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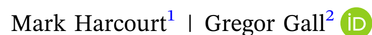
# The Open Shop, Closed Shop, Agency Shop, and Union Default in Comparative Perspective: Members, Resources, and Individual Autonomy



Mark Harcourt[1] | Gregor Gall[2]

[1]Department of HRM, Waikato Management School, University of Waikato, Hamilton, New Zealand | [2]CERIC, Leeds University Business School, University of Leeds, Leeds, UK

**Correspondence:** Gregor Gall (gregorgall@outlook.com)

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## ABSTRACT

Strategies designed to revive the declining union movement require new resources and new members for success. For this, many unions often used closed or agency shops. We compare these with the now dominant open shop as well as the union default. These options are assessed by asking how effective would each be at securing both members and resources for unions; and how much would each option protect and/or advance worker's autonomy in terms of various individual freedoms? Though closed and agency shops have many merits, especially in relation to the open shop, we conclude that the union default is superior to both.

## 1 | Introduction

Any strategy designed to revive the declining union movement in the richer Anglophone countries, where private-sector union densities have sunk below 15% (see, e.g., ABS 2022; BLS 2024; DB&T 2024; Statistics Canada 2022), requires new resources and new members to be successful. This means pushing back against the now dominant 'open shop' situation.[1] Financial resources are necessary to help fund the activities of organising, bargaining (sometimes involving striking), servicing, and lobbying, especially in new non-union 'greenfield' sites in the growing private service sector. Members are needed to assist with, and participate in, these same activities, and to provide the bulk of the resources, principally through their membership dues and their activism behaviours. A quorum of members, typically a majority of the bargaining unit, is also needed to obtain (and retain) union recognition, whether by state certification or employer consent. Perhaps most importantly, without substantial membership support, a union cannot credibly claim to democratically represent the 'will of the workers' and is, thus, vulnerable to accusations from the right-wing media of elitism, sectionalism, and even despotism (Harcourt et al. 2023).

This article examines the available policy options for securing both members and resources. These are three traditional forms of 'shop',[2] namely, the open shop, closed shop, and agency shop, and a new proposal, the union default. These options are assessed on two criteria. First, how effective would each be at securing both members and resources for unions? This is critical to union survival and revival, and to the gains that unions can secure for workers via negotiation, litigation, and lobbying. Second, how much would each option protect and/or advance worker's autonomy in terms of various individual freedoms, such as the freedom of association, freedom of religion, freedom of conscience, and freedom of expression? These are foundational values of any modern social democracy (Harcourt et al. 2021). Consideration of these freedoms is also politically realistic, since they are clearly important to the public and so would affect receptivity to any reform proposal.

The focus here is on the richer Anglophone countries for several reasons. First, union density has plummeted precipitously

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as of 2020 to, for example, 10% in the US, 14% in Australia, and 19% in New Zealand.[3] Such declines have been especially precipitous in Australia and New Zealand, where density levels were approximately 50% as recently as the early 1980s (Bray and Walsh 1998, 363). Canada has experienced a less dramatic decline from 38% in the late 1980s to 29% in 2022, in part reflecting more moderate changes to labour law. However, these differences are somewhat illusory: density and coverage in Canada remain high, approximately 70%, only in the public sector, but in the private sector, have fallen steadily over four decades and are now under 15% (Statistics Canada 2022). Similarly, in the United Kingdom (UK), though overall density has fallen to 22%, it is now just 12% in the private sector in 2023. Collective bargaining coverage, tied closely to membership levels, has similarly contracted—for example, from 36.4% in the UK in 2000 to 26.6% in 2022 (DB&T 2023). With unions' power waning, labour's share of national income has declined (Kristal 2010) and the gap between high- and low-paid workers has widened significantly (Brian 2015), most obviously between the executive suite and the shopfloor in the US (Huang et al. 2017).

Second, continental Western European countries, have been less adversely affected by union decline (see Vandaele 2019). Union density has fallen less or not at all in several countries, most obviously those in Scandinavia (Vandaele 2019). Furthermore, bargaining coverage remains high, exceeding 90% in France, for example, and is less dependent on membership levels (Mueller et al. 2019; Stanford 2021). Collective bargaining is often centralised, especially in Scandinavia, with an agreement specifying at least minimum terms and conditions for an entire sector (Rasmussen 2017). Alternatively, a collective agreement with major employers is automatically extended to other employers in the same industry, including non-union employers (Flaarønning 2024). Collective bargaining is, thus, highly institutionalised as the principal means of determining terms and conditions.

This article begins by laying out the legal approaches to union security arrangements in five richer Anglophone countries, namely, Australia, Canada, New Zealand, the United Kingdom and the United States (being the same five countries Zappala (1991) studied on the impact of the closed shop). It then defines and describes the union default alternative, an innovative institutional support for unionisation which has not been practiced and is little examined. Indeed, in Visser's (2024) recent wide-ranging survey of future scenarios for unions, the union default did not warrant even a mention. The article then assesses the shop options, together with the union default, in two key respects: the collective interests of unions in membership and resources, and the individual rights and freedoms of workers. It shows how a union default could increase union membership and funds as the basis of a reinvigorated unionism, while still respecting the rights and freedoms of workers as autonomous individuals, in ways less possible via conventional union security arrangements.

