
COMPELLED SUBSIDIES AND THE FIRST AMENDMENT

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INTRODUCTION

Sometimes the government compels people to pay money to organizations they oppose. A lawyer may be forced to fund a bar association, a college student forced to fund student group activities, a public employee forced to fund a labor union. Unsurprisingly, people often bristle at such compulsion. People don't like having their money taken, and knowing that it will be spent on causes they oppose seems to add insult to injury. But when is it unconstitutional?

For over forty years, the Court has unanimously concluded that being required to pay money to a union, or to a state bar, is a serious burden on one's First Amendment rights.¹ This burden, the Court has held, is generally unconstitutional when the money is used for most kinds of political advocacy.²

In *Janus v. AFSCME*,³ a majority of the Court went further and held that requiring public employees to pay union agency fees is categorically unconstitutional, even when the money is used for collective bargaining.⁴ Such public-sector collective bargaining, the majority held, is itself inherently political.⁵ And the government interests in mandating such payments don't suffice to justify such requirements.⁶ There was a strong dissent by four Justices, but as we discuss in Part I, we think the majority had the better argument on both of these points.

But we think the majority — and for that matter the dissent, and the opinions in *Abood v. Detroit Board of Education*⁷ and *Keller v. State Bar of California*⁸ — erred on the preliminary point. The better view, we think, is that requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all. The employees in *Janus* were not compelled to speak or to associate. They were compelled to pay, just as we all are compelled to pay

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¹ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *overruled by* *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

² See *Abood*, 431 U.S. at 235–36; *Keller*, 496 U.S. at 14.

³ 138 S. Ct. 2448.

⁴ See *id.* at 2486.

⁵ See *id.* at 2480.

⁶ *Id.* at 2465–69, 2477–78.

⁷ 431 U.S. 209.

⁸ 496 U.S. 1 (1990).

taxes; our having to pay taxes doesn't violate our First Amendment rights, even when the taxes are used for speech we disapprove of — likewise with their having to pay agency fees. If we are right, as we argue in Part II, then the result in *Janus* was wrong.

In Part III, we turn from evaluating the decision to anticipating its consequences. We doubt *Janus* will have significant effects on government speech rights (section III.A), but it will likely forbid compelled funding of other forms of private speech. *Janus* will likely extend to a prohibition on state bar dues, at least so long as the bar is seen as sufficiently removed from other government agencies (section III.B). It might also lead to constraints on student governments' use of student activity fees at public universities, though universities can create accounting workarounds that will practically allow such student activity funding to continue (section III.C).

Finally, and perhaps most consequentially, *Janus* may lead to massive liability for unions that have collected the agency fees that are now viewed as unconstitutional (section III.D). Though the fees were seen as valid when collected, the Supreme Court's precedents say that constitutional reversals in civil cases are generally retroactive, so everyone in *Janus*'s shoes can get agency fee refunds just as *Janus* himself could (at least so long as the statute of limitations has not run). Moreover, private organizations such as unions are generally not entitled to qualified immunity or similar defenses. While the unions do have some possible arguments to mitigate the damages or try to claim a special form of good faith, those defenses are speculative, and cannot be counted on.

I. PAYING IS SPEAKING

There are two ways of thinking about the constitutionality of compelled payments to others. One way would view them as a serious burden on First Amendment rights. The argument goes something like this: A law that compels person A to give money to entity B is a compelled contribution of money. Since restricting voluntary contributions of money that will be used for speech itself restricts speech,⁹ compelling people to give money that will be used for speech is like compelling people to speak themselves.¹⁰ And compelling people to speak themselves is in turn like restricting their speech¹¹ — maybe even worse.¹² Thus, compelled subsidies raise serious First Amendment problems.

⁹ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

¹⁰ *Abood*, 431 U.S. at 234–35.

¹¹ *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977).

¹² *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (“It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.”).

A. *The Plausibility of Janus*

Under this framing, the majority opinion in *Janus* is quite plausible, and probably even correct. In *Janus*, the Court confronted the constitutionality of so-called “agency shop” laws in the public sector — laws that compel state employees to pay for a union to represent them in collective bargaining and other “chargeable” activities, even if the employees did not choose to join it and pay dues.¹³ *Janus*, in line with the framing above, proceeded under the theory that compelling employees to fund a union raised “First Amendment concerns”¹⁴ analogous to compelled speech or association.

If that framing is correct — if such laws raise serious First Amendment concerns — then the laws are probably unconstitutional. To survive First Amendment review, such laws would likely need to have a strong justification (a “compelling interest”) and need to serve that justification better than significantly less restrictive alternatives.¹⁵

It is not clear that there are any truly “compelling” interests in compelling employee support for public sector labor unions. Twenty-eight states do not have any kind of agency fee arrangements for public employees and instead have a so-called “right to work.”¹⁶ That most states have chosen to do without them weakens the claim of a “compelling” interest, though perhaps not decisively.¹⁷

We also know that a compelling interest to justify compelled speech must be “ideologically neutral.”¹⁸ In *Wooley v. Maynard*,¹⁹ a famous compelled speech case that allowed drivers to tape over the motto on their license plates, the Court rejected the state’s interests in “appreciation of history, individualism, and state pride” as “not ideologically neutral” and concluded that they could not justify compelled private

¹³ *Janus*, 138 S. Ct. at 2460–61.

¹⁴ *Id.* at 2464.

¹⁵ See *id.* at 2464–65; *Harris v. Quinn*, 134 S. Ct. 2618, 2641 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309–10, 321–22 (2012).

¹⁶ *Right-to-Work Resources*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> [<https://perma.cc/ZV44-PRVG>].

¹⁷ *Holt v. Hobbs*, 135 S. Ct. 853 (2015), for instance, concluded that a prison grooming policy failed strict scrutiny under the Religious Land Use and Institutionalized Persons Act, in part because “the vast majority of States and the Federal Government” were content with a less restrictive approach. *Id.* at 866. Query whether the same analysis would apply if states were split closer to half and half, as was the case in *Janus*. See *Carey v. Wolnitzek*, 614 F.3d 189, 203 (6th Cir. 2010) (“That a majority of the States with nonpartisan Supreme Court elections have opted not to censor their candidates in [the way challenged in that case] of course does not establish the invalidity of the clause, but it does call into question the necessity of implementing Kentucky’s nonpartisan judicial election system in this way and whether it amounts to the least restrictive means of protecting the Commonwealth’s interests.” (internal quotation marks omitted)).

¹⁸ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

¹⁹ 430 U.S. 705.

speech.²⁰ Public sector unions' positions — and unionism generally — seem to be as ideological as “individualism” or “state pride.”

In any event, even if one assumes (as the Court in *Janus* ultimately did²¹) that public sector unions promote compelling state interests, we would then look to whether less burdensome means are available. The majority opinion concluded that simply abolishing agency fees will still likely serve the government's interests in labor peace and efficient bargaining just fine. Labor unions will still have an incentive to represent nonmembers, the Court reasoned,²² and some individualized services such as grievance representation could be denied to free riders.²³

These predictions were debated by the dissent.²⁴ But there was an even stronger argument available to the majority, a less restrictive means that would achieve all of the state's goals and then some: Rather than requiring employees to directly pay unions, the state itself could instead pay the unions, out of state coffers. Instead of deducting an agency fee from the employee's paycheck and sending that to the union, the state employer could simply reduce the employee's salary by the same amount — with no decrease in take-home pay — and pay that to the union as a “labor relations contract fee.” Indeed, if the state employer believes that unions provide it valuable services, such as by promoting labor peace, improving employee morale, efficiently handling labor-management disputes, and the like, then paying the unions directly for services rendered would be the logical, normal payment mechanism.

Say, for instance, that state employees get an average of \$25,000 a year and then must choose whether to pay \$600 of it in union dues, or \$500 in chargeable agency fees.²⁵ Under the agency fee regime, the state deducts \$500 from each employee's paycheck (though formally characterizing this as requiring each employee to pay the union \$500). The union thus collects \$500 for each non-union employee, as well as \$600 for each member. Under the direct payment alternative, the government instead lowers the average wage to \$24,500 a year. Union dues drop to \$100, and non-union members pay nothing. The government then gives the money directly to the unions. The unions again collect \$500 for each non-union employee, as well as \$600 for each dues-paying member. And

²⁰ *Id.* at 716–17.

²¹ *Janus*, 138 S. Ct. at 2465.

²² *Id.* at 2467.

²³ *Id.* at 2468–69.

²⁴ *Id.* at 2490–91 (Kagan, J., dissenting).

²⁵ These are rounded approximations of the numbers in *Janus*. See *id.* at 2461 (majority opinion); Joint Appendix at 332, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

the employees continue to get the same net salaries as under the old system.²⁶

This alternative is revenue neutral for the state, so it avoids the questions confronted in cases like *Burwell v. Hobby Lobby Stores, Inc.*,²⁷ such as when the government must “assume the cost” of a new program under least-restrictive-means analysis.²⁸ And it accomplishes everything legitimate that agency fees accomplished — funding the desired activities of public sector unions and avoiding free riding without (on net) costing either the state or state employees a nickel. The majority does not mention this alternative; but we think it would be constitutionally permissible, and an adequate means for serving the government interest.

Now, some people (including us) have argued that the presence of such alternatives should be a clue that there is nothing unconstitutional about the agency fee arrangement and other compelled subsidies.²⁹ But it could cut the other way: if we accept the premise that compelled subsidies do work a serious First Amendment injury, then the availability of this direct payment alternative just proves that it is an injury that is wholly unnecessary to inflict, and therefore wholly unjustified.³⁰

It is also true that there would be some transition costs in moving from one regime to the other, and the details would vary by state. In some states the alternative would require legislative change, in others apparently not.³¹ But it seems unlikely that threatened transition costs alone would be enough to make the program constitutional; at most they would come into the consideration of stare decisis, which we won’t discuss here, fascinating though it is.

B. Janus Under Employee Speech Doctrine

Now, perhaps, even if we accept that compelled funding is compelled speech, it would be subject to lesser scrutiny in the particular context of government employment, where the Court has recognized that government employers have broader powers over employee speech than they would over ordinary citizens.

But even in the public employment context, this kind of compelled speech (if that’s what it is) would be difficult to uphold. The closest

²⁶ Actually, because of the federal tax treatment of union dues, they may get slightly net higher salaries. See Daniel Hemel & David Louk, *Is Abood Irrelevant?*, 82 U. CHI. L. REV. DIALOGUE 227, 236–37 (2015).

