Casenote

Mandatory Fees No More!: *Janus v. AFSCME* Continues First Amendment Trend and Effectively Eliminates Union Power*

I. INTRODUCTION

For decades, labor unions have added value to the American economy by advocating for the rights of minorities and fair labor practices in the workplace.[1] The Supreme Court of the United States' recent decision in

*To my wife, Alex, thank you for your support and understanding as I worked on this professional endeavor. To my casenote advisor, Professor Patrick Longan, thank you for the direction in this project's development. To the Volume 70 Editorial Board and staff who have worked on this volume, thank you for your commitment to excellence. Finally, to my parents, Mel and Steve, thanks for all you do. This would not be possible without all of you.

1. *Our Labor History Timeline*, AFL-CIO, https://aflcio.org/about/history (last visited Dec. 19, 2018). Unions have made significant strides in the promotion of rights of women, children, and immigrants in the workplace. *Id.* Further, unions in the United States have existed locally in the crafting industries (shoemaking, printing, tailoring, and so forth) of large cities such as Philadelphia and New York since the 1790s. FLORENCE PETERSON, AMERICAN LABOR UNIONS: WHAT ARE THEY AND HOW DO THEY WORK 1 (1945). These unions looked similar to what exists today as craftsmen had the ability to bargain over wages, hourly pay, and boycott terms. *Id.* Sometimes unions, which were normally restricted by city, even sent money to organizations in other cities to assist in striking efforts. *Id.* Though unions may have existed, the requirement that an employer recognize an employee's right to join a union was introduced much later, only two years prior to the enactment of the National Labor Relations Act (NLRA) through the National Industrial Recovery Act (NIRA) of 1933. JULIA E. JOHNSON, COLLECTIVE BARGAINING: THE REFERENCE SHELF 3–4 (Julia E. Johnson ed., 1st ed. 1935); National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935); National Industrial Recovery Act, Pub. L. No. 107-217, 48 Stat. 195 (1933). Section 7(a)(1) of the NIRA reads in parts that "employees shall have the right to organize and bargain collectively through representatives of their

Janus v. American Federation of State, County, & Municipal Employees, Council 31[2] has the potential to undercut the value contributed by labor unions. In *Janus*, the Supreme Court analyzed the fee structure of public sector labor unions, holding that the collection of mandatory union fees violated the employee's First Amendment[3] free speech rights.[4] The Court's decision in *Janus* overruled forty years of precedent and changed the structure of fee collection in public-sector unions across the nation.[5] The new structure has significant impact on national labor law, the framework of unionization fee collection, and the power of unions to advocate effectively for their members.[6] Furthermore, the decision in *Janus* represents a continuation of the Supreme Court's affirmation of First Amendment rights.[7]

II. FACTUAL BACKGROUND

Mark Janus, the petitioner in *Janus*, was employed for more than a decade at the Illinois Department of Healthcare and Family Services as a child support specialist.[8] He and other public employees were represented by the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME).[9] AFSCME exclusively represented more than 35,000 state workers in Illinois.[10] Janus chose not to join AFSCME because he opposed AFSCME's public policy endeavors and believed that their collective bargaining strategy was ineffective given the Illinois economy.[11] Regardless of his opposition to

own choosing." National Industrial Recovery Act, 48 Stat. 195, 198. This section "confuse[d] and obstruct[ed] the true course of collective bargaining," such that the National Labor Relations Act had to be introduced to clarify what rights were conferred. JOHNSON, *supra*, at 3.

2. 138 S. Ct. 2448 (2018).

3. U.S. CONST. amend. I.

4. *Janus*, 138 S. Ct. at 2459–60.

5. *Id.*

6. *See infra* Section V.

7. *See* Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J. L. & POL'Y 64, 64–65 (2016).

8. Mitchell Armentrout, *Mark Janus Quits State Job for Conservative Think Tank Gig After Landmark Ruling*, CHI. SUN TIMES (July 20, 2018), https://chicago.suntimes.com/ news/janus-afscme-illinois-policy-institute-job-ruling-fair-share-union-dues/; *Who is Mark Janus?,* STAND WITH WORKERS, https://standwithworkers.org/mark-janus/ (last visited Dec. 19, 2018).

9. STAND WITH WORKERS, *supra* note 8.

10. *Janus*, 138 S. Ct. at 2461.

