LABOR UNIONS: UNION SECURITY AGREEMENTS

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INTRODUCTION

The problem that this paper addresses is compulsory union membership. It is settled law, that employers cannot require employees to be union members. But, Congress allows employers to require employees to pay union dues through what are called agency shop agreements which are a type of union security agreement. This is the type of compulsory unionism I will be discussing; the financial type. Congress also allows states to prohibit employers from requiring employees to pay union dues. So, although, Congress allows agency shop agreements, they allow states to prohibit them. "Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in such states illegal" through what are called state right-to-work laws. I will argue that Congress should deal with this problem themselves, instead of handing it over to the states to confront.

I. BACKGROUND

A. Types of Union Security Agreements

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2 See NLRB v. Gen. Motors Corp., 373 U.S. at 734.


There are several different types of union security agreements which accomplish different results. One type of a union security agreement is a closed shop agreement. A closed shop agreement is an agreement in which the employer agrees to employ only members in good standing of the labor organization.\(^5\) Closed shop agreements require people to join a labor organization before they can even be hired.\(^6\) Closed shop agreements are illegal because they violate Section 8(a)(3) of the National Labor Relations Act (NLRA) in that they require employers to discriminate in regard to hire or tenure of employment in order to encourage membership in a labor organization.\(^7\)

Another type of a union security agreement is a union shop agreement. "The union shop [agreement] does not condition initial employment on union membership but requires that employees join the union after a grace period on the job and remain union members during the term of the agreement."\(^8\) Union shop agreements are legal, however, Section 8(a)(3) of the NLRA forbids a grace period shorter than thirty days.\(^9\) Therefore, a union shop agreement can after 30 days of employment require employees to join a labor organization and remain a member of that labor organization for the duration of that agreement.\(^10\) At the same time, the NLRA permits the states to enact right-to-work laws that bar union shop agreements.\(^11\)

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\(^5\) See ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 641 (1976).

\(^6\) See id. at 640.


\(^8\) GORMAN, supra note 5, at 642.


\(^10\) See GORMAN, supra note 5, at 642.
A third type of a union security agreement is an agency shop agreement. An agency shop agreement does not require an employee to be a union member at any point in time. It does, however, require employees to “pay the union for services rendered by the union to employees within the bargaining unit as the employees’ ‘agent’ in negotiating and administering the labor contract,” such as, initiation fees and periodic dues.\(^{12}\) Agency shop agreements require nonunion member employees to pay the same amount as union member employees in order to combat the free rider problem.\(^{13}\) The free rider problem recognizes that nonunion member employees receive the same benefits from union representation as the union member employees.\(^{14}\) If the nonunion member employees do not have to pay for these services, whereas the union member employees do, the nonunion member employees are allowed to enjoy the same benefits without having to pay for them, and thus, they get a “free ride.”\(^{15}\) Generally, agency shop agreements are legal, but, some states have made agency shop agreements illegal. The NLRA gives the states the authority to prohibit agency shop agreements.\(^{16}\)

A fourth type of a union security agreement is a maintenance of membership agreement. A maintenance of membership agreement does not require an employee to join a labor organization, however, it requires an employee to remain a member once having voluntarily joined


\(^{12}\) GORMAN, supra note 5, at 642.

\(^{13}\) See id.

\(^{14}\) See id.

\(^{15}\) See id.

a labor organization. Even though a maintenance of membership agreement does not force somebody to become a union member, it does force somebody to remain a union member once they become a member. Maintenance of membership agreements are legal in a limited form. Employees who join a union are allowed to revoke their union membership, in the sense that they are not required to continue to be a full member of the union, but, they are still required to pay their full union dues. So, what this means is that the employee is no longer subject to the union rules, however, the employee still is obligated to pay the same amount in union dues as a full member.

A fifth type of a union security agreement is a dues checkoff agreement. A dues checkoff agreement does not require an employee to join a labor organization, but, it requires that the employer “deduct from the earnings of union members (just as it would for taxes, insurance premiums or charitable contributions) the periodic membership dues and ... pay that amount directly to the union.” A dues checkoff agreement requires employers to deduct union dues from the employees’ pay check, which makes it much easier for the union to collect their dues because they do not have to collect them from the individual union members, instead, they collect them from the employer. Dues checkoff agreements are legal as long as they are voluntarily authorized by the employees.

