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Educating the United States Supreme Court at Summers' School: A Lesson on the "Special Character of the Animal"

Rafael Gely
University of Missouri School of Law, gelyr@missouri.edu

Ramona L. Paetzold
University of TexasA & M Mays Business, rpaetzold@tamu.edu

Leonard Bierman
University of TexasA & M Mays Business, lbierman@mays.tamu.edu

EDUCATING THE UNITED STATES SUPREME COURT AT SUMMERS' SCHOOL: A LESSON ON THE "SPECIAL CHARACTER OF THE ANIMAL"

BY
RAFAEL GELY,* RAMONA L. PAETZOLD,** AND LEONARD BIERMAN***

> "Public employee bargaining suffers from cognitive dissonance because, though seemingly similar to private sector bargaining, it differs fundamentally in that it is part of the political process for conducting the government's business."[1]

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* James E. Campbell Missouri Endowed Professor of Law, University of Missouri.

** Professor of Management and Mays Research Fellow, Mays Business School, Texas A&M University.

*** Professor of Management, Mays Business School, Texas A & M University.

1. *See* Clyde W. Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 281 (1987) [hereinafter *Principles and Politics*].

I. INTRODUCTION

Defining the content and extent of public employees' workplace rights has proven to be a remarkably difficult and frustrating process.[2] The process has been difficult because the idiosyncrasies of the public employment sector raise some complex issues that do not arise in the private sector context. Public employees are not only employees but also citizens interacting with government officials. As such, they stand on a different footing than private sector employees.[3] Public employees enjoy certain constitutionally provided protections not generally available in the private sector.[4] And, even when acting as an employer, the government is constrained by constitutional principles that do not affect most private sector employers.[5]

At times, this distinction has resulted in public sector employees enjoying some employment and labor protections not available to their private sector counterparts, such as the protections granted since the early 1900s under various federal and local versions of the civil service system.[6] At other times, however, public sector employees have seen their employment and labor rights fall behind those of private employees, as has been the case with regard to their ability to organize and bargain collectively.[7]

Professor Clyde W. Summers understood the differences between the public and private sectors better than anyone. In a series of four articles

2. *See* John Lund & Cheryl L. Maranto, *Public Sector Labor Law: An Update*, *in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 21, 21 (Dale Belman, Morley Gunderson & Douglas Hyatt eds., 1996) (referring to public sector employment laws as a "crazy-quilt patchwork of state and local laws, regulations executive orders, court decisions, and attorney general opinions"); *see also* James T. Bennett & Marick F. Masters, *The Future of Public Sector Labor-Management Relations*, 24 J. LAB. RES. 533, 535 (2003).

3. *See* Richard B. Freeman, *Unionism Comes to the Public Sector*, 24 J. ECON. LIT. 41, 42 1986) (noting that unlike employees in the private sector, as voters, employees in the public sector play a role in selecting their employers).

4. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987) (dealing with privacy issues); Connick v. Myers, 461 U.S. 138 (1983) (dealing with issues of free speech); Elrod v. Burns, 427 U.S. 347 (1976) (dealing with political activities); United Public Workers v. Mitchell, 330 U.S. 75 (1947) (dealing with freedom of association).

5. This principle was recognized by the Supreme Court in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (noting that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights").

6. *See* Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 797-98 (2000) (describing the origins of the civil service system).

7. *See* Joseph E. Slater, *The Court Does* Not *Know 'What A Labor Union Is': How State Structures and Judicial (Mis)Constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981, 981-82 (2000) (noting that while private sector employees received statutory protection with regard to organizing and bargaining rights as early as 1935, no similar protection existed for public employees until the mid 1960s).

published in the span of thirty-five years, Professor Summers developed a sophisticated framework for understanding the dynamics and structures of the public sector labor relations process.[8] This framework, in which he fondly refers to public sector bargaining as a "different animal,"[9] first and foremost recognizes that public sector collective bargaining is different from private sector collective bargaining because public employment is different from private employment.[10] In particular, notes Professor Summers, "in private employment collective bargaining is a process of private decisionmaking shaped primarily by market forces, while in public employment it is a process of governmental decisionmaking shaped ultimately by political forces."[11] That is, the key difference between public and private employment is that in the former the "employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters."[12]

Based on this basic premise, Professor Summers goes on to develop a series of normative implications having application primarily with regard to the operation of the collective bargaining process in the public sector. For example, Professor Summers makes fairly specific proposals as to the type of subjects that should be channeled through the collective bargaining process and those that should be left to other political channels.[13] He also makes normative arguments in favor of granting (at least some) public employees the right to strike and against the use of interest arbitration as a means of resolving bargaining disputes in the public sector.[14]

Professor Summers' main lesson is that in designing and adopting policies regarding the regulation of the public employment relationship, decisionmakers must be aware of the different character of the public employment animal. Neither wholesale adoption nor rejection of the private employment model will do. A careful examination of the differences between the two sectors and the manner in which those differences affect the role played by all the relevant actors is crucial in

8. The series of articles include *Principles and Politics*, *supra* note 1; Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974) [hereinafter *A Political Perspective*]; Clyde W. Summers, *Public Sector Bargaining, A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441 (2002-2003) [hereinafter *A Different Animal*]; and Clyde W. Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. CIN. L. REV. 669 (1975) [hereinafter *Governmental Decisionmaking*].

9. *A Different Animal*, *supra* note 8, at 441.

10. *A Political Perspective*, *supra* note 8, at 1156.

11. *Id.*

12. *Governmental Decisionmaking*, *supra* note 8, at 670.

13. *A Political Perspective*, *supra* note 8, at 1177-83.

14. *Principles and Politics*, *supra* note 1, at 274-81.

adopting policies that make sense.

Professor Summers' work in this area has become particularly relevant in light of two recent decisions of the United States Supreme Court, which we aver are based on a fundamental misunderstanding of the public employment relationship. Specifically, this article advances the argument that the recent decisions of the Supreme Court in *Garcetti v. Ceballos*[15] and *Davenport v. Washington Education Ass'n*[16] represent a shift towards what we refer to as the privatization of public sector employment law. We argue that in these two cases, the Supreme Court fails to recognize the different contexts in which private and public employees operate, choosing instead to apply principles that, while perhaps well-suited to the private sector, are arguably incompatible with the dynamics of the employment relationship in the public sector. We note that such a privatization shift significantly reduces the labor and employment law protections available to public employees.

In this article, we explore the implications that Professor Summers' insights regarding public employment have for the *Garcetti* and *Davenport* decisions. In particular, we focus on the extent to which the political nature of public employment affects public employees' rights to freedom of speech as well as matters regarding the representational functions of public employee unions.

