JANUS V. AFSCME

I. INTRODUCTION

The Supreme Court ruled in Janus v. AFSCME that a state’s interest in “Labor Peace” and a “well-funded bargaining agent” were not sufficiently promoted by agency shop arrangements—not enough, that is, to permit unions to override workers’ free speech rights. This decision, meant to protect the First Amendment rights of some dissenting public sector employees who find themselves politically at-odds with their unions, in reality undermines the pillars of industrial democracy and pluralism in the workplace that decades of US labor law have built to balance employers’ and unions’ interests. This comment offers a brief history of public sector unions, arguing that the Supreme Court’s practical misunderstanding of how labor law has been legally designed to balance the interests of unions and employers will force unions to find new ways to maintain labor peace and improve workplace standards under Janus budgetary and organizing conditions. This Court decision, balancing the state’s interests with dissenting unionists’ speech rights whilst ignoring unions’ interests as collective representatives for all of the workers at a worksite, fundamentally undermines the power of a union to exclusively represent its employees. The union’s diminished capacity to fund the work and organizing cannot be overstated. Nonetheless, the Court’s ruling that the work that unions do is public and political is the strongest remaining legal grounds for workers to uphold their collective right to both collectively bargain and engage in the political work required to transform the balance of power in public sector workplaces and win high quality universal social goods for everyone.

II. WHAT IS JANUS?

A. A Brief History of Public Sector Unions

Public sector unions are unions that represent state employees in the public sector—school teachers, government employees, state university employees, police officers. Public sector unions first formed in the 1860s with postal workers, police, teachers and firefighters founding craft unions from the 1850s-1900s, followed by general purpose federal and local state
employee organizations in the 1910s-1930s.\textsuperscript{1} Substantial growth of unions in the public sector began in the 1960s, thirty years after the Wagner Act and the National Labor Relations Act were enacted. It took until the 1960s for the legal environment that prohibited strikes and collective bargaining in the public sector to become hospitable to public sector unionization.\textsuperscript{2} Until then, labor relations in the public sector were governed by court-made laws denying the right to collectively bargain or arbitrate disputes, allowing public employers to enforce yellow-dog contracts, promote company unions, and fire employees for supporting unions and local decisions by mayors, school boards, and agency heads;\textsuperscript{3} under this regime of court-made law, public sector unions generally had no right to strike, to bargain collectively, or to arbitrate disputes.\textsuperscript{4}

Judges ruled that they should defer decisions of employment to local public officials, and that public employers could not delegate any power to control employment to the private bodies of unions.\textsuperscript{5} Unions lobbied government agencies for pay increases and were often unable to produce meaningful gains for members during this period.\textsuperscript{6} Nationwide, public sector unions began gaining greater acceptance in the late 1940s and into the 1950s, and those decades featured more stable, routinized and professionalized labor relations.\textsuperscript{7} By the late-1950s, Arkansas was the first court to strike down a ban on organizing in the public sector.\textsuperscript{8}

Increasingly, the gap between the law in theory and the law in practice for public sector collective bargaining was widening. Commentators of the period noted that informal collective bargaining in the public sector was rampant, and the question of legalizing public sector bargaining needed to be analyzed from a practical standpoint, because labor unrest would only increase as unions were denied legal rights to do what they were doing in practice.\textsuperscript{9} Heightening the contradictions, in January 1962, President JFK signed Federal Executive Order 10988, which gave limited bargaining rights to federal workers.\textsuperscript{10}

