Locke v. Karass: Should the Court Overrule *Lehnert*'s Test For Determining Whether Union Expenditures Are Related to Collective Bargaining?

*By Phineas E. Leahey**

In the fall 2008 term, the U.S. Supreme Court will hear argument in *Locke v. Karass*, a case of more potential significance than suggested by the narrow question presented: whether, consistent with the First Amendment, the State may compel non-member employees to fund litigation by the affiliate of a union certified as their exclusive bargaining agent. Certiorari was granted to resolve a circuit split over whether such "extra-unit" litigation expenses are "chargeable" to dissenting non-members, but *Locke* presents a possible opportunity for the Court to revisit the prevailing constitutional standard for determining when public sector unions may compel financial support for their activities from non-members.

In *Locke*, both the non-members and their exclusive bargaining agents under Maine law urge the Court to rule in their favor based on *Lehnert v. Ferris Faculty Association*,[1] where the majority opinion of a splintered court led by Justice Blackmun—joined, in relevant part, by Justices Rehnquist, White, Stevens, and Marshall—announced a three-part test under which non-members are responsible for costs that: (1) are "germane" to collective bargaining; (2) are justified by the state's interest in "labor peace" and avoiding "free riders"; and (3) do not significantly add to the burdening of free speech inherent in laws permitting extraction of service fees from non-members.[2] In a concurring and dissenting opinion, Justice Scalia—joined, in relevant part, by Justices O'Connor, Kennedy, and Souter—would have limited compelled contributions to "the costs of performing the union's statutory duties as exclusive bargaining agent," warning that Justice Blackmun's broad approach would engender further "confusion."[3] Neither approach was wholly unsupported, but rather were distillations of statements in prior case law.[4]

Applying *Ellis v. Railway Clerks,*[5] a private sector union case decided under the Railway Labor Act, Justice Blackmun's plurality opinion held that litigation "that does not concern the dissenting employees' bargaining unit" would be not be "germane" under the First Amendment either.[6] Lower courts, including the Third and the Sixth Circuits, have ruled otherwise by reasoning that only Chief Justice Rehnquist and Justices White and Stevens joined in that portion of the opinion; and, in any event, the holding in *Ellis* is limited to "direct contribution" of local union monies to litigation efforts by an affiliate "without expectations of reciprocal contributions."[7] Finding that, in *Locke*, local monies were "pooled" as part of a cost-sharing agreement, the First Circuit likewise distinguished *Ellis* and, under *Lehnert*'s three-part test, determined that the extra-unit litigation expenses at issue were chargeable.[8]

Since *Lehnert* was decided, the composition of the Supreme Court has changed significantly,[9] which raises the possibility of the Court overruling the three-part test.

The narrow question presented in *Locke* concerns the ambiguity as to whether unions may charge non-members the costs of extra-unit litigation when there is a pooling arrangement between the exclusive bargaining agent and the affiliate.[10] Although Justice Blackmun considered extra-unit litigation "akin to lobbying"[11]—which is not chargeable unless related to contract "ratification or implementation"[12]—litigation may vary from the partisan political to the "germane."[13] Even Justice Scalia's discussion of "on demand" services for the *direct* benefit of the bargaining unit might be read to implicitly reject a per se ban on charging non-members for pooling extra-unit litigation expenses.[14] The current "case-by-case" approach of *Lehnert* supports the conclusion of the First Circuit that "litigation is not susceptible to a single label," but may be, on a particular set of facts, "expressive" or "central to the negotiation and administration of a collective bargaining agreement."[15]

