

# THE BAY CITY Beacon

## U. S. Supreme Court's Janus Decision: Pure Unadulterated Politics

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When the United States Supreme Court rendered its decision in *Janus v. AFSCME Council 31*, overruling a prior Supreme Court's decision, *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, the court dealt a major blow to public employee unions, millions of wage earners across the country, the labor movement and the Democratic Party. The decision was not unexpected although it was a stunning departure from well established legal precedent.

The doctrine of stare decisis calls for courts to give deference to prior decisions and the usual reasons for not doing so do were not present in *Janus*. There were no extraordinary circumstances, no new facts nor any recent developments that needed to be considered. Twenty states had enacted statutes consistent with the *Abood* decision, leading to thousands of union contracts which included agency shop clauses covering millions of employees.

The *Abood* case stood for the principle that while public sector employees cannot be required to join a union and pay union dues, they can be required to pay an "agency shop" or "fair share" fee to the union. The amount of the fee is determined by deducting from the amount of union dues, whatever portion of those dues were spent on political or ideological activities, adjusted yearly.

The argument that prevailed in *Abood* was that nonmembers benefit from the union's bargaining and representation activities, as much as dues paying members do (according to the U. S. Department of Labor, on average, employees not represented by unions receive only 80% of what their union represented counterparts receive). Therefore, it was only fair that nonmembers share in the costs. Otherwise, dues paying union members are forced to pay for everyone while nonmembers get a "free ride." But, the majority's anti-union decision in *Janus* demonstrated that the court is not in the least immune from the political tribalism that we are plagued with today.

The Supreme Court has reversed its prior decisions on several occasions, including based on popular opinion. For example, its outlook changed significantly during the 1930s. Although earlier Supreme Court decisions found child labor laws and minimum wage requirements to be

unconstitutional, this traditionalist, Republican viewpoint would not survive the Great Depression. Franklin Roosevelt's landslide election victory in 1936 reflected the popularity of much of his New Deal legislation, including unemployment compensation and social security. It was in that environment that the Supreme Court, in *NLRB v. Jones & Laughlin Steel Corp.* (1937), upheld the National Labor Relations Act (NLRA) by a five to four vote, significantly expanding the court's application of the commerce clause.

The NLRA guaranteed private sector employees the right to organize, join unions and engage in collective bargaining. Justice Brandeis, who concurred with the majority in upholding the constitutionality of the NLRA, expressed what then was becoming a commonly accepted viewpoint. "Strong, responsible unions are essential to industrial fair play. Without them the labor bargain is wholly one-sided. The parties to the labor contract must be nearly equal in strength if justice is to be worked out, and this means that the workers must be organized and that their organizations must be recognized by employers as a condition precedent to industrial peace."

This acceptance of labor unions and their legitimate role in society prevailed throughout the next few decades, among both Democrats and Republicans. So it was no surprise when, in 1977, the Burger Court, with seven of its nine justices having been appointed by Republican presidents Eisenhower (Chief Justice Warren Burger, Justices William Brennan and Potter Stewart), Nixon (Justices Louis Powell, Harry Blackmun and William Rehnquist) and Ford (Justice John P. Stevens), joined the two Democrats on the court (Justices Byron White and Thurgood Marshall) in holding unanimously that Agency Shop agreements were not violations of the U. S. Constitution. So why did five conservative Republican appointed justices in 2018 overturn a decision concurred in by seven conservative Republican appointed justices in 1977?

The answer is that the Supreme Court's decision in *Janus* was purely political. AFSCME Council 31's Executive Director, Roberta Lynch, pointed out that the case "was bankrolled by the National Right to Work Foundation and the Liberty Justice Center --- the litigation wing of the Illinois Policy Institute, a network funded by billionaires and corporate CEOs who use their massive fortunes to tilt the playing field in their favor." No surprise.

But it is the political transformation, from the 1970s to date, that was determinative, not the fact that conservative Republicans were able to obtain a majority on the court. The Burger court was certainly considered quite conservative, but nonetheless unanimously upheld the legality of agency shop fees. The conservative majority that overruled that decision demonstrated that the Court, as well as Congress and much of the rest of the country, has become more extreme and partisan, to a much greater degree than the Supreme Court's post depression predecessors. No less important are the facts that Republicans have been winning, and have obtained a very large measure of control over Congress, the presidency and our judiciary.

Justice Kagan, while dissenting from the majority opinion in *Janus*, explained how the majority opinion could starve unions of resources, leading to ineffectiveness and collapse. She, like Brandeis, argued that strong unions were essential to our democracy. However, to

the *Janus* majority, the Republican Party and its funders, weakening if not destroying unions was their goal.

