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YSURSA AND DAVENPORT: PUTTING A DENT IN UNION ACCESS TO MEMBER CONTRIBUTIONS FOR POLITICAL ACTIVITIES

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I. INTRODUCTION

In two recent decisions, the United States Supreme Court put a significant dent in the ability of unions to collect contributions for political activities from union members through payroll deductions. In *Ysursa v. Pocatello Education Ass'n*,¹ the United States Supreme Court in a six-to-three decision decided that an Idaho statute prohibiting counties, municipalities, school districts and other local public employers from providing payroll deductions for contributions by public employees to the union's political action committee did not violate the First Amendment.² "Idaho's law," the court ruled, "does not restrict political speech, but rather declines to promote that speech by allowing public employee check-offs for political activities."³ The state's decision to prohibit payroll deductions for political contributions, the Court determined, was "reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity."⁴

In *Davenport v. Washington Education Ass'n*,⁵ the U.S. Supreme Court reviewed a First Amendment challenge to a State of Washington statute that required public sector labor unions to receive affirmative authorization from individuals who were not members of the union but on whose behalf the union negotiated a collective bargaining agreement before spending their agency fees for ideological or political purposes unrelated to the union's collective bargaining responsibilities.⁶ The Court ruled that the

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¹ *Ysursa v. Pocatello Educ. Ass'n*, 172 L. Ed. 2d 770 (2009).

² *Id.* at 775.

³ *Id.*

⁴ *Id.*

⁵ *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372 (2007). The U.S. Supreme Court in *Davenport* was unanimous in its judgment and partly unanimous in the opinion by Justice Scalia. The Court was unanimous in Parts I and II-A; Justice Breyer, joined by Chief Justice Roberts and Justice Alito, did not join Part II-B because it resolved arguments raised for the first time in briefs submitted to the U.S. Supreme Court.

⁶ The State of Washington in the interim amended the statute "to codify a narrower interpretation of 'use' of agency-shop fees than the interpretation adopted below by the state trial court that passed on that question." The question presented to the U.S. Supreme Court was not moot,

affirmative authorization provisions did not violate the First Amendment.⁷ This decision permits states to restrict political activities undertaken by public employee unions by making the unions get the nonmembers' affirmative consent before spending mandatory fees for political purposes.⁸

Ysursa and *Davenport* supplement a long line of U.S. Supreme Court decisions dealing with the First Amendment implications of using union dues and fees for political purposes contrary to the viewpoints of individuals compelled to pay them. Those eight decisions,⁹ which were issued during the period 1956 to 1991, and which examined the First Amendment implications of compelling membership in unions or unions' representation of workers in collective bargaining, the union's use of dues and fees for political or ideological purposes, and protection of the worker's right not to be associated with or contribute financially to the political speech of the union, provide significant protection to workers who object to the use of their dues and fees for political activities.

The purpose of this article is to examine the protections provided by the U.S. Supreme Court to workers who object to the use of their dues and fees for political purposes, and to determine whether *Ysursa* and *Davenport* indicate a willingness by the U.S. Supreme Court to alter those protections. Part II of this article will catalogue the major First Amendment protections provided by the eight decisions. Part III will examine the U.S. Supreme Court decision in *Ysursa*, and concludes that *Ysursa* does not represent a major departure from the principles established in the eight decisions. Part IV of this article will examine the U.S. Supreme Court decision in *Davenport*, and concludes *Davenport* represents a departure from the principles established in the eight decisions, and Part V of this article assesses the implications of *Davenport's* departure from the principles established in the eight decisions.

II. FIRST AMENDMENT PROTECTIONS AGAINST THE USE OF UNION DUES AND FEES FOR POLITICAL PURPOSES

The major principles and protections spelled out by the U.S. Supreme Court in the eight major decisions referred to above are summarized in the following sections. The discussion begins with the constitutionality of the requirement to join a union.

A. COMPELLING WORKERS TO BECOME MEMBERS IN A UNION SHOP AS A CONDITION OF EMPLOYMENT OR TO BE REPRESENTED BY A UNION FOR COLLECTIVE BARGAINING PURPOSES IN AN AGENCY SHOP DOES NOT VIOLATE THE FIRST AMENDMENT

In *Railway Employees' Department v. Hanson*,¹⁰ employees of the Union Pacific

however, because petitioners sought money damages for the alleged violation of the prior version of the statute. *Id.* at 2377 n.1.

⁷ *Id.* at 2382.

⁸ Jess Bravin, *High Court Allows a Curb on Union Political Activity*, WALL ST. J., June 15, 2007, at A3.

⁹ *Railway Employees' Dept. v. Hanson*, 76 S. Ct. 714 (1956); *Int'l Ass'n of Machinists v. Street*, 81 S. Ct. 1784 (1961); *Railway & Steamship Clerks v. Allen*, 83 S. Ct. 1158 (1963); *Abood v. Detroit Bd. of Education*, 97 S. Ct. 1762 (1977); *Ellis v. Brotherhood of Railway Clerks*, 104 S. Ct. 1883 (1984); *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986); *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990); *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991).

¹⁰ *Railway Employees' Dept. v. Hanson*, 76 S. Ct. 714 (1956).

Railroad brought suit in Nebraska courts against the railroad and the labor organizations representing employees of the railroad to enjoin the enforcement of a union shop agreement, which required all employees of the railroad to become members of the union within sixty days.¹¹ The plaintiff employees were not members of the union, did not want to become members of the union, and did not want to lose their jobs and employments benefits if they refused to join the union.¹² The employees argued that the union shop arrangement authorized by the Railway Labor Act violated the “right to work” provision of the Nebraska Constitution.¹³

The U.S. Supreme Court upheld the union shop provisions of the Railway Labor Act as a valid exercise by Congress of its powers under the Commerce Clause to “regulate labor relations in interstate commerce,” “encourage the settlement of disputes,” and achieve “[i]ndustrial peace along the arteries of commerce.”¹⁴ The U.S. Supreme Court also ruled that the union shop arrangement did not violate the First Amendment rights of the union members,¹⁵ noting that “there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar,”¹⁶ that the

¹¹ *Id.* at 716. Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, authorized union-shop agreements between interstate railroads and the unions of their employees. In the union shop arrangement established by the Railway Labor Act, all workers were required to pay union dues, initiation fees and assessments and to become members of the union as a condition of continued employment within sixty days of their employment.

¹² *Id.* The union shop arrangement authorized by Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provided:

Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such conditions of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Id. at 716 n.2.

¹³ *Id.* The Nebraska Constitution provides: “No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.” *Id.* at 716 n.1 (citing NEB. CONST. art XV, § 13).

¹⁴ *Id.* at 718-19.

¹⁵ *Id.* at 721.

¹⁶ *Id.*

record contained nothing to demonstrate that mandatory membership in the union impaired the union members' freedom of expression,¹⁷ and that the statutory restriction against any conditions upon membership in the union except for the payment of dues, initiation fees, and assessments safeguarded the union members freedom of expression.¹⁸ The U.S. Supreme Court concluded that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate . . . the First Amendment."¹⁹

The U.S. Supreme Court applied its holding in *Hanson* to an agency shop arrangement in *Abood v. Detroit Board of Education*.²⁰ In *Abood*, the U.S. Supreme Court unanimously upheld a Michigan statute, which authorized union representation of state and municipal employees in an "agency shop" arrangement (under which all government workers are represented by the union even if they do not join the union), and required the government workers represented by the union to pay a service charge equal in amount to union dues to the union as a condition of employment.²¹ The Court determined that the union's assessment of such service charges against nonmembers to finance collective bargaining, contract administration, and dispute resolution activities did not violate the First Amendment rights of the non-member employees covered by the collective bargaining agreement, but was constitutionally justified by the important contribution of the agency shop arrangement to the system of labor relations established by Congress.²²

The U.S. Supreme Court affirmed its holdings in *Hanson* and *Abood* that mandatory union membership or representation does not violate the First Amendment in *Keller v.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Abood v. Detroit Bd. of Educ.*, 97 S. Ct. 1762 (1977). Some of the analysis of *Abood* reflected in this section appeared in a prior article written by the authors of this article. See Edward J. Schoen et al., *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech - Now You See It, Now You Don't*, 39 AM. BUS. L.J. 467, 476-77 (2002).

²¹ *Abood*, 97 S. Ct. at 1799-1800. See DONALD M. GILLMOR ET AL., MASS COMMUNICATIONS LAW: CASES AND COMMENTS 30 (5th ed. 1990) ("The Court held that a law imposing compulsory service charges, equivalent to union dues . . . on union members violated the First Amendment when those charges were to be used for political or ideological purposes not related to the union's role as a collective bargaining agent").

²² *Abood*, 97 S. Ct. at 1794. The court noted:

The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law. The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.