\begin{enumerate}
  \item Richard Kearney & Patrice Mareschal, Labor Relations in the Public Sector 14–16 (2014).
  \item Id. at 16–17.
  \item See Frederick v. Owens, 25 Ohio C.C. (N.S.) 581 (Ct. App. 1915); City of Jackson v. McLeod, 199 Miss. 676 (1946).
  \item Joseph E. Slater, Public Workers: Government Employee Unions, the Law, and the State, 1900–1962 71 (2004).
  \item Id. at 75.
  \item Slater, supra note 4, at 160.
  \item See generally Potts v. Hay, 318 S.W.2d 826 (Ark. 1958).
  \item Slater, supra note 4, at 164.
  \item Exec. Order No. 10988, 3 C.F.R. 1959–1963 (1962). The executive order granted exclusive bargaining rights (over very limited topics) to a union chosen by a majority of employees in a bargaining
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The first state to formally permit collective bargaining by government employees was Wisconsin in 1959. Unions lobbied to pass public sector statutes for the state of Wisconsin and beyond, adapting from defeats, and calling for statutory bargaining rights for all local government workers. New legislation helped to foster greater organization among public sector workers, and strong organization often led to further legislation. These public sector statutes were modeled off the NLRA, including language guaranteeing the right to organize and bargain collectively, providing for union elections procedures, and outlining Unfair Labor Practices. Public sector union membership remained relatively low through the mid-1960s. Unionization ballooned after the 1960s due to the growth of government via Great Society programs, coupled with demands from Baby Boomers, decades of stable bargaining relations governed by the NLRA, private sector workers spilling into the public sector, changes in the public sector legal environment, and federal orders guaranteeing unionization and bargaining rights for federal employees. By the late 1960s, states and the Court began finding that public employment constituted state action sufficient to trigger the Bill of Rights, including the right to association, prohibiting bars on public unionization. With this recognition, workers could agitate for their legally-protected associational and speech rights to organize and unionize.

Beginning in the 1960s, then, courts upheld the constitutional right for public workers to organize as state laws supplemented old judicial rules across the country, each law recognizing the same “fundamental right” recognized for private sector employees in the 1930s. States began to pass laws allowing limited bargaining rights that mirrored the NLRA, but with more limited strike actions. By 1966, sixteen states had enacted laws extending at least some organizing and bargaining rights to at least some public-sector

unit; gave formal recognition to a union representing 10 percent of employees (entitling the union to consultation rights); and gave informal recognition to a union representing any employees (allowing it to express its views on policies affecting its members).

11. KEARNEY & MARESCHAL, supra note 1.
12. SLATER, supra note 4, at 180–181.
14. Freeman, Unionism Comes to the Public Sector 24 J. ECON. LIT. 41, 45 (1986).
15. Id. at 18–21.
18. Slater, supra note 4, at 72.
employees. This growth responded to a great strike wave that spanned the next two decades, wherein public workers across the country forced public employers to finally recognize their unions. They rejected backroom lobbying and demanded real collective bargaining, backed by the right to strike. The upsurge came about in part because of the massive expansion of public sector employment, more than doubling from 1946 to 1967; in part because of larger militant movements for social change nationally; in part because private sector unions received the benefits of collective bargaining, fueling demands from public workers and making asks more palatable to policymakers. It is within this historical milieu of the rise of public sector unions that we must understand the legal regulation of public sector labor unions.

B. Legally Regulating Public Sector Unions

Public sector unionism flourished and generated growth in an era of private sector union decline; with its rise came the rise of its regulation. Just like with private sector unions, once workers decide to form a union in the public sector, the Union becomes the exclusive representative of all the workers in a workplace; only the union engages in collective bargaining for workers represented by a union. Public sector unions are governed by state laws that determine and limit the definitions and requirements of union membership, many of which were union shops in the 1960s and 1970s, where everyone covered by a union contract was paying fees to the union to cover the costs of representation. “Fair share fees,” or “agency fees,” emerged over the course of the last quarter of the twentieth century as a standard mechanism regulating how unions would allocate members’ fees to cover the costs of union membership as separate from their “political work.” Public-sector unionism was a relatively new phenomenon in 1977 when this two-tiered scheme was created by Abood; the decision to develop two tiers of union membership within a unionized shop fundamentally misunderstood what it takes to exercise the fundamental right of collective bargaining in the public sector.

