Union Shops, State Action, and the National Labor Relations Act

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Collective bargaining agreements under the National Labor Relations Act (NLRA) may include union shop provisions, which compel all of a company's employees to pay dues to the union, regardless of whether or not those employees support the union or agree with the way the dues are spent.[1] Disgruntled employees have on a number of occasions launched First Amendment challenges to this practice.[2] In considering those challenges, the Supreme Court has wrestled with the issue of whether the union's actions constitute state action,[3] for governmental actors alone are subject to the constrictions of the First Amendment.

The Supreme Court has yet to articulate a clear standard for determining whether state action exists in union shop provisions and, therefore, whether a constitutional challenge can be brought against such provisions. Indeed, the Court has reached contradictory results when interpreting the virtually identical union shop provisions of the two major labor law statutes. The Court has found state action in collective bargaining agreements negotiated under the Railway Labor Act (RLA),[4] but has suggested that state action is not present in the case of NLRA provisions.[5]

This unresolved question of whether state action exists in union shops that are governed by the NLRA bears significant implications for labor law—implications that extend well beyond the First Amendment context. Over six million workers in the United States are employed under NLRA union shop provisions that compel them to pay union dues regardless of whether they choose to join the union.[6] Consequently, the characterization of these provi-

1. National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1988).

2. *See infra* Part I (discussing cases).

3. The term "state action" refers generically to actions of the federal, state, and local governments. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 n.2 (2d ed. 1988); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 n.15 (1985); Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 592 (1991).

4. Railway Labor Act, 45 U.S.C. §§ 151-188 (1988). State action has been found in Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435 (1984); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

5. *See infra* notes 35-37 and accompanying text.

6. Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51, 53 (1990).

sions as state action directly affects the ability of these workers to challenge the constitutionality of the use of their dues. Yet confusion regarding the rights of these workers persists because the Supreme Court has not provided a clear answer to the issue, and the lower courts remain divided.[7]

In addition to its financial consequences for dissenting union members, the state action question bears on other issues in labor law. For example, state action implicates the ability of employees to challenge collective bargaining agreements that have a discriminatory effect,[8] a union's failure to pursue an employee's grievance for discriminatory reasons,[9] and union rules that limit campaign contributions during union elections.[10] A finding of state action under the NLRA could have significant consequences for individual employees in each of these situations by providing them with constitutional protection against the actions of a union.

This Note examines the Supreme Court's inconsistent approach to this state action question and concludes that state action does exist when parties negotiate collective bargaining agreements under the NLRA. By empowering labor unions to serve as the exclusive representatives of all employees in companies in which union shop provisions have been negotiated, and by compelling those employees to pay union dues, the federal labor statutes facilitate the very deprivation of employee rights alleged in a constitutional challenge. As a result, courts should consider the substantive merits of constitutional challenges to NLRA union shop agreements, rather than dismissing those cases on state action grounds. This Note does not argue for a reconceptualization of the state action doctrine. Rather, it accepts the doctrine as it now stands and argues that state action is present because of the particular characteristics of federal labor law.

Part I of this Note reviews the Supreme Court cases concerning the existence of state action in union shop agreements under the RLA or the NLRA. Part II examines the state action doctrine in order to develop a useful framework for analyzing the state action issue in labor law. Part III applies that framework to collective bargaining agreements negotiated under the NLRA and finds that state action results from the federal government's role in facilitating the union's exclusive representation and in permitting union shop agreements.

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7. Three circuit courts, and district courts in two other circuits, have held that state action is present under the NLRA. *See* Hammond v. United Papermakers & Paperworkers Union, 462 F.2d 174, 175 (6th Cir. 1972); Linscott v. Millers Falls Co., 440 F.2d 14, 16 (1st Cir. 1971); Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1003-04 (9th Cir. 1970); Havas v. Communications Workers, 509 F. Supp. 144, 147-48 (N.D.N.Y. 1981); Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21, 25 (E.D. Pa. 1980). Two other circuit courts have reached the opposite result. *See* Kolinske v. Lubbers, 712 F.2d 471, 474-80 (D.C. Cir. 1983); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410 (10th Cir. 1971).

8. United Steelworkers v. Weber, 443 U.S. 193 (1979) (no state action in Title VII challenge to affirmative action plan); Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) (state action can arise where collective bargaining agreement discriminates against black employees).

9. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

10. United Steelworkers v. Sadlowski, 457 U.S. 102, 121 n.16 (1982) (absence of state action precludes First Amendment challenge to restriction on contributions during union elections).

I. STATE ACTION AND ITS APPLICATION TO LABOR LAW BY THE COURT

The two major federal labor statutes—the RLA and the NLRA—permit the inclusion of union shop provisions in collective bargaining agreements.[11] If a union governed by one of these statutes successfully negotiates for the inclusion of such a provision, all employees become obligated to join the union within thirty days.[12] This requirement is significantly limited, however, by an additional provision in the statute that prohibits discharge "for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."[13] Thus, as long as an employee continues to pay dues, he does not have to participate in any other union activities. In this way, "'[m]embership' as a condition of employment is whittled down to its financial core."[14] Individuals who pay dues without otherwise participating in union activities are commonly characterized as dissenting union members.

This arrangement is not always satisfactory for employees who may object either to paying any money to the union or to particular union expenditures. These objections have led dissenting union members to challenge the use of their dues as an infringement of their First Amendment rights. In cases involving public sector employees, where state action clearly exists because the state is an actual party to the collective bargaining agreement, the Supreme Court has held that dissenting employees have a legitimate constitutional interest in challenging the use of their dues. "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests"[15] because "one's beliefs should be shaped by his mind and

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11. Railway Labor Act, § 2, Eleventh (a), 45 U.S.C. § 152 (1988); National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158 (1988). The only significant difference in regard to union shops is that the RLA provision expressly preempts state law on the subject, whereas the NLRA permits states to prohibit union shops if they desire, an issue that is dealt with more extensively *infra* notes 93-99 and accompanying text.

12. National Labor Relations Act, § 8(a)(3); *see also* Railway Labor Act, § 2, Eleventh (a) (60 days). For a general discussion of union shop provisions, see THOMAS R. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS (1977); Billie A. Brotman & Thomas J. McDonagh, *Union Security Clauses as Viewed by the National Labor Relations Board*, 37 LAB. L.J. 104 (1986).

13. National Labor Relations Act, § 8(a)(3)(ii)(B); Railway Labor Act, § 2, Eleventh (a). The original provision of the NLRA did not prohibit unions from requiring that all employees be active union members. *See* National Labor Relations (Wagner) Act, ch. 372, § (8)(3), Pub. L. No. 74-198, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(3) (1988)). The 1947 amendments to the Act added the provision limiting the requirement for membership to the payment of dues. *See* Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 101, 61 Stat. 136.

14. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). This "whittling down" means that union shop provisions under the NLRA are not really "true union shops," which would require active participation in the union. *See* HAGGARD, *supra* note 12, at 36-37. They are also not "closed shops," which would require that an employee already be a member of the union in order to be hired. *Id.* at 36. Instead, § 8(a)(3) requires that an employee have 30 days after his employment begins to join the union.

15. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977) (requirement of dues in case involving public union creates constitutional infringement).

his conscience rather than coerced by the State."[16] While the government interest in permitting union shop agreements may override employees' First Amendment interests in some instances,[17] in other instances courts have prohibited particular union expenditures.[18]

Because the Supreme Court has accepted challenges on the merits to the use of union dues in cases where the state is a party, the only barrier to a constitutional challenge to compulsory union dues in the private sector is a finding of state action. In cases involving the RLA and the NLRA, where the state is not an actual party to the agreement, the Court has had difficulty determining whether restrictions on employee rights can be attributed to the government. This part of the Note examines how those cases have resolved that question.

A. *State Action Under the Railway Labor Act*

The Supreme Court has consistently found state action in union shop provisions negotiated under the Railway Labor Act; however, the Court has provided only limited exposition in support of this conclusion. The Court first considered the issue in the 1956 case *Railway Employes' Department v. Hanson*,[19] in which employees of the Union Pacific Railroad claimed that a union shop provision in their collective bargaining agreement was unconstitutional. The Court concluded that state action was present because "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."[20] Part of the reasoning in the opinion focused on a provision of the RLA that explicitly overrode state attempts to prohibit union shop agreements.[21] The Court, in an opinion by Justice Douglas, explained that this federal preemption provision meant that a union shop agreement "by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State."[22] In fact, the Nebraska Constitution, which had been applied by the Nebraska Supreme Court

16. *Id.* at 235; *see also* Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1960 (1991); *cf.* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[The] right of freedom of thought protected by the First Amendment and against state action includes both the right to speak freely and the right to refrain from speaking at all."), *quoted in Lenhert*, 111 S. Ct. at 1957; West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (government cannot force individual to salute flag or recite pledge of allegiance), *cited in Abood*, 431 U.S. at 235. *But see* Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61 (1983) (compulsory union dues are not First Amendment violation).

17. *See Lehnert*, 111 S. Ct. at 1960.

18. *Id.* at 1963-66 (prohibiting expenditures of dissenting members' dues on lobbying and litigation expenses of other bargaining units).

19. 351 U.S. 225 (1956).

20. *Id.* at 232.

21. Railway Labor Act, § 2, Eleventh, 45 U.S.C. § 152 (1988) (authorizing union security agreements "[n]otwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State").

22. 351 U.S. at 232.

in the case, contained a provision prohibiting union security agreements. Thus, absent the RLA, the dissenting union members would not have been compelled to pay dues.[23]

While the Court accepted the argument concerning the existence of state action, it held against the dissenting union members on the merits. It reasoned that the congressional goal of promoting industrial peace and collective bargaining justified any infringement on constitutional rights resulting from union security agreements that require the payment of dues to fund collective bargaining expenses.[24] However, the Court emphasized that its ruling was confined to the facts before it and did not preclude future consideration of challenges to the use of dissenting members' dues for purposes other than collective bargaining. The Court explained, "If other conditions are in fact imposed . . . in contravention of the First Amendment, this judgment will not prejudice the decision in that case."[25]

The Court next considered the state action issue five years later in *International Ass'n of Machinists v. Street*, in which a group of dissenting union members challenged their union's use of membership dues for contributions to political campaigns.[26] The Court reaffirmed its conclusion in *Hanson* that the use of dissenting members' dues, which were compelled by a union security agreement negotiated under the RLA, involved state action.[27] However, the Court held that because the statute itself prohibited the use of dissenting members' dues for political purposes, the case could be decided without reaching the constitutional issue.[28]

Finally, in 1984, in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, the Court considered a challenge by dissenting union members who objected to the use of their dues for purposes unrelated to collective bargaining.[29] The Court reasoned that unlike the political contributions in *Street*, the RLA permitted some of the challenged expenditures here. Consequently, union expenditures for publications unrelated to collective bargaining, expenses for attending union conventions, and expenses for union social hours could only be challenged on constitutional grounds.[30]

In deciding the First Amendment question, the *Ellis* Court presumed the existence of state action and, as a result, did not feel compelled to analyze the issue. Instead, it simply cited *Hanson* and stated: "The First Amendment does

23. The fact that federal preemption was a ground for finding state action does not mean that other factors would not also support that conclusion. *See infra* notes 97-98 and accompanying text.

24. 351 U.S. at 233-38.

25. *Id.* at 238.

26. 367 U.S. 740 (1961).

27. *Id.* at 746-49 (reviewing *Hanson*).

28. The Court considered a very similar issue two years later in Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113 (1963). In that case, the Court reached the same result that it had in *Street* and relied heavily on *Street*'s logic.

29. 466 U.S. 435 (1984).

30. *Id.* at 455-57.

limit the uses to which the union can put funds obtained from dissenting employees."[31] The Court then considered the level of constitutional infringement resulting from the expenditures and found the expenses at issue de minimis, and thus constitutionally permissible.[32] Nevertheless, by considering the merits of the argument, the Court revealed again its conclusion that state action exists when parties subject to the RLA negotiate union security agreements.

B. *State Action Under the National Labor Relations Act*

While the RLA cases have provided a clear but cursory answer to the state action question, only brief dictum in one Supreme Court case, *Communications Workers v. Beck*, has addressed the issue of state action for union shop provisions negotiated under the NLRA.[33] In that case, dissenting members of a union operating with a union shop provision challenged the union's decision to spend their dues on various activities, such as lobbying; participation in social, charitable, and political events; and efforts to organize employees in other workplaces. After the Court carefully analyzed the permissibility of the expenditures under the NLRA's statutory language, it concluded that the Act prohibited charging those expenses to dissenting union members. The Court reasoned that because the language and legislative history of the NLRA and the RLA were so similar, many of the same factors that had led to the prohibition of such expenditures under the RLA in *Street* and *Ellis* also applied in *Beck*.[34]

The conclusion that the NLRA itself prohibited such expenditures made any consideration of the state action issue irrelevant because the case could be decided without turning to the constitutional question. Thus, at the end of the opinion the Court commented: "We need not decide whether the exercise of rights permitted, though not compelled, by section 8(a)(3) involves state action."[35] Yet immediately after that sentence, the Court provided citations with parenthetical explanations to two cases that suggested no state action exists in NLRA union shop agreements.[36]

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31. *Id.* at 455.

32. *Id.* at 456 ("[W]e perceive little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself.").

33. 487 U.S. 735 (1988).

34. *Id.* at 747-54.

35. *Id.* at 761.

36. *Id.* (citing United Steelworkers v. Weber, 443 U.S. 193 (1979), and United Steelworkers of Am. v. Sadlowski, 457 U.S. 102 (1982)). The *Beck* conclusion contradicted the one reached by the Fourth Circuit in the case, which also noted that state action analysis was unnecessary for deciding the case, but nevertheless concluded "that there is governmental action sufficient to sustain jurisdiction." Beck v. Communications Workers, 776 F.2d 1187, 1205 (4th Cir. 1985).