Looking back from our increasingly polarized political environment, it is plain to see the origins in the 1970s of a particularly aggressive hostility to labor unions in America. During the Nixon administration, a "Labor-Management Group" was formed which was supposed to bring labor and corporate leaders together to cooperate. Douglas Fraser, President of the United Auto Workers from 1977-83, on his resignation from the Labor-Management Group in 1978, wrote in his particularly prescient letter of resignation: "I believe leaders of the business community, with few exceptions, have chosen to wage a one-sided class war today in this country—a war against working people, the unemployed, the poor, the minorities, the very young and the very old, and even many in the middle class of our society."

At least one modern era business leader is willing to acknowledge that Fraser's contention, at least regarding the assertion that class warfare was initiated by the business community against labor and our country's working class, is accurate. Warren Buffett, among the wealthiest individuals in the country and Chief Executive of Berkshire Hathaway, famously stated in an interview conducted by attorney/economist Ben Stein for *Your Money*, "There is class warfare all right, but it's my class, the rich, who are making war and we're winning."

And boy are they winning! In the late 1970's they began putting together what would become the most successful organizing drive in the history of our country since WWII. Their success would result in an eventual takeover of Congress and political dominance across the nation, which is the status quo today. Whatever the reasons or motivations, corporate America and dozens of exceedingly rich Americans rather quickly formed an incredible infrastructure. It would be used to fund organizations that would impact public opinion while simultaneously contributing heavily to candidates for public office. In addition to what the leaders of this coalition claimed was the altruistic goal of saving capitalism, the massive political machine that they created would be focused on lowering their taxes, deregulating their industries, and minimizing government intervention in the economy. The impact of their "successes" was to enrich themselves while producing the growing income inequality we have today.

The Heritage Foundation, American Legislative Exchange Council, CATO Institute (originally the Charles Koch Foundation) and the Business Roundtable were all founded in the 1970s as "think tanks" for the purpose of impacting public opinion. All, together with the U. S. Chamber of Commerce, had and have anti-union agendas, including supporting "right to work" laws and opposing project labor agreements, prevailing wage requirements, labor law reform and unions.

As reported by Hedrick Smith, in *Who Stole the American Dream*, although in 1971 only 175 companies had registered lobbyists, by 1982 there were approximately 2,500. The U. S. Chamber of Commerce doubled its membership in the 1970s and the National Federation of Independent Businesses (small businesses) grew from 300 to 600,000 members. The number of companies with Washington lobbying offices grew from 175 in 1971 to 2,445 a decade later. Along with 2,000 different trade associations, businesses in Washington had a staff of 50,000 plus 9,000

lobbyists and 8,000 public relations specialists. By the end of the decade, business lobbyists and advocates outnumbered members of Congress 130 to 1.

The business community's coordinated campaigns paid off almost immediately. In 1978, the GOP would pick up 3 Senate seats, 15 seats in the House of Representatives and 6 Governorships. In 1980, when Ronald Reagan was elected, four prominent Democratic Senators were defeated: George McGovern, Birch Bayh, Frank Church and John Culver.

This GOP takeover of Congress continued, most strikingly in 2010 when their numbers drastically improved largely due to an enormous amount of "dark money" put in play across the nation. In that year, the GOP took over the House of Representatives by picking up 63 seats, took over the Senate by winning an additional 6 seats, and won an amazing 675 legislative seats across the country. The GOP then had both the legislatures and governorships in 21 states, while the Democratic Party had only 11.

In 1975, there were 19 states who had enacted so called "right to work" laws, which outlaw agency shop type agreements in the private sector. Today there are 28. Union membership across the nation dropped from a high of 34% in the 1950s, to 20.1% by 1983, and to 10.7% in 2017 (only 6% in the private sector). Employers obviously save by having workers who are not represented by unions in that those workers earn only 80% of what union members receive for similar work.

While our wealthiest citizens have always had more than their share of control over our government, the degree to which they dominate today may well render the very large prosperous middle class that was brought about by the New Deal and the application of Keynesian economics, a mere aberration.

As a result of their legislative lobbying and political contributions, we have witnessed numerous, enormous tax cuts, the deregulation of industries and other enactments that have resulted in a redistribution of wealth from the working and middle classes to the richest among us. For forty years, the return on capital investments has greatly exceeded the growth of our economy, while wages remained flat. The impact of this assault on organized labor and the working class has been monumental. Quoting Brandeis once again: "We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both."