NOTES

JANUS V. AFSCME: THE CANARY IN THE COALMINE OF JUDICIAL EVOLUTION

Daniel Christian[*]

INTRODUCTION

While judicial evolution is a natural part of the common law process,[1] *Janus v. AFSCME*[2] represents an aberration of the natural process. This natural process has been replaced with an artificially expedited and partisan process, by which long-held principles in American jurisprudence are overturned in a matter of a few years. This departure threatens the stability of American law, politicizes the Supreme Court, and empowers the Court to act outside of its regular constitutional boundaries.

While conservatives view *Janus*'s holding as a victory,[3] the conservative movement to undermine *Abood v. Detroit Board of Education*[4] acted against the longstanding tradition of *stare decisis*.[5]

[*] J.D. Candidate, Albany Law School Class of 2020. I would like to thank Professor Louis Jim for his constant efforts in pushing me to refine my writing; and to my family, Eleanor, and Abigail for their constant support.

[1] *See, e.g.*, Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1167–68 (2005).

[2] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (overturning forty-one-year-old precedent and holding that agency shop fees—mandatory union fees deducted by the state from nonmembers in order to cover apolitical administrative costs—were unconstitutional under the First Amendment).

[3] *See* Paul Waldman, *The Republicans Are Winning Their War on Unions*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/06/27/the-republicans-are-winning-their-war-on-unions/ [https://perma.cc/H2C3-R6PP].

[4] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[5] *See* Tucker Higgins, *In a Blow to Public Sector Unions, Supreme Court Overturns 40-Year-Old Precedent*, CNBC (June 27, 2018, 10:02 AM), https://www.cnbc.com/2018/06/27/supreme-court-rules-in-janus-labor-union-case.html [https://perma.cc/2XWZ-SVWG]; *see also* Jonathan Turley, *Kennedy's Decisions May Not Last. It Might Be His Own Fault*, WASH. POST (June 27, 2018, 7:05 AM), https://www.washingtonpost.com/outlook/kennedys-decisions-may-not-last-it-might-be-his-own-fault/2018/06/28/e39c3298-7a87-11e8-aeee-4d04c8ac6158_story.html

Thus the *Janus* victory may be short lived, as there will likely come a day when the liberals hold a Court majority[6] and will be able to deploy the strategies of the *Janus* Court and chip away at landmark cases favored by conservatives, eventually overturning them.

Regardless of whether one agrees with the constitutional principle announced in *Janus*, the process by which it the Court reached its decision should alarm adherents of a sound judicial system. "[T]he law can retain the necessary stability only if this Court resists that temptation, overruling prior precedent only when the circumstances demand it."[7] If the swift and targeted approach implemented during the process of *Janus* becomes commonplace, it would change the landscape of the judiciary. Such a seismic shift in judicial norms would shock the American system and jurisprudence and reduce the common law to a moving target for political machinations.

The effort to end agency shop fees,[8] although accelerated by judicial standards, did not happen overnight as predecessor cases laid the groundwork on which the Court relied when justifying its decision in *Janus*.[9] To fully understand the complexity of this undermining of the judicial process, we must look to the original standard as announced in *Abood* and how subsequent cases chipped away at it.

This Note first examines the pre-*Janus* framework and its compromise to the agency shop question. Doing so will aid in the understanding of the complex and deeply rooted system that was cast aside by *Janus*, as well as the compromises of *Abood* and the necessity of such compromises. From there, the Note discusses how the pre-*Janus* framework was changed as unions came to be labeled as inherently political entities, unable to exist absent an agenda.

[https://perma.cc/7RV3-FCUL] ("[Justice] Kennedy signed on to yet another opinion driving a stake into the heart of stare decisis.").

[6] *Cf.* Jonathan Chait, *New Survey Shows Young People Are Staying Liberal and Conservatives Are Dying Off*, N.Y. MAG. (Mar. 1, 2018), http://nymag.com/intelligencer/2018/03/new-survey-young-staying-liberal-conservatives-dying-off.html [https://perma.cc/8Y4X-6ERS] ("In the long run, as John Maynard Keynes quipped, '[w]e are all dead.' But over the long run, the Republicans are especially dead.").

[7] Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1506 (Breyer, J., dissenting).

[8] *See* Waldman, *supra* note 3. Agency shop fees were mandatory deductions, taken directly from the paychecks of nonmembers for the purposes of bargaining and administering their collective bargaining agreement. *See* Dylan Matthews, *The Supreme Court Decision Gutting Public Sector Unions, Explained*, VOX (June 27, 2018, 10:08 AM), https://www.vox.com/2018/6/14/17437832/janus-afscme-supreme-court-union-teacher-police-public-sector [https://perma.cc/C5ZN-BA8X]; Lisa Nagele-Piazza, *What Does the Supreme Court's Union-Dues Ruling Mean for HR?*, SHRM (July 9, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-relations-janus-hr-tips.aspx [https://perma.cc/VR3U-QC6Q].

[9] *See* Michael J. Reitz, *The American Labor Movement Should Embrace Free Association*, HILL (Mar. 2, 2019, 12:00 PM), https://thehill.com/opinion/finance/431686-the-american-labor-movement-should-embrace-free-association [https://perma.cc/LS7W-322G].

Next, this Note discusses how the current composition of the Supreme Court has influenced a jurisprudential shift in the way that the Court has addressed issues relating to public-sector labor unions. This shift is best explained through the targeted and methodical process of undermining *Abood* decision by decision.

Understanding the factual nuances of these cases will allow for a deeper understanding of the shift in judicial sentiment towards public unions, from punishment for misbehavior to contempt and utter eradication. Tracing the cases leading up to *Janus* will lead to the final question this Note will addresses: Why does the conduct of the Court matter? The broader implications of an activist Court would catastrophically disrupt a system built on the principles of *stare decisis*. Turning a blind eye to this now will only empower future generations of jurists—with whom many will disagree—to bind the American populous with judge-made law, absent any actions by Congress or the President.

I. THE PRE-*JANUS* STANDARD

Abood v. Detroit Board of Education represented a compromise of ideals: the need to keep the government out of the business of compelling political speech and the need to promote effective labor peace.[10] The Michigan statute at issue in *Abood* made union membership a "condition of employment."[11] In adopting the standards of private-sector closed shops,[12] *Abood* extended the principles of exclusive bargaining to public workers and their representatives.[13] The extension of exclusive representation "carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones."[14]

---

[10] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224, 226 (1977) (citing Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 238 (1956)).

[11] *Id.* at 211.

[12] In labor law, a closed shop occurs when a union has the exclusive right to bargain with an employer. John V. Spielmans, *The Dilemma of the Closed Shop*, 51 J. POL. ECON. 113, 115 (1943). The shop is "closed" because employees may not work without joining the union or paying agency shop fees. *See id.* at 113; Matthews, *supra* note 8.

[13] *Abood*, 431 U.S. at 211, 223–24.

[14] *Id.* at 221 ("They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged 'fairly and equitably to represent all employees . . . , union and nonunion,' within the relevant unit." (quoting Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 760–61 (1961)).

The Court split the proverbial baby, creating two classes of workers—members and nonmembers (feepayers)—while maintaining a union's right to political speech.[15] To preserve this right, however, "the Constitution requires only that such expenditures [relating to political activities] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."[16] So this compromise then seems to reach the best of both worlds: unions may deduct dues germane to the process of collective bargaining and contract administration, while nonmembers are required to pay only for the services from which they reap a reward.[17] This unanimous decision stood for over forty years.[18] The dawning of a new millennium came with a new understanding of fees as compelled political speech.[19]

"[T]he political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate."[20] *Abood* did not see public servants as political objects belonging to a party; instead, it focused solely on market forces, which would unify apolitical bargaining power.[21] Unfortunately, in today's political climate, the country can no longer agree that fighting for the best interests of a bargaining unit, in even its most basic form, is not inherently political.[22] "Moreover, according to the Court's dicta in *Harris v. Quinn*,[23] even the most quintessentially traditional collective bargaining subject—

[15] *See id.* at 211, 235 ("We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative.").

