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The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson

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THE LEGAL STATUS OF UNION SECURITY FEE ARBITRATION AFTER *CHICAGO TEACHERS UNION V. HUDSON*†

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When a majority of the employees in a bargaining unit selects a union to represent them, the union becomes the exclusive bargaining representative for all employees in the unit. Selection of the union as exclusive representative does not necessarily require all employees to join the union. Nevertheless, the union is required to represent all bargaining unit employees regardless of union membership in dealing with the employer concerning wages, hours and other terms and conditions of employment.[1]

The union's responsibility to represent all employees renders it vulnerable to the possibility that some employees will receive the benefits of union representation but, because they do not join the union and pay dues, will not contribute to the costs of representation. To prevent nonmembers from "free riding" on the dues paid by members, unions and employers frequently agree to union shop, agency shop or fair share provisions in their collective bargaining agreements. Union shop provisions require that all employees join the union after a specified grace period to retain their jobs. Agency shop or fair share fee provisions require all nonmember employees to pay the union a fee to cover their share of the costs of representation.[2] Incorporating such provisions

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[1] *See generally* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). A union that discriminates against nonmembers in performing its representational duties breaches its duty of fair representation. *See, e.g.*, Del Casal v. Eastern Airlines, 634 F.2d 295, 300–01 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981); National Ass'n of Letter Carriers, Branch 6000 v. NLRB, 595 F.2d 808, 811–13 (D.C. Cir. 1979); Jones v. Trans World Airlines, 495 F.2d 790, 797 (2d Cir. 1974).

[2] Both types of union security provisions effectively serve the same purpose of compelling employees who would not otherwise do so to contribute to the costs of their representation. The union shop's membership requirement is tempered by statutory provisions that prohibit discharge for loss of union membership, except where that loss results from a failure to pay dues. *See, e.g.*, National Labor Relations Act §§ 8(a)(3), (b)(2), 29 U.S.C. §§ 158(a)(3), (b)(2). Employees may terminate their formal membership voluntarily and still avoid discharge by continuing to tender an amount equal to union dues. NLRB v. Hershey Foods Corp., 513 F.2d 1083, 1087 (9th Cir. 1975). A union lawfully may not represent to new employees that they are required to comply with obligations of membership other than payment of dues. United Stanford Employees Local 680 v. NLRB, 601 F.2d 980, 982–83 (9th Cir. 1979).

The Supreme Court has observed that the union shop is the "practical equivalent" of the agency shop, NLRB v. General Motors Corp., 373 U.S. 734, 743 (1963), but has not had occasion to decide whether the differences between the two are constitutionally significant. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217 n.10 (1977). In Buckley v. American Fed'n of Television and Radio Artists, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), the Second Circuit held that, to the extent that a union shop agreement imposes only a requirement to pay dues, it is not constitutionally different from an agency shop agreement. The distinction between union shop and agency shop

into the collective bargaining agreements between a union and a public employer implicates the first amendment rights of employees who object to them. Although it is not unconstitutional to charge and to collect a union security fee, a public employee has a first amendment right not to be compelled to contribute to expenditures of a political or ideological nature that are not germane to collective bargaining.[3] In *Chicago Teachers Union, Local 1 v. Hudson*[4] the Supreme Court held that, to safeguard employees' first amendment rights, unions must provide those who object to political and ideological expenditures with a fair opportunity to contest charges for those expenditures. The contest procedure must result in a reasonably prompt resolution by a neutral decisionmaker.[5] The Court expressly approved arbitration as an appropriate procedure for resolving such contests.[6] The Court did not, however, offer much guidance on the role of arbitration in union security fee dispute resolution. Nor did it offer any guidance on the appropriate allocation of dispute resolution functions between the arbitrator and the courts. Thus, although the Court mandated that unions establish procedures to safeguard nonmember employee rights, it left a major void concerning the implementation of those procedures. Unions, employees, public employers and arbitrators must act at their peril.

This article attempts to fill this void. Section I discusses *Hudson* and judicially mandated union security fee procedures.[7] Section II develops the role of union security fee arbitration by contrasting it with the role of the traditional grievance arbitration.[8] Sections I and II lay a foundation for the remainder of the article, which presents a theory of the legal status of union security arbitration.

Section III focuses on the source of the arbitrator's authority to resolve union security fee objections.[9] It suggests that, like the grievance arbitrator, the union security fee arbitrator derives his or her authority from the applicable collective bargaining agreement. This conclusion leads to an analysis of the respective roles of the arbitrator and the court, which is the subject of Sections IV and V.

Section IV considers whether nonmember objectors may bypass the arbitration procedure and litigate their objections in federal court.[10] Subsection IV.A concludes that they may not because they are bound by the collective bargaining agreement and because of the role of arbitration in union security fee dispute resolution.[11] Subsections IV.B and IV.C then reject the proposition that this conclusion is inconsistent with Supreme Court interpretations of section 1983 of the Civil Rights Act of 1871[12] and of required union security fee objection procedures, respectively.[13] Finally, Subsection IV.D concludes that

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agreements may be constitutionally significant, however, regarding the requirement of notice to potential objectors, which the Supreme Court announced in Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292 (1986). *See infra* note 38 and accompanying text. This article will refer collectively to union shop, agency shop, fair share and all similar fees as "union security fees."

[3] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233–35 (1977).

[4] 475 U.S. 292 (1986).

[5] *Id.* at 307.

[6] *Id.* at 308 n.21.

[7] *See infra* notes 18–45 and accompanying text.

[8] *See infra* notes 46–95 and accompanying text.

[9] *See infra* notes 96–120 and accompanying text.

[10] *See infra* notes 121–82 and accompanying text.

[11] *See infra* notes 124–32 and accompanying text.

[12] 42 U.S.C. § 1983. *See infra* notes 133–60 and accompanying text.

[13] *See infra* notes 161–75 and accompanying text.

denial of pre-arbitration access to the federal courts does not impose an unconstitutional burden on objectors' first amendment rights.[14]

Sections V and VI consider post-arbitration attacks on a union security fee award. Section V analyzes the role of the arbitrator's award in subsequent litigation under section 1983.[15] It concludes that, if the parties conduct the arbitration in compliance with certain standards of formality, nonmembers challenging the award should not receive a trial *de novo*. It suggests a three-tier standard for judicial review of the award: *de novo* review of the arbitrator's conclusions of law, independent review on the record of arbitral findings of constitutionally significant facts and broad deference to findings of basic facts.[16]

Section VI analyzes the role of the employer in post-arbitration litigation.[17] It concludes that, if the arbitration proceeding incorporated all the *Hudson* safeguards, the employer has no liability to nonmember objectors. This should be true even if the arbitrator erred in his or her conclusions and allowed the union to charge nonmembers for constitutionally objectionable expenditures.

I. Judicially Mandated Fee Objection Procedures

Prior to *Hudson*, the Supreme Court considered union security fees in several cases arising under the Railway Labor Act[18] and under the first amendment. These decisions involved the propriety of charging objectors for particular expenditures. Although *Hudson* was the first case in which the Court directly faced the issue of constitutionally required fee objection procedures, the prior cases had resolved many procedural matters.

The pre-*Hudson* case law established that, even where unions use union security fees for political or ideological purposes, there is no reason to presume that the employees are opposed to such expenditures.[19] Accordingly, the employees have the burden to advise the union of their objections to the use of their fees.[20] This burden is minimal, as employees are not required to specify which expenditures they find objectionable.[21] When an employee files an objection, the union must take such steps as advanced fee reductions and escrows to ensure that it will not use the objector's fees, even temporarily, on matters that are not chargeable.[22] The union bears the burden of proving how the objector's fees will be spent.[23]

In *Hudson* the union and employer agreed that bargaining unit employees who were not union members would pay a fair share fee to the union through mandatory payroll deductions.[24] The union calculated the fair share fee for the coming year by determining

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[14] *See infra* notes 176–82 and accompanying text.

[15] *See infra* notes 183–262 and accompanying text.

[16] *See infra* text following note 262.

[17] *See infra* notes 265–74 and accompanying text.

[18] 45 U.S.C. §§ 151–188 (1982).

[19] *E.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 768–69 (1961).

[20] *Id.* at 774.

[21] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977); Brotherhood of Ry. and S.S. Clerks v. Allen, 373 U.S. 113, 118 (1963).

[22] Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, 466 U.S. 435, 444 (1984).

[23] *Allen*, 373 U.S. at 122.

[24] Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292, 295 (1986). Union security clauses usually are enforced in one of two ways. Either the employer makes mandatory payroll deductions, as in *Hudson*, or the contract empowers the union to demand that the employer discharge those who fail to pay. Threat of discharge was the enforcement mechanism the union used in *Abood*.

the percentage of its income used in the previous year for admittedly objectionable expenditures and proportionately reducing the amount of the coming year's monthly union dues.[25] The union described the fee and procedures for objecting to it in its newspaper, which it distributed to all employees, including nonmembers, and in flyers and posters, which it distributed through its member delegates from all schools.[26]

The union established an internal procedure for handling fee objections, which provided for the union's executive committee's initial review of the objections. If the committee action did not satisfy the objecting employees, they could submit their objections to arbitration. The union selected the arbitrator from a list of arbitrators whom the Illinois State Board of Education had accredited to hear tenured teacher dismissal cases. The union paid the costs of the proceeding, including the arbitrator's fee.[27]

The United States Court of Appeals for the Seventh Circuit held the arbitration procedures to be constitutionally deficient in three respects.[28] First, the union alone selected the arbitrator.[29] The court reasoned that a procedure by which one of the parties selected the judge could not adequately safeguard the rights of the other party.[30] Second, the court held that the union's payment of the arbitrator's fee gave the arbitrator a financial interest in the outcome of the dispute.[31] Third, the court believed that arbitration was inherently unsuited for resolving union security fee objections.[32] The court opined that an arbitrator was skilled in resolving contractual issues, not in resolving constitutional issues.[33] The court held that, at a constitutional minimum, objectors were entitled to "fair notice, a prompt administrative hearing . . . — the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies — and . . . judicial review of the agency's decision."[34]

The Supreme Court affirmed the Seventh Circuit's judgment, but not its reasoning. The Court held that the Constitution mandates procedural safeguards for two reasons.[35] First, the Court observed that carefully tailored procedures are necessary to minimize the infringement of employees' first amendment rights.[36] Second, the Court reasoned that employees are entitled to a fair opportunity both to identify the governmental action's impact on their interests and to assert a meritorious first amendment claim.[37]

The Court held that a constitutionally adequate fee objection procedure must have three components. First, the union must disclose to potential objectors the basis for computing the fee. In the case before it, the Court held that the Chicago Teachers Union's notice was inadequate because it advised nonmembers only of the percentage of dues allocated to admittedly objectionable expenditures. It did not delineate the expenditures that the union maintained were chargeable and on which the union based

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[25] *Id.*
[26] *Hudson*, 573 F. Supp. 1505, 1509 (N.D. Ill. 1983).
[27] *Hudson*, 475 U.S. at 296.
[28] 743 F.2d 1187, 1194–97 (7th Cir. 1984).
[29] *Id.* at 1194.
[30] *Id.* at 1195.
[31] *Id.*
[32] *Id.* at 1195–96.
[33] *Id.* at 1196.
[34] *Id.*
[35] Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292, 302 (1986).
[36] *Id.* at 302–03.
[37] *Id.* at 303.

the fee. The Court reasoned that, whereas employees have the burden of objecting to charges, unless the union advises them of the basis for those charges, they are incapable of determining whether to accept or object to the union's calculation.[38]

Second, when the union receives objections, it must take steps to ensure that it does not use the objectors' fees, even temporarily, for objectionable purposes.[39] The Court suggested two ways of doing this. The union may escrow the entire fee pending resolution of the objections, or may escrow part of the fee, retaining that portion that an independent certified public accountant has verified is not subject to reasonable challenge, less a cushion to protect against arithmetic errors.[40]

Third, the union must provide objectors with a reasonably prompt resolution by an impartial decisionmaker.[41] The Court agreed with the Seventh Circuit that the Chicago Teachers Union's arbitration scheme did not meet this standard because the union selected the arbitrator.[42] The Court, however, expressly rejected the Seventh Circuit's conclusion that arbitration is an inherently unsuitable forum for resolving fee objections. The Court opined that expeditious arbitration might produce a reasonably prompt decision by an impartial decisionmaker, but selection of the arbitrator must not represent the union's unrestricted choice.[43]

The Court did not address the Seventh Circuit's concern that, when the union pays the arbitrator, the arbitrator acquires a financial interest in the proceeding and cannot be impartial. The Court's silence should not prevent unions from paying the arbitrator's fee. The arbitrator's financial interest arises not from union payment alone, but from union payment coupled with exclusive union control over arbitrator selection. Under that combination, arbitrators who rule against the unions truly would be biting the hands that feed them. When the union does not exclusively control the arbitrator's receipt of future work, however, union payment of the arbitrator's fee does not give the arbitrator a financial stake in the proceeding. This is particularly so if the arbitrator selection is

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[38] *Id.* at 306. Parties and reviewing authorities easily can apply the Court's holding that potential objectors must be given notice of the fee components to fair share or agency shop agreements. In those cases only nonmembers are potential objectors. In union shop agreements, however, every member is a potential objector. A reasonable argument can be made that notice must be given to every member. Although employees in a union shop can resign their membership and retain their jobs by tendering amounts equal to dues, and unions cannot affirmatively mislead employees concerning the requirements of a union shop clause, *see supra* note 2, unions are not obligated to go out of their way to explain the options open to employees.

The typical union shop clause simply requires membership without any explanation of how to meet the requirement. It is unlikely that most employees have made an informed decision to be full members. Nevertheless, it is likely that, given the choice, most employees would opt for full membership. In agency shop and fair share bargaining units, the overwhelming majority of employees opt for membership. Whether this phenomenon is due to indifference or a conscious decision to retain the benefits of membership, it suggests that, in union shops, the notice of fee calculation need not go to every member, but can be limited to those employees who have been suspended or expelled from the union or who have indicated that they wish to limit their membership to paying dues.

[39] *Id.* at 305.

[40] *Id.* at 310. The *Hudson* union had escrowed 100% of the objectors' fees. *Id.* at 309. The Court held that, though this eliminated the risk of temporary impermissible use, it did not overcome the union's failure to satisfy the other two procedural standards. *Id.*

[41] *Id.* at 307.

[42] *Id.* at 308.

[43] *Id.* at 308 n.21.

entirely independent of the union, such as through appointment by the American Arbitration Association or a state public employment relations board.[44] Thus, union payment of the arbitrator's entire fee should not invalidate a fee objection procedure.

Most post-*Hudson* decisions have focused on the adequacy of the union's fee objection procedures.[45] This article assumes that the union has implemented adequate procedures, which culminate in arbitration. Compliance with *Hudson*, however, raises substantial issues regarding the proper role of arbitration in the process of union security fee administration and litigation.

II. The Role of Union Security Fee Arbitration

The institution of labor arbitration developed primarily as a means of resolving grievances over the interpretations and applications of collective bargaining agreements. Grievance arbitration is a system mutually agreed to by the union and the employer, and wholly controlled by those parties. Union security fee arbitration is involuntary.

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[44] The American Arbitration Association's Rules for Impartial Determination of Union Fees (Effective June 1, 1986) [hereinafter AAA Rules] provide for AAA appointment of the arbitrator in cases it administers. AAA Rules, *supra*, Rule 3. The AAA provides a very valuable service by appointing the arbitrator. Appointment by a neutral agency insulates the arbitrator from having a personal interest in the outcome of the proceeding. The alternative, joint selection by the union and the objectors, will be cumbersome at best and unworkable at worst. Individual objectors are not likely to have sufficient experience to evaluate the qualifications of potential arbitrators. Where there are many objectors it will be difficult, and perhaps impossible, to reach a consensus on arbitrator selection.

Although the most common arrangement in grievance arbitration is for the parties to divide the arbitrator's fee equally, it is not unheard of for one party to pay the entire fee. Some collective bargaining agreements provide for the loser to pay the entire fee. Nonunion grievance systems that culminate in arbitration often provide for the employer to pay the entire fee. For a discussion of one such system, see Wolf, *Trans World Airlines' Noncontract Grievance Procedure*, 39 National Academy of Arbitrators Proc. 27–33 (1987).

