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Rights In Common: A Deconstruction Of Political Speech, Agency Fee Structures, And The Union As Commons After Janus v. AFSCME

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**RIGHTS IN COMMONS: A DECONSTRUCTION OF
POLITICAL SPEECH, AGENCY FEE
STRUCTURES, AND THE UNION AS COMMONS
AFTER *JANUS V. AFSCME***

Susannah Maltz[†]

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INTRODUCTION: THE DECONSTRUCTION OF THE WORKERS’ STATE

When, in February 2017, then White House Chief Strategist Stephen Bannon asserted that the new presidential administration was dedicated

[†] CUNY School of Law, 2018. The author gratefully acknowledges Professor Ruthann Robinson, who provided invaluable guidance and discouraged stylistic inhibition, and to the Staff and Board of the CUNY Law Review, who spent countless hours editing and developing this article and issue. Thanks are also due to friends who supported the author through the writing process in myriad ways: Ean Fonseca, Sarafina Kietzman-Nicklin, Lucas Isakowitz, Nicole Faut, Brian McWalters, and many others. This article is dedicated to the workers and their fight against privatization and greed, and to the author’s mother, beekeeper and anti-corporate crank.

to the “deconstruction of the administrative state,”¹ the phrase was immediately itself deconstructed by all manner of news media.² Perhaps this declaration was offered as a familiar tenet of classical libertarianism,³ sig-

¹ Bannon made this comment while still a White House staffer, at the Conservative Political Action Conference (“CPAC”), where he gave a joint interview with former White House Chief of Staff Reince Priebus. Bannon laid out three overarching policy goals of the Trump administration: bolstering “national security and sovereignty;” instituting “economic nationalism;” and finally, the “deconstruction of the administrative state.” See Ryan Teague Beckwith, *Read Steve Bannon and Reince Priebus’ Joint Interview at CPAC*, TIME (Feb. 23, 2017), <https://perma.cc/3VVE-WQDB>. Bannon’s articulation of this conceptual troika suggested that the administration would pursue an economic vision that is racist, anti-immigrant, and war-keen (and thus extremely anti-worker), as well as virulently competitive and favoring of an unfettered free market. See Max Fisher, *Stephen K. Bannon’s CPAC Comments, Annotated and Explained*, N.Y. TIMES: INTERPRETER (Feb. 24, 2017), <https://perma.cc/E83R-K2NQ> (“Bannon often cites sovereignty to argue that trade deals or other forms of cooperation will necessarily suborn American interests. This is different from isolationism Rather, it is nationalism, which demands engagement [in global trade] but on ruthlessly competitive terms.”).

² See, e.g., Fisher, *supra* note 1 (“[Bannon implies that the state] is not an instrument of the American electorate, nor even a hurdle to be overcome as mainline conservatives often see it, but rather an adversary innately hostile to the people.”); see also Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State,’* WASH. POST (Feb. 23, 2017), <https://perma.cc/UPN3-EXM2> (interpreting comments Bannon made and terms he used throughout the interview); Phillip Carter, *The Trump Administration’s Not-So-Benign Neglect*, SLATE (Feb. 24, 2017, 6:03 PM), <https://perma.cc/ZH9M-FRTE> (suggesting that the idea put forth in Bannon’s statement has materialized in the Trump administration’s failure to appoint staff to federal positions and agencies, as well as in the appointment of unqualified or inexperienced personnel to such positions). The latter piece concludes that this is not dysfunction, but rather a deliberate attempt to prevent the federal government from fully functioning, and to “undo the state that has evolved since the New Deal.” Phillip Carter, *The Trump Administration’s Not-So-Benign Neglect*, SLATE (Feb. 24, 2017, 6:03 PM), <https://perma.cc/ZH9M-FRTE>; see also David French, *Trump Wants to Deconstruct the Regulatory State? Good. Here’s How You Start*, NAT’L REV. (Feb. 24, 2017, 10:36 PM), <https://perma.cc/B2AE-2ZC2> (in a familiar conservative take, lauding the Trump administration’s interest in dismantling the executive branch, which purportedly acts not for the public good but bureaucracy itself, and suggesting that the President and administrative agencies begin by abdicating power—in general, the power to promulgate rules—and allowing Congress to legislate the administration’s policy goals into being). Despite Bannon’s resignation and subsequent fall from grace, the three pillars of the policy he articulated continue to stand. See, e.g., Danny Vinik, *The Radical Idea Buried in Trump’s State of the Union*, POLITICO (Feb. 1, 2018, 6:24 PM), <https://perma.cc/XG9W-YQNA> (outlining Trump’s continued commitment to the deconstruction of the administrative state by drastically reorganizing the federal bureaucracy and reshaping federal agencies); Jeremy W. Peters, *Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State,’* N.Y. TIMES (Mar. 26, 2018), <https://perma.cc/KXE8-4GPG> (discussing how the Trump administration pairs judicial nominees with its administrative deregulation priorities).

³ Favoring, as its core principle, “regulation” of the economy by the free market and a corresponding rejection of economic regulation by the government. See, e.g., David Boaz, *Key Concepts of Libertarianism*, CATO INST. (Jan. 1, 1999), <https://perma.cc/7KKB-UY7Y> (“Free

naling to conservatives and proponents of small government that supportive services for the poor and impediments to unfettered growth of business and capital were in danger. Perhaps it was an indication of a more total obliteration⁴ of the core functions of executive agencies, signaling to a variable right-oriented, right-leaning, or right-parallel⁵ congregation

markets are the economic system of free individuals, and they are necessary to create wealth. Libertarians believe that people will be both freer and more prosperous if government intervention in people's economic choices is minimized.”)

⁴ While Bannon was a campaign staffer and later Chief Strategist, there was some anxiety in the media around his purported Leninism. Apparently, Bannon told Ronald Radosh—former Communist Party member turned conservative thinker and historian—at a party at Bannon's townhouse that he was a Leninist, and like Lenin, aimed to destroy the state. See Ronald Radosh, *Steve Bannon, Trump's Top Guy, Told Me He Was 'a Leninist'*, DAILY BEAST (Aug. 22, 2016, 1:00 AM), <https://perma.cc/ABN7-VK7T>. Radosh, who critiqued the concept of a “no-fault [Marxist] revolution” as “a fantasy . . . no longer tenable,” in light of the Soviet Russian government's human rights violations, see Rick Perlstein, *When Leftists Become Conservatives*, NATION (Mar. 23, 2015), <https://perma.cc/8B92-PEM9>, was “[s]hocked” “Radosh, *supra*. It bears noting that Lenin, in his interpretation of Marx, called for the destruction of the bourgeois state, and the seizing of control by the proletariat, which in large part involved a nationalizing of resources and the means of production. See generally V.I. Lenin, *THE STATE AND THE REVOLUTION* 22-33 (1918) (Robert Service trans., 1993). Lenin, quoting Marx, opens his seminal work, *THE STATE AND THE REVOLUTION*, by reflecting on the necessity of the proletariat “wrest[ing] . . . all capital from the bourgeoisie, to centralize all instruments of production in the hands of the state, i.e., of the proletariat organized as the ruling class.” *Id.* at 22-23. This notion is rather contrary to that of the deconstruction of the administrative state. Lenin differs from Marx—and gains his reputation as an advocate of destruction—in part due to his proposal that the seizing of the state should not happen “by degree,” and asks whether “is it conceivable that such an organization [a proletariat-controlled state government] can be created without first abolishing, destroying the state machine created by the bourgeoisie for themselves?” *Id.* at 25. This is not to suggest that Bannon is cryptically advocating for state-owned industry or divestment of power from the political classes to the working classes. He most certainly is not; though, like Lenin, he may see the working class as a political force that need not understand itself. See, e.g., NEIL HARDING, *LENIN'S POLITICAL THOUGHT* 122 (1983) (“Lenin's argument was that the workers did not have to come into socialist consciousness to acquire political consciousness.”). Bannon, or at least some of those interpreting him, may have heavily dichotomized two notions: the administrative state as force which, in part, defends the working class against a corporate supremacy, and the administrative state as a corrupt and entrenched bourgeoisie institution off of which the rich profit—believing one a fantasy and the other a reality.

⁵ By “right-parallel,” I intend to capture the cacophony of political theories (though in some instances “political theory” may be too generous) that have risen to mainstream view out of the dark caverns of the so-called “alt-right” internet. White nationalist conspiracy theorists, anarchist misogynists, teenagers who fancy themselves nihilists—an incoherent, disjointed assemblage of theory, rage, misinterpretation, who frequently celebrate racism, capitalism, and white supremacy. See generally Evan Malmgren, *Don't Feed the Trolls*, DISSENT (2017), <https://perma.cc/BUL8-VNJ3> (discussing the factions and ideological alignments of the so-called “alt-right” internet, including the intermingling of “nihilistic troublemakers” with “committed racists,” and tensions between “white nationalists, who see their political identity rooted in their race” and “civic nationalists, whose nationalism is grounded in citizenship”).

that powers delegated to the state would be shifted to the private sphere, the market, or a faction of unelected nationalist ideologues close to the President.⁶ In either case, there was no positive interpretation for workers or for organized labor.

Stationed in the broader context of the administration's political appointments, "the deconstruction of the administrative state" has taken the shape of an attack on social programs for workers and the poor:⁷ the dissolution of regulations, corporate power hobbling workers, their safety, and wealth;⁸ the narrowing or extinguishing of avenues for the forces of organized labor to formally represent workers bringing grievances against their employers;⁹ and perhaps a deconstruction of the apparatus on which

⁶ See Editorial Board, *President Bannon?*, N.Y. TIMES: OPINION (Jan. 30, 2017), <https://perma.cc/45LL-2NZ4> (speculating about the powers accorded to Bannon and his influence over the executive branch, prior to his expulsion or departure from the administration); Editorial Board, *Donald Trump Keeps It in the Family*, N.Y. TIMES: OPINION (Jan. 13, 2017), <https://perma.cc/J4KU-PBZA> (reporting on the appointment of Trump's son-in-law, Jared Kushner, to an unelected advisory position); Glenn Thrush & Jennifer Steinhauer, *Stephen Miller Is a 'True Believer' Behind Core Trump Policies*, N.Y. TIMES (Feb. 11, 2017), <https://perma.cc/NR8Q-JVMC> (commenting on the influence of former far-right gadfly cum White House adviser, Stephen Miller).

⁷ See, e.g., Derek Thompson, *Things Are About to Get Much Worse for Poor Americans*, ATLANTIC (Nov. 9, 2016), <https://perma.cc/N5UD-DQCC>; Tracy Jan & Steve Mufson, *If You're a Poor Person in America, Trump's Budget Is Not for You*, WASH. POST: WONKBLOG (Mar. 16, 2017), <https://perma.cc/2L6A-86T8> (discussing the Trump administration's first proposed budget, which cut funding to low-income housing and homelessness programs, food support programs like Meals on Wheels, and legal aid services for low-income people).

⁸ See, e.g., Exec. Order No. 13,777, 88 Fed. Reg. 12,285 (Mar. 1, 2017) (requiring executive agencies, like the Department of Labor, to appoint a task force to review the agency's existing regulations and repeal or modify those out of keeping with the administration's policy goals); Dave Jamieson, *Trump Repeals Regulation Protecting Workers from Wage Theft*, HUFFINGTON POST (Mar. 27, 2017, 3:40 PM), <https://perma.cc/PLJ4-CNNG> (discussing the repeal of the Fair Pay and Safe Workplaces rule, which required the federal government to terminate contracts with contractors with records of wage and safety violations if they did not comply with wage and safety law).

⁹ The passage of national so-called right-to-work laws, see Dave Jamieson, *Republicans Want to Pass a National Right-to-Work Law*, HUFFINGTON POST (Feb. 1, 2017, 11:25 AM), <https://perma.cc/6HK6-V3AX>, or the success of *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (2017), will make it difficult for public sector unions to get the funds they need to administer the contract to the entirety of the workers in the bargaining unit, if only some were required to pay fees and dues. Additionally, recent activity at the National Labor Relations Board narrowed the scope of some of the rights protected under the National Labor Relations Act. See *Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017). The Board, propelled by the pro-management Trump appointees Marvin Kaplan and William Emanuel, repealed a number of prior decisions, notably, *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. No. 75 (Nov. 19, 2004), which prohibited facially neutral workplace policies that, interpreted reasonably, might encroach on the right to organize under the National Labor Relations Act. See *Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017).

unions themselves rest.¹⁰ Particularly notable is the successful appointment of Neil Gorsuch to the Supreme Court,¹¹ fresh from a decade of pro-corporation, anti-worker legal gymnastics on the United States Court of Appeals for the Tenth Circuit,¹² at an extremely critical time for unions—

¹⁰ The installation of national right-to-work has, as its ultimate objective, the destruction of the functional union in general. On the subject of right-to-work, Dr. Martin Luther King, Jr. said:

In our glorious fight for civil rights, we must guard against being fooled by false slogans, such as “right to work.” It is a law to rob us of our civil rights and job rights. Its purpose is to destroy labor unions and the freedom of collective bargaining by which unions have improved wages and working conditions of everyone.

Martin Luther King on “Right to Work”, ECON. POL’Y INST.: QUICK TAKES (Apr. 4, 2011), <https://perma.cc/A5MJ-K53M> (quoting Dr. Martin Luther King, Jr. in a statement made in 1961).

