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State of the Unions: The Impact of Janus on Public University Student Fees

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STATE OF THE UNIONS: THE IMPACT OF JANUS ON PUBLIC UNIVERSITY STUDENT FEES

*Jonathan Kaufman**

In Janus v. American Federation of State, County, and Municipal Employees, Council 31, the U.S. Supreme Court overruled forty-one years of precedent that had allowed public-sector unions to collect agency-shop fees from nonmembers. The Court ruled this mandatory fee collection unconstitutional as a violation of nonmember First Amendment rights. This decision may pose problems for other public entities, such as public universities, who also collect mandatory fees that support political speech.

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I. INTRODUCTION

Public unions and public universities occupy a distinct place in our constitutional tradition.¹ In spite of their respective differences, these institutions have played a similar and significant role in First Amendment jurisprudence because both public unions and public universities relate to a compelling government interest: promoting labor peace and educating the public, respectively.² These interests have caused the U.S. Supreme Court to give unions and universities wide leeway to govern their affairs under the auspices of federalism.³

In 2018, the Court changed its approach toward public unions. Specifically, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Court overruled forty-one years of precedent that had allowed public-sector unions to collect fees from nonmember employees.⁴ The Court ruled that collection of these mandatory fees, albeit essential to support core union activities, violated the First Amendment rights of nonmembers who disagreed with union activity.⁵ This Note will argue that the Court's reasoning potentially threatens the ability of public universities to collect mandatory student fees that support explicit political

¹ See *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012) (observing that prior U.S. Supreme Court reasoning about agency-shop fees in public unions is "an anomaly"); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (noting that "universities occupy a special niche in our constitutional tradition").

² See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 (1977) (holding that public unions have "important government interests") *overruled by* *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *see also* *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231 (2000) (acknowledging that "recognition must be given . . . to the important and substantial purposes of the university").

³ See *Abood*, 431 U.S. at 225 (noting that the "important government interests" that support the union "presumptively support" the government interest in a constitutional analysis); *Southworth*, 529 U.S. at 232 (noting that "it is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning").

⁴ 138 S. Ct. 2448, 2460 (2018) ("[N]o reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.").

⁵ See *id.* at 2386 (holding that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" because "[t]his procedure violates the First Amendment").

activity,⁶ which is currently permitted in furtherance of public education.⁷

In this Note, I argue that the Court's reasoning threatens the ability of public universities to collect mandatory student fees that support explicit political activity. Parts II and III of this Note will analyze the historical jurisprudence behind these two arrangements, including key Supreme Court precedent for each arrangement. Part IV will introduce the 2018 *Janus* ruling and its effect on public-union precedent. Part V will compare *Janus* with *Southworth* and ultimately propose that mandatory student fees are no longer a sure constitutional bet for constitutionally funding controversial student opinions on public university campuses. Part VI concludes with an analysis of the potential consequences of *Janus* on higher education.

II. BACKGROUND

A. PUBLIC UNIONS

Public unions in the United States are a relatively recent development.⁸ Until the mid-to-late twentieth century, public employees were largely excluded from federal statutes that created employee unions.⁹ At that time, President Kennedy established union recognition procedures that granted limited collective bargaining rights to federal employees.¹⁰ However, despite the recency of public union laws, public employees have demonstrated great interest in unions, especially compared to their private

⁶ See *Southworth*, 529 U.S. at 223 (describing the relationship between student fees and political speech on college campuses as “consistent with the University’s mission”).

⁷ See *id.* at 233–34 (“[T]he University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees . . .”).

⁸ See Melvin W. Reder, *The Rise and Fall of Unions: The Public Sector and the Private*, 2 J. ECON. PERSP. 89, 103 (1988) (stating that public sector unionization “burst . . . during the 1960s and 1970s”).

⁹ See Deborah Prokopf, Note, *Public Employees at the School of Hard Knox: How the Supreme Court Is Turning Public Sector Unions into a History Lesson*, 39 WM. MITCHELL L. REV. 1363, 1365 (2013) (“While organized craft unions in the private sector date back to the mid-nineteenth century, major federal legislation granting workers the right to organize and bargain collectively left out public employees.” (footnote omitted)).

¹⁰ *Id.* at 1366 (“In 1962, . . . President Kennedy signed Executive Order 10988, which established union recognition procedures and granted limited collective bargaining rights for federal employees in the executive branch.”).

counterparts.¹¹ According to a 2018 study, 26.4 percent of the federal workforce were union members compared to only 6.4 percent of private sector workers.¹²

The rise of public unions was controversial.¹³ “Prior to the 1950s, . . . most politicians, labor leaders, economists, and judges opposed collective bargaining in the public sector.”¹⁴ Today, however, public unions are active and enjoy exclusive bargaining power on behalf of all employees in their field (including nonmember employees).¹⁵

To accommodate this large role of public unions in collective bargaining, states have authorized “agency-shop” arrangements, which require all public employees to contribute financially to the union, even those who oppose union activities.¹⁶ States permit these agency-shop fees because even employees who disagree with the politics of the public union receive numerous nonpolitical benefits,¹⁷ such as collective bargaining, contract administration, and grievance adjustment.¹⁸ Therefore, unions reason that all employees should contribute their fair share of that union’s operating costs.¹⁹ Forcing them to contribute financially prevents over 70% of public employees from becoming free riders.²⁰ Crucially,

¹¹ See *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT. tbl. 42 (2018), <https://www.bls.gov/cps/tables.htm> [hereinafter *Labor Force Statistics*].

¹² *Id.*

¹³ See Reder, *supra* note 8, at 104 (“Changes in labor law do not occur randomly, but result from political struggle . . .”).

¹⁴ See Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT’L AFF. (2010), <https://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>.

¹⁵ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977) (noting that these essential policy interests were key in the Court’s decision to uphold agency-shop agreements and stating that these services provide a benefit to all government employees, not just those who pay to subsidize them), *overruled by Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448 (2018).

¹⁶ See *id.* at 211–12, 217, 219 (noting that agency-shop fees have been challenged in Michigan, Nebraska, and Georgia, in which unions required all public employees to contribute financially to their respective unions).

¹⁷ See *id.* at 236 (upholding agency-shop fees that support union expenditures as long as they support collective bargaining and not “ideological activities unrelated to collective bargaining”).

¹⁸ See *id.* at 225–26 (upholding agency-shop fees that support union expenditures in these three categories).

¹⁹ See *id.* at 221–22 (“A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become ‘free riders’ . . .”).

