

Boom! Lawyered 204: The Racist Ideology Neil Gorsuch Will Use to Break Unions

Imani Gandy: Hello, fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire Radio podcast hosted by the legal journalism team that recommends that you lock yourself into a hermetic bubble until this vicious cold and flu season is over. After all, why interact with people when you could not interact with people? I'm Imani Gandy.

Jess Pieklo: And I'm Jess Pieklo. Rewire.news is dedicated to bringing you the best reproductive rights and social justice news, commentary and analysis on the web. And the Team Legal podcast is part of that mission so thank you so much for listening and subscribing.

Imani Gandy: Yes, thank you so much we truly appreciate it and today we are going to be talking about unions, or rather we're going to talk about the imminent decimation of unions thanks to none other than Neil Gorsuch. I'm sorry, you know I mean Neil Gorsuch. Earlier this week, the Supreme Court heard oral arguments in a case that labor advocates are worried could spell the end of public sector unions as we know them.

Jess Pieklo: The case is Janus versus the American Federation of State, County and Municipal Employees or AFSCME and at issue is whether or not fees that go to help to support collective bargaining efforts by the union are political speech. If they are, then the over 20 state laws that allow unions to collect those fees could end up tossed while conservatives usher in a national quote unquote, right to work regime. In this episode, we'll give you some history on public sector unions the crusade by conservatives to gut them. We'll also dive into the legal arguments in Janus and what a win for conservatives would mean for the rest of us. And we'll get to listener reviews so stay tuned.

All right, so let's talk about unions and this so called right to work nonsense at issue in Janus. 28 states, primarily in the south and the Midwest, have what the right calls right to work laws. Those are laws that make it illegal for unions to require things called agency fees from nonunion members.

Imani Gandy: Wait, wait, wait, wait, wait. Maybe we should back all the way up. Back it all up and explain what unions are really quickly. Our listeners probably know, but it never hurts to be thorough.

Jess Pieklo: No, that's a good idea. Why don't you do that for us Imani?

Imani Gandy: Okay, I will. It may shock you but left to their own devices, employers tend to shit on their employees. And so it was early in the industry era long before there were minimum wage laws or child labor laws or workplace health and safety laws, workers toiled in unsafe workplaces for 16 hours a day in some cases -- for almost no money. And some employers didn't even pay their workers money. They would pay them in essentially store credit. So the workers would dump their wages back into the company. That's a neat trick, right?

Jess Pieklo: Jesus Christ. Store credit in lieu of wages sounds like a GOP policy proposal coming to a state near you.

Imani Gandy: Yeah, it sure does. But pardon the interruption, you were saying about right to work laws?

Jess Pieklo: Okay, right. So let's get to this. Right to work laws.

Imani Gandy: Wait, wait, wait, wait, wait. I have to interrupt you again. What do you mean by right to work laws exactly?

Jess Pieklo: Imani, come on.

Imani Gandy: Well you can't see me now, Jessica, but I'm smiling very sweetly and batting my eyelashes at you. Bat, bat, bat, bat. That's the sound that my eyelashes make when they're batting.

Jess Pieklo: You're lucky I like you so much.

Imani Gandy: I know. So what are right to work laws exactly?

Jess Pieklo: Okay, here's how this works. And sit tight, because I'm going to lawyer this and give a long answer. Unions negotiate on behalf of employees, and usually a strong union is one that is made up of a lot, if not all, of the employees. The stronger the union, the stronger the employee negotiating power. But unions don't run on goodwill and unicorn dust. Like any organization they need money to function. Union dues pay for some of that action but only union members pay dues and joining a union is voluntary. So that means that not all employees will necessarily be union members. But, nonunion members still benefit from union work. Economists call this a free rider problem and it's exactly what it sounds like. These folks are free riding off the union's work without helping to support any of it.

So unions came up with agency fees as a way to address this and these are payments, in this case in the form of paycheck deductions, that every employee makes regardless if they're a union member or not. The unions use them to cover expenses of things like bargaining on behalf of the employees. The thinking is, everyone benefits from union negotiating whether a member or not. It's not like only union members get stronger benefits or pay. So states like Illinois have statutes that specifically say these kinds of payments are okay. Those are the laws that Janus in this case is trying to gut and replace with a right to work regime. So what is a right to work law? Those are laws that specifically make the kinds of payments I just talked about to the union illegal.