¹¹ Julie Hirschfeld Davis, *Neil Gorsuch Is Sworn In as Supreme Court Justice*, N.Y. TIMES (Apr. 10, 2017), <https://perma.cc/WTU9-VS7U> (recounting the history of Gorsuch’s contentious nomination, believed by some Congressional Democrats to be an invalid appointment to a position that should have been filled by Judge Merrick Garland, former President Obama’s appointee, filibustered by Senate Democrats, and ultimately, most memorable for Senate Republicans’ lowering the number of majority votes required to confirm a Supreme Court nominee).

¹² See, e.g., Hannah Belitz, *The Supreme Court Vacancy and Labor: Neil Gorsuch*, ONLABOR (Jan. 31, 2017), <https://perma.cc/5WHC-2FP4> (reviewing several decisions involving labor unions and workers, demonstrating an anti-labor trend). In his confirmation hearing, Gorsuch came under fire for his dissent in the “Case of the Frozen Trucker.” See Mark Berman, *The ‘Case of the Frozen Trucker’ Emerges Again*, WASH. POST: POLITICS (Mar. 21, 2017, 1:28 PM), <https://perma.cc/24RY-HSEU>. In the case, *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206 (10th Cir. 2016), a trucker, Alphonse Maddin, was fired after the brakes on his vehicle froze and he was forced to pull over. *Id.* at 1208-09. He radioed for help and waited for several hours in the cold; the heat in the truck’s cab had broken. *Id.* at 1209. After waiting, he radioed again and was told to wait; he found that he couldn’t feel the lower half of his body and that his speech was slurred. *Id.* While the cab of the truck was operable, the truck and trailer when conjoined were not. *Id.* He detached the cab of the truck and left the trailer on the side of the road because he believed it was necessary to save his life. *Id.* at 1209. TransAm fired Maddin for abandoning his trailer. *Id.* Maddin’s case, because it was so horrifying, made for a perfect defense—the law prohibits firing where a worker “refuses to operate a vehicle because [of] . . . a reasonable apprehension of serious injury.” *Id.* at 1211. Of every federal judge who heard the case, Gorsuch wrote the only dissent. See Amy Goodman & Denis Moynihan, *Neil Gorsuch and the Case of the Frozen Trucker*, DEMOCRACY NOW (Mar. 23, 2017), <https://perma.cc/8BBD-WQCU>. Gorsuch found TransAm’s argument, that Maddin had in fact operated his vehicle because he left the scene in the truck’s cab persuasive, despite the well-established legal principle known as *Chevron* deference, mandating that courts defer to the administrative agency—here, the Department of Labor—in the agency’s interpretation of the statute under review. See Jed Handelsman Shugerman, *Neil Gorsuch and the “Frozen Trucker”*, SLATE (Mar. 21, 2017, 10:38 AM), <https://perma.cc/5G68-546H>. Gorsuch did not offer a different interpretation of the word “operate,” nor did he investigate the ambiguity of other words in the statute, such as “vehicle.” *Id.* He insisted, despite the governing principle of *Chevron*, the ambiguity of the statute, and the clear public policy interest in avoiding serious

a time in which the constitutionality of agency fees¹³ hung in the balance.¹⁴

injuries in the workplace, that he had to follow the letter of the law. *Id.* Legal scholars criticized this dissent as evidence of an “arrogant and cold judicial personality.” *Id.* Maddin’s attorney characterized the dissent as a defense of his client’s “legal right to stay in the truck and freeze to death.” Goodman & Moyhnihan, *supra* (quotation marks omitted).

On the issue of *Chevron* deference, Gorsuch has espoused his own sense of the deconstruction of the administrative state. He has advocated for the dismantling of the doctrine, which favors administrative agencies.

[T]he reality is that Judge Gorsuch embraces a judicial philosophy that would do nothing less than undermine the structure of modern government — including the rules that . . . regulate the financial markets and protect workers and consumers. In strongly opposing the administrative state, Judge Gorsuch is in the company of incendiary figures like the [former] White House adviser Steve Bannon, who has called for its “deconstruction.”

Businesses have always complained that government regulations increase their costs, and no doubt some regulations are ill-conceived. But a small group of conservative intellectuals have gone much further to argue that the rules that safeguard our welfare and the orderly functioning of the market have been fashioned in a way that’s not constitutionally legitimate. This once-fringe cause of the right asserts, as Judge Gorsuch put it in a speech last year, that the administrative state “poses a grave threat to our values of personal liberty.”

Emily Bazelon & Eric Posner, *The Government Gorsuch Wants to Undo*, N.Y. TIMES (Apr. 1, 2017), <https://perma.cc/WB3S-ELRT>.

In fact, Gorsuch justifies his adverseness to *Chevron* deference by relying on New Deal Era anti-worker precedent, if not akin to *Lochner*, in its legal reasoning, discussed *infra* note 35, then related in its anti-worker, pro-business motivations. *See Lochner v. New York*, 198 U.S. 45 (1905). *Schechter Poultry Corp.* invalidated the National Industrial Recovery Act (“NIRA”), which instituted workplace safety provisions and wage and hour regulations for workers in the poultry industry. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) The NIRA’s Achilles heel was its delegation to the executive branch the power to approve “fair competition” standards, a mechanism for restraining free market competition by instituting price controls and standards of market conduct. *Id.* The Supreme Court, not yet willing to support Franklin D. Roosevelt, found that Congress’s delegation to the executive was an impermissible abdication of its responsibility to make law. *See id.* at 529. Gorsuch, in his crusade against *Chevron* deference, and, by extension, administrative power, cites *Schechter Poultry* though it has been impliedly overruled. *See United States v. Frank*, 864 F.2d 992 (3d Cir. 1988). The fact of Gorsuch’s reliance on precedent which invalidates resistance to the free market and worker protections in his quest to lessen the power of what he considers to be a “titanic administrative state,” reinforces a sense that the deconstruction of the administrative state, in the era of Trump, means a brutalization of legal structures erected to protect workers. Bazelon & Posner, *supra*.

¹³ Agency fees, discussed at length *infra* Part II, are fees charged to non-members in a union shop, in lieu of union dues. Agency fees are designed to pay for the costs of collective bargaining, which benefit all workers, be they members or non-members of the union.

¹⁴ *See generally* Friedrichs v. California Teachers Ass’n, 136 S. Ct. 1083 (2016) (mem.) (per curiam), *reh’g denied*, 136 S. Ct. 2545 (2016) (leaving the Ninth Circuit ruling intact).

Friedrichs v. California Teachers Association,¹⁵ a case on the constitutionality of agency fees charged by public sector unions, was brought before the United States Court of Appeals for the Ninth Circuit, appealed to the Supreme Court of the United States, and granted certiorari.¹⁶ In January 2016, the Court heard oral arguments on the case.¹⁷ In February 2016, Justice Antonin Scalia, one of the Court's cohort of conservative justices, died unexpectedly.¹⁸ In March 2016, the Court deadlocked with eight justices and left undisturbed the Circuit Court's decision preserving the constitutionality of agency fees.¹⁹

One year later, a nearly identical case, *Janus v. American Federation of State, County, and Municipal Employees Council 31*, was decided in the United States Court of Appeals for the Seventh Circuit.²⁰ The plaintiffs, understanding that the appellate court was bound by the precedent *Friedrichs* had nearly toppled, asked the court to rule in favor of their opponents.²¹ By exhausting their remedies in the circuit courts, they could petition for a writ of certiorari to appear before the Supreme Court and finish what *Friedrichs* started: stripping agency fees of their constitutionality. The Supreme Court granted certiorari in September 2017²² and heard oral argument in February 2018.²³

This article was written at an uncertain time in American history and in labor history. At the time of this writing, the right of unions to collect agency fees from non-members occupies a precarious and diminishing space between these two judicial decisions. By the time of publication, that gap will likely have closed, and any imagining of an alternate future will take on an incontrovertibly theoretical dimension. Readers will likely experience this article's perspective on the outcome of *Janus* as an understood but not yet realized reality. The article's call, however, to understand the union as something beyond a service provider, predates and will postdate *Janus*. The proliferation of the right to work narrative necessitates an answer, especially during a moment where it appears to have reached the apex of its power.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Transcript of Oral Argument, *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915), 2016 WL 344760.

¹⁸ Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://perma.cc/QY4E-QT9V>.

¹⁹ *Friedrichs*, 136 S. Ct. at 1083.

²⁰ *Janus v. AFSCME*, 851 F.3d 746, 747-48 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (2017) (mem.).

²¹ *Id.* at 747.

²² *Janus v. AFSCME*, 138 S. Ct. 54 (2017) (mem.).

²³ *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, SCOTUSBLOG, <https://perma.cc/G8PL-9M35> (last visited Apr. 18, 2018).

In this article, I review the inadequacy of First Amendment arguments in opposition to agency fees, and attempt to reframe the union as a commonly-managed infrastructure, an antithesis to the privatization, unequal access, and isolation which characterize this historical moment. In analyzing the union as a commons, I seek to not only bolster the case for the constitutionality—and necessity—of agency fees, but to recognize the value—and necessity—of commonly-managed resources at a point in history where the powerful narrative of the supremacy of individual rights over collective rights permeates legal analysis, and where the concentration of power at the pinnacle of hierarchical structures is understood as the standard.

This introduction locates the reader in the historical moment and reviews the state of the federal government with special attention to issues of workers' rights. Part I briefly reviews the nature of agency fees and their foil, "right to work" laws, as well as the unfixed nature of political speech doctrine as it is employed in the agency fee fight. Part II discusses the doctrinal history of agency fees First Amendment exceptionalism, and the arguments articulated in *Friedrichs*, *Janus*, and related precedent. Part III explores the theory of the union as commons, applying economic theories of commonly-managed infrastructure to agency shop unions, and then explores the efficacy of the use of the commons as a lens through which to understand the fallibility of the First Amendment in the agency fee context.

I. UNION STRUCTURES AND STRICTURES: POLITICAL SPEECH AND THE AGENCY FEE FRAMEWORK

Union fees, dues, and agreements requiring workers to join a union upon hire have been subject to stringent critique.²⁴ In a unionized or partially unionized workplace, the union must represent all workers, whether or not they are members.²⁵ Non-members who benefit from union representation are often conceptualized as "free riders."²⁶ The free rider theory

²⁴ A wealth of academic critique exists. See, e.g., Shirley V. Svorney & Melanie Stallings Williams, *Bad Math: How Non-Union Employees Are Unconstitutionally Compelled to Subsidize Political Speech*, 25 S. CAL. INTERDISC. L. J. 135 (2016).

²⁵ See Nat'l Labor Relations Bd., *Right to Fair Representation*, <https://perma.cc/6X7T-AXMC> (last visited Apr. 18, 2018).

²⁶ See Nina Totenberg, *Is it Fair to Pay Dues to a Union You Don't Agree With?*, NPR (Jan. 11, 2016, 5:00 AM), <https://perma.cc/UN5K-3M79> (discussing the concept of free riders).

is prevalent throughout economics²⁷ and was initially a theory of the exploitation of public goods designated for public use.²⁸ The notion of a member of society benefitting from a common good without contributing to its upkeep is telling in the context of the union, as it accepts as its premise that the union performs a positive function or provides a valuable resource to all who use it. In the union context, a free rider is a worker who does not pay union membership dues but benefits from the employment contract provisions, such as pay increases, workplace safety standards, and access to benefits.²⁹

Unions have dealt with the issue of free riders in a number of ways. In some instances, unions have sought to require workers coming into a workplace to join the union via union security contracts—in which the union negotiates a union shop agreement with an employer requiring workers to join the union after a grace period.³⁰ Alternately, the union could negotiate an agency shop agreement.³¹ Under an agency shop agreement, workers are not required to join the union but must pay an agency fee, also called a fair share fee, which covers the cost of negotiating and administering the contract.³² The legality of such a union security agreement was litigated in *Abood v. Detroit Board of Education*, and has been a hallmark of federal labor law since the inception of the National Labor Relations Act.³³ However, the Labor-Management Relations Act reserves to the states the power to diminish the rights of unions,³⁴ and so-called³⁵

²⁷ RUSSELL HARDIN, *The Free Rider Problem*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003), <https://perma.cc/PEY4-AXDL>.

²⁸ *Id.*

²⁹ See Totenberg, *supra* note 26.

³⁰ 48 AM. JUR. 2D LABOR AND LABOR RELATIONS § 1062 (2018).

³¹ See *id.* § 1063.

³² *Id.*; see also Totenberg, *supra* note 26 (noting that agency fees are also called fair share fees and explaining their function in covering the bread-and-butter benefits covered by the contract).

³³ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

³⁴ Better known as the Taft-Hartley Act, the Labor-Management Relations Act, 29 U.S.C §§ 141-197 (2012), gave states the right to work option. See Bashar H. Malkawi, *Labor and Management Relationships in the Twenty-First Century: The Employee/Supervisor Dichotomy*, 12 N.Y. CITY L. REV. 1, 5 (2008) (“Just like the NLRA, the Taft-Hartley Act defined a slate of ‘unfair labor practices.’ But if the NLRA used this term to define unfair management practices against labor, Taft-Hartley defined unfair practices by labor against management. Where the NLRA granted workers the right to organize, the Taft-Hartley Act gave employers the right to oppose union organization. Some Taft-Hartley highlights include allowing states to pass right-to-work statutes, requiring unions to give notice prior to striking, the prohibition of closed shops, and the outlawing of secondary boycotts.”).