²⁰ See *Labor Force Statistics*, *supra* note 11 (showing that over 70 percent of public employees are not union members).

however, “the Constitution requires . . . that [political] expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas.”²¹

Agency-shop fees to nonmember employees are high.²² For almost five decades, these fees have largely subsidized the operations of public unions.²³ In the case of two particular unions, agency-shop fees contributed \$500,000,000 per year—one third of the unions’ operating budgets.²⁴ Agency-shop fees have also subtly promoted union membership among those who might not have wished to join but have been “spurred” to pay the full cost of union dues to retain full membership rights instead of paying 75% or more of the cost for less than full protection.²⁵ For these reasons, agency-shop arrangements and public union bargaining power have long raised constitutional questions about compelled speech and the right of federal employees to freely associate.²⁶

B. PUBLIC UNIVERSITIES

Public universities, on the other hand, have a long tradition in the United States.²⁷ The first public university in the United States, the University of Georgia, was chartered in 1785.²⁸ For decades, courts have recognized the importance of higher education and have

²¹ See *Abood*, 431 U.S. at 235–36.

²² Agency-shop fees normally constitute 75 to 80 percent of full union membership dues. Robert Iafolla, *Mass Exodus of Public Union Fee Payers after High Court Ruling*, BLOOMBERG (April 5, 2019, 4:10 PM), <https://news.bloomberglaw.com/daily-labor-report/mass-exodus-of-public-union-fee-payers-after-high-court-ruling>.

²³ See Mike Antonucci, *Teachers Unions at Risk of Losing “Agency Fees,”* 16 EDUCATION NEXT 22 (2016) (detailing the use of agency-shop fees in union budgets).

²⁴ See *id.* (detailing public union budgets).

²⁵ See *id.* (noting that several unions “know that mandatory agency fees provide a spur to join the union”).

²⁶ See Lindsay Colvin Stone, *Supreme Court Deems Public-Sector Union Agency Fees Unconstitutional*, LAB. & EMP. L. BLOG (June 28, 2018), <https://www.laboremploymentlawblog.com/2018/06/articles/scotus/public-sector-union-agency-fees-unconstitutional/> (discussing the history of U.S. Supreme Court precedent regarding agency-shop fees and noting that the new *Janus* decision “presents major implications for public-sector union funding”).

²⁷ See generally Claudia Goldin & Lawrence F. Katz, *The Shaping of Higher Education: The Formative Years in the United States, 1890 to 1940*, 13 J. ECON. PERSP. 37 (1999) (describing the development of higher education in the United States).

²⁸ *The Birthplace of Public Higher Education*, UGATODAY (Jan. 22, 2017), <https://news.uga.edu/birthplace-public-higher-education-america/>.

granted broad freedom to universities to fulfill their pedagogical interests.²⁹ In that vein, the U.S. Supreme Court has stated:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.³⁰

In order to fund their operations, public universities charge their students some combination of tuition and mandatory student fees.³¹ Tuition generally subsidizes faculty salaries and core educational services,³² while mandatory student fees are segregated from tuition costs and “support various campus services and extracurricular student activities.”³³ Mandatory student fees were initially instituted by students themselves in order to improve everyday student life.³⁴ For example, some fees subsidize improved residence hall facilities and give students access to campus sporting events.³⁵

Recently, however, student fees have become increasingly controversial.³⁶ During the mid-twentieth century, universities redirected mandatory student fees from peripheral quality-of-life expenses to registered student organizations (RSOs).³⁷ RSOs are comprised of students who associate based on, among other things,

²⁹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (noting that courts have long recognized the importance of academic freedom for universities).

³⁰ *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

³¹ See Alina Tugend, *How Public Universities Are Addressing Declines in State Funding*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/how-public-universities-are-addressing-declines-in-state-funding.html> (summarizing interviews with higher education professionals that focused on how universities fund their operations).

³² See Nathan Lewis, *U.S. Colleges: Where Does the Money Go?*, FORBES (Feb. 17, 2017, 8:06 AM), <https://www.forbes.com/sites/nathanlewis/2017/02/17/u-s-colleges-where-does-the-money-go/#71832b1e73ca> (examining personnel costs at several universities).

³³ See, e.g., *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 222 (2000) (explaining the purpose of the University of Wisconsin’s mandatory activity fee).

³⁴ See JORDAN LORENCE, FIRE’S GUIDE TO STUDENT FEES, FUNDING, AND LEGAL EQUALITY ON CAMPUS 3 (2003) (describing the origins of mandatory student fees).

³⁵ *Id.* (outlining notable uses of mandatory student fees at public universities).

³⁶ *Id.* at 7–8.

³⁷ *Id.*

personal interests, religious beliefs, or political viewpoints.³⁸ Universities sponsor these organizations to educate students, which the U.S. Supreme Court has described as a compelling government interest.³⁹ Universities, the Court explained in *Southworth*, “undertake to stimulate the whole universe of speech and ideas” to educate their students, which may include education about differing political opinions.⁴⁰ The Court noted:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.⁴¹

In line with this reasoning, courts have traditionally held that universities may charge mandatory student fees to create a “universe” of ideas to promote their pedagogical interest even if the fees help fund some organizations (and, by extension, political or religious speech) with which a student fee-payer disagrees.⁴²

Like agency-shop arrangements, mandatory student fees have been challenged under the First Amendment.⁴³ Also like agency-shop arrangements, mandatory student fees have been upheld because they further a compelling government interest that

³⁸ *Id.* at 5 (describing RSOs).

³⁹ See *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (noting “that student expression may not be suppressed unless school officials reasonably conclude that it will ‘materially and substantially disrupt the work and discipline of the school.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969))).

⁴⁰ See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232 (2000) (“The speech the [u]niversity seeks to encourage . . . is . . . not . . . discernable [by its] limits but by its vast, unexplored bounds.”). The university’s mission would be undermined by strict rules about which speech could be propagated. *Id.* at 229 (“The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students.”).

⁴¹ *Id.* at 233.

⁴² See cases cited *infra* note 43.

⁴³ See *Southworth*, 529 U.S. at 231–33; see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (holding that the University of Virginia could not lawfully withhold student activity fund support from a Christian newspaper based on the paper’s religious perspective).

overrides the rights of free speech or free association.⁴⁴ However, times may be changing.

In *Janus*, the Court overruled *Abood* by holding that collection of agency-shop fees, albeit essential to support core union activities and explicitly not supporting political speech, violated the First Amendment rights of nonmembers who fundamentally disagreed with union activity.⁴⁵

III. FREE SPEECH CHALLENGES TO MANDATORY FEES

Both public unions and public universities have been party to countless First Amendment lawsuits since their respective inception.⁴⁶ Most relevant here, many of these lawsuits have consisted of challenges to compelled fee-paying under the First Amendment.⁴⁷ This includes agency-shop fees in the public union sector and mandatory student fees in the public university sector.⁴⁸ Fee challengers contend that these fees support political causes with which they disagree: unions, which challengers argue are inherently political, and political student organizations.⁴⁹ Fee-payers argue that their First Amendment right to freedom of expression forbids these government entities from compelling their speech in these ways.⁵⁰

⁴⁴ See *Southworth*, 529 U.S. at 232–33 (upholding mandatory student fees over a First Amendment challenge).

