Tyranny or Liberty? The Public Sector Union and the First Amendment

Emily A Jackson-Hall
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Introduction

"The dissent says that when the Framers 'constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.'...That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak in association with other individual persons...It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals...cannot be denied the right to speak on the simplistic ground that it is not "an individual American.""¹

What speech is fit for public consumption? What political speech? The First Amendment protects the right to speak and to associate with others. It’s freedom from government interference. The government should leave you free to speak your mind to whoever cares to listen.

What happens when speech costs money? Shouldn’t an individual--or a group of individuals--be free to spend their money as they see fit? If the goal of a particular group is to persuade as many voters as possible to see their side of an argument--can a group of individuals spend their money in a political campaign without the government restricting them? “Yes, but...” There are laws which have passed constitutional muster, restricting the time, place and manner of political speech.² But in Citizens United, the Supreme Court held unconstitutional a

² The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. In contrast to the blanket rule that the majority espouses, our cases recognize that the Government’s interests may be more or less compelling with respect to different classes of speakers, cf. Minneapolis Star & Tribune Co. v. Minnesota Comm’n of Revenue, 460 U.S. 575, 585, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983)
statute that was an “unprecedented governmental intervention into the realm of speech.” The government has no business or power to “select what political speech is safe for public consumption by applying ambiguous tests.”

The Wisconsin legislature enacted “Act 10” in March 2011, “dramatically curtail[ing]” the associational and collective bargaining rights” of most, but not all, Wisconsin public employees. Public sector unions are now divided into two categories---”public safety” and “general employee”---and for those “General Employee” unions (representing teachers, etc), the state of Wisconsin will no longer allow their dues to be automatically deducted from their pay. The state also requires the unions representing “General Employees” to recertify annually, and even if a union is certified as the collective bargaining agent for, say, the local teachers, the union may only bargain for a wage increase no greater than the change in the consumer price index. The state will bargain with individual employees for larger raises. And the state will continue to treat the “public safety” unions as it did before Act 10--allowing payroll dues deduction, engaging in collective bargaining without restriction, and no annual recertification requirement.

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4 Citizens United v. FEC, 558 U.S. 310, 130 S. Ct. 876, 896
5 Wisconsin Educational Association Council, et. Al. plaintiff’s brief, 2012 WL3024287, pg. 11
6 “All employees governed by MERA and SELRA are “general employees” unless specifically identified as “public safety employees” in Act 10. In creating this distinct group, the Act cross-references seven of the twenty-two occupations §43 listed in a separate statute, which governs the Wisconsin Public Employee Trust Fund. See Wis. Stat. § 40.02(48)(am). Under SELRA, Act 10 identifies state troopers and state motor vehicle inspectors as public safety employees. Wis. Stat. § 111.81(15r). Act 10 did not, however, identify the Capitol Police and the University of Wisconsin Police as public safety employees, even though both occupations qualified as such under the trust fund statute. Compare Wis. Stat. § 40.02(48)(am), with Wis. Stat. § 111.81(15r). Act 10’s list of public safety employees under MERA is somewhat longer, including (1) police officers, (2) fire fighters, (3) deputy sheriffs, (4) county traffic police officers, and (5) village employees that perform fire or police protection. Wis. Stat. § 111.70(1)(mm)” Wisconsin Educ. Ass’n Council v. Walker, 705 F.3d 640, 642-43 (7th Cir. 2013)
7 “Prohibited subjects of bargaining; general municipal employees. The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following: 1. Any factor or condition of employment except wages, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions. 2. Except as provided in s. 66.0506 or 118.245, whichever is applicable, any proposal that does any of the following: a. If there is an increase in the consumer price index change, provides for total base wages for authorized positions in the proposed collective bargaining agreement that exceeds the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement by a greater percentage than the consumer price index change.” Wis. Stat. Ann. § 111.70 (West)
Act 10 highlights the tension between the obligation of the government to be stewards of the taxpayers money, and the right of individuals and associations to be free from government interference. More freedom is good. We want individuals and associations to be able to speak and spend their money to speak as they see fit. Should the rules change when the speaker is a government employee or group of government employees, and dependant upon taxpayer money for their survival? The bottom line is that any association of individuals--including unions--should be free to speak. Collective bargaining between public sector unions and the government is by its very nature political speech. The subject of the bargaining is how taxpayer dollars will be spent. And how those taxpayer dollars are spent is a necessary extension of who won the last election.

What is the dividing line between the “public safety” and the “general employee” union? The legislature permits the public safety unions to operate as they did before. The state and its municipal governments engage in unrestricted collective bargaining with unions representing state troopers, motor vehicle inspectors, and most municipal policemen and firefighters, because (according to the Wisconsin legislature) the threat to public safety is greatest if these employees were to strike. To save taxpayer dollars, the legislature drew a line in the sand. They reasoned that if teachers and garbage collectors go on strike, the threat to public safety is de minimis.

However, the “general employee” unions point out that the so-called “public safety” unions also happen to be the very same groups of state employees that publicly supported the election of Governor Scott Walker⁸. And as for the fear of strikes? The “public safety” unions

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⁸ Notably relevant to the arguments in this appeal, when Governor Walker ran for election in 2010, only five public employee organizations endorsed his candidacy during the campaign: (1) the Wisconsin Troopers Association, which represents state troopers and motor vehicle inspectors; (2) the Milwaukee Police Association; (3) the Milwaukee Professional Fire Fighters Association; (4) the West Allis Professional Police Association; and (5) the Wisconsin Sheriffs and Deputy Sheriffs Association Political Action Committee. Each of these organizations represents employees categorized as public safety employees under Act 10. The public safety employee definition, however, also includes employee organizations that opposed or failed to endorse the governor. For instance, all state, municipal, and village police officers and firefighters qualify as public safety employees even though only those in Milwaukee and police officers in West Allis endorsed Walker. In addition, the Professional Firefighters of
are barred by law from striking. Furthermore, during legislative debate on Act 10, one state senator actually stated that to pass Act 10 would “make it more difficult for President Obama to carry Wisconsin in the 2012 presidential election.”

The “First Amendment stands against attempts to disfavor certain subjects or viewpoints.” State restrictions that suppress speech, “whether by design or inadvertence,” are subject to strict scrutiny. The government must prove, under strict scrutiny, that “the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” In the cases which challenged Act 10 in federal court, the government has only proved that its legitimate interest satisfies a rational basis for the restrictions on “general employee” unions. But the impact of the law has been to restrict the ability of the unions, and thus the union members, to engage in the political and private arena. While the Supreme Court has previously upheld state restrictions on public sector unions that limit their speech, with Citizens United, if the “purpose and effect” of a law is to “silence entities whose voices the Government deems to be suspect,” then it must be overruled. The government should never be in the business of subsidizing or suppressing speech.