State Bar of California.²³ In *Keller*, the U.S. Supreme Court determined that requiring practicing lawyers to become member of the State Bar did not infringe on the First Amendment right of freedom of association.²⁴ Just as employees in union shops can be required to join the union, an organization that engages in political actions, in order to attain the benefits of bringing order to labor relations in railroad industry, so too can the State of California require that lawyers practicing law in California join and pay dues to their bar association, in order to obtain the benefits of regulating the practice of law.²⁵

B. EXPENDITURE OF DUES AND FEES FOR POLITICAL PURPOSES VIOLATES
FIRST AMENDMENT RIGHTS OF WORKERS WHO OBJECT TO SUCH EXPENDITURES

In *International Ass'n of Machinists v. Street*,²⁶ members of a group of labor organizations representing workers employed by the Southern Railway System in a union shop arrangement,²⁷ sought injunctive relief against the enforcement of the collective bargaining agreement, because the unions expended member dues to finance political campaigns of candidates for state and federal offices whom they opposed and to promote political ideologies with which they disagreed.²⁸ The U.S. Supreme Court ruled that expenditures of union members' dues without their consent to assist candidates for public office or advance political causes compel the union members to support political speech with which they may disagree, contrary to the First Amendment.²⁹ In contrast, unions could spend member dues to cover the expenses of collective bargaining negotiation and administration and disposition of grievances and disputes without the members' consent, because those purposes fell immediately within the reasons advanced by Congress in passing the Railway Labor Act through which union shops were authorized in the railroad industry.³⁰ The Court carefully reviewed the history of union security in the railway industry and the legislative history of the Railway Labor Act, and concluded "that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes,"³¹ that Congress refrained from giving unions "unlimited power to spend exacted money,"³² and that section 2, Eleventh, "is to be construed to deny the unions, over an

²³ *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990). Much of the analysis of *Keller* reflected in this section appeared in a prior article written by the authors of this article. See Schoen, *supra* note 20, at 476-77.

²⁴ *Id.* at 2233.

²⁵ *Id.* at 2233-34.

²⁶ *Int'l Ass'n of Machinists v. Street*, 81 S. Ct. 1784 (1961).

²⁷ The union shop arrangement in *Street*, based on Section 2, Eleventh, was identical to the union shop arrangement in *Hudson* discussed *supra* note 11. *Int'l Ass'n of Machinists v. Street*, 81 S. Ct. at 1788 n.1.

²⁸ *Id.* at 1787.

²⁹ *Id.* at 1800.

³⁰ 64 Stat. 1238, 45 U. S. C. § 152, Eleventh. The union shop agreement permitted by the Railway Labor Act required employees of railroads to pay union dues, initiation fees and assessments as a condition of gaining and continuing their employment. *Int'l Ass'n of Machinists v. Street*, 81 S. Ct. at 1787.

³¹ *Id.* at 1797.

³² *Id.* at 1800.

employee's objection, the power to use his exacted funds to support political causes which he opposes."³³

The U.S. Supreme Court reached the same conclusion in dealing with the agency shop arrangement in *Abood*.³⁴ In *Abood*, several teachers alleged that the union engaged in economic and political activities that they did not approve, and used service fees they were required to pay under the agency shop arrangement to support those activities.³⁵

³³ *Id.* In *Comm'n Workers of Am. v. Beck*, 108 S. Ct. 2641 (1988), the U.S. Supreme Court reached the same conclusion: the union was prohibited from spending dues and fees for political purposes to which nonmembers objected under the National Labor Relations Act Section 8(a)(3), 29 U.S.C.S. § 158(a)(3). The National Labor Relations Act Section 8(a)(3) is the equivalent of Section 2, Eleventh under the Railway Labor Act. As amended by the Labor Management Relations Act of 1947, or Taft Hartley Act, 29 U. S. C. §158(a)(3), the National Labor Relations Act permits the employer and the exclusive bargaining representative to agree that all employees in the bargaining unit must pay periodic dues and fees as a condition of continued employment, and prohibits any discrimination in hiring or terms of employment against an employee for nonmembership in the union except for the payment of dues and initiation fees. Relying on *Street*, the U.S. Supreme Court ruled in *Beck* that Section 8(a)(3) prohibits a union, over the objections of nonmembers who have paid their dues, to spend objecting nonmember dues on activities unrelated to collective bargaining activities. *Id.* at 2657. Unlike *Street*, however, the basis of the Court's decision in *Beck* was the language in the statute, not the First Amendment. This disparity troubles one commentator:

In determining whether sufficient state action exists to trigger First Amendment protection for private-sector cases arising under the RLA or the NLRA, the Court appears to have two positions. For cases premised on the RLA, the Court conceded that *Hanson* determined 'that because the RLA pre-empts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves 'governmental action' and is therefore subject to constitutional limitations.' For cases arising under the NLRA, the Court has stated that it is simply not required to decide that issue. While solicitous regarding First Amendment issues, the Court appears to prefer to escape grounding its decisions in the Constitution. Instead, it works around the Constitution and discovers an alternative basis for granting relief to dues objectors or rules against them. In the *Beck* case, for instance, the Court found that the duty of fair representation constituted a sufficient basis to grant dues objector's relief despite the District court's determination that '[the] disbursement of agency fees for purposes other than bargaining unit representation violated the associational and free speech right of objecting nonmembers.

Harry G. Hutchinson, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. PA. J. BUS. & EMP. L. 663, 695 (2008).

³⁴ *Abood v. Detroit Bd. of Educ.*, 97 S. Ct. 1762 (1977). Some of the analysis of *Abood* reflected in this section appeared in a prior article written by the authors of this article. See Schoen, *supra* note 20, at 476-77.

³⁵ *Abood*, 97 S. Ct. at 1788. Under the agency shop clause, teachers were not required to become members of the union. Teachers who did not become members of the union, however, were required within sixty days of hire to pay the union a service charge equal in amount to the regular dues paid by union members. Teachers who did not pay the service charge were discharged from employment. *Id.* at 1788. Under the National Labor Relations Act, regulation of the labor relations of state and local governments is left to the states, and Michigan permitted employees of local government units to exercise the same rights as those protected by Federal law: the right to self organization, to bargain collectively, and to use secret ballots in representation elections. *Id.* at

The U.S. Supreme Court determined that the union was prohibited from requiring an employee to pay dues and fees to support of an ideological cause he or she may oppose as a condition of holding a job as a public school teacher.³⁶ The Court reasoned that the First Amendment protects the right of individuals to refuse to associate with others and to refuse to contribute funds to associations that advance ideas and promote beliefs, and that those First Amendment protections are not surrendered by virtue of public employment.³⁷ Hence, the state cannot under the First Amendment mandate association with a political point of view as a condition of retaining public employment.³⁸ The Court emphasized, however, that its decision did not prohibit the union from spending money to advance political or ideological viewpoints or promote the candidacy of individuals to public office.³⁹ Those expenditures, however, must be financed by the dues and fees paid by union members who neither object to nor are not coerced to support those viewpoints by the threat of loss of public sector employment.⁴⁰

The U.S. Supreme Court subsequently reaffirmed the First Amendment protection against expenditure of dues for political purposes without the consent of the member in *Keller v. State Bar of California*.⁴¹ In *Keller*, members of the State Bar of California objected to the use of a portion of their mandatory membership dues to support political and ideological activities with which they disagreed.⁴² The U.S. Supreme Court determined that the relationship between the California State Bar and its members was substantially analogous to the relationship between a union and its members.⁴³ This permitted the Court to apply the *Abood* analysis to the State Bar's use of member dues,⁴⁴ and to conclude that the First Amendment prohibits the State Bar from spending member dues on political or ideological activities unless those expenditures are necessarily or reasonably incurred to regulate the legal profession or improve the quality of legal services.⁴⁵ It was also entirely appropriate that lawyers who benefited from their admission to the practice of law before the courts should be required to pay a fair share of the costs of regulating the legal profession and enhancing the educational and ethical

1793.

³⁶ *Id.* at 1799-1800.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* (“We do not hold that a union cannot constitutionally spend funds for expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as a collective bargaining representative.”) In making these political expenditures, the union must act “consistently with any applicable (and constitutional) system of election campaign regulation.” *Id.* at 1800 n.32.

⁴⁰ *Id.* at 1800.

⁴¹ *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990). Much of the analysis of *Keller* reflected in this section appeared in a prior article written by the authors of this article. See Schoen, *supra* note 20, at 476-77.

⁴² *Id.* at 2231.

⁴³ *Id.* at 2235.

⁴⁴ *Id.* at 2235-36.

