The Ethics of Closed Shops

***Defining terms:***

While the Taft-Hartley Act of 1947 outlawed “closed shops,” it allowed two closely related entities: “union shops” and “agency shops.” A union shop is a workplace in which all new hires are required to join the union (usually after a short period of time), and the company is required to fire any employee who refuses to pay dues (though not employees kicked out of the union for other reasons). An agency shop is a workplace in which new hires are not required to join the union but *are* required to pay union dues. The comments in this essay apply generally to union and agency shops as well as to Taft-Hartley “closed shops.”

***The essay:***

In American parlance, a closed shop is one in which a union has a contract with an employer requiring all employees to be union members. Although this is, strictly speaking, a private contract, various forms of the closed shop are sanctioned by law; and the two big political parties constantly squabble over the laws surrounding these entities.

From the natural rights view, closed shops clearly require justification, because they seem at least a prima facie violation of freedom of association. If people want to unionize and collectively bargain a contract with management, that is their right. But why should they be allowed to force others to join them?

Several arguments are offered to justify closed shops. The first two are broadly consequentialist while the third takes more of a natural rights course. We can call them the free- rider argument, the unequal power argument, and the freedom to contract argument.

The free-rider argument, such as found, for example, in Joseph DesJardins’ *An Introduction to Business Ethics*,[[1]](#footnote-1) holds that employees who join a unionized company without joining the union are free riders. They are reaping the benefits of collective bargaining—presumably, higher wages and better benefits than they could get on their own—without paying their dues, literally and figuratively. This, on the face of it, appears unfair. As DesJardins puts it,

If one receives benefits from a process that entails costs, it seems only fair that you share the costs. Especially if there is evidence that workers would receive lower wages and benefits without the union, mandatory union membership allocates the benefits and burdens of union membership in a fair and equal manner.[[2]](#footnote-2)

Proponents of this argument often cite statistics to buttress the claim that unions are able to negotiate better contracts. Twenty-two states are “right to work” states (i.e., they have laws prohibiting closed [and union] shops). The U.S. Department of Labor statistics are often cited to show that workers in right-to-work states earn less than workers in union-shop states (4% was the figure given by the Economic Policy Institute in 2001, controlling for differences in living costs) and that they also have more workplace fatalities.

But the free-rider argument is unconvincing for a number of reasons. First, it is unclear why I should consider myself obligated to share the costs of some process that benefits me if I don’t want to be a part of that process. Suppose I live in a crime-plagued neighborhood and some of my neighbors form a vigilante group that kidnaps gang members and lynches them. Even if it does lower crime, thus benefiting me, why am I obligated to support it, when I consider its actions reprehensible?

Second, the free-rider argument applies, at best, only to the average worker. What about workers who are exceptionally talented, well-educated, or hardworking? Such people might well be able to get a better contract on their own.

Third, and more generally, what compelling evidence is there that unions *always* negotiate the best contracts? It may well be true that unions historically have often gotten higher wages and better benefits, but they have also, in many cases, put companies out of business because they saddled them with such high labor costs that they couldn’t survive competition or forced them to close under the pressure of a prolonged strike. Workers may get more short-term benefits but at the cost of long-term security. So if workers can be compelled to pay dues to a union under the theory that the union gives them benefits, shouldn’t a union be compelled to pay workers when its actions cost them their jobs or other things they value?

The comparative data are interesting on this point. For example, Census Bureau statistics indicate that during the period of 1982–2001, the number of manufacturing companies grew by 7% in right-to-work states while shrinking by 4.9% in union-shop states. Moreover, data from the Department of Commerce (Bureau of Economic Analysis) indicate that during the period of 1993–2003, real personal income grew by 37% in right-to-work states, compared to only 26% in union-shop states.

Fourth, we have to consider other factors besides wages, benefits, and job security when assessing the consequences of union activity to the workers involved. In particular, unions spend (and have historically spent) much of their members’ dues on political campaigns. The argument here is that unions are providing such good benefits that allowing them to compel all workers to belong is justified, but it doesn’t take into account this other cost: the union may elect politicians who increase the workers’ taxes, abridge their right to own weapons, deprive them of choice about their children’s education (by opposing voucher and charter schools), or deny their children equal opportunity (by supporting affirmative action schemes that give other children preference).

This is no purely abstract point. In recent elections, unions have spent 60% of their members’ dues on lobbying, political donations, and other political activities. And 90% of those political donations go to Democratic Party candidates, even though up to 40% of union members vote Republican in any given election. Much of the opposition to closed and union shops comes from this opposition to dues being used to further projects that workers despise. Doesn’t compelling someone to pay for causes that he religiously, economically, or philosophically opposes violate that person’s rights in a profound way?