[16] *Id.* at 235–36.

[17] *See id.*

[18] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018); *Abood v. Detroit Board of Education*, OYEZ, https://www.oyez.org/cases/1976/75-1153 [https://perma.cc/79H3-V687].

[19] One conservative commentator, who filed an amicus brief in support of the AFSCME, points out that under the logic of *Janus*, taxation is a far more inherently political form of compelled speech. *See* Eugene Volokh, *Why There's No First Amendment Problem with Compulsory Union Agency Fees*, REASON (Jan. 19, 2018, 5:02 PM), https://reason.com/volokh/2018/01/19/why-theres-no-first-amendment-problem-wi [https://perma.cc/9JQT-QNZ7]; *see also* Justin Berrier, *The Volokh Conspiracy and Washington Post's Move to the Right*, MEDIA MATTERS AM. (Jan. 22, 2014, 4:30 PM), https://www.mediamatters.org/washington-post/volokh-conspiracy-and-washington-posts-move-right [https://perma.cc/UC3E-N483].

[20] *Janus*, 138 S. Ct. at 2483 (2018).

[21] "A public employer . . . is not guided by the profit motive and constrained by the normal operation of the market." *Abood*, 431 U.S. at 227.

[22] *See* Courtlyn G. Roser-Jones, *Reconciling Agency Fee Doctrine, the First Amendment, and the Modern Public Sector Union*, 112 NW. U. L. REV. 597, 602 (2018).

[23] Harris v. Quinn, 573 U.S. 616 (2014).

wages—can reach important political issues in the public sector, particularly in an age of ballooning state payrolls and unbalanced budgets."[24] In other words, the Court would have one believe that a union using agency and member fees to lobby an employer for a pay raise does not do so for the benefit of the employees, but rather to advance some political agenda in an effort to further indebt the state. This characterization of agency fees as unavoidably political is at best cynical and at worst warped.

II. THE SIX-YEAR CAMPAIGN

A. Alito's Influence

It would seem unfair to discuss public-sector unions without discussing the author of the three majority decisions undermining and then overturning *Abood*.[25] Most shocking is the manner in which "a relatively junior Justice" was able to set the agenda for the Court.[26] The appointment of Justice Alito tipped the scale, moving the Court to the right and creating the strong conservative majority needed to overturn *Abood*.[27] However, one should not overturn a forty-year-old precedent simply because one does not agree with the political arguments. Nevertheless, Justice Alito embarked on what Justice Kagan dubbed the Court's "6-year campaign to reverse *Abood*."[28]

The overturning of *Abood* would become a crusade to Justice Alito, who authored all three majority opinions, each building upon the last, which overturned *Abood*. The message of these decisions was simple: *Abood* was wrongly decided.[29] Justice Alito, despite only being on the Court for six years at the time of his first anti-*Abood* opinion,[30] was

---

[24] Roser-Jones, *supra* note 22, at 602.

[25] *See Janus*, 138 S. Ct. at 2459, 2460; *Harris*, 573 U.S. at 620, 656–57; Knox v. SEIU, Local 1000, 567 U.S. 298, 302, 322–23 (2012).

[26] Brianne J. Gorod, *Sam Alito: The Court's Most Consistent Conservative*, 126 YALE L.J.F. 362, 366 (2017).

[27] Jess Bravin, *Supreme Court Deals Blow to Public-Sector Union*, WALL STREET J. (June 27, 2018, 2:35 PM), https://www.wsj.com/articles/supreme-court-deals-blow-to-public-sector-unions-1530108179 [https://perma.cc/RSB7-724Y] ("[T]he court tilted further to the right in 2006, with the appointment of Justice Alito, antiunion groups developed a challenge on the premise that anything a union does in relation to a government agency, including bargaining, is inherently political, because elected officials ultimately are responsible for its decisions.").

[28] *Janus*,138 S. Ct. at 2487 (Kagan, J., dissenting) (citing Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016); *Harris*, 573 U.S. 616; *Knox*, 567 U.S. 298).

[29] *See id.* at 2460; *Harris*, 573 U.S. at 635, 36; *Knox*, 567 U.S. at 322.

[30] *See Knox*, 567 U.S. at 302; *Samuel Alito Fast Facts*, CNN, https://www.cnn.com/2013/02/03/us/samuel-alito-fast-facts/index.html [https://perma.cc/S784-AR3T].

able to act as the architect of a targeted takedown of a long-settled precedent.

B. Knox v. SEIU

Justice Alito's first attempt to crack the foundation of compulsory agency shop fees came in 2012 with *Knox v. SEIU, Local 1000*.[31] This represented the perfect first case for Alito: with *Abood*'s intended protections against compelled political speech, the *Knox* issue cut directly against *Abood*'s intent.[32] *Knox* involved a California union's decision to levy a special fee increase in order to defeat two special elections propositions called for by then-Governor Arnold Schwarzenegger.[33] These propositions would have required unions to obtain an employee's affirmative consent before raising dues for political purposes and would have given the governor, in some circumstances, the ability to limit appropriations to public-employee benefits.[34] Naturally, such an existential threat to California state unions elicited a strong response, but the tactics of the Service Employees International Union (SEIU), Local 1000, would become too drastic for even some moderate and liberal justices.[35]

SEIU distributed its annual *Hudson* notice,[36] which set the levels at which dues would be deducted and established what percentage of dues would be chargeable expenses related to the day-to-day apolitical operations of the union.[37] The annual charge was estimated at 56.35% and established fee caps—fee payers

[31] *See Knox*, 567 U.S. at 302; Linda Greenhouse, *It's All Right with Sam*, N.Y. TIMES (Jan. 7, 2015), https://www.nytimes.com/2015/01/08/opinion/its-all-right-with-samuel-alito.html [https://perma.cc/YD8N-NV86].

[32] *See Knox*, 567 U.S. at 321–23; *Abood*, 431 U.S. at 241.

[33] *See Knox*, 567 U.S. at 303–04.

[34] *Id.* at 304.

[35] Justices Sotomayor, Ginsburg, and Kennedy all votes in favor of the Court's holding. *See id.* at 301; *see also About – SEIU Local 1000*, SEIU, https://www.seiu1000.org/about [https://perma.cc/7ETF-4QMN] ("Local 1000 of the Service Employees International Union is a united front of 96,000 working people employed by the State of California, making Local 1000 the largest public sector union in California and one of the largest in the country.").

[36] *See Knox*, 567 U.S. at 303. Public-sector unions must give notice to members—and former fee payers—of what their fees will cover. Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986) ("[T]he constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.").

[37] *Knox*, 567 U.S. at 303; *see also Abood*, 431 U.S. at 232 ("We conclude that the Michigan Court of Appeals was correct in viewing this Court's decisions in *Hanson* and *Street* as controlling in the present case insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes.").

(nonmembers) would have thirty days to object to the full amount and instead have only the 56.35% deducted, creating an opt-out system.[38] This notice also included a provision stating that "the agency fee was subject to increase at any time without further notice."[39] After the notice had been sent out, but before the end of the thirty-day period, Governor Schwarzenegger announced the special elections.[40] Once the thirty-day window closed, SEIU announced a temporary twenty-five percent dues increase and the elimination of dues caps.[41] SEIU's action was publicly labeled and advertised as the "Emergency Temporary Assessment to Build a Political Fight-Back Fund."[42] This money was then used for a variety of political speech and activities, such as mailers, television and radio advertising, voter registrations, and education.[43]

Abood had articulated a clear and simple message: "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."[44] However, "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."[45] Thus the SEIU's campaign, which was a surprise and purely political initiative created only after the objection period had ended, cut squarely against *Abood*'s prohibition on using mandatory fees to fund political speech.

