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Newsroom

Yelnosky: Future of Public Sector Union 'Dues'

Dean Michael Yelnosky discusses why a Trump Supreme Court is likely to overturn 40 years of precedent on public sector collective bargaining agreements.

Michael J. Yelnosky, Dean of the RWU School of Law and professor of law, who has studied and written extensively about labor law issues, contibuted this piece to RWU's First Amendment Blog:

In all likelihood, sometime in 2017 a new U.S. Supreme Court justice will take the bench and fill the vacancy created by the death last year of Justice Antonin Scalia. Sometime thereafter, I am confident, the court will reverse almost 40 years of precedent and rule that the First Amendment prohibits provisions in public sector collective bargaining agreements requiring all covered employees to compensate the union for the costs associated with the union's negotiation and administration of that agreement.

State law determines whether and to what extent public employees have the right to select a union to bargain with their employer -- for example, a state or a municipality. By contrast, federal law governs these issues in the private sector. To make a long story short, the Supreme Court has concluded that in the private sector these "fair share" contract provisions are enforceable so long as they focus on the costs incurred by the union when engaged in activities related to collective bargaining. By contrast, provisions requiring employees to join the union or to help fund union activities such as participating in social,

charitable and political causes would violate the associational and free speech rights of employees who objected to the levy. The court reasoned that provisions requiring each employee to contribute to the cost of collective bargaining were lawful because those enjoying the benefits of union representation should contribute their fair share to the expense of securing those benefits. Thus, it is fair to say that the court had struck a balance between the rights of objecting employees to be free from compelled financial contributions and the legitimate right of unions to be compensated for their efforts and to prohibit free riders – employees who would accept the benefits of a collective bargaining agreement without paying their fair share of the costs.

In 1977 (in *Abood v. Detroit Board of Education*), the court applied the same approach to "fair share" provisions in the public sector, rejecting arguments that all forced payments should be prohibited because in the public sector the act of bargaining with a state or municipality over terms and conditions of employment is necessarily political.

The law remained stable for almost 40 years. But in 2014, in a case the court decided on other grounds (*Harris v. Quinn*), the court's opinion made it clear that five justices (Roberts, Thomas, Kennedy, Alito and Scalia) were eager to overrule *Abood*. Indeed, the court accepted *certiorari* in a case that presented the issue the following term. That case, *Friedrichs v. California Teachers Association*, was argued in January 2016. During that argument, Justice Scalia repeatedly insisted that the First Amendment rights of public employees were more robust than in the private sector because in the public sector "what is bargained for is, in all cases, a matter of public interest. And that changes the . . . situation in a way that that may require a change of the rule."

Justice Scalia died before the court issued its opinion in *Friedrichs* -- a 4-4 decision that left the lower court's ruling following *Abood* in place. Given President-elect Trump's statements about whom he would likely nominate for the court, that justice would provide the fifth vote to overrule *Abood*.

So what? After all, *Abood* is not *Roe v. Wade* or *Obergefell v. Hodges.*

First, the court's willingness to overrule *Abood* might give us some clues about its willingness to overrule other decisions. Overruling *Abood* would hardly be a non-event. There are tens of thousands of collective bargaining agreements with fair share provisions affecting millions of employees in the public sector. Second, free riding by public sector employees could deal a serious blow to the financial health and power of public sector unions. Those who believe that a healthy labor movement is necessary to counter the strong economic and political forces that lead to increased income inequality should be very concerned. Third, opponents of organized labor, in a stroke of public relations genius, describe the struggle over fair share provisions as a struggle over "the right to work." The public policy debate would be better informed if

people understood what was really at stake. Finally, while this is a quiet corner of First Amendment law, it is at the heart of one of the important policy disputes of our time.