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Unpacking The Janus Decision

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WASHINGTON, DC - FEBRUARY 26: Plaintiff Mark Janus passes in front of the U.S. Supreme Court after a hearing on February 26, 2018 in Washington, DC. The court is scheduled to hear the case, Janus v. AFSCME, to determine whether states violate their employees' First Amendment rights to require them to join public sector unions which they may not want to associate with. (Photo by Alex Wong/Getty Images)

Earlier today, the Supreme Court issued a landmark ruling in *Janus v. AFCME* that overturns 40 years of precedent and ends compelled union dues for public employees. *Janus* was one of the most-watched cases of the Supreme Court's term, and for good reason. Overruling a 40 year precedent that affects thousands of workers will undoubtedly have serious repercussions. But with such a controversial decision, it's easy to misunderstand what the decision actually accomplishes and what it does not.

The Court's opinion, written by Justice Alito, holds that it violates the First Amendment rights of non-union workers when the state compels them to pay union fees against their will. Workers can already opt-out of paying for expressly political union activities, but for the past 40 years, all workers have been compelled to pay agency fees to cover collective bargaining. This arrangement has always been unsatisfactory to many workers as collective bargaining itself often implicates a host of controversial policy issues.

Most obviously, collective bargaining profoundly affects city and state budgets. When union's ask for raises and benefits (often with little apparent regard for a state's financial situation), the result is often increased taxes and budget shortfalls. These are undoubtedly political issues that public employees can disagree about. And this alone was enough for the Court to conclude that collective bargaining is an inherently political action.

But relying on the unique experience of teachers, the Court showed just how pervasively political collective bargaining really is. In the education context, collective bargaining affects policy questions such as merit pay, classroom size, the length of the school year, and tenure. Teachers who disagree with their union (a sizable percentage according to Education Next and the Harvard Kennedy School) are compelled to fund advocacy they oppose.

With all this in mind, the Court concluded that "because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." Compelling individuals to support political speech they oppose violates any basic understanding of the First Amendment. To argue otherwise requires serious wrestling with First Amendment jurisprudence.

That hasn't stopped parties from wrestling as hard as they can. Compelled union dues have traditionally been justified on two grounds. First, that agency fees help preserve labor peace. And second, that agency fees prevent workers from free-

riding off of union services and sending unions into insolvency. When the Court first heard these arguments in 1977, it assumed without evidence that they were true. The arguments are still used to this day to argue that unions will not be able to function without compelled agency fees.

The problem with both of these arguments is that they have never been substantiated. Ending compelled agency fees is not necessary for labor peace or to keep unions from insolvency. The Court's opinion in *Janus* considered the experience of labor unions over the past 40 years to show that quite the opposite is true. Compelled agency fees are not imposed on employees of the Federal Government, the Post Office, and 28 states. Yet, employees in each are represented by unions that are not in danger of insolvency. (If insolvency does become a real concern, public employee unions could divert some of the approximately $166 million they donated to political campaigns in the 2016 election cycle.)

Today's decision, then, does not spell the end of public employee unions and is not an attack on worker's right to organize. Unions will still be free to organize and able to represent their members. They just won't be able to compel non-members to support their endeavors. Public employees will now enjoy the same First Amendment right as everyone else -- the right to decide for themselves which causes and organizations they want to support.

I am the Director of Legal and Public Affairs at the Center for Individual Rights, a non-profit public interest law firm that litigates free speech cases. I am also a Researcher at the Antonin Scalia Law School at George Mason University, where I received my J.D. My writings... **MORE**