In her concurrence in *Knox*, Justice Sotomayor, joined by Justice Ginsburg, agreed that such deductions were made without an opportunity for fee payers—and even current members—to object to the increase that was made purely for political purposes.[46] Such a gross overreaching of the standards established by *Abood* and *Hudson* made *Knox* the perfect opportunity for Justice Alito to establish his toehold of anti-*Abood* precedent. After all, *Abood* was

[38] *Knox*, 567 U.S. at 303.
[39] *Id.*
[40] *See id.* at 303–04.
[41] *See id.*
[42] *Id.* at 304.
[43] *Id.*
[44] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).
[45] *Id.* at 235–36.
[46] *See Knox*, 567 U.S. at 324 (Sotomayor, J., concurring) (citing Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986)).

settled law that could seemingly not be overturned in a single decision, and certainly not without more conservative support.

Knox is essential to understanding the successful targeted attack on public-sector labor. While Chief Justice Roberts has overseen one of the most conservative Courts in history,[47] until *Knox* the Court at that point had yet to formally question *Abood*.[48] It was in this case that Justice Alito was able to take his first shot at the foundation of *Abood*. "'The primary purpose' of permitting unions to collect fees from nonmembers . . . is 'to prevent nonmembers from free-riding on the union's efforts . . . .'"[49] This "anomaly" would become a fixture in Justice Alito's discussion of public-sector unions.[50] Subsequent opinions, including *Janus*, all authored by Justice Alito, are built on the back of his *Knox* framework.[51]

The impact of the *Knox* majority opinion on the foundation of *Abood* did not go unnoticed, even in the concurrence.[52] "To cast serious doubt on longstanding precedent is a step we historically take only with the greatest caution and reticence. To do so, as the majority does, on our own invitation and without adversarial presentation is both unfair and unwise."[53] As raised by Justice Sotomayor, this clandestine approach "deprives [the Court] of the benefit of argument that the parties, with concrete interests in the question, are surely better positioned than we to set forth."[54] Justice Sotomayor further reiterates by quoting Justice Alito himself: "It is undesirable for us to decide a matter of this importance in a case in which we do not have

[47] *See* Adam Liptak, *The Roberts Court; The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1.

[48] *See Knox*, 567 U.S. at 302 (citing *Abood*, 431 U.S. 209); Greenhouse, *supra* note 31.

[49] *Knox*, 567 U.S. at 311 (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 181 (2007)).

[50] "Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly . . . ." *Id.* (citing *Hudson*, 475 U.S. at 303). "In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, but in more recent cases we have recognized that this holding is 'something of an anomaly,' . . . and that *Abood*'s 'analysis is questionable on several grounds.'" Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463 (2018) (first quoting *Knox*, 567 U.S. at 311; and then quoting Harris v. Quinn, 573 U.S. 616, 617 (2014)) (citing *Abood*, 431 U.S. at 232).

[51] *See Janus*, 138 S. Ct. at 2463 (first quoting *Knox*, 567 U.S. at 311; and then quoting *Harris*, 573 U.S. at 617) (citing *Abood*, 431 U.S. at 232); *Harris*, 573 U.S. at 627–28 (quoting *Knox*, 567 U.S. at 311).

[52] *See Knox*, 567 U.S. at 305, 328 (Sotomayor, J., concurring).

[53] *Id.* at 328.

[54] *Id.* (citing NASA v. Nelson, 562 U.S. 134, 147 n.10 (2011)). The Court in *Nelson* assumed, but did not decide, that background checks of private-sector employees working under contracts with the federal government implicated a "constitutional right to informational privacy." *Nelson*, 562 U.S. at 138, 146–47.

the benefit of briefing by the parties and in which potential *amici* had little notice that the matter might be decided."[55]

Knox, as the beginning of the end for *Abood*, may have even more significance than *Janus*, after all, "[i]t has been clear ever since the 2012 *Knox v. SEIU* decision that the Supreme Court was poised to rule that mandatory union payments violate the constitutional rights of public employees."[56] Justice Alito seized this opportunity to legislate from the bench, with which he began to write a script that would change the course of public employment in this country.

C. Harris v. Quinn

Justice Alito's next crack at *Abood* came just two years after *Knox,* in 2014, with *Harris v. Quinn*.[57] Unlike *Knox*, the facts of *Harris* do not involve the questionable practices of a union, but instead the very existence and reach of one.[58] Moreover, this case would be split directly down ideological lines.[59]

In order to save on overall treatment cost, federal Medicaid subsidized state-run programs that enabled patient access to at-home caregivers, many of whom were patients' relatives.[60] Illinois had created such a system and, in the *Harris* majority's view, had made it painstakingly obvious that the employee-employer relationship existed solely between the patient and the caregiver.[61] Mainly, the law of Illinois vested the right to hire or fire the caregiver with the patient.[62] The Court reasoned that the employees were not bona fide state workers.[63]

While the discussion of this case revolved around the legitimacy of *Abood*, the issue of *Harris* focused on the classification of the workers involved.[64] Nonetheless, the majority took this opportunity to take "potshots at *Abood*."[65] "The *Abood* Court's analysis is questionable on several grounds. Some of these were noted or apparent at or before

---

[55] *Knox*, 567 U.S. at 328 (quoting *Nelson*, 562 U.S. at 147 n.10).

[56] *Mark Janus Asks Appeals Court to Order Refund of Forced Union Fees Outlawed by U.S. Supreme Court*, NRTW (Mar. 27, 2019), https://www.nrtw.org/news/janus-03272019/ [https://perma.cc/XAY6-V7JY].

[57] *See Harris*, 573 U.S. at 633–37; *Knox*, 567 U.S. 209.

[58] *See Harris*, 573 U.S. at 638–39.

[59] *See id.* at 646–47.

[60] *See id.* at 620–21.

[61] *See id.* at 621.

[62] *See id.* at 621–22.

[63] *See id.* at 625.

[64] *See id.* at 638–39.

[65] *Id.* at 658 (Kagan, J., dissenting).

the time of the decision, but several have become more evident and troubling in the years since then."[66] What follows in the *Harris* opinion is a flurry of dicta, irrelevant to the issue of whether to narrowly extend *Abood* to a new class of worker.[67]

> The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union. As we have explained, *Street* was not a constitutional decision at all, and *Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years later. Surely a First Amendment issue of this importance deserved better treatment.[68]

The Court's decision then rests partially on the legitimacy of *Abood*. But instead of overruling *Abood*, the Court simply refused to extend it.[69] In so doing, the Court defied what its own precedent impelled—to declare the fees constitutional under *Abood* given the personal assistants' status as state employees under the Illinois statute—and belied the conservative majority's view that *Abood* was bad policy that should be constrained and not just bad law that should be ended. Unprompted, Justice Alito again began creating a powerful string of dicta, one to which he would return whenever an opportunity to overturn *Abood* materialized.[70] "The petitioners in this case asked this Court to end that discussion for the entire public sector, by overruling *Abood* and thus imposing a right-to-work regime for all government employees. The good news out of this case is clear: The majority declined that radical request."[71] Maybe because of the inability to reconcile at-home workers with full-time public employees, or simply because Justice Alito could not yet get his five votes, the time had not yet come to overturn *Abood*. The *Harris* opinion, "[w]hile not quite the stake in the heart that would kill

[66] *Id.* at 635 (majority opinion).

[67] *See id.* at 635–36; *see also id.* at 659 (Kagan, J., dissenting) ("This case thus raises a straightforward question: Does *Abood* apply equally to Illinois's care providers as to Detroit's teachers? No one thinks that the fair-share provisions in the two cases differ in any relevant respect.").

[68] *Id.* at 635–36 (majority opinion).

[69] "Because of *Abood*'s questionable foundations, and because the personal assistants are quite different from full-fledged public employees, we refuse to extend *Abood* to the new situation now before us." *Id.* at 645–46 (emphasis omitted).

[70] *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463 (2018) ("*Abood*'s 'analysis is questionable on several grounds.'" (quoting *Harris*, 573 U.S. at 635)).

