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## Janus's Two Faces

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JANUS'S TWO FACES

In ancient Roman religion and myth, Janus is the god of beginnings, transitions, and endings. He is often depicted as having two faces, one looking to the future and one to the past. The Supreme Court's *Janus v AFSCME* case of last Term is fittingly named.<sup>1</sup> Stunning in its disregard of principles of stare decisis, *Janus* overruled the forty-year-old precedent *Abood v Detroit Board of Education*.<sup>2</sup> The *Janus* decision marks the end of the post–New Deal compromise with respect to public sector unions and the First Amendment. Looking to the future, *Janus* lays the groundwork for further attack on labor rights—as well as for a broader erosion of civil society and democracy at the expense of corporate power. In that way, *Janus* represents an unequivocal transition to what Justice Kagan termed a “weaponized” view of the First Amendment among the Court’s majority—indeed, far more so than her dissent elaborates.

But *Janus* may also have another, more hopeful, forward-looking face. Ultimately, *Janus*’s undoing of the compromise that governed union fees for nearly fifty years provides the opportunity for a sys-

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<sup>1</sup> 138 S Ct 2448 (2018).

<sup>2</sup> 421 US 209 (1977).

tematic rethinking of the relationship between labor and the Constitution and, more generally, of the meaning of the First Amendment.

In *Janus*, the dissenters on the Court gestured at this broader project, but their future-facing efforts were partial and unsatisfying. Instead, they looked backward to *Abood*, a precedent the result of which was tolerable, but the reasoning of which was deeply flawed. *Abood* adopted a categorical approach to compelled subsidization of speech. It also fundamentally misconstrued the role of unions and their relationship to politics, the public's interest in labor relations, and the nature of the "public square." In so doing, *Abood* helped lay the groundwork for *Janus*'s demolition of union rights and for its protection of a right to exit from democratic institutions. Though *stare decisis* counseled in favor of maintaining *Abood*, its demise now opens up space to begin to flesh out what, in this setting, Justice Kagan's promise of a "First Amendment meant for better things" might look like.<sup>3</sup> This essay takes a first step toward that end.

## I

There is little dispute that the Supreme Court dealt a devastating blow to unions last Term when it issued *Janus*.<sup>4</sup> At its core, *Janus* overruled *Abood v Detroit Board of Education*,<sup>5</sup> a four-decades-old precedent that allowed public employers to require employees to pay "fair-share" or "agency" fees covering the costs that unions incur in negotiating and administering labor contracts on the employees' behalf. *Janus* invalidated thousands of public sector labor-management contracts in more than twenty states, affecting millions of government employees.<sup>6</sup> The decision will likely have substantial adverse effects on union membership and funding in the short term,<sup>7</sup> while forcing

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<sup>3</sup> *Janus*, 138 S Ct at 2502 (Kagan, J, dissenting).

<sup>4</sup> See, e.g., Sarah Jaffe, *With Janus the Court Deals Unions a Crushing Blow: Now What?*, NY Times (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/supreme-court-janus-unions.html>; Chris Maisano, *Labor's Choice After Janus*, Jacobin (June 27, 2018), <https://jacobinmag.com/2018/06/labors-choice-after-janus>; George Will, *In Janus the Supreme Court Corrects Its First Amendment Jurisprudence*, National Review (July 1, 2018), <https://www.nationalreview.com/2018/07/supreme-court-janus-decision-win-for-first-amendment-freedoms/>.

<sup>5</sup> 421 US 209 (1977).

<sup>6</sup> *Janus*, 138 S Ct at 2487–88 (Kagan, J, dissenting).

<sup>7</sup> Id at 2487. See Henry S. Farber, *Union Membership in the United States: The Divergence Between the Public and Private Sectors*, in Jane Hannaway and Andrew J. Rotherham, eds,

unions and government to explore new ways of structuring public sector worker representation going forward.<sup>8</sup> At the very least, to remain viable, unions will need to reallocate resources from organizing new workers and advocating for worker-friendly policies to soliciting fees and collecting dues.

Long before *Janus*, labor unions—and American workers—were already struggling. Globalization, the fissuring of the employment relationship, intense employer hostility to worker organizing, a weak labor law regime, and internal union deficiencies all had contributed to declining rates of unionization in the private sector.<sup>9</sup> Meanwhile, decades of austerity politics, the privatization of public services, and systematic conservative attack had put public sector unions on the defensive.<sup>10</sup> For many years, commentators had diagnosed American labor law as ossified and impotent to meet the needs of workers in the face of rising employer resistance and a transformed economy.<sup>11</sup> But with *Janus* and the passage of new “right-to-work” laws prohibiting agency fees in the private sector, even in states once considered union bastions, the American system of labor relations is no longer merely sclerotic and ineffectual. It is now unraveling at its seams.

To understand how momentous *Janus* was for unions and for labor law, one must understand the system of collective labor law that has governed since the New Deal. Both the National Labor Relations Act (the NLRA), which applies to private sector workers, and the

*Collective Bargaining in Education: Negotiating Change in Today's Schools* 27 (Harvard, 2006) (finding that union coverage is significantly higher where unions are allowed to negotiate union security provisions as compared to where agency shop arrangements are prohibited).

<sup>8</sup> See Part V.

<sup>9</sup> See Kate Andrias, *The New Labor Law*, 126 Yale L J 2, 13–45 (2016); David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard, 2014); Katherine V. W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge 2004).

<sup>10</sup> On the history of the right-to-work campaign, see Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* 56–78, 115–32, 223–55 (Cambridge, 2014); Joseph A. McCartin and Jean-Christian Vinel, *Compulsory Unionism: Sylvester Petro and the Career of an Anti-Union Idea, 1957–1987*, in Nelson Lichtenstein and Elizabeth Tandy Shermer, eds, *The American Right and U.S. Labor in America: Politics, Ideology, and Imagination* 226 (Pennsylvania, 2012). On the history of austerity politics and the sustained attack on the welfare state, see Paul Pierson and Theda Skocpol, *The Transformation of American Politics: Activist Government and the Rise of Conservatism* (Princeton, 2007); Paul Pierson, *Dismantling the Welfare State?: Reagan, Thatcher, and the Politics of Retrenchment* (Cambridge, 1994).

<sup>11</sup> See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum L Rev 1527 (2002) (arguing that the National Labor Relations Act has ossified); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv L Rev 1769 (1983) (detailing the failure of the NLRA to protect workers' right to organize).

vast majority of state-enacted public sector labor laws embrace the principles of majoritarian democracy. When a majority of workers in a given bargaining unit votes to unionize, the union becomes the exclusive bargaining agent charged with representing all workers in the unit, even those who objected to unionization.<sup>12</sup> The union has a duty to represent all of the workers fairly, and the negotiated contract benefits workers collectively.<sup>13</sup> In turn, each worker must pay a fee that covers the union's costs germane to its role as the exclusive bargaining agent. Without such a fee, a classic collective-action problem would arise.<sup>14</sup>

Beginning in the 1950s, however, the Supreme Court ruled that nonmembers could not be forced to pay for any of the union's political or ideological expenses.<sup>15</sup> Such contributions in the public sector, the Court opined in *Abood*, violate workers' First Amendment rights,<sup>16</sup> and, in the private sector, reach beyond what is permitted by statute.<sup>17</sup> In *Abood*, the Court explained the rule as follows: mandatory fees to cover collective bargaining are acceptable on the ground that the state has an interest in negotiating with a single bargaining representative to achieve "labor peace."<sup>18</sup> But, political activity, the Court concluded, is subsidiary to unions' core mission and risks conflicting with individuals' freedom of belief.<sup>19</sup>

This compromise—compulsory dues for the cost of representation and bargaining only—is known as the "agency-shop," or a "fair-

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<sup>12</sup> 29 USC § 159; *Emporium Capwell Co. v Western Addition Community Organization*, 420 US 50 (1975); *J. I. Case Co. v NLRB*, 321 US 332 (1944).

<sup>13</sup> *Vaca v Sipes*, 386 US 171, 186 (1967); *Steele v Louisville & N.R. Co.*, 323 US 192, 202–3 (1944).

<sup>14</sup> See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups 2* (Harvard, 1971).

<sup>15</sup> *Railway Employees Department v Hanson*, 351 US 225 (1956); *International Association of Machinists v Street*, 367 US 740 (1961).

<sup>16</sup> *Abood*, 431 US 209. See also *Chicago Teachers Union, Local No. 1 v Hudson*, 475 US 292 (1986) (establishing procedures that unions must follow to ensure employees have the ability to opt out of nonchargeable expenses).

<sup>17</sup> *Communication Workers of America v Beck*, 487 US 735 (1988) (interpreting the NLRA); *International Association of Machinists v Street*, 367 US 740 (1961) (interpreting the Railway Labor Act).

<sup>18</sup> *Abood*, 431 US at 224; see *Ellis v Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 US 435, 455–56 (1984) (stating that "[i]t has long been settled that . . . interference with First Amendment rights is justified by the governmental interest in industrial peace" and that compulsory fees are permissible when enabling an exclusive bargaining agreement).

<sup>19</sup> *Abood*, 431 US at 213, 235.

share” system. It existed in relatively stable form for over fifty years.<sup>20</sup> States that wished to prohibit fair-share systems and ban compulsory union fees altogether could do so for both their public and private sector workers. Yet under such “right-to-work” systems, unions must still represent the nonpaying workers, giving rise to a collective-action problem of “nightmarish proportions.”<sup>21</sup> Until recently, however, less than half of states—nearly all in regions with little union density—had adopted right-to-work laws.<sup>22</sup>

With the Great Recession of 2008, however, union opponents opened up a new line of attack.<sup>23</sup> Conservatives systematically began pushing the argument that, in the face of stagnating wages, unionized workers, and unionized government workers in particular, constituted an “elite” whose pay and pensions were not sustainable.<sup>24</sup> The proposition that public sector union contracts had become too expensive, and that unsustainable and underfunded union-won pension plans were undermining the finances of cities and states, gained traction.<sup>25</sup> Against this background, the National Right to Work Committee (NRTWC), which had long fought unions, and mandatory

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<sup>20</sup> Some scholars have argued that the dues settlement was a component of a “roughly even-handed” compromise that reduced constitutional protection for both pro- and anti-union speech. Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U Chi Legal F 513, 536 (2018); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich L Rev 169, 184–85, 193 (2015) (describing compromise as a quid pro quo).

<sup>21</sup> *Janus*, 138 S Ct at 2490 (Kagan, J, dissenting); *Abood*, 431 US at 220–22. For further discussion of the collective action problem, see Catherine L. Fisk and Martin H. Malin, *After Janus*, 107 Cal L Rev \*6–16 (forthcoming 2019), [https://lwp.law.harvard.edu/files/lwp/files/2019-fisk-c-malin-m-after\\_janus-clr-107.pdf](https://lwp.law.harvard.edu/files/lwp/files/2019-fisk-c-malin-m-after_janus-clr-107.pdf).

<sup>22</sup> *Right to Work States Timeline* (National Right to Work Committee), <https://nrtwc.org/facts/state-right-to-work-timeline/>.

<sup>23</sup> Joseph A. McCartin, *Public Sector Unionism Under Assault: How to Combat the Scapegoating of Organized Labor*, 22 New Labor F 54, 55–56 (2013); Richard B. Freeman and Eunice Han, *The War Against Public Sector Collective Bargaining in the U.S.*, 54 J Industrial Relations 386 (2012).

<sup>24</sup> For some examples of the recent scholarly attack on public sector unions, see Daniel DiSalvo, *Government Against Itself: Public Union Power and Its Consequences* (Oxford, 2015); Steven Greenhut, *Plunder!: How Public Employee Unions Are Raiding Treasuries, Controlling Our Lives, and Bankrupting the Nation* (Forum, 2009); Steven Malanga of the Manhattan Institute added *Shakedown: The Continuing Conspiracy Against the American Taxpayer* (Ivan R. Dee, 2010); Mallory Factor, *Shadowbosses: Government Unions Control America and Rob Taxpayers Blind* (Center Street, 2012). For a history of the conservative legal movement more generally, see, e.g., Jefferson Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (Oxford, 2016); Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, 2008); Joseph Fishkin and David E. Pozen, *Asymmetric Constitutional Hardball*, 118 Colum L Rev 915, 951–59 (2018).

