

**MUST AGENCY SHOP FEE CHALLENGERS
EXHAUST UNION-PROVIDED ARBITRATION
PROCEDURES BEFORE BRINGING A CLAIM IN
FEDERAL COURT? THE UNITED STATES
SUPREME COURT CLARIFIES HUDSON IN AIR
LINE PILOTS ASS'N V. MILLER**

[A]s I understand the Court's opinion, the complaining non-member need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.¹

INTRODUCTION

On January 10, 1951, Congress amended the Railway Labor Act ("Act") to expressly allow agency shop fees.² The amendment brought into existence section 2, Eleventh of the Act, which was an effort to eliminate the "free riding" nonunion employee who did not pay union dues or fees, but benefited from the collective bargaining of a union that was legally required to represent all employees in a collective bargaining unit.³ After the enactment of section 2, Eleventh, nonunion employees began to challenge the constitutionality of the agency shop fees and how the unions spent the fees.⁴

1. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 311 (1986) (White, J., concurring).

2. THE RAILWAY LABOR ACT 190 n.235 (Douglas L. Leslie ed., 1995); see *infra* note 21 and accompanying text for pertinent provisions of the Railway Labor Act. Agency shop fees and union shop fees are sometimes collectively referred to as union security agreements. Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. REV. 857, 857-58 n.2 (1988). The agency shop fee requires nonunion members to pay a fee for the union's representation from which the nonunion members benefit. Malin, 29 B.C. L. REV. at 857-58. The union shop fee simply requires all employees of an employer to become a union member within specified time period to retain their jobs. *Id.* at 857. As Professor Malin noted in his article, the Supreme Court has held the union shop to be the "practical equivalent" of the agency shop," and therefore, this note will refer to these types of fees generically as agency shop fees. *Id.* at 857 n.2.

3. THE RAILWAY LABOR ACT, *supra* note 2, at 190 n.235.

4. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225-26 (1977) (stating that the agency shop fee is constitutionally justified when "such expenditures [are] financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of . . . employment"); *Brotherhood of Ry. & Steamship Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113, 118 (1963) (stating that unions cannot use

In 1961, the United States Supreme Court, in *International Ass'n of Machinists v. Street*,⁵ held that unions could not use funds derived from agency shop fees for political purposes with which nonunion members did not agree.⁶ After the Supreme Court's decision in *Street*, it is clear that a nonunion member cannot be forced to fund the political and ideological programs of a union if the nonunion member objects thereto.⁷ The goal, according to the Court, is to find "a way of preventing 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."⁸ In an effort to meet this goal, the Court held, in *Chicago Teachers Union, Local No. 1 v. Hudson*,⁹ that a union must afford certain procedural protections to each nonunion member who challenges the union's calculation of an agency shop fee.¹⁰

Recently, in *Air Line Pilots Ass'n v. Miller*,¹¹ the United States Supreme Court determined that even though a union must provide the procedures set forth in *Hudson*, the agency fee challenger need not exhaust those procedures before bringing a claim in federal court, unless he had previously agreed to do so.¹² The Supreme Court declared that the nonunion pilots, who brought the agency fee challenge in *Miller*, had not agreed to exhaust the union-provided arbitration procedure before bringing the claim in federal court, and as such, could not be compelled to give up their right to challenge the agency shop fee in court.¹³ The Court noted that *Hudson* should not be read to mandate exhaustion of the procedures required by the *Hudson* majority's opinion, but should only be read to force the union to afford the agency

agency shop funds to support political or ideological causes which are opposed by the nonunion member); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 742-44 (1961) (stating that unions cannot use agency shop funds to support political causes which are opposed by the nonunion member); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 227, 238 (1956) (holding the agency shop fee constitutional).

5. 367 U.S. 740 (1961).

6. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 742-44 (1961).

7. See *Abood*, 431 U.S. at 225-26 (stating that the agency shop fee is constitutionally justified when "such expenditures [are] financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of . . . employment"); *Allen*, 373 U.S. at 118 (stating that unions cannot use agency shop funds to support political or ideological causes which are opposed by the nonunion members) (citation omitted); *Street*, 367 U.S. at 742-44 (stating that unions cannot use agency shop funds to support political causes which are opposed by the nonunion members).

8. *Abood*, 431 U.S. at 237.

9. 475 U.S. 292 (1986).

10. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 297-98, 302-03, 310 (1986).

11. 118 S. Ct. 1761 (1998).

12. *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761, 1768-69 (1998).

13. *Miller*, 118 U.S. at 1766-67.

fee objectors “a neutral forum in which their objections can be resolved swiftly.”¹⁴ Finally, the Court declared that even though a union may have a genuine interest in avoiding litigating the agency fee challenge in both the arbitration and the judicial fora simultaneously, this interest does not overwhelm a challenger’s right to resist an arbitration procedure to which the challengers did not agree.¹⁵

This Note will first review the facts and holding of *Miller*.¹⁶ This Note will then examine the evolution of agency shop fee challenges, the procedural aspect of these challenges, the circuit split regarding the exhaustion requirement, the contractual nature of arbitration, and the precedential effect of dicta.¹⁷ Next, this Note will contend that the Court in *Miller*: (1) correctly held that agency fee challengers cannot be compelled to arbitrate their objection unless they had agreed to do so, and (2) implicitly resolved the circuit split on the “arbitration first” issue, and in so doing (a) properly dispelled the notion that efficiency arguments outweigh the rights of agency fee challengers, and (b) clarified *Hudson* so it can no longer be misconstrued to require exhaustion.¹⁸ Finally, this Note will criticize the *Miller* dissent, because it based its argument in favor of an “arbitration first” rule on a misinterpretation of *Hudson*.¹⁹

FACTS AND HOLDING

Air Line Pilots Association (“Union”), a labor union and the exclusive representative of the pilots of Delta Airlines, Inc. (“Delta”), renegotiated their collective bargaining agreement (“agreement”) with Delta in November 1991.²⁰ The agreement contained an “agency shop” provision as permitted by the Railway Labor Act (“Act”).²¹ The

14. *Id.* at 1767-68.

15. *Id.* at 1769.

16. *See infra* notes 20-99 and accompanying text.

17. *See infra* notes 100-430 and accompanying text.

18. *See infra* notes 445-594 and accompanying text.

19. *See infra* notes 595-643 and accompanying text.

20. *Air Line Pilots Ass’n v. Miller*, 118 S. Ct. 1761, 1764 (1998).

21. Brief for Respondent at 1-2, *Air Line Pilots Ass’n v. Miller*, 118 S. Ct. 1761 (1998) (No. 97-428). The Railway Labor Act states, in pertinent part:

First. The term “carrier” includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of title 49, as of December 31, 1995,, [sic] and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such “carrier”: *Provided, however*, That the term “carrier” shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of

transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tippie, and the operation of equipment or facilities therefor, or in any of such activities.

Railway Labor Act, 45 U.S.C. § 151, First (Supp. II 1996). Furthermore:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tippie, or the loading of coal at the tippie.

Railway Labor Act, 45 U.S.C. § 151, Fifth (1994 & Supp. II 1996). Additionally, the Act states:

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Railway Labor Act, 45 U.S.C. § 151, Sixth (1994). The Act further provides:

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Railway Labor Act, 45 U.S.C. § 152, First (1994). According to section 152, Fourth:

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees,

agency shop provision stipulated that, beginning January 1, 1992, each nonunion pilot must pay a service charge to the Union for its administration of the agreement.²² The provision further provided that the Union would establish the service charge in an amount equal to the union's dues, along with other assessments.²³ The Union established written policies and procedures to determine the amount the

assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Railway Labor Act, 45 U.S.C. § 152, Fourth (1994). Section 152, Fifth provides: Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Railway Labor Act, 45 U.S.C. § 152, Fifth (1994). Finally, section 152, Eleventh states: Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted —

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

Railway Labor Act, 45 U.S.C. § 152, Eleventh (1994). The above provisions of the Railway Labor Act are also applicable to airlines. Railway Labor Act, 45 U.S.C. § 181 (1994).

22. Brief for Respondent at 2, *Miller* (No. 97-428).

23. Brief for Petitioner at 3, *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761 (1998) (No. 97-428).

nonunion pilots must contribute each year.²⁴ These policies and procedures required the Union to determine which collective bargaining expenditures were germane to the agreement and which were not.²⁵ According to the Union's policies and procedures, a nonunion member could object if the Union used fees for purposes not germane to the administration of the agreement.²⁶ The policies and procedures further provided that the Union was authorized to stipulate the process by which objections were to be made:

(1) inform nonmember fee payers how to notify [the Union] if they have an objection to paying for activities that are not germane to collective bargaining; (2) require [the Union] to prepare and distribute each year to all fee payers a "Statement of Germane and Nongermane Expenses" (SGNE), audited by [the Union's] independent auditors, disclosing "in reasonable detail, the year's expenditures, segregating those that were germane to collective bargaining from those that are not;" (3) provide that all fee payers who submit a written objection will receive an appropriate dues reduction, rebate, or credit, based on the percentage of [the Union's] expenses that the SGNE shows were used for purposes not germane to collective bargaining; and (4) provide an arbitration procedure by which an objector may challenge [the Union's] calculation of the dues reduction or rebate. If the objector so requests, the amount reasonably in dispute will be placed in escrow. The selection of the arbitrator, and the procedures of the arbitration, are governed by the American Arbitration Association Rules for Determination of Union Fees.²⁷

Prior to the effective date of the agency shop provision, five pilots filed an action against the Union in the United States District Court for the District of Columbia, claiming the provision was invalid on its face.²⁸ This original complaint contained several allegations that the agreement was unlawful under constitutional and federal statutory law.²⁹ The pilots moved for a preliminary injunction to prevent the implementation of the agreement's agency shop provision, but the district court denied the motion.³⁰ Soon thereafter, in January of 1992, the

24. Brief for Petitioner at 4-5, *Miller* (No. 97-428).

25. *Miller v. Air Line Pilots Ass'n, Int'l.*, No. CIV. A. 91-3161, 1995 WL 864556, at *1 (D.D.C. Aug. 30, 1995), *rev'd*, 108 F.3d 1415 (D.C. Cir. 1997), *aff'd*, 118 S. Ct. 1761 (1998).

26. *Miller v. Air Line Pilot Ass'n*, 108 F.3d 1415, 1416 (D.C. Cir. 1997), *aff'd*, 118 S. Ct. 1761 (1998).

27. Brief for Petitioner at 4-5, *Miller* (No. 97-428).

28. *Miller*, 118 S. Ct. at 1764; Brief for Respondent at 2, *Miller* (No. 97-428).

29. Brief for Petitioner at 4, *Miller* (No. 97-428). The pilots' complaint contained seven causes of action. *Id.* The seventh cause of action alleged that the Union had used the agency shop funds for nongermane purposes. *Miller*, 1995 WL 864556, at *1.

30. *Miller*, 118 S. Ct. at 1764.

Union began collecting agency fees from nonunion pilots based on 1990 and 1991 expenditure figures.³¹ The Union determined the fees for nonunion pilots for two periods of 1992.³² First, the Union established nonunion member fees for January 1 through June 30 to be 8% less than members' dues.³³ Then, for the period of July 1 to December 31, the Union determined the fee to be 17% less than members' dues.³⁴ At the end of 1992, the Union determined in its Statement of Germane and Nongermane Expenses ("SGNE") that 19% of the funds it collected from agency shop fees were used for nongermane purposes and adjusted nonunion member fees charged accordingly.³⁵ The pilots then amended their complaint, alleging "that [the Union] had overstated the percentage of its expenditures genuinely attributable to 'germane' activities."³⁶ The Union, pursuant to its policies and procedures, treated the protest as an objection and initiated arbitration.³⁷

Before any arbitration hearing, the pilots challenging the SGNE asked the American Arbitration Association ("AAA") to suspend the arbitration, because the pilots wished to proceed with their claim in federal court.³⁸ The AAA denied this request.³⁹ The pilots then moved to enjoin the arbitration, but the district court denied their motion.⁴⁰ The arbitrator proceeded with the hearings at which the pilots entered a conditional appearance.⁴¹ The arbitrator then sustained the fee charged to the nonunion pilots in substantial part, but "concluded that 'nongermane' expenses made up 21.94 percent of the [U]nion's budget, not 19 percent as the Union had determined."⁴²

After the arbitrator issued his decision, the Union moved for summary judgment in the district court action.⁴³ The pilots argued that under the Act, the Union could not be permitted to require arbitration and that the court could not refer to the arbitrator's findings.⁴⁴ In granting the motion, the district court explained that, because the Union provided for arbitration in its policies and procedures, the Union "should be entitled to insist that the arbitration procedure be

31. Brief for Respondent at 2, *Miller* (No. 97-428).

32. *Id.*

33. *Miller*, 108 F.3d at 1416-17.

34. *Id.*

35. *Miller*, 118 S. Ct. at 1764.

36. *Id.*

37. *Id.*; *Miller*, 108 F.3d at 1417.

38. *Miller*, 118 S. Ct. at 1765.

39. *Id.*

40. *Miller*, 108 F.3d at 1417.

41. *Miller*, 118 S. Ct. at 1765.

42. *Id.* at 1764-65.

43. *Id.* at 1765.

44. *Miller*, 1995 WL 864556, at *5.

exhausted before resorting to the courts."⁴⁵ The court reasoned that the procedures outlined by the United States Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*⁴⁶ established a duty, which requires unions to provide arbitration.⁴⁷ The court concluded "that it would be pointless and unreasonable for the Supreme Court to require unions to establish arbitration procedures and then permit employees to ignore those procedures and bring their claims directly to federal court."⁴⁸

The nonunion pilots appealed the district court's decision to the United States Court of Appeals for the District of Columbia Circuit, arguing that the district court erred in finding the pilots must "exhaust" the arbitration procedures established by the Union before they could object to the arbitration in federal court.⁴⁹ Specifically, the nonunion pilots argued: "We cannot be required to put to an arbitrator our claim against the union under federal law because we have never agreed to do so."⁵⁰ The Union contended that the nonunion pilots should be required to "exhaust" arbitration procedures, because if they did not, the Union would be frequently forced to litigate both in an arbitration proceeding and in federal court.⁵¹ Thus, the Union complained that forcing the union to deal with both fora simultaneously would cause "it great expense and confusion."⁵²

The District of Columbia Circuit rejected the Union's argument and reversed the district court's decision, holding that the pilots could not be forced into arbitration.⁵³ The court reasoned that the decision of an arbitrator is afforded deference in a federal court only because both sides have agreed to settle the dispute before the arbitrator.⁵⁴ Because the nonunion pilots had not agreed to do so, the court noted that there was "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process."⁵⁵ The court declared that it was not insensitive to the Union's problem of defending the agency fees in two independent fora.⁵⁶ However, the court noted that *Hudson* "did not require arbitration per se," but

45. *Id.* at *3, *7, *10 (quoting *Hudson*, 475 U.S. at 311 (White, J., concurring)).

46. 475 U.S. 292 (1986).

47. *Miller*, 1995 WL 864556, at *3, *5.

48. *Id.* at *6.

49. *Miller*, 108 F.3d at 1416-17.

50. *Id.*

51. *Id.* at 1418.

52. *Id.*

53. *Id.* at 1416, 1421.

54. *Id.* at 1418.

55. *Id.* at 1421. Justice White's concurrence in *Hudson* stated that when the union provides arbitration procedures, then employees must exhaust them. *Hudson*, 475 U.S. at 311.

56. *Miller*, 108 F.3d at 1421.

rather a “reasonably prompt decision by an impartial decisionmaker.”⁵⁷ As such, the circuit court indicated that the *Hudson* requirement could be fulfilled in other ways.⁵⁸ For example, the court noted that as federal courts become more familiar with agency shop claims, *Hudson’s* requirement of a “reasonably prompt decision by an impartial decisionmaker” may be satisfied if the court’s proceedings move relatively quickly.⁵⁹ The court further suggested that a state could provide methods for swift judicial review of challenges to agency shop fees, or nonunion members could bring the action as a class.⁶⁰ The court concluded that the availability of these alternate procedures allowed the Union and the nonunion pilots the opportunity to deal with agency fee problems without unduly burdening the Union.⁶¹ The Union appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari to consider “whether an objector must exhaust a union-provided arbitration process before bringing an agency-fee challenge in federal court.”⁶²

On appeal, the Supreme Court affirmed the decision of the circuit court, holding that “unless they agree to the procedure, agency-fee objectors may not be required to exhaust an arbitration remedy before bringing their claims in federal court.”⁶³ Justice Ruth Bader Ginsburg, writing for the majority, began the Court’s analysis by delving into the substantive legal foundation of agency fee agreements, beginning with the Act and Supreme Court decisions interpreting the Act.⁶⁴ First, the Court stated that the Act allows employers and unions to enter into agency shop agreements.⁶⁵ The Court noted that the purpose of agency shop agreements is to resolve the problem of nonunion employees acting as free riders by benefiting from the collective bargaining of the union without having to contribute to the cost of such bargaining.⁶⁶ The Court further indicated that agency shop agreements are designed to force nonunion members to pay their fair share of union expenses “necessarily or reasonably incurred [by a union] for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management is-

57. *Id.*

58. *Id.* at 1421-22.

59. *Id.*

60. *Id.*

61. *Id.* at 1422.

62. *Miller*, 118 S. Ct. at 1765.

63. *Id.* at 1769.

64. *Id.* at 1763, 1765-66.

65. *Id.* See *supra* note 21 for the text of the section of the Act referred to by Justice Ginsburg.

66. *Miller*, 118 S. Ct. at 1765.

sues.”⁶⁷ However, the Court concluded, to prevent encroachment of a nonunion employee’s constitutional rights, those expenses not related to the union’s representation duties may not be imposed on nonunion members.⁶⁸

The Court then addressed the procedural rules developed by the Court in *Hudson* to protect nonunion employees who challenge agency shop fees.⁶⁹ The Court stated that these procedural safeguards for employees are: (1) employees must have “sufficient information to gauge the propriety of the union’s fee” provided to them by the union; (2) the union must provide those challenging the agency fee “a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker;” and (3) an escrow must be established by the union to hold the amount of the objector’s fee that is reasonably in dispute.⁷⁰

With the procedural framework in place, the Court turned to the question presented: “When a union adopts an arbitration process to comply with *Hudson*’s ‘impartial decisionmaker’ requirement, must agency-fee objectors pursue and exhaust the arbitral remedy before challenging the union’s calculation in a federal-court action?”⁷¹ The Court answered the question in the negative, declining “to read *Hudson* as a decision that protects nonunion members at a cost — delayed access to federal court — they do not wish to pay.”⁷² In reaching this conclusion, the Court rejected the Union’s two arguments: (1) that the Court should extend the doctrine of discretionary exhaustion-of-remedies to agency fee arbitration disputes, and (2) that the “arbitration first” rule would provide greater efficiency when dealing with objectors’ claims.⁷³

In refusing to extend the exhaustion-of-remedies doctrine, the Court declared it to be irrelevant to the present situation, because the doctrine is used to allow administrative agencies empowered by Congress to carry out their programs.⁷⁴ The Court stated that the Union merely sought to exhaust a remedy established, not by the government, but by private parties.⁷⁵ Further, the Court explained that the

67. *Id.* at 1766 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)).

68. *Id.*

69. *Id.*

70. *Id.* (quoting *Hudson*, 475 U.S. at 303, 306, 310).

71. *Id.* at 1767.

72. *Id.*

73. *Id.* at 1767-68. The United States Supreme Court stated that the doctrine of discretionary exhaustion-of-remedies provides “where Congress has not clearly required exhaustion, sound judicial discretion governs.” *McCarthy v. Madigan*, 503 U.S. 140, 142 (1992).

74. *Miller*, 118 S. Ct. at 1767-68.

75. *Id.* at 1767.

principles enumerated in *Hudson* outweigh exhausting arbitration procedures and *Hudson* works to protect challengers of agency fees by providing them with a swift resolution before an impartial decision maker.⁷⁶ The Court maintained that such a swift resolution is not possible if the challenger must first proceed through arbitration and then into federal court.⁷⁷ Thus, the Court refused to read "*Hudson* in a manner that might frustrate its very purpose, to advance the swift, fair, and final settlement of objectors' rights."⁷⁸

The Court turned its attention to the Union's focus on "the asserted efficiency gains of requiring objectors to proceed to arbitration first."⁷⁹ The Court noted that the Union's interests in avoiding multiple proceedings, while genuine, did not outweigh the challengers' right to by-pass a procedure to which they did not consent and proceed directly to federal court to have their federal rights determined.⁸⁰ The Court acknowledged that the Union underestimated federal courts' abilities to handle challenges to agency shop fees without preparatory arbitration.⁸¹ Moreover, the Court noted that the challengers will be able, through use of reasonable discovery, to point out expenditures that they believe are nongermane.⁸² Therefore, the Court explained that the Union could answer its own efficiency concerns by conscientiously managing the pretrial process.⁸³ Furthermore, the Court stated that if an arbitrator fails to sustain a challenger's objection to the union fee's calculation, that would require a challenger "to traverse two layers of procedure rather than one."⁸⁴

Justice Stephen Breyer, joined by Justice John Paul Stevens, dissented, contending that the Union should be able to insist upon compliance with the arbitration provision in the agency shop agreement, "as long as the required arbitration is nonbinding and conducted expeditiously by an 'impartial' arbitrator, as *Hudson* requires."⁸⁵ The dissent expressed that *Hudson* impliedly approves of requiring arbitration first and acknowledged the "basic position" set forth in Justice White's concurrence in that case: "[I]f the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure

76. *Id.* at 1767-68.

77. *Id.*

78. *Id.*

79. *Id.* at 1768.

80. *Id.* at 1769.

81. *Id.* at 1768.

82. *Id.* at 1769.

83. *Id.* at 1768.

84. *Id.*

85. *Id.* at 1769 (Breyer, J., dissenting).

be exhausted before resorting to the courts."⁸⁶ The dissent reasoned that *Hudson's* requirements are an effort to balance two interests: (1) "the union's concern that nonunion employees share the cost of the collective bargaining from which they benefit," and (2) the nonmembers' interest in not paying for union activities that are not germane, such as activities that "may promote ideological or political views that the non-member does not share."⁸⁷ The dissent opined that mandatory, nonbinding arbitration is a reasonable extension of the *Hudson* mandate for a "reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker."⁸⁸ The dissent reached this conclusion by looking at the question presented from three viewpoints: the union, the dissenting employees, and the courts.⁸⁹

First, the dissent argued that the requirement of arbitration is reasonable from the union's perspective, because it reduces the cost of resolving disputes, as well as makes the resolution manageable.⁹⁰ Second, the dissent, while looking at the problem from the challenging employees' point of view, contended that the majority's rule helps only a few challengers, because arbitration may resolve the fee dispute to most pilots' satisfaction, "perhaps those whose objections rest less upon ideology and more upon the desire to minimize the fee they must pay."⁹¹ The dissent also noted that those few employees whose ideological views may be protected under the majority's opinion cannot outweigh the harm caused to the union.⁹² Further, the dissent asserted that the challengers may, if they are dissatisfied with the results of the arbitration, bring an action in federal court in which the judge will not give the arbitrator's finding any special legal weight.⁹³ Finally, the dissent contended that arbitration is helpful from the courts' perspective as well.⁹⁴ The dissent noted that arbitration can settle matters satisfactorily for the parties, avoiding "unnecessary, perhaps time-consuming, judicial investigation of highly complex union accounts and expense allocations."⁹⁵

The dissent disagreed with the majority's decision on two additional grounds: (1) consent was not relevant to the legal justification of

86. *Id.* at 1769-70 (Breyer, J., dissenting) (quoting *Hudson*, 475 U.S. at 311 (White, J., concurring)).