[71] *Harris*, 573 U.S. at 680 (Kagan, J., dissenting).

public employee unions altogether, . . . at least made *Abood* a ghoul, one of the walking dead."[72]

D. Friedrichs v. CTA[73]

Nearly two years after *Harris*, an appeal from the Ninth Circuit gave the Supreme Court another opportunity to overturn *Abood*.[74] The Ninth Circuit simply upheld the lower court's decision (upholding *Abood*) finding "that the questions presented in this appeal are so insubstantial as not to require further argument."[75] However, the Supreme Court disagreed, granting certiorari in June 2015.[76] Conservative commentators noted that during the oral arguments for *Friedrichs v. CTA*, Justices Scalia and Kennedy seemed to agree with Justice Alito that public unions are inherently political, indicating those Justices were likely to vote with the teachers and against the union.[77] However, before the case was decided, Justice Scalia suddenly passed away.[78]

Instead of a resounding victory, conservatives were left with an affirmance of the Ninth Circuit's holding by an equally divided Supreme Court.[79] Lacking a conservative majority, the Supreme Court did not hear a case implicating *Abood* in the term immediately following Justice Scalia's passing.[80] The April 2017 confirmation of Neil Gorsuch to Justice Scalia's seat reinstated the Court's conservative majority.[81] By September of that same year, the Court granted a writ of certiorari to the *Janus* petitioners.[82]

---

[72] John Eastman, Harris v. Quinn *Symposium:* Abood *and the Walking Dead*, SCOTUSBLOG (June 30, 2014, 6:09 PM), https://www.scotusblog.com/2014/06/harris-v-quinn-symposium-abood-and-the-walking-dead/ [https://perma.cc/5S4C-5KN4].

[73] Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016).

[74] *See id.*; *Harris*, 573 U.S. 616.

[75] Friedrichs v. Cal. Teachers Ass'n, No. 13-57095, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014), *aff'd by an equally divided Court*, 135 S. Ct. 1083.

[76] Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015).

[77] *See* Matthews, *supra* note 8.

[78] *See* Adam Liptak, *Justices' 4-4 Tie Gives Unions Win in Labor Lawsuit*, N.Y. TIMES, Mar. 30, 2016, at A1.

[79] *Friedrichs*, 136 S. Ct. at 1083.

[80] *See* Matthews, *supra* note 8; *Neil Gorsuch*, OYEZ, https://www.oyez.org/justices/neil_gorsuch [https://perma.cc/B9FJ-R78T].

[81] *See* Matthews, *supra* note 8; *Neil Gorsuch*, *supra* note 80.

[82] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 54 (2017).

E. Janus v. AFSCME

"Today, the Court succeeds in its 6-year campaign to reverse *Abood*."[83] Regardless of the political outcomes of the ruling, the Court's decision in *Janus* represents the culmination of a targeted campaign against *Abood*. The facts of this case seem irrelevant; with the addition of a new conservative Justice, the outcome of *Janus* appeared inevitable.[84]

The Court's logic held that the promotion of labor peace and the avoidance of free riders were not compelling state interests to overcome the free speech rights of public employees.[85] Moreover, the Court held that free riders could be addressed in a less restrictive means than agency fees.[86] Free riding has long stuck out as a difficult issue to properly address, even for the conservative Antonin Scalia.[87] This would seem to leave the issue of free riding with more questions than answers as unions begin a new chapter in a post-*Janus* world.

III. UNDERMINING *STARE DECISIS*

A. The Need for Natural Judicial Evolution

A quintessential example of judicial evolution is the decision in *Brown v. Board of Education*.[88] *Brown* overturned *Plessy v. Ferguson*[89] and its doctrine of "separate but equal,"[90] a doctrine courts

[83] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2487 (2018) (Sotomayor, J., dissenting) (citing *Friedrichs*, 136 S. Ct. 1083; Harris v. Quinn, 573 U.S. 616 (2014); Knox v. SEIU, Local 1000, 567 U.S. 298, 302, 322–23 (2012)).

[84] *See generally* Matthews, *supra* note 8 ("The Court punted on a similar case in 2016, deadlocking 4-4 in the wake of Antonin Scalia's death. With Scalia replaced with a fellow conservative, Neil Gorsuch, there was finally a 5-4 majority to rule against the unions.").

[85] *See Janus*, 138 S. Ct. at 2466 (quoting *Knox*, 567 U.S. at 311).

[86] *See id.* (citing *Harris*, 573 U.S. 616). Some states, such as New York, have been proactive in their protections for unions, minimizing the resources that must go to free riders. *See, e.g.*, Max Parrott, *Cuomo's Anti-Janus Labor Law May Divide Workers, Critics Contend*, CSNY (June 29, 2018), https://www.cityandstateny.com/articles/policy/labor/andrew-cuomo-anti-janus-labor-law-supreme-court.html [https://perma.cc/N2FY-44KC] ("The new law . . . reduc[es] the number of services that New York's public-sector unions must provide to workers who opt not to join the union. The unions . . . will not have to provide . . . benefits such as free legal representation, pension counseling or continuing education to non-members.").

[87] *See, e.g.*, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment part and dissenting in part) ("In the context of bargaining, a union must seek to further the interests of its nonmembers . . . . Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.").

[88] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[89] Plessy v. Ferguson, 163 U.S. 537 (1896).

[90] *Brown*, 347 U.S. at 495.

had "labored with" for over fifty years.[91] The Supreme Court alone had heard "six cases involving the 'separate but equal' doctrine in the field of public education."[92] Throughout this period, the Court heard several segregation cases with various of its members authoring the resulting opinions.[93] The culmination of this process was the Court's unanimous decision in *Brown* to reject the weakened foundation of *Plessy*.[94]

The path to *Brown* can be distinguished from the path to *Janus*, which saw three majority opinions—including *Janus*—authored by the same member of the Court and consistently split down party lines.[95] In contrast, *Brown*'s precursors include a range of voices,[96] giving the Court the benefit of diversity of thought and discussion as it evolved to overturn *Plessy*. Such inclusiveness prevents the Court's domination by singular thought, and imbues it with the creativity and collegiality needed to solve some of the nation's most divisive issues. When one Justice is allowed to author opinion after opinion in just a few short years undermining precedent, diversity of thought is lost. In place of compromise sits singular dictation, as the Court shifts away from acting as the mouthpiece for the people and instead speaks for one.

In an effort to create expediency, the Court lost its chance for earnest discussion on the First Amendment issues relating to fee deduction and instead allowed one man to act as the voice of the Court. Had the Court allowed for a natural process, there may have been a unanimous decision in the distance—one harmonious compromise—that would have represented the voice of the people and not just the majority.

---

[91] *Id.* at 491.

[92] *Id.*

[93] *See* McLaurin v. Okla. State Regents, 339 U.S. 637 (1950) (Vinson, C.J.); Sweatt v. Painter, 339 U.S. 629 (1950) (Vinson, C.J.); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (per curiam); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (Hughes, C.J.); Gong Lum v. Rice, 275 U.S. 78 (1927) (Taft, C.J.); Cumming v. Richmond Cty. Bd. of Educ., 175 U.S. 528 (1899) (Harlan, J.).

[94] *See Brown*, 347 U.S. at 486, 495.

[95] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2459 (2018); Harris v. Quinn, 573 U.S. 616, 620 (2014); Knox v. SEIU, Local 1000, 567 U.S. 298, 302 (2012). Although *Knox* was a 7-2 decision, the majority opinion authored by Justice Alito—which contained language relating to the validity of *Abood*—only received five votes. *See Knox*, 567 U.S. at 301–02.

[96] *See supra* note 93 and accompanying text.

