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# SPEECH INEQUALITY AFTER *JANUS V. AFSCME*

CHARLOTTE GARDEN\*

## INTRODUCTION

The right to free speech does not hinge on wealth, but the practical ability to make oneself heard often does. The reality is that wealth and income inequality are linked to what we might think of as speech inequality—the unequal distribution of opportunities to persuade. Speech inequality has many manifestations, but one of the most significant arises in connection with electoral politics: many of the means of persuading others to support a particular candidate that have the greatest reach are also among the most expensive.

Speech inequality is not an inevitable feature of American electoral politics, at least not to the degree that exists now. Strategies aimed at reducing the influence of the rich include contribution and expenditure limits and public financing schemes. Bottom-up strategies to increase the influence of people who are poor and working class include campaign finance innovations such as “democracy vouchers”<sup>1</sup> and also empowering labor unions both to attack the root problem of income inequality and to pool working-class resources (including shoe leather) to exert influence in the political realm.

The Roberts Court is a barrier—one of the most important barriers—to reforms aimed at reducing electoral speech inequality. Over the last ten years, the Court has struck down several attempts to limit the role of money in politics, establishing a principle that in the “marketplace of ideas,” the First Amendment demands a *laissez-faire* approach. The major exception concerns labor unions and their members, whom the Roberts Court has asymmetrically disempowered in a series of decisions culminating with *Janus v. American Federation of State, County, & Municipal Employees, Council 31*.<sup>2</sup> *Janus* held that public employees cannot be required to pay

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\* Co-Associate Dean for Research & Faculty Development & Associate Professor, Seattle University School of Law. This Article is based on remarks delivered at the 2018 Stewart Lecture in Labor and Employment Law. I am grateful for feedback on the project that I received at the Stewart Lecture, as well as the conference on Labor and the U.S. Constitution hosted by Cornell ILR School, the conference on Organized Labor and Challenges to Democracy hosted by Cornell Law School, the symposium on Labor Law and Antitrust Law in the Age of Trump, hosted by the University of St. Thomas School of Law, and the 2018 meeting of the Law and Society Association. I am also grateful to the editors of the *Indiana Law Journal* for their careful work on this Article.

1. Democracy vouchers are a method of public financing in which each eligible voter receives vouchers worth a set amount, which they can contribute to eligible candidates. The program was pioneered in Seattle, where each voter receives four vouchers worth \$25 each. See Daniel Beekman, *Washington State Supreme Court Unanimously Upholds Seattle’s Pioneering ‘Democracy Vouchers’*, SEATTLE TIMES (July 11, 2019, 8:43 AM), <https://www.seattletimes.com/seattle-news/politics/washington-state-supreme-court-unanimously-upholds-seattles-pioneering-democracy-vouchers-program/> [https://perma.cc/SXK2-NVRA] (describing Seattle’s voucher system, which was unsuccessfully challenged in state court under the federal First Amendment).

2. 138 S. Ct. 2448 (2018).

dues or fees to the union that represents them as a condition of their public-sector employment.<sup>3</sup> Because of *Janus*, unions and their members pay a surcharge—the cost of representing nonpaying nonmembers—as a condition of engaging in campaign advocacy.<sup>4</sup> This, the *Janus* majority tells us, is necessary to prevent unions from exerting their economic influence to try to affect political outcomes.<sup>5</sup>

This Article explores the growing divide between the Roberts Court’s treatment of the free speech rights of wealthy individuals and corporations in campaign finance cases as compared to its treatment of the rights of public-sector labor unions and their members. First, it highlights some internal contradictions in the *Janus* Court’s analysis. Then, it discusses the growing—yet mostly ignored—divergence in the Court’s treatment of corporate and labor speakers with respect to the use of market influence to achieve political influence.

The Article has two Parts. In Part I, I explain how the Court reached its decision in *Janus* before critiquing the decision’s internal logic on several points. And in Part II, I contrast the Roberts Court’s approach in *Janus* to its approach in First Amendment challenges to campaign finance law, arguing that the Court’s solicitude towards the First Amendment rights of wealthy or corporate speakers is in tension with its cramped view of the First Amendment rights of unions and union members.

#### I. *JANUS*’S INTERNAL CONTRADICTIONS

After briefly situating *Janus* in its doctrinal context, this Part describes how the decision’s own logic favors some speakers—those who prefer not to financially support the union that represents them—over the union itself and union members, including those who want to engage in politics through their unions. The Court does this in three ways. First, it identifies one form of purported First Amendment injury (the payment of an agency fee, compelled upon pain of job loss) and then analyzes the injury in a vacuum, ignoring that unions and union members have diametrically opposed First Amendment interests.<sup>6</sup> Second, the Court compounds its blindness toward pro-union workers’ First Amendment interests by imposing on them (and only them) a bureaucratic hurdle: the requirement that they must opt into paying union dues or fees by “clear and compelling” evidence.<sup>7</sup> Third, the Court vacillates between treating the case as a challenge to the obligation for a single worker to pay an agency fee and as a challenge to the totality of the union’s speech at the bargaining table.<sup>8</sup> This Part begins with some doctrinal background and an analysis of the Court’s decision in *Janus* and then discusses each of these sources of speech inequality.

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3. *Id.* at 2486.

4. *See infra* Section I.B.

5. *See Janus*, 138 S. Ct. at 2486.

6. *See infra* Section I.C.

7. *Janus*, 138 S. Ct. at 2486; *see also infra* Section I.C.

8. *See infra* Section I.D.

*A. The Road to Janus*

Mark Janus was employed by the state of Illinois as a child support specialist when he filed his complaint in what ultimately became *Janus*.<sup>9</sup> The union defendant American Federation of State, County, and Municipal Employees, Council 31 (AFSCME) had been elected to represent Janus and his fellow state employees in collective bargaining and subsequent contract enforcement; in performing those roles, the union was statutorily required to represent each bargaining-unit member fairly, whether or not they joined the union.<sup>10</sup> In exchange, each bargaining unit member was required by contract to pay a pro rata share of AFSCME's representation costs; in Janus's case, this amount totaled about \$535 per year.<sup>11</sup>

At least until the *Janus* decision, that basic arrangement—known as the “agency shop”—was replicated in public-sector bargaining units in more than half of states. It involved three key components: exclusive representation, in which an elected union is the sole representative of every employee in a bargaining unit;<sup>12</sup> the duty of fair representation, which prohibits the exclusive representative from treating represented workers arbitrarily or in bad faith and from discriminating against them based on their opposition to the union (among other reasons);<sup>13</sup> and the mandatory agency fee, which requires each worker to share equally in the costs a union incurs while acting as the agent for the workers in the bargaining unit.<sup>14</sup>

The agency fee is distinct from union dues, which are paid only by workers who opt to become union members. Agency fees could only be used for representational activities, but union dues cover both the union's work as the bargaining representative for a group of employees and its other activities, which are sometimes referred to as “nonchargeable” activities.<sup>15</sup> The nonchargeable category includes many activities that are aimed at building union power. For example, a union's work organizing unrepresented workers falls in the category of union activities for which only union dues, and not agency fees, could be used.<sup>16</sup> Additionally, union dues (and not agency fees) finance union political activity, such as running “get out the vote” efforts, paying for political advertisements, and the like.<sup>17</sup>

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9. *Janus*, 138 S. Ct. at 2461.

10. *Id.* at 2460.

11. *Id.*

12. *See* *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50, 64–65 (1975).

13. *See* *Vaca v. Sipes*, 386 U.S. 171, 177–78 (1967) (discussing duty of fair representation in context of the Labor Management Relations Act, which amended the National Labor Relations Act (NLRA) of 1935. Ch. 120, sec. 101, § 8(b), 61 Stat. 136, 141 (1947) (codified as amended at 29 U.S.C. § 158(b) (2012))).

14. *See* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 206–07 (2015) (describing the “quid pro quo” in public-sector labor law, in which unions serve as the exclusive representative for a group of workers and owe each bargaining-unit member a duty of fair representation, in exchange for agency fees).

15. *See generally* *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519–24 (1991) (delineating chargeable and nonchargeable union expenditures).

16. *Id.*

17. *Id.*

The Supreme Court blessed public-sector agency shops in the 1977 case *Abood v. Detroit Board of Education*.<sup>18</sup> *Abood* reflected a compromise of sorts between the union's and the public employer's shared position that the union could charge represented workers for all of its activities<sup>19</sup> and the objectors' position that any state-imposed obligation to pay union dues or fees was unconstitutional.<sup>20</sup> This outcome mirrored the Court's approach in earlier cases about the extent to which private-sector employees could be required to pay agency fees under contracts governed by the Railway Labor Act (RLA).<sup>21</sup>

In addition to relying on its RLA precedent, the Court gave two interlocking reasons justifying union agency fees. First, it is costly for unions to provide fair representation in bargaining and grievance representation, and the fact that the duty of fair representation is not tied to the payment of agency fees means that employees could simply free ride if not required to pay the fee.<sup>22</sup> Second, legislatures could reasonably believe that this overall system—collective bargaining with an exclusive representative that must fairly represent all workers in a unit and is supported by agency fees—would yield stable labor relations.<sup>23</sup>

In addition, the Court emphasized the limited nature of the infringement on represented nonmembers' freedom, observing that public-sector unions could not restrict public employees' speech. "A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint."<sup>24</sup> In other words, represented workers are free to campaign against the union or its priorities. And, as Professor Ben Sachs has pointed out, the fact that union representation generally results in a wage premium for workers means that a typical union-represented worker who is unwillingly compelled to pay an agency fee will still come out ahead<sup>25</sup>—and they are free to devote their entire net gain to speech opposing the union.

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18. 431 U.S. 209 (1977).

19. *See generally* Brief for Appellees, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (No. 75-1153), 1976 WL 181667.

20. *See generally* Brief for the Appellants, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (No. 75-1153), 1976 WL 181666.

21. *See Abood*, 431 U.S. at 219–20; *see also id.* at 232 ("The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.").