³⁵ Critiques of the “right to work” terminology abound; the phrase is frequently likened to the “liberty of contract” right celebrated by the notorious case, *Lochner*, in which the Court upheld exceedingly long work hours for bakers, reasoning that limiting their work hours would deprive them of the personal right to sell their labor. *Lochner v. New York*, 198 U.S. 45, 45

“right to work” laws in twenty-eight states made union shop and agency shop security agreements illegal.³⁶ *Janus* soon followed.

(1905). Both the phrase “liberty of contract” and *Lochner* are frequently invoked as shorthand for exploitation and unscrupulous labor practices. Herbert Hill, labor secretary for the NAACP wrote that:

[W]hile the slogan [“Right to Work”] sounds fair and equitable, in reality it is based on a total disregard for the truth.

The phrase “Right to Work” sounds good and honest and has been used to capture the sympathy of those who favor a square deal for wage earners. But when such a slogan is advanced by . . . union-busting open shop employers and takes root in states where civil rights and liberties are systematically violated and where governors and congressmen have openly announced their defiance of basic constitutional guarantees, then every citizen has a right to view the slogan with great suspicion

Does the slogan “Right to Work” mean that every person has an inalienable right to work? If that is so, then we have certainly reached the millennium . . . Does the slogan mean that every worker has the right to a job and to receive work at fair wages, reasonable hours and under other decent labor standards? . . .

Or does the slogan mean that workers have a right to work but only under conditions unilaterally established by their employers? Is the slogan “Right to Work” a revival of the old concept of “liberty of contract”[?]

See Herbert Hill, “*Right to Work*” *Laws and the Negro Worker*, 65 *CRISIS* 327, 327-28 (1958).

William Safire, famed lexicologist and journalist, remembered in part for his tenure as a speechwriter for Nixon, and a self-proclaimed libertarian, Michael Elliott, *William Safire: Pundit, Provocateur, Penman*, *TIME* (Sept. 28, 2009), <https://perma.cc/V9KD-P5T2>, traced the etymology of the phrase, writing rather candidly that “[m]anagement has won the battle of semantics with organized labor *Right to work* is a management slogan that has been adopted as the generic term for anti-compulsory-union legislation, which labor refers to as ‘union busting laws.’” WILLIAM SAFIRE, *Right to Work*, in *SAFIRE’S POLITICAL DICTIONARY* 627 (2008). Safire, citing Socialist Eugene Debs as the initial popularizer of the phrase, and following the thread through Franklin Delano Roosevelt’s New Deal era “economic bill of rights,” refers to this appropriation of the phrase as “taking a negative or defensive position and fashioning it into a positive slogan,” comparing it to anti-abortion advocates rebranding themselves as “pro-life.” *Id.*

³⁶ See, e.g., Ross Eisenbrey, *So-Called “Right-to-Work” Laws Will Lower Wages for Union and Non-Union Workers in Missouri*, *WORKING ECON. BLOG* (Jan. 19, 2017, 12:51 PM), <https://perma.cc/C2PX-D5QX>; see also *Right to Work Laws and Bills*, Nat’l Conf. of State Legislatures, <https://perma.cc/UA9X-5VXS> (last visited Apr. 18, 2018). The result of this has been swift and categorical. Workers in right-to-work states earn lower wages than their unionized counterparties. See Elise Gould & Will Kimball, “*Right-to-Work*” *States Still Have Lower Wages*, *ECON. POL. INST.* (Apr. 22, 2015), <https://perma.cc/XS3V-JDXE>. This article updated a 2011 study on wages in right to work states to account for more recent data and found that “[w]ages in RTW states are 3.1 percent lower than those in non-RTW states, after controlling for a full complement of individual demographic and socioeconomic factors as well as state macroeconomic indicators. This translates into RTW being associated with \$1,558 lower annual wages for a typical full-time, full-year worker.” *Id.* Right-to-work laws drag down the wages of both union and nonunion workers.

A great deal of manufactured anxiety³⁷ around agency fees, an anxiety which ultimately provided the foundation for First Amendment claims challenging agency fees, came from a concern with the union's political role. Unions are not confined to the locale of the workplace, but because labor issues are often captured in—or endangered by—legislation and the political sphere, they are also actors in the broader political world. Unions, as political actors, endorse candidates, campaign for legislation, and spend money to advance political causes.³⁸ It is this latter function that opponents of agency fees have utilized as a toehold for First Amendment action.

Unions are not permitted to use money paid by non-members for political purposes; agency fees must be used only to cover the costs of bargaining for the contract and administering its terms.³⁹

Though the distinction between money spent on negotiating the union contract and enforcing its terms, applicable to all the workers in a

³⁷ Manufactured via untruths propagated by anti-union forces. *See, e.g.*, this statement given by Rebecca Friedrichs, the named plaintiff in *Friedrichs v. California Teachers Association*, in an interview:

When I was a student teacher in 1987, I was being trained by an outstanding master teacher, but next door to us was a teacher who had become, in my opinion, abusive to her little first graders. I would witness every day as she would be lining them up outside the classroom. She'd grab them by the arms, she'd yank them over, she'd yell right in their faces. I asked my master teacher, "What can we do about this awful situation?" She sat me down and she said, "Today is your lesson on the teachers union." She told me about tenure and that districts really struggle to rid themselves of these teachers. And I was shocked.

At that point I was really soured on union representation.

Emma Brown, *Two Teachers Explain Why They Want to Take Down Their Union*, WASH. POST (Aug. 11, 2015), <https://perma.cc/7KCE-GSRA>.

Friedrichs premises her rejection of the union on the notion that it protects abusive teachers. This is not true. Tenured teachers can be fired when they are abusive. *See id.* This myth, that tenure (and, by proxy, unionization) protects teachers who behave inappropriately is a popular one. *See, e.g.*, Perry Chiaramonte & Jack Ellis, *Dirty Dozen: 12 Bad Teachers Protected by Tenure and Unions*, FOX NEWS (Jun. 17, 2014), <https://perma.cc/BYG3-YYX4>.

³⁸ *See, e.g.*, Ctr. for Responsive Politics, "AFL-CIO," OPENSECRETS, <https://perma.cc/Y95Q-NFYM> (tracking the union's political spending from 1998 to the present).

³⁹ *Comm'n Workers of Am. v. Beck*, 487 U.S. 735, 735 (1988) ("[The] exaction of agency fees beyond those necessary to finance collective bargaining activities violated judicially created duty of fair representation and nonunion members' First Amendment rights."); *see also* Totenberg, *supra* note 26. ("[T]hey are required to pay an amount that covers the costs of negotiating the contract and administering it. The idea is that they reap the bread-and-butter benefits covered by the contract — wages, leave policies, grievance procedures, etc. — so they should bear some of the cost of negotiating that contract. They do not, however, have to pay for the union's lobbying or political activities.").

workplace, and money spent elsewhere, appears straightforward, a nuanced question of what constitutes the political is nonetheless implicated in categorizing the spending.

A. The Political, “Political,” and the Penumbra

The political in the context of the union may be best conceptualized as three layers—the first layer is the explicitly political. In the political sphere, for example, something that is seen as expressly political is contributing money to a political candidate’s campaign. The second layer involves issues that may be perceived by some as related to representing workers, and others as “political”—for example, politicized identity markers. The third layer is the union itself as a political entity, which colors any and all money it collects or spends with a kind of political penumbra.

The first layer is easy to interpret. Expenditures on the mechanisms of the political machine—elected officials, policy campaigns, ballot measure endorsements—fall within a cognizable, expressly political realm.

The second is less so. Anti-union forces have expressed some anxiety about what exactly constitutes an expense related to representing workers. The conservative weekly, the *Washington Examiner*, alleged⁴⁰ that the California Teachers’ Association (“CTA”) had written off as a cost of representing workers a “conference on gay-lesbian-bisexual-transgender issues.”⁴¹ Though the piece makes it unclear what conference is being discussed, it may be the annual LGBTQ Conference put on by the CTA to “address issues affecting LGBTQ+ educators,” such that the union may, presumably, represent those workers’ issues to management more effectively.⁴²

The *Washington Examiner* article is telling in that it captures, if subtly, the notion that the mere existence of LGBTQ workers is “political,” in that their identity is somehow linked to policy and that money spent on them is somehow akin to money spent on a political agenda. The *Examiner* points out that the CTA also “contributed 1 million in 2008 to an effort by liberal groups to defeat Proposition 8, which defined marriage as an act between a man and a woman.”⁴³ This follows the discussion of

⁴⁰ Steven Malanga, *When Unions Use Non-member Dues to Finance Political Activities*, WASH. EXAM’R: OP. (Apr. 29, 2014, 12:00 AM), <https://perma.cc/EUS9-93EW>.

⁴¹ *Id.*

⁴² *Calendar: GLBT Issues Conference*, Cal. Teachers Ass’n., <https://perma.cc/Y5KN-9DA9> (last visited May 5, 2018).

⁴³ Malanga, *supra* note 40.

the conference but apparently is not related to it. The article does not propose that the union attempted to write off this support as money spent on representing workers and ensuring that the collective bargaining agreement was enforced. It appears to be called up as an oblique attempt to link representation of workers with an ongoing political campaign having to do with the rights of LGBTQ people in general;⁴⁴ that money spent on workers is related to the rights of those workers, and others, as determined by the ballot or the legislature. It exposes a rather tenuous (at best—at worse, an imagined) link between the political and the “political.” It is this type of thinking that gives the third layer of the political or “political” its justification, and gives First Amendment arguments in the agency fees context their heart.

The third layer of the political conceives of the very existence of the union as political; through this lens, the payment of an agency fee for the cost of negotiating and administering a collectively bargained-for agreement is a political expense. This notion capitalizes on an easy conflation of an understanding of the right to organize a union and bargain collectively as a political right,⁴⁵ and political speech as illuminated in classic First Amendment doctrine.⁴⁶

⁴⁴ The personal is political, but to suggest that expenditure on LGBTQ workers is political *because* they are LGBTQ is to suggest that the very existence of LGBTQ workers is a cause that may be agreed with, a position that may be endorsed.

One of the plaintiffs in *Friedrichs*, Harlan Elrich, subscribed to this understanding of the political, also in the context of queer workers. In an interview, he said: “I realized much of what the union does goes against my beliefs. Recently in California they had the vote on same-sex marriages. I am against same-sex marriages, and from my understanding the union put a lot of money into supporting them.” Brown, *supra* note 37.

⁴⁵ Enshrined in the National Labor Relations Act, 29 U.S.C. § 157 (1947) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”).

⁴⁶ See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307-08, 332-42 (1978) (reviewing the history of political speech doctrine and the substance of major judicial decisions).

This misunderstanding is further confused by the Supreme Court's evolving interpretation of "political speech." The Court reiterates repeatedly⁴⁷ that speech of a political nature, in the political realm,⁴⁸ is at the very "core" of the First Amendment; it is the reason for and true subject of the First Amendment.⁴⁹ If this originalist and high-minded premise is accepted, then political speech is at the forefront of the forefront,⁵⁰ the pinnacle of the pinnacle of sacred American rights. The Court's treatment of the political speech doctrine has, by some estimations, somewhat profaned that right by taking an expansive view of the expenditure of money.⁵¹ Arguments might be made that the Court has, in its development of the doctrine, subscribed to a realistic view of money's influence on the political sphere, in acknowledging that money functions as speech in that it expresses endorsement, support, and agreement. Arguments, however, have been made—and perhaps vindicated—that an understanding of money as speech turns the First Amendment into a tool that harms democracy,⁵² into a conduit for corporate power.

⁴⁷ See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open."); see also Amicus Curiae Brief of the Am. Civil Rights Union in Support of Appellant Citizens United at 2, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 132718, at *2 ("This case involves core political speech protected by the First Amendment, long recognized as a fundamental foundation of our democracy. Such core political speech enjoys the maximum possible protection under our Constitution. Yet, a federal agency claims the legal authority to prohibit the broadcast of such core political speech.").

⁴⁸ The political realm rather than "pornography or nude dancing," according to the American Civil Rights Union in their amicus brief for *Citizens United*. See Supplemental Brief for Amicus Curiae the Am. Civil Rights Union in Support of Appellant Citizens at 4, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205) ("The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection.").

⁴⁹ See *Mills*, 384 U.S. at 218.

⁵⁰ The First Amendment is often conceptualized in arguments as the most sacred of the Bill of Rights, positioned at the top of the document for its importance. In fact, prior to the ratification process, the First Amendment was not first. See RUTHANN ROBSON, *FIRST AMENDMENT: CASES, CONTROVERSIES, AND CONTEXTS* 7-8 (1st ed. rev. 2016).

⁵¹ See Kyle Langvardt, *Imagining Change Before and After Citizens United*, 3 ALA. C.R. & C.L. L. REV. 227, 235-38 (2012).

