AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Janus v. American Federation of State, County, and Municipal Employees, Council 31, \_\_\_ U.S. \_\_\_** (2018)

*Mark Janus is a child support specialist employed by the Illinois Department of Healthcare and Family Services. Under Illinois law, he must pay an agency fee to the American Federation of State, County, and Municipal Employees, Council 31 even though he is not a member of the Union because he believes that the Union “does not appreciate the current fiscal crisis in Illinois.” The agency fee is required because the union has the power under Illinois law to represent all state employees in the collective bargaining process. In* Abood v. Detroit Board of Education *(1977), the Supreme Court held that states could require employees to pay agency fees that covered the costs of collective bargaining, but could not be compelled to pay dues that covered the political activities of the union. Janus joined a lawsuit initially filed by the Governor of Illinois claiming that* Abood *should be overruled and that the state law mandating agency fees violated First and Fourteenth Amendment free speech rights. The lower federal district court dismissed the case and that dismissal was affirmed by the Court of Appeals for the Seventh Circuit. Janus appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States reversed the Seventh Circuit by a 5-4 vote. Justice Samuel Alito’s majority opinion overruled* Abood *when holding that agency fees were a form of compelled speech. Alito insisted that agency fees should be determined under a fairly strict form of judicial scrutiny. Justice Elena Kagan dissent’s opinion insisted that past precedents required more deferential scrutiny. What precise standards does each justice use? How do they defend those standards? How do they apply those standards? Who has the better of the argument? Alito and Kagan also dispute the application of stare decisis? Alito claims decisions to overrule are based on five factors. What are those factors? How does he apply them? What factors does Kagan use? How does she apply them? Who has the better of the argument? Unions are fairly reliable supporters of the Democratic Party, municipal unions in particular. Do you find any evidence in the majority opinion that the Republican judicial appointees in the majority are hostile to municipal unions? Do you find any evidence in the dissenting opinion that the Democratic judicial appointees in the minority are unduly supportive of unions? Is this, as the majority suggests, a vital free speech case or, as the dissent suggests, an economic case masquerading as a free speech case?*

JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I3e7265f17a1011e8bbbcd57aa014637b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” . . . Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. . . . .

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Free speech serves many ends. It is essential to our democratic form of government and it furthers the search for truth. . . . When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence. *West Virginia Board of Education v. Barnette* (1943). Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns. As Jefferson famously put it, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.”

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In *Knox v. Service Employees* (2012), . . . we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. Even though commercial speech has been thought to enjoy a lesser degree of protection, prior precedent in that area . . . had applied what we characterized as “exacting” scrutiny, a less demanding test than the “strict” scrutiny that might be thought to apply outside the commercial sphere. Under “exacting” scrutiny, we noted, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.”

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In *Abood v. Detroit Board of Education* (1977), the main defense of the agency-fee arrangement was that it served the State's interest in “labor peace.” By “labor peace,” the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, “inter-union rivalries” would foster “dissension within the work force,” and the employer could face “conflicting demands from different unions.” . . . We assume that “labor peace,” in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded. . . .

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members. . . . Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that “labor peace” can readily be achieved “through means significantly less restrictive of associational freedoms” than the assessment of agency fees.

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. . . . [A]voiding free riders is not a compelling interest. As we have noted, “free-rider arguments ... are generally insufficient to overcome First Amendment objections.” To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

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Those supporting agency fees contend that the situation here is different because unions are statutorily required to “represen[t] the interests of all public employees in the unit,” whether or not they are union members. . . . . First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. . . . Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. . . . These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to “act solely in the interests of [the union's] own members.” What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers. . . . It is noteworthy that neither respondents nor any of the 39 amicus briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate “the interests of [an] individual employee ... to the collective interests of all employees in the bargaining unit.”

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Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. . . .

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The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide any protection for the free speech rights of public employees. . . . [The] First Amendment's original meaning [does not] support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. . . .  We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid–20th century. . . . Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as “‘sinful and tyrannical,’” and others expressed similar views.

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*Abood* was not based on *Pickering v. Board of Ed. of Township High School Dist. 205* (1968). The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that “there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse.” . . . [T]he *Pickering* framework was developed for use in a very different context—in cases that involve “one employee's speech and its impact on that employee's public responsibilities.” This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. . . . The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. . . .

[T]he *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. . . .