²⁷ 134 S. Ct. 2751 (2014).

²⁸ *Id.* at 2780–81.

²⁹ Brief of Professors Eugene Volokh and William Baude as *Amici Curiae* in Support of Respondents at 12, *Janus*, 138 S. Ct. 2448 (No. 16-1466); Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1077 n.165 (2018).

³⁰ See Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 197–204 (2016).

³¹ Hemel & Louk, *supra* note 26, at 248–49.

precedents may well be the Supreme Court's "political patronage" cases, which protect almost all public employees from being required to join, endorse, or contribute to a political party.³² Such requirements "severely restrict political belief and association," and cannot be justified under strict scrutiny.³³

While the government has undoubted power to discharge and discipline its government employees, the patronage cases nonetheless conclude that an employee's job with the government "cannot properly be conditioned upon his allegiance to [a] political party."³⁴ Indeed, the plurality in *Elrod v. Burns*³⁵ expressly noted that "any assessment of [the employee's] salary is tantamount to coerced belief."³⁶

It has long been argued that public sector labor unions are also "inherently 'political'"³⁷ — even if one excludes their "nonchargeable" activities — and the choices that they lobby the government to make are of great public importance.³⁸ Compelling employees to endorse or expressly join unions would thus be as unconstitutional as compelling them to endorse or join political parties. And if one accepts that compelled contributions are comparable to compelled speech or compelled membership, then they would likely be unconstitutional as well — justifiable only if they pass strict scrutiny, which (as discussed above) would be very difficult to do.

Even if we ignore the patronage cases and employ the laxer standard of *Pickering v. Board of Education*,³⁹ compelled expression in support of unions is still likely unconstitutional. Under the *Pickering* framework, speech on a matter of public concern⁴⁰ (and not part of one's official job duties⁴¹) can be restricted only if "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern."⁴²

The test is not quite framed for compulsions of payment; it was designed for restrictions on speech. But if we apply it, both threshold conditions appear to be met. Supporting a union is not exactly what

³² See Tang, *supra* note 30, at 152–53. The exception is for narrow job categories where political affiliation is seen as an important job criterion, for instance high-level decisionmakers. See *Branti v. Finkel*, 445 U.S. 507, 517–18 (1980).

³³ *Elrod v. Burns*, 427 U.S. 347, 372 (1976) (plurality opinion); see also *Branti*, 445 U.S. at 515–16.

³⁴ *Branti*, 445 U.S. at 519; see also *Elrod*, 427 U.S. at 355 (plurality opinion).

³⁵ 427 U.S. 347.

³⁶ *Id.* at 355 (plurality opinion).

³⁷ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977) (characterizing appellants' argument).

³⁸ See, e.g., *Janus*, 138 S. Ct. at 2474–77.

³⁹ 391 U.S. 563 (1968).

⁴⁰ *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004).

⁴¹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁴² *Pickering*, 391 U.S. at 568.

state employees are “employed to do,” nor are their communications to the union “official communications” or “official business.”⁴³ As for “public concern,” public sector unions negotiate over many big-ticket issues that affect government budgets and important government policies,⁴⁴ as well as individual grievances that are sometimes of private concern and sometimes not.⁴⁵ But the question is how to characterize compelled support for the union itself. We could either try to split support for a union into its “private concern” and “public concern” portions — a split that would place a lot in the “public concern” category, given the public significance of union actions — or we could conclude that all decisions to support or not support a union are matters of public concern if they relate in part to the big-ticket issues. And to the extent that these threshold tests are met, agency fees would likely fail the balancing test in light of the direct payment alternative.

Perhaps for these reasons, the dissent in *Janus* tried to argue that something even weaker than *Pickering* was the law: “If an employee’s speech is about, in, and directed to the workplace, she has no possibility of a First Amendment claim.”⁴⁶ And elsewhere the dissent argued that the “public concern” test from *Pickering*⁴⁷ “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.”⁴⁸

But this overstates the government’s power under the employee speech doctrine. In *Givhan v. Western Line Consolidated School District*,⁴⁹ the Court concluded that the First Amendment protected speech by a schoolteacher to a principal (i.e., directed to someone in the workplace),⁵⁰ at school (in the workplace),⁵¹ about alleged race discrimination in the school (about the workplace).⁵² The Court specifically rejected the school district’s claim that First Amendment protection “is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”⁵³

⁴³ *Garcetti*, 547 U.S. at 421–23.

⁴⁴ See, e.g., *Janus*, 138 S. Ct. at 2474–77.

⁴⁵ See, e.g., *Connick v. Myers*, 461 U.S. 138, 154 (1983).

⁴⁶ *Janus*, 138 S. Ct. at 2496 (Kagan, J., dissenting) (internal quotation marks omitted).

⁴⁷ 391 U.S. at 569–73.

⁴⁸ *Janus*, 138 S. Ct. at 2495 (Kagan, J., dissenting).

⁴⁹ 439 U.S. 410 (1979).

⁵⁰ *Id.* at 411–13.

⁵¹ *Ayers v. W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977), *rev’d sub nom. Givhan*, 439 U.S. 410.

⁵² *Givhan*, 439 U.S. at 412–13.

⁵³ *Id.* at 415–16.

Likewise, in *Connick v. Myers*,⁵⁴ the Court concluded that speech by an employee to coworkers, at work, about alleged “pressure[] to work in political campaigns on behalf of office supported candidates” was on a matter of public concern.⁵⁵ The *Connick* Court concluded that the speech could still be restricted on the facts of that particular case, because it was sufficiently disruptive to fail the *Pickering* test — but the Court deliberately did not conclude that such in-, to-, and about-workplace speech was categorically unprotected.⁵⁶

So whether seen through the general lens of compelled speech or the specific lens of government employee speech, it is hard to justify the First Amendment harms supposedly inflicted by agency fees.

C. Janus’s *Widely Accepted Premise*

Many thoughtful people have taken this general view — that compelled subsidies for speech raise serious First Amendment problems — even if they have quibbled over its scope. It was the approach taken by nearly every Justice in *Abood v. Detroit Board of Education*.⁵⁷ It was unanimously extended to state bar associations in *Keller v. State Bar of California*, thirteen years later.⁵⁸ Before all that, it was forcefully argued by both Justices Black⁵⁹ and Douglas⁶⁰ — who were certainly not right about everything in their day, but who were sometimes visionary.⁶¹ Without explicitly putting it in First Amendment terms, a 1943 ACLU-proposed “‘bill of rights’ for union members”⁶² likewise argued that “no [union] member should be assessed for a political purpose which he does not support.”⁶³

⁵⁴ 461 U.S. 138 (1983).

⁵⁵ *Id.* at 149.

⁵⁶ *Id.* at 164.

⁵⁷ 431 U.S. 209, 222, 236 (1977); *id.* at 244 (Powell, J., concurring in the judgment). Then-Justice Rehnquist reiterated his view that the First Amendment protections for government employees were weak and that the patronage cases were wrongly decided, but joined the majority anyway. *Id.* at 242–44 (Rehnquist, J., concurring).

⁵⁸ 496 U.S. 1, 16–17 (1990).

⁵⁹ *Lathrop v. Donohue*, 367 U.S. 820, 871 (1961) (Black, J., dissenting); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 788–89 (1961) (Black, J., dissenting).

⁶⁰ *Street*, 367 U.S. at 776–78 (Douglas, J., concurring).

⁶¹ The underlying argument traces at least as far back as Cecil B. DeMille’s 1944 California challenge to use of union dues for political purposes. Appellant’s Opening Brief at 33–35, *De Mille v. Am. Fed’n of Radio Artists*, Civ. 15067, 175 P.2d 851 (Cal. Dist. Ct. App. 1947), *aff’d*, 187 P.2d 769 (Cal. 1947).

⁶² ACLU, *DEMOCRACY IN TRADE UNIONS* 68 (1943) (capitalization omitted).

⁶³ *Id.* at 70; *see also id.* (“[I]f for political purposes the assessments should be wholly voluntary.”); *id.* at 67 (asserting “the right of the minority not to be assessed” when unions “contribute funds to political campaigns”). This proposal dealt with dues at private workplaces, *id.* at 66, not governmental ones (since public employees were generally not allowed to collectively bargain at the time, *see Developments in the Law — Public Employment*, 97 HARV. L. REV. 1611, 1676–77 (1984)); it also called for “every possible pressure . . . exerted from within and without the labor movement to

Even the dissent in *Janus* — which adopted a generally barn-burning rhetorical approach — never really disputed this general view of compelled subsidies as compelled speech. The dissent recites, without disapproval, *Abood*'s concession of employee “First Amendment interests.”⁶⁴ It then goes on to battle about the strength of the government's interests and the scope of employees' free speech rights without ever really denying that there are serious free speech rights at issue in the first place.⁶⁵ Scholars who challenge the Court's compelled subsidy jurisprudence as incoherent or overbroad likewise often concede this view in at least some measure, for instance arguing (1) that the subsidies might be unconstitutional if they make it look like the subsidizers endorse the speech,⁶⁶ (2) that there is a symmetry between the right to contribute money and the right not to contribute,⁶⁷ or (3) that compelled subsidies “might work some infringement of freedom of conscience” (though “slight”).⁶⁸

The majority opinion in *Janus* has been and will be subjected to quite strong critiques, not just as to its merits but as to its methodological legitimacy: some argue that the Justices are unprincipled hacks who only profess to care about text and history when it suits them,⁶⁹ that they are reviving *Lochner* to constitutionalize libertarian economic

induce unions to measure up to such standards,” but only pressures short of legislation, ACLU, *supra* note 62, at 68–69. See also Clyde W. Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 835–36 (1951) (concluding that “compulsory contribution to political causes” was “[a] private poll tax” that was “difficult to justify”).

⁶⁴ *Janus*, 138 S. Ct. at 2489 (Kagan, J., dissenting) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977)).

⁶⁵ The dissent did cite our amicus brief, which challenged this premise, but without endorsing or fully describing this part of our argument. See *id.* at 2494–95.

⁶⁶ Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 218–20; see also David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1019–20 (1982) (allowing this possibility, though arguing it is unlikely in the agency fee context).

⁶⁷ Post, *supra* note 66, at 221–25; see also Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 26 (2016) (“The better reading of the decision . . . is that *Abood* is the mirror image of *Buckley*.”).

⁶⁸ Gaebler, *supra* note 66, at 1022; see also David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of California*, 1990 SUP. CT. REV. 163, 185, 187 (arguing that because “the actual amounts of money levied are rather small” the First Amendment interests are easily outweighed by “unionism, which has been one of the mainstays of American society for over a century”).