The Court did not refer to two other cases that would suggest the presence of state action. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967); Steele v. Louisville & N.R. Co., 323 U.S. 192, 198 (1944). Those cases are considered in greater detail later in this Note. *See infra* notes 139-45 and accompanying text.

It is difficult to ascertain whether this dictum, which consists only of one sentence and two citations, indicates that the Court has actually resolved the state action issue. One plausible reading of the language suggests that the Court was signaling its conclusion that no state action exists under the NLRA. Professor Dau-Schmidt supported this reading in an article arguing against the presence of state action in labor law. He explained that the Court's dictum "would seem to defeat any arguments that a union's actions in negotiating and observing a union security agreement are state actions."[37]

Yet even if *Beck* is not read to stand for that proposition, the case does highlight the fact that the question of state action under the NLRA remains unanswered. Since the Court will likely confront the question again in the near future, the question of state action remains important.[38] The recent trend toward restricting the state action doctrine suggests that the current Court may be less willing to find state action than was the *Hanson* Court in 1956.[39] Moreover, the circuit split on the issue demonstrates that the finding of state action under the RLA does not inevitably lead to the finding of state action under the NLRA.[40]

Regardless of whether the *Beck* Court misanalyzed or simply failed to analyze the question of state action, the issue warrants more attention than the single, passing sentence it received. The resolution of the state action question has important substantive consequences for the six million workers governed by the NLRA.[41] While the decision in *Beck* held that the statute prohibited some uses of dues paid by dissenting union members, the opinion left other uses of dues unaffected. As *Ellis* demonstrated, a number of possible union expenditures can survive scrutiny under the labor statutes, but not under the Constitution.[42] Without a finding of state action for employees covered by the NLRA, those employees will continue to be denied constitutional protections that employees governed by the RLA enjoy. In addition to the monetary benefits for workers that could result from a finding of state action, such a finding could implicate other constitutional concerns briefly considered at the end of this Note.[43]

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37. Dau-Schmidt, *supra* note 6, at 70-71; *accord* Lisa Rhode, Note, *Section 8(a)(3) Limitations to the Union's Use of Dues-Equivalents: The Implications of* Communications Workers of America v. Beck, 57 U. CIN. L. REV. 1567, 1585 (1989) (noting that *Beck*'s suggested there is no state action in NLRA collective bargaining agreements).

38. Dau-Schmidt, *supra* note 6, at 117.

39. *See* Strickland, *supra* note 3, at 589; Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L.J. 683, 700-21 (1984).

40. *See* cases cited *supra* note 7.

41. *See* Dau-Schmidt, *supra* note 6, at 53.

42. *See supra* text accompanying notes 29-32.

43. *See infra* notes 157-62 and accompanying text.

II. THE STATE ACTION DOCTRINE

The U.S. Constitution protects individuals from actions by the government, not actions by private parties. As a result, the fact "[t]hat an act violates the Constitution when committed by a government official... does not answer the question whether the same act offends constitutional guarantees if committed by a private" individual.[44] Even assuming, as is likely the case,[45] that the Supreme Court would find that compelled union dues raise legitimate First Amendment concerns, dissenting union members would not necessarily prevail when challenging the use of their dues under union shop agreements. Instead, those employees would first have to demonstrate that "the conduct allegedly causing the deprivation of [the] federal right [can] be fairly attributable to the State."[46]

This part of the Note examines the elements of the state action doctrine relevant to determining whether state action exists under the NLRA. The first section reviews the general principles underlying the doctrine. The second section then examines two state action tests likely to be employed by courts in analyzing the doctrine's applicability to the NLRA.

Part II does not offer a normative argument for reforming the state action doctrine.[47] Instead, it examines the current doctrine in order to develop an analytical framework for Part III, which considers the doctrine in the specific context of the NLRA. Part III then argues that under the Supreme Court's prevailing state action framework, union shop agreements constitute state action. Thus the failure to find state action under the NLRA is a result of courts not accurately recognizing critical attributes of labor law, rather than of a mischaracterization of the state action doctrine.

A. *The Function of the State Action Doctrine*

Making sense of the state action doctrine is not an easy task. The doctrine is regularly criticized and has frequently been characterized as "a conceptual disaster area"[48] for which "[t]here still are no clear principles."[49] Neverthe-

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44. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082 (1991).

45. *See supra* notes 15-18 and accompanying text.

46. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

47. For two such arguments, see Chemerinsky, *supra* note 3, and Ronna G. Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150 (1985).

48. Charles Black, *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); *see also* Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (Black's characterization of the doctrine "would appear even more apt today."); Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982) ("The whole state action area appears now, more than ever, a shambles.").

less, "[d]espite both the predictions of and the call for the demise of the state action doctrine," the Court continues to apply it.[50] This continuing application necessitates an understanding of the doctrine's general principles.

The state action doctrine is used to identify "where the governmental sphere ends and the private sphere begins,"[51] thereby preventing the application of public, constitutional limitations to the private realm. This limitation is traditionally thought to further three policies: preservation of individual liberty, federalism, and separation of powers.[52]

The state action doctrine enhances individual liberty by permitting private parties "to structure their private relations as they choose subject only to the constraints of statutory or decisional law."[53] Without this limitation, the fear of intruding on constitutional rights might unduly chill private action. For example, in *National Collegiate Athletic Ass'n v. Tarkanian*, the Supreme Court held that the sanctions imposed by a private athletic association did not constitute state action.[54] Had the Court found state action, the university would have been required to comply with constitutional due process requirements before firing Tarkanian. In contrast, the Court's decision in *Edmonson v. Leesville Concrete Co.*, which found state action when civil litigants exercise peremptory challenges to petit jurors in federal trials, required those litigants to meet the Constitution's equal protection standards for jury selection.[55]

The state action doctrine also enhances federalism because the doctrine stems from "a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority."[56] In *Jackson v. Metropolitan Edison Co.*, the Court held that because a state-regulated utility operated as a private party, its decision to terminate service for customers delinquent in paying their bills was not subject to constitutional due process standards.[57] The *Jackson* decision promoted federalism by leaving the state free to regulate its utilities without the additional constraints of the Federal Constitution.

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49. Chemerinsky, *supra* note 3, at 503-04; *see also* Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 221.

50. Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 334 (1990).

51. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082 (1991); *see also* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974); Chemerinsky, *supra* note 3, at 504.

52. *See, e.g.*, TRIBE, *supra* note 3, at 1691; William M. Burke & David J. Reber, *"State Action," Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1014-17 (1973); Cole, *supra* note 50, at 345.

53. *Edmonson*, 111 S. Ct. at 2082; *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982). *But see* Chemerinsky, *supra* note 3, at 542 (state action doctrine harms individual liberty by preventing government from addressing violations of individual constitutional rights by private entities).

54. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

55. 111 S. Ct. 2077 (1991).