<sup>25</sup> McCartin, 22 New Labor F at 56 (cited in note 23).

fees in particular,<sup>26</sup> began a renewed attack on agency fees in state legislatures and in the courts.<sup>27</sup>

In 2012, the conservative majority on the Supreme Court took up the cause, reaching out to grant certiorari in cases presenting the constitutionality of public sector union fees, despite the absence of any circuit splits. Invoking the First Amendment, the Court began to chip away at the agency-fee system. In *Knox v SEIU*,<sup>28</sup> Justice Alito, writing for the majority, constructed new rules that made it harder for unions to collect fees, while warning that *Abood*'s holding is "something of an anomaly."<sup>29</sup> In 2014, in *Harris v Quinn*,<sup>30</sup> he—and the Court—went further. In *Harris*, home-care workers in Illinois contested paying fees to the union elected by a majority of fellow home-care workers. In extended dicta, Justice Alito, writing for the majority, questioned *Abood*'s analysis and suggested that the First Amendment should prohibit fair-share fees in public sector employment generally.<sup>31</sup> But the *Harris* Court stopped short of overruling *Abood*, concluding instead that while the home-care workers could not be required to pay an agency fee, *Abood* did not squarely control their situation because they were only quasi-public sector employees.<sup>32</sup> In 2016, in *Friedrichs v California Teachers Association*,<sup>33</sup> the Court seemed poised to finish what *Knox* and *Harris* began: to hold that the First Amendment prohibits fair-share agreements of any sort in the public sector. With Justice Scalia's death, however, the Court split 4–4, thus affirming the decision below without opinion, and letting stand existing doctrine.<sup>34</sup>

During this same period, the NRTWC and conservative Republicans pushed for anti-union laws in previously union-friendly states,

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<sup>26</sup> See generally Lee, *The Workplace Constitution* (cited in note 10); McCartin and Vinel, *Compulsory Unionism* (cited in note 10).

<sup>27</sup> McCartin, 22 New Labor F at 57–58 (cited in note 23); Moshe Z. Marvit, *For 60 Years, This Powerful Conservative Group Has Worked to Crush Labor*, The Nation (July 5, 2018), <https://www.thenation.com/article/group-turned-right-work-crusade-crush-labor/>.

<sup>28</sup> *Knox v Service Employees International Union*, 567 US 298 (2012).

<sup>29</sup> *Id.* at 311.

<sup>30</sup> 134 S Ct 2618 (2014).

<sup>31</sup> *Id.* at 2630–34.

<sup>32</sup> *Id.* at 2634–38.

<sup>33</sup> 136 S Ct 1083 (Mem) (2016) (per curiam).

<sup>34</sup> *Id.*

bringing the total number of states that prohibit agency fees in the private sector to twenty-seven.<sup>35</sup> Michigan, the birthplace of the once mighty United Auto Workers, enacted an expansive right-to-work law in 2012.<sup>36</sup> That same year, Indiana expanded its prohibition on agency fees to cover all private sector employment.<sup>37</sup> Wisconsin enacted a series of even more far-reaching laws, prohibiting agency fees in the private sector, while stripping most governmental workers of their collective bargaining rights.<sup>38</sup> The right-to-work campaigns were part of a broader, long-running project to undermine unions and to weaken the Democratic Party, with which unions had long been associated.<sup>39</sup>

*Janus* represents the capstone of the anti-union campaign. With the newly appointed Justice Gorsuch supplying the fifth vote, Justice Alito declared for the conservative majority: “Fundamental free speech rights are at stake.”<sup>40</sup> “States and public-sector unions may no longer extract agency fees from nonconsenting employees,” he explained.<sup>41</sup> Indeed, Alito went further, holding that the First Amend-

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<sup>35</sup> *Right to Work States Timeline* (cited in note 22). But see Noam Scheiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, NY Times (Aug 7, 2018), <https://www.nytimes.com/2018/08/07/business/economy/missouri-labor-right-to-work.html>. The NLRA has been interpreted to allow states to enact “right to work” laws prohibiting agreements under which unions obtain a “union security clause” obliging all employees to pay any fees as a requirement of employment. For reasons eloquently explained by Judge Diane Wood, this statutory interpretation is questionable. See *Sweeney v Pence*, 767 F3d 654, 671 (7th Cir 2014) (Wood dissenting); see also Brief of Law Professors Andrias, Estlund, Fisk, Lee, and Weinrib as Amici Curiae in Support of Appellants, *International Union of Operating Engineers Local 139 v Schimel*, 863 F3d 674 (7th Cir 2017).

<sup>36</sup> Monica Davey, *Limits on Unions Pass in Michigan, Once a Mainstay*, NY Times (Dec 1, 2018), <https://www.nytimes.com/2012/12/12/us/protesters-rally-over-michigan-union-limits-plan.html>. See Mich Comp Laws § 423.14.

<sup>37</sup> Monica Davey, *Indiana Governor Signs a Law Creating a “Right to Work” State*, NY Times (Feb 1 2012), <https://www.nytimes.com/2012/02/02/us/indiana-becomes-right-to-work-state.html>. See Ind Code § 22-6-6.

<sup>38</sup> Monica Davey, *Unions Suffer Latest Defeat in Midwest with Signing of Wisconsin Measure*, NY Times (March 9, 2015), <https://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html>; Monica Davey, *Wisconsin Senate Limits Bargaining by Public Workers*, NY Times (March 9, 2011), <http://archive.nytimes.com/www.nytimes.com/2011/03/10/us/10wisconsin.html>. See Wis Stat § 111.04; 2011 Wis Laws 10.

<sup>39</sup> See Lee, *The Workplace Constitution* (cited in note 10); Elizabeth Tandy Shermer, *Sunbelt Capitalism: Phoenix and the Transformation of American Politics* (Pennsylvania, 2015). Compare with James Feigenbaum, Alexander Hertel-Fernandez, and Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* (National Bureau of Economic Research, Working Paper No 24259, 2018), <http://www.nber.org/papers/w24259.pdf> (describing political effects of right-to-work laws).

<sup>40</sup> 138 S Ct at 2460.

<sup>41</sup> Id at 2486.



ment protects not only a right to opt out of union fees but requires that workers affirmatively consent before any fees can be taken from their paychecks.<sup>42</sup>

## II

The majority opinion was stunning in its subversion of traditional principles of stare decisis. As Justice Kagan emphasized in dissent, *Abood* was not just any precedent. It was one on which there was extensive and widespread reliance in state law and contract. By overruling *Abood*, the Court “wreak[ed] havoc on entrenched legislative and contractual arrangements.”<sup>43</sup> And it did so notwithstanding that the other factors for stare decisis were met.<sup>44</sup> The lower courts had not struggled to apply *Abood*.<sup>45</sup> The *Abood* rule was deeply embedded in federal constitutional law.<sup>46</sup> *Abood* cohered with the Court’s approach to reviewing regulation of public employees’ speech in the nonunion context, such as in *Pickering v Board of Education*.<sup>47</sup> And *Abood*’s requirement that workers affirmatively opt out of union dues was in line with broader First Amendment doctrine in which the Court has required that dissenters object to compulsory speech; dissent is not presumed.<sup>48</sup> Indeed, the only basis for the claim that *Abood*

<sup>42</sup> Id. Compare with Aaron Tang, *Janus and the Law of Opt-Out Rights*, Harv L Rev Blog (July 2, 2018), <https://blog.harvardlawreview.org/janus-and-the-law-of-opt-out-rights/> (emphasizing novelty of the opt-out rule).

<sup>43</sup> 138 S Ct at 2499 (Kagan, J, dissenting). Compare with *Payne v Tennessee*, 501 US 808, 827 (1991) (“Considerations in favor of stare decisis are at their acme in cases involving property and contract rights. . .”).

<sup>44</sup> See *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 867–68 (1992) (discussing factors in stare decisis analysis).

<sup>45</sup> 138 S Ct at 2498 (Kagan, J, dissenting).

<sup>46</sup> See, e.g., *Locke v Karass*, 555 US 207, 213–14 (2009); *Lehnert v Ferris Faculty Association*, 500 US 507, 519 (1991); *Teachers v Hudson*, 475 US 292, 301–02 (1986); *Ellis v Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 US 435, 455–57 (1984). The Court had also relied on the rule when deciding cases involving compelled speech subsidies outside the labor sphere, in circumstances involving, for example, bar dues and student association fees. See, e.g., *Keller v State Bar of California*, 496 US 1, 9–17 (1990) (state bar fees); *Board of Regents of University of Wisconsin System v Southworth*, 529 US 217, 230–32 (2000) (public university student activity fees); *Glickman v Wileman Brothers & Elliott, Inc.*, 521 US 457, 471–73 (1997) (commercial advertising assessments).

<sup>47</sup> 391 US 563 (1968) (holding that the First Amendment protects speech on matters of public concern but that public employers have a right to manage their workforces by restricting employment-related speech); *Garcetti v Ceballos*, 547 US 410 (2006) (discussing doctrine); *Janus*, 138 S Ct at 2492–97 (Kagan, J, dissenting).

<sup>48</sup> See *West Virginia Board of Education v Barnette*, 319 US 624 (1943) (striking down state regulation requiring expulsion of schoolchildren who refused to recite the Pledge of Alle-

had become “an outlier among [the Court’s] First Amendment cases” was the doctrine Justice Alito had himself penned, in recent years, with the clear aim of weakening *Abood*—and unions.<sup>49</sup> The Court, Kagan charged, was doing far more than overruling a long-standing precedent. It was threatening the rule of law by undermining “the actual and perceived integrity of the judicial process.”<sup>50</sup>

But debates about *stare decisis* ultimately turn on how right or wrong the underlying decision is on the merits. If *Lawrence v Texas*<sup>51</sup> is correct—if *Bowers v Hardwick*<sup>52</sup> was wrong from the day it was decided—*stare decisis* worries abate.<sup>53</sup> So is *Janus* correct on the merits? And if not, why not?

Kagan’s answer to this question was again vehement. Recalling debates from the New Deal, she invoked the relationship between courts and majoritarian institutions: “There is no sugarcoating today’s opinion. The majority . . . prevents the American people, acting through their state and local officials, from making important choices about workplace governance.”<sup>54</sup> The most “alarming” feature of the majority’s opinion, she explained, was that it was using the Constitution to designate winners and losers in what should be understood as a policy debate.<sup>55</sup> The Court was “turning the First Amendment into a sword,

giance); *Wooley v Maynard*, 430 US 705 (1977) (holding that a Jehovah’s witness could not be criminally prosecuted for obscuring the state motto of New Hampshire, “Live Free or Die,” on the prefabricated license plate of his automobile).

<sup>49</sup> *Janus*, 138 S Ct at 2498 (Kagan, J, dissenting).

<sup>50</sup> *Id.* at 2478, quoting *Payne*, 501 US at 827. See Richard H. Fallon Jr., *Foreword: Implementing the Constitution*, 111 Harv L Rev 54, 109, 112 (1997) (describing justifications for the principle of *stare decisis* as promoting fairness, efficiency, predictability, and stability, and noting that “[t]o invite indiscriminate re-fighting of constitutional battles, and to raise attendant doubts about the stability of doctrine generally, would do more to retard than to advance the project of constitutionalism . . .”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum L Rev 723, 742–46, 757 (1988) (noting that in constitutional matters the Court has been relatively unconstrained by its own precedents but arguing that “precedent binds absent a showing of substantial countervailing considerations”). See also Randy J. Kozel, *Precedent and Speech*, 115 Mich L Rev 439 (2017) (critiquing Court’s recent willingness to ignore precedent in First Amendment cases).

<sup>51</sup> 539 US 558 (2003).

<sup>52</sup> 478 US 186 (1986).

<sup>53</sup> *Lawrence*, 539 US at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”). But compare with Frederick Schauer, *Precedent*, 39 Stan L Rev 571, 575 (1987) (“[I]f we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.”).