22. *Id.* at 221–22. For a thorough discussion of the free-riding problem to which agency fees are a solution, see Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CALIF. L. REV. (forthcoming 2019), available at <https://www.ssrn.com/abstract=3245522> [<https://perma.cc/T69U-4UVK>].

23. *Abood*, 431 U.S. at 222–23. In addition, the *Abood* Court relied on its own precedent involving unions governed by the Railway Labor Act. *See id.* at 219. In other work, I have criticized both the *Abood* Court's reading of these cases, as well as how later decisions concerning agency fees—including *Janus*—have described the *Abood* Court's treatment of these cases. *See* Charlotte Garden, *Avoidance Creep*, 168 U. PA. L. REV. (forthcoming 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3356035](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356035) [<https://perma.cc/4SGW-PADC>].

24. *Abood*, 431 U.S. at 230.

25. Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1067 (2018).

The *Abood* Court held that under the First Amendment public-sector employers and unions could not require represented workers to pay the full amount of union dues, even if those employees were not required to join the union.<sup>26</sup> Observing that a portion of union dues often went towards the union's political or ideological advocacy, the Court analogized to its then-recent watershed campaign finance decision, *Buckley v. Valeo*: "[o]ne of the principles" underlying *Buckley* "was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment."<sup>27</sup> Thus, the Court continued, compelled "contributions for political purposes work[] no less an infringement of [public employees'] constitutional rights."<sup>28</sup>

In other words, the key difference between chargeable and nonchargeable expenses for the *Abood* Court was whether or not the union's spending was justified by the state's interest in stable labor relations and avoiding free riding.<sup>29</sup> As the Court saw it, those interests were implicated only by the costs the union incurred while acting as the bargaining agent for a group of represented employees.<sup>30</sup>

In the following decades, the Supreme Court and the lower courts refined and expanded on *Abood*, including by ruling particular union expenses chargeable or nonchargeable and by establishing and refining a procedure for union-represented workers to challenge the union's calculation of the mandatory agency fee.<sup>31</sup> Alongside those legal fights, political fights resulted in changes to state labor relations regimes, with some states expanding public-sector collective-bargaining rights<sup>32</sup> and other states restricting or even substantially eliminating those rights.<sup>33</sup>

In the early 2000s, both the legal and the political fights accelerated and intensified. For example, Wisconsin Governor Scott Walker signed Act 10 into law in 2011.<sup>34</sup> In addition to prohibiting unions from charging mandatory agency fees,

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26. *Abood*, 431 U.S. at 234 (concluding that the objectors' argument that "they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative" was "meritorious").

27. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

28. *Id.*

29. *See id.* at 220–21, 232 (explaining justification for agency fees in the RLA context and then stating that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights").

30. *See id.*

31. *See, e.g.*, *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (establishing procedural requirements intended to enforce *Abood*'s rules).

32. *See* SETH D. HARRIS, JOSEPH E. SLATER, ANNE MARIE LOFASO & CHARLOTTE GARDEN, *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS* 65, 72–77 (2d ed. 2016) (describing changes to state public-sector labor laws); *see also* Brief for the States of New York et al. at app. at 1–10, *Harris v. Quinn*, 573 U.S. 616 (2014) (No. 11-681) 2013 WL 6907713, at \*1a–10a (listing state public-sector bargaining laws, including those covering public employees who were jointly employed by individual customers and the state; collective-bargaining laws allowing this group of workers to unionize and bargain collectively with states over working conditions within state control are relatively novel).

33. *See* Brief for the States of New York et al., *supra* note 33, at 72–77.

34. 2011 Wis. Act 10; *see also* Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 *HOFSTRA LAB. & EMP. L.J.* 511, 532–33 (2013)

Act 10 either eliminated or curtailed the scope of collective bargaining for most public-sector employees. This change followed a heated public battle—“the largest series of protests at the [Wisconsin] Capitol since the Vietnam War,” according to one publication—during which thousands of protestors occupied the statehouse,<sup>35</sup> and Democratic legislators fled the state in an attempt to prevent a quorum.<sup>36</sup>

One year after Act 10, the Supreme Court decided *Knox v. Service Employees International Union, Local 1000*.<sup>37</sup> *Knox* did not attract much attention when it reached the Supreme Court; instead, *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*,<sup>38</sup> which raised the question of whether certain religious employers could invoke the “ministerial exception” as a defense in employment discrimination cases, arrived at the Court as the Term’s highest profile labor and employment case.<sup>39</sup>

As it turned out, *Knox* was a sleeper case. In a case involving an unusual midyear increase in union dues and agency fees, the Court held that the defendant union was required to obtain affirmative consent from represented nonmembers before charging the increased fees.<sup>40</sup> I have criticized the outcome in *Knox* at length elsewhere,<sup>41</sup> and I discuss the case further below.<sup>42</sup> In itself, that holding was not earthshaking, because unions do not routinely levy midyear dues increases. But *Knox* is important for two other reasons. First, *Knox* held that “exacting” scrutiny should be applied to agency fees<sup>43</sup>—a move that predictably “doom[ed] [agency fees], notwithstanding state legislatures’ efforts to tailor agency fees and collection procedures to meet

(describing the scope of Act 10).

35. Molly Beck, *The Protest That Wouldn't End: Act 10*, WIS. ST. J. (Oct. 23, 2017), [https://madison.com/wsj/the-protest-that-wouldn-t-end-act/article\\_08d9d341-b665-5733-983a-de170c671de0.html](https://madison.com/wsj/the-protest-that-wouldn-t-end-act/article_08d9d341-b665-5733-983a-de170c671de0.html) [<https://perma.cc/VQZ9-RQ4N>].

36. *Wis. Democrats Flee to Prevent Vote on Union Bill*, NPR (Feb. 17, 2011, 4:26 PM), <https://www.npr.org/2011/02/17/133847336/wis-democratic-lawmakers-flee-to-prevent-vote> [<https://perma.cc/BN9A-2SK5>].

37. 567 U.S. 298 (2012).

38. 565 U.S. 171 (2012).

39. As an indication of *Knox*'s relatively low profile, there were only three amicus briefs filed in the case—one in support of *Knox*, and two in support of the union. See *Knox v. Service Employees Int'l Union, Local 1000*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/knox-v-service-employees-intl-union-local-1000/> [<https://perma.cc/DJQ7-QJSC>]. By comparison, there were thirty amicus briefs filed in *Hosanna-Tabor*. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eecoc/> [<https://perma.cc/AG5N-3FJT>]. Two years later, there were eighteen amicus briefs filed in another union fees case, *Harris v. Quinn*. See *Harris v. Quinn*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/harris-v-quinn/> [<https://perma.cc/W4TF-M88K>].

40. *Knox*, 567 U.S. at 322.

41. Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855, 886–88 (2014) (observing that “[t]he Court has never convincingly explained why, when, and to what extent” the First Amendment prohibits a procedure that requires individuals to opt out of nonmandatory subsidization of a private group, and criticizing the Court’s reliance on untested assumptions about the behavior and preferences of union-represented workers).

42. See *infra* Sections I.B & I.C.

43. *Knox*, 567 U.S. at 310.

government interests in public-sector collective bargaining.”<sup>44</sup> Second, *Knox* also began laying the groundwork for *Janus*; not only was there no obvious way to distinguish the midyear dues increases, to which *Knox* applied, from routine dues assessments, but the majority also questioned whether *Abood* was still good law.<sup>45</sup> This dicta was significant both because the Court relied on it in later cases,<sup>46</sup> and because it was an unmistakable signal to advocates that the Court’s conservative justices were interested in revisiting *Abood*.

Two years after *Knox*, the Court again criticized *Abood* in dicta. In *Harris v. Quinn*,<sup>47</sup> the Court stopped short of overruling *Abood*, instead holding that the decision did not apply to home healthcare workers who were jointly employed by states and the customers whom they serve. But before reaching this outcome, the majority opinion—which, like the majority opinion in *Knox*, was authored by Justice Alito—spent several pages criticizing *Abood*.<sup>48</sup> In the view of the five conservative-leaning justices who comprised the majority, *Abood* “failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector.”<sup>49</sup>

This time, it was not immediately clear whether *Harris* meant that more incursions on *Abood*, or even a wholesale reversal, were on the horizon. On one hand, the Court’s criticism of *Abood* could have been further groundwork to eventually overturn that decision. But it was also possible that Alito had initially drafted the decision to overturn *Abood*, only to reverse course after one or more of the other justices in the majority balked. If the latter, then perhaps *Abood* was safe.

It became apparent that the first reading was the correct one when, one year later, the Court granted certiorari in *Friedrichs v. California Teachers Association*.<sup>50</sup> The main issue in the case was whether *Abood* should be overturned,<sup>51</sup> and the Court would have been unlikely to grant certiorari if, as of the date the *Harris* decision was issued, five members of the Court thought the answer to that question was no. Then, questioning during oral argument only confirmed that the Court was poised to overrule *Abood*, and a list of commentators predicted that result.<sup>52</sup>

44. Courtlyn G. Roser-Jones, *Reconciling Agency Fee Doctrine, The First Amendment, and the Modern Public Sector Union*, 112 NW. U. L. REV. 597, 601 (2018); see also *infra* Part I.C.

45. See *Knox*, 567 U.S. at 311 (“Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly . . .”).

46. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018); *Harris v. Quinn*, 573 U.S. 616, 627 (2014).

47. See *Harris*, 573 U.S. 616, 635–38 (2014).

48. See *id.* at 633–38.

49. *Id.* at 636.

50. 135 S. Ct. 2933 (2015) (mem.) (granting certiorari).

51. See *Petition for a Writ of Certiorari, Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (per curiam) (mem.) (No. 14-915), 2015 WL 393856.

