

## How Do Judicial Decisions Impact the Ability of Unions to Organize and Collectively Bargain?

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Throughout history unions have risen up to speak to ensure the betterment of America's workers, and they were able to do that due to a preserving attitude, a strong group effort, and a tactic termed collective bargaining. A union's ability to organize and collectively bargain are the primary attributes that make unions beneficial to workers. Without these abilities, workers would not have a collective voice to negotiate on their behalf, resulting in losses or lack of improvement in wages, benefits, working conditions, and all the other life improving effects that unions negotiate on the workers' behalf. However, as is to be expected, there are some resources that unions require in order to perform their duties to their members as well as to those non-union workers who benefit from the contract negotiations—support, both financial and physical, being the most important.

Recent judicial decisions have affected the future of unions, particularly in the private sector, by cutting off a major line of financial support, while furthermore making membership appear less beneficial and appealing to the individual. *Janus v. AFSCME*, a 2018 court case, ruled to prohibit the collection of “fair share” fees by unions of the public sector. These fees were meant to be a supplement to member dues and to help fund union activities, such as the ability to collectively bargain and represent the workers.<sup>1</sup> This essay will focus on two judicial decisions, *Janus v. American Federation of*

*State, County and Municipal Employees (AFSCME)* and the case that it overruled, *Abood v. Detroit Board of Education* and how these decisions impacted both the ability of unions to organize and their ability collectively bargain.

First, let's take a step back and address exactly how unions organize and what collective bargaining means. On their own, a single employee would have a hard time negotiating contract terms with their employer. Unions are a way for employees to band together as a collective allowing the union to negotiate with the workers' employer on the behalf of everyone—not just the union members—this is referred to as collective bargaining.<sup>2</sup> Everyone has the right to join or form a union if they choose as it was established as an “enabling” right in the United Nation's Universal Declaration on Human Rights. So while judicial decisions cannot really affect anyone's right to organize into a union, the decisions can hinder the ability for a union to thrive, which in turn affects the organization's ability to collectively bargain.

Collective bargaining is now a right to most workers in the United States due to an act passed in 1935—the National Labor Relations Act—which allows unions to negotiate contract terms such as benefits, wages, leave, safety, and much more on behalf of the workers. So, while a series of laws gave workers the rights to organization and collectively bargain, decisions in the courts can and have impacted the ability of workers to

fully utilize these rights—rights deemed fundamental.

The 1977 case *Abood v. Detroit Board of Education* helped unions to acquire funding by permitting them to collect “fair share” fees. These are fees paid by nonmembers of equal to, or less value, than those paid by union members. The fees cover expenses associated with benefits the nonmembers receive from the union, such as benefits negotiated by collective bargaining and representation, should they need it.<sup>1</sup> The basis for collecting these fees was that a union is obligated by law to represent everyone in the work place, not just its members. This means that if a union negotiates better wages for employees of a certain company it cannot stipulate that only the union members receive the higher wage while nonmembers must remain at the lower pay grade. “Fair share fees are a way to make sure everyone contributes to that representation”.<sup>3</sup> Anyone could see where a problem may arise with this arrangement.

“Free riders” as they have been called, are people who benefit from the work of the union without making any contributions themselves. *Abood v. Detroit Board of Education* helped to curb the issue of “free riders” by allowing the collection of “fair share” fees with the option to opt out of paying the portion of the fees that would go towards forwarding political ideals of the union. This judicial decision helped to make sure that while everyone’s rights to join or not join a union were preserved, the benefits received by the presence of the union were not taken advantage of by those reaping the benefits without paying their share to the cause.<sup>4</sup>

Since a union is required to represent everyone, not just their members, it is more

sustainable if everyone benefiting makes a contribution. Keyser describes this logic in an IBEW article,

“Fair share fees are a simple way of making sure everyone contributes to the collective effort of employees in a workplace,” Keyser said. “Asking people to pay for a service they’re receiving shouldn’t be controversial, but these anti-union groups’ goal is to destroy the labor movement, and attacking our ability to provide collective bargaining services is their plan of attack”<sup>3</sup>

In more recent history, the 2018 *Janus v. AFSCME* ruling overturned *Abood v. Detroit Board of Education* preventing the collection of “fair share” fees.

The 2018 case ruled “fair share” fees to be unconstitutional under the pretense that they are a violation of freedom of speech. This belief is given favor because unions use some of their funds to forward political goals and if nonmembers were required to pay a fee, then that money could go toward political or goals of other natures that they are personally opposed to. However, this was not the case as overturned *Abood v. Detroit Board of Education* explicitly stated that nonmembers could choose to opt out of fees that were not directly related to collective bargaining and representation.<sup>4</sup> The ruling of *Janus v. AFSCME* passed because while the option to opt out of some fees was present, a case was made that by using nonmembers’ money for collective bargaining, members’ money could be freed up to advocate for political goals.<sup>1</sup> *Janus v. AFSCME*, by prohibiting the collection of “fair share” fees had a strong impact on both union membership and funds.

The effect of rulings such as *Janus v. AFSCME* are exemplified in “right-to-work” states. Union membership in these states is lower than in non-“right-to-work” states.<sup>5</sup> This is likely because workers can receive much of the benefits of being in a union, i.e. collective bargaining, without being dues paying members. If membership becomes too low the union can no longer function as it no longer has sufficient financial or physical support. It is hard to blame people for making the decision to leave their unions if they believe not much will change and they will be able to save money by doing so. But the truth of the matter is that this way of thinking is not sustainable in the long term and will harm the ability of unions to collectively bargain.<sup>6</sup>

Now that *Janus v. AFSCME* made their ruling, all public sector unions face these issues of withdrawn support and will likely suffer as they lose people and funds. However, this decision has been long foreseen as it made its way through the courts, giving public sector unions time to prepare for the worst, “public sector unions in Minnesota have been working over the last several years to reach all of their ‘fair share’ members and convince them to become full union members” according to Bierschbach.<sup>7</sup> Fortunately for this union it has worked, as Bierschbach also reports that education union membership has grown and is the strongest it has ever been in Minnesota.

The example with Minnesota shows that because of recent judicial decisions such as *Janus v. AFSCME* unions will have to work a lot harder to gain and retain members. There will have to be changes enacted that make membership more appealing, or participation will plummet as it did in “Right-to-work” states.

To take a positive outlook, this means that members are more likely to participate because they truly believe in the work that the unions are doing and it will also make unions more accountable for their own success. Not that they weren’t accountable in the past, but if they are truly successful without the aid of outside fees, it means that there are many members that are present because they know the union is truly improving their life and the lives of others.

Unfortunately, a positive outlook can only go so far as to counteract the financial upheaval of judicial decisions like *Janus v. AFSCME*. Public sector unions have their work cut out for them as they work through the changes that come with loss of a good portion of their funding, while still continuing to provide services such as collective bargaining and representation to everyone in the workplaces they serve. Future judicial decisions may either help or harm the state of this country’s unions, but only time will tell. Unions rose up in order to advocate for the rights of workers and we can hope that same spirit will help them persevere through any future decisions that may adversely affect their ability to represent the worker.

## References

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