RESPONSE

WHOSE MONEY IS IT ANYWAY: HAVE WE BEEN WRONG ABOUT AGENCY FEES ALL ALONG?[†]

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Justice Antonin Scalia was many things to many people, but only on the rarest occasions was he the swing vote. Yet that is where many onlookers thought he stood on the weighty question of whether, under the First Amendment, a government employer may compel an employee to subsidize the costs of collective bargaining by a union to which she is opposed.[1] The Supreme Court resolved that question in favor of government employers long ago in *Abood v. Detroit Board of Education*,[2] but the Court took up the issue again in 2015 — with Justice Scalia's stance far from certain[3] — in *Friedrichs v. California Teachers Ass'n*.[4] Late in the oral argument in the case, however, Justice Scalia seemed to tip his hand: the fact that public sector bargaining implicates "in all cases, a matter of public interest," he observed, "changes the situation in a way that — that may require a change of the rule."[5]

Justice Scalia passed away one month later, leaving the Supreme Court to affirm the lower court's ruling (which upheld agency fees under *Abood*) by an equally divided opinion.[6] But with the grant of certiorari in *Janus v. American Federation of State, County and Municipal Employees, Council 31*[7] this September, the question is now back before the Court. And this time, all indications suggest there is no swing vote to be had.[8]

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

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1 *See, e.g.*, Catherine Fisk, *Guest Post: Scalia May Be Critical Vote in* Friedrichs v. California Teachers' Ass'n, ONLABOR (June 30, 2015), http://onlabor.org/guest-post-scalia-may-be-critical-vote-in-friedrichs-v-california-teachers-assn/ [https://perma.cc/EXN3-ESUN].

2 431 U.S. 209 (1977).

3 *See* Fisk, *supra* note 1.

4 135 S. Ct. 2933 (2015) (mem.).

5 Transcript of Oral Argument at 76, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (No. 14-915), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-915_e2p3.pdf [https://perma.cc/UXL6-TDHH].

6 136 S. Ct. 1083 (2016) (mem.) (per curiam) (affirming by an equally divided Court).

7 138 S. Ct. 54 (2017) (mem.) (granting certiorari).

8 *See* Sean Higgins, *Gorsuch Will Tip Supreme Court on Key Labor Issue, Liberals Fear*, WASH. EXAMINER (Apr. 17, 2017, 12:01 AM), http://washex.am/2nNINP1 [https://perma.cc/3ZUP-ETHX] (quoting DNC Chair Tom Perez as observing that Justice Gorsuch "is poised to cast the

In *Agency Fees and the First Amendment*, Professor Benjamin Sachs offers a pair of novel arguments for why the Court should pause before invalidating public sector union agency fee agreements throughout the country.[9] Both arguments attack a critical assumption on which the entire edifice of the First Amendment challenge to agency fees is built: the notion that government-negotiated collective bargaining agreements force employees to pay their own money to support objectionable union speech. If that assumption is wrong — that is, if the money is actually not the objecting employees' to begin with — then, as Sachs astutely notes, there would be "no First Amendment question to be asked."[10]

So whose money is it anyway? Under the traditional view that undergirds the Court's prior decisions, agency fees are the *employees'* money. That is because government employers pay their employees a wage, and agency fees are an amount of that wage that employees must send to a union to subsidize its collective bargaining efforts, usually through a paycheck deduction.[11]

Sachs proposes two alternatives to this understanding. First, he argues that the money sent to unions to offset their bargaining costs is better viewed as the government *employer's* money than as the employees'.[12] This is because employees are in one sense just faceless intermediaries, perhaps akin to a bank that holds or transfers the money but never acquires dominion over it. Collective bargaining agreements force employees to turn the money over to the union on pain of losing their jobs, after all, and so (like a bank) the workers never have a "genuine choice" whether to make the payment at all.[13] That, Sachs explains, should lead us to "treat agency fees as a direct payment from employer to union."[14]

Second, Sachs argues that the money might instead be better understood as the *union's* all along. This position is premised on the view that the money unions receive in the form of agency fees only comes about as the product of a wage premium that unionized workers experience over their non-unionized counterparts.[15] But for the benefits of collective bargaining, the argument goes, the fees that unions receive from workers would not exist anyways — and so the money is properly viewed as the union's property from the outset.