⁴⁵ See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) (holding that agency-shop fees are “unconstitutional exactions [that] cannot be allowed to continue” because “this procedure violates the First Amendment”).

⁴⁶ See generally *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (involving a public employee challenge to agency-shop fees on First Amendment grounds), *overruled by Janus*, 138 S. Ct. at 2460; see also *Janus*, 138 S. Ct. at 2460 (overruling *Abood* in a challenge to public union agency-shop fees); *Southworth*, 529 U.S. at 236 (consisting of a First Amendment challenge to mandatory student fees at public universities); *Rosenberger*, 515 U.S. at 846 (discussing whether under the First Amendment a public university may withhold funding from a religious organization based on viewpoint); *Amidon v. Student Ass’n of the State Univ. of N.Y. at Albany*, 508 F.3d 94 (2d Cir. 2007) (addressing a challenge to public university funding decisions on First Amendment grounds).

⁴⁷ See cases cited *supra* note 46.

⁴⁸ See cases cited *supra* note 46.

⁴⁹ See *Janus*, 138 S. Ct. at 2460–61 (explaining that employees challenge agency-shop fees because the fees fund political speech); *Southworth*, 529 U.S. at 220–22 (noting that student fee-payers held ideological objections to some fee-supported speech); *Rosenberger*, 515 U.S. at 845 (involving a First Amendment challenge to a public university’s refusal to allocate student fee dollars to a religious student group).

⁵⁰ See *Abood*, 431 U.S. at 211–13 (observing that some union members hold theoretical and practical disagreements with the existence of their public unions because their political

In both types of cases, the government's response is two-fold. First, the government argues that there is no First Amendment violation.⁵¹ Second, the government argues that even if the speech is political in nature it serves a compelling government interest in a legitimate fashion, which overrides the challenger's First Amendment claims.⁵² This reasoning has been adopted by the U.S. Supreme Court in both the public union and public university sectors for decades, with *Abood* as controlling precedent in the public union context and *Southworth* as controlling precedent in the public university context. However, with the Court's 2018 *Janus* decision which overrules *Abood*, times may be changing for *Southworth* as well.

A. ABOOD

Despite challenges to agency-shop arrangements in the 1960s, the U.S. Supreme Court specifically endorsed the right of public unions to collect agency-shop fees in *Abood*.⁵³ *Abood* remained good law for over four decades.⁵⁴ *Abood* began in 1969 when several public school teachers in Michigan brought suit against the state, alleging that mandatory agency-shop fees—even when specifically designated towards nonpolitical budgetary items—were a violation of their First Amendment rights to not be compelled to speak in support of ideas with which they disagreed.⁵⁵ These teachers

beliefs are inconsistent with the existence of the union); *Southworth*, 529 U.S. at 220–22 (observing that some students have lodged objections with student fees because they disagree with the speech their funds are used to endorse).

⁵¹ See *Abood*, 431 U.S. at 213 (observing that the union moved for summary judgment in response to the teacher's First Amendment challenge); *Southworth*, 529 U.S. at 221 (noting that the University "contends that its mandatory student activity fee and the speech it supports are appropriate to further its educational mission").

⁵² See *Abood*, 431 U.S. at 215 (explaining that although union expenditures might further a political purpose, previous precedent had already suggested that this compelled speech would be constitutional); *Southworth*, 529 U.S. at 221 (explaining that fee support of political messages is constitutionally acceptable if it helps educate the university's students in a viewpoint neutral manner).

⁵³ See *Abood*, 431 U.S. at 223 (holding that "[a]s long as [the union promotes] the cause which justified bringing the [union] together, the individual [employee] cannot withdraw his financial support merely because he disagrees with the group's strategy").

⁵⁴ See *Janus*, 138 S. Ct. at 2460 (observing that *Abood* had been good law for forty-one years).

⁵⁵ See *Abood*, 431 U.S. at 213 ("The complaint prayed that the agency-shop clause be declared invalid . . . under the United States Constitution as a deprivation of . . . the plaintiffs' freedom of association protected by the First . . . Amendment[] . . .").

claimed that their public union was engaged “in a number . . . of activities and programs which [were] economic, political, professional, scientific, and religious in nature of which Plaintiffs [did] not approve.”⁵⁶ The teachers further argued that “a substantial part of the sums required to be paid under said Agency Shop Clause [were] used and [would] continue to be used for the support of such activities and programs.”⁵⁷ Therefore, the teachers argued that mandatory agency-shop fees were a deprivation of their First Amendment rights to not be compelled to speak.⁵⁸

The U.S. Supreme Court disagreed.⁵⁹ The Court held that “insofar as [the fees] are used to finance expenditures by the union for collective-bargaining, contract-administration, and grievance-adjustment purposes,”⁶⁰ the fees were permissible, even if compelling employees “to support their collective-bargaining representative [had] an impact upon their First Amendment interests.”⁶¹ In recognizing these legitimate private interests and that the imposition of agency-shop fees interferes with those interests, the Court ruled that “such interference . . . is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”⁶² Therefore, “[a]s long as [the fees] act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group’s strategy.”⁶³

This ruling, however, did not leave public employees without some protection.⁶⁴ The Court recognized “the fact that the appellants are compelled to make . . . contributions for political purposes works no less an infringement of their constitutional

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.* at 212–13 (observing that teachers had challenged these fees because “they opposed collective bargaining in the public sector”).

⁵⁹ *See id.* at 242 (holding that mandatory agency-shop fees were valid and did not constitute a violation of First Amendment rights of association and against compelled speech).

⁶⁰ *Id.*

⁶¹ *Id.* at 222.

⁶² *Id.*

⁶³ *Id.* at 223.