Wisconsin’s mistake wasn’t disallowing payroll dues deduction for some unions--the state should not participate in any kind of speech subsidy (albeit indirect) for any public sector unions. The government should allow public sector unions to freely engage in collective

Wisconsin and the Wisconsin Professional Police Association endorsed Walker's opponent. And the head of the Madison firefighters' union called for a general strike in response to Act 10, despite its employees' public safety classification. Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 643 (7th Cir. 2013)

Admittedly, the Unions do offer some evidence of viewpoint discrimination in the words of then-Senate Majority Leader Scott Fitzgerald suggesting Act 10, by limiting unions' fundraising capacity, would make it more difficult for President Obama to carry Wisconsin in the 2012 presidential election. While Senator Fitzgerald's statement may not reflect the highest of intentions, his sentiments do not invalidate an otherwise constitutional, viewpoint neutral law. Consequently, Act 10's prohibition on payroll dues deduction does not violate the First Amendment. Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 645 (7th Cir. 2013)

Citizens United v. FEC, 130 S. Ct. 876, 898
Citizens United v. FEC, 130 S. Ct. 876, 898
bargaining, but should neither sanction nor suppress (even indirectly) any speech by participating in payroll dues deduction for some groups and not others. The one restriction on collective bargaining which should be retained—the elimination of agency fees—actually operates to increase freedom in all sectors. Wisconsin protects the individual’s freedom of speech from possible union impingement by allowing public sector employees to bargain directly with the government for employment, or by joining a union which will bargain on his behalf.

Following a brief background of public sector unions in the state of Wisconsin, and of the cases challenging Act 10 in federal court, this paper will consider how the Supreme Court might act on appeal, in light of past decisions on state regulation of public sector unions, political speech and First Amendment rights. We will consider the impact of Citizens United on public sector union speech, and also look at the interplay of the interpretive styles of two outspoken and oftentimes diametrically opposed Supreme Court justices—Justices Scalia and Breyer. Finally, the paper will conclude with broader implications of state restrictions on union speech for individual freedom. Does curtailing the ability of the union to engage in collective bargaining and in political speech mean more or less freedom for the individual? The individual also has the right to associate—and “to speak includes the right to speak in association with other individual persons...It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf.” The association of individuals,“whether in a teacher’s union, a corporation, an environmental watch group, or a gun club, “cannot be denied the right to speak on the simplistic ground that it is not ‘an individual American.’”

A Brief History of Public Sector Unions and Collective Bargaining—in Wisconsin

The Wisconsin Labor Relations Act of 1937 marks the beginning of collective bargaining rights for private employees in Wisconsin. Collective bargaining rights for some, but not all, public sector employees would not be sanctioned by the legislature for another 20 years. As early as 1944, the board of education in Eau Claire, Wisconsin began formal negotiations with a union of its teachers. In 1959, with the passage of the Municipal Employees Relations Act (MERA), Wisconsin became the first state to recognize the right of some municipal employees to engage in collective bargaining. Notably, public safety employees were not extended collective bargaining privileges, and the law “limited the scope of collective bargaining to wages, hours and conditions of employment and did not require Wisconsin public employers to negotiate in good faith.”

MERA was the beginning of a sea change in the relationship between municipal, state, and eventually federal employees, and their respective levels of government in its role as employer. Executive Order 10988, signed by President John F. Kennedy in 1962, would adopt much of the language of MERA and open a new swathe of the population to union membership. However, membership in private-sector unions has declined to just 7% of those employed in the private sector, with so-called "right-to-work" states eschewing the "closed shops" as protectors of the worker in favor of reliance on the many federal and state anti-discrimination and safety laws (and the agencies exercising extensive oversight) that have found

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16 (Krendel & Samoff, 1977), pg. 82
17 Ibid., pg. 84
19 (Krendel & Samoff, 1977), pg. 85
their way into law.\textsuperscript{20} Public-sector unions are now the lifeblood and growth industry of the labor movement. 41\% of the nearly 20.5 million government employees belong to one of several unions, including the American Federation of State, County and Municipal Employees (AFSCME), the National Education Association (NEA), and the American Federation of Teachers.\textsuperscript{21}

Fiscal conditions in the state of Wisconsin led to several consecutive elections of politicians promising to tighten spending and end deficits. Some of those election promises have come to fruition, most controversially in the modifications of the relationships between the state and municipal governments and the unions representing government workers. In 2011, Governor Scott Walker and the Republican-majority legislature of Wisconsin passed the 2011 Budget Repair bill, known as "Act 10." Act 10 classifies public sector unions as either "public safety" or "general" employee unions. While "public safety" unions may continue to engage in collective bargaining much as they did before, "general" employee unions’ collective bargaining rights are now more restricted. The legislative, executive, and electorate-driven erosion of public sector union political clout was met with much resistance by Wisconsin-affiliated unions and their national headquarters. The legislative gymnastics and controversial recall elections that accompanied the passage of Act 10 are well-known to the people of Wisconsin and anyone else tuned in to labor issues in the spring of 2011. They are not fodder for this paper, except for the passing references to “entanglement[s] with partisan politics” made in the judicial opinions and trial documents.\textsuperscript{22} The most recent election (November 2012) found Republicans retaining their majority in the state Assembly and capturing another seat in the state Senate, confirming the

\textsuperscript{20} Title VII, OSHA, and agencies such as the EEOC, to name a few. (Factor, Mallory & Elizabeth Factor, \emph{Shadowbosses}, Center Street, 2012), pg. 9
\textsuperscript{21} (Factor, Mallory & Elizabeth Factor, \emph{Shadowbosses}, Center Street, 2012), pg. 9
\textsuperscript{22} \emph{Wisconsin Educ. Ass'n Council v. Walker}, 824 F. Supp. 2d 856, 876 (W.D. Wis. 2012).
people of Wisconsin’s desire to continue Governor Walker’s approach.\textsuperscript{23} However, the controversy continues in the courts.