11. *Id.*

their work, Janus was required to pay $44.58 per month to AFSCME as a part of his "chargeable" nonmember union fees.[12]

The Illinois Public Labor Relations Act[13] permitted public employees to unionize, and if a majority of the employees in a public sector wanted to be represented by a particular union, that union was designated as the sole representative of all employees.[14] Once a union was designated as the representative, it could "negotiate with the employer on matters relating to 'pay, wages, hours[,] and other conditions of employment.'"[15] Under Illinois law, public employees were forced to subsidize unions through chargeable fees regardless of the position that they took to the union's activities.[16] The chargeable fee or "agency fee" was based on the percentage of union dues that unions put towards "collective bargaining."[17] The agency fee excluded the percentage of dues that would be used for the union's political and ideological projects, also known as "non-chargeable expenses."[18] Chargeable expenses were taken out of the nonmembers' paycheck automatically and nonmembers were not required to consent to the fees being deducted.[19]

Janus's complaint suggested "that all 'nonmember fee deductions are coerced political speech' and that 'the First Amendment'" protects from this type of coercion.[20] The United States District Court for the Northern District of Illinois granted a motion to dismiss by the respondent, the Governor of Illinois, and the United States Court of Appeals for the Seventh Circuit affirmed.[21] Janus appealed from the court of appeals judgment and the Supreme Court of the United States granted certiorari.[22]

12. *Id.* at 2462. Collective bargaining dues are generally referred to as "chargeable" if nonpolitical and "nonchargeable" if put towards political and ideological activities. *Id.* at 2461.

13. 5 ILL. COMP. STAT. 315/6(a) (2018).

14. *Janus*, 138 S. Ct. at 2460.

15. *Id.* (alterations in original) (quoting 5 ILL. COMP. STAT. 315/6(a)).

16. *Id.*; STAND WITH WORKERS, *supra* note 8.

17. *Janus*, 138 S. Ct. at 2461.

18. *Id.*

19. *Id.*

20. *Id.* at 2462.

21. *Id.*

22. *Id.*

III. LEGAL BACKGROUND

A. The Creation of the Statutory Right to Unionize and Its Framework

Congress created an employee's right to unionize through the enactment of the National Labor Relations Act[23] in 1935.[24] The NLRA was designed to encourage fair labor practices by addressing the employer's failure to accept collective bargaining procedures, which in turn led to economic obstruction and an inequity of bargaining power between employer and employee.[25] The goal of the NLRA was to balance the power dynamics within labor relations and to prevent labor disputes.[26] The legislature believed that this balancing would primarily come through union organization, and this intent was codified in 29 U.S.C. § 157[27] which stated that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining."[28]

A 1947 amendment to the NLRA created the National Labor Relations Board (NLRB), [29] an entity that had the power to enforce the NLRA through "the investigation of charges and the issuance of complaints."[30] The NLRB had "jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level," which, defined broadly, covered "non-government employers with workplace[s] in the United States, including non-profits,

23. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

24. 29 U.S.C. § 151 (2006).

25. *Id.*

26. Membership in the American Federation of Labor, the largest union before the National Labor Relations Act was enacted, grew rapidly in the years prior to enactment, growing from 40,000 members in 1881 to 265,000 members in 1896. LEO WOLMAN, THE GROWTH OF AMERICAN TRADE UNIONS 1881–1923, at 31–32 (Wesley C. Mitchell et al. eds., 1st ed. 1924). In this time of rapid growth, labor disputes existed and were indeed tumultuous; employers were allegedly interrogating and blacklisting members of unions for their participation, which led to violent striking in the 1930s. *National Labor Relations Act (1935)*, OURDOCUMENTS.GOV, https://www.ourdocuments.gov/doc.php?flash=false&doc= 67# (last visited Dec. 19, 2018); *Depression Era: 1930s: 'Bloody Thursday' & Other Labor Strikes*, PICTURETHIS, http://picturethis.museumca.org/timeline/depression-era-1930s/poli tical-protest/info (last visited Dec. 19, 2018).

27. 29 U.S.C. § 157 (2006).

28. *Id.*

29. 29 U.S.C. § 159 (2006).

30. 29 U.S.C. § 153 (2006).

employee-owned businesses, labor organizations, non-union businesses, and businesses in . . . 'Right to Work' [states]."[31]

The NLRA and NLRB left the regulation of labor relations of state and local government to the states in all but a few labor sectors,[32] establishing a framework for widespread unionization and instilling principles that influenced court decisions for the next ninety years.[33] Prior to the enactment of the NLRA and NLRB, Congress enacted the Railway Labor Act (RLA)[34] in 1926 as a way "to avoid any interruption to commerce . . . to forbid any limitation upon freedom of association among employees or any denial . . . of the right of employees to join a labor union."[35] The RLA created a specific right to unionize for employees in the railway (and later in the airline) industry but did not create a general right to unionization for employees of other industries.[36] The NLRA and the RLA were enacted for the similar purposes of creating an employee's right to unionize; the NLRA and the NLRB gave states the ability to create labor laws, while the RLA gave the federal government the power to regulate national labor.[37] While these statutes seem far removed from the issue presented in *Janus*, they were integral to the early development of labor unions.[38]

B. Development of Labor Unions' Underlying Policy Considerations

Railway Employees' Department v. Hanson[39] was among the first cases to question whether mandatory union fees were permissible under the First Amendment.[40] The Supreme Court of the United States held

31. *Jurisdictional Standards*, NAT'L L. REL. BOARD, https://www.nlrb.gov/rights-we-protect/jurisdictional-standards (last visited Dec. 19, 2018).