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17 See GORMAN, supra note 5, at 642.
18 See id. at 645.
19 See id. at 645-46.
20 See id.
21 Id. at 642.
22 See id. at 671.
B. History

The Wagner Act of 1935 legalized closed shop agreements.\textsuperscript{23} The Wagner Act of 1935 provided that "an employer could lawfully agree to hire and retain only union members (provided the union was selected by a majority of employees in the bargaining unit and was not employer dominated or assisted)."\textsuperscript{24} The Taft-Hartley amendments of 1947 made closed shop agreements illegal. Section 8(a)(3) of the National Labor Relations Act provides that "it shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."\textsuperscript{25} Thus, closed shop agreements violate Section 8(a)(3) because they amount to discrimination in hire or tenure of employment in order to encourage union membership.\textsuperscript{26}

In 1963, the Supreme Court held that the purpose of Section 8(a)(3) was to abolish closed shop agreements and to validate agency shop agreements.\textsuperscript{27} Therefore, employers are prohibited from agreeing to employ only union members, however, employers can require employees to pay the union a service fee.\textsuperscript{28} The Court did find that agency shop agreements do, in essence, require

\begin{itemize}
\item \textsuperscript{23} See GORMAN, supra note 5, at 640.
\item \textsuperscript{24} Id
\item \textsuperscript{25} 29 U.S.C. § 158(a)(3) (1999).
\item \textsuperscript{26} See GORMAN, supra note 5, at 640.
\item \textsuperscript{27} See NLRB v. Gen. Motors Corp., 373 U.S. 734 (1963).
\item \textsuperscript{28} See NLRB v. Gen. Motors Corp., 373 U.S. at 734.
\end{itemize}
membership in labor organizations, but that requirement is balanced by the fact that states may pass right-to-work laws that bar agency shop agreements.\textsuperscript{29}

C. Union dues

Employees may be required to pay to the union "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."\textsuperscript{30} An employee's financial obligation to the union must be periodic, regular, uniform, and general.\textsuperscript{31} If an employee fails to pay his union dues, the employer may discharge the employee.\textsuperscript{32}

The Board held and the court enforced the Board's holding that the union may not exact the same monthly dues from all persons within the unit, members and nonmembers, and then refund a certain amount from those dues to members who attend union meetings.\textsuperscript{32} Subsequently, the Board held that the union could give a refund to members who attended the union meetings, however, no court has approved this holding, as of yet.\textsuperscript{34}


\textsuperscript{31} See Stage Employees Local 409 (Radio Corp. of Am.), 140 N.L.R.B. 759 (1963).

\textsuperscript{32} See GORMAN, supra note 5, at 650.

\textsuperscript{33} See Leece-Neville Co. Local 1377, 140 N.L.R.B. 56 (1962), enforced, 330 F.2d 242 (6th Cir. 1964).

\textsuperscript{34} See Pulp, Sulphite & Paper Mill Workers Local 171 (Boise Cascade Corp.), 165 N.L.R.B. 971 (1967).
The NLRA prohibits the union from conditioning membership on payment of an excessive or discriminatory fee.\textsuperscript{35} If an employer discharges an employee for failure to pay their initiation fee and the fee was unreasonably excessive or discriminatory, the discharge is in violation of the NLRA.\textsuperscript{36} However, just because the union is prohibited from charging an excessive or discriminatory fee, does not mean that the union has to charge everybody the same initiation fee.\textsuperscript{37} The union can charge different people different initiation fees, as long the differences are based on reasonable classifications.\textsuperscript{38} For example, the union can charge veterans of the armed forces a lesser initiation fee than members who are not veterans.\textsuperscript{39} The union can also charge a different (higher or lower) initiation fee to past members of the union than to new members of the union.\textsuperscript{40}

The union cannot charge a lower initiation fee to somebody who becomes employed after the contract is made and charge a higher fee to somebody who was an employee at the time the contract was made, but was not a union member at that time.\textsuperscript{41} This is because even though the NLRA provides that union shop agreements are lawful, the employees still have a right to refrain from union membership for the first thirty days of employment or the execution of a contract.\textsuperscript{42}


\textsuperscript{36} See GORMAN, supra note 5, at 652.

\textsuperscript{37} See id.

\textsuperscript{38} See id.

\textsuperscript{39} See id.

\textsuperscript{40} See Foundry Workers (Food Mach. & Chem. Corp.), 101 N.L.R.B. 116 (1952).

\textsuperscript{41} See Automobile Workers Local 753 (Ferro Stamping & Mfg. Co.), 93 N.L.R.B. 1459 (1951).