⁶⁹ Andrew Strom, *In Janus, the Court's “Originalists” Show Their True Colors*, ON LABOR (June 29, 2018), <https://onlabor.org/in-janus-the-courts-originalists-show-their-true-colors/> [https://perma.cc/86XJ-PBF5].

principles,⁷⁰ that they are “weaponizing the First Amendment” (whatever precisely that might mean),⁷¹ and that they are “black-robed rulers overriding citizens’ choices” at “every stop.”⁷² We think *Janus* is wrong too, as we will explain, but this kind of criticism is both unfair and insufficiently ambitious. The majority’s argument proceeds quite logically from a widely held and plausible premise about First Amendment compelled speech. The case for the agency fees was lost when that premise was accepted.

II. PAYING IS NOT SPEAKING

So if requiring someone “to contribute to the support of an ideological cause” (even just by paying money) interferes with “the freedom of belief”⁷³ protected by the First Amendment, then the *Janus* majority was likely right: *Abood* would have been correct to recognize such a right, and then wrong not to protect that right more fully. *Janus* is more convincing than *Abood* in recognizing that collective bargaining — at least for government employee unions bargaining with government officials over public funds — is “an ideological cause” that involves “a political message”⁷⁴ as well.

But there is another way to think about compulsory funding, one we think is ultimately correct. Requiring someone to pay money is not requiring them to believe, to speak, or to associate, even if the money is spent for political purposes. By itself, it does not implicate the First Amendment, and does not require the government to try to use less restrictive alternatives. This means that *Abood* erred at its root, in recognizing such a right at all.

A. *The Ubiquity of Compulsory Funding of Ideological Expression*

Requiring people to pay money that can be used for speech with which they disagree is utterly commonplace. If “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical,”⁷⁵ then it’s sin and tyranny that are everywhere in modern government. After all, each of us must pay taxes that will in part go to spread opinions many of us

⁷⁰ Mark Joseph Stern, *A New Lochner Era*, SLATE (June 29, 2018, 4:01 PM), <https://slate.com/news-and-politics/2018/06/the-lochner-era-is-set-for-a-comeback-at-the-supreme-court.html> [<https://perma.cc/G9FP-WCKL>].

⁷¹ *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

⁷² *Id.* at 2502.

⁷³ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

⁷⁴ *Id.* at 234.

⁷⁵ *Janus*, 138 S. Ct. at 2464 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950) (emphasis omitted)).

disbelieve and abhor — military recruiting campaigns, antidrug campaigns, publicity for or against abortion or contraception, public school and university curricula, and a vast range of other messages.⁷⁶

Justice Black in *Lathrop v. Donohue*⁷⁷ insisted that he could “think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support,” among other things, “ideologies or causes that they are against.”⁷⁸ In a companion case, *International Association of Machinists v. Street*,⁷⁹ he condemned a law “being used as a means to exact money from . . . employees . . . to support doctrines they are against.”⁸⁰ But he never explained how this vision was consistent with the everyday reality of “exact[ion]” through taxation to support ideologies, causes, and doctrines — whether related to tolerance, drugs, alcohol, crime, war, the environment, respect for the law, or anything else — that some taxpayers “are against.”

The government cannot require us to say things as part of its programs. It generally cannot require us to display things on our property⁸¹ (except when it can⁸²). But it can certainly require us to pay for speech by others. You can refuse to say the Pledge of Allegiance, but you can’t require the government to refund the portion of your taxes that it spends on patriotic observances.

Perhaps because of this, the Court in *Janus* (unlike Justice Black) was careful to condemn only “compelled subsidization of *private* speech.”⁸³ And in *Johanns v. Livestock Marketing Ass’n*⁸⁴ and *Board of Regents of the University of Wisconsin System v. Southworth*,⁸⁵ the Court expressly made clear that the logic of *Abood* and similar cases doesn’t apply to compelled funding of government speech.⁸⁶

But having recognized that government speech can be funded by taxes, we should have doubts about the *Abood* First Amendment argument in the first place. Why would the First Amendment distinguish

⁷⁶ Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 22–24 (1983); Leslie Gielow Jacobs, *The Link Between Student Activity Fees and Campaign Finance Regulations*, 33 IND. L. REV. 435, 453–54 (2000); Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1111–17 (2005).

⁷⁷ 367 U.S. 820 (1961).

⁷⁸ *Id.* at 873 (Black, J., dissenting).

⁷⁹ 367 U.S. 740 (1961).

⁸⁰ *Id.* at 790 (Black, J., dissenting).

⁸¹ *See, e.g.*, Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376, 2378 (2018) (holding that California could not require crisis pregnancy centers to post certain disclosures).

⁸² *See, e.g.*, Rumsfeld v. Forum for Acad. and Institutional Rights, 547 U.S. 47, 58–70 (2006) (holding that Congress could require law schools to distribute information about where students can find on-campus military recruiters).

⁸³ *Janus*, 138 S. Ct. at 2464 (emphasis added).

⁸⁴ 544 U.S. 550 (2005).

⁸⁵ 529 U.S. 217 (2000).

⁸⁶ *Johanns*, 544 U.S. at 559; *Southworth*, 529 U.S. at 229.

compelling people to subsidize private speech from compelling people to subsidize government speech? If compelled subsidy of private speech somehow “undermines” “the search for truth,”⁸⁷ the much larger compelled subsidy of government speech would do so at least as much. If compelling people to subsidize private speakers’ ideas is “demeaning” and “coerc[es them] into betraying their convictions,”⁸⁸ then compelling people to subsidize the government’s ideas is just as bad. That we accept such government compulsion without any constitutional qualm suggests that compulsion to pay money, by itself, is not a constitutional problem at all.⁸⁹

In *Abood*, Justice Powell opined that compelled payment for speech “of a private association is fundamentally different” from compelled payment for government speech, because “the government is representative of the people,” while the private association “is representative only of one segment of the population, with certain common interests.”⁹⁰ But why should it matter that “the government is representative of the people”? The First Amendment protects against majoritarian speech compulsions as much as against speech compulsions that favor one segment of the population.

We don’t say, for instance, “requiring schoolchildren to say a pledge of allegiance would be unconstitutional if the government delegated the writing of a pledge to the Boy Scouts, but if the requirement is imposed by a representative legislature, it’s just fine.” If compelled *payment* is just as bad as compelled speech, then why should the presence of democratic decisionmaking — generally so inadequate to justify speech compulsions — legitimize compelled payments?

In *Southworth*, the Court likewise suggested that compulsory funding of government speech could be justified by the presence of “traditional political controls to ensure responsible government action” that might be “sufficient to overcome First Amendment objections.”⁹¹ But the First Amendment isn’t limited to preventing “[ir]responsible government action.” The premise of the compelled subsidy cases is that requiring people to fund speech that they oppose unduly interferes with their dignity and autonomy, not that the government may use people’s money irresponsibly.

Indeed, consider the public employment contract negotiation itself. Some employees may disapprove of the position being taken by a union

⁸⁷ *Janus*, 138 S. Ct. at 2464.

⁸⁸ *Id.*

⁸⁹ We also think the Court will continue to accept the compulsion without constitutional qualm even after *Janus*. See *infra* section III.A, pp. 195–96.

⁹⁰ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in the judgment); see also Post, *supra* note 66, at 225 (offering a similar analysis).

⁹¹ 529 U.S. at 229.

using their agency fees. But many employees may disapprove of the position being taken by *management* using their tax dollars. If compulsory agency fees are allowed, compulsory payments are being used to fund both sides of the negotiation. There is no First Amendment problem with the management negotiators speaking using compulsorily raised funds. Why should there be a First Amendment problem with the union negotiators speaking using compulsorily raised funds?⁹²

Compulsory tax revenue also routinely ends up subsidizing private speech. Tax money funds private artists (through National Endowment for the Arts grants), private scientists (through National Science Foundation grants), public university professors writing law review articles (through faculty salaries), and much more. All that speech may well express private opinions that many taxpayers might reject; yet there is no First Amendment problem with tax money being used this way.⁹³ And if one defends such funding on the grounds that the funding to the private speakers is still authorized by “the government[, which] is representative of the people” — well, the same is true of agency fees.

Another possible distinction is that most taxes go to a wide range of uses, and come from a wide range of taxpayers; agency fees are narrower in both respects. But we think the Court was quite right in *Johanns* to conclude that this distinction can’t make a First Amendment difference.

In *Johanns*, the Court upheld a program in which the government used money raised through “a targeted assessment on beef producers, rather than by general revenues” to pay for generic beef advertising.⁹⁴ “The compelled-subsidy analysis,” the Court held, “is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment.”⁹⁵ “The First Amendment does not confer a right to pay one’s taxes into the general fund, because the injury of compelled funding . . . does not stem from the Government’s mode of accounting.”⁹⁶ We agree: there is no reason the government should have less freedom to use, say, revenues from an excise tax on alcohol or gasoline than revenues from a general income tax, property tax, or sales tax.⁹⁷

⁹² We express no opinion on the policy arguments for why one side should be funded this way and the other should not. But we see no good argument that the First Amendment allows compulsorily raised funds to be used by one side but not the other.

⁹³ Perhaps some such grants might include conditions limiting the use of the funds for certain political purposes, such as electioneering or lobbying. But such conditions are surely not *required* by the First Amendment, even when they are allowed by it, and in any event they leave grant recipients free to express many controversial but not election- or legislation-related opinions.

⁹⁴ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

⁹⁵ *Id.* (emphasis omitted).

⁹⁶ *Id.* at 562–63.

⁹⁷ If the tax itself discriminates against speech based on its content, or targets those with disfavored views, it would be unconstitutional on those grounds. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). But normal, content-

Nor can the First Amendment analysis reasonably turn on the narrowness of the purposes for which the tax is collected.⁹⁸ For instance, the nation is full of special-purpose districts that receive specially targeted property tax revenue: school districts, business improvement districts, public library districts, hospital districts, mosquito control districts, and many more. There is no reason why they should be more constrained by the First Amendment than are cities, counties, states, or the federal government. Whatever injury there might be — none, we think — to a taxpayer whose money is spent to buy library books he disapproves of, that injury is the same whether the books are paid for by general income tax funds or by a property tax imposed on behalf of a special library district.⁹⁹ Likewise with special assessments to pay for union negotiations or for bar programs.