Agency fee arrangements began with Abood v. Detroit Board of Education, 31 U.S. 209 (1977). The lower courts in Michigan had held that the state public sector labor statute rightfully allowed agency shops and unions to spend agency shop fees on “political activities.” The Court on appeal held that government employees had First Amendment rights to refuse to join the unions that represent them, and thus, to refuse to provide financial

19. Slater, supra note 4, at 191.
20. Burns, supra note 6, at 23.
21. Id. at 27–28.
support for the unions’ political activities that were unrelated to the union’s negotiating and enforcement duties. The court reached this decision by canvassing the purposes of the “agency shop.” They found it rooted in the principle of exclusive representation, a central element of industrial relations since the New Deal; they also stated that exclusive representation required adequate funding. Both the employees and the employer would gravitate toward an agency-shop arrangement to facilitate peaceful and stable labor relations and to ensure that the costs of collective bargaining were evenly distributed, the Court reasoned. By recognizing the First Amendment interests of employees, though, the court determined that individuals’ free speech rights may override the collective voice of public sector unions in bargaining and political activity. The *Abood* Court carved up the union shop into members and non-members, dues- and fee-payers, those who pay for “non-chargeable” and “chargeable” activities.

After *Abood*, the question of whether contracts with agency fee arrangements would exist was left to state law under the Taft-Hartley Act, allowing states to outlaw agency fees independent of federal oversight. State laws either permitted or legalized fee-arrangements that require unionized workers to pay union fees. For public sector unions in states with so-called “right-to-work” statutes, no worker represented by a collective bargaining agreement pays fair share fees to their union. Those states have enacted statutes, exercising their Section 14(b) rights under the NLRA, that restrict union agreements and agency-fee arrangements. For the twenty-two states where fair-share fee arrangements are legal, the “agency fee” system limits what an employer and union can require employees to pay in fees to the union in support of negotiation and administration of the collectively bargained agreement. In 2019, twenty-two states had “fair share” provisions in place. By contrast, twenty-eight states were “right-to-work” states. As of 2017, public sector unions in those states with “fair share” provisions represented at least twenty percent of state employees in those states. In states including California, New York, Pennsylvania, and Illinois, the figure of union-represented public sector employees was over fifty percent.

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means that more than half of the public-sector workers in some of the biggest
states in the United States, including New York, California, Pennsylvania,
and Illinois, were represented by unions that benefited from fair share fees,
until Janus.

The progression from Abood to Janus must be understood as a world
that labor law never meant to create. Labor law has historically made unions
exempt from traditional First Amendment restrictions—justifying
restrictions on strikes and picketing because traditional speech protections
are overridden by managerial and public interests in the bargaining and
employment relationship. Individual workers’ free speech rights are
generally overridden in the collective bargaining context because collective
bargaining as a fundamental right requires prioritizing collective speech both
legally, and practically. Individual free speech rights do have their place
within industrial democracy: through voting, elections, and contract
ratifications, workers direct their individual speech into collective decisions.
Courts must promote all those activities that safeguard the right to
collectively bargain.

C. Case

i. Facts and Procedural History

Janus v. AFSCME was first brought by Illinois Governor Bruce Rauner
as a challenge to the constitutionality of the state law authorizing agency fees,
and was dismissed for the Governor’s lack of standing. The court permitted
Mark Janus, a child support specialist, to continue with his own complaint
challenging the constitutionality of the fees themselves. The amended
complaint claimed that all nonmember fee deductions were coerced political
speech, and that the First Amendment forbids collecting any money from
non-members. The District Court dismissed the claim as foreclosed by
Abood. The Seventh Circuit affirmed.

Under the Illinois Public Labor Relations Act, employees of the state
can unionize if a majority of the workers in a bargaining unit vote to be
represented by a union as their exclusive representative. As sole
representative, only the union may negotiate with the employer on matters
relating to pay, wages, hours, and other conditions of employment, including
policy matters. The union has a duty to protect and represent the interests
of all represented public sector workers in Illinois, who were then paying

    (1935).
32. Id.
33. Illinois Public Labor Relations Act § 315/6(a),(c), 5 ILCS § 315 (1984).
34. Id. at § 315/6 (c), SS 315/4.
“agency fees” to their unions under Illinois state law. After *Abood*, this fee could only be designated to cover union expenditures germane to the union’s collective bargaining activities (“chargeable” fees). Under Illinois State law, the agency fee could only compensate the costs of the collective bargaining process, contract administration, and pursuing matters affecting wages, hours and conditions of employment. Some workers would pay additional membership dues related to the union’s “political and ideological projects”.

