Book Reviews

How the Workplace Constitution Ties Liberals and Conservatives in Knots

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Introduction

On the last day of the Supreme Court’s last term, in *Harris v. Quinn*, a majority of the Court lined up with the “right-to-work movement” in the latest phase of the latter’s long-running battle with organized labor over mandatory union fees. The Court held that for Illinois to require home-care workers to pay an “agency fee” to a union that represented them in collective bargaining, pursuant to a majority vote of their coworkers, would violate the First Amendment rights of workers who opposed the union. Yet *Harris* was narrower than the unions had feared, and hinged on the home-care workers’ unusual joint-employment relationships. Yet *Harris* revealed the deep judicial skepticism that unions face in attempting to defend the agency fee arrangements that help underwrite their financial viability and their ability to represent workers. *Harris* is also a testament to the right-to-work movement’s success in building a constitutional case for the “right to refrain” from supporting unions.

*Harris* was thus a victory for the anti-union right and a serious blow for the labor unions that have been stalwarts of the post-New Deal Democratic coalition. Ironically, however, if the right-to-work movement has its way and the right to refrain from paying for union representation is eventually extended to all public employees, and even to private employees, it will do so partly on the basis of constitutional precepts for which liberals fought during their own long-running battle to expand the rights of employees, especially against discrimination.

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2. *Id.* at 2644.
3. *Id.* at 2638.
That is among the provocative lessons of this outstanding book of twentieth-century legal history. Professor Sophia Lee explores the evolution of two visions of what she calls the “workplace Constitution”—two conceptions of the federal constitutional rights of employees—that have been contending for judicial approval since the New Deal. The liberal workplace constitutionalists fought chiefly to deploy constitutional arguments to combat discrimination in private-sector employment, especially in the decades before the Civil Rights Act of 1964. The conservative workplace constitutionalists proclaimed the rights of individual workers as against collectivist trade unions and especially against mandatory union fees. Lee explores the intertwined jurisprudential underpinnings of the liberal and conservative variants of the workplace Constitution, which have swirled beneath and around some of the most elemental constitutional controversies of the mid-twentieth century and beyond. The famously confounding “state action” problem is at the heart of the story, and Lee brings that problem and others to life through vivid histories of lawmaking and litigation that feature sophisticated legal analysis—both that of the participants and Lee’s own.

The opening sentences of the book make a bold claim: “Today, most Americans lack constitutional rights on the job. Instead of enjoying free speech or privacy, they can be fired for almost any reason, or for no reason at all. This history explains why.” But that opening claim might both overstate and understate what the book delivers. The lack of constitutional constraints on arbitrary employer power in the private-sector workplace has its roots in the state action requirement: nearly all of Americans’ federal constitutional rights run only against state action, not against purely private infringement. That limitation on employees’ constitutional rights originated long before the post-New Deal period that Lee describes. But what Lee’s book does deliver is a gripping and richly illuminating history of the passionate and partly successful post-New Deal litigation battles to expand workers’ constitutional rights and the scope of state action in the workplace. She tells the story of how private-sector employers emerged from those battles with their immunity from employees’ constitutional claims intact, while unions became—and continue to be—more vulnerable to constitutional litigation.

It is a central irony of the workplace Constitution that it constrained the powers of unions far more than that of employers. It did so largely because of the threshold requirement of state action. But it is ironic because, for many liberals before and since the New Deal, workers’ right to

5. See the Civil Rights Cases, 109 U.S. 3, 11–13 (1883), for the original articulation of the “state action requirement” for alleged constitutional violations.
form independent unions and engage in collective bargaining represented the advent of democracy and freedom into industrial life and the liberation of workers from autocratic employer rule. The National Labor Relations Act (NLRA), and union representation itself, sought to combat arbitrary employer power and to transform workers from subjects into citizens of the workplace, by arming the latter with a rudimentary “bill of rights” as against employers and enabling them to participate in workplace governance. In effect, the NLRA created a metaphorical workplace constitution to extend the reach and the values of the actual Constitution beyond the state action threshold.

For others, however, the growing role of trade unions in industrial life was a singular threat to individual workers’ autonomy and opportunity (not to mention the threat to employer freedom of action). Other critics of unions—including some friendly critics within the labor movement—focused more narrowly on racially exclusionary, segregationist, and discriminatory practices. Crucially, union critics of all stripes were better able than union proponents to harness the Constitution and constitutional litigation in support of their views of workers’ rights. That is because, in the wake of the New Deal, the powers of unions were intertwined with government action in ways that employer powers were not. As a consequence, unions, and ultimately unions’ ability to counter employer power over employees, were far more vulnerable to constitutional challenges than were employers themselves. The metaphorical workplace constitution embodied in the New Deal labor laws thus came into conflict with the actual post-New Deal workplace Constitution—especially with its conservative variant, but to some extent with its liberal variant as well.

Lee’s rich account of how those conflicts played out from the 1930s through the 1980s brings the modern reader face-to-face with paradoxes and contradictions in the law of work that have periodically burst into public consciousness over the decades and that percolate underneath some of today’s most contentious debates about workers’ rights and the future of unions. In particular, strange bedfellows like those that appear throughout Lee’s history of the workplace Constitution are likely to reappear in future chapters of the roiling agency fee controversy.

7. Id.
I. How the “Liberal Workplace Constitution” Divided the New Deal Coalition

Lee begins her story after the New Deal “switch in time” sounded the death knell for the old Constitution of the workplace—the *Lochner* era doctrine of “liberty of contract” that had long been the conservative bulwark against much progressive legislation and against the trade unions that both pressed for and benefited from some of that legislation.9 The death knell was sounded most decisively when the Supreme Court upheld the NLRA against multiple constitutional challenges in 1937,10 to the surprise of nearly everyone at the time. But the New Deal was hardly the end of constitutional challenges to the law and institutions of the workplace. Some of the new challenges were not really new; they echoed the old Constitution of substantive due process and liberty of contract. But the chosen vessels for the post-New Deal round of constitutional claims, both the new and the not so new, were the First Amendment and the Equal Protection Clause, declared fit for service in *Carolene Products*11 and its famous footnote.12