B. The Irrelevance of Cutting Out the Government Middleman

Now many of the examples we gave involve money being taken from objectors, placed in the treasury, and then sent to private recipients. Agency fees, by contrast, at least formally flow from the objecting employees directly to the private union. Yet even this formal difference is thin — both agency fees and taxes are usually withheld from one's paycheck and then routed by the government to the objectionable use.

And, more broadly, why should this formal difference matter? One way or the other, objectors are required to fund speech they dislike. That the government adds an extra step, where the government puts the money in the treasury after taking it and before transferring it, should not have First Amendment significance. Sometimes formal differences do matter in law — but usually they are significant for a *reason*, whether practical, textual, or historical. As we've discussed, there is no practical ground for a distinction between agency fees and taxes, nor is there anything in the text of the First Amendment that suggests one.

The Court in *Abood*, *Janus*, and many other cases has vaguely hinted at a historical argument, citing Jefferson's objection "to compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors."¹⁰⁰ But in that quote Jefferson was

neutral taxes cannot be invalidated on the grounds that they pay for speech that the taxpayers dislike. *Ark. Writers' Project*, 481 U.S. at 229.

⁹⁸ See, e.g., Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 189 (2002) ("The objection in *Keller* and *Abood* — that a single recipient used dues to advance its own causes — is absent in the taxpayer situation, where general taxpayer funds are used for a wide array of government speech purposes.").

⁹⁹ See, e.g., Fla. Op. Att'y Gen. 88-21 (May 26, 1988) (discussing library taxing districts).

¹⁰⁰ Jefferson, *supra* note 75 (emphasis omitted). *Janus* cited two additional historical sources, 138 S. Ct. at 2471 n.8, which did not discuss funding but simply criticized religious tests, oaths of allegiance, and the like. Oliver Ellsworth, *The Landholder*, VII., CONN. COURANT, Dec. 17, 1787, reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 167, 167-71 (Paul

specifically talking about the propagation of *religious* opinions,¹⁰¹ which is regulated by a separate constitutional provision — the Establishment Clause. And indeed, Establishment Clause precedent further proves our point. Precedent forbids the government from requiring us to tithe to a church.¹⁰² Yet it equally bars the government from selectively targeting churches for gifts of tax funds as well.¹⁰³ So the historical references provide no particular support for the Court’s distinction between compelled direct payments and compelled payments that go through the treasury.

Some people have defended the formal distinction by saying that coercively funded government speech is inevitable, but at least coercive funding of private speech is not. And we do appreciate that constitutional rights shouldn’t be entirely rejected simply because they can’t be completely protected. But the inevitability of coercively funded government speech should serve as a clue that coercively funded private speech is not unconstitutional either.

This is especially so because coercion for government speech is so common and so substantial. Average agency fee payers likely pay about 2% of their wages in agency fees,¹⁰⁴ but the average tax burden (federal, state, and local) is about 25%.¹⁰⁵ Much of those tax payments will go to activities that have at least as “powerful political and civic consequences”¹⁰⁶ as the activities paid for by agency fees. Yet we see no Free Speech Clause problems with those massive compelled payments for, among other things, speech; it’s not just that we view this as deeply regrettable but inevitable — the legal system views taxes as raising no Free Speech Clause objections at all, whether the taxes go to speech or anything else.¹⁰⁷ That should make us doubt that there are First Amendment problems with the much smaller compelled agency fees.

Leicester Ford ed., *Historical Printing Club* 1892); NOAH WEBSTER, *On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office*, in *A COLLECTION OF ESSAYS AND FUGITIV WRITINGS* 151, 151–53 (Boston, I. Thomas & E.T. Andrews 1790).

¹⁰¹ The quote was from his bill on religious freedom, and condemned fees that were used to support religious teaching. Jefferson, *supra* note 75; see also David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 235 (2003) (similarly criticizing use of this Jefferson quote); Klass, *supra* note 76, at 1114.

¹⁰² *Everson v. Bd. of Educ.*, 330 U.S. 1, 10–11 (1947).

¹⁰³ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

¹⁰⁴ Sachs, *supra* note 29, at 1048.

¹⁰⁵ ORG. FOR ECON. CO-OPERATION & DEV., *REVENUE STATISTICS 2017 — THE UNITED STATES* (2017), <https://www.oecd.org/tax/revenue-statistics-united-states.pdf> [https://perma.cc/3XJ5-PFHZ].

¹⁰⁶ *Janus*, 138 S. Ct. at 2464 (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012)).

¹⁰⁷ Of course, some people morally object to taxation generally, or to taxation used for particular purposes. But in our experience, they rarely distinguish taxes spent on speech from taxes spent on other behavior — and the legal system certainly does not.

Sometimes formal distinctions at least accomplish something symbolic, but we do not see that here either. Paying agency fees could be seen by some as complicity in the actions that the union engages in using those fees. But of course the same is routinely perceived by many when it comes to taxes: “It is not a man’s duty . . . to devote himself to the eradication of . . . even the most enormous wrong,” Thoreau wrote, “but it is his duty, at least, to wash his hands of it, and . . . not to give it practically his support” through the payment of taxes.¹⁰⁸

Conversely, one could say that no one would reasonably view paying taxes as endorsement of the government’s actions, precisely because everyone understands that people pay taxes because they have to. Yet exactly the same is true of agency fees.¹⁰⁹ However we think about complicity in these contexts, we see no symbolic difference between government coercion to pay money to others and government coercion to pay money to the government so it can be paid to others (whether government employees or recipients of government grants).

To be sure, the government spends money on more things than unions do (though unions spend it on many things, too). Some might therefore think that paying money to a government that is fighting a war does not symbolize support for the war, but paying money to a union symbolizes support for the union’s collective bargaining positions. But from 1942 to 1945 and from 1951 to 1961, the federal government spent the majority of its outlays on the military.¹¹⁰ Likewise, some local property taxes are specifically targeted to schools, which are chock full of government speech that many people might deeply oppose.

More broadly, even if most people today don’t see compelled funding of the federal government as symbolically expressing support of (say) the War on Terror, surely the funding symbolically expresses support of *the federal government* as an institution at least as much as compelled agency fees symbolically express support of unions. Yet we do not perceive being forced to pay taxes as burdening people’s First Amendment rights, even if they oppose the federal government as a whole (whether because they think that it is particularly evil, or because they think all government is evil). And this is so regardless of the symbolism they or others may perceive from such a forced payment. The same should be so for public employees being forced to pay agency fees.

So there seems to be no adequate reason — textual, historical, practical, or symbolic — for treating compelled payments differently depending on whether they pass through the treasury. And we can see this by

¹⁰⁸ HENRY DAVID THOREAU, *A YANKEE IN CANADA* 131 (Boston, Ticknor & Fields 1866).

¹⁰⁹ See Gaebler, *supra* note 66.

¹¹⁰ “National defense” expenditure as a percentage of all outlays was over 70% throughout America’s World War II years, nearly 90% in 1945, and nearly 70% from 1952 to 1954. See OFFICE OF MGMT. & BUDGET, HISTORICAL TABLE 3.1 — OUTLAYS BY SUPERFUNCTION AND FUNCTION: 1940–2023, <https://www.whitehouse.gov/omb/historical-tables/> [https://perma.cc/49K3-XT6F].

considering the many situations where the government requires people to buy goods or services from private organizations, even though those organizations can then use some of this compulsorily provided revenue to express their views on whatever topics they please.

For instance, a public law school might require that applicants take the LSAT, which would require them to pay money to the Law School Admission Council. LSAC uses some of that money for speech, including research reports and public statements that many might see as imbued with ideological messages.¹¹¹ And if the whole process of public employee collective bargaining can itself be viewed as political, then the LSAC's entire mission — of measuring the future operators of the legal system in particular ways, with an eye toward particular judgments of quality and merit — can be seen as political, too. Yet there's no First Amendment problem with requiring public law school applicants to pay the money to LSAC. Nor would applicants likely care whether they had to pay the LSAC directly, or had to pay (say) the Department of Education, which would then subcontract the task to LSAC.

Likewise, there's no First Amendment problem with requiring drivers to pay money to auto insurance companies, requiring public university students to buy Apple computers,¹¹² or requiring litigants to pay opponents' legal fees.¹¹³ The companies might well spend some of their profits on lobbying, ideological advocacy, and even outright electioneering. But that compelled payment is not compelled speech. For the same reason, there's no First Amendment problem with requiring employees to buy the services of a union, whether or not they like how their money is spent.

C. *Nothing New, from 1947 to Today*

There is nothing fundamentally new in our position: Justices Frankfurter and Harlan took much the same view nearly fifty years ago, when they argued that agency fees for railroad employees (*Machinists v. Street*) and mandatory bar dues for lawyers (*Lathrop v. Donohue*) didn't violate the First Amendment. In such situations, they reasoned,

¹¹¹ See *Research Library*, LAW SCH. ADMISSION COUNCIL, <https://www.lzac.org/data-research/research> [https://perma.cc/SE75-BM8X] (listing reports on, among other things, performance by race, sex, and ethnicity); *LSAC Diversity Matters Grants*, LAW SCH. ADMISSION COUNCIL, <https://www.lzac.org/members/lzac-grant-programs/lzac-diversity-matters-grants> [https://perma.cc/AZ7L-6J72] (promoting various grants for, among other things, "diversity outreach efforts").

¹¹² See *Frequently Asked Questions (FAQ) Student Laptop Computer Requirement*, UNIV. OF CINCINNATI BLUE ASH COLL. (June 23, 2017), <http://www.ucblueash.edu/content/dam/ucblueash/docs/academics/academic-departments/emedial/2017-Laptop-FAQ.pdf> [https://perma.cc/EUB5-J28X].

¹¹³ *Banning v. Newdow*, 14 Cal. Rptr. 3d 447, 453 (Ct. App. 2004); Post, *supra* note 66, at 210–12 (discussing this example and offering others).

No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues

. . . . It is a commonplace of all organizations that a minority of a legally recognized group may at times see an organization's funds used for promotion of ideas opposed by the minority [For example,] the Federal Government expends revenue collected from individual taxpayers to propagandize ideas which many taxpayers oppose.¹¹⁴

And indeed this position goes back still fifteen years more, to *De Mille v. American Federation of Radio Artists*,¹¹⁵ a 1947 California Supreme Court case. The plaintiff was the great director Cecil B. DeMille, who was also a prominent political opponent of the labor movement. DeMille had a radio program, the Lux Radio Theatre, which required him to be a member of a union. The union assessed all members a \$1 fee that was used to oppose a California right-to-work ballot measure. DeMille refused to pay, which got him ejected from the union and lost him his \$100,000 per year salary.¹¹⁶

DeMille sued, claiming this violated his First Amendment rights. Unlike in *Abood* and *Janus*, there was no state action present: the \$1 assessment was imposed and enforced just by the union. But the court didn't focus on the absence of state action, and instead squarely confronted the compelled speech argument.