32. DOUGLAS W. HALL, KEY DIFFERENCES AND SIMILARITIES BETWEEN THE RAILWAY LABOR ACT AND ITS YOUNGER COUSIN, THE NATIONAL LABOR RELATIONS ACT 1 (2017), http
s://www.americanbar.org/content/dam/aba/events/labor_law/2017/11/conference/papers/Hall-Key-Differences-and-Similarities-Between-the-Railway-Labor-Act-and-Its-Younger-Cousin-the-National-Labor-Relations-Act.pdf. The RLA is older than the NLRA, and as such the RLA continued to regulate the railroad and airline industries. *Id.* The reasoning is typically attributed to the strong union presence in the railroad and airline industries as opposed to the anti-union sentiment in many others. *Id.*

33. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223 (1977).

34. Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified at 45 U.S.C. §§ 151 to 165 (2018)).

35. 45 U.S.C. § 151(a) (2018).

36. 45 U.S.C. § 151.

37. Railway Emps.' Dep't v. Hanson (*Railway*), 351 U.S. 225, 232 (1956).

38. *See Janus,* 138 S. Ct. 2461.

39. 351 U.S. 225 (1956).

40. *Id.* at 236.

in *Railway* that the requirement to financially support unions who collectively bargain on employees' behalf did not violate the First Amendment.[41] The plaintiff in *Railway* argued that union shop agreements force political and ideological associations with the unions, thus violating the plaintiff's First Amendment rights.[42] Further, the plaintiff argued that the RLA violated the Nebraska Constitution's[43] right to work provision.[44]

In the *Railway* majority, the Supreme Court rejected the plaintiff's theory, explaining that mandatory union fees were no more infringing upon the plaintiff's First Amendment rights than mandatory state-sanction admission to the state bar.[45] The Court also preemptively determined that should there be additional components or conditions imposed upon mandatory union members, the Court could then conclude that the employee's First Amendment rights had been violated.[46]

The Supreme Court of the United States limited the *Railway* decision in *International Ass'n of Machinists v. State*.[47] In this case, the Court explained that it only meant for the allowance of mandatory union membership should there not be a showing that the membership fees were being used for political purposes.[48] The Court concluded that mandatory union fees were permissible under constitutional scrutiny because of the fees' public policy benefits, namely eliminating "free riders" and promoting equal representation.[49] These policy concerns were important to the Court in *International Machinists*, and the "free rider" problem in particular was decisive due to a growing concern that employees could enjoy the benefits of the union's collective bargaining efforts without making monetary contributions towards the funding of

41. *Id.* at 238.

42. *Id.* at 228.

43. NEB. CONST. art. XV, § 13.

44. *Railway*, 351 U.S. at 227–28.

45. *Id.* at 238. Interestingly, a short essay by the President of the Michigan state bar brings this claim up in the wake of the decision in *Janus*. *See* Donald G. Rockwell, *To Be or Not to Be: That Is the Question Confronting the Mandatory Bar*, 97 MICH. B.J. 8 (Aug. 2018).

46. *Railway*, 351 U.S. at 238. For example, should the union force a member to support the union's political interests through a membership fee, the member's First Amendment rights are violated; however, no such argument to that effect was made in this case, and the Court did not address it on its own. *Id.*

47. 367 U.S. 740, 742 (1961).

48. *Id.* at 748–49.

49. *Id.* at 761.

those endeavors.[50] In determining that mandatory union fees were not a violation of an individual's First Amendment rights, the Court realized that it was deciding between "critical issues of individual right[s] versus collective interests."[51]

The concern about individual rights versus collective interests was abated by the Court's recommendation that the right union fee structure could avoid this problem altogether.[52] The Court suggested two structures,[53] which collectively represented major steps towards a modern structure.[54]

C. Abood *Affirms Policy Considerations and Adds New Employee Requirement*

Ultimately, the "free riding" concern would remain a fixture of the reasoning behind mandatory labor union fees for the next fifty-six years.[55] In 1967, the Detroit Federation of Teachers (Detroit Union), was certified under Michigan law[56] as the exclusive representative of teachers employed by the Detroit Board of Education (Detroit Board).[57] The Detroit Union and the Detroit Board made an agreement that included an "agency shop" clause[58] requiring that every member either become a member within sixty days (paying full dues in the process) or pay a service charge equal to the amount of the union dues.[59] In 1969,

50. *Id.* at 762.