Imani Gandy: Okay, so can we talk about how quote unquote, right to work is such a bullshit framing? They make it sound like some constitutional imperative. Like every American has the right to work. It's just yet another example of the way the right uses clever framing to couch their regressive and dangerous policies as actually

good for Americans. Right to work enthusiasts say that the constitutional right to freedom of association protects workers and allows them to decide whether or not to become a part of a union. They say that it's unfair that unions can force employees to become union members and also force them to pay dues for services that they may not want or may not even support. They talk about quote unquote, right to work because it dovetails nicely with their endless blathering about liberty. But one thing that they don't want you to know about is the racist roots of the founder of this quote unquote right to work nonsense.

- Jess Pieklo: Well generally Conservatives don't like to talk about the racist roots of their nonsense which is why they're always yammering about how Democrats created the KKK, as if something like the Southern Strategy never happened.
- Imani Gandy: No shit. Listening to Conservatives yap about how Martin Luther King was a Republican makes me extremely stabby.
- Jess Pieklo: Oh my God, me too. It's like they'll take any opportunity to take information out of context and use it to cover for their racism. "We know MLK, he was a Republican just like us." Give me a break.
- Imani Gandy: It's so ridiculous. A lot of folks don't know that the quote unquote right to work movement was fueled by Texas businessman and noted white supremacist Vance Muse. That's Vance Muse as in Courtney B. Vance who is married to Angela Bassett and the band Muse. Vance Muse believed that the right to work would help crush unions and maintain segregation and white supremacy. He once said that, "Without the right to work," and this is an actual quote so just gird your loins. He said that, "Without the right to work, white women and white men will be forced into organizations with Black African apes whom they will have to call brother or lose their jobs."
- Jess Pieklo: Stop it. No. I'm sorry, what? He said what?
- Imani Gandy: Yes, he said, "Black African apes, white men and white women will be forced to work with Black African apes." And he also aligned himself with the KKK in order to oppose FDR's New Deal, as if the new deal was great for Black people in the first place but I digress. So back to these agency fees. You were mentioning that agency fees are fees that nonunion employees have to pay if they work at place that has union representation?
- Jess Pieklo: Yeah. So those fees cover costs of the unions who negotiate for things like paid sick leave and personal days and other benefits that the employees get even if they're not in the union.
- Imani Gandy: So agency fees basically prevent freeloaders.
- Jess Pieklo: Yep. I mentioned that part of the labor equation where people benefit from all the work the union does without paying any dues to help make that work possible. It's exactly that. Without agency fees, nonunion members of unionized workplaces can

still benefit from the higher wages and benefits guaranteed by collective bargaining contracts but they're not required to keep those efforts financially afloat.

Imani Gandy: Well that doesn't seem fair. If you're a nonunion worker who is benefiting from the union's work it seems like you should chip in something.

Jess Pieklo: You would think, right? But Mark Janus, the plaintiff in the Supreme Court case, argues that doing just that, chipping in something in the form of paying agency fees, violates his first amendment rights to freedom of speech and association. Janus says that by paying those fees he is being compelled to support a political organization just like if the state made him donate to the ACLU. The union counters by arguing that the fees are just fine under 40 years of Supreme Court law that has already looked at this issue. But conservatives have been coming for agency fees for a long, long, long time and they weren't going to let a little thing like judicial precedent and settled law get in the way from them trying to find a way to get rid of them. We'll talk about that history and more about the Janus case after the break.

Imani Gandy: Conservatives really hate unions and the fight in Janus is over 40 years in the making. So let's walk through that history just a little bit.

In 1977, there was case called Abood v. Detroit Board of Education. In that case, the Supreme Court upheld the maintaining of a union shop in a public workplace. In other words, the court said that unions could organize government workers. Put another way, the government could not bar or block its employees from forming a union and negotiating on their behalf if they wanted to. In Abood, public school teachers in Detroit wanted to overturn the requirement that they pay fees that are equivalent to union dues. Why? Because they opposed public sector collective bargaining and objected to the ideological activities of the union. That's more or less the same argument that Mark Janus is making now.

In Abood, the court not only ruled that public sector unions were okay, it said that nonmembers could be assessed dues for quote, collective bargaining, contract administration, and grievance adjustment purposes. But that objectors to union membership or policy may not have their dues used for other ideological or political purposes.