52. See, e.g., Lyle Denniston, *Argument Analysis: The Question Not Asked*, SCOTUSBLOG (Jan. 11, 2016), <https://www.scotusblog.com/2016/01/argument-analysis-the-question-not-asked/> [<https://perma.cc/7JF7-5S3A>]. I both co-authored an amicus brief in support of the state and the union respondents in *Friedrichs* and attended oral argument. My

Ultimately, the *Friedrichs* Court did not overturn *Abood*—instead, it affirmed the underlying court of appeals decision applying *Abood*, based on an equally divided vote following Justice Scalia’s death.<sup>53</sup> However, once Justice Neil Gorsuch replaced Justice Scalia, it was apparent that *Abood* was again in peril. And indeed, the Court granted certiorari in *Janus v. American Federation of State, County, & Municipal Employees, Council 31* in September 2017.<sup>54</sup> The next Section discusses that decision.

### B. The Janus Decision

*Janus* undid the *Abood* compromise, holding that public-sector employees could not be required to pay any union representation costs. The majority began by stating that it would apply “exacting” scrutiny—a standard that, like its cousin strict scrutiny,<sup>55</sup> is exceedingly difficult for litigants to satisfy.<sup>56</sup> Unsurprisingly, the Court did this mainly by relying on *Knox*.<sup>57</sup>

The *Janus* majority suggested that compelled speech might be an even greater First Amendment harm than a speech restriction; if that is true, then the fact that speech restrictions receive heightened scrutiny means that, *a fortiori*, so should instances of compelled speech.<sup>58</sup> As the Court put it, “[w]hen speech is compelled . . . additional damage is done. . . . [I]ndividuals are coerced into betraying their convictions.”<sup>59</sup> Whether the experience of being forced to mouth particular words is more “demeaning”<sup>60</sup> than being banned from saying particular words is probably a question on which reasonable minds can differ. However, First Amendment law involves vastly more cases dealing with speech restrictions than with compelled speech, and the pedigree of the First Amendment right against compelled speech is a relatively recent development.

The *Janus* majority acknowledged in the very next paragraph that paying an agency fee is not exactly the same as being forced to speak a particular message, even as it discounted the importance of that difference: “[c]ompelling a person to

own judgment was that five justices would vote to overrule *Abood*. See John Fensterwald, *Supreme Court Signals It’s Ready to Hand CTA, Public Unions Big Setback*, EDSOURCE (Jan. 11, 2016), <https://edsource.org/2016/supreme-court-signals-its-ready-to-hand-cta-public-unions-big-setback/93186> [<https://perma.cc/S27M-RZXW>] (including my prediction, based on oral argument, that five justices would vote to overturn *Abood*).

53. See *Friedrichs*, 136 S. Ct. 1083 (2016).

54. 138 S. Ct. 54 (2017) (mem.).

55. The *Janus* Court characterized the requirements of strict scrutiny as follows: “Under ‘exacting’ scrutiny, we noted, a compelled subsidy must ‘serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.’” *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465 (2018) (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012)).

56. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844–55 (2006) (discussing the difficulty of meeting the strict scrutiny standard in First Amendment cases).

57. See *Janus*, 138 S. Ct. at 2465 (citing *Knox*, 567 U.S. at 310).

58. *Id.* at 2464.

59. *Id.*

60. *Id.*

*subsidize* the speech of other private speakers raises similar First Amendment concerns [as compelling speech].”<sup>61</sup> In other words, the Court noted the difference between speech and subsidization, but ultimately treated the difference as insignificant. This is a mistake that runs throughout the Court’s agency-fee case law, including *Abood*, which held that compelled subsidization of speech implicates the First Amendment but did not explain why that was so. If the Court’s concern with compelled speech is related to human dignity—the affront that occurs when “individuals are coerced into betraying their convictions”<sup>62</sup>—then it is not clear why compelled speech should be equal to compelled subsidization of speech. After all, individuals must pay taxes that go to support a variety of expressive projects and speakers with which they disagree, and this does not raise any First Amendment problems<sup>63</sup>: why should compelled subsidization of a union raise more serious dignitary concerns? *Janus* does not provide answers to this question, nor does it offer alternative accounts of why compelled subsidization of speech is as troubling as compelled speech (or, for that matter, as prohibitions on speech).<sup>64</sup> Instead, one gets the impression that a kind of sleight of hand has gone on—and at the end of the trick, the Court’s majority has pulled out of its sleeve a card reading “exacting scrutiny.”<sup>65</sup>

Next, the Court applied exacting scrutiny, considering the justifications on which *Abood* rested—labor peace and avoiding free riding. Ultimately, the Court concluded that neither justification could meet exacting scrutiny. First, the Court agreed that labor peace, as articulated by the *Abood* Court, was a compelling state interest but that agency fees were not required to achieve it.<sup>66</sup> Here, the Court relied on the existence of “right-to-work” public-sector labor law regimes, writing that their existence illustrated that stable collective bargaining was possible without agency fees.<sup>67</sup>

Then, the Court concluded that the government’s interest in avoiding free riding failed on the first prong of the exacting scrutiny test, writing that “avoiding free riders

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61. *Id.* (emphasis in original).

62. *Id.*

63. *See, e.g.*, William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 184–85 (2018) (discussing irrelevance of whether compelled subsidization is of government versus private groups); Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 197 (2005) (“Although *Johanns* is quite definite that citizens ‘have no First Amendment right not to fund government speech,’ it never offers a theoretical account of why taxation is an exception to the basic premise . . . .” (quoting *Johanns v. Mktg. Ass’n*, 544 U.S. 550, 562 (2005))).

64. Moreover, the federal courts have extended the *Abood* rule against compelled subsidization of speech to only one other arena: unified bar dues. *See Keller v. State Bar of Calif.*, 496 U.S. 1, 17 (1990). Yet, as other commentators have discussed, other situations whose structures seem to mirror *Abood* do not draw First Amendment scrutiny. For example, public employees are sometimes required to pay a portion of their salary to private investment managers. *See Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 866–68 (2012).

65. *See Janus*, 138 S. Ct. 2448, 2465 (2018).

66. *Id.*

67. *Id.* at 2466 (discussing federal public-sector labor relations).

is not a compelling interest.”<sup>68</sup> The majority began by comparing unions to private groups that take political positions but do not owe any duty of fair representation to either members or nonmembers.<sup>69</sup> The government, the Court continued, could not require beneficiaries of the latter groups’ advocacy efforts to pay agency fees to those groups.<sup>70</sup>

But what about unions’ duty of fair representation to members and nonmembers? Here, the Court reasoned that exclusive representation backed by the duty of fair representation is possible without agency fees because unions would not “refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees.”<sup>71</sup> First, the Court asserted that unions “avidly” or “eagerly” seek exclusive representative status<sup>72</sup> and that the “benefits” of exclusive representative status for unions “greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers.”<sup>73</sup> This statement is literally true, in that unions do seek exclusive representative status. But it is also seriously misleading, because public-sector unions in the United States are typically required to become the exclusive representative of a group of employees before the employer will sit down at the bargaining table.<sup>74</sup> In other words, the benefit that unions seek when they obtain exclusive representative status is the ability to engage in collective bargaining at all. A union that eschewed exclusive representative status would be able to engage in some forms of advocacy on behalf of its members—for example, its representatives could speak at school board meetings or lobby state government—but it would be barred from the core functions of bargaining and then enforcing a collective agreement.

Second, the Court wrote that agency fees were unnecessary to support the union’s fulfillment of its duty of fair representation, because that duty is likely constitutionally required when public-sector unions assume exclusive representative

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68. *Id.*

69. *Id.* (discussing a group that “lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians”).

70. *Id.*

71. *Id.* at 2467.

72. *Id.* at 2467 & n.5.

73. *Id.*

74. American jurisdictions that adopt statutory schemes to allow public-sector collective bargaining require unions to win exclusive representative status in order to represent workers. As of this writing, every state statute allowing public-sector workers to bargain collectively premises the employer’s bargaining obligation on the union winning exclusive representative status. *See, e.g.*, 5 ILL. COMP. STAT. ANN. § 315/7 (West Supp. 2019); CAL. GOV’T CODE § 3543.3 (West 2019). In other words, public-sector employers will engage with a union at the bargaining table if and only if that union is the exclusive representative of a group of employees. (One quasi-exception, Tennessee, allows multiple organizations representing different groups of workers to participate in “collaborative conferencing,” a process that affords less power to any of the organizations than collective bargaining typically does. TENN. CODE ANN. § 49-5-605 (2016).) While it is possible for unions to advocate for workers even when their employer does not have a statutory bargaining obligation, that advocacy will take a much different form and occur in different forums than when the employer does have an obligation to deal with the union at the bargaining table.

status.<sup>75</sup> Further, the Court suggested that the cost of bargaining a contract that was fair to nonmembers was not likely to be significantly greater than bargaining a members-only contract. But the Court's support for this point was that "neither respondents nor any of the thirty-nine *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements."<sup>76</sup> (Here, it is worth remembering that *Janus* was decided on a motion to dismiss, meaning that there was no factual record developed on this or any other topic in the trial court.)<sup>77</sup> As to the costs that unions incur when they represent nonmembers in grievance proceedings, the Court suggested that unions could charge nonmembers for representation services or refuse to represent them.<sup>78</sup>

Next, the Court moved on to "new" arguments—those not based on *Abood*'s reasoning—in support of agency fees. First, the Court rejected the union's originalist argument that "*Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees."<sup>79</sup> The majority seemed not to take the argument very seriously, because it did not believe that the union sincerely wanted the Court to hold that public employees lacked First Amendment protection—here, the Court cited an *amicus* brief filed by a different union in the 2006 case *Garcetti v. Ceballos*, which argued unsuccessfully for broad First Amendment protections for employees' job-related speech—and because the union also made an alternative argument based on the Court's precedents finding that public employees had limited First Amendment protection from employment-based consequences for their speech.<sup>80</sup> Then, the Court rejected the argument on the merits because "[e]ntities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid-20th century."<sup>81</sup>

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75. *Janus*, 138 S. Ct. at 2469 ("[W]e said many years ago that serious 'constitutional questions [would] arise' if the union were *not* subject to the duty to represent all employees fairly." (alteration in original) (emphasis in original) (quoting *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198 (1944))). For a thorough analysis and critique of the Court's treatment of exclusive representation and its possible consequences, see William B. Gould, *How Five Old Men Channeled Nine Old Men: Janus and the High Court's Anti-Labor Policymaking*, 53 USF L. REV. 209, 234-40 (2019).