The NLRA, like the Railway Labor Act (RLA)13 before it, had not only legitimized labor unions but made them central actors in a new industrial-relations regime. Before the NLRA, unions had gained considerable legal latitude to organize employees and pressure employers to bargain with unions on employees’ behalf (through strikes, picketing, and such). In particular, the 1932 Norris-LaGuardia Act had sharply restricted the use of labor injunctions and union liabilities in the federal courts14 and thus ushered in a brief era of “collective *laissez-faire*” under federal law.15 But employers’ refusal to recognize and deal with unions, even when they had overwhelming majority support, continued to fuel growing industrial conflict. So the NLRA went a big step further: once a union had the support of a majority within an appropriate bargaining unit of employees, that union became the *exclusive* representative of all employees in the

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10. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25, 29–30 (1937). As the dissent observed, the Court’s recent decisions in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), had placed “purely local” industry, as opposed to the instrumentalities of commerce, beyond the reach of Congress. *Jones*, 301 U.S. at 76–77, 84 (McReynolds, J., dissenting).
12. *Id.* at 152 n.4.
bargaining unit. The employer was compelled to bargain in good faith with the majority-backed union and was prohibited from recognizing another union and from bargaining separately with individual employees. The latter stood in particularly sharp contrast with the recently vanquished liberty of contract.

Under the exclusivity doctrine at the heart of both the NLRA and the RLA, employees were bound by the terms collectively bargained between the union and their employer, whether they supported or belonged to the union or not. Under the original NLRA (though not the RLA), that could include a “closed shop” agreement, which required the employer to hire only union members. Closed shop agreements were later prohibited by the Taft-Hartley amendments in 1947, but the first part of Professor Lee’s book takes us back into the world as it existed under the original NLRA and some of the constitutional controversies it wrought.

Consider how this regime affected many black workers in the deeply segregated society of the late 1930s and early 1940s. Both employers and unions practiced blatant forms of discrimination and segregation, especially in the South. While some labor unions were among the most racially progressive institutions in this era—the Congress of Industrial Unions (CIO) was pioneering a new integrationist course in its push for plant-wide, integrated industrial unions—others were among the bulwarks of a racist society. In particular, many skilled trades were organized by all-white unions, and those unions often sought a closed shop agreement requiring the employer to hire only union members. The National Labor Relations Board (NLRB) cast doubt in 1943 as to whether all-white closed unions could be permitted to negotiate a closed shop on behalf of a partly black bargaining unit, but it did little to follow through on that doubt. Many CIO unions, for their part, sought a “union shop,” which left hiring to the employer but required employees to join the union and pay union dues and fees once hired. The closed shop or union shop exacerbated the problems faced by black workers who could be saddled with exclusive representation

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17. Employers were also prohibited by § 8(2) of the NLRA from forming a more compliant company union, not only when the employees chose independent union representation but even if they did not. NLR § 8(2), 29 U.S.C. § 158(a)(2) (2012).
19. NLRA § 8(3).
21. See supra note 4, at 15–16.
22. See id. at 14.
23. Id. at 42.
24. Id. at 58.
by a union that excluded them from membership or that sought to relegate them to the worst jobs or to drive them out of their jobs altogether.

Until the 1930s, many leading black lawyers “saw the labor movement primarily as a threat to African American workers . . . . To defend against Jim Crow, they embraced the liberty-of-contract doctrine.”25 In particular, one of its “key components, the right to work, was a revered tenet of the black bar, wielded against discriminatory unions seeking to close African Americans out of jobs and restrictive licensing laws that excluded them from particular trades.”26 But the integrationist program of the CIO and the comparatively progressive politics of the New Deal led many black labor leaders to conclude that black workers’ “best hope lay in joining and advancing the labor movement.”27 In Charles Hamilton Houston’s words, African Americans “are not antagonistic to collective bargaining but we d[o] insist on being part of the collection as well as part of the bargain.”28

Black trade unionists are among the compelling figures in Lee’s narrative. Even in the face of violent white supremacy from some quarters of organized labor, some black trade unionists put their trust in the power of labor solidarity and politics to eventually prevail over racist exclusion.29 While some black trade unionists cast their lot with the CIO activists who were preaching integration, others fought to preserve separate black unions.30 And while some black unionists sought to fight their battles within the labor movement and the political sphere, others turned to the courts for relief.31 But the latter found little law on the books to help them. No statute then barred racial discrimination by either employers or unions. The constitutional commitment to equal protection of the laws applied only to state action, not the private actions of employers and unions,32 and it did not yet bar racial segregation, for “separate but equal” still ruled the day in this era before Brown v. Board of Education.33

Those political cross currents and legal challenges form part of the backdrop behind a cornerstone of the workplace Constitution, Steele v.

25. Id. at 21. See generally David E. Bernstein, Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal (2001) (arguing that many labor laws harmed the economic prospects of African Americans, including the NLRA, the RLA, the Davis-Bacon Act, and the Fair Labor Standards Act).
26. Id., supra note 4, at 21.
27. Id. at 22.
28. Id. at 21.
29. See id. at 13–15.
30. Id. at 13–16.
31. See id. at 11–12, 18–20.
32. Id. at 19–20.
Louisville & Nashville Railroad Co.,\textsuperscript{34} the story of which Lee tells in Chapter 1. The union that was designated under the RLA as the plaintiff’s exclusive representative, based on support by a majority of the larger bargaining unit, barred him and his fellow black workers from membership.\textsuperscript{35} The union had set about bargaining with the employer on behalf of its white members to marginalize the black workers and to establish a white monopoly over jobs under their jurisdiction.\textsuperscript{36} For black workers in the era of Jim Crow, that was what exclusive union representation could mean.\textsuperscript{37}

The Supreme Court rose to the challenge posed by this obvious injustice in \textit{Steele} and held that the RLA imposed on labor unions an unwritten statutory duty to represent fairly and without discrimination all of the workers in the bargaining unit they represented.\textsuperscript{38} It did so, said the Court, to avoid serious constitutional questions: for Congress to foist upon black workers “exclusive representation” by a union that excluded them from membership, and that had no duty to fairly represent them, would arguably deny to black workers the equal protection of the law.\textsuperscript{39} \textit{Steele} is a founding document of the liberal workplace Constitution in Lee’s account. As she recognizes, however, it was an ambiguous starting point, given that it did not resolve or even clearly state the constitutional question that the Court sought to avoid.\textsuperscript{40} \textit{Steele} set a template of “constitutional avoidance” in labor law that has endured. The implied statutory “duty of fair representation” eventually spread beyond the RLA into the NLRA, beyond collective bargaining into contract administration and grievance handling, and beyond race discrimination into other grounds for unfair treatment—all without the Court ever seriously engaging with the constitutional arguments, and especially the nature of the state action, that had impelled the statutory result in \textit{Steele}.\textsuperscript{41}