<sup>54</sup> *Janus*, 138 S Ct at 2501 (Kagan, J, dissenting).

<sup>55</sup> *Id.*

and using it against workaday economic and regulatory policy.”<sup>56</sup> It was “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.”<sup>57</sup> As Kagan asserted, this was “not the first time the Court ha[d] wielded the First Amendment in such an aggressive way.”<sup>58</sup>

Kagan was echoing a charge made by multiple observers that the Roberts Court has used the First Amendment much as the *Lochner* Court did the Due Process Clause—to thwart democratically chosen outcomes and, more specifically, to protect the privileges of the economically powerful while resisting legislative and executive efforts to advance the interests of the less powerful.<sup>59</sup> Kagan cited two recent cases, *National Institute of Family and Life Advocates v Becerra*<sup>60</sup> and *Sorrell v IMS Health Inc.*<sup>61</sup> She could have added numerous others, including *FEC v Wisconsin Right to Life*,<sup>62</sup> *Citizens United v FEC*,<sup>63</sup>

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<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> *Janus*, 138 S Ct at 2501 (Kagan, J, dissenting).

<sup>59</sup> See, e.g., Jeremy K. Kessler and David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 Colum L Rev 1953, 1959–60 (2018); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 Colum L Rev 2117, 2158–59 (2018); Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 Colum L Rev 2057, 2062–63 (2018); Jedediah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 Colum L Rev 2161 (2018); Weinrib, 2017 U Chi Legal F at 533–35 (cited in note 20); Amanda Shanor, *The New Lochner*, 2016 Wis L Rev 133 (2016); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 Harv CR-CL L Rev 323, 323–24 (2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum L Rev 1453, 1455–57 (2015); Jedediah Purdy, *The Roberts Court v. America*, Democracy (Winter 2012), <http://democracyjournal.org/magazine/23/the-roberts-court-v-america>; Joseph Fishkin and William E. Forbath, *Constitutional Political Economy When the Court Is to the Right of the Country*, Balkinization (June 28, 2018), <http://balkin.blogspot.com/2018/06/constitutional-political-economy-when.html>. See also Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 Colum L Rev 1915, 1917–18 nn 5–8 (2016) (collecting sources published from 2011 to 2016 that suggest the First Amendment has been “hijacked” by antistatist, economically libertarian interests).

<sup>60</sup> 138 S Ct 2361 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant factual information to patients).

<sup>61</sup> 564 US 552 (2011) (striking down a law that restricted pharmacies from selling data).

<sup>62</sup> 551 US 449 (2007) (holding that the federal campaign finance law’s prohibition on use of corporate funds to finance electioneering communications during pre-federal-election periods violated corporation’s free speech rights when applied to its issue-advocacy advertisements).

<sup>63</sup> 558 US 310 (2010) (striking down on First Amendment grounds federal restrictions on corporate “electioneering communications”).

*Arizona Free Enterprise Club's Freedom Club PAC v Bennett*,<sup>64</sup> *McCutcheon v FEC*,<sup>65</sup> and *Harris v Quinn*.<sup>66</sup>

As scholars have detailed, the Roberts Court's First Amendment cases, taken together, expand the scope of activity that the First Amendment protects, transforming what was previously understood as ordinary business activity into protected speech.<sup>67</sup> The decisions are also increasingly absolutist: once the speech interest is identified, the governmental interest is nearly always insufficient to justify the regulation. The cases thus enable individuals and corporations to opt out of democratically made decisions, while disabling the government from engaging in regulation, frequently, regulation that achieves redistribution.<sup>68</sup> An empirical study recently concluded, "[n]early half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals."<sup>69</sup>

### III

At the very end of the opinion, Kagan briefly moved beyond critique to gesture toward an affirmative vision for the First Amendment. "The First Amendment," she asserted, "was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions."<sup>70</sup> But

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<sup>64</sup> 564 US 721 (2011) (striking down on First Amendment grounds provision of Arizona's Citizens Clean Elections Act which provided matching funds to publicly financed candidates when privately funded opponent's spending exceeds the publicly financed candidate's initial state allotment).

<sup>65</sup> 572 US 185 (2014) (striking down on First Amendment grounds Federal Elections Campaign Act's (FECA) aggregate limit on candidate contributions and other contributions to party committees).

<sup>66</sup> 134 S Ct 2618 (2014) (striking down on First Amendment grounds agency fee requirement for home-care workers).

<sup>67</sup> See sources cited in notes 61–66; see also *Burwell v Hobby Lobby Stores, Inc.*, 134 S Ct 2751 (2014) (holding that the Religious Freedom and Restoration Act permits commercial enterprises to opt out of laws they judge incompatible with their sincerely held religious beliefs).

<sup>68</sup> See Garden, 51 Harv CR-CL L Rev at 332 (cited in note 59); Kessler and Pozen, 118 Colum L Rev at 1960 (cited in note 59); Purdy, 118 Colum L Rev at 2162–63 (cited in note 59). For further discussion of the implications of this doctrine, see Part IV.

<sup>69</sup> John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, & Implications*, 30 Const Comm 223, 224 (2015).

<sup>70</sup> *Janus*, 138 S Ct at 2502 (Kagan, J, dissenting).

what does it mean to say that the First Amendment is meant for better things? Despite Kagan's searing assessment of the majority's approach, her opinion offered scant explanation of what a First Amendment doctrine protecting democratic governance would look like.

Instead, in offering an alternative to the weaponized First Amendment, Kagan looked backward to *Abood*. Her dissent rested on a defense of *Abood*'s essential compromise—its acceptance of compulsory union fees to cover expenses germane to collective bargaining but not to politics. Yet while *Abood*'s outcome was tolerable for unions, the opinion's reasoning was deeply flawed on at least three levels. First, *Abood* overstated the speech harm to dissenting workers. Second, it fundamentally misdefined the role of unions and their relationship to politics, as well as the public's interest in labor questions. Third, it adopted a crabbed understanding of the government's interest in facilitating unions, one that rested on a narrow and one-sided view of the speech rights at stake. Ultimately, *Abood* offered, at best, a feeble defense of public sector unions and their relationship to democratic governance. At worst, the *Abood* compromise helped to sow the seeds for the weaponized, *Lochner*-ized First Amendment.<sup>71</sup>

A

The *Janus* majority and dissent share a basic premise: dues payments are a form of compelled speech protected by the First Amendment. That premise, which lies at the core of the “weaponized First Amendment,” long predates the Roberts Court.

Prior to World War II, the lawyers who championed the freedom of speech and expression were concerned, above all, with protecting labor's rights—the right to organize, to picket, to strike.<sup>72</sup> But as early

<sup>71</sup> Consider Kessler, 116 Colum L Rev at 1922 (cited in note 59) (arguing that First Amendment *Lochner*-ism long predates the Roberts Court and that economically libertarian tendencies “may be intrinsic to judicial enforcement of civil liberties”).

<sup>72</sup> Laura Weinrib, *The Taming of Free Speech: America's Civil Liberties Compromise* (Harvard, 2016). For additional work exploring how progressive lawyers, administrators, and activists invoked a range of constitutional rights, largely but not exclusively outside of the courts, in the hopes of building a more socioeconomically equal, pluralistic, and democratic society, see Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 Colum L Rev 1083 (2014); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Harvard, 2007); Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge, 2004); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 Va L Rev 1 (2000); James Pope, *Labor's Constitution of Freedom*, 106 Yale L J 941 (1997).

as the mid-1930s, conservative lawyers and businessmen began to reframe their *Lochner*-era substantive due process arguments in the language of the First Amendment, challenging New Deal regulation and collective labor rights as threats to free expression and individual rights.<sup>73</sup> By the postwar period, liberal lawyers and politicians shared some of conservatives' concerns about growing labor power and the "totalitarian" reach of the administrative state.<sup>74</sup> Ultimately, they coalesced around a compromise that allowed deferential review of ordinary economic legislation but promised active judicial review to protect individual civil liberties.<sup>75</sup> The line between economic policy and individual liberties was, however, contested from the outset. By the mid-1940s, the Supreme Court had already begun to invoke the First Amendment to protect employers' right to oppose unionization—with support from both business groups and the American Civil Liberties Union.<sup>76</sup>

Ironically, the Court's move to constitutionalizing a right to opt out of union dues can be traced to a 1956 case involving a private sector workforce, where the First Amendment typically does not apply.<sup>77</sup> In *Railway Employees Department v Hanson*,<sup>78</sup> the NRTW Foundation argued that the Railway Labor Act violated the First Amendment because it allowed railroad employers to compel employees to join and support unions.<sup>79</sup> The Court found state action, but without deciding

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<sup>73</sup> Weinrib, *Taming of Free Speech* at 226–310 (cited in note 72); Kessler, 116 Colum L Rev at 1925–36 (cited in note 59); Kate E. Andrias, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 Yale L J 2415, 2423–26 (2003); Lee, *The Workplace Constitution* (cited in note 10). See also Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 Harv L Rev 1, 52–62 (2017).

<sup>74</sup> Kessler, 114 Colum L Rev at 757–73 (cited in note 72). See also Weinrib, 2017 U Chi Legal F at 526–29 (cited in note 20) (describing how the Court backed away from its protection of labor's concerted activity).

<sup>75</sup> See Laura M. Weinrib, *The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940* (May 1, 2011) (unpublished PhD diss., Princeton University), [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1005&context=other\\_publications](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1005&context=other_publications). The oft-cited judicial encapsulation of this view is *United States v Carolene Products Co.*, 304 US 144, 152 n 4 (1938).

<sup>76</sup> *NLRB v Virginia Electric & Power Co.*, 314 US 469 (1941). See Weinrib, 17 U Chi Legal F at 529 (cited in note 20); Weinrib, *Taming of Free Speech* at ch 8 (cited in note 72); see also Andrias, 112 Yale L J at 2423–26 (cited in note 73).

<sup>77</sup> See Lee, *The Workplace Constitution* at 75–78, 89–93, 103, 124, 166–67, 179–82, 216–17, 245–53 (cited in note 10) (providing a history of the relationship between the state-action doctrine and debates about exclusive representation).

<sup>78</sup> 351 US 225 (1956).

<sup>79</sup> See Lee, *The Workplace Constitution* at 122–29 (cited in note 10).

the First Amendment question it rejected the NRTW's argument on the ground that nothing in the record indicated that the union was actually spending money for political purposes.<sup>80</sup>

A few years later, however, in *International Association of Machinists v Street*, the Court concluded that railroad collective-bargaining agreements requiring payment of union dues or fees do raise First Amendment concerns to the extent that the union spends the money on political causes.<sup>81</sup> The Court then avoided the constitutional issue by reading—or straining to read—the Railway Labor Act (RLA) not to authorize union security provisions that require employees to pay fees to support political causes.<sup>82</sup> In 1977, the Court extended the compelled-speech holding to public sector workers with *Abood*—the case *Janus* overruled. The Court ruled that Michigan could not constitutionally allow expenditure of agency fees on political activities over the objection of Detroit's nonunion teachers.<sup>83</sup> The Court also applied the same logic to state bars in *Keller v State Bar of California*, holding that attorneys' bar dues could not be used for political advocacy that was not “germane” to “the State's interest in regulating the legal profession and improving the quality of legal services.”<sup>84</sup> Later, the Court brought its reasoning back to the private sector in *Communications Workers v Beck*, as a matter of statutory construction of the National Labor Relations Act.<sup>85</sup>

Throughout this circuitous line of cases, however, the Court never offered a satisfying explanation for why requiring workers to subsidize a union (or requiring citizens to subsidize another representative organization) constitutes a violation of the First Amendment.<sup>86</sup> Com-

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<sup>80</sup> The Court found state action on a theory like the one it adopted in *Shelley v Kraemer*, 334 US 1, 20 (1948) (government enforcement of restrictive covenants is state action). According to the Court, the RLA's preemption of a state law invalidating a contract made the contract terms state action. But the Court never extended this theory beyond the RLA. See Lee, *The Workplace Constitution* (cited in note 10).