87. *Id.* at 1770 (Breyer, J., dissenting).

88. *Id.* (Breyer, J., dissenting) (quoting *Hudson*, 475 U.S. at 310).

89. *Id.* at 1770-71 (Breyer, J., dissenting).

90. *Id.* at 1770 (Breyer, J., dissenting).

91. *Id.* at 1770-71 (Breyer, J., dissenting).

92. *Id.* (Breyer, J., dissenting).

93. *Id.* at 1771 (Breyer, J., dissenting).

94. *Id.* (Breyer, J., dissenting).

95. *Id.* (Breyer, J., dissenting).

the arbitration question before the Court, and (2) the Union's argument should not have been viewed as an extension of the discretionary exhaustion-of-remedies doctrine.⁹⁶ The dissent argued that consent was not relevant, because the "arbitration first" rule as established in *Hudson* was more like "court rules that require parties to submit their claims to nonbinding arbitration before they pursue a case in court."⁹⁷ The dissent further argued that the "arbitration first" rule is an extension of *Hudson's* attempt to balance the competing demands the First Amendment places upon agency fee challenges, and as such the legal justification for the discretionary exhaustion-of-remedies doctrine

96. *Id.* at 1771-72 (Breyer, J., dissenting).

97. *Id.* at 1771 (Breyer, J., dissenting). Here, Justice Breyer referred to 28 U.S.C. §§ 651-658. *Id.* These sections have recently been amended by the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (1998), and pertinent sections state in part:

§ 651. Authorization of alternative dispute resolution

(a) DEFINITION — For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

(b) AUTHORITY — Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

§ 652. Jurisdiction

(a) CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION IN APPROPRIATE CASES — Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

§ 654. Arbitration

(a) REFERRAL OF ACTIONS TO ARBITRATION — Notwithstanding any provisions of law to the contrary and except as provided in subsections (a), (b), and (c) of section 652 and subsection (d) of this section, a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where —

(1) the action is based on an alleged violation of a right secured by the Constitution of the United States. . . .

Alternative Dispute Resolution Act of 1998 §§ 3-6 (1998).

should play no role in the Court's decision.⁹⁸ In sum, the dissent maintained:

The upshot is that the "arbitration first" rule "prevent[s] compulsory subsidization of ideological activity" without unduly "restricting the Union's ability" to collect a legitimate agency fee. Consequently, neither the First Amendment, nor any statute, as interpreted by this Court, prohibits the Union's insistence upon that rule.⁹⁹

BACKGROUND

A. THE SUBSTANTIVE LEGAL EVOLUTION OF AGENCY SHOP FEES

Congress authorized unions to collect agency shop fees from non-union members when it enacted section 2, Eleventh of the Railway Labor Act ("Act") in 1951.¹⁰⁰ Section 2, Eleventh of the Act allows unions to make agreements with employers to have all the employees represented by the union and who work for the employer, regardless of whether that employee is a member of the union, pay what has today become termed an agency shop fee.¹⁰¹ Thus, the statute eliminated "free riders" — those employees who the union has a statutory duty to represent, but who refuse to pay for the costs of representation.¹⁰² The United States Supreme Court was presented with the question of whether the unions that extract the agency fee could use the funds derived therefrom to fund its political causes with which the employees paying the fees oppose.¹⁰³ The Supreme Court first held that unions in the private sector could not use the funds derived from the agency shop fees to bolster their political causes.¹⁰⁴ The Court further extended the concept to cover public sector employees who are required to pay agency shop fees under a statute similar to the Act.¹⁰⁵ The result of this evolution of the agency shop fee is that the Court

98. *Miller*, 118 S. Ct. at 1772 (Breyer, J., dissenting).

99. *Id.* at 1771 (Breyer, J., dissenting).

100. THE RAILWAY LABOR ACT 190 (Douglas L. Leslie ed., 1995); 45 U.S.C. § 152, Eleventh (1994).

101. THE RAILWAY LABOR ACT, *supra* note 100, at 190-91; 45 U.S.C. § 152, Eleventh (1994); Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. REV. 857, 857-58 n.2 (1988).

102. THE RAILWAY LABOR ACT, *supra* note 100, at 190-91. In *Lehnert v. Ferris Faculty Ass'n*, the United States Supreme Court summarized that:

Hanson and Street and their progeny teach that chargeable activities must (1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991).

103. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768 (1961).

104. *Street*, 367 U.S. at 768-69; *Lehnert*, 500 U.S. at 516.

105. *Lehnert*, 500 U.S. 516-18.

will scrutinize the agency shop fee to prevent "the compulsory subsidization of ideological activity by employees who object thereto without restricting the [u]nion's ability to require every employee to contribute to the cost of collective-bargaining activities."¹⁰⁶

In *International Ass'n of Machinists v. Street*,¹⁰⁷ the United States Supreme Court held that the Railway Labor Act does not allow unions to use funds derived from an agency shop fee to support political causes that nonunion members oppose.¹⁰⁸ In *Street*, nonunion employees of the Southern Railway System ("Railroad") sued the International Association of Machinists ("Union") in the Superior Court of Bibb County, Georgia, alleging that funds derived from an agency shop fee were used by the Union for political purposes with which the employees disagreed.¹⁰⁹ The Union had entered into an agency shop agreement with the Railroad, which provided that all of the Railroad's employees would pay "dues, initiation fees and assessments" to the Union as a condition to maintain employment.¹¹⁰ The dues the employees paid should have been used to fund only "the negotiation, maintenance, and administration of agreements concerning rates of pay, rules and working conditions, or wages, hours, terms and other conditions of employment, or the handling of disputes relating to the above."¹¹¹ However, a "substantial portion" of the funds were used to support political campaigns and legislative agendas.¹¹²

The superior court found for the employees and perpetually enjoined the agency shop agreement, holding that the agency shop agreement and the section of the Act under which the fee was pro-pounded violated the First, Fifth, Ninth and Tenth Amendments of the United States Constitution.¹¹³ The superior court found that the funds derived from the fee were being used by the Union "in substantial amounts to propagate political and economic doctrines, concepts and ideologies and to promote legislative programs opposed by plaintiffs and the class they represent."¹¹⁴ The superior court reasoned that such political uses were not reasonably necessary to the collective bargaining process.¹¹⁵ The court concluded that section 2, Eleventh of the Act cannot invade the employees' personal rights, such as freedom

106. *Abood*, 431 U.S. at 237; *Hudson*, 475 U.S. 301-02.

107. 367 U.S. 740 (1961).

108. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961).

109. *Street*, 367 U.S. at 742-44.

110. *Id.*

111. *International Ass'n of Machinists v. Street*, 108 S.E.2d 796, 799 (Ga. 1959), *rev'd*, 367 U.S. 740 (1961).

112. *Street*, 108 S.E.2d at 799-800.

113. *Id.* at 802-03 (quotation omitted).

114. *Id.* at 802 (quotation omitted).

115. *Id.* at 803 (quotation omitted).

of speech, association and thought.¹¹⁶ Consequently, the superior court entered the injunction, but allowed the Union the ability to dissolve the injunction when it could show that it had ceased using the agency shop fees to fund its ideological and political activities.¹¹⁷

The Union appealed the decision of the superior court to the Supreme Court of Georgia, arguing that the superior court erred in its final decree, which concluded that the Act violated the employees' constitutional rights.¹¹⁸ The supreme court affirmed, concluding that the superior court's "final decree was not erroneous."¹¹⁹ The supreme court stated that the personal convictions of the employees were violated, because they were being forced to fund Union programs and ideologies with which they disapproved.¹²⁰ The supreme court reasoned that the Federal Bill of Rights does not confer rights, but provides the "shall nots" of what the federal government cannot do respecting those enumerated rights.¹²¹ The court stressed the untouchable nature of the rights protected by the Bill:

Coercion or compulsion is the antithesis of freedom or liberty. In the area of choice, support or association of or with the political or economic views of others, the individual has the natural right not only to disagree but to rebel against either regimentation or restraint in the exercise of his own judgment.¹²²

The court concluded that compelling an employee to contribute the "fruits of his labor" to political causes in which he does not believe deprives that employee of his freedom of speech as much as if he were forced to give vocal approval to causes he opposes.¹²³ The Union then appealed the decision of the Supreme Court of Georgia to the United States Supreme Court under 28 U.S.C. § 1257, to consider whether the Union's power to spend the agency shop funds "is restricted to the

116. *Id.* (quotation omitted).

117. *Id.* (quotation omitted).

118. *Id.* at 796, 803.

119. *Id.* at 809. The supreme court framed the issue as follows:

The fundamental constitutional question is: Does the contract between the employers of the plaintiffs and the union defendants, which compels these plaintiffs, if they continue to work for the employers, to join the unions of their respective crafts, and pay dues, fees, and assessments to the unions, where a part of the same will be used to support political and economic programs and candidates for public office, which the plaintiffs not only do not approve but oppose, violate their rights of freedom of speech and deprive them of their property without due process of law under the First and Fifth Amendments of the Federal Constitution?

Id. at 807.

120. *Street*, 108 S.E.2d at 808.

121. *Id.* at 807.

122. *Id.*

123. *Id.* at 808.

extent of denying the unions the right, over the employee's objection, to use [the funds] to support political causes which [the employee] opposes."¹²⁴

On appeal, the Supreme Court reversed and remanded the decision of the Georgia Supreme Court, stating that an injunction preventing enforcement of the agency shop agreement was not appropriate and only those employees that objected to the Union's use of the funds were entitled to relief.¹²⁵ Justice William Brennan, writing for the majority, reasoned that the employees' right of action stemmed from the Act itself, because the funds were being spent for purposes not authorized under the Act.¹²⁶ The Court further explained that an injunction of the agency shop agreement would defeat "the congressional plan to have all employees benefited share costs 'in the realm of collective bargaining.'"¹²⁷ The Court concluded that an objection to the use of the fee will not be presumed and, therefore, those employees who challenge the use of the agency fee funds for political purposes must make their challenge known to the Union.¹²⁸ The proper remedy, according to the Court, was to either provide an injunction against the Union's expenditure of the proportion of the objecting employees' funds used for political purposes, or for restitution thereof.¹²⁹

Subsequently, in *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes v. Allen*,¹³⁰ the United States Supreme Court concluded that an injunction granted by a state court preventing a union from collecting agency shop fees was inconsistent with the Court's holding in *Street*.¹³¹ In *Allen*, nonunion employees brought suit in the Superior Court of Mecklenburg County, North Carolina, to enjoin the enforcement of an agency shop agreement entered into by the Southern Railway Company ("Railroad") and the Brotherhood of Railway and Steamship Clerks ("Union") pursuant to the Railway Labor Act ("Act").¹³² The nonunion employees argued that they did not want to be part of the Union and they did not want to pay dues; alternatively, if they did have to pay dues, they did not want any of the funds to be used for any other purpose but collective bar-

124. *Street*, 367 U.S. at 740, 742, 768. When *Street* was decided, section 1257 of the United States Code authorized the Supreme Court to review decisions of the highest court of a state by way of appeal. 28 U.S.C.A. § 1257 (West 1993).

125. *Street*, 367 U.S. at 771, 774-75.

126. *Id.* at 742, 771.

127. *Id.* at 772 (quoting *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 235 (1956)).

128. *Id.* at 774.

129. *Id.* at 774-75.

130. 373 U.S. 113 (1963).

131. *Brotherhood of Ry. & Steamship Clerks, Freight Handlers, Express & Station Employes v. Allen*, 373 U.S. 113, 119-20 (1963).

132. *Allen*, 373 U.S. at 115-16.

gaining.¹³³ The nonunion employees sought an injunction, alleging that enforcement of the agency shop agreement would encroach on their First, Fifth, and Ninth Amendment rights.¹³⁴ Specifically, the nonunion employees argued that, because the Union had not used all of the fees for collective bargaining purposes, "the union shop agreement should be restrained until such time as [the] Union[] establish[ed] precisely *what* portion of the dues, etc., [was] used solely for purposes reasonably necessary and related to collective bargaining."¹³⁵ The superior court granted the injunction based on the jury finding that the Union had used the agency shop fees for purposes not germane to collective bargaining.¹³⁶ The injunction issued by the superior court prevented the Union from collecting any funds from all nonunion members or from compelling nonunion members to join the Union.¹³⁷

The Union appealed the decision of the superior court to the Supreme Court of North Carolina, arguing that the superior court erred in granting the injunctive relief demanded by the nonunion employees.¹³⁸ The supreme court reversed, holding that the nonunion employees were not entitled to injunctive relief, because the United States Supreme Court had recently validated the constitutionality of the agency shop fee.¹³⁹ The North Carolina Supreme Court reasoned that the nonunion employees' attack on the constitutionality of the agency shop agreement need not be addressed, because *Hanson* expressly upheld the constitutionality of the agency shop fee.¹⁴⁰ With the constitutional validity of the agency fee established, the supreme court reasoned that the Union only wanted the nonunion employees to pay the same periodic dues that it requires of all its members and the nonunion employees were still free to "speak and act according to their

133. *Allen v. Brotherhood of Ry. & Steamship Clerks, Freight Handlers, Express & Station Employes*, 107 S.E.2d 125, 130 (N.C. 1959), *rev'd*, 373 U.S. 113 (1963).

134. *Allen*, 107 S.E.2d at 129-30.

135. *Id.* at 130.

136. *Allen*, 373 U.S. at 117. The jury found that the funds were used for the following purposes: "(1) to support or oppose legislation, (2) to influence votes in elections for public office, (3) to make campaign contributions in such elections, (4) to support the death-benefits system operated by petitioner Brotherhood of Railway Clerks." *Id.*

137. *Allen*, 373 U.S. at 117 (quotation omitted).

138. *Allen*, 107 S.E.2d at 135.

139. *Id.* at 134-35. The court based its holding on *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), in which the Supreme Court held that the Act did not violate the First and Fifth Amendments. *Allen*, 373 U.S. at 117-18. The court noted that the Supreme Court in *Hanson* stated "that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Allen*, 124 S.E.2d at 132-33.

140. *Allen*, 107 S.E.2d at 134.

own desires."¹⁴¹ However, upon reconsideration to determine the effect of the United States Supreme Court's decision in *Street*, a newly reconstituted court divided equally, "which had the effect of affirming the lower court's judgment."¹⁴² The Union appealed the decision of the Supreme Court of North Carolina to the United States Supreme Court, which granted certiorari "to consider whether the injunction granted by the [s]uperior [c]ourt might stand consistently with [the Court's] decision in *Street*."¹⁴³

On appeal, the Supreme Court reversed the superior court's decision to grant the injunction, concluding that in accordance with its decision in *Street*, the Union should be permitted to collect from all employees that portion of the agency shop fees germane to collective bargaining, as well as collect such fees from those employees who do not object to the fees' political use.¹⁴⁴ Justice William Brennan, writing for the majority, reasoned that the decision in *Street* made it clear that unions may use funds derived from agency shop fees for political purposes only if an employee does not object to such an expenditure.¹⁴⁵ The Court then stated that it would be impractical for an agency fee challenger to prove which expenditures by the union are for political purposes and which are not, and thus employees need not make their objection with particularity.¹⁴⁶ The Court further stated that unions bear the burden of proving the proportion of their expenditures which are political in nature.¹⁴⁷ The Court concluded that in order to provide the appropriate remedy, two determinations must be made on remand: (1) which expenditures made by the Union were political, and (2) what proportion of the total expenditures were political.¹⁴⁸ The Court held that the fee objector would be entitled to a refund of that percentage of the fee which was political and a reduction of future fees in the same amount.¹⁴⁹ Therefore, the Court stated that on remand, after the Union proves which proportion of the fees

141. *Id.*

142. *Allen*, 373 U.S. at 118. The Chief Justice had retired from the court and another Justice was elevated to his position. *Allen v. Southern Ry. Co.*, 124 S.E.2d 871, 872 (N.C. 1962) (per curiam), *rev'd*, 373 U.S. 113 (1963). The vacancy on the court was then filled; however, the new Justice did not take part in the consideration or decision of the rehearing, because she had presided over earlier portions of the case. *Allen*, 124 S.E.2d at 872. This left six judges, three who were in favor of affirming the judgment of the lower court and three who concluded the trial court erred. *Id.*

143. *Allen*, 373 U.S. at 118.

144. *Id.* at 119-21, 124.

145. *Id.* at 115, 118-19.

146. *Id.* at 118.

147. *Id.* at 122.

148. *Id.* at 121.

149. *Id.* at 122.

were expended for political purposes, only the nonunion employees who objected to the fee would be entitled to the above remedies.¹⁵⁰

The Supreme Court, having established that private nonunion employees may challenge union expenditures of agency shop fees for opposing political and ideological purposes, later extended the rule into the public sector.¹⁵¹ In *Abood v. Detroit Board of Education*,¹⁵² the United States Supreme Court held that the United States Constitution requires the union to finance its political expenditures from agency shop funds contributed by those nonunion public employees who do not oppose such causes.¹⁵³ In *Abood*, the State of Michigan enacted legislation providing for union representation of local governmental employees.¹⁵⁴ The statute further authorized an agency shop provision requiring nonunion teachers, as a condition of employment, to pay a fee to the union.¹⁵⁵ Two separate groups of nonunion teachers brought suit in state court against the Detroit Federation of Teachers and the Detroit Board of Education (collectively "Union").¹⁵⁶ The teachers argued that the agency shop provision violated the First and Fourteenth Amendments of the United States Constitution and alleged that the provision required the nonunion teachers to subsidize the Union's religious, political and social activities with which the teachers did not agree.¹⁵⁷ The two cases were eventually consolidated and the trial court granted the Union's motion for summary judgment by retroactively applying the recently enacted statute, which expressly authorized the agency shop agreements.¹⁵⁸ The court also found that the agency shop agreements did not offend the Constitution.¹⁵⁹

Both groups of teachers appealed the decision of the trial court to the Michigan Court of Appeals, arguing the trial court erred in failing to preserve the teachers' First Amendment rights.¹⁶⁰ The Michigan Court of Appeals consolidated the two actions and reversed the decision of the trial court, concluding "that the agency shop clause, as prospectively authorized by the [statute,] could violate plaintiffs' First

150. *Allen*, 373 U.S. at 119, 122.

151. See *supra* notes 107-50 and accompanying text; *infra* notes 152-80 and accompanying text.

152. 431 U.S. 209 (1977).

153. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

154. *Abood*, 431 U.S. at 211.

155. *Id.*

156. *Id.* at 212-14.

157. *Id.* at 213.

158. *Id.* at 214-15.

159. *Id.*

160. *Id.* at 215; *Abood v. Detroit Bd. of Educ.*, 230 N.W.2d 322, 326 (Mich. Ct. App. 1975), *vacated by* 431 U.S. 209 (1977).

and Fourteenth Amendment rights.”¹⁶¹ The court of appeals reasoned that it must balance “two powerful countervailing public policies.”¹⁶² The court stated that, on one hand, is the need to preserve freedom of expression, while on the other hand, is the desire to provide labor stability.¹⁶³ However, the court concluded that the “freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded. This is particularly true where, as here, employees are compelled by the government to support the collective bargaining activities of an organization which they prefer not to join.”¹⁶⁴

Additionally, the court indicated that only those nonunion employees who object to the expenditures of agency fee funds for political purposes may receive relief in court.¹⁶⁵ The court then stated that such relief could take two forms: (1) an injunction against expenditure of the proportion of the agency shop funds used for political purposes which complaining employees oppose, or (2) restitution to each objecting employee of that portion of the fee which was used for political purposes.¹⁶⁶ In sum, the court reiterated that:

Employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve his right, the employee must make known to the union those causes and [political] candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection.¹⁶⁷

The court found that none of the teachers had objected to the Union’s expenditure of the agency fee funds for political purposes.¹⁶⁸ Therefore, the court reasoned that none of the teachers were entitled to relief.¹⁶⁹ However, the court reversed the decision of the trial court, because it found that the trial court had inappropriately applied the statute retroactively.¹⁷⁰ Subsequently, the Michigan Supreme Court

161. *Abood*, 431 U.S. at 215

162. *Abood*, 230 N.W.2d at 326.

163. *Id.*

164. *Id.*

165. *Id.* at 327.

166. *Id.*

167. *Id.*

168. *Abood*, 431 U.S. at 215.

169. *Abood*, 230 N.W.2d at 327.

170. *Id.* The state court of appeals’ ruling that the statute “was not to be given retroactive effect” had no effect on the trial court’s decision, because the court of appeals’ finding that the teachers claims were not ripe required the same outcome as that ordered by the lower court. *Abood*, 431 U.S. at 215-16 n.8. The Supreme Court also noted that the remand must only have been for ministerial purposes. *Id.*

denied the teacher's appeal, so the teachers appealed to the United States Supreme Court, which granted certiorari to consider whether Michigan's agency shop law "violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by compulsory service fees."¹⁷¹

On appeal, the Supreme Court vacated and remanded the decision of the Michigan Court of Appeals, holding that no employer can require any of its employees "to contribute to the support of an ideological cause he may oppose as a condition of holding a job."¹⁷² Justice Potter Stewart, writing for the majority, reasoned that the Constitution requires that union expenditures of agency shop funds for political or ideological causes not germane to collective bargaining be made only from funds of those who do not object to such expenditures.¹⁷³ The Court reasoned that:

at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state. And that freedom of belief is no incidental or secondary aspect of the First Amendment's protections.¹⁷⁴

Additionally, the Court rejected the teachers' argument that public employees are entitled to greater First Amendment protection than private employees.¹⁷⁵ The Court stated that public and private employees are basically the same, because they use the same skills, pursue the same advantages and have the same needs.¹⁷⁶ Thus, the Court concluded that the differences between public collective bargaining and private collective bargaining cannot translate into a difference in First Amendment protection.¹⁷⁷

The Court then stated that its decisions in *Allen* and *Street* provided the two possible remedies for application in this case: (1) an injunction against the Union to prevent the spending of agency shop funds used for political causes which complaining employees oppose, and (2) restitution of that portion of the funds that are used for political purposes.¹⁷⁸ The Court stated that these remedies are particularly appropriate here, because the Union had already adopted one of the two remedies in its plan, which allowed a pro rata refund of

171. *Abood*, 431 U.S. at 211, 216.