B. The Effects of an Improper Process

Why should anyone care about public sector unions? Justice Alito's majority opinion in *Janus* reasons that "*stare decisis* is 'weakest' when deciding matters of constitutional law."[97] This lack of deference, along with the vague "poorly reasoned" catch-all,[98] grants the Court absurd power and political sway in interpreting matters of the Constitution. After all, each of the nine Justices view the document in a different light, and even minor shifts in the Court's composition could lead to an undermining of the whole judicial system.[99]

Each single shift in precedent, even for an issue as narrow as union fee deductions, can lead to billions of dollars of ligation.[100] "[N]ew petitions [challenging organized labor] are part of what lower courts have begun to call 'clean-up proceedings' in the wake of the Supreme Court's 5-4 decision last term in *Janus v. AFSCME*."[101] With at least thirty-five class action suits brought in eighteen federal districts in the wake of *Janus*, this can be felt throughout the nation.[102] Each petition seeks millions of dollars—covering a two-or-more-year statute of limitations—deducted in reliance on the settled law of *Abood*, representing existential threats to public-sector unions across the country.[103] If the Court holds unions responsible for these deductions, they would be penalizing unions for failing to follow a precedent that had yet to even exist.[104] These cases push the boundaries of how we view culpability, as the defendants in these cases were simply following the law. As reasoned by Judge Robert W. Gettleman of the Northern District of Illinois, "*Abood* remained

---

[97] Turley, *supra* note 5; *see Janus*, 138 S. Ct. at 2478 ("[*S*]*tare decisis* applies with perhaps least force of all to decisions [regarding] First Amendment rights.").

[98] *Janus*, 138 S. Ct. at 2460; Turley, *supra* note 5.

[99] *See* Danielle Root & Sam Berger, *Structural Reforms to the Federal Judiciary*, CTR. FOR AM. PROGRESS (May 8, 2019, 12:01 AM), https://www.americanprogress.org/issues/courts/reports/2019/05/08/469504/structural-reforms-federal-judiciary/ [https://perma.cc/6ETM-QHQ6]; *see also* Adam Winkler, *Why the Supreme Court Won't Impact Gun Rights*, ATLANTIC (June 7, 2016), https://www.theatlantic.com/politics/archive/2016/06/why-the-supreme-court-wont-restrict-gun-rights/485810/ [https://perma.cc/UX4B-BS9V] (discussing a shift in the Court's composition in the context of interpreting the Second Amendment).

[100] *See, e.g.*, Marcia Coyle, *Dozens of Class Actions Build on Supreme Court's 'Janus' Union Ruling*, NAT'L L.J. (Mar. 14, 2019, 2:38 PM), https://www.law.com/nationallawjournal/2019/03/14/dozens-of-class-actions-build-on-supreme-courts-janus-union-ruling/ [https://perma.cc/GG35-VCU2].

[101] *Id.*

[102] *See id.*

[103] *See id.*

[104] *See* Janus v. AFSCME, Council 31, No. 15 C 1235, 2019 WL 1239780, at *3 (N.D. Ill. Mar. 18, 2019).

the law of the land. And, despite [statements in *Janus* that the constitutionality of the fees were uncertain notwithstanding *Abood*], there was no way for defendant [a public sector union] to predict the resolution of this case."[105] He further noted that "had the general and/or presidential election resulted differently, the composition of the Supreme Court that decided the case may well have been different, leading to a different result."[106] This underscoring of the tenuous balance on which these precedents sit, along with the mess that can be made by hastily overturning them, is the very essence of the need for *stare decisis*. This need has not been lost on the Court, as even Chief Justice Roberts has, when convenient, spoken for its necessity.[107]

During his confirmation hearing, Chief Justice Roberts addressed the disruption that overturning settled law has on the justice system:

> I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the court has emphasized this on several occasions—*it is not enough that you may think the prior decision was wrongly decided*.[108]

However, when it came to *Janus*, he would fail to stand by those words.[109] Indeed, Chief Justice Roberts had recently argued in favor of respecting *stare decisis* where the Court's precedent had failed to keep pace with the development of e-commerce.[110] He also wrote, "Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy *should be undertaken by Congress*."[111] This deference to the policy-making authority of the political branches was not present in *Janus*, where the Court disregarded state and federal legislation for the sake of overturning settled law.[112] Chief Justice Roberts further stated that

---

[105] *Id.*

[106] *Id.*

[107] *See, e.g.*, Danny Cevallos, *Why Roe v. Wade Is Most Likely Not in Grave Danger No Matter Whom Trump Nominates*, NBC NEWS (July 5, 2018, 4:30 AM), https://www.nbcnews.com/politics/supreme-court/why-roe-v-wade-likely-not-grave-danger-no-matter-n888836 [https://perma.cc/PUS7-39JT].

[108] *Id.* (emphasis added).

[109] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018).

[110] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2104–05 (2018) (Roberts, C.J., dissenting).

[111] *Wayfair*, 138 S. Ct. at 2101 (emphasis added).

[112] *See Janus*, 138 S. Ct. at 2501 (Sotomayor, J., dissenting).

"[t]he Court should not act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago."[113] The hypocrisy comes to life with the realization that these cases were decided within one week of each other.[114]

Chief Justice Roberts joined the *Janus* majority, which decided to, in their opinion, "expiate a mistake . . . made" over forty years ago.[115] The Roberts Court has overturned precedent at a historically low rate.[116] It is interesting that the October Term 2017 saw the overturning of several major precedents, including *Abood*.[117] If the Roberts Court—with its newly solidified hardline conservative majority[118]—decides to become as judicially active as it was in the October Term 2017,[119] the coming years could see the demise of many longstanding liberal precedents.[120]

The Court's descent into another arm of party politics has brought the rise and fall of both liberal and conservative majorities, each with its own agenda.[121] It is at this inflection point in the Court's history

---

[113] *Wayfair* 138 S. Ct. at 2101.

[114] *Compare Wayfair*, 138 S. Ct. 2080 (decided June 21, 2018), *with Janus*, 138 S. Ct. 2448 (decided June 27, 2018).

[115] *Wayfair*, 138 S. Ct. at 2101; *see Janus*, 138 S. Ct. at 2459, 2460, 2486.

[116] *See* Jonathan H. Adler, *The Stare Decisis Court?*, REASON (July 8, 2018, 10:05 AM), https://reason.com/volokh/2018/07/08/the-stare-decisis-court [https://perma.cc/PC95-W9MJ]. Although, the argument persists that this is only because the Roberts Court, as in *Heller*, does not fully reject precedent but instead narrows or sidesteps it, coming just short of a full-scale overturning. *See, e.g.*, *id.*

[117] *See id.*

[118] Sheryl Gay Stolberg, *Senate Votes 50-48 to Put Kavanaugh on Supreme Court*, N.Y. TIMES, Oct. 7, 2018, at A1.

[119] *See* Adler, *supra* note 116.

[120] *See, e.g.*, Ariana Eunjung Cha, *At Least 20 Abortion Cases Are in the Pipeline to the Supreme Court. Any One Could Gut Roe v. Wade.*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/health/2019/02/15/least-abortion-cases-are-steps-us-supreme-court-any-one-could-gut-roe-v-wade/ [https://perma.cc/TU9D-RJ5K].