\textit{Steele} explicitly declined to require unions to admit black workers as members.\textsuperscript{42} But that was among the issues that were to occupy the NLRB and the courts for decades to come. \textit{Steele} did embolden the NLRB in 1946

\begin{itemize}
\item \textsuperscript{35} \textit{Steele}, 323 U.S. at 194–95.
\item \textsuperscript{36} \textit{Id.} at 195.
\item \textsuperscript{37} In industries covered by the NLRA, the closed shop was lawful, and those agreements often kept black workers from even gaining entry to jobs by making all-white unions the gatekeepers to the trade. \textit{See supra} notes 19–20, 22 and accompanying text.
\item \textsuperscript{38} \textit{Steele}, 323 U.S. at 202–03.
\item \textsuperscript{39} \textit{Id.} at 202.
\item \textsuperscript{40} \textit{See Lee, supra} note 4, at 33.
\item \textsuperscript{41} \textit{See Archibald Cox, The Duty of Fair Representation}, 2 \textit{Vill. L. Rev.} 151, 153–56 (1957) (surveying cases post-\textit{Steele}).
\item \textsuperscript{42} \textit{Steele}, 323 U.S. at 204.
\end{itemize}
to announce a “firm policy against allowing closed unions to organize closed shops”; the board cited “the NLRA’s term ‘representative’ in light of that act’s purposes, as well as ‘the national policy against discrimination,’” expressed in both the Constitution and executive orders. 43 But other constitutional questions loomed: were unions themselves state actors by virtue of their legal powers? If so, the Constitution would presumably require them to admit black workers as members (as Charles Hamilton Houston had argued unsuccessfully in the Steele litigation), and it might require them to ban segregated locals (though that argument faced the additional hurdle of separate but equal before Brown v. Board of Education). Of course, if unions were state actors, they would become vulnerable not only to equal protection claims but to an expanding array of individual rights claims under the constitutional jurisprudence that had begun to unfold in the Supreme Court after the mid-1930s.

Whether or not unions were state actors, what were the constitutional obligations of federal agencies administering the labor laws? A fascinating and mostly forgotten strain of the liberal workplace Constitution that Lee explores lies in litigation claiming that federal administrative agencies might violate the Constitution simply by ignoring the discriminatory practices of the private actors that appeared before them in statutory and regulatory disputes. 44 This line of argumentation surmounted the state action hurdle by targeting actual branches of the state, but it posed difficult questions about the substantive scope of state actors’ constitutional obligations and how far they reached beyond those actors’ own intentional discrimination. For example, was the NLRB obligated to deny certification to unions that excluded black workers? Or to unions that maintained segregated local chapters—both an all-white local and an auxiliary black local? Or that discriminated in less overt ways? These questions were deeply troubling not only on jurisprudential grounds but on pragmatic political grounds. The NLRB and some civil rights advocates believed that union representation was an essential part of the battle for equal opportunity and fairness at work, and they worried that opening the door to an inquiry into union discrimination would give employers—often themselves discriminators—a new pretext to resist union certification. 45 As a legal matter, attempts to construe the statute to bar union discrimination were complicated by the fact that, until 1947, there was nothing in the NLRA that directly regulated union practices at all—no text that might be construed to reach discriminatory practices.

43. LEE, supra note 4, at 54 (quoting 10 NLRB ANN. REP. 17 (1945)).
44. Id. at 45–47.
45. See id. at 101, 188–89.
The Taft-Hartley Act, passed over President Truman’s veto in 1947, was a monumental victory for the opponents of unions. The NAACP had opposed the law because of its harsh anti-union cast, but its lawyers nonetheless recognized new opportunities for civil rights advocacy in the revised NLRA. Taft-Hartley sharply cut back on unions’ control over employment opportunities through the closed shop and union shop; that was a gain for black workers given their exclusion from many unions. It also dramatically recast the statutory context for challenges to union practices. Even though nothing in the statute directly addressed race discrimination or union membership policies, the creation of new “unfair labor practices” targeting some union practices opened the door to new Steele-like arguments by black workers and civil rights advocates before the NLRB. Under the shadow of possible unconstitutionality, some civil rights advocates argued that the board should construe the statute to prohibit racial discrimination and segregation by unions in both membership and representation.

For these constitutional avoidance arguments to have any bite, the board and the courts would have to embrace a broad conception of “state action.” An expanding state action doctrine was the linchpin for broader rights against union and employer discrimination and broader duties of agencies and unions themselves to purge discriminatory practices. But was state action present only when the state itself discriminated (as in Brown) or when it compelled discrimination by private actors (as in many of the follow-on public accommodation cases in the Jim Crow South)? Or when courts enforced discriminatory agreements by private actors (as in Shelley v. Kramer)? Or when the state empowered private actors to carry out discrimination (as the RLA arguably did in Steele)? Was state action present when the state granted licenses or other privileges to private actors in regulated industries that engaged in discriminatory employment practices (as in a series of cases under the Federal Communications Commission)? Or when it merely tolerated, or failed to combat, private discrimination (as in many of the cases before the NLRB and other federal agencies involving discriminatory union or employer practices)? The broadest theories of state action reached the actions of private employers, though primarily when they were exercising or seeking legal privileges beyond the baseline rights of property and contract and the law of incorporation.

46. Id. at 52.
47. Id. at 52–53.
48. Id. at 52.
49. See id. at 53.
50. Id.
51. 334 U.S. 1 (1948).
52. See LEE, supra note 4, at 156–72.
The fate of the liberal workplace Constitution was of course intertwined with a broader set of civil rights challenges to discrimination and segregation by powerful private actors, all of which turned on the scope of state action. The legal battle over state action reached a fever pitch in 1964 in *Bell v. Maryland*, in which the Court reviewed the trespass convictions of civil rights sit-in protesters at a segregated restaurant. The Court had already invalidated Jim Crow laws requiring segregation. Congress was then debating the Civil Rights Act, which would prohibit discrimination in public accommodations—but its fate was in doubt given Southern senators’ record-breaking filibuster. The question in *Bell*, and perhaps the most divisive legal controversy of the day, was whether the Constitution itself prohibited states from enforcing private property-owners’ right to exclude others on discriminatory grounds.