With regard to the former, we begin with Professor Summers' observation about the nature of managerial decisionmaking in the public sector. He points out that public employment involves not only managerial decisionmaking, that is, decisions "shaped primarily by market forces,"[17] but that it also involves decisionmaking "shaped primarily by political forces."[18] This insight places in a new light the nature of the speech in which public employees engage and the functions they perform in their dual roles as employees and citizens. In this article, we explore the implications that Professor Summers' framework for understanding public employment have for the way we define workplace speech rights.

Professor Summers' framework also is relevant to our understanding of the role that public sector unions play in representing employees. In a particularly insightful observation, Professor Summers explains the reasons why union representation (and thus collective bargaining) is needed in the public sector. According to Summers, public employee bargaining is

15. 547 U.S. 410 (2006).
16. 551 U.S. 177 (2007).
17. *A Political Perspective*, *supra* note 8, at 1156.
18. *Id.*

needed because "our political system has a built-in bias which requires it."[19] He notes that in the public sector context, employees are basically outnumbered by other groups having interests in getting more and better public services at the lowest possible cost.[20] The political process, therefore, does not adequately protect public employees in their interests *as* employees.[21] Collective bargaining becomes an equalizer – a process that gives public employees "an ability to counteract the overriding political strength of other voters who constantly press for lower taxes and increased services."[22]

A corollary of this clever observation is equally important. Collective bargaining in the public sector is but one of the tools available to public employees to deal with their employers. Just like other citizens, they have the ability to engage in various forms of action (e.g., speeches, petitions, voting) to influence the policies adopted by their elected officials. Granting public employees the right to organize and bargain collectively should not result in a reduction in other forms of political participation, because a combination of approaches is likely required to affect government decisions. Professor Summers is aware of this when he cautions us about transplanting the practices of private sector bargaining into the public sector. Instead, notes Professor Summers, the focus should be on understanding, "what practices in the public sector will improve the political process."[23]

This insight is particularly relevant to what we believe are the serious and undesirable implications of the *Davenport* decision. In *Davenport*, the Supreme Court held that a state statute requiring that public sector unions provide an "opt-in" provision, which prevented public sector unions from collecting agency fees for collective bargaining functions from non-union employees unless they explicitly opted in, was constitutionally permissible.[24] Although involving a very different issue, the Supreme Court decision in *Davenport* raises concerns that are similar to those raised by *Garcetti*, namely, the Court's failure to recognize the differences between public and private employment. Even more troubling in *Davenport* is the attempt by the Court to apply principles developed in the context of private sector labor law to the public sector, thus going one step further in privatizing public sector employment and labor law.

19. *Principles and Politics*, *supra* note 1, at 268.
20. *Id.*
21. *A Political Perspective*, *supra* note 8, at 1160.
22. *Governmental Decisionmaking*, *supra* note 8, at 675.
23. *A Political Perspective*, *supra* note 8, at 1161.
24. *Davenport*, 551 U.S. at 184.

The article proceeds as follows. In Part II, we discuss in detail the work of Professor Summers on public sector employment and labor law.[25] While his work has implications for a variety of issues, we focus our attention on those implications of relevance to questions of public employee speech and the role of public sector labor organizations. In Part III, we briefly summarize the *Garcetti* and *Davenport* decisions, while in Part IV, we develop the argument that these two decisions are indicative of a new, and in our opinion misguided, approach to deal with issues concerning public sector employment and labor law.[26] We challenge the Court's recent decisions by analyzing them through the lens of Professor Summers' work in this area. Part V concludes the paper.

II. GOING TO SUMMERS' SCHOOL: LESSONS ON THE DIFFERENCES BETWEEN PUBLIC AND PRIVATE EMPLOYMENT

A. A Political Perspective in New Haven

Professor Summers' most influential paper on public sector collective bargaining and the role of public employees was published in the *Yale Law Journal* in 1974 near the end of his career on the faculty of the Yale Law School. The paper, *Public Employee Bargaining: A Political Perspective*,[27] makes the key point that "government is not just another industry" and that the introduction of collective bargaining into the public sector has had a major impact on restructuring various "political processes."[28] Professor Summers begins this paper by describing the manner in which decisions regarding terms and conditions of employment are made in the public sector. First, Professor Summers points out that in the public sector, decisions about the employment relationship are "governmental decisions made through the political process."[29] While economic considerations factor into those decisions, they nonetheless remain ultimately political decisions.[30] Second, in the public sector, the employer is not necessarily an elected official who at any given point in time holds elected office, but is instead "the voters to which the public officials are responsible."[31]

25. *See infra* notes 27-77 and accompanying text.

26. Part III is discussed *infra* notes 78-121 and accompanying text, while Part IV is discussed *infra* notes 122-150 and accompanying text.

27. *A Political Perspective*, *supra* note 8.

28. *Id.* at 1156.

29. *Id.* at 1159.

30. *Id.*

31. *Id.*

Professor Summers notes that voters, as purchasers and users of public services, have economic interests that are inherently in conflict with those of public employees, because voters want "to maximize services and minimize costs."[32] Third, public employees are and will always be outnumbered by voters, and thus are at "a significant disadvantage when their terms and conditions of employment are decided through a process responsive to majority will."[33] Finally, notes Professor Summers, collective bargaining is but one of several avenues through which public employees could participate in determining the terms of their employment relationship.[34] Unlike employees in the private sector, public employees can use the normal political process (e.g., vote, support candidates, organize pressure groups) to influence decisions that affect their conditions of employment.[35]

Professor Summers then explores how the introduction of collective bargaining to the public employment context affects the manner in which employment decisions are made. Professor Summers notes that where public employees are allowed to organize and bargain collectively, "special procedures" are created for making decisions about specific aspects of the employment relationship.[36] These special procedures, argues Professor Summers, might be justified given the inherent numerical disadvantage at which public employees find themselves. By recognizing that collective bargaining in the public sector is a special procedure within the larger context of the governmental decisionmaking process, Professor Summers is able to frame the question not in terms of how public sector bargaining is similar to private sector bargaining, but instead in terms of how the introduction of collective bargaining into the public sector affects the process by which decisions about the public employment relationship are made.