[121] *See* Joseph J. Ellis, *The Supreme Court Was Never Meant to Be Political*, WALL ST. J. (Sept. 14, 2018, 4:13 PM), https://www.wsj.com/articles/stop-pretending-the-supreme-court-is-above-politics-1536852330 [https://perma.cc/JN6U-2RSP] ("[S]ince Brown we have watched the Supreme Court bend the law in two different directions, landing on one side or the other of the political spectrum based on which political party could command a 5-4 majority."). Part and parcel with this conversation is the fear of placing political Justices on the bench, whose minds have already been made up. Justices such as Souter, Kennedy, O'Connor, and Stevens stood as free-thinkers who were not swayed by political machinations, but instead chose to walk as free-standing apolitical figures. *See* Brandon Bartels, *It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court. Here Are 3 Reasons Why*, WASH. POST (June 29, 2018, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why/ [https://perma.cc/5ZN8-ZC4G] ("Three Republican appointees—Justices Harry Blackmun, John Paul Stevens and David Souter—underwent wholesale ideological reversals, drifting from center-right to liberal positions. Justices Sandra Day O'Connor and Kennedy became quintessential 'swing justices,' casting decisive votes in significant liberal and

that *Janus* arises, heralding a new breed of judicial instability: rather than simply justifying radical departures from precedent with miraculously newfound interpretations of constitutional text, the Court relies on "settled caselaw" its members just recently created. By building an anti-*Abood* case history before ultimately overturning *Abood*, the Court did not rely on a textualist critique of *Abood*. Instead, Justice Alito relied on the "settled law" of recent decisions—all of which *he wrote*—that questioned *Abood*.[122]

In effect, the process discourages compromise, and encourages Justices to chapter their manifestos in opinions, concurrences, and dissents until enough likeminded colleagues agree to abandon a targeted principle, and then in their decisions call up their ready-made and bespoke bodies of judge-made law to ground their choices. This strategy enables Court majorities—perhaps heretofore restrained by the interaction of *stare decisis*, shifting popular wisdom, and the Justices' own mortality—to quickly reconstruct constitutional law on a young foundation high enough to be unassailable by any one-time comer seeking to restore the prior order.

IV. IMPACT OF LOWER STANDARD ON SETTLED LAW

If the Court continues down the slippery slope of "*mocking stare decisis*,"[123] it runs the risk of alienating values held dear by liberals and conservatives alike. This is no more apparent than when viewed through two of the most divisive issues in American politics: abortion and guns.[124]

conservative rulings."). This ideological freedom is an essential element of an independent judiciary and a foundational building block of the U.S. system of government.

[122] *See Janus*, 138 S. Ct. at 2484 (first quoting Arizona v. Gant, 556 U.S. 332 (2009); and then quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)) (first citing Knox v. SEIU, Local 1000, 567 U.S. 298, 302 (2012); then citing Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015); and then citing Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam)).

[123] *Id.* at 2498 (Sotomayor, J., dissenting) (emphasis added).

[124] *See, e.g.*, *Abortion*, GALLUP, https://news.gallup.com/poll/1576/abortion.aspx [https://perma.cc/6QMZ-V9PW]; *Guns*, GALLUP, https://news.gallup.com/poll/1645/guns.aspx [https://perma.cc/H4J7-7RX8]; Lawrence Hurley, *U.S. Supreme Court to Tackle Gay Rights, Guns, Abortion and Trump*, REUTERS (Oct. 3, 2019, 7:08 AM), https://www.reuters.com/article/us-usa-court-term/u-s-supreme-court-to-tackle-gay-rights-guns-abortion-and-trump-idUSKBN1WI139 [https://perma.cc/9CTU-YZQW].

A. Roe *and* Casey

The landmark 7-2 decision in *Roe v. Wade*[125] "established a woman's legal right to an abortion."[126] However, it was never a strong precedent and has been referred to as the constitutional equivalent of the "duck-billed platypus."[127] As the *Washington Post*'s David Von Drehle observed, "*Roe*'s weakness was well understood in constitutional circles. So in 1992, three centrist justices performed a sort of taxidermy in a case called *Planned Parenthood v. Casey*. To preserve the essence of *Roe*, they replaced its guts with sturdier material."[128]

The preservation of *Roe*'s "essence" was authored, in part, by a conservative-leaning Sandra Day O'Connor.[129] However, the concerns of an aging Justice Blackmun echoed modern fears of the weakening of *stare decisis*.[130] "I do not underestimate the significance of today's joint opinion. . . . I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light."[131] He further opined, "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."[132] Justice Blackmun, a conservative judicial appointment himself,[133] feared that this controversial precedent could become a focal point of the discussion on his replacement as unpopular Court rulings could become a rallying cry.[134] With the passage of time came

---

[125] Roe v. Wade, 410 U.S. 113 (1973).

[126] *This Day in History: January 22, 1973:* Roe v. Wade, HIST., https://www.history.com/this-day-in-history/roe-v-wade [https://perma.cc/45J5-CU8M].

[127] David Von Drehle, Roe v. Wade *Might Not Be Doomed After All*, WASH. POST (July 3, 2018, 5:50 PM), https://www.washingtonpost.com/opinions/roe-v-wade-might-not-be-doomed-after-all/2018/07/03/5049cb80-7eed-11e8-b0ef-fffcabeff946_story.html [https://perma.cc/28PG-EK34] ("Its author, Justice Harry A. Blackmun, could hardly have sketched a more ungainly beast. Roe was to constitutional law what the duck-billed platypus is to evolution.").

[128] Von Drehle, *supra* note 127; *see* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[129] *See Casey*, 505 U.S. at 842–43; Michael Kiefer, *As the Supreme Court Shifted Right, Conservative Sandra Day O'Connor Shifted to the Middle*, AZCENTRAL, (Oct. 23, 2018, 12:33 PM), https://www.azcentral.com/story/news/local/phoenix/2018/10/23/sandra-day-oconnor-swing-vote-us-supreme-court-roe-v-wade-texas-sodomy-law-bush-v-gore/1537536002/ [https://perma.cc/5MHA-ZNQM]; Von Drehle, *supra* note 127.

[130] *See Casey*, 505 U.S. at 940, 943 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[131] *Id.* at 923.

[132] *Id.* at 943.

[133] *See Harry A. Blackmun*, OYEZ, https://www.oyez.org/justices/harry_a_blackmun [https://perma.cc/L59P-V3K7] ("On April 14, 1970, Blackmun was nominated to the Supreme Court by President Nixon.").

[134] *See Casey*, 505 U.S. at 943; *Harry A. Blackmun*, *supra* note 133.

the realization of that fear as any judicial nominee's view on *Roe* and *Casey* became a litmus test for fitness for the federal bench.[135] That test may have finally succeeded as the confirmation of Justice Kavanaugh solidifies a conservative majority that the Court never had with Justice Kennedy.[136]

As "[President] Trump's two-year odyssey to change the face of the judiciary and encourage critics of abortion rights to accelerate their efforts and work to pass other laws restricting abortion"[137] comes to an end, the Court may approach *Roe* and *Casey* with the same mindset and strategy with which it dismantled *Abood*: allowing for a baseless review of settled law, without cause or reason. With the Court solidly conservative, along with this newfound ability to revisit past decisions, there will be no telling how the Court will operate. If the prior dissents and sentiments are any barometer for how this untethered Court will act, it may already be too late for existing precedents.

Justice Thomas has no issues striking longstanding rulings which cut against his personal views.[138] He took his first swing at *Roe* by joining Chief Justice Rehnquist's dissent in *Planned Parenthood v. Casey*: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."[139] While many things may have changed since 1992, Justice Thomas's view of *Roe* has not.[140] He has decried the decision as "notoriously incorrect" and authored "more than 250 concurring or dissenting opinions seriously questioning precedents, calling for their reconsideration or suggesting that they be overruled."[141] Justice Thomas by his own admission does not bend

[135] *See* Ellis, *supra* note 121 ("What we are really witnessing, however, in the Kavanaugh hearings is the scene in 'The Wizard of Oz' when Dorothy draws back the curtain. The nomination and appointment process has become so transparently partisan and thoroughly politicized that no exalted image of the Supreme Court as a uniquely American version of the Oracle at Delphi is sustainable any longer."); Scott Horsley, *Kavanaugh Defends Controversial Abortion, Gun-Control Dissents*, NPR (Sept. 5, 2018, 5:00 AM), https://www.npr.org/2018/09/05/644615158/kavanaugh-hearings-day-2-senators-questions-to-take-center-stage [https://perma.cc/LKH4-U2B9].

[136] Ariane de Vogue, *Trump's Two Justices Mean Supreme Court Could Essentially Flip Abortion Access Ruling From 2016*, CNN (Jan. 30, 2019), https://www.cnn.com/2019/01/30/politics/abortion-supreme-court-judicial-nominations/index.html [https://perma.cc/5UND-Q357]. Justice Kennedy even co-wrote *Casey*'s joint opinion. *See Casey*, 505 U.S at 843.