76. *Id.* at 2468 (emphasis in original).

77. *Id.* at 2462 (describing procedural posture).

78. *Id.* at 2468–69. Given the Court's later observation that it would raise constitutional questions if an exclusive representative union were not required to represent nonmembers fairly, it is possible that the Court was referring to members-only representation here. But as described above, *see supra* note 76, no state has adopted this labor relations system.

79. *Janus*, 138 S. Ct. at 2469 (emphasis in original).

80. *Id.* ("[W]e doubt the Union—or its members—actually want us to hold that public employees have 'no [free speech] rights.' It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*." (alteration in original) (emphasis in original) (quoting Brief for Union Respondent at 1, *Janus*, 138 S. Ct. 2448 (No. 16-1466)) (citing Brief for National Treasury Employees Union as *Amicus Curiae* Supporting Respondent at 7, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473)).

81. *Id.* at 2471.

The Court next addressed the argument that agency fees were consistent with the Court's cases about First Amendment rights in the context of public employment. In general, those cases establish that public-sector employees have no protection from employment consequences that stem from their speech if it is "part of what the employee is paid to do"<sup>82</sup> or is about a matter of only private concern.<sup>83</sup> In contrast, employers may punish employees who speak as citizens and about matters of public concern only if their interest in providing efficient public service outweighs the employee/citizen's interest in "commenting upon matters of public concern."<sup>84</sup> This general framework was established by three key Supreme Court cases—*Pickering v. Board of Education*, *Connick v. Myers*, and *Garcetti v. Ceballos*.

Responding to that argument, the Court began by subtly shifting its focus from whether agency fees were consistent with public employees' free speech rights to whether *Abood* was consistent with those rights, stating that "we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions."<sup>85</sup> Then, the Court distinguished the *Pickering/Connick/Garcetti* framework for three reasons. First, those cases involved the ad hoc punishment of individual employees, rather than "a blanket requirement that all employees subsidize speech."<sup>86</sup> This purported difference between an individual employee's speech and many employees' payment of agency fees figured prominently in the Court's analysis. I critique this approach in detail in Section I.D, but the key point is that the Court considered the union speech enabled by all of the employees' agency fees and union dues taken together, and then focused on the potential consequences of that speech. Thus, the Court wrote that it is a matter of only private concern when "a single employee complains that he or she should have received a 5% raise," whereas "a public-sector union's demand for a 5% raise for many thousands of employees it represents would be" a matter of public concern because of the potential budgetary effects of the public employer's decision to agree to the raise.<sup>87</sup> Second, the Court wrote that the *Pickering/Connick/Garcetti* line of cases did not involve compelled speech.<sup>88</sup> Third, and finally, the Court concluded that "[s]uperimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime."<sup>89</sup>

Finally, after rejecting stare decisis arguments for retaining *Abood*,<sup>90</sup> the Court turned to the second issue in the case: whether a constitutional problem arises when a union and public employer adopt an opt-out default, by assuming that represented workers will pay for union representation unless they opt out.<sup>91</sup> As in *Knox*, the Court held that this arrangement was unconstitutional, and an opt-in default was

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82. *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006)).

83. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 146–49 (1983)).

84. *Id.* (quoting *Harris v. Quinn*, 573 U.S. 616, 653 (2014) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968))).

85. *Id.* at 2472.

86. *Id.*

87. *Id.* at 2472–73.

88. *Id.* at 2473.

89. *Id.*

90. *See id.* at 2478.

91. *See id.* at 2486.

constitutionally required.<sup>92</sup> I have previously criticized the inadequacy of the Court's analysis in *Knox*,<sup>93</sup> which was perhaps attributable, at least in part, to the fact that the opt-in/opt-out issue was not briefed by the parties.<sup>94</sup> But although the issue was briefed in *Janus*, the Court's analysis was no more detailed: whereas its discussion of the main issue in the case spanned dozens of pages, this issue consumed only a single paragraph:

This [opt-out] procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, 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. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *Knox*, 567 U.S., at 312–313. Rather, to be effective, the waiver must be freely given and shown by “clear and compelling” evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680–682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.<sup>95</sup>

Of course, there is no reason for any court to pad the application of straightforward legal principles with repetitive explanation. But the opt-in issue was not straightforward, nor—with the exception of *Knox*—were the cases on which the Court relied so obviously on point that no further explanation was warranted. The main case on which the Court relied, *Johnson v. Zerbst*, concerned waiver of the Sixth Amendment right to counsel; the *Zerbst* Court's analysis relied on the inability of “[e]ven the intelligent and educated layman” to defend himself without counsel, and held that “whether there has been an intelligent waiver of right to counsel must depend . . . upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”<sup>96</sup> But the waiver of the right to counsel is not obviously analogous to waiving the right not to pay union fees for several reasons, including that if an opt-out default is a First Amendment problem, then so is an opt-in default.<sup>97</sup> And in any event, in adopting a blanket opt-in default, *Janus*'s approach differs from the *Zerbst* Court's call for a context-sensitive analysis of the sufficiency of a particular individual's alleged waiver of the right to counsel.

The second half of the Court's paragraph about defaults establishes that not only must union-represented workers opt into paying union fees, they must do so by “clear

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92. *See id.*

93. *See* Garden, *supra* note 42.

94. *See generally* Brief for Petitioners, *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012) (No. 10-1121), 2011 WL 4100440; Brief for Respondent, *Knox*, 567 U.S. 298 (No. 10-1121), 2011 WL 5908951.

95. *Janus*, 138 S. Ct. at 2486 (parallel citations omitted).

96. *Johnson v. Zerbst*, 304 U.S. 458, 463–64 (1938) (citations omitted).

97. *See* Garden, *supra* note 42, at 902.

and compelling” evidence.<sup>98</sup> This evidentiary standard was not discussed in *Knox*, so the two cases on which the Court relied in *Janus* represent the sum total of the Court’s analysis. The portion of *Curtis Publishing Co. v. Butts* on which the *Janus* Court relied was a plurality opinion concerning the potential waiver of a First Amendment argument as a defense to a libel claim.<sup>99</sup> The plurality did conclude that waivers of constitutional arguments must be by “clear and compelling” evidence, but later Courts have not always applied that standard, even in more directly on-point situations.<sup>100</sup> And *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* was even further afield, rejecting constructive waivers of state sovereign immunity.<sup>101</sup> The key point is that there is no general principle establishing that First Amendment rights are implicated when government sets a speech default—much less that the Constitution requires that waivers of constitutional rights be established by clear and compelling evidence.<sup>102</sup> Thus, the Court’s reliance on a small number of cases drawn from different contexts obscures what is really going on: the Court is finding a new constitutional principle that—at least for now—applies only to protect represented workers who do not join their unions vis-à-vis those unions.

This subpart has described and analyzed key portions of the majority opinion in *Janus*. Parts I.B and I.C discuss in more detail two problems with *Janus*’s analysis that are apparent on the face of the decision itself—first, its disregard for the First Amendment rights of unions and pro-union employees, and second, its shifting treatment of the precise nature of the claim at issue.

### C. Who Counts as a Speaker in *Janus*?

Perhaps the most fundamental problem with the *Janus* majority’s reasoning is that it treats objectors as compelled speakers while ignoring that their First Amendment rights are inextricably linked to the First Amendment interests of unions and union members. That is, holding that represented nonmembers cannot be required to pay agency fees is tantamount to holding that union members must subsidize their union’s fair representation of nonmembers. Yet these mirror image First Amendment interests are absent from the *Janus* majority opinion, which instead treats unions mainly as economic actors that will react to incentives in predictable (and self-interested) ways. And workers who want to join their unions aren’t present in the *Janus* majority opinion at all, even though *Janus* effectively held that they must subsidize their objecting coworkers as a condition both of union representation at work and of aggregating their voices to participate in politics through their unions.

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98. *Janus*, 138 S. Ct. at 2486 (citation omitted).

99. See 388 U.S. 130, 145 (1967).

100. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (refusing to consider petitioner’s due process claim because “[i]n reviewing the judgment of state courts . . . the Court has, with very rare exceptions, refused to consider petitioners’ claims that were not raised or addressed below”); cf. *U.S. Nat. Bank of Ore. V. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (holding court of appeals had discretion to consider waived argument).

101. See 527 U.S. 666, 682 (1999).

102. See *Garden*, *supra* note 42, at 886–87.

To state the obvious, unions, union members, and represented nonmembers all have First Amendment rights, including the rights to speak or refrain from speaking and to associate or refrain from associating. These rights are implicated in workers' choices to join their unions just as much as their choices not to join. This is true both in the doctrinal sense—the Supreme Court has long recognized that the right to speech and association includes the right to associate with or advocate for a public-sector union<sup>103</sup>—and in the more conceptual sense that workers can join unions to convey a literal or metaphoric message. For example, employees may vote for union representation and then join their unions because they want a more effective voice at work, because they agree with the union's political advocacy, or because they want to affiliate themselves with a larger workers' movement.<sup>104</sup> Conversely, workers who do not want to do any of these things may vote against union representation and refrain from joining a union at their workplace. Even before *Janus*, union-represented workers in the public sector were free to refuse union membership; at most, these workers could be required to pay an agency fee.<sup>105</sup> In “right-to-work” jurisdictions, they could not be required to pay anything.<sup>106</sup>

Unions also exercise their own First Amendment rights.<sup>107</sup> They negotiate on behalf of represented workers at the bargaining table and in grievance proceedings; to the extent bargaining involves union proposals that bargaining-unit members receive particular packages of pay and benefits in exchange for their work, we might think of them as engaging in commercial speech,<sup>108</sup> although one might also think of bargaining about pay as being more inherently political than advertising a product at a particular price. Unions also engage in a list of other activities that are at the core of the First Amendment's protection for speech on matters of public concern. A partial list would include attempts to influence public debates over topics affecting workers at all levels of government through lobbying and protest, pressure

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103. See, e.g., *Smith v. Ark. Highway Emps. Local 1315*, 441 U.S. 463 (1979).