⁴⁵ *Id.* The Court also notes that compliance with *Abood* and *Keller* is neither difficult nor burdensome. Rather, the constitutional requirements for the collection and use of fees are providing an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending. *Id.* at 2237; accord *Chicago Teachers Union v. Hudson*, 106 S. Ct. at 1076 n.17 (1986).

standards of the admitted lawyers.⁴⁶

C. UNION MEMBERS WHO OBJECT TO THE PAYMENT OF DUES FOR POLITICAL OR IDEOLOGICAL PURPOSES AND WHO ARE CURRENT IN THE PAYMENT OF THEIR DUES ARE ENTITLED TO A REFUND OF THOSE DUES PLUS APPROPRIATE INTEREST, AND THE BURDEN OF ESTABLISHING THE AMOUNT TO BE REFUNDED IS IMPOSED ON THE UNION

In *Railway & Steamship Clerks v. Allen*,⁴⁷ employees of the Southern Railway Company, who, like the employees in *Street*, were obligated to pay dues, fees and assessments to various labor organizations as a condition of their continuing employment in a union shop arrangement, obtained an injunction against the enforcement of the labor agreement, because the union used the collected dues to lobby for and against legislation, to influence votes in public elections, and to make campaign contributions.⁴⁸ The U.S. Supreme Court ruled the injunction contained four fatal flaws. First, the injunction covered all workers, not just those who objected to the expenditures.⁴⁹ Second, the injunction covered all union dues, not just those dues used for political purposes thereby interfering with the union's ability to undertake collective bargaining activities.⁵⁰ Third, the injunction was issued without any determination by the union of the percentage of union dues used for political purposes,⁵¹ the burden of proof of which rests with the union.⁵² Fourth, the injunction should have directed the union to refund that portion of the collected funds in the same proportion that the union's political expenditures bear to total union expenditures, and to reduce future collections of dues and fees by the same proportion.⁵³

The Court's holding in *Allen* was affirmed in *Ellis v. Brotherhood of Railway Clerks*.⁵⁴ In *Ellis*, clerical employees of Western Airlines objected to the use of assessed agency fees (equal in amount to union member dues) in support of political activities, and challenged the adequacy of the rebate procedures implemented by the union to reimburse them for that portion of their agency fees used for those purposes.⁵⁵ The U.S. Supreme Court ruled that the rebate scheme employed by the union was inadequate, because the collection and utilization of union fees for improper purposes followed by a rebate of those improper expenditures amounts to "an involuntary loan for purposes to which the employee objects."⁵⁶ Because readily available and convenient means exist to ameliorate the wrongful though temporary use of the funds (*e.g.*, advanced reduction of dues or interest bearing escrow accounts), the union's temporary use of the funds for improper purposes violates the statute.⁵⁷ In other words, the union was required to

⁴⁶ *Id.* at 2236.

⁴⁷ *Railway & Steamship Clerks v. Allen*, 83 S. Ct. 1158 (1963).

⁴⁸ *Id.* at 1160.

⁴⁹ *Id.* at 1162.

⁵⁰ *Id.*

⁵¹ *Id.* at 1163.

⁵² *Id.* at 1164.

⁵³ *Id.*

⁵⁴ *Ellis v. Brotherhood of Railway Clerks*, 104 S. Ct. 1883 (1984).

⁵⁵ *Id.* at 1888, 1888 n.3. The clerical workers did not object to their mandatory union membership required by the union shop arrangement; that claim was precluded by *Railway Employees v. Hanson*, 76 S. Ct. 714 (1956). See *Ellis*, 104 S. Ct. at 1887.

⁵⁶ *Ellis*, 104 S. Ct. at 1890.

⁵⁷ *Id.*

provide more than a “pure” rebate remedy that permits it to expend fees for political purposes and then later refund that portion of the fee to the worker. The union must either pay interest on the amount refunded or provide a mechanism to permit the worker to reduce his service fee payments prospectively by the portion employed for political ideological purposes.⁵⁸

The U.S. Supreme Court further amplified the refund remedy that unions must provide to objecting workers in *Chicago Teachers Union v. Hudson*.⁵⁹ In *Hudson*, several workers represented by the union objected to the use of their dues for purposes not related to collective bargaining and challenged the procedure implemented by the union to handle their objections.⁶⁰ The U.S. Supreme Court ruled that the procedures enacted by the union to deal with nonmember objections were inadequate for three reasons. First, the union was permitted to use the objectors’ dues temporarily for purposes to which they objected, rather than preliminarily obtaining their consent to finance activities unrelated to collective bargaining.⁶¹ Second, the procedures failed to provide nonmembers with sufficient information about the basis on which the proportionate share was calculated in advance of their raising an objection; instead, the union provided information about the calculation of the proportionate share after the objectors filed their objections.⁶² Further, the information ultimately provided to the objectors was inadequate, because it failed to disclose the expenditures for collective bargaining and administration that benefited all members and nonmembers alike and for which a fee could be charged; the mere disclosure of a percentage of expenditures does not explain why they were required to pay dues.⁶³ Third, the procedure failed to provide “a reasonably prompt decision by an impartial decision maker.”⁶⁴ The Court noted that, because the agency shop arrangement effects an infringement on First Amendment rights of association,⁶⁵ the nonunion employee “is entitled to have his

⁵⁸ *Id.*

⁵⁹ *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986).

⁶⁰ *Id.* at 1071.

⁶¹ *Id.* at 1075.

⁶² *Id.* at 1075-76.

⁶³ *Id.* at 1076. Notably, the Court prefaced its determination that insufficient information was provided to the nonmembers by reiterating its language in *Abood* placing the burden of proof on the union. The court noted:

In *Abood*, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: ‘Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.’ Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee - and requiring them to object in order to receive information - does not adequately protect the careful distinctions drawn in *Abood*.

Id. at 1075-76 (citations omitted).

⁶⁴ *Id.* at 1076.

⁶⁵ *Id.* at 1076 n.20 (citing *Ellis*, 466 U.S. at 455).

objections addressed in expeditious, fair, and objective manner.”⁶⁶ The procedure employed by the union did not meet this standard, because it permitted the union, an interested party, to control the process from the moment the process begins (collection of the dues), through the two-step appeal process (controlled by the union executive committee and union executive board), and through the final arbitration (decided by a union-selected arbitrator).⁶⁷ In sum, “the original Union procedure was inadequate, because it failed to minimize the risk that nonunion employees’ contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker.”⁶⁸

Notably, then, *Hudson* requires the union to make significant disclosures to employees so that they can make an informed decision to object to the expenditures of dues and fees for purposes not related to collective bargaining, contract administration, and grievance adjustment. More particularly, the union must inform the employees (1) how it calculated the proportion of expenditures for activities unrelated to collective bargaining, contract administration, and grievance adjustment, and (2) the nature of expenditures included under the category of collective bargaining and contract administration that benefited members and nonmembers alike.⁶⁹ Further, the union’s disclosure of this information must be made before the employee is given the opportunity to object to expenditure of dues and fees for purposes not related to collective bargaining and contract administration. As discussed in Part IV below, those protections were not provided by the union to employees in *Davenport*, a shortcoming overlooked by the U.S. Supreme Court in its decision.

D. THE UNION’S ASSESSMENT OF SERVICE CHARGES AGAINST NONMEMBERS IN AN AGENCY SHOP DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF WORKERS WHO WERE NOT MEMBERS OF THE UNION TO THE EXTENT THOSE FEES ARE EXPENDED FOR COLLECTIVE BARGAINING AND GRIEVANCE RESOLUTION PURPOSES

In *Ellis*, the U.S. Supreme Court also addressed the nature of expenses that may properly be paid from union dues and service charges. The test employed by the Court to determine the propriety of these expenditures was “whether the challenged

⁶⁶ *Hudson*, 106 S. Ct. at 1076.

⁶⁷ *Id.* at 1076-77.

⁶⁸ *Id.* at 1077. The U.S. Supreme Court also rejected the Union’s argument that the implementation of an escrow arrangement through which 100% of the dues of objecting nonmembers were held intact pending resolution of the member’s objection was sufficient, because, while it prevented the improper use of objector’s dues, it failed to satisfy the second (adequate explanation of the use of fees) and third (prompt decision) criteria. *Id.*

⁶⁹ One commentator debunked the effectiveness and truthfulness of these disclosures:

[L]abor unions aware of judicial precedent have an incentive to shield ideological and other nonrepresentational expenditures from scrutiny. A truthful response to the question of which expenditures are expended impermissibly may deprive unions of such funds. Unions have reason to blur the lines between germane and nongermane expenditures by suggesting that all expenditures are required to fulfill their collective-bargaining role.

expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”⁷⁰ Notably, under this test:

[O]bjecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees at the bargaining unit.⁷¹

Hence, objecting employees may be required to pay fees to the union to support the direct costs of collective bargaining activities and those activities that are normally and reasonably employed to carry out those collective bargaining activities. Using that test, the Court concluded that the following expenses are sufficiently related to collective bargaining to be paid from union dues: (1) travel expenses to attend national conventions during which officers are elected and guidance on collective bargaining is provided; (2) refreshments for members during business meetings and social activities; (3) publications which inform union members about negotiations, contract demands, employee benefits, proposed legislation, and recreational and social activities; and (4) litigation expenses related to negotiating and administering the collective bargaining agreement and settling grievances.⁷² The Court also determined that the expenses related to organizing and recruiting additional union members were not sufficiently related to collective bargaining activities to be paid from union dues, and refrained from expressing an opinion on the death benefits paid to union members, because the record was unclear whether or not the objecting employees were entitled to receive the death benefits.⁷³

In *Lehnert v. Ferris Faculty Ass’n*,⁷⁴ the U.S. Supreme Court amplified its decision in *Ellis*. In *Lehnert*, faculty members employed by Ferris State College, a state-related public institution of higher education supported by the State of Michigan, objected to

⁷⁰ *Ellis*, 104 S. Ct. at 1892.