⁶⁴ *See id.* at 234, 241 (holding that appellant employees have the right to refuse to associate with the union and that remedies are available when union speech is clearly political).

rights” than a prohibition on that right, which clearly violates the First Amendment.⁶⁵ The Court therefore struck a compromise between the expressive rights of public employees and the compelling government interest of public unions to negotiate on behalf of those employees.⁶⁶ The Court recognized that a union could legitimately “spend funds for the expression of political views . . . toward the advancement of . . . ideological causes not germane to its duties as collective-bargaining representative.”⁶⁷ But First Amendment principles “prohibit . . . requiring [employees] to contribute to the support of an ideological cause [they] may oppose as a condition [of their public employment].”⁶⁸ On balance, the Court protected the First Amendment rights of objecting employees by requiring that the union’s “[political] expenditures be financed . . . by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”⁶⁹ Agency-shop fees, on the other hand, may not be used to finance political expenditures.⁷⁰ By this measure, both the First Amendment rights of the objecting employees and the political interests of the unions could be served—so long as some employees voluntarily contribute as full, dues-paying union members willing to participate in the political speech at issue.

Interestingly, the *Abood* Court rejected a counterargument that it would later, in *Janus*, find persuasive.⁷¹ As Justice Rehnquist acknowledged in his *Abood* concurrence, “the position[] taken by public employees’ unions in connection with their collective-bargaining activities *inevitably touch[es] upon political concern* if the word ‘political’ [is] taken in its normal meaning.”⁷² The teachers argued that contributing to collective bargaining at all—even if explicit political support for a union’s nongermane

⁶⁵ *Id.* at 234.

⁶⁶ *Id.* at 235–36.

⁶⁷ *Id.* at 235.

⁶⁸ *Id.*

⁶⁹ *Id.* at 236.

⁷⁰ *Id.* at 240–41 (describing that if petitioners can demonstrate that their funds are being used for political speech there is relief available).

⁷¹ *See id.* at 226 (finding unpersuasive the appellants’ argument that public sector collective bargaining is inherently political); *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2467–69 (2018) (explaining why the role of public unions represents political speech even while the unions engage in collective bargaining).

⁷² *Abood*, 431 U.S. at 243 (Rehnquist, J., concurring) (emphasis added).

political activity was clearly withheld—was in fact a political statement, thereby necessarily implicating political speech.⁷³ After all, politics and government are inherently intertwined, and “[s]uccess in pursuit of a particular collective-bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way.”⁷⁴ Ultimately, however, the Court ruled that the compelling government interest in deciding how to bargain with its employees overrode this supposedly tenuous connection between the union’s everyday collective-bargaining activities and violative political speech.⁷⁵ In essence, the Court implemented a balancing test in which agency-shop fees were deemed constitutional so that unions could operate, even if they loosely funded political speech. But mandatory full union membership and explicit support of egregiously political union speech was not permissible.⁷⁶

B. *SOUTHWORTH*

Aboud became widely influential, eventually playing a key role in *Board of Regents of University of Wisconsin System v. Southworth*, an important First Amendment challenge to a public university’s mandatory student fees. In *Southworth*, a group of students at the University of Wisconsin-Madison sued the university for using money from the mandatory student activity fee to fund student groups with which they disagreed.⁷⁷ The students claimed (and the district court agreed)⁷⁸ that using the funds in this manner “compelled students to ‘support political and ideological activity with which they disagree’ in violation of [the students’] First Amendment rights to freedom of speech and association.”⁷⁹ This action would thereby violate the established principle that “[i]f there is any fixed star in our constitutional constellation, it is that

⁷³ *Id.* at 246 (Powell, J., concurring).

⁷⁴ *Id.* at 243.

⁷⁵ *Id.* at 225–226 (majority opinion).

⁷⁶ *Id.* at 235–36 (holding that political union expenditures be funded by “employees who do not object to advancing those ideas”).

⁷⁷ *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 220–22 (2000).

⁷⁸ *See Southworth v. Grebe*, No. 96–C–0292–S, 1996 WL 761950, at *12 (W.D. Wis. Nov. 29, 1996), *rev’d*, 151 F.3d 717 (7th Cir. 1998), *rev’d*, 529 U.S. 217 (2000) (holding that “the balance between the competing interests in this case tips in favor of [the students’] First Amendment rights not to be compelled to speak or associate”).

⁷⁹ *Southworth*, 529 U.S. at 227.

no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion[,] or other matters of opinion or force citizens to confess by word or act their faith therein.”⁸⁰ In response, the university claimed that the mandatory student fees were used to create a “whole universe of speech and ideas” in support of legitimate pedagogical aims, not merely political ones, and therefore the university was not forcing students to speak in support of any particular message.”⁸¹ The university also “disclaimed that the speech [was] its own,” rendering moot the discussion of whether a university is using these funds to speak for itself.⁸² Rather, it claimed to create this universe to “enhance students’ educational experience” consistent with its mission.⁸³ The university thereby argued that it was endeavoring to serve a compelling government interest and was “entitled to impose a mandatory fee to sustain an open dialogue to these ends.”⁸⁴

As in *Abood*, the Court was faced with a question of compelled spending in light of a compelling government interest.⁸⁵ The *Southworth* Court explained that “*Abood* . . . provide[s] the beginning point” for the Court’s analysis because the “complaining students are being required to pay fees which are subsidies for speech they find objectionable, even offensive.”⁸⁶ Like in *Abood*, the Court decided to balance the fact that the compelled student fees “infringe[] on the speech and beliefs of the individual” with “the important and substantial purposes of the University, which seeks to facilitate a wide range of speech.”⁸⁷ However, when deciding how to pragmatically balance these two interests, the Court diverged from *Abood*, whose germaneness standard was ruled “unworkable” in the university context.⁸⁸ The Court acknowledged that it had “encountered difficulties in deciding what is germane and what is not” even in the union context.⁸⁹ Thus, in the context of a university,

⁸⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁸¹ *Southworth*, 529 U.S. at 232.

⁸² *Id.* at 229.

⁸³ *Id.* at 217.

⁸⁴ *Id.* at 233.

⁸⁵ *Id.* at 230 (noting the similarity between the student fee challenge and the *Abood* challenge).

⁸⁶ *Id.*

⁸⁷ *Id.* at 231.

⁸⁸ *Id.*

⁸⁹ *Id.* (explaining that the difficulties have manifested themselves “even in the context of a labor union, whose functions are, or so we might have thought, well known and understood

“where the State undertakes to stimulate the whole universe of speech and ideas,” “the standard [became] all the more unmanageable.”⁹⁰

Recognizing that the university must provide some protection to the First Amendment rights of its students but also recognizing legitimate governmental and pedagogical interests in fostering debate, the Court applied a new standard for application of public university student fee allocation: viewpoint neutrality.⁹¹ Under this standard, “when a university requires its students to pay fees to support the extracurricular speech of other students . . . it may not prefer some viewpoints to others.”⁹² In this way, a university may compel its students to financially support speech with which they disagree because they are not technically making a political statement. Instead, they are financially contributing to a universe of ideas and statements that may happen to include viewpoints with which they disagree, all for the purpose of educating the entirety of the student body.⁹³

Despite *Southworth*'s divergence from *Abood*, the two cases share an important similarity: they each found unconstitutional an instance of more direct compelled speech which was more obviously political. In *Abood*, the Court ruled that requiring payment for purely political speech promulgated by the union was unconstitutional as a blatant First Amendment violation.⁹⁴ Similarly, in *Southworth*, the Court ruled that one type of regulation—a student referendum withdrawing the students' financial support from RSOs based solely on the viewpoint of those RSOs—“would undermine the constitutional protection the program requires.”⁹⁵ The Court was skeptical of a system that allowed the university to withhold funding from one viewpoint over another because that system allowed blatantly political speech to be

by the law and the courts after a long history of government regulation and judicial involvement”).

