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Janus v. AFSCME and “Weaponizing the First Amendment”

June 30, 2018 Edward Fitzpatrick

On June 27, the U.S. Supreme Court announced its 5-4 decision in *Janus v. AFSCME*. The majority held that the First Amendment prohibited the enforcement of ubiquitous provisions in collective bargaining agreements between public sector labor unions and government employers requiring all employees represented by the union to pay their share of the costs the union incurs when bargaining with the employer on their behalf. In doing so, the court reversed its 1977 decision in *Abood v. Detroit Board of Education*.

The decision was exceedingly predictable. I first predicted it in 2014 when the court decided *Harris v. Quinn* because the majority opinion in *Harris* “read[] like *Abood*’s obituary.” On this blog in 2017, I again predicted the court would overrule *Abood*, although that outcome had been in doubt after Justice Antonin Scalia’s death when it appeared Judge Merrick Garland would be Scalia’s replacement.

Once the Republicans managed to block Garland's appointment (and I am still mystified about how they pulled that off) and it was clear President Trump would get to name Scalia's successor, the die was once again cast. Finally, again [on this blog](#), I predicted after the oral arguments in *Janus* that the Supreme Court would overrule *Abood*, with Justice Neil Gorsuch in the majority.

I post now not to say "I told you so." After all, there was widespread agreement that *Abood* was and had been squarely in the court's crosshairs. Instead, I want to unpack the provocative language in Justice Elena Kagan's dissent accusing the *Janus* majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."

What does she mean, and how should one react to her criticism?

One way to understand her critique is to appreciate the fundamental workforce management decision made by the 22 states whose laws *Janus* declared unconstitutional. Those states had concluded that public sector unions would promote stable labor relations in the public sector and improve the provision of services to the public. Central to the promise of stability is making those public sector unions the exclusive representative of all the employees in a bargaining unit and requiring those unions to fairly represent every one of those employees, union supporters and opponents alike.

This duty of fair representation, for example, forbids a public sector union from negotiating a wage increase that applies only to bargaining unit members who have joined the union and pay union dues. Finally, those 22 states had decided that in order to ensure these unions would have a stable funding source to support these activities, all members of the bargaining unit would be required to pay their share of the costs incurred by the union in negotiating on their behalf. Without the requirement to make these fair share payments, those states had reasonably concluded, members of the bargaining unit might refuse to pay for those services, even if they benefited from them and get something for nothing.

That state policy choice, which the court in *Abood* had respected, was deemed by the court in *Janus* to be insufficient to justify interference with the following First Amendment right: the right of employees represented by a public sector union to refuse to pay their share of the costs to the union of bargaining on their behalf over wages, hours and other terms and conditions of employment.

Justice Kagan seems to be saying that this modest First Amendment right was transformed (or “weaponized”) by the majority in *Janus* into one of sufficient importance to trump the states’ interest in deciding how to best operate their workforces and serve the public. Moreover, the majority concluded that preserving this right justified requiring almost half of the 50 states to change their laws and requiring thousands of collective bargaining agreements to be renegotiated with teachers, firefighters, police officers and other public employees who provide essential services to the public.

However, Justice Kagan’s “weaponizing” critique is broader than *Janus*.

She pointed to, as another example of the court’s “aggressive” use of the First Amendment, *National Institute of Family and Life Advocates v. Becerra*, which the court announced the day before *Janus*. In *Becerra*, the same 5-4 majority concluded that a California law requiring licensed crisis pregnancy centers (pro-life centers that offer pregnancy-related services) to notify women of the availability of free or low-cost services, including abortion services, violated the First Amendment rights of those centers. It also concluded that another provision of the law, this one requiring unlicensed centers to notify women of their unlicensed status, violated the First Amendment.

In his dissent in *Becerra*, Justice Stephen Breyer warned that, under the majority’s reasoning, ordinary disclosure laws (such as a law requiring hospitals to tell parents about child seat belts) might violate the First Amendment. He warned that this view of the First Amendment would justify judicial second-guessing of wide swaths of state and federal economic regulation. Justice Kagan joined that dissent.

The other example cited by Justice Kagan of what she views as the “weaponizing” of the First Amendment is the court’s 2011 decision in *Sorrell v. IMS Health Inc.*

There, a majority ruled that a Vermont law forbidding pharmacies from selling information about the prescribing habits of physicians to pharmaceutical companies seeking to market their products to those physicians violated the First Amendment. Justice Breyer again wrote a dissent, which Justice Kagan joined, warning that the majority’s approach puts at constitutional risk ordinary economic regulatory programs.

In *Janus*, Justice Sonia Sotomayor, who joined the majority in *Sorrell*, expressed buyer's remorse because of what it has wrought in the hands of the current majority. She wrote that "[a]lthough I joined the majority in *Sorrell* . . . I disagree with the way that this Court has since interpreted and applied that opinion."

The alarm sounded by Justice Kagan in *Janus* is challenging for those of us who consider ourselves supporters of the First Amendment.

Many of us have, I suspect, embraced the notion that the First Amendment protects speech with which we disagree and which we might, in fact, find abhorrent. However, while Justice Kagan's assertion in her *Janus* dissent that "[t]he First Amendment was meant for better things [than striking down public sector union fair share fee regimes]" has great appeal, it may not be that easy to distinguish the worthy from the unworthy assertion of First Amendment rights. And it certainly appears the court is likely to continue to mine this vein of First Amendment rights and continue to challenge our understanding of the content and purpose of the First Amendment.