

When Easy Cases Make Bad Law: *Davenport v. Washington Education Association* and *Washington v. Washington Education Association*

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It seems uncharitable to be critical of a case in which the side you supported prevailed, but that is the odd position in which I find myself regarding the Supreme Court's recent decision in *Davenport v. Washington Education Association* (decided together with *Washington v. Washington Education Association*).¹ Despite the laudable result, the Court in *Davenport* took a rather circuitous path to that result and ended up doing violence to the First Amendment along the way. Rather than simply stating that the lower court had gotten things exactly backwards—finding a First Amendment right in favor of the Union rather than the nonunion employees regarding coerced excess “agency” fees the Union had no valid justification for charging in the first place—the Court instead took a restrictive approach to the First Amendment and emphasized state discretion in order to turn back the Union's challenge. That emphasis on state discretion, rather than on nonunion-employee rights, likely will encourage further uncertainty and litigation in states such as Washington that improperly allow unions to intentionally collect agency fees in excess of their chargeable expenses. The Court's approach to the First Amendment, and its treatment of the supposed state interest in the “integrity” of the elections process said to support the limited opt-in requirement in this case, could also have untoward consequences in the campaign finance area.

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¹127 S. Ct. 2372 (2007). My support for the prevailing side took the form of filing a brief on behalf of the Cato Institute, the Reason Foundation, and the Center for Individual Freedom, as *amici curiae* in support of the petitioners in the combined cases (available at <http://www.esjpc.com/WEA-Cato-Amicus-Final.pdf>).

I. Background

The Supreme Court's decision in *Davenport* is the latest in a long line of cases addressing the First Amendment implications of so-called "union-shop" and "agency-shop" agreements. Under a union-shop agreement, an employer agrees to hire only union members; consequently, anyone who wants to work for the employer must join the union. An agency-shop agreement does not require employees to join the union, but instead requires employees who are not members of the union to pay an "agency" fee to the union. The union in such arrangements has the obligation to represent all employees in collective bargaining and related activities, and the agency fee is intended to eliminate "free-riding" by nonmembers.

As the Supreme Court observed in *Davenport*, a long line of cases has established that while agency-shop agreements are permissible and serve the supposedly important interest in avoiding free-riding by nonmembers on the collective bargaining efforts of members, such agreements, particularly with regard to public-sector employees, also impinge upon the First Amendment rights of nonmembers by forcing them to support the speech of the union.² Over the years the balance that had been struck is that nonmember employees can be forced to contribute only to union expenses that are "germane" to the collective bargaining and related activities on which the employees are supposedly free-riding. As for expenses attributable to union activities that are *not* germane to collective bargaining and the like, and especially expenses for ideological speech and activity by the union, such expenses are not properly chargeable to nonmembers. Ordinarily, the separation of chargeable and non-chargeable expenses results in an agency fee that is somewhat less than regular union dues given that unions spend a portion of the dues they receive from members on activities and speech that are not chargeable to nonmembers. The state of Washington, however, does things a bit differently.

Washington permits a union that negotiates an agency-shop agreement with an employer to collect agency fees from nonmember employees at a level *equal* to the amount that members of the union

²127 S. Ct. at 2376–77 (citing and discussing *Machinists v. Street*, 367 U.S. 740 (1961), *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), *Teachers v. Hudson*, 475 U.S. 292 (1986), and *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991)).

pay as dues.³ Such an amount, however, represents more than just the *pro rata* costs of collective bargaining, contract administration, and grievance adjustment: it includes the costs of political contributions and other non-germane activities that have nothing to do with the collective bargaining process and that are not properly chargeable to nonmembers.

Nonmember employees of an agency shop previously could recover such non-chargeable portion of their agency fee only by periodically objecting in response to a so-called *Hudson* packet identifying the excess charges and giving the employees a limited opportunity to opt-out of such charges. That system effectively enabled the union automatically to take money to which it had no proper entitlement and then placed the burden on the nonmembers to seek a rebate of money that was rightfully theirs to begin with.

That opt-out approach regarding excess agency fees was changed in part when the people of Washington adopted by initiative a provision that forbids a union from using excess agency fees for political purposes without the affirmative consent of the nonmembers from whom the excess fees were taken. The relevant provision, RCW 42.17.760 (“§ 760”), provides:

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.

