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Legal Sidebar

Bar Dues or Bar Don't? Compelled Fees and the First Amendment

December 19, 2018

Do mandatory dues imposed by compulsory professional associations violate the First Amendment's Free Speech Clause? The Supreme Court was recently presented with this question in *Fleck v. Wetch*, an appeal from the United States Court of Appeals for the Eighth Circuit (Eighth Circuit). The Eighth Circuit ruled against an attorney who argued that the State Bar Association of North Dakota's mandatory membership fees operate in violation of the First Amendment. But on December 3, 2018, the Supreme Court vacated the Eighth Circuit's decision and remanded the case to that court "for further consideration in light of" last term's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)*. *Janus* held that states and public-sector unions may not "extract agency fees from nonconsenting employees." This Sidebar briefly explains the legal issues implicated by *Fleck*—including why compulsory bar dues may be more constitutionally suspect post-*Janus*—and looks forward to other cases that may clarify the broader implications of *Janus*.

Legal Background

The Supreme Court first upheld the constitutionality of mandatory bar dues in 1961 in *Lathrop v. Donohue*. The State of Wisconsin had adopted an integrated bar system, under which attorneys were required to enroll in the state bar association and pay dues in order to be licensed to practice law. (This is sometimes also described as a "unified bar" or simply a "mandatory bar." Today, there are over 30 integrated bars in the United States. These types of bar associations are generally authorized by statute or by the state's court system, creating the state action necessary to implicate the First Amendment.) The plurality opinion in *Lathrop* rejected a lawyer's argument that compelling him to join and pay dues to the State Bar of Wisconsin violated his First Amendment right to freedom of association. Four members of the Court held that, "in order to further the State's legitimate interests in raising the quality of professional services," the state could "constitutionally require that the costs of improving the profession . . . should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." The plurality opinion, however, only ruled on the challenger's freedom of association claims, and declined to address "whether his constitutional rights of free speech are infringed." Three additional members of the Court agreed that the integrated bar was constitutional. At least two of these concurring Justices would have reached the free speech claim and resolved it in favor of the state.

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https://crsreports.congress.gov
LSB10233

The Court again considered the constitutionality of mandatory bar dues in 1990 in *Keller v. State Bar of California*. This time, the Court believed that it was squarely confronted with the free speech claim it declined to resolve in *Lathrop*. Members of the State Bar of California argued that the bar's "use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment." California, like Wisconsin in the *Lathrop* case, employed an integrated bar. In evaluating the attorneys' free speech and association claims, the *Keller* Court drew on the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*. *Abood* had approved of public-sector "agency shop arrangements," in which all employees represented by a union were essentially required to pay union dues—so long as the fees were used to finance certain collective-bargaining activities, rather than "ideological causes not germane to [the union's] duties as collective-bargaining representative." The Court in *Abood* recognized that these compelled fees did implicate the First Amendment, but concluded that, with respect to fees used for activities that were germane to collective bargaining, "important government interests" nonetheless justified the "impingement upon associational freedom."

The *Keller* opinion applied *Abood*, notwithstanding the fact that, unlike the government employees in *Abood,* the bar association involved private-sector employees. The Court concluded in *Keller* that "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." As in *Abood*, the Court held that the bar could use mandatory member dues to "fund activities germane to those goals," but could not use mandatory dues to fund non-germane ideological activities. The Court noted that while, for example, the bar could not use compulsory dues "to endorse or advance a gun control or nuclear weapons freeze initiative," it could spend funds "for activities connected with disciplining members . . . or proposing ethical codes for the profession." *Abood*—and *Keller*—therefore created a line between germane and non-germane activities, raising questions regarding whether various expenditures were germane. After *Abood*, litigants also challenged the procedures that unions and state bars used to ensure that objecting members' dues were only spent on germane expenses.

In *Janus*, issued on June 27, 2018, the Supreme Court overruled *Abood*, holding that public-sector agency shop arrangements "violate[] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern," regardless of how the fees were spent. (For more on this decision, see this prior Legal Sidebar.) The Court ruled that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" even if those fees are used for collective-bargaining activities, noting that "a union . . . 'takes many positions during collective bargaining that have powerful political and civic consequences.'" The majority opinion rejected *Abood*'s conclusion that certain government interests—promoting labor peace and preventing free riders—could justify the compelled subsidization of a public employee union. Going forward, under *Janus*, public employee unions may not collect payments from nonmembers "unless the employee affirmatively consents to pay." Writing in dissent, Justice Kagan argued that overruling *Abood* would have significant disruptive consequences, because the Court had "relied on that rule when deciding cases involving compelled speech subsidies outside the labor sphere"—including in *Keller*. Similarly, a group of past Presidents of the District of Columbia Bar had filed an amicus brief in *Janus* noting that the Court's cases upholding state bars' mandatory dues requirements relied on the rationale of the Court's "union-shop decisions."

Fleck v. Wetch

The Eighth Circuit relied on *Abood* in its opinion in *Fleck v. Wetch*, which the court issued prior to the Supreme Court's *Janus* decision. Arnold Fleck, an attorney and member of the State Bar Association of North Dakota, had challenged the bar's use of member dues to oppose a state ballot measure, arguing that the procedures for allowing members to object to non-germane expenditures and to opt out of certain expenditures were insufficiently protective of his First Amendment rights. (The Supreme Court cast doubt

on the constitutionality of "opt-out" procedures in a precursor to *Janus*, *Knox v. SEIU, Local 100*.) The Eighth Circuit rejected his challenge to the bar's procedures, concluding that the system was in fact one where attorneys "'opt[ed] in' to subsidizing non-germane expenses." Fleck also preserved a challenge to the constitutionality of the integrated bar scheme as a whole, while conceding in the Eighth Circuit that this argument was foreclosed by *Keller*.