In the remainder of this seminal article, Professor Summers answers this question. He first discusses the effect of public sector collective bargaining on the bottom line – that is, how collective bargaining alters the budget-making process.[37] It is here that the need for public sector collective bargaining is more apparent. Professor Summers describes the budgeting process in the public sector as "a complicated political bargaining process

32. *Id.*
33. *Id.* at 1160.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1162 (noting that it is in the budget-making process "where public employee bargaining has its primary impact").

in which various interest groups seek to have larger shares of the budget allocated for particular purposes."[38] In this complicated process, public employees represent but one of the many groups with their interests at stake. Viewed within this context, collective bargaining provides public employees with an official and especially effective and exclusive means for influencing public officials.[39] Professor Summers argues that such special treatment is necessary to equalize the inherent disadvantage that public employees otherwise face in the budgetary process.[40] In particular, Professor Summers argues that not only are public employees outnumbered in the political process, but in general, their interests are contrary to the interest of every other interest group. Thus, concludes Professor Summers, other interest groups will be able to form natural alliances against the interest of public employees, making it impossible for public employees to protect their employment interests through the political process.[41]

Professor Summers concludes his article with what he refers to as a "suggestive" preliminary exploration of the implications of his "political perspective."[42] Two of the implications he discusses are particularly relevant to this article: the implications of "end-run" bargaining,[43] and the definition of appropriate subjects of bargaining.[44]

Professor Summers explores the consequences of a failure to integrate the budgetary and collective bargaining processes. Where the person or agency negotiating the contract on the employer side is not in charge of budgetary decisions, the possibility exists for "end-run" bargaining.[45] End-run bargaining is normally associated with a situation where a union, having failed to win a concession from the opposing side at the bargaining table (e.g., the mayor), may seek to circumvent the bargaining table and pressure the city council (or appropriate legislative authority) to incorporate the benefit the union was seeking in the new budget.[46] Professor Summers notes, however, that there is another kind and perhaps more pernicious form of end-run that occurs when "the chief executive will agree to a costly

38. *Id.*

39. *Id.* at 1164-65.

40. *Id.* at 1165.

41. *Id.* at 1166-68. Professor Summers, though, notes that this argument is weakened in situations in which the interests of public employees coincide with those of other interest groups. In such cases, public sector unions have the ability to form alliances through the normal political process, and thus, arguably the need for collective bargaining is less pressing. *Id.* at 1173.

42. *Id.* at 1183.

43. *Id.* at 1184-86.

44. *Id.* at 1192-97.

45. *Id.* at 1186.

46. *Id.*

contract and attempt to shift to the legislature the onus of either rejecting the union's demands or approving increased taxes."[47] Professor Summers' major concern here is that end-runs undermine the effectiveness of collective bargaining.[48] The broader implication is, however, that to the extent that end-run bargaining is inevitable, a point that Professor Summers readily concedes,[49] collective bargaining is but one of the tools public employees are likely to have to use in order to protect their interest as employees. Negotiating a deal at the bargaining table does not guarantee public employees that such a deal will be implemented. To fully protect the gains made at the bargaining table, public employees and their unions need to engage in other forms of political activities. Such engagement is not only likely, but perhaps expected, as the parties understand that the collective bargaining process is but one of the avenues available to implement policy changes.

Professor Summers then discusses the implications of his model for the related issue of the type of subjects that should be channeled through the collective bargaining process. Professor Summers argues that to the extent that public sector collective bargaining is justified on the grounds that public employees tend to be outnumbered in the political sphere, and thus need some way of leveling the playing field, the scope of collective bargaining should be limited to those areas in which public employees are likely to face "massed resistance."[50] Thus, argues Professor Summers, collective bargaining should be limited to issues such as wages and workloads, since in those issues the interests of public employees are likely to run counter to the combined interests of taxpayers and every citizen who uses the public service.[51] Collective bargaining, however, is inappropriate in other areas and subjects where the interests of public employees are not necessarily in conflict with the interests of all other stakeholders.[52] That is, disputes regarding issues in which the "political alignment of taxpayers and users against employees does not occur"[53] should be resolved through other political channels, not through the collective bargaining process.

The import of this last observation is that public employees, even in

47. *Id.*

48. *Id.*

49. *Id.* at 1184 (noting that integration of bargaining authority and budgeting decisionmaking is hard to achieve given that budgeting authority tends to be diffused across departments and agencies).

50. *Id.* at 1193.

51. *Id.* at 1194 (noting that in addition to wages and workloads, collective bargaining is appropriate in issues such as insurance, pensions, sick leave, length of work week, overtime pay, vacations, and holidays.)

52. *Id.*

53. *Id.*

cases (and perhaps particularly so) where they enjoy collective bargaining rights, must have the ability to engage in the political process by other means. Many jurisdictions even impose limits on the types of subjects public sector unions are allowed to bring to the bargaining table.[54] In those instances, in particular, public employees must have the ability to participate in the political process through other means. Policies that limit the ability of public employees to participate in the political process also limit the ability of public employees to protect their employment interests.

B. Decisionmaking in Cincinnati

While his 1974 *Yale Law Journal* article is his most influential and widely cited paper on the topic (in part likely because of the nature of the outlet), a keynote address he gave to a public sector labor symposium at the University of Cincinnati Law School the following year and published in that school's law review is arguably the best paper he has authored on the subject.[55] The 1975 article is unusually well written, even for someone with well-recognized extraordinary legal writing talents.

As in his *Yale Law Journal* article, Professor Summers begins with a discussion about the uniqueness of public sector bargaining.[56] However here, Professor Summers focuses more on the actors than on the process itself. He first states quite directly that "[t]here is nothing unique about public employees."[57] He points out that they have the same "needs," "values," and "capacities" as private sector employees, and that many public employees have previously worked in the private sector or may do so in the future.[58] Moreover, he quite articulately points out that there really is nothing all that "unique about the work which public employees perform."[59] He notes, rather insightfully, that the private sector also employs nurses, janitors, construction workers, and even teachers, and that the work performed in the private sector in this regard may actually be just as "critical" (e.g., in the event of a work stoppage) as that done in the public sector.[60] Is, for example, the impact of a strike by teachers at a parochial high school really all that different from the impact of a strike by

54. See PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 213-20 (Joseph R. Grodin et al. eds., 2004) for a sampling of states' approaches to defining mandatory subjects of bargaining.

55. *Governmental Decisionmaking*, *supra* note 8.

56. *Id.* at 669-72.

57. *Id.* at 669.

58. *Id.*

59. *Id.*

60. *Id.* at 669-70.

teachers at a public high school?[61]

So Professor Summers asks, what *is* unique about public employment (and derivatively public sector collective bargaining)? In his *University of Cincinnati Law Review* piece, Professor Summers states that the "uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer."[62] In such situations the "employer is government" and it is public officials answerable to "citizens and voters" that are acting "on behalf of the employer."[63] In short, in Professor Summers' opinion it is the nature of the employer, not the employees, that makes public sector labor law so different.

This lens for viewing public sector bargaining clarifies a number of significant issues. First, and as noted in his *Yale Law Journal* article, public sector employees are also "citizens" and they already have "a voice in [political] decisionmaking through customary political channels."[64] Thus, one key difference between public sector employees and private sector employees is that public sector workers are both simultaneously employees and "bosses," i.e., they are not only employees but also citizens with the power to cast votes that help determine the makeup of local and state governments and therefore the officials who will be their supervisors. Private sector employees never really have the power to fire their bosses, but public employees, at least hypothetically, do.