56. Peterson v. City of Greenville, 373 U.S. 244, 250 (1963).

57. 419 U.S. 345 (1974).

Finally, the state action doctrine promotes separation of powers. "By limiting the scope of the rights which the Constitution guarantees, the state action requirement limits the range of wrongs which the federal judiciary may right in the absence of congressional action . . . ."[58] This concern of the state action doctrine recognizes that congressional authority to protect constitutional rights is broader than judicial authority to do the same.[59] For example, while Congress can use the Commerce Clause to prevent privately owned hotels and restaurants engaging in interstate commerce from discriminating against customers,[60] the state action doctrine would prohibit the Court from creating that protection in the absence of a congressional statute.

B. *State Action Tests*

While the general principles of the state action doctrine are easily recognized, "formulating an infallible test" for identifying state action is an "impossible task."[61] Instead, state action analysis depends on the particular factual context under analysis.[62] Consequently, the Court has articulated a variety of tests for resolving state action claims.[63] This section examines two tests that seem appropriate for a state action analysis of collective bargaining agreements negotiated under the NLRA. One is the general state action test introduced in the 1982 case of *Lugar v. Edmondson Oil Co.*,[64] which sets out a two-step approach to state action questions. The second is the "nexus" test that emerged in *Jackson* and is applicable where government regulations underlie the claim of state action. The nexus test focuses on the link between the government regulation and the alleged constitutional violation.[65] While in some senses it is an alternative to the *Lugar* test, the nexus test is particularly helpful in understanding whether the second part of the *Lugar* inquiry has been satisfied.

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58. TRIBE, *supra* note 3, at 1691.

59. Cole, *supra* note 50, at 347.

60. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

61. Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

62. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (quoting *Burton*).

63. For attempts to categorize the state action cases, see Barbara R. Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1063-84 (1990) (arguing that Court's varied approaches are confused when action is by both state and private actors); Strickland, *supra* note 3, at 596-633 (arguing that the Court employs various tests depending on fact situation rather than on any single state action formula).

64. 457 U.S. 922, 937 (1982).

65. 419 U.S. 345, 351 (1974); *see also* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (rearticulating nexus test).

1. *The* Lugar *Two-Part Test*

In *Lugar*, the Court began its analysis of a state action challenge by reviewing its major decisions in the area. According to the Court, its prior state action decisions suggested the existence of a general two-part test for determining when state action exists in a particular case.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[66]

The *Lugar* Court employed the test to conclude that the role of Virginia officials in assisting in prejudgment attachments of property constituted state action. The Court reasoned that because the "State ha[d] created a system" where state officials were statutorily required to attach property at the request of private parties, state action was present.[67] Thus, the first part of the test was met because the state had created the relevant legal framework; the second part was met because state officials—literal state actors—enforced the system.

Last Term, the Court confirmed the continued viability of this test in *Leesville Concrete*, finding state action when private litigants exercise peremptory challenges to exclude black jurors in a civil trial.[68] The Court held that the first part of the *Lugar* test was met because peremptory challenges are a creation of the government.[69] The second part of the test was met because without the assistance of government officials in creating and executing a system of juries and peremptory challenges, such challenges could not take place.[70] In addition to providing another example of the application of the *Lugar* test, *Leesville Concrete* also demonstrates the Court's willingness to apply the test beyond the § 1983 context in which it was created.[71]

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66. 457 U.S. at 937.
67. *Id.* at 942.
68. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).
69. *Id.* at 2083.
70. *Id.* at 2083-84.
71. In deciding *Leesville Concrete*, which was not a § 1983 case, the Court placed significant reliance upon *Lugar*. The Court explained: "We begin our discussion within the framework for state action analysis set forth in *Lugar*." *Id.* at 2082. The Court then carefully applied the test to the facts of the case. *Id.* at 2083-87.

2. *The* Jackson *Nexus Test*

While *Lugar* provides a useful general framework for beginning state action analysis, the fact-dependent nature of the doctrine[72] necessitates consideration of other state action theories. This point is highlighted by the *Lugar* Court's explanation of the second part of its two-part test, noting the variety of ways in which a party can be considered a state actor.[73] An examination of the state action cases confirms this conclusion.[74] For example, state action claims can be based on actual conduct by state officials,[75] the state's role in enforcing private law,[76] joint action by private actors and state officials,[77] actions by a private party that cause the party to take on the functions of a governmental entity,[78] or direct government regulation of the conduct of a private party.[79]

This last theory—the influence of government regulation—is most applicable to the state action claim in labor law.[80] This Note argues that although labor unions are private parties, they can be characterized as state actors because of the role of the federal labor law statutes in regulating collective bargaining agreements. Those statutes create a regulatory framework governing collective bargaining agreements that differs significantly from the system that would otherwise exist. The importance of such a difference for state action purposes is highlighted by three major Supreme Court decisions over the past twenty years that recognized the possibility of state action existing as a result of government regulation. Those cases indicate that government regulation of private action can lead to a finding of state action when the link between the government activity and the challenged behavior is very strong.

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72. *See supra* note 62 and accompanying text.

73. 457 U.S. 922, 937 (1982).

74. *See supra* note 63.

75. *See, e.g.*, National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) ("A state university without question is state actor."); West v. Atkins, 487 U.S. 42 (1988) ("public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law"); Burke & Reber, *supra* note 52, at 1045; Strickland, *supra* note 3, at 599.

76. Shelley v. Kraemer, 334 U.S. 1 (1948) (state court enforcement of private covenant that was racially discriminatory constitutes state action). *But see* Chemerinsky, *supra* note 3, at 526 ("The Supreme Court, however, has recoiled from this conclusion and largely has refused to apply *Shelley*."); Ronna G. Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737, 754 (1985) ("Subsequent decisions have shown that the Court has not given an expansive reading to *Shelley*.").

77. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("The State had so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity."). *But see* Strickland, *supra* note 3, at 624 (*Burton* is often cited but generally not used to find state action).

78. *See* Marsh v. Alabama, 326 U.S. 501 (1946) (company town functions in the same way a public town functions and therefore could be considered state actor). *But see* Hudgens v. NLRB, 424 U.S. 507 (1976) (employer does not violate First Amendment by prohibiting labor union from distributing handbills on company property); Lloyd Corp. v. Tanner 407 U.S. 551 (1972) (private owner of shopping mall does not violate First Amendment by prohibiting distribution of handbills on mall).

79. *See infra* notes 80-88 and accompanying text.

80. *See infra* Part III.A.