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fifth vote to make it next to impossible for public-sector labor unions to organize"). Indeed, if Justice Gorsuch were inclined to reaffirm *Abood*, his conservative colleagues would have presumably declined to grant certiorari in *Janus* altogether.

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

[10] *Id.* at 1070.

[11] *Id.* at 1057 n.70.

[12] *Id.* at 1048–50.

[13] *Id.* at 1049.

[14] *Id.* at 1062; *see id.* at n.98.

[15] *Id.* at 1063.

These arguments, and the second in particular, are among the best defenses of agency fees that I have seen. Sachs cleverly identifies supportive precedent from different strands of Supreme Court case law, and he articulates solid functional defenses of each approach.

Ultimately, however, both arguments are susceptible to counterattack. Part I discusses some problems with the argument that agency fees are payments directly from the employer; Part II addresses the difficulties that arise with viewing agency fees as the union's property from the outset. In a final concluding part, I express my agreement with Sachs on another point: the whole debate over compelled union subsidies is utterly avoidable.[16] The twenty-two states that permit agency fee agreements in the public sector can undo any impact of an adverse outcome in *Janus* by authorizing government employers to reimburse unions directly for their bargaining costs.[17] It is this legislative alternative that, in my view, warrants the greatest attention from labor proponents in the coming years.

I. ARE AGENCY FEES THE EMPLOYER'S MONEY, PAID DIRECTLY TO THE UNION?

Sachs's first contention is that the money directed to a public sector union in the form of an agency fee should be considered a payment directly from the government employer, not one from the individual worker. He roots this conclusion in an innovative source: the Supreme Court's reasoning in Establishment Clause cases. For example, the Court wrote in *Zelman v. Simmons-Harris*[18] that money sent from the government through an intermediary (families who elect to receive a school voucher) on to a different ultimate recipient (religious schools) should be considered a direct payment from the government if the intermediary lacks a "true private choice" over where to direct the money.[19] Applying that principle to agency fees, Sachs notes that objecting employees do not have a "true private choice" because they are compelled to pay the union on the threat of losing their jobs.[20] As a result, the money ought to be treated as coming from the government.

There are two ways of seeing the difficulty with this argument, one doctrinal and the other consequentialist. Starting at the level of doctrinal

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[16] *Id.* at 1073–74.

[17] Professors Daniel Hemel, David Louk, and I have argued this point in previous work. *See* Daniel Hemel & David Louk, *Is* Abood *Irrelevant?*, 82 U. CHI. L. REV. DIALOGUE 227 (2015–2016); Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144 (2016). Professor Sachs convincingly calls for renewed attention to this proposal. Sachs, *supra* note 9, at 1051–52, 1052 n.23.

[18] 536 U.S. 639 (2002).

[19] *Id.* at 653.

[20] Sachs, *supra* note 9, at 1049–50.

theory, the more natural conclusion to draw from the Establishment Clause analogy is the opposite of what Sachs proposes. In that context, a finding that individuals lack "true private choice" whether to direct government funds to a religious institution results in the *invalidation* of the government action.[21] At the most intuitive level, then, a finding that individuals likewise lack true private choice in the compelled speech subsidy context should lead to the same result: if the government forces an individual to subsidize an expressive message that she opposes, the absence of individual choice renders the state action unconstitutional.

In fact, Sachs provides strong theoretical support for this conclusion in the course of defending his reliance on Establishment Clause principles in the free speech setting. Both the First Amendment's compelled speech and Establishment Clause doctrines, he notes, "are aimed at preventing the government from requiring individuals to support institutions and ideas they would not freely choose to support."[22] "Liberty of conscience," in other words, is at the root of the Free Speech Clause and Establishment Clause alike.[23] It follows that if the government enacts two laws invading that liberty — one compelling persons to provide support for an objectionable secular message and another compelling support for an objectionable religious message — the government's deprivation of choice under both laws should lead equally to the invalidation of each one.