[137] de Vogue, *supra* note 136.

[138] *See* Adam Liptak, *That's Settled Precedent? Thomas Disagrees.*, N.Y. TIMES, Mar. 5, 2019, at A13.

[139] *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting).

[140] *See* Liptak, *supra* note 138.

[141] *Id.*

to the will of *stare decisis*, and instead interprets the Constitution in his own distinct way with little regard for the influence of his predecessors.[142]

B. Heller

While defenders of the Second Amendment have little to fear with the current composition of the Court,[143] blissful ignorance of *stare decisis* is a double-edged sword which could one day slice in their direction.[144] There are many, including Justice Breyer, who see *Heller*'s reasoning as weak and ill-informed.[145] An ardent opponent of the *Heller* majority, Justice Breyer both wrote his own dissent and joined in Justice Stevens's:

> The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.[146]

Justice Sotomayor's concurrence in *Janus* echoes Justice Stevens's dissent in *Heller*. She, like Stevens before her, laments the dangerous line the Court toes:

> Dicta in those recent decisions [*Knox* and *Harris*] indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like

---

[142] *See id.* When asked if *stare decisis* held any force with him, Justice Thomas responded, "[N]ot enough to keep me from going to the Constitution." *Id.*

[143] *See* Hannah Shearer, *Brett Kavanaugh's Extreme Beliefs on Gun Control Ignore the Concerns of Most Americans*, NBC NEWS (Sept. 4, 2018, 4:12 PM), https://www.nbcnews.com/think/opinion/brett-kavanaugh-s-extreme-beliefs-gun-control-ignore-concerns-most-ncna906296 [https://perma.cc/4SQL-HBUM]; Richard Wolf, *Supreme Court's Conservatives Appear Poised to Expand Second Amendment Gun Rights*, USA TODAY (Jan. 31, 2019, 6:00 AM), https://www.usatoday.com/story/news/politics/2019/01/31/supreme-court-poised-expand-gun-rights-after-decade-inaction/2705601002/ [https://perma.cc/9AHE-EAFG].

[144] *See, e.g.*, John Paul Stevens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES, Mar. 28, 2018, at A23 ("That decision—which I remain convinced was wrong and certainly was debatable—has provided the N.R.A. with a propaganda weapon of immense power.").

[145] *See* District of Columbia v. Heller, 554 U.S. 570, 681 (2008) (Breyer, J., dissenting).

[146] *Id.* at 679 (Stevens, J., dissenting).

> a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."[147]

This idea of "gratuitous criticisms" should sound alarms for the conservative movement, as several liberal justices believe *Heller* was wrongly decided.[148] All controversial precedents are in a precarious situation. *Abood* stood as good law for over forty years,[149] surviving through that time period with a consistently conservative Court.[150] In comparison, *Heller* has only stood a little over ten years.[151] Moreover, *Heller* obfuscated an over-sixty-year-old precedent in *Miller*.[152] And unlike the about-face from *Abood* to *Janus*, a Court with a different ideological leaning has yet to interpret *Heller*.[153]

Weighing these factors, it would seem elementary that the stronger precedent would be the one that had stood four times longer and had survived ideological opposition throughout that period. If a liberal majority were to take over the Supreme Court, the liberal majority could, by *Janus* principles, dismantle the *Heller* framework without regard to *stare decisis*. Although this day will likely not come for some time,[154] it may take only one liberal justice to change the tone of the Court.[155] What happens on the day when a new Justice, like Justice Thomas, does not like *stare decisis* "enough to keep [him] from going to the Constitution?"[156] After all, Justice Scalia's majority opinion in *Heller* is little more than a parsing of the direct text of the

---

147 Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2498 (2018) (Sotomayor, J., dissenting).

148 *See, e.g.*, Winkler, *supra* note 99; *see also Ginsburg's Exit Interviews*, WALL STREET J. (July 13, 2016, 3:20 PM), https://www.wsj.com/articles/ginsburgs-exit-interviewsginsburgs-exit-interviews-1468437647 [https://perma.cc/ZWM2-TN46] ("Concerning a landmark 2008 Second Amendment case, [Justice Ginsburg] said, 'I thought *Heller* was a very bad decision.'").

149 *See Janus*, 138 S. Ct. at 2486; Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

150 *See* Alvin Chang, *Brett Kavanaugh and the Supreme Court's Drastic Shift to the Right, Cartoonsplained*, VOX, https://www.vox.com/policy-and-politics/2018/7/9/17537808/supreme-court-brett-kavanaugh-right-cartoon [https://perma.cc/4V7K-B9W8].

151 *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

152 *See id.* at 595–97 (citing United States v. Miller, 307 U.S. 174 (1939)).

153 *See, e.g.*, McDonald v. Chicago, 562 U.S. 742 (2010) (incorporating against the states *Heller*'s interpretation of the Second Amendment only two years after *Heller*).

154 *See* Oliver Roeder, *How Long Will the Supreme Court's Conservative Bloc Survive?*, FIVETHIRTYEIGHT (July 19, 2018, 5:59 AM), https://fivethirtyeight.com/features/how-long-will-the-supreme-courts-conservative-bloc-survive/ [https://perma.cc/9WNG-Z2ZW] (predicting a long-lasting conservative majority based on the relative youth of its Justices).

155 *See* Winkler, *supra* note 99 (discussing the comparative impact of conservative and liberal nominees).

156 Liptak, *supra* note 138.

Second Amendment,[157] which could be interpreted differently by a new liberal Justice.

Should a liberal Court return to *Heller*, it would be able to read the Constitution in whatever way it sees fit, regardless of prior rulings. This emphasis on textualism over contextualism could represent an existential threat to the Court; after all, the principle of *stare decisis* focuses on the need of the Court to serve as an apolitical arbitrator and not as a third decision-making political body.[158] Such a drastic shift in judicial norms must not go unnoticed.

V. WHY *JANUS* IS DIFFERENT

A. Building a Foundation

Like *Heller*, *Janus* muddles decades of settled law.[159] Unlike *Heller*, *Janus* overturned a preexisting standard instead of sidestepping it.[160] *Janus* represents a chilling threat to judicial process. Over the course of six years, the majority of the Court was able to fabricate a trail of breadcrumbs just strong enough to overturn precedent that stood for decades.[161] Dicta lying in wait in majority opinions would become a substitution for meaningful analysis.[162] This foundation is where *Janus* now sits—instead of one

[157] *See* District of Columbia v. Heller, 554 U.S. 570, 573–78 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

[158] *See* Ellis, *supra* note 121; John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, STAN. L. SCH. (Feb. 29, 2016), https://cgc.law.stanford.edu/commentaries/15-john-walker/ [https://perma.cc/W4Y7-9AZK].

[159] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2497 (2018) (Sotomayor, J., dissenting) ("*Abood* is not just any precedent: It is embedded in the law . . . in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining . . . and those of political activities . . . ."); District of Columbia v. Heller, 554 U.S. 570, 638 (Stevens, J., dissenting) ("Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980." (citing Lewis v. United States, 445 U.S. 55, 65–66 n.8 (1980)).

[160] *See Janus*, 138 S. Ct. at 2486 ("*Abood* was wrongly decided and is now overruled.").

[161] Dylan Matthews, *6 Excerpts That Explain the Supreme Court's Big Anti-Union Ruling*, VOX (June 27, 2018, 11:48 AM), https://www.vox.com/2018/6/27/17509460/supreme-court-janus-afscme-public-sector-union-alito-kagan-dissent [https://perma.cc/C53K-89PG] ("[Justice] Alito used majority opinions in 2012's *Knox v. SEIU* and 2014's *Harris v. Quinn* to detail the [*Abood*] decision's flaws, with an eye toward eventually overturning it in full (which the Court's liberals warned in dissents in those cases was his eventual game plan).").