Mark Janus worked as a child support specialist at the Illinois Department of Healthcare and Family Services until July 2017. He was a non-union member represented by the American Federation of State, County, and Municipal Employees Council 31 (AFSCME 31). In the state of Illinois, about half of its ~873,000 unionized workers are public sector employees, and AFSCME represents more than 75,000 of those employees, with a more than 90% membership rate across the state. Janus claimed that he opposed the positions of his union, including those taken in collective bargaining, out of concern for the state’s finances. According to Janus, a significant infringement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences.

**ii. Court’s Holding**

The Court held first, that the District Court had jurisdiction over the petitioner’s suit and that Mark Janus was injured by Illinois’ agency-fee scheme. Second, that the state’s extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. It overruled *Abood* for four reasons.

First, *Abood* was inconsistent with standard First Amendment principles. The court ruled that the agency fees compelled individuals to financially support views that they might find objectionable, and compelled individuals to speak in cases where they opposed those views. Under an “exacting scrutiny” standard, neither a defense of agency fees as serving the

36. Illinois Public Labor Relations Act, § 315/6(e), § 315/3(g).
40. *Id.* at 2457.
41. *Id.* at 2454–55.
42. *Id.* at 2456–57.
43. *Id.* at 2459.
State’s interest in “labor peace,” nor as avoiding the risk of free riders, were appropriate reasons to restrict non-members’ speech rights.\footnote{44}

Second, alternative justifications for \textit{Abood} are unavailing. For instance, the Court dismissed the argument that the first amendment was never meant to protect the free speech rights of public employees.\footnote{45} Next, the Court dismissed defending \textit{Abood} on \textit{Pickering} grounds, where employee speech was found to be largely unprotected if it is part of what the employee is paid to do\footnote{46}. According to the Court, \textit{Pickering} applied where employee’s speech impacted that employee’s public responsibilities—quite different than a blanket requirement that all employees subsidize speech that they may or may not agree with.\footnote{47} It was not designed for cases where the government compels speech or speech subsidies in support of third parties.\footnote{48} Finally, \textit{Abood}’s chargeable (germane to collective bargaining) v. nonchargeable (concerns political or ideological issues) activity did not map onto \textit{Pickering}’s framework of weighing employees’ free speech v. employers’ interests.\footnote{49}

Third, even applying \textit{Pickering}’s framework, Illinois’ agency-fee arrangement still would not survive. The Court decided this because \textit{Pickering} limits employees’ speech when it is the speech of the employer, not the union on behalf of employees;\footnote{50} additionally, the speech is a matter of public concern because state spending on employee benefits and education, child welfare, healthcare, and minority rights are all subjects of public regulation and governance.\footnote{51} The State’s interests then do not justify the burden that agency fees place on nonmembers’ First Amendment interests—and the state’s interest in bargaining with an adequately funded exclusive bargaining agent is not at issue.\footnote{52}

Finally, \textit{stare decisis} does not require retaining \textit{Abood}. \textit{Abood} was reasoned poorly;\footnote{53} it is not workable;\footnote{54} factual and legal developments in First Amendment jurisprudence have eroded the decision’s underpinnings;\footnote{55} and unions were sufficiently warned not to rely on the law.\footnote{56}
III. ANALYSIS: WHY JANUS MATTERS

A. What Unions are Meant to Do: Unions have been Legally Designed to Balance the Interests of Unions and Employers

Unions are entities that represent their members collectively, overriding individualized-free-speech-interests workers may have in opposition to grievances or political advocacy, in order to win a collective grievance, engage in collective bargaining, or collectively advocate for more state funding for the workplace. Justice Kagan’s dissent in Janus artfully explains why the government should be allowed to limit individuals’ speech. Kagan turns to a history of individual public employees’ rights yielding when weighed against the realities of the employment context, because otherwise every employment decision would become a constitutional matter. The court, until Janus, continuously struck a basic balance that enabled the government to curb employees’ speech when the regulation was designed to protect the state’s managerial interests. Having a well-funded bargaining agent is one-such interest. What Kagan’s dissent reifies, though, is the divide between a public sector union’s representational work and its ideological work, relying on where the speech is directed: to the employer, or to the public sphere, rather than relying on the basic elements of collective rights and industrial democracy that unions embody.