## 1.1 | Union Security Arrangements and the Union Default: Definitions and Descriptions

This section defines and describes the main types of 'shop', as well as the union default.

### *1.1.1 | Open Shop*

In the past, the open shop term often referred to a strictly non-union workplace with few, if any, union members and no collective agreement (Lewis 1912). Today, the term more commonly refers to a bargaining unit with union representation where all covered employees are not obliged either to become (or remain) union members or pay union dues (Taras and Ponak 2001). In such shops, employers are generally free to hire whomever they prefer, but labour legislation specifically prohibits hiring on the basis of union/non-union status. Non-union employees in the bargaining unit still receive the same terms and conditions as members via the collective agreement by law, as, for example, in the US (Taras and Ponak 2001). Alternatively, employers 'pass on' such terms and conditions to non-union workers on individual agreements by convention, as, for example, in New Zealand (Barnes 2005). Hence, the open shop allows non-union employees to free-ride on the union and its membership.

### *1.1.2 | Closed Shop*

The closed shop is a bargaining unit with union representation where all covered employees are required to join the union and pay dues to it (Dunn and Gennard 1984). The closed shop is normally specified in a clause of the collective agreement, though, in the UK prior to the Second World War, it was usually a more informal arrangement enforced through social pressure on employers and co-workers (McKelvey and McKelvey 1954). Closed shops are pre-entry or post-entry. With pre-entry, employees are contractually obliged to be union members as a condition of gaining employment (Taras and Ponak 2001). In this case, hiring non-union personnel is typically a breach of contract by the employer. With post-entry closed shops, known also as union shops, employees are contractually obliged to become and remain members soon after hiring as a condition of continued employment (Taras and Ponak 2001). In this case, failure to dismiss an employee for not joining (or for leaving the union) is typically a breach of contract by the employer. For pre-entry, part of the hiring process involves ascertaining membership in advance of making the employee a job offer. For post-entry, membership is verified shortly after commencement of employment (e.g., 30 days). Closed shops in the five countries under study were most prevalent in heavy industries and manufacturing, covering in 1978 in Australia and the UK, respectively, 67% and 40% of all union members (de Turberville 2007, 379).

### *1.1.3 | Agency Shop*

The agency shop is a bargaining unit with union representation where covered employees are not obliged to become (or remain) union members but are obliged to pay dues or an 'agency fee' to help cover the union's representation costs (Taras and Ponak 2001). Free-riding on the union and its membership is thereby prevented. Moreover, all employees under coverage, members and non-members, are still legally bound by the same collective agreement. The employer has the freedom to hire their preferred employee, though labour laws typically forbid hiring based on union/non-union status.

### *1.1.4 | Union Default*

The union default would default all employees in a bargaining unit to union membership, but with a subsequent



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right to opt out (Harcourt et al. 2021). A union would secure legal default status through a formal recognition (e.g., certification) process by recruiting a minimum percentage (e.g., 10% or 20%) or number of members (e.g., 1000), whichever is the lesser, of a proposed workplace or industry bargaining unit (Harcourt et al. 2024). Default status would afford a union the right to represent workers on a members-only basis. Non-members, employees who have opted out, would retain individual agreements with the employer. If the collective agreement were multi-employer (e.g., an industry), it would establish minimum terms and conditions for all covered employees, including non-unionists on individual agreements. Employers would be free to hire their preferred employee, but all human resource decisions (e.g., hiring, firing, promotion, pay increases) based on union/non-union preference would be unlawful (see Harcourt et al. (2024) for details).

## 1.2 | The Current Legal Status of Union Security Arrangements[4]

### 1.2.1 | *Australia*

Across Australia, for private and public sectors, both forms of closed shop were made unlawful under the federal *Workplace Relations Act 1996* (Lambropoulos 2013). This situation remains unchanged, following the Labor government's enactment of the *Fair Work Act 2009*, which partially restored a centralised wage-setting arbitration system, but not union security arrangements. The *Fair Work Act 2009* enshrines a principle of freedom of association, giving workers rights to associate or not associate with a union, as per their wishes. Any discrimination against workers for their status, whether union or non-union, is deemed an 'adverse action' and outlawed. Clauses in industry awards and collective bargaining agreements that give preference to union/non-union status in, for example, hiring, firing, and promotion, are prohibited. It is also unlawful to require non-members under collective agreement coverage to pay dues or agency fees to the union, as per the agency shop. State laws, which govern employment relations for civil servants, have come into line with the *Fair Work Act 2009*. They, too, uphold freedom of association, as a guiding principle, interpreted as the unrestricted right to join, or not join, a union, and have therefore effectively banned all union security arrangements (Stanford 2021).