⁹⁰ *Id.* at 231–32.

⁹¹ *See id.* at 233 (defining viewpoint neutrality).

⁹² *Id.*

⁹³ *See id.* (explaining why viewpoint neutrality is needed in universities).

⁹⁴ *Id.* at 235–36 (holding that “the Constitution requires . . . that [political] expenditures be financed . . . by employees who do not object to advancing those ideas”).

⁹⁵ *See id.* at 235.

funded by the mandatory student fee.⁹⁶ In other words, both *Abood* and *Southworth* provided stark examples of the Court striking down unconstitutionally compelled speech before allowing the government to fund more loosely political speech that served the compelling government interests of collective bargaining and viewpoint neutrality.

This similarity between *Abood* and *Southworth* proves again the relatedness of these cases and the compelled speech jurisprudence as it relates to public institutions. The *Abood* Court ruled that collective bargaining was a compelling governmental interest, not inherently political speech.⁹⁷ The *Southworth* Court held that allowing RSO speech was a compelling government interest, not inherently political speech.⁹⁸ But the Court in both cases recognized that political speech was somewhat implicated by both activities: the *Abood* Court recognized that collective bargaining, to some extent, is inherently political speech,⁹⁹ and the *Southworth* Court explicitly recognized that “[i]t is all but inevitable that the [student] fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs.”¹⁰⁰ Because the speech in each of these two areas served a compelling government interest and was only somewhat political, the Court upheld the regulations as balanced in favor of the public entity.¹⁰¹

⁹⁶ See *id.* at 235–36 (analyzing the “referendum aspect” of the university’s program and noting that “it is unclear . . . what protection, if any, there [was] for viewpoint neutrality in [that] part of the process” and remanding for further findings).

⁹⁷ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 242 (1977) (explaining the Court’s analysis of union activity in light of the First Amendment and subsequently ruling in favor of the union instead of the employee’s interests), *overruled by* *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

⁹⁸ Collective bargaining and public education are two different government interests; however, they both inculcate political speech in these two cases. The approach to the constitutionality in each case is similar even though the fact patterns differ. Compare *Abood*, 431 U.S. at 225, 227 (noting that collective bargaining is an important government interest and that the employees raise a First Amendment claim), with *Southworth*, 529 U.S. at 233 (holding that the university is entitled to compel political speech when in service to important university functions).

⁹⁹ See *Abood*, 431 U.S. at 243 (Rehnquist, J., concurring) (explaining the link between union activity and speech).

¹⁰⁰ *Southworth*, 529 U.S. at 232.

¹⁰¹ See *id.* (“The First Amendment does not require the University to put the program at risk.”); *Abood*, 431 U.S. at 222–23 (upholding the fees in spite of the employees’ First Amendment interests).

IV. TIMES CHANGE: THE *JANUS* DECISION

In 2018, the U.S. Supreme Court decided to upend this constitutional framework and weigh a compelled speech challenge anew against the government interest of public collective bargaining.¹⁰² *Janus* marked a distinct shift in the Court's compelled speech jurisprudence because the Court overturned *Abood* and ruled in favor of a union employee fighting an agency-shop arrangement.¹⁰³

In 2018, an employee of the Illinois Department of Healthcare and Family Services, Mr. Janus, complained that he was forced to subsidize a public union.¹⁰⁴ Specifically, Mr. Janus claimed that the agency-shop fees he paid unconstitutionally supported the union's public policy positions.¹⁰⁵ Mr. Janus asserted that all "non-member fee[s] . . . are coerced political speech."¹⁰⁶ Therefore, he argued that compelled agency fees violated his right to freely abstain from speech.¹⁰⁷

In a landmark opinion, the Court overruled the 41-year-old precedent of *Abood*.¹⁰⁸ The Court's compelled speech analysis began with a heavier hand than the same analysis in *Abood*, noting that "a 'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'"¹⁰⁹ Significantly, the *Janus* Court initially rejected the *Abood* Court's position that unions were not inherently political organizations.¹¹⁰ While *Abood* recognized that unions necessarily participated *somewhat* in political speech, it maintained that the connection between general union activities—especially contract drafting and collective

¹⁰² See *Janus*, 138 S. Ct. at 2461 (upholding a First Amendment challenge to agency-shop fees).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* (noting that Mr. Janus fundamentally disagreed with the purpose and political advocacy of his public union and wished to withdraw his support).

¹⁰⁶ *Id.* at 2462.

¹⁰⁷ See *id.* (explaining Mr. Janus' claim that compelled agency-shop fees violate the First Amendment).

¹⁰⁸ *Id.* at 2486.

¹⁰⁹ *Id.* at 2464 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310–11 (2012)).

¹¹⁰ *Id.* at 2480 (holding that the *Abood* Court "missed the point" about the union's activities that are inherently designed to achieve political ends).

bargaining—was only tenuously connected to political speech.¹¹¹ *Janus* thus signals that the U.S. Supreme Court now disagrees with that proposition.¹¹² In light of this view, the *Janus* Court—more sensitive about speech being effectively political than the *Abood* Court—nearly decided to analyze restrictions on the freedom of speech under strict scrutiny instead of the rational-basis review that the *Abood* Court had applied.¹¹³ In dicta, the Court explained that rational-basis review “is foreign to our free-speech jurisprudence, and we reject it here.”¹¹⁴ The Court, however, found it “unnecessary to decide the issue of strict scrutiny” because the union did not assert a compelling interest.¹¹⁵

Because no compelling interest was present in either the agency-fee context or the free-rider context, as argued by the union, “the balance tip[ped] decisively in favor of the employees’ free speech rights.”¹¹⁶ While the Court may have ruled differently had it not found “the State’s assertion that the absence of agency fees would . . . impair the efficiency of government operations . . . questionable,” dicta suggests that the Court has shifted towards weighing free speech rights more heavily, even in cases with a compelling government interest.¹¹⁷ This signals a potentially transformative shift in the Court’s jurisprudence in cases where a First Amendment compelled speech claim is only tenuously connected to that compelling government interest. The Court in *Janus* takes speech concerns in this context more seriously than before, quoting an emphatic Thomas Jefferson: “[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.”¹¹⁸ In all, *Janus* evidences a willingness on the Court’s

¹¹¹ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236–37 (1977), *overruled by Janus*, 138 S. Ct. at 2460.