⁷¹ *Id.*

⁷² *Id.* at 1892-95. The U.S. Supreme Court recently affirmed the conclusion that litigation expenses were chargeable expenses in its unanimous decision:

[C]osts of that litigation are chargeable provided the litigation meets the relevant standards for charging other national expenditures that the *Lehnert* majority enunciated. Under those standards, a local union may charge a nonmember an appropriate share of its contribution to a national's litigation expenses if (1) the subject matter of the national litigation bears an appropriate relation to collective bargaining and (2) the arrangement is reciprocal -- that is, the local's payment to the national affiliate is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.

Locke v. Karass, 129 S. Ct. 798, 806 (2009)

⁷³ *Ellis*, 104 S. Ct. at 1893, 1895.

⁷⁴ *Lehnert v. Ferris Faculty Ass’n*, 111 S. Ct. 1950 (1991).

the expenditures of funds by the Ferris Faculty Association, the exclusive bargaining representative of the faculty in an agency shop arrangement.⁷⁵ The objecting faculty members claimed that the expenditures in question were used for purposes other than negotiating and administering the collective bargaining agreement, thereby violating their First Amendment Rights.⁷⁶ The U.S. Supreme Court initiated its analysis by summarizing *Hanson, Street, Allen, Abood*, and *Ellis* as follows:

[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.⁷⁷

The Court in its plurality opinion then resolved the six categories of payments challenged by the dissenting employees, and decided dissenting union members' dues could properly be expended on: (1) the "pro rata share of the costs associated with otherwise chargeable activities of the state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit"⁷⁸; (2) the expenses of attending and participating in union conventions, because "bargaining strategies and representational policies" are developed at those meetings and those activities are "essential to the union's discharge of its duties as bargaining agent"⁷⁹; and (3) the expenses of preparing for a strike, even if the strike is illegal, because those expenses "aid [collective bargaining] negotiations and inure to the direct benefit of members of the dissenters' unit" and do not further burden their First Amendment rights.⁸⁰

The Court also decided that the following expenses could not be paid by dissenting members' dues: (1) lobbying and political activities "outside the limited context of contract ratification or implementation," because such expenditures "use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable'"⁸¹; (2) public education programs through publications of the union, because the union did not demonstrate how the public education programs was "oriented toward the ratification or implementation of petitioners' collective-bargaining agreement"⁸²; and (3) public relations expenses incurred to enhance the reputation and

⁷⁵ *Id.* at 1955-56.

⁷⁶ *Id.* at 1956.

⁷⁷ *Id.* at 1959. The Court rejected a more stringent test that required "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 1961. One commentator observed that the refusal to adopt the more stringent test "has consequences because it may encourage subsequent courts to conclude that a union does not act unlawfully by charging expenses that are for services that may ultimately inure to the benefit of the members of the local union This may be a mistake 'because virtually any activity may ultimately inure to the benefit of members.'" See Hutchinson, *supra* note 33, at 690.

⁷⁸ *Id.* at 1961. See Locke, *supra* note 72 (deciding unanimously that the local union's share of the national's litigation expenses are chargeable, and thereby affirming the plurality determination in *Lehnert*).

⁷⁹ *Id.* at 1965.

⁸⁰ *Id.*

⁸¹ *Id.* at 1960-61.

⁸² *Id.* at 1963.

standing of public school teachers and their profession, because they “entailed speech of a political nature in a public forum,” were not “sufficiently related to the union’s collective bargaining functions to justify compelling dissenting employees to support it,” and imposed a “substantially greater burden upon First Amendment rights.”⁸³

III. U.S. SUPREME COURT DECISION IN YSURSA

In *Ysursa v. Pocatello Education Ass’n*,⁸⁴ the U.S. Supreme Court decided that an Idaho statute entitled “Voluntary Contributions Act,” which prohibited the use of payroll deductions for political activities from wages of employees of the state and its political divisions, did not violate the First Amendment.⁸⁵ Labor organizations challenged the constitutionality of the statute before it went into effect.⁸⁶ The District court rejected the labor unions’ argument with respect to the state, but upheld their challenge with respect to local governments.⁸⁷ Analogizing the relationship between the State and its political subdivisions to that between the State and a regulated private utility,⁸⁸ the Ninth Circuit Court of Appeals treated the prohibition on payroll deductions at the local level as a content-based restriction on speech, applied strict scrutiny, and held the statute unconstitutional as applied at the local level.⁸⁹ The U.S. Supreme Court granted certiorari to determine whether “the First Amendment to the United States Constitution prohibit[s] a state legislature from removing the authority of

⁸³ *Id.* at 1964.

⁸⁴ *Ysursa v. Pocatello Educ. Ass’n*, 172 L. Ed. 2d 770 (2009).

⁸⁵ *Id.* at 775.

⁸⁶ *Id.* at 776.

⁸⁷ *Id.*

⁸⁸ The Ninth Circuit Court of Appeals relied on *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980) in reaching its conclusion that the relationship between the State and its political subdivisions was analogous to that between the State and regulated public utilities. *Ysursa*, 172 L. Ed. 2d at 777, 780. In *Consolidated Edison*, the U.S. Supreme Court ruled that an order of the New York Public Service Commission prohibiting the inclusion of utility company inserts discussing controversial issues of public policy in its monthly bills violated the First Amendment. Noting that corporations are entitled to freedom of speech, the Court ruled that none of the interests advanced by the Commission - protecting the utility’s customers from having views forced upon them, allocating limited space in the billing envelopes in the public interest, and ensuring ratepayers do not subsidize the cost of the bill inserts - was a compelling state interest justifying the prohibition on the utility company’s speech. Billed customers were a “captive audience,” but they could simply toss the insert away in the wastebasket; billing envelopes were not, unlike broadcast frequencies, part of a scarce, publicly owned resource; and there was no basis to assume the Commission could not exclude the costs of the bill inserts from the utility’s rate base.

The U.S. Supreme Court reached a similar decision in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 20-21 (1986). In *Pacific Gas*, the U.S. Supreme Court decided that the order of the California Public Utilities Commission requiring Pacific Gas and Electric Co. (PG&E) to include communications prepared by a public interest organization in its billing envelopes violated the First Amendment rights of PG&E, because PG&E was required to use its own property to disseminate the views of others with which it disagrees contrary to the First Amendment.

⁸⁹ *Ysursa* 172 L. Ed. 2d at 777. See *Pocatello Educ. Ass’n v. Heidemen*, 504 F.3d 1053, 1059 (2007).

Neither party challenged the District Court’s determination with respect to state level employees. *Ysursa*, 172 L. Ed. 2d. at 776.

state political subdivisions to make payroll deductions for political activities under a statute that is concededly valid as applied to state government employers."⁹⁰

In response to the labor union's argument that the Idaho statute employed a content-based restriction and hence was subject to strict scrutiny,⁹¹ the U.S. Supreme Court noted that the state is "not required to assist others in funding the expression of particular ideas, including political ones,"⁹² and that *Davenport* confirms the state's right to decline to assist political speech by collecting political contributions via payroll deduction in the absence of the specific consent of the worker.⁹³ Similarly, "Idaho does not suppress political speech but simply declines to promote it through public employer checkoffs for political activities."⁹⁴

Acknowledging that payroll deductions "enhance the unions' exercise of First Amendment rights" and that the Idaho elimination of payroll deductions made it more difficult for the union to raise funds for political activities,⁹⁵ the Court noted that Idaho's decision not to provide payroll deductions for political activities is not an abridgment of the unions' speech, because the unions "are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor."⁹⁶ Hence, the Court concluded, Idaho's decision to prohibit payroll deductions "is not subject to strict scrutiny,"⁹⁷ and Idaho "need only demonstrate a rational basis to justify the ban on political payroll deductions."⁹⁸ A sufficient rational basis exists at the state level, the Court noted, in the state's interest in avoiding the "appearance of government favoritism or entanglement with partisan politics."⁹⁹ Because municipal organizations are merely "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions,"¹⁰⁰ the same rational basis exists at the political subdivision level: states may prohibit payroll deductions of political contributions to advance the state's interest "in separating the operation of government from partisan politics."¹⁰¹ Having concluded the state demonstrated a sufficient rational basis for its decision to eliminate payroll deductions at the local level, the U.S. Supreme Court reversed the decision of the Ninth Circuit Court of Appeals.¹⁰²

⁹⁰ The question presented appears in the docket of U.S. Supreme Court, at <http://origin.www.supremecourtus.gov/qp/07-00869qp.pdf>, (last visited March 17, 2009) (original in possession of Edward J. Schoen). The Petition for Writ of Certiorari was granted on March 31, 2008. See docket of U.S. Supreme Court, accessed on March 19, 2009, at <http://origin.www.supremecourtus.gov/docket/07-869.htm> (last visited March 17, 2009) (original in possession of Edward J. Schoen).