Granted, in 1988, the U.S. Supreme Court ruled (in the *Beck* case) that employees have a right to refuse to pay that portion of their dues that is used for political purposes. But unions have been very successful at blocking implementation of the *Beck* ruling. Typically, a union will demand that any dissident employee wanting a dues rebate put his or her request in writing, which is an inconvenience and subjects the worker to the possibility of reprisal. Several states have passed “paycheck-protection” acts that put the burden of getting worker approval for spending dues on political campaigns squarely on the union. When Colorado and Utah passed paycheck-protection laws that required unions to get written permission from members before using their dues for political campaigns, dues collections dropped by more than two-thirds.

Needless to say, unions that have ties to organized crime have an especially poor argument for the closed or union shop. Any benefits the union delivers must be balanced against the costs of criminal activity.

The unequal power argument rests on the idea that management is typically in a position to say “take it or leave it” to the individual worker, and the worker will have to submit to a bad deal. Only if there is a union to represent the workers will they have a fair chance in negotiation, and unions can exist only when there is solidarity.

The truth of this argument is debatable. Even if unions always, or typically, negotiate the best deals, why would that require total “solidarity,” that is, total membership of the workforce? Why couldn’t a union representing (say) 80% of the workers still have the power to negotiate a good contract?

But even if we answer “it could,” there is a problem with the logic—it is an *ignoratio elenchi.* At most it shows that unions are generally necessary for empowering the worker. If this is true, it only shows that workers ought to join the union for their own good, not that it is morally permissible for them to be compelled to do so as a condition of employment.

By far the most philosophically interesting argument, and the one that is bound to be most interesting to libertarians, is the freedom to contract argument. It seeks a reversal of sorts: to use classical liberalism, viewed by the political Left as a pro-business ideology, to justify a practice that greatly benefits unions. Under classical liberal economic principles, employers are free to offer any compensation package they want, and potential employees are free to accept or reject the package or counter with any proposals they want. As long as no coercion is involved, the government should stay out of the matter. Why, then, should unions not be able to contract with employers for a closed shop?

Before critiquing this argument, I want to make two observations about it. The first is that, as economist Charles Baird has noted[[3]](#footnote-3), the same argument would equally support the view that the government should not—as it currently does—prohibit yellow-dog contracts, contracts that require employees to surrender their right to form unions as a condition for employment. Needless to say, union supporters never advocate permitting *those* contacts.

The second is that the key qualification, that the employer (and employee) not be coerced, is seldom honored in the real world. To get a closed-shop contract from a company, unions historically have threatened or resorted to strikes (which typically involve the breaking of an earlier agreement to work, in the classical liberal view) and have in many cases harassed or even assaulted dissident and replacement workers, sabotaged equipment, vandalized property, or committed other coercive acts. The presence of a closed-shop agreement has often signified the fact that coercion has been used to get it. But let’s waive these points and focus on the argument itself. Must someone who holds classical liberal principles necessarily accept the legitimacy of closed shops? I think not.

We need to remember that, from the classical liberal point of view, agreements that limit the parties’ later rights and freedoms are inherently suspect, even if entered into freely. A classic example is the one given by John Stuart Mill in *On Liberty*, where he argues that the law should not allow a person to sell himself into slavery. For the same reason we look askance at free elections in which one of the candidates clearly intends to eliminate free elections if he wins. We derisively, and rightly, refer to such elections as “one man, one vote, once.” For a similar reason, Congress is barred from passing laws that restrict later congresses’ powers, such as a law that would require future tax bills to get a two-thirds vote to be passed.

In a similar vein, it is morally questionable that I should be encouraged to join an organization that will not allow me to quit—which is what a union shop amounts to. While it makes sense, in general, to say that I should be free to enter into contracts, this is not the same as entering into contracts that limit my freedom to make new contracts. To put it another way, while I am ethically bound by prior agreements (that is, my freedom is limited to some degree by the contracts I’ve entered into), that doesn’t apply to my freedom to make new agreements, going forward.

Something like this principle is found in the common law on contracts. For centuries, common law has held that contracts to compel someone to perform some job cannot be enforced; this smacks too much of slavery. Suppose an opera singer agrees to sing on a given night, signing a contract to do so and accepting partial payment and then refuses to perform. The managers of the opera house cannot sue to compel the singer to sing. They can sue the singer to get their advance back, to get compensatory damages for lost revenues, and perhaps even to get punitive damages—but they cannot compel the singer to perform.

One might reply that if a person doesn’t want to work for a closed shop, he or she can just go elsewhere—as can the worker who doesn’t want to work for a company that has a yellow-dog contract banning unions. But the problem with this reply is that it allows for the possibility of clearly coerced choices. It is possible that in some future place or time, open shop companies may not exist (if, for instance, a union manages to get closed shop contracts from all the companies in a worker’s field). In such a scenario, the employee would either have to join a union or go without work: join or starve. That is hardly the paradigm of free choice. (The same holds for yellow-dog contracts: if all companies in the economy managed to get them, then any worker who wanted to be allowed to join a union would either have to give up that right or starve.)