But *Lehnert* is the product of a badly fractured court, which arrived at divergent views on the chargeability of six expenditures.[16] In its immediate aftermath, one commentator opined that the Court should "reexamine" chargeability jurisprudence in part because "unions will be lost in a destructive morass of judicial busy work such as the kind *Lehnert* fosters."[17] The same concern applies equally, if not more so, to non-members who, as the *Locke* petitioners note, are placed in the "untenable position of litigating for years or decades seeking refunds of money that should never have been collected from them."[18] Both non-members and unions are more inclined, under a fluid test, to what Justice Scalia referred to in *Lehnert* as "give it a try litigation."[19] Even though a five-justice agreement on the three-part test in 1991 is stare decisis, "when governing decisions are unworkable or are badly reasoned," the Court "has never felt constrained to follow precedent," particularly in constitutional cases.[20] Justice Scalia's approach, if clarified (or modified), would permit incursions on the First Amendment rights of non-members *only* when necessary to achieve the objective of the compulsory agency shop or to otherwise provide direct benefits to a local bargaining unit.[21]

Last year, in *Davenport v. Washington Educational Association*, Justice Scalia delivered a unanimous opinion for the Court upholding a Washington law requiring unions to obtain affirmative consent of non-members before using their agency fees for political causes.[22] As he noted there, a union's entitlement to any monies from non-members, even fees for collective bargaining, is a creature of federal or state law, not a constitutional mandate.[23] That does not mean a state legislature should prohibit all compelled contributions, nor that such laws are constitutionally infirm. Each legislature, to the outer limits of the First Amendment, may decide whether to prohibit compulsory dues, condition them on affirmative consent, or extract them under fair procedures that require the

* *Phineas E. Leahey is an Associate in the Issues & Appeals practice in the New York office of Jones Day. He successfully represented a dissenting non-member employee in Seidemann v. Bowen. The opinions expressed here are solely those of the author and do not necessarily reflect those of Jones Day or any of that firm's clients, past, present, or future.*

union to return a pro rata portion of them spent on activities unrelated to effectuation of collective bargaining agreements. Justice Scalia's approach in *Lehnert* would limit compelled contributions, where authorized by state or federal law, to expenses reasonably necessary to performing the duties of an exclusive bargaining agent; which, in turn, allows unions a fair measure of compensation for protecting the interests of non-members on a par with their own.

Justice Blackmun's critique of Justice Scalia's "statutory duties" approach highlights the generality of state laws authorizing agency shops, which he considered a "poor criteri[a]" for determining which charges violate the First Amendment because the obligations of the union "extend beyond those delineated in skeletal state labor law statutes."[24] But Justice Scalia would concede that his approach limits compelled contributions to a narrower set of circumstances commensurate with the union's state-mandated duties to represent non-members.[25] He does, however, incorporate state common law, including judicial construction of labor statutes in suits alleging breach of the duty of fair representation,[26] and he appears to allow risk pooling between local bargaining units and their affiliates.[27]

If the Court adopted Justice Scalia's test, then states would determine in the first instance the scope of the exclusive bargaining agents' duties. Even if state statutes and their common law varied in material respects, as noted, many do not even permit extraction of compulsory dues from non-members. That others would authorize exclusive bargaining agents to collect such fees and define their duties with varying degrees of specificity seems to be little cause for concern. Indeed, *Davenport* illustrates the manageability of allowing states to define the duties of exclusive bargaining agents and the corresponding obligations of non-members.[28]

Defining First Amendment limits by reference to state law might be a concern where legislatures or courts significantly broaden the duties of exclusive bargaining agents. But statutes expanding their duties outside the "financial core" of "collective bargaining, contract administration, and grievance adjustment"—a trio approved by the Court in *Communication Workers v. Beck*[29]—would be constitutionally suspect.[30] States should be permitted to establish, for public sector unions, a duty of lobbying for the narrow purpose of ratifying or implementing the non-member's collective bargaining agreement as well as pooling, but only for *reasonably anticipated* extra-unit expenses.[31] As such, the "statutory duties" test need not be so narrowly construed but would limit forced compensation to unions from non-members to expenses reasonably necessary for them to fulfill their legal, yet constitutional, mandates and, where appropriate, to provide the local unit direct benefits. Even assuming that "scant" guidance in state labor law rendered Justice Scalia's approach problematic, an alternative would be to limit chargeability to "financial core" duties, in addition to pooling for direct benefit to the local unit as a reasonable means of performing them.