It is this phenomenon of public employee "duality" that is really at the heart of Professor Summers' public sector labor law scholarship. In their roles as "citizens," public employees inherently have First Amendment free speech rights, as well as other rights afforded the citizenry at large.[65] Professor Summers is particularly concerned with identifying the subtle ways in which the structures and processes of government decisionmaking might infringe upon the speech rights of public employees. For example, Professor Summers points out that the collective bargaining process itself could interfere with the ability of employees to make their opinions known to public officials. He illustrates this concern with a case involving a school teacher who, at a public meeting of the school board, presented a petition against a provision the union was trying to negotiate with the school board.[66] The school board was charged with a violation of the existing state

61. *Id.*
62. *Id.* at 670.
63. *Id.*
64. *A Political Perspective*, *supra* note 8, at 1193.
65. *Governmental Decisionmaking*, *supra* note 8, at 671.
66. *Id.* (discussing Madison Sch. Dist. v. Wis. Emp. Rel. Bd., 231 N.W.2d 206 (Wis. 1975)).

bargaining law for allowing the teacher to speak and then accepting the teacher's position. Such action, according to the state agency, amounted to a violation of the principle of exclusive representation: Allowing the employer to directly deal with employees represented by a union weakened the union's role as the employees' bargaining representative and thus weakened the process of collective representation. While perfectly acceptable in the private sector, argues Professor Summers, this decision raises significant concerns in the context of public employees because it appears to limit the ability of citizens, albeit public employees, "to make their views known to public officials on public issues."[67]

C. The Special Character of the Animal: Toledo and Penn

As discussed above, the Cincinnati article proposes that the uniqueness of public employment lies not with the employees, nor with the work performed, but instead "in the special character of the employer."[68] In the last two articles published by Professor Summers on this subject, he uses even more vivid language when describing the unique nature of public employment, referring in both articles to the "special character,"[69] and a "different" kind of animal.[70] This shift in language nicely captures the essence of both articles in which Professor Summers replays his basic framework while sharpening some of the specific arguments.

For example, in the article published in the *Toledo Law Review*, Professor Summers frames the problem as one of cognitive dissonance – while participants acknowledge that differences exist between public and private employment, the public sector bargaining statutes and regulations are modeled after those in existence in the private sector.[71] Professor Summers pays particular attention in this article to the processes available in the public sector to deal with collective bargaining disputes – strikes and interest arbitration. Professor Summers argues in favor of a limited right to strike and against the use of interest arbitration.[72] His rationale relates back to his initial insight. Public employees must have the ability to participate meaningfully in the political debate through a variety of means, including

67. *Governmental Decisionmaking*, *supra* note 8, at 671.

68. *Id.* at 670.

69. *Principles and Politics*, *supra* note 1, at 272.

70. *A Different Animal*, *supra* note 8.

71. *Principles and Politics*, *supra* note 1, at 265.

72. Professor Summers recognizes, though, that strikes might be "intolerable" for certain public employees (police and firefighters) and thus that interest arbitration might be necessary with respect to those employees. *Id.* at 280.

strike activity.[73] Professor Summers notes that when viewed through this lens, strikes, just like the collective bargaining process itself, are but another way of leveling the inherent disadvantage that public employees face in the political arena.[74]

Professor Summers' concerns with the use of interest arbitration derive from the same principle. According to Professor Summers, interest arbitration is "wrong in principle" because it fails to recognize that decisions about the terms of employment for public employees are political decisions that should be left to a political process.[75] Interest arbitration delegates the authority to make decisions to a party with no political responsibility and allows public officials to avoid making decisions and instead "push the decision off to an arbitrator."[76] In short, Professor Summers' primary concern with the use of interest arbitration is its failure to recognize the political nature of public employment, and the way it interferes with the political process itself.

Professor Summers concludes the last of the four articles on this subject with an observation that presciently foreshadows what we argue is the wrongheaded path the Supreme Court has taken in recent years. In referring to what he sees as the fundamental difference between private and public employment – that in the public sector, the terms of employment are made by government officials and are shaped by political and market forces – Professor Summers notes:

> The law and practice of public sector collective bargaining have been slow to recognize and react to this fundamental difference and its impact. In part, this is because most of the lawyers who represent the parties in public sector bargaining are the same lawyers who represent the parties in private sector bargaining. They have a tendency to carry over their ways of thinking from the private to the public sector. The legislatures also bear a large measure of responsibility, for they carried over the language of the public sector statutes from the private sector. The similarity of wording has induced a similarity of thinking.[77]

In the remainder of this article, we argue that not only have lawyers and legislatures missed the critical distinction that Professor Summers forcefully asserts differentiates public and private employment, but that the Supreme Court has recently made the same mistakes.

73. *Id.* at 277.
74. *Id.* at 279.
75. *Id.*
76. *Id.*
77. *A Different Animal*, *supra* note 8, at 452.

III. SKIPPING SUMMERS' SCHOOL: ENTER *GARCETTI* AND *DAVENPORT*

In this section, we briefly discuss the two recent Supreme Court decisions in *Garcetti v. Ceballos*[78] and in *Davenport v. Washington Educational Ass'n.*[79] We argue that these two decisions are suggestive of a trend towards the privatization of public sector employment and labor law. Despite the fact that both decisions are fairly recent, they have already generated a copious literature.[80] Our intention here is not to examine either case in close detail. We leave that task to others. Our goal is to identify the elements of the Court's opinions that we argue are illustrative of the shift towards a jurisprudence of privatization and in that way, hope to highlight some of the implications that these two cases might have in the future development of public sector labor and employment law.

A. Garcetti v. Ceballos

Garcetti involved a Section 1983 civil rights action by a deputy district attorney, Richard Ceballos, against his supervisors, alleging that he was subject to adverse employment action because of his speech.[81] Specifically, Ceballos claimed to have suffered a series of retaliatory employment actions following his decision to investigate and report, as part of his job duties, concerns with a warrant that had been issued in a case that was being prosecuted by the district attorney's office in which he worked.[82] After a grievance filed by Ceballos was denied, he brought a Section 1983

78. 547 U.S. 410 (2006).

79. 551 U.S. 177 (2007).

80. On *Garcetti*, see, for example, Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance,* 97 GEO. L.J. 945 (2009); Ruben J. Garcia, *Against Legislation:* Garcetti v. Ceballos *and the Paradox of Statutory Protection for Public Employees,* 7 FIRST AMEND. L. REV. 22 (2008); Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations,* 97 CAL. L. REV. 433 (2009); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression,* 59 DUKE L. J. 1 (2009); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative,* 77 FORDHAM L. REV. 33 (2008); Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees,* 7 FIRST AMEND. L. REV. 117 (2008); Gary W. Spring, *A New Methodology for Testing Permissible Political Communications in the Workplace,* 2008 MICH. ST. L. REV. 1023 (2008).