In the 1974 case *Jackson v. Metropolitan Edison Co.*,[81] the Court considered the state action doctrine when the plaintiff claimed that a private utility's termination of her electric service violated the Due Process Clause. Although the utility was heavily regulated by the government, the Court found no state action. Rather than simply equating government regulation with state action,[82] the Court explained instead that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[83]

This nexus inquiry also received significant attention in two 1982 cases that were part of a trilogy that included *Lugar*. In *Rendell-Baker v. Kohn*, the Court held that a private school was not a state actor when it fired one of its teachers even though it received significant state funding and was subject to extensive state regulation.[84] The Court relied on the nexus test put forth in *Jackson*, explaining that while the school was heavily regulated by the state, its decisions to terminate employees were not subject to state regulation.[85]

In *Blum v. Yaretsky*, the Court found no state action in a decision by a nursing home to transfer Medicaid patients to a lower level of care, even though the decisions occurred after periodic assessments required by state and federal law.[86] Because the transfer decisions were ultimately based on the independent medical judgments of private physicians, the Court reasoned that no state action was present.[87] The Court rejected respondent's argument that the government was attempting to encourage a particular discharge policy.

While the Court found no state action in any of these three cases, the opinions offer guidance for determining the existence of state action in the case of a highly regulated private entity. As the Court explained in *Blum*, state action is present when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[88] This standard, along with the facts of these three cases, suggests that the state action inquiry must focus on whether the state is attempting to bring about its own policy choice through regulations.

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81. 419 U.S. 345 (1974).

82. *Id.* at 350.

83. *Id.* at 351; *see also* Thomas R. McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785, 807 (1978); Phillips, *supra* note 39, at 704.

84. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

85. *Id.* at 841-42.

86. Blum v. Yaretsky, 457 U.S. 991 (1982).

87. *Id.* at 1008 ("[D]ecisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State.").

88. *Id.* at 1004, *quoted in* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982), and San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 546 (1987); *cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (holding private club's discrimination was not state action despite regulation by Liquor Control Board because that regulation "plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor").

The combination of the *Lugar* test and the government regulation cases provides a framework for analyzing state action under the NLRA. First, it is necessary to inquire whether the alleged First Amendment violations are conduct authorized by statute, in this case the NLRA. Second, it is necessary to determine whether union officials can be considered state actors because they have received significant assistance from the government's regulatory policy. The standard set forth in *Jackson* indicates that the second element of the *Lugar* test requires a strong nexus between the government regulation and the claimed deprivation of rights. Use of this analytical framework blends together two different formulae for state action, but that is not surprising given the dependence of state action analysis on the particular factual context. In fact, *Leesville Concrete*,[89] as well as one of the circuit court cases[90] analyzing state action under the NLRA, applied both the *Lugar* framework and the *Jackson* nexus test.

III. RETHINKING STATE ACTION AND THE UNION SHOP: CONSIDERATION OF THE COERCIVE EFFECT OF EXCLUSIVE REPRESENTATION

This part of the Note examines the issue of state action in union shop provisions negotiated under the NLRA by applying the framework established in Part II. It argues that state action exists in such provisions because the statutory requirement of exclusivity compels all employees to work under the terms negotiated by the majority union. Consequently, dissenting union members are obligated to pay dues despite their opposition to both the union and the payment of dues. In this way, Congress "has cast the weight of the Federal Government behind the agreements just as surely as if it had imposed them by statute."[91]

This argument is distinct from *Hanson*'s discussion of how the preemptive effect of federal labor law produces state action under the RLA.[92] Unlike the RLA, which preempts state efforts to prohibit union shop agreements, the NLRA permits states to prohibit such agreements.[93] Currently, twenty-one states have chosen to do so,[94] a fact which has led some courts and commentators to conclude that no state action exists under the NLRA because its union security provisions do not preempt law in those states.[95] This approach to state

89. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

90. Kolinske v. Lubbers, 712 F.2d 471 (D.C. Cir. 1983).

91. Buckley v. American Fed'n of Television & Radio Artists, 419 U.S. 1093, 1095 (Douglas, J., dissenting from denial of certiorari); *accord* Havas v. Communications Workers, 509 F. Supp. 144, 149 (N.D.N.Y. 1981) ("the federal government has affirmatively put its omnipresent weight and power" behind such agreements).

92. Railway Employes' Dep't v. Hanson, 351 U.S. 225, 232 (1956). For discussion of this argument, see *supra* notes 19-25 and accompanying text.

93. National Labor Relations Act, § 14(b), 29 U.S.C. § 164(b) (1988).

94. 7 Lab. Rel. Rep. (BNA) 730:19-20 (1991).

95. Kolinske v. Lubbers, 712 F.2d 471, 474-80 (D.C. Cir. 1983); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410 (10th Cir. 1971); Dau-Schmidt, *supra* note 6, at 111.

action presumes that the focal point of analysis should be the applicability of the Supremacy Clause.

Such a conclusion suffers from two major flaws. First, it misreads *Hanson*, which depended on "the Congressional imprimatur placed on union shop clauses," not the preemption provision of the RLA.[96] The fact that the preemption provision was indicative of the federal influence on the process does not mean that it was the only relevant indicator of state action. Preemption was relevant in *Hanson* because it demonstrated that "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."[97] It is also quite possible that other provisions in the labor statutes could be "the source of power and authority." The *Hanson* Court recognized this possibility and suggested an alternative basis for finding state action in a footnote: "Once courts enforce the agreement the sanction of government is, of course, put behind them."[98] Yet even if the state action in *Hanson* is anchored in the RLA's preemption provision, that should not preclude the Court from considering alternative bases of state action.

Indeed, reliance on the RLA preemption theory of state action may not even be very sound. It is surely not the case that any time the federal government preempts state law, state action exists. As Professor Wellington explained five years after *Hanson* was decided, if the preemption theory were adopted, "[it would mean] that all private action taken under the authority of federal legislation that occupies a field by that token alone becomes governmental action."[99] Consequently, *Hanson*'s reliance on federal preemption does not eliminate the need to consider other possibilities for finding state action.

A. *Part One of the State Action Test*

The first part of the *Lugar* state action test inquires whether "the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority."[100] Collective bargaining under the NLRA satisfies this part of the test by conferring two rights on labor unions: the power to negotiate exclusively and the power to negotiate union shop provisions. At the same time, the conferral of these privileges on the majority union deprives dissenting union members of rights that they would otherwise retain. These benefits are a direct product of the statute.

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96. 351 U.S. at 232. *See* Havas v. Communications Workers, 509 F. Supp. 144, 148 (N.D.N.Y. 1981); Lykins v. Aluminum Workers Int'l Union, 510 F. Supp. 21, 25 (E.D. Pa. 1980); *accord* Linscott v. Millers Falls Co., 440 F.2d 14, 16 (1st Cir. 1971).

97. Railway Employes' Dep't v. Hanson, 351 U.S. 225, 232 (1956).

98. 351 U.S. at 232 n.4 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).

99. Harry H. Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 356-57 (1961).

100. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082-83 (1991); *accord* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

Congress provided exclusivity in the NLRA because it determined that "collective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all."[101] As Charlton Ogburn of the American Federation of Labor testified at the time, "To have . . . equality of bargaining power the workers in each plant must present a united front in dealing with their employer. . . . Employers know full well that so long as they can keep the employees divided into rival groups there can be no collective bargaining."[102]

Exclusivity ensures that the union elected by the majority of employees represents all of the employees, regardless of whether dissenting employees support the union.[103] The collective bargaining agreement negotiated by the union is then binding upon all employees.[104] This provision of the NLRA significantly increases a union's bargaining power. Even if forty-nine percent of the employees vote against the union, the union will be able to speak for all employees in negotiations.