Jess Pieklo: In other words, under Abood, agency fees are fine and that's because the union is able to separate any political from nonpolitical speech and make sure that fees from nonmembers don't go to activities that would otherwise be considered political.

Imani Gandy: Exactly. And since Abood, the courts have developed law around how to tell what fees go to what activity. And Janus is trying to blow all of that up. It's kind of like what conservatives do when they whine about Planned Parenthood funding. Planned Parenthood receives federal funding in the forms of Medicaid reimbursements for preventive healthcare but conservatives are convinced that Planned Parenthood uses that federal funding for abortions. Now, it doesn't. It

should but it doesn't. And the organization has accounting systems in place to ensure that it doesn't.

Jess Pieklo: Right. Exactly. These are not amateur organizations, after all. And the only way conservatives' argument makes any sense is if you believe that anything a public sector employee union does for its employees is akin to lobbying and that all accounting should be able to happen on the back of an envelope.

Okay, so then four years ago the court looked like it would decide this fees issue in another case out of Illinois, Harris v. Quinn but they didn't. Instead they punted and ruled the employees in that case, Home Health Aides who usually take care of family members and are compensated by the state, were not full-fledged public employees.

Imani Gandy: So what do you mean when you say they weren't full-fledged public employees?

Jess Pieklo: Okay, well Abood related to public sector unions. The Abood court said that unions can organize government workers, but the workers in Harris v. Quinn weren't strictly public employees. They were partial public employees like contractors with the government. And so Abood did not extend to them. However, five justices led by Justice Sam Alito, including Robert Scalia, Kennedy and Thomas, suggested they were all down to overturn Abood. Why didn't they bite then and do it in Quinn? Who knows? Maybe Kennedy got cold feet and wanted to but figure he didn't have enough cover with the particular facts of the case.

Imani Gandy: So let's fast forward to 2016 where the court considered a case almost identical to Janus. That case was called Friedrichs v. California Teachers Association. Now, we were not kidding when we said that gutting public sector employee unions is a cause for the right wing. One might call it a cause celebre if you were French. At issue in Friedrichs was again whether a Abood should be overruled. Again. Because that is always the issue whether or not to fuck unions over.

Jess Pieklo: Friedrichs is Janus, basically, with teachers.

Imani Gandy: Right. And at the time Friedrichs was argued, it looked like conservatives had finally gotten the win that they'd been gunning for. And then Scalia up and died on them before the court could even issue its ruling. That left the remaining eight members of the court split so they issued a one-line order that said, "We give up." And basically punted Friedrichs back to the Court of Appeals, which again ruled that agency fees were constitutional.

Jess Pieklo: So conservatives have teed up Janus for their third crack at gutting public sector unions and we'll talk about that case when we're back.

Now that we got some of the legal history out of the way, let's dig into Janus.

Imani Gandy: Sorry.

Jess Pieklo: I mean if we have to.

Imani Gandy: I'm seriously five years old. Let's dig into Janus. Moving on.

Jess Pieklo: Mark Janus was upset about the roughly \$45 deduction from his paycheck that goes to the local branch of the AFSCME. That's the American Federation of State, County and Municipal Employees. The union that represents him. He works as a child support specialist in Illinois' Department of Healthcare and Family Services. He is also ideologically opposed to unions, so there's that, too.

Imani Gandy: Meanwhile, during all of this, Illinois is in the middle of a huge push to break public employee unions. A lot like Wisconsin was in 2010. I'm sure a lot of you remember back in 2010 when there was this right to work push in Wisconsin, and Democrats literally fled the state in order to avoid being forced to vote on that measure. It's a perfect storm situation to drive another challenge to Abood and conservatives jumped on it. Janus challenged the \$45 deduction arguing that it was akin to the state forcing him to speak, since the union lobbied for political activity like giving state workers raises that he disagreed with. Now let me repeat that. This is a man who disagreed with the state of Illinois giving workers like himself raises. Mark Janus says Abood was wrong because there's no distinction between bargaining with the government and lobbying the government. Both are political speech. He also says that Abood conflicts with other cases that subject compelled association and speech to heightened scrutiny.

Jess Pieklo: Hold up, wait a second. We should probably explain what heightened scrutiny is.