\textsuperscript{42} See Automobile Workers Local 753 (Ferro Stamping & Mfg. Co.), 93
However, the union can waive initiation fees of people who become members immediately after the contract is made in order to encourage people to become members quickly.\(^{43}\) But, the union cannot waive initiation fees of employees who become members before a representation election and charge an initiation fee of the employees who become members after the representation election.\(^{44}\)

D. Elections

Once a union has been elected and the union and the employer have executed a collective bargaining agreement, no election can be held for a period of time up to three years and this is known as the contract bar.\(^{45}\) However, if the collective bargaining agreement contains an unlawful union security agreement, the contract bar does not apply and an election can be held at any time.\(^{46}\) But, in order to avoid application of the contract bar, the collective bargaining agreement must contain a union security agreement that is unlawful on its face or a finding by the Board that it is unlawful.\(^{47}\)

II. ANALYSIS

A. National Labor Relations Act Section 8(a)(3)


\(^{45}\) See GOLDMAN, supra note 5, at 653-54.

\(^{46}\) See id. at 654.

\(^{47}\) See id.
Section 8(a)(3) abolishes closed shop agreements and validates agency shop agreements.\(^48\) Therefore, employers are prohibited from agreeing to employ only union members, however, employers can require employees to pay the union a service fee.\(^49\) Agency shop agreements require employees to join a labor organization, in practice.\(^50\) However, it is argued that this obligation is appropriate because states are allowed to pass right-to-work laws that bar agency shop agreements.\(^51\)

Agency shop agreements require employees to join a union, in the sense that, they require employees to pay the same amount of union dues as full members are required to pay. "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues."\(^52\) The membership which the employer can require of all employees is "whittled down to its financial core."\(^53\) Employers can condition employment on the payment of union dues, but employers cannot condition employment on union membership and there is a slight difference.\(^54\) Just because somebody pays union dues does not make that person a union member. A union member is subject to union discipline for violation of union rules, whereas a person who merely

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\(^49\) See NLRB v. Gen. Motors Corp., 373 U.S. at 734.

\(^50\) See id.


\(^52\) NLRB v. Gen. Motors Corp., 373 U.S. at 742.

\(^53\) Id.

\(^54\) See GORMAN, supra note 5, at 645.
pays union dues is not subject to the union's rules. The union cannot impose fines on members who have resigned from the labor organization for violation of a union rule, even if the resignation is invalid.

In *NLRA v. Allis-Chalmers Manufacturing Co.*, the union imposed fines on union members who crossed the picket line to work for the employer during an authorized strike against the employer. The employees argued that the union did not have the authority to impose fines; the union only had the authority to expel union members. The Supreme Court rejected the employees' argument and held that the union does have the authority to impose fines as well as expel union members. A full union member is subject to this union rule of not crossing the picket line, but an employee who merely pays his union dues and is not a full union member is not subject to this union rule. Thus, a fine can be imposed on the union member for crossing the picket line, but no such fine can be imposed on the non-union member who merely pays union dues.

In *NLRA v. Industrial Union of Marine and Shipbuilding Workers of America Local 22*, there was a rule in the union constitution which provided that a union member must exhaust all of

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55 See id.


57 388 U.S. 175 (1967).


60 See GORMAN, supra note 5, at 645.
his remedies provided for in the constitution before going to the National Labor Relations Board (NLRB). 62 In this case, a union member violated this rule and the union expelled him. 63 The Court held that the union did not have the authority to expel this union member in this case. 64 Although the union has the authority to regulate their own internal affairs, the union does not have the authority to obstruct access to the NLRB. 65

In *Scafied v. NLRB*, employees were paid by the employer on a piecemeal basis, meaning the more you produce the more you are paid. 66 Union members challenged a union rule which fixed a maximum on production, in that, if employees produced more than the maximum allowed they could not demand immediate payment for production above that maximum, but they could carry over the excess production to days when they did not reach the maximum rate. 67 The union members violated the rule and the union imposed fines on them for their violations. 68 The Court upheld the union rule and the fines imposed for the violations of the rule. 69 The Court held that a

61 See id.


64 See Indus. Union of Marine and Shipbuilding Workers of Am. Local 22, 391 U.S. at 418.

65 See id.


68 See Scafied, 394 U.S. at 423.

69 See id.
union is “free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor law, and is reasonably enforced against union members who are free to leave the union and escape the rule.” 70

B. National Labor Relations Act: Section 14(b)

The NLRA, by way of section 14(b), establishes that states have the authority to enact right-to-work laws. 71 Section 14(b) provides that, “[n]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.” 72 Section 14(b) permits states to prohibit agency shop agreements. By virtue of Section 14(b), states may prohibit and render illegal a provision of a collective bargaining agreement which requires that, as a condition of continued employment, an employee, even though he does not join the union, must pay to the union an initiation fee and union dues. 73

“Section 14(b) allows states to permit free riders,” in that it allows states to prohibit employers from requiring employees to pay union dues. 74 Unions argue that “in the absence of

70 I d. at 430.

71 See GORMAN, supra note 5, at 661.


such provisions [agency shop agreements] many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost. This, of course, is true and is the essence of the free rider problem. However, Congress was aware of this when they enacted Section 14(b), yet, they decided it was the states' role to balance these interests.