On *Davenport*, see, for example, Robert C. Cloud, Davenport v. Washington Education Ass'n: *Agency Shop & First Amendment Revisited,* 224 Educ. Law Rep. (West) 617 (2007); Harry G. Hutchinson, *Reclaiming the First Amendment through Union Dues Restrictions?,* 10 U. PA. J. BUS. & EMP. L. 663 (2008); 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.

81. *Garcetti*, 547 U.S. at 415.

82. *Id.* at 414-15. In particular, Ceballos claimed to have been reassigned to a different position, transferred to a different location, and denied a promotion.

action asserting that his employer violated the First and Fourteenth Amendments by retaliating against him for performing his job duties.[83]

The United States District Court for the Central District of California granted defendant's motion for summary judgment, agreeing with the defendant's claim that Ceballos' speech was not entitled to First Amendment protection since it was written pursuant to his employment duties.[84] The Court of Appeals for the Ninth Circuit reversed. The Ninth Circuit reasoned that under the existing case law – *Pickering* and *Connick* – the initial question was whether the expressions in question were made by the speaker "as a citizen upon matters of public concern."[85] If the answer to that inquiry is yes, the court then will balance the interests of the employee in free speech against the interest of the employer in responding to it.[86] Finding that issues of governmental misconduct are inherently matters of public concern, the Ninth Circuit concluded that the speech was protected even though it also related to his employment responsibilities.[87] The Court of Appeals proceeded then to balance Ceballos' interests in his speech against his employer's interests in responding to it, finding that there was no evidence in the record suggesting that Ceballos' speech has resulted in "disruption or inefficiency in the workings of the District Attorney's Office."[88]

The Supreme Court disagreed and reversed the Ninth Circuit's decision. The Supreme Court first acknowledged that the *Pickering* test provided a useful starting point and that "public employees do not surrender all their First Amendment rights by reason of their employment."[89] The Court went even further by acknowledging that "a citizen who works for the government is nonetheless a citizen" and that as long as public employees speak as citizens, "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[90] The Supreme Court also noted that the interests it sought to protect went beyond the interests of individual employees. In particular, pointed the Court, the public has an interest "in

83. *Id.* at 415.

84. *Id.* In the alternative, the district court held that even if Ceballos' speech was constitutionally protected, the defendant enjoyed qualified immunity. *Id.*

85. Ceballos v. Garcetti, 361 F. 3d 1168, 1174 (9th Cir. 2004). The Court of Appeals had applied the analysis set forth in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).

86. *Ceballos*, 361 F.3d at 1173.

87. *Id.* at 1178.

88. *Id.* at 1180.

89. *Garcetti*, 547 U.S. at 417.

90. *Id.* at 419.

receiving the well-informed views of government employees engaging in civic discussion."[91]

Yet, the Court found Ceballos' speech unprotected because his statements were made pursuant to his official duties.[92] "We hold," concluded the Court, "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[93] The Court noted that restricting speech that derives from the employee's official duties "does not infringe any liberties the employee might have enjoyed as a private citizen."[94] Critical to the Court was the fact that Ceballos' statements were the result of performing his job, and as such demanded the attention of his supervisors.[95] In such a situation, noted the Court, the employer has "heightened interests" in controlling the employee's speech, and these heightened interests require that employers be given sufficient discretion to manage their operations.[96]

In response to the concern raised by the Ninth Circuit that it would be inconsistent to compel public employers to tolerate employees' speech that was made publicly but not pursuant to their assigned duties, the Supreme Court drew a particularly strong line between the roles of individuals as public employees and as citizens. The Court noted that "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government."[97] On the other hand, "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees."[98] As to the concern that the Court's decision might provide an incentive to public employees to voice their concerns publicly "as citizens" instead of privately as employees, the Court noted that a public employer could avoid such incentives by instituting internal policies and procedures to channel employee criticism.[99] "Giving employees an internal forum for their

91. *Id.*
92. *Id.* at 421.
93. *Id.*
94. *Id.* at 421-22 (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).
95. *Id.* at 423.
96. *Id.* at 422-23.
97. *Id.* at 423.
98. *Id.* at 424.
99. *Id.*

speech," noted the Court, "will discourage them from concluding that the safest avenue of expression is to state their views in public."[100]

B. Davenport v. Washington Education Ass'n

Davenport involved consolidated lawsuits by the State of Washington and a group of non-union public school employees, challenging the Washington Education Association (WEA) use of agency shop fees.[101] At issue was Washington State's "opt-in" provision for agency-shop arrangements. Agency-shop arrangements have been critical to the financial vitality of unions by requiring nonmember unit employees to pay, as a condition of their employment, a fee for the role the union plays as their agent in collective bargaining representation, thus prohibiting nonmembers from "free riding" on the union's efforts.[102]

The State of Washington allows public sector unions to charge nonmembers an agency fee and to have the employer collect that fee through payroll deductions.[103] The state law, however, restricts unions from using these fees in certain kind of activities "unless affirmatively authorized by the individual" – the so-called "opt-in" requirement.[104] Twice a year and consistent with its obligations under existing law, the WEA sent all nonmembers information notifying them of their right to object to paying fees for non-chargeable expenditures.[105] Nonmembers were given three options regarding these fees: "(1) pay full agency fees by not objecting within 30 days; (2) object to paying non-chargeable expenses and receive a rebate as calculated by respondent; or (3) object to paying for non-chargeable expenses and receive a rebate as determined by an arbitrator."[106]

The approach taken by the WEA was challenged on the grounds that the union had failed to obtain affirmative authorization from nonmembers before using their agency fees for election-related purposes.[107] The

100. *Id.*

101. Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 177 (2007).

102. *See* Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51, 99 (1990).

103. *Davenport*, 551 U.S. at 177.

104. Section 760 of the Fair Campaign Practices Act provided that "[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 (2009).

105. This information package was referred to as the "*Hudson*" packet. *Davenport*, 551 U.S. at 182.

106. *Id.* at 182-83.

107. *Id.* at 183.

