Other People's Money...

*By Rob McKenna & Geoffrey William Hymans**

Davenport v. Washington Educational Association had all the ingredients of a blockbuster: a campaign finance case with First Amendment speech and association claims, important federalism implications, and major players with significant resources (a large labor union and the State of Washington) on each side.[1] Of the thirteen judges who examined the case before it reached the United States Supreme Court, eight thought the statute unconstitutional, while five held the opposite view.[2] In the Washington State Supreme Court, six justices voted to strike down the campaign finance law, which had the approval of the electorate and protected non-union members. Their opinion rested heavily on a short phrase drawn from a U.S. Supreme Court precedent: "dissent is not to be presumed."[3] Yet when the opinion was handed down from the United States Supreme Court, it was a 9-0 decision, with three justices stating that they would not even have reached all the union's claims.[4] Placing the lower court's misapplication of the phrase in proper context, the case resulted in a decisive victory for the rights of public employees to dissent and protected the ability of states to experiment with varied worker-protection and campaign finance regulations.[5]

The Statute

As Justice Scalia noted in the unanimous opinion he authored, "the National Labor Relations Act leaves States free to regulate their labor relationships with their public employees."[6] States have adopted varied approaches to their regulation of, and relationship with, public sector labor unions. In a "closed shop" state, all employees are required to be members of a labor union.[7] In an "agency shop" state, public employees do not have to belong to a union but they must still pay a fee, known as an "agency shop fee," to the union to support its collective bargaining activities.[8] In a "right to work" state, public employees typically are not required to belong to a union or to pay agency shop fees.[9]

Washington is an "agency shop" state.[10] Under Washington statutes and collective bargaining agreements in place at the time *Davenport* arose, public sector employees were required to pay an agency shop fee to labor unions equivalent to union dues, and those fees were deducted from public employees' paychecks and deposited in the union's accounts.[11] The acknowledged purpose of requiring payment of such agency shop fees as a condition of employment is "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred."[12]

In 1992, the citizens of the Washington State approved an initiative known as the Fair Campaign Practices Act.[13] That act was approved by an overwhelming majority of Washington voters, with 73% voting in favor.[14] The Act contained the provision at issue in this case, which stated:

> 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.[15]

This statute provided a deceptively simple limitation on union election spending. A union could not spend agency shop fees—the fees paid by non-members of the union to support collective bargaining—"to influence an election" unless the non-member "affirmatively authorized" such expenditures. The provision did not specify how such affirmative authorization was to be obtained and did not set in place any documentation or record-keeping requirements. The provision did not regulate the spending of union *member* dues (presuming that all union members agreed with the unions' election-related expenditures). The restriction was limited to expenditures to influence an election or operate a political action committee (PAC). There were no statutory restrictions on a union spending member dues, or non-member agency shop fees, on other "political" activities, such as lobbying or "public education" campaigns.

The Precedent

The U.S. Supreme Court has, in a series of cases, established limits on the ability of unions to use their members' dues for political purposes without their members' consent.[16] In *Abood v. Detroit Board of Education*,[17] the Court held that "public-sector unions are constitutionally prohibited from using the fees of objecting nonmembers for ideological purposes that are not germane to the union's collective-bargaining duties."[18] In current parlance, the amount of union dues that is "germane" to collective bargaining activities is "chargeable," and the remaining portion of union dues (or agency shop fees) is "nonchargeable." *Abood* grounded the dissenter's rights in the First Amendment, both in the freedom from compelled speech and the freedom from forced association.[19]

In *Teachers v. Hudson*,[20] the Court "set forth various procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting non-member can prevent the use of his fees for impermissible purposes."[21] These constitutionally mandated "*Hudson* procedures" require a public-sector union to notify non-members of their right to object to paying fees for non-chargeable expenses and to provide the non-members with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for all amounts reasonable in dispute while such challenges are pending."[22] *Hudson* thus held that the ability to "opt-out" of paying non-chargeable expenses was constitutionally required, and legislative schemes which reflect such procedures are referred to as "opt-out" statutes.[23] A statute such as Washington's, requiring affirmative assent before a union could spend a subset on non-chargeable expenses, is an "opt-in" legislative scheme.

