

10-15-2008

Consider the Source: A Note on Public-Sector Union Expenditure Restrictions Upheld in *Davenport v. Washington Education Association*

Daniel A. Himebaugh

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Election Law Commons](#), [First Amendment Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Daniel A. Himebaugh, *Consider the Source: A Note on Public-Sector Union Expenditure Restrictions Upheld in Davenport v. Washington Education Association*, 28 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2008)

Available at: <https://digitalcommons.pepperdine.edu/naalj/vol28/iss2/5>

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Consider the Source: A Note on Public-Sector Union Expenditure Restrictions Upheld in *Davenport v. Washington Education Association*

By Daniel A. Himebaugh*

I. INTRODUCTION

In some states there is private taxation, where a private organization is authorized by the state to compulsorily collect money from certain people for the organization's own use. The "agency-fee system," by which public-sector employee unions collect "dues" from nonmembers as a condition of government employment, is a manifestation of private taxation. It is still the way of doing business in Washington State.¹

In 1850, the classical liberal philosopher Frederic Bastiat envisioned such a system, calling it "legal plunder:"

Sometimes the law defends plunder and participates in it. . . . See if the law takes from some persons what belongs to them, and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen cannot do himself without committing a crime. . . . The person who profits from this law will complain bitterly, defending his *acquired rights*. . . . Do not listen to this sophistry by vested interests. The

* Daniel A. Himebaugh is a J.D. candidate at Pepperdine University School of Law.

1. See WASH. REV. CODE § 41.59.100 (2007). All references to Washington hereafter, refer to the State of Washington.

acceptance of these arguments will build legal plunder into a whole system.²

The Supreme Court of the United States found a grain of merit in Bastiat's characterization. In the opinion of Justice Scalia, public-sector employee unions (private entities) are not constitutionally entitled to spend the agency fees they collect on just anything.³ Those fees are "other people's money."⁴

Davenport v. Washington Education Association decided whether a state law prohibiting the Washington Education Association (the WEA) from spending nonmember agency fees on election-related purposes without affirmative consent of the nonmembers violated the First Amendment.⁵ A unanimous Court held it did not.⁶ This case note, divided into six main sections, explains the Court's holding. Immediately following this introduction is the background, including the allocation of regulatory authority between the federal National Labor Relations Board and state governments; a more thorough treatment of the law's view of agency-fee systems; and a look at the core, but somewhat latent, First Amendment issue here—campaign finance.⁷ The case facts are then summarized,⁸ and an analysis of the opinion is presented.⁹ Finally, the impact of the case is discussed,¹⁰ and concluding thoughts are offered.¹¹

2. FREDERIC BASTIAT, THE LAW 16-18 (Foundation for Economic Education, 1998) (1850).

3. See *Davenport v. Wash. Educ. Ass'n* 127 S. Ct. 2372, 2380 (2007).

4. *Id.*

5. See *id.* at 2376.

6. See *id.* at 2383.

7. See discussion *infra* Part II.

8. See discussion *infra* Part III.

9. See discussion *infra* Part IV.

10. See discussion *infra* Part V.

11. See discussion *infra* Part VI.

II. BACKGROUND

A. Labor Relations—Federal and State Responsibilities

In 1935, Congress passed the National Labor Relations Act (the NLRA), which created the National Labor Relations Board (NLRB), to regulate problems brought about by labor strife.¹² Originally justified on interstate commerce grounds, the NLRA sought to “promote the full flow of commerce,”¹³ and prescribe rights to employees and employers in labor relations nationwide.¹⁴

The Act cast a wide net over American employers, but significant exemptions impacted the decision in *Davenport*. Specifically, subsection 2 of section 152 of the NLRA, the section that defines the scope of the Act, excludes states and their political subdivisions from regulation.¹⁵ Therefore, Washington State, acting in its capacity as the employer of public schoolteachers (through the political subdivision of school districts), is saved from NLRB direct oversight and left to regulate its own labor relations.¹⁶ Since state law governs in this arena, under Washington State law, public-sector employee unions, such as the WEA, may become exclusive collective-bargaining agents for state-employed teachers.¹⁷

12. See 29 U.S.C. §§ 151, 153 (2007). The NLRA was amended in 1947 to promote a more mutual approach, focusing on the interests of both employees and employers. See 29 U.S.C. § 141 (2007).

13. 29 U.S.C. § 141 (2007).

14. *Id.*

15. 29 U.S.C. § 152(2) (2007); see James C. Howe, *Collective Bargaining—Faculty Status Under the National Labor Relations Act—NLRB v. Yeshiva University*, 582 F.2d 686 (2d Cir. 1978), cert. granted, 99 S. Ct. 1212 (1979), 54 WASH. L. REV. 843, 844-45 n.13 (1979) (explaining that the NLRA only applies to those individuals who fall within the statutory definition of “employee,” and specifying that the NLRA’s protections are limited to employees working for non-government employers).

16. See 29 U.S.C. § 152(2).

17. See generally Educational Employment Relations Act, WASH. REV. CODE §§ 41.59.010-950 (2007) (outlining Washington State law on education employee relations and awarding exclusive collective-bargaining rights to employee organizations where the state board certifies the representation).

B. The Agency-Fee System—Supreme Court Precedent

State regulations vary accordingly, but Washington's Revised Code endorses an agency-fee system, the very scheme at the center of the *Davenport* controversy.¹⁸ Given that it possesses the authority to vest agency-fee collection power to private-entity unions, Washington State does so under the theory that agency-fee systems prevent free-riding.¹⁹ The logic underlying this theory is that because an exclusive agent (here the WEA) represents public employees (the teachers) in a collective-bargaining capacity, employees who choose not to be members of the union must pay an agency fee the equivalent of union dues for the collective-bargaining protection available to them through the union's efforts.²⁰ It is considered a safeguard for the unions.²¹

Teachers, who are employed by the state, are represented in labor negotiations by a union even if they object to being union members. The agency-fee system covers nonmembers by compelling them to pay an equivalent due (agency fee) to the union as a condition of their employment as public schoolteachers.²² This involuntary charge on nonmembers necessitates protection of teachers who are forced to pay money to a union, in which they want no part, from union expenditures to which they object. Protection was established by the Court in *Abood v. Detroit Board of Education*,²³ which curtailed unions' ability to spend agency fees for ideological purposes over the objections of nonmembers.²⁴ *Abood* held that

18. See WASH. REV. CODE § 41.59.100.

19. See *Davenport*, 127 S. Ct. at 2376-77.

20. See *id.*; see, e.g., *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 511 (1991) (providing an additional source of law for the Court that recognized the validity of public-sector employee union agency-fee systems in state law).

21. See *Davenport*, 127 S. Ct. at 2377 (citing *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 760-64 (1961)). "The primary purpose of such arrangements is to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 127 S. Ct. at 2377.

22. See WASH. REV. CODE § 41.59.100.

23. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

24. See *Abood*, 431 U.S. at 235-36 (holding that "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by

nonmembers could permissibly object to the ideological and political purposes for which their fees were spent.²⁵ A “constitutional floor,”²⁶ or minimum requirement, for procedural enforcement of the *Abood* rule against unions was adopted in *Teachers v. Hudson*.²⁷ In accordance with *Hudson*, the WEA sent “Hudson packets”²⁸ to nonmembers affording them the opportunity to object to union political expenditure of agency fees and instructing them on rebate options.

Unlike cases before it, *Davenport* determined whether a state law could require that unions obtain “affirmative consent” of agency-fee-paying nonmembers before spending the money for political purposes, instead of requiring the nonmembers to respond in opposition within a given time period.²⁹ The operative difference is that affirmative consent stops unions from spending the money before obtaining permission, rather than allowing unions to spend the money if nonmembers fail to object. However immaterial the distinction might appear on first impression, the union argued that it held a constitutional and property interest in the agency fees, which the affirmative-consent requirement impinged. That belief stemmed, in part, from the underlying campaign finance issue.

employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment”).

25. *See id.*

26. *Davenport*, 127 S. Ct. at 2379.

27. *Chi. Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986) (setting forth procedures unions must use to assure nonmembers are empowered to prevent unions from spending the agency fees impermissibly). The minimums set forth in *Hudson* were: (1) “an adequate explanation of the basis for the fee;” (2) “a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker;” and (3) “an escrow for the amounts reasonably in dispute while such challenges are pending.” *Id.* at 310.

28. *Davenport*, 127 S. Ct. at 2377-78.

29. *Id.* at 2377; *see* WASH. REV. CODE § 42.17.760. “A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or operate a political committee, unless affirmatively authorized by the individual.” WASH. REV. CODE § 42.17.760(1) (2007).

C. Campaign Finance—Money as Political Speech

There is a liberal dose of skepticism prevalent in many discussions of campaign finance, especially regarding a First Amendment speech protection of contributions and expenditures that in recent decades has instigated a national reform effort.³⁰ Take, for example, Elizabeth Drew in her book *The Corruption of American Politics*:

The First Amendment is a mobile missile . . . To politicians the First Amendment means ensuring that they have the financial resources to do what they need to do” “The First Amendment is a great issue: People may think politics is corrupt, but do you want your rights taken away? There’s something unique about using the word ‘rights’ to Americans that rallies them. I think the opponents [to reform] believe it now—that First Amendment rights are threatened. They’ve said it so many times that it’s in their belief system, but what it’s really about is power.”³¹

Cynical as Drew’s outlook may be, it is not the legal philosophy on the issue.

The Federal Election Campaign Act was amended in 1974 to expand the scope of campaign finance regulation, including the

30. See 2 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS 151 (6th ed. 2003).

In 2002, Congress enacted the Bipartisan Campaign Finance Reform Act, its most far-reaching regulation of election practices since the 1974 statute that led to *Buckley v. Valeo*. The 2002 law limits the contributions that corporations, labor unions, and individuals can make to political parties, often referred to as “soft money contributions” because they are not made to an identifiable candidate. The law also prohibits corporations, trade associations, and unions from financing “electioneering” ads pertaining to candidates for federal office during the last sixty days before a general election and the last thirty days before a primary election.

Id.