DeMille had argued the \$1 compelled payment "would be an expression on his part contrary to his personal beliefs,"¹¹⁷ which he argued was unconstitutional under *West Virginia State Board of Education v. Barnette*.¹¹⁸ The court disagreed, noting that *Barnette* had not concerned "payment of taxes assessed for the support of school districts requiring flag salute ceremonies"; had that been the issue in *Barnette*, the court opined, "we doubt that the disposition would have been the same."¹¹⁹ And the court held that there was no right to be exempted from such assessments, "else payment of a tax . . . could be avoided by the mere assertion of beliefs . . . opposed to the accomplishment thereof."¹²⁰

¹¹⁴ *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 806, 808 (1961) (Frankfurter, J., dissenting); *accord Lathrop v. Donohue*, 367 U.S. 820, 856–57 (1961) (Harlan, J., joined by Frankfurter, J., concurring in the judgment); see also Post, *supra* note 66, at 210–12 (giving other examples).

¹¹⁵ 187 P.2d 769 (Cal. 1947).

¹¹⁶ *De Mille v. Am. Fed'n of Radio Artists*, 175 P.2d 851, 851 (Cal. Ct. App. 1946), *aff'd*, 187 P.2d 769.

¹¹⁷ *De Mille*, 187 P.2d at 775.

¹¹⁸ 319 U.S. 624 (1943).

¹¹⁹ *De Mille*, 187 P.2d at 775 (emphasis added).

¹²⁰ *Id.* at 776.

This earlier view was right, we think, and *Abood* (and perhaps *Street*) started us down a mistaken path — a path that leads logically to *Janus*. True, much of what public employee unions do is political. Some involves overtly ideological advocacy. Much involves at least taking bargaining positions “that have powerful political and civic consequences.”¹²¹ But much of what government does is political, too.

The First Amendment does not protect us from having our money forcibly taken — on threat of prison — to pay for governmental expression that we disagree with. Why then should it protect us from having our money forcibly taken — on threat of being fired — to pay for union expression that we disagree with? These are simply the consequences of sharing a nation or a workplace with people who disagree with us.

D. *Isn't Money Speech?*

Abood relied in part on an analogy to campaign finance law. *Buckley v. Valeo*,¹²² the Court noted, held “that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment”;¹²³ and the Court concluded that, when it comes to agency fees, “[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.”¹²⁴ This analogy, we think, is misplaced.

Money is not speech, but restricting us from spending money to speak restricts our speech — it makes it impossible for us to put up a billboard, buy a newspaper ad, and the like.¹²⁵ Likewise, restricting newspapers from spending money to publish would restrict their free press rights; restricting parents from spending money to educate their children would restrict their parental rights; restricting people from spending money on abortions would restrict their abortion rights; restricting criminal defendants from spending money on lawyers would restrict their right to the assistance of counsel.¹²⁶

¹²¹ *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012).

¹²² 424 U.S. 1 (1976).

¹²³ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (citing *Buckley*, 424 U.S. 1).

¹²⁴ *Id.*

¹²⁵ See *Citizens United v. FEC*, 558 U.S. 310, 338–41 (2010); *Buckley*, 424 U.S. 1; see also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“[A] decision to contribute money to a campaign is a matter of First Amendment concern — not because money *is* speech (it is not); but because it *enables* speech.”); Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 421 (2013). We think the Court’s approach to campaign finance speech restrictions is basically right. See Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1101 (2002).

¹²⁶ See, e.g., *Meyer v. Grant*, 486 U.S. 414, 415–16 (1988) (Stevens, J., writing for a unanimous Court) (holding that the Free Speech Clause includes the right to pay people to circulate initiative petitions); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (noting that “the

But compelling us to *give* money does not appreciably restrict our speech, other than by slightly reducing the amount of money we have left over. Nor does compelling us to give money, without compelling us to do more, compel us to speak or to believe. That is why the government can compel each of us to pay money to the treasury every year even though it cannot require any of us to pledge allegiance to the government.¹²⁷ No court would accept a challenge to a state property tax on the grounds that it was equivalent to a pledge of allegiance to the state or its school system, nor on the grounds that it left property owners with less money to spend on billboards.¹²⁸ That is because compelled payment is neither compelled speech nor a speech restriction.

In *Buckley*, the Court did hold that the very act of contributing money to a political cause can be symbolic expression, so restricting contributions restricts that symbolic expression and not just the recipient's ability to spend the money for speech.¹²⁹ But the Court gave little weight to this contributor interest in symbolic expression, and upheld the limits on contributions.¹³⁰ And whatever symbolism there might be in voluntary political contributions, it would disappear for government-compelled payments, as shown by the countless exactions the legal system accepts without qualm.¹³¹

Now when it comes to religious exemption claims, such as under a Religious Freedom Restoration Act (state or federal), the analysis is different: requirements that people pay money — including for taxes — may indeed count as a “substantial burden” on religious objectors.¹³² The objectors might still often be denied an exemption from such requirements, on the theory that uniform administration of a tax

Government [does not] deny that the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire”.

¹²⁷ See Gaebler, *supra* note 66, at 1020 (“[F]inancial support of an institution is a far less personal or intimate endorsement of the institution or its principles than the reciting of a pledge or the giving of a salute or even than the public display of a slogan or motto on one’s personal property.”).

¹²⁸ See Lathrop v. Donohue, 367 U.S. 820, 852 (1961) (Harlan, J., concurring in the judgment).

¹²⁹ *Buckley*, 424 U.S. at 20–21.

¹³⁰ *Id.*; see also Klass, *supra* note 76, at 1118 (making a similar point). Subsequent cases have recognized some challenges to contribution limits, but based on rationales unrelated to the symbolic expression rationale (for example, by noting that unduly low limits interfere with the recipient’s ability to effectively speak in the election campaign). See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448–50 (2014) (plurality opinion); *Randall v. Sorrell*, 548 U.S. 230, 246–62 (2006) (plurality opinion).

¹³¹ See Klass, *supra* note 76, at 1122–23 (“*Buckley* was right to recognize that *voluntary* payments for the speech of others are often interpreted as symbolic acts of support, that they have an (albeit limited) expressive content. But . . . our linguistic community does not interpret the payment of *mandatory assessments* in the same way.”).

¹³² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014); see also *United States v. Lee*, 455 U.S. 252, 257 (1982).

law passes strict scrutiny;¹³³ but the law would accept their sincere subjective claims that paying money that goes for evil purposes is itself sinful.¹³⁴

Yet that just reflects how religious exemption cases operate differently from free speech cases. Hobby Lobby got a federal Religious Freedom Restoration Act¹³⁵ exemption from a regulation that compelled employers to provide employees with certain kinds of medical benefits.¹³⁶ But it doesn't follow that such a compulsion violated the Free Speech Clause rights of all employers who disapproved of it. Refusal to pay money might be a religious practice, and compelling payments might substantially burden religious practice; but it doesn't follow that refusal to pay money is speech, or that compelling the payment of money is compelled speech.

E. Contributions to Political Parties

We thus think that the government can compel us to fund others' speech just as permissibly as it can speak directly (with our money). This leads to the question: Are there things that the government indeed can't say or support directly, so that even under our view the government can't compel people to subsidize them?

We mentioned above the only area where the answer is clearly "yes" under current doctrine: religious advocacy, which is constrained by the Establishment Clause. The government can't convey sufficiently religious views itself¹³⁷ or selectively give taxpayer funds to have such views conveyed.¹³⁸ Likewise, the government would likely be barred by the Establishment Clause from deducting funds from employee paychecks and transferring them directly to a religious organization for the same forbidden uses.

Some Justices have suggested that there is a second area where the government is barred from spending money: to support a particular political party. Justice Black argued in *Street* that "[p]robably no one would suggest" that the First Amendment would let workers be taxed "to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their

¹³³ See, e.g., *Lee*, 455 U.S. at 260.

¹³⁴ See *Hobby Lobby*, 134 S. Ct. at 2777–79.

¹³⁵ 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated as to state and local laws by City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹³⁶ See *Hobby Lobby*, 134 S. Ct. at 2780–83.

¹³⁷ See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 878–81 (2005).

¹³⁸ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–49 (2002); cf. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995). The exact rule for when government grants can and can't be spent for religious purposes is complicated, but we won't focus on it here.

controversial causes.”¹³⁹ Justices Frankfurter and Harlan apparently accepted this position.¹⁴⁰

Likewise, in *National Endowment for the Arts v. Finley*,¹⁴¹ Justices Scalia and Thomas agreed that the government could not “promote candidates nominated by the Republican Party,” but denied that “that unconstitutionality has anything to do with the First Amendment.”¹⁴² Some courts have suggested that the protection might stem from the Guarantee Clause.¹⁴³ Justices Frankfurter and Harlan thought that government spending that creates “risks of governmental self-perpetuation . . . might justify the recognition of a Constitutional protection against the ‘establishment’ of political beliefs.”¹⁴⁴

The Court has never had occasion to decide whether such a doctrine exists. Yet if it does exist, it would have to be narrowly limited to the (very rare) government support of particular political parties, political candidates, and perhaps (though perhaps not) ballot measures.¹⁴⁵

¹³⁹ *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting).

¹⁴⁰ *See Lathrop v. Donohue*, 367 U.S. 820, 853 (1961) (Harlan, J., concurring in the judgment).

¹⁴¹ 524 U.S. 569 (1998).

¹⁴² *Id.* at 598 n.3 (Scalia, J., concurring in the judgment). In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), Justice Rehnquist argued that a city should have broad latitude to choose who may use its property (in that case, a city-owned theater), but “cannot unfairly discriminate in violation of the Equal Protection Clause,” for instance by opening property “to Republicans while closing [it] to Democrats,” *id.* at 572 n.2 (Rehnquist, J., dissenting). Perhaps Justice Scalia took a similar view toward supplying funds in *Finley* as Justice Rehnquist did to opening access to physical space — though then one would have to have a theory for why discrimination based on party affiliation (say, the government endorsing the Republican candidate) violates the Equal Protection Clause but discrimination based on viewpoint (say, the government endorsing pro-recycling messages) does not.

¹⁴³ *See R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1107–08 (E.D. Cal. 2003); *Burt v. Blumenauer*, 699 P.2d 168, 175 (Or. 1985).