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The Case Below

In 2001, the Washington Education Association (WEA) was sued by both the State of Washington and a group of non-members who had been required to pay agency shop fees. The WEA is the exclusive collective bargaining agent for approximately 70,000 public educational employees in Washington.

One case began when the Evergreen Freedom Foundation, a Washington nonprofit public policy group, filed a complaint with the Washington State Public Disclosure Commission (PDC). This state agency has general statutory authority to enforce state campaign finance laws. The complaint alleged violations of section 760, and the WEA entered into a stipulation with the PDC agreeing that the WEA had violated section 760 during the 1999-2000 fiscal year. The PDC referred the case to the Office of the Attorney General, and the Attorney General filed an action alleging that the WEA had violated section 760 from 1996-2000. The trial court judge granted the state's motion for partial summary judgment holding section 760 constitutional, and proceeded to a bench trial to determine whether the union had in fact violated the statute. After the trial the judge issued a letter opinion in which he held that the WEA had violated section 760 and assessed a fine of $400,000. With statutory costs and attorney's fees the total judgment against the union was $590,000.[24]

The second action also began in 2001, when five public educational employees who were not WEA members, including the named plaintiff, Gary Davenport, filed a class action against WEA seeking a refund of the portion of agency shop fees used for political expenditures.[25] The trial court stayed proceedings pending interlocutory appeal, and the cases were consolidated for review in the Washington State Court of Appeals.[26] The court of appeals split 2-1, with the majority holding that section 760's:

> [A]ffirmative authorization requirement... would unduly require a union to protect nonmembers who disagree with a union's political expenditures but are unwilling to voice their objections. The procedures imposed on unions by federal law fully protect nonmembers' First Amendment rights. Further restrictions, such as an opt-in procedure, upset the balance between nonmembers rights and the rights of the union and the majority.[27]

The case thus arrived at the state supreme court, which affirmed the state court of appeals, holding in a 6-3 decision that section 760 was unconstitutional. Before the state supreme court, the WEA initially argued that "the *Hudson* process satisfies the requirement of affirmative authorization because it provides each individual non-member the opportunity to object, to obtain a refund, and to prevent fees from being used by WEA[.]"[28] Thus, the union actually argued that a teacher's failure to respond equaled *affirmative* authorization. The state supreme court majority did not expressly reject this linguistic oxymoron, but ultimately accepted what the plain language "seemed" to state:

> Because § 760 does not define "affirmative authorization," it is unclear whether the *Hudson* process satisfies the authorization requirement. The plain language seems to indicate a nonmember must provide an expression of positive authorization. Failure to respond to the Hudson packet may be considered acquiescence, but it would not fulfill the affirmative authorization requirement. The difference is that affirmative authorization seems to indicate that the member must say "yes," instead of failing to say "no."[29]

The majority then turned to the union's constitutional challenges to the statute. Examining the U.S. Supreme Court's *Street, Abood, Ellis* and *Hudson* cases, the majority determined that these cases not only provided a constitutional "floor" setting forth requirements to protect dissenting non-member's rights, they also imposed a constitutional "ceiling" limiting the amount of protection for dissenters a state could provide. The majority plucked a phrase from *Street*: "[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee,"[30] then examined *Abood* and concluded that the U.S. Supreme Court "affirmed that the burden is on the employee to make his objection known."[31]

The majority stated that "Section 760 impermissibly shifts to the union the burden of the non-members' rights. This has the practical effect of inhibiting one group's political speech (the union and supporting non-members) for the improper purpose of increasing the speech of another group (the dissenting non-members)."[32] It went on to accept the union's assertion that the administrative procedures required to procure affirmative authorization would be "extremely costly and would have a significant impact on the union's political activities."[33] Finally, the majority held that "a presumption of dissent violates the First Amendment rights of nonmembers as well" because "[i]t assumes that because an employee has not joined the union, he or she disagrees with the union's political expenditures…. For those non-members who agree with the union's political expenditures, section 760's presumption of dissent presents an unconstitutional burden on the right to associate themselves with the union on political issues."[34]