172. *Id.* at 235-36, 242.

173. *Id.* at 211, 235-36.

174. *Id.* at 234-35.

175. *Id.* at 229-30.

176. *Id.*

177. *Id.* at 232.

178. *Id.* at 238 (citations omitted).

agency fees in proportion to those spent for political purposes.¹⁷⁹ Thus, the Court reasoned that, if on remand the teachers proved their allegations, then determination of the proper remedy should be based on devising "a way of preventing 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."¹⁸⁰

B. THE PROCEDURAL ASPECTS OF AGENCY SHOP FEE CHALLENGES AND THE QUESTION OF EXHAUSTION

In *Chicago Teachers Union, Local No. 1 v. Hudson*,¹⁸¹ the United States Supreme Court created procedural protections to prevent agency shop agreements from encroaching on the constitutional rights of nonunion members.¹⁸² In *Hudson*, teachers who were not members of the Chicago Teachers Union ("Union") brought an action against the Union in the United States District Court for the Northern District of Illinois, claiming, *inter alia*, that the Union violated their First Amendment right to free speech and free association.¹⁸³ The nonunion teachers objected to the Union's policy establishing the procedure by which the nonunion teachers could challenge an agency shop fee, a fee which they were required by state law to pay to the Union.¹⁸⁴ The Union's procedure for challenging the fee required the nonunion

179. *Id.* at 240 & n.41. The Court explained the Union's plan as follows:

[A] dissenting employee may protest at the beginning of each school year the expenditure of any part of his agency-shop fee for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment." The employee is then entitled to a pro rata refund of his service charge in accordance with the calculation of the portion of total Union expenses for the specified purposes. The calculation is made in the first instance by the Union, but is subject to review by an impartial board.

Id. at 240 n.41 (quotations omitted). The Court further stated that it did not see any reason to treat the present claim any differently than the statutory claims in *Street* and *Allen*. *Id.* at 240.

180. *Abood*, 431 U.S. at 237.

181. 475 U.S. 292 (1986).

182. *Miller*, 108 F.3d at 1419.

183. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 294, 297-98 (1986).

184. *Hudson*, 475 U.S. at 294-98. At the time, the Illinois School Code provided:

Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

Id. at 295 n.1 (quoting ILL. REV. STAT., ch. 122, ¶ 10-22.40a (1983)).

teacher to object in writing to the Union's President "within 30 days after the first payroll deduction."¹⁸⁵ The Union's Executive Committee would then consider the challenge and notify the challenger within thirty days of its determination.¹⁸⁶ If the challenger opposed the committee's decision, then the challenger had another thirty days to appeal the decision of the Executive Committee to the Union's Executive Board.¹⁸⁷ Finally, if the challenger disagreed with the judgment of the Executive Board, the Union's President would choose an arbitrator to hear the case.¹⁸⁸

The nonunion teachers objected to the Union's procedure, contending, *inter alia*, that the procedure infringed upon their First Amendment rights, because it interfered with their rights of free speech and free association.¹⁸⁹ The district court rejected the nonunion teachers' contentions, reasoning that the procedure "was fair; it represented a good faith effort by the Union; and it was not unduly cumbersome."¹⁹⁰ The district court further reasoned that the constitutional challenges failed, because the Union's procedure was the least restrictive alternative to protect the non-union teachers' rights of free speech and free association while protecting the union's interest in obtaining the agency shop fee from nonunion members.¹⁹¹

The nonunion teachers appealed the decision of the district court to the United States Court of Appeals for the Seventh Circuit, arguing that the district court erred in finding that the Union's procedure to determine the fee and the procedure to challenge the fee were valid.¹⁹² The Seventh Circuit unanimously reversed, concluding that:

[T]he Constitution requires the Union to follow a procedure that protects the nonmembers from being compelled to subsidize political or ideological activities not germane to the collective-bargaining process, that the Union's objection procedure was inadequate, and that any rebate which allowed the Union temporary use of money for activities that violate the nonmembers' rights was unconstitutional.¹⁹³

185. *Hudson*, 475 U.S. at 296.

186. *Id.*

187. *Id.*

188. *Id.* The arbitrator was to be chosen from a list compiled by the Illinois Board of Education and the arbitration would be funded by the union. *Id.*

189. *Hudson*, 475 U.S. at 297-98. The challenging teachers also argued that their due process rights were violated and their proportionate share was being used for impermissible purposes. *Id.*

190. *Hudson*, 475 U.S. at 298.

191. *Id.*

192. *Id.* at 298-99; *Hudson v. Chicago Teachers Union, Local No. 1*, 743 F.2d 1187, 1190 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986). The Union changed its position and argued that it had placed all of the challengers' fees in escrow, thereby avoiding encroaching on the challengers constitutional rights. *Hudson*, 475 U.S. at 299.

193. *Hudson*, 475 U.S. at 299.

The Seventh Circuit declared that any expenditures were impermissible if they were not germane to collective bargaining, and that any procedure the Union used to process the objections must include fair notice, prompt administrative hearing, and the ability for the challenger to seek judicial review of the outcome of the administrative proceeding.¹⁹⁴ The court based its conclusion on two grounds.¹⁹⁵ First, the court stated that the First Amendment establishes a duty on the Union to maintain a procedure to protect agency fee challengers' rights because, if no procedures are in place, then many First Amendment violations may go undetected.¹⁹⁶ Second, the court recognized that the Due Process Clause of the Fourteenth Amendment assures the nonunion employee:

that the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride on an entity that (whether or not they want to support it) is providing services to him as his collective bargaining representative.¹⁹⁷

Next, the court analyzed the procedure used by the Union in the present case.¹⁹⁸ The court found the Union's procedure to be "constitutionally inadequate" and stated that the Union "must go back to the drawing board."¹⁹⁹ The court noted that the most conspicuous requirement of the procedure was that from beginning to end it was entirely controlled by the Union and this made some nonunion members think it futile to even try to challenge the agency fee.²⁰⁰ Additionally, the court reasoned that the arbitrator himself was not likely to be skilled at interpreting the Constitution and making the required First Amendment determinations necessary in deciding whether an expenditure is political on the one hand, or germane to the collective bargaining process on the other.²⁰¹ The Union appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari to consider whether the procedure used by the Union adequately protected the distinction drawn in *Abood*.²⁰² Specifically, the Court addressed the Union's need to require all employees to pay for the cost of collective bargaining and the need to prevent the nonunion

194. *Id.* at 299-300.

195. *See infra* notes 196-97 and accompanying text.

196. *Hudson*, 743 F.2d at 1192.

197. *Id.* at 1192-93.

198. *Id.* at 1194.

199. *Id.* at 1196.

200. *Id.* at 1194.

201. *Id.* at 1195-96.

202. *Hudson*, 475 U.S. at 300-02.

members from being forced to contribute fees to support political activities of the Union with which they do not agree.²⁰³

On appeal, the Supreme Court affirmed the decision of the Seventh Circuit, holding that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."²⁰⁴ Justice John Paul Stevens, writing for the majority, reasoned that procedural precautions are necessary, because First Amendment rights are involved and, as such, any procedure dealing with those rights must be "carefully tailored to minimize the infringement."²⁰⁵ Additionally, the Court stated that a nonunion teacher must be given "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim."²⁰⁶

The Court further reasoned that the Union's procedure was flawed in three aspects.²⁰⁷ First, the Court stated that the Union may not force the nonunion teachers to pay agency fees and provide a procedure for return of those fees upon objection, because no individual should be forced to "contribute even three pence for the propagation of opinions which he disbelieves."²⁰⁸ Second, the Court reasoned that objectors must be given the information necessary to gauge the validity of the agency fee, and in this case the information provided by the Union was inadequate.²⁰⁹ Finally, the Court noted that the Union did not provide "a reasonably prompt decision by an impartial decisionmaker."²¹⁰ The Court emphasized that, because the challenging nonunion teachers' First Amendment rights were at stake, objections must be heard in an expeditious, fair, and objective manner.²¹¹ The Court concluded that the Union's procedure did not satisfy these requirements, because the first two steps in the procedure involved the Union itself and the third step allowed the Union to select the arbitra-

203. *Id.*

204. *Id.* at 310-11.

205. *Id.* at 293, 302-03.

206. *Id.* at 303.

207. *Id.* at 304-05.

208. *Id.* at 305 (quotations omitted).

209. *Id.* at 306. Justice Stevens further qualified that the information provided by the Union need not be exhaustive and detailed, but must at a minimum "include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18.

210. *Hudson*, 475 U.S. at 307. The decision of the impartial decisionmaker (*i.e.*, arbitrator) would not receive preclusive effect in any subsequent action. *Id.* at 308 n.21.

211. *Hudson*, 475 U.S. at 307.

tor.²¹² The Court noted in a footnote that the Union's third procedural step of arbitration might satisfy the impartial decisionmaker requirement if the Union did not have sole discretion in choosing the arbitrator.²¹³ The Supreme Court affirmed the court of appeal's reversal and ordered the further proceeding to be consistent with its opinion.²¹⁴

Justice Byron White, along with Chief Justice Warren Burger, concurred in the judgment, stating:

[A]s I understand the Court's opinion, the complaining non-member need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that arbitration procedure[s] be exhausted before resorting to the courts.²¹⁵

C. THE CIRCUIT SPLIT REGARDING THE EXHAUSTION REQUIREMENT

1. *Exhaustion Required in the Seventh and Tenth Circuits*

In *Hudson v. Chicago Teachers Union, Local No. 1*,²¹⁶ the United States Court of Appeals for the Seventh Circuit held, on remand, that "a dissenting employee must exhaust all available nonjudicial remedies provided those remedies are adequate under the criteria established by the Supreme Court [in *Hudson*]."²¹⁷ The nonunion teachers argued that "a prior hearing and prior judicial determination [by a federal court] of the correctness of a fair share fee is a precondition to the collection of the fee."²¹⁸ The Seventh Circuit rejected this argument, stating that such a process by the courts would "render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute."²¹⁹ The court further reasoned that the decision of the impartial decisionmaker is not preclusive, such that if the fee challengers believe the decision to be erroneous, they can ask the federal courts to review the decision.²²⁰ The court concluded that the proper procedure includes the three prerequisites determined in *Hudson*:

212. *Id.* at 308. The Court rejected the Union's argument that placing the funds in escrow would avoid the risk that any funds would be improperly used and thus violate the challengers First Amendment rights for much the same reason. *Id.* at 309.

213. *Hudson*, 475 U.S. at 308 n.21.

214. *Id.* at 310-11.

215. *Id.* at 311 (White, J., concurring).

216. 922 F.2d 1306 (7th Cir. 1991).

217. *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1522 (10th Cir. 1996); *Hudson v. Chicago Teachers Union, Local No.1*, 922 F.2d 1306, 1313-14 (7th Cir. 1991).

218. *Hudson*, 922 F.2d at 1314.

219. *Id.*

220. *Id.*

"[T]he fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision."²²¹ Therefore, the court found that the procedure implemented by the Union was constitutionally adequate.²²²

Similarly, in *Lancaster v. Air Line Pilots Ass'n*,²²³ the United States Court of Appeals for the Tenth Circuit determined that a non-union employee must exhaust nonjudicial remedies provided by the Union before bringing a claim in federal court.²²⁴ In *Lancaster*, John L. Lancaster, a nonunion pilot for United Airlines, Inc. ("United"), sued United and the Air Line Pilots Association ("Union") in the United States District Court for the District of Colorado, claiming the Union and United violated his First Amendment rights by forcing him to pay an agency fee to support striking Union members of another airline.²²⁵ The district court granted the defendants' motion for summary judgment.²²⁶

The pilot appealed the decision of the district court to the United States Court of Appeals for the Tenth Circuit, arguing that the district court erred in granting summary judgment on his First Amendment claim.²²⁷ The Tenth Circuit reversed, concluding that, because the pilot did not receive "adequate notice [of the strike fee] under *Hudson* before he began pursuing his nonjudicial remedies," the pilot did not need to exhaust the Union's nonjudicial remedies before bringing action in federal court.²²⁸ In reaching this conclusion, the court of appeals reasoned that a nonunion employee challenging the fee must

221. *Id.*

222. *Id.* at 1309, 1316.

223. 76 F.3d 1509 (10th Cir. 1996).

224. *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1521-22 (10th Cir. 1996).

225. *Lancaster*, 76 F.3d at 1510, 1513-14. The Union required Lancaster to pay a monthly strike assessment from May 1989 to March 1990. *Id.* at 1513. Lancaster refused to pay and the Union asked United Airlines, Inc. to terminate Lancaster for non-payment. *Id.* Thereafter, Lancaster offered to pay the fee, but the Union rejected the fee and Lancaster was terminated by the airline. *Id.* Subsequently, Lancaster filed a grievance with the airline pursuant to the collective bargaining agreement, but Lancaster did not claim that the strike fee violated his constitutional rights. *Id.* After the Airline rejected his claim, Lancaster, following the collective bargaining procedure, appealed to arbitration, where he also failed to raise the constitutional questions. *Id.* The arbitrator denied Lancaster's claim and the Airline formally terminated him. *Id.* at 1513-14.

226. *Lancaster*, 76 F.3d at 1513.

227. *Id.* at 1513-14.

228. *Id.* at 1528. The Union and United executed a Supplemental Agreement in June of 1985, providing in part:

C. A protest by a pilot who is to be discharged as the result of an interpretation or application of the provisions of this Agreement shall be subject to the following procedures:

exhaust the nonjudicial remedies that the Union provides so long as the remedies meet the standards set forth by the Supreme Court in *Hudson*.²²⁹ The court stated that the Seventh Circuit's approach in *Hudson* was correct and adopted it as the view of the Tenth Circuit.²³⁰

The court's reasoning in adopting the Seventh Circuit's view was two-fold.²³¹ First, the court stated that it could not disregard the concurring opinion of Justice Byron White in *Hudson*, because: (1) his view should carry "the same precedential weight as Supreme Court dicta to the extent it is consistent with the majority opinion," and (2) his view cannot be overlooked unless the court is presented with a significant reason to disregard it.²³² Second, the court reasoned that if exhaustion was not required, then the procedure set forth in *Hudson* would be "a waste of time and money" and would force courts to "micromanage the fee calculation in every case challenging a union assessment."²³³ This, the court stated, would unduly burden the courts with disputes that could readily be resolved without judicial intervention.²³⁴ The court further reasoned that the plaintiff pilot was bound by the collective bargaining agreement and the Supplemental Agreement providing for arbitration of agency fee challenges, even though he was not a member of the Union, and therefore, not a

1. A pilot who believes that the said provisions have not been properly interpreted or applied as they pertain to him, may submit his request for review in writing within ten (10) days after receipt of the notification from the Senior Vice President — Human Resources, as provided in paragraph C above. The request must be sent . . . to the Senior Vice President — Human Resources or his designee, who will review the protest and render a decision in writing, not later than ten (10) days following receipt of the protest.

2. The Senior Vice President — Human Resources or his designee shall forward his decision to the pilot, with a copy of [the Union]. . . . Said decision shall be final and binding on all interested parties, unless appealed as hereinafter provided. If the decision is not satisfactory to either the pilot or [the Union], then either may appeal within ten (10) days from the receipt of the decision, by filing a notice of appeal. Such notice shall be sent to the other party and the Company. . . . Appeal shall be directed to a Neutral Referee who shall be agreed upon by the pilot and [the Union] within ten (10) days after receipt of the notice of appeal. . . . The hearing before the Neutral Referee shall be held as soon as possible. . . . The decision of the Neutral Referee shall be final and binding on all parties to the dispute. . . .

Id. at 1520 n.3.

229. *Lancaster*, 76 F.3d at 1521-22. The collective bargaining agreement provided for arbitration of the agency fee dispute. *Id.* at 1525.

230. *Lancaster*, 76 F.3d at 1522. Specifically, the court agreed with the Seventh Circuit's view that "a dissenting employee must exhaust all available nonjudicial remedies provided those remedies are adequate under the criteria established by the Supreme Court." *Id.*

231. See *infra* notes 232-33 and accompanying text.

232. *Lancaster*, 76 F.3d at 1522.

233. *Id.* (quoting *Bromely*, 843 F. Supp. at 1153).

234. *Id.*

party to the agreement.²³⁵ Nevertheless, the court declared that the pilot need not exhaust the Union's nonjudicial remedies, because the Union did not provide the pilot with an adequate notice of the strike fee.²³⁶ Thus, the court concluded:

[I]f the union established a constitutionally adequate objection procedure, which it must after *Hudson*, and the procedure requires employees to notify the union of their objection within a specific time or lose the right to take advantage of it, the employee must either comply or risk dismissal of the subsequent federal action for failure to exhaust nonjudicial remedies.²³⁷

However, the court reiterated that "an employee is not obligated to comply with the union's notice requirement until and unless the employee himself receives adequate notice under *Hudson*."²³⁸

2. Exhaustion Not Required in the Ninth, Sixth, and Third Circuits

In *Knight v. Kenai Peninsula Borough School District*,²³⁹ the United States Court of Appeals for the Ninth Circuit held that nonunion employees are not required to exhaust remedies provided by a union before bringing a case in federal court to challenge the fees charged in agency shop agreements.²⁴⁰ In *Knight*, three cases were consolidated for appeal, including *Patterson v. Anchorage School District*,²⁴¹ which discussed requiring exhaustion of union remedies.²⁴² In *Patterson*, Rebecca Patterson and seven other nonunion teachers (collectively "teachers") sued the Anchorage Education Association ("Union") under 28 U.S.C. § 1983 in the United States District Court for the District of Alaska.²⁴³ The teachers did not pay a fee to the Union for representation after they were notified of the agency shop fee by the Union in a 230 page "*Hudson* notice," which was later sup-

235. *Id.* at 1524. The court referred to Martin H. Malin's law review article, which states: "The collective bargaining agreement . . . binds all employees, regardless of membership status." *Id.* at 1524-25 (quoting Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. REV. 857, 878 (1988)).

236. *Lancaster*, 75 F.3d at 1527. The notice that the Union provided nonunion pilots was a monthly statement that described the charge as "EAL ASSESSMENT" and gave no indication whether it was germane to the collective bargaining agreement." *Id.* at 1526.

237. *Lancaster*, 75 F.3d at 1527.

238. *Id.* Additionally, the statute of limitation does not run until the dissenting employee receives adequate notice. *Id.* at 1528.

239. 131 F.3d 807 (9th Cir. 1997).

240. *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 810-11, 816 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

241. No. A93-0189-CV(HRH), 1994 WL 110923, at *1 (D. Alaska Jan. 18, 1994).

242. *Knight*, 131 F.3d at 809, 816.

243. *Id.* at 807, 809.

plemented by an audited financial statement.²⁴⁴ The teachers brought suit to have the federal court review the representation fee.²⁴⁵ The district court stated that the notice was not sufficient under *Hudson*, because it did not provide an audited breakdown of the Union's expenditures.²⁴⁶ The court further found that the Union's procedures, which allowed for a deduction or refund of the fee and escrowed the amount of the fee in question while a challenge is in progress, were valid.²⁴⁷ The court then held that the proper remedy for the violation of the *Hudson* notice requirement was to order arbitration of the dispute.²⁴⁸

The teachers appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing, *inter alia*, that the district court erred in ordering arbitration.²⁴⁹ The Ninth Circuit reversed, holding that the nonunion teachers need not exhaust the union arbitration remedies before proceeding to federal court.²⁵⁰ The court of appeals noted that courts have imposed the exhaustion requirement for three reasons.²⁵¹ First, the court noted that Justice White's concurrence in *Hudson* supports requiring exhaustion.²⁵² Second, the court stated that "in the absence of an exhaustion requirement, 'the procedure spawned by the Supreme Court [in *Hudson* would be] largely a waste of time and money.'"²⁵³ Finally, the court maintained that not requiring exhaustion would make federal courts the micro-managers of every case involving challenges to fee calculations.²⁵⁴

244. *Id.* at 811. The nonunion teachers are required to pay a representation fee by Alaska Statute section 23.40.110, which states in pertinent part:

(b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment

(1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on the effective date of the agreement, whichever is later; or

(2) payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit.

ALASKA STAT. § 23.40.110 (Michie 1998).

245. *Knight*, 131 F.3d at 811. The Union procedure allowed challengers of the fee to object in two ways: (1) accept the Union's calculation of the fee and "receive a rebate equal to the percentage of full dues attributable to the nonchargeable expenses;" or (2) submit challenge to arbitration. *Id.* at 810.

246. *Knight*, 131 F.3d at 811.

247. *Id.* at 810-11.

248. *Id.* at 811.

249. *Id.* at 809, 815.

250. *Id.* at 816.

251. *Id.*; see *infra* notes 252-54 and accompanying text.

252. *Knight*, 131 F.3d at 816.

253. *Id.*

254. *Id.* (quoting *Bromley*, 843 F. Supp. at 1153).

Although the Ninth Circuit acknowledged these concerns, they stated that there was "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process."²⁵⁵ The court further reasoned that the majority opinion in *Hudson* did not mention the exhaustion requirement and that exhaustion would be inconsistent with the majority's view in *Hudson*, because the Court wanted to ensure nonunion members a speedy resolution of their dispute.²⁵⁶ The Ninth Circuit stated that "to require nonmembers to exhaust arbitration before being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process."²⁵⁷ Additionally, the court reasoned that exhaustion can only be imposed by the judiciary if it is consistent with congressional intent.²⁵⁸ The court found no such congressional intent behind 28 U.S.C. § 1983.²⁵⁹

Similarly, in *Tierney v. City of Toledo*,²⁶⁰ the United States Court of Appeals for the Sixth Circuit stated that the exhaustion clause contained in the agency shop agreement unduly infringed upon the nonunion members' constitutional rights.²⁶¹ In *Tierney*, seventeen police officers, who were not members of the Toledo Police Patrolman's Association ("Union"), brought suit against the Union in the United States District Court for the Northern District of Ohio.²⁶² The officers sought to enjoin the Union's acquisition of agency shop fees by deductions from their paychecks, arguing that the city ordinance authorizing union agency shop fees violated their First Amendment and due process rights.²⁶³ The Union used an "escrow/rebate" procedure that re-

255. *Id.* (quoting *Miller*, 108 F.3d at 1421).

256. *Id.* The court noted that the Supreme Court in *Hudson* only "imposed an obligation on unions and employers to provide for 'a reasonably prompt decision by an impartial decisionmaker' so that nonmembers would have an alternative forum for redress than courts." *Id.*

257. *Knight*, 131 F.3d at 816. The court reversed the district court's judgment requiring arbitration. *Id.*

258. *Knight*, 131 F.3d at 816 (citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 502 (1982)).

259. *Id.* In fact, Congress imposed an exhaustion requirement under 28 U.S.C. § 1983, but only in actions brought by prisoners. *Id.*

260. 917 F.2d 927 (6th Cir. 1990).

261. *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990).