⁹¹ *Ysursa*, 172 L. Ed. 2d at 777.

⁹² *Id.* (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (noting that Congress can decide that tax-exempt organizations should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying)).

⁹³ *Ysursa*, 172 L. Ed. 2d at 779.

⁹⁴ *Id.*

⁹⁵ *Id.* at 777.

⁹⁶ *Id.*

⁹⁷ *Id.* at 778.

⁹⁸ *Id.*

⁹⁹ *Id.* at 779.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 780.

¹⁰² *Id.* at 781. By reversing the Ninth Circuit, the U.S. Supreme Court resolved inconsistent rulings

Ysursa appears to be a fairly straight-forward decision garnering the votes of both liberal and conservative justices¹⁰³ and demonstrating simply that “the legal controversy” over upholding paycheck protection “was more contrived than real.”¹⁰⁴ The biggest downfall from the decision, it appears, is the diminished ability of unions to raise political activities contributions via payroll deduction and the increased burden imposed on the union to solicit and collect those contributions directly from its members.¹⁰⁵

Notably, *Ysursa* does not appear to represent a departure from the principles and protections provided to workers who do not wish their dues and fees to be used for political purposes to which they object. Their First Amendment freedom of association

rendered by three federal circuit courts of appeal and an Ohio appellate court dealing with almost identical state statutes. See Jay E. Grenig, *May a State Legislature Prohibit State Political Subdivisions from Making Payroll Deductions for Political Activities?*, 2 ABA PREVIEW 113 (2008). Grenig writes:

Both the Ninth Circuit in *Pocatello Education Association* and the Tenth Circuit in *Utah Education Association v. Shurtleff*, 512 F.3d 1254 (10th Cir. 2008), held a statutory prohibition of payroll deductions for political activities to be unconstitutional. The Sixth Circuit in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), has held a similar statute to be constitutional. In a state-court decision, the Ohio Court of Appeals held a statute prohibiting payroll deductions for political activities was unconstitutional because, “The prohibition on direct partisan political expression by labor organizations strikes at the core of the electoral process and constitutional freedom of speech.”

Id. at 116.

¹⁰³ Chief Justice Roberts authored the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Ginsburg joined as to Parts I and III, and also filed an opinion concurring in part and concurring in the judgment.

¹⁰⁴ See M. Royce Van Tassel, “Taxpayers shouldn’t have to subsidize political donations for unions,” *DESERT MORNING NEWS*, March 8, 2009, at http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T6049667705&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T6049667712&cisb=22_T6049667711&treeMax=true&treeWidth=0&csi=164282&docNo=1 (last visited March 16, 2009) (original in possession of Edward J. Schoen).

¹⁰⁵ See Wendy Leonard, *DESERT MORNING NEWS*, February 25, 2009, at http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T6049667705&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T6049667712&cisb=22_T6049667711&treeMax=true&treeWidth=0&csi=164282&docNo=7 (last visited March 16, 2009) (original in possession of Edward J. Schoen) (“During the one year that the Voluntary Contributions Act was in effect in Utah, the UEA political-action committee’s fundraising fell 75 percent, and the Utah Public Employee Association political action committee’s fundraising dropped to zero.”). A spokesman for the Idaho Education Association expressed disappointment, but said the union has “moved on.” See Mark Welsh, “Supreme Court Backs Idaho’s Payroll-Deduction Curb,” *EDUC. WK.*, March 4, 2009, at http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T6049667705&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T6049667712&cisb=22_T6049667711&treeMax=true&treeWidth=0&csi=313401&docNo=8 (last visited March 19, 2009) (original in possession of Edward J. Schoen) (“[I]n the wake of the passage of the 2003 law, IEA members moved away from payroll deductions and toward electronic funds transfer as a means of making their political donations.”).

is not affected. There is no indication worker contributions to the union's political-action committee were deducted from their wages without their consent. There was no wrongful retainer of contributions or failure to provide prompt refunds with interest of political activities contributions erroneously deducted. There was no indication the contributions obtained via payroll deduction were expended for unauthorized purposes. Hence, *Ysursa* is fairly unremarkable in so far as the canon of principles governing political use of union dues and fees.

IV. U.S. SUPREME COURT DECISION IN *DAVENPORT*

As noted above in the introduction to this article, the U.S. Supreme Court in *Davenport v. Washington Education Ass'n*¹⁰⁶ upheld a Washington State statute that required public sector labor unions to obtain affirmative authorizations from employees in a agency shop who were not members of the union but were required to pay service fees to the union before spending those fees for political purposes to which the employees objected.¹⁰⁷ The State of Washington permitted the unions to charge nonmembers a service fee equal in amount to the union dues it collected from members; both the service fee and the union dues were collected via payroll deduction.¹⁰⁸ Further, because the service fee was the same amount as the union dues, the service fee collected necessarily exceeded the costs of collective bargaining, contract administration, and grievance adjustment.¹⁰⁹ The union sent "*Hudson* packets" to all nonmembers twice a year, in which they asked the nonmembers to select one of three options: agree to pay the full agency fee within thirty days, object to payment of nonchargeable expenses and receive a rebate calculated by the union, or object to payment of nonchargeable expenses and receive a rebate calculated by an arbitrator.¹¹⁰ These arrangements permitted the nonmembers to "opt out" from the payment of excess service fees, rather than permitting them to "opt in" to the payment of excess service fees.¹¹¹

Contending that these arrangements failed to meet the affirmative authorization requirements of the statute, the State of Washington filed suit against the union, and several nonmembers of the union initiated a separate class action lawsuit against the union to recover union expenditures for political purposes.¹¹² The trial court in the State of Washington action decided the union failed to comply with the affirmative authorization requirements, and awarded the State money and injunctive relief.¹¹³ The trial court in the nonmembers' action found in favor of the nonmembers and certified

¹⁰⁶ *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372 (2007).

¹⁰⁷ *Id.* at 2383. The statute provided: "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. Wash. Rev. Code § 42.17.760.

¹⁰⁸ *Davenport*, 127 S. Ct. at 2377.

¹⁰⁹ Erik S. Jaffe, *Campaign Finance and Free Speech: When Easy Cases Make Bad Law*: *Davenport v. Washington Education Association*, 2006-2007 CATO SUP. CT. REV. 115, 116.

¹¹⁰ *Davenport*, 127 S. Ct. at 2377-78.

¹¹¹ See Jaffe, *supra* note 109, at 117.

¹¹² *Davenport*, 127 S. Ct. at 2378.

¹¹³ *Id.*

the class.¹¹⁴ After intermediate appellate proceedings, the Washington Supreme Court ruled (1) agency fee jurisprudence attempts to establish a balance between the First Amendment rights of the nonmembers and the First Amendment rights of the union, and (2) the affirmative authorization requirements of the statute interfered with that balance and violated the First Amendment right of the union.¹¹⁵ The Court reasoned that the burden of objecting to the expenditure should be shouldered by the nonmembers rather than the union.¹¹⁶ In reaching this conclusion, the Supreme Court of Washington relied on language in *Street* that a union member's dissent from the use of union dues for political purposes should not be presumed. Rather, the dissenting member should make his or her dissent known to the union.¹¹⁷

The U.S. Supreme Court granted certiorari¹¹⁸ and decided that the Washington Supreme Court's interpretation of the agency fee cases missed the mark. With respect to the Washington Supreme Court's reliance on the language in *Street* that dissent is not to be presumed, the U.S. Supreme Court insisted that language "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 limitation established in those cases could be satisfied by a narrower remedy."¹¹⁹

The U.S. Supreme Court also disagreed with the Washington Supreme Court determination that unions have a First Amendment right to utilize service fees for political purposes. Rather, the U.S. Supreme Court insisted, "unions have no constitutional entitlement to the fees of nonmember-employees," and the First Amendment is not "implicated whenever governments place limitations on the union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require."¹²⁰

In the U.S. Supreme Court's view, *Hudson* provides "a minimum set of procedures by which a [public sector] union in an agency-shop relationship could meet its requirements under *Abood*," and the fact that the State of Washington "required more

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2379.

