



AAUP CSU NEWSLETTER

March 2018

IN THIS ISSUE

- Opposing Bias, p. 1
- Janus and the War on Labor Unions: McConnell's Duplicity will Pay off when Gorsuch Pays it Forward, p. 3
- AAUP CSU, p.5
- How to Join the AAUP, p.5

OPPOSING BIAS

Stephen Mumme

The University's swift condemnation of the hate speech infused violence that accompanied Turning Point USA's campus appearance in January is much to be praised. President Tony Frank's blistering rebuke of the Traditionalist Workers' Party flyers—"A Nazi is a Nazi is a Nazi"¹—made national news, and made the campus proud. But the new campus Bias Reporting Hotline rolled out in the wake of these incidents, worthy as it is, deserves a little more reflection.

Let's begin with bias. Modern dictionaries define the term as prejudice informed by unreasoned or preconceived judgment.² The university's BRH defines a "Bias Related Incident" as "any conduct, speech, or expression, motivated in whole or in part by bias or prejudice that is meant to intimidate, demean, mock, degrade, marginalize, or threaten individuals or groups based on that individual's or group's actual or perceived disability (or ability), age, geographical background, citizenship or immigration status, ethnicity, race, sex, color, gender, genetic information, national origin or ancestry, sexual orientation,

parenting or pregnancy status, veteran status, first generation status, [or] socioeconomic status."³ Bias, as such, is not a hate crime, but may contribute as a motivating factor to such crimes. The BRH webpage encourages those who believe they are victims of bias to report such incidents, but cautions that offensive speech "is not necessarily a bias-related incident," and affirms CSU's commitment to free expression. Links to anti-bias websites are provided.

The BRH puts teeth into CSU's Principles of Community. What's not to like? Well, of course, there's much to like. Faculty leaders have long advanced the principles of tolerance and diversity on campus. But as with every administrative procedure there is some risk of unintended consequences. And that's where the potential for trouble lies.

¹ See, Scott Jaschik, "White Supremacists, in Person on Campus," *Inside Higher Ed*, February 5, 2018.

<https://www.insidehighered.com/news/2018/02/05/white-supremacist-group-angers-many-colorado-state-and-university-tennessee>

² See, Merriam-Webster online at, <https://www.merriam-webster.com/dictionary/bias>.

³ Bias Reporting Hotline, Colorado State University, website at, <http://supportandsafety.colostate.edu/incidents-of-bias>. Note that political bias (e.g. party identification, ideological orientation) is protected—hence, it is not on this list.

Take, for instance, the fact that faculty are particularly vulnerable to accusations of bias. The university's disclaimer to the contrary, quite a few students (and possibly some faculty) may have difficulty sorting out intentional and targeted bias from offensive but legitimate speech as delivered in a classroom setting. The lines are blurry here, particularly where human actions intersect with identity.

Take several hypothetical examples. Professor X, professor of Middle East Studies at a prestigious Massachusetts university, lectures on the politics of Israeli-Palestinian relations. She provides a detailed analysis of Israeli settlements policy with charts and photos and argues that recent developments are a clear violation of the spirit, if not the letter, of the Oslo Accords. A student immediately accuses her of anti-Semitism.

Or, professor Y, at a Western state land grant university, lectures on U.S.-Mexican relations, observing that under the strict terms of existing boundary and water treaties, a U.S. administration cannot build barriers along the border that would displace the riparian boundary without Mexico's consent. A student feels diminished and immediately accuses him of Mexican favoritism and anti-Anglo sentiment and files a bias complaint.

In another case, professor Z, a renowned medical expert in human sexuality at a prominent Midwestern private college, lectures on the biological complexity of gender identity, arguing that at the very least some individuals must be permitted to elect their own gender identity and that society should respect their choice. A highly devout student accuses the professor of anti-religious bigotry and files a charge of bias.

In each of the instances above these professors' are using reasoned argument fully protected by the mantle of academic freedom. By any reasonable standard their speech is unbiased.⁴ But students report the speech to the BRH. Then what?

And that's where another problem arises. It remains unclear from the BRH website just how complaints lodged against faculty will be handled. Presumably, they are communicated to Campus Public Safety, the Office of Equal Opportunity, or other competent administrative authorities. But, at this point, our knowledge concerning the handling of complaints against faculty, and procedures for assessing their merits, remains murky.

What seems sure enough is that those faculty addressing controversial issues are likely to be in the university's pro-active anti-bias cross-hairs. We can hope that doesn't happen, but only time will tell. And for the record, this writer is professor Y.

⁴ . And even if it were biased, it is most-likely protected short of engaging in patently discriminatory remarks. As Rodney Smolla writes, "Principles of free speech and academic freedom should certainly be understood to give faculty a large measure of independence in how they present materials in class on matters relating to race, sex, or sexual orientation. Viewpoint discrimination should not be permitted, even when the university regards the view espoused by the professor as repugnant." Rodney Smolla, "Academic Freedom, Hate Speech, and the Idea of a University," *Law and Contemporary Problems*, 53:3 (Summer 1990), at 221.