31. ELIZABETH DREW, THE CORRUPTION OF AMERICAN POLITICS 56-57 (2000) (quoting an anonymous “prominent business lobbyist”).

creation of the Federal Election Commission as the enforcement and regulatory agency administering the provisions of federal election law.³² Along with establishing the FEC, the Act produced four main components that constituted a regulatory scheme for federal elections: (1) limit the size of contributions made to political campaigns by individuals and groups; (2) limit the amount candidates spend in their own campaigns; (3) require disclosure of contributions and expenditures; and (4) provide a program of public financing for presidential campaigns.³³

A lawsuit challenged the Act on First Amendment grounds in the important 1976 case *Buckley v. Valeo*.³⁴ In that case, the Court evaluated two competing issues: combating corruption in the federal election process and impinging on the free-speech rights guaranteed by the Constitution.

The lengthy decision split the law in light of constitutional tensions, upholding some provisions and invalidating others:

In [*Buckley v. Valeo*] . . . the Court upheld the [A]ct's disclosure requirements and its limits on campaign contributions, maintaining that they served an important purpose (elimination of corruption) and impinged only minimally on speech. But the justices invalidated the limits on campaign expenditures, concluding that such restrictions limited the communication of political views without contributing significantly to the control of corruption.³⁵

Thus, both sides won and lost, with the Court deciding that a restriction on speech had limits even if the law served a meritorious purpose central to the maintenance of constitutional government.³⁶ Especially of concern were private expenditures by candidates on their own campaigns, which "[raise] First Amendment problems because restricting the use of money for speech purposes is a speech

32. See 2 U.S.C. § 437c (2007).

33. See ROSSUM & TARR, *supra* note 30, at 150.

34. *Buckley v. Valeo*, 424 U.S. 1 (1976).

35. ROSSUM & TARR, *supra* note 30, at 150.

36. See generally *Buckley*, 424 U.S. 1.

restriction.”³⁷ However, the importance of *Buckley* for purposes of *Davenport* is that the Court recognized the spending of money for political purposes as an exercise of speech rights under the First Amendment, an interpretation upon which the WEA certainly relied.

With the law prior to *Davenport* recognizing a speech issue in the spending of money for political purposes, and the necessity of protecting union nonmembers from being compelled to contribute money to purposes they do not actively support, the relative rights of the parties had to be resolved vis-à-vis the Washington law that gave union nonmembers affirmative-consent power over the unions’ expenditure of agency fees. At issue: Where is the First Amendment crossed, and whose money is it anyway?

III. FACTS

A. At Issue

Justice Scalia concisely described the issue before the Court in *Davenport*: “The State of Washington prohibits labor unions from using the agency-shop fees of a nonmember for election-related purposes unless the nonmember affirmatively consents. We decide whether this restriction, as applied to public-sector labor unions, violates the First Amendment.”³⁸

B. Setting the Stage

In Washington, public-sector employee unions operate in an agency-fee system built by state statute.³⁹ The system allows unions to charge public employees who are union nonmembers an agency fee, taken directly through payroll.⁴⁰ In 1992, the voters of Washington approved a statewide ballot initiative known as the Fair Campaign Practices Act.⁴¹ The controversial provision of that legislation, labeled “§ 760” by the Court, restricted unions’ ability to

37. Eugene Volokh, *Freedom of Speech and of the Press*, in THE HERITAGE GUIDE TO THE CONSTITUTION 314 (Meese et al. eds., 2005).

38. *Davenport*, 127 S. Ct. at 2376.

39. See WASH. REV. CODE §§ 41.59.060, 41.59.100 (2007).

40. See *id.*

41. See *Davenport*, 127 S. Ct. at 2377.

use agency fees for political purposes.⁴² Section 760 prohibited unions from spending agency fees to influence an election or operate a political committee unless the union was affirmatively authorized to do so by the individual nonmember who paid the agency fee.⁴³

The *Davenport* respondent, the WEA, represented approximately 70,000 public schoolteachers as an exclusive collective-bargaining agent in Washington State, including many teachers who were not members of the union.⁴⁴ Twice a year the WEA sent a “Hudson packet”⁴⁵ to all nonmembers. Contained in the packet was a notification of the individual nonmember’s right to object to the union’s use of agency fees for political purposes.⁴⁶ It provided “three options: (1) pay full agency fees by not objecting within 30 days; (2) object to paying for nonchargeable expenses and receive a rebate as calculated by [the WEA]; or (3) object to paying for nonchargeable expenses and receive a rebate as determined by an arbitrator.”⁴⁷ Fees were held in escrow until the objection time-window elapsed.⁴⁸ The WEA’s method for settling agency-fee expenditures with nonmembers did not comply with § 760 because the WEA spent the money for purposes prohibited under § 760 unless nonmembers *objected* instead of holding the money to wait for affirmative *authorization* as the law required.⁴⁹

C. State Lawsuits

Two lawsuits were filed against the WEA in 2001, one by Washington State and the other by a class of union nonmembers alleging that the WEA had violated § 760 by not obtaining affirmative consent from nonmembers before spending agency fees for election-related purposes.⁵⁰ After extensive litigation, the case

42. *Id.*

43. See WASH. REV. CODE § 42.17.760.

44. See *Davenport*, 127 S. Ct. at 2377.

45. See *supra* note 27.

46. See *Davenport*, 127 S. Ct. at 2377.

47. See *id.* at 2377-78.

48. See *id.* Nonmembers were allowed thirty days to respond in objection. See *id.* Silence did not count as an objection. See *id.*

49. See WASH. REV. CODE § 42.17.760.

50. See *Davenport*, 127 S. Ct. at 2378.

reached the Supreme Court of Washington where it was decided that the WEA had indeed failed to follow the provisions of § 760.⁵¹ But the Washington court ruled that § 760 was unconstitutional with respect to the U.S. Constitution because the affirmative-consent requirement violated the First Amendment relative to a balance of associational and speech rights that allowed the union to spend agency fees for political purposes, uninhibited by the strict requirements of § 760.⁵²

The Supreme Court of Washington read the Supreme Court of the United States' previous decisions on the issue of agency fees to require a certain relationship between the interest of unions and the interest of nonmembers that the strictures of § 760 had violated. Justice Scalia explained:

The court reasoned that this Court's agency-fee jurisprudence established a balance between the First Amendment rights of unions and of nonmembers, and that § 760 triggered heightened First Amendment scrutiny because it deviated from that balance by imposing on [the WEA] the burden of confirming that a nonmember does not object to the expenditure of his agency fees for electoral purposes.⁵³

The WEA had in fact violated § 760 by not obtaining affirmative consent before spending agency fees on election-related purposes, but whether that statute would be invalidated because it required more of the union than the First Amendment would bear was a question for the Supreme Court of the United States. The decision was appealed from the Supreme Court of Washington in a

51. See *id.*; see also *State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 130 P.3d 352, 357 (Wash. 2006).

52. See *Wash. State Pub. Disclosure Comm'n*, 130 P.3d at 357-65; see also *Davenport*, 127 S. Ct. at 2378. The Supreme Court of Washington ruled that § 760 did not stand up to strict scrutiny for speech rights, and that it "interfered with respondent's expressive associational rights." *Davenport*, 127 S. Ct. at 2378. The court below cited *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that a state public accommodation law requiring the Boy Scouts to accept homosexual scoutmasters into their organization violated the Boy Scouts' First Amendment right of expressive association). *Id.*

53. *Davenport*, 127 S. Ct. at 2378.

consolidation of the two cases brought in the state.⁵⁴ The Court granted certiorari.⁵⁵

IV. ANALYSIS

A. Section 760—A Condition on an Extraordinary Power

The Court presented its reasons for holding that § 760 did not violate the First Amendment with a bifurcated analysis.⁵⁶ Part II-A, supported by a unanimous court, explained how the Supreme Court of Washington misread the Court's agency-fee precedent.⁵⁷ Part II-B, joined by all except Justices Alito, Breyer, and Chief Justice Roberts,⁵⁸ explored the Court's rationale more deeply, including a dismissal of the WEA's "encumbrance theory,"⁵⁹ a review of content-based First Amendment restrictions; and a clarification of the limitations of the holding.⁶⁰ Central to the analysis, however, is a short introductory paragraph to Part II.⁶¹

Justice Scalia, penning the majority opinion, wrote openly about the extraordinary nature of the agency-fee system.⁶² His description of the "undeniably unusual"⁶³ program informed the bulk of the opinion. In the Court's mind, the agency fees in *Davenport* were essentially taxes paid by government employees to a private entity.⁶⁴ Though the WEA argued for the recognition of its legal right to

54. See 127 S. Ct. 35 (2007) (granting certiorari).

55. See *id.*; see also 28 U.S.C. § 1257 (2006) (providing the Court with subject matter jurisdiction to hear cases appealed from the highest state court when the constitutionality of a state statute is in question).

56. See *Davenport*, 127 S. Ct. at 2378-83. Part II-A's unanimous opinion corrected the mistaken reading of agency-fee precedent. See *id.* Part II-B, supported by six justices, dismissed the WEA's encumbrance and content-based discrimination theories, and applied limitations to the Court's holding. See *id.*

57. See *id.* at 2379.

58. See *id.* at 2383. The three justices wrote a brief concurrence. See *id.*

59. See *id.* at 2380.

60. See *id.* at 2380-83.

61. See *id.* at 2378.

62. See *id.*

63. *Id.*

64. See *id.*

collect the fees, the Court could not clear the hurdle of explaining why the election-related expenditure of money extracted from people who were not part of the union was of such high First Amendment importance to the WEA.

Instead, the Court characterized § 760 as a “condition on the union’s exercise of [an] extraordinary power.”⁶⁵ The condition, of course, was the affirmative-consent requirement of § 760, which protected nonmembers from unapproved union expenditures by requiring the union to acquire nonmember permission to spend agency fees for political purposes. “The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive,”⁶⁶ wrote Justice Scalia. The Court, therefore, dispatched with the WEA’s argument that the union possessed a constitutional right⁶⁷ to spend nonmember agency fees without complying with § 760 and turned the Supreme Court of Washington’s opinion on its head.