While activities beyond this "whittled-down" core might benefit non-members, "private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for."[32] As the *Ellis* Court explained, "free riding" on "the union's organizing efforts outside the bargaining unit" is "not the type of free riding that [the Railway Labor Act] seeks to prevent."[33] Nor are non-representational activities the type of "free riding" that the First Amendment should permit a state to remedy. The Court has twice observed—implying that such limitations on chargeability would be appropriate—"*by allowing the union shop at all*, we have already countenanced a significant impingement on First Amendment rights."[34] Accordingly, the benefits from the union's performance of activities outside the scope of the union's duties as bargaining agent do not support more impingement on non-member rights than is reasonably necessary to effectuate the purpose of the agency shop and, in the case of pooled expenses, to provide for the direct benefit of the local bargaining unit.[35]

Endnotes

[1] 500 U.S. 507 (1991).

[2] *Id.* at 519.

[3] *Id.* at 551 (Scalia, J., concurring in part and dissenting in part). Justice Scalia disagreed with the principal opinion's expansive permission to charge dissenting non-members for the costs of the union's magazine relating to "teaching and education generally" and similar matters, sending delegates to an affiliate's convention—at least to the extent that the local unit's bargaining activities are not discussed—and preparing for an illegal strike. *Id.* at 559-562. With respect to extra-unit expenses, he rejected Justice Blackmun's view that there need not be "'a direct relationship between the expense at issue and some tangible benefit to the dissenter's bargaining unit.'" *Id.* at 562, quoting 500 U.S. at 522.

[4] Both Justices relied on agency fee cases decided under federal labor statutes. Railway Employees v. Hanson, 351 U.S. 225 (1956); Machinists v. Street, 367 U.S. 740 (1941); Railway Clerks v. Allen, 373 U.S. 113 (1963); Ellis v. Railway Clerks, 466 U.S. 435 (1984); Communication Workers v. Beck, 487 U.S. 735 (1988). Because the Court has construed federal labor laws to be consistent with the First Amendment in order to remove doubts about their constitutionality, each Justice considered these cases relevant to public sector unions. *Lehnert*, 500 U.S. at 516; *id.* at 555 (Scalia, J., concurring in part and dissenting in part). Before *Lehnert*, cases decided under the First Amendment focused on the procedural requirements for public sector unions to exact service fees from non-members. Abood v. Detroit Bd. Of Educ., 431 U.S. 209 (1977); Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

[5] 466 U.S. 435 (1984).

[6] *Lehnert*, 500 U.S. at 528.

[7] Otto v. Penn. Educ. Ass'n, 330 F.3d 125, 135-39 (3d Cir. 2003); Reese v. City of Columbus, 71 F.3d 619, 624 (6th Cir. 1995). Earlier decisions construed *Lehnert* to have adopted *Ellis*'s prohibition on compelling non-members to contribute to extra-unit litigation. *See, e.g.*, Pilots Against Illegal Dues v. Airline Pilots Ass'n ("PAID"), 938 F.2d 1123, 1129-31 (10th Cir. 1991).

[8] Locke v. Karass, 498 F.3d 49, 58-59, 63 (1st Cir. 2007). In *Lehnert*, Justice Scalia commented that *Ellis* should reflect "the constitutional rule" applicable to public sector union cases. *Lehnert*, 500 U.S. at 555 (Scalia, J. concurring in part and dissenting in part). As the First Circuit noted, however, Justice Scalia did not "specifically" address extra-unit litigation and he approved of charges for services provided directly by affiliates to the bargaining unit. *Locke*, 498 F.3d at 59-60.