¹⁴⁴ *Lathrop*, 367 U.S. at 853 (Harlan, J., concurring in the judgment).

¹⁴⁵ *See Kidwell v. City of Union*, 462 F.3d 620, 625–26, 625 n.4 (6th Cir. 2006) (holding advocacy of ballot measure constitutional, though advocacy of a particular candidate would be unconstitutional); *Cook v. Baca*, 95 F. Supp. 2d 1215, 1227–29 (D.N.M. 2000) (holding advocacy of ballot measure constitutional), *aff’d for reasons given below*, 12 F. App’x 640, 641 (10th Cir. 2001); *Fraternal Order of Police v. Montgomery Cty.*, 132 A.3d 311, 323–27 (Md. 2016) (holding advocacy of ballot measure constitutional); *Carter v. City of Las Cruces*, 915 P.2d 336, 339 (N.M. Ct. App. 1996) (noting that other authorities have found “support in the constitution for the general proposition that, at some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign”); Helen Norton, *Campaign Speech Law with a Twist: When the Government Is the Speaker, Not the Regulator*, 61 EMORY L.J. 209, 256–59 (2011) (arguing for the constitutionality of government speech supporting ballot measure, but not candidate, campaigns). Several cases hold that advocacy of a particular ballot measure is unauthorized under state or municipal law. *See, e.g.*, *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988); *Stanson v. Mott*, 551 P.2d 1, 3 (Cal. 1976); *Anderson v. City of Boston*, 380 N.E.2d 628, 634 (Mass. 1978); *Citizens to Protect Pub. Funds v. Bd. of Educ.*, 98 A.2d 673, 677–78 (N.J. 1953) (Brennan, J.). One case holds that advocacy of a ballot measure violates the Delaware Constitution’s provision that “[a]ll elections shall be free and equal.” *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 797 (Del. Ch. 2015) (opinion of Laster, V.C.) (alteration in original) (quoting DEL. CONST. art. I, § 3); *id.* at 858–59.

Such a doctrine could not support a more general limit on government *ideological* speech, which is commonplace. Governments are generally not barred from speaking out for or against legislative actions.¹⁴⁶ Indeed, the President is expressly authorized to recommend legislation;¹⁴⁷ other executive officials, state and federal, routinely do the same; so do federal and state judiciaries;¹⁴⁸ so do cities and counties.¹⁴⁹ Similarly, nothing forbids the government from funding controversial causes like Planned Parenthood or crisis pregnancy centers (as some governments do¹⁵⁰) or, if it wished, funding the National Rifle Association or the American Civil Liberties Union.

So if this doctrine exists, it could only limit compelled subsidies to a modest extent: if the government can't itself speak in favor of or fund political parties or candidates, the government can't require people to give money that gets spent in support of those parties or candidates.¹⁵¹ But in our view nothing would prevent the government from compelling all of us to pay sums that get spent on an ideological cause — for or against abortion, gun regulation, environmentalism, or anything else. Because the government can support these causes directly, it can support them indirectly. That some of us might find some of these actions objectionable is just a reminder that the government can do many objectionable things in our name.

¹⁴⁶ See, e.g., *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 287 (4th Cir. 2008).

¹⁴⁷ U.S. CONST. art. II, § 3, cl. 2.

¹⁴⁸ See, e.g., JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8, <https://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> [<https://perma.cc/595C-QB25>] (asking Congress to provide more funding and confirm more judges).

¹⁴⁹ See, e.g., *Membership*, NAT'L LEAGUE OF CITIES, <https://www.nlc.org/membership> [<https://perma.cc/7RK6-NA6T>] (noting that dues paid by cities help pay for “[f]ederal [a]dvocacy” with congressional offices); see also *Burkhardt v. Lindsay*, 811 F. Supp. 2d 632, 647 (E.D.N.Y. 2011) (discussing municipal lobbying).

¹⁵⁰ See, e.g., PLANNED PARENTHOOD EMPIRE STATE ACTS, TESTIMONY OF PLANNED PARENTHOOD EMPIRE STATE ACTS BEFORE THE JOINT LEGISLATIVE BUDGET HEARING ON HEALTH AND MEDICAID 3–4 (2018), <https://nyassembly.gov/write/upload/publichearing/000864/001546.pdf> [<https://perma.cc/C4G2-32VF>]; SPECIAL INVESTIGATIONS DIV. OF MINORITY STAFF OF H.R. COMM. ON GOV'T REFORM, 108TH CONG., REP. ON THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY EDUCATION PROGRAMS 13 (2004), <http://spot.colorado.edu/~tooley/HenryWaxman.pdf> [<https://perma.cc/NB7N-QL9J>].

¹⁵¹ We're speaking here of governmental favoritism based on a candidate's or party's ideology; government-funded programs through which rival parties and candidates can convey their views would remain constitutional. See *Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 989 (7th Cir. 1984) (expressly rejecting an *Abood*-based objection to a public campaign funding program, on the grounds that “the funds are not considered to be contributing to the spreading of a political message, but rather are advancing an important public interest, the facilitation of ‘public discussion and participation in the electoral process’” (citation omitted)). Some cases reject constitutional challenges to such programs without discussing *Abood*-like challenges. See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998) (publicly funded debates); *Buckley v. Valeo*, 424 U.S. 1, 90–108 (1976) (public financing of political campaigns); *Clark v. Burleigh*, 841 P.2d 975, 987–88 (Cal. 1992) (ballot pamphlets containing candidate statements).

All this means that the hypothetical doctrine prohibiting government electoral speech could support a narrow limit on agency fees — but the effect would be much more like that of *Abood* than of *Janus*, and indeed more modest than that of *Abood*. Unions would need to avoid using agency fees to support or oppose particular parties or candidates, or perhaps particular ballot measures. But they would remain free to use agency fees for collective bargaining (as under *Abood*¹⁵²) and even for ideological expenditures to promote the same kinds of causes that the government can itself promote.

Thus, for instance, the teachers' union public relations campaign aimed at praising the teaching profession, which *Lehnert v. Ferris Faculty Ass'n*¹⁵³ held could not be paid for with agency fees,¹⁵⁴ should have posed no First Amendment problems. The government can spend tax money to promote Teacher Appreciation Week; a union should be free to spend agency fees to do the same.

And of course it remains quite possible that there is no such doctrine at all, and that the government is free to support not only causes but also candidates, however unfair that may seem. It remains quite unsettled, for instance, whether the First Amendment — or another constitutional provision — restricts governmental drawing of districts designed to entrench a particular political party.¹⁵⁵ Likewise, it is far from clear that there is a broader rule against government speech designed to entrench a party. Perhaps the only constraints on such government speech are political, not legal.

III. THE EFFECTS OF *JANUS*

Janus has been seen as hugely consequential, but we suspect its effects will be more complex than many anticipate. For instance, it is not at all clear that *Janus* will have any effect on private labor unions. Though *Abood*'s predecessors, like *Street*, discussed a First Amendment problem with even private labor unions exacting agency fees, they rested on a broad conception of the state action doctrine that is out of favor today¹⁵⁶ — as the *Janus* majority expressly noted.¹⁵⁷ It seems more likely that at least some members of the *Janus* majority would conclude that private labor unions that agree with private employers to exact agency fees are not regulated by the First Amendment.

¹⁵² See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225–26 (1977).

¹⁵³ 500 U.S. 507 (1991).

¹⁵⁴ *Id.* at 528–29 (Blackmun, J., writing for four Justices); *id.* at 559 (Scalia, J., writing for four other Justices, concurring in the judgment in part and dissenting in part).

¹⁵⁵ See *Gill v. Whitford*, 138 S. Ct. 1916, 1926–29 (2018).

¹⁵⁶ See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 849–51 (2012); Joseph E. Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?*, 96 NEB. L. REV. 62, 68–94 (2017).

¹⁵⁷ *Janus*, 138 S. Ct. at 2479 n.24.

Nor is it clear that *Janus* will have a major long-term effect on even the law governing public sector unions — outside of transition costs — because (as we will discuss shortly in section III.A) it seems to preserve the possibility of direct payments to unions by the government, and of the government speech doctrine more generally. But *Janus* will likely affect funding for supposedly private speech, such as activities of bar associations and university student groups. And it raises the serious possibility of retroactive liability that could make the transition costs costly indeed.

A. *Government Speech vs. Private Speech*

We have argued that governments remain free to directly support public sector unions using taxpayer dollars, and that this possibility undercuts the logic of *Janus*. After *Janus*, we suspect that at least some jurisdictions will switch to this regime. But now that *Janus* has been decided, might the Court ride the analogy down the opposite side of the slope and conclude that even direct government funding of unions is unconstitutional?

We suppose it's possible, but we very much doubt it. Government speech and support for speech are ubiquitous, and have been allowed in various forms by the Court. For instance, the Court has unanimously concluded that university curriculum choices are likely government speech, and taxpayers have no constitutional right to be exempted from funding them.¹⁵⁸ It has upheld, as government speech, advertising campaigns promoting particular products and denied a constitutional right to be exempted from paying assessments to fund them.¹⁵⁹ And it has unanimously agreed that the government can speak by allowing certain monuments in public parks but not others.¹⁶⁰

To the extent there is controversy about the boundaries of the doctrine, the controversy is generally over when something stops being government speech and becomes a limited public forum devoted to private speech.¹⁶¹ Though the *Janus* majority did not cite these government speech cases, it stressed that it was condemning governmental funding of “private speech.”¹⁶² We suspect this distinction will remain key.

¹⁵⁸ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 234–35 (2000); *id.* at 242–43 (Souter, J., concurring in the judgment).

¹⁵⁹ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557–67 (2005).

¹⁶⁰ *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–73 (2009); *id.* at 485 (Souter, J., concurring in the judgment) (agreeing that in the instant case the government's act was permissible speech).

¹⁶¹ *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2254–63 (2015) (Alito, J., dissenting as to the majority's determination that the speech at issue was government speech rather than private speech).

¹⁶² 138 S. Ct. at 2460 (opening paragraph of majority); *id.* at 2464.

We therefore doubt that *Janus* will have much effect, for example, on the series of decisions about agricultural marketing orders that occupied the Court from 1997 to 2005. The orders involved assessments imposed on agricultural producers and used by state or federal governments to pay for generic promotion (for example, “Buy California Summer Fruits”). The Court upheld one such scheme in *Glickman v. Wileman Bros. & Elliott, Inc.*¹⁶³ and struck down another in *United States v. United Foods, Inc.*,¹⁶⁴ but ultimately held in *Johanns v. Livestock Marketing Ass’n* that these orders were permissible so long as they were crafted as government speech.¹⁶⁵ This is likely to remain accepted, even after *Janus*; *Janus* will mostly affect programs construed as promoting private speech, such as bar dues and student activities.