In *Bell*, Justice Brennan managed to cobble together a majority for reversal of the convictions, based on a rather arcane state law ground that avoided the constitutional question, and the passage of the Civil Rights Act a few weeks later spared the Court from ever deciding it. But most of the Justices in *Bell* felt compelled to address the question. As Justice Douglas put it: “The whole Nation has to face the issue . . . , North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue . . . consumes the public attention. Yet we stand mute, avoiding decision of the basic issue by an obvious pretense.” For some Justices, equal access to places of public accommodation was a fundamental aspect of equal citizenship ensured by the Fourteenth Amendment. But for others, property owners’ right to exclude others, backed by trespass law, and the freedom of association in private settings, were themselves fundamental tenets of a decent and well-ordered society. Lee recounts the high drama behind the scenes of the Court’s decision in *Bell* and shows how these passionate debates swirled around the intense and contemporaneous controversy over the civil rights movement’s effort to force the desegregation of union locals.

54. Id. at 227.
56. *Bell*, 378 U.S. at 228.
59. Id. at 247–52; id. at 288 (Goldberg, J., concurring).
60. Id. at 343, 346 (Black, J., dissenting).
61. Lee, supra note 4, at 150–54.
The civil rights advocates were propounding a broad theory of state action that would compel the NLRB to strike down discriminatory and segregationist practices of many unions, rather than “sanctioning” such practices by ignoring them. That put them at odds with the leaders of organized labor, who were seeking to reform discriminatory union practices and were supporting civil rights legislation, but who resisted constitutionalizing the battle against union discrimination. For its part, the Supreme Court did expand the meaning of state action in order to strike down some entrenched Jim Crow practices. But much as the Court balked in *Bell*, it never went far enough in its state action jurisprudence to impose constitutional constraints on ordinary private employers’ hiring, firing, and disciplinary practices. The power of private-sector employers over workers reflected baseline legal entitlements embodied in property and contract law, as the Legal Realists had emphasized, but those baseline entitlements apparently did not count as state action for constitutional purposes. By contrast, trade unions since the New Deal had gained power in part from federal statutory provisions that departed from the common law baseline. In short, after decades of intense contestation and expanding constitutional rights, the impact of the federal Constitution in the workplace was sharply skewed by the state action doctrine toward scrutiny of unions, not employers.

These questions roiled the labor movement and the civil rights movement, the NLRB, and the courts even after Title VII of the Civil Rights Act of 1964 finally prohibited discrimination by both employers and unions, for civil rights advocates pressed for additional fora and regulatory resources to speed enforcement. Unlikely as it may seem for the modern reader, many advocates saw the NLRB as a better forum—cheaper for complainants and more powerful—for discrimination claims than both the Equal Employment Opportunity Commission (EEOC) and the courts. But the labor movement and some of its liberal allies were skeptical of engaging the NLRB more heavily in the fight against race discrimination; they worried that discrimination claims would become another weapon in

62. See id. at 44–47, 76–77.

63. Id. at 139–41.

64. See *Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 199–216 (2004) (documenting the Supreme Court’s shift to a more liberal conception of state action to reach private discriminatory behavior prior to federal civil rights legislation).


employers’ anti-union arsenal. That worry grew as employers ramped up their resistance to unions.

Lee shows that, “[a]lthough historians generally date business conservatives’ coordinated attacks on labor to the mid-1970s, they were under way, if largely hidden from view, in the 1960s”; that was when “resisting unionization became a more mainstream business position.” Against that background, union lawyers worried that the right-to-work movement would see the NLRB’s new antidiscrimination rules as “‘an opportunity to destroy collective bargaining in this country.’” Liberal scholars, too, argued that it was best to leave the problem of discrimination to the EEOC and private litigants under Title VII, and to keep such issues out of the process of union-certification and unfair-labor-practice proceedings before the NLRB. These issues were debated within the labor–civil rights coalition on the grounds of both pragmatic politics and legal theory, and Lee’s account infuses these debates with both the urgency of the times and the jurisprudential sophistication of leading advocates. One of the great strengths of Lee’s book lies in her serious engagement throughout with legal arguments, legal doctrine, and legal theory.

The nature of the legal issues changed as the law and institutions changed, but Lee highlights the tectonic plates moving below the surface, not only throughout the period she studies—the New Deal through the 1980s—but even today. That is seen in her discussion of early controversies over affirmative action policies that favored underrepresented minorities in hiring and promotions. By the 1970s, the civil rights movement’s battle to open unions and workplaces to black workers had been largely won at the level of principle and shifted toward issues of implementation and enforcement. Some employers, under pressure from within and from without, had begun to embrace affirmative action, and to actively pursue a more racially diverse workforce, out of a mix of motives—social justice, litigation avoidance, public relations. But at that point white workers and their conservative allies sought to seize the banner of equal opportunity for themselves, again putting constitutional principles into play. The conservative workplace constitutionalists initially took aim at affirmative action admissions programs and government preferences for minority contractors where state action was not in question. But how far would the constitutional arguments against affirmative action reach in the

68. Lee, supra note 4, at 188–89.
69. Id. at 187.
70. Id. at 188.
71. Id. at 188–89.
72. See id. at 164–72.
private sector? The question was intertwined with the legality of minority preferences under Title VII, but the constitutional questions lurked in the background.

As the Supreme Court’s equal protection jurisprudence veered toward the “color-blind” Constitution,74 the political valence of the state action arguments for the civil rights community was reversed: if private employers’ conduct involved state action, all of the constitutional arguments crafted by civil rights advocates to combat discrimination could be turned against the proponents of affirmative action. As Lee explains:

Supporters of the liberal workplace Constitution had stretched the state action doctrine to reach traditionally private workplaces in part to impose affirmative action duties on employers and unions. With the Court tipping toward a color-blind Constitution, broad theories of state action could now threaten these workplaces’ affirmative action programs.75

The same dilemma plagued conservative legal thinkers as well. Conservative “strict constructionists” like Justice Rehnquist were pushing back against the most ambitious constitutional theories for combatting private discrimination.76 But in doing so, the strict constructionists were also undercutting the arguments that other conservative legal thinkers sought to deploy against private affirmative action. The controversy was emblematic of the battle within the conservative establishment between proponents of judicial restraint and those who advocated a more muscular use of judicial review to promote conservative values. That battle was also taking place in the parallel litigation campaign by the right-to-work movement.