Three justices dissented. The dissent's author, Justice Richard Sanders, began with a quote from Thomas Jefferson "[t]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." The dissent noted that:

> The majority turns the First Amendment on its head. Unions have a statutory, not constitutional, right to cause employers not only to withhold and remit membership dues but also to withhold and remit fees from nonmembers in an equivalent amount. Absent this statutory mechanism for the withholding and remission of agency fees (or membership fees for that matter), there is no right, constitutional or otherwise, for the union to require it.[35]

Justice Sanders stated that since the legislature (or the people, acting through the initiative process) could eliminate the compelled payment of an agency fee altogether, it was "nearly beyond comprehension" that the compelled collection of such fees could not be qualified to protect dissenters even above the constitutional "floor." Finally, the dissent expressed skepticism that non-union employees who elected not to associate with the union would nevertheless want to have their fees used to support the union's political activities, and the dissent concluded that simply requiring those rare individuals to "check a box" would constitute no constitutionally cognizable burden on their association or speech rights.

The Case Arrives

Davenport thus arrived at the U.S. Supreme Court with the potential to redefine accepted First Amendment interests of union members and non-members. It also raised significant federalism issues, as noted in the amicus brief of the States of Colorado, Alabama, Idaho, Ohio, Utah, and Virginia. As set forth in that brief, states have adopted a wide variety of legislation regulating the collection of public employee union dues, from "right to work" states that ban compulsory fees to requirements that unions maintain separate political accounts funded only by voluntary contributions to legislative implementation of the *Hudson* procedures.[36]

The case attracted a significant number of amicus briefs (thirteen) filed in support of the State of Washington, but only a single amicus brief filed in support of the WEA.[37] Several of those briefs are worthy of mention. The Solicitor General filed a brief on behalf of the United States which essentially tracked the arguments made in the dissent below. The *Davenport* plaintiffs and several amici filed briefs arguing that dissent on the part of non-members should be presumed, and thus the constitution should be interpreted to require an opt-in approach. Some amici argued that even union members should be presumed to dissent from the political spending of a union unless they affirmatively authorize the use of their dues for such purposes.[38]

Oral argument took place on January 10, 2007.[39] Washington State Attorney General Rob McKenna appeared on behalf of the State of Washington and United States Solicitor General Paul Clement appeared on behalf of the United States in support of the state. John M. West appeared on behalf of the WEA. The bench was active, initially focusing on the apparent intent of section 760 as a campaign regulation rather than as a worker protection measure and whether the Court was bound by the state supreme court's determination of legislative intent with respect to the statute. Solicitor General Clement discussed the federalism aspects of the case. Perhaps his most interesting colloquy came when Justice Alito echoed several amici by asking "why should the First Amendment permit anything other than an opt-in scheme?" General Clement replied that the First Amendment interest distilled from the *Abood* line of cases was "in not having a compelled extraction, and as part and parcel of the constitutional violation, it seems to have assumed there's a need for a stated objection." This response likely unnerved those hoping the Court would replace "opt-out" with "opt-in" as the constitutional floor.

Justice Alito, in questioning the WEA's counsel, expressed skepticism that non-members who want their fees used for the union's election spending even exist. Chief Justice Roberts questioned the extent of the administrative burden an opt-in requirement would actually place on the union, and Justice Scalia's questioning focused on what would become the crux of the opinion—the legislature's underlying authorization for the union to compel payment of agency shop fees as a condition of public employment.