51. *Id.* at 767.

52. *Id.* at 774–75.

53. The first suggested structure explained that the courts could enjoin unions against expenditures for political activities opposed by the complainant in the proportion of total expenditures used for political activities to the union's total budget. The Court proposed a second remedy, where "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he opposed." Unions later adopted the second of these options. *Id.*

54. *Id.*

55. *Janus*, 138 S. Ct. at 2466.

56. MICH. COMP. LAWS § 423.211 (2018).

57. *Abood*, 431 U.S. at 211–12.

58. The opinion in *Abood* uses the language agency shop, which is a general term describing union agreements; what is described in the opinion, however, is technically a "union shop" agreement. In a union shop an employer can hire a worker who is not a member of a union, but that worker must become a member of the union as a requisite to continue working. *Union Shop*, BLACK'S LAW DICTIONARY (4th ed. 1968). This is distinguishable from a "closed shop agreement," which requires that "[a] worker must be a member of [a] union as condition precedent to employment." *Closed Shop*, BLACK'S LAW DICTIONARY (4th ed. 1968).

59. *Abood*, 431 U.S. at 212.

Abood and other teachers filed an action in the state trial court alleging that they were unwilling or had refused to pay the dues as described because they were in opposition to the collective bargaining of the Detroit Union.[60] The trial court granted the Detroit Union's motion for summary judgment, concluding that as a matter of law a clause mandating participation does not violate the United States Constitution.[61]

On appeal, the Michigan Court of Appeals concluded that the trial court had failed to properly consider whether the compulsory service charges to further "political purposes" was constitutionally valid.[62] The Michigan Court of Appeals reversed and remanded, and after the Michigan Supreme Court denied review, the Supreme Court of the United States granted certiorari.[63]

Relying on *Railway* and *International Machinists*, the Supreme Court considered prior use of the RLA, focusing on whether the use of compulsory union dues for political purposes violated the act itself while noting that an injunction may be too harsh.[64] In the holding in *Abood*, the Supreme Court determined that the policy considerations were too important to be overruled and that the principle of exclusive union representation underlying both the NLRA and the RLA was central in the congressional structuring of labor relations.[65] As the majority opinion later noted, the "interference [caused to the First Amendment by the imposition of mandatory labor fees] . . . is constitutionally justified by the legislative assessment of the important contribution of

60. *Id.* at 212–14.

61. *Id.* at 214–15.

62. *Id.* at 215.

63. *Id.* at 215–16. By way of background, it is important to note that leading up to *Abood* there was a major discussion occurring around the future of public sector educator unions. Stanley Elam, *Teachers and Labor Unions, in* 35(5) AMERICAN LABOR TODAY 47–52 (Herbert L. Marx, Jr. ed., 1965). The two major education labor unions, the American Federation of Teachers (AFT) and the National Education Association (NEA), were trying to rally support around their ideas of what educator union membership should look like. *Id.* at 47–48. The AFT argued that traditional union ideals surrounding blue-collar values was the best way forward, while the NEA believed in the power of turning teachers into a "professional" job. *Id.* at 48. Interestingly, most teachers in the public sector came from blue-collar backgrounds but were trying to affiliate with white collar ideals as a part of an upwardly mobile group. *Id.* at 50. Union membership was appealing to educators because educators typically received low pay and had poor public perception (many viewed themselves as "more nearly mice than men") but did not fit neatly into the traditional union mold because it was seen as a way into elite professional roles. *Id.* at 48.

64. *Abood*, 431 U.S. at 219–20.

65. *Id.* at 220.

the union shop to the system of labor relations established by Congress."[66]

The plaintiff advanced the argument that collective bargaining in the public sector was inherently political and as such required a different result from *Railway* and *International Machinist*.[67] The Court rejected this theory, however, saying that a public employer was distinguishable from a private employer for a variety of reasons, especially because of the failure of public-sector employers to be guided by profits.[68] Further, the Court reasoned that public-sector employees were less likely to "act as a cohesive unit" and were therefore less restrained by the necessity for collective bargaining.[69] Finally, the Court explained that public-sector employers were inherently political, and the existence of a union itself was a political concept.[70] The Court explained that because something was political in an isolated sense does not overcome the need for uniform collective bargaining.[71] In conclusion, however, the Court doubled back on the distinctions drawn between public and private employees, saying that both types of employees had the same freedoms and that the differences between them did not translate into different applications of the First Amendment.[72] There was one significant issue that was present in *Abood* that the Court determined was not already decided by *Railway* and *International Machinists*. The issue was whether using public union dues for political and ideological purposes unrelated to the collective bargain process violates the First Amendment.[73] The Court determined that this was a violation of the public sector employee's constitutional rights because the compulsion to make contributions for political purposes went against the notion that the "individual should be free to believe as he will . . . rather than be coerced by the State."[74] In order to either pay proportionately or receive restitution for their compelled monies, employees must have made known to the employer that they disapproved of their funds being used for political purposes.[75] "[An employee's] [d]issent," the Court reasoned,

66. *Id.* at 222.
67. *Id.* at 227.
68. *Id.*
69. *Id.* at 228.
70. *Id.* at 228–29.
71. *Id.* at 229–30.
72. *Id.* at 232.
73. *Id.* at 232–33.
74. *Id.* at 235.
75. *Id.* at 238.