The NLRA was written to enshrine majoritarian rule in the workplace as the means to govern collective decisions and rights. The National Labor Relations Act was designed to promote “labor peace”—to reduce labor strife, to promote industrial peace, to promote equity in bargaining power, to reduce conflict in the workplace, and to promote industrial democracy. While specifically written for private employees, states have likewise written laws

59. Id.
60. National Labor Relations Act, S. 1958, 79 Cong. Rec. 2368, 1313 (1935). Senator Wagner introducing the NLRA amendments to the Senate argued that:

"[A] great deal of interest centers around the question of majority rule. The national labor relations bill provides that representatives selected by the majority of employees in an appropriate unit shall represent all the employees within that unit for the purposes of collective bargaining. This does not imply that an employee who is not a member of the majority group can be forced to enter the union which the majority favors. It means simply that the majority may decide who are to be the spokesman for all in making agreements concerning wages, hours, and other conditions of employment. Once such agreements are made the bill provides that their terms must be applied without favor or discrimination to all employees. These provisions conforms to the democratic procedure that is followed in every business and in our governmental life, and that was embodied by Congress in the Railway Labor Act last year. Without them the phrase "collective bargaining" is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves."

to ensure orderly relations between public sector unions and the state. These goals, while they expand the state’s powers to regulate economic freedom, are fundamentally responsive to the “public interest,” which requires “mitigating inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract.” These laws have been designed to embody a balance of power between employers and the workforce. Labor relations acts balance unions’ and employers’ rights in order to determine how a workplace will be jointly governed by workers and the employer. In spite of later amendments limiting unions’ powers and more restrictive laws in the public sector, the fundamental principles of labor law were meant to balance power between employers and unions. The Court in Janus defined labor peace as not having two unions competing against each other. But this is a fundamentally flawed and limited definition of labor peace. That there will not necessarily be conflict between unions in the workplace is not the robust definition of “labor peace” that the legislatures imagined. While they were concerned with competing unions and company unions, they at root wished to avoid labor strife and imbalanced power relations in the workplace. The architecture of Labor Law was designed to

62. Id. at 19, Senator Wagner spoke before a Conference of Code Authorities in 1934 claiming that:
“The primary requirement for cooperation is that employers and employees should possess equality of bargaining power. The only way to accomplish this is by securing for employees the full right to act collectively through representatives of their own choosing... The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively, guaranteed to labor by section 7 (a) of the Recovery Act, is a veritable charter of freedom of contract; without it there would be slavery by contract.”

See also Boris, supra note 22, at 329.

63. National Labor Relations Act, S. 1958, 79 Cong. Rec. 2368 at 15. This design is articulated in Senator Wagner’s Presentation of the purpose of the NLRA when it came up for amendment:
“The keynote of the recovery program is organization and cooperation. Employers are allowed to unite in trade associations in order to pool their information and experience and make a concerted drive upon the problems of modern industrialism. If properly directed, this united strength will result in unalloyed good to the Nation. But it is fraught with great danger to workers and consumers if it is not counterbalanced by the equal organization and equal bargaining power of employees. Such equality is the central need of the economic world today. It is necessary to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions. Genuine collective bargaining is the only way to attain equality of bargaining power. By section 7 (a) of the Recovery Act, Congress attempted to open the avenues to collective bargaining by restating the right of employees to act through representatives of their own choosing, free from the influence of employers. But section 7 (a) did not outlaw the specific practices by which some employers set up insuperable obstacles to genuine collective bargaining.”

66. National Labor Relations Act, S. 1958, 79 Cong. Rec. 2368 at 1312. Senator Wagner explained the Amendments to the NLRA as:
“The break-down of section 7 (a) [bringing] results equally disastrous to industry and to labor. Last summer it led to a procession of bloody and costly strikes, which in some cases swelled
maintain labor peace between workers and the employer; right to work laws reduce the power of unions to exist, meaning there is no legal infrastructure for administering workplace grievances, which leads to greater labor strife.