II. How the “Conservative Workplace Constitution” Divided the New Right

Lee’s history of the converging and diverging interests and constitutional arguments of civil rights activists and trade unionists during the fifty years after the New Deal, and particularly the nuanced legal analysis that Lee brings to the project, is a major scholarly contribution. Although others have labored in these vineyards,77 Lee finds much that is

74. Lee, supra note 4, at 244–45.
75. Id. at 245.
76. For example, see Justice Rehnquist’s opinion in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171–72 (1972).
new and unexpected there. What has the reader’s head spinning, however, is the parallel story Lee tells about the evolution of the right-to-work movement—the “conservative workplace Constitution”—and its philosophical, jurisprudential, and even organizational intersections with the civil rights movement and the liberal workplace Constitution. Lee finds these disparate forces not only drawing on overlapping constitutional arguments but enjoying overlapping constituencies. Some black workers who were fighting all-white unions were drawn into the nascent right-to-work movement, and some right-to-work activists embraced the cause of excluded black workers.78 (The latter was more a reflection of political expediency than of conviction—the right-to-work movement was predominantly white and Southern and at least as infected with the prevailing racism of the day as the worst white unionists.)

The story of the conservative workplace Constitution features Cecil B. DeMille—yes, that Cecil B. DeMille—in a leading role. DeMille was part of a conservative anti-New Deal elite, with industrialists in the lead, which had been fighting since 1937 to roll back New Deal legislation and in the state legislatures to ban the closed shop.79 By 1941, the anti-union forces had already claimed for themselves the historically resonant phrase “right to work.”80 DeMille was thus outraged when his union, the American Federation of Radio Artists (AFRA), sought in 1944 to charge him a one-dollar assessment to fund AFRA’s opposition to a California ballot measure that would ban the closed shop.81 And that one-dollar assessment enabled DeMille to launch a new phase of the anti-union crusade. Lee portrays DeMille as having made two crucial contributions to the right-to-work movement: The first was to take his fight against AFRA’s assessment to the courts and to begin to craft a constitutional argument against mandatory union fees.82 The second was to weave those arguments into a populist campaign and to recast the fight against unions as a fight for the rights of ordinary working people.83

DeMille’s lawyers, like the Steele plaintiffs, relied partly on pre-New Deal substantive due process cases; they sought to salvage an individual right to work, free from collective compulsion, from the broad repudiation of the old doctrine of liberty of contract.84 They also relied on Steele itself and sought to take advantage of newly emerging case law in support of

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78. LEE, supra note 4, at 73–74, 229–30.
79. Id. at 58–61.
80. Id. at 59.
81. Id. at 56.
82. Id. at 62–66.
83. See id. at 66–69.
84. Id. at 63–64.
“minority rights” and individual religious and political liberties versus collectivism and majority rule. These arguments implicitly relied on an expanding conception of “state action” of the sort that Steele suggested, though DeMille (like much of the public then and now) remained largely oblivious to the state action hurdles to invoking the Constitution and nearly all its fundamental rights.

There was a cynical dimension to these arguments: As Lee observes, “[l]ike other conservatives, DeMille used the analogy between right to work and African Americans’ civil rights to bolster his own movement, not to support theirs.”86 His own movement was backed and funded largely (though quietly, at DeMille’s insistence) by rich conservatives and industrialists who sought to undercut the CIO’s ability to use mandatory assessments to raise political funds.87 “By attacking the left’s supply route and building ‘an organization with a voting power surpassing that of the unions,’ [DeMille’s] foundation would transform the constitutional spirit of the times.”88 DeMille’s movement also sought to mobilize white Southerners who opposed both civil rights for African Americans and the CIO’s leftist and integrationist agenda.89

Still, it was easier to turn the civil rights and civil libertarian Constitution to the anti-union right-to-work cause in the early 1940s than it might appear today, given the practices already discussed. Unions, many of them all white, had enormous power over individuals’ ability to get or keep a job in many trades, especially in the closed shop and the original union shop.90 Both made union membership a condition of employment, and unions then had complete control of their membership. It was not hard to find individuals who had been put out of a job by high-handed or discriminatory unions, and it was not hard to generate public sympathy for these individuals even in the relatively pro-union climate of the 1940s.

The campaign to limit union power gained traction after World War II with the rise of anti-Communist fervor and anti-collectivist sentiments. The Taft-Hartley Act in 1947 curbed union power in many ways. Some provisions (like the secondary boycott ban) directly regulated unions’ ability to exert collective economic power in their contests with employers.91 Other provisions targeted unions’ power over individuals’ livelihoods (which indirectly undercut their power vis-à-vis employers).92

85. Id. at 122.
86. Id. at 74.
87. Id. at 67–69.
88. Id. at 68.
89. Id. at 74, 83.
90. See supra note 22 and accompanying text.
92. Id. § 8(b)(2) (codified at 29 U.S.C. § 158(b)(2)).
The abolition of the closed shop and the transformation of the union shop from a requirement of membership—controlled by the union—to a requirement of dues payment—controlled by the individual—were welcomed both by anti-union employers and ideologues and by some individual dissenters and racial minorities whose cause could be embraced by many good liberals today.

The Taft-Hartley Act did not mandate the “open shop,” which foreclosed any contractual requirement of union membership or fees as a condition of employment, but it expressly permitted states to do so. So after 1947, the right-to-work movement shifted its political focus to the states and to passing open shop or right-to-work laws. But the constitutional battles in the courts continued. DeMille lost his lawsuit in the California courts, not on state action grounds (state action was not a prerequisite to state constitutional claims in California), but on the merits:

The majority was entitled to seek agreements imposing mandatory dues and fees, said the court, and the union assessment in no way compelled DeMille’s personal expression. In the meantime, as the right-to-work litigation shifted into the federal courts, the state action issue moved to the fore.