Instead of the opt-out system previously in effect, the law thus requires an “opt-in” system in order for a union to convert excess fees taken without employee consent into voluntary political contributions to the union.

In litigation by the state of Washington and by nonunion employees to enforce § 760, the Washington Education Association (“WEA” or the “Union”) challenged the opt-in requirement as being a violation of its supposed First Amendment right to use excess agency fees for non-chargeable purposes absent affirmative objection from the nonmember employees. When the case eventually reached the

³Wash. Rev. Code §§ 41.59.060, 41.59.100 (2007).

Washington Supreme Court, that court, over a vigorous dissent, agreed with the Union and struck down § 760.

The court below reached that conclusion based on the ill-conceived grounds that § 760 abridged the First Amendment rights of the Union to engage in political association with nonmembers who simply fail to respond to the periodic opt-out notice, and that any competing rights of dissenting nonmembers were adequately protected by the *Hudson* opt-out procedure, which served as a less restrictive means of protecting their rights without burdening the supposed First Amendment rights of the Union.⁴ In reaching that rather bold conclusion, the court relied on language from an earlier U.S. Supreme Court case, *Machinists v. Street*, which held, in the context of a union shop (*i.e.*, mandatory union membership for all employees), that a union member's dissent from the use of union dues for political purposes unrelated to collective bargaining "should not be presumed."⁵ The court also relied on the supposed association rights of the Union and employees who had not actually joined the Union but who might silently wish to make a contribution of their excess agency fees.⁶

II. The Supreme Court's Opinion

In a unanimous judgment (and partly unanimous opinion by Justice Antonin Scalia), the Supreme Court reversed and held that § 760's opt-in requirement did not violate the Union's First Amendment rights.

The unanimous portion of the opinion began by summarizing the constitutional distinction between chargeable and non-chargeable expenses under the Court's earlier cases and then suggested, without elaboration, that "[n]either *Hudson* nor any of our other cases, however, has held that the First Amendment mandates a public-sector union obtain affirmative consent before spending a nonmember's agency fees for purposes not chargeable under *Abood*."⁷ The Court then assumed, for purposes of the consolidated cases, that

⁴State v. Washington Educ. Ass'n, 130 P.3d 352, 364 (Wash. 2006).

⁵*Id.* at 358–59, 364 (citing International Ass'n of Machinists v. Street, 367 U.S. 740, at 760–64 (1961)).

⁶*Id.* at 364 (citing Boy Scouts of America v. Dale, 530 U.S. 640 (2000)).

⁷Davenport v. Washington Education Association, 127 S. Ct. 2372, 2377 (2007).

the opt-out procedures applied by the Union were consistent with the constitutional requirements of *Hudson* and *Abood* with regard to non-chargeable expenses.⁸

Having thus assumed that it was constitutionally permissible for the state to allow the Union to charge the excess fees in the first place, subject to a subsequent opt-out procedure, the Court nonetheless characterized as “unusual” and “extraordinary” the power granted the Union to exact agency fees at all, much less the power to tax fees beyond the amounts chargeable to collective bargaining and related activities. Viewing the entire power of the Union to charge agency fees as being merely a government-granted privilege that could be eliminated entirely without offending the Constitution, the Court held that the “far less restrictive limitation” on the use of such fees for election-related speech “is of no greater constitutional concern.”⁹

The Court similarly rejected the lower court’s purported balancing of First Amendment rights as between the Union and the nonmember employees “for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees” in the first place.¹⁰ According to the Court, cases such as *Abood* and *Hudson*, which require unions to give nonmember employees the opportunity to object to allegedly non-chargeable portions of agency fees, establish a *minimum* set of procedures for such agency-shop arrangements in those cases, not a maximum set of safeguards beyond which a union gets to claim constitutional offense.¹¹

As for the language from *Street* that dissent should not be presumed, relied upon by the court below, the Court explained that such language posed a limitation only on the power of the *courts* to enjoin the expenditure of funds collected from all employees, including those who had not objected. But while “courts have an obligation to interfere with a union’s statutory entitlement no more than is necessary to vindicate the rights of nonmembers,” said the Court, such restrictions do not apply to the legislatures or voters

⁸ *Id.*

⁹ *Id.* at 2379.