An unresolved issue is whether the union could require the objectors to share responsibility for the fee. The amount of money in dispute in a union security fee arbitration is often quite small. Requiring objectors to share in the costs of the proceeding may substantially burden their rights to object. One must assess the constitutionality of such a burden in light of the judiciary's general approval of charging fees for access to first amendment forums only if the fees are reasonable and proportionate to the added costs the activity poses and do not amount to a tax on the activity. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943); Cox v. New Hampshire, 312 U.S. 569, 577 (1941); Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050, 1055–57 (2d Cir. 1983); Fernandes v. Limmer, 663 F.2d 619, 632–33 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); Baldwin v. Redwood City, 540 F.2d 1360, 1370–72 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977); United States Labor Party v. Codd, 527 F.2d 118, 119–20 (2d Cir. 1975). *But see* Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523 (11th Cir. 1985) (charges exceeding a nominal amount are unconstitutional regardless of relationship to added expenses), *cert. denied*, 475 U.S. 1120 (1986). *See generally*, Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 329–351 (1985).

[45] *See, e.g.*, Damiano v. Matish, 830 F.2d 1363 (6th Cir. 1987); Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987); Tierney v. City of Toledo, 824 F.2d 1497 (6th Cir. 1987); Robinson v. New Jersey, 806 F.2d 442 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 2463 (1987); Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306 (W.D. Mich. 1986); Gilpin v. AFSCME, 643 F. Supp. 733 (C.D. Ill. 1986); McGlumphy v. Fraternal Order of Police, 633 F. Supp. 1074 (N.D. Ohio 1986); Hewitt v. Board of Educ., No. 18577-D (Wisc. Emp. Rel. Comm'n slip op. filed Sept. 1, 1987); United Univ. Professionals and Barry, N.Y.P.E.R.B. ¶ 20-3039 (1987).

Judicial decisions have imposed it on the parties, and judicial precedent controls it.[46] Nevertheless, because grievance arbitration is so basic to the institution of labor arbitration, it provides an appropriate starting point and a basis of comparison in developing the role of union security fee arbitration.

A. *Grievance Arbitration*

Grievance arbitration is a privately created and privately administered system under which a dispute over the interpretation or application of a collective bargaining agreement is submitted for resolution to an individual whose expertise, credentials and impartiality are satisfactory to both parties. The arbitrator, selected by the parties, is also bound by their agreement and responsible to them for his or her work product. The parties control the process itself but have agreed to be bound by the arbitrator's award. Thus, the arbitrator derives from the parties an institutional competence to resolve their dispute — a competence that courts and administrative tribunals lack.[47]

Arbitration plays a vital role in the process of industrial self-government. That process begins with the negotiation of a collective bargaining agreement, which usually is effective for several years. During the term of the agreement, there inevitably will arise issues that were not foreseen, disputes over the applicability of the agreement to particular situations, disputes over the facts giving rise to particular applications of the agreement, and matters that the parties deliberately left vague in the agreement because they did not consider them to be sufficiently important to prevent reaching agreement and they either expected or hoped that disputes over these matters would not actually arise.

When these issues of contract interpretation or application arise, the parties attempt to negotiate their resolution through the grievance procedure. If, however, they are unable to settle a matter, their agreement to submit it to binding arbitration effectively means that the contract means whatever the arbitrator says it means.[48] Arbitration thus plays a small but vital role in the continuing process of collective bargaining between employer and union. Arbitration creates a private common law of the workplace, based on the parties' contract,[49] but subject to change by the parties' subsequent agreement.[50]

Collective bargaining agreements may be enforced through litigation, but arbitration is the uniformly preferred alternative. Private control of the arbitration process insures that it will be quicker and less expensive than litigation. If one arbitrator is not available to hear a case in a timely fashion, the parties may agree to select another arbitrator who is. The parties may, and often do, control costs by dispensing with briefs and transcripts, and even by specifying the form and length of the arbitrator's award. Formal discovery,

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[46] Of course, courts and state labor relations boards may also resolve union security fee disputes. A union that relies on such procedures, however, runs the risk that it will be held to not satisfy *Hudson*. *See, e.g.*, *Hudson*, 475 U.S. at 307–08 n.20; *Gilpin*, 643 F. Supp. at 737–38.

[47] For a discussion of the role of private selection of the arbitrator and control of the process, see Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 926–31 (1979).

[48] *See, e.g.*, United Paperworkers Int'l Union v. Misco, 108 S. Ct. 364, 370–71 (1987).

[49] *See generally* Cox, *Reflection Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

[50] Even an agreement to overrule the arbitrator retroactively is valid under appropriate circumstances. *See* Strick Corp., 241 N.L.R.B. 210, 216–20 (1979).

one of the most expensive aspects of litigation, is rare in grievance arbitration.[51] Information exchanges are informal, reinforced by the statutory duty to disclose relevant information upon demand, unless the interests in confidentiality outweigh the interests in disclosure.[52]

Grievance arbitration protects workplace peace by providing an alternative to the threatened and actual use of economic weapons to resolve disputes that arise during the term of the contract. The employer's agreement to binding arbitration is viewed as the quid pro quo for the union's agreement not to strike.[53] In his seminal presentation of a general theory of the collective bargaining agreement, Professor Feller concluded that the primary obligations assumed by the parties are to comply with the grievance and arbitration machinery and to refrain from striking.[54]

The process of grievance arbitration may benefit the parties' relationship, even if the grievance clearly lacks merit. The parties may bring the case to arbitration because they deem it politically or otherwise preferable for the final responsibility for resolution to rest with the arbitrator.[55] The hearing of the grievance may have therapeutic value, even though there is little doubt as to its outcome.[56]

B. *Union Security Arbitration*

Union security fee arbitration serves some private industrial relations interests that are similar to those that its grievance counterpart serves. For example, it is common for fee payers to file objections, not because they seek to challenge the union's claim that its expenditures are chargeable, but because they are dissatisfied with the wisdom of those expenditures or with the adequacy of representation that those expenditures have purchased.[57] Challenges on such grounds, though legally insufficient to state a cause of action in court, are nevertheless processed through the objection and arbitration procedure. The processing of these objections may have therapeutic value in the workplace similar to that which the processing of frivolous grievances provides.

Arbitration is preferable to litigation as a method for resolving security fee disputes. Indeed, given the nature of a union security fee objection, its resolution through litigation may be unworkable. Whereas complaints in lawsuits must contain brief statements providing the bases for their claims and must be based on reasonable beliefs in the claims,

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[51] *See generally* O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 137–46 (2d ed. 1973); R. FLEMING, THE LABOR ARBITRATION PROCESS 62–63 (1965). Nevertheless, the duty of employers and unions to bargain in good faith requires that they supply each other with information relevant to contract administration. NLRB v. Acme Indus. Co., 385 U.S. 432, 435–36 (1967). At least one prominent arbitrator and scholar has argued for formal prehearing discovery in labor arbitration. Jones, *The Accretion of Federal Power in Labor Arbitration — The Example of Arbitral Discovery*, 116 U. PA. L. REV. 830 (1968).

[52] *See* Detroit Edison Co. v. NLRB, 440 U.S. 301, 317–20 (1979).

[53] Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 248 (1970); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

[54] Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 792–99 (1973).

[55] F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 12 (4th ed. 1985).

[56] United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 568 (1960) (citing Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247, 261 (1958)).

[57] *See, e.g.*, Local 46, Public Serv. Employees' Union and Campbell, slip op. at 4, 13 n.4, 16 n.6, (March 18, 1987), (Nathan, Arb.).

union security fee objectors need not state any bases for their objections. Moreover, whereas complaints will proceed to trial only if there are disputed issues of material fact, objections trigger a union's duty to prove to an impartial decisionmaker that its fee is based only on chargeable expenditures. Objectors are not required to provide reasons for triggering this duty. In fact, their reasons may be frivolous. Nevertheless, under *Hudson*, the objector has a first amendment right to put the union to its proof.[58]

Many of the practical advantages of grievance arbitration over breach of contract litigation also apply to union security fee arbitration. The absence of formal discovery and of other formal procedures, and the ability to demand priority from the arbitrator in scheduling and issuing the award, enable union security fee arbitration to resolve objections more quickly and more cheaply than litigation. Indeed, the expense of litigation will usually greatly exceed the amount of fees in dispute. The absence of any burden on the objector to state reasons for the objection effectively makes a fee contest available upon demand by the objector. Absent an arbitration alternative, the costs of administering a union security provision would threaten the provision's existence. Yet, when a collective bargaining statute authorizes union security fees, the legislature has determined that the stability, financial and otherwise, that a union attains by eliminating "free riders" contributes to positive labor relations.[59] Union security fee arbitration helps secure these benefits.

Nevertheless, union security fee arbitration does not primarily function to further the private purpose of efficiently administering the union security clause, while providing a mechanism for the cathartic venting of employees' frustrations with their exclusive bargaining representative. Instead, it primarily functions to further the public purpose of resolving the tension between the first amendment rights of objectors and of non-objectors.[60] Consequently, the development of a theory of the legal status of union

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[58] Chicago Teachers Union, Local 1 v. Hudson, 475 U.S. 292, 306 (1986). It appears that the Court in *Hudson* rejected litigation as the principal means of resolving union security fee disputes. Were litigation to be the principal dispute resolution mechanism, an employee's objection would force the union to sue for a judicial validation of its proposed fee. The National Right to Work Legal Defense Fund advocated this approach on behalf of the *Hudson* plaintiffs. The Right to Work Fund argued that the union security fee was an employee debt and that mandatory payroll deduction of the fee amounted to an unconstitutional prejudgment attachment of the employee's wages to satisfy that debt. *Id.* Brief for the Respondents at 6–10. The *Hudson* Court's three-prong standard clearly rejected this approach.

[59] *See infra* note 76 and accompanying text. The judiciary and the legislature have recognized the public interest in the exclusive bargaining representative's financial stability. *See* International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979); S. REP. No. 187, 86th Cong., 1st Sess. 7 (1959) (rejecting "destructive sanctions to a union," and "indirect sanctions such as penalizing the union and its membership for malpractice of its officers" for Labor Management Reporting and Disclosure Act (LMRDA) violations).

To the extent that union security fees encourage employees who would not otherwise do so to join the union, they may provide for a more representative union. One study of an open shop found that senior employees were far more likely to join the union than their junior colleagues. Jermier, Cohen, Powers & Gaines, *Paying Dues: Police Unionism in a "Right-to-Work" Environment*, 25 INDUS. REL. 265, 272 (1986). The result is not surprising. The initial direct economic benefits of unionization may not outweigh the costs of initiation fees and dues. For the senior employee, however, the added direct economic benefits of a union negotiated seniority system far outweigh the costs of dues. *See id.*; Lentz, *The Economics of the Decision to Join a Union*, 1 J. LAB. RESEARCH 377, 381 (1980).

[60] The *Hudson* Court effectively so stated: '[T]he objective must be to devise a way of preventing

security fee arbitration requires an understanding of the nature of these competing first amendment rights.

Almost all union security litigation has focused on the objectors' rights. This litigation has established that collection of a union security fee does not implicate objectors' rights. Fee collection does not impose ideological conformity on employees opposed to the union to any greater extent than does the requirement that employees accept a majority union as their exclusive representative.[61] The union's duty to represent all employees fairly[62] tempers the harshness of the exclusive representation rule.[63] To the extent, if any, that exclusive union representation and the collection of union security fees infringe employees' freedom of association, such indirect infringement is justified by the government's interest in stable and orderly labor relations.[64]

In contrast to fee collection, the expenditure of union security fees does implicate objectors' rights. Where the union spends fees on political or ideological activities, it not only forces employees to pay the costs of setting and administering their terms and conditions of employment, but it also forces them to help finance political or ideological causes with which they might disagree. If the expenditures do not relate to collective bargaining, the coerced employee contributions are not contributing substantially to stable labor relations. Thus, political and ideological expenditures unrelated to collective bargaining directly infringe on employee first amendment rights and the government interest that might justify the infringement is minimal, at best.[65]

Although the Supreme Court consistently has reiterated the above principles concerning fee collection and expenditure, it has not been consistent or clear in expressing its rationale. In its first consideration of the issue, *Railway Employees' Department v. Hanson*,[66] the Court declared flatly that requiring "financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments."[67] The Court reversed the judgment of the Nebraska Supreme Court, which had held that the union shop agreement necessarily infringed employees' first amendment right to freedom of association, particularly where the union engaged in political activity with which employees might disagree.[68] The *Hanson* Court

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compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" 475 U.S. at 302 (*quoting* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 (1977)). As developed *infra* notes 92–94 and accompanying text, to the extent that an objection procedure restricts the Union's ability to require objectors to contribute to the costs of collective bargaining, it restrains the rights of nonobjectors to engage in political and ideological activity.

[61] *See* Railway Employees' Dep't. v. Hanson, 351 U.S. 225 (1956).

[62] Vaca v. Sipes, 386 U.S. 171, 177 (1967); Humphrey v. Moore, 375 U.S. 335, 342 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 337–38 (1953); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 199–203 (1944).

[63] The first Supreme Court cases that recognized the duty of fair representation did so, in part, to avoid constitutional attacks on the exclusive representation principle. *See generally* M. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 347–49 (1988).

[64] *Abood*, 431 U.S. at 222–23; International Ass'n of Machinists v. Street, 367 U.S. 740, 760 (1961).

[65] *Abood*, 431 U.S. at 234–35; *Street*, 367 U.S. at 768–69.

[66] 351 U.S. 225 (1956).

[67] *Id.* at 238.

[68] Hanson v. Union Pac. R.R. Co., 160 Neb. 669, 697, 71 N.W.2d 526, 546 (1955), *rev'd*, 351 U.S. 225 (1956).

did not equate forcing employees to contribute financially to the costs of their collective bargaining representation with unconstitutional forced ideological conformity.[69] It reserved the issue of whether political expenditures over objection would infringe the objectors' rights.[70]

In *Abood v. Detroit Board of Education*, the Court faced a union security fee that a public employer and a public sector union had imposed.[71] The Court rejected the argument that union security in public employment differed from union security in private employment and applied *Hanson* in holding that an agency shop fee was not inherently unconstitutional.[72] The Court held, however, that a public sector union constitutionally could not spend objecting employees' fees on political or ideological activity that did not involve their representation in collective bargaining.[73]

The Court's reasoning in *Abood* injected considerable ambiguity into the conceptual framework for analyzing the constitutionality of union security fees. First the Court reaffirmed *Hanson*'s holding that union security fees do not infringe on first amendment interests and went out of its way to support *Hanson*'s continuing validity against attack by three concurring justices.[74] Immediately thereafter, however, the Court suggested that union security fees necessarily have an impact upon first amendment interests, even when their use is limited to supporting collective bargaining activities. It cited as examples of this first amendment impact potential employee ideological objections to such union negotiated contract provisions as a health insurance plan's coverage of abortion, a no strike clause, a wage scale thought to be inflationary or an anti-discrimination clause.[75] The Court opined that, in light of these examples, union security fees "might well be thought . . . to interfere with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, . . . [b]ut such interference, as exists is constitutionally justified by the legislative assessment" of the union shop's importance to labor relations.[76]

The ambiguity arises from the Court's characterization of fees expended on collective bargaining activity as having an "impact," or being thought to "interfere" with the first amendment right of freedom of association. It is not clear if the Court meant that such fees would violate the first amendment absent the counterbalancing government interests in orderly labor relations. Although the Court's language suggests this conclusion, its defense of *Hanson* immediately preceding this discussion of the "impact" of collective bargaining expenditures on freedom of association suggests the opposite because the *Hanson* Court dismissed the claim of interference with first amendment rights without suggesting any need to balance such rights against government interests supporting the union shop.

Clarification of this ambiguity is essential to determining the scope of a permissible union security fee. If the fee does not interfere with first amendment rights unless the union spends it on political or ideological activity unrelated to collective bargaining, the

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[69] 351 U.S. at 238.

[70] *Id.*

[71] 431 U.S. 209, 212 (1977).

[72] *Id.* at 224, 232.

[73] *Id.* at 235. The Court previously reached the same result through statutory interpretation of the Railway Labor Act in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

[74] 431 U.S. at 220 & n.13.

