



## Public Sector Union Dues: Grappling with Fixed Stars and Stare Decisis (Part II)

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*UPDATE: The Supreme Court is scheduled to hear oral arguments in *Janus v. AFSCME, Council 31*, on February 26, 2018.*

As discussed in [Part I](#) of this two-part Sidebar, on March 29, 2016, an eight-member Supreme Court divided equally over whether to overrule its 1977 decision in *Abood v. Detroit Board of Education* and hold that public sector agency fees violate core First Amendment principles (the Court’s “fixed star”). Earlier this Term, the Court agreed to consider the question again in the case of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*. Part II of this Sidebar begins with a brief summary of the parties’ arguments in *Janus*. It then highlights some key statements from the prior decisions of Justice Gorsuch, who is likely to be a critical voice in deciding whether to overturn *Abood*. The post concludes by exploring the potential implications of the *Janus* decision.

**The Janus Case.** *Janus* is brought by an Illinois state employee, who [argues](#) that the Court should wield its prior critiques of *Abood* (discussed in [Part I](#) of this Sidebar) to strike the final blow to public sector agency fees, which Janus views as “the largest regime of compelled speech in the nation.” In response, the union representing Janus’s bargaining unit—the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)—urges the Court to stay its hand. In addition to [challenging](#) whether the case is properly before the Court, AFSCME [argues](#) that *Abood* established a First Amendment principle that has informed the Court’s analysis of every First Amendment “obligatory cost-sharing” challenge thereafter. The Illinois Attorney General also [asks](#) the Court to uphold *Abood*, particularly in light of the doctrine of [stare decisis](#)—in the Court’s words, “the idea that today’s Court should stand by yesterday’s decisions.”

As background, the Court generally views adherence to precedent as the “[preferred course](#)” because it “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”

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Nonetheless, the Court has recognized that certain considerations, including the Court's role in upholding the Constitution, the soundness of the reasoning of prior decisions, the workability of governing case law, and the extent of the reliance interests involved may justify overruling a prior decision.

***A New Voice on the Court.*** As noted above, Justice Gorsuch is likely to be a key voice in deciding the *Janus* case on what otherwise might be an equally divided Court. On the role of stare decisis, Justice Gorsuch, as a lower court judge, wrote that the “the most [elemental dictate](#) of legal reasoning always has been and remains: like cases should be treated alike,” and that “[judges](#) do not necessarily profess a conviction that every precedent is rightly decided, but they must and do profess a conviction that a justice system that failed to attach power to precedent . . . would hardly be of the name.” Nevertheless, at that time, then-Judge Gorsuch was bound by controlling Supreme Court precedent, and it is unclear precisely how he would apply stare decisis principles as a Supreme Court Justice. Perhaps the best analog from Justice Gorsuch's prior tenure is when he sat en banc (i.e., along with the full circuit), wherein he did [express](#) a willingness to overturn circuit precedent to “correct grave errors . . . when they become apparent,” even if the “precedents in question happen to be old.”

Whether Justice Gorsuch would view *Abood* as a “grave error” in the Court's jurisprudence is not entirely clear from [his First Amendment cases](#), which simply did not address the issue of compelled union dues. In the context of government limits on campaign contributions, the newest Associate Justice found common ground among the parties in the [view](#) that political contributions implicate (in the Supreme Court's words) a “basic constitutional freedom” derived from the First Amendment's protections of freedom of speech and association. But even if Justice Gorsuch regards the inverse as true—that compelled contributions implicate core First Amendment freedoms—it is not a foregone conclusion that the Associate Justice will adopt *Janus*'s view of the case because he has not yet written or otherwise commented on the specific concerns that justified compelled subsidization in *Abood*—i.e., the labor peace and free rider concerns.

***Significance of the Decision.*** Briefing in *Janus* is ongoing, but to date, nineteen states, eighteen organizations, and seven individuals have filed or joined amicus briefs in the case, signaling the significance of the decision to a range of stakeholders. The *Janus* case also has important implications for the roughly [6.7 million](#) state and local government employees who are represented by unions, many of whom reside in states that [authorize](#) the assessment of agency fees for non-member, represented employees. Many opponents of *Abood* argue that if the decision is allowed to stand, it will continue to result in an impermissible infringement of employees' [First Amendment rights](#). *Abood* supporters argue that agency fees are necessary for public sector unions to perform as [effective bargaining representatives](#), and that overruling *Abood* will lead quickly to [free-rider problems](#), creating tension between dues-paying and non-dues-paying employees and [disrupting](#) the stability of labor relations. Opponents counter that such threats to union membership and budgets are overstated, citing [examples](#) from jurisdictions that do not allow agency shops. Still, some commentators have posited that [partisan motivations](#) lurk behind the legal and policy debates over agency fees, with left-leaning public sector unions pitted against more conservative groups backing non-union employees.

In addition to the concerns noted above, *Janus* raises important considerations for lawmakers and the judiciary. If the Court upholds *Abood*, we might expect to see continued litigation in the lower courts over the permissibility of certain union expenditures and the adequacy of specific union procedures to protect the rights of objecting employees. There also might be increased pressure on some state legislatures to ban agency fees altogether. On the other hand, a decision overturning *Abood* could call into question the Court's reasoning in other cases in which the Court applied *Abood*'s rationale—a concern raised by the [dissent](#) in *Harris v. Quinn*. For example, the Court has upheld the collection of mandatory [state bar dues](#) for activities germane to regulating the legal profession, as well as assessments charged to California [fruit growers](#) and handlers to cover the costs of generic advertising authorized by Congress.

***What's Next?*** The Supreme Court likely will elicit more information about the effects of *Abood* when it hears arguments (not yet scheduled) in the case, in order to contextualize the speech that agency fees are

said to compel unlawfully and the reliance interests and other stare decisis considerations that may militate against dismantling *Abod*'s test.