The federal government has pre-empted states in the field of union security agreements. Federal law governs union security agreements, not state law. But, Section 14(b) is an exception to this otherwise full pre-emption by federal government in the field of union security agreements. Section 14(b) gives the states the power to prohibit agency shop agreements, even though the federal government allows them.

C. State Right-To-Work Laws

Nineteen states have enacted right-to-work laws. Most of these right-to-work laws prohibit agency shop agreements. In other words, they prohibit conditioning employment on the

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75 Int'l Union of United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. and Can. Local Unions Nos. 141, 229, 681, and 706, 675 F.2d at 1260.
76 See Ky. State AFL-CIO v. Puckett, 391 S.W.2d 360 (Ky. 1965).
77 See Puckett, 391 S.W.2d at 360.
78 See id.
79 See id.
80 Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas,
payment of union dues. Since most right-to-work laws prohibit agency shop agreements, they also, in essence, prohibit union shop agreements because union shop agreements require employees to be members of a union, but the only thing that membership requires is the payment of union dues.

The Supreme Court has held that state right-to-work laws are constitutional. The union argued that it was unconstitutional to allow states to prohibit compelling employees to join a labor organization. But, the court rejected this argument, holding that it was constitutional for a state to proscribe agreements which require union membership.

In Retail Clerks International Ass'n Local 1625 v. Schermerhorn, a state right-to-work law prohibited union shop agreements and agency shop agreements. The union argued that section 14(b) only allows the states to prohibit union shop agreements, not agency shop agreements. The Court rejected the union's argument, holding that a union shop agreement is

Utah, Virginia, and Wyoming have right-to-work laws. See GORMAN, supra note 5, at 661.

82 See GORMAN, supra note 5, at 661.

81 See id.

80 See id.


84 See Lincoln Fed. Labor Union No. 19129, 335 U.S. at 525.

85 See id.


87 See Schermerhorn, 373 U.S. at 746.
essentially equivalent to an agency shop agreement. A union shop agreement requires union membership, but this requirement has been held only to require the payment of union dues and an agency shop agreement requires the payment of union dues, thus, they essentially require the same thing.

D. Freedom of Thought and Association

In *Railway Employees' Department v. Hanson*, union members challenged the constitutionality of an agency shop agreement on the basis that it infringed on their freedom of thought and association. The Court held that the agreement was constitutional because all the agreement did was require all employees to financially support the union and since all the employees benefited from the union's services and representation, this was appropriate. "Such limited compulsory 'membership' does not on its face impair freedom of expression." The Court felt that since the only thing that membership required was paying the union dues, this was not an infringement on one's freedom of expression. The Supreme Court held that agency shop agreements are not facially invalid.

In *International Ass'n of Machinists v. Street*, union members challenged an agency shop agreement because part of their dues were being used to finance specific candidates' campaigns.

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89 See id.

90 See id.


92 See Ry. Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

93 Hanson, 351 U.S. at 225.

94 See id.

95 See id.
running for federal and state positions that they opposed. The Court held that the union cannot use money collected from employees to support political causes which the employee opposes, if the employee objects.

The Court's construction of the Act thus required that a distinction be made between 'the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievance and disputes,' the costs of which may be taxed against even objecting members of the bargaining, and the support of 'political causes,' which may not.

If employees oppose the spending of their money for negotiation of a certain provision, the union is still allowed to spend their money on the negotiation on that certain provision. But, if employees oppose the spending of their money for support of a certain political candidate, the union cannot spend their money on support of that certain political candidate.