[75] *Id.* at 222.

[76] *Id.* (footnote omitted).

union need not justify expenditures that are neither political nor ideological. If, however, the fee is permitted only to the extent that the interests in orderly labor relations outweigh the interferences with freedom of association, the union must justify every expenditure in terms of its collective bargaining function.[77]

Clarification of the *Abood* ambiguity is also necessary to determine the rigor with which a court or arbitrator must scrutinize union expenditures. If the fee interferes with freedom of association, such interference must be justified by a compelling state interest and must be tailored narrowly so that it is no greater than what is necessary to effectuate that interest.[78] If, however, no interference with first amendment rights arises unless the expenditures are political or ideological, then a court or arbitrator will review all other expenditures, if at all, under a reasonable or rational relationship test.

The Court had an opportunity to clarify the *Abood* ambiguity when it faced a variety of challenged union expenditures in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*.[79] Instead of clarifying the issue, however, the Court further muddied the waters. The *Ellis* Court characterized the union security fee as "a significant impingement on First Amendment rights . . . justified by the governmental interest in industrial peace."[80] But the Court did not require the union to establish that it had narrowly tailored the challenged expenditures to advance the compelling interest in industrial peace. It held, in a constitutionally based interpretation of the Railway Labor Act, that a union may charge objectors for expenditures that "are necessarily or reasonably incurred for the purposes of performing the duties of an exclusive representative."[81]

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[77] In *Hudson*, the Seventh Circuit viewed the fair share fee as inherently infringing on the objector's liberty interest in free association. 743 F.2d at 1193. Although such a deprivation of liberty could be constitutionally justified by the government's interests in orderly labor relations, in the court's view, it could not occur without affording the objector a due process hearing replete with procedural safeguards. *Id.* at 1192–93. In the court's view, those safeguards were needed to confine the fee to collective bargaining expenditures regardless of whether they were political or ideological. *Id.* at 1192.

The Supreme Court majority found it unnecessary to address the Seventh Circuit's deprivation of liberty analysis and its underlying view that even nonpolitical and nonideological expenditures are unconstitutional unless they are germane to collective bargaining. *Hudson*, 475 U.S. at 299–301. In a concurring opinion, Justice White, joined by Chief Justice Burger, labelled the Seventh Circuit's view "[u]nder our cases . . . very questionable." *Id.* at 311 (White, J., concurring). Nevertheless, the Sixth Circuit has read *Hudson* as holding that *any* security fee infringes the first amendment rights of objectors and that the union is entitled only to those monies that will be spent on collective bargaining activity regardless of whether the expenditure is ideological. Tierney v. City of Toledo, 824 F.2d 1497, 1504–05 (6th Cir. 1987); *But see* Andrews v. Education Ass'n of Cheshire, 829 F.2d 335, 339 (2d Cir. 1987) (characterizing nonmembers' first amendment right as "not to be coerced to contribute funds to support political activities that they do not wish to support").

The difference in amount between a fee that merely excludes political and ideological expenditures unrelated to collective bargaining and one that is strictly limited to collective bargaining expenditures can be quite substantial. *See* Clark, *A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Management Perspective*, 14 J.L. & EDUC. 71, 73 (1985).

[78] *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91–92 (1982); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958).

[79] 466 U.S. 435 (1984).

[80] *Id.* at 455–56.

[81] *Id.* at 448. The Court elaborated:

> Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining

The Court applied this seemingly lenient standard with inconsistent degrees of strictness in evaluating specific expenditures. The Court broadly approved union institutional expenditures, allowing charges for the full costs of conventions and social activities even though political activities were undertaken at those conventions, and allowing charges for union publications as long as they were prorated to exclude charges for political messages in those publications.[82] In contrast, the Court took a very strict view of the degree to which a union may charge for litigation expenses, limiting those charges to cases directly involving bargaining unit employees.[83] The Court questioned charges for litigating the validity of an airline industry mutual aid pact,[84] even though the pact strengthened airline employers' ability to respond to strikes and thereby lessened the union's bargaining power.[85]

> contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. The Court's standard of expenditures reasonably or necessarily incurred as exclusive bargaining representative may permit differing levels of scrutiny, depending on whether the inquiry is into the reasonableness or necessity of the expenditures. *See* DuQuoin Educ. Ass'n and Bosecker, 4 P.E.R.I. ¶ 1064 at IX-254–IX-256 (Ill. Educ. Lab. Rel. Bd. 1988).

[82] *Ellis*, 466 U.S. at 448–50.

[83] *Id.* at 453.

[84] *Id.*

[85] *Ellis*, 685 F.2d 1065, 1073–74 (9th Cir. 1982). The Court also disallowed any charges for organizing outside the employees' bargaining unit, finding that such activity affords only the most attenuated benefits to the already organized fee payers and was beyond the scope of the free rider rationale. 466 U.S. at 451. In so finding the Court did not even discuss the generally recognized view that unions have legitimate concerns with the wages and working conditions existing at competitors of employers whom they have organized. *See, e.g.*, Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) (recognizing that the nonstatutory antitrust exemption may protect a union's legitimate interest in eliminating competition based on substandard wages and working conditions); 2 THE DEVELOPING LABOR LAW 1078 (C. Morris 2d ed. 1983) (discussing legitimate union concerns that union standards not be undermined in the context of what picketing is outlawed by § 8(b)(7) of the National Labor Relations Act, 29 U.S.C. § 158(b)(7)). Instead, the Court relied on Railway Labor Act (RLA) legislative history, observing in particular that B.R.A.C.'s president had assured Congress that unions were not seeking union shop agreements for the purpose of strengthening their collective bargaining power. 466 U.S. at 451. The *Ellis* Court's disallowance of charges for organizing expenses thus appears to be rooted in the RLA and should not govern the constitutionality of such charges in the public sector.

Although public sector employers do not compete in a way that makes employers with substandard wages or working conditions an economic threat to organized employers, the case for allowing public sector unions to charge objectors for organizing expenses is actually stronger than in the private sector. Most public sector unions do not have the right to strike. *See generally* Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1059–60 (1982). State statutes commonly provide interest arbitration in place of strikes as the ultimate method of impasse resolution. *See, e.g.*, ALASKA STAT. § 23.40.200 (1984) (police officers, firefighters, jail and correctional institution personnel, and hospital workers); CONN. GEN. STAT. ANN. §§ 7-473, 7-473c (West Supp. 1988) (municipal employees); DEL. CODE ANN. tit. 19, § 1310 (1985) (state and local workers); HAWAII REV. STAT. § 89–11 (Supp. 1984) (state and local personnel); ILL. REV. STAT. ch. 48, paras. 1607, 1614(g), 1712 (1987) (certain correctional facility employees, police officers, fire fighters and educational personnel); IND. CODE ANN. § 20-7.5-1-13(c) (Burns 1985) (certificated school employees); IOWA CODE ANN. § 90.15 (West 1984) (firefighters); IOWA CODE ANN. § 20.22 (West 1978) (state and local workers); ME. REV. STAT. ANN. tit. 26, § 965(4) (Supp. 1983) (local government workers); ME. REV. STAT. ANN. tit. 26, § 979-D(4) (1974) (state employees); ME. REV. STAT. ANN. tit. 26, § 1026(4) (Supp. 1983) (university personnel); MASS. GEN. LAWS ANN. ch. 150E,

A proper resolution of the *Abood* ambiguity requires examination of different types of union collective bargaining expenditures. Most expenditures of union security fees in the collective bargaining process merely require employees to subsidize the costs of setting their terms and conditions of employment. The examples of first amendment infringements the *Abood* Court cited concerned terms and conditions of employment with which employees might disagree.[86] These terms and conditions do not infringe employees' first amendment rights when they are negotiated with an exclusive bargaining representative any more than they would if the employer promulgated them unilaterally. The possible first amendment infringements raised in *Abood* arise from the principle of exclusive representation, rather than the exaction of a union security fee. Exclusive representation, however, is a legitimate method for a public employer to use in establishing terms and conditions of employment and does not infringe on first amendment rights.[87] When the exclusive representative and employer agree that all employees in the

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§ 9 (West 1982) (state and local employees); MICH. COMP. LAWS ANN. §§ 423.231–423.240 (West 1978) (police and firefighters); MINN. STAT. ANN. § 179A.16 (West Supp. 1988) (essential employees); MONT. CODE ANN. §§ 39-31-310 (state and local personnel), §§ 39-34-101–106 (firefighters) (1987); NEB. REV. STAT. §§ 48-810–819.01 (1984) (state and local personnel); NEV. REV. STAT. § 288.200 (Supp. 1987) (local government employees); N.H. REV. STAT. ANN. § 273-A:12 (1987) (state and local workers); N.J. STAT. ANN. §§ 34:13A-7 (state and local personnel), 34:13A-16(c) (police and firefighters) (West 1988); N.M. STATE PERSONNEL BD. REGULATIONS § 14(c), 2 Pub. Bargaining Cas. (CCH) ¶24,519 (state employees); N.Y. CIV. SERV. LAW § 209 (McKinney 1983) (state and local employees); OHIO REV. CODE ANN. § 4117.14(C)(1) (Baldwin 1983) (state and local employees); OKLA. STAT. ANN. tit. 11, §§ 51-101–113 (West 1978 & Supp. 1987) (police and firefighters); OR. REV. STAT. §§ 243.712(2)(c) (state and local personnel), 243.742 (police, firefighters, and guards at mental and correctional institutions) (1986); PA. STAT. ANN. tit. 43, § 217.4 (Purdon Supp. 1987) (police and firefighters); R.I. GEN. LAWS §§ 28-9.1-7 (1979) (firefighters), 28-9.2-7 (1979) (police), 28-9.3-9 (1979) (teachers), 28-9.4-10 (1979) (municipal workers), 28-9.5-7 (Supp. 1983) (state police), 36-11-9 (1984) (state employees); TEX. REV. CIV. STAT. ANN. art. 5154c-1, §§ 9–15 (Vernon 1987) (police and firefighters); VT. STAT. ANN. tit. 3, § 925 (1985) (state workers), tit. 21, § 1733 (1987) (local government employees); WASH. REV. CODE ANN. § 41.56.450 (Supp. 1988) (police and firefighters); WIS. STAT. ANN. §§ 111.70(4)(cm) (Milwaukee police), 111.77 (non-Milwaukee police and firefighters) (West 1988); WYO. STAT. §§ 27-10-101–109 (1987) (firefighters).

Even where the right to strike is granted, political pressures and other factors may lead the parties to voluntarily employ interest arbitration to avoid or settle a strike. *See* ILL. REV. STAT. ch. 48 ¶¶ 1618 (requiring arbitration where a court has ordered striking public employees back to work), 1713 (prohibiting strikes if the parties have agreed to use interest arbitration) (1987). In interest arbitration the principal factor on which arbitrators most commonly rely is how the wages and working conditions of the bargaining unit at issue compare to those of other employers. Anderson, *Presenting an Interest Arbitration Case: An Arbitrator's View*, 3 LAB. L.J. 745, 750 (1987); Laner & Manning, *Interest Arbitration: A New Terminal Impasse Resolution Procedure for Illinois Public Sector Employees*, 60 CHI. KENT L. REV. 839, 856–57 (1984); Weitzman & Stochaj, *Attitudes of Arbitrators Toward Final-Offer Arbitration in New Jersey*, 35 ARB. J., Mar. 1980, at 25, 31–32. Thus union organizing efforts in other bargaining units, resulting in improved wages and working conditions, can have an impact on wages and working conditions in the fee payers' bargaining unit that is more direct than in the private sector.

[86] *See supra* notes 75–76 and accompanying text.

[87] Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 287–91 (1984). Justice Brennan, who dissented in *Knight*, agrees with the general proposition that exclusive representation does not infringe on first amendment rights. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 177–78 (1976) (Brennan, J., concurring).

The examples of first amendment infringements *Abood* cited are simply products of the exclusive representation collective bargaining process. A fee payer's alleged compelled association with abortion, no strike pledges and wage increases results not from the union security fee, but from

bargaining unit should subsidize the cost of the process of establishing and administering terms and conditions of employment, no inherent infringement of free association rights results, and a broad standard of reasonableness should govern the scope of permissible charges.

Some expenditures, however, while effectuating the union's status as exclusive bargaining representative, are clearly political or ideological, and infringe on objectors' first amendment rights. For example, the *Abood* Court recognized that the collective bargaining process in the public sector extends beyond the bargaining table and grievance hearing room into the appropriate legislative body.[88] To effectuate their representational duties, public sector unions frequently must lobby legislative bodies to ratify collective bargaining agreements and to appropriate sufficient funding. Required legislative ratification of a collective bargaining agreement changes the nature of the union's activity from participation in the administrative establishment of terms and conditions of employment to lobbying on an issue open for political debate. Dissenting employees have

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the fee payer's being bound by the contract negotiated by the union. The establishment of terms and conditions of employment, whether through collective bargaining or by unilateral employer action, does not compel ideological conformity. The union security fee plays an intimate role in funding the collective bargaining exclusive representation process. The union's status as exclusive representative creates its need for and legitimizes its claim to the union security fee. *See* Orr, *The Free Rider and Labor Law: Introduction and Overview*, 1 J. LAB. RES. 285, 286–88 (1980). One cannot distinguish the constitutional validity of the fee from the constitutional validity of the exclusive representation principle.

Professor Harpaz, however, has argued that a union security fee for collective bargaining expenditures cannot be distinguished in a constitutionally significant way from a union security fee for political expenditures. Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 864–67 (1986). She contends that there is no difference between the two in their degree of offensiveness to the individual employee. She maintains that fees for collective bargaining activity discourage individuality to a greater extent than fees for political expenditures. *Id.* at 864. Fees for political expenditures leave employees free to oppose union political causes and may even motivate employees to more active opposition. *Id.* at 867. Fees for collective bargaining activity force employees into dependency on the union, requiring them to work with the union to have their personal views taken into account. *Id.* at 866.

Professor Harpaz is correct that there are many incentives for an employee who wishes to become involved in the workplace to join the union. Although the duty of fair representation places some limits on a union's ability to exclude nonmembers from collective bargaining decisionmaking, *see* Branch 6000, National Ass'n of Letter Carriers v. NLRB, 595 F.2d 808, 811–13 (D.C. Cir. 1979), only union members have the right to run and vote in union elections. 29 U.S.C. § 481(e) (1982). Unions usually limit contract ratification votes to members, a limitation that has received judicial approval. *See* Maurer v. UAW, 105 L.R.R.M. 2883, 2887 (M.D. Pa. 1980); Daigle v. Jefferson Parish School Bd., 345 So. 2d 583 (La. App.), *cert. denied*, 347 So. 2d 260 (La. 1977); Pennsylvania Labor Relations Bd. v. Eastern Lancaster County Educ. Ass'n, 58 Pa. Commw. 78, 83–88, 427 A.2d 305, 308–10 (1981), *cert. denied*, 459 U.S. 838 (1982). *But see* American Postal Workers Union, Headquarters Local 2885 v. American Postal Workers Union, 113 L.R.R.M. 2433, 2434 (D.D.C. 1982), *aff'd mem.*, 766 F.2d 1566 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

This encouragement of union membership, however, does not result from the imposition of union security fees. Rather, it results from the union's collective bargaining activity. It is likely to result whenever an employer recognizes a union, even if the recognition is not exclusive. For example, prior to the enactment of the Illinois Public Labor Relations Act, several public employers in central and southern Illinois recognized unions as bargaining representatives for their members only. In practice, these employers unilaterally imposed the terms reached in negotiation with the union on the nonunion employees. Moreover, there is no first amendment right implicated in the setting of wages, hours and working conditions.

[88] 431 U.S. at 236.

first amendment free speech rights to lobby legislative officials to reject the agreement.[89] Compelling these employees to subsidize their union's lobbying efforts in support of ratification directly infringes their free speech rights. Although the government's interest in labor peace may be strong enough constitutionally to justify this infringement, the scope of permissible charges must be drawn narrowly to limit the infringement to that which is necessary to promote that interest.