By the late 1940s, as we have seen, the Supreme Court had begun to expand the meaning of state action—in inconclusive dicta in Steele but more decisively in Shelley v. Kraemer, in which the Court struck down a state court’s enforcement of a private restrictive covenant that barred non-whites from buying a home in a white neighborhood. But the right-to-work lawyers made even broader arguments of the sort that some liberal civil rights and civil liberties lawyers were also making at the time: There is state action, they argued, whenever the courts permit a private entity (like a union, or presumably an employer) to invade the rights of individuals. “‘No distinction can properly be made as to whether the judicial action challenged on constitutional grounds is affirmative or negative.’”

Let us pause to ponder the implications of the theory of state action that was being propounded by the right-to-work advocates in the late 1940s: That theory would seem to render private employers subject to constitutional claims whenever they discriminated against employees, retaliated against them for their off-duty or on-duty speech and associations, or disciplined or discharged them without due process; for the court’s failure

93. Id. § 14(b)(2), 61 Stat. at 151 (codified at 29 U.S.C. § 164(b)).
94. See LEE, supra note 4, at 75.
95. Id. at 75.
96. Id.
to enforce the constitutional rights of individuals could constitute the requisite state action. Acceptance of that argument would create in one stroke a broad set of fundamental rights at work, and essentially reverse the longstanding presumption of employment at will.  

It may be surprising to find right-wing right-to-work advocates supporting such an expansive theory of state action. Their employer allies in particular must have blanched. Certainly their union adversaries did. Broad state action theories threatened to expose unions not only to the constitutional claims of the right-to-work crowd but also to the constitutional claims of black workers who were excluded from membership and subject to forms of discrimination and segregation in which the unions were deeply implicated.

Alliances shifted again in the early 1950s as the leadership of organized labor both purged from their ranks the left-wing unions and union activists who had been the strongest proponents of racial equality and signed onto the civil rights agenda (up to a point). The labor movement’s leadership was now officially committed to opposing union discrimination, though continuing discrimination on the ground by many unions gave some resonance to the argument of the right-to-work advocates that “it was the open shop, not union rights, that best protected black workers from discrimination.” The right-to-work movement’s white-supremacist ties obviously undercut those claims and put it at odds with a labor–civil rights alliance. But the right-to-work movement’s constitutional litigation strategy and some of its legal foundations—broad conceptions of both individual constitutional rights and the state action that made them actionable—continued to scramble its alliances at the level of jurisprudence.

In the wake of liberals’ constitutional victories in expanding the scope of state action, and in expanding individual rights to freedom of speech and association and freedom from compelled speech and association, the right-to-work movement continued to pursue its legal campaign against mandatory union fees. Along the way, the movement sought to cast off some of its most reactionary associations and to embrace some of the constituencies whose lawyers had been propounding similarly broad constitutional theories. The movement sought to “all[y] itself with African Americans’ struggle for civil rights,” with working women, and “with New

99. It would bring the rights of American workers close to those of German workers, for example, under their post-war Fundamental Law, which constrains employers in their conduct toward workers. See generally JENS KIRCHNER ET AL., KEY ASPECTS OF GERMAN EMPLOYMENT AND LABOUR LAW 4–11 (2010), for an overview of the employment rights of German workers.
100. LEE, supra note 4, at 83.
101. Id. at 132.
102. Id. at 83.
103. See id. at 231–33.
Left critiques of ossified union bureaucracy.”104 These moves helped to
draw more public support, and perhaps more judicial support, for the right-
to-work cause.

For labor lawyers, the headlines in the litigation campaign against
union security and mandatory union fees are familiar, but the inside story
that Lee tells is not only a gripping historical drama but one that is rich with
implications for the present and future. Many of the cases that the labor
movement counts as losses were also seen as losses by the right-to-work
movement, which continued to press the maximalist argument that any
requirement that individuals pay union fees as a condition of employment—
whether imposed by statute or by contract—was unconstitutional. The
right-to-work advocates lost that argument in 1956 in *Railway Employees’
Department v. Hanson*,105 which upheld a union shop agreement under the
RLA against the claim that it was a violation of dissenters’ free speech
rights to compel them to pay any dues to a union that they opposed: “On the
present record, there is no more an infringement or impairment of First
Amendment rights than there would be in the case of a lawyer who by state
law is required to be a member of an integrated bar.”106 The lawyers in
*Hanson* had failed to press or present evidence for the narrower theory “that
compulsory membership will be used to impair freedom of expression.”107
That narrower issue was presented five years later in *International
Association of Machinists v. Street*,108 in which the Court held, by way of
constitutional avoidance, that the RLA “denies the authority to a union,
over the employee’s objection, to spend his money for political causes
which he opposes.”109

*Street* established a basic principle and a rationale that held for
decades, that was eventually extended to the public sector (where state
action was clear) in 1977 in *Abood v. Detroit Board of Education*110 and to
the rest of the private sector under the NLRA (again by way of
constitutional avoidance) in 1988 in *Communication Workers of America v.
Beck*.111 It was impermissible—either unconstitutional or a statutory
violation that reflected constitutional concerns—for unions to charge
dissenters for political and ideological expenditures, but it was permissible
to charge them an agency fee for the costs germane to collective bargaining
and contract administration.112 State and federal labor laws in public and

104. *Id.* at 229–30.
106. *Id.* at 238.
107. *Id.*
109. *Id.* at 750.
private employment alike all provided for exclusive representation of employees by a union chosen by a majority within the bargaining unit, and
Steele and its progeny required unions to fairly represent all the employees, members and non-members alike.\textsuperscript{113} The minor infringement that agency fees imposed on the First Amendment interests of dissenters was necessary in order to vindicate the government’s legitimate interest in preventing “free riders” from undermining the union’s ability to represent the whole bargaining unit.\textsuperscript{114}

As of \textit{Beck}, the right-to-work advocates had succeeded in depriving unions of the ability to compel contributions to their political activities and in confining union security provisions to the partial agency fee-for-services, in all states and all sectors of the economy. They continued to litigate many details of the agency fee, mainly over which expenses were “chargeable” to dissenters and which were not and over the procedures for opting out of the non-chargeable portion of dues; the Supreme Court saw many of these cases.\textsuperscript{115} But the ultimate goal of the right-to-work advocates—embraced by Justice Black’s dissent in \textit{Street}\textsuperscript{116}—was uncompromising and unchanged. In their view, the Constitution compels an open shop, or a right-to-work regime across the board, and is contravened by any contractual or statutory provision requiring individuals to pay a fee of any kind to a union they oppose.\textsuperscript{117} That claim recently prevailed for the first time for one unusual subset of public employees in \textit{Harris},\textsuperscript{118} and is now being litigated in cases across the country.\textsuperscript{119}