Sachs wants to reject this analogy at the level of holdings by relying on a particular aspect of *Zelman*'s underlying reasoning. One reason the Supreme Court has said the lack of choice matters for Establishment Clause purposes, he correctly points out, is that money that passes through private hands on its way to a religious institution without "true private choice" is treated directly as the government's own.[24] But why that matters is an artifact of the Establishment Clause itself, which seeks not only to preserve individual freedom from compelled support of unwanted beliefs, but also to ward off direct government attempts to advance a preferred religion.[25] If the government obviously cannot do so directly (say, by writing a check to a favored church), then it ought not be able to evade that limit by acting indirectly (say, by giving money to individuals and then forcing them to send it to the same church in turn).

The unconstitutionality of laws compelling individuals to contribute money to religious institutions they oppose is thus overdetermined. One reason is the "liberty of conscience" principle Sachs identifies: compelled

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21 *Zelman*, 536 U.S. at 648–49.

22 Sachs, *supra* note 9, at 1060.

23 *Id.* (arguing that concern for the "liberty of conscience . . . is at the root of the Establishment Clause," which is "akin to the concerns [behind] compelled speech and association").

24 *Id.* at 1061.

25 *See Zelman*, 536 U.S. at 648–49 ("The Establishment Clause . . . prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing . . . religion.").

payments would force individuals to "support religion or religious institutions that they would not freely choose to support."[26] But a second, independently sufficient rationale is that such laws impermissibly advance certain faiths by effectively "provid[ing] aid directly to religious" institutions.[27]

Compelled speech is different. The problem here is not government advancing a particular viewpoint; indeed, government is free under the government speech doctrine to support particular messages directly, free of First Amendment restrictions.[28] So the no-advancement rationale for why the lack of "true private choice" matters in the Establishment Clause context — the rationale that Sachs's argument turns on — just does not apply in the free speech setting.

Yet here is the critical point: the liberty of conscience rationale still does apply. It is actually the *raison d'être* of compelled speech doctrine: our pluralistic society harbors a deep concern for the injury to freedom of conscience that occurs when government forces individuals to support messages they find objectionable for political, social, or moral reasons. As Justice Jackson put it long ago in the seminal compelled speech case of *West Virginia State Board of Education v. Barnette*,[29] "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[30] And the rule against compelled financial subsidies is a natural corollary of this principle. If government cannot force us to speak by pledging allegiance to the flag or putting up a yard sign supporting a particular political candidate, then it also cannot force us to support the same message uttered by someone else, such as by donating to the American Flag Society or a candidate's campaign for office. It is the *very act* of government compelling an individual to speak or support an objectionable message, in other words, that the Free Speech Clause aims to prevent. Yet Sachs's proposed rule would treat that compulsion as a virtue rather than a vice.

As with many arguments about doctrine and theory, the problems with the proposed rule may be illuminated by considering its consequences. As an initial matter, if agency fees are the employer's money rather than the employees', that means *Abood* still has to be overruled — just a different part of it. Recall that part of *Abood*'s core holding is that public employees can be required to pay fees to support the union's costs of collective bargaining.[31] This is the rule that Sachs

[26] Sachs, *supra* note 9, at 1060.
[27] *Id.* at 1061 (quoting *Zelman*, 536 U.S. at 649).
[28] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245–46 (2015).
[29] 319 U.S. 624, 642 (1943).
[30] *Id.* at 642.
[31] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).

wishes to defend. But the other part of *Abood*'s rule is that employees may *not* be required to pay fees to support political expenses the union incurs that are not germane to the union's bargaining duties.[32] If Sachs is right that the money was never the employees' to begin with, then the latter rule must fall: a union may exact fees from employee paychecks and give that money to any candidate or political cause of its choosing, no matter how controversial. The government, after all, is free to prefer particular messages,[33] and so if it is just the government's money being spent on these causes (and not the objecting workers' money), there is no First Amendment problem to speak of.