The distinction between a very broad range of chargeable expenditures that involve only the setting and administering of terms and conditions of employment and a very narrow range that infringe free speech rights may explain the apparent inconsistencies in *Ellis*. Such union institutional expenditures as conventions and social activities facilitate the union's ability to carry out its role as bargaining representative and impose no ideological conformity on dissenting employees.[90] Litigation, however, is a means of petitioning the government that the first amendment protects.[91] Consequently, compelled subsidization of union litigation directly infringes objectors' corresponding first amendment right to refrain from litigation. The need to tailor this infringement narrowly mandates that the range of litigation expenditures chargeable to objectors be limited to those directly involving bargaining unit employees.

Union security fee arbitration thus serves the public purpose of protecting the objectors' first amendment rights to be free of compelled subsidization of such union political and ideological activities as lobbying, litigation and support for candidates for public office except where the activity is directly related to the union's function as bargaining representative. The constitutionally significant role of the fee arbitration, however, is not limited to safeguarding objectors' rights. The procedure also safeguards the rights of union members and nonobjecting fee payers.

Nondissenting employees have first amendment rights to associate as a union and to pool their resources to support political and ideological causes.[92] The filing of an objection, however, temporarily restrains these rights. When employees object to the amount of their union security fees, the union must place the fees in escrow to insure that objectors' money will not be used, even temporarily, for nonchargeable political and ideological purposes.[93] The escrow, however, temporarily deprives the union of access to funds that will be used for chargeable expenditures. The union's deprivation of funds to which it will ultimately be entitled should not exceed that which is reasonably necessary to protect the dissenting employees' rights not to subsidize objectionable expenditures. The *Hudson* Court recognized the need for this limitation in holding that a union need

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[89] *Madison Joint School District*, 429 U.S. at 175.

[90] In her concurring opinion in Roberts v. United States Jaycees, 468 U.S. 609 (1984), Justice O'Connor interpreted *Abood* as distinguishing union collective bargaining activity as commercial association outside the first amendment from union political activities as ideological association within the first amendment. *Id.* at 638 (O'Connor, J., concurring). She characterized *Ellis* as a case that applied the commercial-ideological association distinction to the specific expenditures at issue. *Id.* For an argument that even political expenditures of union security fees should not violate the first amendment, see Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 70–76 (1983).

[91] NAACP v. Button, 371 U.S. 415, 429–31, 437 (1963).

[92] *See* International Ass'n of Machinists v. Street, 367 U.S. 740, 773 (1961); Shelton v. Tucker, 364 U.S. 479, 485–87 (1960); McLaughlin v. Tilendis, 398 F.2d 287, 288–89 (7th Cir. 1968).

[93] *See supra* notes 22, 39–40 and accompanying text.

not escrow that portion of the fee that an independent audit establishes to be beyond reasonable dispute.[94]

Even when the union reduces the escrow as *Hudson* permits, the union will usually be temporarily deprived of some funds to which it ultimately will be found to be entitled. These eventual entitlements will include an escrow cushion against arithmetic errors and funds representing expenditures reasonably disputed, but ultimately found to be chargeable.

During the period that the union escrows the objectors' fees, it must temporarily divert fees that the union supporters have paid, and that should be available for political and ideological purposes, to cover chargeable expenditures. The longer objectors' fees remain in escrow, the greater the infringement on non-objectors' first amendment rights. A reasonably prompt arbitration procedure minimizes this infringement. Thus, union security fee arbitration serves the public purpose of maintaining an appropriate balance between the rights of objecting employees and the rights of other employees and of the union.

Recognition of the primarily public purpose of union security fee arbitration merely lays the foundation for discerning the legal status of the procedure. An arbitrator can act only if he or she has the authority to act. Identifying the source of that authority is crucial to determining the procedure's legal status.

III. The Source of the Arbitrator's Authority

Although the *Hudson* Court indicated that arbitration can fulfill a union's duty to provide a reasonably prompt neutral resolution to employees' objections, it offered no comment on the source of the arbitrator's authority. Shortly after the *Hudson* decision, the American Arbitration Association adopted special rules governing the arbitration of union fee disputes.[95] Unfortunately, these rules also fail to address the authority issue. The AAA Rules require only a request from the union for the AAA to appoint an arbitrator.[96] The rules do not require the employees' consent, and expressly permit the hearing to proceed in the absence of any party who was given due notice.[97]

If objecting employees agree to arbitrate their objections, that agreement serves as the source of the arbitrator's authority. If an arbitrator is to proceed *ex parte* and without the objectors' consent, as the AAA Rules authorize, however, the source of arbitral authority must be clearly delineated.

The first post-*Hudson* arbitration of fair share fees charged by the American Federation of State, County and Municipal Employees (AFSCME) in Illinois illustrates the need to delineate the source of the arbitrator's authority.[98] The arbitrator's opinion reveals that ninety-five nonmembers in bargaining units that AFSCME locals represented

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[94] "We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain." *Hudson*, 475 U.S. at 310.

[95] *See supra* note 44.

[96] AAA Rules, *supra* note 44, Rule 2.

[97] *Id.* Rule 13.

[98] Denham and AFSCME Council 31, AAA Case No. 51673-000-1-86-L, slip op. (Nov. 29, 1986) (Duda, Arb.) [hereinafter AFSCME-Illinois Award].

objected to the amounts of their fair share fees.[99] AFSCME invoked the American Arbitration Association's procedures, and AAA appointed an arbitrator.[100]

The arbitrator and AFSCME took numerous steps to facilitate the objectors' participation in the hearing. They scheduled several hearing dates, including Saturdays, in Chicago and Springfield. AFSCME made its documentary evidence available for inspection by the objectors for several weeks prior to the hearing.[101] The arbitrator invited objectors and the union to submit prehearing written statements. The arbitrator also sent notice of all procedures to each objector and advised each of his or her right to participate in the hearing, cross-examine union witnesses and present evidence.

Despite these efforts, only thirteen objectors appeared, and only eight actively made presentations at the hearings.[102] The arbitrator's award purports to bind all ninety-five objectors and also orders prospective relief for nonmembers who failed to object.[103] The arbitrator, however, did not address the source of his authority to bind objectors other than those who, by their appearance at the hearing, consented to the proceeding. Although two state agencies with jurisdiction over Illinois public employees have reviewed the award, neither has addressed the authority issue.[104]

Except where compelled by statute, arbitration is a voluntary process the parties resort to by agreement. The contract alone determines the scope of the arbitrator's authority.[105] Although the parties to the arbitration need not always be the original parties to the agreement, they must be bound by the agreement to arbitrate for the arbitrator to have authority to resolve their dispute.[106]

The source of the union security fee arbitrator's authority, accordingly, must be the collective bargaining agreement. No other agreement binds the objectors. In some cases, the collective bargaining agreement will expressly detail the union security fee objection procedure, and no issue concerning the arbitrator's authority will arise. These cases will probably be rare. Employers tend to view the dispute over union security fees as one that is limited to the union and the employees, and are reluctant to become involved in developing the fee objection procedure.[107]

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[99] *Id.* at 19.

[100] *Id.* at 20, 21.

[101] *Id.* at 21–22.

[102] *Id.* at 22, *see also* AFSCME Council 48, slip op. (May 13, 1987) (Weisberger, Arb.) (none of the objectors participated in the proceeding).

[103] *Id.* at 100.

[104] Rochon and AFSCME Council 31, 3 P.E.R.I. ¶ 3031 (Ill. Local Lab. Rel. Bd. 1987); Lovell and AFSCME, No. 86-FS-0051-S (Ill. Educ. Lab. Rel. Bd. Executive Director, March 9, 1987); Linde and AFSCME, No. 86-FS-0014-C (Ill. Educ. Lab. Rel. Bd. Executive Director, March 9, 1987).

[105] United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[106] For example, in appropriate cases, arbitrators may have authority over successor employers. John Wiley & Sons v. Livingston, 376 U.S. 543, 548 (1964). Similarly where a dispute arises under the contract between an employer and one union but potentially affects rights under a contract between the employer and a second union, the arbitrator may have authority over the second union. CBS v. American Recording & Broadcasting Ass'n, 293 F. Supp. 1400, 1402–03 (S.D.N.Y. 1968), *aff'd*, 414 F.2d 1326, 1329 (2d Cir. 1969).

[107] *But see* Kay, Reinhold & Andreola, *Legal Problems in Administering Agency Shop Agreements — A Management Perspective*, 13 J.L. & EDUC. 61 (1984) (recognizing that the real dispute in union security cases is between union and fee payer but suggesting that because the employer can be dragged into the battle, the employer should negotiate fee objection procedures into the collective bargaining agreement).

In other cases, the collective bargaining agreement may expressly refer to the union's fee objection procedure. These cases may occur with increasing frequency. Employers usually insist on "wall-to-wall" indemnification clauses, in which the union agrees to hold the employer harmless for liability and costs incurred in defending union security fee contests.[108] In light of *Hudson*, indemnification clauses may begin to contain recitals in which the union recognizes its obligation to provide procedural safeguards for fee payers.

Collective bargaining agreements often refer expressly to documents beyond the four corners of the contract. These documents include employer-generated work rules and union-generated rules governing priority in hiring hall referrals. Express references in collective bargaining agreements to union generated fee objection procedures certainly empower an arbitrator to resolve fee challenges in accordance with those procedures.

In many, and perhaps most, cases, however, the collective bargaining agreement will not refer expressly to the fee objection procedure. The union, recognizing that it must provide a procedure that meets the *Hudson* standards as a prerequisite to collecting any fee, will establish and implement one unilaterally. Even in these cases, for the reasons developed below, the collective bargaining agreement should serve to empower the arbitrator to resolve the fee dispute.

Although most view the administration of union security fees as primarily a union concern, the employer may not divorce itself from the issue.[109] The potential infringement on employees' first amendment rights results from the nature of the employer, not from the nature of the union. The state action necessary to implicate the first amendment exists because the union security clause is part of a contract with a government entity that requires payment of the fee as a condition of retaining public employment.

Indeed, in *Hudson* the Seventh Circuit held that the employer had the primary duty to resolve the fee dispute.[110] That burden has been relieved by the Supreme Court's approval of arbitration as a fee dispute resolution procedure.[111] What remains is the employer's burden to ensure that a constitutionally adequate procedure is in place, even if the employer plays no role in its development or administration.

A union security clause in a contract with a public employer must provide for an objection procedure that complies with the *Hudson* standards, or else it is unconstitutional. When a contract is susceptible to two interpretations, one that renders the contract unenforceable and another that renders it enforceable, the latter interpretation usually should prevail.[112] Thus, where the contract is silent concerning union security fee objec-

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[108] *See* Clark, *A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Management Perspective*, 14 J.L. & EDUC. 71, 83 (1985) (recommending that employers include such indemnification language in the union contract).

[109] In *Hudson*, the Court characterized the defective procedures it found as "used by the Chicago Teachers Union and approved by the Chicago Board of Education . . . ." 475 U.S. at 302. An indemnification clause shifts liability as between the employer and the union, but cannot affect the employer's constitutional duty to dissenting employees. Dixon v. City of Chicago, 609 F. Supp. 851 (N.D. Ill. 1987).

[110] *Hudson*, 743 F.2d at 1194.

[111] *See supra* note 43 and accompanying text.

[112] *See, e.g.*, Sun Oil Co. v. Vickers Refining Co., 414 F.2d 383, 390 (8th Cir. 1969); Maryland Casualty Co. v. Fidelity & Casualty Co., 71 Cal. App. 492, 497, 236 P. 210, 213 (1925); Perbal v. Dazor Mfg. Corp., 436 S.W.2d 677, 689 (Mo. 1968); Mason & Hanger-Silas Mason Co., 75 Lab. Arb. (BNA) 1038, 1040 (1980) (Shearer, Arb.); Stokely-Van Camp, Inc., 71 Lab. Arb. (BNA) 109, 112 (1978) (Snow, Arb.).

tion procedures, but the union has implemented constitutionally adequate procedures, those procedures should be implied into the contract. To accomplish this, it should be implied that the parties have delegated to the union the task of developing adequate procedures in the first instance. When the union develops those procedures, they become part of the union security clause of the collective bargaining agreement.

This approach of implying the union's fee objection procedures into the collective bargaining agreement requires that the union security clause be interpreted in the context of first amendment law as developed in *Hudson*. A debate has raged for several decades among arbitrators and scholars over the use of "external law" in interpreting collective bargaining agreements.[113] This debate, however, should not preclude reliance on first amendment law in interpreting union security clauses.

The debate over use of external law focuses on the role of the arbitrator. Those who contend that arbitrators should confine their awards to the contract, and not take external law into account, argue that the parties are submitting their dispute for contractual interpretation, and not legal opinion.[114] They further maintain that interpretation of external law is beyond the arbitrator's authority and expertise.[115] They urge that if the arbitrator's award forces a party to violate the law, it is up to the courts to deny enforcement of the award.[116]

Whether a union-generated fee objection procedure should be implied into an otherwise silent union security clause in the collective bargaining agreement is an issue of arbitral authority. Issues of substantive arbitrability are issues for the courts, rather than for the arbitrators.[117] This minimizes, and perhaps totally eliminates, the danger of inexpert or unauthorized arbitrators interpreting external law.[118] Moreover, in deciding issues of arbitrability, courts presume that a given dispute is arbitrable.[119] To overcome that presumption, the court must be able to state with positive assurance that the dispute is beyond the arbitrator's authority. When presented with a "silent" union security clause and a union-generated fee objection procedure, a court cannot be positive that an employee's fee objection is not arbitrable.

The employer's reaction to a union-generated fee objection procedure may strengthen the case for constructively incorporating it into a collective bargaining agreement's union security clause. Where the employer collects the fee through mandatory payroll deductions, the employer owes a constitutional duty to the employees not to make such deductions absent an adequate fee objection procedure.[120] By making payroll deductions, the employer indicates its approval of the union's procedure. This approval strengthens the implication of the procedure into the collective bargaining agreement.

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[113] For the views of the three leading principals in the debate, see Howlett, *The Arbitrator, the NLRB and the Courts*, 20 NATIONAL ACADEMY OF ARBITRATORS PROC. 67, 83–103 (1967); Meltzer, *Rumination About Ideology, Law, and Arbitration*, 20 NATIONAL ACADEMY OF ARBITRATORS PROC. 1, 14–19 (1967); Mittenthal, *The Role of Law in Arbitration*, 21 NATIONAL ACADEMY OF ARBITRATORS PROC. 42 (1968).

[114] Mittenthal, *supra* note 113, at 49.

[115] *Id.* at 48.

[116] *Id.* at 54–55.

[117] A.T.& T. Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986).

[118] The issue whether to infer a union's fee objection procedure most likely will arise in court proceedings in which a party seeks to compel arbitration or to collaterally attack the award.

[119] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960).

[120] *See supra* notes 109–11 and accompanying text.

If the union accomplishes its fee collection through threat of discharge for nonpayment, the employer's role is more passive unless and until the union demands an employee's termination. Nevertheless, the employer continues to owe employees a constitutional duty to ensure the existence of adequate objection procedures. An employer's failure to object to union collection efforts suggests at least constructive employer approval of the union's procedure. This approval also strengthens the implication of the procedure into the collective bargaining agreement.

Thus, regardless of whether the collective bargaining agreement expressly refers to the union security fee arbitration procedure, the agreement provides the source of the arbitrator's authority. This conclusion influences the relationship between union security fee arbitration and litigation. That relationship is explored in Sections IV and V below.

IV. May an Objector Bypass the Arbitration Procedure?

The *Hudson* decision held only that employees must be provided with a procedure that results in a reasonably prompt, impartial resolution of their objections.[121] The *Hudson* Court did not state whether employees must use the procedure. In a concurring opinion, Justice White, joined by Chief Justice Burger, suggested that employees may be required to exhaust arbitration remedies prior to filing suit.[122] Prohibiting employees from bypassing arbitration raises four issues: whether there is authority to bind the employee to use arbitration, whether such a requirement is consistent with section 1983 of the 1871 Civil Rights Act, whether such a requirement is consistent with existing case law governing fee objections, and whether it is constitutionally permissible to specify the form an objection must take.[123]

A. *Is the objector bound to arbitrate?*

Typically, the union drafts the fee objection procedure, and its executive board or other governing body approves the procedure in accordance with the union's constitution and bylaws. A union's constitution is a contract between the union and its members.[124] Members are bound to abide by the constitution and all rules promulgated thereunder.[125]

The most common union security provision in the public sector is the agency shop or fair share fee. Objecting fee payers cannot be union members. Therefore, the union's constitution or rules specifying the method for resolving fee disputes cannot bind them.[126]

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[121] *See supra* note 41 and accompanying text.