### 1.2.2 | *United Kingdom*

In the United Kingdom, after a period of restricting the legal latitude for closed shops through legislation in the 1980s, the pre-entry and post-entry closed shop were finally and fully effectively made unlawful under the *Employment Act 1990* and *Trade Union and Labour Relations (Consolidation) Act 1992* (see Addison and Siebert 1998). These Acts forbid any requirement that employees be a union member, or not be a member, as a condition for obtaining employment or remaining in said employment.[5] The subsequent employment law reforms of the Labour governments from 1997 to 2010, especially with the *Employment Relations Act 1999*, did not change this situation (see, e.g., Bogg 2005).

### 1.2.3 | *Canada*

In Canada, the federal government and 10 provincial governments each have their own jurisdiction over industrial relations. The closed (pre-entry), union (post-entry), and agency shops are allowed in all 11 jurisdictions (Taras and Ponak 2001). Thus, Canadian unions are free to negotiate a closed, union, or agency shop clause in their collective agreement. The agency shop is also effectively the legal minimum in the federal and several provincial jurisdictions. As such, if a union requests an agency shop, the employer is obliged to concede one (Taras and Ponak 2001).

The Canadian constitution's Charter of Rights and Freedoms guarantees the freedom of association under Section 2(d) and the freedom of expression under Section 2(b). Two Supreme Court of Canada (SCC) cases involved challenges to union security arrangements, alleging violation of these freedoms. In the *Lavigne* case,[6] a community college teacher claimed that the agency shop in the collective agreement violated his Charter freedoms as a non-union worker with different political views from the union. The SCC argued there was no violation of freedom of expression, as payment of dues did not prevent Lavigne from expressing contrary political views to the union's or signify that he necessarily sided with the union on issues where he disagreed. Nonetheless, part of the SCC conceded that the agency shop did potentially violate Lavigne's freedom of association but was still justified under Section 1 of the Charter as a reasonable limit on this freedom, demonstrably justified in a free and democratic society. In other words, such union security arrangements were legitimate because of the larger aims of labour relations laws. In the *Advance Cutting and Coring Ltd*. case,[7] the appellants challenged what was effectively a pre-entry closed shop in the Quebec construction sector, alleging infringement of their freedom of association. They had been penalised under Quebec law for working without a competency certificate, which established a right to work in the sector, but was only lawfully available to union members. In a majority decision, the SCC confirmed the law's constitutionality, arguing it did not violate freedom of association because it had not imposed any 'ideological conformity' on the appellants or, if it did, it was a reasonable limit, demonstrably justified in a free and democratic society.

### 1.2.4 | *New Zealand*

New Zealand supports a policy of voluntary unionism, effectively meaning the open shop (Harcourt and Haynes 2011). Both pre- and post-entry closed shops are unenforceable either as part of a contract or as an informal arrangement. In particular, the *Employment Relations Act 2000* indicates that employees must not be forced to (not) join or (not) leave a union. The Act also states that the employer is not to deliberately confer any preference in obtaining or retaining employment, or in obtaining better terms and conditions in regards, for example, pay, fringe benefits, or promotion, based on union membership or non-membership.[8]

The *Employment Relations Act 2000* does allow a restricted and largely ineffectual agency shop (Harcourt and Haynes 2011). Specifically, the Act allows employers and union to negotiate a 'bargaining fee' clause in their collective agreement, which requires non-union workers under coverage to pay the equivalent of union dues (or a lesser amount) to the union. However, such clauses must be supported by a majority of covered employees in a secret ballot. When the collective



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agreement expires, the bargaining fee also expires and must then be re-negotiated anew. Most problematically, non-union workers are free to opt out of a bargaining fee clause, provided they do so in writing within a time limit.[9]

### 1.2.5 | *The United States*

The *National Labor Relations Acts (NLRA) 1935* is the principal statute that governs all private-sector labour relations in the US. The Act initially allowed unions and employers to negotiate their own shop clause. Closed (e.g., pre-entry), union (e.g., post-entry), and agency shop clauses were all legally enforceable (Taras and Ponak 2001). However, the *Labor Management Relations Act 1947* (Taft-Hartley) outlawed the (pre-entry) closed shop while still permitting the union and agency shops in collective agreements (Taras and Ponak 2001). In 23 states, this remains the law as of 2024. In 27 other states, legislatures have passed so-called 'right-to-work' laws, overriding the *NLRA* by outlawing union and agency shop arrangements.[10] In these states, National Labor Relations Board certification authorises unions to negotiate collective agreements, binding upon all employees in a bargaining unit, but where covered non-union employees are not required to join or pay dues/agency fees (Taras and Ponak 2001).

In the public sector, the Supreme Court's *Abood v. Detroit Board of Education (1977)* decision initially allowed the negotiation of agency shops as long as non-union employees were only charged an agency fee for collective bargaining, and not political, activities.[11] The Supreme Court's *Janus v AFSCME (2018)* decision overturned this, on the basis that compulsory payment of any dues was a violation of freedom of expression, as established by the First Amendment of the US Constitution.[12] In this view, payment of fees was treated as synonymous with support for a union which the non-union worker had clearly rejected and decided not to support. Thus, the closed, union, and agency shops are all effectively forbidden in the public sector in the US.

