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Introduction to *The Workplace Constitution from the New Deal to the New Right*

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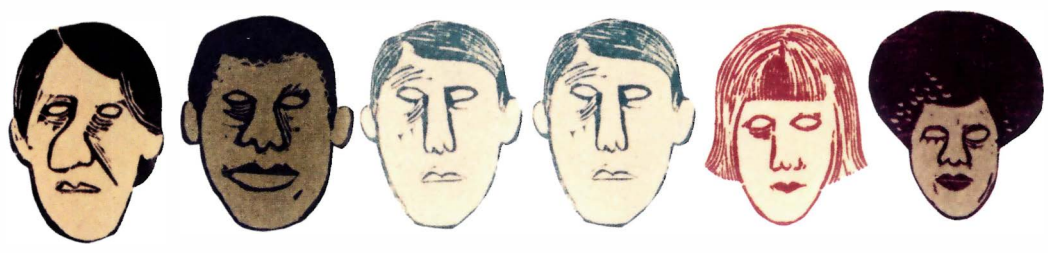
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THE WORKPLACE CONSTITUTION



FROM THE NEW DEAL TO THE NEW RIGHT



SOPHIA Z. LEE



“*The Workplace Constitution from the New Deal to the New Right* is both ambitious and important – it moves across time; among a variety of individuals, organizations, and government entities; and utilizes a wide range of archival material – all of keen interest to historians, legal scholars, and political scientists alike. Lee’s formidable intelligence gives us new insights, as well as historical and historiographical surprises.”

– Risa L. Goluboff, John Allan Love Professor of Law; Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia

“Sophia Lee brilliantly pairs her analysis of the civil rights movement with the rise of the right-to-work movement and the ‘union-avoidance’ industry. She also matches her fine history of the state action theory with an equally persuasive argument that administrative agencies have been a fruitful source of constitutional visions and versions. This beautifully written book represents deep and broad research and entirely original analysis. I know of nothing like it.”

– Laura Kalman, University of California, Santa Barbara

■
“Sophia Lee’s *The Workplace Constitution from the New Deal to the New Right* is one of the most insightful and provocative studies of the bifurcated matrix of laws and court rulings that govern the American work regime. Deploying a marvelous talent as narrative historian, she demonstrates that the attempt to construct a labor relations regime that simultaneously protects the rights of racial minorities proved an enormously vexing and contentious project, one standing close to the heart of American politics for more than half a century.”

– Nelson Lichtenstein, MacArthur Foundation Professor in History, University of California, Santa Barbara

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The Workplace Constitution from the New Deal to the New Right

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. It takes readers back to the 1930s and 1940s when advocates across the political spectrum – labor leaders, civil rights advocates, and conservatives opposed to government regulation – set out to enshrine constitutional rights in the workplace. The book tells of their interlocking fights to win constitutional protections for American workers, recovers their surprising successes, explains their ultimate failure, and helps readers assess the outcome.

Sophia Z. Lee is Professor of Law and History at the University of Pennsylvania Law School. She earned her JD and her PhD in history from Yale.

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University of Pennsylvania Law School



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Introduction

C. W. Rice did not know it, but he set the stage for a fifty-year struggle that has left Americans today with little or no constitutional protections in the workplace. Born in rural Tennessee at the close of the nineteenth century, Rice settled in Houston in the 1920s. There, he established the Texas Negro Business and Laboring Men's Association, a labor brokerage that placed black workers in industrial jobs. Like most African Americans in the early twentieth century, Rice was harshly critical of the American Federation of Labor (AFL). The AFL's member unions generally organized workers in a single craft, such as carpenters or machinists. These unions protected jobs and wages by limiting who could join their locals or work alongside their members. This restrictiveness built solidarity and shored up the members' economic power. It also hurt African Americans because most unions limited membership to "white candidate[s]." These rules and employers' long-standing hiring practices left African Americans "only those jobs ... [with] low wages, disagreeable dust, and ... tasks regarded as too heavy for native-born white Americans." Black leaders of Rice's generation favored thrift, hard work, and self-help to redress this economic hardship. Rice also favored black *independent unions* (those not affiliated with the AFL). He promoted them in his paper, the *Negro Labor News*, and organized workers at Houston's Hughes Tool Company. To many, Rice was a champion of black solidarity and

economic advancement who was prolabor yet courageously critical of discriminatory unions.¹

Rice's opponents, however, thought he helped employers exploit workers and served as a tool in their antiunion campaigns. Employers had resisted unionization since the nineteenth century. They preferred *open shops*, in which they could hire whomever they wanted and refuse to bargain with unions. They claimed that unions interfered with management, inflated wages, and were inconsistent with American ideals of individualism and free contract. When Rice built ties with white industrialists, promoted open shops, and encouraged African Americans to take jobs even when they would replace striking white workers, he seemed to side with employers and against organized labor. To his critics, Rice's all-black independent unions were just *company unions*: formed with the employer's blessing, they did not make tough demands and kept out unions that would. In the 1920s, the AFL criticized Rice while civil rights leaders and black Houstonians generally sided with him. But during the New Deal 1930s, a growing number of African Americans switched sides. The federal government promoted unionization, organized labor offered new interracial unions, and radicals argued that only a united working class could end racism. Rice's approach now seemed outdated: many African Americans believed that they should unite with white workers, not with employers.²