¹¹⁷ See *State of Washington v. Washington Educ. Ass'n*, 130 P.3d 352, 358-59 (2006). See Patrice Wade DiPietro, *Authorization Required For Certain Union Spending*, 9 LAW. J. 2 (2007) ("[The Washington Supreme Court] concluded that Section 760 was unconstitutional because it believed that agency-fee cases, having balanced the constitutional rights of unions and nonmembers, dictated that a nonmember must shoulder the burden of objecting before a union can be barred from spending nonmember fees for impermissible purposes [under *Abood*]. The court also reached its conclusion by stating that dissent is not to be presumed - - it must affirmatively be made known to the union by the dissenting employee.").

¹¹⁸ That the U.S. Supreme Court granted certiorari surprised at least one commentator. "The Court granted certiorari, even though the State of Washington had modified its statute, few other states had similar provisions, and there was no apparent circuit conflict. Perhaps the Court just wanted to deprive the union of a victory, or maybe it just did not have many cases to occupy its time." Michael Selmi, *The Supreme Court's 2006-2007 Term Employment Law Cases: A Quiet But Revealing Term*, 11 E.M.P.L. RTS. & EMPLOY. POL'Y 219, 248-49 (2007).

¹¹⁹ *Davenport*, 127 S. Ct. at 2379. See DiPietro, *supra* note 117 ("The court opined that the lower court read far too much into its admonition that 'dissent is not to be presumed,' clarifying that it only meant 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 statutory or constitutional requirements could be satisfied by a narrower remedy.").

¹²⁰ *Id.* Citing *Lincoln Fed. Union v. Northwestern Iron & Metal Co.*, 334 U.S. 525, 529-31 (1949), the U.S. Supreme Court noted that the State of Washington could eliminate the agency fee entirely. *Id.*

than the Hudson minimum does not trigger First Amendment scrutiny."¹²¹ In other words, the minimum requirements imposed by *Hudson* are the "constitutional floor" for expending agency fees, and *Hudson's* minimum requirements are not "a constitutional ceiling for state-imposed restrictions," which trigger First Amendment review.¹²² Thus, while the *Hudson* language suggests that requiring parties to opt out is the proper course of action, it is not a constitutional requirement.¹²³ Hence, state legislatures can further restrict (and indeed eliminate entirely) the union's entitlement to use the dues and fees of nonmembers beyond the requirements of *Abood* and *Hudson* without violating the First Amendment. Quite simply, the union is entitled to collect agency fees from nonmembers only because the State of Washington compelled nonmembers to pay those fees, and the requirement that nonmembers consent to the expenditure of collected fees for political purpose to which the nonmembers object is simply a condition imposed on the union's entitlement to spend "other people's money,"¹²⁴ and in no way restricts the union right to expend funds for political purposes.¹²⁵

Four aspects of the U.S. Supreme Court's decision deserve attention. First, the U.S. Supreme Court stressed that its decision applied only to public-sector unions and not private-sector unions, even though the language of the Washington statute "applies on its face to both public- and private-sector unions in Washington."¹²⁶

¹²¹ *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. at 2379. The curt language employed by the Court caused a sympathetic response from one commentator: "Reading the opinion, one comes away feeling a bit sorry for the union. The tone of the opinion seemed to chide the union for daring to complain about restrictions on fees it had no right to in the first place. . . . Indeed, the case manifests a certain hostility to unions and their gumption, which was evident by the Court taking the case in the first place." Selmi, *supra* note 118, at 251.

¹²² *Davenport*, 127 S. Ct. at 2379.

¹²³ See Selmi, *supra* note 118, at 249. Selmi writes:

[T]he *Hudson* language suggested that requiring parties to opt out of the agency fees would be the proper course, but what the language did not indicate is whether that was a constitutional requirement. Based on the language from *Hudson*, it would be constitutionally problematic for a court to invalidate an opt-out requirement, but the question posed in this case was whether a state legislature could mandate an opt-in requirement. To the Court, that was a very different question. As the Court explained, "the mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny. The constitutional floor for union's collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions."

Id.

¹²⁴ *Davenport*, 127 S. Ct. at 2380. One commentator criticizes the U.S. Supreme Court for not going farther and upholding the Washington State statute on the grounds it better protects the First Amendment rights of the objecting members: "I think the dispositive consideration is that not only did the Union lack any 'right' to the excess fees, but in fact the First Amendment rights of the nonmember employees precluded the state from giving the Union the power to compel even the initial payment of such excess fees." See Jaffe, *supra* note 109, at 122.

¹²⁵ *Davenport*, 127 S. Ct. at 2380 n.2.

¹²⁶ *Id.* at 2382 ("We emphasize an important limitation upon our holding: we uphold § 760 only as applied to public-sector unions such as respondent. Section 760 applies on its face to both public- and private-sector unions in Washington. Since private-sector unions collect agency fees through contractually required action taken by private employers rather than by government agencies,

Second, the U.S. Supreme Court decision in *Davenport* and the Washington statute affect only those fees paid by employees who are not members of the union; they do not affect the union's ability to access and spend the dues of its own members.¹²⁷ During the period 1996 to 2000, Washington Education Association (WEA) had approximately 3,500 nonmembers per year, about five percent of the total number of persons represented by WEA.¹²⁸ The decision will not affect the 70,000 or so members of WEA.¹²⁹

Third, *Davenport* permitted the State of Washington to restrict the union's expenditures for political purposes solely from the dues or fees of the workers who affirmatively "opt in" by approving the payment beforehand.¹³⁰ In contrast, the cases

Washington's regulation of those private arrangements presents a somewhat different constitutional question."). In making this distinction, the Court also hinted that the answer for private-sector unions might not be different. *Id.* at 2382 n.4 ("We do not suggest that the answer must be different. We have previously construed the authorization of private-sector agency-shop arrangements in National Labor Relations Act in a manner that is arguably content based."); see DiPietro, *supra* note 117 (noting that section 760 was upheld only as applied to public-sector unions and that regulation of private sector unions presents a different constitutional question that the court did not address).

The failure of the U.S. Supreme Court to apply its ruling to both public- and private-sector unions troubled one commentator:

[T]he *Davenport* Court could not find a basis to validate the § 760 with respect to private-sector workers. This is troubling because it is difficult to separate public- from private-sector labor unions. . . . If a state fails to outlaw private-sector union-shops and union security agreements sanctioned by the NLRA, it appears that just as much governmental coercion is present as the Court has found in cases arising under public-sector bargaining statutes. Private-sector employers and labor unions operating under the aegis of the NLRA or the RLA were ceded authority by the Federal government to coerce private sector dues payments from dissenting employees, enforceable through the right to terminate workers for nonpayment of dues.

Hutchinson, *supra* note 33, at 707-08. Further, "public and private sector unions and their respective revenues cannot be clearly divided since they are often both affiliate members of, and contribute to the same national labor organization and share the same mission [and] because approximately one-half of a typical union's financial activity occurs at the national level." *Id.* at 712. ¹²⁷ *Davenport*, 127 S. Ct. at 2380 n.2 (2007) ("The only reason [the union's] use of its member's dues was burdened is that respondent chose to commingle those dues with nonmembers' agency fees.").

¹²⁸ *State of Washington v. Washington Educ. Ass'n*, 130 P.3d 352, 354 (2006).

¹²⁹ *Davenport*, 127 S. Ct. at 2378 ("Respondent [is] the exclusive bargaining agent for approximately 70,000 public education employees . . .").

¹³⁰ Erwin Chermersky & Marci A. Hamilton, *Nineteenth Annual Supreme Court Review: First Amendment Decisions from the October 2006 Term*, 23 *TOURO L. REV.* 741, 743 (2008) ("[N]on-union members [have] the right to not have their dues used for political activities they did not agree with; the Washington law fulfills that by requiring the affirmative opt-in. The Court did not say the Constitution requires this, only that the State of Washington could require it, if it chose."). That the U.S. Supreme Court did not require the affirmative consent of nonmembers to non-chargeable expenditures of union dues and fees troubled one commentator: "[T]he Court's failure to require prior consent . . . appears to dispute Madison's view requiring consent before the ideological burdens of membership can attach," particularly in light of lower court determinations in *Beck* that nearly 80% of union dues were not chargeable and in *Lehnert* that nearly 90% of dues were spent on non-representational activity. See Hutchinson, *supra* note 33, at 709-10.

discussed above involved “opt out” provisions, *i.e.*, workers who object to expenditures of their dues “opt out” of paying a portion of their fees and dues for political purposes. The work imposed on the union by the Washington State “opt in” procedure will be likely be more burdensome than “an opt-out” procedure. Rather than simply providing the workers the opportunity to object to the expenditure, the union must convince the worker to provide affirmative consent for political expenditures. This may be a difficult task, particularly with those workers who were not willing to join the union in the first place.¹³¹ Likewise, while the record does not contain a calculation or estimate of the financial impact of an “opt out” and an “opt in” system, it appears likely that the “opt in” system will produce a smaller pot of money for political expenditures than an “opt out” system for two reasons. First, the “opt out” procedure permits the union to use the dues of workers who do not receive or understand the form, misplace the form, simply forget to complete the form, or fail to do so in a timely manner. The “opt-in” procedure prevents the union from using those fees.¹³² Second, the “opt-in” procedures increase administrative expenses, because the union is required to seek, obtain, and record the affirmative consent and to refund the political portion of the fees to all nonmembers who did not affirmatively agree.¹³³

¹³¹ See Selmi, *supra* note 118, at 248 (“In most workplaces, non-members must affirmatively opt-out of the fee structure as a means of manifesting their lack of consent, but the state of Washington passed legislation requiring unions to gain the affirmative consent of the non-members before any of their fees could be used for election-related purposes. Presumably very few non-members will give their affirmative consent since if they were willing to provide their consent one would also assume they would be willing to join the union.”).