The need to overrule a separate part of *Abood* may not strike some as overly problematic, but it is just the tip of the iceberg. The more troubling implications come from what the proposed safe harbor for government-compelled subsidies with no true private choice might do to other areas of free speech law. Take *Elrod v. Burns*,[34] a case that set limits on the practice of political patronage. There, a newly elected sheriff who was a member of the Democratic Party demanded that certain employees at the office "contribute a portion of their wages to the Party" or else lose their jobs.[35] The Court invalidated this practice, with the plurality opinion explaining that it "unquestionably inhibits protected belief and association" without sufficient justification.[36] But if Sachs is right that a compelled payment out of a public worker's wages is actually one straight from the government, then the vitality of this part of *Elrod* would face considerable uncertainty.[37]

The problem is not limited to (or even primarily about) compelled contributions to political campaigns. Any supervisor of a government unit could fire any employee who refuses to financially support the supervisor's preferred cause, *whatever it may be*. Thus, just as the head of a local or state government unit might fire an employee who refuses to write a check to the Trump campaign, so too could a public worker

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32 *Id.*

33 *See Walker*, 135 S. Ct. at 2245–46.

34 427 U.S. 347 (1976) (plurality opinion).

35 *Id.* at 355.

36 *Id.* at 359; *see also id.* at 369–70.

37 I say "uncertainty" because of the possibility that, even if the First Amendment no longer protects the public worker in the *Elrod* setting, some other constitutional principle might still prohibit government employers from compelling support for partisan activity. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring in the judgment) ("[I]t would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party . . . and I do not think that that unconstitutionality has anything to do with the First Amendment."); R.J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp. 2d 1085, 1107 (E.D. Cal. 2003) ("[T]he Constitution would appear to contain a core structural principle . . . that would limit the use of tax dollars to fund overtly partisan activity."); *id.* at 1108 (suggesting potential Due Process and Equal Protection limits on irrational government speech programs).

be terminated if she refuses her boss's demand to contribute money to the NRA, Planned Parenthood, or a white supremacist organization.

Nor is the problem limited to compelled exactions from government employees. Treating compelled subsidies as the government's own money would eliminate First Amendment protections that *any* individual or entity (such as a welfare recipient or government contractor) would otherwise enjoy when the government offers money on the condition that the recipient financially support some objectionable message. So a state could condition a single mother's receipt of housing assistance or welfare payments on a compelled financial contribution to Focus on the Family or some likeminded organization.[38] On Sachs's account, the very thing that seems so problematic about all of these examples — the compelled individual's lack of choice whether to make the objectionable payment — is what would eliminate the First Amendment's protection.[39]

Finally, it is also unclear how the impact of this new rule could be cabined to the compelled subsidy context. If compelled monetary payments are to be attributed to the government because of the lack of genuine private choice, why not compelled speech, too? Yet this would mean overruling *Barnette* and a host of other precedents protecting individuals from being compelled to support unwanted messages.[40] Each of these cases, after all, involved government compulsion against individuals or entities that did not wish to express the government's preferred message. If lack of choice converts an objectionable message into the government's own just as it converts objectionable financial payments, then the individual who is forced to intone the government's favored message would enjoy no First Amendment protection.[41]

To avoid the unraveling of *Barnette* and our venerable compelled speech doctrine, one would need a theory to explain why depriving in-

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[38] Or a government employer could force a public sector union to contribute the agency fees it receives to a national right to work campaign on pain of the union being decertified. The lack of true choice by the union would mean the money being sent to the right-to-work organization was the government's all along.

[39] It is true that most agency fees are paid through a dues checkoff procedure that automatically deducts employee wages from paychecks and redirects them to the union, a procedure which might not exist in the hypotheticals I have offered. But as Sachs acknowledges, what matters is not the administrative mechanism through which employee money is sent to support objectionable messages but rather the fact that it is compelled at all. *See* Sachs, *supra* note 9, at 1057 n.70 ("[T]he difference [between dues checkoff and separate payments] is irrelevant . . . all that matters is that the fees payment is mandatory.").

[40] *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986) (plurality opinion) (invalidating state requirement that public utility company include third party's newsletter in its billing envelopes as impermissible compelled speech); Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating New Hampshire requirement that drivers display the words "Live Free or Die" on state license plates); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating state right-of-reply law forcing newspaper to afford a political candidate space to reply to the paper's critical editorial).

