump originalism. Further, if the union is correct that the Framers never intended the First Amendment to protect employee speech, then even *Pickering*'s limited support for employee speech on matters of public concern would fall. Why, then, does the union embrace *Pickering* so strongly in its brief? In fact, Alito scolds, the union wants us to apply "[t]he Constitution's original meaning only when it suits them. . . . We will not engage in this halfway originalism."⁷⁰ He then punctures the union's argument. First, any restrictions placed by the First Congress on government employees limited their outside business dealings, not their speech. Early restrictions on men in the military from using disrespectful words against the president are easily justified as a

⁶⁸ See Brief of Respondent American Federation of State, County, and Municipal Employees, Council 31 ["AFSCME Brief"] at 17–20, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466).

⁶⁹ *Janus*, 138 S. Ct. at 2469.

⁷⁰ *Id.* at 2470.

matter of military discipline. Lastly, the union relies on *dictum* from a 20th-century case, *Connick v. Myers*, that “a public employee had no right to object to conditions placed upon the terms of employment,”⁷¹ as if it bolstered its originalist argument. That case, Alito points out, is by definition separate from and an alternative to an originalist interpretation. Alito leaves the union’s originalist argument in tatters, and Justice Kagan was wise not to touch it.

In fact, Alito argues, originalism points in the other direction. History shows that the Founders had no experience with unions or collective bargaining. But they knew about compelled speech. As a fundamental principle, the Framers rejected government coercion to compel support for particular beliefs. To that end, Alito points to Thomas Jefferson’s attack on religious assessments in Virginia: “[T]o compel a man to furnish contributions for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.”⁷² Unfortunately, Alito gives little more Founding-era evidence. It is a question, therefore, whether this one Jeffersonian swallow doth make for an originalist spring on compelled speech. Jefferson’s position on religious assessments has been tied to contested notions of the original understanding of the Establishment Clause; it applied to one state only; and it may not have had evident parallels in the political realm.

More was needed it would seem, and Alito attempted to supply it in his opinion in *Knox v. SEIU*. There he put forward a series of closely related propositions, each supported by major Supreme Court precedents:

1. “The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.”
2. “The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.”

⁷¹ *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983) and citing *AFSCME Brief* at 2, 17).

⁷² *Id.* at 2464 (citing *A Bill for Establish Religious Freedom*, in 2 *Papers of Thomas Jefferson* 545 (J. Boyd ed., 1950)).

3. "The First Amendment protects 'the decision of both what to say and what not to say.' And the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."⁷³

Taking those propositions together with his defense in *Janus* of the citizen's right to search for truth based on his own freely informed conscience, we see that Alito treats the doctrine of compelled speech as the logical application of this moral axiom: Citizens in a representative republic possess rights of free inquiry in the search for truth, liberty to achieve association with fellow citizens, and protection and appropriate action from their government. This is, at bottom, a natural law proposition positivized in the First Amendment to the Constitution.⁷⁴ That, we can say, is the originalism of Justice Alito.

Justice Clarence Thomas has the reputation of being the most rigorous originalist on the Court. One might think that if he found Alito's analysis wanting, he would have appended a clarifying concurrence. But Thomas joined Alito's opinions in *Knox* and *Janus* without a separate concurrence. Nor did he himself make originalist argument for the protection of compelled speech in his opinion in *National Institute of Family and Life Advocates v. Becerra*, decided this term. We can conclude that Justice Thomas is in accord with Justice Alito's originalist and philosophical principles on the doctrine of compelled speech.

X. Weaponizing the Constitution

Justice Kagan's writing has sometimes been likened to Justice Scalia's. Her dissent in *Janus* is well structured, uses economy of language, and is bitingly ironic. There is another parallel to Scalia. Although she does not possess the same panache, she attacks the majority as Scalia would when he thought the Court was striking off in an unjustified direction. She just espouses a different direction. What does Kagan fear? What does she think is really going on here?

She, of course, believes that *Janus* will cripple public-sector unions. Unions will lose "a secure source of financial support," and without adequate funding they will be a less effective representative of

⁷³ *Knox v SEIU*, 567 U.S. 298, 309 (2012).

⁷⁴ See generally Hadley Arkes, *Beyond the Constitution* (1990).

workers. Nonunion workers do not lose out in an agency-fee regime, she claims. By law, the union must represent all workers. Without agency fees, free riders, being “economically rational actors,” will maintain benefits without having to bear the costs.⁷⁵ Recent reports of union finances and membership losses since *Janus*, though others observe that without the crutch of agency fees, public-sector unions will become more aggressive and effective in recruiting members.⁷⁶

Justice Alito pointed out that federal workers’ unions, which by law cannot collect agency fees, are nonetheless very strong and enjoy exclusive representation. Kagan rejoined that the free rider problem in the federal workforce is, in fact, severe. Moreover, she noted that wages and benefits are not the subject of union-management negotiations in the federal sphere. Congress independently takes care of that. (Alito had found that avoidance of free rides was not a compelling interest sufficient to justify infringement of First Amendment rights.)