The unions are guaranteed the benefit of exclusivity because employers are compelled to abide by such agreements regardless of how they view them. An employer commits an unfair labor practice when it refuses to bargain with the union chosen to represent the majority of workers, even if that employer favors the position of the dissenting union members.[105]

At the same time, the exclusivity provision of the NLRA deprives employees of an important right.[106] Because the NLRA mandates exclusivity in negotiations, it "extinguishes the individual employee's power to order his own relations with his employer."[107] An employee who believes that he is capable of negotiating better terms independently is prohibited from doing so. Instead, she must seek employment on the terms negotiated by the union. This deprivation stems directly from the grant of power to the union to negotiate on behalf of all employees.

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101. *Hearings on S. 1958 Before the Senate Comm. on Education & Labor*, 74th Cong., 1st Sess. 43 (1935); *see also* Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945).

102. *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 151 (1935) (testimony of Charlton Ogburn, Counsel for American Federation of Labor).

103. The National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (1988), provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."

See also Railway Labor Act, § 2, Fourth, 45 U.S.C. § 152 (1988) ("The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.").

104. The policy of exclusive representation was held to be constitutional by the Supreme Court in 1944 when it rejected challenges to the relevant provisions of both the RLA and the NLRA. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (NLRA); Order of R.R. Tels. v. Railway Express Agency, Inc., 321 U.S. 342 (1944) (RLA).

105. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944) (bargaining directly with employees "would be subversive of the mode of collective bargaining which the statute has ordained"); Labor Board v. Jones & Laughlin Corp., 301 U.S. 1, 44 (1936).

106. American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1940).

107. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

A second source of union strength is the NLRA's authorization of union shop agreements.[108] In states that have not prohibited union shops, all employees must pay union dues,[109] even though those employees opposed to the union do not have to participate in union activities in any other way.[110] Congress added this provision out of a concern that "if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself."[111] The dues requirement would therefore create a sense of equality between all employees that could ultimately promote industrial peace.[112]

The ability to negotiate union shop provisions enables unions to collect financial dues from all employees. While dissenting employees who oppose the union do not have to participate in union activities in any other way, the payment of "their share of financial support" provides the union with additional resources to increase its strength.[113] In this way, unions are guaranteed a significant level of financial support regardless of the popular support they enjoy.

Just as the NLRA requires employers to negotiate exclusively with the union, it also compels employers to accept union shop provisions. It is an unfair labor practice for an employer to refuse to negotiate over a union shop provision.[114] Once such an agreement has been negotiated, the employer may be obligated to facilitate its implementation by agreeing to provisions such as check-off requirements, in which union dues are deducted from paychecks.[115] In addition, an employer commits an unfair labor practice, and is subject to state sanctions, when he refuses to discharge employees who do not pay their union dues.[116]

This obligation to fund the union harms employees because it deprives them of the right to withhold funding for causes they find antithetical to their interests. For example, they may be convinced that the collective bargaining agreement does not serve their interests because they could negotiate a better agreement on their own.[117] In addition, their mandatory dues can be used for a variety of purposes beyond collective bargaining, such as lobbying activities,

108. National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158 (1988); *see also* Railway Labor Act, § 2, Eleventh (a), 45 U.S.C. § 152 (1988) (same for RLA).

109. National Labor Relations Act, § 8(a)(3).

110. Communications Workers v. Beck, 487 U.S. 735, 757-59 (1988); NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); HAGGARD, *supra* note 12, at 37.

111. 93 CONG. REC. 4887 (1947) (testimony of Sen. Taft).

112. Dau-Schmidt, *supra* note 6, at 85-91 (summarizing legislative history).

113. Radio Officers v. NLRB, 347 U.S. 17, 41 (1954).

114. Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403 (9th Cir. 1977).

115. Matter of Indep. Stave Co., 248 N.L.R.B. 219, 220 (1979).

116. *See id.*; Matter of Montgomery Ward & Co., 162 N.L.R.B. 369 (1966); Glenn A. Zipp, *Rights and Responsibilities of Parties to a Union Security Agreement*, 33 LAB. L.J. 202, 212 (1982).

117. *See supra* note 107 and accompanying text.

public relations, litigation, and social activities.[118] Absent the NLRA, dissenting union members would not be compelled to fund such activities.

Although a number of states have chosen to prohibit union shop provisions,[119] their decision provides little consolation to employees in the twenty-nine states that permit such agreements. In those states, union shop provisions are still enforceable through exclusivity provisions negotiated under the federal statute. The federal statute plays a significant role because it is the NLRA that compels dissenting employees in those states to pay the dues.

Thus, the first part of the *Lugar* test is met because the alleged constitutional deprivation—the payment of union dues in violation of the First Amendment—stems directly from the union's statutory right to compel the dues under the NLRA. This conclusion is consistent with the application of the test in *Lugar* and *Leesville Concrete*. In *Lugar*, the Court found that the first part of the test it created was met because the prejudgment attachments of property occurred through a "procedural scheme created by the statute [that] obviously is the product of state action."[120] In *Leesville Concrete*, the Court reasoned that the first part of the test was met because peremptory challenges constitute an exercise of government power "permitted only when the government, by statute or decisional law" authorizes their use.[121] Thus, "[w]ithout this authorization, granted by an Act of Congress itself, Leesville would not have been able to engage in the alleged discriminatory acts."[122] Similarly, without the authority of the NLRA, labor unions would not be in a position to function as the exclusive representatives of all employees and to negotiate union shop provisions.

B. *Part Two of the State Action Test*

The second part of the state action test involves consideration of "whether the private party charged with the deprivation could be described in all fairness as a state actor."[123] In the most literal sense, a labor union is obviously not a state official; however, because the union "has obtained significant aid from state officials" it "may fairly be said to be a 'state actor'" under the second part of the *Lugar* test.[124] The role of government regulations under the *Jackson* nexus test buttresses this conclusion.

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118. This is not to say that a finding of state action should lead to a prohibition on all such expenditures. It may very well be that the Court would find such expenditures justified by a compelling state interest. *See, e.g.*, Railway Employes' Dep't v. Hanson, 351 U.S. 225, 233-34 (1956); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977). The argument being made is that a consideration of the constitutional merits would force that interest to be weighed against the infringement on employees' interests.

119. *See supra* text accompanying note 94.

120. Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982).

121. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991).

122. *Id.*

123. *Id.*; *accord Lugar*, 457 U.S. at 937.

124. 457 U.S. at 937.