Act 10 “dramatically curtails the associational and collective bargaining rights” of most, but not \textit{all}, Wisconsin public employees.\textsuperscript{24} Act 10’s dues deduction provisions differ depending on the \textit{type} of public employee, which is a change from previous law allowing any and all unions—including those who only represented a minority of employees and therefore could not engage in collective bargaining—to participate in the payroll deduction system.\textsuperscript{25} Under Act 10, dues deduction is only permissible for so-called “public safety employees.”\textsuperscript{26} “General employee” unions can only engage in collective bargaining on “total base wages,” and can no longer negotiate so-called “fair share agreements” to collect agency fees from represented non-members.\textsuperscript{27} Act 10 also requires that unions outside the “public safety employee” definition hold annual re-certification elections.\textsuperscript{28}

The impact on “general employee” unions has been more than “de minimis.” Union membership in the Wisconsin Educational Association Council (WEAC), for example, is down. Getting members to pay their dues in the absence of payroll dues deduction has also proved challenging.\textsuperscript{29} Overall union membership in Wisconsin declined from 13.3\% in 2011, to 11.2\%
in 2012, below the national average of 11.3%. That’s despite an increase in the number of persons employed in Wisconsin over the same period, from 2,538,000 to 2,605,000. The reduced ability to engage in collective bargaining also impacts the ability of the unions to speak by reducing their membership. Why join a union that isn’t permitted to speak as it did before? Without the automatic payroll dues deduction, the ability of the unions to collect dues and therefore fund actions (speech) in support of their members and their members’ interests is also severely impacted. The state of Wisconsin, in Act 10, basically picks and chooses which political speakers it wishes to support. When the state “establishes a system for employee payroll deductions for payment to various third parties, including labor unions,” it has created a nonpublic forum. The state may not engage in viewpoint discrimination when selecting who may use the non-public forum. “It is equally well established under the First Amendment that the public employer may not engage in political or viewpoint discrimination when choosing which payroll deductions are allowed.” Wisconsin articulated a “rational basis” for the differentiation between the types of public sector employee unions that was recently upheld by the 7th Circuit Court of Appeals. Yet is this a “regime” that allows a state “to select what political speech is safe for public consumption by applying ambiguous tests?”

30 Last year, 11.3 percent of U.S. workers belonged to a union. That’s half a percentage point lower than in 2011. Wisconsin’s union membership fell to about 11 percent last year. That’s lower than 2011, when union members made up more than 13 percent of the state’s workforce. American Federation of Teachers-Wisconsin President Bryan Kennedy says the decline is because of Act 10, which limits collective bargaining and places rules on union dues. “The union can’t bargain all the things they used to bargain and membership for those who still have their base wages negotiated by a union, they don’t have to pay for that. If you could get something for free, wouldn’t you?” Union workers do make more money on average than nonunion workers. Wisconsin State AFL-CIO Secretary-Treasurer Stephanie Bloomingdale says she’s worried that over time, wages could go down if there are fewer union workers, “When you have less and less people with the ability to speak out and say, ‘You know, company, you’re making a good profit here.’ All we want is for the workers to have a fair share of the overall pie.” Bloomingdale says the lack of bargaining contributes to the growing wage disparity between the workers and the company owners and shareholders. SEIU Wisconsin State Council President Mike Thomas says he’s concerned workers who are no long represented by unions may have a harder time moving up from the poor working class to the middle class.


32 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 660 (7th Cir. 2013)

33 Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 896
Act 10’s opponents describe the distinction between “general” and “public safety” employees as public safety “gerrymandering,” making it suspect. As a result, there are two cases making their way through the state and federal courts challenging the constitutionality of the act. Other states, to include Arizona, Michigan and possibly Ohio, are also making changes to their collective bargaining laws. This makes it very likely that the challenges in Wisconsin to Act 10 will reach the purview of the Supreme Court.

Unions, Free Speech, and Citizens United

Collective bargaining and agency fee disputes often reach the Supreme Court, and in the last two decades, the Court has ruled (unanimously at times) in favor of increasingly strict state restrictions on the ability of unions to spend agency fees and collect dues or fees through government-enabled payroll deductions. States may even do away completely with collective bargaining for public sector employees—the National Labor Relations Act leaves them free to do so. In *Ysursa v. Pocatello Education Association* (2009), the Supreme Court found that the First Amendment “does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression.” In the more recent *Knox v. SEIU, Local 1000* (2012), the court went even further, declaring “we see no justification for any further impingement” by unions on the First Amendment rights of nonmembers. The emerging general rule is that “individuals should not be compelled to subsidize private groups or private speech.”

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34 Wisconsin Educational Association Council, et. Al. plaintiff’s brief , 2012 WL3025287, pg. 24
36 551 U.S 177, 180
37 555 U.S. 353, 355 (2009)
38 132 S.Ct. 2277, 2295 (2012)
The emerging rule is not without dissent. Justice Breyer disagrees with the Court’s conclusions in *Ysursa* and with the standard of review used to determine whether laws which affect union speech, even indirectly, violate the First Amendment. Preventing unions from impinging on the rights of nonmembers shouldn’t prevent the unions from speaking on behalf of their consenting members. A law which “picks and chooses among political causes, prohibiting deductions that help one political party while permitting deductions that help another” is unfair and Justice Breyer believes it would be unconstitutional. Would that kind of distinction, which is just the sort of distinction that Act 10’s opponents see in the law, survive scrutiny under the Equal Protection Clause and the First Amendment? This is precisely the question raised by the Wisconsin cases. By acting *piecemeal* to dismantle the ability of some public sector unions to use payroll deductions and engage in collective bargaining, instead of treating all public sector unions alike, the Wisconsin legislature (and executive) seem to be paying political patronage to those select unions which supported the governor’s election. Groups of individuals who joined together to speak with one voice are being silenced in the name of political efficiency.

The looming question for the Court is the type of scrutiny it will apply to restrictions on union speech. The decision in *Citizens United* adds another wrinkle. There is a tension between the *Citizens United* decision and the opinions in *Ysursa* and *Knox v. SEIU Local 1000*, both of which increased the scrutiny on union expenditures when the spending went against the desires (and included the financial contributions) of individual non-consenting union members or non-members. *Citizens United* held that the “Government may not suppress political speech on the
basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”

The dissent in *Citizens* would limit the rights of the corporation to “speak,” and thus would limit unions. The majority and concurring opinions in *Citizens United* would give the corporation (and the union) the same speech rights as the individual--since the association is just a group of individuals, speaking louder by speaking together. This bumps up against the recent approach of the court to regulation of union speech. Under the banner of textualism, the Court has relied on rational basis review when considering state restrictions on union speech. Yet strict scrutiny must apply to “laws that burden political speech,” that restrict speech “based on the identity of the speaker” as they are “all too often simply a means to control content.”