104. See RICHARD B. FREEMAN, ECON. POLICY INST., BRIEFING PAPER NO. 182, DO WORKERS STILL WANT UNIONS? MORE THAN EVER (2007), <http://www.sharedprosperity.org/bp182/bp182.pdf> [<https://perma.cc/54CB-DHXC>] (discussing the connection between workers' desire for union representation and their desire for voice at work).

105. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222–23 (1976).

106. See *What Are 'Right to Work' Laws?*, FINDLAW, <https://employment.findlaw.com/wages-and-benefits/what-are-right-to-work-laws.html> [<https://perma.cc/GK8T-VKSB>].

107. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down restriction on independent political expenditures as it applied to corporations and unions).

108. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (framing question about whether commercial speech is protected by the First Amendment in terms of “whether speech which does ‘no more than propose a commercial transaction,’ is so removed from any ‘exposition of ideas’ . . . that it lacks all protection” (citations omitted)); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988) (contrasting union speech about the relevance of working conditions at a job site to the larger community from commercial speech). Government infringements of union speech that is appropriately treated as commercial speech would at least receive a form of intermediate scrutiny under *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

campaigns to encourage public or private actors to treat workers well, and attempts to convince workers at unorganized workplaces to vote for union representation. All of these activities are costly, and even before *Janus*, nearly all of them could be funded only through union dues (or other union sources of income, such as rental or investment income) and not through agency fees.<sup>109</sup>

After *Janus*, it will be more difficult for unions to engage in all of these activities, because as a practical matter public-sector union dues must go towards the representation of nonpaying nonmembers before they can go toward organizing drives, printing picket signs, making political donations, or funding any of the other expenses that undergird organizing and advocacy work. To be sure, this was always the case in “right-to-work” states, where legislatures had made the policy choice to bar unions and employers from mandating agency fees.<sup>110</sup> But as Professor Catherine Fisk and Margaux Poueymirou have described regarding *Janus*’s predecessor case, *Harris v. Quinn*, elevating this policy choice to the constitutional level creates a mirror-image First Amendment problem<sup>111</sup>: “On the Court’s analysis, contracts requiring unionized employees to pay for union representational services compel speech of dissenters exactly to the same extent that their prohibition compels speech of unions and their members.”<sup>112</sup> Viewed in this light, *Abood* struck a reasonable compromise between competing First Amendment interests, whereas *Janus* overrode many states’ choices to allow agency fees in order to favor objectors over unions and their members.<sup>113</sup>

*Janus*’s second holding, that nonmembers must opt in before they are charged union fees, raises a similar problem—one first created in *Knox*, then extended in *Janus* in two ways. First, *Janus* held that the *Knox* rule applies to all payments by represented nonmembers to a labor union rather than to just those imposed in the middle of the fiscal year; and second, *Janus* imposed a heightened evidentiary standard by requiring “clear and compelling” evidence that the employees agreed to pay “before any money is taken from them.”<sup>114</sup> My focus here is a source of speech inequality that I first described in response to the Court’s decision in *Knox*: “if an opt-out violates the First Amendment . . . then an opt-in default should pose a problem of the same magnitude,” because the choice to pay union fees is just as expressive as a choice not to pay.<sup>115</sup>

Assume for a moment that the *Janus* Court was right that “[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be

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109. See *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 527–31 (1991) (holding that various categories of union expenses were not chargeable to nonmembers).

110. Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 Loy. L.A. L. Rev. 439, 441 (2014).

111. *Id.* (citing *Harris v. Quinn*, 573 U.S. 616 (2014)).

112. *Id.* at 442.

113. See *id.* at 439 (“Once the First Amendment rights of unions and union members are recognized, agency fees emerge as a constitutionally sound accommodation of the interests of dissenters, unions, and union members.” (emphasis omitted)).

114. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (citation omitted); see *supra* note 41 and accompanying text.

115. See Garden, *supra* note 42, at 902.

presumed.”<sup>116</sup> If that is true, then it must be equally true that we cannot assume that workers who fail to overcome a presumption against paying union fees have intentionally waived their First Amendment rights.<sup>117</sup> Instead, we can be confident that workers have intentionally waived their rights to pay for their share of their union’s speech only if they are asked to pay agency fees and refuse. But where workers do not respond to an opt-in default, we often will not know whether they preferred not to pay union fees or whether the obligation to opt into union speech had the effect of deterring speech in which the workers would have preferred to engage.<sup>118</sup>

This means that once *Janus* followed *Knox* in holding that speech defaults implicate the First Amendment, it should have followed through by holding that states could not adopt either a speech or a silence default—an outcome that would require states that permit workers to pay union fees through check-off to neutrally inquire about each worker’s payment (or nonpayment) preferences. Instead, the Court held that the First Amendment requires that states make it more difficult for workers to “speak” by paying union fees than to “remain silent” by not paying. The practical effects of this decision will be that unions will have to stretch member dues to cover representation costs for workers who fail to overcome the silence default and to fund “internal organizing” efforts intended to encourage workers to take the affirmative steps necessary to pay the agency fee or join the union and pay dues.<sup>119</sup>

To be clear, I think *Knox* and *Janus* were wrong in holding that speech defaults implicate the First Amendment in the first place; in my view, legislatures should be free to adopt either opt-in or opt-out defaults. One advantage of this approach is that it comports with what the Court does in nearly every other context, including other

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116. *Janus*, 138 S. Ct. at 2486.

117. It is true that unions are likely to attempt to approach represented workers to ask them either to join the union and pay full dues or to pay an agency fee. However, this likelihood is not a complete answer to the problem of mirror-image First Amendment rights that this paragraph discusses. First, unions may not reach each represented worker in a timely fashion, though state laws that allow unions opportunities to conduct an orientation for new hires would help in this regard. Second, if states adopt onerous opt-in processes, then workers who are pressed for time still may not manage to overcome these hurdles, even after speaking with a union representative. Third, even if unions do manage to educate workers about how to opt in to paying dues or fees, this solution relies on private entities to undo the effects of what, under the logic of the *Knox* and *Janus* decisions, should still be regarded as a First Amendment violation committed by government employers.

118. Moreover, as I wrote in *Meta Rights*, people can perceive defaults as conveying a message about the appropriateness of one choice or another. Thus, it is possible that workers who otherwise would have chosen to pay an agency fee will be dissuaded from doing so by the choice of default. See Garden, *supra* note 42, at 901–04.

119. This is due to the interaction of the duty of fair representation—which requires unions to fairly represent nonmembers—and the holding in *Janus* that nonmembers cannot be required to pay agency fees.

compelled-speech contexts.<sup>120</sup> In fact, as I have explained in detail elsewhere,<sup>121</sup> it is routine for both government and private persons to ask—even sometimes to pressure—others to waive their First Amendment rights, and those requests are never thought to raise First Amendment problems of their own.<sup>122</sup> But if we accept *Janus*'s internal logic—that speech defaults implicate the First Amendment and that paying money to a union is equivalent to speaking for First Amendment purposes—then the implication is that the *Janus* majority has privileged worker silence over worker or union speech.

This Part has described one problem with *Janus* that animates both of that case's holdings: that the Court recognizes only one speech interest, when in fact there are multiple, opposing interests. The next part turns to another problem—that *Janus* conflates the plaintiff's own agency fee with the whole of the union's representational speech.

#### D. The Value of Collective Speech

The *Janus* majority did not grapple with how its approach to the First Amendment rights of union objectors harms the ability of unions and union members to engage in political speech and other advocacy. But it did acknowledge unions' speech at the bargaining table, relying on the fact that the public may care about topics resolved during collective bargaining as a reason to distinguish its prior cases holding that public employees may face employment consequences for their speech about only matters of private concern.<sup>123</sup> In doing so, the Court lost sight of the nature of the case before it. At crucial moments, the majority shifted between analyzing the case as it was—a challenge to Mark Janus' \$535 annual agency fee—and analyzing the case as though it was a challenge to the whole of the union's speech.

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120. See Garden, *supra* note 42, at 893–95 (describing government-created “speech defaults” in other contexts; for example, schools routinely lead all students in saying the Pledge of Allegiance, even though students have the right not to participate, and departments of motor vehicles often issue license plates with the state motto printed on them, even though drivers have a First Amendment right to obscure the motto).

121. Garden, *supra* note 42, at 887.

122. In other contexts, the Court has held that bureaucratic requirements violate the First Amendment by making it too difficult for people to engage in speech—for example, a core part of the Court's reasoning in *Citizens United v. FEC* was that the challenged portion of campaign finance law “is a ban on corporate speech notwithstanding the fact that a [political action committee] created by a corporation can still speak.” 558 U.S. 310, 337 (2010). Here, the Court's focus was on the “burdensome” nature of PACs—“they are expensive to administer and subject to extensive regulations.” *Id.*

To be clear, I am not arguing that it is as difficult for one worker to provide “clear and compelling” evidence of their desire to pay their share of union representation costs as it is for a corporation to form a PAC. Instead, the better analogy is between the PAC requirement and the burden that *Janus* imposes on unions to collect qualifying evidence from each represented worker. This burden may prove to be especially significant if the Court's requirement that employees provide the necessary consent “before any money is taken,” *Janus*, 138 S. Ct. at 2486, allows union opponents to argue that unions must now obtain new, post-*Janus* consents, even from workers who have been paying agency fees for years without objection.