"is not to be presumed."[76] In conclusion, *Abood* confirmed the holdings of *Railway* and *International Machinists* while adding an additional requirement for employees to ensure that their union representatives were aware of their dissatisfaction with the use of their funds in furthering the union's political endeavors.[77] This represented a major shift in the context of national labor law as employees now had an obligation to inform the union of their dissent to the use of their fees in political endeavors; while the union was the sole representative in the bargaining process for the employees relative to the employer, employees were left to represent themselves relative to the union.[78]

*D. Post-*Abood *Considerations: Modern Developments*

One of the first major decisions in the post-*Abood* era that considered the question of mandatory public union dues was *Chicago Teachers Union, Local No. 1 v. Hudson*.[79] The Court in *Hudson* considered the constitutionality of the procedure that the Chicago Teachers Union (Chicago Union) adopted to determine how to respond to nonmembers' objections to the manner of determining percentages of nonmember union fees.[80] The Chicago Union was acting as the exclusive collective-bargaining representative for the Chicago Board of Education's (Chicago Board) employees.[81] Despite 95% of the Board's employees being listed as members of the Chicago Union, the Chicago Board was concerned with what it perceived as a free-rider problem.[82] To alleviate this, the Chicago Board and the Chicago Union installed measures designed to deduct "proportionate share payments" from the paychecks of nonmembers, which were assessed at 95% of union dues.[83] This fee was assessed by the Chicago Union by putting the expenses for noncollective bargaining and dividing that by the total expenses for the

76. *Id.*

77. *Id.*

78. This development was not surprising, as one of the "significant change[s] . . . [of] the 1960s . . . [was] the new attitude of the individual union member towards his labor union." Herbert L. Marx, *The Union Member Speaks Up, Editors Introduction, in* 35(5) AMERICAN LABOR TODAY 53 (Herbert L. Marx, Jr. ed., 1965). Marx contends that as labor unions grew in power, the individual left the union to be "his protector and champion in dealing with 'the boss,'" but forced the member to deal with the union itself at arm's length. *Id.* Interestingly, Marx's insight mirrors the holding in *Abood* despite being published over ten years earlier. *Id.*

79. 475 U.S. 292 (1985).

80. *Id.* at 294.

81. *Id.*

82. *Id.*

83. *Id.* at 294–95.

year, after which point the Union rounded up[84] to the nearest full percentage.[85] Hudson and other nonmembers of the union filed suit in the United States District Court for the Northern District of Illinois, claiming that the proportionate share structure (1) violated their First Amendment rights relative to freedom of expression, (2) violated their Fourteenth Amendment due process rights, and (3) permitted use of their funds for unpermissible purposes.[86]

In *Hudson*, the Supreme Court explained that unions must meet two procedural steps in informing nonmember employees of their fee structuring so not to violate the constitutional rights of the employee.[87] The first step was giving nonmember employees an adequate explanation of how their expenditures were being constructed in such a way that the employee can identify which of the expenditures was used for collective bargaining compared to those used for political activities.[88] The second procedural step that unions must take in communicating their reasoning behind the fee construction was in hiring an objective, impartial party to determine the fee structure.[89] As the interested party, the Chicago Union was partial to the amount that it was being paid, which justified the need for an objective outside party.[90] The Court in *Hudson* essentially tested the validity of *Abood*, and resulted in a major limitation and burden on the unions that had previously been reserved only for the employee.[91]

Nearly thirty years later, the Supreme Court of the United States again considered the validity of foundational principles established in *Abood*. In *Harris v. Quinn,*[92] the Illinois Public Labor Relations Act "authorize[d] state employees to join labor unions and to bargain collectively on the terms and conditions of employment," further including language creating an agency shop agreement.[93] This authorization was consistent with the framework set forth in *Abood*, and the Court in *Harris* did not question the validity of this principle.[94] Instead the Court considered whether to expand the agency-shop

84. In this case, 4.6% was rounded to 5%. *Id.* at 295.

85. *Id.*

86. *Id.* at 297.

87. *Id.* at 309.

