Forbes

Janus v. AFSCME: Perhaps This Time The Court Will Take The First Amendment Seriously

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On February 26, the Supreme Court heard oral arguments in *Janus v. AFSCME.* The issue in the case is whether public unions can compel workers who have declined to become members to pay them an "agency fee" that supposedly covers the union's activities other than political action.

Mark Janus is a public employee in Illinois and under state law, he must pay "his" union, the American Federation of State, County, and Municipal Employees a fee that is 78 percent of the full membership dues. That is the amount that the union says is the "fair share" of workers who decline to become members -- $45 per month for Mr. Janus.

Even if you believe that public unions like AFSCME spend only 22 percent of their revenues on politics, Janus contends that because the activities of public unions are *inherently* political, being forced to support any portion of their spending impinges on his First Amendment rights. Just as the government cannot interfere with Americans when they wish to communicate, neither can it compel them to provide money to enable others to communicate.

Moreover, and by their own admission, union officials are not just interested in negotiating on behalf of the employees they represent, but also for a host of "social justice" concerns. Lawrence Sand points out in this California Policy Center article that public unions have boasted about their dedication to "bargaining for the common good." For example, the president of the Unified Teachers of Los Angeles declares that he thinks the union should bargain for "green spaces" at schools and provide a legal defense fund for students and family members who might face deportation.

Whether you agree with those ideas or not, when unions make them part of their bargaining objectives, they are not merely representing the workers, but advancing their own ideological agendas. Those who favor them should be free to support them, but those who disagree should be free to say "no."

Public unions have long used mandatory dues and fees collected from workers who must either pay up or lose their jobs to support their statist goals, and workers who don't want to be forced to underwrite those goals have been fighting back in the courts for many years. The issue was squarely presented to the Supreme Court in *Abood v. Detroit Board of Education.* In that 1977

case, the Court upheld the constitutionality of Detroit's mandatory agency fee law was a reasonable compromise between the government's interest in "labor peace" and the free speech rights of dissident employees.

When the Janus case came before the Seventh Circuit, that court ruled that under the precedent of *Abood,* it had no choice but to rule in favor of the state. Therefore, the argument before the Court boils down to upholding or overruling *Abood*.

Although *Abood* appears as a unanimous decision, three justices on the Court were very troubled by it.

Writing a concurrence (joined by Chief Justice Burger and Justice Blackmun) that was actually more of a dissent, Justice Lewis Powell observed that the Court had played fast and loose by citing precedents that were not truly applicable to the public union case at hand and had given scant thought to the First Amendment issues involved.

Justice Powell wrote, "Working from the novel premise that public employee unions are under no greater constraints than their counterparts in the private sector, the Court apparently rules that public employees can be compelled by the state to pay full union dues to a union with which they disagree, subject only to a possible rebate or deduction if they are willing to step forward and declare their opposition to the union and initiate a proceeding to establish that some portion of their dues has been spent on ideological activities unrelated to collective bargaining. Such a sweeping limitation of First Amendment rights by the Court is not only unnecessary on this record, it is also unsupported by either precedent or reason."

Powell went on to show that the cases the decision relied upon to support its holding involved private sector unions and thus not apposite to the circumstances in *Abood.* He could see no distinction between a law forcing workers to support a political party as a condition of employment and a law forcing workers to support a public union. He also argued that the Court shouldn't have accepted at face value the government's claims that compelling dissidents to pay their assigned fees was really necessary to achieving its goals such as "labor peace."

Still, like a pawn defending the king on a chessboard, *Abood* has stood in place since 1977, supporting the process whereby public unions extract money from workers and use most of it to promote left-wing candidates and causes. It was severely criticized by Justice Alito in his 2014 opinion in *Harris v. Quinn*, who called it "questionable" and "troubling," but the disposition of that case did not require that *Abood* be overruled, so it wasn't.

How will the Court decide *Janus*?

The oral arguments were quite predictable – like "Groundhog Day" wrote Cato Institute's Ilya Shapiro. Liberal Justice Elena Kagan, for example, asked about the impact of a ruling for Janus on existing union contracts. Freedom of choice always gives liberals nightmares when it threatens the big-government status quo. Responding to her question, William Messenger of the National Right to Work Legal Defense Foundation correctly noted that public sector unions are able to function in states that don't allow mandatory fees and, more importantly, that defending the First Amendment matters far more than any concerns over the short-run effect on unions.

The only new justice on the Court since the last time this issue was argued (in *Friedrichs v. California Teachers Association,* which ended in a 4-4 split after the death of Justice Scalia) is

Neil Gorsuch. He asked no questions during oral arguments, but it seems very likely that he will side with Janus. Supposing a 5-4 decision in his favor and against mandatory agency fees, what will the consequences be?

Daniel DiSalvo and Stephen Eide, both affiliated with the Manhattan Institute, point out in their Wall Street Journal op-ed "The Supreme Court May Rescue Blue-State Finances," that after Wisconsin legislated an end to public union mandates, membership fell by 60 percent. Union power has therefore waned somewhat in Wisconsin and not coincidentally the state's finances have improved. If the Court decides against public union coercion, other states where the unions hold enormous clout, especially California, New York, and Illinois, might see similar political swings.

Attorney Mark Pulliam here sums up the issues: "In a free society, union membership and financial support should be voluntary. In 1977, the Court made a grievous error. Forty-one years later, after the false start of *Friedrichs* and the tragic loss of Justice Scalia, it is time to correct the mistake."

We will find out in June if it does.