## 1.3 | The Union's Collective Interests: Membership and Financial Resources

In the following, the open shop option is presented first to provide a baseline against which to compare and judge the other options. The foci of the comparison are membership levels and financial resources (e.g., dues), both of which are important to union power, stability, and legitimacy. Of course, there are other important factors as well, including leadership, strategy, tactics, and membership mobilisation, but these are perhaps less predictably related to union security and the union default.

### 1.3.1 | *Open Shop*

The open shop is predicated on an individualistic orientation towards unions, where joining is permitted but the individual chooses to join (or not) based upon a self-interested comparison of costs and benefits (Levine 2001a,b).[13] Hence, joining is an instrumental act and of a transactional, rather than transformational, nature. The underlying view here is that voluntary societies, such as unions, should have voluntary membership and obligations. Voluntarism is predicated on a *laissez faire* relationship between capital and labour, where the state merely guarantees the individual worker's right to associate and leaves almost everything else to capital and labour, which, in practice, mostly means capital, given the latter's control over the workplace via managerial prerogative. Union financial resources are, thus, limited to the levies/fees of voluntary membership.

A fundamental problem with this perspective is that unions do not offer merely private benefits (Olson 1965; Stanford 2021). They generate public goods externalities, where benefits are not limited to members alone for two reasons (Freeman and Medoff 1984). First, the nature of these benefits can be indivisible and so must be shared with non-members, as with any improvements to health and safety (e.g., lower noise levels), where unionists and non-unionists work in proximity (Freeman and Medoff 1984). Second, the benefits can be collective agreement entitlements (e.g., a wage increase) that must be extended to covered non-union employees by law, as in Canada and the US (Taras and Ponak 2001). Alternatively, the employer 'passes on' such improvements to covered non-union staff by convention, for reasons of administrative simplicity, fairness, and/or union avoidance, as in New Zealand (Barnes 2005). Since non-members can obtain most of the benefits of union membership, there are incentives to free-ride on the efforts and contributions of members by not paying fees or joining (Olson 1965; Stanford 2021). Free-riding occurs, even though the benefits of membership to the individual worker, in improved, pay, benefits and working conditions, generally greatly exceed the costs in dues payments (Bennett and Kaufman 2008). This, in a nutshell, is the collective action problem explained by Olson (1965). Surveys from Australia, New Zealand and the UK show that many non-union workers avoid joining the union because management gives them the same terms and conditions as unionised colleagues. Specifically, 64% of New Zealand (Bryson 2008, 15), 52% of Australian (Haynes et al. 2008, 17), and 33% of British (Bryson 2008, 15) respondents had not joined the union because management 'passes on' any improvement the union secures via collective bargaining.

In its milder form, some free-riding means the union has fewer resources for services to members (e.g., personal grievances) and collective bargaining with the employer. Inevitably, the union has less power to secure benefits and advantages for members and non-members alike. In its severe form, free-riding produces a 'tragedy of the commons' scenario (Hardin 1968), where increasing free-riding progressively weakens the union's capacity to secure improved terms and conditions, prompting yet more workers to free-ride in a downward spiral, until the union eventually collapses or struggles on, albeit in a parlous state, because of the loyalty of a few diehard activists. Once a union becomes weak and unrepresentative, employers are likely to derecognise, or employees to decertify it. European research at both workplace and industry levels shows that high rates of free-riding, associated with lower union density, precipitate yet more free-riding and further declines in density (Goerke and Pannenberg 2004; Ibsen et al. 2017). This downward spiral of collapsing membership, sparked by high initial free-riding, was also prevalent in US open shops more than a century ago, exacerbated by employers that deliberately favoured non-unionists in hiring and unionists in firing in their efforts to



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become and stay union-free (Lewis 1912). However, the same European research mentioned earlier also shows that high density levels, above 45%–65%, tend to be self-perpetuating, minimising and stabilising the level of free-riding (Ibsen et al. 2017). High density helps create a social custom of unionism (Akerlof 1980; Booth 1985), developed and reinforced, we would argue, via social norms. For instance, if high density means that workers observe most of their co-workers joining the union, a descriptive norm (Everett et al. 2015), they are likely to conclude this must be the rational action to take, what is referred to as social proof of legitimacy (Cialdini et al. 1999). Likewise, if high density emboldens and empowers charismatic union leaders to exhort workers to join, an injunctive norm (Everett et al. 2015), workers are likely to follow the advice of such revered authority figures and join.