[162] *See Janus*, 138 S. Ct. at 2463 (first quoting Knox v. SEIU, Local 1000, 567 U.S. 298, 311 (2012); and then quoting Harris v. Quinn, 573 U.S. 616, 617 (2014)) (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977)); *Harris*, 573 U.S. at 636 (quoting Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961)).

decision overturning forty years of precedent, it is now a litany of cases, each one strengthening the last.[163]

Justice Sandra Day O'Connor once said, "I don't know that there are any short cuts to doing a good job,"[164] and Justice Alito did a very good job. The *Janus* Anthology[165] will be able to stand the test of time as not one single decision, but a series of decisions which build to nearly undisputable caselaw. This extra step ensures that the usurping opinion is written stronger than the last. This advantage, combined with an expedited timeline and focused efforts, allows for Courts to simultaneously unearth settled law while also ensuring that future Courts grant greater deference to that unearthing.

B. Needless Review

In the wrong hands, the rubberstamp of the Court can lead to absolute tyranny. As the only unelected branch of the federal system, their power is not checked by election.[166] Instead, they are appointed for life, fearing little consequence for the actions that they take.[167] Sitting by and allowing for the Court to substitute itself for the legislature undermines the very principles of the republic. After all, Chief Justice Roberts himself in *Wayfair* found no issue delegating to Congress.[168] However, *Wayfair* did not deal with a fundamental right, as *Janus* did.[169] This distinction leads to an interesting question: If closed shops so clearly violated the First Amendment, why did so many decisions find otherwise? Why did this apparently obvious violation of the First Amendment stand for over forty years and require three opinions for Justice Alito to correct it?

As was the case in *Heller*, the textual interpretation of a fundamental right supersedes all precedent.[170] With that in mind, one might wonder why Justice Alito was unable to simply overturn *Abood* before Mr. Janus even contemplated bringing his case. It is

---

[163] *See* Matthews, *supra* note 161.

[164] Rachel Swalin, *11 Quotes from Female Supreme Court Justices That Will Give You a Major Confidence Boost*, READER'S DIG., https://www.rd.com/culture/female-supreme-court-justice-quotes/ [https://perma.cc/76NA-DVFR].

[165] A collection of *Janus*, *Knox*, and *Harris*.

[166] *See FAQs – General Information*, SUP. CT. U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/K2E9-CVZE].

[167] *See id.*

[168] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2101 (2018) (Robert, C.J., dissenting).

[169] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2459–60 (2018); *Wayfair*, 138 S. Ct. at 2087.

[170] *See* District of Columbia v. Heller, 554 U.S. 570, 573–98 (2008) (deconstructing the language of the Second Amendment).

because he needed to soften the blow for the remainder of the conservative majority. This building of a paper trail—here, a decade's worth of anti-*Abood* jurisprudence—allows the Court to violate the sanctity of *stare decisis* without the mess. Such a violent shift would surely sound an alarm in the American consciousness, as cries of judicial overreaching echoed throughout the country.[171]

Instead of drastically overturning forty-year-old precedent, the Court could frame its revisionism as simply following the direction of its prior decisions, which themselves responded to even more narrowly tailored issues of law.[172] This strategy allows the Court to focus on overturning precedent quickly and convincingly. So long as the Court acts methodically, they are now able to build quite a case against any issue regardless of how settled it may be. After all, the complex scheme dismantled in *Janus* was not built overnight; instead it grew and developed over time in reliance on *Abood*.[173]

The gutting of *Abood* was neither a response to a recent congressional act nor the first opportunity the Court had to analyze the constitutionality of a narrow issue.[174] Instead this was the Court selectively deciding that after forty years of standing jurisprudence they were going to reevaluate settled law. *Janus* did not challenge a new piece of legislation,[175] and that reason alone should shake confidence in the Court.[176] This law sat for decades,[177] filed under the "asked and answered" category of issues. Should the people allow the Court to select cases for review based on ideological grounds, the United States will be a nation without a settled jurisprudence.

Justice Breyer presented these fears to the nation in his recent dissenting opinion in *Hyatt*: "I understand that judges, including Justices of this Court, may decide cases wrongly. I also understand that later-appointed judges may come to believe that earlier-appointed judges made just such an error."[178] This message is directed squarely at the conservative majority, who in *Hyatt* once again unsettled *stare decisis* in the name of correcting the error of a

[171] *See generally* ALL. FOR JUSTICE, THE ROBERTS COURT AND JUDICIAL OVERREACH 9 (2013) (discussing the Roberts Court's failures to respect longstanding precedents).

[172] *See* Harris v. Quinn, 573 U.S. 616, 636 (2014); Knox v. SEIU, Local 1000, 567 U.S. 298, 311 (2012).

[173] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018).

[174] *See, e.g.*, *Harris*, 537 U.S. at 620.

[175] *See Janus*, 138 S. Ct. at 2460.

[176] *See* ALL. FOR JUSTICE, *supra* note 171, at 5.

[177] *See Janus*, 138 S. Ct. at 2460.

[178] Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1506 (Breyer, J., dissenting).

past Court.[179] He added, "I understand that, because opportunities to correct old errors are rare, judges may be tempted to seize every opportunity to overrule cases they believe to have been wrongly decided."[180] As with Justice Kagan's dissent in *Janus*, Justice Breyer scolded the majority for a seeming lack of restraint and willingness to abandoned settled law.[181] Justice Breyer further warned of the temptation posed by the opportunity to overturn precedent and the vital nature of judicial restraint.[182] It is this temptation that pushed Justice Alito to act against *Abood*, and this same temptation will continue long after he leaves the Court. Succumbing to this temptation, which is checked only by *stare decisis*, would lead to no settled law.

Standing idly by while forty years of law is burned before our very eyes means that no case is safe—not *Casey*, *Heller*, or any other closely held precedent. Instead as the pendulum of the Court swings, so too will the laws of the land. Constant relitigation of controversial but crucial decisions will consume the Court. It is for this reason—not just to protect the collective bargaining rights of teachers, police officers, or other civil servants—that *Janus* cannot become the standard. For once it is allowed there is no turning back.

CONCLUSION

While the politization of the Court is an ongoing issue, even absent *Janus*, the Court's ability to construct a body of caselaw contrary to a well settled precedent in under six years is alarming regardless of the Court's future ideological composition. If this tactic continues to be a tool for the majority of the Court, it will inevitably be used against both liberal and conservative rulings, undermining *stare decisis*. This is not a suggestion that the Court should blindly follow *stare decisis*; rather, it is a hope that the Court will resist selectively

[179] *See id.*

[180] *Id.*

[181] *See* Ariane de Vogue, *Justice Breyer's Warning and Other Things We Learned at the Supreme Court Monday*, CNN, https://www.cnn.com/2019/05/13/politics/justice-breyer-warning-supreme-court/index.html [https://perma.cc/F2WH-JPUK] ("Breyer was clear[ly] echoing the sentiments of Justice Elena Kagan, writing for her liberal colleagues, last term when she criticized the conservatives for overturning 1977 precedent in a 5-4 case that dealt a major blow to public sector unions.").

[182] *See Hyatt*, 139 S. Ct. at 1506 (Breyer, J. dissenting) ("[T]he law can retain the necessary stability only if this Court resists that temptation, overruling prior precedent only when the circumstances demand it.").

applying the principle.[183] The *Janus* roadmap could become a weapon of judicial mass destruction if the Court continues to undermine the precedential value of its previous decisions and succumbs to selective enforcement of *stare decisis*. Should this be the case, Court majorities would be able to wield extraordinary power as they dictate policies that could last for generations, all while unearthing settled law.

Janus is the canary in the coalmine: it exists as a warning to both sides of a potential future for the Court. One in which judicial instability is fueled by political motives. So, while public sector labor unions losing their ability to deduct fees is not a world-shattering legal moment, accepting the Court's questionable methodology to reach that conclusion will surely invite one.

[183] *Compare* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2101 (2018) (Robert, C.J., dissenting) ("The Court should not act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago."), *with* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018) (overturning *Abood* with Chief Justice Roberts joining the majority).