262. *Tierney*, 917 F.2d at 927-29.

263. *Id.* at 929. The Toledo Ordinance provided in part:

In recognition of the Toledo Police Patrolman's Association's services to the bargaining unit and the Toledo Police Patrolman's Association's role in helping develop a more harmonious and stable labor relationship between the bargaining unit employees and the City, employees within the bargaining unit . . . shall either become members of the Toledo Police Patrolman's Association or share in the financial support of the Toledo Police Patrolman's Association (TPPA) by paying to the TPPA a service fee not to exceed the amount of dues uniformly required of members of the TPPA.

quired nonunion officers to pay an agency fee equal to that of union members' dues.²⁶⁴ In the first year of the agency shop agreement, the entire amount of all nonunion officers' agency shop fees would be placed in escrow.²⁶⁵ At the end of the first year in which the agency shop agreement was in effect, the Union would pay for an arbitrator to determine which portion of the agency shop funds were allocable to collective bargaining expenses.²⁶⁶ After this determination, a refund would be ordered to each nonunion member.²⁶⁷ Subsequently, the escrow amount would be determined yearly by using the prior year's refund as the basis and then adding five percent.²⁶⁸

The district court concluded that the ordinance and rebate plan were constitutional and that the procedure used to calculate the amount to be escrowed for later repayment was "a reasonable means of safeguarding the nonmembers' First Amendment rights and enabling the [U]nion to fulfill its collective bargaining obligations on behalf of all the patrolmen whom it represent[ed]."²⁶⁹ The court reasoned that the agency shop funds which were placed in escrow would not be accessible to the Union for any purpose and that even if the Union would have some of the funds at its disposal, it would only

Id. at 929-30 n.2 (quoting TOLEDO MUNICIPAL CODE § 2129.97 (1983)). Further, Ohio Revised Code section 4117.09(c) provides in part:

4117.09 WRITTEN AGREEMENT; CONTENTS . . .

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The arrangement does not require any employee to become a member of the employee organization, nor shall fair share fees exceed dues paid by members of the employee organization who are in the same bargaining unit. Any public employee organization representing public employees pursuant to this chapter shall prescribe an internal procedure to determine a rebate, if any, for nonmembers which conforms to federal law, provided a nonmember makes a timely demand on the employee organization. Absent arbitrary and capricious action, such determination is conclusive on the parties except that a challenge to the determination may be filed with the state employment relations board within thirty days of the determination date specifying the arbitrary or capricious nature of the determination and the board shall review the rebate determination and decide whether it was arbitrary or capricious. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee.

OHIO REV. CODE ANN. § 4117.09(c) (Banks-Baldwin 1994).

264. *Tierney v. City of Toledo*, No. C 83-430, 1985 WL 56740, at *2 (N.D. Ohio Mar. 26, 1985), *aff'd*, 785 F.2d 310 (6th Cir.), *vacated by* 475 U.S. 1115 (1986),

265. *Tierney*, 1985 WL 56740, at *2.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at *2-*4; *Tierney*, 917 F.2d at 930.

be for a brief time and would have "an utterly de minimus impact upon the First Amendment issues at stake in this controversy."²⁷⁰

The nonunion officers appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit, arguing that the district court erred in finding the ordinance constitutional.²⁷¹ The Sixth Circuit affirmed, stating that the officers must follow the plan before they could complain further.²⁷² The court stated the test in determining the constitutionality of the amount of the rebatable funds is whether:

the challenge[d] expenditures are necessarily or reasonably incurred for the purpose of performing the duties of the exclusive representative of the employees in dealing with the employer on labor-management issues. 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-bargain 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.²⁷³

The nonunion police officers appealed the decision of the circuit court to the United States Supreme Court, which vacated the decision of the Sixth Circuit and remanded to the circuit court to consider the case in light of the Court's decision in *Hudson*.²⁷⁴ On remand, the Sixth Circuit held that the Union's plan did not meet the requirements of *Hudson*, and thus remanded the case for further consideration.²⁷⁵ The Sixth Circuit noted that the Supreme Court in *Hudson* designed procedural safeguards "to prevent compulsory subsidization of ideological activity by employees who object thereto without restricting [a] [u]nion's ability to require every employee to contribute to the cost of collective-bargaining activities."²⁷⁶ The court recognized that *Hudson* required the Union's procedure to provide nonunion members with adequate information for the basis of calculating the fee, with "a reasonably prompt decision before an impartial decisionmaker," and with an escrow "to avoid the risk that the dissenters'

270. *Tierney*, 1985 WL 56740, at *3.

271. *Tierney v. City of Toledo*, Nos. 85-3016, 85-3290, 1986 U.S. App. LEXIS 19892, at *3 (6th Cir. Jan. 14, 1986).

272. *Tierney*, 1986 U.S. App. LEXIS 19892, at *6.

273. *Id.* at *5 (quoting *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 448 (1984)).

274. *Tierney v. City of Toledo*, 475 U.S. 1115 (1986).

275. *Tierney*, 917 F.2d at 930, 940.

276. *Tierney v. City of Toledo*, 824 F.2d 1497, 1502 (6th Cir. 1987) (quotation omitted), *on remand*, No. C 83-430, 1988 WL 167239, at *1 (N.D. Ohio Sept. 21, 1988), *aff'd in part, rev'd in part*, 917 F.2d 927 (6th Cir. 1990).

funds may be used temporarily for an improper purpose."²⁷⁷ The court found that the Union's agency fee plan did not meet the *Hudson* requirements for three reasons.²⁷⁸ First, the court stated that the plan failed to prevent nonunion officers' funds from being used for purposes not related to collective bargaining.²⁷⁹ Second, the court noted that the plan did not contain a single provision related to the *Hudson* requirement of providing financial information to nonunion members.²⁸⁰ Third, the court stated that the Union's plan did not provide for an impartial decisionmaker to resolve the nonunion officers' agency fee challenges in a swift manner, in that the plan's provisions provided that the nonunion officer cannot "receive his refund until at least one year following [the nonunion member's] decision."²⁸¹

On remand to the district court, the Union submitted a new agency fee plan as requested by the court.²⁸² The district court granted summary judgment for the Union and upheld the constitutionality of the fee plan.²⁸³ The district court reasoned that the Union's new plan met constitutional requirements.²⁸⁴ The court stated that the new plan resolved the possible advance taking of agency fees that were nongermane to collective bargaining, because it required an advance rebate based upon a certified audit to determine the non-chargeable portion of the agency fee.²⁸⁵ The court also found that the new plan contained a provision which provided for an impartial decisionmaker who would provide a prompt adjudication of the fee

277. *Tierney*, 824 F.2d at 1502-03.

278. *Id.* at 1505-07; see *infra* notes 279-81 and accompanying text.

279. *Tierney*, 824 F.2d at 1505.

280. *Id.* at 1506.

281. *Id.* at 1506-07.

282. *Tierney*, 917 F.2d at 930. The plan included the following provisions:

V. IMPARTIAL FEE DETERMINATION

If one or more timely objections are received, the TPPA will contact the American Arbitration Association within five (5) business days of the March 1st deadline to arrange for an impartial arbitrator to decide the amount of the agency shop fee.

VI. EXHAUSTION OF REMEDIES

The objecting non-member(s) and/or the TPPA may challenge the arbitrator's determination of the agency shop fee according to law, but such challenge, if successful, shall not result in an agency shop fee greater than that determined by the arbitrator.

Any objecting non-member must exhaust the remedies provided by this procedure prior to seeking judicial review of any issues capable of resolution under this procedure.

Id. at 932-33.

283. *Tierney*, 917 F.2d at 931.

284. *Tierney v. City of Toledo*, No. C 83-430, 1988 WL 167239, at * 3-5 (N.D. Ohio, Sept. 21, 1988), *aff'd in part, rev'd in part*, 917 F.2d 927 (6th Cir. 1990).

285. *Tierney*, 1988 WL 167239, at *3.

challenges.²⁸⁶ Finally, the court reasoned that nonunion officers were further protected by the new plan, because the new plan allowed them complete access to the Union's financial records.²⁸⁷ In sum, the court concluded that, while there may be many provisions in the new plan that the nonunion officers did not like, "none of their objections or contentions is of constitutional magnitude."²⁸⁸

The nonunion police officers appealed to the United States Court of Appeals for the Sixth Circuit, arguing, *inter alia*, that the district court failed to abide by the Sixth Circuit's directions on remand.²⁸⁹ The Sixth Circuit reversed in part, holding that the exhaustion clause must be deleted from the Union's procedural plan.²⁹⁰ The exhaustion clause provided:

The objecting non-member(s) and/or the [Union] may challenge the arbitrator's determination of the agency shop fee according to law, but such challenge, if successful, shall not result in an agency shop fee greater than that determined by the arbitrator.

Any objecting non-member must exhaust the remedies provided by this procedure prior to seeking judicial review of any issue capable of resolution under this procedure.²⁹¹

The officers argued that the final sentence of the exhaustion clause was an attempt to limit nonunion members' "access to the [federal] courts on their constitutional claims."²⁹² The Union argued that the clause was not intended to infringe on the nonunion members' constitutional rights, but was merely included in the plan to prevent the nonunion officers from litigating the amount of the agency fee in federal court.²⁹³ The court stated that the language of the exhaustion clause could be construed to require the nonunion officers to exhaust the Union's procedures before allowing them to bring an action in federal court to assert their rights.²⁹⁴ Therefore, the Court concluded that the plan unduly placed limitations on the officers' constitutional rights and the clause must be removed from the plan.²⁹⁵

286. *Id.* at *4.

287. *Id.*

288. *Id.*

289. *Tierney*, 917 F.2d at 931.

290. *Id.* at 940.

291. *Id.* at 933.

292. *Id.* at 939.

293. *Id.* at 940.

294. *Id.* (citing *Lowary v. Lexington Local Bd. of Educ.*, 704 F. Supp. 1456, 1469 (N.D. Ohio, 1988)).

295. *Id.* This proposition was followed in *Bromley v. Michigan Education Ass'n*, in which the court restated that objecting employees may not be required to exhaust their arbitration remedies before bringing suit in federal court. *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 694 (6th Cir. 1996).

Likewise, in *Hohe v. Casey*,²⁹⁶ the United States Court of Appeals for the Third Circuit held that section 575(g) of the Public Employee Relations Act ("Act") was unconstitutional.²⁹⁷ In *Hohe*, fifteen nonunion state workers brought suit under 42 U.S.C. § 1983 against Council 13 ("Union"), the exclusive bargaining agent of state employees, in the United States District Court for the Middle District of Pennsylvania.²⁹⁸ The workers sought to enjoin the implementation of the Act, arguing that the Act violated their First and Fourteenth Amendment rights as guaranteed by the United States Constitution.²⁹⁹ The Act provided for the deduction of "fair share fees" from nonunion employees' paychecks to be paid to the Union.³⁰⁰ Pursuant to the Act, the Union notified the nonunion employees of the fee, after which the nonunion employees brought suit in the district court.³⁰¹ The district court concluded that the expense report provided by the Union did present a fair allocation of chargeable and non-chargeable expenses.³⁰²

The nonunion employees appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing, *inter alia*, that section 575(g) of the Act was facially unconstitu-

296. 956 F.2d 399 (3d Cir. 1992).

297. *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992).

298. *Hohe*, 956 F.2d at 400, 402.

299. *Id.* at 402. The Act provided in part:

(d) As a precondition to the collection of fair share fees, the exclusive representative shall establish and maintain a full and fair procedure, consistent with constitutional requirements, that provides nonmembers, by way of annual notice, with sufficient information to gauge the propriety of the fee and that responds to challenges by nonmembers to the amount of the fee. The procedure shall provide for an impartial hearing before an arbitrator to resolve disputes regarding the amount of the chargeable fee. A public employer shall not refuse to carry out its obligations under subsection (c) on the grounds that the exclusive representative has not satisfied its obligation under this subsection.

(e) Within forty (40) days of transmission of notice under subsection (d), any nonmember may challenge as follows:

- (1) to the propriety of the fair share fee; or
- (2) to the payment of fair share fees for bona fide religious grounds.

(f) Any objection under subsection (e) shall be made in writing to the exclusive representative and shall state whether the objection is made on the grounds set forth in subsection (e)(1) or (2).

(g) When a challenge is made under subsection (e)(1), such challenge shall be resolved along with all similar challenges by an impartial arbitrator, paid for by the exclusive representative, and selected by the American Arbitration Association, or the Federal Mediation and Conciliation Service, pursuant to the Rules for Impartial Determination of Union Fees promulgated by the American Arbitration Association. The decision of the impartial arbitrator shall be final and binding.

PA. STAT. ANN. tit. 71, § 575 (West 1990).

300. *Hohe*, 956 F.2d at 402 & n.1.

301. *Id.* at 402.

302. *Id.* at 403.

tional, because it "impose[d] an unenforceable exhaustion requirement."³⁰³ The Third Circuit reversed, holding that section 575(g) of the Act was constitutionally unenforceable.³⁰⁴ The circuit court examined the procedures set forth in subsections (e), (f) and (g) of the Act to challenge the propriety of the fee, stating that subsection (e) provided nonunion members with two types of challenges, that subsection (f) provided how the challenges should be made, and that subsection (g) required arbitration be used to resolve challenges to the propriety of the fee.³⁰⁵ The court maintained that, even though the Act did not require nonunion members to resolve their challenges before bringing court action, "it would be absurd to suppose that the General Assembly intended to require arbitration but did not intend to require it before nonmembers brought their challenges to court."³⁰⁶ Accordingly, the court held subsection (g) unconstitutional, because it required nonunion members to exhaust nonjudicial remedies before bringing an action in court, and therefore, was inconsistent with Supreme Court precedence that exhaustion of state remedies cannot be required before nonunion members bring action to protect federal rights.³⁰⁷ The court stated that *Hudson* did not require unions or states to force nonunion members to arbitrate issues regarding their constitutional rights; rather, it only required that an alternative to litigation be made available to nonunion members.³⁰⁸

D. ARBITRATION AS A MATTER OF CONTRACT

1. *General Contract Principle: It Takes Two to Make a Bargain*

One vital element to the existence of a contract is the parties' mutual assent.³⁰⁹ In *Insurance Co. v. Young's Administrator*,³¹⁰ the

303. *Id.* at 401, 403, 406.

304. *Id.* at 408-09.

305. *Id.* at 408.

306. *Id.*

307. *Id.* at 408-09 (citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 516 (1982) (stating that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to section 1983")).

308. *Id.* at 409.

309. See *Giddings v. Insurance Co.*, 102 U.S. 108, 111 (1880) (stating that a contract is not binding on parties if the vital aspect of assent is not present); *Accord Utley v. Donaldson*, 94 U.S. 29, 47 (1876) ("There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. It is as indispensable to the modification of a contract already made as it was to making it originally. Where there is a misunderstanding as to any thing material, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract does not exist, and neither party is bound."); *Insurance Co. v. Young's Adm'r*, 90 U.S. (23 Wall.) 85, 107 (1874) (stating that assent is required for a contract to exist); *Mallory v. City of Detroit*, 449 N.W.2d 115, 118 (Mich. Ct. App. 1989) (noting that an implied contract must satisfy the element of mutual assent); *Zimmerman v. Martindale*, 221 Neb. 344, 348, 377 N.W.2d 94, 97 (1985) (opining that for a contract to be binding "it is

United States Supreme Court concluded that no contract existed between an applicant for a life insurance policy and the insurance company, because neither party assented to the contract.³¹¹ In *Young's Administrator*, the administrator of McPherson Young's estate sued the Mutual Life Insurance Company of New York ("Company") in the United States Circuit Court for the District of California, alleging that the Company and Young had entered into an insurance policy agreement and the Company had not paid the \$5000 due under the policy.³¹² Young met an agent of the Company on June 5, 1867, and applied for a life insurance policy.³¹³ The application filled out by Young contained terms for the policy that differed from the terms in the policy subsequently issued.³¹⁴ Before the policy was returned to Young, he was shot and died soon thereafter.³¹⁵ The circuit court stated that a contract existed, because the Company accepted the application and sent a duly executed policy to its agent in San Francisco.³¹⁶ The Company appealed the decision of the circuit court to the United States Supreme Court, arguing that the finding of the circuit court does not sustain the existence of a valid contract.³¹⁷

essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement"); *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980) (indicating that "[a] contract requires a meeting of the minds concerning its essential elements"); *McCarter v. Uban*, 166 N.W.2d 910, 913 (Iowa 1969) (concluding that "to become contractually bound, either orally or by writing, the parties must manifest a mutual, unequivocal assent to the terms of the contract"); *Farago v. Burke*, 186 N.E. 683, 684 (N.Y. 1933) (indicating that "[a] contract assumes an agreement, a meeting of the minds, on the thing to be done"); *George W. Wilcox, Inc. v. Shell E. Petroleum Products, Inc.*, 186 N.E. 562, 565 (Mass. 1933) (noting that parties must agree to all essential terms to have a valid contract); *International Transp. Ass'n v. Bylenga*, 236 N.W. 771, 772 (Mich. 1931) (concluding that "[a] meeting of the minds of the parties upon all essential points is necessary to constitute a valid contract"); *Harper v. Goldschmidt*, 104 P. 451, 453 (Cal. 1909) ("[A]n essential of every contract there must be an agreement and meeting of minds. Thus the agreement must precede the signature to the contract, however speedily thereafter such signature may follow."); *Butler v. Moses*, 1 N.E. 318, 319 (Ohio 1885) (stating that a valid contract can exist only if parties "assented to the same thing in the same sense").

310. 90 U.S. (23 Wall.) 85 (1874).

311. *Insurance Co. v. Young's Adm'r*, 90 U.S. (23 Wall.) 85, 107-08 (1874).

312. *Young's Adm'r*, 90 U.S. at 86.

313. *Id.* at 87.

314. *Id.* at 88. The terms of the application were: (1) \$5000 policy; (2) quarterly premiums of \$99.30; (3) quarterly premiums to be paid on the fifth of each quarter, *i.e.*, June 5, September 5, December 5, and March 5; and (4) effective date of June 5, 1867, if application was accepted by the company, while the policy approved by the home office had an effective date of April 5, 1867, and it required premium payments in the sum of \$96.60 to be paid quarterly on the 6th of April, July, October, and January. *Id.*

315. *Young v. Mutual Life Ins. Co. of N.Y.*, 30 Cas. 856, 857 (C.C.D. Cal. 1873) (No. 18,168). This policy was then shipped back to San Francisco and arrived at the Company's office there on August 2, 1867. *Young's Adm'r*, 90 U.S. at 89. Young was shot on August 21, 1867, and died on September 20, 1867. *Young*, 30 Cas. at 857.

316. *Young*, 30 Cas. at 857.

317. *Young's Adm'r*, 90 U.S. at 86, 92.

On appeal, the Supreme Court reversed, stating that because there was no mutual assent, no contract could exist.³¹⁸ Justice Noah Swayne, writing for the majority, stated that for a contract to exist, there must be mutual assent of both parties.³¹⁹ The Court opined that both parties had not assented to the final policy or the application.³²⁰ Further, the Court noted that it had no power to make an agreement for the parties.³²¹ The Court declared that it was clear that the Company had not agreed to the terms of the application, and that it was equally clear that Young had not agreed to the policy.³²² The Court further noted that Young had a duty to communicate with the Company's agent to determine when an answer from the Company's New York office was expected.³²³ The Court reasoned that Young did not keep in touch with the agent, and thus, never bound himself to the terms of the policy.³²⁴ Therefore, the Court stated that Young was:

certainly in nowise bound until such assent was given. Until then, there could be no contract on his part, and if there was none on his part, there could be none on the part of the [C]ompany. . . . The requisite assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority.³²⁵

The Court explained that the Administrator was trying to gather something that Young had not sown.³²⁶ The Court concluded that "it takes two to make a bargain."³²⁷

In *Bagnall v. Air Line Pilots Ass'n*,³²⁸ the United States Court of Appeals for the Fourth Circuit stated that nonunion members are bound only by the terms and provisions of the collective bargaining agreement, not the union's constitution or by-laws.³²⁹ In *Bagnall*, several nonunion pilots brought suit against the Air Line Pilots Association ("Union") in the United States District Court for the Eastern District of Virginia, alleging, *inter alia*, that the Union illegally imposed a finance charge on nonunion members' payments of member-

318. *Id.* at 107-08.

319. *Id.* at 105, 107.

320. *Id.* at 88, 107-08.

321. *Id.* at 106.

322. *Id.* at 106-07.

323. *Id.* at 107.

324. *Id.*

325. *Id.* at 107-08.

326. *Id.* at 108.

327. *Id.*

328. 626 F.2d 336 (4th Cir. 1980).

329. *Bagnall v. Air Line Pilots Ass'n*, 626 F.2d 336, 341 (4th Cir. 1980).

ship dues.³³⁰ For the nonunion members, the collective bargaining agreement provided that they must become a member of the Union or pay an agency shop fee equivalent to membership dues.³³¹ The Union's constitution and by-laws provided three methods by which payment of annual dues could be made: (1) paid in full on January 1 each year; (2) paid monthly from payroll deductions by the employer; and (3) paid monthly to the Union through the Union's finance plan.³³² Under the finance plan option, the Union would loan the employees the funds for their annual dues and the employees would then make monthly payments with a fixed finance charge of one percent each month on the unpaid balance.³³³ The finance plan was challenged by the nonunion members as a violation of section 2, Eleventh of the Railway Labor Act ("Act"), which provides that any dues a union collects must be uniform and periodic, as well as exclude fines and penalties.³³⁴ The district court granted the Union's motion for summary judgment.³³⁵

The nonunion members appealed the decision of the district court to the United States Court of Appeals for the Fourth Circuit, arguing that the finance charge assessed on the "unpaid balance of monthly dues of those employees who chose to participate in the [Union's] finance plan constitute[d] a penalty which [was] neither uniform nor periodic."³³⁶ The Fourth Circuit reversed, concluding that the nonunion members could not be charged the finance fee, and the Union was entitled to no more than the nonunion members' payment of their agency shop fees.³³⁷ The court noted that the Union's constitution and by-laws stipulated how fees and dues were to be paid, and "[n]othing in the collective bargaining agreement gives the Union the right to regulate a [nonunion member's] method of payment."³³⁸ The court refused to read the terms of the Union's constitution and by-laws into the collective bargaining agreement.³³⁹ The nonunion members had deliberately chosen not to be members of the Union; therefore, the court stated that the Union could not go outside the bounds of the collective bargaining agreement and impose its constitution and by-laws upon the nonunion members.³⁴⁰ The court concluded that:

330. *Bagnall*, 626 F.2d at 338.

331. *Id.*

332. *Id.*

333. *Id.* at 338-39.

334. *Id.* at 340.

335. *Id.* at 338.

336. *Id.* at 336, 340.

337. *Id.* at 341, 344.

338. *Id.* at 341.