The NLRA provides significant aid to the union by empowering it to negotiate on behalf of all employees, and by enabling it to negotiate union security agreements that compel all employees to pay dues to it. As the analysis of the first part of the *Lugar* test demonstrated, this assistance provides unions with much greater strength than they would otherwise possess.[125] Whether or not this assistance is good policy, there is no doubt that as a positive matter, it is part of a deliberate federal policy. Without that assistance, unions would not be in a position to negotiate exclusively on behalf of all employees or to bind dissenting employees to join the union by negotiating union shop provisions.

A comparison with the pre-NLRA status quo further demonstrates the significance of the aid. Before the enactment of the federal labor law statutes, unions did not have exclusive authority to negotiate on behalf of all employees. Instead, all employees could either work under the terms negotiated by the union or negotiate an independent arrangement with the employer.[126] "The legislative adoption of the majority rule principle as the central concept of the collective bargaining structure constitute[d] a complete repudiation of all previous judicial efforts to deal with the problem."[127]

Union shop provisions were also subject to a number of legal obstacles before the enactment of the NLRA. For a period of time, unions that negotiated union shop provisions could face criminal conspiracy charges.[128] After the use of conspiracy charges began to decline following the 1842 decision of the Massachusetts Supreme Court in *Commonwealth v. Hunt*,[129] a number of cases held that a union seeking to negotiate or enforce a union shop provision could face civil liability.[130]

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125. The argument in favor of state action under the *Lugar* framework appears to involve some "bootstrapping" because the federal labor statutes are used to meet both requirements of the test. The statute, however, functions differently in the two elements of the test. While the first part of the test uses it to demonstrate that federal law is the basis for the deprivation of employees' rights, the second part uses it to demonstrate the significant role the government plays in regulating collective bargaining. Similarly, in *Leesville Concrete* the relevant statutes were applied to meet both elements of the *Lugar* test. *See* 111 S. Ct. at 2083 (first part); *id.* at 2084-85 (second part).

126. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 102 (1936) (McReynolds, J., dissenting); Adair v. United States, 208 U.S. 161 (1908); Yazoo & M.V.R.R.V. Co. v. Webb, 64 F.2d 902, 903 (5th Cir. 1933); *see also* Minier Sargent, *Majority Rule in Collective Bargaining Under Section 7(a)*, 29 ILL. L. REV. 275 (1934) (discussing individual right not to participate in majority's collective bargaining agreement).

127. Weyand, *supra* note 101, at 559.

128. *See* HAGGARD, *supra* note 12, at 11-17.

129. 45 Mass. (4 Met.) 111 (1842).

130. *See, e.g.*, Moore Drop Frying Co. v. McCarthy, 243 Mass. 554 (1923) (inducing breach of contract by seeking closed shop agreement); Berry v. Donovan, 188 Mass. 353 (1905) (successful tort suit by employee who was discharged for refusing to join the union); Plant v. Woods, 176 Mass. 492 (1900) (damages against union striking over union shop provision). *But see* National Protective Ass'n of Steam Fitters v. Cumming, 170 N.Y. 315 (1902) (denying injunction). *See generally* HAGGARD, *supra* note 12, at 17-24.

Some scholars in labor law,[131] as well as certain governments of other nations,[132] have favored an approach that permits the existence of multiple unions. Such a system could be adopted in the United States in lieu of exclusivity and union shop provisions. This alternative would allow all employees opposed to a particular union to join a different union and negotiate independently. This Note does not recommend that Congress adopt such an approach and return to the pre-NLRA era because many good reasons favor maintaining the current system.[133] Rather, this alternative is noted in order to emphasize that the status quo is part of a system established by the government and not something that arose from purely private action.[134]

This recognition of the role of federal aid in meeting the second part of the *Lugar* test is supported by the Court's reasoning in *Leesville Concrete*, which used a "but for" analysis to determine that the second part of the state action test had been met. The Court explained that "a private party could not exercise its peremptory challenges *absent the overt, significant assistance* of the Court."[135] It based this conclusion on the fact that the litigant was only able to exercise his right to peremptory challenges because of the statutorily created system of juries and peremptory challenges. Similarly, a union is only able to exercise its authority over dissenting union members by virtue of the provisions of the NLRA increasing unions' power and authority.

The role of exclusivity in creating state action is also consistent with the *Jackson* nexus test. It is not simply that labor law is heavily regulated, but rather that the particular functions at issue—the right to negotiate exclusively and the power to negotiate union shop provisions—are governed by the labor statute. In *Jackson*, *Rendell-Baker*, and *Blum*, the Court found no state action because the particular policy decisions, although made by regulated entities, were not themselves regulated.[136] In contrast, when union shop provisions are negotiated under the NLRA, a federal policy directly causes the deprivation of rights. Without the provisions for exclusivity and union shop agreements, dissenting employees simply would not be obliged to pay dues.

The Court has previously recognized this link between federal labor law policy and its effect on individual workers. For example, in *NLRB v. Allis-Chalmers Manufacturing Co.*, the Court explained that "the national labor

131. *E.g.*, George W. Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344, 351 (1976) ("Why should a union be any stronger than is desired by the people it represents?"); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975) (arguing that unions have been given unduly significant power over employees to compensate for employer power over union).

132. *See* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1425-30 (1971); Schatzki, *supra* note 131, at 919 n.53.

133. *See supra* notes 101-02, 108-12 and accompanying text.

134. *See* ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 362 (11th ed. 1991) ("In sum, Congress has to a considerable degree replaced a bargaining structure based on volunteerism and economic force with one based on legal compulsion.").

135. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2084 (1991) (emphasis added).

136. *See supra* text accompanying notes 81-88.

policy vested unions with power to order the relations of employees with their employer."[137] Similarly, in *American Communications Ass'n v. Douds*, the Court recognized that union "authority derives in part from Government's thumb on the scales."[138] Like those decisions, this Note acknowledges the important role the federal government plays in shaping union actions.

In addition, while the Court has not explicitly found state action in union shop agreements negotiated under the NLRA, in two other cases it strongly intimated that state action exists under the statute. In *Steele v. Louisville & N.R. Co.*[139] and *Vaca v. Sipes*,[140] the Court considered the challenges of employees who claimed that they were subject to mistreatment as a result of the power wielded by a union under the system of exclusive representation. In both cases the Court suggested that if it could not have ruled for petitioners on statutory grounds, it would have done so on constitutional grounds. These cases demonstrate that the Court's precedents support the conclusion that union action can rise to the level of state action.

In *Steele*, the majority union, which was governed by the RLA, negotiated an agreement to eliminate gradually the jobs of all black employees and to hire white workers as replacements. The Court explained that if the RLA was not held to prohibit such an agreement, "constitutional questions arise. For the representative is *clothed with power not unlike that of a legislature* which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates."[141] The Court avoided reaching the constitutional issue because it held that the statute itself imposed an obligation to represent all members of the union fairly.[142] While this was an RLA case, its language addresses powers that are identical under the NLRA.