Justice Kennedy’s majority opinion in *Citizens United* makes several seemingly noncontroversial statements. “The First Amendment provides that ‘Congress shall make no law...abridging the freedom of speech.’” He emphasizes that free speech is “an essential mechanism of democracy, for it is the means to hold officials accountable to the people.” The *people* are sovereign in a republic, and the “right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” In choosing the leaders of the government, those representatives of the people who will be stewards and spenders of taxpayer dollars, citizens must have the right to speak and be heard in order to make informed decisions. “Low information voters” do nothing to promote democracy.

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Collective bargaining between the public sector employees union and the government involves debate on how to spend taxpayer dollars. Collective bargaining is necessarily political speech when it involves taxpayer dollars. The government officials, elected by the political process, are empowered to determine how the government will collect funds in order to fund the government—which, of course, involves paying public sector employees.

The current “political climate” of Wisconsin is a good example of the tension between a legislative majority and an executive elected on campaign promises to rein in spending, and public sector unions whose members depend upon taxes for their livelihood. The public sector unions became the disfavored speakers. The legislature passed laws to restrict the speech of some public sector unions in order to save money. Yet *Citizen United* tells us that “the Government may [not] impose restrictions on certain disfavored speakers.” Restrictions which distinguish “among different speakers, allowing speech by some but not others,” are “prohibited.” Wisconsin “commit[ed] a constitutional wrong when by law it identifie[d] certain preferred speakers,” the “public-safety” unions, and allowed them to engage freely in collective bargaining while limiting another category of public sector unions.

In the cases challenging Act 10, the Wisconsin government’s proffered “rational basis” for the distinction between the different types of public sector unions is the ensuing danger to the public of strike. The danger of “public safety unions” going on strike is too great to impose the restrictions placed on the “general employee” unions. But if the act of engaging in collective bargaining between the public sector employees union and the government involves debate on how to spend taxpayer dollars, collective bargaining is necessarily political speech when it involves taxpayer dollars. The government officials, elected by the political process, are empowered to determine how the government will collect funds in order to fund the government— which, of course, involves paying public sector employees.

"The majority opinion of the 7th Circuit decision summarizes the Wisconsin legislature’s argument: “The Unions also label as ‘wholly implausible’ the legislature’s fear that a payroll prohibition on public safety employees would trigger an illegal strike. But rational basis review does not require the state to “produce evidence to sustain the rationality” of the law, provided the law has “some footing in the realities of the subject addressed by the legislation.” *Heller*, 509 U.S. at 320–21, 113 S.Ct. 2637. The state’s fear is rational, particularly considering the controversy surrounding passage of Act 10 and the Unions’ own admission before the district court that the effect of the payroll prohibition would be “catastrophic.” Consequently, the payroll dues prohibition survives rational basis review.” *Wisconsin Educ. Ass’n Council v. Walker*, 705 F.3d 640, 657 (7th Cir. 2013)
bargaining is political speech, then “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations,” nor on unions.\textsuperscript{51}

In his concurring opinion in \textit{Citizens United}, Scalia waxes eloquent on the right of the “association of individuals” to speak, saying that the speech of an association “cannot be denied...on the simplistic ground that it is not ‘an individual American.’”\textsuperscript{52} Scalia looks specifically to the text of the First Amendment, noting that “[its] \textbf{text offers no foothold for excluding any category of speaker}....We are therefore simply left with the question whether the speech at issue in this case is ‘speech’ covered by the First Amendment.”\textsuperscript{53} Is the ability of a union to speak protected? It is comprised of individuals who have chosen a leader to speak on their behalf—to speak to the government, to “use speech to strive to establish worth, standing, and respect for the speaker’s voice.”\textsuperscript{54} That is “covered” speech.

Justice Stevens’ concurring/dissenting opinion notes that “we have consistently approved laws that bar Government employees, but not others, from contributing to or participating in political activities.”\textsuperscript{55} Stevens goes on to explain that the option for unions and corporations to form a PAC or political action committee, in order to engage in “political speech,” is “constitutionally sufficient.”\textsuperscript{56} The government has a compelling interest in “‘preserving the integrity of the electoral process, preventing corruption, ... sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government,’ ” and maintaining “‘the individual citizen's confidence in government.’”\textsuperscript{57} Opening the floodgates to corporate expenditures outside the realm of the PAC is too dangerous. Quoting \textit{Pipefitters},

\textsuperscript{52} \textit{Citizens United v. Fed. Election Comm’n} 558 U.S. 310, 130 S. Ct. 876, 928
Stevens uses concerns about “robust use of corporate and union funds,” that do not come from voluntary contributions of either stockholders or union members, to justify his opposition to less-fettered restrictions on union or corporate speech.\textsuperscript{58} Stevens’ concern in the \textit{Pipefitters} footnote to \textit{Citizens United} is the “legislative” concern about “protect[ing] the dissenting stockholder or union member.”\textsuperscript{59} This echoes the “general rule” from \textit{Knox v. SEIU Local 1000}--that “individuals should not be compelled to subsidize private groups or private speech.”\textsuperscript{60}

The issue for the state of Wisconsin and the constitutionality of Act 10 is not protecting the speech of the dissenting union member or nonmember. By allowing individual employees to bargain directly with the government for the terms of their employment, without restriction, Wisconsin eliminates the need for agency fees. Employees may speak for themselves. Part of Act 10’s restrictions on collective bargaining are the prohibition on agency fees. Individual rights are protected and therefore we can move on to the more pressing question--the right of the unions to speak on behalf of their consenting members without artificial constraints.

Why join a union? On average, union members are paid better. They enjoy more benefits and higher pay even in states where collective bargaining with public employee unions is prohibited.\textsuperscript{61} Under Act 10, however, public sector unions in the “general employee” category are barred from engaging in collective bargaining for anything more than a cost of living