Lee’s account of these litigation battles, which ends with \textit{Beck}, is bristling with insights into the future course of constitutional litigation against unions. She shows, for example, how the agency fee issue exposed deep fault lines within the conservative legal establishment between the

\begin{itemize}
  \item \textsuperscript{113} \textit{See supra} notes 16–19, 38–41 and accompanying text.
  \item \textsuperscript{114} \textit{E.g.}, \textit{Beck}, 487 U.S. at 762; \textit{Abood}, 431 U.S. at 221–22; \textit{Street} 367 U.S. at 760–61.
  \item \textsuperscript{115} \textit{See, e.g.}, Locke v. Karass, 555 U.S. 207, 210 (2009) (permitting unions to charge dissenters for some national litigation that is germane to collective bargaining); Davenport v. Wash. Educ. Ass’n, 551 U.S. 177, 191 (2007) (upholding state requirement that public sector unions receive affirmative authorization prior to spending nonmember fees for political purposes); Air Line Pilots Ass’n v. Miller, 523 U.S. 866, 869 (1998) (striking down mandatory arbitration of agency fee disputes); Lehner v. Ferris Faculty Ass’n, 500 U.S. 507, 519 (1991) (holding that cost of lobbying activity that does not concern the collective-bargaining agreement is not chargeable to dissenters); Chi. Teachers Union v. Hudson, 475 U.S. 292, 310 (1986) (requiring unions to explain and afford an opportunity to challenge fees and hold disputed money in escrow); Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448–53 (1984) (allowing the union to charge dissenters for conventions, social events, and publications but not organizing or all litigation).
  \item \textsuperscript{116} \textit{Street}, 367 U.S. at 789–91 (Black, J., dissenting).
  \item \textsuperscript{117} \textit{Id}. at 790–91.
  \item \textsuperscript{118} \textit{See supra} notes 1–2 and accompanying text.
\end{itemize}
advocates of right-to-work and the advocates of judicial restraint. Justice Rehnquist, who personified the latter, joined the *Abood* majority’s rejection of the right-to-work movement’s claim that any mandatory fee violated the First Amendment rights of dissenters. That claim rested on robust First Amendment rights of public employees that liberal majorities had recently embraced but that Justice Rehnquist (and other conservative justices) had rejected. So while most of the conservatives joined a concurrence by Justice Powell that sought to expand upon constitutional claims that they had recently opposed, Rehnquist instead joined most of the Warren Court liberals in rejecting the extension of public employees’ First Amendment rights to the agency fee context.

That battle within the conservative legal establishment continued in the *Beck* litigation, which culminated during the Reagan Administration, and which again pitted the anti-union, right-to-work branch of the right wing against the partisans of judicial restraint. In particular, when *Beck* brought the state action problem back to the fore, the right-to-work lawyers found that the “greatest doctrinal challenges were placed before them by the Court’s conservative justices,” who had been pulling back the frontiers of state action since the late 1970s. Moreover, the emerging gospel of strict constructionism embraced by Attorney General Edward Meese and Solicitor General Charles Fried was deeply at odds with the right-to-work movement’s expansive constitutional claims. Strict constructionism prevailed when Solicitor General Fried filed an amicus brief against the right-to-work plaintiffs in *Beck*, and uproar ensued within the Republican Party. For its part, as we have seen, the Supreme Court in *Beck* extended the basic *Street* compromise into the NLRA, again by way of constitutional avoidance, rejecting both the maximalist position of the right-to-work movement that no mandatory fees were permissible and the labor movement’s position that mandatory union fees involved no state action and raised no constitutional concerns worth avoiding.

Lee demonstrates vividly that the Reagan administration’s constitutional agenda “created winners and losers among the New Right coalition”; “the workplace Constitution divided the New Right just as it had split the New Deal coalition in its heyday.” Lee’s book chronicles these splits,

121. *Lee*, *supra* note 4, at 237.
122. *Id.* at 235–37.
123. *Id.* at 246.
124. *Id.* at 250–52.
125. *Id.* at 252–53.
126. *See supra* note 111, and accompanying text.
127. *Lee*, *supra* note 4, at 255.
and the surprising cross currents of constitutional thought underlying them, with enormous intelligence, fair-mindedness, and flair.

III. Tangled up in Dues: The Agency Fee Controversy Scrambles the Politics of the Workplace Constitution Again

Lee’s whiplash-inducing account of the workplace Constitution, its evolution, and its implications for the future stirred up and helped to crystallize some concerns that have been percolating in my mind since the *Harris* case landed on the Supreme Court docket. Why does the agency fee issue find some advocates and scholars on both sides of the debate talking out of both sides of their mouths? Why do we find the issue so perplexing? I hope the reader will indulge this lapse into a more personal vein, for the convergence of the *Harris* decision and Lee’s book have compelled me to revisit my own views on the workplace Constitution.

The freedom of speech at and about work has long been a preoccupation of mine. My student note in 1982 argued for stronger First Amendment protection of unions’ peaceful consumer picketing. It invoked the Supreme Court’s ringing declaration in *Thornhill v. Alabama* that the facts of ordinary labor disputes were matters of public concern whose communication through peaceful picketing deserved constitutional protection. Labor picketing was inherently political expression, I argued, and not merely an exercise of economic power, as the courts had mostly treated it since the 1950s. Along similar lines, my first article as an academic in 1990 criticized the holding of *Connick v. Myers* that public employees’ ordinary workplace grievances were rarely “matters of public concern” and enjoyed no constitutional protection within the government workplace. I argued for the political import and constitutional significance of shared workplace grievances.