⁵² See *id.* at 234. Professor Langvardt argues that protecting corporate expenditure as speech under the First Amendment is inherently incongruous with the democratic political process:

Money was initially folded into the political speech doctrine in the campaign finance context in *Buckley v. Valeo*, which was brought on the heels of the Watergate scandal and the subsequent interest of Congress in corruption and the fallibility of the political system.⁵³ This interest was captured and codified in the Federal Election Campaign Act, which *Buckley* challenged on First Amendment grounds.⁵⁴ The legislation placed limits on the amount of money that could be donated to a political campaign and the amount of money a campaign could spend on advertising. A challenge was brought on a freedom of speech and freedom of association theory.⁵⁵ The Court, navigating the passage between public disgust with the capacity of campaign finance to create quid pro quo economies and the framing of limited expenditure as “suppressing communication,” drew a distinction between speech spent by an individual on a campaign, and speech spent by a campaign on advertising—contributions were constitutionally limitable, advertising expenditures were not.⁵⁶ The Court reasoned that the government interest in preventing corruption or the suggestion of corruption attached to contributions but not expenditures.⁵⁷ And, while contributions constituted an endorsement of a candidate, advertising might touch on a vaster landscape, and a more sacred one—the discussion of political ideas, issues, and subjects of debate.⁵⁸ From this broad concept, it was not a difficult climb to *Citizens United*, which, at base, found that corporate-funded political propaganda is protected “political”

[W]e cannot hope to enhance the voice of ordinary people by allowing our . . . business corporations to politick as if they were citizens. Any argument for such a policy assumes [a] false premise[] . . . that the corporate voice is as valuable to the political process as the expressed thoughts of potential voters Unlike human beings, business corporations are bred for perpetual strife. They survive by undercutting the competition, by guarding secrets, by exacting the highest price the market will permit [O]ur politics suffer when parochial and selfish interests crowd out the shared interests of the nation as a whole.

Id.; see also John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data and Implications*, 30 CONST. COMMENT. 223, 264 (2015) (“[T]he corporate takeover of the First Amendment represents a pure redistribution of power over law with no efficiency gain That power is taken from ordinary individuals with identities and interests as voters, owners and employees, and transferred to corporate bureaucrats pursuing narrowly framed goals with other people’s money.”).

⁵³ See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 17.

⁵⁷ *Id.* at 17-20.

⁵⁸ See *id.* at 19.

speech.⁵⁹ *Citizens United* is perhaps best known to laypeople⁶⁰ for its particularly naked embrace of corporate personhood,⁶¹ the legal theory that applies rights commonly associated with individuals to corporate enterprises.⁶² The question of what (or who) corporations constitute is less relevant here than the question of what constitutes a corporation. The ruling in *Citizens United* expanded First Amendment protection to the political speech of corporations and of non-profit organizations.⁶³ Several of the latter non-profit organizations wrote amicus briefs in support of the appellant media corporation,⁶⁴ including the controversial and conservative gun rights poster-child, the National Rifle Association;⁶⁵ the corporate cheerleader and free market propaganda mouthpiece, the Cato Institute;⁶⁶

⁵⁹ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁶⁰ Or at least, in my estimation. In 2010, when *Citizens United* was decided, there was a great deal of outrage expressed at social gatherings that “corporations are people now.”

⁶¹ One thinks of Justice Kennedy, writing for the majority, stringing together a series of pluralities and dissents to express that “[c]orporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster” The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” *Citizens United*, 558 U.S. at 343 (internal citations omitted).

⁶² In this instance, free speech. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), free exercise of religion. But also, less controversial, rights “to own and transfer property . . . to enter and enforce contracts, to initiate and defend lawsuits, and so on.” Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1143 (2012).

⁶³ *Citizens United*, 558 U.S. at 365.

⁶⁴ Itself a non-profit—Citizens United is actually a “social welfare organization” under Internal Revenue Code § 501(c)4, see *FAQs*, CITIZENS UNITED, <https://perma.cc/3JPQ-ZPEY> (last visited Apr. 18, 2018), and ostensibly a documentary production company, see *All Films*, CITIZENS UNITED, <https://perma.cc/A264-M2VE> (last visited Apr. 18, 2018), often accused of creating wildly misleading libertarian and conservative propaganda pieces, see, e.g., *Anti-McAuliffe “Documentary” Continues Citizens United’s Long History of Dishonest Propaganda*, BRIDGE PROJECT (July 30, 2013) <https://perma.cc/8VSN-8DDA> (describing Citizens United film and commercial projects as “viciously dishonest propaganda”).

⁶⁵ Brief of Amicus Curiae Nat’l Rifle Ass’n in Support of Appellant on Supplemental Question, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2359481, at *1.

⁶⁶ Supplemental Brief for Amicus Curiae Cato Inst. in Support of Appellant, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365223, at *1. The Cato Institute has been an amplifier for fringe free market theory on behalf of corporate interests—especially in the oil industry. Launched by the Koch brothers,

it has consistently pushed for corporate tax cuts, reductions in social services, and laissez-faire environmental policies. When President Obama, in a 2008 speech, described the science on global warming as “beyond dispute,” the Cato Institute took out a full-page ad in the *Times* to contradict him. Cato’s resident scholars have re-

and the most recognizable face of the American labor movement, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”).⁶⁷

Though *Citizens United* makes no distinction between for-profit corporate lobbying activities and lobbying and political advocacy by labor organizations, political expenditure by labor unions is different than corporate expenditure. Federal law requires that unions disclose expenditures publicly,⁶⁸ and, in some circumstances, requires unions to obtain the consent of members before making a particular expenditure.⁶⁹ Corporations, by contrast, need only disclose their expenditures under very particular conditions, are not mandated by law to make expenditure information available publicly, and have no obligation to seek consent from shareholders.⁷⁰

Though the AFL-CIO’s amicus brief calls on the Court to distinguish between corporate and business expenditure and that of labor unions and other non-profits,⁷¹ it nevertheless forges an alliance between labor and

lently criticized political attempts to stop global warming as expensive, ineffective, and unnecessary. Ed Crane, the Cato Institute’s founder and president, told [journalist Jane Mayer] that “global-warming theories give the government more control of the economy.”

Jane Mayer, *Covert Operations: The Billionaire Brothers who are Waging a War Against Obama*, NEW YORKER (Aug. 30, 2010), <https://perma.cc/GNN6-RBVH>.

⁶⁷ Brief for the Am. Fed’n of Labor and Congress of Indus. Orgs. as Amicus Curiae in Support of Appellants at 1, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205).

⁶⁸ See Liz Kennedy & Sean McElwee, *Do Corporations & Unions Face the Same Rules for Political Spending?*, DEMOS (July 15, 2014), <https://perma.cc/F73V-UZWZ>.

⁶⁹ See *id.*

⁷⁰ *Id.* at 6.

⁷¹ This is generous. The brief groups unions and corporations together in the first argument it makes, that *McConnell v. Federal Election Commission* should be overturned, and that the Bipartisan Campaign Reform Act (“BCRA”) § 203, 52 U.S.C. § 30101 (2002), provision prohibiting union and corporate funding of “electioneering communications” should be invalidated as unconstitutionally overbroad. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318 (2010); Brief of the Am. Fed’n of Labor and Congress of Indus. Orgs. As Amicus Curiae in Support of Appellant, *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310 (2010) (No. 08-205). This is a canny positioning, as *McConnell* and the BCRA treat unions and corporations as one type of entity. See *id.*

The brief does distinguish between unions and corporations in its second and third arguments, contending that the government’s interest in preventing corruption does not justify restrictions on speech, and that there is no compelling government interest offered to justify prohibiting union expenditures, writing:

In upholding § 203 [the BCRA provision at issue], *McConnell* recited concern about “the special characteristics of the *corporate* structure [that] require particularly careful regulation” but recited none about unions *Austin v. Michigan Chamber of*

corporations.⁷² The AFL-CIO made a strategic choice to further its own interests despite the dangerous implications of its argument.⁷³ A more

Commerce, a case in which the Supreme Court found constitutional a Michigan statute prohibiting corporations from using corporate treasury funds for independent expenditures supporting or opposing candidates for office, which was ultimately overruled by *Citizens United*] identified “a different form of corruption” than had *Buckley*, namely, “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

Whatever the correctness of this holding as to the [Michigan] Chamber [of Commerce], the Court squarely rejected its applicability to *unions* in denying the Chamber’s equal-protection [*sic*] claim that the state law under-inclusively failed also to apply to unincorporated labor organizations. The Court reasoned that unions have “crucial differences” from corporations: first, although unions too “may be able to amass large treasuries, they do so without the significant state-conferred advantage of the corporate structure”; and, second, “the funds available for a union’s political activities more accurately reflect members’ support for the organization’s political views than does a corporation’s general treasury” because a union may not compel represented non-members to support, with dues or other fees, the union’s political, legislative and other ideological spending that is not directly germane to “collective bargaining, contract administration and germane adjustment.”

Brief of the Am. Fed’n of Labor and Congress of Indus. Orgs. As Amicus Curiae in Support of Appellant, *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310 (2010) (No. 08-205) 2009 WL 2365216, at *15-16 (internal citations and quotations omitted) (emphasis in original).

⁷² In that it calls on the Court to overturn *McConnell* and the BCRA § 203, 52 U.S.C. § 30101 (2002).

⁷³ The brief’s argument advances a position dangerous to its own interests by making points helpful to corporations, entities which seek to undercut and extinguish union power. If one could characterize this as “siding with corporate interests”—in this case perhaps a little deliberately obtuse, it would not be the only time the AFL-CIO sided with corporate interests. In September 2016, for example, the Federation released a statement to the press endorsing the controversial Dakota Access Pipeline project, over protests from its rank-and-file membership and affiliate organizations. In acknowledging the protest actions against the pipeline, the Federation wrote that it was “fundamentally unfair to hold union members’ livelihoods and their families’ financial security hostage to endless delay.” Press Release, AFL-CIO President Richard Trumka, *Dakota Access Pipeline Provides High Quality Jobs*, AFL-CIO (Sept. 15, 2016), <https://perma.cc/XR7Q-96X8>. The AFL-CIO, effectively siding with the vast network of corporate funders, shareholders, subsidiaries and sub-subsidiary corporations over the working- and middle-class community of indigenous North Dakota residents and their neighbors. For more information on labor movement involvement in resistance to the pipeline, see Labor for Standing Rock, FACEBOOK, <https://perma.cc/KNY9-7ZLL> (last visited May 26, 2018). For more information on the enmeshed network of corporate involvement, please see Jo Miles & Hugh Macmillan, *Who’s Banking on the Dakota Access Pipeline*, FOOD & WATER WATCH (Sept. 6, 2016), <https://perma.cc/S6SE-N6Z6>.

flattering read might suggest that the AFL-CIO, recognizing the inevitable growth of corporate power, resourcefully slipstreamed in its wake in order to consolidate some power of their own.⁷⁴

Whatever its strategic angle, the filing of the amicus brief was perceived as support for Citizens United and the corporate campaign finance apparatus. The AFL-CIO pushed back strenuously on this narrative.⁷⁵ AFL-CIO President Richard Trumka, speaking at a National Press Club event a year and a half after the ruling, accused the Supreme Court of “breaking” the federal election system by ruling in favor of the appellant in *Citizens United*: “The campaign finance laws need to be changed, so I for one would be for an overhaul . . . I’d start at the Supreme Court probably because they believe that money equals free speech. That’s what their decision said.”⁷⁶ Though the spirit of Trumka’s sentiment—a favorable reading might capture the notion that private corporate wealth has an outsize influence on campaign finance—is salvageable, consonant with labor’s values, the statement is rather oblivious given that the AFL-CIO’s entire amicus brief, which asked the Court to grant the decision Trumka references, was premised on the concept of the expenditure of money as speech and therefore subject to First Amendment protection. Though the amicus brief advocated for a privileging of union “money [as] free

⁷⁴ The usefulness of this potential strategic motivation has been subject to some ridicule. From this perspective, any power gained is inconsequential in the face of corporate wealth. In a piece criticizing union support for the appellant Citizens United, John Nichols, national affairs correspondent for the Nation, wrote that this support “neglect[s] the reality that one corporation—Goldman Sachs—spends more annually just to pay its top employees than the combined assets of all the nation’s major unions.” John Nichols, *Unions Can’t Compete with Corporate Campaign Cash*, NATION: BUSINESS BLOG (Jan. 24, 2010), <https://perma.cc/FD5Z-ASC7>. In the same vein, Rose Ann DeMoro, the executive director of National Nurses United, said that “[e]quating what unions and working people could spend on campaigns [with corporate expenditures] would be like comparing a toy boat to an aircraft carrier.” *Id.*

⁷⁵ See, e.g., John Nichols, *AFL-CIO Letter Details Role In, Position on Citizens United Case*, NATION: CRIM. JUST. BLOG (Jan. 29, 2010), <https://perma.cc/Z84G-BBHQ> (including a response from an AFL-CIO lawyer and author of the *Citizens United* amicus brief, Laurence Gold, to Nichols’ article criticizing the AFL-CIO’s position on the case).

The AFL-CIO believes that the Court wrongly treated corporate expenditures the same as union expenditures . . . Perhaps the most notably disturbing feature of the *Citizens United* decision is its unrestrained enthusiasm for the role that business corporations play in American life . . . On campaign finance matters, the AFL-CIO supports a system of regulation that promotes democratic participation in elections by individuals and their associations. *Id.*

⁷⁶ Matt Cover, *AFL-CIO Trumka: Electoral Process ‘Broken’ by Supremes in Citizens United Case*, CNS NEWS (May 20, 2011, 4:58 PM), <https://perma.cc/2GQA-X32L>.

speech”⁷⁷ over an interpretation that includes corporations, it nevertheless supported the premise of the argument by accepting money as speech.