[122] *Hudson*, 475 U.S. at 311 (White, J., concurring).

[123] The ability to bypass arbitration may also be significant for the objector who arbitrates and then successfully attacks the arbitration award in section 1983 litigation. If the objector could have bypassed arbitration, the court may deny the objector attorneys' fees expended in the arbitration. The court probably will award attorneys' fees if resort to arbitration is mandatory. *Compare* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 71 (1980) (attorneys' fees awarded for administrative proceedings pursuant to Title VII of the Civil Rights Act) *with* Webb v. Dyer County Bd. of Educ., 471 U.S. 234, 240–41 (1985) (attorneys' fees not awarded for administrative proceedings pursuant to section 1983, and expressly distinguishing *Carey* because the administrative proceeding in *Carey* was required by statute).

[124] M. Malin, Individual Rights Within the Union 4 & n.11 (1988).

[125] *See generally id.* at 4–22.

[126] *Cf.* Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 295 (1st Cir. 1978); Mendicki v. International Union, UAW, 61 L.R.R.M. 2142, 2143 (D. Kan. 1965). *But see* Reid v. International

Even in union shops where all employees are members, objectors may not be bound by union rules on fee objections. The only membership requirement that a union may impose on employees is payment of that portion of dues that supports chargeable expenditures.[127] Compliance with the union constitution, bylaws or rules is not a membership obligation on which a union may insist once a "member" makes known his or her objection to doing anything other than making the minimum payment.

The collective bargaining agreement, however, binds all employees, regardless of membership status. Moreover, because a court should interpret the collective bargaining agreement in a manner that preserves the agreement's constitutionality, it must read the union security clause to authorize charging objectors only those fees that do not infringe their first amendment rights. Thus, a fee objection that challenges the fee amount the union is seeking to charge, in essence, alleges a breach of the collective bargaining agreement. If the fee objection procedure is expressly or impliedly incorporated into the contract, arbitration provides the remedy for the alleged breach. Although this alleged breach and its remedy differ in several respects from the traditional grievance, those differences do not justify treating this procedure differently from the arbitration remedies collective bargaining agreements traditionally provide to resolve union grievances against the employer.

One such difference arises because the objection, in effect, alleges a *proposed* union breach of contract that the arbitration procedure will prevent. It is expenditure of the fee on nonchargeable items that violates the first amendment and, by implication, the contract. Under *Hudson*, the objection automatically triggers the escrowing of at least that portion of the objector's fee that can reasonably be disputed. The escrow prevents the union from immediately spending the fee, and thereby breaching the contract.

In contrast, the typical grievance arbitration involves a union challenge to an alleged employer breach that has already occurred. Occasionally, however, an employer will announce an action and, in response to a union's grievance, agree to delay implementation of the action until the grievance is resolved. Such a stay of implementation does not deprive the arbitrator of jurisdiction or the union of its obligation to exhaust the grievance procedure.

Union security arbitration is analogous to grievance arbitration where the employer has agreed to stay implementation of the action being grieved. When a union notifies potential objectors of its fees, it is announcing the expenditures it plans to make with those fees. Escrowing postpones implementation of those expenditures pending resolution of the objections. Escrowing does not deprive the arbitrator of jurisdiction or the objectors of their obligation to exhaust the arbitration procedure.

Union security fee arbitration also differs from grievance arbitration because it has its own procedure, separate from the traditional grievance procedure. This separation is made necessary by the alignment of the parties, rather than by the dispute resolution function that fee arbitration serves. The union exclusively controls invocation of the traditional grievance procedure, and the parties to the process are the union and the employer. Employees often have no standing in their own right, but may only act through their union.[128] In contrast, the employees invoke the union fee arbitration procedure,

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Union, UAW, Dist. Lodge 1093, 479 F.2d 517 (10th Cir. 1973) (requiring nonmembers to use intra-union fee objection procedure), *cert. denied*, 414 U.S. 1076 (1973).

[127] *See supra* note 2.

[128] *See generally* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 175–80 (4th ed. 1985).

and they and the union control it. The employees have individual standing, and the union opposes them, rather than represents them.

The alignment of the parties in union security fee arbitration does not justify an exhaustion rule different from that applied to traditional grievance arbitration. Occasionally, a traditional grievance procedure provides for employee challenges to union conduct. For example, in an exclusive hiring hall setting, an employee may challenge the union's determination of referral priorities. In such a case, the employee is obligated to exhaust the grievance procedure before suing the union.[129]

Employees contesting alleged breaches of collective bargaining agreements must attempt to use available grievance and arbitration procedures.[130] The Supreme Court has articulated exceptions to this general rule, but none should apply to the union security fee procedure absent special circumstances. An employee may bypass the traditional contractual grievance and arbitration remedies when the employer effectively repudiates the contractual procedures, or where the union's wrongful refusal to process the grievance has prevented the employee from exhausting his or her contractual remedies.[131] The Court also has exempted situations where an employer-union conspiracy renders resort to contractual remedies futile.[132]

None of the conditions in which employees are permitted to bypass arbitration will prevail, however, if the union security fee objection procedure complies with the *Hudson* standards. If the procedure operates impartially and promptly, there is no reason to assume that it will be futile or that the union has repudiated it. Moreover, because the employees invoke the procedure and provide for their own representation in the hearing, the excuse of a union's wrongful refusal to process a grievance is irrelevant. Thus, if the fee objection procedure is viewed as a contractual remedy, the collective bargaining agreement provides the necessary authority for binding objecting employees to an exhaustion requirement.

B. *Does section 1983 require that employees be permitted to bypass the union security fee arbitration procedure?*

Most union security fee litigation is brought pursuant to section 1983 of the Civil Rights Act of 1871. Beginning with *McNeese v. Board of Education*,[133] the Supreme Court consistently has held that a plaintiff need not exhaust state administrative remedies before bringing a section 1983 suit. In *McNeese* several black students brought a section 1983 action, alleging that racial segregation of their school system violated their rights under the fourteenth amendment.[134] Under state law, the plaintiffs could have complained to the state superintendent of public instruction who, after a hearing, could have sustained the complaint and referred it to the state attorney general with a request to

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[129] Kusterns v. Local Union No. 433, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, 175 Cal. Rptr. 874, 876–78 (App. 1981); *see also* Hammons v. Adams, 783 F.2d 597 (5th Cir. 1986) (union has duty of fair representation to process grievance challenging referral priorities). *Hammons* is criticized in Moreland & Stapp, *A Primer on Hiring Halls in the Construction Industry*, 37 LAB. L.J. 817, 830 (1986).

[130] Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

[131] Vaca v. Sipes, 386 U.S. 171, 185 (1967).

[132] Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969).

[133] 373 U.S. 668 (1963).

[134] *Id.* at 669–70.

initiate suit. The lower courts dismissed the section 1983 complaint for failure to exhaust these state administrative remedies.[135] The Supreme Court reversed, reasoning first that section 1983 provided a federal remedy that supplements the state remedy.[136] Therefore, the Court held that invoking the state remedy was not a prerequisite to invoking the federal remedy.

The Court further reasoned that the section 1983 action sought to vindicate federal rights.[137] The legality of the school district's conduct under state law was, in the Court's view, irrelevant to the plaintiffs' federal claim. Finally, the Court observed that the state administrative remedy was deficient.[138] The most the administrative procedure could produce was a request to the state attorney general to litigate the matter in state court.[139]

In several subsequent cases, the Court refused to require section 1983 plaintiffs to exhaust state remedies.[140] Finally, in *Patsy v. Board of Regents*, the Court declared that its cases had established a flat rule that section 1983 plaintiffs need not exhaust state administrative remedies.[141] The Court rejected a Fifth Circuit approach that required exhaustion of state administrative remedies under very limited circumstances.[142] The Court offered three reasons in support of its decision.

First, the Court examined the legislative history of the Civil Rights Act of 1871. The Court found that the Civil Rights Act was a "crucial ingredient in the basic alteration of our federal system accomplished during the Reconstruction Era," which established the federal government as the principal guarantor of constitutional rights and gave to the federal courts a paramount role in protecting those rights.[143] This realignment of federal and state authority was necessary because state governments were unwilling or unable to protect individuals' civil rights.[144] Thus, the Court concluded, an exhaustion requirement was inconsistent with the purpose underlying section 1983.[145]

Second, the Court relied on the Civil Rights of Institutionalized Persons Act,[146] which imposed a limited exhaustion requirement for prisoners bringing section 1983 suits.[147] The Court observed that Congress assumed that, absent specific legislation, no

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[135] *Id.* at 670.

[136] *Id.* at 671–72.

[137] *Id.* at 674.

[138] *Id.* at 674–75.

[139] *Id.* at 675.

[140] *See* Barry v. Barchi, 443 U.S. 55, 66 (1979); Gibson v. Berryhill, 411 U.S. 564, 574–75 (1973); Carter v. Stanton, 405 U.S. 669, 670–71 (1972); Wilwording v. Swenson, 404 U.S. 249, 251 (1971); Houghton v. Shafer, 392 U.S. 639, 640–41 (1968); Damico v. California, 389 U.S. 416, 417 (1967).

[141] 457 U.S. 496, 500–01 (1982).

[142] *Id.* at 498–516. The Fifth Circuit required exhaustion where five conditions were met: (1) an orderly system of review was provided; (2) relief commensurate with the claim could be granted; (3) relief was available within a reasonable period of time; (4) the procedures were fair, not overly burdensome and would not be used to discourage legitimate claims; and (5) interim relief was available to prevent irreparable injury and preserve the plaintiff's rights during the administrative process. 634 F.2d 900, 912–13 (5th Cir. 1981), *rev'd*, 457 U.S. 496 (1982).

[143] 457 U.S. at 503.

[144] *Id.* at 503–04.

[145] *Id.* at 507.

[146] 42 U.S.C. § 1997e (1982).

[147] *Patsy*, 457 U.S. at 508.

exhaustion of state remedies would be required.[148] The legislatively imposed exhaustion scheme was particularly detailed and was expressly limited to prisoner cases.[149]

Finally, the Court considered the policy issues underlying a section 1983 exhaustion requirement and concluded that the resolution of those matters was best left to Congress. The Court considered such issues as the standards for judging the adequacy of administrative remedies, tolling and time limit requirements, res judicata and collateral estoppel effects of administrative findings and the availability of interim judicial relief pending an administrative hearing.[150] The Court concluded that legislation could resolve these issues more efficiently than judicial decision could.

It is facially appealing to suggest that, because a section 1983 claimant need not exhaust state administrative remedies, *a fortiori*, a fee objector need not exhaust contractual arbitration remedies. This suggestion might find reinforcement in some of the traditional reasons for bypassing administrative remedies. Courts often view resort to such remedies as delaying the plaintiff's access to federal protection of his or her constitutional rights.[151] Particularly where a citizen alleges a restraint of his or her exercise of first amendment rights, the legal system should not deny that person immediate access to a life-tenured federal judge.

Closer scrutiny of the fee objection procedure, however, reveals that the courts should *not* allow a fee objector to bypass arbitration. If the union complies with *Hudson*, it automatically escrows at least that portion of the objector's fee that is reasonably subject to dispute. To the extent that monies to which the union is ultimately entitled are escrowed, and the union is required to divert funds it would have spent on political activity to replace the escrowed money, the objection procedure restrains the first amendment rights of nonobjectors. A reasonably prompt arbitration procedure minimizes this restraint by confining its duration to that which is necessary to protect the objectors' rights. Allowing objectors to bypass arbitration will prolong the restraint on nonobjectors' rights through the delays inherent in the litigation process.

Moreover, objectors who wish to bypass arbitration seek not only to avoid exhaustion, but also to litigate claims that are not ripe for adjudication. In *McNeese, Patsy* and similar cases, government action had violated the plaintiffs' constitutional rights. The administrative procedures might have remedied those violations, but only by righting the wrongs that already had been committed. Similar redress awaited the plaintiffs in federal court.

Fee objectors, however, suffer no constitutional injury when a union collects its security fee. The injury arises only after the employees object to the use of the fee on objectionable expenditures and the fee is so used, even if the use is only temporary. The automatic escrowing of disputed fees continues until the arbitrator resolves the dispute. The arbitrator's award determines what portion of the fee the union may properly spend. Any constitutional injury to the employees occurs only after the arbitrator's award frees the union to spend objectors' fees on arguably objectionable matters.

Generally, where constitutional injuries will not occur until after administrative proceedings are completed, section 1983 claims are not ripe for adjudication until those

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[148] *Id.*

[149] *Id.* at 512.

[150] *Id.* at 513–14.

[151] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

proceedings are exhausted.[152] For example, in *Wilson v. Robinson*,[153] several deputy sheriffs alleged that their employer had discharged them without a hearing, in violation of the due process clause of the fourteenth amendment.[154] Some of the deputies also alleged that their discharges were in retaliation for conduct protected by the first amendment.

The district court enjoined the terminations and ordered the sheriff to provide the plaintiffs with the pre-termination hearings required under a county ordinance.[155] The Eighth Circuit held that, in light of the injunction, litigation of the first amendment claims should be stayed because they were not ripe for judicial resolution.[156] The court reasoned that, because the thrust of the first amendment claims involved wrongful discharges, the injunction's removal of the threat of discharge rendered the claims unripe. The court observed that the employer might abandon the termination attempt, or the discharges might ultimately not take place.[157] The court distinguished its holding that the claims were not ripe from a requirement of exhaustion:

> The ripeness doctrine addresses some of the concerns of those who are critical of the no-exhaustion rule in section 1983 cases. It ensures that only *actual* deprivations of federal rights can be the basis of section 1983 relief. Requiring exhaustion, on the other hand, would sweep too far. Even when a plaintiff has established that his federal rights have been deprived in fact through state action, he would nonetheless be required to pursue possible remedies from those responsible for such deprivation before seeking judicial relief. We decline to impose such a burden.[158]

The case for finding pre-arbitration litigation of union security fees to be unripe under section 1983 is even stronger than the case *Wilson v. Robinson* presented. A public employer might use the threat of instituting discharge proceedings against disfavored employees as part of a larger scheme to suppress first amendment rights. Although a threatened employee's subjective fears of retaliation do not render a proposed discharge ripe, intentional misuse of discharge proceedings to chill the exercise of first amendment rights should permit immediate judicial intervention.[159]

No such potential chill exists where a fee objection arbitration procedure complies with the *Hudson* standards. Unlike the institution of disciplinary proceedings, which raises negative inferences about the employee, and places the employee on the defensive, filing a union security fee objection is an affirmative assertion of first amendment rights.

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[152] *See, e.g.*, Williamston County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192–94 (1985); Bergh v. Washington, 535 F.2d 505, 507 (9th Cir.), *cert. denied*, 429 U.S. 921 (1976); Broderick v. di Grazia, 504 F.2d 643, 645 (1st Cir. 1974); *see also* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 283 (2d ed. 1986).

[153] 668 F.2d 380 (8th Cir. 1981).

[154] *Id.* at 381–82.

[155] *Id.* at 382.

[156] *Id.* at 384.

[157] *Id.*

[158] *Id.* (emphasis in original).

[159] *Compare* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (ambiguous regulation of speech coupled with threat of discharge chills first amendment rights) *with* Laird v. Tatum, 408 U.S. 1, 9–16 (1972) (Army's gathering of data on civilians does not chill first amendment rights where potential misuse of data is speculative) *and* National Treasury Employees Union v. Kurtz, 600 F.2d 984, 988–89 (D.C. Cir. 1979) (Internal Revenue Service personnel rule prohibiting disclosure of certain information does not chill first amendment rights where no specific sanctions against employees exercising those rights have been threatened).