It mattered to the Court that the WEA enjoyed what appeared to be a sweetheart deal with the state legislature that allowed them to collect fees from schoolteachers who wanted no stake in the union.⁶⁸ Such a power had limits, and § 760 represented a minimally restrictive variation of those limits.⁶⁹ The Court noted, and the respondent conceded, that the voters of Washington could have seen fit to reduce agency-fee expenditure capabilities to the portion of those fees strictly required by the union for collective-bargaining activities, or even eliminate the agency-fee system completely.⁷⁰ It followed that § 760 posed “no greater constitutional concern”⁷¹ as a

65. *Id.*

66. *Id.*

67. *See id.* at 2379. The union’s lack of constitutional entitlement was further expanded in Part II-B where the Court addressed the encumbrance theory promoted by the WEA to impugn § 760. *See id.* at 2380.

68. *See id.*

69. *See id.* at 2378.

70. *See id.*; *see, e.g.,* *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525 (1949) (upholding the constitutionality of state laws that prohibited employers from denying an employee an opportunity to work because they were not a member of a labor union and forbidding such contracts to be made between employers and unions).

71. *Davenport*, 127 S. Ct. at 2379.

restriction of a lesser degree than other far-reaching and perfectly constitutional limitations that could be hypothetically applied. The WEA possessed a powerful warrant under the agency-fee system.⁷² It was not unconstitutional for the citizens of Washington to constrain the WEA's state-awarded authority by allocating more control over the expenditure of agency fees to the nonmembers from whom they were levied.⁷³

In *Davenport* the Court's jurisprudence on expenditure restrictions hinged on the source of funds and the means of acquisition.⁷⁴ Although campaign-finance precedent recognized that spending money for political purposes triggered First Amendment concerns,⁷⁵ the Court was troubled by the argument that unions had a constitutional right to nonmembers' money to spend as they pleased.⁷⁶ In the WEA's defense, however, the collection of agency fees in Washington was (and is) completely legal.⁷⁷ Once those fees are in the possession of the union, why should the law view them any differently than funds collected from the voluntary dues of members who want to "pitch in?"⁷⁸ The WEA complied with *Hudson* procedures by allowing nonmembers to timely object to election-related expenditures⁷⁹—waiting for affirmative consent seemed unnecessarily burdensome.

Part of the answer that defused the WEA's position was located in the *Abood* case,⁸⁰ which established the particular First Amendment shield upon which the nonmembers relied. In the aforementioned case, the Court found a clear First Amendment right of employees not to be compelled to spend money for political

72. *See id.* at 2378.

73. *See id.* at 2379.

74. *See id.* at 2383.

75. *See generally Buckley*, 424 U.S. 1.

76. *Davenport*, 127 S. Ct. at 2380.

77. *See* WASH. REV. CODE § 41.59.100 (2007); WASH. REV. CODE § 42.17.760. As of 2008, Washington State still endorsed the agency-fee system. *See id.*

78. *See Davenport*, 127 S. Ct. at 2380-83. The union asserted there was no difference due to their legal right to collect the fees. The Court dismissed this line of reasoning—the idea that § 760 impermissibly encumbered funds in possession of the union—in Part II-B. *See id.*

79. *See id.* at 2377-78.

80. *See Abood*, 431 U.S. at 235-36.

purposes they did not favor.⁸¹ Appellants in the case argued that they had been prohibited from refusing to associate themselves with the advancement of political beliefs because their compulsory dues were being put to that use by a union to which they did not belong.⁸² The *Abood* Court recited the *Buckley* principle that “contributing to an organization for the purpose of spreading a political message is protected by the First Amendment.”⁸³ In *Abood*, however, that right also applied to individuals who did not want to contribute but had no other choice than to forfeit their jobs.

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.⁸⁴

Abood ultimately held that union political expenditures could only be financed by those members who did not object to the use of their money for that purpose.⁸⁵

In Part II-A, the Court recounted agency-fee precedent and explained that § 760 did not upset the balance of rights between unions and nonmembers.⁸⁶

B. Part II-A—Section 760 Squares with Precedent

Perhaps the best introduction to Part II-A is to re-cap the individuals’ First Amendment rights from *Abood* in light of the issue in *Davenport*. *Abood* stood for the following proposition: unions which collect agency fees from nonmembers cannot spend those fees

81. *See id.* at 233-35.

82. *See id.* at 234.

83. *Id.* (citing *Buckley*, 431 U.S. at 1).

84. *Id.* at 234-35.

85. *See id.* at 235-36.

86. *See Davenport*, 127 S. Ct. at 2379.

over the objection of nonmembers, who are forced to contribute the money, because the individual nonmembers have a First Amendment right that prevents the funds from being used for political purposes the nonmembers do not support.⁸⁷

However, the WEA argued that the Court must recognize a union's First Amendment right to spend money for political purposes.⁸⁸ But the Court deflected that argument by relying on the rights of nonmembers established in *Abood*.⁸⁹ Because the nonmembers had a First Amendment right to direct the use of the funds they were compelled to provide to the union, the Court concluded that the WEA's right to spend those funds depended on assent⁹⁰ of the nonmembers.⁹¹ In *Abood*, objecting nonmembers were entitled to those agency fees that would be used for political purposes even though the union had legally acquired the funds.⁹²

Moreover, in *Davenport* the Court determined that mandating the union to obtain affirmative consent from nonmembers did not impermissibly abridge the WEA's First Amendment right to spend the agency fees on politics.⁹³ *Davenport* harkened the individual right founded in *Abood*: Nonmembers must not be forced to contribute money to political purposes they do not want to support.⁹⁴ Therefore, unions are *not constitutionally entitled* to those agency fees, despite being *statutorily allowed* to collect them.⁹⁵ There exists a First Amendment right on the part of individuals that limits union fee-use even after the money has left the control, or never entered the direct control, of the individual nonmembers.⁹⁶

87. See *Abood*, 431 U.S. at 235-36.

88. See *Davenport*, 127 S. Ct. at 2380.

89. See *id.* at 2379.

90. See WASH. REV. CODE § 42.17.760. Assent was manifested by a failure to object, not to be confused with the § 760 requirement of "affirmative consent," which requires permission. See *id.*

91. See *Davenport*, 127 S. Ct. at 2380. Basically, the union's ability to spend agency fees on politics is not plenary. The First Amendment rights of nonmembers temper the union's spending ability. See *id.*

92. See *Abood*, 431 U.S. at 235-36.

93. See *Davenport*, 127 S. Ct. at 2383.

94. See *id.*

95. See *id.* at 2380-81.

96. See *Abood*, 431 U.S. at 235-36.

Since unions are not constitutionally entitled to agency fees, consequently they do not possess the same First Amendment right to spend that money as the individuals from whom it was taken.⁹⁷ The practical effect of the *Davenport* ruling is that agency fees do not *belong* to the union unless the union complies with statutory restrictions on how the money can be used.⁹⁸

With that rights-based groundwork at the fore, the Court addressed the Supreme Court of Washington's mistaken reading of *Abood* and other precedent.⁹⁹ Justice Scalia wrote, "The principle reason the Supreme Court of Washington concluded that § 760 was unconstitutional was that it believed that our agency-fee cases . . . dictated that a nonmember must shoulder the burden of objecting before a union can be barred from spending his fees for purposes impermissible under *Abood*."¹⁰⁰ In other words, the default position as interpreted by the Supreme Court of Washington allowed unions to spend agency fees so long as the nonmember did not object. Section 760 flipped that requirement through legislation, making it illegal for unions to spend agency fees on politics unless the nonmember authorized it, shifting the burden of compliance to the union.¹⁰¹ The Washington Court viewed that role reversal as upsetting a delicate constitutional balance between nonmembers and unions in agency-fee states.¹⁰²

The Washington Court nurtured the principle expressed in *Hudson*: "[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."¹⁰³ Did § 760 abate this *Hudson* principle by legislatively assigning the burden of obtaining authorization to the union, instead of requiring nonmembers to actively object? The Supreme Court of the United States recognized the question, and answered in the affirmative.¹⁰⁴

97. See *Davenport*, 127 S. Ct. at 2380.

98. See *id.* To be clear, the concurring Justices did not expressly reach the "other people's money" conclusion of Part II-B, though their interpretation of *Abood* is in line with the rest of the Court. See *id.* at 2380-83.

99. See *id.* at 2379.

100. *Id.*

101. See WASH. REV. CODE § 42.17.760.

102. See *Davenport*, 127 S. Ct. at 2379.

103. *Id.* (quoting *Chi. Teachers Union, Local 1*, 475 U.S. at 306).

104. See *id.*

But the Court did not acquiesce in the argument that the § 760 requirement, placed on the unions by the voters of Washington State, was an unconstitutional infringement of the WEA's First Amendment rights.¹⁰⁵ The WEA argued, successfully before the Supreme Court of Washington, that § 760 "deviated from [the] perceived constitutional balance by requiring unions to obtain affirmative consent."¹⁰⁶ The Washington Court therefore evaluated § 760 under strict scrutiny,¹⁰⁷ and found it deficient.¹⁰⁸ The Supreme Court of the United States, however, disagreed and explained that the Supreme Court of Washington had meandered well beyond the scope of Supreme Court of the United States precedent in agency-fee cases.¹⁰⁹

The argument the WEA purveyed in *Davenport* rested in the determination that the union retained the right to use agency fees as allowed by *Abood* and *Hudson*.¹¹⁰ The WEA argued below that the Court had recognized a balance of rights in the previous cases that gave nonmembers the ability to object to political expenditures, but simultaneously bestowed the union with the right to spend the fees for political purposes.¹¹¹ Any differing allocation of rights would be a thumb on the scale, according to the Supreme Court of Washington, and would disrupt the tender equilibrium that had been wrought through judicial effort.¹¹²

The Supreme Court of the United States did not countenance that argument: "Those cases were not balancing constitutional rights in the manner respondent suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees."¹¹³ Quite simply, there was no constitutional midpoint of nonmember and union rights; rather, nonmember rights to agency

105. *See id.* at 2383.

106. *Id.* at 2379.