88. *Id.*

89. *Id.*

90. *Id.* According to the Supreme Court, 95% of total dues payment by nonmembers is preferable to 80%, even if both are justifiable under the model. *Id.*

91. *Id.* at 310–11.

92. 134 S. Ct. 2618 (2014).

93. *Id.* at 2625.

94. *Id.* at 2627.

requirement as described in *Abood* to those who were "deemed to be public employees," not just to "full-fledged public employees."[95] The Court in *Harris* declined to extend the agency-shop requirement to those employees that were deemed to be public.[96]

This holding stems from a skeptical analysis of the opinion in *Abood* and its use of precedent cases.[97] The Court in *Harris* concluded that the Court in *Abood* erred in determining *Railway* and *International Machinist* had disposed of the "critical question" of whether compulsory payments to a public sector union were constitutional.[98] "[The Court in *Abood*] failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector."[99] The failure to realize these foundational principles served as the reason the Court in *Harris* declined to extend the holding of *Abood*.[100] The Court reasoned that the extension of the holding in *Abood* would be overly inclusive and would create a slippery slope effect leading to forced union dues subsidization for every person who has a "common calling."[101] The failure to extend the holding in *Abood* was the last step towards its total abolishment and a recognition that its principles no longer worked as intended.

Although the majority opinion in *Harris* described *Abood* as poorly reasoned, the Court declined to go so far as to overturn the ruling.[102] The decision and rationale as described in *Harris* was important because it set up the framework for the Court's reasoning in *Janus v. AFSCME*.[103]

95. *Id.* The issue here was that there were "hybrid employees" (home health workers and personal assistants) who worked both for private entities and for the state. *Id.*

96. *Id.* at 2638.

97. *Id.* at 2632.

98. *Id.*

99. *Id.*

100. *Id.* at 2638.

101. *Id.*

102. *Id.* at 2651–52. The majority opinion makes clear that the Court's refusal to overrule the holding of *Abood* is based on its view of *stare decisis*. *Id.* at 2651. According to the Court, many factors are considered: whether the prior opinion creates a reliance interest, recent opinions that elevate the holding's place in a larger legal context, and whether the case that would be overruling the precedent case meets a special justification standard. *Id.* at 2651–52.

103. 138 S. Ct. 2448, 2481 (2018).

IV. COURT'S RATIONALE

In *Janus*, the Supreme Court of the United States held that *Abood* was inconsistent with the First Amendment.[104] In making this determination, the Supreme Court went through many of the same cases and reasonings as seen above, beginning with a discussion of the Court's view of the First Amendment relative to compelled speech.[105] "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[106] While the speech in question was not actually being "compelled" in the traditional sense, the Court recognized that the subsidization of speech of others raises similar concerns.[107] In determining how courts should look at the facts, the Supreme Court recognized that past courts used an "exacting" level of scrutiny for public employees, which was less demanding than the "strict" scrutiny that is used in the commercial context.[108] The Court determined that while the petitioner recommends the Court use the strict scrutiny standard, the Illinois union scheme as described failed under even the exacting scrutiny used in prior cases.[109]

In making its determination, the Supreme Court considered the public policy implications behind the decision in *Abood*, determining that the two goals described in *Abood*, creating labor peace and avoiding free riders,[110] were misguided in the present era.[111] In *Abood*, the labor peace argument was advanced to advocate for the prevention of inter-union rivalries and dissent within the work force, and the Court in *Janus* determined that while the restrictions caused by mandatory labor dues may have been one way to promote labor peace, there were far less restrictive ways of accomplishing this goal.[112] The free rider argument was put forth on behalf of what was considered equitable for the labor unions, and mandatory dues were a way for unions to ensure no one was benefiting from the money it spent in collective bargaining without properly paying for that representation.[113] In *Janus*, the Supreme Court advanced two possible arguments for why avoidance of

104. *Id.* at 2478.
105. *Id.* at 2463.
106. *Id.*
107. *Id.* at 2464.
108. *Id.* at 2464–65.
109. *Id.* at 2465.
110. *Abood*, 431 U.S. at 224.
111. *Janus*, 138 S. Ct. at 2465.
112. *Id.* at 2466.
113. *Id.*

the free riders might be a valid defense for mandatory fees on behalf of the union, but concluded that both would be unsound "because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay."[114] To the former point, the Court explained that there is little evidence that unions would be unwilling to represent employees because the individual nonmembers could still pay for representation.[115] To the latter point, the Court explained that unions are required, due to their exclusive representation status, to advocate equally for all employees, regardless of payment.[116] The constitutional restrictions imposed on the employees, wherein they were under a payment structure where they did not have protection if the union disregards their interest, was determined by the Court to be created as an unfortunate byproduct of the combination of exclusive and equal representation.[117] These byproducts outweighed the benefit unions' received through the payment of dues.[118]