[41] *See supra* note 28 and accompanying text.

dividuals of the choice to *speak* a distasteful message causes a constitutional injury, while depriving individuals of the choice to provide *financial support for the exact same message* is a constitutional cure-all. Not only is such a theory difficult to articulate and (to my mind, at least) normatively unattractive, it also remains impossible to reconcile with the entirety of the Supreme Court's compelled subsidy case law.[42] For all these reasons, I am doubtful the Court will be interested in a rule that so significantly upends its broader First Amendment jurisprudence.[43]

II. ARE AGENCY FEES THE UNION'S MONEY ALL ALONG?

Alternatively, agency fees might be treated as the union's property all along because the money at issue would not exist but for the union's ability to negotiate a wage premium for workers. As Sachs points out, this approach draws significant support from precedent in the analogous contexts of takings law as applied to interest on lawyer trust accounts (IOLTAs) and eminent domain.[44] In both settings, the aggregation of multiple individuals' property (that is, multiple clients' funds into a larger pool and multiple parcels of land unified into a single, larger lot) can produce gains in value that would not exist but for the aggregation. The question that arises is whether this additional value constitutes property belonging to the individuals or to the collective itself. As Sachs persuasively explains, the rule in both contexts is that "where value is created through collectivization, it is the collective, not the individual, that owns the value thus created."[45] So the same should be true of public unions, too.

This argument fares quite a bit better, though it does raise some doctrinal and practical questions. As to doctrine, the impact of treating agency fees as the union's property is more muted because such an approach would not upset broader compelled subsidy and speech law in the same way as treating agency fees as a direct payment from the government would. Still, *Abood*'s rule against compelled payments in support of a union's *political* speech would require overruling, as treating the money as the union's would mean it is free to spend that money however it sees fit. A union could thus take fees from employee

[42] *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405 (2001) (invalidating compelled subsidy for mushroom advertising under the First Amendment); Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion).

[43] *Cf.* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791–92 (2011) (rejecting the "startling and dangerous proposition" that the government may "create new categories of unprotected speech by applying a simple balancing test," *id.* at 792 (internal quotation marks omitted) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)), thereby disrupting the "traditional limitations" established under the First Amendment "[f]rom 1791 to the present," *id.* at 791 (internal quotation marks omitted) (quoting *Stevens*, 559 U.S. at 468)).

[44] Sachs, *supra* note 9, at 1063–67.

[45] *Id.* at 1051.

paychecks and spend it in support of controversial political candidates and advocacy organizations, no matter how ardently a worker may object.

My greater worry, though, lies at the level of practice. The fact that unions produce an *aggregate* wage premium for workers in the neighborhood of eleven percent does suggest that *most* individual unions produce wage gains for *many* individual workers.[46] For those workers, it is reasonable to view agency fees as a deduction from a wage increase they would not have otherwise enjoyed — and thus as the property of the union that produced it.

But it is not inevitable that every union produces a premium for every worker that exceeds the size of the agency fee the union wishes to exact. The easiest way to see this is with a high-performing worker.[47] Take, for example, Sean McComb — a Baltimore English teacher who was named National Teacher of the Year in 2014 at the age of thirty.[48] As a then–eighth year teacher with a master's degree, McComb earned an annual salary of $65,663 courtesy of the lockstep salary schedule negotiated by the Teachers' Association of Baltimore County.[49] Many teachers in the same school district earned far more. A thirty-year veteran with a master's degree, for instance, received more than $105,000 per year.[50]

Did McComb's $65,663 salary include a premium that he received by virtue of the union, such that an agency fee should be seen as a portion of his paycheck that was the union's to begin with? That is difficult to say. In the absence of a union, McComb may have been free to negotiate an employment contract with the school district individually. Had he done so, it is not hard to imagine the district offering that much to retain him — and perhaps more, given the higher salaries paid to less decorated teachers in the district.[51] If that is correct, then there would

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[46] *See id.* at 1048 n.11.

[47] One might also perceive the problem in the context of a low-performing union. In theory, such a union might negotiate a wage rate that is roughly on par with what its workers might have been able to garner in the union's absence, leaving a premium on the table that a more zealous bargaining agent would have been able to achieve. In that case, the lack of a wage premium would mean agency fees actually would come out of *every* employee's own property. While such instances may be quite rare, courts would need some way of identifying them so as to disallow compelled fees when there is no union wage premium from which they can be deducted.