Did the AFL-CIO’s participation in the *Citizens United* decision make the argument that agency fees are not political more or less tenable? By arguing that First Amendment protections extend to independent expenditures (by the union) for “electioneering communications,”⁷⁸ did the AFL-CIO undermine the labor movement’s position by fully accepting that, as Trumka says, “money equals free speech”?⁷⁹ By engaging in a legal argument likely to open a Pandora’s box of corporate influence in the political sphere, special interest dominance in social policy, and secrecy in political funding, did the AFL-CIO place unions in the path of fanatical right to work campaigns and strenuous employer-driven, anti-union pushback?

By participating and standing to benefit, did the AFL-CIO lend weight to the argument that unions are, themselves, inherently political, and that collective bargaining cannot be divorced from the AFL-CIO’s bargaining tactics as described in its amicus brief, asking the Court for more influence to elect more labor-friendly candidates and strengthen labor rights in the workplace? Or, did the AFL-CIO’s participation in *Citizens United* highlight the different roles a union might play, and the distinction between the political sphere—candidates, endorsement, and legislative campaigns—and the union’s in-house role in the workplace as an administrator of agreed-upon terms—benefits, pay structure, and health and safety issues?

Ultimately, it will remain unclear whether and to what extent the union participated in or became associated with a dangerous narrative of political overreach here. Challenges to union vitality continued to climb through the courts irrespective of union strategy.

II. PAST AND FUTURE INTERPRETATIONS: THE COLLAPSING FIRST AMENDMENT SHELTER FOR AGENCY FEES

An initial challenge to the constitutionality of agency fees came in 1977 in *Abood*.⁸⁰ The Detroit Federation of Teachers had negotiated a contract requiring teachers to join the union within sixty days of hire or pay an agency fee.⁸¹ Non-unionized teachers, represented by the union

⁷⁷ *Id.*

⁷⁸ Brief of the Am. Fed’n of Labor and Cong. of Indus. Orgs. as Amicus Curiae in Support of Appellant, *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310 (2010) (No. 08-205).

⁷⁹ Cover, *supra* note 76.

⁸⁰ *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209 (1977).

⁸¹ The union security clause required that newly hired workers either comply with the union shop clause provision and join the union after a certain period of time or remain non-members but pay agency fees under the agency shop clause provision. *Id.* at 212.

but not members of it, alleged a First Amendment violation.⁸² The purported violation was two-fold: the non-unionized teachers asserted that the union shop clause, requiring teachers to join the union, violated their freedom of association, and that the imposition of an agency fee if they did not join violated free speech principles because the union was involved in a “variety of activities and programs which [were] economic, political, professional, scientific and religious in nature of which Plaintiffs [did] not approve, and in which they [would have had] no voice, and which [were] not and [would] not be collective bargaining activities.”⁸³

The Supreme Court wove together miscellaneous labor precedent on the subject of union security clauses, compulsory speech, and fees paid for collective bargaining expenses in the fair share, anti-free rider tradition, noting Congressional interest in “peaceful labor relations,”⁸⁴ and writing that there was “no evidence that union dues were used to force ideological conformity or otherwise to impair the free expression of employees.”⁸⁵ Past precedent, however, suggested that “assessments” imposed on employees “not germane to collective bargaining . . . [would present] a different problem.”⁸⁶ This problem—presenting “questions of the utmost gravity”—arose in *Machinists v. Street*.⁸⁷ There the Court found that only costs associated with collective bargaining were aligned with Congress’s thinking on the permissibility of union shop agreements. To justify the charging of fees to non-members, the money had to be spent on the issues lent importance by Congress in the Railway Labor Act—those related to collective bargaining.⁸⁸

Having tangled together a number of First Amendment concepts—freedom of association, political speech or expenditure, as well as some unexplored appeals to principles against compelled speech—the Court cut the doctrinal Gordian knot.⁸⁹ Largely dispatching with the question of free association and with compelled speech, the Court found that agency fees spent on the bargaining process and maintenance of the contract were

⁸² Alana Semuels, *Why Are Unions So Worried About an Upcoming Supreme Court Case?*, ATLANTIC (Jan. 8, 2016), <https://perma.cc/23R2-AM5X>.

⁸³ *Abood*, 431 U.S. at 213 (quotation marks omitted). Also note that it was not immediately clear what these “religious” activities and programs were. An amicus brief was submitted by the National Education Association suggesting that the plaintiffs objected to paying fees because supporting collective bargaining itself was against their religious convictions. See Brief Amicus Curiae for the National Educ. Ass’n at 25-29, *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209 (2007) (No. 75-1153), 1976 WL 181674, at *25-29.

⁸⁴ *Abood*, 431 U.S. at 219.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 219-20 (quoting *Int’l. Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961)).

⁸⁸ *Int’l. Ass’n of Machinists v. Street*, 367 U.S. 740, 761-62 (1961).

⁸⁹ *Abood*, 431 U.S. at 233-37.

constitutional under the First Amendment, per Congress and basic economic principles of fairness, as well as some lingering anxiety regarding labor unrest.⁹⁰ Additionally, the Court held, agency fees spent on political causes violated the First Amendment, writing that “an individual should be free to believe as he will . . . in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State . . . [by] requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public schoolteacher.”⁹¹

Abood created the distinction between agency fees and member dues,⁹² and peeled away the first layer of the expressly political. For the next four decades, the power of organized labor ebbed.⁹³ In 2014, the Court heard *Harris v. Quinn*,⁹⁴ a case that, “while not quite the stake in the heart that would kill public employee unions altogether,”⁹⁵ in the gleeful estimation of conservative scholars,⁹⁶ “at least made *Abood* a ghoul, one of the walking dead.”⁹⁷ This metaphor was a bit premature. *Harris* dealt the precedent a heavy blow, but did not kill it, let alone bury it.⁹⁸ *Harris* is narrow, if telling, in its predation on a vulnerable group generally left out of labor rights protections—home health care workers.⁹⁹ The

⁹⁰ See *Int’l. Ass’n of Machinists*, 367 U.S. at 767-69.

⁹¹ *Abood*, 431 U.S. at 235 (internal citations omitted).

⁹² See Semuels, *supra* note 82.

⁹³ See, e.g., GERALD MAYER, UNION MEMBERSHIP TRENDS IN THE UNITED STATES, CONG. RES. SERV. 10-12 (2004), <https://perma.cc/D2TW-QM5X> (tracking declining union membership trends).

⁹⁴ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

⁹⁵ John Eastman, *Harris v. Quinn Symposium: Abood and the Walking Dead*, SCOTUSBLOG (Jun. 30, 2014, 6:09 PM), <https://perma.cc/X2C6-MADH>.

⁹⁶ John Eastman—in addition to authoring this vampire/zombie metaphor—was, among other things, a former clerk for Justice Clarence Thomas. See *Dr. John Eastman*, CHAPMAN UNIV., <https://perma.cc/52SU-5SRC> (last visited May 6, 2018).

⁹⁷ Eastman, *supra* note 95. Eastman argues that *Abood* was poorly reasoned, and so do I, but for a different reason. While Eastman finds the justification for preserving the constitutionality of agency fees to be shoddy, *see id.*, I find the rhetoric of free speech and individual autonomy to be untethered.

⁹⁸ *Harris* did not overturn *Abood*. *Harris*, 134 S. Ct. at 2621 (referring to *Abood*’s questionable foundations, but finding that it is not controlling here).

⁹⁹ Home care workers have long been an object of exclusion and exception. To prevent Black women from accessing New Deal labor benefits under the National Labor Relations Act and the Fair Labor Standards Act, “domestic workers”—a coded term understood to encompass a significant portion of the Black, female workforce—were left out of minimum wage, overtime, and organizing protections. See, e.g., Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO STATE L.J. 95, 96 (2011) (“[T]he statutory exclusion of . . . domestic employees was well-understood as a race-neutral proxy for excluding blacks from statutory benefits and protections made available to most whites.”). In fact, home care workers employed by third party organizations were only recently able to access fair labor

plaintiffs in *Harris* were a group of home health care workers paid with state and federal Medicaid funds and were represented by the Service Employees International Union.¹⁰⁰ Justice Alito wrote for the majority that the specific circumstances of home health care workers' employment rendered them "quasi" public employees not subject to the *Abood* holding.¹⁰¹ *Harris* took from *Abood* what it could, but left the constitutionality of agency fees intact.

Friedrichs v. California Teachers Association was intended to be a more comprehensive *Harris*. Non-unionized, fee-paying public school teachers covered by the California Teachers Association's collective bargaining agreement brought suit alleging that the payment of fees toward collective bargaining costs itself was political.¹⁰² Departing from *Abood*, the Court seemed prepared to agree. The non-unionized teachers lost in the United States District Court in the Central District of California and again in the United States Circuit Court of Appeals for the Ninth Circuit, both of which were bound by the *Abood* precedent.¹⁰³ In fact, the plaintiffs asked for a judgment in favor of the defendants, to appeal to the Supreme Court as quickly as possible because the lower federal courts did not have the power to overrule *Abood*.¹⁰⁴

Despite the sound reliance of the District Court and Court of Appeals on past precedent, the Supreme Court granted *certiorari*.¹⁰⁵ This signaled a willingness on the part of at least four justices¹⁰⁶ to reconsider the *Abood* holding.

The precarious position of agency fees relative to political speech, if evident when the case was accepted, was made more so as the arguments played out before the Court. At oral argument, Justice Scalia explained,

standards protections, in 2015. See generally *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016) (mem.).

¹⁰⁰ *Harris*, 134 S. Ct. at 2626.

¹⁰¹ *Id.* at 2638.

¹⁰² See *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.) (per curiam), *reh'g denied*, 136 S. Ct. 2545 (2016) (mem.).

¹⁰³ See *Friedrichs v. California Teachers Ass'n*, No. SACV 13-676-JLS (CWx), 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013); *aff'd* *Friedrichs v. California Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. 2014).

¹⁰⁴ Plaintiffs' Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points & Authorities in Support of Motion for Judgment on the Pleadings, *Friedrichs v. California Teachers Ass'n*, No. 8:13-cv-00676-JST-CW, 2013 WL 3878526 (C.D. Cal. July 9, 2013) ("Plaintiffs concede that this Court should deny their Motion and, instead, grant judgment on the pleadings to Defendants.").

¹⁰⁵ *Friedrichs v. California Teachers Ass'n*, 135 S. Ct. 2933 (June 30, 2015) (mem.) (granting petition for certiorari).

¹⁰⁶ See *Supreme Court Procedures*, U.S. COURTS, <https://perma.cc/QD8B-HE5F> (discussing the convention that four justices must agree in order for a petition for writ of certiorari to be granted).

“everything that is collectively bargained is within the political sphere, almost by definition. Should the government pay higher wages or lesser wages? Should it promote teachers on the basis of seniority or on the basis of—all of those questions are necessarily political questions.”¹⁰⁷ Chief Justice Roberts also appeared to conclude that collective bargaining and the union were political by nature, asking the union to name a term in a collective bargaining agreement within the public sector that did not “present a public policy question.”¹⁰⁸ When the union suggested mileage reimbursement rates, the amount of money an employer should reimburse an employee for miles driven within the scope of employment,¹⁰⁹ the Chief Justice answered, “That’s money. That’s how much money is going to have to be paid to the teachers. If you give more mileage expenses, that costs more money.”¹¹⁰ Following Justice Roberts’ logic, the question of whether work should be paid is political speech under the First Amendment.¹¹¹

When *Friedrichs* was before the Supreme Court, another case that brought an identical theory, *Janus v. American Federation of State, County, and Municipal Employees Council 31*, was stayed at the district court pending *Friedrichs*’ outcome.¹¹² The *Janus* plaintiffs, who had previously filed an amicus brief in support of the *Friedrichs* petitioners when certiorari was pending,¹¹³ were employees of the state of Illinois.¹¹⁴ When

¹⁰⁷ Transcript of Oral Argument at 45, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915).

¹⁰⁸ *Id.* at 46.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ This logic suggests that any bargained-for expenditure by the state, in its capacity as an employer, on its employees, is political. If the collective bargaining agreement calls for teachers to be paid for work performed, and the plaintiffs argue that the payment of agency fees is an endorsement of such term, it then follows that they are being asked to endorse the notion that teachers should be paid for the work they perform. While Roberts’ anxiety seems to come in part from the fact that the state, not a private employer, is paying the wages, then the reasoning, however reductive, stands. Is the issue then taken with the payment of public employees for their work? And if so, is the issue then with the functioning of the state itself? Admittedly, perhaps advocates of the state’s destruction would have a reason to suggest that state employees not be paid for their work.

¹¹² Appellant’s Brief and Short Appendix at 3, *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017) (No. 16-3638) (“[T]he district court stayed the case pending the outcome in *Friedrichs v. California Teachers Ass’n*.”).

¹¹³ See generally Brief of Illinois State Workers as Amici Curiae in Support of Petitioners, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915).

¹¹⁴ *Janus v. AFSCME*, 851 F.3d 746, 747-48 (7th Cir. 2017), cert. granted, 138 S. Ct. 54 (2017) (mem.). The named plaintiff, Mark Janus, is an employee of the Illinois Department of Healthcare and Family Services, and a second plaintiff, Marie Quigley, is an employee of the Illinois Department of Public Health, are included non-union members in agency-shop bar-

Justice Scalia died, and *Friedrichs* fell back down to the precedent-faithful Ninth Circuit, *Janus* moved forward, losing in the District Court of the Northern District of Illinois, and then, in March 2017, at the Circuit Court of Appeals for the Seventh Circuit.¹¹⁵ Having exhausted their appeals in the lower courts, the plaintiffs-appellants filed for a writ of certiorari in June 2017.¹¹⁶ Certiorari was granted three months later, in an effort to address the lingering question of the constitutionality of agency fees in *Friedrichs*. Ultimately, *Janus* arrived at the Supreme Court and fell right into the lap of Neil Gorsuch.