123. See *Janus*, 138 S. Ct. at 2472–73.

As described above, Mark Janus was the sole plaintiff remaining in *Janus* by the time it reached the Supreme Court. In his complaint, he sought declaratory and injunctive relief as well as a refund of the fees that he paid during the applicable statute of limitations period.<sup>124</sup> Yet this is how the majority analyzed whether the public-employee speech at issue involved a matter of public concern:<sup>125</sup>

Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern . . . . But a public-sector union’s demand for a 5% raise for the many thousands of employees it represents would be another matter entirely.<sup>126</sup>

Here, the majority cited *Pickering*, but the paragraph might also remind readers of *Borough of Duryea v. Guarnieri*,<sup>127</sup> on which the dissent relied.<sup>128</sup> Guarnieri was a public employee who alleged that his employer had wrongly imposed certain job conditions and had failed to pay \$338 in overtime, all in order to retaliate against Guarnieri for filing a previous union grievance.<sup>129</sup> Guarnieri’s argument was that the job conditions illegally retaliated against him for exercising his right to petition.<sup>130</sup> The Court rejected Guarnieri’s claim, holding that the same basic rules established in the speech context in *Pickering* and *Connick*<sup>131</sup> also applied in the petition context. The Court wrote that “[t]he government’s interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer’s responsibilities may be affected.”<sup>132</sup> Significantly, the *Guarnieri* Court expressed concern that “[e]mployees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations.”<sup>133</sup> If those grievances were accompanied by robust First Amendment protections, then “[b]udget priorities, personnel decisions, and substantive policies might all be laid before the jury. This would raise serious federalism and separation-of-powers concerns,” and “consume the time and attention of public officials.”<sup>134</sup> The potential for courts to second guess

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124. Plaintiff’s First Amended Complaint at 15–17, *Rauner v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, No. 1:15-CV-01235 (N.D. Ill. 2015), *rev’d sub nom. Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 851 F.3d 746 (7th Cir. 2017), *rev’d*, 138 S. Ct. 2448, <https://jlc-assets.s3.amazonaws.com/2016/12/Rauner-v.-AFSCME-120-First-Amended-Complaint-2015.06.01.pdf> [<https://perma.cc/F676-V7BG>].

125. As discussed above, *see supra* notes 84–92 and accompanying text, this is important because the Court’s public-employee speech cases hold that public employees enjoy First Amendment protections against employment consequences for their speech only if they were speaking as citizens on a matter of public concern.

126. *Janus*, 138 S. Ct. at 2472–73 (citing *Pickering v. Board of Ed.*, 391 U.S. 563 (1968)).

127. 564 U.S. 379 (2011).

128. *See Janus*, 138 S. Ct. at 2493 (Kagan, J., dissenting).

129. *Guarnieri*, 564 U.S. at 384.

130. *Id.*

131. *See id.* at 387.

132. *Id.* at 392–93.

133. *Id.* at 391.

134. *Id.*

public employers' decisions was a reason to limit public employees' rights so that an employee fired for demanding a raise would not have a First Amendment claim.

The distinction between asking for an individual raise and asking for a raise for everyone was thus key to the Court's analysis of why the case was different from the *Pickering/Connick* line of cases as well as from *Guarnieri*.<sup>135</sup> The Court also relied on that distinction in *Harris v. Quinn*.<sup>136</sup> But that distinction is inapt—or, more precisely, its applicability hinged on the Court conflating Mark Janus's agency fee with the whole of the union's speech at the bargaining table.

In other words, the Court treated a lawsuit over Mark Janus's \$535 agency fee as a lawsuit over “a public-sector union's demand for a 5% raise for the many thousands of employees it represents.”<sup>137</sup> But it is not clear why that should be the case. To be sure, there is a sense in which Janus's agency fee helped facilitate the union's ability to make a credible bargaining demand, just like it helped the union keep the lights in the office on, reimburse employees' travel, and the like. But Janus was also one of tens of thousands of represented workers, and presumably, every (or nearly every) worker was paying either union dues or agency fees.<sup>138</sup> This means that, although the union's ability to engage in effective collective bargaining would be harmed if many workers stopped contributing, the union's bargaining-table speech likely would have been unaffected if Janus alone stopped paying.

If this is true, then perhaps the right approach would have been to treat Janus's agency fee as though it paid for none of the union's speech. Or perhaps the Court should have attempted to translate Janus's fee into some unit of the union's speech—say, two hours of a lawyer's time preparing or prosecuting a single grievance. But under either of those two approaches, Janus's agency fee (and the speech it actually funds) starts to look much more like a matter of private concern—closer to the single employee asking for a raise than to the union demanding a raise for everyone. And if this is right, then the Court's *Pickering* analysis rested on a flawed foundation—the Court should have kept its focus on Janus's agency fee and treated it as equivalent to speech on a matter of private concern.

There is another potential problem with the Court's distinction between an individual employee seeking a raise and a public-sector union seeking a raise for everyone. The Court implies that the distinction turns on the fact that wages and working conditions that apply to entire workforces affect the public fisc in ways that individual raises do not. But it seems unlikely that the Court would deem it a matter of public concern if an individual employee went to their boss and said, “I think you should give everyone in the workforce a five percent raise.” This suggests that the operative difference between the individual employee's request and the union's request is not that one is on behalf of a single employee and the other is on behalf of many employees. Instead, the key difference is how the *public employer* is likely to respond—the public employer is under a statutory obligation to bargain only with

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135. See *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2492–93 (2018).

136. See 573 U.S. 616, 654 (2014).

137. *Janus*, 138 S. Ct. at 2473.

138. See *AFSCME Council 31 - Organizational History*, AFSCME COUNCIL 31, <https://www.afscme31.org/about/afscme-council-31-organizational-history> [<https://perma.cc/29QN-Z87N>].

the union, not with the individual who seeks a raise for everyone. In other words, if one accepts the Court's premise that the public is likely to be concerned about increasing payroll budgets, which are not implicated by individual requests for raises, then it is less a matter of concern what the union asks for in bargaining than how the public employer responds. Consider the following example: assume a state adopts a statute barring its agencies from agreeing to any raise whatsoever in collective bargaining. Nonetheless, a public-sector union asks for a raise. Is that request still a matter of public concern? Presumably not, because the state would be barred from agreeing to the raise, and so there is no chance that the bargaining demand would lead to an increased tax burden or any other results for the public.

All of this suggests that the Court was wrong to treat *Janus* as a case that raised the issue of whether the entirety of a union's speech was a matter of public concern. But even accepting that framing, the Court was wrong to treat any union speech that occurs in the context of collective bargaining as speech on a matter of public concern. At a minimum, the policy environments that shape employer responses to union demands play a role in whether particular instances of union speech really involve matters of public concern as the Court understood that term.

This Part has focused on *Janus*'s internal contradictions; the next Part looks outward, contrasting the Court's treatment of political advocacy by unions to its treatment of other political advocacy.

## II. *ABOOD*, *JANUS*, AND MONEY IN POLITICS

*Abood*, *Janus*, and other agency-fee cases are about the rights of union objectors, but they are also about unions' political advocacy and about unions' and workers' money in politics. And although they are not typically included in lists of key campaign finance cases, their implications for unions' and workers' spending on politics are as significant or more significant for unions as cases like *Citizens United v. FEC*. The distinction is that, whereas *Citizens United* and related cases enlarge unions' rights to engage in political speech as a legal matter,<sup>139</sup> *Janus* limits what money is available for public-sector unions' political speech by requiring unions and union members to subsidize nonmembers' representation, thereby restricting what unions can say as a practical matter.<sup>140</sup>

When one considers *Janus* in light of the Supreme Court's campaign finance cases, a troubling inconsistency emerges. On one hand, the Roberts Court has repeatedly held that government cannot adopt policies designed to respond to the effects of economic inequality in the political process, at least when those policies might discourage political spending by the rich. On the other hand, the Court took precisely the opposite view in *Janus*, effectively imposing a political participation tax on workers who choose to associate with their unions in order to try to make themselves heard in politics.

I begin this Part by discussing the relationship between two cases that have been squarely overruled by the Roberts Court: *Abood*, and the 1990 campaign-finance case

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139. See *infra* notes 169–73 and accompanying text.

140. See *infra* note 180.

*Austin v. Michigan State Chamber of Commerce*.<sup>141</sup> This Part argues that those two cases had a consistent worldview regarding the relationship between individuals, organizations, money, and politics. Then, I contrast the reasons that the Roberts Court overruled *Abood* and *Austin*, illustrating the divergence between the way the Court now treats political spending by the rich and by the working class.

A. *Limiting Economic Influence in Political Advocacy: Abood and Austin*

As discussed briefly above, the *Abood* Court relied in part on *Buckley v. Valeo*'s holding that campaign contributions are a form of First Amendment activity: quoting *Buckley*, the *Abood* Court wrote that “[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals.”<sup>142</sup> From there, the Court reasoned that requiring public-sector employees, on pain of job loss, to pay to unions money that those unions would eventually use to engage in partisan politics was unjustified.<sup>143</sup> The same basic principles hold in the private sector, although for statutory rather than constitutional reasons.<sup>144</sup> Before *Abood*, the Court decided, in *International Association of Machinists v. Street*, that the RLA authorized collective-bargaining agreements that require workers to pay agency fees, but no more.<sup>145</sup> The Court wrote that the statute did not authorize unions and employers to require employees to pay money to “support candidates for public office, and advance political programs,” as those uses “fall[] clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.”<sup>146</sup> And in a later case interpreting the NLRA, the Court wrote that Congress intended to solve the union’s free-rider problem by allowing agency fees, but not mandatory fees for “unrelated” union activities.<sup>147</sup>

In summary, the Court’s pre-*Janus* agency-fee case law held that neither private-sector nor public-sector unions could require workers to pay full dues as a condition of working for a unionized employer; this was for constitutional reasons in the public sector and for statutory reasons in the private sector.<sup>148</sup> This meant that neither public- nor private-sector unions could use their economic influence—their position as an elected exclusive representative of a group of employees—to compel employees to pay money toward the union’s political advocacy by demanding that

141. 494 U.S. 652 (1990).

142. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1976) (alteration and omission in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)).

143. *Id.* at 235.

144. I have elsewhere critiqued the Court’s statutory analysis in these cases; this paragraph does not repeat that criticism and provides only a brief description of the Court’s reasoning. *See generally* Garden, *supra* note 24.

145. 367 U.S. 740, 771 (1961).

146. *Id.* at 768.

147. *Comm’ns Workers v. Beck*, 487 U.S. 735, 759 (1988).