With the Court's rebuttals to the primary reasons for the advancement of *Abood*, the American Federation of State, County and Municipal Employees suggested that the Court should partake in an originalist reading of the First Amendment, which it contended was to be understood as public employees lacking free speech protection.[119] The Court explained that this argument was unpersuasive, as there was no founding-era evidence that the Framers meant for this to be the interpretation.[120] Further, the 1983 dictum[121] upon which the Union relies did not support this reading either.[122]

Relying on the reasoning above, the Court overruled *Abood* and declared that public-sector agency shop arrangements violated the First Amendment.[123] This decision was based on the conclusion that the Court in *Abood* misunderstood its precedent cases, and that those cases

114. *Id.* at 2467.

115. *Id.*

116. *Id.* at 2468.

117. *Id.* at 2469.

118. *Id.*

119. *Id.*

120. *Id.* at 2470.

121. The dictum reads, "For most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *See* Connick v. Myers, 461 U.S. 138, 143 (1983).

122. *Janus*, 138 S. Ct. at 2472.

123. *Id.* at 2469–70.

(*Railway* and *International Machinist*) did not carefully consider the First Amendment.[124] Further, the decision in *Abood* did not sufficiently take into account the difference between public-sector and private-sector collective bargaining.[125] For "these reasons—that *Abood*'s proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings," the Supreme Court overruled the decision, meeting the special justifications required for overturning the decision.[126]

In the dissenting opinion, Justice Kagan (joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor) argued that the decision in *Abood* had struck an appropriate balance between public employees' free speech rights and the government's interest in running its workforces as it saw fit.[127] Justice Kagan indicated her belief that there will be long term adverse consequences as a result of the decision, and said that "[p]ublic employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interest will need to find new ways of managing their workforces."[128] Justice Kagan suggested that the unions, in their weakened state, would become more like shadows of their former selves that cannot effectuate change.[129] Justice Kagan believed that this plays into the hands of the public employers, as they no longer must deal with effective bargaining techniques stemming from well-funded unions.[130] Justice Kagan's dissent coincides with Justice Sotomayor's dissenting opinion, where she stated that the Court has decided to "wiel[d] the First Amendment in . . . an aggressive way."[131] In essence, the dissenters agreed that the majority did not abide by the usual strict standards that are afforded prior rulings through *stare decisis*, concluding that the majority failed to see the economic reasons for why a government would want agency fees, most strongly considering the free-rider concern.[132]

124. *Id.* at 2479.
125. *Id.* at 2479–80.
126. *Id.* at 2486.
127. *Id.* at 2487 (Kagan, J., dissenting).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* (Sotomayor, J., dissenting) (alteration in original).
132. *Id.* at 2489–90 (Kagan, J., dissenting).

V. IMPLICATIONS

A. Janus's *Impact on Labor Unions Moving Forward*

The Supreme Court left unanswered how its holding applies to state labor law fee structuring in the public sector and, more broadly, to national labor law. The 2017 national average of union participation (in a combined public- and private-sector metric) was 10.7%.[133] This number is misleading, however, because public-sector unions see nearly five times as many union members by percentage than private-sector unions.[134] Where these union members live varies widely based on the status of the state of occupancy as a "right to work" state.[135] Low union participation, such as is found in Eleventh Circuit Court of Appeals states, fall well below the national average.[136] By contrast, high union participation states such as Illinois (14.5% union participation), California (15.9% union participation), and Washington (17.4% union participation) significantly exceed the national average.[137]

The implications of this decision, regardless of the state's status as right to work, are enormous, though the greatest impact of the decision in *Janus* is likely to be in those states where union presence is the strongest, such as California and Washington.[138] The Court in *Janus* concluded that the free-rider concern has not come to fruition, which is relatively shortsighted as that statement neglects to recognize that the structure of union participation under the decision in *Abood* would prevent free riding in the first place. Ultimately, the majority in *Janus* contradicts and undermines the purpose of unions as they currently exist: why would someone elect to join a union when they know they will get collective bargaining representation regardless of whether they

133. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS—2017, at 1 (2018), https://www.bls.gov/news.release/archives/union2_01192018.pdf.

134. *Id.* Public-sector union participation was at 34.4% in 2017 as compared to the private-sector union participation that was 6.5% in 2017. *Id.*

135. Being a right to work state means that employees in that state are generally protected against being fired due to failure to pay union dues or failure to join a labor union. *See* JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 4:6 (5th ed. 2018).

136. In 2016, Georgia, Florida, and Alabama (all of which are right to work states) had general union participation rates of 3.9%, 5.6%, and 8.1%, respectively, as compared to the 2016 national average of 10.7%. *Union Membership Rates by State in 2016*, BUREAU LAB. STAT. (Feb. 23, 2017), https://www.bls.gov/opub/ted/2017/union-membership-rates-by-state-in-2016.htm (last visited Dec. 19, 2018).