¹⁰ *Id.*

¹¹ *Id.*

that have granted (and hence can limit) the scope of the entitlement to collect agency fees.¹²

The Court also quickly disposed of the lower court's odd reliance on *Boy Scouts of America v. Dale* as supporting the Union's right to associate with employees who had declined to join the Union but silently may have wished to contribute the excess agency fees taken from them to the Union for purposes of election-related speech. Needless to say, the Supreme Court found such reliance misplaced, noting that, unlike the compelled association at issue in *Dale*, § 760 neither compelled the Union to accept unwanted members nor otherwise made union membership less attractive.¹³

In a further portion of the opinion joined by only six of the justices, the Court rejected a number of alternative First Amendment arguments made by the Union though not raised in, or relied upon by, the court below.¹⁴

Rejecting the Union's argument that § 760 imposes a restriction on how the Union may spend "its" money for political purposes, and discriminates between certain political spending by unions and supposedly comparable spending by corporations, the Court found the campaign finance cases relied upon by the Union inapplicable because § 760 was not a restriction on the *Union's* money. Rather, it placed a condition "upon the Union's extraordinary *state* entitlement to acquire and spend *other people's* money."¹⁵ The Court observed that it would have been a different matter if the restriction were on union spending of the voluntary dues from its members, rather than involuntary exactions from nonmembers.¹⁶

The Court then noted that the question thus became one of whether § 760 was a constitutional condition on the spending of the excess agency fees. Rejecting the Union's argument that § 760 drew unconstitutional content-based distinctions between spending excess

¹²*Id.*

¹³*Id.* at 2380 n.2 (second paragraph).

¹⁴The three justices not joining this part of the opinion—The Chief Justice, Justice Breyer, and Justice Alito—simply declined to reach the Union's further arguments, preferring that they instead be presented to and ruled upon by the lower courts in the first instance. *Id.* at 2383 (Breyer, J., concurring in part and concurring in the judgment).

¹⁵*Id.* at 2380.

¹⁶*Id.* n.2 (first paragraph)

agency fees on election-related speech and spending such excess on other non-chargeable speech, the Court instead declared that the content distinctions here were innocuous and permissible. The Court analogized the speech at issue in this case to obscenity or defamation—speech that itself is unprotected and of negligible First Amendment value—and noted that content discrimination within such “a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed.”¹⁷ Also particularly relevant, said the Court, are situations in which the government acts in a non-regulatory capacity—such as when it subsidizes speech or allows speech on government property that is a nonpublic forum—and is given greater leeway to use content-based distinctions.¹⁸

The Court held that § 760 was a reasonable and viewpoint-neutral limitation and did not impermissibly distort the marketplace of ideas. Addressing the objection that § 760 did not cover all union spending of agency fees for nonchargeable purposes, the Court argued that the purpose of § 760 was “to protect the integrity of the election process . . . which the voters evidently thought was being impaired by the infusion of money extracted from nonmembers of unions without their consent. The restriction on the state-bestowed entitlement was thus limited to the state-created harm that the voters sought to remedy.”¹⁹ The Court concluded finally that the content-based limitation at issue “[q]uite obviously” involved “no suppression of ideas . . . since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission.”²⁰

¹⁷*Id.* at 2381–82 (citing, *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992)).

¹⁸*Id.* (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548–50 (1983), and *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799–800, 806 (1985)).

¹⁹*Id.* at 2381. The Court expressly limited its holding to the application of § 760 to public-sector unions, taking no position on its lawfulness as applied to private-sector unions that receive agency-shop fees as a matter of contract and government non-interference rather than affirmative government compulsion. *Id.* at 2382. It declined to consider any overbreadth claim as such an argument was not raised by the Union. *Id.*

²⁰*Id.*

III. Discussion

As I noted at the outset, I think *Davenport* was an easy case and that the Supreme Court reached the correct result. The reasons I think the case was easy, however, are not the reasons given by the Court in its opinion. Rather, 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. Before defending that stricter application of the First Amendment, however, it is useful to consider some of the problems with the Supreme Court’s reliance on state discretion, rather than employee rights, to reach its result.