Unions are institutions providing the fundamental rights of collective bargaining and representation, fighting for and winning social goods, welfare, and democratic governance for all workers. Legally embodied within the NLRA and similar public sector acts, unions were meant to provide privately what the New Deal State would otherwise provide publicly: healthcare, wages, pensions, etc. Public sector unions must necessarily be involved in politics in order to change their members’ working conditions, in order to get people elected to office who support funding their worksite, in order to win legislation that reduces harassment at work; in order to create the conditions for healthcare, wages and pensions in the public sphere. “Access to collective bargaining” is crucial “for recognition as a worker, and thus for full citizenship in the welfare state.” This duty of fair representation is a state-imposed duty. And where the state imposes this duty on a union to deliver services, it may permit the union to demand reimbursement for those services.

It is well within the state’s interest to bargain with a well-funded bargaining agent. The majority of the Supreme Court in Janus recognized this interest, but disputed that agency fees were necessary to ensure the

67. National Labor Relations Act, S. 1958, 79 Cong. Rec. 2368 at 16. As the NLRA was amended, Senator Wagner explained:

“Today, despite the minimum-wage provisions of the codes, the purchasing power of the individual employee working full time is less than it was during March of last year. This situation cannot be remedied by new codes or by general exhortations. It can be remedied only when there is genuine cooperation between employers and employees, on a basis of equal bargaining power. The only road to this goal is the free and unhampered development of real employee organizations and their complete recognition. Such development was promised by the Recovery Act.”


69. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 219 (1977); see also Lehnert v. Ferris Faculty Assn., 500 U.S. 507, 556 (1991), where Scalia said, uniquely, that “the law requires the union to carry non-members, indeed requires the union to go out of its way to benefit them, even at the expense of its other interests.”

70. See National Labor Relations Act, S. 1958, 79 Cong. Rec. 2368, 1321 (1935) (Senator Wagner in his Speech to the Conference of Code Authorities in 1934 describing the NLRA as the “[m]ost important, far-sighted, broad-minded employers, who see the threat to industrial peace and economic security implicit in the present state of affairs, will enter whole-heartedly into this plan for improvement”).

71. Even the majority opinion of the Supreme Court upheld the first two prongs of Abood making this very point: that exclusive representation benefits some government entities because they facilitate stable labor relations and because the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. See Janus v. AFSCME, 585 U.S. ___, 138 S. Ct. 2448, 2493–94 (2018) (Kagan, J., dissenting).
stable funding of such an agent.\textsuperscript{73} The majority cites the case of federal worker unions, which the minority argues is a poor framework for comparison, because the record shows that federal unions face free rider problems and are financially supported by the employer.\textsuperscript{74} The real problem, however, is that without public sector unions, it is unlikely that public sector workers will be adequately compensated and that public goods will be adequately provided.\textsuperscript{75} First, without a well-funded bargaining agent, unions will face obstacles to forming at all, and will not be able to effectively bargain for benefits. There will be no common goods for public sector workers to free ride on in the first place without strong unions.\textsuperscript{76} Unions will start to only represent members in grievances, converting a collective good into an exclusive good,\textsuperscript{77} one that may only be allowed during an open enrollment period.\textsuperscript{78} The erosion of access to the public goods that unions provide are one way in which the absence of agency fees will indeed lead to a destabilized bargaining agent.

\textsuperscript{73} Id. at 2494 (Kagan, J., dissenting).

\textsuperscript{74} Id. at 8, explaining that the majority relies on statistics from the federal workforce when in fact many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector; and second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See also Fort Stewart Schools v. FLRA, 495 U. S. 641, 649 (1990); Kearney & Mareschal, supra note 1, at 26. This means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector uses large, often national, bargaining units that provide unions with economies of scale. See Brief of International Brotherhood of Teamsters at 7, Janus v. AFSCME, 585 U.S. ___, 138 S. Ct. 2248 (2018).


\textsuperscript{76} Catherine Fisk & Martin Malin, After Janus, 107 CALIF. L. REV. ___ (forthcoming 2019); see also MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOOD AND THE THEORY OF GROUPS (1965) (explaining that organizations will never form, and individuals will not benefit from its common goods, if there are no mechanisms that require those who benefit from the common good to share in the common costs (i.e. taxation)).

\textsuperscript{77} OLSON, supra note 76, at 24.

\textsuperscript{78} Id. at 30, 36.