<sup>81</sup> 367 US 740, 749 (1961).

<sup>82</sup> *Id.* at 750–70.

<sup>83</sup> 431 US at 225–56.

<sup>84</sup> 496 US 1, 13 (1990).

<sup>85</sup> 487 US 735 (1988).

<sup>86</sup> Several scholars have argued that there is no persuasive answer. William Baude and Eugene Volokh, Comment, *Compelled Subsidies and the First Amendment*, 132 Harv L Rev 171 (2018); see also Catherine Fisk and Erwin Chermersinsky, *Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 Harv L Rev F 42 (2018) (agreeing that *Janus* was wrongly decided because paying money for services is not compelled speech that violates the

pulsory payment of fees does not constitute “true ‘compelled speech’” in which an individual is obliged personally to express a message with which he disagrees.<sup>87</sup> Compulsory payment of fees also does not restrict the payor’s own speech. As Justice Frankfurter wrote in his *Street* dissent, union objectors are not subject to “suppression of their true beliefs.”<sup>88</sup> “The individual member may express his views in any public or private forum as freely as he could before the union collected his dues.”<sup>89</sup>

From this vantage point, union dues are analogous to the wide range of circumstances where the government compels speech without triggering any First Amendment inquiry.<sup>90</sup> For example, legislators require witnesses to testify at hearings; judges insist that jurors pronounce verdicts; agency heads force regulated entities to report all sorts of information.<sup>91</sup> Like union dues, these compulsions occur without attribution of particular views to the speaker and without a restriction of the speaker’s own speech.<sup>92</sup>

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First Amendment); Catherine L. Fisk and Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 Loyola LA L Rev 439 (2015) (arguing that the Court wrongly finds compelled speech in union dues while ignoring the associational rights of unions). Brishen Rogers disagrees with the *Abood* approach, but he notes that it is broadly consistent with a mid-century “civil libertarian” approach that emphasized individual rights and expression in the political sphere but not the economic sphere. See Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 Berkeley J Empl & Labor L 177 (2016).

<sup>87</sup> Justice Scalia drew the distinction between true compelled speech and compelled subsidization of speech in *Johanns v Livestock Marketing Association*, 544 US 550, 557 (2005). For examples of cases the Court sees as involving “true compelled speech,” see *West Virginia Board of Education v Barnette*, 319 US 624 (1943); *Wooley v Maynard*, 430 US 705 (1977).

<sup>88</sup> *Street*, 367 US at 805 (Frankfurter, J, dissenting).

<sup>89</sup> *Id* at 806.

<sup>90</sup> Robert Post, *Compelled Subsidization of Speech: Johanns v Livestock Marketing Association*, 2005 Supreme Court Review 195, 216 (2005). See also Nikolas Bowie, *The Government Could Not Work Doctrine*, 105 Va L Rev \*1 (forthcoming 2019), <https://poseidon01.srn.com/delivery.php?ID=866105071122103089102091120092017075031054071045017087095110103101105001067068114109106101006099105006110085012114086100114098007082094092014083115102084022015065086090044076126010117073112120025023026079120005111098118107092092076091073071026017083097&EXT=pdf> (arguing that applying strict scrutiny to objectionable compulsion undermines government’s ability to function).

<sup>91</sup> *Id* at \*35; Post, 2005 Supreme Court Review at 216 (cited in note 90).

<sup>92</sup> The Court has inconsistently relied on the distinction between compulsions that require endorsement of speech or imputation of views and compulsions that do not. Compare *Rumsfeld v Forum for Academic and Institutional Rights*, 547 US 47 (2006) (emphasizing distinction between compelled subsidization of speech and compelled endorsement of speech and upholding a federal statute that required institutions of higher education to provide military recruiters equal access to that provided to other employers); *Board of Regents of the University of Wisconsin System v Southworth*, 529 US 217 (2000) (upholding university requirement that students pay fees to support organizations as long as university distributed fees in viewpoint neutral manner);



More to the point, if union dues constitute compelled speech, it is hard to see why fees and taxes imposed by the government do not as well.<sup>93</sup> As Justice Frankfurter emphasized in his *Street* dissent, the government requires us to pay for speech by the government all the time.<sup>94</sup> Pacifists must pay taxes knowing some portion will be used to subsidize pro-military expression. Climate change deniers must fund significant environmental measures expressing the contrary. Atheists must fund the speech of numerous government chaplains. None of these individuals has a First Amendment claim.<sup>95</sup> So too, the Court has held that the government may compel us to fund the speech of private actors, including political candidates through the public financing of political campaigns.<sup>96</sup> This is true even though the Court has concluded that restrictions on campaign expenditures violate the First Amendment.<sup>97</sup> In Justice Frankfurter's words, "[o]n the largest

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*Glickman v Wileman Brothers & Elliot, Inc.*, 521 US 457 (1997) (upholding a federal marketing program for California summer fruits that required private parties to subsidize advertising campaign on ground that program did not require endorsement); *PruneYard Shopping Center v Robins*, 447 US 74, 87 (1980) (holding that state constitutional provisions authorizing individuals to petition on the property of a privately owned shopping center did not raise First Amendment concerns even though it required the property owners to subsidize speech; the views of the persons petitioning would "not likely be identified with those of the owner"), with *Agency for International Development v Alliance for Open Society International*, 570 US 205, 208, 213, 218 (2013) (striking down a statute that prohibited federal funds from going to organizations that did not have "a policy explicitly opposing prostitution and sex trafficking" because the government was "compelling a grant recipient to adopt a particular belief as a condition of funding").

<sup>93</sup> Baude and Volokh, 132 Harv L Rev at 9–13 (cited in note 86); Bowie, 105 Va L Rev at \*24–25 (cited in note 90).

<sup>94</sup> *International Association of Machinists v Street*, 367 US 740, 808 (1961) (Frankfurter, J., dissenting).

<sup>95</sup> See *United States v Lee*, 455 US 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 451–52 (1988) (emphasizing that the First Amendment does not allow citizens to veto public programs of which they do not approve); *Jobanns*, 544 US at 562 ("[Citizens] have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object."). For further discussion, see Bowie, 105 Va L Rev at \*23–25 (cited in note 90); compare with Part IV (discussing developments post *Janus*).

<sup>96</sup> *Buckley v Valeo*, 424 US 1, 91–92 (1976) (per curiam) (rejecting a challenge to the federal campaign finance law that compelled taxpayers to subsidize presidential candidates who asked for public funding and upholding the financing scheme as no different from "any other appropriation from the general revenue").

<sup>97</sup> See Bowie, 105 Va L Rev at \*23 (cited in note 90) (analyzing Court's public financing holding in *Buckley v Valeo*); Baude and Volokh, 132 Harv L Rev at 189–90 (cited in note 86) (questioning the analogy between compelling to give money and restricting money).

scale, the Federal Government expends revenue collected from individual taxpayers to propagandize ideas which many taxpayers oppose.<sup>98</sup>

The Court has recognized the tension between the *Abood* line of cases prohibiting compelled subsidization and the obligation to pay taxes and other government fees, but has provided little reasoned justification for the distinction.<sup>99</sup> It has simply asserted that “[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.”<sup>100</sup> Notably, the Court has not clarified whether compelled subsidization of government speech does not implicate speech interests or rather whether the government’s interest in raising revenue and maintaining its operations outweighs any speech harm.<sup>101</sup>

Justice Powell—who would have restricted agency fees even more than the majority in *Abood*—claimed that subsidization of government speech was different than subsidization of private organizations because government was “representative of the people.”<sup>102</sup> But under this logic, compulsion to contribute to a union should be permissible as well: a fundamental tenet of labor law is that the union is a majoritarian body that must represent all workers in the bargaining unit fairly; and the Labor Management Reporting and Disclosure Act of 1959 is designed to ensure that all workers are entitled to rights of democratic participation.<sup>103</sup>

By deeming compelled union fees protected speech, *Abood* helped to lay the foundation for the weaponized First Amendment.<sup>104</sup> For

<sup>98</sup> *Street*, 367 US at 808 (Frankfurter, J, dissenting).

<sup>99</sup> Compare *United States v United Foods, Inc.*, 533 US 405 (2001) (holding that mandatory check-off for generic mushroom advertising violated the First Amendment) with *Jobanns*, 544 US at 566–67 (because the generic beef advertising at issue was the government’s own speech it was exempt from First Amendment scrutiny). See Post, 2005 Supreme Court Review at 197 (cited in note 90).

<sup>100</sup> *Jobanns*, 544 US at 562; see also *id.* at 559, quoting *Southworth*, 529 US at 529 (“[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”).

<sup>101</sup> *Id.*

<sup>102</sup> *Abood v Detroit Board of Education*, 431 US 209, 259 n 13 (1977) (Powell, J, concurring).

<sup>103</sup> See 29 USC §§ 411–15; *Sheet Metal Workers’ International Association v Lynn*, 488 US 347 (1989); Fisk and Malin, 107 Cal Law Rev at \*4 (cited in note 21).

<sup>104</sup> The Court’s increasing solicitude for commercial speech also played an important role in the weaponizing of the First Amendment. See *Central Hudson Gas & Electric Corp. v Public Service Commission of New York*, 447 US 557, 566 (1980); *Buckley v Valeo*, 424 US 1, 19 (1976); *First National Bank of Boston v Bellotti*, 435 US 765, 784 (1978); *Virginia State Board of*

if union dues cause a First Amendment harm worthy of strict scrutiny—even though they involve payment to a representative, democratic body and do not require actual speech by the payor, restrict the payor’s speech, or risk attribution of a view to the payor—all sorts of other compulsions could too, certainly much governmental regulation and perhaps even some taxes.<sup>105</sup>

## B

The problem with *Abood*’s reasoning, however, stems not only from the initial determination that the First Amendment is implicated but also from what followed next. One could grant that union dues constitute an infringement on dissenters’ freedom of speech (or association) rights but recognize that the infringement is marginal, while engaging in a reasoned inquiry about the social value of union dues. Here, too, however, *Abood* and the *Janus* dissent fell short.

American constitutional rights over the twentieth century have frequently been framed as absolutes.<sup>106</sup> In the First Amendment area, once a regulation falls into the category of restricting or compelling protected speech, and in particular political speech, the regulation is likely to fail. The work is done by the categorization.<sup>107</sup> At that point, little attention is paid to how burdensome a regime is in practice, or how good a reason the government has for its regulation in light of the particular situation. *Janus* is part and parcel of this approach: once the Court concluded that political speech was burdened, the union objector was destined to win. The government’s interests could not outweigh this categorically grievous harm.

*Abood* and the *Janus* dissent, at first blush, appear to take a different approach, weighing the government’s interest in labor peace, and therefore in exclusive representation, against the objecting worker’s interest in not being compelled to subsidize speech with which she disagrees. Having so balanced, *Abood* concluded that the government’s interest could prevail with respect to matters germane to collective

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*Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 762 (1976); Garden, 51 Harv CR-CL L Rev at 325 (cited in note 56); Robert Post, *Compelled Commercial Speech*, 117 W Va L Rev 867 (2015).

<sup>105</sup> See Part IV.

<sup>106</sup> Jamal Greene, Foreword, *Rights as Trumps?*, 132 Harv L Rev 28 (2018).

<sup>107</sup> *Id.* at 40. See also Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 Harv L Rev 22, 58 (1992).

bargaining. But, in fact, *Abood* was nearly as categorical as *Janus*, for the *Abood* Court agreed that dues for political speech were absolutely protected. This is the position Justice Kagan defended.