137. *Id.* As a note of consideration, the Eleventh Circuit states are all right to work while none of the other mentioned states share that status. *Right to Work*, NAT'L RIGHT TO WORK COMMITTEE, https://nrtwc.org/facts/right-work-mean/ (last visited Mar. 19, 2019).

138. BUREAU LAB. STAT., *supra* note 136.

pay dues? With its decision in *Janus*, the Supreme Court has created a structure wherein the unions must represent all members equally, as described in the NLRA, while simultaneously requiring public employees to be part of a union for collective bargaining representation without having to pay for it. The nexus between the NLRA and the holding in *Janus* is unworkable because it forces the unions to provide union representation and collective bargaining with no ability to mandate the collection of fees. As Justice Kagan says in her dissenting opinion, "[T]he relationships of public employees and employers will alter in both predictable and wholly unpredictable ways."[139]

B. Janus *as a Continuation of First Amendment Trends*

As a final note of consideration, and speaking towards the broader trend of Supreme Court decisions as of late, the decision in *Janus* fits neatly into recently increased protections for First Amendment rights.[140] As Justice Kagan's dissent says, "[T]he majority has chosen the winners by turning the First Amendment into a sword."[141] In many ways, Chief Justice Roberts has led the Supreme Court towards a broader understanding and interpretation of the First Amendment.[142] Recent Supreme Court rulings have applied the First Amendment to everything from medical counseling to health care law. [143] If it is any indication of his influence, Chief Justice Roberts has only been in the minority opinion of the Supreme Court's thirty-nine First Amendment cases once.[144] Labor law should fair no differently, and should the Supreme Court reconsider the issues that the decision in *Janus* poses in the years to come, free speech considerations will likely take center stage with Chief Justice Roberts squarely within the majority opinion.

Justice Sotomayor disagrees with this approach, as shown by her dissenting opinion wherein she states that she believes the Supreme Court has applied the First Amendment too aggressively in recent

139. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

140. Gora, *supra* note 7, at 65.

141. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

142. Ronald K. Collins, *FAN 63 (First Amendment News) CJ Roberts: Mr. First Amendment—The Trend Continues*, CONCURRING OPINIONS (June 10, 2015), https://concur ringopinions.com/archives/2015/06/fan-63-first-amendment-news-cj-roberts-mr-first-amen dment-the-trend-continues.html.

143. The most prominent of the First Amendment cases in recent memory is *Citizens United v. Federal Election Commission*, where the Supreme Court of the United States held that the government may not suppress a corporation's political speech. 558 U.S. 310, 365 (2010). *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

144. Collins, *supra* note 142.

years.[145] Justice Sotomayor's statement is likely a look at decisions still to come, as the balance of power in the Supreme Court relative to these issues is unlikely to change any time soon. Justice Kavanaugh's recent appointment to the Supreme Court, and his replacement of Justice Kennedy, who joined in the majority opinion in *Janus*, gives an indication to this effect, especially considering the assertion that the Supreme Court is more willing to protect conservative speech than liberal speech.[146] Justice Kavanaugh's judicial record, however, shows a willingness to protect free speech rights regardless of the political undertones of the subject matter at hand.[147] Whether his record matters given the appointment process that got him on the bench,[148] or the loyalist president that nominated him,[149] will surely be of interest moving forward.

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145. *Janus*, 138 S. Ct. at 2487 (Sotomayor, J., dissenting).

146. Brian Miller, *Judge Kavanaugh's Principled Record on Free Speech,* FORBES (July 10, 2018), https://www.forbes.com/sites/briankmiller/2018/07/10/judge-kavanaughs-principled-record-on-free-speech/#4bebdeaa519b.

147. See *Emily's List v. Federal Election Commission*, 581 F.3d 1, 25 (D.C. Cir. 2009), which upheld the rights of an abortion clinic, and *Priests for Life v. United States Department of Health & Human Services*, 772 F.3d 229, 277 (D.C. Cir. 2014), which upheld an organization's right to be excused from performing services that it opposed. Interestingly, *Priests for Life* was later overturned while *Emily's List* was not, which contradicts the alleged preferential treatment towards conservative free speech issues, at least in the District of Columbia Court of Appeals.

148. Joe Sommerlad, *Brett Kavanaugh: How is the US Supreme Court Nomination Process Supposed to Work?*, INDEPENDENT (Sept. 28, 2018), https://www.independent.co.uk /news/world/americas/us-politics/brett-kavanaugh-us-supreme-court-process-senate-judici ary-committee-christine-blasey-ford-sexual-a8559031.html.

149. Mark Lander & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court,* N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html.