148. In most contexts, unions and employers could require employees to pay agency fees. But, the Court held in *Harris v. Quinn* that so-called “partial public employees”—employees who were paid by a governmental entity but whose work is directed and supervised by private individuals—could not be required to pay any union dues or fees. *See supra* note 48 and accompanying text.

employers fire employees who refused to pay full union dues.<sup>149</sup> This also meant there was a direct link between the strength of unions' political advocacy and the underlying will of the union's represented employees—represented employees who objected to a union's political positions could avoid funding those positions by becoming agency-fee payers. To be clear, this is not to say that each union member necessarily agreed with each of their union's political positions—nor is it to say that every nonmember disagrees with each position. There are many reasons that a represented worker might decide to join or to not join their union, and that decision might be the result of carefully weighing various (potentially competing) factors, or it might be made relatively passively. But at minimum, a worker who objected to their union's political priorities could both opt out of paying money that the union would eventually use to effectuate those priorities, and could actively support other priorities.<sup>150</sup>

That general approach—prohibiting unions from using their economic influence to strengthen their political clout—was consistent with the Court's earlier more general stance regarding the regulation of independent political expenditures by corporations. One (now-overruled) case—*Austin v. Michigan State Chamber of Commerce*—detailed that approach.<sup>151</sup>

In *Austin*, the Court considered the constitutionality of a Michigan law that prohibited corporations from using general treasury funds for independent expenditures, though it allowed corporations to engage in political spending using separate segregated funds.<sup>152</sup> Michigan did not impose the same restrictions on unions, which were free to use general treasury funds for state-level political advocacy.

Upholding the law, the Court focused on the relationship—or lack thereof—between the reasons that people might affiliate with corporations and their support for the corporation's political advocacy. As the Court put it, “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.”<sup>153</sup> Further, these advantages attract investors and other stakeholders for much the same reason that individual workers might decide to work for a unionized employer—to make money. Thus, the Court continued, “[t]hese state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”<sup>154</sup> The source of the “unfair advantage” was

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149. Even before *Janus*, unions could not say even that much in “right to work” states, where statutes barred unions and employers from mandating agency fees. See *supra* text accompanying note 34.

150. Unionized workers generally earn a wage premium over nonunion workers. See, e.g., JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 45 (2014); Sachs, *supra* note 26, at 1048 n.11 (reviewing literature regarding the union wage premium). This means that a union-represented worker who opposed their union's political agenda would likely have more disposable income to contribute toward opposing that agenda.

151. See 494 U.S. 652 (1990).

152. *Id.* at 654.

153. *Id.* at 658–59.

154. *Id.* at 659 (quoting *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238,

that people or entities would decide to make investments for economic reasons—reasons that were influenced by the state-conferred advantages of the corporate form—and then corporations could use the invested funds on their political priorities.<sup>155</sup> This reasoning came to be known as the “anti-distortion” rationale for restricting corporate political spending, because it focused on “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>156</sup>

The Court’s discussion of the anti-distortion rationale focused on the state-conferred benefits of the corporate form in attracting investments, but its reasoning went further. The plaintiff in the case—the Michigan State Chamber of Commerce (“Chamber”)—was not a traditional for-profit corporation. Rather, it was a “nonprofit ideological corporation” that had members rather than investors.<sup>157</sup> Still, the Court wrote that Michigan’s law could be applied to the Chamber for two main reasons. First, member businesses could join for reasons other than a desire to contribute to the Chamber’s political spending,<sup>158</sup> and second, Michigan could decide to protect businesses’ ability to participate in the Chamber’s nonpolitical program without also paying a portion of membership dues that went towards the Chamber’s political advocacy.<sup>159</sup> Further, the Court observed that many of the Chamber’s members were corporations, which “could circumvent [Michigan’s] restriction by funneling money through the Chamber’s general treasury.”<sup>160</sup> In other words, Michigan could both follow the money from corporate bank accounts to the Chamber and impose limits on all of the Chamber’s political advocacy in order to protect the integrity of the corporate expenditure limit.

Finally, the Court rejected the Chamber’s argument that Michigan’s restriction on corporate independent expenditures was unconstitutionally underinclusive because it did not include labor unions. Here, the Court explicitly tied its analysis to its agency-fee case law, citing *Abood* and *Beck*,<sup>161</sup> and writing that as a result of those cases, “the funds available for a union’s political activities more accurately reflects members’ support for the organization’s political views than does a corporation’s general treasury.”<sup>162</sup>

What is important here is the relative consistency of the Court’s approach to political advocacy by unions and other types of associations in *Abood* and *Austin*. Most significantly, by attending to the different reasons that persons might pay money to an entity that engages in political advocacy, the Court’s approach limited

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257 (1986)).

155. *Id.* at 660 (“[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”).

156. *Id.*

157. *Id.* at 661.

158. *Id.* at 662.

159. *Id.* at 663 (distinguishing the Chamber from nonprofit organizations that existed only to engage in political advocacy).

160. *Id.* at 664.

161. *Id.* at 665 (citing *Comme’s Workers v. Beck*, 487 U. S. 735, 745 (1988); *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977)).

162. *Id.* at 666.

(or allowed legislatures to limit) the extent to which an entity's economic influence could be leveraged to yield political influence. Further, it permitted legislatures to calibrate their approaches to regulating corporations and unions in light of the degree of leverage that each could bring to bear on their respective constituencies.

Of course, there are also important differences between the cases. Chief among them, *Austin* allowed legislatures flexibility in regulating corporations, and *Abood* took away flexibility in regulating public-sector unions by prohibiting legislatures or public employers from agreeing to a union security clause that required represented workers to pay anything more than an agency fee. Nothing about the holding in *Austin* required Michigan to protect shareholders by regulating corporate independent expenditures, nor did *Austin* require Michigan to exclude unions from its independent expenditure ban in light of *Abood*. But, as the next Section will show, this rough parallelism between the Court's treatment of union and corporate political advocacy was much closer than the Court's more recent approach.

None of this is to say that either *Abood* or *Austin* is unassailably correct. For example, the premise that courts or legislatures should think of either union dues or shareholder funds as "belonging" to the payer even after they have been transmitted to the union or the corporation and spent on other things is dubious at best.<sup>163</sup> Further, the *Austin* Court distinguished *Buckley v. Valeo*, which struck down limits on independent expenditures by individuals,<sup>164</sup> by implying that spending by corporations but not by individuals reflects the influence of state-conferred benefits associated with the corporate form. That distinction means that legislatures could respond to independent political spending by Koch Industries, but not by Charles and David Koch. But is it reasonable to say that the latter's fortunes are unrelated to economic benefits achieved with help from the legal benefits of corporate status? And what about individuals whose personal fortunes are attributable to other legal regimes? Shouldn't legislatures be able to respond to distortions that they cause in the political arena as well? Perhaps the Court could have reconciled these inconsistencies by overruling the relevant portion of *Buckley* in another case—but, as discussed in the next Section, the Court instead overruled *Austin* in a series of decisions in which the Court's treatment of unions' political advocacy increasingly diverged from its treatment of political advocacy by other entities.

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163. See, e.g., Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. Seiu, Local 1000*, 98 CORNELL L. REV. 1023, 1073 (2013) (arguing that because money is fungible, it does not make sense to treat a particular amount of money in a union's bank account as belonging to the person who paid it); Todd E. Pettys, *Unions, Corporations, and the First Amendment: A Response to Professors Fisk and Chemerinsky*, 99 CORNELL L. REV. ONLINE 23, 29–30 (arguing that it does not make sense to attribute corporate spending to particular shareholders because "the corporation typically obtains the money it uses to engage in political speech not from shareholders, but rather from revenues the corporation generates through sales to its customers"); Sachs, *supra* note 26 (arguing that agency fees should be regarded as union property because the union negotiates the wage premium from which agency fees are deducted).

164. 424 U.S. 1, 49 (1976).

*B. Economic Influence in Political Advocacy, and the Increasing First Amendment Isolation of Unions*

The Court's post-*Austin* shift in (nonunion) campaign finance cases is exemplified by three cases: *Davis v. FEC*,<sup>165</sup> *Citizens United v. FEC*,<sup>166</sup> and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.<sup>167</sup> This Section discusses these three cases in turn, focusing on how they diverge from the Court's recent treatment of unions and union members in agency-fee cases.

First, in *Davis*, the Court struck down the Bipartisan Campaign Reform Act's (BCRA) "Millionaire's Amendment." Roughly, the Millionaire's Amendment raised the individual contribution limits applicable to candidates running against opponents who spent more than \$350,000 of their own money on their campaign.<sup>168</sup> The plaintiff, Jack Davis, was a candidate who declared his intention to spend one million dollars of his personal funds in pursuit of a seat in the House of Representatives during the 2006 election cycle; the FEC also alleged that Davis had failed to make required disclosures about his personal spending on his campaign during the previous cycle.

Davis successfully argued that differential contribution limits violated his First Amendment rights.<sup>169</sup> The majority opinion began by relying on *Buckley* to discuss the "fundamental nature of the right to spend personal funds for campaign speech."<sup>170</sup> Yet the Millionaire's Amendment—unlike the provision the Court struck down in *Buckley*—did not cap the amount that candidates could spend on their own campaigns. Instead, the *Davis* majority held, the Amendment "imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."<sup>171</sup> The problem, the Court continued, was that the prospect of facing an opponent who could raise more money from individual contributors might deter wealthy candidates from spending the amount that would trigger the Amendment.<sup>172</sup>

Having concluded that the First Amendment was triggered by the Millionaire's Amendment, the Court went on to consider whether the Amendment could nonetheless survive strict scrutiny. Holding that it did not, the Court rejected "level[ing] electoral opportunities for candidates of different personal wealth" as even a *legitimate* objective.<sup>173</sup> Instead, the Court wrote that being "wealthy" or "hav[ing] wealthy supporters" were simply items on a list of potential strengths that different candidates would have to different degrees—and legislatures should not be permitted to make "judgments about which strengths should be permitted to contribute to the outcome of an election."<sup>174</sup>

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165. 554 U.S. 724 (2008).

166. 558 U.S. 310 (2010).

167. 564 U.S. 721 (2011).