A. Section 760’s Content-Based Condition on the Union’s Statutory Privilege Raises More Significant First Amendment Concerns than the Court Acknowledges

Regarding the unanimous portion of the Court’s opinion, the holding that the collection of agency fees is an extraordinary privilege, rather than a right, is certainly correct as far as it goes, but it does not go far enough to resolve the First Amendment question. Even privileges may be subject to conditions that violate the First Amendment, as the Court implicitly recognizes in the latter (non-unanimous) portion of its opinion. That the privilege of collecting non-chargeable fees at issue in this case is unusual or extraordinary adds little to the analysis given the Court’s *assumption* that Washington’s system of collecting such excess fees subject to later objection satisfies *Abood* and *Hudson*.

The Court’s further holding that *Abood* and *Hudson* establish *minimum* procedures rather than maximum safeguards that cannot be exceeded again is certainly correct as far as it goes, but once again does not resolve whether the imposition of more burdensome procedures—applied in a content-based manner to only a subset of the excess agency fees—imposes an unconstitutional condition regardless whether those same procedures would be innocuous if applied uniformly to all non-chargeable expenses covered by the excess agency fees.

Insofar as the Court’s initial approach is offered as only a first step in an unconstitutional conditions analysis, it is not particularly troubling. Insofar as it is offered as the *end* of the analysis, it seems

to slight the unconstitutional conditions doctrine and threatens to revive the discredited rights/privileges distinction and the mistaken notion that the greater power to eliminate agency fees entirely includes the lesser power to regulate them at will. Although the Court certainly does not go that far, the language of the opinion leans heavily in that direction, to the detriment of First Amendment doctrine generally.

As for the Court's treatment of the language from *Street* that dissent is not to be presumed, its reconciliation of that case is a bit more troubling. *Street*, of course, dealt with the very different situation of a *union* shop rather than an agency shop, where all employees were in fact members of the union, albeit some of those memberships were involuntary. Because a union and its voluntary members indeed have a First Amendment right to associate and to use their voluntary dues for expressive purposes (including purposes unrelated to collective bargaining), and because there is no facially obvious way to distinguish voluntary membership from involuntary membership, it is at least a fair notion that dissent is not to be presumed as to *all* union *members* and that such a presumption would indeed create an added burden on the free association of the union and its voluntary members.

In the agency-shop context, however, there is no possibility of mistakenly burdening the association of a union and its voluntary members, because any limitation on the use of excess agency fees by definition does not apply at all to the ordinary dues of voluntary union members. Agency fees, by their very nature, are exacted only from employees who have declined to join the union, for whatever reasons, and as to them not only can dissent from the exaction of excess fees be presumed, it in fact should be presumed and arguably must be presumed in order to protect the First Amendment rights of the nonmembers.

Rather than distinguish *Street* on such grounds, however, the Court seemed to suggest that *Street's* language might well apply even in the agency-shop context, at least where the state legislature agreed that dissent should not be presumed. While state legislatures (or voters) enacting state law are not bound by *Street's* presumptions concerning assent or dissent, the Court's suggestion that federal courts applying the First Amendment might indeed be bound even in the agency-shop context undermines the rights of nonmember

employees who, unlike the union members in *Street*, certainly *can* be presumed, and in fact *should* be presumed, to dissent from a union's compulsory exaction of agency fees in excess of the amount germane to collective bargaining.

The Court's opinion becomes more troubling still when it moves on to the non-unanimous discussion of whether § 760 is an unconstitutional condition on the use of excess agency fees. Analogizing the Union's use of agency fees for non-chargeable political speech to a class of "proscribable" speech such as obscenity or defamation is a doubtful and dangerous stretch. Political speech in general, and the election-related political speech targeted by § 760 in particular, has ample First Amendment value quite unlike obscenity or defamation. The *value* of that speech is unrelated to the source of the funds or to whether the state could eliminate agency fees entirely. The State could just as easily increase my taxes, yet that does not make the speech I pay for with a tax refund any less valuable. (And if the state increased my taxes using content-based distinctions, that action would likewise raise a First Amendment problem, notwithstanding that non-content-based increases in taxes raise no First Amendment concerns regardless whether they decrease my available resources for speech.)