In order for the union to be prohibited from spending money collected from union members, the employee must inform the union that he does not want his money being spent on political causes. The employee does not have to object to every individual

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98 GORMAN, supra note 5, at 657.
99 See Int'l Ass'n of Machinists, 367 U.S. at 740.
100 See id.
political expenditure that the employee opposes; the employee merely has to inform the union that he does not want his money going towards any political cause. 102

E. Freedom of Thought and Religion

In Buckley v. American Federation of Television and Radio Artists, a television commentator challenged an agency shop agreement as violating his right to free speech because he was not allowed to broadcast until he paid his union dues. 103 The Court held that the agency shop agreement did not violate the free speech clause because Congress could reasonably believe that the agreement has a legitimate purpose. 104 The alleged legitimate purposes were to eliminate the free rider problem and to financially support the union. 105

In Linscott v. Millers Falls Co., Seventh Day Adventists challenged an agency shop agreement as violating their religious freedoms. 106 The Seventh Day Adventists "assert that their religious tenets—principally the belief that social wrongs must be cured by the conscience of the individual and not by organized group action—prevent them from financially supporting a union against their will." 107 The Court held that the agency shop agreement was constitutional because

102 See Allen, 373 U.S. at 113.
103 496 F.2d 305 (2d Cir. 1974).
104 See Buckley v. Am. Fed'n of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974).
105 See Buckley, 496 F.2d at 305.
106 440 F.2d 14 (1st Cir. 1971).
107 GORMAN, supra note 5, at 660.
the agreement does not force employees to adhere to any religious beliefs. Subsequently, Congress has enacted Section 19 of the NLRA, which provides:

any employee who ... adheres to established and traditional tenets ... of a bona fide religion ... which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required ... in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund.

An employee who holds religious beliefs which contravene with membership in a labor organization, may refuse to join a labor organization. However, the employee still has to pay union dues, but the union dues do not go to the union, they go to a charitable organization.

Congress should extend Section 19 to apply to all employees regardless of their religious beliefs. All employees should be required to pay an amount equivalent to union dues, but they should be able to decide where they want this money to go. Employees should be able to choose that their money go to either the union or some kind of charitable organization. This does not completely solve the free rider problem, but it does reduce the effects of the free rider problem. Since employees are still required to pay an amount

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110 See id.
equivalent to union dues, many employees will choose to have their money go to the union. There is no incentive not to pay the union because all employees are required to pay the same amount of money. Those employees who support the union, will elect to have their money go to the union. But, those employees who oppose the union, may choose to have their money go to a charitable organization instead of the union. Employees opposed to the union should not be forced to give money to the union.

The free rider problem will still exist because some employees are going to decide that they are not going to financially support the union, but they are still going to receive the benefits that the union has to offer. However, if enough employees do this, the union is going to go belly up and knowing this should be enough to encourage those who support the union to support the union financially. Should not we be asking that if there is not enough employees who support the union to make the union survive, should the union exist anyway?

This is a better solution to the free rider problem because it does not compel employees to be union members but it does not give employees an incentive to be "free riders." Employees should not be forced to financially support the union if they do not want to. Unions should be subject to the rules of capitalism. If there is enough support for the union, then the union will thrive. If there is not enough support for the union, then the union will go under. But, just because unions may not survive does not mean that the government has the right to shove unions down the throats of employees who do not want them. If employees want the benefits of the union, then they will financially support the

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111 See id.
union. But, if employees feel that the union does not benefit them, then unions will cease to exist.

If Section 19 is extended to apply to all employees regardless of their religious beliefs, there would be no need for Section 14(b). Thus, Section 14(b) should be abolished. I find it strange that Congress enacted legislation which provides that employers can require employees to pay union dues, but allows states to prohibit employers from doing this, but that is exactly what Congress did when it enacted the NLRA. The federal government seems to be saying, we do not have the nerve to outlaw agency agreements, but states if you want to, go ahead. I see no reason to have a conflict between federal and state laws. The law should be uniform. Plus, if employees are able choose where their money goes, then there is no need for the states to be able to prohibit agency shop agreements because employers are no longer able to compel employees to support the union.

CONCLUSION

Employers cannot agree with the union to only hire people who are already union members. Employers can agree with the union to require employees to become union members after 30 days. However, union membership only requires the payment of union dues. The employer cannot require employees to be full union members, and thus, be subject to union rules


114 See NLRB v. Gen. Motors Corp., 373 U.S. at 734.
and union discipline for violation of those union rules. The employers can require employees to pay union dues. The above is the federal law, however, states can change the above in some ways. The federal government allows states to enact right-to-work laws, which prohibit agency shop agreements. States can prohibit employers from requiring employees to pay union dues. The above is the law as it stands. I believe it needs to be reformed. Employees should be required to pay an amount equivalent to union dues, but employees should have the right to designate this money to go to either the union or a charitable organization. This would solve the problem of compulsory union membership, while not crippling unions financially.

115 See id.
116 See id.
118 See id.