Supreme Court of Washington held that the state's imposition of the affirmative authorization requirement violated the First Amendment of the U.S. Constitution, reasoning that it was contrary to the balance that the U.S. Supreme Court had established with regard to agency fee use. According to the state's Supreme Court, requiring unions to establish that nonmembers do not object to the expenditure of their agency fees for electoral purposes violated the union's First Amendment rights.[108]

The U.S. Supreme Court reversed, holding instead that the Washington statute was constitutional. The Court noted that Washington could have eliminated agency-shop arrangements altogether or restricted the level of fees that public unions could collect from nonmembers.[109] Further, the court did not see the Washington statute as an impermissible content-based regulation of speech that would distort the marketplace of ideas, even though it required affirmative consent only for election-related expenditures and not other aspects of a union's speech.[110] Describing the statute as imposing a "viewpoint-neutral limitation," the Court thus permitted state voters to place the burden on public unions to obtain assent from nonmembers for all expenditures related to elections, making it harder for unions to influence the political process.[111]

The decision, we argue, reflects an interesting, and somewhat conflicting theme. In the part of the decision in which the Court was unanimous, the Court appears to recognize the uniqueness of public sector employment. For example, the Washington State Supreme Court had held that the state's agency-fee statute was unconstitutional because it upset the balance that the U.S. Supreme Court agency-fee cases have established. In particular, the state court noted that the existing case law mandated that a dissenting nonmember must shoulder the burden of objecting to the manner in which the union spent agency fees.[112] In rejecting this argument, the Court in *Davenport* acknowledged the unique treatment that public sector unions are afforded under the Court's agency-fee jurisprudence. The Court referred to the authority given to public sector unions to levy fees on government employees, even those who do not wish to join the union, as

108. State *ex rel.* Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 130 P.3d 352, 356-65 (Wash. 2006).

109. *Davenport*, 551 U.S. at 184.

110. *Id.* at 187-88.

111. *Id.* at 189.

112. *State* ex rel. *Wash. State Pub. Disclosure Comm'n*, 130 P.3d at 357-61. The Washington Supreme Court relied on the proposition commonly invoked by the U.S. Supreme Court that "dissent is not to be presumed – it must affirmatively be made known to the union by the dissenting employee." Abood v. Detroit Bd. of Educ. 431 U.S. 209, 238 (1977).

"undeniably unusual."[113] The Court noted that states clearly have the authority, if they desire, to deny unions the authority to collect agency fees. Thus, concluded the Court, the lesser type of restriction imposed under Washington law, i.e., requiring unions to obtain affirmative permission to spend the fees in electoral type activities, does not raise any constitutional concerns.[114] The Court's analysis reflects the understanding that public employment is somewhat unique. That is, the rules that govern the public employment relationship need to be properly calibrated to meet the needs of the process they seek to regulate.

The rest of the opinion, in which six Justices joined, reflects a different approach, however. The WEA had argued that the statute unconstitutionally drew distinctions based on the content of the union's speech.[115] In particular, noted the WEA, the statute did not prohibit the use of agency fees in all traditionally non-chargeable activities, but only in election activities.[116] In responding to this argument, the Court initially acknowledged that the state's statute was in fact drawing a content-based distinction. The Court also noted that content discrimination is generally viewed with suspicion since it raises the risk of the government driving "certain ideas or viewpoints from the marketplace."[117] However, the Court concluded that those concerns were unfounded in this context, characterizing the potential risk with the state's statute as "inconsequential."[118] The Court compared the prohibition made under the Washington's statute to prohibitions against obscenity and defamation, noting that such speech is unprotected and of negligible value to the marketplace of ideas.[119] The Court also compared the situation at hand with cases in which government seeks to regulate speech that it has itself subsidized. The Court noted that in those cases, the government is allowed to make content-based distinctions.[120] Similarly here, concluded the Court, where the state could totally prohibit unions from spending money collected from nonmember agency fees on any kind of activity, the state could also choose only to limit expenditures in more specific areas. "The voters," noted the Court, "did not have to enact an across-the-board limitation on the use of nonmembers' agency fees by public-sector unions

113. *Davenport*, 551 U.S. at 184.
114. *Id.*
115. *Id.* at 188.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 188-89.

in order to vindicate their more narrow concern with the integrity of the election process."[121]

Unlike the unanimous part of the opinion, what is missing from this portion of the opinion is any discussion of context. While the types of speech to which the Court seeks to analogize union election-related speech might be appropriate as a matter of constitutional law, they are nonetheless an odd pair to which one would compare public sector union's election-related speech. The comparison, we suggest, illustrates the Court's failure to recognize the type of dynamics that Professor Summers notes as key to understanding the public sector employment relationship.

IV. BACK TO SUMMERS' SCHOOL: LESSONS ON THE SPECIAL CHARACTER OF PUBLIC SECTOR EMPLOYMENT AND LABOR LAW

While dealing with two seemingly unrelated issues, the Supreme Court decisions in *Garcetti* and *Davenport* represent, we posit, a troubling trend. Both decisions appear to be grounded in a basic misunderstanding of the differences that exist between public and private employment. In particular, both decisions represent a wholesale adoption of the principles that courts have used in deciding employment and labor cases in the private sector without much thought being given to whether those principles should apply to the public sector employment context. In that sense, we argue, the Court needs to heed Professor Summers' lessons.

A. The Public Employee and Free Speech

One of the key lessons embedded in Professor Summers' scholarship is the importance of recognizing the "dual" roles employers and employees play in the public sector. The "duality" lived by public employees both results in and stems from a complex tension between public employers, public employees, and the citizenry at large. Public employers (e.g., public officials) have an obligation to manage their governmental units in ways that protect the public welfare, allocate resources appropriately, and avoid abuses of power. In other words, they have obligations and duties to the general public. At the same time, they view their units as workplaces in which they must exercise business judgment in oversight of public employees and maintenance of workplace efficiency. These goals are not antithetical to each other; in fact, both serve the public interest.[122]

121. *Id.* at 189.

122. As previously indicated, workplace efficiency serves the public good because voters want to obtain services at minimal cost. *See supra* note 32 and accompanying text.

Arguably, however, the former obligation is the primary goal; day-to-day management of the workplace can be viewed as facilitating that goal, as a means to a public service end.

When viewed this way, the critical role that public employees play in accomplishing the goals of the public employer becomes apparent. Not only do these employees directly help to deliver the requisite public services, but they serve as a critical link between elected officials and the electorate via a watchdog function. Public officials, whose jobs depend on the constituency of state and local governments, may tend to manage their employees in ways that are self-serving in order to preserve their jobs. They may seek to hide important but unflattering information from the public; they may become overzealous in behavioral control of the workplace. In other words, public officials are highly motivated to maintain discipline by controlling public employee speech, a key part of the political process that allows public employees to participate in civic discourse. Although public employees may serve as "bosses" who participate in the political process to help elect their supervisors, individual employees who speak out on workplace issues do not have sufficient political power to provide a meaningful threat to their employers and thus could opportunistically be subject to discipline or dismissal for voicing their concerns.[123]

Until 2006, public employee speech had long been governed by the *Connick/Pickering*[124] balancing test, which attempted to ensure the free speech rights of public employees who spoke as citizens on matters of public concern.[125] Only speech that fit within this framework received First Amendment protection; concerns about the efficiency of the public workplace generated a second prong of the test to determine whether the governmental interest in limiting the speech outweighed the employee's interest in speaking on the matter of public concern.[126] In *Garcetti*, the Supreme Court shifted the focus even more to the workplace aspect when it decided that public employee speech made "pursuant to" official job duties

123. The lack of political power versus the general electorate was discussed earlier as being central to Professor Summers' views. *See supra* notes 32-41 and accompanying text.