Janus is faithful to *Friedrichs*, mimicking the potentially successful argument with which Justice Scalia—and the four justices who, when the Court found itself equally divided, would have held for the appellants—appeared to agree at oral argument:¹¹⁷ that agency fees are violative of the First Amendment because the plaintiffs do not agree with collective bargaining activities.¹¹⁸ The issue is framed in the familiar language of the union opposition—a powerful and bloated bureaucratic enterprise leeches money from hardworking people against their will; the plaintiffs’ brief summarizes the argument by writing that the union “violate[s] plaintiffs’] First Amendment rights by forcing them to subsidize their unions’

gaining units organized under the American Federation of State, County and Municipal Employees (AFSCME). *Id.*; Brief for Respondent at 12, *Janus v. AFSCME*, 138 S.Ct. 2448 (2018) (No. 16-1466). The third plaintiff, Brian Trygg, is an employee of the Illinois Department of Transportation, and is a non-member in a unit organized by General Teamsters/Professional & Technical Employees Local No. 916. *Janus v. AFSCME*, 851 F.3d 746, 747-48 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (2017) (mem.). [Should this all be cited to recent decision?]

¹¹⁵ *Id.* Though understood to be more conservative than the United States Court of Appeals for the Ninth Circuit, *see, e.g.*, Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeal More Liberal or Conservative Than Others?*, 45 LAW & SOC’Y REV. 171, 171 (2011) (cataloguing some of the ire leveled at the supposed liberal proclivities of the Ninth Circuit), where *Friedrichs* was heard, neither the Seventh or the Ninth Circuit Courts of Appeals had the authority to overturn the Supreme Court’s ruling in *Abood*. *See Janus*, 851 F.3d at 747-48 (“Of course, only the Supreme Court has the power, if it so chooses, to overrule *Abood*. *Janus* and Trygg acknowledge that they therefore cannot prevail either in the district court or in our court—that their case must travel through both lower courts—district court and court of appeals—before they can seek review by the Supreme Court.”).

¹¹⁶ *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, SCOTUSBLOG, <https://perma.cc/G2EQ-ZHGR> (last visited Apr. 18, 2018).

¹¹⁷ *See generally* Transcript of Oral Argument, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915).

¹¹⁸ *See* Appellant’s Brief and Short Appendix at 3, *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017) (No. 16-3638); *cf.* Brief for Petitioner, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915).

bargaining-related activities, notwithstanding their deeply held opposition to the positions their unions advance in collective bargaining.”¹¹⁹

The *Janus* brief mentions the issue of “compelled expressive association,”¹²⁰ but locates its primary argument in a “political speech” theory to address what the petitioners and union opponents perceive as the mistakes of *Abood*.¹²¹ Taking cues from *Harris* and the *Friedrichs* oral argument, *Janus* nests that argument in the fact that the unions operate within the public sector, and that the employer they bargain with is the government.¹²² The fact of state action is used not only as a foundation for the constitutional claim, but also as a tool to convey the political nature of the collective bargaining itself; petitioners argue that because the union negotiates with a state actor, collective bargaining is, by association, political.

In referring to collective bargaining by a public-sector union as “speech directed at the government,”¹²³ *Janus* claims that “bargaining with government is indistinguishable from lobbying.”¹²⁴ This is a conjectural step from *Harris*, where the Court wrote that:

Abood failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see. Collective bargaining concerns the union’s dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.¹²⁵

¹¹⁹ Though the brief refers repeatedly to “their unions,” the plaintiffs are would-be free riders who are non-members of the defendant unions. See Appellant’s Brief and Short Appendix at 2, *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017).

¹²⁰ *Id.* at 6.

¹²¹ The contention of petitioners is that “[t]he *Abood* Court fundamentally misunderstood the difference between government authorizing compulsory fee arrangements between private parties . . . and government itself seizing compulsory fees from individuals, which is the situation in the public sector . . . Here, Illinois directly seizes agency fees from State employees.” *Id.* (internal citations and quotation marks omitted) (alteration in original).

¹²² See *id.*

¹²³ *Id.* at 7 (quotation marks omitted).

¹²⁴ *Id.* at 8.

¹²⁵ *Harris v. Quinn*, 134 S. Ct. 2618, 2632-33 (2014).

And yet, the Court did not overrule *Abood*, nor does acknowledging “the conceptual difficulty of distinguishing”¹²⁶ between political expenditure and expenditure germane to collective bargaining deny that the two are, in fact, distinguishable.

At oral argument, the *Friedrichs* petitioners became entangled in a variety of distinctions and did not have the opportunity to argue, with any substance, that collective bargaining as purportedly inherently political had some relationship to the government employers. When asked what effect a favorable ruling would have on private sector unions, petitioners responded that it would have no effect—the First Amendment challenge would not be tenable, and in a private sector scenario, the government passively allows, rather than affirmatively requires, agency fees to be paid.¹²⁷ This maneuver invited a slate of questions as to the state action of statutory requirements—whether the passing of a statute is itself state action, for instance—that unions be allowed to negotiate union or agency shops.¹²⁸

Having spent these questions emphasizing the difference in public and private sector unions, Justice Kagan challenged petitioners to differentiate between the employer in those contexts:

One of the points of . . . public employee cases . . . is essentially to ensure that when the government acts as an employer, that the government be put in the same position as a private employer . . . the various constraints that would constrain the government when its acting as sovereign fall away and a different and lesser set of constraints apply that are meant essentially to ensure that the government doesn’t use its position as leverage over things it oughtn’t to be able to control, but that the government can do the same things that a private employer can. And so why doesn’t this fall within that category of things? In other words, you’ve just said private employer can decide to do this. That’s not a constitutional problem. So too with the government employer.¹²⁹

The petitioners’ answer was premised on the distinction between public and private employers, rather than between the government’s role as a sovereign and employer.¹³⁰ The *Janus* brief does not address these ques-

¹²⁶ *Id.* at 2632.

¹²⁷ See Transcript of Oral Argument, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915). The questions about statutory state action went largely unanswered.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Despite what looked like missteps in an argument which bore the burden of overturning established precedent, *Friedrichs* was favored to be decided in favor of the petitioners. *Janus*

tions, but instead leans heavily on the notion of government as simultaneous employer and policymaker; likewise, at oral argument the sovereignty notion was barely touched on.¹³¹

The *Janus* brief does not extensively deal with the question—of the apparently inherently political nature of public sector bargaining—that the *Friedrichs* petitioners were unable to flesh out during oral argument and does not explain—beyond the insistence that both are speech directed at the government—the manner in which collective bargaining and lobbying are indistinguishable.

At oral argument in *Friedrichs*, the petitioners’ argued that “collective bargaining is unique, because it requires public officials to meet and negotiate in good faith and mediate any impasses with unions,” emphasizing the good faith requirement, codified in the National Labor Relations Act, suggesting that it makes the government a captive audience to union wants.¹³² The government cannot “close their door whenever they want,” as in a lobbying scenario.¹³³ This is advanced notwithstanding the fact that it may undermine the argument that the two processes of lobbying and bargaining are “indistinguishable”¹³⁴ to suggest that in regards to the standards of conduct in contract negotiation, “none of that exists in lobbying.”¹³⁵ The impression of the captive government official was evidently convincing to Justice Kennedy, who offered, as something the hypothetical government official and bargaining representative might discuss, a “public relations campaign.”¹³⁶

Conspicuously absent was any discussion regarding to what body the fees, and the lobbying expenditures, might go. There was no explanation

appears to be modeled not only on the most successful arguments but on arguments the court has heard before, however ill-argued in the first case.

¹³¹ Transcript of Oral Argument at 47, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915); Appellant’s Brief and Short Appendix at 7-8, *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017) (No. 16-3638).

¹³² Transcript of Oral Argument at 14, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915); *see also* 29 U.S.C. § 158(d) (1974).

¹³³ Transcript of Oral Argument at 14, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915).

¹³⁴ Appellant’s Brief and Short Appendix at 8, *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017) (No. 16-3638).

¹³⁵ Transcript of Oral Argument at 14, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915).

¹³⁶ Somewhat different from the terms suggested by the *Janus* plaintiffs themselves: “Illinois law provides that union representation extends to bargaining over wages, hours of employment, and other terms and conditions of employment, including health and other benefits. These issues—the spending of public dollars and the operation of state government—are all inherently political in nature, and are matters on which individuals may and do have different opinions.” Appellant’s Brief and Short Appendix at 7, *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017) (No. 16-3638).

of whether agency fees are kept in the care of the union, and spent on issues deemed germane to collective bargaining, while lobbying money goes to legislators and organizations unaffiliated with the union. For its part, the *Janus* brief does not anticipate an argument of this nature.

Borrowing from *Harris*, the *Janus* brief also argues that there is “no cognizable interest, let alone a compelling or important one, in preventing employees, or anyone else, from supposedly ‘free riding’ on political advocacy.”¹³⁷ This is, again, a rather generous step from the precedent, which nonetheless expresses a disdain for the free rider problem.¹³⁸ The Court writes in *Harris* that “[p]reventing nonmembers from free-riding on the union’s efforts is a rationale generally insufficient to overcome First Amendment objections.”¹³⁹ This dismissal is coupled with a compelled speech argument.¹⁴⁰ In *Friedrichs*, it is clumsily made: following an avowal that the union’s right of exclusive representation is not at issue and not troubling to the petitioners,¹⁴¹ the petitioners went on to say, “we are required to free ride on the union because they are the exclusive representative and we don’t have our own vehicle.”¹⁴² The *Janus* brief characterizes this as a “forced ride.”¹⁴³ Thus, the charge of free ridership is conveyed as a malicious charlatan—a coercive condition attempting to pass as a government interest.

Against the impressive heft of the critical First Amendment rights, then, the free rider problem evidently weighs not at all. One wonders why free ridership does not inspire, as it does in the context of the commons,¹⁴⁴ from which it was derived, a sense of exploitation and community disengagement.¹⁴⁵ Whether such connotations even register on the scale opposite the First Amendment is a question beyond the threshold inquiry: why are unions not considered collective assets which confer benefits accessible by the entire community? Why are unions not conceived of as resources maintained as a mutual responsibility, subject to profiteering by those who would take without giving?

¹³⁷ *Id.*

¹³⁸ *Harris v. Quinn*, 134 S. Ct. 2618, 2621 (2014).

¹³⁹ *Id.* (internal quotations omitted).

¹⁴⁰ *Id.*

¹⁴¹ Transcript of Oral Argument at 3, *Friedrichs v. California Teachers Ass’n*, 136 S. Ct. 1083 (2016) (No. 14-915) (referring to exclusive representation as “fine with us”).

¹⁴² *Id.* at 4.

¹⁴³ Appellant’s Brief and Short Appendix at 8, *Janus v. AFSCME*, 851 F.3d 746 (7th Cir. 2017) (No. 16-3638).

¹⁴⁴ A “resource [which] is openly accessible to all within a community regardless of the entity’s identity or intended use.” Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 921 (2005).

¹⁴⁵ RUSSELL HARDIN, *The Free Rider Problem*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003).

III. ECONOMIC AND SOCIAL PROFIT: AGENCY SHOP UNIONS AS THE COMMONS

A. *The Infrastructures of the Commons: Commonality of Access*

In envisioning the commons, one might think back to a high school social studies or history class on the commons and their infamous “tragedy,”¹⁴⁶ a sensationalized or disdainful account of Easter Island,¹⁴⁷ or perhaps an exercise in which students role-play resource consumers and have the opportunity to deplete—or refrain from depleting—a shared pool of something valuable.¹⁴⁸ One might also think of that quaint community

¹⁴⁶ The “tragedy of the commons” is an economic thought problem and cautionary tale which postures that if every individual acts in her own interest, without regard for the needs of others, in relationship to a common resource, the resource will be depleted as the demand—for immediate economic gain—outstrips the natural supply. See GARRETT HARDIN, *Tragedy of the Commons*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS, LIBRARY OF ECONOMICS AND LIBERTY (2008), <https://perma.cc/VDZ8-RRE6> (last visited Apr. 18, 2018).

The problem presents almost as a critique to unbridled free market economics, which both assumes and celebrates the idea that each market participant will act in her own interest to produce and consume as many commodities as possible without regulation, thereby keeping the nature of the transactional market on even keel.

The central question is ultimately of the nature of rationality and individualism. Free market economics favors a rabid individualism, postulating that “rationality” means the rapacious monopolizing of resources. The tragedy of the commons, to the contrary, suggests that a rational consumption strategy is to limit consumption and regulate the individual drive to accumulate—which it acknowledges, in some sense, as an inherent human weakness—lest it fully overtake supply. In other words, one theory suggests that individualism balances the economy, while the other suggests that it destroys it.

For more on classic economic theory, see generally ADAM SMITH, THE WEALTH OF NATIONS (Edwin Cannan, ed. 2015) (1776); but cf. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (Geoff Tily ed., 2007) (1936); cf. THOMAS PIKETTY, THE ECONOMICS OF INEQUALITY (Arthur Goldhammer trans., 2015) (1997).