¹³² The rebate checks paid to those who objected to expenditures for political purposes were between \$44 and \$76 per person. *State of Washington v. Washington Educ. A'n*, 130 P.3d at 355. If all 3,500 nonmembers failed to opt in, the financial impact to WEA would be range from \$154,000 to \$266,000.

¹³³ It is interesting to consider whether *Davenport's* upholding the substitution of “opt-in” provisions for “opt-out” provisions will pass muster in other First Amendment contexts. In doing so, it is important to recall that *Davenport* determined the union has no First Amendment right to collect dues and service charges through payroll deductions. Unlike *Davenport*, however, those who might object to switching opt-in provisions for opt-out provisions likely have a recognized First Amendment right that is negatively affected by the switch. This is illustrated by a recent news report about a Rutgers University proposal to permit its undergraduate students to “opt-in” to the payment of the subscription fee for the *Daily Targum*, the student newspaper, rather than permitting the students to request a refund if they do not wish to subscribe. See Rita Giordano, “Rutgers paper fights fee proposal,” PHILADELPHIA INQUIRER, January 24, 2009, at B1, at http://www.philly.com/philly/education/20090124_Rutgers_paper_fights_fee_proposal.html (last visited Jan. 24, 2009) (original in possession of Edward J. Schoen). According to the editor of the *Daily Targum*, the proposal will “imperil the second-oldest college newspaper in the nation,” because it will substantially diminish student funding for the newspaper. *Id.* In contrast, the chairman of the Student Assembly favors the proposal, because “students shouldn't have to jump through hoops to get their money back.” *Id.*

Notably, courts have recognized a First Amendment right to financial support of student publications. In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000), the U.S. Supreme Court ruled that First Amendment permits a public university to charge students mandatory fees segregated from the tuition charge to fund extracurricular student speech, provided viewpoint neutrality is employed in allocating funding to student organizations engaging in such speech. The principal justification advanced for this decision is that universities should be permitted to “determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in

Fourth, U.S. Supreme Court's determined that "unions have no constitutional entitlement to the fees of nonmember-employees."¹³⁴ While this appears to be inconsistent of the Court's previous statement in *Street* that the union should not be sanctioned in favor of an employee who makes no complaint regarding the use of his or her money,¹³⁵ the petitioner-nonmembers argued, and respondent-WEA expressly conceded, that a union has no constitutional right to collect an agency fee in the first place.¹³⁶ At first blush this concession appears somewhat surprising. Further reflection,

their extracurricular campus life outside the lecture hall." *Id.* Once the University makes this determination, it is "entitled to impose a mandatory fee to sustain an open dialogue to these ends." *Id.*; see *Lathrop v. Donohue*, 367 U.S. 820, 843, 845-846 (1961) (holding that Wisconsin State Bar Association rule requiring members to pay dues did not violate First Amendment rights of members of the bar, where dues are utilized to raise quality of professional services and the record does not disclose the fees are used to support political speech to which the members object).

¹³⁴ *Davenport*, 127 S. Ct. at 2379.

¹³⁵ *Int'l Ass'n of Machinists v. Street*, 81 S. Ct. at 1803 ("The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.").

¹³⁶ Brief for Petitioners, at 17, at http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-1589_Petitioner.pdf (last visited May 13, 2009) (original in possession of Edward J. Schoen) ("unions have no constitutional right to collect fees from nonmembers."); Brief for Respondents, at 46 at http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-1657_Respondent.pdf (last visited May 14, 2008) (original in possession of Edward J. Schoen) ("Any union right to collect an agency fee is a matter of statutory authorization, not constitutional principle, and a state is thus constitutionally free to prohibit or decline to authorize an agency fee.").

Having conceded the absence of a First Amendment right to collect an agency fee, the union advanced alternate First Amendment arguments in support of its position: (1) once the fees were in the union's possession, U.S. Supreme Court's campaign finance law precedents require the Court to review the Washington statute under the strict scrutiny test; and (2) the Washington statute was an impermissible content-based restriction, because it focused on election-related expenses. Both arguments were rejected by the U.S. Supreme Court:

Realizing its argument based on *Hudson* was going to come up short, the union turned to several more creative arguments. First, it claimed that once the union had the fees in its possession, the Supreme Court's campaign finance law precedent, which frequently requires strict scrutiny on how those funds are spent, would come into play. While clever, the Court found the analogy inapt because the fees were only in the union's possession because the state had compelled the employees to provide the fees, and the government coercion easily distinguished the Court's prior campaign finance jurisprudence. When the campaign finance argument ran aground, the unions switched to another powerful first amendment doctrine, contending that the state legislation was an impermissible content-based restriction because it singled out election-related expenditures. This argument, however, called into question the Court's entire doctrine in the area, as the union was effectively arguing that its use of nonmember fees could not be regulated, or at least could not be regulated when it came to expressive activity. In its early cases, including its decision in *Hudson*, the Court had made clear that states could restrict the use of agency shop fees, and could, in fact, impose specific regulation on the use of those fees for election-related purposes.

however, demonstrates it to be the correct conclusion for two principal reasons. To begin with, the U.S. Supreme Court has ruled that the First Amendment rights of labor unions and their members are no different than those given to all individuals.¹³⁷ Those rights are “the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances . . . [and] the right of associations to engage in advocacy on behalf of their members.”¹³⁸ It is difficult to argue convincingly that the right to associate with others encompasses a constitutional right to use for political purposes the compelled fees of nonmembers when they have decided for whatever reason not to join the union. Secondly, U.S. Supreme Court decisions upholding right to work laws belies the existence of a First Amendment right of the union to collect fees and dues.¹³⁹ In upholding those laws, the Court rejected a lower court argument that the right of association somehow supports a constitutional right to compel union membership to enhance the effectiveness of the union.¹⁴⁰ The Court has also determined “there is no constitutional duty to bargain collectively with an exclusive bargaining agent,”¹⁴¹ and right to work laws do not interfere with First Amendment rights.¹⁴² In short, unions have no supplemental First Amendment rights by virtue of their representation of workers in the collective bargaining process permitting it to collect the agency fee from the workers it represents.

By eviscerating any First Amendment entitlement on the part of the union to dues

¹³⁷ *Smith v. Arkansas State Highway Employees*, 99 S. Ct. 1826, 1827 (1979). The court noted:

[T]he First Amendment is not a substitute for the national labor relations laws. The fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution. The First Amendment right to associate and to advocate ‘provides no guarantee that a speech will persuade or that advocacy will be effective.’ The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Id. (citations omitted).

¹³⁸ *Id.*

¹³⁹ See *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 69 S. Ct. 251, 254 (1949) (holding that state statutes in Nebraska and North Carolina prohibiting employers from entering into contracts to exclude non-union members from employment do not violate the First Amendment, because “[i]t is difficult to see how enforcement of this state policy could infringe the freedom of speech of anyone, or deny to anyone the right to assemble or to petition for redress of grievances. And appellants do not contend that the laws expressly forbid the full exercise of those rights by unions or union members.”).

¹⁴⁰ *Smith v. Arkansas State Highway Employees*, 99 S. Ct. at 1827.

¹⁴¹ *Id.* at 1828 n.2.