¹¹² *See Janus*, 138 S. Ct. at 2464.

¹¹³ *Id.* at 2465 (holding that “it [is] unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even [a] more permissive standard”).

¹¹⁴ *Id.*

¹¹⁵ *See id.* (analyzing, and eventually rejecting, the assertion that labor peace and avoidance of free riders are compelling government interests).

¹¹⁶ *Id.* at 2477.

¹¹⁷ *See id.* (observing the “heavy burden that agency[-shop] fees inflict on nonmembers’ First Amendment rights” and finding that “the balance tips decisively in favor of the employees’ free speech rights”).

¹¹⁸ *Id.* at 2464 (quoting THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM 545–53 (Julian P. Boyd ed., Princeton Univ. Press 1950) (1779)).

part to find that the government is making strong political statements in situations which, in the past, would have been considered tenuously connected to political speech and permissible in pursuit of a compelling government interest.

Whether the jurisprudential shift that occurred in *Janus* is appropriate is a separate question entirely. As noted by Justice Kagan in her dissent, the majority opinion in *Janus* “wield[s] the First Amendment in an aggressive way.”¹¹⁹ *Janus*, according to Justice Kagan, “threatens not to be the last” time the Court wields the First Amendment in such a way: “the majority’s road runs long” because “almost all economic and regulatory policy affects or touches speech.”¹²⁰ Justice Kagan further recognized that *Abood* is possibly the first in a long line of cases altering the Court’s First Amendment analysis in a way largely deferential to individual citizens, instead of compelling government interests.¹²¹ At least one commentator has already noted that *Janus* “endanger[s] free expression on [university] campuses.”¹²²

V. RECONCILING *JANUS* WITH PUBLIC UNIVERSITIES

Janus may have deleterious effects on established First Amendment jurisprudence in the public university context. *Janus* is difficult to reconcile with *Southworth*, which was based on *Janus*’ now-overturned predecessor, *Abood*. The Court, over the course of forty years, had established a consistent line of thought with regard to mandatory contributions to public entities who served compelling government interests by using that money to fund political speech.¹²³ After *Janus*, public universities now may have to shift their fee structures to avoid an adverse First Amendment decision.

The Court has engaged in balancing analyses between compelling government interests and individual First Amendment

¹¹⁹ *Id.* at 2501–02 (Kagan, J., dissenting).

¹²⁰ *Id.* at 2502.

¹²¹ *See id.* at 2498 (noting that the Court has relied on the now-overturned *Abood* precedent numerous times even “outside the labor sphere”).

¹²² *See* John K. Wilson, *The Problems with the Janus Decision on Union Dues*, INSIDE HIGHER ED (Aug. 16, 2018), <https://www.insidehighered.com/views/2018/08/16/problems-janus-decision-union-dues-opinion>.

¹²³ *See Janus*, 138 S. Ct. at 2460 (observing that *Abood* had been good law for forty-one years); *see also id.* at 2497–98 (Kagan, J., dissenting) (noting that for “[o]ver four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction” numerous times).

rights in different contexts for several decades.¹²⁴ Generally, the Court has concluded that a compelling government interest, when connected to a tenuous violation of individual expressive freedoms, is permissible under the First Amendment.¹²⁵ At first glance, *Janus* does not change that jurisprudence because the Court ruled that effective operation of public unions is not a compelling government interest—not that expressive rights would actually outweigh a legitimately compelling interest.¹²⁶

Janus, however, hints at a much more significant underlying jurisprudential shift: compelling government interests may not be enough to override the speech rights of private citizens, even where the speech is only somewhat political.¹²⁷ If this shift continues in the manner that Justice Kagan forewarned, many different compelling government interests will be open to potentially persuasive challenges that could fundamentally alter the avenues in which government is allowed to operate.¹²⁸ One such avenue is the *Southworth* framework. Applying *Janus* to this framework will hamstring the ability of public universities to levy mandatory student fees. These universities will subsequently lack the ability to fund organizations and groups with which their fee-payers may not agree, at the expense of public education.

A. UNIVERSITY INTEREST IN PEDAGOGY IS DECISIVELY A COMPELLING GOVERNMENT INTEREST

Several characteristics help materially distinguish public unions and public universities. The first question this Note undertakes is also the first question that a court will ask in a challenge of this kind: is public higher education a compelling government interest? The answer to this question has traditionally been a resounding

¹²⁴ See Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/31/compelling-state-interest> (last visited Jan. 12, 2020) (describing U.S. Supreme Court holdings that consider compelling government interests (e.g., education and reducing political corruption) against individual rights).

¹²⁵ *Id.* (explaining the different levels of scrutiny, including the strict scrutiny relevant for the present First Amendment analysis).

¹²⁶ See *Janus*, 138 S. Ct. at 2466 (“[A]voiding free riders is not a compelling [government] interest.”).

¹²⁷ See *id.* at 2465–2469 (discussing why the government’s free-rider argument is insufficient to overcome First Amendment objections in this case).

¹²⁸ See *id.* at 2502 (Kagan, J., dissenting) (observing that “[s]peech is everywhere—a part of every human activity” and that “almost all economic or regulatory policy touches speech”).

“yes.”¹²⁹ The answer, however, was also a resounding “yes” in the public union context until June 2018.¹³⁰ A de novo review of this question seems appropriate. Ultimately, the answer to the posed question probably remains “yes.”

Unlike the government’s stated interests in *Janus* (promoting “labor peace” and “avoiding free-riders”),¹³¹ creation of a pedagogical environment on a public university campus is generally a nonpartisan issue.¹³² While universities and professors are increasingly portrayed as liberal-leaning,¹³³ public universities are generally nonpartisan,¹³⁴ and U.S. Supreme Court precedent repeatedly requires universities to remain viewpoint neutral.¹³⁵ Labor unions, on the other hand, are partisan almost to their core.¹³⁶ Additionally, the U.S. Supreme Court tends to defer to educators about pedagogy due to its relative lack of expertise about educational concerns.¹³⁷ As the U.S. Supreme Court noted in *Hazelwood v. Kuhlmeier*, “[e]ducators are entitled to exercise greater control over . . . student expression to assure that participants learn whatever lessons the activity is designed to

¹²⁹ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”).