339. *Id.*

340. *Id.*

[t]he collective bargaining agreement[] did not provide for payment of an amount equal to the amount a union member pays and paid by the method he pays. Rather, [it] provide[d] for the payment of [an agency shop fee] "in an amount equal to the regular and usual monthly dues." So long as the non-member pilot pays to the union the monthly requirement, whether by way of payroll check-off or otherwise, it is a matter of indifference how he comes by the money or the method of payment.³⁴¹

2. Arbitration as a Matter of Contract

Generally, arbitration is a matter of contract between labor and management.³⁴² Arbitration has developed over the years through private contract, as well as custom.³⁴³ Thus, because the parties have chosen arbitration as the most effective way to solve their differences, the parties usually honor the agreement.³⁴⁴ In fact, one commentator has stated that "[t]he uniqueness enjoyed by arbitration as a system of industrial jurisprudence is that it is the creature of the parties. It is created by them, and its limits, rules and regulations are established and may be changed by them."³⁴⁵ The arbitrator is limited by the language of the contract – thus:

[a]rbitrators are not soothsayers and "wise men" employed to dispense equity and good will according to their own notions of what is best for the parties, nor are they kings like Solomon with unlimited wisdom or courts of unlimited jurisdictions. Arbitrators are employed to interpret the working agreement as the parties themselves wrote it. In contract interpretation, [arbitrators try] to ascertain the mutual intention of the parties.³⁴⁶

Recently, the United States Supreme Court was presented with an opportunity to address the notion of arbitration as a creature of contract.³⁴⁷ In *First Options of Chicago, Inc. v. Kaplan*,³⁴⁸ the Supreme Court concluded that because the parties did not agree to arbitration, they could proceed with their claim in court.³⁴⁹ In *Kaplan*, Manuel Kaplan, owner of MK Investments ("MKI"), and

341. *Id.*

342. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 28 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

343. ELKOURI & ELKOURI, *supra* note 342, at 28.

344. *Id.*

345. *Id.* at 28 n.2 (quotation omitted).

346. OWEN FAIRWEATHER, *FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 173 (Ray J. Schoonhoven ed., 3d ed. 1991) (quotation omitted).

347. *See infra* notes 348-82 and accompanying text.

348. 514 U.S. 938 (1995).

349. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

Carol Kaplan, objected to the arbitration of a claim that they were personally liable for any deficiency to First Options of Chicago, Inc. ("First Options") for debts incurred by MKI as a result of the 1987 stock market crash.³⁵⁰ MKI was an "options market maker" on the Philadelphia Stock Exchange ("Exchange"), and First Options was a clearinghouse, which supplied "administrative support and risk control services" and guaranteed MKI's account to others with whom they traded.³⁵¹ The crash of the stock market on October 19, 1987, caused MKI's net equity to fall from \$10.5 million to a deficit of \$2.1 million.³⁵² Because First Options was the clearinghouse for MKI, it guaranteed to the Exchange and to those who traded with MKI "that all positions in MKI's account would be covered."³⁵³ First Options then exercised its right to liquidate MKI's positions, which resulted in increasing the deficit to \$5.1 million.³⁵⁴ First Options then attempted to convince Kaplan to undertake personal liability for MKI's deficit, but he refused.³⁵⁵ Subsequently, the Kaplans, First Options and MKI entered into an agreement to settle the dispute over MKI's deficit.³⁵⁶ The agreement consisted of four documents, only one of which contained an arbitration clause — a Subordinated Loan agreement to which the only pertinent parties were MKI and First Options.³⁵⁷ MKI resumed trading and once again suffered a loss of \$1.5 million.³⁵⁸

350. *Kaplan*, 514 U.S. at 940-41.

351. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1506 (3d Cir. 1994), *aff'd*, 514 U.S. 938 (1995).

352. *Kaplan*, 19 F.3d at 1506.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* The agreement was termed a workout agreement and had the following terms:

- MKI agreed to repay a total of \$6,227,188, the full amount of its trading deficits, including the added \$3 million incurred while First Options was liquidating its risky accounts;
- MKI immediately transferred four Exchange memberships to First Options;
- MKI and Mr. Kaplan immediately contributed \$900,000 to a new Trading Account and MKI resumed trading on the new account in April 1988;
- Mr. Kaplan paid First Options \$80,000;
- Mr. and Mrs. Kaplan agreed to remit to First Options their 1987 tax refund, estimated to be at least \$300,000, upon its receipt; and
- MKI agreed to split its trading profits with First Options.

Id. at 1507.

357. *Kaplan*, 19 F.3d at 1506-07. The Subordinated Loan Agreement stated in pertinent part:

[A]ny controversy arising out of or relating to this [Subordinated Loan] Agreement, the Letter Agreement, the Subordinated Notes or any other document referred to herein or therein or the breach thereof shall be submitted to and settled by arbitration pursuant to the Constitution and Rules of the Exchange. The parties hereto and all who may claim under them shall be conclusively bound by such arbitration.

Id. at 1507 n.5.

358. *Kaplan*, 19 F.3d at 1507.

First Options then took control of MKI's accounts and began to liquidate all of MKI's positions — this time resulting in a \$65,000 loss.³⁵⁹ First Options then demanded the funds guaranteed under the agreement to cover the loss and the Kaplans refused.³⁶⁰

Consequently, First Options sought arbitration of the dispute before the Exchange.³⁶¹ The Kaplans objected to the arbitrator's jurisdiction, arguing that they had not agreed to arbitrate the dispute.³⁶² However, the matter proceeded to arbitration and Kaplan and MKI were held jointly and severally liable to First Options.³⁶³ The Kaplans brought suit in the United States District Court for the Eastern District of Pennsylvania, arguing that the arbitration award should be vacated.³⁶⁴ The district court confirmed the arbitration award.³⁶⁵

The Kaplans appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing that the arbitration panel had no jurisdiction over them.³⁶⁶ The Third Circuit reversed, finding that the dispute was not arbitrable.³⁶⁷ The Third Circuit stated that "[a]rbitration is fundamentally a creature of contract" and a party's consent to arbitration must be established by the evidence.³⁶⁸ The court then noted that the Kaplans had entered into various agreements to pay fixed sums of money, but had not agreed to arbitration.³⁶⁹ The court noted that the only agreement which contained an arbitration clause was the Subordinated Loan Agreement.³⁷⁰ However, the court further noted that the Kaplans did not sign this agreement.³⁷¹ Therefore, the court stated that the district court erred in finding that the Kaplans consented to arbitration from a document they did not sign.³⁷² First Options appealed the decision of the Third Circuit to the United States Supreme Court, which granted certiorari to consider whether an arbitrator or the federal courts has

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 1508; *Kaplan*, 514 U.S. at 941.

363. *Kaplan*, 19 F.3d at 1508.

364. *Id.* at 1507.

365. *Id.*

366. *Id.* at 1509-10.

367. *Kaplan*, 514 U.S. at 941.

368. *Kaplan*, 19 F.3d at 1512.

369. *Id.* at 1513.

370. *Id.*

371. *Id.*

372. *Id.* at 1516. Specifically, the court noted that the facts of the case plainly negated any claim that the Kaplans agreed to consent to arbitration, because the document they signed contained "only limited and precisely detailed obligations." *Id.* at 1514. The court acknowledged that "people intend to perform the obligations that are embodied in the words of the formal agreements they sign; no more, no less." *Id.*

the power to decide if parties to a dispute agreed to arbitration of the dispute.³⁷³

On appeal, the Supreme Court affirmed the decision of the Third Circuit, holding that the Kaplans did not agree to arbitrate the dispute, and therefore, the court of appeals “was correct in finding that the arbitrability of the . . . dispute was subject to independent review of the courts.”³⁷⁴ Justice Stephen Breyer, writing for a unanimous Court, reasoned that “arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration.”³⁷⁵ Accordingly, the Court stated that to determine whether the parties did agree to arbitration, courts must examine state contract law “govern[ing] the formation of contracts.”³⁷⁶ Therefore, the Court noted, under the applicable state law at issue in the case, the inquiry would be “whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.”³⁷⁷ The Court further stated that a court should not presume that the parties have agreed to arbitrate a matter unless it is clearly shown by the evidence that they

373. *Kaplan*, 514 U.S. at 941-42.

374. *Id.* at 947.

375. *Id.* at 939, 943. *Accord* *AT & T Tech. Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) (“[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.”); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974) (“No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.”); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) (“The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.”); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) (“Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. . . . For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997) (“[T]he union cannot consent for *the* employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.”); *Blake Const. Co., Inc. v. Laborers’ Int’l Union of N. Am.*, 511 F.2d 324, 327 (D.C. Cir. 1975) (“To be sure, duty to arbitrate rests on contract, and submission to arbitration is compellable only to the extent that there is agreement to do so. The role of the courts is ‘confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract,’ and the judicial task is limited to construing the agreement for that purpose.”).

376. *Kaplan*, 514 U.S. at 944.

377. *Id.*

agreed to do so.³⁷⁸ The Court stated that the objective is to enforce the terms of arbitration agreements, not to seek resolution of the dispute in the swiftest manner possible.³⁷⁹ The Court declared that First Options did not demonstrate that the Kaplans clearly agreed to arbitrate the dispute.³⁸⁰ To the contrary, the Court concluded that the Kaplans' actions in forcefully objecting to the arbitration demonstrated their unwillingness to have the dispute submitted to arbitration.³⁸¹ Therefore, the Court held that because the Kaplans did not agree to arbitrate, the dispute was subject to review by the courts.³⁸²

Similarly, in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,³⁸³ the United States Supreme Court opined that parties must submit to arbitration only those disputes which they agreed to submit.³⁸⁴ In *Warrior & Gulf*, the United Steel Workers of America ("Union") brought suit against Warrior & Gulf Navigation Company ("Warrior") in the United States District Court for the Southern District of Alabama, seeking to compel arbitration under a collective bargaining contract.³⁸⁵ The Union represented the employees of Warrior, a business engaged in the transportation of steel products throughout the southern part of the United States.³⁸⁶ For a two year period Warrior laid off employees and then contracted out the work previously performed by them.³⁸⁷ Subsequently, several employees signed a grievance protesting Warrior's practice of contracting out work, which had been previously performed by their employees.³⁸⁸ The grievance alleged that Warrior was "in violation of the [collective bargaining agreement] by inducing a partial lock-out, of a number of the employees who would otherwise be working were it not for this unfair practice."³⁸⁹ The Union argued that section 10 of the collective bargaining

378. *Id.*

379. *Id.* at 947.

380. *Id.* at 946.

381. *Id.*

382. *Id.* at 947.

383. 363 U.S. 574 (1960).

384. *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

385. *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 168 F. Supp. 702, 702-03 (S.D. Ala. 1958), *aff'd*, 269 F.3d 633 (5th Cir. 1959), *rev'd*, 363 U.S. 574 (1960).

386. *Warrior & Gulf*, 168 F. Supp. at 703.

387. *Warrior & Gulf*, 363 U.S. at 575. The employees' numbers were reduced from 42 men to 23 men over a two-year period. *Id.*

388. *Warrior & Gulf*, 363 U.S. at 575.

389. *Warrior & Gulf*, 168 F. Supp. at 704. The collective bargaining agreement provided in pertinent part:

Section 10.

Adjustment of Grievances.

agreement was broad enough to require arbitration of the dispute.³⁹⁰ The district court concluded that the collective bargaining agreement did not give the Union the right to compel arbitration on the question of whether Warrior could contract out work.³⁹¹ The court stated that the collective bargaining agreement "expressly prohibits arbitration of matters which are strictly a function of management."³⁹² Consequently, the court reasoned that the "contracting out of work" is a management function and not limited by the collective bargaining agreement.³⁹³

The Union appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, arguing the district court erred in failing to compel arbitration.³⁹⁴ The Fifth Circuit affirmed, stating that Warrior's contracting out of work was not subject to arbi-

Issues which conflict with any Federal statute in its application as established by court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

A. For Maintenance Employees:

First, between the aggrieved employees and the Foreman involved;

Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic;

Third, between a member or members of the Grievance Committee and at the option of such committee a representative of the National Organization of the Union and the Vice President;

Fourth, between the representatives of the National Organization of the Union and the representatives of the Executives of the Company; and,

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Company and the Union.

Section 11.

Management.

The management of the Company and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union.

Id. at 703-04.

390. *Warrior & Gulf*, 168 F. Supp. at 704.

391. *Id.* at 705.

392. *Id.*

393. *Id.*

394. *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 269 F.2d 633, 635 (5th Cir. 1959), *rev'd*, 363 U.S. 564 (1960).

tration.³⁹⁵ The court stated that the collective bargaining agreement did not address Warrior's power to contract out work previously performed by its employees.³⁹⁶ Further, the court noted that "we clearly have here a matter which by the agreement of the parties, is strictly a matter of management."³⁹⁷ The court concluded that the contracting out of this work was limited by the collective bargaining agreement, and as such is "strictly a matter of management," which falls outside the range of arbitration.³⁹⁸ The Union appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari to consider whether the Union could compel arbitration.³⁹⁹

On appeal, the Supreme Court reversed the decision of the Fifth Circuit, stating that the Union's grievance was a question for the arbitrator, and it was a dispute about the "meaning and application of the provisions of the [collective bargaining] agreement" which the parties had agreed to arbitrate.⁴⁰⁰ Justice William Douglas, writing for the majority, began the Court's analysis by stating that a "collective bargaining agreement is an effort to erect a system of industrial self-government," and that arbitration is a substitute for industrial conflict.⁴⁰¹ The Court then noted that the arbitrator is a member of a self-governing system, in that he is limited by the parties.⁴⁰² The Court further stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."⁴⁰³ The Court stated that it did not agree with the district court or court of appeals that Warrior's "contracting out" was exempted from the grievance procedure because it was a management function that was not subject to arbitration.⁴⁰⁴ The Court noted that the agreement stated that "if differences arise or if any local trouble of any kind arises, the grievance procedure shall be applicable."⁴⁰⁵ The Court reasoned that "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."⁴⁰⁶

395. *Warrior & Gulf*, 269 F.2d at 637.

396. *Id.* at 636.

397. *Id.* at 637.

398. *Id.* at 636.

399. *Warrior & Gulf*, 363 U.S. at 577.

400. *Id.* at 585.

401. *Id.* at 578, 580.

402. *Id.* at 581.

403. *Id.* at 582.

404. *Id.* at 583.

405. *Id.* (quotations omitted).

406. *Id.* at 584-85.

E. THE PRECEDENTIAL EFFECT OF DICTA

The precedential weight of dicta depends upon its character.⁴⁰⁷ One commentator has stated that in evaluating dicta, "much depends on the character of the dictum. Mere orbiter may be entitled to little weight, while a carefully considered statement . . . though technically dicta, must carry great weight, and may even . . . be regarded as conclusive."⁴⁰⁸ Orbiter dicta is that which:

is stated only "by the way" to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision. The concept of dictum has thus been used to distinguish that which is significant, authoritative, [and] binding — in short, meant — in a judicial opinion from that which is not.⁴⁰⁹

Conversely, considered dicta is dicta that has the " earmarks of careful consideration."⁴¹⁰ Some commentators suggest that lower federal courts are often confused by this characterization.⁴¹¹ According to another commentator, some "lower courts give considerable, and sometimes dispositive, weight to nonbinding but well-considered dicta when addressing novel legal questions."⁴¹² For example, in *United States v. Bell*,⁴¹³ the United States Court of Appeals for the Second Circuit rejected the Government's argument that a statement by the Supreme Court was "pure dicta," and thus, should be disregarded.⁴¹⁴ In *Bell*, an informant notified police that Marce Bell was in possession of heroin and was armed with a firearm.⁴¹⁵ Subsequently, Bell was apprehended by the New York Drug Enforcement Task Force while he was changing a flat tire on his car, which had New Jersey license plates.⁴¹⁶ A .38 caliber pistol was found tucked under Bell's waist-

407. *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 18-19 (1st Cir. 1991).

408. *McCoy*, 950 F.2d at 18-19 (quoting CHARLES A. WRIGHT, *THE LAW OF THE FEDERAL COURTS* § 58, at 374 (4th ed. 1983)).

409. Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 773.

410. See *McCoy*, 950 F.2d at 18-19 (noting that a footnote in a United States Supreme Court decision that construed the Employee Retirement Income Act to preempt state law is considered dicta); *United States v. Bell*, 524 F.2d 202, 203-05 (2d Cir. 1975) (noting that the United States Supreme Court's construction of section 1202(a) of the Omnibus Crime Control and Safe Streets Act in *Bass v. United States*, 404 U.S. 336 (1971), is considered dicta).

411. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2027 (1994). See Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 512 (1952) (commenting on the "mist of qualifications" that have been applied to the simple rule that dicta cannot constitute precedent).

412. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 75 (1994).

413. 524 F.2d 202 (2d Cir. 1975).

414. *United States v. Bell*, 524 F.2d 202, 205-06 (2d Cir. 1975).

415. *Bell*, 524 F.2d at 203.

416. *Id.*

band.⁴¹⁷ Bell was indicted and convicted in the United States District Court for the Southern District of New York for "receiving, possessing and transporting in commerce or affecting commerce a firearm after having been convicted of a felony in violation of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968."⁴¹⁸

Bell appealed his conviction to the United States Court of Appeals for the Second Circuit, arguing that the gun he had in his possession did not have a "sufficient nexus with interstate commerce to come within the language of the statute."⁴¹⁹ The Second Circuit reversed, concluding that there was no evidence that Bell was about to enter into interstate commerce, and thus there was not a sufficient contemporaneous nexus with interstate commerce to uphold the conviction.⁴²⁰ In reversing the lower court's conviction, the court relied on what it believed to be the considered dicta of the Supreme Court in *United States v. Bass*,⁴²¹ in which the Court construed the statute under which Bell was convicted to require a contemporaneous interstate nexus for conviction of possession of a firearm.⁴²² The Second Circuit recognized the language regarding the structure of the statute in part III of the Supreme Court's opinion was indeed dicta — but considered dicta.⁴²³ The court explained "that a distinction should be drawn between 'obiter dictum,' which constitutes an aside or an unnecessary extension of comments, and considered or 'judicial dictum' where the Court, as in this case, is providing a construction of a statute to guide the future conduct of inferior courts."⁴²⁴ The Second Circuit noted that considered dicta, while not binding, could not be ignored by it and must even be given considerable weight.⁴²⁵

The Second Circuit's view of considered dicta and its precedential weight is shared by a number of lower federal courts.⁴²⁶ However, in

417. *Id.*

418. *Id.* The pertinent language of the statute provided:

Any person who

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

Id. at 203-04.

419. *Bell*, 524 F.2d at 202-03.

420. *Id.* at 205, 208.

421. 404 U.S. 336 (1971).

422. *Bell*, 524 F.2d at 205-09.

423. *Id.* at 205-06.

424. *Id.* at 206.

425. *Id.*

426. See *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by the Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *Alston v. Redman*, 34 F.3d 1237, 1246 (3d Cir. 1994) (concluding that, even

United States v. Crawley,⁴²⁷ the United States Court of Appeals for the Seventh Circuit stated that instead of defining the term dicta, it would ask "what reasons there are against a court's giving weight to a passage found in a previous opinion."⁴²⁸ The court provided several reasons why a court should not give weight to a passage: (1) the passage was not necessary to the outcome of the case, and thus probably was not as fully considered as the passages that are essential to its outcome; (2) the passage was not an integral part of the case, thus it can be dismissed without harming the analytical framework of the opinion; (3) the passage was "not grounded in the facts of the case;" and (4) the passage addressed an issue that was not presented to the court, and thus was not clarified by the "fires of adversary presentation."⁴²⁹ The court noted that any one of these reasons would indicate that a particular passage from an opinion was not a fully developed judicial pronouncement, that it is doubtful that readers should rely upon it, and "that it may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended."⁴³⁰

though language in Supreme Court's decision is dicta, "we must consider it with deference, given the High Court's paramount position in our 'three-tier system of federal courts,' . . . and its limited docket"); *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 470 (1st Cir. 1991) (noting that court of appeals cannot assume the Supreme Court "proclaims the law lightly" when it authors considered dicta); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (stating that court of appeals for the Seventh Circuit "should respect considered Supreme Court dicta"); *In re Bremer*, 104 B.R. 999, 1005 (Bankr. W.D. Mo. 1989) ("[L]ower courts should give great weight to statements made by the Court of Appeals in their circuit, even though the statements were dicta."); *Lewis v. Sava*, 602 F. Supp. 571, 573 (S.D.N.Y. 1984) (stating that the court must follow the Supreme Court's analysis, even if it is dicta, if there is no clear authority to the contrary); *Max M. v. Thompson*, 585 F. Supp. 317, 324 (N.D. Ill. 1984) ("In the absence of a controlling Supreme Court ruling, a federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of dictum."); *In re Comac Co.*, 402 F. Supp. 43, 45 (E.D. Mich. 1975) ("[I]t must be remembered that even dictum is entitled to serious consideration by the lower federal courts when it appears in an opinion by the Supreme Court. Since docket constraints do not permit the Supreme Court to pass upon all issues of federal law that arise within the system, the Court frequently paints with a brush somewhat broader than necessary to decide the case immediately before it in order that general guidance may be provided to the courts below."); *Riverside Cement Co. v. Rogan*, 59 F. Supp. 401, 404 (S.D. Cal. 1945) ("A dictum of the Supreme Court, especially one of recent origin, has compelling persuasion on lower courts."); *United States v. Association of Am. R.R.*, 4 F.R.D. 510, 526 (D. Neb. 1945) ("This court will not . . . presumptuously set its individual opinion above the considered expression upon a controverted issue, of its acknowledged judicial superiors, however summarily or obliquely it may be published.").

427. 837 F.2d 291 (7th Cir. 1988).

428. *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988).

429. *Crawley*, 837 F.2d at 292-93.

430. *Id.* at 293. One commentator contends that "words derive their precedential value not from the fact that they have actually been pronounced by judges, but from the fact that they express, however imperfectly, the doctrine necessarily involved in the

ANALYSIS

In *Air Line Pilots Ass'n v. Miller*,⁴³¹ the United States Supreme Court refused to require nonunion pilots to exhaust a union-provided arbitration procedure when the pilots challenged the calculations of agency shop fees.⁴³² In *Miller*, the Air Line Pilots Association ("Union") had developed procedures, pursuant to the United States Supreme Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*,⁴³³ to provide nonunion pilots who challenge the Union's agency shop fee an arbitration forum.⁴³⁴ The Union argued that, by implementing the *Hudson* procedures, it should be able to compel the nonunion pilots to exhaust the procedures before the pilots could challenge the agency fee in federal court.⁴³⁵ The Court refused to read *Hudson* in a way that would protect nonunion members at the cost of delaying their access to federal court.⁴³⁶ The Court further stated that arbitration is a matter of contract between the parties, and in the absence of an agreement to arbitrate agency shop fee objections, nonunion members are not required to exhaust an arbitration procedure before bringing action in federal court.⁴³⁷ Additionally, the Court stated that if agency fee challengers were required to proceed first with arbitration and the arbitrator failed to sustain their objection to the union fee's calculation, then the challenger would be forced "to traverse two layers of procedure rather than one."⁴³⁸ Finally, the Court recognized the genuineness of the Union's concern of defending itself in two fora, but once again stressed that a union's interests cannot "overwhelm objectors' resistance to arbitration to which they did not consent and their election to proceed immediately to court for adjudication of their federal rights."⁴³⁹

The United States Supreme Court in *Miller* properly held that nonunion members who challenge a union's calculation of agency shop fees cannot be prevented by union procedures from initially challeng-

decision." Charles W. Collier, *Precendent and Legal Authority: A Critical History*, 1988 Wis. L. Rev. 771, 776. However, Professor Collier notes that great weight can be attached to an opinion written by more learned and esteemed judges. Collier, 1988 Wis. L. Rev. at 780. For example, Professor Collier lists the following influential judges: "Coke, Hale, Holt, Lord Mansfield, Baron Parke, Chancellor Kent, Chief Justice Marshall, Justice Story, Chief Justice Shaw, or Chief Justice Gibson." *Id.*

431. 118 S. Ct. 1761 (1998).