B. Bar Dues

Compulsory bar dues have long been treated the same as public employee union agency fees. In *Lathrop v. Donohue*, the Court held that lawyers can be required to pay such dues,¹⁶⁶ but in *Keller v. State Bar of California*, the Court held that the dues couldn’t be used for political advocacy that wasn’t “germane” to “the State’s interest in regulating the legal profession and improving the quality of legal services.”¹⁶⁷ *Keller* thus tracks the old *Abood* rule, in which dues could be required but only for certain purposes.¹⁶⁸

Now that public employees can’t be required to pay money at all to unions, we think the Court will say that lawyers can’t be required to pay it to state bars either. After all, speech by the state bar is as likely as speech by unions to “touch fundamental questions of . . . policy,”¹⁶⁹ and more broadly to “have powerful political and civic consequences,”¹⁷⁰ even when it just has to do with regulating the legal profession.

As with agency fees, we think this would extend a mistake. The First Amendment should not constrain bars’ use of dues.

Indeed, we think this should be even more clear than with agency fees, because it is more logical to see a state bar as an agency of the state government, as the California Supreme Court had held in *Keller*.¹⁷¹ The California Bar is an agency expressly authorized by the California Constitution¹⁷² and, at the time, was run by a Board of Governors that

¹⁶³ 521 U.S. 457, 467–77 (1997).

¹⁶⁴ 533 U.S. 405, 409–17 (2001).

¹⁶⁵ 544 U.S. 550, 557–59 (2005).

¹⁶⁶ 367 U.S. 820, 843 (1961) (plurality opinion).

¹⁶⁷ 496 U.S. 1, 13–14 (1990).

¹⁶⁸ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977).

¹⁶⁹ *Janus*, 138 S. Ct. at 2476.

¹⁷⁰ *Id.* at 2464.

¹⁷¹ *Keller v. State Bar of Cal.*, 767 P.2d 1020, 1025–29 (Cal. 1989), *rev’d*, 496 U.S. 1.

¹⁷² CAL. CONST. art. VI, § 9.

was partly appointed by the state governor and partly elected by state bar members.¹⁷³

The U.S. Supreme Court, though, concluded that a state bar didn't qualify as a government speaker for First Amendment purposes. Since *Keller*, the Court has made clear that this determination turned on one critical fact: “[T]he state bar’s communicative activities to which the plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision.”¹⁷⁴ When, on the other hand, “the government sets the overall message to be communicated and approves every word that is disseminated,” it is free to use compulsory fees to convey the message, even when the details of the message are produced with “assistance from nongovernmental sources.”¹⁷⁵

Yet this seems to us an oddly crabbed view of how “official government supervision”¹⁷⁶ can operate. Indeed, in the federal government, messages are generally set by executive agencies (for example, the Department of Agriculture in *Johanns*), though occasionally by the judiciary or by Congress. But state governments have a very different approach to separation of powers. Among other things, they often have (1) subordinate political subdivisions, including ones in which only particular kinds of property owners can vote,¹⁷⁷ and (2) various government agencies that are appointed by a mix of officials from various branches of government.¹⁷⁸

Why should these agencies — and, in particular a state bar that is governed by a mix of gubernatorial appointees and directors elected by California lawyers — be treated differently for First Amendment purposes than agencies that have more direct federal analogues? As *Johanns* itself acknowledges, there is no difference for First Amendment purposes between speech funded by an income, property, or sales tax and speech funded by a tax levied on a particular occupation.¹⁷⁹ Why should there be a First Amendment difference based on the way in which the supervisors of the speaking organization are appointed or elected?

¹⁷³ Six were gubernatorial appointees, fifteen were elected by state bar members, and one was elected by the directors of the Young Lawyers section of the bar. *Keller*, 767 P.2d at 1024.

¹⁷⁴ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973).

¹⁷⁸ See, e.g., ARK. CONST. amend. 98, § 19 (medical marijuana licensing commission); MD. CONST. art. II, § 21A (gubernatorial salary commission); N.D. CONST. art. VIII, § 6 (state board of higher education); N.J. CONST. art. VIII, § 2, para. 5 (state council on unfunded mandates, empowered to essentially eliminate unfunded state mandates on local subdivisions); N.Y. CONST. art. VI, § 2, subdivs. c–d (judicial nominating commission); OHIO CONST. art. XI, § 1 (redistricting commission).

¹⁷⁹ See 544 U.S. at 562–63.

The oddness of *Keller* becomes even plainer when one considers that some state bars — such as the California bar since 2018 — are governed entirely by appointees of elected executive, legislative, and judicial officeholders.¹⁸⁰ That looks to us like an eminently official government body, which would thus provide “official government supervision.”¹⁸¹

We thus think that the restructured California bar should be viewed as a fully governmental speaker for First Amendment purposes, and thus outside the constraints of *Keller*. Yet we would have thought the same about the original California bar, which included lawyer-elected trustees as well as those appointed by the Governor.¹⁸² Perhaps then our predictions can’t be trusted, and both partly elected state bars and entirely government-official-appointed state bars will be forbidden from demanding that lawyers pay any dues.

C. Public University Student Government Activity Fees

In *Southworth*, the Court unanimously upheld a public university’s requirement that students pay a \$330 “student activity fee” that would then be distributed to student groups through the student government.¹⁸³ The Court concluded that the case was analogous to *Abood* and *Keller*, but that “[t]he standard of germane speech” applied in those cases “is unworkable” when it comes to university student group funding, given the “vast, unexplored bounds” of the speech that universities generally subsidize.¹⁸⁴ Because of this, the Court upheld the program to the extent that it funded student groups viewpoint-neutrally.¹⁸⁵

But *Janus* took the opposite approach to the difficulty of identifying what speech is “germane” to a government program — *Janus* held that, when such a line is “impossible to draw with precision,”¹⁸⁶ the solution is to reject all such compulsory funding of speech, not to allow all such compulsory funding. Applying the same logic to student activity fees, then, all such fees would need to be held unconstitutional: if “[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns”¹⁸⁷ to compelling speech, then that

¹⁸⁰ E.g., CAL. BUS. & PROF. CODE §§ 6010–6013.5 (West Supp. 2018) (providing for five trustees appointed by the California Supreme Court, four by the Governor, and four by legislative leaders).

¹⁸¹ *Johanns*, 544 U.S. at 562. Nor do we think it should matter whether the messages are “prescribed by law in their general outline.” *Id.* (emphasis added). The presence of a specific legislative command may be relevant under other constitutional doctrines, but we see no reason why it should matter to the free speech doctrine applied to the states.

¹⁸² *Keller v. State Bar of Cal.*, 767 P.2d 1020, 1024 (Cal. 1989), *rev’d*, 496 U.S. 1 (1990).

¹⁸³ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221–22 (2000).

¹⁸⁴ *Id.* at 231–32.

¹⁸⁵ *Id.* at 233–34.

¹⁸⁶ 138 S. Ct. at 2481.

¹⁸⁷ *Id.* at 2464.

would be as improper when students are compelled to subsidize student groups as when employees are compelled to subsidize employee groups.

Now three of the Justices in *Southworth* — Justices Stevens, Souter, and Breyer — would have upheld student fees for broader reasons than did the majority. They concluded that the dissenting students’ “objection has less force than it might otherwise carry because the challenged fees support a government program that aims to broaden public discourse.”¹⁸⁸ And they noted that students must pay tuition, which the government can use for all sorts of speech that students disapprove of, and that “[s]ince uses of tuition payments . . . may fund offensive speech far more obviously than the student activity fee does, it is difficult to see how the activity fee could present a stronger argument for a refund.”¹⁸⁹

But these arguments do not fit well with the *Janus* majority. If requiring people to fund speech they disapprove of is similar to “coerc[ing] them] into betraying their convictions,” and thus “demeaning,”¹⁹⁰ then that would happen whether the compelled payment is aimed at “broaden[ing] public discourse”¹⁹¹ or at some other purpose. And while universities constantly use tuition funds for speech students may object to, likewise the government constantly uses tax revenues for speech taxpayers may object to. If this power to use taxes to speak does not include the power to use much lower compelled agency fees to support speech, then it’s hard to see how the power to use tuition payments to speak includes the power to use much lower activity fees to support speech.

The three concurring Justices in *Southworth* also argued that “the relationship between the fee payer and the ultimately objectionable expression is far more attenuated,” because the student fees flow through “a distributing agency [the student government] having itself no social, political, or ideological character.”¹⁹² Likewise, they reasoned that “the disbursements, varying from year to year, are as likely as not to fund an organization that disputes the very message an individual student finds exceptionable.”¹⁹³

But these positions are hard to sustain factually. In practice, at a typical public university the student government will indeed have a “social, political, or ideological character,” and most funded groups will be on one side of the political spectrum. We suspect that at most public universities that will be the left side — but even if at some it is the right side, there’s little reason to think that all or even most universities will be politically balanced.

¹⁸⁸ *Southworth*, 529 U.S. at 240–41 (Souter, J., concurring in the judgment).

¹⁸⁹ *Id.* at 243.

¹⁹⁰ *Janus*, 138 S. Ct. at 2464.

¹⁹¹ *Southworth*, 529 U.S. at 240–41 (Souter, J., concurring in the judgment).

¹⁹² *Id.* at 240.

¹⁹³ *Id.*

Perhaps for these reasons, the concurrence's arguments did not persuade any of the other Justices at the time, and they now seem even less likely to persuade members of the *Janus* majority. *Southworth* thus seems to be in jeopardy.

Yet public universities that want to keep funding student groups can easily avoid this problem, simply by folding the student activity fee into the tuition, and then funding the student groups out of that tuition. The Court acknowledged in *Southworth* that, "[i]f the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker."¹⁹⁴ *Johanns* strengthens that hypothesis to a near certainty.

And of course this wouldn't be limited to situations where the university necessarily endorses the supported viewpoints: universities routinely use tuition funds (or tax funds) to support guest speakers (either one at a time or on panels aimed at presenting contrasting views), even when the university may not agree with all the speakers. We know of no cases suggesting that such funding of university-invited speakers would violate the First Amendment rights of taxpayers or tuition payers. We likewise think the university is free to pay for speakers invited by student groups.