\textsuperscript{79} Id. at 45.
Second, public sector unions ensure that workers’ pay and working conditions remain competitive with private markets, so that public employers retain a workforce that can provide social goods to those living in the state. This is crucial for residents to have access to education, mental health services, and other state-provided benefits and service schemes. The state is competing in a limited way, and to varying degrees, with other employers for teachers, police, social workers, and firefighters. Without public sector unions, the quality of these social goods erode.\textsuperscript{80} If we believe that the state should deploy its police powers to employ teachers, police officers, and civil service workers who are qualified to do their jobs, and if the state will not of its own accord pay competitive rates, it is the union’s benefits (stability, pensions, healthcare), safeguarded by its stable funding, that guarantee adequately compensated public sector workers, and concomitantly the high quality goods that these workers produce (education, safety, welfare).\textsuperscript{81}

The jurisprudential turn to treat unions as entities that infringe on workers’ private free speech rights has failed to understand the historical arrangement of unions and employers that the NLRA set up so that workers could benefit from a democratically governed workplace that advocates for all workers’ rights. The NLRA created a series of collective rights that override free speech rights. The NLRA re-defined speech rights and First Amendment jurisprudence by creating collectivized social goods and collective speech rights (and prohibitions). For example, the right to picket (arguably, a speech right) is limited by Section 8 of the NLRA.\textsuperscript{82} Fundamentally, by “emphasizing the rights of individual workers rather than organized labor, state supervision favor[s] employers.”\textsuperscript{83} A legal world that prioritizes individual rights over collective rights in the unionized context will surely result in stronger employers, weaker unions, and a hollowed-out NLRA; a world contrary to that intended by NLRA, wherein the rights of workers and employers would be balanced.\textsuperscript{84} In order to engage in collective bargaining, a fundamental right, worker organizations must be able to advocate collectively and effectively with a unified voice that represents their members’ interests.\textsuperscript{85} In fact, contrary to economic arguments in favor of disempowering unions, the government should foster unions and regulate the

\textsuperscript{80} Celine McNicholas and Heidi Shierholz, \textit{Supreme Court Decision in Janus Threatens the Quality of Public-Sector Jobs and Public Services}, ECON. POL’Y INST., Jan. 13, 2018, https://www.epi.org/149780.
\textsuperscript{81} Id.
\textsuperscript{82} See National Labor Relations Act § 8b(7).
\textsuperscript{83} Boris, \textit{supra} note 22, at 325.
\textsuperscript{84} Id.
conduct of industrial relations to promote workplace equity and industrial peace.  

What the majority in Janus failed to understand, then, is that depriving a bargaining agent of resources fundamentally erodes public goods and labor peace. A robust definition of labor peace understands that the regulated bargaining relationship between unions and employers allows workers to govern their workplace, embodying industrially democratic principles, without labor strife. In reality, labor peace, as a function of industrial pluralism, is only possible with a well-funded bargaining agent whose members share the full costs of representation, so that the union can meet the employer on even footing to provide goods and services to publicly-employed workers. The Court dismissed that the costs of union representation might be a state interest, and explained instead that they “recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members.”

B. The Porous Line of “Politicking” and “Collective Bargaining” and the Fundamentally Public Duties of Public Sector Unions

My union is one among many that is redoubling our organizing efforts to thrive in the wake of Janus. With 19,000 represented public sector employees across California in our bargaining unit, with a quarter of our workforce coming in and out of unit every term, maintaining a well-funded bargaining agent is logistically quite challenging; and without a strong union, there cannot be shared governance in the workplace, and the quality of education provided at the University of California will suffer if academic student employees choose not to attend the University of California because the compensation and benefits offered are worse than at other institutions.

Janus rests on the argument that “because the compelled subsidization of private speech seriously infringes on First Amendment Rights, it cannot be casually allowed.” Jurisprudence since Abood treated unions’ political activities as speech, and dues and fees as possible contributions to this political speech. Kagan’s dissent reinforces this notion—claiming that Abood struck the appropriate balance between public employers’ interests and public employees’ expression. Kagan aptly recognized that exclusive representation arrangements benefit government entities’ stable labor relations, that these benefits require a union to have secure funding, and that

88. Id. at 2497 (Kagan, J., dissenting).
89. Id. at 2492 (Kagan, J., dissenting).
agency fees ensure this funding. But she failed to extend her analysis to all of the work of the union.