### 1.3.2 | *Closed Shop*

The closed shop resolves the collective action problem. The union's costs do not fall disproportionately on the more active or ideologically committed members, who would remain union members regardless. Instead, everyone who potentially benefits from a union's representational functions, whether in collective bargaining, grievance handling, or otherwise, is also required to help bear the corresponding costs. With no opportunities for free-riding, no 'tragedy of the commons' scenario can develop, where workers free-ride, the union responds by cutting services or hiking fees, and then more members desert until the union completely collapses. The closed shop is, therefore, fundamentally both fair and efficient, at least from a union viewpoint. With all members contributing, the union is less likely to run short of funds for its main representational functions. Thus, it is more likely to afford professional staff and a strike fund necessary to support a more extensive collective bargaining agenda. Compulsion to join also avoids the difficulty and expense of re-organising a bargaining unit when new workers are hired, especially challenging with high staff turnover and dispersal over multiple worksites, the situation typical in today's small business service sectors (Doorey 2013).

### 1.3.3 | *Agency Shop*

The agency shop also resolves the collective action problem, because all workers under coverage are required to pay fees, albeit possibly less for non-union staff (Taras and Ponak 2001). Thus, those who benefit from union representation are obliged to contribute to its cost. As with the closed shop, full fee paying eliminates free-riding and has a correspondingly positive effect on total union resources. A 'tragedy of the commons' is prevented, irrespective of what happens to membership, because non-members must pay for the benefits of bargaining. With all workers contributing, the union is more likely to have the required funds for its main representational activities, just as with the closed shop. However, the agency shop does differ from the closed shop in a significant way. If staff leave, they can initially be replaced with non-union workers who can remain non-union, and so the union must still expend time and resources to approach new staff and encourage them to join. They are not automatically enlisted as with the closed shop. However, without the opportunity to avoid union dues, new staff have no financial motivation to stay non-union. So, many of them would likely want to join the union, and either take the initiative to join themselves or be open to being approached to join.

### 1.3.4 | *Union Default*

The union default, at first instance, completely resolves the public goods externality issue for unions by automatically enrolling all workers under coverage as members (Harcourt et al. 2024). In principle, all workers could still choose to free-ride by subsequently opting out of membership. In practice, it is likely that most workers would stay with a union because of the *default effect* (Harcourt et al. 2019). The default effect refers to the empirical observation that, when an option is designated the default in any choice scenario, it is much more likely to be selected than otherwise (Jachimowicz et al. 2018). Studies have consistently found default effects in a broad range of contexts, including pension plans, organ donation, consumer product purchases, insurance purchases, and the law (legal default rules), confirmed in a recent meta-analysis of such studies (Jachimowicz et al. 2018). In other words, defaults are 'sticky': whatever is pre-specified as the default becomes the option many or most individuals end up choosing. It follows that switching the default from non-union to union in the employment relationship, at least if certain conditions are satisfied, could significantly increase union membership. At the very least, a union default would enable workers who prefer union membership the means to join a union, without expending any time or effort (Harcourt et al. 2019).

Default effects would likely arise from one or more of four principal causes identified in the existing empirical literature (Harcourt et al. 2019). First, specifying a particular option as the default reduces the transaction costs of choosing that option. Thus, automatic enrolment in a union would reduce or even eliminate the costs of joining, for the individual worker and union, making it that much easier to do. Second, the inertia (e.g., doing nothing) that normally develops when individuals prevaricate over difficult decisions favours remaining with a status quo default. Hence, any worker unsure of whether to join a union would be defaulted to union membership. Third, defaults frequently denote social norms: what the state or some other authority has endorsed (injunctive norm) or a majority of individuals has chosen (descriptive norm). Hence, a union default would communicate, to both employees and employers, that union membership is both more acceptable (injunctive) and even preferable (descriptive). Fourth, a default creates a reference point for assessing 'gains' and 'losses', in considering whether to switch from a default to another option, where 'losses' are normally weighted twice as heavily by the human mind as equivalent 'gains'. As a result, with a union default, a worker would likely stay in the union to avoid 'losing' what are perceived as more valued advantages of union membership (Harcourt et al. 2019).

A union default would likely produce high and relatively stable levels of union membership and a correspondingly high and stable source of funds in most situations. In fact, in surveys, more than 60% of New Zealand employees (Harcourt et al. 2024) and more than 50% of Canadian employees (Harcourt et al. 2022) indicated they would stay in union membership if defaulted, density levels high enough to create a



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self-sustaining social custom of union membership (Ibsen et al. 2017). With some opting out still inevitable, funding levels would necessarily be lower than under a closed or agency shop. However, the limited opting out would likely place unions in a more stable financial position than they currently have in open shop arrangements.

Most importantly, a union default could also be used to facilitate recruitment of members in non-union workplaces (Harcourt et al. 2024). Organising is normally an expensive and time-consuming process, generally lacking in economies of scale, especially in geographically dispersed smaller workplaces with high staff turnover (Doorey 2013; MacDonald 1997). Individual workers often must be approached, one-by-one, to be persuaded to join (Doorey 2013; MacDonald 1997). Moreover, large numbers must be recruited, often more than 50%, just to qualify for representation rights or prompt an election as a precursor to recognition. And, if recognition is granted via certification, for example, only then can union and employer focus on bargaining over union security arrangements. In contrast, a union default would be predicated on a members-only approach to establishing representation rights rather than majority rule (Harcourt et al. 2024). As such, a union would not need to win an election or prove majority support 'on the cards' to earn recognition. A critical mass of members (e.g., 10% of the bargaining unit or 1000 members, whichever is the lesser) would be sufficient to demonstrate a union's viability as a bargaining partner (Harcourt et al. 2024). Fulfilment of this condition, even if challenging at times, would be a lot easier to achieve than winning over most of a bargaining unit. Following recognition, default status would enable the union to recruit much of the bargaining unit as members without expending precious resources on further organising.