107. *See id.*

108. *See Wash. State Pub. Disclosure Comm'n*, 130 P.3d 352.

109. *See Davenport*, 127 S. Ct. at 2379.

110. *See id.*

111. *See id.*

112. *See id.* The balance theory recognizes that there are two competing First Amendment rights: the right of nonmembers to the use of agency fees as in *Abood*, and the right to political speech as in *Buckley*. *Id.* As long as the agency-fee system is in place, these two claims will be in tension. *See id.*

113. *Id.*

fees outweighed the seemingly illusory right of the union to those fees, if the state so legislated.¹¹⁴ Why? Because the state gave taxation power to the union, the state could take it away. Thus the argument circled back to the proposition set forth at the origin of the decision: § 760 acts as a “modest limitation upon an extraordinary benefit”¹¹⁵ granted to the WEA by Washington, not the United States Constitution.

As an extraordinary power positively conferred by state statute, the agency-fee system can be tailored by further legislation, even legislation that implements a statutory regime with which the union must comply before spending agency fees for election-related purposes.¹¹⁶ That, in essence, is the *Davenport* holding, and similar to the reasoning of *Hudson*, by which the Court established procedural safeguards for union nonmembers.¹¹⁷

The *Davenport* Court stated that the limitations of *Abood* and *Hudson* were constitutional minimums.¹¹⁸ *Abood* afforded a nonmember the opportunity to object to a union’s political use of agency fees, and *Hudson* outlined a basic procedure for union compliance with *Abood*.¹¹⁹ But “the mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny. The constitutional floor for unions’ collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions.”¹²⁰ Thus, the Court ruled that the state-granted nature of the union power to collect agency fees would not preclude the state legislature (or state voters) from modifying the conditions of such a windfall to the union.¹²¹

Also, it was important for the Court to note *who* maintained the power to place conditions, such as § 760, on the agency-fee

114. *See id.*

115. *Id.* at 2378.

116. *See id.* at 2383.

117. *See Chi. Teachers Union, Local 1*, 475 U.S. 292.

118. *See Davenport*, 127 S. Ct. at 2379.

119. *See id.* (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990)) (“[W]e have described *Hudson* as ‘outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its requirement under *Abood*.’”).

120. *Davenport*, 127 S. Ct. at 2379.

121. *See id.*

system.¹²² The cipher to the Washington court's misreading of the "[d]issent is not to be presumed" principle rested in that court's concern that unions would be entirely stopped from spending on politics due to one hold-out objector.¹²³ The Supreme Court of the United States countered: "We meant only that it would be improper for a court to enjoin the expenditure of the agency fees of all employees, including those who had not objected, when the statutory or constitutional limitations established in those [previous] cases could be satisfied by a narrower remedy."¹²⁴ But the judiciary's duty to find the least obstructive solution did not apply to the other branches of government.¹²⁵ The statutory entitlement that allowed unions to collect agency fees from nonmembers could be limited by legislatures or voters, who had breathed life into the agency-fee

122. *See id.*

123. *See id.* (quoting *Hudson*, 475 U.S. at 306 n.16). The Court did not mean the judiciary could enjoin the union from spending agency fees contributed by non-objectors, only that the proper remedy would be limited to stopping unions from spending the money of people who objected. *See id.* In the case of § 760, each individual nonmember who wanted his agency fees to be spent for political purposes had the opportunity to authorize—not object to—that expenditure of his contributed portion. *See* WASH. REV. CODE § 42.17.760. The Supreme Court of Washington viewed the § 760 consent requirement as an unduly burdensome restriction of the union's right to spend agency fees, subject to heightened scrutiny. *See Davenport*, 127 S. Ct. at 2379. However, the Supreme Court of the United States did not abide by that argument, partly because the union did not have to commingle the agency fees with the voluntary dues, and because it could spend the agency fees for non-political purposes under Washington law without prohibition. *See id.* at 2380 n.2. Section 760 simply meant the WEA could not spend agency fees for political purposes, unless the nonmember consented. *See id.* But that was the policy point of § 760, to make it easier for nonmembers to retain control over the fees they paid to the union as a condition of being employed by the state. *See* WASH. REV. CODE § 42.17.760. Currently, ninety-five percent of Washington State public schoolteachers belong to the WEA and voluntarily contribute dues. *See* Zena McFadden, *Davenport, Gary, et al. & Washington v. Washington Education Assn.*, NORTHWESTERN. UNIV. MEDILL JOURNALISM (2006), <http://docket.medill.northwestern.edu/archives/003887.php>. Section 760 created an exception for the protection of teachers who did not want to belong to the union, but still had to pay. *See* WASH. REV. CODE § 42.17.760.

124. *Davenport*, 127 S. Ct. at 2379. The Court cited *Abood*, *Street*, and *Hudson* as examples of their "narrow remedy" reasoning. *Id.*

125. *See id.*

system.¹²⁶ Section 760 was such a limitation and would not be struck down.¹²⁷

Part II-A can be summarized as follows. Two First Amendment rights claims conflicted. The first right, recognized in *Abood*, entitled a union nonmember to prevent his or her portion of compulsory agency fees from political use by objecting to the union's expenditure of the fees for that purpose.¹²⁸ The second right, established in *Buckley* and referenced in *Abood*, recognized that spending money on certain election-related purposes was protected speech.¹²⁹ The Washington court had viewed these rights in perfect harmony, unable to be disjoined; but the Supreme Court of the United States determined the strength of each claim by examining the source of the funds and the legitimacy of each asserted interest.¹³⁰ As to agency fees, the nonmembers who had a slice of their paychecks automatically transferred to the union maintained a constitutional entitlement to that money, which allowed them to object to certain forms of union expenditure, i.e., political use.¹³¹ The union, however, enjoyed no constitutional entitlement to the agency fee, even though collecting it was legal under state law,¹³² because *Abood* had drawn a distinction between voluntary fees of members and involuntary fees of nonmembers.¹³³ The *Abood* right of nonmembers to object trumped the union's ability to spend, even though the union could freely spend its members' voluntary contributions.¹³⁴ The "balance" had thus remained since *Abood* was decided in 1977, with *Hudson* giving procedural guidance on how to secure the *Abood* right in 1986.¹³⁵ *Davenport* calcified *Abood* in two ways: (1) by reinvigorating the concept of nonmembers' substantial interest in agency fees and their subsequent use,¹³⁶ and (2) by

126. *See id.*

127. *See id.*

128. *See Abood*, 431 U.S. at 235-36.

129. *See id.* (citing *Buckley*, 424 U.S. at 1).

130. *See Davenport*, 127 S. Ct. at 2379.

131. *See Abood*, 431 U.S. at 235-36.

132. *See Davenport*, 127 S. Ct. at 2379.

133. *See Abood*, 431 U.S. at 235-36.

134. *See id.*

135. *See Hudson*, 475 U.S. at 310.

136. *See Davenport*, 127 S. Ct. at 2379-80.

exposing the agency-fee system as an extraordinary, conferred benefit,¹³⁷ subject to limits enacted through the democratic process.¹³⁸ Section 760 rested on the *Abood* premise that nonmembers had rights to agency fees. Therefore, § 760 placed a condition on the private taxation power of the unions that provided further protection of nonmembers and mandated compliance by the union.¹³⁹ The Court found the limitation acceptable¹⁴⁰ as an exercise in controlling a positive right granted by the state for the benefit of a private entity.

C. Part II-B—Additional Concerns

1. Encumbrance

With the conclusion of Part II-A, a rare moment of Court unanimity flitted away. The issues addressed in Part II-B arose from different arguments¹⁴¹ than the Court's deconstruction of the Supreme Court of Washington's opinion of the case in Part II-A. Consequently, three Justices refrained from Part II-B, finding Part II-A a sufficient resolution of the case.¹⁴² However, Part II-B presented important principles that shaped the impact *Davenport* will have in future controversies. While the Court in Part II-A attacked the judgment below based on the Supreme Court of Washington's faulty rights reasoning,¹⁴³ Part II-B dealt directly with the premise that the Washington court proposed independent of rights-balancing precedent, namely, that § 760 impermissibly encumbered funds that were lawfully within the WEA's possession.¹⁴⁴ The encumbrance-

137. *See id.* at 2378.

138. *See id.* at 2379.

139. *See* WASH. REV. CODE § 42.17.760.

140. *See Davenport*, 127 S. Ct. at 2383.

141. *See id.* at 2380.

142. *See id.* at 2383. Justices Alito, Breyer, and Chief Justice Roberts did not join Part II-B. *See id.*

143. *See id.* at 2379.

144. *See id.* at 2380; *see Wash. State Pub. Disclosure Comm'n*, 130 P.3d at 363-64.

Section 760 then encumbers the use of such funds by prohibiting their expenditure for political speech absent affirmative

theory reasoning offered by the WEA differed from the constitutional-balance theory upon which the Supreme Court of Washington ultimately decided the case, as presented in Part II-A.¹⁴⁵ The Supreme Court of the United States noted that the encumbrance premise¹⁴⁶ led the respondent to call upon campaign-finance cases to defend the union's right to spend "its" money for political purposes: *First National Bank of Boston v. Bellotti*¹⁴⁷ and *Austin v. Michigan Chamber of Commerce*.¹⁴⁸

In *Bellotti*, the Court struck down a Massachusetts statute that restricted a banking association from spending its money to oppose a state referendum that would have amended the Massachusetts Constitution to include a graduated income tax.¹⁴⁹ Massachusetts had enacted a criminal statute that limited such associations' contributions to certain types of political issues, specifically excluding associations from speaking (by spending) on issues that did not materially affect the "property, business or assets of the corporation."¹⁵⁰ The Court found that the association, a corporation, did not possess lesser First Amendment rights to political speech because of its corporate character or the political views it sought to promote.¹⁵¹ Therefore, the corporation's right to speak and the nature of the speech, absent a compelling state interest to regulate it, rendered the Massachusetts statute unconstitutional.¹⁵² "The speech proposed . . . [was] at the heart of the First Amendment's

authorization by the agency fee paying nonmember. Notably, the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech.