\textsuperscript{60} 132 S.Ct. 2277, 2295 (2012)
\textsuperscript{61} “Seven states in the US outlaw public sector collective bargaining, but employees in these states still join unions. Public sector workers join unions in other states even when unions are unable to obtain collective agreements. Using the Current Population Survey Merged Outgoing Rotation Group 2001-2010, we estimate union membership wage premium for public sector employees across states with different public sector bargaining laws. We find that unionism is associated with higher earnings even in states that outlaw public sector bargaining. Using the School and Staffing Survey for teachers, we find that a substantial and increasing proportion of school districts reach meet-and-confer agreements with teachers unions and that those agreements are associated with better retirement plans for teachers. The percentage of workers who join unions in a school district is associated with higher earnings and lower contract working days for union members in states that outlaw collective bargaining as well as in states that mandate bargaining, which suggests that density contributes to the success of unions in the absence of collective bargaining.” \textit{Public Sector Unionism without Collective Bargaining}, Richard B. Freeman (Department of Economics, Harvard University & NBER. Email: freeman@nber.org), Eunice S. Han (Department of Economics, Harvard University. Email: ehan@fas.harvard.edu), December, 2012
adjustment. This provides little incentive for individuals to join unions or to continue their membership. Furthermore, while saving money for the state in the short run, it may cost the government more in the long run, as it is far less efficient to deal with each individual teacher, for example, than to make contracts with a few representing the many. Beyond the collective bargaining, unions may have other “political speech” they wish to make. In its amicus brief to the *Citizens United* case, the AFL-CIO notes that 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 and “contract administration.”62 They encourage the court to “recognize no compelling governmental interest in criminalizing independent union electoral speech.”63 The amicus brief also mentions that unions can “amass large treasuries,” but without the “significant state-conferrd advantage of the corporate structure” (quoting *Communications Workers of America v. Beck*, 487 U.S 735, 746 (1988)).64 This hasn’t stopped the Wisconsin Educational Association Council (WEAC) from fielding large numbers of lobbyists and enormous amounts of capital in pursuit (legal pursuit) of its political goals.65

*Citizens United* found that the government may not, under the First Amendment, suppress political speech on the basis of the speaker’s corporate identity.66 If the speech of public sector

65 “School Choice Wisconsin has a total of five registered lobbyists, including organization president Jim Bender. But Bender says even with Gard and Fitzgerald on his side he's still fighting a lopsided battle. "Well I would look at it this way, when you take up the Wisconsin Association of School District Administrators, the school administrators, the business school administrators, Wisconsin Education Association Council, the teacher's union, they've got more than 20 lobbyists out there on the other side of the issue--we've got just a handful," countered Bender. "It's an expensive process," a FOX 11 Fact Check found School Choice Wisconsin spent $15,006 on lobbying efforts during 2011 the most recent budget year, accounting for a total of 198 hours of direct and indirect lobbying. The American Federation for Children spent $123,440 and 1,137 hours on lobbying. In comparison WEAC, Wisconsin Education Association Council spent more than $2.2 million on a wide variety of lobbying efforts including the voucher issue in 2011. The second highest amount spent out of all organizations in the state accounting for 10,642 hours. The Wisconsin Association of School Boards lobbyists racked up $378,000 accounting for 4,721 hours. [www.fox11online.com/dpp/news/local/on_assignment/big-money-plays-part-in-voucher-pitch](http://www.fox11online.com/dpp/news/local/on_assignment/big-money-plays-part-in-voucher-pitch)
66 *Citizens United v. Federal Election Commission*, 130 S. Ct. 876
unions engaged in collective bargaining is also “political speech,” the next logical step is to consider how individual members of the court have considered “union speech” in other cases. If the political speech of unions engaged in collective bargaining is to be given the same protections as other political speech, how can the Court reconcile the textualist interpretation of Scalia and his previous opinions on union speech? Several dissenting opinions of Justice Breyer, outlining a purposivist approach to speech, would use strict scrutiny to evaluate even indirect violations of the First Amendment. A shift to the persuasive purposivism theory of interpretation will use a heightened level of scrutiny to determine if infringements on union speech are unconstitutional restrictions on First Amendment expression. Next, we will examine these two interpretive styles and the 7th Circuit Court of Appeals decision on Act 10, and how these might play out in a Supreme Court showdown. Can Scalia’s textualist approach to union speech, which will be described below, meet in the middle with Breyer’s purposivism?

**Scalia on Unions: They Spend Other People’s Money**

The *Davenport* case begins with the premise that unions have “no constitutional entitlement to the fees of nonmember employees.” The Washington state law at issue required public-sector unions to obtain affirmative consent of nonmembers to spend their agency fees for political purposes. Justice Scalia points out the mistaken premise of the respondent union—that the state law restricts “how the union may spend ‘its’ money.” He clarifies that the union has “public-sector agency fees in [its] possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees.” In other words, Scalia is saying the state didn’t have to grant the union agency fees—the unions are lucky

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67 551 U.S. at 185
68 551 U.S. at 185
69 551 U.S. at 186
to get them. Thus the state law is “not fairly described as a restriction on how the union can spend ‘its’ money; it is a condition placed upon the union’s extraordinary state entitlement to acquire and spend other people’s money.”\(^{70}\) There is no suppression of ideas as “the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission.”\(^{71}\) The court disagrees with respondent’s contention that the law creates “unconstitutional content-based discrimination” by distinguishing between the use of fees for election-related expenditures or “collective bargaining” expenditures.\(^{72}\) The money is in the union’s possession via the “assistance of governmental coercion of its employees.”\(^{73}\) Since the government subsidizes the speech, it can make content-based distinctions.\(^{74}\) Justice Scalia also dispenses with the notion that the law is unconstitutional because it does not limit “equivalent election-related expenditures by corporations.”\(^{75}\)

Since Justice Scalia takes care to note in his majority opinion in *Davenport* that “unions have no constitutional entitlement to the fees of non-member employees,” then he would likely find, as the 7th Circuit did, that Act 10’s limits on the ability of a union to collect agency fees to be constitutional.\(^{76}\) He would probably find any state limit how the union spends the agency fees to be constitutional. “We have never suggested that the First Amendment is implicated whenever governments place limitations on a union’s entitlement to agency fees above and beyond what *Abood* and *Hudson* require.”\(^{77}\) The ability of the unions to collect dues is itself an

\(^{70}\) 551 U.S. at 187
\(^{71}\) 551 U.S. at 189
\(^{72}\) 551 U.S. at 187-8
\(^{73}\) 551 U.S. at 187
\(^{74}\) 551 U.S. at 188
\(^{75}\) *Davenport v. Washington Education Association*, 551 U.S. 177, 186 (2007)
\(^{76}\) *Davenport v. Washington Education Association*, 551 U.S. 177, 185 (2007)
\(^{77}\) *Davenport v. Washington Education Association*, 551 U.S. 177, 185
“extraordinary power” and “it would be constitutional for Washington to eliminate agency fees entirely.” Wisconsin has, for the general employee unions, done away with the payroll dues deduction and ability to negotiate for agency fees, and has reduced the scope of general public sector unions to collectively bargain. Following the cut and dry logic of Justice Scalia in the *Davenport* decision, Wisconsin’s decision to enact these limits is constitutional. When the plaintiffs in the Wisconsin cases argue the legislative purpose was to discriminate against the unions which did not support Governor Walker’s election, this means nothing to the textualist Scalia, who only looks at the meaning of the law as it was to be understood by those who would read it and follow it. Incremental limitations on the ability of unions to collect dues and fees is permissible since the state could do away with such agreements entirely.