168. *Davis*, 554 U.S. at 729 (describing the Millionaire's Amendment in more detail).

169. *Id.* at 738.

170. *Id.*

171. *Id.* at 739.

172. *Id.*

173. *Id.* at 741 (quoting Brief for Appellee at 34, *Davis*, 554 U.S. 724 (No. 07-320)).

174. *Id.* at 742.

To be clear, there is no First Amendment right to run a political campaign against a relatively poorly financed opponent. Instead, the *Davis* Court's conclusion rested on the fact that government had intervened to help level the playing field. But it is important to keep in mind that—as the *Austin* Court recognized, albeit imperfectly—the playing field is shaped in part by the various legal advantages and disadvantages that are conferred on candidates by government. As Justice Stevens put it in his partial dissent, quoting the legal scholar Cass Sunstein, “[a] well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other.”<sup>175</sup> *Davis* collapsed this distinction, instead holding that legislatures could not disincentivize the wealthy from spending so much on politics that they drown out the voices of their popular but undercapitalized competitors.

Next, in *Citizens United*, the Court overruled *Austin* directly,<sup>176</sup> striking down BCRA's prohibition on certain corporate and union independent expenditures. The Court rejected *Austin*'s anti-distortion rationale,<sup>177</sup> citing *Davis* for the proposition that “[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.”<sup>178</sup> Elaborating on that point, the Court turned from the interests of corporate speakers to the interests of listeners: “[t]he Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’”<sup>179</sup> But these “voices and viewpoints” can “advise voters on which persons or entities are hostile to their interests.”<sup>180</sup> Finally, the Court criticized the distinction between the economic marketplace and the marketplace for political speech, writing that the First Amendment protects “speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.”<sup>181</sup>

Likewise, the Court rejected the protection of dissenting shareholders from “being compelled to fund corporate political speech” as a compelling government interest.<sup>182</sup> Here, the Court's reasoning was very brief, limited to the assertions that if the Court permitted campaign spending restrictions based on this rationale, then government could also “ban the political speech even of media corporations,” and further, that “the procedures of corporate democracy” would suffice to protect dissenters.<sup>183</sup>

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175. *Id.* at 756–57 (Stevens, J., concurring in part and dissenting in part) (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994)).

176. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

177. *Id.* at 313.

178. *Id.* at 350.

179. *Id.* at 354 (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., dissenting)).

180. *Id.*

181. *Id.* at 361. The Court also rejected the government's argument that the corporate and union independent-expenditure ban was justified by the need to prevent corruption or its appearance. *Id.* at 356–58.

182. *Id.* at 361.

183. *Id.* at 361–62 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

Finally, in *Arizona Free Enterprise Club*, the Court struck down a third method of regulating money in politics. This time, the case concerned Arizona's method of public election financing. Candidates who opted into public financing were generally eligible for a set amount. But they would also receive extra matching funds when their privately financed opponents' expenditures, plus the expenditures by independent groups, exceeded the initial public financing amount.<sup>184</sup>

The Court found that, as in *Davis*, the First Amendment rights of both privately financed candidates and their supporters were burdened by the law.<sup>185</sup> In fact, the Court held that the First Amendment problem was greater than in *Davis*, because Arizona's scheme resulted in the "direct and automatic release of public money" rather than allowing candidates more generous contribution limits, which would not matter if the candidate was not able to attract large contributions.<sup>186</sup> Likewise, the Court wrote that supporters of privately financed candidates who wanted to make supportive independent expenditures might refrain, or might change their message, in order to avoid triggering the matching funds.

Arizona defended its law by pointing to its speech benefits, reasoning that it would result in more "free and open debate that the First Amendment was intended to foster."<sup>187</sup> But, relying mostly on its own intuition, the Court wrote that the law would either decrease speech by privately financed candidates or render their speech less effective by allowing publicly financed candidates to respond to more of it.<sup>188</sup> Remarkably, the Court wrote that "[a]ll else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted."<sup>189</sup> In one sense, this statement is unremarkable and probably accurate. But it casts as a First Amendment good the probability that a wealthy candidate with wealthy supporters will be able to broadcast their uncontroverted message, leaving voters to make their choices with only half the story.

Comparing *Davis*, *Citizens United*, and *Arizona Free Enterprise Club* with *Janus* shows how the Court's treatment of unions has continued to diverge from its treatment of other speakers. First, the three campaign-finance cases make clear that governments cannot interfere with private entities' use of their economic influence to increase the strength of their political messages, even if the source of that influence was government-conferred. *Citizens United* put this most clearly: "speech, even if it

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184. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 729 (2011).

185. *Id.* at 737.

186. *Id.* In addition, the Court observed that the Arizona system could result in additional matching funds going to multiple publicly financed candidates in three- (or more) way races, and that privately financed candidates who opted to spend less than the cap might still be pushed over the cap by independent expenditures, which were out of the candidates' hands. *See id.* at 737-38.

187. *Id.* at 740 (quoting Brief of State Respondents at 41, *Arizona Free Enterprise Club*, 564 U.S. 721 (nos. 10-238, 10-239)).

188. *Id.* at 740-41, 747. The Court compared Arizona's law to situations in which entities were literally required to subsidize others' speech, writing that in both situations, the government had impermissibly attempted to "increase the speech of some at the expense of others." *Id.* at 741 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974)).

189. *Id.* at 747.

was enabled by economic transactions with persons or entities who disagree with the speaker's ideas" cannot be regulated in order to protect dissenters or prevent distortion.<sup>190</sup>

Applying that principle in the union context undermines the Court's conclusion in *Janus*. The *Janus* Court held that public employees had a First Amendment right to work for their unionized employers without paying for union representation, meaning that unions must devote funds to representing nonpaying nonmembers that they might have preferred to spend on political speech. But if one applies the lens from *Davis*, *Citizens United*, and *Arizona Free Enterprise Fund*, the Court should have held that unions had a First Amendment right to engage in political speech, even if that speech is funded by leveraging a government-conferred position in the market to negotiate a union security clause. And rather than a First Amendment response, the workers would have had recourse to only a market response—to pressure their employers not to agree to such a contract term, or to find work at a nonunion employer.

Arguably, the analysis in the previous paragraph is flawed because of the involvement of a public-sector employer. That is, perhaps the public employer's role in requiring its employees to pay union dues or fees means we should regard those fees as compelled by the government, rather than by a market actor exercising its economic influence. But even if this is the right way to think about public-sector agency fees,<sup>191</sup> it is doubtful that it makes a First Amendment difference. As discussed above, at least where unions are not involved, public-sector employees have limited First Amendment rights at work, and public employers are often afforded the same types of leeway to manage their workforces as private employers. Therefore, even if it is correct to deem the public-sector employer to be the source of the job requirement to pay agency fees, it would not necessarily follow that those payments violate the First Amendment.

But even if the market pressure argument is ultimately not persuasive in the public sector, the same counterarguments are not present in the private sector, where unions can at most negotiate for workplaces to be agency shops because of the Court's interpretations of the RLA and the NLRA.<sup>192</sup> As discussed above, those statutes prohibit unions from using their economic position to take in money that they would use for political advocacy.<sup>193</sup> But this restriction is in tension with the First Amendment values expressed in the Roberts Court's campaign finance decisions. First, under *Citizens United*, protecting dissenters from funding unwanted political speech should be an invalid state interest, especially because union dissenters have democratic remedies—they can attempt to decertify their unions or to discourage their employer from agreeing to a union security clause—and they can leave their jobs. The possibility of democratic remedies means that the normative argument for permitting unions to negotiate union security clauses, requiring employees to pay full

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190. *Citizens United v. FEC*, 558 U.S. 310, 351 (2010).

191. Public-sector union fees are often negotiated, although they are sometimes required by statute. At least where a union negotiates for a union security clause, it makes sense as a practical matter to attribute the fees to the union's exercise of bargaining power, rather than to the (likely indifferent) employer.

192. *See supra* text accompanying notes 150–52.

193. *See supra* text accompanying notes 150–52.

union dues, is stronger than the argument in favor of permitting employers to require employees' participation in the employer's preferred political program—yet the latter is permitted in many jurisdictions,<sup>194</sup> and the political scientist Alexander Hertel-Fernandez has documented at length how employers already do this.<sup>195</sup> Second, under *Davis* and *Arizona Free Enterprise Club*, a First Amendment harm results when law intentionally deters speakers from political advocacy in which they would like to engage, and for which they could probably raise the funds, unless that advocacy is the result of quid-pro-quo corruption or could be seen as such.<sup>196</sup> Yet it is difficult to see how corruption concerns could be implicated by union political advocacy supported by union security agreements.

In addition, the campaign finance cases show that there are also listener interests to consider. Quoting an earlier case, the *Citizens United* majority emphasized that corporate political spending was desirable because corporations “best represent the most significant segments of the economy.”<sup>197</sup> Putting aside that the statement apparently involves a mix of unproven empirical claims and value judgments, there is a plain analogy to the union context, as unions equally “best represent” a significant segment of the economy, making their perspectives valuable to the public. Moreover, the fact that unions can engage in *some* political advocacy does not undo the First Amendment violation; the Court emphasized in *Arizona Free Enterprise Club* that discouraging additional political advocacy by one class of speakers implicates the First Amendment as much as banning advocacy by that class of speakers.

#### CONCLUSION

It is not yet apparent how the Court's decision in *Janus* will affect workers and unions. But this Article has sought to establish that the *Janus* decision was unprincipled both on its own terms and against the backdrop of analogous First Amendment cases. Further, *Janus*'s effects will likely extend beyond public sector workers' terms and conditions of employment by also limiting workers' abilities to make themselves heard in the political process.

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194. See Note, *Citizens United at Work: How the Landmark Decision Legalized Political Coercion in the Workplace*, 128 HARV. L. REV. 669 (2014).

195. See generally ALEXANDER HERTEL-FERNANDEZ, *POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS* (2018).

196. See *supra* note 187.

197. 558 U.S. 310, 354 (2011) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 257–58 (2003) (Scalia, J., dissenting)).