No one may draw a general negative inference about the objector from it. Moreover, the arbitration proceeding does not place the objecting employee on the defensive; rather, it requires the union to affirmatively justify the charges it seeks to impose on the objector. Requiring employees to channel their objections through a reasonably prompt impartial arbitration procedure will not chill their rights not to subsidize political and ideological causes unrelated to collective bargaining, unless the procedure is abused. Union abuse of the procedure, however, will cause it to fail to comply with the *Hudson* standards and render the fee subject to immediate attack under *Hudson*.[160]

Application of the *McNeese-Patsy* reasoning that exhaustion of state administrative remedies is not required confirms that preventing objectors from bypassing the arbitration procedure is proper. Because the constitutional injury can only arise after the arbitral award, the paramount role of the federal courts in protecting constitutional rights cannot come into play until the arbitrator has rendered an award. Moreover, resolution of the constitutional issues raised by the section 1983 suit depends on the outcome of the arbitration proceeding. The arbitration and the section 1983 litigation are not parallel remedies. Instead, the arbitration authorizes the union to spend the fee objector's funds; the section 1983 suit seeks to remedy that authorization. Finally, the scope of the arbitral exhaustion requirement does not raise the complicated legislative policy judgments that the *Patsy* Court considered best left to Congress. Rather, it raises first amendment due process issues, issues that are particularly suited for judicial resolution. These first amendment issues include the impartiality and reasonable promptness of the proceedings and the scope of judicial review of the arbitrator's award.

C. *Do prior Court decisions on the fee objection process permit the objector to bypass arbitration?*

In addition to potential conflicts with Supreme Court interpretations of section 1983, preventing objectors from bypassing arbitration may conflict with Supreme Court interpretations of the fee objection process. In *Brotherhood of Railway & Steamship Clerks v. Allen*,[161] a case decided under the Railway Labor Act, employees opposed to the use of their union security fees did not communicate their objections to the union,[162] but instead filed suit in state court challenging the constitutionality of the union shop agreement.[163] Following the Supreme Court's decision in *Hanson*, the employees amended their complaint to allege that the union was spending their fees on political causes to which they were opposed.[164] The Supreme Court noted that employees first alerted the union to their objections by filing their complaint in state court, but stated that such notice of objection was sufficient.[165]

Similarly, in *Abood*, the Court found that there was sufficient notice of objection to the union by the allegation in the employees' complaint that they were opposed to any expenditures of their funds for political or ideological causes unrelated to collective

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[160] Dissenting employees can avoid exhausting arbitration remedies by alleging that the procedure is constitutionally deficient. If, on its face, the procedure complies with *Hudson*, the court should require the dissenters to come forward with something more than conclusory allegations to avoid summary disposition of their claim.

[161] 373 U.S. 113 (1963).

[162] *Id.* at 119 n.6.

[163] *Id.* at 116.

[164] *Allen*, 249 N.C. 491, 493–94, 107 S.E.2d 125, 126 (1959).

[165] 373 U.S. at 119 n.6.

bargaining.[166] Read broadly, *Allen* and *Abood* might suggest that notice of objection may be communicated to the union by any reasonable means, including the filing of a lawsuit. Such a broad reading, however, is inappropriate. The unions in *Allen* and *Abood* did not have internal objection procedures at the time the lawsuits were filed.[167] In both cases, the Court viewed the establishment of internal procedures as highly desirable[168] and in *Abood* the Court suggested that exhaustion of such a procedure might be required.[169] *Abood* and *Allen* should be read to permit objectors to use any reasonable means to communicate their objections only in situations where the unions lack appropriate objection procedures.

Generally, where resort to an internal union remedy is required prior to initiating litigation, the burden is on the union to provide a clearly defined procedure. For example, under the Labor Management Reporting and Disclosure Act (LMRDA),[170] union members claiming that an officer election violated Title IV must pursue internal union remedies for up to three months before filing complaints with the Secretary of Labor.[171] A union may require members alleging union violations of Title I's member bill of rights to pursue internal remedies for up to four months before filing suit.[172] Under the LMRDA, however, the burden is on the union to develop clear and effective internal procedures.[173]

Similarly, exhaustion of internal union remedies may be appropriate in certain circumstances before members sue their unions for breach of the duty of fair representation.[174] Here too, if internal procedures are not clearly delineated by the union, the employee is not expected to know of them or exhaust them.[175] Thus, when viewed in the context of general judicial treatment of internal union remedies, *Allen* and *Abood* present cases where the union's failure to clearly delineate an objection procedure freed the employees of any requirement to notify the union before filing suit. The two decisions do not authorize an objector to bypass constitutionally adequate and clearly delineated internal objection procedures.

D. *Does mandatory resort to arbitration unconstitutionally burden objectors' first amendment rights?*

Courts have closely scrutinized requirements that individuals use specific procedures before they may exercise first amendment rights, and have frequently struck down such requirements. For example, in *Lamont v. Postmaster General*[176] the Court held unconsti-

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[166] Abood v. Detroit Bd. of Educ., 431 U.S. 208, 241 (1977).

[167] *See Abood*, 431 U.S. at 240; *Allen*, 373 U.S. at 122–23.

[168] *Abood*, 431 U.S. at 240; *Allen*, 373 U.S. at 122–23.

[169] *Abood*, 431 U.S. at 242.

[170] 29 U.S.C. § 482 (1982).

[171] *Id.*

[172] 29 U.S.C. § 411(a)(4) (1982).

[173] *See* Donovan v. Sailors' Union of the Pac., 739 F.2d 1426, 1428 (9th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); Vandeventer v. Local Union No. 513 of the Int'l Union of Operating Eng'rs, 579 F.2d 1373, 1379 (8th Cir.), *cert. denied*, 439 U.S. 984 (1978); Steib v. New Orleans Clerks and Checkers, Local No. 1497, 436 F.2d 1101, 1106 (5th Cir. 1971); Marshall v. Local 1859, Int'l Bhd. of Elec. Workers, 105 L.R.R.M. 3380, 3381 (N.D. Ill. 1980).

[174] *See* Clayton v. UAW, 451 U.S. 679, 695 (1981).

[175] *See* Hammons v. Adams, 783 F.2d 597, 602 (5th Cir. 1986); Robinson v. Marsh Plating Corp., 443 F. Supp. 811, 813–15 (E.D. Mich. 1978).

[176] 381 U.S. 301 (1965).

tutional a statute that required the postmaster to detain mail from foreign countries if it contained "communist political propaganda," and that also required the postmaster to advise the addressee that such matter would be delivered only upon the addressee's request.[177] The Court reasoned that the almost certain effect of placing an affirmative obligation on addressees to request their mail was to deter addressees from receiving their mail.[178]

In many other cases, the Court has indicated approval of license and permit requirements if the requirements are content-neutral and place only reasonable time, place and manner restrictions on first amendment activities.[179] To be valid, the license or permit procedure must contain strict procedural safeguards against abuse, including clearly delineated, objective and narrowly drawn criteria,[180] and immediate judicial review of a license denial.[181] The *Hudson* Court, however, distinguished these cases and held that the Constitution does not require immediate judicial review of union security fees.[182]

The *Hudson* Court's distinction is sound. In its prior cases, the Court considered government action that placed obstacles in the path of individuals' exercise of their first amendment rights. Absent the statute in *Lamont*, the addressee would receive all of his or her mail regardless of content or point of origin. Absent a licensing or permit requirement, a demonstrator could parade and a movie theater could exhibit without obtaining government approval. When government requirements thus burden the exercise of first amendment rights, the government must minimize the burden and maximize the procedural safeguards.

Employees covered by union security agreements occupy a different position. Their objections to expenditure of their fees on nonchargeable items are not procedural obstacles they must overcome to exercise their first amendment rights. The act of objecting is the exercise of a first amendment right. It is the objection that registers the fee payer's dissent to expenditures that the union could otherwise constitutionally charge.

Channeling fee objections into the arbitration procedure will not deter employees from objecting. The sole source of deterrent effect results from the union's knowledge of the objectors' identities. The union will gain this knowledge regardless of whether the objection is made through the arbitration procedure or by filing a lawsuit.

Once the objection is made, all burdens shift to the union. The union, through advance reductions and escrows, must insure that it will not spend the objectors' fee on nonchargeable expenditures pending resolution of the objection. Moreover, if the union wishes ultimately to gain the use of the objectors' fees, it must justify the charges that form the bases for the fees. Channeling objections through a valid *Hudson* objection procedure including arbitration thus does not overly burden the employees' rights to be free from subsidizing objectionable expenditures. Accordingly, objectors should not be allowed to bypass an arbitration procedure that complies with the *Hudson* standards. When the union follows the procedure, an objector's post-arbitration lawsuit essentially seeks judicial review of the arbitration award.

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[177] *Id.* at 302, 305.

[178] *Id.* at 307.

[179] *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[180] *See* Freedman v. Maryland, 380 U.S. 51, 58–59 (1965).

[181] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969).

[182] Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 298, 308 n.20 (1986).

V. Review of the Arbitrator's Award

In *Hudson*, the Court noted, "[t]he arbitrator's decision would not receive preclusive effect in any subsequent § 1983 action."[183] The only support the Court offered for this unfortunate dictum was a citation to *McDonald v. City of West Branch*,[184] the third of a trilogy of Supreme Court decisions that held that arbitration awards under collective bargaining agreements do not preclude subsequent litigation of related federal statutory claims. In the first such case, *Alexander v. Gardner-Denver Co.*,[185] the plaintiff alleged that his discharge from employment was racially motivated, in violation of Title VII of the Civil Rights Act of 1964.[186] The plaintiff had previously grieved his discharge under the applicable collective bargaining agreement. An arbitrator had denied the grievance and found that there was just cause for the discharge.[187] The Court held that the plaintiff was entitled to a *de novo* trial on his Title VII complaint in United States district court.[188]

The Court first reasoned that Title VII was designed to supplement, rather than supplant, existing remedies.[189] The Court observed that the statutory cause of action was independent of the contractual grievance.[190] Congress, the Court concluded, did not intend to preclude *de novo* consideration of a Title VII claim where an arbitrator has denied a contractual grievance arising out of the same transaction.[191] The Court also relied on the distinctly separate nature of the contractual and statutory rights to reject the employer's claims that the employee had waived his Title VII rights prospectively[192] and that allowing the Title VII action to proceed gave the employee "two strings to his bow when the employer has only one."[193]

The Court next considered whether it should adopt a policy of deferral to arbitration awards. It rejected the concept, offering three reasons. First, the Court viewed the arbitrator as an expert in contractual interpretation rather than an expert in the law under Title VII.[194] Second, the Court viewed the relative informality of the arbitration process compared to the judicial process as rendering arbitration a less appropriate forum for resolving Title VII issues.[195] Finally, the Court expressed concern that the union controlled the presentation of the grievance and that the collective interests represented by the union might conflict with the individual interests of the grievant.[196]

In *Barrentine v. Arkansas-Best Freight System, Inc.*,[197] the second case in the trilogy, the Court applied *Gardner-Denver* to an action under the Fair Labor Standards Act (FLSA).[198] The plaintiffs were truck drivers whom federal regulation required to conduct pre-trip

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[183] *Id.*
[184] 466 U.S. 284 (1984) (*cited by Hudson*, 475 U.S. at 308 n.20).
[185] 415 U.S. 36 (1974).
[186] 42 U.S.C. § 2000e (1982). *See Gardner-Denver*, 415 U.S. at 43.
[187] 415 U.S. at 39–43.
[188] *Id.* at 59–60.
[189] *Id.* at 48–49.
[190] *Id.* at 49–50.
[191] *Id.*
[192] *Id.* at 51–54.
[193] *Id.* at 54.
[194] *Id.* at 57.
[195] *Id.* at 57–58.
[196] *Id.* at 58 n.19.
[197] 450 U.S. 728 (1981).
[198] 29 U.S.C. §§ 206, 216(b) (1978 & Supp. 1987).

safety inspections of their trucks, but whom their employers did not compensate for time spent in the inspection or in obtaining repairs of defects that the inspection uncovered.[199] The plaintiffs filed grievances, which a joint union-employer grievance committee rejected.[200] The Court held that the grievance committee's award did not preclude the plaintiffs from receiving *de novo* consideration of their FLSA claims.[201]

The defendant had argued that, unlike the *Gardner-Denver* Title VII claim, the FLSA claims involved wages, a matter at the heart of the collective bargaining process.[202] The Court rejected this distinction. It reasoned that FLSA and Title VII both conferred rights on individual employees that were independent of the collective bargaining agreement.[203] The Court reiterated the concerns over arbitrator expertise, procedural informality and exclusive union control of the grievance presentation that it had expressed in *Gardner-Denver*.[204] It then added another concern: that the remedies available to an arbitrator under the contract likely would be more limited than those available to a court under the statute.[205]

In *City of West Branch*, the last case in the trilogy, the plaintiff sued pursuant to section 1983, claiming that his employment was terminated in retaliation against his exercise of first amendment rights.[206] An arbitrator had sustained the plaintiff's discharge, finding that it was supported by just cause.[207] The Court appeared to derive from *Gardner-Denver* and *Barrentine* a general rule that awards rendered in collectively bargained arbitration procedures do not preclude subsequent litigation of federal statutory claims arising out of the same action that gave rise to the grievance.[208] Lower courts generally have applied these cases to deny preclusive effects to arbitration awards in litigation under other employment statutes.[209]

The relationship between union security fee arbitration and subsequent section 1983 litigation is significantly different from the relationship between grievance arbitration and subsequent statutory litigation. Grievance arbitration and statutory litigation provide parallel avenues for seeking to remedy an injury that already has occurred. In grievance arbitration, the only issue before the arbitrator is whether the employer violated the collective bargaining agreement. The collective bargaining agreement is the basis of the arbitrator's award. The relevance of statutes or case law depends entirely on the collective bargaining agreement. Consequently, the arbitration may ignore totally the statutory

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[199] 450 U.S. at 730.

[200] *Id.* at 730–31. Such joint employer-union grievance committees serve the same function as independent arbitrators, and courts treat their awards in the same manner. General Drivers, Local Union No. 89 v. Riss & Co., 372 U.S. 517, 519 (1963).

[201] 450 U.S. at 745.

[202] *Id.* at 738.

[203] *Id.* at 738–45.

[204] *Id.* at 742–44.

[205] *Id.* at 744–45.

[206] 466 U.S. at 286.

[207] *Id.*

[208] *Id.* at 292.

[209] *See, e.g.*, Wilmington v. J.I. Case Co., 793 F.2d 909, 916–18 (8th Cir. 1986) (claim under 42 U.S.C. § 1981 (1982)); Johnson v. University of Wisconsin-Milwaukee, 783 F.2d 59, 62 (7th Cir. 1986) (claim under Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (1982)). *But see* Gonzalez v. Southern Pac. Transport. Co., 773 F.2d 637 (5th Cir. 1985) (deferring to arbitrator's findings in claim under anti-retaliation provisions of Federal Employers' Liability Act, 45 U.S.C. § 60 (1982)).

claim.[210] Even where the arbitrator considers elements of the statutory claim, because the statute itself is not the basis of the grievance, the arbitrator's ruling cannot resolve the statutory cause of action.

In contrast, union security fee arbitration presents the arbitrator with the identical constitutional challenge to the amount of the fee that a court faces in the subsequent section 1983 lawsuit. This identity of issues before the arbitrator and the court occurs because the contractual authorization of a union security fee must be read to permit a fee that is no broader than the Constitution authorizes.[211] Thus, in the arbitration, the union must prove that its fee is based only on expenditures that constitutionally may be charged over objection. In section 1983 litigation, the union must prove the same thing.

If the union maintains a proper escrow, per the *Hudson* decision, no constitutional injury occurs until after the arbitrator has issued the award. The security fee infringes objectors' first amendment rights only if the arbitrator authorizes charges based on nonchargeable expenditures. The escrow insures that the section 1983 lawsuit, in essence, will be an action to review the arbitrator's award. Thus, the arbitrator not only is empowered to consider the constitutional issues but is also required to do so. The award must be based on the Constitution.[212]

In light of the identity of issues facing the arbitrator and the court, the *Hudson* dicta's analogy of a section 1983 union security fee lawsuit to *City of West Branch* is simply inappropriate. Indeed, when statutory claims are submitted to arbitration, in subsequent litigation courts generally defer to the arbitrator's award, unless the award displays a manifest disregard for the law.[213] Analysis of the nature of union security fee arbitration reveals that the *City of West Branch*, *Barrentine* and *Gardner-Denver* concerns with employees' control of their representation, arbitrator expertise and remedial authority, and procedural informality are not present in union security fee arbitration.