124. Connick v. Myers, 461 U.S. 138, 157 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 573-74 (1968).

125. *Connick*, 461 U.S. at 157; *Pickering*, 391 U.S. at 573-74.

126. At least one commentator has argued that because the *Connick/Pickering* test does not sweep in all public employee speech as protected under the First Amendment, even it is arguably too deferential to the public managerial prerogative. Cynthia K.Y. Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement,* 76 CAL. L. REV. 1109, 1119 (1988).

was not deserving of First Amendment protection.[127] This primary, magnified focus on the efficient workplace aspect of the governmental unit reflects a view of the public employer through the lens of the private employer, without adequate consideration of the functioning of the unit in providing public services. *Garcetti* therefore represents a step toward "privatization" of the public workplace.

Although the majority opinion in *Garcetti* recognized that public employees can make significant contributions to civic discourse, it effectively determined that any speech within a public employee's official job duties was made outside of the role of citizen. According to the Court in *Garcetti*, while speech by a public employee who speaks as a citizen addressing a matter of public concern requires First Amendment scrutiny, speech that occurs while "the employee is simply performing his or her job duties" warrants no similar degree of scrutiny.[128] "To hold otherwise," noted the Court "would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."[129] The dual nature of the public employee was minimized in the interest of providing less government intrusion into the inner workings of the public workplace and more deference to the public official as employer. The chilling effect on public employees' providing of their watchdog function was not adequately addressed. The question of whether speech made pursuant to official job duties disrupted the workplace – even potentially – is no longer reached.[130] The public employer now enjoys free rein in limiting this form of speech, which, according to the majority in *Garcetti*, is akin to any supervisor conducting a performance appraisal of a subordinate.[131] The public employer now enjoys private "ownership" of public employee speech articulated as part of official job duties. This displacement of managerial discretion by judicial supervision finds no support in existing case law. As a result of the *per se* holding in *Garcetti*, whether speech made in accordance with a public employee's official job duties may also be a matter of public concern is irrelevant. Thus, from a privatization perspective, the Court has elevated the role of governmental employee as mere worker and downplayed the employee's role as serving the public

127. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

128. *Id.* at 423.

129. *Id.*

130. In *Garcetti*, the Ninth Circuit, applying the *Connick/Pickering* balancing, had held that Ceballos' speech was on a matter of public concern and that the potential for workplace disruption was insufficient to rule for the government. *See supra* notes 84-87 and accompanying text.

131. *Garcetti*, 547 U.S. at 422.

interest.

The privatization tendency is also reflected in another interesting aspect of the majority opinion. Towards the end of his opinion and in response to concerns raised by the lower court that granting First Amendment protection only to employees speaking as citizens will perhaps create incentives for public employees to voice their complaints publicly instead of internally to their employers, Justice Kennedy encouraged public employers to institute "internal policies and procedures" for dealing with employee work-related criticism and complaints. He offered that giving public employees an "internal forum for their speech" would perhaps "discourage them" from stating their "views in public."[132]

Although in no way acknowledging this in his opinion, Justice Kennedy in many respects is applying to public employees in *Garcetti* the Supreme Court's classic 1960's *Steelworkers Trilogy* model of private sector employee/industrial relations.[133] The *Steelworkers Trilogy* emphasized the development of employer/union internal grievance procedures culminating ultimately in outside labor arbitration.[134] The explicit "quid pro quo" of these internal fora for employee grievances was that employees would not take their grievances public, i.e., go on strike, during the term of a given labor contract.[135] Instead of making a "federal case" of an employee grievance or complaint, "dirty laundry" regarding workplace issues would instead be resolved internally.[136] Indeed, in a series of important cases the Supreme Court even allowed employers to obtain federal court injunctions enforcing labor contract grievance procedure "no strike clauses," even through Congress seemingly explicitly prohibited federal courts from issuing injunctions against "labor disputes" in the 1932 Norris-LaGuardia Act.[137]

132. *Id.* at 424 (noting that a public employer could encourage its employees to voice concerns privately by "instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public").

133. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

134. The presumption of arbitrability is a strong one. As stated by the Supreme Court in *Warrior & Gulf Navigation Co.*, "[d]oubts [regarding the applicability of arbitration] should be resolved in favor of coverage." *Warrior & Gulf Navigation Co.*, 363 U.S. at 582, 583.

135. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) (Douglas, J.).

136. *Id.*

137. Section 4 of the Norris-LaGuardia Act has contained this prohibition since its inception. 47 Stat. 70 (1932). However, in Boys Markets, Inc. v. Retail Clerks Union, Local 778, 398 U.S. 235, 254-55 (1970), the Supreme Court permitted a federal injunction against a strike that violated a no-strike clause in the collective bargaining agreement. *Boys Markets* represents the Supreme Court's reconciliation of the Norris-LaGuardia prohibition on injunctions of labor disputes with Section 301 of

The use of the grievance procedure and arbitration as a means of resolving disputes over the terms of collective bargaining agreements and as a means for administering the labor contract is likely a normatively sound policy (and a policy that enjoys many supporters). Our argument is not that encouraging grievance arbitration is a misguided policy, but instead that the Court's approach in *Garcetti* reflects the transplanting of a private sector employment framework into public employment without the type of careful analysis that Professor Summers suggests is warranted.

B. Public Employees, Collective Bargaining, and Agency Shops

Professor Summers' scholarship is relevant not only with regard to the issue of employee speech, but also with regard to our understanding of the political process through which decisions that affect public employees are made. As discussed above, Professor Summers aptly observes that public employees have a number of mechanisms to try to influence the terms and conditions of employment. Unlike private employees, as voters, public employees have the ability to influence who sits across the bargaining table. As citizens they also have the ability to participate in the public discourse through the normal political process. Where available, collective bargaining represents one more avenue, and to some extent an extraordinary one, for public employees to present their preferences to the employer and to have those preferences heard in a meaningful way.

Professor Summers convincingly argues that the extraordinary step of providing public employees with another mechanism to influence their terms of employment is entirely justified once we take into account the political nature of public employment. Collective bargaining on conditions of employment serves the important purpose of maintaining the workplace function of the government, as it does with private employees, but in the governmental context, that workplace function must be viewed in its critical role of providing services to the public. Unions therefore serve a particularly important function in the public sector: They protect the public employee, who would be powerless as an individual to offset the citizenry's interest in having a low-cost government.[138] Thus, unions engage in the political process, helping to balance the power between public employees and the electorate.