By calling the union’s activities “political speech,” the Court for the last forty years misunderstood the public, social good that unions generally and public sector unions specifically, have always provided. In order to effectively advocate for workers and ensure that there are teachers who want to accept their jobs, public sector unions have advocated at the state and federal levels for pro-worker candidates, legislation, and propositions that enhance public employees’ working conditions. The line between collective bargaining and lobbying has always been porous. Fundamentally, unions are embodying a vision of collective speech and collective voice that promotes the fundamental right to collectively bargain, because a public sector union cannot collectively bargain without state funding and state sanctions.

Unions have been funded by workers in the workplace for decades, not by infringing on workers’ free speech rights, but because there are no private speech rights that unions are trampling when advocating beyond the bargaining table, within the halls of the legislature. Some argue that individual employees do not determine the rate of agency fees, which are determined by the employer and the union. According to this “genuine choice” doctrine, individual free speech rights are not infringed upon, because neither dissenting nor supportive union employees had a genuine choice in the matter, and so there was no abridgement of constitutional rights. Meanwhile in Abood, the Court determined that economic issues like salaries and pension benefits did not raise First Amendment questions. They argued that this activity fell into terms of employment, separate from politicking. These lines of argument obscure what the majority in Janus correctly recognizes as the true history of labor laws: unions’ speech is public, collectivized speech, whether they are collectively bargaining or politicking. Where the majority errs, however, is in stating that this public speech infringes on individual speech. Unions’ speech does not so infringe, because individual workers, choosing to direct funds to the union (and with democratic choice in determining those rates), are governed by labor laws that limit employees’ First Amendment rights in their employment relationship (to strike, to picket, etc.).

Unions’ interest in public speech, as representatives of the majority of its membership, overrides any individual claim for both legal reasons (the fundamental right to collectively bargain) and practical reasons (otherwise a

90. Id. at 2492–93.
Union cannot effectively bargain). The purpose of labor law is to balance the competing power of unions and employers, not to balance the rights of individual workers and the employer. Rejecting the Abood and Janus frameworks recognizes that the public, political work that a union does, and the union’s collective interest, overrides any individual speech interest, in service of labor peace.

Now, unions will do the same work they always have: they will represent workers in contracts negotiations and in grievances, they will develop workplace campaigns, and they will take the fight for public funding to the legislatures in order to fully and effectively represent their membership. Public unions are necessarily political institutions. Management is wed to the state, and winning wage increases requires winning money in the political arena. That the court says that this political work of unions trammels workers’ private free speech rights abrogates the purpose of a union: to unite together in collective voice to transform working conditions in the face of managerial control and exploitation.

IV. CONCLUSION: PUBLIC SECTOR UNIONS’ WORK IS NECESSARILY PUBLIC

At the heart of the Janus decision is a sense that exclusive representation “substantially restricts the rights of individual employees.”93 Exclusive representation was designed to enhance the rights of all employees in a workplace by virtue of industrial democracy and workplace governance. These tenets of trade unionism are eroded by Janus. A well-funded bargaining agent is key to enhancing the rights of workers in a workplace and enacting democratic governance of the worksite. Without majority engagement and participation, there is no union to ensure workers’ grievances receive a fair hearing; without agency fees, unions have much less power in a world where even unionized jobs are increasingly precarious. Judicially differentiating “Chargeable” and “Non-Chargeable” activities in Abood misconstrued the statutorily- and constitutionally-guaranteed rights of public sector unions to do “political” work. To promote the fundamental right of collective bargaining, the union must engage with state politics, and in order to represent its workers, it must speak in a collective voice for everyone.

Public sector unions only rose to a force in the mid-twentieth century after years of labor militancy and struggle. They began as closed and union shops, and only after 1977 were they made into agency shops. The slow erosion of this scheme set up to ensure the provision of public goods has been further propagated by Janus.94 Unionism provides social goods that state workers and state residents have a right to. Janus tries to take away that right. It won’t succeed.

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