432. *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761, 1769 (1998).

433. 475 U.S. 292 (1986).

434. *Miller*, 118 S. Ct. at 1764, 1767-68.

435. Brief for Petitioner at 10-12, *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761 (1998) (No. 97-428).

436. *Miller*, 118 U.S. at 1767.

437. *Id.* at 1767, 1769.

438. *Id.* at 1768-69.

439. *Id.* at 1769.

ing the fee in federal court.⁴⁴⁰ The propriety of the *Miller* Court's holding stems from several related factors.⁴⁴¹ First, the Court correctly found that arbitration is a creature of contract, and therefore, the nonunion pilots could not be forced to arbitrate because they had not agreed to do so.⁴⁴² Second, the Court implicitly resolved the circuit split regarding the "arbitration first" rule, and in so doing (a) correctly rejected the efficiency arguments typically used by unions to justify the "arbitration first" rule, and (b) clarified *Hudson*, such that *Hudson* can no longer be construed to require exhaustion.⁴⁴³ Finally, the dissent's argument in favor of an "arbitration first" rule was based upon a misplaced interpretation of *Hudson*.⁴⁴⁴

A. A PARTY MAY NOT BE COMPELLED TO ARBITRATE AN ISSUE TO WHICH HE DID NOT AGREE

The Court in *Miller* properly concluded that nonunion members, who object to the calculation of agency shop fees, cannot be forced to exhaust a union-provided arbitration procedure to which they did not agree before bringing suit in federal court.⁴⁴⁵ In resolving the exhaustion issue, the Court in *Miller* focused on arbitration as a matter of contract and required that both parties consent to such a procedure before either is bound to it.⁴⁴⁶ The decision in *Miller* finds its support in basic contract principles and in the Court's established precedent.⁴⁴⁷

1. *General Contract Principles and the Effects of Collective Bargaining*

The *Miller* Court's holding that nonunion pilots cannot be bound to an arbitration agreement to which they did not agree has a firm foundation in contract principles.⁴⁴⁸ Generally, a party cannot be bound to a contract unless he/she agreed to it.⁴⁴⁹ This principle was

440. See *infra* notes 441-643 and accompanying text.

441. See *infra* notes 442-44 and accompanying text.

442. *Miller*, 118 S. Ct. at 1769; see *infra* notes 445-93 and accompanying text.

443. See *infra* notes 494-594 and accompanying text.

444. See *infra* notes 595-643 and accompanying text.

445. *Miller*, 118 S. Ct. at 1769; see *infra* notes 446-93 and accompanying text.

446. *Miller*, 118 S. Ct. at 1768-69.

447. See *infra* notes 448-93 and accompanying text.

448. See *infra* notes 449-66 and accompanying text.

449. See *Giddings v. Insurance Co.*, 102 U.S. 108, 111 (1880) (stating that a contract is not binding on parties if the vital aspect of assent is not present); *Accord Utley v. Donaldson*, 94 U.S. 29, 47 (1876) ("There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. It is as indispensable to the modification of a contract already made as it was to making it originally. Where there is a misunderstanding as to any thing material, the requisite mutuality of assent as to such thing is wanting; consequently the supposed contract

recognized by the United States Supreme Court in *Insurance Co. v. Young's Administrator*,⁴⁵⁰ in which the Court stated that assent of the parties is essential to the validity of all contracts.⁴⁵¹ In *Young's Administrator*, the Court stated that the parties had not entered into a binding contract for life insurance, because there was no mutual assent as to the terms of the life insurance policy.⁴⁵² Likewise, in *Miller*, there was no mutual agreement regarding the Union's arbitration procedures for agency fee disputes, because the procedures were established by the Union alone.⁴⁵³

Assent is also important in the realm of collective bargaining.⁴⁵⁴ In *Bagnall v. Air Line Pilots Ass'n*,⁴⁵⁵ the Union, acting as the exclusive representative for pilots on various airlines, created procedures by which agency shop fees were to be paid to the Union.⁴⁵⁶ The procedures were contained in the constitution and by-laws of the Union, not in the collective bargaining agreement.⁴⁵⁷ In *Bagnall*, the Fourth Circuit held that the nonunion members were bound only by the collective bargaining agreement, and therefore, could not be forced to pay fees via the methods stipulated in the Union's constitution and by-laws.⁴⁵⁸ The *Bagnall* court refused to extend the terms of the Union's

does not exist, and neither party is bound."); *Insurance Co. v. Young's Adm'r*, 90 U.S. (23 Wall.) 85, 107 (1874) (stating that assent is required for a contract to exist); *Mallory v. City of Detroit*, 449 N.W.2d 115, 118 (Mich. Ct. App. 1989) (noting that an implied contract must satisfy the element of mutual assent); *Zimmerman v. Martindale*, 221 Neb. 344, 348, 377 N.W.2d 94, 97 (1985) (opining that for a contract to be binding "it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement"); *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980) (indicating that "[a] contract requires a meeting of the minds concerning its essential elements"); *McCarter v. Uban*, 166 N.W.2d 910, 913 (Iowa 1969) (concluding that "to become contractually bound, either orally or by writing, the parties must manifest a mutual, unequivocal assent to the terms of the contract"); *Farago v. Burke*, 186 N.E. 683, 684 (N.Y. 1933) (indicating that "[a] contract assumes an agreement, a meeting of the minds, on the thing to be done"); *George W. Wilcox, Inc. v. Shell E. Petroleum Products, Inc.*, 186 N.E. 562, 565 (Mass. 1933) (noting that parties must agree to all essential terms to have a valid contract); *International Transp. Ass'n v. Bylenga*, 236 N.W. 771, 772 (Mich. 1931) (concluding that "[a] meeting of the minds of the parties upon all essential points is necessary to constitute a valid contract"); *Harper v. Goldschmidt*, 104 P. 451, 453 (Cal. 1909) ("[A]n essential of every contract there must be an agreement and meeting of minds. Thus the agreement must precede the signature to the contract, however speedily thereafter such signature may follow."); *Butler v. Moses*, 1 N.E. 318, 319 (Ohio 1885) (stating that a valid contract can exist only if parties "assented to the same thing in the same sense").

450. 90 U.S. (23 Wall.) 85 (1874).

451. *Insurance Co. v. Young's Adm'r*, 90 U.S. (23 Wall.) 85, 107-08 (1874).

452. *Young's Adm'r*, 90 U.S. at 87, 107-08.

453. *Miller*, 118 S. Ct. at 1764, 1769.

454. See *infra* notes 455-66 and accompanying text.

455. 626 F.2d 336 (4th Cir. 1980).

456. *Bagnall v. Air Line Pilots Ass'n*, 626 F.2d 336, 338 (4th Cir. 1980).

457. *Bagnall*, 626 F.2d at 338, 341.

458. *Id.* at 341.

constitution and by-laws to the nonunion members who had deliberately chosen not to be members of the Union.⁴⁵⁹

Similarly, the pilots in *Miller* were exclusively represented by the Union pursuant to the Railway Labor Act ("Act").⁴⁶⁰ Because the Act empowered the Union to bargain on behalf of all pilots, the pilots are deemed to have consented to the collective bargaining agreement and are bound thereby, just as the nonunion pilots in *Bagnall*.⁴⁶¹ Furthermore, the Union in *Miller* created policies and procedures which established the means by which agency shop fee objections might be made.⁴⁶² These policies and procedures are similar to the constitution and by-laws established by the union in *Bagnall*, in that nonunion members are not bound by them, but only the collective bargaining agreement.⁴⁶³ As in *Bagnall*, the pilots in *Miller* were not union members, and thus, cannot be bound to the Union-created arbitration procedures.⁴⁶⁴ Consequently, the *Miller* Court was correct in holding that nonunion members cannot be bound to policies established outside the bounds of the collective bargaining agreement.⁴⁶⁵ This decision demonstrates the concept uttered by the Supreme Court in *Young's Administrator* so many years ago: "[A]ssent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority."⁴⁶⁶

459. *Id.*

460. *Miller*, 118 S. Ct. at 1764; see *infra* note 461 and accompanying text.

461. *Miller*, 118 S. Ct. at 1764; Railway Labor Act, 45 U.S.C. § 152, Fourth (1994 & Supp. II 1996); see *Bagnall*, 626 F.2d at 341 (stating that nonunion members are bound to collective bargaining agreement); Martin H. Malin, *The Legal Status of Union Security Fee Arbitration After Chicago Teachers Union v. Hudson*, 29 B.C. L. REV. 857, 878 (1988) (stating that collective bargaining agreements bind all employees regardless of membership status). This proposition is also supported by *Lancaster v. Air Line Pilots Ass'n*, in which the United States Court of Appeals for the Tenth Circuit held that the agency fee challenger was bound to the collective bargaining agreement even though he was not a member of the union. *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1524 (10th Cir. 1996).

462. Brief for Petitioner at 4-5, *Miller* (No. 97-428).

463. Compare *Bagnall*, 626 F.2d at 338 (noting that the union's constitution and by-laws provide for the methods by which agency shop fees are to be paid), with *Miller*, 118 S. Ct. at 1764 (describing the union's policies and procedures to allow nonunion members to elect to object to the fee's calculation through arbitration).

464. Compare *Bagnall*, 626 F.2d at 341 (stating that nonunion members are bound to the collective bargaining agreement but not to the union's constitution and by-laws), with *Miller*, 118 S. Ct. at 1764 (noting that the Union's arbitration procedure was only contained in the Union's "Policies and Procedures Applicable to Agency Fees").

465. See *supra* notes 447-57 and accompanying text.

466. *Young's Adm'r*, 90 U.S. at 107-08; see *supra* notes 448-65 and accompanying text.

2. *Agreement To Arbitrate An Issue Requires Consent of the Parties*

The Supreme Court's established precedence provides further support for its conclusion in *Miller* that arbitration is a matter of contract, and therefore, can only be required of parties who so agree to arbitrate.⁴⁶⁷ For example, in *First Options of Chicago, Inc. v. Kaplan*,⁴⁶⁸ the Supreme Court unanimously reaffirmed its long-held proposition that arbitration is a matter of contract.⁴⁶⁹ In *Kaplan*, First Options sought to force arbitration resulting from an agreement entered into between itself and an investment company owned by Manuel Kaplan.⁴⁷⁰ Kaplan argued that he was not bound to the arbitration agreement, because he had not personally signed the document which provided for the arbitration procedure.⁴⁷¹ Conversely, his investment company readily agreed to arbitration, because it had signed the agreement which contained the arbitration clause.⁴⁷² The Court emphasized that Kaplan could not be bound to arbitrate, because he had not agreed to do so.⁴⁷³ Finding nothing in the record to demonstrate that Kaplan agreed to submit the dispute to arbitration, the Court determined that Kaplan could not be forced to arbitrate the matter.⁴⁷⁴

467. See *infra* notes 468-93 and accompanying text.

468. 514 U.S. 938 (1995).

469. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995). *Accord* *AT & T Tech. Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty."); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. . . . For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

470. *Kaplan*, 514 U.S. at 940-41; see *supra* notes 350-65 and accompanying text for a thorough discussion of the agreement entered into by Kaplan's investment company and First Options.

471. *Kaplan*, 514 U.S. at 941.

472. *Id.*

473. *Id.* at 946-47.

474. *Id.*

Similarly, in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,⁴⁷⁵ the Supreme Court opined that a party cannot be forced to submit to arbitration any dispute which it had not agreed to submit.⁴⁷⁶ In *Warrior & Gulf*, the Court determined that the parties must arbitrate a grievance filed by the Union concerning the employer's ability to lay off employees and then contract out the work previously done by them.⁴⁷⁷ The Court held that the dispute must be arbitrated, and noted that the collective bargaining agreement was worded sufficiently broad so as to provide for arbitration if "differences arise or if any local trouble of any kind arises."⁴⁷⁸ This broad language, the Court stated, was enough to bring the dispute over contracting out work into the arbitration realm.⁴⁷⁹ Therefore, the Court once again decided the question of whether an issue can be submitted to arbitration by asking whether the parties had agreed to arbitrate.⁴⁸⁰

In *Miller*, the Court correctly dealt with the arbitration issue by focusing on the question of whether the parties agreed to arbitrate the agency fee dispute.⁴⁸¹ The *Miller* Court decided the issue before it in a manner similar to the Supreme Court in both *Kaplan* and *Warrior & Gulf*.⁴⁸² For example, in both *Kaplan* and *Miller*, the similarity lies in the nature of the agreement to arbitrate, whereby there was no agreement to arbitrate the precise issue presented to both Courts.⁴⁸³ Specifically, *Kaplan* involved a contract to arbitrate to which only one of the contesting parties had agreed.⁴⁸⁴ Similarly, in *Miller*, the nonunion pilots did not agree to the Union's policies and procedures that sought to force nonunion pilots to arbitrate agency fee claims, because they were not part of the collective bargaining agreement.⁴⁸⁵ As in

475. 363 U.S. 574 (1960).

476. *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

477. *Warrior & Gulf*, 363 U.S. at 575-76.

478. *Id.* at 583-85.

479. *See id.* (noting that there must be an explicit agreement not to arbitrate disputes under this broad arbitration clause).

480. *See supra* notes 468-79 and accompanying text.

481. *See supra* notes 448-80 and accompanying text; *infra* notes 482-93 and accompanying text.

482. *Compare Warrior & Gulf*, 363 U.S. at 584-85 (stating that parties must arbitrate because the collective bargaining agreement was broad enough to encompass their dispute); *and Kaplan*, 514 U.S. at 946 (finding no evidence to show that a party agreed to arbitrate the matter), *with Miller*, 118 S. Ct. at 1769 (concluding that a party cannot be forced to arbitrate an issue with which it did not agree).

483. *Compare Kaplan*, 514 U.S. at 946 (finding no evidence to show that party agreed to arbitrate the matter), *with Miller*, 118 S. Ct. 1769 (concluding that a party cannot be forced to arbitrate an issue with which it did not agree).

484. *Kaplan*, 514 U.S. at 940-41.

485. *Compare Kaplan*, 514 U.S. at 940-41 (declaring that the agreement was entered into between First Options and Manuel Kaplan's wholly owned investment com-

Kaplan, where Kaplan did not sign the agreement to arbitrate, the *Miller* Court aptly recognized that, by virtue of their decision not to be members of the Union, the nonunion pilots had never agreed to be bound to the policies and procedures.⁴⁸⁶ Therefore, the Court in *Miller* correctly refused to force the pilots to arbitrate the agency shop fee dispute, thereby recognizing the Supreme Court's long-held view that a party cannot be bound by any arbitration provision to which it did not consent.⁴⁸⁷

Similarly, the Court in *Warrior & Gulf* required that parties can only be forced to arbitrate an issue if they agreed to do so.⁴⁸⁸ However, the *Warrior & Gulf* Court did find evidence of intent to arbitrate the issue in the language of the collective bargaining agreement to which both parties had assented, and therefore, compelled arbitration.⁴⁸⁹ *Miller* can be reconciled with *Warrior & Gulf*, because the Court in *Miller* found that the pilots did not agree to arbitrate agency shop fee challenges.⁴⁹⁰ Specifically, unlike *Warrior & Gulf*, where the arbitration requirement was found in the collective bargaining agreement, the arbitration clause in *Miller* was found in the Union's policies and procedures.⁴⁹¹ Therefore, unlike *Warrior & Gulf*, the nonunion members did not "agree" to the policies and procedures as a matter of contract, and therefore, cannot be bound by the arbitration requirement contained therein.⁴⁹² As a result, the Supreme Court in *Miller* correctly concluded that there is "no legal basis for forcing into

pany; Manuel did not sign the agreement in his individual capacity), *with Miller*, 118 S. Ct. at 1764, 1769 (noting that only the Union's policies and procedures contained the agency fee arbitration provision).

486. Compare *Kaplan*, 514 U.S. at 940-41 (declaring that the Kaplans had not personally signed the contract and therefore were not bound to arbitrate), *with Miller*, 118 S. Ct. at 1767-69 (declining to force nonunion members to exhaust a union procedure to which they did not agree).

487. See *supra* notes 467-86 and accompanying text.

488. *Warrior & Gulf*, 363 U.S. at 582.

489. See *id.* at 584-85 (noting that there must be an explicit agreement not to arbitrate disputes under this broad arbitration clause).

490. Compare *id.* (declaring that the parties agreed to arbitrate the issue presented, when collective bargaining agreement states that all "differences [that] arise or if any local trouble of any kind arises, the grievance procedure shall be applicable"), *with Miller*, 118 S. Ct. at 1764-67 (noting that the pilots did not agree to arbitration).

491. Compare *Warrior & Gulf*, 363 U.S. at 584-85 (noting that there must be an explicit agreement not to arbitrate disputes under this broad arbitration clause), *with Miller*, 118 S. Ct. at 1764, 1769 (noting that only the Union's policies and procedures contained the agency fee arbitration provision).

492. Compare *Warrior & Gulf*, 363 U.S. at 582-84 (declaring that the dispute between the union and employer was covered by arbitration agreement, and therefore, must be submitted to arbitration), *with Miller*, 118 S. Ct. at 1764-65, 1769 (noting that the nonunion members did not agree to arbitrate agency fee challenge as provided by Union's policies and procedures, and therefore, they cannot be compelled to arbitrate their challenge).

arbitration a party who never agreed to put his dispute over federal law to such a process.”⁴⁹³

B. RESOLVING THE CIRCUIT SPLIT

The Supreme Court in *Miller* implicitly resolved the split among the circuits regarding the “arbitration first” rule, and in so doing correctly rejected the Union’s efficiency arguments and clarified *Hudson*, such that *Hudson* can no longer be construed to require exhaustion.⁴⁹⁴ In *Miller*, the Union offered several arguments regarding the efficient use of union and court resources.⁴⁹⁵ The Union first argued that allowing an agency fee challenger to bring a claim directly to federal court would hinder the basic purpose of the arbitration procedure, which according to the Union, is “to relieve the court of having to ‘micromanage’ fee calculations.”⁴⁹⁶ Second, the Union asserted that the same issue could be litigated in an arbitration and a court proceeding, simultaneously, if some objectors preferred one forum over the other.⁴⁹⁷ Third, the Union argued that arbitration could provide a satisfactory outcome, and thus eliminate the need for litigation in federal court.⁴⁹⁸ Finally, the Union contended that by compelling arbitration first, a subsequent court action would benefit from the arbitration, because the issues would be well defined and narrowed for the court’s review.⁴⁹⁹

According to the Union, the Court’s decision in *Chicago Teachers Union, Local No. 1 v. Hudson*,⁵⁰⁰ supports the above arguments.⁵⁰¹ In *Miller*, the Union’s policy on agency fee objections were devised as a response to the Court’s decision in *Hudson*.⁵⁰² In *Hudson*, the Court held that for a union’s agency fee collection to be constitutionally valid it must provide “an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”⁵⁰³ The Court noted that these procedural safeguards were necessary to achieve the objective of devising “a way of preventing compulsory sub-

493. *Miller*, 118 S. Ct. at 1767 (quoting *Miller v. Air Line Pilots Ass’n*, 108 F.3d 1415, 1421 (D.C. Cir. 1997)); see *supra* notes 467-92 and accompanying text.

494. See *infra* notes 495-594 and accompanying text.

495. Brief for Petitioner at 11, *Miller* (No. 97-428).

496. *Id.*

497. *Id.* at 11, 21-22.

498. *Id.* at 11.

499. *Id.*

500. 475 U.S. 292 (1986).

501. Brief for Petitioner at 11, *Miller* (No. 97-428).

502. *Id.* at 4.

503. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

sidization 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."⁵⁰⁴ The Court stressed that any procedure must require the union to provide a prompt decision regarding the fee before an impartial decisionmaker, because nonunion employees' First Amendment rights are implicated.⁵⁰⁵ Therefore, the *Hudson* Court concluded, if the nonunion employee objects, he "is entitled to have his objections addressed in an expeditious, fair, and objective manner."⁵⁰⁶ The Union in *Miller* interpreted *Hudson* to require exhaustion, and asserted that "there are no significant countervailing considerations militating against a prompt exhaustion requirement."⁵⁰⁷

1. *The Union's Efficiency Arguments*

While the Union's efficiency concerns supporting its exhaustion argument may be valid, the *Miller* Court's conclusion that such concerns do not outweigh the interests of nonunion members in adjudicating their rights is well supported by other courts.⁵⁰⁸ For example, in *Knight v. Kenai Peninsula Borough School District*,⁵⁰⁹ the Ninth Circuit held that nonunion members challenging a union's agency fee could not be forced to exhaust the union-provided arbitration procedures to which they do not agree.⁵¹⁰ In so holding, the Ninth Circuit rejected the union's argument that not requiring exhaustion would be "a waste of time and money" and would force federal courts to become the micromanagers of agency fee calculations.⁵¹¹ The court reasoned that policy considerations, like efficiency and waste of money arguments, cannot justify exhaustion, because the court could find no legal

504. *Hudson*, 475 U.S. at 302.

505. *Id.* at 307.

506. *Id.*

507. Brief for Petitioner at 11-12, *Miller* (No. 97-428).

508. Compare *Miller*, 118 S. Ct. at 1768-69 (reasoning that union asserted efficiency gains to require exhaustion of arbitration procedures), with *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir. 1997) (rejecting arguments that not requiring exhaustion would lead to a waste of time and money, as well as force federal courts to become the micromanagers of agency fee calculations); and *Miller*, 108 F.3d at 1421 (finding no legal basis for requiring arbitration when a party has not agreed to do so, and addressing alternatives that union could use to facilitate a speedy resolution of the agency fee disputes, such as the efficient management of pre-trial procedures and effective use of class action procedures); and *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509 (10th Cir. 1996) (declaring that not to require exhaustion would make the procedures devised in *Hudson* to be a waste of time and money and would place a heavy burden on courts that could have been avoided through the arbitration process).