See *Wash. State Pub. Disclosure Comm'n*, 130 P.3d at 363-64.

145. See *Davenport*, 127 S. Ct. at 2379.

146. See *id.* at 2380.

147. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

148. *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990).

149. See *Bellotti*, 435 U.S. at 765. This footnote refers to the case syllabus prepared by the Reporter of Decisions.

150. See *id.* This footnote refers to the case syllabus prepared by the Reporter of Decisions.

151. See *id.* at 784.

152. See *id.* at 795.

protection.”¹⁵³ In *Davenport*, the WEA compared its position to that of the *Bellotti* association by claiming that § 760 impermissibly blocked them from speaking politically, which would include speaking for or against ballot propositions as the First Amendment allows.¹⁵⁴

However, in *Austin*, the Court upheld a Michigan campaign finance statute that prevented the Michigan State Chamber of Commerce, a nonprofit corporation, from using general treasury funds to run a newspaper advertisement in support of a specific candidate for a specific office.¹⁵⁵ The Court found the state provision narrowly tailored to serve a compelling state interest, and thus declined to invalidate it.¹⁵⁶ Significant to the decision for the WEA’s purposes was the Court’s inclination to sanction corporate campaign finance expenditure restrictions on the grounds that

153. *See id.* at 776. The Court further elaborated by citing *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Id.

154. *See Davenport*, 127 S. Ct. at 2380.

155. *See Austin*, 494 U.S. at 652. This footnote refers to the case syllabus prepared by the Reporter of Decisions.

156. *See id.* at 655-58. The act exempted from regulation expenditures which were made from the corporation’s segregated fund for the specific purpose of political advocacy. *See id.* at 655.

To determine whether Michigan’s restriction on corporate political expenditures may constitutionally be applied to the Chamber, we must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest. . . . Certainly, the use of funds to support a political candidate is “speech;” independent campaign expenditures constitute “political expression ‘at the core of our electoral process and of the First Amendment freedoms.’” . . .

The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.

Id. at 657 (citations omitted). But the compelling state interest was that “the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption.”

Id. at 658.

corporations had special legal privileges that enhanced their gravity in the political game:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments. These state-created advantages not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use “resources amassed in the economic marketplace” to obtain “an unfair advantage in the political marketplace.”¹⁵⁷

In *Austin*, the Court recognized a compelling interest in combating corruption and justified counteracting the “influence of political war chests funneled through the corporate form.”¹⁵⁸ The *Davenport* Court mentioned that the WEA’s focus on *Austin* drew attention to § 760’s exclusive effect on unions while exempting corporations, which the Court found suspicious in *Austin*.¹⁵⁹

The two campaign finance arguments were packaged by the *Davenport* Court: “[The WEA] argues that, under the rigorous First Amendment scrutiny required by [*Bellotti* and *Austin*], § 760 is unconstitutional because it applies to ballot propositions and because it does not limit equivalent election-related expenditures by corporations.”¹⁶⁰ The point was reminiscent of a similar contention proffered by the union in Part II-A that the WEA should be considered harmless because it was legally allowed to collect agency fees and had complied with *Hudson* procedures in protecting the rights of nonmembers.¹⁶¹ The Court dispatched with that argument in Part II-A by setting the relative rights of the nonmembers and unions in the proper relation under precedent, and vindicating the

157. *Id.* at 658-59 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

158. *Id.* at 659 (quoting *Mass. Citizens for Life, Inc.*, 479 U.S. at 257).

159. *See Davenport*, 127 S. Ct. at 2380.

160. *Id.*

161. *See id.* at 2377-78.

state's ability to build on the minimum regulatory floor of *Hudson*.¹⁶² Yet the union believed its campaign finance argument had teeth. Had not the Court continuously recognized a First Amendment speech and associational right in the expenditure of money for political endeavors?¹⁶³ Section 760 explicitly limited the ability of the WEA to exercise that right without limiting any other political players.¹⁶⁴

But the Court distinguished the campaign finance cases cited as "not on point."¹⁶⁵ The operative difference, according to the Court, rested in the source of the funds and the means of acquisition—that in *Davenport* the money originated from nonmembers who were forced by law to pay.¹⁶⁶ Part II-A had established the *Aboud* rights of nonmembers to be protected from political expenditures of agency fees; *Hudson* laid the procedural groundwork for doing so;¹⁶⁷ and Washington law authorized an agency-fee system for union funding,¹⁶⁸ the well from which the WEA drew. Therefore, the money in *Davenport* had been exacted under state authorization from people who did not want to pay, but the WEA's campaign finance cases dealt only with the rights of organizations to spend money contributed *voluntarily* by their members.¹⁶⁹

The distinction made the whole case for the Court; in fact, the WEA's reliance on their possession of the fees as the linchpin to a campaign finance argument was brushed aside as "entirely immaterial."¹⁷⁰ Another aspect of the agency-fee system influenced the Court more than any encumbrance argument: "What matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees."¹⁷¹ Unlike either

162. *See id.* at 2379.

163. *See e.g., Buckley*, 424 U.S. 1; *Bellotti*, 435 U.S. 765.

164. *See* WASH. REV. CODE § 42.17.760.

165. *Davenport*, 127 S. Ct. at 2380.

166. *See id.*

167. *See id.* at 2379.

168. *See* WASH. REV. CODE §§ 41.59.060, 41.59.100.

169. *See Davenport*, 127 S. Ct. at 2380.

170. *Id.*

171. *Id.*

Bellotti or *Austin*, the WEA's money was rooted in coercion.¹⁷² Thus, the cornerstone of the Court's holding, which appeared by allusion in Part II-A, came to light: "[Section] 760 is not fairly described as a restriction on how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money."¹⁷³

Justice Scalia then interrupted the decision with an important footnote.¹⁷⁴ The WEA had failed in every aspect of its defense, but Justice Scalia provided some direction midstream. He assured the union that they "might have had a point, if" § 760 burdened the WEA's ability to spend the dues of its own members.¹⁷⁵ The Court recognized the First Amendment issue at stake for the union: the right to spend money on political speech. But as Scalia gave with one hand, he took with the other, declaring that "[t]he only reason respondent's use of its members' dues was burdened is that respondent chose to commingle those dues with nonmembers' agency fees."¹⁷⁶ Better accounting practices might have saved the day for the WEA because any incidental burden on member dues arising from lazy bookkeeping was chalked up to the WEA's laxity, not any imposition of § 760. Furthermore, the Court informed the WEA that current technology would likely ease the transition from *Hudson* minimums to § 760 affirmative-consent compliance by providing nonmembers with a facile method by which to confirm their agency-fee desires.¹⁷⁷ In the eyes of the Court, the WEA's own practices were the greatest obstacle to compliance with § 760.¹⁷⁸

Section 760 survived the rights-balancing analysis of Part II-A and the encumbrance theory of the campaign-finance cases. Next came the constitutional question of whether § 760 impermissibly drew distinctions based on the content of the WEA's political speech.¹⁷⁹

172. See *id.* (citing *Bellotti*, 435 U.S. at 767-77; and *Austin*, 494 U.S. at 654-56). The Court cited *Bellotti* and *Austin* in contrast to *Davenport*. See *id.*

173. *Id.*

174. See *id.* at 2380 n.2.

175. *Id.*

176. *Id.*

177. See *id.*

178. See *id.*

179. See *id.* at 2380.

2. Content-Based Discrimination

Notwithstanding the ease with which the Court discarded the WEA's former arguments, the Court respected the First Amendment issues at stake in *Davenport* because the *Buckley* principle of political speech still rings true.¹⁸⁰ Therefore, as the WEA brought to light its concerns about § 760's impact on speech and associational rights, the Court delved into an analysis of permissible content-based speech restrictions and sketched an outline of circumstances in which content discrimination was afforded.¹⁸¹ The catalyst in such cases, said the Court, was whether a speech prohibition, "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."¹⁸²

"It is true enough that content-based regulations of speech are presumptively invalid."¹⁸³ Did § 760 stifle the WEA's right to political speech based on the substance of the causes, elections, and ballot propositions the agency fees were spent to support? The Court decided that it did not.¹⁸⁴ Where the risk that the government is trying to exclude certain ideas from public dialogue is "inconsequential,"¹⁸⁵ strict scrutiny of the speech prohibition is "unwarranted."¹⁸⁶ The Court counted four examples: (1) obscene or defamatory speech "can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas;"¹⁸⁷ (2) the government can discriminate within classes of banned speech to proscribe only the most prurient speech;¹⁸⁸ (3) "the

180. *See Buckley*, 424 U.S. 1; *see also Thornhill*, 310 U.S. at 101-02.

181. *See Davenport*, 127 S. Ct. at 2381.

182. *Id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

183. *Davenport*, 127 S. Ct. at 2381.

184. *See id.* at 2381-82.

185. *Id.* at 2381.

186. *Id.*

187. *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382-84 (1992)).

188. *See Davenport*, 127 S. Ct. at 2381 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)). "Content discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the

government can make content-based distinctions when it subsidizes speech;”¹⁸⁹ and (4) “when the government permits speech on government property . . . [in] a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are . . . reasonable”¹⁹⁰ The rationale behind all four instances being that such limitations on speech are not accomplished in order to drive out certain views, but are reasonably applied to the circumstances in light of other considerations.¹⁹¹

The Court conceded that § 760 restrictions placed on the WEA did not qualify as one of the four neat and tidy options cited.¹⁹² However, the “principle underlying”¹⁹³ those scenarios does apply to *Davenport*. Section 760 likely caused content-based discrimination to a minute degree in affecting the union’s ability to spend a sliver of their funds for political purposes—an incidental effect, but discrimination nonetheless. The Court did not fight that premise, but instead focused on the reason voters passed § 760 and the nature of the entitlement that § 760 restricted in light of the admonition that the law concerns itself with distortions in the marketplace of ideas.¹⁹⁴ The Court concluded that the limitation was “reasonable” and “viewpoint-neutral” as a permissible condition on Washington’s “general authorization allowing public-sector unions to acquire and spend the money of government employees.”¹⁹⁵

According to the Court, the voters of Washington had a good reason for passing § 760: “to protect the integrity of the election process.”¹⁹⁶ But so did Congress before *Buckley*, and the state of Massachusetts in *Bellotti*. How could the Court justify allowing a content-based restriction after habitually lifting up political spending

selected subclass is chosen for the very reason that the entire class can be proscribed.” *Id.*

189. *Davenport*, 127 S. Ct. at 2381 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548-50 (1983)).

