Civil Rights and the Right to Work

A new book finds unexpected connections between two movements that shaped the 20th century.

David Bernstein


Labor history is a dreary field dominated by activist-scholars. If they have any knowledge of economics at all, it typically has a Marxist spin. The relentlessly politicized nature of such scholarship has made it lamentably narrow in both subject matter and perspective.

Historian David Beito has shown that millions of American workers belonged to fraternal and mutual aid societies in the late 19th and early 20th centuries. But because these societies generally existed outside of union direction or control, labor historians have shown scant interest in admitting their existence, much less studying them.

For decades, meanwhile, these historians ignored or played down the fact that some of the most powerful unions in the United States, including the Railroad Brotherhoods and the American Federation of Labor construction unions, excluded African Americans, or at best relegated them to segregated locals. To the extent that these academics addressed the issue at all, they blamed union exclusion on black workers’ strikebreaking, blamed employers for playing off white and black workers against each other, or pointed to relatively progressive Congress of Industrial Organizations (CIO) unions and to unions’ political support for the civil rights movement starting in the 1950s as making up for all prior sins.

When a younger generation of labor historians no longer could brush aside race, they nevertheless began with the assumption that class solidarity “should” naturally lead to racially egalitarian unions. The problem, these scholars concluded, lay with the essential conservatism of American unions, with the role of big business in encouraging racial conflict, and with the government’s suppression of radical unions to the advantage of more conservative ones. Deviations from this party line, especially deviations that reflected the insights of neoclassical economics, public choice, and cartel theory, typically came from outside the labor historian guild, as was the case with the Hillsdale College historian Paul Moreno’s excellent 2006 book Blacks and Organized Labor: A New History and my own 2001 book Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal.

Sophia Lee’s The Workplace Constitution brings more fresh air to this stale field. Lee, a law professor and historian at the University at Pennsylvania, doesn’t so much challenge the dominant paradigms of labor history as ignore them. And by ignoring them, she is able to address matters that labor historians have neglected.

As Lee relates, in the 1930s union activists hoped that labor legislation would lead to a “workplace constitution” in which the “right to organize” and ultimately other “social rights” would be constitutionally protected. Labor historians have spilled a great deal of ink explaining why that did not happen, typically (once again) blaming the “conservatism” of American unions. Unlike European unions, which embraced various forms of state socialism from social democracy to communism, most American unions were fundamentally committed to a more libertarian political and economic system.

Lee, by contrast, focuses on what happened next: Civil rights activists attempted via litigation to establish their own set of workplace rules, which she calls the “liberal workplace constitution.”

African Americans had historically been skeptical of the labor movement because of the deep-rooted discriminatory policies that many of these unions pursued. But black leaders embraced labor unionism in the 1930s, for three major reasons. First, union membership was growing dramatically under the federal government’s sponsorship, and there seemed no choice but to try to join the union bandwagon and hope it took blacks aboard. Second, the new CIO unions tended to be ideologically sympathetic to civil rights, and their broad-based industrial model made excluding any group counterproductive. The rise of these unions provided reason for optimism about the labor movement’s future racial policies. And finally, the emerging black leadership of the 1930s was much more left-wing than its predecessors. Smitten by socialist ideology, many of these leaders sincerely believed that America’s race problems were simply a manifestation of class conflict and would recede once workers emerged triumphant.

At the ideological and political level, then, most black civil rights leaders pledged their support for labor unionism. At the grassroots
level, however, many black workers found that labor unions were using their newfound powers under the Railway Labor Act as amended in 1934 and the Wagner Act of 1935 to exclude them. Some unions demanded that employment go only to union members. This led to the complete exclusion of black workers, who were barred from membership by union charter.

Other unions organized their fields in ways that forced African American workers, who had previously formed their own unions to represent narrow classes of workers in jobs that blacks dominated, to join a broader-based union in which they were in a distinct minority. These broader-based unions then negotiated contracts that assured black workers would get only the lowest-level jobs, if any. Job categories were shifted so that white workers could take the best jobs that blacks had, but blacks were excluded from traditionally “white” work. In other cases, particularly in the construction trades, blacks were relegated to segregated locals, limiting their employment prospects to jobs in black neighborhoods.

Black workers responded with a series of lawsuits seeking federal intervention, starting in the early 1940s. Their lawyers argued that a statutory duty of “fair representation” required unions to fairly represent all workers in a bargaining group, regardless of whether those workers were, or were allowed to become, union members. The courts and the National Labor Relations Board proved reasonably amenable to this argument, but success on this ground meant expensive and time-consuming litigation over whether the unions were in fact engaging in fair representation.