¹³⁰ See *Janus*, 138 S. Ct. at 2486.

¹³¹ See *id.* at 2466 (acknowledging the petitioner’s reliance on labor peace and risk of free riders as government interests).

¹³² See Thomas Ehrlich & Ernestine Fu, *Troubling Attacks on Public Higher Education*, FORBES (Mar. 23, 2015, 12:55 PM), <https://www.forbes.com/sites/ehrllichfu/2015/03/23/troubling-attacks-on-public-higher-education/#75be6d6a4e12> (noting that, amidst heightened partisanship, “nonpartisan preparation for democracy is an essential task of colleges and universities”).

¹³³ See Cass Sunstein, *The Problem with All Those Liberal Professors*, BLOOMBERG (Sept. 17, 2018), https://www.bloomberg.com/opinion/articles/2018-09-17/colleges-have-way-too-many-liberal-professors?utm_source=url_link (noting that one “concern has grown over what many people see as a left-of-center political bias at colleges and universities”).

¹³⁴ See Leon Botstein, *American Universities Must Take a Stand*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/opinion/american-universities-must-take-a-stand.html> (detailing a university president’s belief that “American colleges and universities . . . are properly seen as nonpartisan elements in civil society”).

¹³⁵ See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (affirming a viewpoint neutrality requirement).

¹³⁶ Richard Berman, *Commentary: 40% of Union Members Vote Republican. So Why Does 99% of Union Advocacy Money Go to Liberal Groups?*, FORTUNE (Jan. 17, 2018), <http://fortune.com/2018/01/17/employee-rights-act-labor-unions-democratic-party/>.

¹³⁷ See Steve Sanders, *Affirmative Action and Academic Freedom: Why the Supreme Court Should Continue Deferring to Faculty Judgments about the Value of Educational Diversity*, 1 IND. J.L. & SOC. EQUALITY 50, 52 (2013) (observing a “settled principle of deference to educational decisions” by the U.S. Supreme Court).

teach.”¹³⁸ Universities exist to educate the public, so the Court grants them broad deference to achieve that goal.¹³⁹ These reasons distinguish public universities from public unions and provide the Court a potential avenue for distinguishing *Janus*.

B. APPLYING *JANUS*

A court may, however, distinguish pedagogy from union activity as a compelling government interest but still find mandatory student fees unconstitutional. The *Janus* Court’s emphasis on strong First Amendment freedoms suggests that even when balancing their imposition against a compelling government interest the First Amendment argument may win out.

As the Court suggested in *Janus*, compelled speech that implicates political ideas is evaluated under a different level of scrutiny than that in *Abood*.¹⁴⁰ The Court held in *Southworth* that student fees are at least partially compelled political speech but that the speech is so tenuously political that it poses little infringement on the students’ First Amendment rights—so long as the university disburses the funds in a viewpoint neutral fashion.¹⁴¹ Even if student fees are allocated in a viewpoint neutral fashion in a universe of ideas, their distribution to RSOs with particularized political, religious, and social views creates political speech.

Southworth held that while there is at least a tenuous connection between the university’s creation of that universe of ideas and inherently political speech,¹⁴² this connection probably does not outweigh the students’ right to be free from compelled speech.¹⁴³ Political ideas are necessarily included in a universe of expression just as collective bargaining necessarily implies the political importance of public unions. In the university context, at least some of RSO activity (e.g., policy meetings for the College Republicans or

¹³⁸ 484 U.S. 260, 271 (1988).

¹³⁹ *Southworth*, 529 U.S. at 229–30.

¹⁴⁰ *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465 (2018) (rejecting rational-basis review as suggested by *Abood*).

¹⁴¹ *See Southworth*, 529 U.S. at 221 (affirming a fee program on the condition of viewpoint neutrality).

¹⁴² *Id.* at 229.

¹⁴³ *See id.* at 232–33 (holding that although “[i]t is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs[,] . . . the University is entitled to impose a mandatory fee to sustain an open dialogue”).

Democrats) is inherently political and partisan just as union bargaining (even when germane to the union's purpose) is at least somewhat inherently partisan.

Before *Janus*, the Court saw these connections as only tenuous: public unions were somewhat political but that level of forced political speech was acceptable because it was coerced in pursuit of a compelling government interest.¹⁴⁴ The *Janus* Court, however, changed that holding and did not see the same connection as tenuous; instead, it saw collective bargaining as an inherently political activity.¹⁴⁵ Post-*Janus*, a court may find that speech by student organizations, including political and religious organizations, is more than just tenuously political in light of the larger university goal. Rather, the Court may find this speech to be inherently political.

As the Court in *Janus* noted, inherently political speech is more difficult to compel than only somewhat political speech.¹⁴⁶ Furthermore, in *Janus*, the Court strongly rejected arguments overriding the free speech interests of employees even where union behavior was squarely in support of collective bargaining.¹⁴⁷ The Court's move in *Janus* was a decision that "*Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees."¹⁴⁸ This "very different" question is essentially a renewed emphasis on strong protection of speech rights, the abridgement of which was previously justified by government interests. Not so any longer.¹⁴⁹

In a new era of extraordinarily strong freedoms from compelled speech,¹⁵⁰ the similarities between this speech and agency-shop arrangements may be too much for *Southworth* to overcome. If a

¹⁴⁴ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 (1977) (holding that public unions have "important government interests" in spite of their political nature), *overruled by Janus*, 139 S. Ct. at 2460.

¹⁴⁵ See *Janus*, 138 S. Ct. at 2486 (finding that nonmembers' First Amendment rights were violated by the agency-shop fee).

¹⁴⁶ See *id.* at 2464 (noting that "no one . . . would seriously argue that the First Amendment permits" a state to "require[] all residents to sign a document expressing support for . . . one of the major political parties").

¹⁴⁷ See *id.* at 2476 ("Even union speech in the handling of grievances may be of substantial public importance and may be directed at the public square." (internal quotations omitted)).

¹⁴⁸ *Id.* at 2479.

¹⁴⁹ See *id.* at 2460 (overruling *Abood*).

¹⁵⁰ See *id.* at 2465 (rejecting the assertion that labor peace and avoidance of free riders are compelling government interests).

new challenge were to arise against mandatory student fees that fund the political speech of RSOs, the ability of universities to charge these fees may be in danger.

VI. APPLYING *JANUS* TO MANDATORY STUDENT FEES THAT DO NOT SERVE A COMPELLING GOVERNMENT INTEREST

If universities lose their ability to support RSOs through mandatory student fees, they will be forced to change their funding structure to their own detriment. In this Part, I discuss several options for universities to lawfully restructure their RSO funding. Any of these changes may also negatively affect students.