Nor should there be much of a political barrier to this change. Though eye-popping tuition numbers sometimes provoke bad press, student activity fees are small; most students won't care whether they have to pay a \$30,330 tuition check or \$30,000 tuition plus a \$330 student activity fee. Student governments might dislike having the university more involved in the day-to-day funding, but they should prefer this over losing the mandatory fee.

The universities might prefer for political reasons to have minimal interaction with controversial speakers invited by student groups. But universities have — or at least should have — a good deal of experience explaining to the public that hosting and even subsidizing a wide range of speakers doesn't mean agreeing with the speakers' viewpoints.¹⁹⁵ The accounting treatment of student funding seems unlikely to make that explanation more or less persuasive.

So if universities think that subsidizing student groups' speaker invitations is academically valuable, they will be able to keep doing that. Here, even more clearly than as to agency fees, *Janus* might mean a change in accounting but not in substance.

¹⁹⁴ *Id.* at 229 (majority opinion).

¹⁹⁵ See Jacob T. Levy (@jtlevy), TWITTER (Apr. 20, 2018, 11:13 AM), <https://twitter.com/jtlevy/status/987393758877515776> [<https://perma.cc/W96F-V82M>].

D. Union Liability Under Janus

Finally, *Janus* may seriously affect unions themselves. Of course unions will have to change their future behavior, but *Janus* may also lead to liability *now* for money they collected *last year*. In holding unconstitutional the agency fees on which most public employee unions rely, *Janus* makes it likely that they can be sued for substantial damages under the federal civil rights statute, 42 U.S.C. § 1983.

The case for liability has three key steps. First, under standard civil retroactivity doctrine, Supreme Court decisions supposedly state the true law as it has always been, rather than changing the law. While the Court briefly experimented with other more limited forms of retroactivity,¹⁹⁶ black letter law is now that:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.¹⁹⁷

This means that courts must treat the involuntary collection of agency fees before *Janus* as unconstitutional.

Second, unions collecting agency fees are acting “under color” of state law,¹⁹⁸ thanks to precedents like *Lugar v. Edmondson Oil Co.*¹⁹⁹ *Lugar* held that private debt collectors could be sued under § 1983 for making use of an unconstitutional state statute that allowed the attachment of property without due process.²⁰⁰ So long as the private debt collectors “invok[ed] the aid of state officials to take advantage of state-created attachment procedures,” they were liable for unconstitutional behavior under that statute.²⁰¹

Union collection of now-unconstitutional agency fees appears analogous. The state statutes authorizing the collection of agency fees²⁰² are unconstitutional state action, just as in *Lugar*. And the unions “invoked the aid of state officials” to collect those fees, just as in *Lugar*.²⁰³ They too will be liable.

¹⁹⁶ See, e.g., *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105–08 (1971); see also Huiyi Chen, Comment, *Balancing Implied Fundamental Rights and Reliance Interests: A Framework for Limiting the Retroactive Effects of Obergefell in Property Cases*, 83 U. CHI. L. REV. 1417, 1433–36 (2016) (tracing doctrine).

¹⁹⁷ *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993).

¹⁹⁸ 42 U.S.C. § 1983 (2012).

¹⁹⁹ 457 U.S. 922 (1982).

²⁰⁰ *Id.* at 934.

²⁰¹ *Id.* at 942.

²⁰² See, e.g., 5 ILL. COMP. STAT. 315/6(e) (2016), *invalidated by Janus*, 138 S. Ct. 2448.

²⁰³ In Illinois, for example, as in many states, the state employer will automatically deduct agency fees from the employees’ paychecks. *Id.*

Third, unions do not have the qualified immunity defense that is available to government § 1983 defendants. Private entities are generally not immune unless they are performing a government function or acting on behalf of the government.²⁰⁴ Indeed, in *Wyatt v. Cole*,²⁰⁵ the Court specifically rejected a qualified immunity defense for private parties who had availed themselves of unconstitutional state statutes.²⁰⁶ It therefore anticipated and allowed that a private party could simultaneously be subject to liability under *Lugar* without being entitled to any countervailing immunity.²⁰⁷ That is the unions' new bind as well.

Moreover, since *Janus* requires nonmembers to “affirmatively consent” to all agency fees (and requires such consent to be “shown by ‘clear and compelling’ evidence”),²⁰⁸ the potential claimants are many. They could include all nonmembers who paid agency fees, and might even include union members, if the members could show that the threat of the unconstitutional nonmember agency fees caused them to join the union. If these suits could be brought as class actions — which is unclear²⁰⁹ — then the liability could be substantial.

The only sure limit on such suits is the statute of limitations. Under § 1983, the statute of limitations varies by state and follows that state's statute of limitations for personal injury torts.²¹⁰ In most states this will be two or three years.²¹¹ Liability for all agency fees for nonmembers may thus add up to about 10–20% of a union's annual revenue.²¹²

To be sure, this kind of retroactive liability can seem quite unfair, especially when the unions were following Supreme Court precedent.²¹³ And the unions may well have defenses to mitigate that unfairness. For example, they might argue that damages should be sharply reduced because employees received valuable services in exchange for their agency fees. Or they might argue that a permissible alternative scheme would

²⁰⁴ See *Filarsky v. Delia*, 566 U.S. 377, 392–93 (2012); *Wyatt v. Cole*, 504 U.S. 158, 168–69 (1992).

²⁰⁵ 504 U.S. 158 (1992).

²⁰⁶ *Id.* at 164–69.

²⁰⁷ *Id.* at 169.

²⁰⁸ 138 S. Ct. at 2486.

²⁰⁹ See *Riffey v. Rauner*, 873 F.3d 558, 563–65 (7th Cir. 2017) (rejecting class suit under *Harris* because of intra-class conflicts), *vacated and remanded in light of Janus*, 138 S. Ct. 2708 (2018).

²¹⁰ *Wallace v. Kato*, 549 U.S. 384, 387 (2007); *Wilson v. Garcia*, 471 U.S. 261, 276–79 (1985).

²¹¹ See, e.g., CAL. CIV. PROC. CODE § 335.1 (West 2018) (two years); N.Y. C.P.L.R. § 214 (McKinney 2003) (three years). Of the agency fee states, Maine has the longest statute of limitations, at six years. ME. REV. STAT. ANN. tit. 14, § 752 (2007).

²¹² This estimate is based off of a nonmember rate of 8–9%, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS — 2017 tbl.3 at 8, <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/N36H-9KJF>], and an agency fee of 66–75%, see *Sachs, supra* note 29, at 1048 n.12, and 2–3 years of damages.

²¹³ Liability recalls the Otter Principle. See *ANIMAL HOUSE* (Universal Pictures 1978), *excerpted at* <https://www.youtube.com/watch?v=JTF2joOWUi8> [<https://perma.cc/QJA7-98E8>].

have led to the same payments, making the damages arguably nominal.²¹⁴ Still, the apparent premise of *Janus* is that agency fees work a unique First Amendment injury, and while these First Amendment damages must be limited to “plaintiffs’ actual losses,” they can still include intangible nonmonetary losses.²¹⁵

As an alternative, plaintiffs may also be able to pursue claims for restitution and unjust enrichment, somewhat analogous both to claims for the refund of unconstitutional taxes and to payments under a judicial order that has since been reversed.²¹⁶ The exact boundaries of these claims are complex, but they could well lead to some liability.

Post-*Janus* suits against unions could also provide the setting for an “affirmative defense based on good faith and/or probable cause,”²¹⁷ or a new remedial twist to the Court’s civil retroactivity doctrine.²¹⁸ Indeed, some lower courts have given private parties a good faith defense to suits under § 1983, to eliminate the apparent unfairness created by the combination of *Wyatt* and *Lugar*.²¹⁹ A few lawsuits brought against unions under *Harris v. Quinn*²²⁰ (a precursor to *Janus*) were dismissed by the lower courts on such grounds.²²¹

But unions still should not be too confident that they will have such a defense against *Janus* suits. First, this good faith defense has never been endorsed by the Supreme Court, and there is little clear authority for it. If one of the cases makes it to the Court, there is no guarantee that the Justices will recognize the defense. And if the Court turns to private law analogues for such a defense, it might find that restitution and unjust enrichment provide the better analogue.

Second, these particular suits may present a particularly unsympathetic vehicle to the Court. In a discussion of union reliance on *Abood*,

²¹⁴ See *Carey v. Phipus*, 435 U.S. 247, 260, 266–67 (1978) (nominal damages for due process violation that did not affect outcome).

²¹⁵ *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986).

²¹⁶ See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 18–19 (AM. LAW INST. 2017); ANDREW KULL & WARD FARNSWORTH, RESTITUTION AND UNJUST ENRICHMENT 107–19 (forthcoming 2018).

²¹⁷ *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (refusing qualified immunity, but leaving these defenses “for another day”); see also *id.* at 174 (Kennedy, J., concurring).

²¹⁸ E.g., *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 761 (1995) (Kennedy, J., concurring in the judgment) (“We do not read today’s opinion to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions.”); cf. *Chen*, *supra* note 196, at 1444–49 (arguing that the retroactivity of *Obergefell* presents such an exceptional case).

²¹⁹ See *Clement v. City of Glendale*, 518 F.3d 1090, 1096–97 (9th Cir. 2008); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993).

²²⁰ 134 S. Ct. 2618 (2014).

²²¹ *Jarvis v. Cuomo*, 660 F. App’x 72, 75–76 (2d Cir. 2016); *Winner v. Rauner*, No. 15 CV 7213, 2016 WL 7374258, at *5–6 (N.D. Ill. Dec. 20, 2016), *appeal dismissed* (Aug. 18, 2017).

the Court's opinion in *Janus* specifically noted that "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*"²²² and opined that, since 2012, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain."²²³ So even if such a good faith defense were recognized, the courts may well conclude that unions were knowingly gambling on the continued validity of *Abood*, and therefore cannot complain about their losses.

CONCLUSION

Being forced to pay money to objectionable causes is a fact of life, not a First Amendment problem. But for decades, many people have assumed the contrary, and found serious First Amendment burdens in such compelled subsidies. *Janus* takes that (incorrect) assumption to its logical conclusion.

That may not be the final implication either. Assuming similar conclusions extend to other areas of law, existing arrangements for state bar dues and student activity fees, for example, may change as well. And because *Janus* can lead to surprisingly retroactive liability, universities and bar associations should be proactive. They should consider changing their methods of collection *now*, to limit the damage as fast as they can.

²²² 138 S. Ct. at 2484.

²²³ *Id.* at 2485.