The decision, she pursues, “creates an unjustified hole in the law, applicable to union fees alone,”⁷⁷ for other forms of workplace speech continue to be governed by *Pickering*. This decision is, in sum, simply an anti-union diktat. Why did the Court overrule *Abood*? “[B]ecause it wanted to.”⁷⁸ But Justice Kagan fears that there is something else afoot.

There is no sugarcoating today’s opinion. The majority overthrows a decision entrenched in this Nation’s law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.⁷⁹

And there you have her paradigm and her nightmare: The conservative court is readying a return to the years before 1938 when it used the Constitution to monitor and direct the economic policy

⁷⁵ *Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting).

⁷⁶ Compare, e.g., Kris Maher, Unions Take a Hit after Court Ruling, *Wall Street J.*, Aug. 6, 2018, at A3, with David Griesing, The *Janus* Ruling Doesn’t Have to Be a Death Knell for Public Unions, *Chicago Tribune*, Aug. 11, 2018, <https://trib.in/Z+Pm8IP>.

⁷⁷ *Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting).

⁷⁸ *Id.* at 2501.

⁷⁹ *Id.*

of the country. In the same way that the post-1938 Court—Justice Hugo Black most prominently—claimed that the Court had previously weaponized the Due Process Clause against economic reform and in favor of business, Kagan thinks this Court will use the First Amendment to the same end:

[A]lmost all economic and regulatory policy affects or touches speech. So the majority’s road runs long. And at every stop are black-robed rulers overriding citizens’ choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.⁸⁰

In fact, Alito dropped a footnote that might have raised Kagan’s hackles even more. This, the most startling aspect to Alito’s opinion, is his re-opening the door of *Lochner*-era substantive due process. In the section of the opinion in which he tries to develop an originalist defense for the compelled speech doctrine, he wrote, “Indeed, under common law, ‘collective bargaining was unlawful,’⁸¹ . . . and into the 20th century, every individual employee had the ‘liberty of contract’ to ‘sell his labor upon such terms as he deem[ed] proper.’” At this point he cited *Adair v. United States*,⁸² one of the most prominent cases upholding the substantive due process right of contract.

Although he tried to soothe—“We note this only to show the problems inherent in the Union respondent’s argument; we are not in any way questioning the foundations of modern labor law.”⁸³—nonetheless, this may be one of the first times in the modern era that a justice writing a majority opinion has tied the substantive due process cases on liberty of contract to an originalist grounding.

But Kagan is heir, of course, to a line of cases in which the post-New Deal Court weaponized the Constitution to insert policies into the Constitution that would have been unrecognizable to the Framers and even to most justices who served prior to 1960. That Court was also removing issues of public concern from the democratic process altogether, as Justice Scalia time and again pointed out. In other

⁸⁰ *Id.* at 2502.

⁸¹ *Id.* at 2471 (majority op.) (citing *Teamsters v. Terry*, 494 U.S. 558 (1990)).

⁸² 208 U.S. 161 (1908).

⁸³ *Janus*, 138 S. Ct. at 2471, n. 7.

words, many originalists believe that the Court for decades has been weaponizing the Constitution in the culture wars, while heirs to the 1938 Supreme Court believe that the modern Court is using the Constitution as a weapon in an economic and class war.

XI. The Future

Despite Kagan's "the sky is falling" fears of an end to democratic decisionmaking, *Janus* marks an affirmation of the democratic ethos. It does so in three ways. First, it affirms the fundamental nature of the human person in political society: a rational, associative, truth-seeking individual with inalienable rights of conscience. Second, *Janus* is decided amidst a growing awareness that the decision-making process in this republican polity is distorted by independent groups—factions, in Madison's term—wielding power over governmental agencies to make policies over citizens without the citizens' consent. Third, *Janus* represents yet another chapter in the Roberts Court's championing of First Amendment protection over the right to espouse different kinds of expressions and the right to the sanctity of one's own opinions. If Brett Kavanaugh is confirmed for the Supreme Court, we can expect more movement in all of those ways.

But against this sanguine hope, there is a tempering apprehension. One side of the Court claims that the other is making economic policy. The other side says that the Court has been creating new cultural norms. Many senators today vote on nominees based on predictions about what side of the policy battles a nominee will align himself.⁸⁴ It may not be too far distant when this country sees "resistance," not only against particular federal office holders, against particular laws, or against particular election results, but against particular decisions of the Supreme Court. It is then that this country's commitment to the rule of law will be definitively tested.

⁸⁴ See generally Roger Pilon, *Judicial Confirmations and the Rule of Law*, Foreword, 2016–2017 *Cato Sup. Ct. Rev.* ix (2017).