The analogy to proscribable speech further breaks down in that even assuming the class of agency fees, and speech resulting therefrom, to be proscribable in the manner suggested by the Court because it is involuntarily extracted from third-parties, the sub-class of money spent on election-related speech is no more or less involuntary than any other non-chargeable portion of the agency fee spent on speech, and hence the content-based burden imposed on funds for election-related speech is *not* imposed for the same reason that the entire class can be proscribed. Rather, the burden of § 760 is imposed out of concern for the integrity of elections in particular, an interest based either on a particular objection to unions as speakers in the election context—the usual concern in the campaign finance context—or else as merely a proxy for the rights of the employees whose funds may be used for speech contrary to their desires, at which point it is not a concern unique to election-related speech (*i.e.*, § 760 is underinclusive). The Court's casual acceptance of the undefined and amorphous "integrity" of elections as an interest sufficient to justify content-based restrictions on political speech should

also cause concern among First Amendment opponents of so-called “campaign finance reform.” While the Court’s recent campaign finance cases have shown an increased willingness to scrutinize such laws critically under the First Amendment, the glib acceptance of the purported interest here is surprising and unsettling, particularly coming from Justice Scalia.

The analogy to government subsidies for speech, which can be content-based as long as they are not viewpoint discriminatory, also falls short in that this is not a government subsidy of speech using tax dollars but rather the direct transfer of funds from one private party to another. Treating agency fees as if they were government subsidies rather than the taking of private funds risks collapsing the distinctions between government speech, government-subsidized speech, and compelled private support for third-party speech. While those distinctions may indeed be thin to begin with (and I have argued that the *Abood* line of cases should apply even to government speech using general tax revenues), given that the Court has effectively taken the First Amendment out of consideration for government speech, building the analogy between government-authorized agency-fee collection and government-directed subsidies or speech only threatens to destroy the protections set out by the *Abood* line of cases. That should be of great concern to First Amendment advocates, particularly in states that are likely to be pro-union and have little concern for the rights of nonmember employees.

In any event, suffice it to say that none of this gets much attention in the opinion, and the entire matter is brushed aside in a few sentences. In fact, the Court’s suggestion that there “obviously” is no suppression of ideas afoot is anything but obvious given both the content-based and speaker-based nature of § 760. Indeed, if anything, there seems to be a battle over whether to help or hinder the expression of union views in elections. The Washington legislature seemingly leans toward aiding the unions and their political speech by giving them a presumption of assent when collecting and spending non-chargeable fees in the first place, while the *people* of Washington seem to lean against the unions, thus partially repealing the union-favoring presumption of assent adopted by the legislature. The fact that unions remain free to spend their membership dues and other money as they see fit hardly rebuts the notion that the purpose behind § 760 is content or speaker driven. Such distinctions

need not suppress all speech in order to run afoul of the First Amendment. (A tax on or subsidy for only a particular viewpoint in the election context would almost certainly violate the First Amendment, regardless whether it fully suppressed or overwhelmingly magnified the viewpoint at issue.)

Overall, because the Court *assumed* that the Washington system of exacting agency fees overtly in excess of chargeable expenses was consistent with *Abood* and *Hudson*, the Court was forced to find indirect ways of getting around the unconstitutional conditions doctrine. The means chosen by the Court were not entirely convincing, and in fact threaten to weaken First Amendment protections that in other contexts are important to achieving the proper constitutional result.

B. Finding that the First Amendment Precludes Granting Unions the "Privilege" of Exacting Fees for Non-Chargeable Expenses Yields the Same Result with Less Injury to Other First Amendment Doctrines

The far simpler means of resolving this case was to recognize the seemingly self-evident unconstitutionality of knowingly collecting excess agency fees in the first place. The notion (asserted by the lower court and simply assumed, *arguendo*, by the Supreme Court) that the First Amendment is satisfied by providing the opportunity for a rebate of that portion of the agency fee that the Union knows, *ex ante*, is attributable to non-chargeable expenses simply misreads the Supreme Court's cases, particularly *Hudson*.

