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Supreme Court Takes on Public-Sector Unions

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At the start of this "momentous" Supreme Court term — as Justice Ruth Bader Ginsburg called it — most people are focused on partisan gerrymandering. But it's not clear that there are five votes for inserting courts into every redistricting decision, thereby creating an election-lawyer full-employment act. Instead, as far as politics are concerned, what the term may become known for is blunting the power and influence of public-sector unions.

Two cases now before the Court pit the First Amendment rights of millions of workers against a sort of government-union cartel that makes the most feverish theories of Russian collusion with the Trump campaign look like child's play. Both revolve around one fundamental question: whether state legislatures can force workers into unwanted relationships with unions.

The first is Janus v. American Federation of State, County and Municipal Employees, which the Court has already announced it will hear. Alas, the lawsuit does not challenge AFSCME's disdain for the Oxford comma. Instead, Mark Janus, who works for the Illinois Department of Healthcare and Family Services, is challenging a state law that mandates he pay "agency fees" to support union collective-bargaining activities that he does not support. Such a compulsion violates the First Amendment, he argues, because collective bargaining in the public sector involves advocacy on quintessentially political questions such as taxpayer-funded wages and pensions, resource allocation, and enforcement priorities. (Already this year, Illinois raised taxes to pay a $100 billion public-pension debt.) Janus thus faces a Hobson's choice: Either fund advocacy he doesn't like or find other employment.

Although the Supreme Court upheld the constitutionality of non-union-member fees for public-sector workers in the 1977 case Abood v. Detroit Board of Education, it has since questioned Abood's reasoning. In Abood, the Court acknowledged that public-sector collective bargaining does influence policy-making about "ideological" issues. Nonetheless, the Court held that agency fees passed constitutional muster because of "free rider" and "labor peace" concerns. The Court began to scrutinize the flaws of this reasoning 35 years later in Knox v. SEIU: "By allowing unions to collect any fees from nonmembers . . . our cases have substantially impinged upon the First Amendment rights of nonmembers." Moreover, Justice Samuel Alito noted for the majority, "Unions have no constitutional entitlement to the fees of nonmember-employees." Powered by The Court then signaled the death knell for Abood in the 2014 case Harris v. Quinn.

Harris also originated in Illinois, with then-governor Rod Blagojevich's designation of certain home-care providers as "public employees" for collective-bargaining purposes (because they're paid out of state Medicaid funds). Despite many workers' desire to remain unaffiliated, a subsequent collective-bargaining agreement forced them to fork over part of their wages to the Service Employees International Union (SEIU).

The Court struck down the law as a violation of the non-union-member workers' First Amendment rights but did not overturn Abood. The Court reasoned that because the law did not squarely concern "full-fledged public employees" — as had been the case in Abood — it merely had to rule on whether Abood should be extended to cover these workers. This is something the Court was unwilling to do "because of Abood's questionable foundations." More important, the Court, again through Justice Alito's pen, announced that it is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."

Two terms ago, the Court in Friedrichs v. California Teachers Association seemed ready to overrule Abood, but the untimely passing of Justice Antonin Scalia created a 4–4 deadlock that left the state laws in place. Now with a full Court, the justices will have the opportunity to finally vindicate public-sector workers' First Amendment rights once and for all.

But what about workers who aren't "full-fledged public employees"? Thanks to Harris, they no longer must pay unions, but should they have to be associated with them at all? That's the question in Hill v. SEIU, in which a petition for Supreme Court review is pending. Rebecca Hill and thousands of other home-care aides are still forced in certain states to associate with a union that has been designated as their "exclusive representative" for collective bargaining. The justices have the opportunity to vindicate public-sector workers' First Amendment rights once and for all.

The U.S. Court of Appeals for the Seventh Circuit reasoned that Abood and subsequent cases only require that Illinois provide a "rational basis" for forcing workers to associate with the SEIU — not the heightened scrutiny typically required in First Amendment cases — and Harris didn't change that. But if the rationale for compelled fees in Harris doesn't stand up to constitutional scrutiny, neither should being compelled into an association in the first place — even if you don't have to pay for it.

Justice Robert Jackson, one of the Court's most legendary members (whose seat Neil Gorsuch now occupies), wrote back in 1943, "If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." With Janus and Hill, the Supreme Court can uphold this fixed star by correcting a 40-year mistake and returning some of the freedom (and money!) American workers have lost.

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