[48] Ross Brenneman, *Baltimore English Teacher McComb Named 2014 National Teacher of the Year*, EDUC. WEEK: TEACHING NOW (Apr. 30, 2014, 9:45 AM), http://blogs.edweek.org/teachers/teaching_now/2014/04/mccomb_named_2014_national_teacher_of_the_year.html [https://perma.cc/5WZM-NEGC].

[49] *See* DIV. OF BUS. SERVS., BALT. CTY. PUB. SCH., SALARY SCALE FOR 12-MONTH EXEMPT EMPLOYEES REPRESENTED BY TABCO, 2017–2018, http://businessservices.bcps.org/UserFiles/Servers/Server_9047649/File/Business%20Services/Departments/Fiscal%20Services/Payoll/TABCO%2012%20Month%20Employees.pdf [https://perma.cc/68H3-DTSA].

[50] *Id.*

[51] *See* Sam Dillon, *In Washington, Large Rewards in Teacher Pay*, N.Y. TIMES (Dec. 31, 2011), https://nyti.ms/2jG1he4 [https://perma.cc/SE6L-9QK5] (noting that Tiffany Johnson, a special education teacher in Washington, D.C., earned a thirty-eight percent pay raise when she was rated "highly effective" after two straight years of outstanding performance, bringing her annual salary as a seventh-year teacher up from $63,000 to $87,000).

have been no "premium" in McComb's paycheck that belonged to the union in the first place.

The problem with the union-property argument is thus one at the level of case-by-case judicial decisionmaking. The premise of the argument is that the agency fee deducted from each worker's paycheck is actually subtracted from some amount of wages that each individual employee would not have received in the union's absence. Yet if a high-performing public worker like McComb challenges an agency fee, how could a court know with confidence that the union actually produced a premium for *that worker*, given that he might well have attained the same or a higher wage in the union's absence? Counterfactuals of this nature are notoriously difficult to establish, which means litigation over agency fees might become ensnared in complex debates over hard-to-observe hypotheticals of government pay rates in the absence of a union and individual public workers' "true" market values. And even then, the result would be that agency fees would still be unconstitutional as applied to workers for whom the union did not actually produce a premium.

The inherent difficulty with determining whether an individual worker would have earned a higher wage absent the union points up the possibility that I have undersold the doctrinal challenge to this argument. For the reasons I have just described, one could plausibly look at the union, IOLTA, and eminent domain settings and conclude that the kind of collectivization that occurs in the union setting is just fundamentally different. The "true" value of individual client funds in an interest-bearing account or of individual parcels of property that can be bought and sold in a liquid real estate market is an objective fact involving little guesswork. It is thus easy to know when an individual fund would produce positive net interest (such that the interest should belong to the individual rather than the collective), or when an individual parcel is more valuable before unification than after (such that the owner should be compensated at the higher rate). The simplicity of valuation in these contexts means there is little reason to worry about individuals losing out from the process of collectivization; individual property that would have been better off individually can easily be (and must be) treated that way.[52] For all other cases, where individual property is more valuable only *after* collectivization, the Supreme Court has sensibly attributed the value created by the collective to the collective itself.

There is a much greater risk of erroneous valuation in the agency fee context. Human workers are not interchangeable numbers in a bank account or parcels of property that can be valued formulaically. Their value is deeply subjective and deeply contestable, and the cost of a judicial mistake — a court order wrongly telling an employee that, despite her hard work and skill, she is not worth as much as she thinks she is — seems steep. A court could accordingly decline to extend the IOLTA

[52] *See infra* notes 55–56 and accompanying text.

and eminent domain rule about collective value to the agency fee context and instead presume that all workers are capable of *individually* earning the wage premium negotiated by the union, such that any deduction should be seen as coming from their own property.[53] Doing so would allow the court to avoid the business of valuing individual workers' "true worth" in the first place.