The Finale

The Court's unanimous opinion was issued on June 14, 2007. Following a short recitation of the facts and a brief history of the union compelled-speech cases, Justice Scalia noted that "it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees." Justice Scalia then characterized section 760 as "simply a condition on the union's exercise of this extraordinary power[.]"[40]

The Justice then turned to the lower court's opinion. His first target was the lower court's focus on *Street's* oft-quoted phrase, "dissent is not to be presumed." Scalia wrote that the lower court's view of a constitutionally mandated "balance" (making *Hudson* procedures both a floor and a ceiling) extended the "agency-fee cases... well beyond their proper ambit. Those cases were not balancing constitutional rights in the manner respondent suggests, for the simple reason that unions have no constitutional entitlement to the fees of non-member-employees."[41] Scalia went on: "The mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny. The constitutional floor for unions' collection and spending of agency shop fees is not also a constitutional ceiling for state-imposed restrictions."[42]

Justice Scalia then set the "dissent is not to be presumed" maxim in its proper context, stating that:

> We meant only that it would be improper for a court to enjoin the expenditure of the agency fees of all employees, including those who had not objected, when the statutory or constitutional limitations established in those cases could be satisfied by a narrower remedy.... [A]s the dissenting justices below correctly recognized, our repeated affirmation that *courts* have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement.[43]

In a section joined by five other justices,[44] Justice Scalia dismissed the union's claims that the Court's campaign finance cases mandated strict scrutiny of section 760's election-related expenditure limitation, rejecting the union's contention that the expenditure limit was an unconstitutional content-based restriction on speech:

> "We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees.... The restriction on the state-bestowed entitlement was thus limited to the state-created harm that the voters sought to remedy."[45]

Justice Scalia ended on a cautionary note, emphasizing that the Court was upholding the opt-in scheme only as to public sector unions. The distinction in the mechanism of coercion—government mandate as compared to contract—might produce a different outcome. Justice Scalia even qualified his qualification in a conspicuous footnote ("We do not suggest that the answer must be different."[46]).

Postscript

A decisive victory for dissenting worker's compelled speech and association rights, *Davenport* actually raised concerns for one commentator.[47] And the opportunity to determine whether an opt-in mechanism is constitutionally required, as Justice Alito appeared inclined to accept at oral argument, awaits

another day. But the case decisively established the *Abood* line of cases as protective of dissenting workers' rights, and put to rest the notion that those cases serve as a straightjacket on states, limiting their ability to experiment with greater worker protections. *Davenport* is therefore best seen as perhaps one of the more understated, yet important, *federalism* decisions of the 2007 term. The decision fulfilled its promise more subtly than originally anticipated, but perhaps with greater long-term effect.

Endnotes

1 Davenport v. Washington Ed. Assoc., 127 S. Ct. 2372 (2007).

2 One of the two trial court judges in the consolidated cases issued no rulings on the merits of the constitutional claims. *Davenport*, 127 S. Ct. at 2378.

3 Teachers v. Hudson, 475 U.S. 292, 306 n. 16 (1986) (quoting Machinists v. Street, 367 U.S. 740, 774 (1961).

4 *Id*. at 2382 (concurring opinion of Justice Breyer, joined by Chief Justice Roberts and Justice Alito).

5 "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" Gonzales v. Raich, 545 U.S. 1, 42 (2005) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

6 *Davenport*, 127 S. Ct. at 2376 (citing 29 U.S.C. §152(2)).

7 *See* Pattern Makers' League of North America, AFL-CIO v. N.L.R.B., 473 U.S. 95, 105-106 (1985) (citing R. Gorman, 106 Labor Law 639 (1976)).

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

9 *See* Amicus Brief of States of Colorado, Alabama, Idaho, Ohio, Utah, and Virginia at 11.

10 Wash. Rev. Code § (RCW) 41.56.122(1); 41.59.100.

11 RCW 41.56.10; 41.59.060.

12 *Davenport*, 127 S.Ct. at 2377 (citing *Street,* 367 U.S. at 760-764).

13 *See* Wash. State Pub. Disclosure Comm'n v. Washington Ed. Ass'n., 156 Wn. 2d 543, 553, 130 P.3d 352 (2006) (citing Initiative 134, set forth at Laws of 1993, ch.2, §1-36). The State of Washington included in its State Constitution an initiative process by which citizens can collect a set number of signatures and place a legislative proposal before the state legislature. If the legislature fails to take action on the proposal during the next legislative session, the proposal is placed on a statewide ballot, and upon approval such initiatives become enacted state statutes. *See* Wash. Const. art. II, § 1.