Imani Gandy: We sure should. So, the term scrutiny refers to judicial scrutiny, which is the legal term to describe just how hard a court is supposed to look and second guess a law with it is deciding whether that law is constitutional. There are three levels of judicial scrutiny: rational basis review, intermediate scrutiny, and strict scrutiny. I like to call rational basis review the meh, whatever, standard of review. To pass rational basis review, the law must be rationally related to a legitimate end. And that's a really, really easy standard to meet. The court basically will look at a law and say, "Meh, whatever."

Intermediate review is rational basis review but with a bite. It means that the law must quote, promote an important government interest and be substantially related to achieving that interest. Now if that standard sounds squishy to you, that's because it's really, really squishy. And while strict scrutiny is the most strict level of scrutiny, it's right in the name. It means the law must promote a compelling government interest and be narrowly tailored to achieve that interest. And a lot of you are probably familiar with strict scrutiny because that's the level of scrutiny that applies when you're dealing with things like race based classifications.

Here, Janus is complaining that he's being compelled to associate with the union and also being compelled to speak in favor of the union because he's being forced to pay union fees that are speech, essentially. These cases warrant a heightened level of scrutiny.

Jess Pieklo: The unions in the state of Illinois say Janus is wrong, though. They argue this isn't compelled association or speech like Janus claims. They also argue that Abood got it right on the constitutional balance here and so there's no need to apply a heightened scrutiny standard to the Illinois law like Janus wants the court to. They also note that the Supreme Court has held that when a state is acting as an employer, it has more leeway in regulating employee first amendment conduct, which is another reason why Janus should lose.

Imani Gandy: Janus is trying to make this about political speech because it forces the court into heightened scrutiny. His argument for overturning Abood depends on buying into the idea that issues like salaries, pensions, and benefits for government employees are inherently political. And so by bargaining on behalf of one side of that quote, political issue, union agency fees then pay for speech that is intended to influence the government's personnel policies. That's what makes it political speech according to Janus.

He says that requiring him to pay an agency fee is no different from requiring him to subsidize a group that lobbies the government on other issues like gun control for example. In Janus' world, this is all political speech. This is of course nonsense. It's more akin to paying taxes. Taxpayers are not allowed to earmark their taxes for things that they like. Taxpayers are also not allowed to refuse to pay taxes while continuing to use the stuff that taxes pay for. It's basically the same argument.

Jess Pieklo: It is. And if Janus can get the conservative majority to agree with him that these fees are speech, and remember this is the Citizens United court, then states have a much tougher case to make in defending laws that allow for these kinds of agency fees. And that's because of the first amendment protections against the government forcing people, in this case its employees, to speak a message they disagree with. Now Janus has lost on these arguments so far but I'm sorry it's not looking good for unions here given the fact that the court even took this case to begin with. And it did so with all of the justices already on the record except for one, Neil Gorsuch. During oral arguments, all eyes were on Gorsuch and amazingly he said nothing. And I've been in court with him before and he's normally really aggressive, and what that means is I think he probably has his mind made up. I don't know Imani, what do you think?

Imani Gandy: Yeah, I think it means that he's got his mind made up. I think that we've seen that Neil Gorsuch is trying to stake out a position as being farther conservative, farther to the right than Scalia, and Scalia was already onboard for decimating these public sector unions. I think we can safely say that Neil Gorsuch is going to vote like Scalia would have, and bye bye union fees.

Jess Pieklo: Yeah, I think it also means that Gorsuch knows that this is a political case and he knows that he's the deciding vote, like you said, and he's sitting in a stolen seat. McConnell even said that he's expecting payback more or less in the form of a decision against the unions here. And that would come just in time to make it even harder for those unions to participate in the 2018 elections. So he knows that this

vote could and probably will cement his legacy as a politician and not really a serious judicial mind.

Imani Gandy: I'm really not convinced that he's a really serious judicial mind in the first place. And it also may be just the easiest day that he's had on the job. All he had to do on Monday, which is when oral arguments were, was to show up and let Anthony Kennedy yell at everyone for a change.

So let's talk about what happens if Janus wins. It basically means the decimation of public sector unions. Public sector employees could choose to quit their unions and not pay union dues but unions would still be legally obligated to represent them. Now how's a union supposed to represent employees if those employees aren't paying for that representation? How are unions supposed to stay financially afloat?

Jess Pieklo: Well, they're not. That's the entire point, right? To decimate unions and a return to the glory days when employers could exploit their employees willy nilly.