The compromise that divided political activity from matters germane to collective bargaining was understood to be a victory for unions when first announced, and from a financial perspective, it worked fairly well for labor organizations for forty plus years.<sup>108</sup> But as Alito argued in *Janus*, it is untenable to see politics as not germane to unions' work.<sup>109</sup> Indeed, in defining all political activity as not germane to unions' core function, *Abood* fundamentally misdefined unions. It implied that the primary job of unions is that of private business agents whose goal is to resolve narrow disputes for a defined set of members, rather than as organizations participating in a broader deliberation, and sometimes struggle, about the legitimacy of social practices relating to workers' lives, including both the scope of employer authority and the distribution of resources in society.<sup>110</sup>

Throughout its history, the American labor movement's relationship to politics—and to the state—has been complicated and multifaceted.<sup>111</sup> Yet it has never been so limited as the *Abood* line of cases suggests. As far back as the Gilded Age, broad and radical reform politics characterized the views of the mainstream labor movement.<sup>112</sup> The Knights of Labor in the 1880s, who organized unskilled and skilled workers together, sought to transform an economic system of

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<sup>108</sup> See Lee, *The Workplace Constitution* at 131 (cited in note 10) (“[l]abor advocates agreed that they had emerged from *Street* relatively unscathed” and describing *Street* as a “major loss” for the right-to-work movement).

<sup>109</sup> The division of the political from the economic characterized other areas of labor law in the post–New Deal era, presenting similar problems. See Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U Pa L Rev 1358 (1981); Rogers, 37 Berkeley J Empl & Labor L at 28–29 (cited in note 86). The *Janus* majority also objected to the *Abood* compromise on the ground that the line between matters of public concern and matters germane to collective bargaining is hard to draw. But, as Kagan correctly notes, many lines are hard to draw and courts nonetheless draw them. Moreover, there is little evidence that courts have had significant difficulties separating chargeable and nonchargeable expenses. See *Ellis v Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 US 435 (1984).

<sup>110</sup> See Don Herzog, *Household Politics: Conflict in Early Modern England* 99–100 (2013) (describing politics as the realm of conflict over legitimate authority and, more broadly, over the legitimacy of social practices).

<sup>111</sup> See, e.g., Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge, 1985); William E. Forbath, *The Shaping of the American Labor Movement*, 102 Harv L Rev 1109, 1185–95 (1989).

<sup>112</sup> Forbath, 102 Harv L Rev at 1121–23 (cited in note 111).

“wage slavery” into one committed to “republican liberty.”<sup>113</sup> By the early twentieth century, in response to widespread court injunctions against labor activity, the rising American Federation of Labor (AFL) had adopted a less political, more “voluntarist” approach, the primary goal of which was to remove the coercive power of the state from industrial relations.<sup>114</sup> Yet the AFL, too, used political strategies to achieve its goals, eventually winning the Norris LaGuardia Act and the Clayton Act, which limited the ability of federal courts to enjoin labor action.<sup>115</sup>

The rise of the Congress of Industrial Unions (CIO) in the 1930s and ’40s saw the return of a competing approach, as the more radical industrial unions saw politics and economics as inexorably connected, and advanced a vision of social democracy as well as industrial unionism.<sup>116</sup> Their efforts were in line with Progressives and New Dealers who envisioned a broad role for worker organizations and other civic associations in government—and a robust role for the state in enabling such involvement.<sup>117</sup>

Despite the competing visions of unionism, during this period both the AFL and the CIO used legislative and administrative strategies, as well as shop-floor militancy, to advance their goals.<sup>118</sup> In the aftermath of the postwar Taft-Hartley reforms, which constrained labor’s ability to engage in militant class-wide collective action and otherwise limited its strength, subsequent decades saw a return toward a

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<sup>113</sup> Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (Cambridge, 2015); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich L Rev 1, 58 (1999).

<sup>114</sup> Forbath, 102 Harv L Rev at 1118 (cited in note 111).

<sup>115</sup> Id at 1226–33; Nelson Lichtenstein, *State of the Union: A Century of American Labor* 63–65 (Princeton, 2d ed 2013).

<sup>116</sup> Lichtenstein, *State of the Union* at 32, 43–53, 100–05, 185–86 (cited in note 115); Forbath, 98 Mich L Rev at 62–76 (cited in note 113); Kate Andrias, *An American Approach to Social Democracy: The Forgotten History of the Fair Labor Standards Act*, 128 Yale L J \*616, 652–53 (forthcoming 2019) (on file with author). The industrial unions also organized across traditional boundaries of job categories, race, and gender in an effort to build a more egalitarian political economy.

<sup>117</sup> Id at \*642–51.

<sup>118</sup> Andrias, 128 Yale L J (cited in note 116); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv L Rev 1379 (1993); Lichtenstein, *State of the Union* at 43–64 (cited in note 115); Forbath, 98 Mich L Rev (cited in note 113). See also *Street*, 367 US at 800 (Frankfurter, J, dissenting) (“The AFL, surely the conservative labor group, sponsored as early as 1893 an extensive program of political demands calling for compulsory education, an eight-hour day, employer tort liability, and other social reforms.”).

less political unionism, one focused more on internal representation rather than broad-reaching social change.<sup>119</sup> Yet even in these decades, unions engaged in extensive political activity to advance the interests of working people, from efforts to enact national legislation like the Occupational Safety and Health Act and the Affordable Care Act, to fights to shape trade policy, to local campaigns for public housing and state employment law.<sup>120</sup>

The history of public sector labor unions is similarly political, perhaps more so. Public sector workers in municipal and state government were largely nonunion in the 1950s, but by the early 1960s, their wages had fallen behind their private sector counterparts, public sector labor was in short supply, and large groups of public sector workers had begun collectively demanding improved conditions at work.<sup>121</sup> From the outset, public sector labor leaders understood that political mobilization of their membership and communities was of central import to their ability to win union recognition and to bargain effectively.<sup>122</sup> In response to this mobilization, in 1958, Robert Wagner, the mayor of New York, and then in 1962, President Kennedy, issued executive orders legalizing public employee collective bargaining—and public sector unionism grew rapidly across the country over the next several decades.<sup>123</sup> Teacher unions, in particular, found themselves at the heart of political fights about racial identity, distribution of resources, and school control.<sup>124</sup>

In short, politics have always been inextricably connected to the work of the labor movement in the private and public sectors. When the AFL-CIO filed its brief in *Street*, the railway labor case that was

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<sup>119</sup> Lichtenstein, *State of the Union* at 114–40 (cited in note 115).

<sup>120</sup> Jake Rosenfeld, *What Unions No Longer Do* 159–81 (Harvard, 2014); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *Yale L J* 148, 152, 168–71 (2013); Lichtenstein, *State of the Union* at 185–86 (cited in note 115).

<sup>121</sup> Joseph E. Slater, *Public Workers, Government Employee Unions, the Law, and the State, 1900–1962* 193–94 (Cornell, 2016); Lichtenstein, *State of the Union* at 181–82 (cited in note 115).

<sup>122</sup> Lichtenstein, *State of the Union* at 182–83 (cited in note 115).

<sup>123</sup> *Id.*; Slater, *Public Workers* at 193–94 (cited in note 121). See also Slater, *Public Workers* at 158–92 (detailing enactment of Wisconsin public sector labor law).

<sup>124</sup> Marjorie Murphy, *Blackboard Unions: The AFT and the NEA, 1900–1980* (Cornell, 1990); see also Leon Fink and Brian Greenberg, *Upheaval in the Quiet Zone: 1199SEIU and the Politics of Health Care Unionism* (Illinois, 2d ed 2009) (describing politics and organizing successes of insurgent health care union); *Janus*, 138 S Ct at 2475–76.

the precursor to *Abood*, it offered the following encapsulation of the relationship between unions and politics:

A look at the history of union political action supplies abundant proof that labor's interest in politics is as old as its interest in the closed shop or the union shop. It provides full documentary support for legal commentators who have concluded that "political activity is a legitimate if not indispensable means of advancing the cause of organized labor"; that "political activities may be germane to collective bargaining insofar as favorable legislation, or the defeat of unfavorable legislation, strengthen the union's bargaining position"; and that unions have an "inherent interest" in lending financial support to certain political causes. In a word, even a brief survey of historical and economic data establishes that union political activity is wholly germane to a union's work in the realm of collective bargaining, and thus a reasonable means to attaining the union's proper object of advancing the economic interest of the worker.<sup>125</sup>

The brief continued with an elaboration of union politics beginning in colonial times, and then marched through to the present, drawing on historical sources as well as empirical studies, to show labor's involvement in politics for every time period in American history.

Justice Frankfurter, in his *Street* dissent, underlined the point. After detailing the labor movement's achievements, ranging from the eight-hour day to minimum wages, he wrote, "what is loosely called political activity of American trade unions . . . [is] activity indissolubly relating to the immediate economic and social concerns that are the *raison d'être* of unions."<sup>126</sup> In an internal memo found in his papers, which did not make it into the final opinion, Frankfurter noted the consistency between the American labor movement and that of the United Kingdom, emphasizing the necessarily intertwined political and economic role that unions play in any capitalist democracy.<sup>127</sup> In

<sup>125</sup> Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae, *Street*, 367 US at \*14 (US filed March 21, 1960) (available on Westlaw at 1960 WL 98532) (citations omitted). Notably, the AFL offered this argument to counter a due process claim; it saw no First Amendment problem for the reasons elaborated in Part III.A of this essay, and therefore disposed of that issue quickly.

<sup>126</sup> *Street*, 367 US at 800 (Frankfurter, J, dissenting).

<sup>127</sup> Felix Frankfurter, microformed on Felix Frankfurter Papers, Harvard Law School Library ("Felix Frankfurter Papers") at Part II: Supreme Court of the United States Case Files of Opinions and Memoranda: October Terms 1953–61, Reel 67, p 305 ("Reference to the English legislative history in dealing with the so-called political uses to which trade-union funds may be put of course duly takes into account that England does not have our constitutional problems. But trade unionism—its origins, its history, its development, its presuppositions and purposes—does not have geographic bounds, and the response to law to it is not determined by parochial considerations.").

the opinion, Frankfurter similarly drew attention to the fundamental nature of worker organizations in capitalist, common-law democracies; he pointed to the political activity of British trade unions “as early as 1867,” the Canadian Trades Congress in 1894, and recent political activity by Australian unions:

That Britain, Canada and Australia have no explicit First Amendment is beside the point. For one thing, the freedoms safeguarded in terms in the First Amendment are deeply rooted and respected in the British tradition, and are part of legal presuppositions in Canada and Australia. And in relation to our immediate concern, the British Commonwealth experience establishes the pertinence of political means for realizing basic trade-union interests.<sup>128</sup>

As Justice Frankfurter concluded, political efforts to improve the lot of workers generally are, or should be, “as organic, as inured a part of the philosophy and practice of . . . unions as their immediate bread-and-butter concerns.”<sup>129</sup>

The *Abood* line of cases thus fundamentally misconstrued the role of unions and their relationship to politics, and more broadly the relationship of politics to the economy. The cases also misdefined the public’s interest in labor relations and the nature of the “public square.” That is, to sustain the fair-share compromise without reducing fees to a paltry amount, the cases adopted a crabbed definition of “public concern.” The doctrine excluded from its definition of public concern what Justice Kagan in *Harris* termed the “prosaic stuff of collective bargaining.”<sup>130</sup> But workers’ wages are neither prosaic nor of only private concern. They are at the heart of how our society distributes economic resources. Again, Justice Frankfurter made this point in dissent in *Street* years ago.<sup>131</sup>

Ironically, it is now the NRTWC and the *Janus* majority who argue that *Abood* misdefines the nature of economic disputes between employers and employees. The wages and benefits of public sector workers, Alito pointed out, are clearly important to taxpayers and

<sup>128</sup> *Street*, 367 US at 812–13.

<sup>129</sup> *Id.* at 801 (Frankfurter, J, dissenting). See also *id.* at 812 (“For us to hold that these defendant unions may not expend their moneys for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life. American labor’s initial role in shaping legislation dates back 130 years.”).

<sup>130</sup> *Harris*, 134 S Ct at 2655 (Kagan, J, dissenting).