14 *See* http://www.secstate.wa.gov/elections/initiatives/statistics_initleg.aspx.

15 Initiative 134, codified at RCW 42.17.760 (hereinafter §760).

16 Machinists v. Street, 367 U.S. 740 (1961) interpreted a federal statute (the Railway Labor Act) as restricting expenditure of exacted money for political purposes against the express wishes of a dissenting employee. The Supreme Court expressly stated that it so interpreted the statute in order to avoid reaching the constitutional objections also raised by the dissenting employees. *Id*. at 750.

17 431 US 209, 97 S.Ct. 1782 (1977).

18 *Davenport*, 127 S. Ct. at 2377 (citing *Abood*, 431 U.S. at 235-36).

19 *Abood*, 431 U.S. at 233-235.

20 475 U.S. 292, 106 S. Ct. 1066 (1986).

21 *Id.* In *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S. Ct .1883 (1984) the Court struck down a "pure rebate approach" as inadequate under the First Amendment, but the Court did not set constitutionally-required procedural parameters. *See also Hudson*, 475 U. S. at 305.

22 *Hudson*, 475 U. S. at 310.

23 Such a procedure would be constitutionally required under *Hudson* even in the absence of any specific state statutory regulation of public sector union dues collection procedures.

24 All these facts are drawn from the Washington State Supreme Court's opinion at 156 Wn.2d 543, 551-53, 130 P.3d 352 (2006).

25 The non-union teacher plaintiffs were represented by attorneys provided by the National Right to Work Foundation.

26 The court of appeals only issued in an opinion in the consolidated PDC case, but after holding §760 unconstitutional in that case the court of appeals remanded the *Davenport* case to the trial court for dismissal. *Id.* at 553.

27 State ex. rel. Washington State Public Disclosure Com'n v. Washington Educ. Ass'n, 117 Wn. App. 625, 640, 71 P.3d 244 (2003).

28 Wash. State Pub. Disclosure Comm'n v. Wash. Ed. Ass'n., 156 Wn. 2d at 553-54.

29 *Id*. at 554-55 (emphasis added).

30 *Id*. at 559 (quoting *Street*, 367 U.S. at 774).

31 *Id.* The majority made the same claim regarding *Hudson* and *Ellis* in the next paragraph.

32 *Id.* at 560.

33 *Id.* at 561, 569-70. The majority engaged in no discussion of how the burden would be greater on the union than the existing *Hudson* packet, or how the "burden" would be greater on a non-members who actually wanted the union to use their fees for the union's election spending than returning a post-card with the "spend my money" box checked.

34 *Id.* at 561-62. Again, the majority never discussed how that "burden" was greater than perhaps returning a prepaid post-card. The dissent quoted a Michigan "opt-in" case stating "the suggestion that asking people to check a box once a year unduly interferes with the speech rights of those contributors borders on the frivolous." *Id.* at 578 (quoting Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1253 (6th Cir. 1997)).

35 *Id.* at 571-72.

36 *See* Amicus Brief of States of Colorado, Alabama, Idaho, Ohio, Utah, and Virginia at 12-13. Federalism was also the focus of the amicus brief filed by the American Legislative Exchange Council.

37 *See* Amicus Brief of the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and Change to Win in Support of Respondent.

38 *See, e.g.,* Amicus briefs of the Association of American Educators, Mackinac Center for Public Policy, the Mountain States Legal Foundation, and the Pacific Legal Foundation.

39 The transcript of the oral argument is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1589.pdf.

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

41 *Id.* at 2379.

42 *Id.*

43 *Id*.

44 Justice Breyer, joined by Chief Justice Roberts and Justice Alito, wrote a concurrence in which he stated that these arguments by the union should not have been addressed because they were raised for the first time in the WEA's briefs to the United States Supreme Court. *Id*. at 2383.

45 *Id.* at 2382.

46 *Id.* at n. 4.

47 Erik S. Jaffe, *When Easy Cases Make Bad Law: Davenport v. Washington Education Association and Washington v. Washington Education Association*, 2007 Cato Sup. Ct. Rev. 115.