190. *Davenport*, 127 S. Ct. at 2381 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800, 806 (1985)).

191. *See Davenport*, 127 S. Ct. at 2381.

192. *See id.*

193. *Id.*

194. *See id.*

195. *Id.*

196. *Id.*

as a core First Amendment principle? Even if the voters thought labor unions plagued their electoral system, what complaint could they lodge in the face of the Constitution and state law that specifically legalized an agency-fee system where the union had already complied with procedural safeguards for the protection of nonmembers? There had to be more to it than just an interest that the voters of Washington acted to address. After all, the whole point of constitutional rights is to prevent the government (acting in its many capacities, whether legislature or voter majorities) from treading on rights secured against abuses. The desire to restrain unions, like the WEA, had to be justified on sturdier ground. To the Court, that meant a direct tie-in between the voters' wishes and the state-authorized nature of the agency-fee system validated a speech restriction:

The restriction on the *state-bestowed entitlement* was thus limited to the *state-created harm* that the voters sought to remedy. The voters did not have to enact an across-the-board limitation on the use of nonmembers' agency fees by public-sector unions in order to vindicate their more narrow concern with the integrity of the election process.¹⁹⁷

Two ideas come back into frame: (1) the state of Washington could completely abolish the agency-fee system at will,¹⁹⁸ meaning that the WEA only possessed agency-fees because the state granted them the extraordinary power to collect; and (2) the speech right of the nonmembers highlighted in *Abood* attenuated the union's right to the fees even after collection.¹⁹⁹ The Court calculated the permissibility of a content-based speech restriction with those realities in mind—an attendant speech limitation of § 760 was excused by the fact that other, more fundamental speech rights were honored, and the state's right to modify its scheme for conferring positive rights was secured.²⁰⁰

197. *Id.* (emphasis added).

198. *See id.* at 2378.

199. *See id.* at 2379.

200. *See id.* at 2381-82.

Moreover, “no suppression of ideas [was] afoot, since the union remain[ed] as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission.”²⁰¹ The “unique context” of the law, regarding the agency-fee system arrangement in Washington, led the Court to determine that “the content-based nature of § 760 [did] not violate the First Amendment.”²⁰² Having favored the state and the nonmember class on the balance of constitutional rights, campaign finance, and content-based discrimination grounds, little remained for the Court to do but to limit the holding of the case as applied to public-sector unions.

3. Limitations of the Holding

The *Davenport* Court upheld § 760 only as applied to public-sector unions, such as the WEA, and did not address private-sector employee unions.²⁰³ Even though the statute facially applied to both types, the Court found an analysis of § 760’s effect on private-sector unions unnecessary.²⁰⁴ The Court noted that under the NLRA “it is generally not an unfair labor practice for private-sector employers to enter into agency-shop arrangements, . . . but States retain the power under the Act to ban the execution or application of such arrangements.”²⁰⁵ Therefore existing labor law already accounted for the propriety of restricting private-sector unions in ways similar to the limitations placed upon the WEA by § 760.²⁰⁶ Those private matters resided in a realm of contract and labor law, whereby employees agreed to be subjected to an agency-fee regime as part of an employment contract, the terms of which other sources of law, such as the NLRA, regulated.²⁰⁷ According to the Court, those

201. *Id.* at 2382.

202. *Id.*

203. *See id.* There must be no confusion here. The WEA is a private association, but its clientele are public-sector employees. *See id.* Unions that represent employees in other, private, industries in Washington State are private-sector unions. *See id.*

204. *See id.*

205. *Id.* at 2383 n.3.

206. *See id.*

207. *See id.* at 2383.

relationships presented “a somewhat different constitutional question,”²⁰⁸ which did not demand an answer in the present litigation.²⁰⁹

Additionally, the WEA did not present an “overbreadth challenge,” which would have alleged the statute invalid due to a “chilling effect” on free expression.²¹⁰ “Instead, respondent . . . consistently argued simply that § 760 [was] unconstitutional as applied to itself.”²¹¹ The Court recited that the only instance in which the WEA concerned itself with the application of § 760 to the private sector dealt with § 760’s effect of generally limiting election-related speech—another “immaterial” argument to the Court.²¹²

Though § 760 affected the election system in Washington, it applied differently to public-sector unions, such as the WEA.²¹³ When it came to the public-sector unions, associations that escaped the grip of the NLRA, § 760 applied as a state-created “condition” on the entitlement “to coerce fees from government employees.”²¹⁴ Whether or not § 760 was constitutional as applied to private-sector unions had “no bearing on whether § 760 [was] constitutional as applied to public-sector unions.”²¹⁵ Because the effect of § 760 to private-sector unions had no effect on the application of § 760 to the WEA, the Court limited the application of *Davenport* to public-sector unions, such as the WEA, and those similarly situated.²¹⁶

After considering all the arguments mustered by the WEA, the Court held that requiring public-sector unions to obtain affirmative

208. *See id.* The Court opined that the end result of analyzing § 760 as applied to private-sector unions might not differ. *Id.* at 2383 n.4. But the question would not be answered in *Davenport*. *See id.* at 2383.

209. *See id.*

210. *Id.* Overbreadth doctrine: “The doctrine holding that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect—even if it also prohibits acts that may legitimately be forbidden.” BLACK’S LAW DICTIONARY 507 (2d pocket ed., 2001). The Court cites its application in *Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 633-34 (1980). *See also Davenport*, 127 S. Ct. at 2383 n.5.

211. *Davenport*, 127 S. Ct. 2382.

212. *See id.*

213. *See id.* at 2382-83.

214. *Id.*

215. *Id.* at 2383.

216. *See id.* at 2382.

consent of the union's agency-fee-paying nonmembers before spending those fees for political purposes did not violate the First Amendment.²¹⁷ The Court vacated the Supreme Court of Washington's opinion and remanded.²¹⁸

D. Concurrence

Justice Breyer, with the Chief Justice and Justice Alito, abstained from Part II-B in a brief concurrence.²¹⁹ They joined only Part I, Part II-A, and the second paragraph of the second footnote of the opinion.²²⁰ The decision below "rested entirely on flawed interpretations of this Court's agency-fee cases," wrote Justice Breyer.²²¹ That also included the weak reasoning of First Amendment associational rights precedent from *Boy Scouts of America*.²²²

But the concurring Justices declined to rule on Part II-B because the issues there were not addressed by a lower court.²²³ For example, the concurrence cited the *Austin* issue of applying campaign finance restrictions evenhandedly to unions and corporations, an issue the majority of the Supreme Court of the United States addressed, as not presented for decision.²²⁴ Justice Breyer referred to a footnote in the Supreme Court of Washington's ruling that stated, "The parties have not raised, and we [the Supreme Court of Washington] do not address, any argument concerning § 760's application solely to labor

217. *See id.* at 2383.

218. *See id.*

219. *See id.*

220. *See id.* Part I introduced the problem, including an outline of § 760 and Washington's agency-fee system. *See id.* at 2376-78. Part II-A discussed the Supreme Court of Washington's unacceptable treatment of precedent. *See id.* at 2379. The second paragraph of the second footnote dismissed the Supreme Court of Washington's "invocation of the union's expressive associational rights under *Boy Scouts of Am. v. Dale*, [530 U.S. 640 (2000)]." *Id.* at 2380 n.2. The Justices did not concur in the court's reasoning concerning the encumbrance (campaign finance) argument, content-based discrimination, or the holding's limitation to public-sector unions. *See id.* at 2380-83.

221. *Davenport*, 127 S. Ct. at 2383.

222. *See id.* at 2378; *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

223. *See Davenport*, 127 S. Ct. at 2383.

224. *See id.*

organizations while nonprofit, corporate, and other groups are not similarly subject to affirmative authorization requirements.”²²⁵ The WEA did not raise those questions below, but for the first time in briefs before the Supreme Court of the United States.²²⁶ Invoking the example of *National Collegiate Athletic Association v. Smith*,²²⁷ the concurring Justices declined to address such arguments until lower courts entertained those issues.²²⁸

V. IMPACT

To consider the impact of *Davenport* means choosing between two very different alternatives. It takes little effort to learn that while the Court was making its decision, the legislature in Washington changed the agency-fee law to redefine the application of § 760 to the unions, making it much easier to comply, and much less likely that another § 760 challenge would arise.²²⁹ The Court noted this amendment to state law in the first footnote of the *Davenport* decision.²³⁰

On the other hand, *Davenport* offers a valuable peek at the Court’s vision for future cases involving extraordinary state-granted entitlements, such as the power of private taxation. In the context of administrative law, the unanimity of the Court is noteworthy. *Davenport* may be a First Amendment case at heart, but the reality of expansive due process rights in a post-*Goldberg*²³¹ era might cause the reader to question the Court’s distinction of the WEA’s statutory and constitutional right to spend agency fees,²³² which Washington granted the union full authority to collect. Do agency fees constitute a property interest, or are they just a mere privilege that a voter majority can effectively revoke through a ballot initiative? Most

225. *Wash. State Pub. Disclosure Comm’n*, 130 P.3d at 362 n.6.

226. *See Davenport*, 127 S. Ct. at 2383.

227. *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 470 n.7 (1999) (citing precedent that held the Court was not positioned to review alternative theories advanced by respondent in that case).

228. *See Davenport*, 127 S. Ct. at 2383.

229. *See WASH. REV. CODE* § 42.17.760(2).

230. *See Davenport*, 127 S. Ct. at 2377 n.1.

231. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

232. *See Davenport*, 127 S. Ct. at 2380-81.

aspects of the Court's reasoning in *Davenport* suggest that the Court will peer unfavorably upon those beneficiaries who presume too much, by asking for more protection of an "unusual" entitlement than the Court thinks due. And how will the decision affect forthcoming campaign finance cases, especially the reasoning by Justice Scalia that Justices Breyer, Roberts, and Alito did not join?²³³ These and other important questions will recur, and though the WEA might not be involved, other associations will be subject to the Court's strong stance on a state's authority to modify the positive rights that it imparts.

First though, the interpretation that *Davenport* means very little in the grand scheme.

A. The "Impotent" Interpretation

On impact, the *Davenport* decision seems to affect thousands of schoolteachers and other public employees. The Court debilitated each argument the WEA brought in defense of noncompliance with § 760, emphasizing the Court's position that public schoolteachers have a fundamental First Amendment right to be protected from the use of their agency fees for union political activity. Such a strong statement in favor of the individuals clearly established that *Abood* would be respected; that nonmembers, who have opted out of support, control how their "tax" is spent, and even that the money did not "belong" to the union.²³⁴ Proponents of the teachers' rights and § 760 were pleased with the victory.²³⁵

But satisfaction with the decision could not be sustained, for two reasons: (1) the Court did not abolish the agency-fee system; and (2) the Washington legislature enervated the Court's holding by amending § 760 in favor of the WEA. One commentator lamented:

233. *See id.*

234. *See id.* at 2380.

235. *See, e.g.,* Booker T. Stallworth, *Teachers and EFF Win Unanimous Victory at U.S. Supreme Court* (June 14, 2007), http://www.effwa.org/main/article.php?article_id=2069&number=56. One such proponent: Evergreen Freedom Foundation, a conservative Washington think tank that had supported the petitioner teacher class throughout the litigation, put forth a press release shortly after the announcement highlighting their satisfaction with the ruling. *See id.*

“The decision the nine justices handed down won’t really affect anyone going forward—the public employees have to keep paying and the union can keep collecting.”²³⁶ Accordingly, the general counsel of the National Education Association, the WEA’s parent union, expressed a happy acceptance with the Court’s ruling because it had “little or no practical impact.”²³⁷

Unfortunately, Bastiat’s prediction about the systemic nature of legal plunder²³⁸ has come to full bloom. In agency-fee states, such as Washington, a private taxation system still enables union juggernauts to extract money from teachers’ paychecks simply as a condition of employment in the profession. The Court has recognized the constitutional tension such a system creates, specifically with the pronouncement of nonmember rights in *Abood* and procedural safeguards in *Hudson*. But they have declined to further question the propriety of the system itself. To be sure, the Court’s characterization of the WEA’s First Amendment arguments as “counterintuitive”²³⁹ addressed the constitutional concern of who “owns” the agency fees by exposing the union’s rights reasoning as backward and self-interested to a fault. Furthermore, the dismissal of the WEA’s campaign-finance claims struck the right chord. The union’s insistence that § 760 be invalidated because it did not treat corporations equally with unions did not measure up;²⁴⁰ corporations collect donations contributed voluntarily by supporters with congruent political goals, but the WEA has a monopolistic right-of-way to siphon funds from individuals who have specifically chosen to withdraw from association with the union. The only equivalent authority in government is the sovereign taxation power of the state.

The Court attacked the agency-fee system collaterally though, and it is not certain that the Court would do away with the system even if it decided to tread into Washington democratic processes.

236. Center for Individual Freedom, *Winning a Unanimous High Court Decision While Gaining Nothing*, (June 22, 2007), http://www.cfif.org/htdocs/legal_issues/legal_updates/us_supreme_court/davenport-v-washington-ed.htm.

237. *Id.* (quoting the National Education Association’s General Counsel Bob Chanin).

238. *See* BASTIAT, *supra* note 2.

239. *Davenport*, 127 S. Ct. 2378.

240. *See id.* at 2380.

Those state democratic processes, however, including the WEA's lobbying arm, responded outright to the *Davenport* decision in true rent-seeking²⁴¹ fashion by successfully insulating the WEA from the clarion rebuke of the Supreme Court of the United States.

In May 2007, about a month before the release of the *Davenport* opinion, the Washington legislature changed § 760.²⁴² The original version contained only subsection (1), which read, "A labor organization may not *use* agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual (emphasis added)."²⁴³ The new subsection (2) defined the word "use" as applied in subsection (1) to make strict union compliance with subsection (1) less important, and the practice of segregating member and nonmember funds unnecessary. The new section provided: "A labor organization does not *use* agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures (emphasis added)."²⁴⁴ The effect of the new provision seems to be that the union must still obtain permission from the nonmember before the agency fees are spent for political purposes, but that any expenditure of money from the union's general treasury, whether derived from member or nonmember sources, does not constitute an expenditure regulated by subsection (1). Therefore, the WEA can generally spend for political purposes without obtaining nonmember consent, so long as it maintains a balance in the treasury

241. See Dr. Paul M. Johnson, *Rent-seeking behavior*, in *A Glossary of Political Economy Terms*, (2005), http://www.auburn.edu/~johnspm/gloss/rent-seeking_behavior. The term "rent-seeking" refers to "[t]he expenditure of resources in order to bring about an uncompensated transfer of goods or services from another person or persons to one's self as the result of a 'favorable' decision on some public policy." See *id.*

242. See, e.g., Ross Runkle, *Davenport v. WEA Developments*, (May 17, 2007), http://www.lawmemo.com/blog/2007/05/davenport_v_wea.html; see also WASH. REV. CODE ANN. § 42.17.760 (crediting the creation of the statute to Initiative Measure 134, approved by the voters of Washington as a ballot initiative Nov. 3, 1992).

243. WASH. REV. CODE § 42.17.760(1).

244. WASH. REV. CODE § 42.17.760(2).

that exceeds the total amount collected in the form of agency fees from nonmembers. In other words, the union can spend freely as long as enough money remains to refund nonmembers. The Court's advice to implement stricter accounting practices and segregation of nonmember agency fees for purposes of authorization fell on deaf ears. The Washington legislature endorsed an accounting of complete fungibility, with no accountability on the WEA's part to trace sources of income to nonmember agency fees. Consequently, nonmembers must give permission to the union if the union is to spend their agency fees, but the union does not have to wait for such confirmation before it spends out of the very account in which agency fees are deposited. And thus, the state legislature completed the WEA's bridge to circumvention.

In Washington, little will change in practice. The professionals who want to teach in the state's school system but do not want to join the union will continue to pay their tax to the WEA, and the state legislature will be on guard to protect the entrenched interests from additional reckoning. But *Davenport* could be an important decision for broader jurisprudential reasons. The Court's stance on individual First Amendment rights, and how to balance them against positive grants of state entitlement, reflects a fundamental understanding of the nature of government that could have continuing implications.

B. Jurisprudence and Future Consequences

"Washington [State] could have gone much further" ²⁴⁵ Justice Scalia tersely declared that the state-granted nature of the WEA's agency fees subjected the whole agency-fee system to deep modification or abolition; and the unanimous Court accepted that premise. ²⁴⁶ The Court's argument manifested a famous and polemical doctrine of legal reasoning: "The greater includes the lesser." On the understanding that § 760 placed only a limited condition upon a full legislative regime of agency-fee procurement, the provision constituted a mere narrow regulatory option within a wider acceptable set of more drastic options. ²⁴⁷ This conclusion

245. *Davenport*, 127 S. Ct. at 2378.

246. *See id.* The quote appeared in the introductory paragraph of Part II, to which all nine justices joined. *See id.*

247. *See Davenport*, 127 S. Ct. at 2378.

motivated the Court's rationale for upholding § 760 as a constitutionally permissible condition on the WEA's use of agency fees.²⁴⁸

Professor Michael Herz examined the merits and pitfalls of the greater-includes-the-lesser argument in a 1994 law review article.²⁴⁹ He explained that it was a familiar friend to the Court, perhaps well-worn, but nonetheless recurring,²⁵⁰ attributed most directly to Justice Holmes, but utilized also by assorted contemporaries such as Justices White, Rehnquist, O'Connor, Stevens, Blackmun, and *Davenport's* own Justice Scalia.²⁵¹ The logic that the state's agency-fee system could be conditioned by § 760 comported with the understanding that the greater power possessed by Washington to create the system in the first place included the lesser power to regulate the use of benefits obtained by virtue of the system's existence.

Unadorned with refining jurisprudence, the greater-includes-the-lesser argument can sometimes lead to suspect conclusions. An example from Herz: Justice Holmes's famous decision in *McAuliffe v. Mayor of New Bedford*,²⁵² where Officer McAuliffe was permissibly dismissed from the city's police force for violating a rule

248. See *id.* at 2379.

249. See Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 238-49 (1994). Professor Herz spends eleven pages presenting the logic of the doctrine and exposing its weaknesses. See *id.* He cites three significant problems: (1) "[T]he argument obviously is only valid if in fact the greater power exists." *Id.* at 241. (2) "[T]he second obvious error in relying on the greater-includes-the-lesser argument occurs when one proposition is not in fact 'the lesser' of the other." *Id.* at 242. And (3)

[T]he third trap of this argument—another way in which the lesser is not in fact a subset of the greater—is what logicians call the fallacy of composition, or its flip-side, the fallacy of division. The fallacies arise because a set-theoretic approach is not always valid. In set theory, components or elements of the set do not interact; they are unaffected by being grouped together. In the real world this is not necessarily the case. For example, sodium chloride is a harmless substance (table salt). But that does not mean that either sodium or chlorine is harmless; because of their interaction the components do not necessarily share the characteristics of the whole, and vice versa.

Id. at 243.