This is not merely a theoretical problem. Admittedly, in the contemporary private-sector economy, we are far from that scenario. The percentage of private-sector workers who are members of unions has dropped steadily, from 35% in the 1950s to 20% in the ’80s to about

7.4% today. Meanwhile, however, the percentage of public-sector employees who are members of unions has been growing apace.

Suppose I want to be a college instructor in California. Public colleges in California are, generally speaking, agency shops. (The University of California is not, insofar as ladder-and- rank faculty is concerned, but it is in respect to its vast army of teaching assistants, “instructors,” and “lecturers.”) So if I go to work for a public California college or university, I have to pay dues to the teachers’ union. Well, someone might ask me, are you compelled to work for a California public college? Why don’t you just go to work for a private college?

My rejoinder is that because of the power of taxation, the public sector of education has virtually crowded out the private sector. The California Community College system has 109 campuses and 2.5 million students. The California State University system has twenty-three campuses and upward of a half million students. Two hundred thousand students are enrolled in the ten campuses of the University of California system. By comparison, the Association of Independent California Colleges and Universities, which has as members the vast majority of California private colleges, represents only seventy-five campuses and about two hundred fifty thousand students. The state’s power of taxation ensures that the billions poured into the public system dwarf employment opportunities in the private college system. If this crowding out continues to increase, the theoretical problem of a totally closed (or at least union) shop society is not so theoretical after all.

Even stronger examples might be given. Perhaps, as libertarians argue, roads and road building should be privatized; but right now it is virtually a monopoly of the state and can easily be made a monopoly of closed-shop employment practices.

I have examined the most common arguments used to justify closed shops and found them wanting. But are there compelling ethical reasons that support the view that closed shops should not be allowed? I believe there are.

Obviously, we have the natural-rights consideration raised at the beginning of this essay. Closed shops (as well as union and agency shops, but also yellow-dog contracts) manifestly violate freedom of association. Absent compelling ethical reasons to the contrary, a person should be able to join or not to join, support or not to support, any group at any time. And as mentioned above, there are consequentialist reasons to regard closed shops as undesirable.

But I also want to sketch a neglected line of ethical thinking on this issue—the line that might be taken by “virtue ethics,” that is, by the method of evaluating practices by asking how they support or hinder the development of virtue. On this ground, there is a very good reason to criticize closed shops. Simply put, they corrupt unions.

Unions, no less than businesses, flourish as socially useful organizations when they aim to produce something that people want. This only reliably occurs in free markets, because the force of competition requires the organization to take seriously what the consumer wants and deliver it.

But with unions no less than businesses, the temptation is always present to “compel rather than sell,” that is, to coerce consumers rather than letting them choose a good or service freely—enticing them with a superior product or service. A well-run union can play a valuable economic role. It can help many workers negotiate better wages and benefits than they might get on their own, enhance job security, and provide other services (such as pension options, banking services through credit unions, and discounts from merchants). When workers are free to belong or not or to choose among competing unions, these organizations are forced to focus on the workers’ preferences. Allowing unions the power of coercion makes them more interested in enhancing their political power. It also makes them lazy and neglectful about improving their services.

The push for closed, union, or agency shops is just one of a variety of inherently coercive tools that are too often favored by organized labor. Organized labor’s efforts to coerce membership (or at least the paying of dues) use member dues to further the union leaders’ political agenda (in violation of the workers’ *Beck* rights) and get Congress to end secret ballots in votes to unionize workplaces, all ultimately corrupt the unions. In their attempt to achieve such coercive powers, unions come to resemble those desperate businesses that try to save themselves by protectionism.

In sum, there is a strong case based upon converging lines of ethical thought that closed shops are inherently bad. My hope would be to see all states adopt right-to-work laws, not just the twenty-two who do so now. Given the stranglehold organized labor has on many states, this will probably require a federal law.

To those who (understandably) distrust the federal government to make such a major change in labor contract law, I would make several points.

Both state and federal law already set the conditions in which contracts are allowable and enforceable. The federal government, through Wagner, Taft-Hartley, and other acts, sets conditions for the unionization of workplaces, conditions that are generally helpful to unions (although Taft-Hartley disallows closed shops in the narrow sense). Over twenty states have right-to-work laws, and the state governments have had no problem enforcing them, ordinarily with good results.

Modifying the Taft-Hartley Act to disallow union and agency shops as well as closed shops, narrowly defined, would certainly not end federal interference in the marketplace; but it would impart more balance to patterns of government action that are often skewed in favor of unions. It would implement the freedoms vouchsafed to workers by the Supreme Court under its *Beck* ruling, it would increase freedom of association, and it would bring labor law closer to common law principles of contract. Those would be real gains.

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1. Joseph DesJardins, *An Introduction to Business Ethics* (4th ed.) New York: McGraw-Hill 2011. [↑](#footnote-ref-1)
2. DesJardins, *Op. Cit.,* p. 125. [↑](#footnote-ref-2)
3. Charles Baird, “Hayek on Closed Shops and Yellow Dogs,” in *The Freeman,* Vol. 57, Issue 3, April 2007. [↑](#footnote-ref-3)