JANUS AND THE WAR ON LABOR UNIONS:
MCCONNELL'S DUPLICITY WILL PAY OFF WHEN GORSUCH PAYS IT
FORWARD⁵

Ray Hogler

In February 2018, the U.S. Supreme Court heard oral arguments in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, a case with profound implications for organized labor in this country. The litigation involves the question of whether public workers can “opt out” of paying union dues to their collective bargaining representative if they are not union members.

At the core of *Janus* is the proposition that individual liberties cannot be subordinated to any political coercion that conflicts with a person's values. If the Court upholds Mark Janus's claims, the case will alter the constitutional landscape of citizenship. No longer will we be obliged to support communal obligations, so a baker can refuse to sell a wedding cake based on a customer's sexual orientation, and others can refuse to pay taxes that build nuclear weapons.

Neil Gorsuch, Antonin Scalia's ideological clone, will furnish the swing vote. Gorsuch and the Gang of Four -- Kennedy, Thomas, Roberts, and Alito, are poised to trash four decades of precedent without any compelling reason. Alito will write the majority opinion, which will have all the doctrinal underpinnings and reasoned jurisprudence of a high school student's political science essay. What matters is the result, and the road to the result is unimportant.

How Culture Counts

Janus strikes a significant blow in the culture wars. We view worker collective action through deeply embedded cultural filters oriented either toward a “hierarchal-individualistic” or “collectivist egalitarianism” view of the world. The former emphasizes the importance of individual action and rewards, while the latter aims for an equitable distribution of wealth and social power. That social and political divide underlies the arguments in *Janus*.

The Supreme Court will decide *Janus* according to the majority's cultural leanings and not on any compelling constitutional doctrine. The changing rules about union security did not evolve from workers' dissatisfaction with unionism, but are part of a broader movement to undo political opposition to the power of corporate interests and their political puppets.

The Supreme Court's opinion in *Knox v. SEIU* in 2012 laid the groundwork for the continuing assault on collective action. In *Knox*, Justice Samuel Alito played the point man in setting aside a union dues assessment by floating the idea that public sector union members should be assumed to “opt out” of compulsory dues unless they specifically “opt in.”

⁵ A modified version of this essay is published on The Conversation's website at <https://theconversation.com/collective-action-is-unions-last-line-of-defense-and-supreme-court-is-on-verge-of-destroying-it-92389>.

The new rule, Alito argued, was grounded in First Amendment principles. In his reasoning by rhetorical questions, he pontificated:

Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues? An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.

Alito flips the rationale for collective action on its head. As the economist Mancur Olson showed in his classic study, collective action is the essential predicate of cooperation, and cooperators have strong incentives to enforce compliance from free riders. Free riding is the exception to social coherence, but Alito assumes that individuals will prefer to put their self-interest above the interests of the group.

Is *Janus* the Nail in Labor's Coffin?

Past cases involving public workers, such as the 2016 *Friedrichs* decision that evenly split the Court and upheld union security, pose no obstacle to a further dismantling of labor unions. As precedent, *Friedrichs* was the final gasp of the Court's liberal faction. While former president Obama attempted to fill Scalia's vacant seat on the Court, Senate Leader McConnell refused to consider Obama's nomination of a moderate candidate, Merrick Garland. Because Obama had the constitutional right to nominate a replacement for Scalia, McConnell's unjustified obduracy stands as an outlandish, and dangerous, tactic that may be reprised in the future.

Meanwhile, McConnell's strategy has paid dividends for Trump and his corporate friends, who have been rewarded with a more lucrative political environment. The correlation between wealth and labor shows that stronger unions are key to a more equitable distribution of national income. Researchers such as Thomas Piketty and his colleagues provide convincing evidence of those economic outcomes. It is undisputed that collective bargaining played a key role in the economic prosperity of the postwar era from 1950 – 1980. As union membership continuously declined from Reagan through Obama, middle class incomes likewise declined and provided the conditions under which Trump captured the Electoral College.

Union membership density in the private sector now stands at 6.5 percent of the workforce. In the public sector, that figure is 34 percent. Once *Janus* topples a central pillar of public union support by undermining the vital revenue stream of dues, those organizations will begin to atrophy like private unions. The losers in the process will be working class voters who elected Trump.

CSU CHAPTER OF THE AAUP

Mary Meyer, President, meyer@stat.colostate.edu, 491-5762

Ross McConnell, Co-President, rmm@cs.colostate.edu, 491-7524

Natalie Barnes, V-P for Non-Tenure-Track Faculty Affairs, Natalie.Barnes@colostate.edu, 491-6774

Dimitris Stevis, Secretary and Treasurer, Dimitris.Stevis@colostate.edu, 491-6082

Steve Mumme, Colorado Conference Co-President, Stephen.Mumme@ColoState.edu, 491-7428

Bill Timpson, at large Executive Committee member, William.Timpson@colostate.edu, 491-7630

Ray Hogler, at large Executive Committee member, Raymond.Hogler@colostate.edu, 491-5221

Mary Van Buren, at large Executive Committee member, mary.vanburen@colostate.edu, 491-3781

Facebook page: <https://www.facebook.com/CSUAAUP?fref=ts>

Website: <https://aaupcsu.org>

AAUP State Conference: <http://aaupcolorado.org>

HOW TO JOIN THE AAUP

To join the AAUP and our CSU chapter, sign up at the national AAUP site: <http://aaup.org>.

They will notify our chapter and we will be in touch.