¹⁴² *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 69 S. Ct. 251, 254 (1949) (“Nothing in the language of [right to work] laws indicates a purpose to prohibit speech, assembly, or petition. Precisely what these state laws do is to forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members.”); accord *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 69 S. Ct. 258 (1948) (upholding the constitutionality of an Arizona state constitutional amendment which prohibited employment discrimination against non-union employees but not against union employees).

and fees, the Court has removed any union interest against which to balance the restrictions authorized by the state, thereby possibly giving the states unfettered right to impose any additional restrictions on the union's access to dues and fees it chooses, including content-based restrictions. The only other countervailing interests that may serve as a check on the restrictions a state may impose on union access to dues and fees are those interests promoted by mandatory union representation: bringing order and peace to labor relations and achieving efficiencies in negotiating and administering collective bargaining agreements and settling disputes. State restrictions on union access to dues and fees may presumably be challenged if those restrictions threaten labor relations and efficiencies in collective bargaining and dispute resolution. Given the severity of that test, however, perhaps unions might be better served by eschewing state directed access to union dues and relying solely on the collective bargaining agreements with employers to obtain dues and fees through payroll deduction.¹⁴³

V. SHORTCOMINGS OF DAVENPORT

By not addressing certain issues, *Davenport* postpones questions that may have to be addressed in the future. First, the U.S. Supreme Court did not review the union's collection of service fees in excess of those needed for collective bargaining, contract administration, and grievance adjustment.¹⁴⁴ This permits the union to avoid its *Hudson* obligations as discussed in Part II above: (1) preliminarily estimating the proportion of chargeable and nonchargeable expenses and reducing the dues charged the nonmembers by the portion of nonchargeable expenses; (2) providing nonmembers information which describes how the proportionate share of chargeable and nonchargeable expenses was calculated; (3) including in the information disclosed the estimated expenditures for collective bargaining and administration that benefited all members and nonmembers alike and for which a fee could be charged; and (4) providing nonmembers with the right to object to the union's determination of what expenses were chargeable and nonchargeable. Notably, *Hudson* requires that obligations (2) and (3) take place prior to step (4) so that the nonmember has sufficient information to challenge those expenses that the union claims are chargeable.¹⁴⁵ As noted by one commentator:

[T]he mere collection of that portion of the agency fee that represents expenditures for political activities rather than collective bargaining . . . violates the First Amendment on its face, regardless whether

¹⁴³ Union access to dues and fees of public sector employees is mandated in only half of the states. Brief of Petitioners, at 18, at http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-1589_Petitioner.pdf (last visited May 13, 2008) (original in possession of Edward J. Schoen) ("In fact, nearly half of the states do not authorize the assessment of compelled fees at all in the public sector.").

¹⁴⁴ See Jaffe, *supra* note 109, at 116-17.

¹⁴⁵ *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066, 1076 (1986) ("Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employee in the dark about the source of the figure for the agency fee - and requiring them to object in order to receive information - does not adequately protect the careful distinctions drawn in *Abood*."). See Jaffe, *supra* note 109, at 129-30.

employees are allowed to seek reimbursement by jumping through the formal procedural hoops for opting out each year.¹⁴⁶

The Washington State procedures upheld by the U.S. Supreme Court do not include these provisions and a subsequent challenge to them may arise.

Second, the U.S. Supreme Court suggests that the language in *Street* indicating that dissent is not to be presumed is equally applicable to union shop and agency shop organizations.¹⁴⁷ Notably, however, *Street* involved a union shop arrangement, in which all employees must be a member of the union as a condition of employment, and some union members voluntarily agree to be associated with the union and its political activities and others do not. Because there is no easy way to identify who is a voluntary member and who is not in a union shop arrangement, it is fair to assume that dissent is not to be presumed as to all union members and to require the nonvoluntary members to come forward and notify the union of their dissent.¹⁴⁸ In contrast, members of an agency shop are not required to become members of the union, but are required only to pay as a service fee that portion of union dues attributable to collective bargaining, contract administration, and grievance adjustment. Because they elected not to become members of the union, for whatever reasons, they are easily identified. Hence requiring the union to take affirmative steps to protect their First Amendment rights is less burdensome in the agency shop than in the union shop.¹⁴⁹ In the former instance, the union must contact only nonmembers to obtain their affirmative consent; in the latter instance, the union must reach out to all members to obtain their affirmative consent.

Third, the U.S. Supreme Court justifies its conclusion that the union has no First Amendment right to the service fees of nonmembers, because "it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely."¹⁵⁰ This language may be an attempt to revive the "if we can ban it then we can regulate it" approach utilized by the Court to resolve First Amendment issues in the commercial speech arena. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,¹⁵¹ the U.S. Supreme Court justified its upholding of a ban on advertising casino gambling aimed to residents of Puerto Rico on the grounds the legislature could also decide to prohibit gambling.¹⁵² The U.S. Supreme Court thereafter backed away from its "greater-includes-the-lesser" reasoning in *44 Liquormart, Inc. v. Rhode Island*,¹⁵³ noting that "it is inconsistent with both logic and well-settled doctrine," and that "banning speech may sometimes prove far more intrusive than banning conduct."¹⁵⁴ Perhaps the "greater-

¹⁴⁶ See Jaffe, *supra* note 109, at 127.

¹⁴⁷ *Id.* at 123.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 123-24.

¹⁵⁰ *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. at 2378. In one commentator's view, the use of this language by the Court "effectively issued an invitation to all of the states" to eliminate agency fees entirely. See Hutchinson, *supra* note 33, at 700.

¹⁵¹ *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986).

¹⁵² *Id.* at 2979 ("[I]t is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.")

¹⁵³ *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

¹⁵⁴ *Id.* at 1512. See Edward J. Schoen & Joseph S. Falchek, *Joe Camel and 44 Liquormart: Has the FDA Gone Too Far?*, 27 ACAD. LEGAL STUD. BUS. NAT'L PROC. 191, 193-94 (1998); Edward J. Schoen et al., *Glickman v. Wileman Bros. & Elliott: California Fruit Marketing Orders Prune the First Amendment*, 10

includes-the lesser” analysis has experienced a resurrection.

VI. CONCLUSION

Street and *Abood* and their progeny have created a fairly coherent body of principles governing the First Amendment implications of unions’ use of employee fees and service charges for political purposes. Such expenditures violate the First Amendment rights of those employees who object, and the union is required to refund that portion of the dues and fees used for political purposes plus accrued interest to objecting employees and to reduce future dues and fee payments by the percentage union expenditures for political and ideological purposes bears to total union expenditures. In order that employees make an informed decision on whether or not to object to the expenditures, the union must disclose the proportion of chargeable and nonchargeable expenses, explain how that proportion was computed, disclose the estimated expenditures for collective bargaining and administration that benefits all members and nonmembers alike, and provide employees with the opportunity to communicate their objections to the union. Further, union expenditures cannot be deemed chargeable unless they are necessarily or reasonably incurred for, and germane to, the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues, thereby advancing labor peace and avoiding free riding. Finally, any dispute between the employee and the union regarding about chargeable expenditures must be resolved by an impartial decision maker in a reasonably prompt manner.

While *Ysursis* does not appear to have departed from these principles, *Davenport* seems to have sidestepped them in upholding the “opt in” restrictions on the use of nonmember dues and service fees for political or ideological purposes. Instead of resolving the issues presented by applying those principles, the U.S. Supreme Court rebutted the Washington State Supreme Court’s reasoning, disclaimed any First Amendment right on the part of the union to collect fees and services, and approved the adoption of more restrictive protections of the nonmembers’ First Amendment right not to be compelled to support political views with which they disagree. The reason for this, of course, is that the Court was not judging the constitutionality of how the union handled objecting employees’ dues and fees (as was the case in *Street* and *Abood* and their progeny), but was reviewing the constitutionality of the state’s enhanced restrictions on the union’s handling objecting employees’ dues and fees. In *Street* and *Abood* and their progeny, objecting employees claimed their First Amendment rights were violated and they prevailed. In *Davenport*, the union claimed its rights were violated and it did not prevail.¹⁵⁵ Further, the intersection of *Street* and *Abood* and their progeny with *Davenport* and its potential progeny will probably not occur, because employees are not likely to challenge enhanced state-imposed restrictions making it

WIDENER J. PUB. L. 21, 55 (2000).

¹⁵⁵ Notably, the unions’ First Amendment arguments were raised as a defense to the two lawsuits brought respectively by the State of Washington and nonmembers of the union. See *Selmi*, *supra* note 118, at 249 (“[G]iven that the union’s challenge arose as a defense, one might have expected the Court to be relatively gentle in reversing the Washington Supreme Court’s decision but the Court did not appear to be in a genteel mood. Indeed, in a unanimous opinion . . . the Court seemed to wonder aloud how the union could have the audacity to bring this challenge, forgetting, of course, that the challenge arose as a defense to two major lawsuits.”).

harder for unions to access their dues and fees, and, lacking any First Amendment right to access dues and fees, the union lacks standing to dispute those restrictions.

Nonetheless, by not upholding the Washington State statute on the grounds it provided better protection of the objecting members' First Amendment rights and by overlooking the union's collection of dues and fees without adhering to all of the *Hudson* requirements, *Davenport* may have reached the right conclusion for the wrong reasons in an opinion that potentially erodes First Amendment protections accorded nonmembers of an agency shop not to be charged service fees in excess of collective bargaining costs.¹⁵⁶ If so, except for providing the foundation for the *Ysursa* decision, *Davenport* hopefully "will be remembered and relied on primarily for its result, not for its reasoning," and "future cases will apply First Amendment principles with greater vigor,"¹⁵⁷ particularly when the employment of the opt-in provisions restricts the first amendment rights of the parties upon whom the restrictions are imposed.

¹⁵⁶ See Jaffe, *supra*, note 109, at 131.

¹⁵⁷ *Id.*