509. 131 F.3d 807 (9th Cir. 1997).

510. *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998).

511. *Knight*, 131 F.3d at 816.

basis to force the nonunion members to arbitrate a dispute which they had not agreed to submit to arbitration.⁵¹² Further, the Ninth Circuit indicated that *Hudson* did not require exhaustion, because requiring exhaustion would be inconsistent with *Hudson's* concern that the nonunion members obtain a speedy resolution to their claim.⁵¹³ Such a speedy resolution could not occur if exhaustion was required, because nonunion members would be forced to arbitrate their claim before they could seek judicial review.⁵¹⁴ Therefore, the Ninth Circuit held that none of the Union's policy arguments justified impeding the nonunion members' rights to a speedy determination of the union's fee calculation.⁵¹⁵

The *Miller* Court rejected the Union's efficiency-based arguments on grounds comparable to *Knight*.⁵¹⁶ As in *Knight*, the Court in *Miller* also rejected the argument that failing to require exhaustion would be a waste of time and money and would force the courts to become micromanagers of agency fee calculations.⁵¹⁷ The Court reasoned that the Union's asserted efficiency gains could not overwhelm the agency fee challengers' right to bring their claim in federal court instead of complying with a procedure to which they did not agree.⁵¹⁸ Additionally, the Court implicitly agreed with *Knight*, by recognizing that reading *Hudson* to require exhaustion would frustrate the central purpose of *Hudson's* procedural requirements; namely providing agency fee challengers with a speedy remedy to their claim.⁵¹⁹ The *Miller* Court also recognized that reading *Hudson* to require exhaus-

512. See *id.* (rejecting arguments that not requiring exhaustion would lead to a waste of time and money, as well as force federal courts to become the micro-managers of agency fee calculations).

513. *Id.* See *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992) (declaring that *Hudson* does not require nonunion members to exhaust arbitration, but only requires the union to provide an alternative to litigation).

514. See *Knight*, 131 F.3d at 816 (noting that requiring arbitration before allowing a party to file a federal action would hamper the intent of expediting the agency fee challenge process).

515. See *supra* notes 509-14 and accompanying text.

516. See *infra* notes 517-22 and accompanying text.

517. Compare *Knight*, 131 F.3d at 816 (rejecting arguments that not requiring exhaustion would lead to a waste of time and money, as well as force federal courts to become the micromanagers of agency fee calculations), with *Miller*, 118 S. Ct. at 1768 (stating that the solution to the Union's efficiency concerns is the effective management of pretrial procedures); see *supra* notes 488-96 and accompanying text.

518. *Miller*, 118 S. Ct. at 1769.

519. Compare *Knight*, 131 F.3d at 816 (noting that requiring exhaustion would be inconsistent with *Hudson* and rejecting arguments that not requiring exhaustion would lead to a waste of time and money, as well as force federal courts to become the micromanagers of agency fee calculations), with *Miller*, 118 S. Ct. at 1767-68 (noting that *Hudson's* emphasis was for a speedy remedy and resisted interpreting *Hudson* in a way that may frustrate its very purpose).

tion would be inconsistent with the purposes behind *Hudson*.⁵²⁰ The Court in *Miller* stated that "*Hudson's* requirement of 'a reasonably prompt decision by an impartial decisionmaker' aims to protect the interests of objectors by affording them access to a neutral forum in which their objections can be resolved swiftly."⁵²¹ The *Miller* Court was as sensitive to the issue of a speedy resolution as was the Ninth Circuit, as it found that requiring exhaustion would prevent the speedy remedy to the agency fee challengers' claim established by the *Hudson* Court.⁵²²

Additionally, the *Miller* Court properly rejected the Union's asserted efficiency arguments, because the Union's own policies and procedures contradicted requiring exhaustion.⁵²³ The Union argued for an "arbitration first" reading of *Hudson*, because of asserted efficiency gains.⁵²⁴ However, the express language of the Union's arbitration procedure seems to correspond with a reading of *Hudson* which would not require arbitration first.⁵²⁵ The Union's "Policy and Procedures Applicable to Agency Fees" stated that a nonunion member *may request* arbitration of her agency fee challenge.⁵²⁶ In *Hudson*, the Court stated that a constitutional element to a union's collection of agency fees is that the union make available an impartial decisionmaker.⁵²⁷ Similarly, in *Miller*, the Union's arbitration procedure, as written, provides agency fee challengers with an opportunity, *at their discretion*, to have their dispute heard before an impartial decisionmaker — an arbitrator — other than a federal court.⁵²⁸ Additionally, the proce-

520. *Miller*, 118 S. Ct. at 1768.

521. *Id.* at 1767-68.

522. Compare *id.* (stating that "*Hudson's* emphasis on the need for a speedy remedy weighs against exhaustion, even through an arbitration procedure intended to be expeditious, as an essential prerequisite to federal-court consideration of nonmember challenges"), with *Knight*, 131 F.3d at 816 ("The Court [in *Hudson*] seemed most concerned with ensuring that nonmembers be able to obtain a speedy resolution without having to endure lengthy and protracted litigation in court. To require nonmembers to exhaust arbitration before being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process.").

523. See *supra* notes 24-27 and accompanying text.

524. Brief for Petitioner at 12-13, *Miller* (No. 97-428); see *Miller*, 118 S. Ct. at 1768 ("Against these concerns, [the Union] stresses the asserted efficiency gains of requiring objections to proceed to arbitration first.").

525. Compare Brief for Petitioner at 4-5, *Miller* (No. 97-428) (stating that the Union's "Policies and Procedures Applicable to Agency Fees" provided, in part, "an arbitration procedure by which an objector *may* challenge [the Union's] calculation of the dues reduction or rebate"), with *Hudson*, 475 U.S. at 294-310 (holding that a union's collection of agency shop fees must provide a reasonably prompt decision by an impartial decisionmaker, but the majority did not mention the requirement of exhausting this procedure).

526. *Miller*, 118 S. Ct. at 1764; see *supra* notes 24-27 and accompanying text.

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

528. Brief for Petitioner at 5, *Miller* (No. 97-428) (stating that the Union's "Policies and Procedures Applicable to Agency Fees" provided, in part, "an arbitration procedure

ture comports with the *Miller* Court's reading of *Hudson* that "nothing in [the *Hudson*] decision purports to *compel* objectors to pursue [arbitration]," because the Union's policies and procedures stated that a challenger *may* request arbitration.⁵²⁹ Essentially, while the Union argued for an "arbitration first" reading of *Hudson*, its own policies and procedures made arbitration a discretionary option, thereby promoting the opposite reading of *Hudson*.⁵³⁰ This contradiction, therefore, only operated to undermine the Union's asserted efficiency arguments.⁵³¹

Furthermore, in light of the discretionary wording of the Union's policies and procedures, it was the Union's insistence on arbitration that caused the purported inefficiencies.⁵³² The nonunion members complied with the Union's procedures, in that they chose to litigate in federal court instead of availing themselves of the union-provided arbitrator.⁵³³ In contrast, the Union did not follow its own procedures and submitted the agency fee challenge to arbitration, and then argued that an "arbitration first" rule is necessary for efficiency reasons.⁵³⁴ However, the Union's own policies are consistent with its efficiency argument, because they do not require, but only *permit*, arbitration.⁵³⁵ By enacting its procedures, the Union essentially submitted itself to only one forum, either federal court or arbitration,

by which an object may challenge [the Union's] calculation of the dues reduction or rebate").

529. *Compare Miller*, 118 S. Ct. at 1764, 1768 (stating nothing in *Hudson* compels nonunion objectors to arbitrate) (emphasis added) (citation omitted), *with* Brief for Petitioner at 5, *Miller* (No. 97-428) (stating that the Union's "Policies and Procedures Applicable to Agency Fees" provided, in part, "an arbitration procedure by which an objector *may* challenge [the Union's] calculation of the dues reduction or rebate").

530. *Compare Miller*, 118 S. Ct. at 1768 ("Against these concerns, [the Union] stresses the asserted efficiency gains of requiring objections to proceed to arbitration first."); *and* Brief for Petitioner at 4-5, *Miller* (No. 97-428) (stating that the Union's "Policies and Procedures Applicable to Agency Fees" provided, in part, "an arbitration procedure by which an objector may challenge [the Union's] calculation of the dues reduction or rebate"), *with Hudson*, 475 U.S. at 294-310 (holding that a union must provide a reasonably prompt decision by an impartial decisionmaker, but the majority did not mention the requirement of exhaustion of this procedure).

531. *See supra* notes 523-30 and accompanying text.

532. *See infra* notes 533-38 and accompanying text.

533. *Compare Miller*, 118 S. Ct. at 1764 (noting that nonunion members filed claim in federal court and the Union was notified that the nonunion members preferred to litigate in federal court), *with* Brief for Petitioner at 4-5, *Miller* (No. 97-428) (stating that the Union's procedures provided that nonunion pilots may challenge the fee through an arbitration proceeding).

534. *Miller*, 118 S. Ct. at 1764, 1768. The Court noted that the Union's policies and procedures provided that an objector may request arbitration, yet the Union is the party who submitted the dispute to arbitration, not the objectors. *Id.* at 1764-65.

535. Brief for Petitioner at 4-5, *Miller* (No. 97-428) (stating that the Union's "Policies and Procedures Applicable to Agency Fees" provided, in part, "an arbitration procedure by which an objector *may* challenge [the Union's] calculation of the dues reduction or rebate"); *see infra* notes 536-38 and accompanying text.

whichever the objector chooses.⁵³⁶ According to the Union's own argument, one forum means no inefficiency.⁵³⁷ Thus, because the Union submitted the claim to arbitration subsequent to being notified by the challengers that the dispute would go to federal court, the Union created its own inefficiency in this case.⁵³⁸

2. Clarifying Hudson

In resolving the circuit split, the Supreme Court in *Miller* clarified the lower courts' misinterpretation that *Hudson* required exhaustion.⁵³⁹ Some lower courts have concluded that a nonunion member must exhaust nonjudicial remedies, provided the procedures comply with the requirements set forth in *Hudson*.⁵⁴⁰ For example, in *Hudson*, the Seventh Circuit, on remand from the Supreme Court, found that it would be unrealistic to require courts to micromanage the calculation of every agency fee that is challenged.⁵⁴¹ The court stated that if it were to accept the argument that courts must determine the correctness of an agency fee before the fee could be collected, this would "render redundant and irrelevant [*Hudson's*] requirement that an impartial decisionmaker hear the dispute."⁵⁴²

In addition, the United States Court of Appeals for the Tenth Circuit, in *Lancaster v. Air Line Pilots Ass'n*,⁵⁴³ agreed with the Seventh Circuit that the agency fee challenger must exhaust union-provided procedures that meet the criteria set out by the Supreme Court in *Hudson*.⁵⁴⁴ The Tenth Circuit provided several reasons for its adoption of the exhaustion requirement.⁵⁴⁵ First, the court relied upon the concurring opinion in *Hudson*, in which Justice Byron White postulated that if a union provides an arbitration proceeding that meets the requirements outlined by the majority, then the union should be able to insist that challengers exhaust those proceedings before bringing a claim in federal court.⁵⁴⁶ The Tenth Circuit stated that it was not

536. See Brief for Petitioner at 4-5, *Miller* (No. 97-428) (stating that the Union's "Policies and Procedures Applicable to Agency Fees" provided, in part, "an arbitration procedure by which an objector may challenge [the Union's] calculation of the dues reduction or rebate").

537. See Brief for Petitioner at 11, 20-23, *Miller* (No. 97-428) (making various arguments for one forum).

538. See *supra* notes 523-37 and accompanying text.

539. See *infra* notes 540-94 and accompanying text.

540. *Hudson*, 922 F.2d at 1314; *Lancaster*, 76 F.3d at 1522-23; see *infra* notes 541-51 and accompanying text.

541. *Hudson*, 922 F.2d at 1314.

542. *Id.*

543. 76 F.3d 1509 (10th Cir. 1996).

544. *Lancaster v. Air Line Pilots Ass'n*, 76 F.3d 1509, 1522 (10th Cir. 1996).

545. *Lancaster*, 76 F.3d at 1522.

546. *Id.* at 1521-22.

bound by the *Hudson* concurrence, but viewed it as “carrying the same precedential weight as Supreme Court dicta to the extent it is consistent with the majority opinion. As such, [the court would] not disregard it without a significant reason for doing so.”⁵⁴⁷ Second, the Tenth Circuit agreed that the “practical appeal of the Seventh Circuit’s approach is obvious and compelling.”⁵⁴⁸ The court stated that if exhaustion were not required, then “the procedure spawned by the Supreme Court in *Hudson* would be largely a waste of time and money,” and the court would be overly burdened, because it would frequently be called upon to “micro-manage” the calculations of agency fees.⁵⁴⁹ This entanglement of fee disputes, the court noted, could be resolved by the Union without the need for judicial intervention.⁵⁵⁰ Thus, the Seventh and Tenth Circuits clearly emphasized the burdens placed upon the courts and the unions if agency fee challengers were not forced to exhaust the union-provided arbitration procedures.⁵⁵¹

However, both courts improperly interpreted the Supreme Court’s holding in *Hudson* for two reasons.⁵⁵² First, the Tenth Circuit’s reliance in *Lancaster* on the *Hudson* concurrence is misplaced, because the *Hudson* concurrence was, in fact, inconsistent with the reasoning of the majority.⁵⁵³ Several courts have demonstrated that the majority’s opinion in *Hudson* cannot be reconciled with a requirement for exhaustion.⁵⁵⁴ In *Knight*, the Ninth Circuit reasoned that the *Hudson* Court was concerned with the nonunion members’ ability “to obtain a speedy resolution” to their agency fee objection and that to require exhaustion before bringing court action “would frustrate the intent of expediting the chargeability calculation and refund process.”⁵⁵⁵ Additionally, the Third Circuit, in *Hohe v. Casey*,⁵⁵⁶ found that *Hudson* did not require exhaustion, but merely required the union to provide an

547. *Id.* at 1522.

548. *Id.*

549. *Id.* (citations omitted).

550. *Id.*

551. See *supra* notes 540-50 and accompanying text.

552. See *infra* notes 553-94 and accompanying text.

553. Compare *Lancaster*, 76 F.3d at 1522 (stating that Justice White’s concurrence will be given the same precedential weight as Supreme Court dicta, but only “to the extent it is consistent with the majority opinion. As such, we will not disregard it without a significant reason for doing so.”), with *Knight*, 131 F.3d at 816 (stating that requiring exhaustion, as suggested by Justice White’s concurrence in *Hudson*, would frustrate the intent of the majority opinion in *Hudson*, which provided for a speedy resolution to an agency fee challenge).

554. See *Knight*, 131 F.3d at 816 (stating that requiring exhaustion would be inconsistent with *Hudson*); *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992) (stating that *Hudson* concluded “that Unions must provide nonmembers with an alternative to litigation”).

555. *Knight*, 131 F.3d at 816.

556. 956 F.2d 399 (3d Cir. 1992).

alternative to judicial litigation.⁵⁵⁷ Likewise, the Supreme Court in *Miller* could not reconcile a requirement to exhaust union arbitration procedures with the Court's opinion in *Hudson*, because this would impede *Hudson's* central emphasis on the objector's right to a speedy resolution of agency fee disputes.⁵⁵⁸ By ignoring the inconsistency between the *Hudson* majority and concurrence, the Tenth Circuit inappropriately relied upon the concurrence as a reason to require exhaustion.⁵⁵⁹

Second, the Tenth Circuit's reliance on the *Hudson* concurrence was flawed, because it was nothing more than orbiter dicta.⁵⁶⁰ There are two types of judicial dicta — orbiter and considered.⁵⁶¹ This distinction between the Supreme Court's well-considered dicta, which is often afforded great weight by lower federal courts, and its orbiter dicta is found throughout the caselaw of the lower federal courts.⁵⁶² For example, the United States Court of Appeals for the Second Cir-

557. *Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992).

558. *See Miller*, 118 S. Ct. at 1768 (noting *Hudson's* emphasis for a speedy resolution to the nonmember's agency fee challenge and resisting to interpret *Hudson* in a way that might frustrate its purpose).

559. *See supra* notes 553-58 and accompanying text.

560. *See infra* notes 561-94 and accompanying text.

561. *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975); *see supra* notes 408-25 and accompanying text; *infra* notes 562-66 and accompanying text.

562. *See Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by the Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *Alston v. Redman*, 34 F.3d 1237, 1246 (3d Cir. 1994) (concluding that, even though language in Supreme Court's decision is dicta, "we must consider it with deference, given the High Court's paramount position in our 'three-tier system of federal courts,' . . . and its limited docket"); *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 470 (1st Cir. 1991) (noting that court of appeals cannot assume the Supreme Court "proclaims the law lightly" when it authors considered dicta); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (stating that court of appeals for the Seventh Circuit "should respect considered Supreme Court dicta"); *In re Bremer*, 104 B.R. 999, 1005 (Bankr. W.D. Mo. 1989) ("[L]ower courts should give great weight to statements made by the Court of Appeals in their circuit, even though the statements were dicta."); *Lewis v. Sava*, 602 F. Supp. 571, 573 (S.D.N.Y. 1984) (stating that the court must follow the Supreme Court's analysis, even if it is dicta, if there is no clear authority to the contrary); *Max M. v. Thompson*, 585 F. Supp. 317, 324 (N.D. Ill. 1984) ("In the absence of a controlling Supreme Court ruling, a federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of dictum."); *In re Comac Co.*, 402 F. Supp. 43, 45 (E.D. Mich. 1975) ("[I]t must be remembered that even dictum is entitled to serious consideration by the lower federal courts when it appears in an opinion by the Supreme Court. Since docket constraints do not permit the Supreme Court to pass upon all issues of federal law that arise within the system, the Court frequently paints with a brush somewhat broader than necessary to decide the case immediately before it in order that general guidance may be provided to the courts below."); *Riverside Cement Co. v. Rogan*, 59 F. Supp. 401, 404 (S.D. Cal. 1945) ("A dictum of the Supreme Court, especially one of recent origin, has compelling persuasion on lower courts."); *United States v. Association of Am. R.R.*, 4 F.R.D. 510, 526 (D. Neb. 1945) ("This court will not . . . presumptuously set its individual opinion above the considered expression upon a controverted issue, of its

cuit, in *United States v. Bell*,⁵⁶³ recognized the distinction between orbiter dicta and considered dicta when determining whether to follow the dicta of the Supreme Court.⁵⁶⁴ The court found that dicta can be categorized as orbiter dicta, "which constitutes an aside or an unnecessary extension of comments," or as considered dicta where the Court provides guidance for the lower courts, such as furnishing a construction of a statute.⁵⁶⁵ The *Bell* court then explained that unlike orbiter dicta, considered dicta "must be given considerable weight and cannot be ignored," especially when the court is presented with a close question.⁵⁶⁶

Additionally, the United States Court of Appeals for the Seventh Circuit, in *United States v. Crawley*,⁵⁶⁷ indicated that instead of defining dicta, the court should begin by asking "what reasons are there against a court giving weight to a passage found in a previous opinion."⁵⁶⁸ Such reasons include whether the "passage was unnecessary to the outcome of the earlier case," was not an integral part of the court's opinion, is firmly grounded in the case's facts, or was not an issue that was presented for the court's review.⁵⁶⁹ If the passage corresponds with these reasons, then it should be deemed "not a fully measured judicial pronouncement" and be afforded little weight.⁵⁷⁰

Under the test in *Crawley*, the *Lancaster* Court was incorrect in affording precedential weight to the *Hudson* concurrence.⁵⁷¹ The concurrence in *Hudson* stated:

[A]s I understand the Court's opinion, the complaining non-member need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.⁵⁷²

The question of whether to afford the *Hudson* concurrence any precedential weight turns on three pertinent prongs of the test.⁵⁷³ First,

acknowledged judicial superiors, however summarily or obliquely it may be published.")

563. 524 F.2d 202 (2d Cir. 1975).

564. *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975).

565. *Bell*, 524 F.2d at 206.

566. *See id.* (noting that the court was presented with a close question).

567. 837 F.2d 291 (7th Cir. 1988).

568. *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988).

569. *Crawley*, 837 F.2d at 292-93.

570. *See id.* (discussing the passage quoted from *United States v. Yancey*, 827 F.2d 83 (7th Cir. 1987)).

571. *See infra* notes 572-82 and accompanying text.

572. *Hudson*, 475 U.S. at 311 (White, J., concurring).

573. *See infra* notes 574-82 and accompanying text.

the passage supplied by the concurrence was not necessary to the outcome of the case, because the Court held that the procedures provided by the Union were inadequate and then provided guidelines for new procedures, none of which included a mention of requiring arbitration.⁵⁷⁴ In fact, the Court in *Hudson* only mentioned arbitration in a footnote, as a *possible* alternative for the impartial decisionmaker requirement.⁵⁷⁵ Second, the concurrence was not an integral part of the case, because it was not an essential element of the analytical structure of the case.⁵⁷⁶ Specifically, the Court did not mention that the impartial decisionmaker requirement *must* be followed by objectors as the concurrence believed.⁵⁷⁷ Rather, the Court held that “the constitutional requirements for the Union’s collection of agency fees include[d] an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”⁵⁷⁸ Third, the issue addressed by the concurrence in *Hudson* — whether union-provided arbitration must be exhausted before bringing an action in federal court — was not presented to the Court.⁵⁷⁹ The Court addressed the issue presented — whether the Union’s procedures were constitutionally adequate — and found that the Union’s procedures were inadequate and described what would constitute proper procedures.⁵⁸⁰ Nowhere in *Hudson* does the majority mention that nonunion members must

574. See *Hudson*, 475 U.S. at 310 (holding only that the Union must provide the following requirements to make their agency shop fee collection constitutional: (1) advance explanation of the fee; (2) “reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker;” and (3) provide an escrow of the “amounts reasonably in dispute”). Justice White’s concurring opinion stated in addition to these requirements, the Union may insist that arbitration must be exhausted before seeking relief in courts. *Id.* at 311 (White, J., concurring).

575. *Hudson*, 475 U.S. at 294-311, 308 n.21.

576. See *Hudson*, 475 U.S. at 294-310 (mentioning in a footnote that arbitration *might* satisfy the impartial decisionmaker requirement, yet never stating that it was a constitutional requirement).

577. See *Hudson*, 475 U.S. at 294-310 (mentioning that a constitutional requirement to the a union’s collection of agency fees is the challenger’s opportunity to have a prompt decision by an impartial decisionmaker, however, the Court never stated that challengers must then proceed with the impartial decisionmaker before bringing their objection before a federal court).

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

579. See *id.* at 302 (stating that the question presented to the court was: “whether the procedure used by the Chicago Teachers Union and approved by the Chicago Board of Education adequately protects the basic distinction drawn in *Abood*. “The objective must be to devise a way of preventing 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.”). Justice White stated that the Union may insist on arbitration, yet the majority was not asked to decide whether the nonunion members must arbitrate. *Id.* at 294-311.

