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February 26, 2018



Ruling could destroy labor unions as we know them

February 26, 2018 Edward Fitzpatrick

Michael J. Yelnosky, dean of the RWU School of Law and professor of law:

On Feb. 26, the Supreme Court of the United States heard arguments in *Janus v. AFSCME*. A ruling in favor of the petitioner could destroy America's public sector labor unions as we know them.

It may come as a surprise that this existential threat comes not from labor law but from the First Amendment. The high court is poised to rule that state laws authorizing unions to collect fees for their services from the employees the unions represent violate any objecting employee's First Amendment rights. (The petitioner is a child support specialist employed by the State of Illinois represented by the respondent union – the American Federation of State, County and Municipal Employees)

I blogged about the case here [last year](#). But now I want to focus on where *Janus* may fit in the fabric of the court's First Amendment jurisprudence.

On one hand, *Janus* could be thought of as an example of the difficulties encountered by an expansive view of the First Amendment. The court, for example, has held that corporate spending to support or oppose candidates for political office is protected by the First Amendment. (*Citizens United v. Federal Election Commission*). It has also held that the Boy Scouts' dismissal of a gay scoutmaster because of its opposition to homosexuality was protected by the First Amendment. (*Boy Scouts of American v. Dale*). And this term, the court seems prepared to hold that the First Amendment protects a baker's refusal to bake a wedding cake for a gay couple because he objects to same-sex marriage. (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*).

So if the court concludes in *Janus* that the First Amendment gives public employees represented by a union the right to refuse to pay their share of the union's costs of negotiating a pay increase for them, *Janus* might be thought of as part of this line of cases.

However, a ruling in favor of *Janus* would be in tension with another line of the court's First Amendment cases – those articulating the free speech rights of public employees. There, the court's view of the First Amendment has been more restrictive.

While recognizing that public employees do not waive their First Amendment rights when choosing to work for the government, the court has repeatedly emphasized that a government employer generally has the right to discipline employees for their speech in the workplace and for speech that interferes with the efficiency and productivity of government operations. Indeed, in *Garcetti v. Ceballos*, the court held that the First Amendment did not protect from employer retaliation a prosecutor who complained to his supervisors about what he believed was police misconduct in connection with an application to a court for a search warrant.

After *Janus*, it is likely that public employees will have a First Amendment right to refuse to pay their fair share for union representation but no First Amendment right to report government misconduct to their supervisors or managers.

That seeming inconsistency will be hard to explain.

The oral arguments were, as might be expected, fast-paced and spirited. That two lawyers argued for each side only added to the sense of urgency in the back and forth with the justices. (Janus' lawyer and the U.S. Solicitor General were on one side, while the Illinois Solicitor General and AFSCME'S lawyer were on the other).

Before examining the role that existing First Amendment law played in the argument, I have three observations.

First, I read a transcript of the argument so I have no sense of the tone of any particular question, answer or comment, but it certainly appears things got heated. For example, during a lengthy dialogue about the court's public employee cases between U.S. Solicitor General Noel Francisco and Justices Elena Kagan and Sonia Sotomayor, Justice Sotomayor seemed to lose her patience, asking Francisco: "How many times this term already have you flipped positions from prior administrations?" Justice Stephen Breyer intervened to get the argument back to the merits of the case.

Justice Anthony Kennedy also seemed impatient. The lawyer for the State of Illinois was explaining that fair share fees helped employee morale and union stability, which made public employee unions better partners with the state in the workplace. Justice Kennedy interrupted to ask, rhetorically, "It can be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion . . . for teacher tenure, for higher wages, for massive government, for increasing bonded indebtedness, for increasing taxes? That's — that's the interest the state has?"

Second, many commentators have concluded, with good reason I think, that the decision in *Janus* will depend on the vote of Justice Neil Gorsuch, as all other members of the court have taken a position on the issue presented in the case. Today's argument shed no light on his position because he did not ask a single question.

Third, Justice Breyer was actively shopping a compromise to the lawyers and presumably to his colleagues. The compromise would be to adopt the approach of a concurring opinion written by Justice Antonin Scalia in *Lehnert v. Ferris Faculty Association* (1991). The question in the case was how to distinguish agency fees that were chargeable to public employees represented by a union and those that were not chargeable. Justice Scalia wrote that public employee unions should be able to charge only for the costs of fulfilling their statutory duty as the exclusive representative of all members of the bargaining unit. Presumably, if a majority accepted that position, the case would be remanded for a determination of which costs are chargeable to objectors and the court's ruling in *Abood v. Detroit Board of Education* would survive.

Finally, the apparent inconsistency between the court's cases giving public employers great leeway in restricting employee speech and the petitioner's position that the state cannot require public employees to pay their fair share for union representation was the subject of much discussion, and, not surprisingly, the lawyers were ready for the questions.

Janus' lawyer said that it makes sense that the government has more leeway to restrict employee speech than it has to compel employee speech because of the government's interest in the efficient operation of the workplace. However, his lawyer admitted to Justice Sotomayor that when an individual employee goes to a government employer to try to negotiate a wage increase that is not First Amendment activity.

"Why," Justice Sotomayor asked, "does it transform into some entitlement to First Amendment protection merely because a collective body of employees are coming to the table at once? What's the transformative nature now of making these substantive questions matters of public policy?"

He responded, "The scale of that is what makes it . . . political." The United States agreed with that position.

On the other side, the Illinois Solicitor General agreed that in some circumstances when the government compels someone to speak it infringes on that person's dignity and conscience in a way it does not when the government restricts what a person has to say. However, he followed up by

explaining, aided by Justice Sotomayor, that agency fees are a compelled subsidy and not compelled speech.

Bottom line: I would give 3-1 odds that the petitioner prevails and the Supreme Court overrules *Abod*, with Justice Gorsuch in the majority.