First, in union security fee arbitration, the objecting employees exclusively control their own representation. They do not depend on their unions or their employers to invoke the procedure or present their cases. In grievance arbitration, by contrast, the only legal control that the grievant can exercise over the union's case presentation is the

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[210] The lower courts have differed over what weight to give an arbitration award that did not consider the statutory claim. In Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140, 142 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983), the Sixth Circuit held in a Title VII action that an award finding just cause for discharge fulfills the defendant's burden of articulating a legitimate, nondiscriminatory reason for the plaintiff's discharge under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In Perry v. Larson, 794 F.2d 279, 284 (7th Cir. 1986), however, the Seventh Circuit upheld the exclusion from evidence of an arbitration award, finding that the plaintiff had been discharged for just cause because the arbitrator had not considered the first amendment issues that the section 1983 action raised.

[211] *See supra* notes 112–20 and accompanying text. *See also* Springfield Educ. Ass'n and Springfield Bd. of Educ., Fair Share Arbitration, slip op. (Feb. 18, 1988) (Malin, Arb.).

[212] The arbitrator's award may also be based on a state labor relations statute. Some statutes authorize union security fees that are narrower than the Constitution permits. For example, different language in the fair share provisions of the Illinois Public Labor Relations Act, ILL. REV. STAT. ch. 48, ¶¶ 1601–27 (1987) and the Illinois Educational Labor Relations Act, ILL. REV. STAT. ch. 48 ¶¶ 1701–21 (1987) suggests that the IPLRA's union security fee is narrower than what the Constitution alone would allow. Malin, *Fair Share Fees Under the Illinois Labor Relations Acts*, 3 ILL. PUB. EMPL. REL. REP. 1 (Winter 1986).

[213] *See, e.g.*, In re Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1213–14 (2d Cir. 1972) (citing Wilko v. Swan, 346 U.S. 427, 436–37 (1953)); Maidman v. O'Brien, 473 F. Supp. 25, 27–28 (S.D.N.Y. 1979) (citing *Wilko*, 346 U.S. at 436–37).

union's duty of fair representation. Under this duty, however, the union has broad discretion in issues of strategy.[214] The Court's concern with the union's control of the grievance procedure is consistent with general principles of litigation preclusion. The doctrine of collateral estoppel does not bar parties from litigating issues that they did not have fair opportunities to litigate previously.[215] Where a party has had a fair opportunity to litigate an issue in arbitration, however, the arbitrator's award may be used in future litigation to collaterally estop that party from relitigating factual findings that were necessary for the award.[216]

Although union control over the grievance procedure normally may deprive the grievant of a sufficiently fair opportunity to litigate, so that an arbitration award is not entitled to collateral estoppel effect, the grievant's active involvement in the grievance proceeding will increase the significance of the grievance outcome in subsequent statutory litigation. For example, in *Strozier v. General Motors Corp.*,[217] the plaintiff had filed grievances under the collective bargaining agreement contesting, *inter alia*, his disciplinary suspension and his discharge on two occasions.[218] He also had filed a lawsuit alleging that the suspension and discharges were racially motivated, in violation of Title VII and section 1981. Thereafter, the plaintiff, represented by counsel, and the defendant voluntarily settled two of the grievances.[219] Although the settlement did not expressly release the statutory claims, the Fifth Circuit held that it foreclosed the lawsuit.[220] The court apparently found the plaintiff's participation in the grievance settlement to be significant, because it rested its holding on two factors: the plaintiff had voluntarily accepted the settlement and the grievance had sought the same remedies as were sought in the lawsuit.[221] Thus, objecting employees' control over their own representation in union security fee litigation greatly diminishes the need for *de novo* consideration of the fee amount in subsequent section 1983 litigation.

Concern over arbitrator expertise has also led the Court to deny preclusive effect to grievance arbitration awards in statutory litigation. Grievance arbitrators are presumed to be expert in contract interpretation, but not in statutory interpretation. This concern led the Seventh Circuit in *Hudson* to conclude that arbitration was an inherently unsuitable forum for resolving union security fee objections. The Supreme Court, however, rejected such a broad indictment of arbitrators' qualifications.

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[214] *See generally* M. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 384–89 (1988).

[215] RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

[216] Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985); Maidman v. O'Brien, 473 F. Supp. 25, 29–34 (S.D.N.Y. 1979); Goldstein v. Doft, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966).

[217] 635 F.2d 424 (5th Cir. 1981).

[218] *Id.* at 425.

[219] *Id.* at 426.

[220] *Id.*

[221] *Id.* There are strong reasons to confine *Strozier* to grievance settlements prior to arbitration in which the grievant is actively involved. Even if the union and employer allow a grievant to provide his or her own representation in the arbitration, courts may refuse to give the award preclusive effect in subsequent statutory litigation. The grievant who chooses to bypass the union's representation in the arbitration may antagonize the union whose help is needed in assembling evidence and witnesses. Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 45 (1971). The presence of the individual's representative, rather than the union's, in the arbitration may signal the arbitrator that the union and employer jointly oppose the grievance. *Id.* at 45–46. These concerns are not present in union security fee arbitration where it is understood that the union and the objectors are adversaries.

Beginning with the *Steelworker Trilogy*,[222] the Supreme Court has developed a national labor policy that strongly supports arbitration of collective bargaining grievances, premised on its view of arbitrators' expertise in the common law of the shop.[223] Arbitrators are unique because of their institutional expertise. The courts presume arbitrators to be institutionally qualified to resolve contractual grievances because the parties have selected them for that purpose.[224] Their acceptability to the parties depends on their ability to interpret the parties' contracts in ways that are consistent with the parties' intent and priorities. Arbitrators' institutional expertise derives from the parties' consent to be bound by their contractual interpretation.[225]

Thus, in grievance arbitration, the arbitrators' institutional expertise is limited to the common law of the shop. The parties have selected an arbitrator whose judgment on the contract they have consented to accept.[226] There is, however, no support for a general presumption that the parties, by selecting an arbitrator to interpret their contract, also have consented to accept his or her judgment on statutes potentially applicable to the same controversy. Indeed, because the arbitrator's responsibility in grievance arbitration is to further the private purpose of the contract, rather than the public purpose of the statute, there is reason to presume that the parties' selection accepts only the arbitrator's contractual judgments.[227]

Nevertheless, many individual arbitrators have the training and expertise to interpret and apply statutes as well as the contract. Moreover, where the contract contains language that parallels the statute, there is reason to believe that expertise in the statute played at least a secondary role in the arbitrator's selection. Thus, in *Gardner-Denver* the Court stated that an arbitration award may be admitted as evidence in subsequent Title VII litigation with its weight a function of, *inter alia*, the presence of a no discrimination clause in the collective bargaining agreement and the arbitrator's personal expertise.[228]

In union security fee arbitration, the arbitrator is selected not for the private purpose of interpreting the parties' collective bargaining agreement, but for the express public purpose of adjudicating the constitutional rights of the objecting employees. The arbitrator will be selected for expertise in adjudicating union security fees, rather than for expertise in the common law of the shop. For example, the American Arbitration Association's Rules provide for AAA appointment of an arbitrator from a separate panel of union fee arbitrators whose qualifications the AAA has screened.[229] One can expect most union security fee arbitrators will be appointed by AAA or state labor relations

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[222] United Steelworkers of Am. v. America 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).

[223] *See Warrior & Gulf*, 363 U.S. at 582.

[224] United Paperworkers Int'l Union v. Misco, 108 S. Ct. 364, 370 (1987).

[225] *See* Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).

[226] *See Warrior & Gulf*, 363 U.S. at 582.

[227] *See* Meltzer, *supra* note 221, at 33.

[228] Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974). Empirical evidence supports the supposition that parties processing a discrimination grievance seek arbitrators with expertise in discrimination law. *See* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, 20 NATIONAL ACADEMY OF ARBITRATORS PROC., 59 (1976) (ten percent of arbitrators receive ninety percent of discrimination cases). The evidence also indicates that the arbitrators are deciding these grievances in accordance with Title VII. *See* Stallworth & Hoyman, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. Sept. 1984, at 49, 55.

[229] AAA RULES, *supra* note 44, Rule 3.

boards after screening their qualifications. Independent agency screening and appointment of union security fee arbitrators will further insulate the arbitrators from the private contractual interests of employers and unions and will develop the arbitrators' institutional expertise in adjudicating union security fees.[230] Thus, concern over arbitrator expertise should not justify *de novo* consideration of the fee amount in subsequent section 1983 litigation.

A third concern the Court has voiced in denying preclusive effect to arbitration awards in statutory litigation is that a court's statutory remedial authority is broader than an arbitrator's contractual remedial authority.[231] Concern over arbitral remedial authority is irrelevant to the issue of how to treat a union security fee award in subsequent section 1983 litigation. The arbitrator does not face an injured employee seeking a remedy. The employee's objection triggers an escrow at least equal to the amount of the fee subject to reasonable dispute and puts the union to its proof, before the arbitrator, of its entitlement to the fee. The arbitrator's role is not to assess injury and remedy, but to determine the amount of fee, if any, to which the union is entitled. The employee's injury arises only after the arbitrator's award, and then only to the extent that the award is in error.

The most troubling concern the Court raised in *Gardner-Denver* and its progeny is the informality of the arbitral process. Arbitration, however, need not be as informal as the *Gardner-Denver* Court portrayed it. Although witnesses need not be sworn, arbitrators have the authority to administer oaths.[232] Arbitrators also have authority to issue subpoenas.[233] There is no requirement that a verbatim record of the proceedings be maintained or transcribed, but parties often use court reporters and transcripts in arbitration.[234] Although the courts do not require arbitrators to explain the reasons for their

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[230] The courts have expressly approved the AAA Rules. *See* Damiano v. Matish, 830 F.2d 1363, 1371–72 (6th Cir. 1987); Andrews v. Education Ass'n of Cheshire, 829 F.2d 335, 340 (2d Cir. 1987). One may argue that the use of labor arbitrators to resolve union security fee disputes may inject a subtle institutional bias against fee payers. The caseload of the typical labor arbitrator is dominated by grievance and interest arbitrations in which the union and the employer jointly select the arbitrator. The typical union security fee arbitration will involve the fee payers and the union. The fee payers are not likely to control much, if any, future work for the arbitrator. The union, however, is far more likely to be in a position to select the arbitrator for future cases. Under these circumstances, subliminal concern for future selections arguably may bias the arbitrator subtly in favor of the union. When the parties to an arbitration are the union and the employer, the employer and its representatives are in a position similar to the union regarding future selection of the arbitrator, thus eliminating or greatly diminishing the potential for subtle bias. *Cf.* Getman, *supra* note 47, at 936 (making a similar point regarding the potential for subtle pro-employer arbitral bias in nonunion wrongful discharge arbitration).

The argument overstates the potential for subtle bias. Although the union and the fee payers frequently will be the only parties appearing before the arbitrator, a union security fee arbitration still occurs in the context of the union-employer collective bargaining relationship. The employer often will be aware of the arbitrator's conduct of the proceeding and decision in the case. Arbitrators overtly or subconsciously concerned with future selection might discount the fee payers' perception of their handling of the proceeding, but they cannot discount the employer's perception of the arbitrator's impartiality.

[231] Barrentine v. Arkansas-Best Freight Sys., Inc. 450 U.S. 728, 744–45 (1981).

[232] Uniform Arbitration Act § 7(a) (1955), reported, as amended in 1956, in 27 LAB. ARB. (BNA) 909, 910 (1957).

[233] *Id.*

[234] *See* Jordan, *Comment, Can the Labor Arbitration Process Be Simplified? If So, in What Manner and at What Expense?*, 39 NATIONAL ACADEMY OF ARBITRATORS PROC., 92, 97 (1987) (21 percent of

awards,[235] the parties in labor cases usually expect written opinions and the arbitrators usually oblige them.[236] Employing sworn witnesses, subpoenas, transcripts and written opinions dissipates much of the Court's concern with informality.

One feature of arbitration that remains informal is the absence of formal discovery. The burden of proof that the union bears, however, compensates for the lack of formal discovery. The union has the burden of proving how the fees will be spent because the union has access to the relevant evidence.[237] Unions have argued that they can meet this burden by showing the percentage of union dues allocated to objectionable expenditures. The Massachusetts Labor Relations Commission (MLRC) has rejected this argument, holding that a union must affirmatively prove the expenditures that underlie the fee being charged, rather than only the expenditures that the union is willing to admit it cannot charge.[238] The MLRC position is sound. Just as the union must give potential objectors notice of the expenditures that form the basis of the fee, so that they can make an informed decision on whether to object, so too must the union submit proof that affirmatively justifies the fee it seeks to charge to enable the arbitrator to assess the fee's appropriateness.

This burden on the union is crucial. If the union could satisfy its burden of proof by merely showing the percentage of dues admittedly apportioned to objectionable expenditures, the burden would then effectively fall on the objectors to affirmatively attack the fee claimed by the union. The objectors could not attack the fee without knowing the components of the fee, which they could not learn without prehearing discovery. The union's burden to prove the expenditures on which it has based the fee forces the union to introduce in its case-in-chief all evidence on which it intends to rely. The objectors are then in a position to attack the union's justification and may obtain any additional relevant evidence through subpoenas. Although prehearing discovery of this evidence would facilitate objectors' preparation for the hearing, the arbitrator can compensate for the absence of discovery by granting a reasonable continuance upon request at the close of the union's case-in-chief. A desire to avoid continuances may

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arbitrations in 1984 had transcripts); *1987 Labor Statistics Mirror 1986*, STUDY TIME, No. 1, 1988 at 5.

[235] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).

[236] Professor Getman explains that:

> The advantages of utilizing precedent make it desirable that arbitrators write opinions. Written opinions also serve to explain to the losing side why it lost and may convince a rejected grievant that he has at least "had his day in court." A written opinion helps to ensure that the arbitrator will consider the opposing contentions and formulate a coherent resolution. It also affords an arbitrator a way to demonstrate his intelligence, fairness, and good judgment, all of which may help him to be chosen in the future.

Getman, *supra* note 225, at 920–21 (citations omitted). The AAA Rules require a written opinion justifying the award. AAA RULES, *supra* note 44, Rule 24.

[237] Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 122 (1963).

[238] Newton Teachers Ass'n and Roman, No. MUPL-2685, 13 MASS. LAB. REL. REP. (NEW ENG. LEG. PUB.) 1152 (Mass. Lab. Rel. Comm'n Apr. 3, 1987); Pultz and Milford Teachers Ass'n, No. MUPL-249, 13 MASS. LAB. REL. REP. (NEW ENG. LEG. PUB.) 1149 (Mass. Lab. Rel. Comm'n. Apr. 3, 1987); Dailey and Woburn Teachers Ass'n, No. MUPL-2850, 13 MASS. LAB. REL. REP. (NEW ENG. LEG. PUB.) 1147 (Mass. Lab. Rel. Comm'n Apr. 3, 1987); Herbst and Educ. Ass'n of Worcester, No. MUPL-2639, 13 MASS. LAB. REL. REP. (NEW ENG. LEG. PUB.) 1151 (Mass. Lab. Rel. Comm'n Apr. 3, 1987); *accord* Andrews v. Educ. Ass'n of Cheshire, 829 F.2d 335, 341 (2d Cir. 1987); Tierney v. City of Toledo, 824 F.2d 1497, 1503 (6th Cir. 1987); DuQuoin Education Ass'n and Bosecker, 4 P.E.R.I. ¶ 1064 (Ill. Educ. Lab. Rel. Bd. 1988).

prompt the union voluntarily to grant objectors prehearing inspection of its evidence.[239] Thus, the absence of discovery in arbitration does not mandate *de novo* consideration of the fee amount in subsequent section 1983 litigation.