[9] Chief Justice Rehnquist and Justices White, Marshall, Blackmun, and O'Connor are no longer on the Court and Chief Justice Roberts and Justices Thomas, Ginsburg, Breyer, and Alito have since been appointed. Even before these appointments, one commentator suggested that "with the departure of Justice Marshall from the Court, the next dues objector case to reach the

Court may well overturn the analytical structure of *Lehnert.*" Joseph A. Ciucci, *Defining the Permissible Uses of Objecting Members' Agency Dues: Is the Solution Any Clearer After Lehnert v. Ferris Faculty Ass'n*, 70 U. Det. Mercy L. Rev. 89, 122 (Fall 1992).

[10] Conceivably, the discussion of extra-unit litigation in *Lehnert* is dicta because the expenditures at issue in the case concerned *reporting* on extra-unit litigation. 507 U.S. at 544-45 (Marshall, J. concurring in part and dissenting in part).

[11] *Lehnert,* 500 U.S. at 528. For this proposition, Justice Blackmun cited *NAACP v. Button*, 371 U.S. 415 (1963), which pertained not to compulsory contributions to litigation, but a Virginia statute that curtailed access to the courts for the purpose of redressing racial discrimination.

[12] *Id*. at 520.

[13] *See Otto*, 330 F.3d at 139 (citing example of local contributions that "ensure the availability of resources for collective bargaining litigation").

[14] *Lehnert*, 507 U.S. at 562 (Scalia, J. concurring in part and dissenting in part) ("expert consulting services on call, even in the years when they are not used," constitute a "tangible benefit" to the local union). Such pooled expenses may be "reasonably necessary to effective performance of the statutory duty of bargaining." *Id*. at n.4. Whether Justice Scalia would distinguish litigation as inherently ideological remains an open question.

[15] *Locke*, 498 F.3d at 65.

[16] Courts have often commented on the difficulty of applying the three-part test. *See, e.g.,* Bd. of Regents of Univ. of Wisconsin System v. Southworth, 529 U.S. 217, 232 (2000) (noting that in *Lehnert* "different Members of the Court reached varying conclusions regarding what expressive activity was or was not germane to the mission of the association"); Beckett v. Airline Pilots, 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J. concurring dubitante) ("it is impossible to detect in the Supreme Court cases—particularly *Lehnert*—a principled basis for distinguishing expenditures that are 'germane' from those that are not").

[17] Calvin Siemer, *Lehnert v. Ferris Faculty Ass'n: Accounting to Financial Core Members: Much A-dues About Nothing?,* 60 Fordham L Rev. 1057, 1082 (Apr. 1992). Chargeability disputes may be resolved in court or by arbitration under a union's agency fee procedure. *Hudson*, 475 U.S. at 310 (requiring union to provide an "impartial decisionmaker"). After *Lehnert*, the Supreme Court decided *Airline Pilots Ass'n v. Miller*, 523 U.S. 866 (1998), which requires courts to adjudicate chargeability claims in the first instance, if requested by the non-member. *Id*. at 879-880. The burden has often fell on reluctant courts to apply *Lehnert*'s three-part test. *See, e.g.,* Weaver v. Univ. of Cincinnati, 970 F.2d 1523, 1536 (6th Cir. 1992) ("Courts should not involve themselves in the factual inquiries involved in making a chargeability determination").

[18] Pet. Br. at 40-41, citing, *inter alia*, *Street*, 367 U.S. at 795-96 (Black, J. dissenting) (predicting that adjudicating agency fee claims "may prove very lucrative to special masters, accountants and lawyers," but "this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated").

[19] *Id*. at 551 (Scalia, J. concurring in part and dissenting in part).

[20] Payne v. Tennessee, 501 U.S. 808, 827-30 (1991) (noting overruling of cases "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," or where they "have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts").

[21] Ordinarily, Supreme Court Rule 14.1(a) limits review to the issue raised in the petition for certiorari, *Yee v. City of Escondido,* 503 U.S. 519, 535 (1992), but "the Court has not always confined itself to the set of issues addressed by the parties," *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999) and, on occasion, has even overruled cases, despite the parties' consensus that existing precedent was controlling. Blonder Tongue Lab., Inc. v. Univ. of Ill. Foundation, 402 U.S. 313, 319-21, 320, n.6 (1971).