In the last portion of the *Davenport* opinion, *not joined* by Chief Justice Roberts and Justices Breyer and Alito, Justice Scalia discusses whether the government can make content-based distinctions. Justice Scalia argues that the condition on the collection of agency fees (that they not be used for political purposes without affirmative consent) is constitutional. “We do not believe the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State’s general authorization allowing public–sector unions to acquire and spend the money of government employees.”

“Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission….In sum, given the unique content-based nature of

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78 *Davenport v. Washington Education Association*, 551 U.S. 177, 184
79 551 U.S. at 188
80 551 U.S. 177, 189
Section 760 does not violate the First Amendment. We emphasize…[w]e uphold Section 760 only as applied to public-sector unions…”  

Since the plaintiffs in the Act 10 cases argue that the distinctions between public safety and general employees and their ability to engage in dues deduction/collective bargaining amount to content-based discrimination, it is important to note that this is still an open question for the court. The dissenters in *Davenport* felt that the question of content-based discrimination and its First Amendment implications should not be addressed until “the lower courts have been given the opportunity to address them.”  

Wisconsin differs from Washington in the *Davenport* case because the limitations on collective bargaining and dues deduction are not viewpoint-neutral. The difference in the Wisconsin cases is that not all public-sector unions are treated alike—some are still able to “acquire and spend” the union members’ money and acquire agency fees without limitation. Others, the “general employee” unions, can no longer negotiate fair-share agreements (thus no more agency fees) and can no longer engage in payroll deduction for union dues. The legislature chose specific unions that had supported the election of the governor for special treatment and reduced the state’s facilitation of speech when it limited the rights of the general employee unions.

In a more recent Supreme Court decision, in June 2012, of *Knox v. SEIU Local 1000*, Justice Alito (joined by Justice Scalia) authored the court’s majority opinion. In *Knox*, the *Davenport* decision is one of several cited as precedent for giving non-members of unions an immediate chance to opt out of unexpected fee increases or special assessments required of

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81 551 U.S. 177, 190
82 551 U.S. 177, 192
workers in closed-shop workplaces. 84 “The general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail. Public sector unions have the right the under the First Amendment to express their views on political and social issues without government interference…. [but] employees who choose not to join a union have the same rights.” 85

The Supreme Court has moved in the direction of preserving the rights of individuals against impingement of their First Amendment rights by unions, but there is much left unsaid on the supposed impingement of union rights by government restrictions on collective bargaining. 86

As stated above in Knox, the public sector unions have the right to express their views on political and social issues. The question for the Supreme Court with regards to Act 10 is whether the state can create content-based distinctions, that have the actual effect of indirectly abridging First Amendment rights of public sector unions instead of treating them alike. If the majority opinion of Knox and the dissent of Ysursa were to coalesce, the result would not be the analysis of Scalia under Davenport. Rather, the content-based distinctions that abridge First Amendment rights of some public sector unions would be subject to an intermediate, heightened scrutiny analysis. This type of analysis would look to more than just historical precedent for justification—it would consider the legislative intent and purpose behind the law.

**Breyer: Captain of the “Logical Ship”** 87

Justice Breyer’s purposivist approach seeks to determine the actual purpose of a law, and the consequences that might flow from the law’s interpretation in a particular way. He uses this

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85 132 S.Ct. at 2295
86 132 S.Ct. at 2295
87 “I must jump the logical ship, however….” (in describing the “logic” of the majority’s opinion), Knox v. Service Employees International Union, 132 S.Ct. 2277, 2304 (2012).
approach with regards to the interpretation of state and federal statutes, treaties, as well as the Constitution itself. For Breyer, the correct approach to deciding any particular case lies in the most logical solution. By articulating an appropriate level of scrutiny, he is attempting to give the lower courts explicit guidance for future cases. The tests he suggests, however, are often found in the dissenting opinion.

In *District of Columbia v. Heller*, for example, he criticizes the court for failing to establish a level of scrutiny for deciding Second Amendment cases. Justice Breyer agrees with Justice Stevens’ dissenting opinion that the underlying purpose of the Second Amendment is a militia-related protection of the right to bear arms, and proceeds from there. He begins by asking “process-based” questions—what standard of review should the Court use, and “how high a protective hurdle does the Amendment erect?” Justice Breyer would adopt a type of “strict scrutiny” test for the Second Amendment, which in practice, would be an “interest balancing inquiry.” Rational basis review does not go far enough for him. “The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny).” He points out that while Scalia’s majority opinion (“unsupported suggestion”) calls such an approach “unprecedented,” the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.

Much like *Heller* provides Justice Scalia’s articulation of the textualist approach in the context of a judicial opinion, *Medellin v. Texas* demonstrates Justice Breyer’s purposivist

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In his dissenting opinion, Justice Breyer criticizes a feckless search by the majority for clear and plain “textual indication” in making its decision.\textsuperscript{92} Breyer articulates his disdain for the textualist method quite clearly, stating, “In a word, for present purposes, the absence or presence of language…proves nothing at all. At best the Court is hunting the snark. At worst it erects legalistic hurdles that can threaten” the application of, in this case, existing treaties.\textsuperscript{93} Breyer finds that while the text “matters very much” and that drafting history “is also relevant,” the “text and history, along with subject matter and related characteristics will help our courts” answer legal questions.\textsuperscript{94} While a “simple test” may not always be possible, “let alone a magic formula,” Justice Breyer aims to formulate a “context-specific judicial approach,” that as clearly as possible separates actions properly within the purview of the judiciary, the legislature or the executive.\textsuperscript{95} When the judiciary must act, the Supreme Court should look to the actual purpose of the law, then craft a test or apply an appropriate standard of review, so as to provide clear paths for the lower courts. Where the constitutional question requires more development, the case should be remanded.