However, it should be conceded that a union default effect would not guarantee, in all circumstances, high levels of membership and associated funding (Harcourt et al. 2024). For instance, strong social norms favouring non-union status might still prevail, as with private-sector management, for example. Even if most workers were averse to 'losing' the advantages of union membership, some might still favour the 'gains' associated with saving money on union dues. Automatic enrolment might make it cheap and easy to choose union membership, but an electronic process available after enrolment would make it almost as cheap and easy to opt out. A 'tragedy of the commons' situation could still arise, with a mass defection of members producing a collapse in union representation, as, for example, if members become sufficiently disgruntled with the union's bargaining performance. However, even in such dire but unlikely scenarios, the availability of automatic enrolment would make it that much simpler and easier for an alternative union to establish itself as the workers' new representative (Harcourt et al. 2024).

## 1.4 | The Individual Worker's Rights and Freedoms

This section considers the rights and freedoms, both positive (e.g., freedom to associate) and negative (e.g., freedom not to associate), associated with the shop options and union default. The focus here is on de facto rather than de jure rights and freedoms. This distinction is important because some rights and freedoms might exist in the law but not in practice, and so have little relevance to the rights and freedoms workers enjoy.

### *1.4.1 | Open Shop*

Under the open shop, ostensibly all freedoms are protected, whether they be the freedom of choice, expression, religion or association. In practice, since employers rule the workplace with their managerial prerogative, only rights and freedoms consistent with employer interests (e.g., opposing a union) are likely to be respected, protected, and even rewarded (Brooks 1905).[14] For example, freedom of religion/conscience is normally respected if people have strong ethical or religious beliefs in opposing or not joining unions. Similarly, the freedom not to associate for whatever reason is generally respected: workers can abstain from joining as they wish. The right to work is also implicitly accepted. In an open shop, employers are unlikely to fire workers or avoid hiring them just because they are non-union. For similar reasons, employers are likely to be agreeable to, or at least tolerant of, workers expressing critical views of unions in the workplace. All of these rights and freedoms are consistent with the employer's interests in remaining union-free.

By contrast, rights and freedoms incompatible with the employer's interests (e.g., supporting/joining a union) are likely to be restricted and even negated through employer threats and punishments (Gall and Dundon 2013). For instance, the freedom to express pro-union views is likely to be curtailed or discouraged. In addition, a worker's freedom to associate largely depends on the availability of a union presence—and a critical mass at that—in the workplace. While a single union member in a non-union workplace can avail him or herself of certain limited union services and benefits, the fuller benefits of union membership cannot be realised until at least recognition is obtained, and this normally requires most workers to be members. However, open shops make it difficult to establish and maintain such a union presence, especially if workplaces are small, staff turnover is high, and management is prepared to fight unionisation efforts (Doorey 2013; MacDonald 1997; Willman 2001). Overall, the open shop is incompatible with autonomous choice.

### *1.4.2 | Closed Shop*

Whereas the open shop effectively protects negative rights and freedoms vis-à-vis unions, the closed shop protects positive ones. The closed shop guarantees the freedom to associate by making it easy to join for those who wish to do so and by rendering management attempts to influence that preference largely futile. Since all workers are union members, management has less latitude or incentive to engage in 'divide and rule' through favouritism.[15] As a result, it is also easier to express pro-union views without fearing retribution.

The closed shop does, however, infringe on various negative rights and freedoms. For instance, compulsory membership necessarily negates the freedom not to associate. It also violates freedom of religion or conscience, where membership is prohibited by a particular religion or runs against a person's ethical framework.[16] In these senses, the closed shop is rightly



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criticised as coercive and incompatible with basic civil liberties. The right to work is also potentially threatened by the closed shop, especially if union density within a given industry or occupation is high and almost all relevant employers have closed shops with the same union. Thus, workers who lose employment for refusing union membership could be blacklisted from re-employment in their chosen field.[17] Nevertheless, in other key respects, the closed shop preserves the rights and freedoms of workers who would prefer not to be members (Mantouvalou 2015). It does not compel participation in the union or agreement with the union's aims, policies, and actions. Indeed, it does not prevent freedom of expression on these matters, nor involvement in contrary political parties or behaviour, outside the workplace. Overall, the closed shop is still incompatible with autonomous choice, but in inverse ways to the open shop.

#### *1.4.3 | Agency Shop*

The agency shop protects both positive and negative rights and freedoms. It provides employees with the freedom to associate and not associate, as a union is available to join, but covered employees are not obliged to do so. It also allows employees to exercise their freedom of religion or conscience in not joining the union when prohibited by their beliefs. Some jurisdictions also allow religious and conscientious objectors to avoid paying union dues by donating the equivalent amount to charity (Taras and Ponak 2001). The agency shop is also compatible with a right to work: a worker who refuses to join cannot be lawfully fired for having done so.