[22] -- U.S. --, 127 S. Ct. 2372, 2383 (2007).

[23] *Id*. at 2378. The legislatures in "right to work" states have prohibited exclusive bargaining agents from collecting any agency fees from non-members. *See*, *e.g.*, Ark. Const. amend. 34 § 1 ("nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment"). These laws may be grounded in *Davenport's* view that agency shops "give a private entity, in essence, the power to tax government employees" which constitutes "an extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport*, 127 S.Ct. at 2378 & 2380 (emphasis in the original).

[24] *Lehnert*, 500 U.S. at 526.

[25] *Id*. at 562 (Scalia, J. concurring in part and dissenting in part).

[26] *Id*. at 558, 559, n.3. The "agency shop provision" of the Michigan statute at issue in *Lehnert*, like that of many other states, advanced "much the same" government interests "as those promoted by similar provisions in federal labor law." *Abood,* 431 U. S. at 225. In *Locke*, the unions were certified as exclusive collective bargaining agents under the Maine law, 26 Me. Rev. Stat. Ann. 979, *et seq*. which permits them to charge non-members for "representational and bargaining services." *Opinion of the Justices*, 401 A.2d 135, 147 (Me. 1979).

[27] *See supra* note 14. A literal or parsiminous "statutory duties" approach that did not allow unions to charge for expenses reasonably necessary to carry out their general directives would be inconsistent with the conclusions reached in Justice Scalia's concurring opinion. *Lehnert*, 500 U.S. at 532 n.6 (Blackmun, J.) (criticizing Justice Scalia's approach).

[28] In upholding the Washington law, Justice Scalia observed that the prior decisions of the Court set a constitutional "floor" for non-member rights, not a "ceiling." *Davenport*, 127 S.Ct. at 2379.

[29] 487 U.S. 735, 745 (1988); *accord* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 37-38 (1998) ("financial core" approach requires "only that employees pay the fees and dues necessary to support the union's activities as the employees' exclusive bargaining representative"). These were private sector cases decided under the National Labor Relations Act. Justice Blackmun noted the "'somewhat hazier' line between bargaining-related activities and purely ideological activities in the public sector," where unions devote considerable resources to secure legislative ratification of collective bargaining agreements. *Lehnert*, 500 U.S. at 520, quoting *Abood*, 431 U.S. at 236.

[30] In *Abood*, 431 U.S. at 225, the Court upheld the constitutionality of the Michigan statute authorizing the agency shop because it limited the union's duties to "collective bargaining, contract administration, and grievance adjustment."

[31] In contrast to ordinary administrative expenses, litigation, like lobbying, tends to be expressive. Therefore, extra vigilance is needed to protect against abuse of pooled expenditures for such purposes. In a lawsuit or arbitration, the burden should continue to be on unions to prove that their service charges are permissible. *Lehnert*, 500 U.S. at 524 (citations omitted). More should be required, however, at the pre-litigation *notice* stage. Although the union's notice to non-members listing chargeable and non-chargeable expenditures need not be"exhaustive," it should provide "sufficient information to gauge the propriety of the union's fee" relating to pooled expenses, *Hudson*, 475 U.S. at 306, without the need for non-members to file an action and request discovery only to find themselves improperly charged months, if not years, later.

[32] *Lehnert*, 500 U.S. at 556 (Scalia, J. concurring in part and dissenting in part).

[33] 466 U.S. at 452-53.

[34] *Hudson*, 475 U.S. at 302 n.8 (1986), quoting *Ellis*, 466 U.S. at 455 (emphasis added).

[35] Under almost all agency shop provisions, only *objecting* non-members are entitled to a pro rata reduction of their agency fees for expenses unrelated to collective bargaining. If they choose to do so, unions may solicit non-members with their own funds to either rejoin the union or to waive recoupment of agency fees devoted to extra-statutory activities that benefit non-members.