Justice Breyer’s purposivist dissents can be summed up in his own words: “The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn”(emphasis added).\textsuperscript{96}

\textbf{7th Circuit Opinion and What’s in Store for Act 10}

\textsuperscript{92} 128 S.Ct. 1346, 1381(2008)
\textsuperscript{93} 128 S.Ct. 1346, 1381- 1382
\textsuperscript{94} 128 S.Ct. 1346, 1382
\textsuperscript{95} 128 S.Ct. 1346, 1382-1383
\textsuperscript{96} 128 S.Ct. 1346, 1389
The most recent federal opinion in the Act 10 cases held up the law in its entirety—
collective bargaining restrictions, payroll dues deduction discrimination, and annual
recertification requirements. However, in some of its reasoning, the majority overlooks a key
factor—that the court has “previously acknowledged the potential to camouflage impermissible
viewpoint discrimination by cloaking it in facially neutral classifications.” The unions argue
that Act 10’s payroll deduction provisions and its collective bargaining provisions violate the
First Amendment. The use of payroll deductions is like the use of a nonpublic forum. The
payroll deduction provision is not viewpoint neutral, because it discriminates between which
similarly situated public sector unions may use it. The unions also argue that since the First
Amendment applies, the court should not use rational basis review to decide whether the state’s
reasons for the legislation are legitimate, but instead should apply a higher level of scrutiny.

With regards to the question of whether the payroll deduction provisions violate the First
Amendment, the 7th Circuit Court of Appeals relies on Ysursa, saying that “the Supreme Court
has settled the question: use of the state's payroll systems to collect union dues is a state subsidy
of speech that requires only viewpoint neutrality.” As discussed above, Ysursa involved a
Washington state statute which had an across-the-board ban on the state subsidies of political
speech. The Supreme Court stated that a state is “under no obligation to aid the unions in their
political activities.” Relying on Ysursa’s decision that the state is not compelled to subsidize
speech, and arguing that the failure to include some public sector unions is merely a failure to
subsidize, the 7th Circuit court concludes that “the use of the state payroll system to collect
union dues is a state subsidy of speech. As such, the distinction between public safety and
general employees only violates the First Amendment if it discriminates on the basis of

97 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 670 (7th Cir. 2013)
98 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 645 (7th Cir. 2013)
viewpoint. Because we conclude that Act 10 is not viewpoint discriminatory, it does not implicate the First Amendment and requires only rational basis review.”

The 7th Circuit points out that the ”Bill of Rights enshrines negative liberties,” and that while a “publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights,” the Constitution does not *entitle* unions to those funds, however much they might enhance speech. The First Amendment, as it protects speech, means the government cannot erect barriers to free speech. The 7th Circuit opinion agrees with the district court finding that there are no state government created barriers to speak of, “that Act 10 diminishes speech only because it diminishes ‘the union's ability to fund its speech.’”

The state did not create the obstacle of “cost” and therefore the state is under no obligation to remove that barrier.

The distinction between which public sector unions may use the payroll dues deduction system, however “facially neutral” the opinion believes the difference to be, may be impermissible viewpoint discrimination camouflaged in “facially neutral language.” While the majority opinion finds the “distinction between public safety and general employee unions in Act 10 is facially neutral, and the Unions do not succeed in showing otherwise,” other circuit have found differently. They interpret the *Ysursa* decision to mean that an across-the-board ban on payroll dues deduction is permissible, rather than using the Supreme Court decision to justify the state *selectively subsidizing political speech.*

In the district of Arizona, the court found that strict scrutiny would apply to a law that only allowed certain public sector unions to utilize a payroll deduction. “By imposing its burdens on

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100 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 652-53 (7th Cir. 2013)
101 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 645 (7th Cir. 2013)
102 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 646 (7th Cir. 2013)
103 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 646 (7th Cir. 2013)
104 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 670 (7th Cir. 2013)
the political speech of some unions and other organizations and not imposing like costs upon other similarly-situated unions, or on other organizations that can use the funds for political activity, the law is underinclusive and discriminates according to speaker.”\textsuperscript{105} The Eastern District of Michigan, in evaluating a similar law, found that the \textit{Ysursa} decision “left open the level of scrutiny that would apply if a law of this nature was not evenhanded and discriminated on the basis of viewpoint or speaker...Prior precedent dictates that when the law discriminates against a small and identifiable group that is engaged in the business of speech, the Court may apply heightened or strict level scrutiny to determine whether a challenged regulation violates the First Amendment.”\textsuperscript{106} A law which allows some public sector unions, but not all, to use a government payroll deduction, discriminates against the banned groups on the basis of the speaker, or who is trying to use the deduction. In Wisconsin, the general employee unions outnumber the public safety unions; nevertheless, Act 10 discriminates against the general employee unions by denying them the use of a “nonpublic forum” of the government’s own creation.

The Michigan case details the many discriminatory effects of a law which discriminates on the basis of speaker for the use of payroll deductions, many of which have come to fruition in Wisconsin. “Precluding payroll deductions would cause a substantial drop in revenue. “[S]electively prohibiting public employers from providing [payroll deductions] to [public school] employees and their unions necessarily diminishes their speech—both [school] employee's ability to support their union financially, as well as the union's ability to fund its speech.” \textit{Id.} at 871. The amendment by its application would burden speech for school unions

\textsuperscript{105} \textit{United Food & Commercial Workers Local 99 v. Brewer}, 817 F. Supp. 2d 1118, 1126 (D. Ariz. 2011)

and no other. The Unions would have to divert resources designated for member advocacy and representation to the collection of dues in order to keep the Unions' speech efforts alive.”  

Despite the different viewpoints of the general employee and public safety unions, the 7th Circuit opinion believes the distinction between the types of unions that may use payroll deduction to be “facially neutral.” “Distinguishing between public safety unions and general employee unions may have been a poor choice, but it is not unconstitutional.” The court moves on to consider several union arguments “that Act 10 presents a facially neutral façade for invidious viewpoint discrimination.” First, that the public safety unions were so designated because of their political endorsement of Governor Walker. Second, that “Act 10 is underinclusive in a way that makes it ‘a mere pretext for an invidious motive.’” Third, that the statements of the state senator during the legislative debate on Act 10 demonstrate “an invidious intent to discriminate.”