580. *Hudson*, 475 U.S. at 304, 310.

first submit their agency fee objection to the union-provided impartial decisionmaker.⁵⁸¹ The *Hudson* concurrence, as dicta, fails each step of the *Crawley* test, and thus cannot be a fully developed judicial pronouncement that is entitled to any precedential weight.⁵⁸²

By failing the *Crawley* test, the language of the *Hudson* concurrence comes within the definition of orbiter dicta.⁵⁸³ In *Bell*, the Second Circuit bifurcated Supreme Court dicta into two varieties: orbiter and considered.⁵⁸⁴ The court in *Bell* then explained that it would afford considered dicta considerable weight.⁵⁸⁵ However, the court defined orbiter dicta as that which is an aside or “an unnecessary extension of comments.”⁵⁸⁶ The traditional concept of orbiter dicta comports with *Bell* and expands the term to include those statements that are not an essential or integral part of the legal reasoning behind a decision.⁵⁸⁷ The *Hudson* concurrence, by not being necessary to the outcome of the case, by not being integral to the analytical structure of the case and by not being an issue before the Court, not only meets the *Crawley* test, but also falls squarely within the definition of orbiter dicta.⁵⁸⁸ Therefore, the *Lancaster* court should not have afforded

581. *Id.* at 294-310.

582. *See supra* notes 568-81 and accompanying text.

583. *See supra* notes 568-82 and accompanying text; *infra* notes 584-89 and accompanying text; Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 772-73 (noting that orbiter dictum is that which “is stated only ‘by the way’ to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision. The concept of dictum has thus been used to distinguish that which is significant, authoritative, binding — in short, meant — in a judicial opinion from that which is not”).

584. *Bell*, 524 F.2d at 206.

585. *Id.*

586. *Id.*

587. *Compare id.* (stating that orbiter dictum is an aside or an unnecessary expansion of comments), with Collier, 1988 WIS. L. REV. at 772-73 (noting that orbiter dictum is that which “is stated only ‘by the way’ to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision. The concept of dictum has thus been used to distinguish that which is significant, authoritative, binding — in short, meant — in a judicial opinion from that which is not”).

588. *Compare Hudson*, 475 U.S. at 311 (White, J., concurring) (“[A]s I understand the Court’s opinion, the complaining nonmember need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that arbitration procedure be exhausted before resorting to the courts.”), with *Hudson*, 475 U.S. at 294-310 (holding only that the Union must provide the following requirements to make their agency shop fee collection constitutional: (1) advance explanation of the fee; (2) “reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker;” and (3) provide an escrow of the “amounts reasonably in dispute”), and *Crawley*, 837 F.2d at 292-93 (stating that three questions the court asks are: (1) was the statement unnecessary to the holding of the case; (2) was the passage an integral part of the case; and (3) was the issue addressed in the statement, an issue presented to the court; additionally stating that these are reasons for the court not providing a completely measured judicial pronouncement, and thus should not be afforded precedential weight), and Collier,

precedential weight to the *Hudson* concurrence because it was merely orbiter dicta.⁵⁸⁹

Unlike the Tenth Circuit in *Lancaster*, the Supreme Court in *Miller* correctly rejected the *Hudson* concurrence's contention that exhaustion should be required if a union provides procedures that meet the standards set forth by the majority, and relegated the concurrence to the status that it always should have held — mere orbiter dicta.⁵⁹⁰ In *Miller*, the Court termed Justice White's contention in *Hudson* to be an unelaborated assertion.⁵⁹¹ Further, the *Miller* Court expressly clarified that *Hudson*'s impartial decisionmaker requirement was to provide agency fee objectors with a neutral forum to allow for a speedy resolution of their objection and that "nothing in our decision purports to compel objectors to pursue that remedy."⁵⁹² The finding of the *Miller* Court finally clarified *Hudson*, and dispelled the *Lancaster* court's reliance on the *Hudson* concurrence.⁵⁹³ By clarifying *Hudson* in this manner, the Court implicitly agreed with those circuits that held that requiring exhaustion would be inconsistent with the central theme of *Hudson* — protecting the interests of the nonunion members by providing a swift resolution to agency fee challenges before an impartial decisionmaker.⁵⁹⁴

C. THE DISSENT — A MISINTERPRETATION OF *HUDSON*

In his dissent in *Miller*, Justice Stephen Breyer's misguided interpretation of *Hudson* led him to conclude that the Court should require the nonunion pilots to exhaust the Union's arbitration procedures before bringing a claim in federal court.⁵⁹⁵ The dissent stated that he read *Hudson* as implying approval of requiring "initial participation in 'prompt' . . . arbitration" and agreed with Justice White's concurrence in *Hudson*.⁵⁹⁶ The dissent's reading of *Hudson* is flawed for two fundamental reasons.⁵⁹⁷ First, the dissent misapplied the balancing test that he used to justify the "arbitration first" rule by not taking

1988 WIS. L. REV. at 772-73 (stating that orbiter dictum is that which "is stated only 'by the way' to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision. The concept of dictum has thus been used to distinguish that which is significant, authoritative, binding — in short, meant — in a judicial opinion from that which is not").

589. See *supra* notes 560-88 and accompanying text.

590. See *supra* notes 560-89 and accompanying text; *Hudson*, 475 U.S. at 311 (White, J., concurring).

591. *Miller*, 118 S. Ct. at 1767.

592. *Id.*

593. See *supra* notes 539-92 and accompanying text.

594. See *supra* notes 539-93 and accompanying text.

595. See *infra* notes 596-643 and accompanying text.

596. *Miller*, 118 S. Ct. at 1769 (Breyer, J., dissenting).

597. See *infra* notes 598-99 and accompanying text.

into account the individual rights of each agency fee challenger.⁵⁹⁸ Second, the dissent mistakenly contended that the proper analogy for the "arbitration first" rule was to be found in court rules which allow courts to "require" parties to enter into nonbinding arbitration before they are allowed to pursue the case in court.⁵⁹⁹ Because the dissent's argument was based upon these two fatal gaps in reasoning, the dissent's view that *Hudson* should be read to imply exhaustion was misguided.⁶⁰⁰

The dissent did not seem to sufficiently take the interest of each individual challenger into account when he balanced the interests of the Union and the challengers and concluded that the "arbitration first" rule was a reasonable extension of *Hudson*.⁶⁰¹ The dissent sought to justify the "arbitration first" rule by balancing the Union's concern that nonunion members "share the cost of the collective bargaining from which they benefit," with the interests of the nonunion member in not paying for union expenditures which may advance "ideological or political views that the nonmember does not share."⁶⁰² In weighing the scales, the dissent viewed the arbitration issue through the eyes of both the Union and the nonunion pilots.⁶⁰³ From the Union's perspective, the dissent perceived the "arbitration first" rule as a reasonable procedure that would reduce the costs of agency fee disputes, while at the same time make their resolution more manageable.⁶⁰⁴ On the other hand, the dissent, while viewing the "arbitration first" rule through the eyes of the fee challenger, perceived the Court's decision as protecting only a few employees' interests, which would not offset the harm suffered by the Union.⁶⁰⁵

For example, the dissent asserted that not requiring the "arbitration first" rule would help only a "few" objectors and "may resolve the dispute to the satisfaction of some dissenting employees, perhaps whose objections rest less upon ideology and more upon a desire to minimize the fee they must pay."⁶⁰⁶ The dissent tried to justify the "arbitration first" rule by further stating that objectors will only be deprived of their money for a short period of time.⁶⁰⁷ Consequently, the dissent perceived the "arbitration first" rule as a way to resolve

598. See *infra* notes 601-21 and accompanying text.

599. See *infra* notes 622-41 and accompanying text.

600. See *infra* notes 601-43 and accompanying text.

601. *Miller*, 118 S. Ct. at 1769-72 (Breyer, J., dissenting); see *infra* notes 602-21 and accompanying text.

602. *Miller*, 118 S. Ct. at 1770 (Breyer, J., dissenting).

603. *Id.* (Breyer, J., dissenting).

604. *Id.* (Breyer, J., dissenting).

605. *Id.* at 1770-71 (Breyer, J., dissenting).

606. *Id.* (Breyer, J., dissenting).

607. *Id.* at 1771 (Breyer, J., dissenting).

disputes to the satisfaction of some objectors, whose focus is mostly on reducing the fee assessment than it is on objecting to the funding of ideological programs.⁶⁰⁸

However, the dissent's assumption ignores the sheer number of agency fee challenges brought in the past forty years in which nonunion members advanced true opposition to a unions' use of the fee for political or ideological purposes.⁶⁰⁹ For example, in *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes v. Allen*,⁶¹⁰ thirty-seven nonunion employees brought suit, objecting to the union's use of agency fee funds to support political causes in which they did not believe.⁶¹¹ Specifically, the nonunion employees objected to the union using agency shop funds for supporting or opposing legislation, influencing votes in elections for public office, and financing political activities.⁶¹² Likewise, in *Abood v. Detroit Board of Education*,⁶¹³ two agency fee challenges, one of which was a class action, were brought by teachers who alleged that the union "engaged in a number and variety of activities and programs which [were] economic, political, professional, scientific and religious in nature of which [the nonunion members did] not approve, and which they [had] no voice, and which [were] not and [would] not be collective bargaining activities."⁶¹⁴ In *Abood*, the Supreme Court stressed an individual's right not to be forced to fund political causes with which he does not agree.⁶¹⁵ Additionally, in *Tierney v. City of Toledo*,⁶¹⁶ seventeen nonunion members brought an agency shop fee challenge in federal court, alleging that the ordinance, which granted authority for the agency shop fee, "coerced monetary and other support for ideological causes to which the [nonunion members] opposed."⁶¹⁷ Additionally, the nonunion members asserted that "[t]hese acts . . . restrain[ed] and abridge[d] plaintiffs' ability to support their own views and causes."⁶¹⁸ These cases indicate that agency shop fee objectors are

608. *Id.* (Breyer, J., dissenting).

609. See *infra* notes 610-21 and accompanying text.

610. 373 U.S. 113 (1963).

611. *Brotherhood of Ry. & Steamship Clerks, Freight Handlers, Express & Station Employes v. Allen*, 373 U.S. 113, 116 n.3 (1963); *Allen v. Steamship Clerks, Freight Handlers, Express & Station Employes*, 107 S.E.2d 125, 126 (N.C. 1959), *rev'd*, 373 U.S. 113 (1963).

612. *Allen*, 373 U.S. at 116 & n.3.

613. 431 U.S. 209 (1977).

614. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-14 (1977).

615. *Abood*, 431 U.S. at 234-35, 234 n.31.

616. 917 F.2d 927 (6th Cir. 1990).

617. *Tierney v. City of Toledo*, 917 F.2d 927, 929 (6th Cir. 1990); *Tierney v. City of Toledo*, Nos. 85-3018, 85-3290, 1986 U.S. App. LEXIS 19892, at *2 (6th Cir. Jan. 14, 1986).

618. *Tierney*, 917 F.2d at 929; *Tierney*, 1986 U.S. App. LEXIS 19892, at *2.

genuinely challenging unions' ideologies, contrary to the dissent's conclusion.⁶¹⁹ Therefore, not requiring the arbitration rule would not just help a "few" objectors as maintained by the dissent.⁶²⁰ As such, the dissent incorrectly applied the balancing test by failing to adequately take into account the individual rights of each agency fee challenger.⁶²¹

The dissent's attempt to compare the purported "arbitration first" rule with court rules that "require" parties to submit to arbitration before proceeding in federal court would make no difference in the outcome of the case.⁶²² The dissent disagreed with the majority's view of arbitration as a consensual matter between the parties, but rather advocated that a court could compel nonunion members to arbitrate their claim before seeking redress in court.⁶²³ The dissent stated that its "arbitration first" rule, as derived from *Hudson*, would be similar to court rules requiring arbitration.⁶²⁴ The rules to which the dissent referred were authorized by 28 U.S.C. §§ 651-658, but the statutes have since been amended.⁶²⁵ Before being amended, the statute referred to by the dissent in *Miller* authorized twenty district courts to implement and use an arbitration program.⁶²⁶ Referral to consensual arbitration was permitted in all twenty district courts authorized to implement the program, and was allowed in every civil action.⁶²⁷ On the other hand, referral to compulsory arbitration was allowed in very limited circumstances and in only ten district courts.⁶²⁸ Compulsory arbitration was available in a civil action seeking *only* money damages

619. Compare *Miller*, 118 S. Ct. at 1170-71 (Breyer, J., dissenting) (arguing that not requiring exhaustion will help only a few objectors, many of whom may have objections that rest merely on lessening the fee than on true ideological grounds), with *Allen*, 373 U.S. at 116 n.3 (noting that thirty-seven nonunion members opposed the use of agency fee funds to finance legislative agendas, to influence votes and to finance political activity), and *Abood*, 431 U.S. at 212-14 (stating that two class actions were consolidated where nonunion members objected the use of agency fee funds for economic, political, scientific and religious purposes with which the nonmembers disagreed), and *Tierney*, 1986 U.S. App. LEXIS 19892, at *3 (noting that seventeen nonunion members brought suit challenging use of agency fee funds for ideological and political purposes with which they did not agree).

620. See *supra* notes 606-19 and accompanying text.

621. See *supra* notes 601-20 and accompanying text.

622. See *infra* notes 623-43 and accompanying text.

623. *Miller*, 118 S. Ct. at 1771 (Breyer, J., dissenting).

624. *Id.* (Breyer, J., dissenting).

625. *Id.* (Breyer, J., dissenting); see *supra* note 97 and accompanying text.

626. *Miller*, 118 S. Ct. at 1771 (Breyer, J., dissenting); 28 U.S.C. §§ 651, 658 (1994), amended by the Alternative Dispute Resolution Act of 1998 § 3, 10.

627. 28 U.S.C. §§ 651, 652, 658 (1994), amended by the Alternative Dispute Resolution Act of 1998 §§ 3, 4, 10.

628. *Id.* § 652(a)(1)(B), amended by the Alternative Dispute Resolution Act of 1998 § 4 (compulsory arbitration was allowed if the civil action was *only* for money damages not to exceed \$100,000 and allowed *only* in district courts listed in 28 U.S.C. § 558(1)).

not exceeding \$100,000.⁶²⁹ Additionally, compulsory arbitration was not allowed in any case that involved "an alleged violation of a right secured by the Constitution of the United States."⁶³⁰ The statute calling for these procedures was amended in October 1998, and today all district courts are permitted to develop alternative dispute resolution procedures; but, in the case of arbitration, a court can require it in any civil action only if the parties consent.⁶³¹ However, under the new rules, no referral to arbitration is allowed if "the action is based upon an alleged violation of a right secured by the United States Constitution."⁶³²

Applying these rules to *Miller* will provide no better outcome for the dissent than would the majority's focus on consensual arbitration, because under the old court rules, the parties could not be compelled to arbitrate their claim and the amended rules now only allow for consensual arbitration.⁶³³ Under the old rules, the parties in *Miller* would have had to consent to the arbitration, because the pilots in *Miller* did not meet the requirements under the compulsory arbitration category.⁶³⁴ The pilots were not seeking *only* money damages, but a recalculation of their agency fee, which involves a challenge to the procedures by which such calculations were derived.⁶³⁵ Additionally, compelling the pilots to arbitrate their complaint under the rules might not have been possible, because 28 U.S.C. § 652 provides that no action alleging a constitutional violation may be referred to arbitration without the consent of the parties.⁶³⁶ While the pilots' action did not stem from the Constitution, there are constitutional questions which may arise in the collection of agency fees that are not germane

629. *Id.*

630. *Id.* § 652(b)(1), amended by the Alternative Dispute Resolution Act of 1998 § 4.

631. Alternative Dispute Resolution Act of 1998 § 4 (codified at 28 U.S.C. § 652 (1998)).

632. *Id.* § 6, (codified at 28 U.S.C. § 654).

633. *Compare Miller*, 118 S. Ct. at 1771 (Breyer, J., dissenting) (stating that the courts should require arbitration instead of leaving that decision to the parties), *with* Alternative Dispute Resolution Act of 1998 § 4 (allowing for consensual arbitration); *and* 28 U.S.C. § 652 (1994), amended by the Alternative Dispute Resolution Act of 1998 § 4 (allowing compulsory arbitration in civil action where the *only* relief sought is money damages not in excess of \$100,000).

634. *Compare Miller*, 118 S. Ct. at 1764 (noting that nonunion members' complaint alleged that the agency shop provision was unlawful on its face and their amended complaint challenged the union's calculation of the fee), *with* 28 U.S.C. § 652, amended by the Alternative Dispute Resolution Act of 1998 § 4 (allowing compulsory arbitration in civil action where the *only* relief sought is money damages not in excess of \$100,000).

635. *See Miller*, 118 S. Ct. at 1764-65 (stating that the courts should require arbitration instead of leaving that decision to the parties).

636. Section 652 Alternative Dispute Resolution Act; *see supra* note 630 and accompanying text.

to collective bargaining.⁶³⁷ Further, the amendment to section 652 renders this line of questions moot, because the new statute only provides for consensual arbitration.⁶³⁸ Therefore, if the parties do not agree, then they may not be forced into arbitration.⁶³⁹ The majority stated that the arbitration at issue in *Miller* turned on the parties' agreement, and this consensual nature of arbitration has a long history in the caselaw of the Supreme Court, as well as in industry.⁶⁴⁰ If the critical difference to the dissent was consent, then the analogy to court rules offered by the dissent provides an answer no different from the majority — the answer will still turn on the consensual nature of the arbitration.⁶⁴¹

The weakness of the dissent's analysis lies in his misreading of *Hudson*, along with his defective balancing of the respective rights of the parties involved in *Miller* and his reliance on an analogy that provided no different an outcome than that achieved by the majority.⁶⁴² These flaws in the dissent's arguments do nothing but strengthen the majority's conclusion that, unless nonunion members agree to arbi-

637. *Miller*, 118 S. Ct. at 1764; see *Lancaster*, 76 F.3d at 1515-16 (discussing the test on the constitutionality of agency fee assessments not germane to collective bargaining).

638. Section 654 of the Alternative Dispute Resolution Act.

639. *Id.*

640. *Miller*, 118 S. Ct. at 1769 (holding "that unless they agree to the procedure, agency fee objectors may not be required to exhaust an arbitration remedy before bringing their claims in federal court"); see *AT & T Tech. Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty."); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. . . . For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); See also FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 28 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (noting that arbitration is generally a matter of contract); OWEN FAIRWEATHER, *FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 173 (Ray J. Schoonhoven ed., 3d ed. 1991) (stating that arbitrators deal with agreements written by parties).

641. See *supra* notes 622-40 and accompanying text.

642. See *supra* notes 602-41 and accompanying text.

trate their agency fee challenges, there is no legal basis for requiring them to exhaust a union-provided arbitration procedure.⁶⁴³

CONCLUSION

In *Air Line Pilots Ass'n v. Miller*,⁶⁴⁴ the United States Supreme Court refused to give force to the Air Line Pilots Association's ("Union") procedures requiring nonunion members to arbitrate their agency fee challenges.⁶⁴⁵ In so holding, the Court recognized the long-held principle that a party cannot be bound to an agreement to which he/she did not assent.⁶⁴⁶ The Court also dispelled the Union's argument that their efficiency concerns necessarily outweigh the interests of the agency fee challengers.⁶⁴⁷ The Court explained that *Chicago Teachers Union, Local No. 1 v. Hudson*⁶⁴⁸ cannot be the basis for requiring nonunion members to exhaust a union-provided arbitration procedure, because such a reading of *Hudson* would conflict with the essential element of that holding — protecting the nonunion members' interests by affording them access to a neutral forum in which their agency fee challenge could be swiftly resolved.⁶⁴⁹ Therefore, the Court's holding necessarily works to afford nonunion members, who seek to challenge a union's calculation of agency shop fees, the right to do so initially in federal court, and also clarifies *Hudson* in a manner in which it can no longer stand for the proposition that agency fee challengers must first exhaust union-provided remedies before proceeding with their claim in federal court.

First, in refusing to order the nonunion members to exhaust arbitration, the Court correctly indicated that arbitration is a matter of contract.⁶⁵⁰ By indicating this, the Court made it essential for the parties to have agreed to the arbitration procedure before it is binding upon them.⁶⁵¹ Second, the Court implicitly resolved the circuit split by properly explaining that nothing in *Hudson* purports to require agency fee objectors to pursue the remedy established by a union to comply with *Hudson's* procedural requirements. By clarifying *Hudson*, the Court abrogated the decisions of the circuit courts that had relied upon the *Hudson* concurrence as authority for requiring an "ar-

643. *Miller*, 118 S. Ct. at 1765; see *supra* notes 602-41 and accompanying text.

644. 118 S. Ct. 1761 (1998).

645. *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761, 1769 (1998).

646. *Miller*, 118 S. Ct. at 1767; see *supra* notes 309-406 and accompanying text.

647. *Miller*, 118 S. Ct. at 1769.

648. 475 U.S. 292 (1986).

649. *Miller*, 118 S. Ct. at 1767-68.

650. See *Miller*, 118 S. Ct. at 1767-68 (stating that arbitration is a matter of contract to which the nonunion pilots did not agree and therefore were not bound).

651. See *id.* at 1769 (refusing to compel the nonunion members to delay their claim in federal court because they had not agreed to arbitrate the issue first).

bitration first” rule. Third, the dissent’s contention that *Hudson* impliedly required an “arbitration first” rule was predicated on an erroneous balancing of the interests of the Union and the individual fee challengers.⁶⁵² The fundamental flaw of the dissent’s analysis was his assumption that only a “few” challengers were necessarily burdened by the arbitration, because most of the challengers were more interested in reducing the amount of the fee, rather than truly challenging the Union’s political and ideological use of the funds.

The astonishing aspect of *Miller* is not its holding, but the sharp dichotomy between the majority’s effort to protect the nonunion pilots’ right to bring an agency fee challenge in federal court and the ease with which the dissent dismissed the interests of the individual rights of the nonunion pilots. The majority seemed to go out of its way to stress the importance of the need for the nonunion pilots to agree to the arbitration procedure before their access to a federal courthouse would be delayed. Unfortunately, the dissent viewed these interests in a significantly less favorable light, perhaps because he did not genuinely believe that the typical challenger of an agency shop fee is truly challenging the fee to protest the union’s use of the funds to support political and ideological beliefs with which the challenger disagrees. The dissent’s less than subtle implication that these challenges are merely made in an effort to minimize the amount of the fee is disheartening. It must have been too much for the dissent to believe that in today’s seemingly apathetic society some individuals truly do have strong political and ideological beliefs and do not wish to have their “hard earned” money spent for purposes that conflict with those beliefs. Fortunately, seven Justices refused to agree with the dissent’s assumption, and thereby allowed the doors to the federal courthouse to remain open for those nonunion members who elect to walk through them.

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652. See *supra* notes 601-21 and accompanying text.