Civil rights litigants therefore also promoted a more radical argument: that the Constitution requires the relevant government authorities to refuse to certify, or to decertify, any union that practices racial discrimination. The American Constitution puts no obligations on private parties, beyond not holding slaves. Government entities, by contrast, are subject to a host of constitutional restrictions, including prohibition on racial discrimination. Civil rights litigants claimed that the unions derived their monopoly power and position from federal labor law. When they used that power to discriminate against blacks, they were implicitly state actors and, thus, were violating the Constitution.

Some moderate-to-liberal Republican jurists were sympathetic to this argument, but the litigants received a great deal of pushback from liberal Democrats, who believed that subjecting unions to constitutional norms risked severely weakening the labor movement. Lee doesn’t stress the point, but this dynamic serves as a reminder that through the early 1960s, assisting labor unions, not promoting civil rights, was the top priority for leading liberal Democrats.
The Supreme Court was busy struggling with the scope of the “state action” doctrine in other contexts, and it never adopted the theory that unions were state actors for constitutional purposes. The push for a liberal workplace constitution soon became mostly moot, as the 1964 Civil Rights Act banned discrimination by labor unions, providing a statutory remedy that diminished the need for a constitutional one. Lee’s narrative therefore wanders into broader issues, such as whether the Federal Communications Commission could decline to renew the license of a TV or radio station that practiced racial discrimination in employment.

While the debate over the liberal workplace constitution played itself out, conservative activists tried to establish via litigation a workplace constitution of their own. In particular, in 1944 the Hollywood mogul Cecil B. DeMille launched an effort to establish the so-called “right to work,” which would ban the closed shop (an arrangement restricting employment to union members), the union shop (requiring nonunion employees hired to join the union within a certain time period), and the agency shop (in which employees must pay union dues).

The Taft-Hartley Act of 1947 banned the closed shop but left it to the state’s discretion whether to also prohibit the union shop and agency shop. That partial right-to-work victory was followed by the 1950 Railway Labor Act amendments, which established the union shop on American railroads. Some prominent railroad union activists opposed these amendments, fearing that the requirement of union membership would invite the government to interfere with the unions’ racial and other policies.

Their concerns had some merit. DeMille and his right-to-work allies didn’t just oppose union and agency shops; they came to argue that such arrangements were unconstitutional. In doing so, they borrowed heavily from the “state action” arguments made by advocates of the liberal workplace constitution. Legal theories pioneered by civil rights lawyers seeking to hold unions accountable for discrimination were also useful to suggest that forcing workers to join a Civil rights litigants claimed that unions derived their power from federal labor law. When they used that power to discriminate, they were implicitly state actors and, thus, were violating the Constitution.

union or pay union dues violated the First Amendment.

Nor was that the only overlap between the two movements. Right-to-work started with a strong foothold in the anti-union South, where union opponents also tended to be very hostile to civil rights. But as the right-to-work movement spread nationally, its leaders began to notice that they had a commonality of interest with advocates of the liberal workplace constitution. Union discrimination provided a useful talking point against compulsory unionism, and right-to-work literature frequently came to feature testimonials by black workers forced out of their jobs by discriminatory unions. The movement never succeeded in constitutionalizing its demands, but it did persuade many states to pass right-to-work laws, and it has managed to win a series of (mostly hollow) Supreme Court victories placing constitutional restrictions on the use of mandatory union dues for political activity.

My one quibble with Lee’s narrative is that we never get a great sense of who joined the grassroots element of the right-to-work movement and what motivated them. What started as a top-down movement funded by moguls like DeMille eventually came to have hundreds of thousands of enthusiastic adherents who lobbied and litigated for right-to-work laws across the United States. Readers will finish Lee’s book with a strong understanding of the grievances black workers had with unions, but a much weaker sense of why many other Americans so resented and despised labor unions.

That aside, The Workplace Constitution is a lively, informative read. Unlike much labor history, it is mercifully free of jargon, of ideological cant, and of the desire to fit round facts into the square peg of Marxist ideology. The very fact that Lee treats the civil rights movement and the right-to-work movement as parallel and at times symbiotic “workplace constitution” movements itself demonstrates a welcome broadmindedness about what is significant in labor and constitutional history.

David Bernstein (dbernste@gmu.edu) is a professor of law at George Mason University. His most recent book is Lawless: The Obama Administration’s Unprecedented Assault on the Constitution and the Rule of Law (Encounter).