Imani Gandy: Ain't capitalism grand? And let's not forget the racial implications here, because as per usual there are racial implications. There are over 7.2 million public sector union employees with black workers more likely than any other group to be union members. So this like almost everything is going to hit black workers hardest. Surprise, surprise.

Jess Pieklo: And as we mentioned at the beginning of the show, about two dozen states have laws like Illinois that allow for these kind of fees specifically. If Janus wins big, those laws could all be at risk for falling like dominoes which is exactly the point of the lawsuit. Republicans would love to gut not just public sector unions but private ones too. And then we can go back to the glory days of working 20 hours a day or parents choosing whether to send their kids to school or to work.

Imani Gandy: See people may think you're being hyperbolic right now but you're really not. After all, it wasn't that long ago, 2011 actually, that Newt Gingrich suggested that schoolchildren should also double as janitors, and that we need to relax our quote unquote truly stupid child labor laws. He actually said that. And I'm going to read this quote to you, so anyone who thinks that we are being alarmist can stop thinking that we're being alarmist and start freaking out with us, because this is seriously fucked up.

Jess Pieklo: So fucked up.

Imani Gandy: So here's what Newt Gingrich said, "You say to somebody, you shouldn't go to work before you're what, 14, 16 years of age, fine. You're totally poor. You're in a school that is failing with a teacher that is failing. I've tried for years to have a very simple model. Most of these schools ought to get rid of unionized janitors, have one master janitor and pay local students to take care of the school. The kids would actually do work, they would have cash, they would have pride in the schools, they'd begin the process of rising."

Can you believe that this man seems to think that if you're a poor student in a school that is quote unquote failing, that you should not only study as a student but double a janitor?

Jess Pieklo: I can. These people are the worst. Let's talk about Paul Ryan real quick. Now that Republicans have paid back their donors by passing this monstrosity of a tax bill, we've got Ryan talking about gutting Medicaid and calling it opportunity for those folks. I mean come on. This is the same tired welfare to work Orwellian bullshit that the Janus case and this right to work campaign is steeped in.

Anyways, we'll get a decision in the case by summer and right now I think it's a five to four win for the right to work folks with Kennedy writing the opinion.

Imani Gandy: Kennedy.

Jess Pieklo: Boo.

Imani Gandy: Boo.

Jess Pieklo: Hiss.

Imani Gandy: Hiss. Thumbs down.

So now's the part of the show where we read our listener reviews and sadly we only have one listener review. Just the one. So, America, I'm going to need you step up your game. You don't want to make me and Jess cry. You don't make me and Jess come over to your house and start banging on your door, pleading and crying for reviews and then drinking all the beer in your fridge.

Jess Pieklo: We might do that.

Imani Gandy: We really might. We have this review from JimmyJames64. The title is, Blog About the Law Without the Legalese. It's not technically a blog, it's a podcast but you know what JimmyJames, we're here for you and we're going to forgive the little error.

"Imani and Jess do a great job of breaking down the legalese and putting it in clear plain language that us non-lawyers can understand with clear examples showing the real life consequence, and they do it with jokes. Keep it up."

We will keep it up JimmyJames. We're going to keep it up for you and we're going to keep it up for all of our listeners. We're going to keep it up for the folks who are hanging out in our Facebook group, Boom! Lawyered. You should go check it out and join and you should leave us reviews. You should continue to listen to our podcast. You should go back and listen to our old episodes and you should I don't know, get involved. Scream, yell, shout, put your back into it.

Jess Pieklo: Make a sign.

Imani Gandy: Make a sign. Tattoo something on your shoulder. Wear a Captain Abortion outfit. Even though this episode had nothing to do with abortion, go ahead and throw that outfit on.

Jess Pieklo: And Captain Abortion's kind of always relevant.

Imani Gandy: It really is especially, and I'm just going to keep mentioning it until we get you into it one day on Instagram.

Jess Pieklo: The weather's warming up.

Imani Gandy: It really is. So thank you for listening. That's the end of our show and we'll be back in a couple of weeks with another episode of Boom! Lawyered.

Jess Pieklo: Thank you.

Boom! Lawyered is created and hosted by Imani Gandy and Jessica Mason Pieklo. The show is produced by Nora Hurley, our executive producer is Marc Faletti, and Rewire's editor-in-chief is Jodi Jacobson.