¹⁴⁷ The story goes that an agricultural community on an isolated island off of the coast of Chile engaged in “slash-and-burn” farming, in which trees were burned to clear and enrich farmland. Robert Krulwich, *What Happened on Easter Island—A New (Even Scariest) Scenario*, NPR (Dec. 10, 2013, 8:41 AM), <https://perma.cc/YL4U-M837>. The farmers, imprudent about the trees’ timeline and capacity for replenishment, depleted so many that the island became barren and infertile. *Id.* This scenario was held up in historical accounts as the “clearest example of a society that destroyed itself by overexploiting its own resources.” *Id.* (quoting Jared Diamond). This story has been challenged in recent years based on evidence that the flora of the island suffered not from over-farming but from the inadvertent introduction of an invasive species of rat which ate its way through every root structure it came across. *Id.* In this telling, the farming community is resourceful rather than foolish, adapting to the island’s quickly homogenizing ecosystem by rejuvenating the soil with mineral-rich rocks, and eating the invasive rats. *Id.*

¹⁴⁸ In my case, it was a pan covered by a tinfoil sheet. Students could reach in, feel around, and gather as many chocolate kisses as they felt suited their purposes. After everyone had a chance to “go fishing,” my 12th-grade science teacher, playing God, would peek under the tinfoil and replenish the kisses, a new generation, according to how many were left. By the

idyll—the common square at the center of town, replete with privately-owned grazing animals, privately-farmed vegetables in public plots, and a public gossip-network of townspeople leaning on their herding and farming implements.¹⁴⁹

The notion of what the commons is has been changing, or expanding, as the nature of infrastructure, and the notion of something that is publicly available, changes. Professor Brett Frischmann categorizes different commonly-managed infrastructures. “Traditional infrastructures,” usually owned by private corporations, but which may be owned by public entities,¹⁵⁰ are “managed in a manner whereby all members of a community who wish to use the resources may do so.”¹⁵¹ As an example he offers common carriers: roads, canals, railroads, telephones, and the postal service.¹⁵² He notes that access to these conduits is neither free (one still has to pay the fare for the subway, the stamp for one’s mail) nor unregulated

time we students, as a community, realized that our own gain was another’s everlasting loss, it was too late, and the chocolate kiss ecosystem had dried up.

¹⁴⁹ See David Harvey, *The Political Economy of Public Space*, in *THE POLITICS OF PUBLIC SPACE* (Setha Low & Neil Smith eds., 2005).

Though an argument that unions constitute the commons of a particular workspace is not predicated on the notion that unions are similar—in a corporeal sense—to the public square, the union does have something of the tenor of a meeting place. The notion that each chapter of a union is called a “local,” the antiquated practice of gathering in a “hiring hall,” the understanding of union business conducted collectively, at a meeting with membership—these cultural perceptions coalesce around the suggestion of a physical meeting space, an exchange of ideas accessible to passersby.

¹⁵⁰ The fact of the public sector being unionized, and the anxiety of the *Janus* plaintiffs around the involvement of government, do not ruffle an understanding of the commons. “Two generalizations about traditional infrastructure are worth noting. First, the government has played and continues to play a significant and widely-accepted role in ensuring the provision of many traditional infrastructures. While private parties and markets play an increasingly important role in providing many types of traditional infrastructure (due to a wave of privatization as well as cooperative ventures between industry and government), the government’s position as provider, coordinator, or regulator of traditional infrastructure provision remains intact in most communities.” Frischmann, *supra* note 144, at 925.

This is not to suggest that the union as commons is limited to the public sector, an analysis of access and positive externalities applies equally to the private sector. It is rather to demonstrate that an anxiety about a government relationship to a common resource is out of keeping with commonly-managed infrastructure. In respect to commons management, the union is something of an anomaly, because of its non-profit status. In commons structures, either the government, a private entity, or both administer the common resource, here, the union—neither government or a traditional “private” entity like a corporation, but rather a non-profit—administers itself.

¹⁵¹ Frischmann, *supra* note 144, at 925.

¹⁵² *Id.*

(“transportation of hazardous substances by highway or mail, for example, is heavily regulated”¹⁵³), but that they are available to the entire community “regardless of the identity of the end-user or the end-use.”¹⁵⁴ In addition to carriers, he includes in the “traditional infrastructure” classification public service conduits like water systems and sewage systems. He also includes more abstracted public-service conduits—public school systems and the court system.¹⁵⁵

Alternately, there are “non-traditional infrastructures,” which include environmental resources (“lakes, the atmosphere, and ecosystems”); information resources (“basic research, abstract ideas, and operating systems”); and Internet resources (“interconnected computer networks . . . and data transfer”).¹⁵⁶

i. A Common(s) Characteristic: Positive Externalities

The commons is characterized in part by its generation of “positive externalities,” in classical economics understood to be a sort of additional output¹⁵⁷—as when matter is burned and produces light *and* heat¹⁵⁸—that benefits a third party. A broader conceptualization of positive externalities is in terms of infrastructure which produces “private gains . . . accompanied by additional large social gains.”¹⁵⁹

A commonly-cited example¹⁶⁰ of a positive externality is the circumstance of the beekeeper: she manages an apiary, and the bees produce honey, which has a positive outcome¹⁶¹ for the beekeeper. The bees produce an additional positive outcome which does not benefit the beekeeper alone—by travelling from flower to flower, pollinating them—the bee has

¹⁵³ *Id.* at 926.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 924.

¹⁵⁶ *Id.* at 927-28.

¹⁵⁷ Frischmann, *supra* note 144, at 924.

¹⁵⁸ A physicist would not like this metaphor, the component parts of light and heat already apparently being present in the matter. But for the rest of us, it seems like a marvelous two-for-one.

¹⁵⁹ W. EDWARD STEINMUELLER, *Technological Infrastructure in Information Technology Industries*, in TECHNOLOGICAL INFRASTRUCTURE POLICY 117 (Morris Teubal et al. eds., 1996) (discussing the traditional idea of infrastructure, largely in terms of transportation and communication networks, which were owned by private entities which stood to gain from their expansion, and explaining the generation of an additional, social good, as well as a private profit).

¹⁶⁰ See, e.g., *Positive Externality*, FUNDAMENTAL FIN.: ECON., <https://perma.cc/6MYH-MHG6> (last visited May 26, 2018).

¹⁶¹ This example is a friendly one for the math-averse and communists alike—the positive outcome of the honey, in this instance, need not be commodified. The beekeeper may sell the honey and make a profit with which to invest in more bees, and/or boost the economy, but the benefit might be of a kind outside of the market—she might enjoy her tea more.

a positive effect on the surrounding community, producing ecological diversity and fertility, yielding, for example, vegetables.¹⁶² The notion of this external, societal benefit, could be expanded beyond the quantifiable—vegetable yield, relative biodiversity—to the less tangible. Here, the ecological products and capacity for more products are the societal benefit, but one could extrapolate on this idea to count, as an output, the unnameable benefits, the effects on society, that living in a community replete with contented bees¹⁶³ and large flowers might have.

This is a rather simplified scenario, and not an ideal illustration of a common resource—to fit bees neatly into the “non-traditional infrastructure” category, one must imagine a beekeeper who goes out into the public world, peering into the cavities of trees, rather than a beekeeper who builds a manufactured apiary, or owns the land where the hollow tree stands. But it stands as a clear example of positive externalities which are easily lent to the commons which Frischmann lists.

The more accessible a common resource, the more amplified the positive externalities. Frischmann cites legal scholar and economic theorist Professor Carol Rose:

Rose was the first to draw an explicit, causal connection between open access and these positive externalities. In her path-breaking article, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, Rose explained that a “comedy of the commons” arises where open access to a resource leads to scale returns—greater social value with greater use of the resource. With respect to road systems, for example, Rose considered commerce to be an “interactive practice whose exponential returns to increasing participation run on without limit Through ever-expanding commerce, the nation becomes ever-wealthier, and hence trade and commerce routes must be held open to the public, even if contrary to private interest. Instead of worrying that too

¹⁶² Again, these vegetables produced as positive externalities could have a commodity value in the agricultural industry, or a non-commodity value, such as food not exchanged for money.

¹⁶³ An economically-oriented workers’ rights perspective might prompt one to ask after the benefits to the bees, the real workers in this scenario. Their honey is taken from them without just compensation, and the benefits that vegetables and a vegetable-rich community might have do not fall on them. To assure oneself that a bee’s (free) labor benefits the bee for the sake of making our world function a little better, and thus the bee, is perhaps safer from the effects that societal turmoil might have on the bee-community, is to invite troublesome logical extremes extending to human workers. The quandary of the benefit to the bees is outside of the scope of the article, and of the textbook illustration, but it is a genuinely important one simply because it calls on a user of common resources to consider who benefits, and who does not. In the agency fee scenario, discussed *infra* Part II, the union, akin to the hive, is benefitted. As for the bees, we may be free-riding on them.

many people will engage in commerce, we worry that too few will undertake the effort.”¹⁶⁴

The positive externality Rose raises is a quantifiable, economic one: the increased wealth of the nation and the proliferation of commerce. There are non-quantifiable, social benefits as well. Road systems offer not only access to commerce but access to variable communities. The more road systems are utilized, the more communication is fostered between different groups of people, leading not merely to a proliferation of commerce but a proliferation of ideas.¹⁶⁵

B. The Union as the Commons

The commons is generally understood as a “resource [which] is openly accessible to all within a community regardless of the entity’s identity or intended use.”¹⁶⁶ If an agency-shop workplace,¹⁶⁷ in which some workers are union members and others are not, the union is nevertheless accessible to all. Despite variation in use, it is a resource from which all of the workers can draw some kind of output—be it a quantifiable, economic output, or a non-quantifiable output.

Imagining the union as a commons does not require great intellectual flexibility, as it fits neatly into the economic framework of commonly

¹⁶⁴ Frischmann, *supra* note 144, at 928 (alteration in original).

¹⁶⁵ This has been evident in history: global trade in the late middle ages resulted in an expansion in global commerce and increased communication amongst disparate communities. It must be noted that this sort of expansion of trade and exchange also produced a number of negative externalities: colonization, not least.

In Rose’s example, limited to the nation, this negative externality in its modern form could—and has—emerged as well, in gentrification. These outputs being non-quantifiable, a cost-benefit analysis fails—but the question of whether the costs of exploitation and violent displacement outweigh the benefits of communication and commerce is a horrifying one: they cannot. In the context of the union as commons, happily, this negative externality does not result; unions, rather than gentrifying or colonizing a community, are oriented toward the alleviation of poverty and collective action—arguably the opposite.

¹⁶⁶ Frischmann, *supra* note 144, at 921.

¹⁶⁷ The theory of the union as a commons extends to the contract administration and workplace context, not necessarily to political lobbying contexts—that exploration is outside of the scope of this article. Though the theory of the union as commons would apply in an open shop context (an open shop being one in which only union members pay dues and fees, and non-members are not required to pay an agency fee despite the fact that the contract applies to them; this is the model employed in right-to-work states), or in a union shop context (in which workers are required to join the union following a grace period after they are hired), those contexts are outside of the scope of this paper. For the purposes of examining the interaction between the First Amendment arguments, free rider problem, and the fate of a maltreated common resource, here the environment of the theory of union as commons extends only to the agency shop context.

managed infrastructure. Unions mimic commonly-held traditional infrastructures in myriad ways if the scope of the community is limited to the workplace or industry.¹⁶⁸ Like traditional commonly-managed infrastructures, all members of the community benefit from the union, regardless of who the “end-user” is, union-member or non-union member.¹⁶⁹ Perhaps more analogous to schools and court systems than to conduit-like infrastructures, unions nevertheless evince the collectivity of a shared commute or water system. At the courthouse, one must have standing and a claim; to participate in the union, one must merely be a worker.

The agency fee is easily conceptualized like a postage stamp or a subway fare—it is the toll one pays to access the benefit. A counterargument favored by libertarians, free-market adherents, and anti-union forces turns on the First Amendment argument often sidelined in judicial challenges to agency fees, in favor of political speech: compelled speech. The argument goes something like this: one chooses to ride the subway.¹⁷⁰

¹⁶⁸ A literal-minded critique of an argument for unions as the commons would note that the union is disqualified because the entirety of the community, conceptualized regionally rather than bounded by workplace or industry, cannot use the services of the union (at least not directly). This argument is unconvincing; the services of a public school, for example, are not available to the middle-aged members of a community. Additionally, many labor rights organizations are, in fact, organized by region. See JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 13 (2006).

¹⁶⁹ See 48 AM. JUR. 2D LABOR AND LABOR RELATIONS § 1071 (2d ed., 2018) (explaining the union’s status as the sole and exclusive bargaining representative of every worker in the bargaining unit, regardless of membership).

¹⁷⁰ This brings to mind a would-be parable of the Trump era. Betsy DeVos, the Trump-appointed Secretary of Education whose controversial Senate confirmation hearing required the Vice President to break a tie for the first time in history, see Emmarie Huetteman & Yamiche Alcindor, *Betsy Devos Confirmed as Education Secretary; Pence Breaks Tie*, N.Y. TIMES (Feb. 7, 2017), <https://perma.cc/KP2X-XGNA>, is nearly synonymous with privatization and the diminishment of the commons of the nation’s public school systems. See Joanne Barkan, *Milton Friedman, Betsy DeVos, and the Privatization of Public Education*, DISSENT (Jan. 17, 2017), <https://perma.cc/KB4X-VW9T>. DeVos is best known for her championing of “school choice,” a catch-all term for a variety of ways in which children and parents are disincentivized from using public education systems. See Anya Kamenetz, *Under DeVos, Here’s How School Choice Might Work*, NPR (Jan. 31, 2017, 11:44 AM), <https://perma.cc/VZP5-4RZX>. Ms. DeVos, in an address at a Brookings Institute event, comparing school choice to a choice of transportation, remarked:

How many of you got here today in an Uber, or Lyft, or another ridesharing service? Did you choose that because it was more convenient than hoping a taxi would drive by? Even if you didn’t use a ridesharing service, I’m sure most of you at least have the app on your phone.