<sup>131</sup> *Street*, 367 US at 815 (Frankfurter, J, dissenting).



citizens.<sup>132</sup> Kagan did not contest that employment-related speech has public import, but she countered: “The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee’s speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square.”<sup>133</sup>

Yet speech about and directed to the workplace is also often simultaneously about and directed to the “public square.”<sup>134</sup> After all, the wages and benefits of both public and private sector workers are critical matters for public debate. Recent teacher strikes taking aim at chronic underfunding of education provide a vivid illustration of the connection between matters germane to collective bargaining and matters central to the public square.<sup>135</sup> So does the Fight for \$15, the remarkably successful union-led campaign to raise the minimum wage in cities and states across the nation.<sup>136</sup> Indeed, in interpreting the NLRA, the Court has recognized that private sector workers’ concerted activity regarding employment issues deserves protection whether it occurs through the employee-employer relationship or in the public square.<sup>137</sup>

In short, *Abood* and the *Janus* dissent operate according to a fiction that politics can be separated from economics, while embracing the view that unions’ primary function is or should be to resolve discrete workplace disputes.<sup>138</sup> The problem is not merely that this logic is unpersuasive as a descriptive matter. The mistake also fatally infected the rule *Abood* adopted about the permissibility of union fees. The *Janus* majority exploited the weakness of the public/private dichotomy for the position that *no* union fees in the public sector are constitutional. The dissenters might have argued the inverse: union fees

<sup>132</sup> 138 S Ct at 2474–76.

<sup>133</sup> *Janus*, 138 S Ct at 2495 (Kagan, J, dissenting).

<sup>134</sup> Kagan differentiated speech directed to the workplace from speech directed only to the public square on the ground that public-square speech does not implicate management interests in labor peace and workplace control. For a critique of this point, see Part III.C.

<sup>135</sup> See Kate Andrias, Feller Memorial Labor Law Lecture, *Peril and Possibility: On Strikes, Rights, and Legal Change in the Era of Trump*, Berkeley J Empl & Labor L (forthcoming 2019) (on file with author).

<sup>136</sup> Andrias, 126 Yale L J (cited in note 9).

<sup>137</sup> *Eastex, Inc. v NLRB*, 437 US 556 (1978).

<sup>138</sup> Compare with *Street*, 367 US at 814 (Frankfurter, J, dissenting) (“The notion that economic and political concerns are separable is pre-Victorian.”).

are constitutional, including those spent on political activity about labor-related issues, for such activities are germane to unions' core function.<sup>139</sup>

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While embracing an overly narrow conception of both unions and the public's concern, *Abood* also adopted too restrictive a view of the government's interest in facilitating unions. With the union framed as an apolitical, workplace problem solver, the Court defined the government's interest in unions as achieving "peaceful labor relations" and "labor stability" with its own employees.<sup>140</sup> In her *Janus* dissent, Kagan elaborated this theory. She detailed how mandatory agency fees promote managerial prerogative: first, she explained, exclusive representation arrangements benefit "government entities because they can facilitate stable labor relations" by eliminating "the potential for inter-union conflict and streamlin[ing] the process of negotiating terms of employment."<sup>141</sup> Second, "the government may be unable to avail itself of those benefits unless the single union has a secure source of funding . . . if the union doesn't have enough [money], it can't be an effective employee representative and bargaining partner. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others."<sup>142</sup>

But the government's interest in facilitating well-funded exclusive bargaining representatives in order to promote industrial peace is dangerously thin ground on which to justify the compulsion of political speech. As Alito pointed out, industrial peace and management prerogative can just as well be achieved, and largely have been, through other methods.<sup>143</sup> Moreover, labor peace and managerial efficiency were not the sole or even the primary motivations for the enactment of

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<sup>139</sup> This distinction would track the line drawn in *Eastex, Inc.*, 437 US, in interpreting section 7 of the NLRA. One might imagine other sensible distinctions, for example, carving out partisan candidate endorsements and contributions from chargeable expenses. The point is that the distinctions would flow from a more realist accounting of the role of unions in society, and would reflect a different judgment about the relative costs of the contested action to union objectors.

<sup>140</sup> *Janus*, 138 S Ct at 2489 (Kagan, J, dissenting).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (citations omitted).

<sup>143</sup> 138 S Ct at 2464–65; *Harris*, 134 S Ct at 2640.

modern labor laws—nor for labor’s insistence on the “union shop” and mandatory fees. As scholars have documented, democratic and egalitarian aspirations better explain the labor statutes enacted in the New Deal and in later decades. Supporters of the NLRA and the subsequent labor and employment statutes governing both private and public sector workers sought both to increase workers’ economic power and to give workers greater voice on the shop floor and in the broader democracy.<sup>144</sup> The labor statutes were a means toward equal citizenship and social equality.<sup>145</sup> And the closed-shop tradition was part and parcel of this effort.<sup>146</sup>

Theorists of social equality have long recognized the workplace as a key location for egalitarian struggle and for the shaping of democracy.<sup>147</sup> Michael Walzer warns that inequality at work can “corrupt the distributive spheres with which it overlaps, carrying poverty into the sphere of money, degradation into the sphere of honor, weakness and resignation into the sphere of power.”<sup>148</sup> Elizabeth Anderson details how employers exercise extraordinary authority over their employees’ lives at work and even beyond work, leaving them with little privacy and freedom.<sup>149</sup> John Dewey argued that the workplace is a central location in our society for the development and exercise of citizenship and democracy.<sup>150</sup> Unions have, since their inception,

<sup>144</sup> See Andrias, 128 Yale L J (cited in note 116); Forbath, 98 Mich L Rev (cited in note 113); Pope, 106 Yale L J (cited in note 72); Barenberg, 106 Harv L Rev (cited in note 118). The effort to equalize power provoked massive resistance by employers and was ultimately curtailed by Court interpretation and statutory amendment. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 Minn L Rev 265 (1978); Nelson Lichtenstein, *Taft–Hartley: A Slave-Labor Law?*, 47 Cath U L Rev 763 (1998).

<sup>145</sup> Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich L Rev 225 (2013); Forbath, 98 Mich L Rev (cited in note 113).

<sup>146</sup> Lichtenstein, *State of the Union* at 68 (cited in note 115). Exclusive representation is not the only way to create strong unions. See Rogers, 37 Berkeley J Empl & Labor L at 46–51 (cited in note 86) (explaining how European labor systems take wages out of competition and achieve greater economic equality and workplace democracy through methods other than compulsory dues).

<sup>147</sup> Bagenstos, 112 Mich L Rev at 243 (cited in note 145).

<sup>148</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 183 (Basic Books, 1983).

<sup>149</sup> Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk About It)* (Princeton, 2017); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 Ethics 287, 289 (1999).

<sup>150</sup> See John Dewey, *The Public and Its Problems* 118–21, 125 (1954); John Dewey, *Liberalism and Social Action*, in Jo Ann Boydston, ed, 11 *The Later Works, 1925–1953* 25 (1987). For a

sought to rectify the imbalances of power at work and to engage workers in the practice of democracy, both in their workplaces and in government.<sup>151</sup>

Today, in an era of staggering inequality, unions still function to increase the power of workers in the economy and the democracy, albeit with less success than in the post–New Deal period.<sup>152</sup> Indeed, Justice Kennedy observed at oral argument that what was fundamentally at stake in *Janus* was worker power in politics. He pressed the union’s lawyer to acknowledge that “if you do not prevail in this case, the unions will have less political influence.” The attorney conceded the point.<sup>153</sup> Though Kennedy offered this argument as a reason why union fees were unconstitutional, Kagan might have offered the opposite perspective, invoking the significant interest the government has in facilitating workers’ collective voice in the democracy as a justification for exclusive representation and union fees.<sup>154</sup>

Yet democratic and egalitarian aspirations—or countervailing speech interests—nowhere appear in *Abood* or Justice Kagan’s *Janus* dissent.<sup>155</sup> Rather, Kagan’s focus is quite the opposite: she emphasizes

modern argument about the relationship of work to citizenship, see Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (Oxford, 2003).

<sup>151</sup> See Andrias, 128 Yale L J (cited in note 116); Gourevitch, *From Slavery to the Cooperative Commonwealth* (cited in note 113); Rosenfeld, *What Unions No Longer Do* (cited in note 120); Forbath, 98 Mich L Rev (cited in note 113).

<sup>152</sup> See Rosenfeld, *What Unions No Longer Do* at 10–30 (cited in note 120). Compare with Richard B. Freeman and James L. Medoff, *What Do Unions Do?* (Basic Books, 1984) (describing, as of the mid-1980s, the role of trade unions in the United States). On the relationship between unions and equality, see, e.g., Bruce Western and Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 Am Soc Rev 513, 513 (2011); see also Henry S. Farber et al, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*, National Bureau of Economic Research Working Paper No. 24587 (May 2018), [http://tuvalu.santafe.edu/~snaidu/papers/union\\_sub3.pdf](http://tuvalu.santafe.edu/~snaidu/papers/union_sub3.pdf) (finding that “unions have . . . a significant, equalizing effect on the income distribution”); Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class* 142 (Simon & Schuster 2010); Kay Lehman Schlozman, Sidney Verba, and Henry E. Brady, *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* 325–26 (Princeton, 2012).

<sup>153</sup> Transcript of Oral Argument at 54, *Janus*, 138 S Ct 2448. For a different take on this exchange, see Purdy, 118 Colum L Rev at 2182 (cited in note 59).

<sup>154</sup> This approach would not have persuaded the majority but would have put the dissent on stronger footing both descriptively and normatively. Notably, Kagan has offered similar arguments in her campaign finance dissents. See *Arizona Free Enter Club’s Freedom Club PAC v Bennett*, 564 US 721, 756 (2011) (“The program does not discriminate against any candidate or point of view, and it does not restrict any person’s ability to speak. In fact, by providing resources to many candidates, the program creates more speech and thereby broadens public debate.”).

<sup>155</sup> Contrast with *id.*

the need to give the government a “free[] hand” in dealing with its employees,<sup>156</sup> underlining the cases’ “attitude . . . of respect—even solicitude—for the government’s prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer.”<sup>157</sup> Indeed, to support her position in *Janus*, Kagan defended the focus on management prerogative as the relevant governmental interest in the area of public employee speech more generally.<sup>158</sup> But, as scholars have shown, the public employee speech doctrine systematically underprotects employee speech interests and the broader interest in social equality, for it nearly always permits the government, as manager, to discipline employees for speech made in the context of their employment.<sup>159</sup> Like the *Abood* doctrine, the public employee speech doctrine places employment not within the domain of governance in which the usual principles of free speech apply, but within the domain of management subject to norms of managerial control and efficiency.<sup>160</sup> In the end, for those committed to a more egalitarian democracy, the doctrine is hard to reconcile with Kagan’s allusion to a First Amendment meant “for better things.”

#### IV

The *Abood* doctrine is long-standing and the *Janus* dissenters had reason to emphasize stare decisis rather than to challenge long-standing precedent. And unions did not seek *Abood*’s reversal. But the liberal compromise struck in the 1950s over Frankfurter’s dissent, extended by *Abood* and defended by the *Janus* dissenters, helped lay the groundwork for the weaponized First Amendment. The *Abood*

<sup>156</sup> *Janus*, 138 S Ct at 2492 (Kagan, J, dissenting), quoting *NASA v Nelson*, 562 US 134, 148 (2011).

<sup>157</sup> *Id* at 2493.

<sup>158</sup> *Id* at 2492–97 (discussing *Pickering v Board of Education*, 391 US 563 (1968) and *Garcetti v Ceballos*, 547 US 410 (2006)).

<sup>159</sup> George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J L & Pol 129, 144 (2008); Bagenstos, 112 Mich L Rev at 265 (cited in note 145). Because of the state-action requirement, the doctrine gives virtually no protection to private employees’ speech. See Bagenstos, 112 Mich L Rev at 254–62 (cited in note 145); Anderson, *Private Government* (cited in note 149).