Fleck appealed this decision to the Supreme Court. His petition was submitted prior to the Court's *Janus* decision, but he nonetheless asked the Court to overrule *Lathrop* and *Keller* and hold that mandatory bar association dues compelled his speech and association in violation of the First Amendment. Fleck also challenged *Abood* itself, arguing that the line drawn in both *Abood* and *Keller* between germane and non-germane activities was constitutionally "indefensible." He claimed that the line was "arbitrary" and that state bars "routinely" violate the germaneness standard by "spend[ing] coerced dues on" impermissible activities. In early December, the Supreme Court granted Fleck's petition, vacated the Eighth Circuit's judgment, and remanded the case to that court "for further consideration in light of" *Janus*.

At least one commentator suggested that this action signals that the Court "doubts the constitutionality of requiring lawyers to support a private bar association." On remand, Fleck is likely to revive his challenge to the constitutionality of the mandatory bar system. Prior to the Court's action in *Fleck*, two prominent First Amendment scholars argued that *Janus* would likely "forbid compelled funding of other forms of private speech," including prohibiting state bar dues. Quoting from *Janus*, they said: "speech by the state bar is as likely as speech by unions to 'touch fundamental questions of . . . policy,' and more broadly to 'have powerful political and civic consequences,' even when it just has to do with regulating the legal profession." Thus, in their view, mandatory state bar dues would seem to raise the same First Amendment concerns that the Court highlighted in *Janus*. Further, not only *Janus*, but other recent cases of the Supreme Court (like *Harris v. Quinn* and *Knox*) have cast some doubt on non-*Abood* labor law cases relied on in both *Lathrop* and *Keller*.

The Eighth Circuit, however, might again reject Fleck's claim and uphold the North Dakota bar's dues scheme—although now, it may not rely on *Abood* to do so. Significantly, the Eighth Circuit is still bound by *Lathrop* (a pre-*Abood* case) and *Keller*, neither of which has been expressly overruled. Although, as legal scholars have pointed out, *Keller* relied heavily on *Abood* to uphold California's dues system, the *Keller* opinion invoked distinct governmental interests to justify the mandatory bar dues than those interests that were rejected in *Janus*. *Keller* said that the dues were justified by the state's "interest in regulating the legal profession and improving the quality of legal services." The Supreme Court appeared to recognize this difference in *Harris*, a 2014 case limiting *Abood*'s reach to "full-fledged public employees." In *Harris*, the Court suggested that *Keller* could be distinguished from its decision to limit *Abood* because of the state's regulatory interests in *Keller*. Specifically, the *Harris* Court noted that the bar rule in *Keller* "requiring the payment of dues was part of" a larger "regulatory scheme," including the promulgation and enforcement of ethics rules, and said that states "have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." And in his petition to the Supreme Court, even Fleck suggested that the First Amendment does not prohibit states from charging attorneys for "the cost of their regulation"—which would include "activities connected with proposing ethical codes and disciplining bar members."

The majority opinion in *Janus* did not address the implications of its decision for state bar associations—or any other mandatory associations in the private sector. But the Court did state that a "very different First Amendment question arises" when a government merely authorizes private organizations to coerce dues payments, as opposed to "when a State *requires* its employees to pay agency fees." Moreover, the Court said that collective bargaining is inherently more political in the public sector than in the private sector. These statements might provide further ways to distinguish *Janus* from *Keller* and hold that mandatory bar associations are constitutional.

Further Legal Developments and Implications for Congress

For now, it is up to the lower courts to determine whether mandatory bar associations violate the First Amendment in a post-*Janus* landscape. And Fleck is not the only attorney challenging the constitutionality of bar dues. In the meantime, the Supreme Court may hear other cases challenging the constitutionality of union representation and fees. For example, a professor has recently filed a petition asking the Supreme Court to hold that the mandatory appointment of a union as her exclusive representative—regardless of whether she is required to pay dues—violates her First Amendment rights, in *Uradnik v. Inter Faculty Organization*. If the Supreme Court further alters the state of First Amendment law in the labor sphere, it would create additional questions regarding the ripple effect on other mandatory associations.

Although bar associations are largely regulated at the state level, *Fleck* raises First Amendment questions that are relevant to Congress—even setting aside the large number of Members who may themselves be members of a bar association. There are a number of other statutes that compel third parties to subsidize other private entities, or authorize third parties to compel such payments, and *Abood* provided the starting point for the First Amendment analysis of those statutes. The Court's overruling of *Abood* may place such statutes into jeopardy. To take one example, the Court has relied on *Abood* to analyze the constitutionality of federal regulatory schemes that compel certain producers to fund generic advertising—upholding one such scheme in *Glickman v. Wileman Bros. & Elliott* but striking down another in *United States v. United Food*. Another consideration for Congress is that *Janus* did not question the government's ability to itself fund or otherwise directly support unions or other professional organizations. Post-*Janus*, commentators, while acknowledging the constitutional legitimacy of such schemes, have debated the wisdom, from a policy standpoint, of direct government support for unions.

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