Just as the traditional taxi system revolted against ridesharing, so too does the education establishment feel threatened by the rise of school choice. In both cases, the entrenched status quo has resisted models that empower individuals.

This preoccupation with choice runs saliently through the *Friedrichs* oral arguments,¹⁷¹ the *Janus* brief, and the public proselytizing of right-to-work forces.¹⁷² Setting aside an argument as to whether one really chooses to use the subway if the circumstances of one's life make that commute more or less necessary, an equally near-sighted counter to the choice argument might be that one "chooses" to work in an agency shop workplace.¹⁷³

i. Positive Externalities in the Union Commons

As with the case of the beekeeper and her community, unions create benefits for the communities in which they are situated. For the workers—

Nobody mandates that you take an Uber over a taxi, nor should they. But if you think ridesharing is the best option for you, the government shouldn't get in your way.

Valerie Strauss, *Devos: Picking a School Should Be Like Choosing Among Uber, Lyft or a Taxi*, WASH. POST (Mar. 29, 2017), <https://perma.cc/A4L8-BGVB>.

In addition to incurring ire for the premise of the statement, comparing the right to procure an education to a "ordinary consumer decision," see Chris Weller, *Betsy Devos Compared School Choice to Taking Uber Over a Taxi—Here's Why That Could Be Troubling*, BUS. INSIDER (Mar. 30, 2017, 12:32 AM), <https://perma.cc/HR49-HUK6>, Secretary DeVos was ridiculed for her analogy, offering three expensive, private methods of transport rather than a common carrier, see Amy X. Wang, *Betsy Devos Thinks Choosing Schools Should Be Like Uber or Lyft—But Both Are for the Wealthy*, QUARTZ (Apr. 3, 2017), <https://perma.cc/B8QK-QYLP> ("Though most of the educated researchers in the audience may've been familiar with Uber or Lyft, DeVos meant for her comparison to apply to all families in the US—and most of them have never even touched a ride-sharing app. The Pew Research Center found in 2016 that only 15% of Americans have used one.").

Secretary DeVos' rather oblivious illustration betrays the fact that there is no space for the commons, nor the commoners who cannot afford chauffeur services, in the Trump administration's deconstruction of the administrative state and reconstruction, in its place, of a private one. In fact, there is not even a place for the commons or commons-users in their metaphors.

¹⁷¹ "Justice Scalia: Mr. Carvin, is—is it okay to force somebody to contribute to a cause he does believe in? Mr. Carvin [lawyer for the plaintiffs]: I wouldn't think, Your Honor, that you could force Republicans to give contributions." Transcript of Oral Argument at 4, *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915).

¹⁷² Patrick Hughes, the Liberty Justice Center lawyer representing the *Janus* plaintiffs, told Fox News, "This is America. If you want to be part of a union God bless you . . . If you don't want to be part of a union, if you don't want to support their speech or their collective bargaining, no one should force you to be part of it." Matt Finn, *Right-to-Work Court Case Could Have National Impact on Unions*, FOX NEWS: POLITICS (Feb. 10, 2017), <https://perma.cc/LXM3-NX49>.

¹⁷³ This argument is problematic, not only in its petulance, but because of its tacit suggestion that if a would-be free rider should seek employment in a non-unionized workplace, there *should* be non-unionized workplaces to benefit such people. This runs counter to the position of the author and to one of this article's ultimate points—a crusade of union-weakening and the creation of a fee structure system that promotes less (or worse) no unionization is a societal ill.

both union members and non-union members, akin here to the beekeeper¹⁷⁴—the union confers the benefit of coverage by the collective bargaining agreement, which might include the terms: wages higher than industry standard; overtime pay; paid leave policies; severance pay; medical benefits; and so forth.

For society, in terms of quantifiable benefits, the union confers those economic positive externalities which result from a well-paid, well-rested, healthy labor force: a higher standard of living and an invigorated economy, in which workers can afford to buy the products they make and utilize the services they provide,¹⁷⁵ and increased productivity.¹⁷⁶ Unions also drive up the standard for workplaces outside of the one where the union is organized.¹⁷⁷

In terms of non-quantifiable benefits, the union creates a culture of worker empowerment, a society that expects more than a modicum of labor rights enforcement.¹⁷⁸ A higher standard of living naturally results in a lessening of societal anxiety around downward economic mobility and instills a sense of financial stability.¹⁷⁹ Society-wide, this effect could be subtle but transformative.

As access to a common resource increases, the scale of the positive externality increases.¹⁸⁰ An expansion in access to the union—increased unionization, that is—would result in these quantifiable benefits and non-quantifiable benefits proliferating throughout communities to which the common resource, the union, was extended.

Figure 1 demonstrates the analogous terms between the beekeeping illustration and an agency shop workplace.

¹⁷⁴ See *Fig. 1* for a comparison of the illustration to the agency shop scenario.

¹⁷⁵ See, e.g., Kai Filion, *Increases in Minimum Wage Boost Consumer Spending*, ECON. POL. INST. (May 27, 2009), <https://perma.cc/Y7HB-4ZPV>.

¹⁷⁶ See, e.g., Justin Wolfers & Jan Zilinsky, *Higher Wages for Low-Income Workers Lead to Higher Productivity*, PETERSON INST. FOR INT'L ECON. (Jan. 13, 2015, 9:45 AM), <https://perma.cc/BU3K-AKD8>.

¹⁷⁷ See Matthew Walters & Lawrence Michel, *How Unions Help All Workers*, ECON. POL. INST. (Aug. 26, 2003), <https://perma.cc/Q8P7-A6KD>.

¹⁷⁸ See Josh Bivens et al., *How Today's Unions Help Working People*, ECON. POL. INST. (Aug. 24, 2017), <https://perma.cc/PTS5-WU7N>.

¹⁷⁹ See, e.g., Bill Gardener, *How to Improve Mental Health in America: Raise the Minimum Wage*, NEW REPUBLIC (May 4, 2016), <https://perma.cc/7SZZ-5B5X>.

¹⁸⁰ Frischmann, *supra* note 144, at 928-29 (citing Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHICAGO L. REV. 711 (1986)).

FIGURE 1: POSITIVE EXTERNALITIES APPLIED TO THE AGENCY FEE SCENARIO

Positive Externalities	
Beekeeping Illustration	Agency Shop Scenario
<u>The Beekeeper</u> Private benefit: the honey	<u>Workers</u> [Members and Non-members] Private benefit: benefits of the contract
<u>Society¹ / The Beneficiary of the Externality</u> Quantifiable benefit: vegetables; biodiversity Non-quantifiable benefit: a community made more lovely and more livable.	<u>Society² / The Beneficiary of the Externality</u> Quantifiable benefit: standards for wages and benefits driven up; higher earning power in the community; an invigorated economy and higher standard of living; increased productivity Non-quantifiable benefit: a notion of social mobility and economic stability, a culture of worker empowerment, and an expectation of enforcement of labor rights.
¹ Scope of society: the apiary, neighboring farms, the larger world	² Scope of society: the workplace, other workplaces

C. The Tragedy of the First Amendment Theory of Agency Fees

The typing of agency fees as political speech, as proffered by *Janus* and *Friedrichs*, frustrates—or is frustrated by—the theory of the union as commons. In the construction of the commons as a fee-based infrastructure—as is the case with tolled roadways, the postal service, and the subway, for example, not to mention tax-funded resources like sidewalks and public schools—the fee is well-understood as a communal contribution to

the function of the system, a charge to maintain access and facilitate the production of positive externalities.

That it might be compelled, coerced, is not debated in a traditional commons context. The fee is tendered with an understanding that it is necessary—not on a personal level—but to preserve the operation. A postage stamp is required to send a letter, though more than 49¢ is required for the actual process. The accumulation of stamps paid for by the larger community assures that the letter will be sent.¹⁸¹

The argument that collective bargaining itself is political is likewise incongruous with the commons. Where one does not “agree” with a common resource, one nonetheless understands its funding to be a condition of community; free riding on the commons is cognizable as a detriment to others. Likewise, the coalescing of the political around the identity of commons users, or the identity of the common resource itself—even though the resource may be regulated, and the users may be regulated, in turn—notions of “the political” do not adhere. The identities of other subway riders on one’s morning commute do not make political the operation of the trains; the resource is accessible “regardless of the identity of the end-user.”¹⁸²

Though the government’s relationship to public sector unions is different from its relationship to (other) common resources, it is in the union context less touched by the fee structure. Where the government administers a fee-based common resource, it collects the fee—the money flows directly to the government. Here, the fee flows to the common resource to fund its function, negotiation with an employer, which in this instance, happens to be the government.

The narrative espoused by right-to-work advocates, by the *Janus* plaintiffs, the narrative rejected in *Abood* and interrupted in *Friedrichs*, becomes absurd where one employs an understanding of the union as the commons. The narrative of a “forced” ride; a coercion; a difference in agreement; a violation of the right to dissent; a minimizing of free-ridership as inconsequential, un concerning; a blurred layering of the political; a “politicizing” of identities; a political sovereign dressed up as an employer—none of it coheres with the framework of the common resource.

¹⁸¹ This is a simplified, but fair evaluation of the economic forces driving the postal service. For a detailed analysis of how cost and production operate in the context of the United States Postal Service, see David Weinberg, *Why it Makes Economic Sense to Send a Letter for 49 cents*, MARKETPLACE (Apr. 25, 2014, 4:30 PM), <https://perma.cc/949T-FCUA>.

¹⁸² Frischmann, *supra* note 144, at 926.

CONCLUSION: THE DISSONANCE OF FIRST AMENDMENT OPPOSITION

The agency fee structure is a miniature administrative state itself, a function within a commons that manufactures and administers its own benefits in a self-sufficient loop. The deconstruction of the agency fee structure and the precedent that it rested on shrinks the notion of the union as a common resource, subject to free rider issues. It simultaneously moves the union further into the “political,” paints it with the brush of stratification, categorization, exclusion, the opposite of a common resource.

In a practical sense, the further the union is pushed into association with the political, the public, the more it will be forced to recede, first into the private and next out of existence.

Framing the union as a commons exposes the shadow logic of a theory of agency fees as political speech; if we understand the union as a commons, collective bargaining as a political undertaking is only feasible if we understand subway riding as inherently political, the postal service as inherently political. Such examples make clear that the theory is not a theory at all, but a masquerade, the deploy of First Amendment doctrine as cover for an agenda which has as its principal line-item the deconstruction of the administrative state—of municipal functions and administrative national functions; transport networks, communication networks—and the corresponding rise of the state of private capital.

In the fight for deconstruction, the free speech clause is an appealing weapon for those in the pro-dismantlement camp, conjuring, as it does, the capitalistic notion of a “marketplace of ideas,” capturing the notion of individual rights pitted bravely against the majority.¹⁸³

¹⁸³ First articulated by Justice Oliver Wendell Holmes the theory suggests that where free speech is unfettered, ideas which are more “correct” will rise to a place of influence, while lesser ideas, of lesser quality, will sink below the current in the stream of intellectual commerce. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes wrote, “[t]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Id.* The concept is preposterous for many reasons, too numerous to explore thoroughly here. However, it must be said that an unregulated economic marketplace benefits those who are already in a position of power, who enrich themselves by exploiting others. The marketplace of ideas theory was happily subscribed to by powerful men on the bench, who were likely never loudly drowned out by a know-it-all conversational partner, and who were reassured at every turn—in the dominant pedagogy, in the values of the Western literary canon, in innumerable hierarchies of recognition—that their methods of logical reasoning were objectively the most correct.

“Free speech” is often invoked, not against the government, as the First Amendment requires, but as a kind of conversational talisman employed to insulate dissent, an unpopular opinion, or some kind of rude epithet.

And yet, following the thread of the free speech argument—an objection to endorsing negotiation itself—it seems that free speech has very little to do with it: unlike the endorsement of a political campaign, the opposition here—a purportedly political one—is to the very existence of the union. The goal then, is not to refrain from endorsing the fact of unions in the world, but to destroy them.

The First Amendment argument posits that workers should not be forced to endorse a position they disagree with. Accepting the union as inherently political, the position such a worker takes issue with is the very existence, the legality, of collective bargaining—a right enshrined in an act of Congress¹⁸⁴—and with the fact of unions, generally. An opposition to a body which discusses wages, hours, and safety measures, the nuts and bolts of work and the workplace. This is a dissonant notion, but more absurd when compared to common uses not codified in law—a political opposition to sending a letter, a distaste for the very notion of municipal transport. Ultimately, there is no political speech, compelled by the state. There is merely the naked desire to destroy the union totally.

A successful deconstruction, a world of privatized commons, is already partially here. *Janus* is the tool that this historical moment has sent to undo workers' rights. The labor movement will have to defend the commons elsewhere.

¹⁸⁴ See National Labor Relations Act, 29 U.S.C. § 157 (1947).