In *Vaca v. Sipes*, the Court considered an employee's challenge to the failure of a union to pursue an employee grievance.[143] In deciding the case, the Court rejected the argument that the National Labor Relations Board had exclusive jurisdiction over the challenge. It explained that more fundamental issues were at stake because, as it had held in *Steele*, "the congressional grant of power to a union to act as exclusive collective bargaining representative . . . would raise grave constitutional problems" if that power were misused.[144] *Vaca*, which was decided under the NLRA, suggests a recognition by the Court

137. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967).
138. American Communications Ass'n v. Douds, 339 U.S. 382, 401 (1940).
139. 323 U.S. 192, 198 (1944).
140. 386 U.S. 171, 182 (1967).
141. 323 U.S. at 198 (emphasis added).
142. *Id.* at 199.
143. 386 U.S. at 171.
144. *Id.* at 182.

of exactly what it attempted to deny in *Beck*[145]—that exclusive representation was imposed by Congress and has a coercive effect.

Vaca and *Steele* both demonstrate that in the past the Court has been receptive to the idea of finding state action under the NLRA. In addition, these decisions reflect an understanding of the "significant aid" that unions receive from the government. Although *Vaca* and *Steele* predate *Lugar*, the reasoning in both cases is in accord with the second element of *Lugar*'s two-part test. In contrast, the two cases cited in the *Beck* dictum fail to analyze the issue of exclusivity and are easily distinguishable.

In the first of these cases, *United Steelworkers v. Sadlowski*,[146] union members challenged an internal election rule that prohibited "outsider" contributions to candidates running in union elections. In a footnote to the opinion, the Court briefly stated that because the rule did not involve state action, the union policy could not be challenged on First Amendment grounds.[147] Two factors distinguish *Sadlowski*. First, union elections are more of an internal matter than are collective bargaining agreements. While elections may indirectly affect dissenting employees, collective bargaining agreements more acutely affect them because they establish the terms of employment. Second, unlike the case of union shop provisions considered in this Note, the election contributions rule is not a matter specifically authorized by the NLRA.

In the other case, *United Steelworkers v. Weber*, the Court considered a Title VII challenge to an affirmative action plan voluntarily negotiated by an employer and a union.[148] In its decision, the Court noted: "Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment."[149] Beyond that single statement, the Court provided no analysis or explanation for the absence of state action, perhaps because the issue was not raised in the suit.[150] Since the issue was not raised, it is unclear why the Court felt the need to note the lack of state action. A compelling argument exists that state action occurs in the negotiation of affirmative action provisions because they have a binding effect on all employees.[151] Thus, had *Beck* devoted more attention to the state action question, *Sadlowski* and *Weber* would not have prohibited a finding of state action.

Justice Douglas recognized the significance of the federal government's role in providing aid to the union through union shop provisions in 1974 when he dissented from a denial of certiorari in *Buckley v. American Federation of*

145. Communications Workers v. Beck, 487 U.S. 735 (1988).
146. 457 U.S. 102 (1982).
147. *Id.* at 121 n.16.
148. 443 U.S. 193 (1979).
149. *Id.* at 200.
150. Brief for Respondent, *Weber* (No. 78-432).
151. *See infra* notes 160-61 and accompanying text.

Television and Radio Artists.[152] In arguing that the Court should have heard the case, which involved a First Amendment challenge to compulsory union dues, Douglas explained that the federal labor statutes provided sufficient aid to the union to create state action:

> When Congress authorizes an employer and a union to enter into union-shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it had imposed them by statute.[153]

Justice Douglas emphasized that the aid resulted from the fact that the government, "by its approval and enforcement of union-shop agreements, may be said to 'encourage' and foster such agreements."[154]

IV. CONCLUSION

This Note has argued that when parties governed by the NLRA negotiate union security agreements, state action is present. Consequently, employees should be able to challenge the constitutionality of such agreements. As the RLA cases demonstrate, such a challenge would not lead to the prohibition of all union shop agreements because compelling state interests may justify the authorization of such agreements.[155] A finding of state action would, however, likely lead the Court to prohibit some statutorily authorized union expenditures as violations of the First Amendment.[156] At some point in the future the Court will face this issue,[157] and a recognition of state action could therefore have, at the very least, important financial consequences for individual employees.

Yet, this conclusion also suggests that a recognition of the role of the NLRA's exclusivity provision in creating state action could have implications for other areas of labor law. For example, while *Vaca v. Sipes* created a statutory duty of fair representation for the pursuance of employee grievances,[158] that obligation provides only limited protection for individual employ-

152. 419 U.S. 1093 (1974).

153. *Id.* at 1095 (Douglas, J., dissenting from denial of certiorari).

154. *Id.*

155. *See* Railway Employes' Dep't v. Hanson, 351 U.S. 225, 233-35 (1956).

156. *See* Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 465 U.S. 435, 455-57 (1984) (First Amendment prohibits use of dissenting members' dues for some union expenditures authorized by RLA); Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1963-64 (1991) (prohibiting public unions' expenditures for publications and national conventions with money paid by dissenting union members); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223 (First Amendment prohibits some expenditures by public union with dissenting members' dues).

157. Dau-Schmidt, *supra* note 6, at 117.

158. Vaca v. Sipes, 386 U.S. 171, 190 (1966).

ees.[159] In fact, at least one circuit has held that under the statutory duty of fair representation, a union "is not liable . . . for careless or boneheaded conduct."[160] A finding of state action under the NLRA might enhance individual employee rights by obliging a union to meet due process standards before deciding not to pursue an employee's grievance. Similarly, if the Court in *Weber*[161] had found state action, it would have analyzed the affirmative action plan at issue under the Equal Protection Clause standards, in addition to considering its legality under Title VII.[162] A recognition of state action might also affect the right of unions to fine individual employees who cross picket lines.[163]

These issues are complex, and a full analysis of them would require a more indepth treatment than this Note provides. In some cases, the state interest supporting the exclusivity provision and the particular union power at issue may outweigh any infringement on employee rights. A finding of state action would therefore not be likely to result in a wholesale reform of labor law. It would, however, lead to an enhancement of the rights of individual employees.

159. *See* United Steelworkers v. Rawson, 110 S. Ct. 904, 911 (1990) ("purposefully limited check"); Note, *Public Sector Grievance Procedures, Due Process and the Duty of Fair Representation*, 89 HARV. L. REV. 752, 782 (1976) ("[A] combination of the good faith test and the courts' general reluctance to overturn arbitration awards makes vindication of the employee's rights unlikely.").

160. Camacho v. Ritz-Carlton Water Towers, 786 F.2d 242, 244 (7th Cir. 1986).

161. United Steelworkers v. Weber, 443 U.S. 193 (1979).

162. *See* Johnson v. Transportation Agency, 480 U.S. 616, 620 n.2 (1987).

163. Although employees have the option of resigning from the union to avoid the fine, they are often not aware of this right until the strike has begun, and resignation is no longer an option. *See* Harry H. Wellington, *Union Fines and Workers' Rights*, 85 YALE L.J. 1022 (1976). The right to fine may involve state action because it is "integral to . . . federal labor policy." NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967) (Black, J., dissenting).