There is, of course, no freedom of contract with an agency shop: non-union staff are still bound by the collective agreement and have no right to negotiate their own separate individual agreement with the employer. However, this restriction is usually inconsequential, since employers ‘pass on’ any union-bargained terms to covered non-union staff (Barnes 2005). Even in the absence of collective bargaining, employers generally provide little scope for individual ‘bargaining’, preferring instead to offer pro-forma contracts to workers with similar jobs (Waring 2000; Wooden 1999). Furthermore, the agency shop allows a freedom to associate without necessarily enabling it. Employees must still take the initiative to join, which can be difficult, especially if opposed by the employer. Alternatively, unions must recruit, which can be expensive, especially with high staff turnover and/or staff dispersion across many smaller worksites.

#### *1.4.4 | Union Default*

The union default is more compatible with a full raft of rights and freedoms than the various shop forms. Automatic enrolment would enable, rather than just permit, association with a union (Harcourt et al. 2024). Save for the initial recruitment drive for a union to gain default status, subsequently, prospective members would not need to exert any effort to join, and unions would not need to recruit members under coverage. An automatic process would make joining potentially less noticeable to management and less blameworthy for having done so. All covered employees would be legally presumed union members until the process had been completed, with enrolment first and opt-out necessarily second in a staggered electronic notification process (Harcourt et al. 2024). Management would thus have an incentive to facilitate the system's functioning, as opting out would not even be possible until after enrolment. At the same time, this staggered electronic process would provide employees with the right not to associate by opting out soon after enrolment. Religious or conscientious objectors to unions could also use the opting-out process to avoid any unwanted union association.

The union default would normalise the union's presence in the workplace by providing it with a stable platform of members. In so doing, it would help to normalise the freedom to express pro-union opinions. The right to work in one's chosen field would also be protected, as non-unionists would continue to work alongside unionists, even if the bargaining unit encompassed an entire occupation or sector. At the same time, the opt-out legitimises leaving and staying outside the union as normal. Thus, workers would be free to oppose the union and express opinions against it. Freedom of expression would, thus, be protected.

## 2 | Overall Assessment

In the preceding discussion, we assumed, for simplicity's sake, that the only consequential divide is between union and non-union. This collapses a complex situation as unions occupy a continuum from militant to moderate and differ in other respects as well—for example, general, multi-trade or specialist/occupational. Thus, workers—and employers—may have a more differentiated choice than appears at first sight. Hence, in practice, there are no pure versions of the various shop options (open, closed, agency) regarding their composition and effect. Contextual considerations are critical for identifying how differing intentions and processes lead to variations. For example, both moderate and militant unions use open, closed and agency shops, leading to different employer responses regarding unionists and non-unionists, with corresponding effects on membership levels and financial resources. In addition, different unions charge different dues, expressed as a flat rate or proportion of pay, and so membership numbers are not always an accurate indicator of union funds. For such reasons, caveats are necessary for the previous assessments.

Nonetheless, the general characteristics of each shop option can be discerned. For the union default, a pure version exists because it remains at the proposal stage. Nevertheless, the default is, overall, the option best able to not just balance but also guarantee the freedom to associate with the freedom not to associate while, critically, reducing the costs and burdens of union recruitment and generating the resources for collective bargaining and other union functions. Moreover, the default also achieves better equity in the distribution of costs relative to benefits. A ‘tragedy of the commons’ is possible with a union default but, we believe, highly unlikely.

### 2.1 | Developing Insights and Understanding

We (see, for example, Harcourt et al. 2019, 2021, 2022, 2023, 2024) have variously and previously studied the merits of a union default in two ways. Firstly, conceptually and theoretically and then, secondly, largely using data generated in from several surveys in



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New Zealand. The latter has comprised testing key propositions developed in the former largely in regard of (i) workers' and public support for a default mechanism; (ii) workers maintaining membership once defaulted into membership; (iii) the influence of public policy, unionism as an 'experience good' and 'public goods' norms upon these two aforementioned aspects; and (iv) technical aspects of how a union default mechanism could work. In this present paper, and without using the New Zealand data, we have returned to some of the salient conceptual and theoretical issues in an innovative way because our standard comparisons for the default have hitherto been non-unionism and free-riding and not the agency and closed shops as alternatives to the union default. Consequently, we have developed a more comparative analytical aspect to augment our previous studies of the union default.

## 3 | Concluding Comment: Policy Implications

Consideration of union security arrangements has a renewed salience in the mid-2020s, exemplified by a number of moderate and centre-left commentators calling for the return of the closed[18] and agency shops,[19] as well as the introduction of a union default.[20] Moreover, in the wider context, even long-time advocates of neo-liberalism such as the IMF and OECD, have recently admitted that unions are important to preventing economic inequality and maintaining/improving living standards (see, e.g., Jaumotte and Buitron 2015).