The above analysis makes clear that *City of West Branch* does not support the *Hudson* Court's dictum that union security fee arbitration awards should not be given preclusive effect in subsequent section 1983 litigation. The dictum also ignores the Court's interpretation of *City of West Branch* in *Dean Witter Reynolds, Inc. v. Byrd*.[240] In *Byrd* the plaintiff sued his stockbroker for alleged violations of the Securities Exchange Act of 1934 and various claims under state law.[241] The plaintiff's contract with the defendant provided for submission of their disputes to arbitration.[242] The defendant moved to compel arbitration of the state law claims and stay proceedings on the federal securities claims. The Ninth Circuit below denied this, reasoning that because the state law claims were intertwined with the securities claims, an arbitration award on the state claims might collaterally estop the plaintiff and thus deny him a federal trial on the securities claims.[243]

The Supreme Court rejected the Ninth Circuit's analysis and held that the parties must arbitrate the state law claims.[244] The Court interpreted *City of West Branch* as requiring a case-by-case analysis to determine whether giving an arbitration award collateral estoppel effect in subsequent statutory litigation adequately protects the federal interests underlying the statute.[245] As discussed above, the reasons that led the Court in *City of West Branch* to conclude that grievance arbitration does not adequately protect the federal interests underlying section 1983 do not apply to union security fee arbitration.

Judicial review of union security fee arbitration awards is more closely analogous to judicial review of grievance arbitration awards than to judicial reconsideration of arbitration awards in subsequent parallel statutory claims. Judicial review of grievance awards arises when one party sues the other to enforce or enjoin the award. The basis of the suit is breach of contract, brought under section 301 of the Labor Management Relations Act[246] in the private sector and comparable statutes in the public sector.[247]

Union security fee cases and grievance cases present the courts with the identical claims presented to the arbitrators. In both types of cases, the arbitrator is selected for his or her expertise with respect to the claims presented, and the moving party, the union in the grievance and the objecting employee in the union fee case, controls its own representation in the arbitration. Courts broadly defer to arbitration awards in grievance cases, enforcing the awards unless they can state positively that the dispute was not arbitrable[248] or the award did not draw its essence from the collective bargaining agreement.[249]

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[239] For example, in the AFSCME Illinois arbitration, the union voluntarily made its documentation available for inspection by objectors several weeks before the hearing. AFSCME-Illinois Award, *supra* note 98, at 25.

[240] 470 U.S. 213 (1985).

[241] *Id.* at 214.

[242] *Id.* at 215.

[243] *Id.* at 216–17.

[244] *Id.* at 217.

[245] *Id.* at 222–23.

[246] 29 U.S.C. § 185 (1982).

[247] *See, e.g.*, 5 CONN. GEN. STAT. § 202(1) (1987); 48 ILL. REV. STAT. § 1611(e) (1987).

[248] *See supra* notes 119–20 and accompanying text.

[249] United States Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

The analogy to grievance arbitration breaks down in one crucial respect. When the parties agree to submit grievances to arbitration, they agree to be bound by the arbitrator's interpretation of their contract. As long as the award is based on contract, and not on the arbitrator's personal notions of industrial justice,[250] the parties receive exactly what they bargained for and a court must enforce that bargain.[251] If the parties wish to change the arbitrator's interpretation, they may do so by mutual agreement.

Union security fee arbitration, however, involves constitutional, rather than contractual rights. Although one can say that the contract means whatever the arbitrator says it means, one cannot say the same for the Constitution. The ultimate authority for interpreting the Constitution rests with the courts.[252] This distinction mandates that courts review union security arbitration rulings on issues of law *de novo* in subsequent section 1983 litigation.

Union security arbitrators' rulings on issues of fact do not require the same scope of review. There is no reason to subject findings on basic facts to *de novo* consideration. These include findings on witnesses' credibility, document authenticity, the appropriateness of accounting procedures, the factual basis of projected expenditures and arithmetic computations. In first amendment litigation, however, the limits of what falls outside the Constitution's protection often turn on judicial evaluation of special facts that have constitutional significance. A reviewing court must make an independent review of these factual findings, based on the record as a whole, to ensure that the trier of fact's findings will not inhibit protected expression.[253]

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[250] *Id.*; *see also* Torrington Co. v. Metal Prod. Workers Union Local 1645, 362 F.2d 677, 680 (2d Cir. 1966).

[251] The Court has stated this view on many occasions, most recently in United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 370–71 (1987):

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract .... As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

[252] Accordingly, in other contexts, the Court has emphasized the need for speedy judicial review of decisions that infringe first amendment rights. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559–60 (1975); Freedman v. Maryland, 380 U.S. 51, 58–59 (1965). These decisions are based on the recognition that the institutional characteristics of the courts, including the appointment process and life tenure, insulate judges from external pressures and make the judiciary that body of government that is most capable of protecting first amendment rights. *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 522–24 (1970).

[253] *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964)); Hess v. Indiana, 414 U.S. 105, 108–09 (1973); Street v. New York, 394 U.S. 576, 585–88 (1969); Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

In *Bose Corp. v. Consumers Union of U.S., Inc.*,[254] the Supreme Court reaffirmed the judicial duty to review constitutional facts independently. The plaintiff alleged that the defendant disparaged it with false statements in a review of the plaintiff's stereo speakers.[255] The plaintiff conceded that it was a public figure and that, under *New York Times v. Sullivan*,[256] it had to prove by clear and convincing evidence that the defendant's statements were made with actual malice.[257] The Court recognized that the presence of malice raised factual issues, but held that those factual findings were of such constitutional significance that they warranted independent review on appeal.[258]

One can use the award in the AFSCME Illinois fair share arbitration to illustrate how a court may apply *Bose Corp.* to section 1983 union security fee litigation. The Supreme Court has recognized that the nature of public sector collective bargaining may justify charging objectors for certain political expenditures that are not chargeable under the Railway Labor Act, but has offered no guidance on how to draw the line between permissible and impermissible charges.[259] The arbitrator found that almost all of AFSCME's lobbying activity was chargeable.[260] This included lobbying concerning the federal budget, tax reform and the Fair Labor Standards Act. The arbitrator based these findings on testimony from union witnesses. He believed that the testimony established that these expenditures were integrally related to the union's collective bargaining activities.

Implicit in the arbitrator's ruling was a legal conclusion that these lobbying expenditures could be charged to objectors if the union provided a sufficient factual foundation. Under the standard proposed herein, this legal conclusion would be subject to *de novo* review. Assuming that it is correct, the arbitrator's finding of a sufficient basis for charging these expenditures would involve a factual issue of constitutional significance. Just as the finding of actual malice in *Bose Corp.* took the speech outside the first amendment's protection, the finding of an integral relationship between the lobbying and collective bargaining takes the objection outside the first amendment's protection. The Supreme Court's standard permits unions to charge for expenditures reasonably or necessarily incurred as representative. This standard is so general that it takes on significance only when applied to specific facts. The Supreme Court has recognized this by its failure to define the dividing line between chargeable and objectionable expenditures with greater precision and by its apparent decision to draw the line on a case-by-case, expenditure-by-expenditure basis.[261] Thus, under the standard of review proposed herein, the factual findings concerning the relationship between lobbying expenditures and collective bargaining would be subject to independent judicial review.[262]

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[254] 466 U.S. 485, 499 (1984) (quoting *New York Times* 376 U.S. at 284).

[255] *Id.* at 993.

[256] 376 U.S. 254 (1964).

[257] *Bose Corp.*, 466 U.S. at 492.

[258] *Id.* at 511.

[259] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).

[260] AFSCME-Illinois Award, *supra* note 98, slip op. at 39–40.

[261] The Court appears to have adopted this expenditure-by-expenditure approach in Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448–57 (1984).

[262] The need for independent judicial review does not justify a trial *de novo*. As Professor Monaghan has observed:

> In applying *Freedman* [*v. Maryland*, 380 U.S. 51 (1965),] to administrative determinations, however, one must recognize an important distinction. *Freedman* requires only

On the other hand, such factual findings as how much money the union spent on particular lobbying efforts and what percentage of dues was attributable to particular expenditures do not require the application of imprecise legal standards for their resolution. Leaving their determination to the arbitrator does not pose a significant threat of inhibiting first amendment activity. Consequently, they are not facts of constitutional significance under *Bose Corp.*, and courts should routinely defer to arbitral findings.

The court may base these three standards of review — *de novo* review of legal conclusions, independent review of findings of constitutional facts, and deference to findings of basic facts — on the record developed in arbitration, and it may resolve them on cross motions for summary judgment. There should be no need for discovery or a trial *de novo* unless there are allegations of fraud, collusion or other arbitral misconduct. Review of the award under these standards should resolve section 1983 litigation in an expeditious and cost-effective manner. The standards thus provide appropriate judicial protection of dissenting employees' rights without sacrificing some of the principal advantages of arbitration.

Initially, section 1983 litigation will often follow security fee arbitration. As the courts better define the range of chargeable expenditures, the issues presented in arbitration will become largely factual, and the level of deference to arbitration awards will increase. At that point, arbitration can operate as an expeditious procedure that simultaneously protects dissenters' and unions' rights.

Judicial review limited to the arbitral record can only occur if the arbitrator explains the award in an accompanying opinion and if the parties maintain a transcript of the hearing. Furthermore, this limited review should only occur if the witnesses in the arbitration testified under oath. Although these trappings of formality are optional in arbitration, their absence leaves a court with no choice but to provide a section 1983 plaintiff with a trial *de novo*.

VI. Employer Post-Arbitration Liability

Most union security fee plaintiffs sue both the union and the employer. The necessary state action is present in a union security fee case because a contract with a public body authorizes the union's action.[263] Moreover, *Hudson* imposes a duty on the employer as well as the union to provide procedural safeguards for potential objectors.[264] Even where such safeguards are provided, an arbitrator might err and award the union a fee that includes expenditures that a court later holds to be nonchargeable. Because the

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> that the court make a separate, independent judgment on the administrative record; it would push *Freedman* too far to require additionally that the court construct its own record. So far as the first amendment is concerned, the task of historical factfinding may be left to administrative agencies, at least if . . . the agencies' procedures appear reasonably capable of ensuring reliable findings. At a minimum, this would require an evidentiary proceeding, with the protections of counsel, confrontation and cross-examination. Moreover, even if these safeguards are present, a completely *de novo* proceeding would seem required unless there is a transcript or written summary of the administrative proceedings; without such an administrative record, a court cannot confidently determine either the dimensions of the first amendment claim or the exact posture in which it was evaluated.

Monaghan, *supra* note 252, at 526 (citations omitted).

[263] *See supra* note 109.

[264] *See supra* note 109 and accompanying text.

union will spend the money in accordance with the arbitrator's award and thereby violate the objector's first amendment rights, the union is clearly liable in a successful post-arbitration section 1983 action. The employer's liability, if any, in the same action is not as clear cut.

Holding the employer liable in a post-arbitration lawsuit will make the employer, in effect, a guarantor of the correctness of the arbitrator's decision and of the way in which the union spends its funds. Because the employer is not in a position to control the arbitrator,[265] the potential liability would force the employer to assert at the bargaining table a right to control the union's expenditures. The employer would have to negotiate detailed limits on how the union could use union security fees and a right to challenge union expenditures that the employer believes exceed those limits. The negative impact that employer supervision of union expenditures would have on orderly labor relations is readily apparent.

In *Hudson* the Seventh Circuit held that employer supervision of union expenditures was constitutionally required if no other governmental body was available to provide objectors with an administrative hearing.[266] The Supreme Court rejected this proposition when it authorized arbitration as an appropriate means of resolving fee objections.[267] *Hudson*, however, does not resolve the issue of whether an employer who agrees with the union to delegate the task of resolving objections to an arbitrator is liable for the arbitrator's constitutional errors.

Resolution of this issue requires analysis of the law under section 1983.[268] The eleventh amendment bars damage actions in federal court against agencies of state government.[269] Damage actions against local governments are available where actions pursuant to that government's policy cause a constitutional tort.[270] Thus, the appropriate inquiry concerning employer post-arbitration liability is whether the constitutional violation has been caused by the employer's policy. If the collective bargaining agreement, expressly or impliedly, contains *Hudson* objection procedures, the employer's policy as contained in the agreement is to permit the exaction from objectors of a union security fee that is limited to constitutionally chargeable expenditures. The arbitration procedure resolves disputes over how much is constitutionally chargeable. Arbitral error in resolving the dispute does not change the employer's policy. Consequently, the employer is not liable for damages such an arbitral error causes.

The Supreme Court's rejection of *respondeat superior* as a basis for local government section 1983 liability[271] reinforces this conclusion. The Court has premised this rejection on its view that Congress, in enacting section 1983, sought to require local governments to control their own acts, but did not seek to compel them to control the acts of others.[272]

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[265] An important issue that is beyond the scope of this article is whether the employer is even a proper party in a union security fee arbitration.

[266] Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1192, 1196 (7th Cir. 1984).

[267] *Hudson*, 475 U.S. at 308 n.21.

[268] An objector might seek to sue the employer directly under the fourteenth amendment. Such actions, however, are not permitted in light of the availability of remedies under section 1983. *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 6.16 (2d ed. 1986).

[269] *Id.* § 5.08, at 285.

[270] Pembaur v. City of Cincinnati, 475 U.S. 469, 477 (1986); Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978).

[271] *Pembaur*, 475 U.S. at 478 (citing *Monell*, 436 U.S. at 691).

[272] *Id.* at 479 (citing *Monell*, 436 U.S. at 665–83).

Thus, the right to control that forms the basis for *respondeat superior* liability does not create, in and of itself, a section 1983 duty to control.[273] The public employer does not even have the right to control the actions of the arbitrator. *A fortiori*, it cannot have a duty to control the arbitrator that can form the basis for post-arbitration liability. Once the arbitrator determines the appropriate fee, the employer's sole role is to administer ministerially the fee collection.[274]

CONCLUSION

In *Chicago Teachers Union v. Hudson*, the Supreme Court held that dissenting employees have a right to a reasonably prompt resolution of their objections to union security fees by a neutral decisionmaker. The Court endorsed the use of arbitration as a procedure that would be appropriate for resolving the objections.

Implementing a union security fee arbitration procedure requires that attention be paid to the arbitrator's authority. The source of that authority is the union security clause of the collective bargaining agreement. The collective bargaining agreement binds employees to resort to the arbitration procedure before litigating their objections. Preventing the employee from bypassing the arbitration procedure is consistent with the first amendment and section 1983 because the escrowing of disputed fees ensures that dissenters will suffer no injury pending the outcome of the arbitration.

In post-arbitration litigation, dissenting employees should not receive trials *de novo*. Instead, such litigation should subject the arbitration awards to review on three levels: *de novo* review of legal conclusions, independent review of constitutional facts and routine deference to arbitral findings regarding basic facts. Regardless of the outcome of the court's review of the award, the public employer's liability to objectors ceases if the employer insures that *Hudson* procedures are used. These standards will ensure that union security fee arbitration develops into an effective means of balancing the competing rights of dissenters and the unions that represent them in collective bargaining.

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[273] *See* S. NAHMOD, *supra* note 268, § 6.06.

[274] A comparison of Anela v. City of Wildwood, 790 F.2d 1063 (3d Cir.), *cert. denied*, 107 S. Ct. 434 (1986), with Carbalan v. Vaughn, 760 F.2d 662 (5th Cir.), *cert. denied*, 474 U.S. 1007 (1985) illustrates the relationship between control and constitutional duty. In *Anela*, the city refused to follow a New Jersey court rule that required police officers in charge to release persons arrested for minor offenses upon issuance of a summons. 790 F.2d at 1066. The city chose instead to follow a cash bail schedule for minor offenses set by a municipal judge. *Id.* The court held that the city's "policy" of requiring cash bond in violation of the court rule subjected it to section 1983 liability. *Id.* at 1067.

In *Carbalan*, a municipal judge, acting contrary to state law, refused to accept a traffic offender's automobile club bond endorsement and demanded a cash bond. 760 F.2d at 663–64. The court held that the city could not control the judge's actions and had no policy of refusing automobile club bond endorsements. *Id.* at 665. Consequently, the city had no section 1983 liability. *Id.*

The employer in a post arbitration setting is more like the city in *Carbalan* than in *Anela*. The employer cannot control the arbitrator's decision or the consequences of that decision. Indeed, the arbitrator's decision implements an employer policy of limiting objectors' union security fees to chargeable expenditures. To the extent that the decision is erroneous, it conflicts with the employer's policy. This conflict does not impose section 1983 liability on the employer. *See* Talbert v. Kelly, 799 F.2d 62, 65–68 (3d Cir. 1986) (city not liable when police lieutenant acted contrary to city policy in processing arrestee).

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