This Court's long line of cases regarding compelled support for union activities has identified only two related government interests that can justify the First Amendment burdens created by such compelled support. The first interest is the promotion of labor peace that is thought to stem from an increased use of collective bargaining and related contract administration and grievance procedures that apply to all employees, regardless whether they are union members.²¹ The second related interest is that of allowing unions to negotiate for a fair distribution of the *costs* of such collective bargaining and related procedures, which benefit all employees and hence should be

²¹ See *Teachers v. Hudson*, 475 U.S. 292, 302 n. 8 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435, 455–56 (1984); *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977).

borne by members and nonmembers alike—often referred to as eliminating the “free-rider” problem.²²

Those are the sole interests that support the imposition of agency fees, and any agency fee arrangement must be narrowly tailored to such interests.²³ Excess agency fees that do not support collective bargaining and related activities thus are not narrowly tailored to the state interests. In *Davenport*, therefore, the mere collection of that portion of the agency fee that represents expenditures for political activities rather than collective bargaining—the admittedly non-chargeable expenses—violates the First Amendment on its face, regardless whether employees are allowed to seek reimbursement by jumping through the formal procedural hoops for opting out each year. Indeed, the procedures for after-the-fact challenges in *Hudson* and other agency-shop cases were not intended as a means of permitting unions to collect and potentially keep what they *know* to be excess fees for non-chargeable expenses, but rather were intended as a means of testing the unions’ good-faith calculation of *chargeable* expenses to determine if the agency fee was indeed valid.

In *Hudson*, the Illinois law under review allowed the union to charge only “proportionate share payments” as an agency fee from nonmembers, and specified that such payment amounts “could not exceed the members’ dues.”²⁴ Consistent with the cost-sharing and free-rider justifications for the agency fee, the union “identified expenditures unrelated to collective bargaining and contract administration,” calculated the percentage of such unrelated expenditures relative to its total expenditures, and set the agency fee at 95% of

²²See *Hudson*, 475 U.S. at 294–95; *Abood*, 431 U.S. at 221–22; *Street*, 367 U.S. at 761, 763.

²³*Abood*, 431 U.S. at 220, 237; cf. *Street*, 367 U.S. at 767, 768 (“[I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the *limited purpose* of eliminating the problems created by the ‘free rider.’” The power given to unions to spend exacted money is not “unlimited,” and “[i]ts use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls *clearly outside the reasons* advanced by the unions and accepted by Congress *why authority to make unionshop agreements was justified.*”) (emphasis added).

²⁴475 U.S. at 295.

the amount of union dues.²⁵ Only *after* deducting all plainly non-chargeable amounts off the top did the union's procedure for objecting to the remaining, presumptively chargeable, fee kick in.²⁶ Furthermore, any subsequent successful objections to items included in the fee calculation resulted in "an immediate reduction in the amount of future [fees] for all nonmembers and a rebate for the objector."²⁷

On a subsequent legal challenge to the procedures adopted by the union, the district court upheld those procedures in part because, *inter alia*, the fee charged "represented a good-faith effort by the Union" to calculate a proper fee.²⁸ The Seventh Circuit reversed and struck down the procedures as insufficiently protective of nonmember rights not to be compelled to subsidize union activities that were not germane to the collective bargaining process.²⁹

The Supreme Court affirmed the Seventh Circuit, finding the procedures constitutionally inadequate. Based on its earlier decision in *Ellis v. Railway Clerks*, the Court held that a "pure rebate approach is inadequate" because the union was not entitled to an "involuntary loan" and there were "readily available alternatives, such as *advance reduction of dues* and/or interest-bearing escrow accounts."³⁰ The Court further held that "the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining."³¹

Hudson concluded that even the advance reduction of dues, without the necessity of prior objection by nonmembers, was constitutionally inadequate because it did not provide nonmembers with sufficient information about what other charges were *included* in the

²⁵ *Id.*

²⁶ *Id.* at 296.

²⁷ *Id.*

²⁸ *Id.* at 298.

²⁹ *Id.* at 299.

³⁰ *Id.* at 303–04 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 443–44 (1984)) (emphasis added).