The fact that public employees are granted the ability to influence

the Labor Management Relations Act's provision for lawsuits to settle breaches of collective bargaining agreements.

138. *See supra* note 36 and accompanying text.

employment decisions via collective bargaining, however, does not imply that the avenues otherwise available to public employees must, or should be, closed. In fact, Professor Summers is very careful in making it clear that public sector collective bargaining, while extraordinary in nature, should not and cannot be the only method for influencing governmental decisionmaking regarding terms and conditions of employment. He emphasizes, for example, that the type of issues that should be channeled through the collective bargaining process (i.e., mandatory subjects) ought to be limited to those where the there is a need to balance the inherent disadvantage faced by public employees in the political process. Professor Summers also recognizes that in the public sector collective bargaining is an inadequate mechanism to make decisions with regard to bargainable issues. Problems such as end-run bargaining and the separation of bargaining responsibilities from the budgeting process limit the ability of public employees to safeguard some of the gains they believe they have made at the bargaining table.[139]

Thus, union representation in the public sector is based on the understanding that the collective bargaining process represents only one component of the relationship between the public employee and the public employer. To be effective, public sector unions must have the ability to access the political process through other means, since both parties understand that collective bargaining is part of a broader political process. In the public sector, just as workplace-related speech cannot readily be separated from speech that is germane to the political process, collective bargaining duties related to conditions of employment cannot readily be seen as distinct from a union's political activities. Whether normatively appropriate or not, public policies that make it harder for public sector unions to engage in political activities also, in turn, make it harder for them to fulfill the full panoply of their bargaining responsibilities. By allowing the imposition under state law of the opt-in requirement, we argue, the U.S. Supreme Court did exactly that in *Davenport*.

Courts and various administrative agencies have struggled with the issue of the appropriateness of allowing unions in both the private and public sectors to collect fees from nonmember employees. In the private sector, although agency shops are permissible, restrictions have been imposed on the ability of a union to spend funds on activities that are not related to collective bargaining when non-union members object.[140] In

139. *See supra* Part II.A.

140. This also applies to administration of the collective bargaining agreement. Commc'n Workers of Am. v. Beck, 487 U.S. 735, 758 (1988).

cases involving private sector employees, the manner in which union fees are used has been tightly constrained. For example, the Court has adopted language limiting the types of uses to which dues collected from nonmember employees are appropriate to those related to the "negotiation and administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes"[141] and those "necessary 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."[142] Using this standard, the Supreme Court has found the expenditures of nonmembers' fees on political activities,[143] organizing employees outside the bargaining unit, and litigation not involving the bargaining unit[144] to be impermissible.

The Court also has found that similar limitations apply in the public sector. In cases involving the use of nonmembers' dues by public sector unions, the Court has made clear that only "expenses that are relevant or 'germane' to the collective-bargaining functions of the union" are permissible.[145] Agency shops are also permissible as long as unions provide a mechanism by which those opposed to non-collective bargaining activities can be reimbursed for the percentage of the agency fee that goes to such activities – so-called "ideological" expenditures.[146] However, the Court has also recognized that because of the political nature of the governmental decisionmaking process, drawing the line between permissible and impermissible fee assessments in the public sector context is likely to be "somewhat hazier."[147] As the Court has noted, "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities."[148]

Recognizing this reality, the Court has allowed for the collection of full agency-shop fees from nonmembers, with adequate provision for them to "opt out" and receive a rebate of that portion of the fees that cannot be

141. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 769 (1961) (interpreting the Railway Labor Act).

142. Ellis v. Bhd. of Ry. Clerks, 466 U.S. 435, 448 (1984) (interpreting the Railway Labor Act); *see also Beck*, 487 U.S. at 760.

143. *Street*, 367 U.S. at 769-70.

144. *Ellis*, 466 U.S. at 451-53.

145. Lenhert v. Ferris Faculty Ass'n, 500 U.S. 507, 516 (1991).

146. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977). The issue for public sector unions involves the constitutionality of allowing the government, as party to the collective bargaining agreement, to restrict the freedom of association of employees who are not members of the union.

147. *Id.* at 236.

148. *Id.*

charged to them upon their objection.[149] Prior to *Davenport*, the Supreme Court had never decided whether affirmative consent – i.e., an "opt-in" – was permissible under the First Amendment before a union could spend a nonmember's agency fee for "ideological purposes that are not germane to the union's collective bargaining duties."[150]

The Court's decision in *Davenport* represents a departure from the understanding reflected in earlier Supreme Court cases regarding the differences in the roles that unions play in the private and public employment sectors. In the public sector, negotiating a collective bargaining agreement is but a part of the representation process. Due to the political nature of the governmental decisionmaking process, full implementation and protection of the gains made at the bargaining table will likely require the union to pressure the public employer in a variety of other ways. Policies that make it harder for public sector unions to engage in that kind of multi-level representation undoubtedly influence the ability of public employees to affect their working conditions. Earlier Supreme Court decisions recognized such complexity and just as Professor Summers has warned, avoided imposing considerations well-suited in the private sector to the "somewhat hazier" public sector context. The Court's decision in *Davenport* appears to ignore that warning, thereby furthering the privatization of public sector employment and labor law.

V. CONCLUSION

Attending Summers' School means learning the lessons that accompany distinctions between public and private employment and becoming an expert on the special character of the public employment animal. Unfortunately, the Supreme Court appears to have "played truant" in its holdings in *Garcetti* and *Davenport*. Although these decisions address different legal issues and touch on somewhat different aspects of public employment, they nonetheless fail in similar ways to incorporate the critical link between terms and conditions of public employment and public employees' participation in the political process. In *Garcetti*, the Court held that public employee speech made pursuant to official job duties is *per se* outside of First Amendment protection, thus failing to understand how speech offered as a part of job performance simultaneously might contribute to the very public discourse that helps to determine the

149. Additionally, there are certain requirements that must be met for the union to collect agency-shop fees, one of which is that the fees reasonably in dispute must be held in escrow. Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

150. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007).

requirements of that performance. Similarly, in *Davenport* the Court failed to demonstrate a deeper understanding of the interweaving of a union's political activities and its collective bargaining duties related to employment.

Professor Summers has provided an elegant and detailed framework for understanding public employment, insightfully highlighting that its special character is due to the nature of the public employer. It is this insight that provides the most fundamental lesson of Summers' School: Limiting the ability of public sector employees to be viewed as public citizens also limits their abilities to protect their employment rights. We admonish the Supreme Court to take this lesson to heart and to adopt a jurisprudence that focuses on, in the words of Professor Summers, "what practices in the public sector will improve the political process."[151]

151. *A Political Perspective*, *supra* note 8, at 1161.