In a very “textualist” bent, the court refuses to look beyond the text of the statute, to neither the effects of the distinction on the individual unions, nor to any evidence of motive from the legislative history, to find any reason that Act 10 is discriminatory. The court specifically “decline[s] the invitation” to “peer[] past the text of the statute to infer some invidious legislative intention.” They find that the legislature has the right to “selectively fund” groups—the winners of an election have that prerogative. The court states that if they do not permit this selective subsidizing, then any selective legislative funding decision would violate the First Amendment as viewpoint discriminatory. Such an interpretation of the First Amendment would

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108 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 656 (7th Cir. 2013)
110 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 649-50 (7th Cir. 2013)
111 Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 649-50 (7th Cir. 2013)
leave legislatures with the unpalatable choice of funding all expressive activity or none at all.”\textsuperscript{112}

“As such, the distinction between public safety and general employees only violates the First Amendment if it discriminates on the basis of viewpoint. Because we conclude that Act 10 is not viewpoint discriminatory, it does not implicate the First Amendment and requires only rational basis review.”\textsuperscript{113}

The opinion of Judge Hamilton concurs with some of the court’s decision (on some collective bargaining restrictions and the annual recertification requirement under Act 10), but parts with the majority on the payroll deduction provisions. Like the courts in Arizona and Michigan, he finds that the payroll deduction provision is to be likened to a nonpublic forum.\textsuperscript{114} He finds that the Supreme Court, in \textit{Ysursa} and other decisions, has left open the question of whether, as applied, a selective ban rather than an across-the-board ban on payroll deduction amounts to discrimination. Judge Hamilton finds that the Supreme Court “not only encourages but actually directs lower courts to consider claims that an invidious, viewpoint-biased motive lies behind a facially neutral restriction on access to a nonpublic forum.”\textsuperscript{115} To Judge Hamilton, the “most relevant corner of First Amendment doctrine here is the law applicable to a ‘nonpublic forum.’” Since the government, under \textit{Ysursa}, is “not required to open its property for expressive or communicative purposes, but chooses to do so for limited purposes, it has created a nonpublic forum.” The government, in controlling the forum, can only make “reasonable”

\textsuperscript{112} Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 649 (7th Cir. 2013)

\textsuperscript{113} Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 652-53 (7th Cir. 2013)

\textsuperscript{114} "In other words, \textit{Ysursa} applied First Amendment doctrine to uphold a broad ban on payroll deductions for union dues that did not discriminate on the basis of viewpoint. That much is common ground in this case. But on the contested issue in this case, the more important point is that \textit{Ysursa} reinforced the established law that viewpoint discrimination in a government's limits on access to a payroll deduction system can violate the First Amendment. 555 U.S. at 361 n. 3, 129 S.Ct. 1093. This remains true whether one prefers to speak in terms of a subsidy or a nonpublic forum. \textit{Ysursa} simply did not decide an issue like the one we face here, whether Act 10's facially neutral but selective limits on access to public payroll deductions are actually viewpoint-neutral or not.”

\textsuperscript{115} Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 663 (7th Cir. 2013)

\textsuperscript{114} Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 663 (7th Cir. 2013)

\textsuperscript{115} Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 663 (7th Cir. 2013)
distinctions “based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”\textsuperscript{116}

Hamilton uses as an example a payroll deduction system, set up by the state, that allowed deductions for the Democratic Party but no other. No one could disagree that such a system would violate the First Amendment. Therefore, when the state unreasonably limits access to a nonpublic forum, it violates the First Amendment.\textsuperscript{117} He doesn’t deny that the state is \textit{not required} to subsidize speech. But if the state chooses to do so, whether it is “providing benefits” or “subsidizing speech,” the First Amendment governs its decisions.\textsuperscript{118}

The Michigan court similarly argues that a law such as Act 10 violates the First Amendment when “by its application, not by its terms, [it] affects speech. A union by its very nature is in existence to engage in expressive speech.”\textsuperscript{119} The state, when it allows some public sector employees, but not all, to utilize payroll deduction, is “essentially targeting only one viewpoint and one set of speakers for discrimination,” “burdening speech” for some public employees to the “exclusion of other similarly situated public employees.”\textsuperscript{120}

\textbf{Conclusion}

“He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”\textsuperscript{121} The First Amendment protects the right to speak by protecting us from laws which would silence us. “Congress shall make no law....abridging the freedom of speech...” A law which permits the

\textsuperscript{116} Wisconsin Educ. Ass'n Council v. Walker, 705 F.3d 640, 660-61 (7th Cir. 2013)
\textsuperscript{117} 705 F.3d 640, 661-62 (7th Cir. 2013)
\textsuperscript{118} 705 F.3d 640, 661-62 (7th Cir. 2013)
government to pick and choose among speakers is dangerous. Preserving the right of your political opponents to voice their opinion is as critical as the fight to have your own voice heard.

The state of Wisconsin wears two hats--employer and rule-maker--when dealing with its public sector employees. The state cannot regulate corporations to restrict their political speech, but it can regulate corporations to protect employees’ off-duty speech. Public sector unions should be similarly unfettered. Laws which restrict, on a preferential basis, collective bargaining rights and the ability to utilize payroll deduction, are impermissible regulation of union political speech. The public sector union, whether it represents “public safety” or “general” employees, should not be restricted from engaging in political speech--whether that speech is the negotiation of an employment contract with a municipal government, or specifically election related. The (dissenting) individual’s freedom of expression is protected by the elimination of agency fees, or at the very least requiring unions to obtain affirmative permission before using those fees to fund political speech. By piercing the veil of a statute’s language, to reveal less-than even-handed treatment of similarly situated parties, we reveal its constitutional failure. If a state is going to “stop facilitating” public sector union speech for some but not all public sector unions, it is infringing on the speech of the “disfavored group.”

The better solution for Wisconsin, and all state governments, is to go the way of Washington and Idaho and get out of the business of subsidizing speech entirely. If there is no state created nonpublic forum, then the state avoids completely the perception and reality of sponsoring one particular viewpoint. Payroll dues deduction for union dues should not be an option for any public sector employee--or it should available for everyone. In line with the Knox decision, and in the interest of preserving individual employee’s freedoms, agency fees should be eliminated for all public sector unions. Both “public safety” and “general” employees
should be permitted to negotiate directly with their government employer. The winners take the spoils—and so the Republican executive and legislative dominated branches in Wisconsin are free to pass laws that target spending in other ways, that do NOT infringe on First Amendment rights.\footnote{For example, proposed legislation in Wisconsin would change the number of “high pay” years averaged for pension purposes from 3 to 5, in order to avoid the abuse of the system when public employees take massive amounts of overtime in their final years of employment, in order to boost their “high three average.” Such legislation is aimed at saving money over the long term, and is completely viewpoint neutral. \url{http://www.leadertelegram.com/news/daily_updates/article_Bdc6cf4d-9509-11e2-93b6-0019bb2963f4.html}}

Thomas Jefferson said, "I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it."\footnote{http://www.monticello.org/site/jefferson/quotations-liberty#_note-5} The preservation of “too much liberty” is preferable to the unjust and incremental loss of freedom by any segment of our society, for eventually, the loss of freedom will be equally visited upon everyone.