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. . . [W]e move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. . . . “[I]t is impossible to argue that the level of ... state spending for employee benefits ... is not a matter of great public concern.” . . . In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own amici show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. What unions have to say on these matters in the context of collective bargaining is of great public importance. . . . Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound “‘value and concern to the public.’”

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Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, ample experience, as we have noted, shows that this is questionable.

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“Stare decisis is 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.” . . . The doctrine “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.” And stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights. . .

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. . . .

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*Abood* judged the constitutionality of public-sector agency fees under a deferential standard that finds no support in our free speech cases. . . . *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. . . . If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—“labor peace”—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. . . .

*Abood* also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. . . . Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. “In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.”

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*Abood*'s line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. . . . [A] majority of the Court adopted a three-part test requiring that chargeable expenses (1) be “‘germane’“ to collective bargaining, (2) be “justified” by the government's labor-peace and free-rider interests, and (3) not add “significantly” to the burden on free speech, but the Court splintered over the application of this test. That division was not surprising. . . . [E]ach part of the majority's test “involves a substantial judgment call,” rendering the test “altogether malleable” and “no[t] principled.”

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It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. . . . This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

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*Abood* particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party. . . . It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. . . .

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. . . . [R]eliance does not carry decisive weight. . . . . This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. . . . Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox*. But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection.

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We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

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JUSTICE SOTOMAYOR, dissenting.

[*omitted*]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

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Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

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*Abood*'s reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others.

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. . . [B]asic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. . . . Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as against financial self-interest—can explain why an employee would pay the union for its services. . . .

. . . [The majority] disregards the defining characteristic of this free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for “senior citizens or veterans” (to use the majority's examples) have no legal duty to provide benefits to all those individuals. . . “Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them.”

. . . . Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. . . . . The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

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“Time and again our cases have recognized that the Government has a much freer hand” in dealing with its employees than with “citizens at large.” That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to “certain limitations on his or her freedom.” . . . . In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering v. Board of Ed. of Township High School Dist. 205* (1968). . . . [T]he Court first asks whether the employee “spoke as a citizen on a matter of public concern.” If she did not—but rather spoke as an employee on a workplace matter—she has no “possibility of a First Amendment claim.” But if she did speak as a citizen on a public matter, the public employer must demonstrate “an adequate justification for treating the employee differently from any other member of the general public.” . . .

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Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in “collective bargaining, contract administration, and grievance adjustment.” It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about “working conditions, pay, discipline, promotions, leave, vacations, and terminations,” . . . *Abood* described the managerial interests of employers in channeling all that speech through a single union. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. . . .

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. . . [T]he majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the “difference between compelled speech and compelled silence” is “without constitutional significance.” And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. . . .

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. . . . The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. . . . . Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering*'s first step. This Court has rejected all attempts by employees to make a “federal constitutional issue” out of basic “employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations.” . . . Of course, most of those issues have budgetary consequences: They “affect[] how public money is spent. . . . But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as “of public concern,” as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) would become “federal constitutional issue[s].”. . .

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The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is sui generis among those addressing public employee speech—and will almost surely remain so.

But the worse part of today's opinion is where the majority subverts all known principles of stare decisis. . . . *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) 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 (which the government can charge to all employees) and those of political activities (which it cannot). . . . Needing to stretch further, the majority suggests that *Abood* conflicts with “our political patronage decisions.” But in fact those decisions strike a balance much like *Abood*'s. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest. . . . 

The majority is likewise wrong to invoke “workability” as a reason for overruling *Abood*. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely “precis[e],” as the majority demands? Well, not quite that—but as exercises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood*, this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. . . . .

And in any event, one stare decisis factor—reliance—dominates all others here and demands keeping *Abood*. . . . Over 20 States have by now enacted statutes authorizing fair-share provisions. . . . Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. . . . Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that “[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights.” Not today. . . . It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans. . . . The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various “long-settled” terms—like fair-share provisions—are taken as a given. . . . .

The majority, though, offers another reason for not worrying about reliance: The parties, it says, “have been on notice for years regarding this Court's misgivings about *Abood*.” . . . But that argument reflects a radically wrong understanding of how stare decisis operates. Justice Scalia once confronted a similar argument for “disregard[ing] reliance interests” and showed how antithetical it was to rule-of-law principles. . . . He concluded: “[R]eliance upon a square, unabandoned holding of the Supreme Court is always justifiable reliance.”

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. . . . [T]he majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, e.g., *National Institute of Family and Life Advocates v. Becerra* (2018). And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.