It is with some chagrin that I find similar strains in the anti-union arguments in *Harris*. For it was the right-to-work, anti-union plaintiff, and the conservative majority in *Harris* that proclaimed the inherently political nature of the issues at stake in collective bargaining, at least in the public sector. The union expression involved in ordinary collective bargaining (in the public sector) is more ideologically charged, held the majority, than

129. 310 U.S. 88 (1940).
130. *Id.* at 102.
134. *Id.* at 37–39.
commercial speech; therefore, compelled support of that expression triggered a higher level of constitutional scrutiny. The union, in the meantime, persuaded four liberal Justices that Connick and its narrower notion of “matters of public concern” supported the line that existing precedent had drawn, and that Harris rejected, between chargeable collective bargaining expenses and non-chargeable political and ideological expenses. (Indeed, there was speculation before Harris that Justice Scalia might supply a fifth vote for the union based partly on his narrow view of the constitutional rights of public employees.)

The ironies will mount as the right-to-work advocates seek to extend Harris to the private sector: the Harris majority offered a narrowing construction of its holding by suggesting that “core issues such as wages, pensions, and benefits,” while political in the public sector, are not generally important political issues in the private sector. Unions will likely rely in part on that suggestion in resisting the extension of Harris to the private sector. Yet union advocates, as well as scholars, have long argued the opposite, as I have, in support of broader free speech rights for unions and employees. To be sure, the latter arguments were unsuccessful; so the conservative justices had to, and will again have to, not only switch positions but ignore or overrule precedent in order to hold for the right-to-work plaintiffs. (The dilemmas are similar to those faced by their predecessors in the Rehnquist era, whose commitments to judicial restraint and strict constructionism were sometimes at odds with their ideological preferences in both affirmative action and the agency fee cases.)

Other ironies await in the state action controversy that will rise to the fore in the coming private-sector phase of the agency fee litigation. Like other employment law scholars in the 1990s and beyond, much of my writing has sought to import some semblance of constitutional rights into private-sector employment—to civilize the harsh employment-at-will regime and to narrow the rights gap left by the state action bar to constitutional claims against private employers. I have seconded the argument of others that judicial enforcement of private arbitration agreements constituted state action and should trigger constitutional due

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136. Id. at 2639.
137. Id. at 2654–55 (Kagan, J., dissenting).
139. Harris, 134 S. Ct. at 2632.
140. See supra note 76, 120–22 and accompanying text.
process scrutiny.\textsuperscript{142} And like many employment law teachers, I have admired the audacity of the \textit{Novosel v. Nationwide Insurance Co.}\textsuperscript{143} decision, which brushed aside state action objections in holding that the First Amendment—in particular, its protection against compelled speech—supplied a public policy basis for a state wrongful discharge tort action against a private employer.\textsuperscript{144} As the litigation over agency fees moves to the private sector, as it is destined to do, right-to-work advocates will be making similarly broad state action arguments, and unions and their allies will be resisting those arguments.

The point is not that it is impossible to reconcile arguments for the constitutionality of agency fees with any of the pro-employee and pro-union arguments that many labor scholars have been making over the years. But some of the arguments both for and against agency fees may trigger some Houdini-like contortions like those that Lee finds strewn throughout the history of the post-New Deal workplace Constitution. With the agency fee issue now on the front burner, some union-friendly labor and employment law scholars will be feeling the heat.

Some of the unions’ conservative adversaries should be feeling the heat as well. For carrying the right-to-work movement’s constitutional crusade against agency fees into the private sector—especially under the NLRA—would require not only overturning the Court’s agency fee precedents but also reopening the state action controversy and reversing course on decades of conservative resistance to broad interpretations of state action. In the private sector, the requirement that individual workers pay an agency fee to a union that they oppose arises not out of any provision of law but out of agreements between private employers and private unions that are merely permitted by federal labor law. Even at its high-water mark, state action doctrine would not readily expose such agreements to constitutional scrutiny. So the upcoming agency fee battles will test both liberals’ and conservatives’ jurisprudential commitments, much as they did in the 1980s in the agency fee and affirmative action cases.

Many of the cross currents in these debates stem from some unique features of unions in our society and our legal system. The union bar took


\textsuperscript{143} 721 F.2d 894 (3d Cir. 1983).

\textsuperscript{144} \textit{Id.} at 898–99. Full disclosure: The law clerk who worked on \textit{Novosel}, Samuel Issacharoff, is now my spouse.
note with alarm when Justice Alito, writing for a majority in the 2012 Knox v. SEIU, Local 1000 decision, said that “[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering ‘labor peace.’ But it is an anomaly nevertheless.” The Court found that “anomaly” unacceptable for the home health-care workers in Harris, and it is sure to give it a close look in the next case involving ordinary public employees and in subsequent cases involving private-sector unions. In the meantime it behooves labor and employment law scholars, including me, to develop a deeper understanding of the agency fee controversy and the nature of unions within constitutional jurisprudence, lest they find themselves on the opposite side of arguments that they have made on behalf of employees in other contexts. Professor Lee’s exceptionally thoughtful and thought-provoking book is a perfect place to begin that effort.

Conclusion

Lee closes her book with reflections on the contemporary relevance of the vigorous, not-so-long-ago debates over the meaning of the workplace Constitution. Lee sees implications for the future of workers’ own impulses toward collective action—impulses that might be inhibited partly by workers’ highly optimistic beliefs about their rights at work. The history of litigation over the workplace Constitution, says Lee, contains some harsh as well as hopeful lessons:

Collective action is hard, messy, and imperfect. Sometimes it involves forms of oppression. Conflicts have abounded over how and why to join together, yet the bare desire to do so has been profound and persistent. The idea of a workplace Constitution, or at least the knowledge of its current paltry protections, could strengthen this impulse. Whether people today organize around the Constitution or another idea better suited to the time, they may yet bring what A. Philip Randolph called “the breath of democracy” into the twenty-first-century workplace.

This is a hopeful conclusion. Its optimism with regard to worker organizing is especially striking in light of the right-to-work movement’s campaign to

146. Id. at 2290 (citation omitted).
147. See supra notes 1–2 and accompanying text.
148. My own effort along these lines has been given more than a nudge by Lee’s book, but it extends beyond the confines of a book review. See Cynthia Estlund, Are Unions a Constitutional “Anomaly”? 144 MICH. L. REV. (forthcoming Nov. 2015).
150. Lee, supra note 4, at 260.
abolish agency fees and its recent victory in *Harris*. But Lee finds an encouraging lesson for the proponents of collective action even in the right-to-work movement’s successes: Constitutional ideas that seem laughable when first articulated—that seem to be swimming against powerful historical currents—may gain traction in society and in the courts through a combination of intellectual creativity and political activism.