First, universities could simply roll their mandatory fee charges into generalized tuition, ceasing their delineation between the funds used for general academic purposes and the funds used to fund these extracurricular groups.¹⁵¹ This would decrease transparency for students and may result in negative media for the university, which would have just dramatically increased its tuition cost (even without an effective rate increase).¹⁵² This adjustment would make it harder for the Court to ban individual RSO funding because universities could simply claim that tuition dollars are essential for the university to operate.¹⁵³ However, a court would probably hear a prompt challenge seeking to allow some students to opt out of “political speech” funds that would be included in tuition, creating a system similar to agency-shop fees in the public union context. A court in that scenario may force the university to charge one rate for “agency-shop” nonmember students, just like the *Abood* Court forced unions to allow public employees to remain nonmembers and not pay for explicit political speech.¹⁵⁴

¹⁵¹ See Erin Golden, *Minnesota Legislature Eyes Making Student Fees Optional at State Colleges, Universities*, STAR TRIBUNE (Apr. 20, 2017, 5:53 AM), <http://www.startribune.com/legislature-eyes-making-student-fees-optional-at-state-colleges-universities/419910683/> (“Some university administrators and students say making the fees optional could just push those charges onto tuition bills . . .”).

¹⁵² See *id.* (explaining that “[r]ight now, students participate in the process and . . . can find online what these fees go to support,” but if the process is changed “it becomes less transparent”).

¹⁵³ See Jonathan Swartz, *Is College Tuition Paying for Essentials, or Lavish Amenities?*, USA TODAY (May 19, 2014, 3:06 PM), <https://www.usatoday.com/story/college/2014/05/19/is-college-tuition-paying-for-essentials-or-lavish-amenities/37391309/> (noting that “universities typically defend their spending as a means to stay competitive with other colleges”).

¹⁵⁴ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977) (“[Political] expenditures [must be] financed from charges, dues, or assessments paid by employees who do not object

A second option is also possible: the university could stop using mandatory student fees to fund RSOs and allow the RSOs to exist without any monetary support from the university.¹⁵⁵ While this may harm the pedagogical environment and somewhat inhibit the university from creating a learning environment that consists of diverse ideas,¹⁵⁶ a court decision rejecting a university's ability to compel support for those RSOs would have just ruled that such an environment is not a compelling enough interest to justify financial support by the entire student body. These RSOs could theoretically still exist without this university funding, provided they became self-funded.¹⁵⁷

Finally, the university could take the most likely course of action if this case actually materializes: allowing students to opt out of paying student fees that support political speech with which they disagree.¹⁵⁸ A court may decide that universities would need to provide a method to withhold dollars from certain organizations while still paying optional fees for the organizations which they support or are neutral towards.¹⁵⁹ The university could probably also allow students to opt out of paying these fees, keeping the status quo intact by allowing students with ideological opposition to particular groups the choice to individualize their fee payments and withhold their support from certain causes or organizations.¹⁶⁰ Practically, this solution seems to carry the most weight, especially considering that many students simply pay their tuition bills without actually reading the fine print.¹⁶¹

to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”), *overruled by Janus*, 139 S. Ct. at 2460.

¹⁵⁵ *But see* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231 (2000) (recognizing the university's “important and substantial purposes[,] . . . which seek[] to facilitate a wide range of speech”).

¹⁵⁶ *Id.*

¹⁵⁷ Fernanda Zamudio-Suaréz, *Optional Student Fees? In Wisconsin, Students Are Divided on the Idea*, CHRON. OF HIGHER EDUC. (Feb. 27, 2017), <https://www.chronicle.com/article/Optional-Student-Fees-In/239333>.

¹⁵⁸ *Southworth*, 529 U.S. at 232 (“If a university decided that its students’ First Amendment interests were better protected by some type of optional or refund system[,] it would be free to do so.”).

¹⁵⁹ *See* Zamudio-Suaréz, *supra* note 157 (noting that if students opted out of these fees altogether many organizations on campus would not survive).

¹⁶⁰ *See id.* (describing a desire by some stakeholders to make student fees optional and discussing the practicality of that change).

¹⁶¹ *See* Elizabeth J. Akers & Matthew M Chingos, *Are College Students Borrowing Blindly?*, 2014 BROOKINGS INST. 1 (2014) (finding that “only a bare majority of [survey] respondents

VII. CONCLUSION

The Court's ruling in *Janus* has potentially wide-ranging effects on student expression rights on public university campuses. Although narrowly applied only in the public union setting, *Janus* may embolden fee-paying individuals in other public sector contexts to challenge the constitutionality of their respective fees. Historically, university students have not been shy about voicing their displeasure with university administration.¹⁶² Following Justice Alito's reasoning in *Janus* down the line in the university context,¹⁶³ it is unclear whether public institutions will be able to compel their students to fund speech with which those students disagree.¹⁶⁴ It is possible, however, that RSO requirements will come under increased scrutiny in light of the Court's expansion of First Amendment protections for individuals even where in conflict with a traditionally compelling government interest. Should *Janus* be applied in the public university context, students may gain the right to withhold their financial support from particular academic environments, but public education may suffer as a result. In the post-*Janus* world, all eyes will be on any new challenges that arise against public entities that compel political speech.

(52 percent) at a selective public university were able to correctly identify (within a \$5,000 range) what they paid for their first year of college”).

¹⁶² See, e.g., Phil Davis, *Johns Hopkins Protest Escalates as Students Chain Themselves to Administration Building*, BALTIMORE SUN (May 1, 2019), <https://www.baltimoresun.com/education/bs-md-ci-johns-hopkins-protests-20190501-story.html> (describing an extensive protest by students at Johns Hopkins University); Wendy Guzman, *Students Peacefully Protest Against Hate on Campus at Hannah Administration Building*, ST. NEWS (Oct. 29, 2019), <https://statenews.com/article/2019/10/fighting-against-hate-protest-5db7542ba8646> (describing a student protest at a public university administration building); Anemona Hartocollis, *Long After Protests, Students Shun the University of Missouri*, N.Y. TIMES (July 9, 2017), <https://www.nytimes.com/2017/07/09/us/university-of-missouri-enrollment-protests-fallout.html> (describing a hunger-strike protest against the University of Missouri administration).

¹⁶³ See *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2486 (2018) (describing the reasons why agency-shop fees violate the First Amendment rights of public employees).

¹⁶⁴ See *id.* at 2498 (Kagan, J., dissenting) (noting that *Southworth* relied on *Abood*, which is now overruled, and further noting that the majority describes *Abood* as an “outlier”).