In this context, Canada remains something of a paradox, despite continuing to permit the closed shop, and even requiring a minimum of the agency shop, in its jurisdictions. On the one hand, Canada is often lauded as a model for union revival in the US, since union density, starting in the 1970s, has been much higher and seemingly more stable (Taras and Ponak 2001). On the other, Canadian density reached a maximum of just 38% in 1981, hardly high by European standards, and has gradually declined since to 29% in 2021 (Statistics Canada 2022). It would, thus, seem clear that union security arrangements were not sufficient to prevent this decline. In this regard, the union default has, we believe, much potential merit. Furthermore, it is now common for industrial relations and labour law scholars (see, e.g., Andrias 2019; Block and Sachs 2020; Madland 2021) to advocate sectoral bargaining as a panacea for union revival. However, we argue that, in the absence of a default to secure higher densities in the workplace, sectoral bargaining would be the proverbial 'house built on sand' (see Harcourt et al. 2024). Somewhat usefully, some research has already explored how a union default could be implemented within the context of existing labour law systems in several countries discussed here, namely, the UK (Harcourt et al. 2021), Canada (Harcourt et al. 2022), New Zealand (Harcourt et al. 2019), and the US (Harcourt et al. 2024).

The prevailing neo-liberal political conditions are not currently conducive to the widespread introduction of a union default via legislation. However, there are some national variations that give some limited cause for optimism. Until recently, New Zealand was one such case (Kent 2021) and now the UK is another in regards of intentions to enact statutory rights to sectoral bargaining for the aged care sector, opening opportunities for renewed consideration of union security arrangements, including a union default. In Australia, Forsyth and McCrystal (2024) suggest that the statutory availability of multi-employer bargaining as a result of amending in 2022 the *Fair Work Act 2009* may open up better opportunities for union representation and bargaining. Even in the US, the *Protecting the Right to Organize Act*—actually a Bill—is still under consideration in Congress, helping open up a debate about workers' and unions' rights in the context of reforming the *NLRA*. The fact that closed and agency shops are generally unlawful does not make them any less credible, practically or ideologically, as this assessment shows. Both have their merits and demerits. Moreover, the common experience of the open shop across countries highlights its weaknesses for the collective interests and individual freedoms of workers.

**Ethics Statement**

The authors have nothing to report.

**Conflicts of Interest**

The authors declare no conflicts of interest.

**Endnotes**

[1] Iceland is the only country in Europe where non-union members are legally required to pay a charge for being covered by union agreements.

[2] The term 'shop' is an abridged form of 'workshop', that is, workplace, though different bargaining units with closed shops have existed within the same workplace or (work)shop.

[3] Statista (2024), and also ABS (2022), BLS (2024), DB&T (2024) and Statistics Canada (2022).

[4] South African labour law also allows for agency and (post-entry) closed shops under the *Labour Relations Act 1995*. By contrast, although there are no provisions expressly allowing such arrangements in the Republic of Ireland, the Irish courts have judged post-entry closed shops unconstitutional because this would constitute coercion to join or not join a union once employed. Yet, pre-entry closed shops are not judged unconstitutional, as there can be no coercion where prospective employees know the recruitment requirements beforehand.

[5] In Britain, the agency shop (called a 'fair share agreement') has rarely featured in its industrial relations, and even then, was only a response to the combined effect of falling union membership and the outlawing of the closed shop.

[6] Lavigne v Ontario Public Service Employees Union, [1991] 2 S.C.R. 211.

[7] R. v. Advance Cutting & Coring Ltd. [2001] 3 SCR 209, 2001 SCC 70. The appellants included construction workers, construction contractors, and real estate promoters.

[8] Sections 8, 9, and 10 of the Employment Relations Act 2000.

[9] Section 69P-W of the Employment Relations Act 2000.

[10] Illinois and Michigan rescinded their 'right-to-work' laws in 2022 and 2024, respectively. Critically for the US union movement, there have never been any attempts to enact such laws in states such as California, New Jersey, New York, Ohio, or Pennsylvania.

[11] Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

[12] Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466, 585 US (2018).

[13] It may also be a subterfuge for obfuscating the existence of employer power and interests.



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[14]The term 'likely' is used to indicate awareness of situations where there are partnerships or mutual gains agreements or where management favours one union—usually a moderate one—over another—usually a more radical union.

[15]This does not mean that management cannot and will not seek to victimise union representatives to weaken the union, prefer one union representative over another, or encourage some union attitudes rather than others.

[16]Exceptions can, and are, made for freedom of religion in practice, but these are cumbersome, complicated and involve applying for an exception to the general rule of compulsory membership.

[17]In practice, industrial tribunals are unwilling to uphold the firing of workers who refuse to join or maintain membership, knowing that it would mean a loss of livelihood.

[18]See, for example, Maguire (2023) and Cuddy et al. (2024).

[19]See, for example, McNicholas et al. (2021) and Stanford (2023).

[20]See, for example, Bales (2017) and Dromey (2018).

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