Alternatively, courts might seek to avoid these uncertain value judgments in the other direction by categorically refusing to recognize *any* challenge to compelled agency fees, instead presuming that *no* worker could individually negotiate a wage higher than the union-negotiated premium. But notice then how far afield the rule would be from the Supreme Court precedents on which it would be based. The IOLTA analog is a case where a client would have received a net positive return had her funds been deposited in an individual interest-bearing account. If her lawyer mistakenly places her funds in an IOLTA account that sends all of its earned interest to a separate destination, is the client entitled to a refund of the interest she would have earned from an individual account? Or may the collective entity claim her interest as its own? The Supreme Court recognized this precise situation as potentially problematic in *Brown v. Legal Foundation of Washington*.[54] But it found no Takings Clause violation in that case because state law independently required the client's lawyer to compensate the client for any loss.[55] The very thing that saved the IOLTA arrangement, in other words, is what the objecting workers seek here: a requirement that money be returned to objecting individuals who do not benefit from collectivization.[56]

III. CONCLUSION

Sachs is to be applauded for identifying novel, thoughtful arguments in defense of agency fees. I doubt the Supreme Court will be moved by them, mostly for the *realpolitik* reason that the five conservative Justices

[53] On this view, the wage "premium" that unions produce for individual workers might be thought of not as some gratuitous payment that unions exact on behalf of undeserving workers, but rather as property that rightfully belonged to them all along (which employers were only able to withhold by suppressing collective bargaining).

[54] 538 U.S. 216, 237–38 (2003) (describing hypothetical where placing a client's funds in a collective IOLTA account would actually result in a loss to the client).

[55] *Id.* at 227, 239.

[56] The analogous eminent domain case would be if the government tried to compensate the owner of a special, high-value parcel of land (for example, a parcel with a very nice house on it) at the identical, lower rate that the government gives to other undeveloped parcel owners after unifying the land for a common use. Such an attempt would violate the axiomatic rule that "it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken." United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 281 (1943).

have already written on the wall.[57] For the further reasons I have described, though, I also think the Court would have good cause to be reluctant to conclude that agency fees are the government's or the union's money, insofar as both approaches rest on uncertain doctrinal footing and would lead to substantial changes in the law (including, at a minimum, the overruling of *Abood*'s prohibition on agency fees for political expenses).

Both of Sachs's arguments do have one indisputably forceful implication: they press us to wonder why states continue to forbid public employers to reimburse unions for their bargaining expenses directly. If that alternative is the functional equivalent of the regime we already have, and if the alternative is altogether free of constitutional concern, then why don't pro-labor states adopt it?[58] As Sachs recognizes, nothing (save for perhaps an attachment to a nearly century-old fear of company unionism that is debatable in the present day) stands in their way.[59]

The easiest answer to the agency fee puzzle, then, is for the twenty-two states that currently permit agency fee agreements in the public sector to amend their laws to authorize direct reimbursements from employers to unions. Of course, the devil is in the details; public sector unions have not done this before, and the institutional effects of such reimbursement arrangements are likely to vary with different design choices that unions and public employers may make.[60] But at a minimum, Sachs's essay shows that there is growing interest in replacing public sector agency fees with "direct payments from employers to unions," a move that would "eliminate compelled speech and association challenges to union financing systems."[61] With *Janus* on the Court's docket, it seems only a matter of time before public sector unions will have to decide whether to heed this call.

[57] *See supra* note 8 and accompanying text.

[58] It is true, as Sachs notes, that the difference between a direct reimbursement regime and the current agency fee approach is largely an accounting formalism. But then so is every instance where government impermissibly forces individuals to subsidize an objectionable cause that the government could pay for directly. The First Amendment has simply been understood to find something distinctively harmful when the government engages in that coercion. *See supra* notes 34–36 and accompanying text.

[59] Sachs, *supra* note 9, at 1076–77.

[60] Sachs thoughtfully addresses some of these issues in his essay. *Id.* at 1072–74. I explore them, too, in Tang, *supra* note 17, at 217–18, as well as in a current work in progress, *see* Aaron Tang, Life After *Janus* (February 2018) (unpublished manuscript) (on file with author) (arguing that public sector unions may draw lessons on how to implement direct government payment models from the partially analogous setting of indigent defense).

[61] Sachs, *supra* note 9, at 1073–74, 1076; *see supra* note 17.

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