<sup>160</sup> On this categorization more broadly, see Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 199–266 (Harvard, 1995).

doctrine first found a categorical speech harm where, at most, a minimal infringement existed. It then went on to adopt an untenable account of the relationship between politics and economics and, more specifically, a cramped definition of both the union role and the nature of the “public square.” Consistent with this approach, *Abood* privileged the government’s managerial interests over its egalitarian and democratic functions and took a narrow, one-sided view of the speech interests at stake. Ultimately, *Abood*’s approach vindicated the “right to exit”—the right of dissenters to opt out of the collective, even when guaranteed the right to fair representation and the right to exercise voice through democratic processes.<sup>161</sup>

The roots of union exit rights are in part liberal and egalitarian. In the 1940s–1960s, African-American workers and civil rights litigators rightfully opposed exclusionary unions, and their interests sometimes overlapped with the goals of the NRTWC.<sup>162</sup> But vindicating the right to participate on an equal basis need not have resulted in constitutionalizing a right to exit. By defending this path, by attempting to prop up *Abood* rather than to rethink it, the Court’s more liberal members accepted the core of a doctrine that now threatens to eviscerate civil society and fortify corporate power.

Looking to the future, how much further the conservative majority on the Supreme Court will go in weaponizing the First Amendment is unclear. *Janus* raises the possibility that exclusive representation could itself be deemed unconstitutional, further unraveling the U.S. labor law regime. After all, if compelled union fees in the public sector constitute an incurable First Amendment harm, why doesn’t compelling a dissenter to be bound by the agreement of a union with which it disagrees? Indeed, in *Janus*, Alito characterized the state’s requirement that a union serve as an exclusive bargaining agent for its employees as “a significant impingement on associational freedoms that would not be tolerated in other contexts.”<sup>163</sup> Thus far lower courts have declined to read *Janus* so broadly<sup>164</sup>—and the position of the conservative majority on this question is unclear. The *Janus*

<sup>161</sup> See Robin West, *A Tale of Two Rights*, 94 BU L Rev 893, 894 (2014).

<sup>162</sup> See Lee, *The Workplace Constitution* (cited in note 10).

<sup>163</sup> *Janus*, 138 S Ct at 2478.

<sup>164</sup> *Bierman v Dayton*, 900 F3d 570 (8th Cir 2018); *Reisman v Associated Faculties of University of Maine*, 2018 WL 6312996 (D Me); *Uradnik v Inter Faculty Organization*, 2018 WL 4654751 (D Minn).

Court did not expressly draw into question *Minnesota State Board for Community Colleges v Knight*, which upheld exclusive representation against First Amendment challenge.<sup>165</sup> Rather, *Janus* spent several pages making clear that the argument that “designation of a union as exclusive representative of all employees in a unit and the exaction of agency fees are [not] inextricably linked.”<sup>166</sup>

Also unclear is whether *Janus* will undermine the government’s own ability to fund speech with which taxpayers disagree: for example, will the line separating the public financing scheme for elections in *Buckley* from the agency-fee scheme of *Janus* hold? In a case pending before the Washington Supreme Court, the Pacific Legal Foundation (PLF) points to *Janus* to support its challenge to an electoral public financing scheme. The PLF asserts that Seattle’s Democracy Voucher Program “compels property owners to bankroll speech they do not wish to support,” and that it “disfavors minority viewpoints” by distributing money “at the whim of majoritarian interests.”<sup>167</sup> In the immediate term, it seems unlikely that those Justices concerned about the Court’s institutional legitimacy will extend *Janus* so far—but the ground is laid.<sup>168</sup>

Another open question is whether *Janus*’s newly manufactured opt-in rule will give rise to a far-reaching presumption of exit from the body politic. Under the doctrine to date, opt-out is the rule: a student who wishes not to recite the Pledge of Allegiance is protected from expulsion, but the school need not affirmatively seek permission from every student or parent before recitation of the pledge.<sup>169</sup> A Jehovah’s Witness who obscures the state’s motto on a license plate is shielded from criminal prosecution, but the state need not affirmatively seek consent from every driver before distributing the standard plate.<sup>170</sup> In *Janus*, Alito turned the doctrine on its head, holding that workers need not object to union dues; rather, their dissent will be

<sup>165</sup> 465 US 271 (1984).

<sup>166</sup> *Janus*, 138 S Ct at 2465–69.

<sup>167</sup> *Elster v City of Seattle*, No 96660-5 (Wash Sup Dec 19, 2018), accepting certification, No 77880-3-I (Wash App).

<sup>168</sup> Linda Greenhouse, *A Supreme Court Divided. On the Right*, NY Times (Dec 20, 2018), <https://www.nytimes.com/2018/12/20/opinion/abortion-planned-parenthood-supreme-court.html>.

<sup>169</sup> *West Virginia Board of Education v Barnette*, 319 US 624 (1943).

<sup>170</sup> *Wooley v Maynard*, 430 US 705 (1977).

presumed and fees will only be collected if workers affirmatively consent.<sup>171</sup> If such logic were extended, a host of majoritarian decisions and governmental regulations would not apply until regulated entities opt in. But this result seems unlikely. The government simply could not function if it were routinely required to obtain consent from each individual and corporation affected by a regulation. Here, it seems the *Janus* majority was willing to distort the traditional approach to compelled speech in order to weaken unions in particular.

In other ways, the reach of *Janus* as a “weapon” is more evident. As Kagan notes in her dissent, and Alito does not refute, the Court had repeatedly relied upon the *Abod* line of cases to approve mandatory fees imposed on state bar members.<sup>172</sup> In 1961, in *Lathrop v Donobue*,<sup>173</sup> the Court treated the constitutionality of bar dues as having been settled in 1956 by *Hanson*. Then, in *Keller v State Bar of California*,<sup>174</sup> the Court relied on *Abod* in setting the constitutional limits on mandatory bar fees. *Keller* is now in doubt, with the Court having granted, vacated, and remanded related cases.<sup>175</sup> The consequences reach beyond the profession of law. The same principle would bar the government from compelling contributions to, and thereby facilitating the operation of, a host of other civic organizations. Frankfurter foresaw this result way back in *Street*. In an internal memo, he warned his brethren that he would “eat his hat” if the Court’s opinion did not lead to a similar ruling for union fees in the private sector (which it did), for integrated state bars (which seems likely), and for other collective bodies.<sup>176</sup>

More generally, *Janus* is unlikely to be the last case in which the Court strikes down regulation on the ground that it requires individuals or corporations to subsidize messages with which they disagree. Conservative judges on the D.C. Circuit have used a similar theory against numerous governmental regulations. For example,

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<sup>171</sup> *Janus*, 138 S Ct at 2486; see Tang, *Janus and the Law of Opt-Out Rights* (cited in note 42). Even more shocking, perhaps, is that this about-face in the doctrine is stated only briefly in the majority opinion with little explanation, and altogether neglected by Kagan. Thanks to Justin Driver for this point.

<sup>172</sup> *Janus*, 138 S Ct at 2498 & n 3.

<sup>173</sup> 367 US 820, 828 (1961).

<sup>174</sup> 496 US 1 (1990).

<sup>175</sup> *Fleck v Wetch*, 868 F3d 652 (8th Cir 2017), cert granted, vac’d, rem’d, 2018 WL 6272044 (Dec 3, 2018).

<sup>176</sup> Felix Frankfurter, Felix Frankfurter Papers at Part II, Reel 67, p 573.



drawing on First Amendment principles, a panel of the D.C. Circuit concluded that requiring an employer to inform workers of their legal right to organize a union via an official posting violated the NLRA's statutory "free speech" provisions.<sup>177</sup> Another panel concluded that a Securities and Exchange Commission regulation violated the First Amendment insofar as it required publicly traded companies to disclose whether their products contained minerals traceable to African war conflicts.<sup>178</sup> Yet another struck down a regulation mandating that cigarette packages display textual warnings and graphic images regarding the health risks of smoking.<sup>179</sup> To date, the D.C. Circuit sitting en banc has rejected this fully weaponized version of the First Amendment.<sup>180</sup> But in the aftermath of *Janus*, employers are pressing the argument again, arguing, for example, that their own free speech rights are violated when employees are granted rights by the National Labor Relations Act to wear union buttons at work; such buttons, the argument runs, carry a message with which the employer disagrees.<sup>181</sup> *Janus* suggests that at least several Justices on the Supreme Court may sympathize with this claim.

## V

What then is *Janus*'s more hopeful, future-looking face for those committed to labor rights? *Janus*'s undoing of the compromise

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<sup>177</sup> *National Association of Manufacturers v NLRB*, 717 F3d 947 (DC Cir 2013) (concluding that section 8(c) of the NLRA, which protects employers' rights to express "any views, argument, or opinion" prohibited the agency from requiring employers to post a notice informing employees of their rights under their law), overruled by *American Meat Institute v U.S. Department of Agriculture*, 760 F3d 18 (DC Cir 2014).

<sup>178</sup> *National Association of Manufacturers v SEC*, 748 F3d 359, 373 (DC Cir 2014), adhered to on reh'g, 800 F3d 518 (DC Cir 2015), and overruled by *American Meat Institute v U.S. Department of Agriculture*, 760 F3d 18 (DC Cir 2014).

<sup>179</sup> *R. J. Reynolds Tobacco Co. v FDA*, 696 F3d 1205, 1214 (DC Cir 2012), overruled by *American Meat Institute v U.S. Department of Agriculture*, 760 F3d 18 (DC Cir 2014).

<sup>180</sup> *American Meat Institute v U.S. Department of Agriculture*, 760 F3d 18, 23–34 (DC Cir 2014) (rejecting prior panel rulings); *In-N-Out Burger, Inc. v NLRB*, 894 F3d 707 (5th Cir 2018) (affirming NLRB decision that restaurant employees have rights under section 7 of the NLRA to wear buttons displaying union message). See also *National Association of Manufacturers v Perez*, 103 F Supp 3d 7, 17 (DDC 2015) (requiring an employer to post government speech about labor rights is simply not compelled speech in violation of the First Amendment).

<sup>181</sup> See *In-N-Out Burger, Inc. v NLRB*, 894 F3d 707 (5th Cir 2018), petition for cert filed, No 18-340 (Sept 14, 2018) (petitioning for certiorari from Fifth Circuit decision that company violated federal labor law by barring an employee from wearing a "Fight for \$15" button on his work uniform and citing *Janus* to support First Amendment argument).

that governed union fees for nearly fifty years is a blow to unions, but it opens up space for innovation and reform. The *Janus* majority suggested that, in order to solve the free-rider problem created by the decision, labor organizations could abandon majoritarian, exclusive representation.<sup>182</sup> They could accept a system in which they no longer represent all workers in a given bargaining unit, offering their services only to supporters. Some scholars have urged the same, with different motivation; they argue that ending exclusive representation would result in more militant and effective unions.<sup>183</sup> A second possible path forward, urged by other scholars and supported by some state legislators, would be for public employers to transmit money directly to unions to support their exclusive representation function.<sup>184</sup> This approach would presumably solve the funding problem created by *Janus*. But neither alternative to worker-funded exclusive representation has gained much traction with the labor movement.<sup>185</sup> The first approach, if pursued without other changes that protect labor rights, risks weakening unions to the point where they might no longer be able to pursue their basic redistributive mission, while the second sacrifices the fundamental nature of unions as membership organizations governed by and for workers.<sup>186</sup>

Unions have instead responded to *Janus* by engaging in renewed internal organizing, with workers explaining to one another why col-

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<sup>182</sup> 138 S Ct at 2467–69 (observing that unions are not compelled to seek the designation of exclusive representation and suggesting that unions could refuse to represent nonmembers in grievance processing).

<sup>183</sup> James Gray Pope, Ed Bruno, and Peter Kellman, *The Right to Strike*, Boston Review (May 22, 2017), <http://bostonreview.net/forum/james-gray-pope-ed-bruno-peter-kellman-right-strike> (urging labor to embrace the right to strike and to abandon exclusive representation); Sophia Lee, Forum Response, *The Right to Strike*, Boston Review (May 22, 2017), <http://bostonreview.net/forum/right-strike/sophia-lee-lee-responds-pope> (arguing that ending exclusive representation should also lead to ending union security agreements).