250. See *id.* at 238 n.45 (citing *Sheldon v. Sill*, 49 U.S. 441, 449 (1850)).

251. See *id.* at 240 n.51.

252. See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892).

that prohibited him from engaging in political speech as a condition of his employment.²⁵³ Modern courts have disparaged that conclusion, and *McAuliffe* no longer represents the state of the law.²⁵⁴ However, this Holmesian deduction, though perhaps the most important analytical basis of the Court's decision, did not exclusively account for the Court's conclusion that § 760 was a constitutional condition applied to Washington's agency-fee system.²⁵⁵

The *Davenport* Court recognized another major consideration—the *Abod* right of union nonmembers overpowered the WEA's contention for control of agency fees. Thus, the reason for allowing § 760 to remain as a condition upon the agency-fee system, although making use of the greater-includes-the-lesser argument, pivoted substantially on the countervailing constitutional right of nonmembers to refuse forced political association,²⁵⁶ despite the inclination of inferior courts to sympathize with the WEA's anti-

253. See Herz, *supra* note 249, at 244 (quoting *McAuliffe*, 29 N.E. 517).

254. See *Connick v. Myers*, 461 U.S. 138, 143-44 (1983); see, e.g., *Pereira v. Comm'n of Soc. Services*, 733 N.E.2d 112, 117 (Mass. 2000).

The question [of whether a government employee could be discharged on a basis that infringes a constitutional interest in free speech] would not be considered substantial if the view of Justice Holmes, expressed more than a century ago, had prevailed. In *McAuliffe v. Mayor of New Bedford*, (citation omitted) the court dismissed a police officer's challenge to a police regulation prohibiting the solicitation of political contributions because, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." . . . This view has not prevailed. In a long line of cases the Supreme Court has clarified that, when a public employer attempts to discharge or otherwise discipline an employee who exercises a right that is constitutionally protected, the employer is subject to some restraint. (citations omitted) A public employer therefore "may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." (citations omitted) To decide whether a public employee has an actionable claim for the infringement of her First Amendment rights, we must determine first, based on "the content, form, and context of [the] given statement, as revealed by the whole record," (citation omitted) whether the public employee was speaking "as a citizen upon matters of public concern."

Pereira, 733 N.E.2d at 117.

255. See *Davenport*, 127 S. Ct. 2378-83.

256. See *id.* at 2379.

Holmesian arguments of unconstitutional speech infringement. The placement of a condition (the lesser) upon a state-created system (the greater) includes the requirement that the condition, in its own right, must be constitutional; and such a condition, contrary to what Justice Holmes might say, is not rendered constitutional simply by reason of its being a lesser restriction imposed on a greater benefit. Therefore, it was indispensable to the Court's reasoning that *Abood* created constitutional precedent in favor of the union nonmembers, establishing for them a First Amendment right to direct agency-fee use. The Court could hang the greater-includes-the-lesser argument on the *Abood* peg because the *Abood* rationale presented a compelling nonmember interest that justified the Court's reasoning that the union did not have a constitutional right to agency fees. Without *Abood*, the Court would have been faced with adjudicating a restriction upon the WEA's use of money legally collected and spent for political purposes with no other constitutional considerations to temper the propriety of such a restriction. Although the Holmesian analysis would find no difficulty imposing the § 760 restriction with little regard for the higher constitutionality of it, the modern Court needed another constitutional right to counter the union's assertions and to make sure that the limitation of § 760 was, itself, constitutional in substance.

There is yet another example of throwback reasoning in *Davenport*, one arising especially from the administrative law field. Before the *Goldberg*²⁵⁷ watershed, many state entitlements counted only as "privileges,"²⁵⁸ with no property interest attaching. The Court has abrogated the privilege doctrine over time in the context of important due-process cases, finding the hallmarks of property rights in such government-granted benefits as welfare checks.²⁵⁹ Rights

257. See *Goldberg*, 397 U.S. 254.

258. See, e.g., *Smith v. Liquor Control Comm'n*, 169 N.W.2d 803 (Iowa 1969) (holding that the revocation of petitioner's liquor license without notice or opportunity for hearing did not violate a constitutional right to due process because a license to sell alcohol granted by the state was not a property right but a privilege subject to the statute under which it is taken and the provisions thereof, including the inopportunity to complain).

259. See *Goldberg*, 397 U.S. at 254; see also *Brookpark Entm't, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991) (holding that a state liquor license could not be revoked without notice and opportunity to be heard because the licensee had "a property interest," which entitled him to due process, and which prevented his

adhering to those individual interests provided through government programs triggered due-process concerns in the face of arbitrary deprivations of such property. Today, for instance, a social security beneficiary possesses extensive due process rights based on thirty-plus years of Court precedent, whereas earlier cases, pre-*Goldberg*, afforded more leeway to the government to revoke benefits positively conferred and provided far less opportunity to the claimant to challenge the revocation.²⁶⁰ The WEA did not sue on due-process grounds because it enjoyed the opportunity to be heard in state court on its constitutional claims. But the principle by which the Supreme Court of the United States resisted the union's call to strike down § 760 skirted the edges of the privilege doctrine by allowing for substantial deference to Washington's judgment that a condition should be placed on the use of a state-granted benefit.

For example, when the WEA argued for recognition of its interest in agency fees already in its possession, the Court disavowed that argument as "immaterial."²⁶¹ Again, only through the mechanisms of Washington law did those funds arrive at the WEA's coffers. Consequently, the state-granted nature of the "privilege" of collecting agency fees accorded no absolute possessory right to the use of those fees, even though the Court's past administrative law due-process jurisprudence might have suggested that some greater property interest attached to that money. Agency fees, though a tax on nonmembers, were essentially a government benefit to the union, yet the Court limited the union's interest in those fees and tethered it to compliance with § 760.

license from being revoked through referendum); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

Certain attributes of "property" interests protected by procedural due process emerge To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Id. at 577.

260. See, e.g., *Liquor Control Comm'n*, 169 N.W.2d 803.

261. *Davenport*, 127 S. Ct. at 2380.

The Court did not entirely revive the classic Holmesian constitutional conditioning or the privilege doctrine, but the *Davenport* logic does build on older methods of interpretation. This indicates a curious backswing toward the recognition of a state's prerogative to craft extraordinary benefit systems subject to conditions, deference to the state as the life-giver of the system, and the understanding that limitations and restrictions of a "modest"²⁶² degree might be proper for the simple reason that the state could permissibly choose to go further. As the distributor of special benefits and privileges, the state remains the master of its own dealings. Fortunately, in *Davenport*, this meant that the Court settled firmly on the side of individual rights and *a fortiori* protection of nonmembers from the forced misuse of their own money for political purposes they did not support.

The Court marked the distinction of member dues and agency fees by distinguishing the means of acquisition, i.e., forced and involuntary contribution.²⁶³ Agency fees came to the union through state-sanctioned coercion not volunteerism, and that difference led to the "new rule" taken from *Davenport* for application in future cases. It had already been settled in *Buckley* that the right to spend money for political purposes did not exist in an absolute sense when other compelling state interests had to be considered.²⁶⁴ *Davenport* decreed one limiting factor that will affect unions in states that operate agency-fee systems: States can prohibit the use of money for political speech if such money was acquired through the extraordinary grant of power to collect it from individuals who are forced by law to pay. The First Amendment right of the compelled contributors to direct the use of their money prevails vis-à-vis the collecting entity's right to spend that money willingly, if the state says so.

A final point on the importance of the Court's decision-making process should be offered. Though there is little overt proof in the text of the *Davenport* opinion, reading between the lines suggests that a specific equitable principle motivated the court's angle of

262. *Id.* at 2378.

263. *See id.* at 2380. The most obvious instance of the Court distinguishing on the basis of acquisition came in Part II-B, where the Court disposed of the WEA's campaign finance argument. *See id.*

264. *See generally Buckley*, 424 U.S. 1.

attack on the issue of the WEA's collection of the agency fees, and the union's argument that the money belonged to it. Justice Scalia's outright rejection of the notion of union ownership with the phrase "other people's money"²⁶⁵ betrays the Court's propensity to view the collection of agency fees, though legal, as unjust enrichment of the union to the detriment of the nonmembers. A fruitful unjust enrichment claim of a plaintiff generally requires the defendant to disgorge the benefit gained at the plaintiff's expense for reasons of fundamental fairness, even in the absence of a contractual relationship. In *Davenport*, the Court did not force the WEA to return the money to the nonmembers. The citizens of Washington had simply conditioned the use of those fees, and the Court would not label the whole system unconstitutional or inequitable where the narrower remedy of upholding a limitation on the fees gained "unjustly" would suffice to vindicate the rights of those teachers from whom the fees were excised.

Yet, if the system was unfair in its core principle, the Court should have taken a stronger position against the practice of agency-fee arrangements in state-employee labor law. It is beyond the scope of this Note to offer reasons for the Court's refusal to strike down the whole system—reasons which may have more to do with Court administration or other principles of law not here elucidated. However, the dissatisfaction manifested by the actual victors of the case in response to the holding suggests there was much more to be desired of the opinion, namely, a firm repudiation of the inveterate agency-fee system that ignores the right of teachers to make an honest living without paying a tax to support a labor union's political activities.

VI. CONCLUSION

Davenport is a case that can easily avoid attention. When stripped to its basics, the question is minor and procedural: Must schoolteachers who do not want their money used for union political activities object to that practice, or can they stop it by withholding permission?

265. *Davenport*, 127 S. Ct. at 2380.

But the paramount issue here does not deal in banal legalese. The power of the WEA to collect agency fees is the very same as that Alexander Hamilton called, “an indispensable ingredient in every constitution”²⁶⁶—the power of the state to tax. Here, the authority of the WEA is not contractual, like between parties to an agreement; but rather the sovereignty of government apportioned to a private entity, not for the benefit of the common good, but for the personal advantage of the delegate. And it was this nature of taxation that sealed the case in favor of the teachers.

The Court needed to say that agency fees were properly nonmembers’ money unless the union complied with conditions limiting its use. If nothing else, *Davenport* accomplished that goal, and continues to serve as recognition of the important individual right to speak politically through money, or in the case of the WEA nonmembers, to choose not to speak through channels the individual deems unfit.

The WEA still enjoys the extraordinary benefit of collecting agency fees because the politicians in Washington have chosen to foster the system. One wonders what actual benefit the WEA provides to teachers when it has no incentive to retain membership through satisfactory performance. After all, leaving the union triggers a state-authorized penalty for the individual who does so. Why the expenditure of that tax for the union’s political work does not bother the state legislature is speculative, but it certainly bothered the Court.

266. HAMILTON, ET AL., THE FEDERALIST 156 (Clinton Rossiter, ed., 1961).