³¹ *Id.* at 304 (quoting *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 at 244 (1977) (Stevens, J., concurring)).

fee calculation as supposedly germane to collective bargaining.³² The problem even with the advance reduction in fees thus was that it did not go *far enough* in that it only “identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers,” and provided no information that would enable nonmembers to challenge allegedly germane expenditures that *were* included as part of the fee.³³ The Court thus concluded that the Constitution required, among other things, “an adequate explanation for the advance reduction of dues,” and a prompt and impartial procedure for challenging the union’s claims that the remaining *reduced* fee represents only properly chargeable expenses.³⁴

In that context the Court’s comment regarding the nonmember’s “burden of raising an objection” takes on a very different meaning—it is a burden of challenging portions of the fee that the union in good faith claims are indeed chargeable, not the burden of challenging amounts that are indisputably *not* chargeable. Quoting *Abood*, the Court in *Hudson* 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.”” *Abood*, 431 U.S., at 239–240, n.40, quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963).”³⁵

“[B]ecause the agency shop itself impinges on the nonunion employees’ First Amendment interests, and because the nonunion employee has the burden of objection,” the “appropriately justified *advance*

³²*Id.* at 306.

³³*Id.* at 307; see *id.* n.20 (procedures failed to fulfill the union’s front-end obligation “to minimize the risk that nonunion employees’ contributions might be used for impermissible purposes,” and “failed to provide adequate justification for the advance reduction of dues”).

³⁴*Id.* at 309; *id.* at 310 (describing “constitutional requirements” for collection of agency fee).

³⁵*Id.* at 306 (footnote omitted).

reduction and the prompt, impartial decisionmaker are *necessary* to minimize both the impingement and the burden.”³⁶

Hudson thus makes clear that an advance reduction of the agency fee to exclude non-chargeable expenses was necessary, but not sufficient, and that the *nonmember’s* burden of objection to an agency fee arises only *after* the initial deduction of expenses that are plainly not related to collective bargaining. While a nonmember may have the burden of initiating a challenge to parts of the fee included in good faith, it is the *union* that bears the initial burden of removing obviously non-chargeable amounts from the fee before it is even exacted.

The misnamed *Hudson* procedures that are used by the WEA in Washington, and that the Court assumed to be adequate to protect nonmember rights, do not even remotely satisfy *Hudson’s* constitutional requirements because they required no advance reduction of obviously non-chargeable amounts for political activities and placed the burden on nonmembers to object to such facially improper charges. Section 760’s opt-in procedure does nothing more than partially restore the safeguards discussed in *Hudson* itself by requiring a deduction of non-chargeable amounts absent a voluntary and affirmative contribution of such amounts by the nonmembers.³⁷

In the end, not only is an opt-in requirement, at a minimum, a *permissible* obligation to impose on the union relative to obviously non-germane fees, it is likely *insufficient* to protect nonmembers from paying such excess agency fees because the First Amendment forbids even the initial *collection* of such amounts in the first place.

³⁶*Id.* at 309 (footnote omitted).

³⁷As mentioned in Part III. A, *supra*, *Street’s* concern for the expressive interests of the union and its *voluntary members*, and its resulting statement that dissent should not be presumed, has no applicability in *this* case given that § 760 does not apply to the use of union membership dues, but only to the use of nonmember agency fees. Such nonmembers—persons who have not, by definition, voluntarily associated with the union—are easily and properly distinguished from union members whose associational rights *inter se* are entirely unaffected by § 760. Unlike in *Street*, there is no need here for involuntary payors to raise their hands and object in order to separate themselves from the majority of voluntary union members—they are readily distinguished by their nonmembership. A presumption that they object to associating with the union for political purposes is entirely justified by their decision not to join the union, and such a presumption in no way burdens those whose support for the union can be presumed by the fact of their voluntary membership.

IV. Conclusion

The result in *Davenport* was easy to reach, is easy to like, and is hard to argue with. The means by which that result was reached, however, are more problematic and disappointing to those who favor a strong First Amendment. There was certainly a more direct way of confirming that unions have no First Amendment right to collect fees from nonmembers in excess of amounts chargeable for collective bargaining. Confirming that it was the nonmember employees, not the Union, whose rights were being protected by the opt-in procedures of § 760 would have been consistent with the Court's precedent and would have added clarity to the law. Instead, the opinion erodes First Amendment protections in a variety of ways and elevates state discretion above individual rights. While it is typically the hard cases that are supposed to make bad law, here seems to be an example of an easy case making bad law because the result was sufficiently obvious that less attention was paid to the means of getting there. One hopes that the case will be remembered and relied on primarily for its result, not for its reasoning, and that future cases will apply First Amendment principles with greater vigor.