<sup>184</sup> Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 NYU L Rev 144, 183–90 (2016); Aaron Tang, *Life After Janus*, 119 Colum L Rev (forthcoming 2019), <https://poseidon01.ssrn.com/delivery.php?ID=802090099084099027098113099011065077034006049004090060007080011125110029072006091093036054102063060023041090069023107001102066056058059054003110100031121088030088079061002053102096024107111008028098090086002119124075086116113026074097111110089017081008&EXT=pdf>. Compare with Benjamin Sachs, *Agency Fees and the First Amendment*, 131 Harv L Rev 1046 (2018) (arguing that fair-share or agency fees deducted from paychecks should not be conceived as employees' money, but rather should be understood as state money paid to the union for services the state requests, such as collective bargaining and contract enforcement).

<sup>185</sup> Fisk and Malin, 107 Cal L Rev (cited in note 21).

<sup>186</sup> *Id.*

lective organization should be supported.<sup>187</sup> Some have been successful at maintaining and even growing their membership.<sup>188</sup> A few unions have also begun to develop campaigns not dependent on exclusive representation, campaigns designed to raise standards for workers throughout an industry, including nonunion workers, while shaping political debate on economic justice issues.<sup>189</sup> Meanwhile, labor leaders and scholars are engaging in a fundamental rethinking of labor law, urging reforms that aim to increase worker power in the workplace, the economy, and the democracy.<sup>190</sup> In short, *Janus* has accelerated a process of introspection and reconsideration, leaving labor's future far from decided but with significant potential for renewal.

The undoing of the *Abood* compromise provides the opportunity for a similar rethinking of First Amendment doctrine: what would a more egalitarian and democratic First Amendment look like in the area of union dues, labor, and beyond? This essay's examination of the errors of the *Abood* line of cases can help point the way forward.

Justice Harlan wrote to Justice Frankfurter at the end of the *Street* deliberations: "Dear Felix, So much water is over the dam since writing first started in this case that your last circulation leads me to say Amen again to your dissent. It is *so* right!"<sup>191</sup> Harlan had a point.

<sup>187</sup> Id; see also Alana Semuels, *Is This the End of Public-Sector Unions in America?*, The Atlantic (June 27, 2018), <https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/>.

<sup>188</sup> Sarah Chaney, *U.S. Union Membership Rate Declined in 2018*, Wall Street Journal (Jan 18, 2019) (describing growth in public sector union rate among some unions and a decline for others), <https://www.wsj.com/articles/u-s-union-membership-rate-declined-in-2018-11547837708>.

<sup>189</sup> Andrias, *Peril and Possibility*, Berkeley J Empl & Labor L (cited in note 135). Compare with Marion Crane and Ken Matheny, *Labor Unions, Solidarity, and Money*, 22 Employee Rights & Employment Pol J 101, 105 (2018) (arguing that "[i]t is time to divorce the need for funding from the meaning of solidarity and to relinquish the vision of unions as service organizations that has . . . contributed to an outsized reliance on law—particularly the exclusivity doctrine and the principle of majority rule—as the source of worker power").

<sup>190</sup> Andrias, 126 Yale L J (cited in note 9); David Madland, *The Future of Worker Voice and Power*, Center for American Progress (Oct 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/10/06051753/WorkerVoice2.pdf>; David Rolf, *Toward a 21st Century Labor Movement*, American Prospect (April 18, 2016), <http://prospect.org/article/toward-21st-century-labor-movement>; Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 Tex L Rev 1623, 1624 (2016); David Madland and Alex Rowell, *How State and Local Governments Can Strengthen Worker Power and Raise Wages*, Center for American Progress (May 2017), <https://cdn.americanprogress.org/content/uploads/sites/2/2017/05/01144237/C4-StateLocalWorkerVoice-report.pdf>; Dylan Matthews, *The Emerging Plan to Save the American Labor Movement*, Vox (Sept 3, 2018), <https://www.vox.com/policy-and-politics/2018/4/9/17205064/union-labor-movement-collective-wage-boards-bargaining>; *Clean Slate* (Harvard Labor and Worklife Program), <https://wp.law.harvard.edu/programs/clean-slate>.

<sup>191</sup> Memo signed JMH (6/15/61), Felix Frankfurter Papers at Part II, Reel 66, p 813.

Frankfurter's warning about the antidemocratic effects of expanding the Court's First Amendment jurisprudence was prescient. He anticipated the creep of the compelled-speech doctrine, which became even more damaging to democratic governance with the subsequent growth of protection for commercial speech.<sup>192</sup>

Frankfurter's deference to the majoritarian branches and reluctance to expand the category of absolutely protected speech beyond its obvious core provide a starting point for imagining a better First Amendment. Quoting Justice Cardozo, Frankfurter wrote,

[C]ountless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.<sup>193</sup>

Adopting a minimalist and deferential approach would give government more room to pursue social democratic aims, including requirements for agency fees, without running afoul of the First Amendment.<sup>194</sup> For those who believe in a more egalitarian political economy, an approach requiring deference to the democratic branches finds support in the empirical reality that courts have long been foes of labor and redistributive legislation more generally.<sup>195</sup>

But minimalism, without more, could have significant downsides, leaving valuable expression and association activity unprotected.<sup>196</sup> What of the rights to organize, bargain, boycott, and strike? An approach that primarily aims to minimize the First Amendment would leave in place, and could even worsen, doctrine that allows significant repression of workers' expressive activity by hostile legislatures—

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<sup>192</sup> See sources cited in note 104.

<sup>193</sup> *Street*, 367 US at 819 (Frankfurter, J, dissenting), quoting *Gully v First National Bank*, 299 US 109, 118 (1936).

<sup>194</sup> Jedediah Purdy terms such an approach a “jurisprudence of permission.” Purdy, 118 Colum L Rev at 2180 (cited in note 59). See Kessler and Pozen, 118 Colum L Rev at 1989 (cited in note 59) (collecting literature debating minimalism and maximalism in First Amendment law).

<sup>195</sup> See Kate Andrias, *Building Labor's Constitution*, 94 Tex L Rev 1591 (2016); Forbath, 102 Harv L Rev (cited in note 111).

<sup>196</sup> Kessler and Pozen, 118 Colum L Rev at 1989 (cited in note 59).

prohibitions on boycotts, pickets, strikes, and even the right of public sector workers to bargain collectively.<sup>197</sup>

And there is an additional problem with a categorically minimalist approach that merely aims to shrink the reach of the First Amendment. Such an approach fails to grapple with the widely held intuition that the First Amendment *is* implicated when government restrains or compels expressive activity that is not “core” speech. More generally, it fails to confront the cultural importance of the First Amendment and the Constitution—the First Amendment’s place in our “small-c constitution”—the web of practices, institutions, norms, and traditions that structure American society.<sup>198</sup> In our constitutional culture, the First Amendment has extraordinary power and resonance.<sup>199</sup> Seeking merely to pull back the reach of the First Amendment without engaging in a debate about what it means to protect freedom of speech and expression in our constitutional democracy concedes the terrain of the Constitution.<sup>200</sup>

Understanding *Abood’s* errors allows us to imagine a substantively different labor speech doctrine as well as one more procedurally deferential to democratic decision makers. In the case of agency fees, imagine, for example, a doctrine that recognizes the minimal speech harm to objecting workers, while embracing a more expansive view of unions’ social function and government’s interest in regulation. The doctrine would recognize that labor organizations serve a role that is not limited to advancing managerial efficiency, nor to the commercial sphere. Rather, unions enable workers’ effective participation in the political process, they facilitate worker voice, and they serve as a critical countervailing force to organized business interests in the public square. They also help achieve social equality. This version

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<sup>197</sup> See Andrias, *Peril and Possibility*, Berkeley J Empl & Labor L (cited in note 135) (describing limits on public employee bargaining rights); Julius G. Getman, *The Supreme Court on Unions: Why Labor Law Is Failing American Workers* 90–100 (2016) (describing law on secondary boycotts by unions).

<sup>198</sup> See Richard A. Primus, *Unbundling Constitutionality*, 80 U Chi L Rev 1079, 1082 (2013) (describing “small-c” constitutionalism and discussing the diversity of small-c constitutional theories); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, 1994).

<sup>199</sup> See Akhil Reed Amar, *The First Amendment’s Firstness*, 47 UC Davis L Rev 1015, 1025–29 (2014); Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 93–119 (Oxford, 1982); Kessler and Pozen, 118 Colum L Rev at 1990 (cited in note 59).

<sup>200</sup> Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution*, 94 BU L Rev 669, 672 (2014); Andrias, 94 Tex L Rev (cited in note 195).

of the First Amendment would allow democratic processes to pursue these interests at least when incursions on other speech rights are minimal. Indeed, it would recognize these interests as essential to an overall system of free speech, expression, and association.<sup>201</sup>

A doctrine revised along these lines would have implications for a host of issues beyond the scope of this essay, including other aspects of public employee speech and association, and even private employee speech doctrine. It might also draw into question such general First Amendment principles as, for example, the requirement of state action, the definition of rights in negative terms, and the law's claim to neutrality. Indeed, a doctrine valuing the speech interests of workers as a group or the government's interest in social equality would not be neutral. But it would be no less neutral than the system adopted in *Abood* or in *Janus*, which put such considerations off limits, weighing only the government's managerial prerogative and interest in labor peace, or only the speech interests of dissenting workers.

That there is a debate to be had about the social value of unions, about permissible governmental interests, and about what it means to protect the freedom of speech does not mean that the place for such debate is primarily in the courts. Litigation is ill-equipped to drive a more egalitarian First Amendment—or a more egalitarian labor law.<sup>202</sup> Instead, debate and struggle over the content of labor law and the nature of “the freedom of speech” must occur first and foremost in the public square and in the political branches.<sup>203</sup> But such political

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<sup>201</sup> See Kessler and Pozen, 118 Colum L Rev at 1994–2001 (cited in note 59) (cataloging literature advocating that courts consider speech “on both sides” and ultimately urging an approach that would “attend[] to the perspective of listeners as well as speakers, and tak[e] into account the informational and expressive interests of as many listeners and speakers as practicable”); Lakier, 118 Colum L Rev at 2127 (cited in note 59) (urging a functional, anti-subordination approach to the First Amendment, including consideration of the expressive interests of third parties when those interests are directly implicated by the First Amendment case at hand). For earlier variations of the speech-on-both-sides and systemic free speech arguments, see Owen M. Fiss, *Why the State?*, 100 Harv L Rev 781, 783 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L Rev 1405 (1986). For a critique, see Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U Col L Rev 1109 (1993).

<sup>202</sup> See Andrias, 94 Tex L Rev (cited in note 195); Leslie Kendrick, *Another First Amendment*, 118 Colum L Rev 2095 (2018); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 Colum L Rev 2219 (2018).

<sup>203</sup> For past examples of such movements, see Fishkin and Forbath, *Constitutional Political Economy* (cited in note 59); Weinrib, *Taming of Free Speech* (cited in note 72); Goluboff, *The Lost Promise of Civil Rights* (cited in note 72); Pope, 106 Yale L J (cited in note 72). See also Andrias, 94 Tex L Rev (cited in note 195) (discussing contemporary labor movement efforts and their relationship to constitutional change).

debate and political conflict will inevitably be in dialogue with the Court's own work.

Given our constitutional system, courts cannot avoid hard questions about social facts or socially constructed values. They inevitably consider, either overtly or covertly, whether government is responding to a genuine problem, whether it is employing responsive instruments that are relatively nonburdensome to rights-holders or that are in service of other rights.<sup>204</sup> As Justice Frankfurter wrote in *Street*:

It disrespects the wise, hardheaded men who were the authors of our Constitution and our Bill of Rights to conclude that their scheme of government requires what the facts of life reject. . . . To say that labor unions as such have nothing of value to contribute to that process (the electoral process) and no vital or legitimate interest in it is to ignore the obvious facts of political and economic life and of their increasing inter-relationship in modern society.<sup>205</sup>

Ultimately, *Janus*'s destruction of the *Abood* compromise offers an opportunity for the now-dissenters on the Court to rethink what, in the context of the facts of our increasingly unequal political and economic life, a "better" First Amendment regime might entail.

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<sup>204</sup> See Greene, 132 Harv L Rev at 63 (cited in note 106) (urging more explicit and extensive proportionality analysis in constitutional adjudication).

<sup>205</sup> *Street*, 367 US at 815.