Rice is not this book's central character. But the puzzle of Rice – was he a prolabor champion of African Americans' rights, a proworker check on oppressive union power, or a tool in employers' antiunion campaigns? – is central. This puzzle attached equally to an idea Rice embraced: that workers had constitutional rights on the job and in the union, what I call the *workplace Constitution*. In the 1930s, Rice turned to the United States Constitution to defend independent black unions. He was one of the first to use the federal Constitution in an effort to redistribute power among and between workers, unions, and employers under the New Deal labor regime. Over the next fifty years, his African American and labor critics, as well as his open shop allies, followed in his path. Often their efforts were as politically confusing as Rice's had been. The perplexing quality of the workplace Constitution, and the uses to which it has been put, help explain why most people in the United States today do not have constitutional rights at work.³

Why Care about the Workplace Constitution?

Many of the workplace rights people expect under the U.S. Constitution are recognized in other industrial countries today: protection from arbitrary firings, due process before workers are terminated, and freedoms of speech, association, and privacy. In the mid-twentieth century, one-third of American workers had similar protections through union contracts. The rest worked under the “at-will doctrine,” a judge-made rule that allowed employers to fire and discipline workers for any reason or for no reason at all. Advocates’ subsequent efforts to use legislation or ordinary contract and tort law to win these protections for nonunion workers have had only limited success. Today, only about one in ten American workers is unionized. For the rest, it seems that constitutional rights offer an attractive alternative to the harshness of at-will employment. In fact, the idea of a workplace Constitution is so appealing that most American workers believe they *do* have these constitutional rights on the job.⁴ The history that follows corrects this mistaken assumption. After examining the workplace Constitution’s contradictory uses, however, readers of this book may well feel relieved, rather than wistful, about its fate.

From the vantage point of the mid-twentieth century, the workplace Constitution’s future looked promising. In the 1930s and 1940s, two movements began trying to extend the Constitution to the workplace. They were opposed to each other politically but they shared this legal goal. One, the civil rights movement, would go on to capture the attention of the nation and dismantle Jim Crow. The other, the right-to-work movement, fought for open shops. Although its history is less well known, this second movement was supported by prominent politicians and opinion makers. Together, the two movements created a strange and contentious but potentially powerful combination. Their successes and failures change the historical understanding of constitutional law, labor politics, civil rights struggles, and conservative movements.

Moving Constitutional History Outside of the Courts

In recent years, historians have recovered civil rights advocates’ focus on workplace discrimination from the 1930s to the 1980s by looking for law in arenas other than courts and in sources other than the Constitution.⁵ Legal scholars have also demonstrated the role non-court actors played in shaping the Constitution’s meaning.⁶ This book

advances these trends by attending to the influence that institutions other than courts have had on the *constitutional* dimension of civil rights history. It focuses on an overlooked but omnipresent constitutional force in the modern American state: administrative agencies.⁷ Agencies' explosive growth during the twentieth century created new venues for advocates' constitutional claims. At the same time, administrators grappled newly with their constitutional responsibilities.⁸ Administrators at agencies such as the National Labor Relations Board and the Federal Communications Commission recognized a robust version of the workplace Constitution even though it was rejected by other federal actors, including the Supreme Court, Congress, and the president.

Reworking Civil Rights History

The meaning of civil rights under the Constitution was up for grabs during the 1930s and 1940s and was as likely to protect the mass of workers as the minority of African Americans. During this time, historians write, lawyers made constitutional claims that could protect African Americans economically and might safeguard all workers from exploitation. By the 1950s, they argue, the lawyers had moved on. Efforts to win protection against racial discrimination in the workplace focused on legislation instead. Eventually, monumental lobbying efforts by labor unions and civil rights groups, as well as considerable pressure from President Lyndon Johnson, produced a coalition of northern Democrats and Republicans in Congress that passed the Civil Rights Act of 1964. Title VII of that act barred employment discrimination on the basis of race, sex, national origin, and religion. Thereafter, Title VII dominated challenges to employment discrimination.⁹

This book enriches the preceding account of the fight for legal protections against workplace discrimination. As Part I argues, the 1930s and 1940s were just the beginning, not the end, of constitutional challenges to discrimination on the job and in the union. Part II demonstrates that the 1950s were not fallow years for such claims. Instead, throughout the decade civil rights and labor advocates pursued them with even more determination. Finally, Part III shows that the workplace Constitution did the most to protect African Americans in the 1960s and 1970s, Title VII's passage notwithstanding. During this time, administrators also extended the workplace Constitution to protect women and a range of other racial and ethnic groups.¹⁰

If constitutional challenges to workplace discrimination diminished in the late 1970s rather than the 1950s, then new explanations for their decline are needed. Histories that argue the civil rights movement stopped focusing on working-class African Americans in the 1950s rely heavily on the start of the Cold War to explain the shift. This explanation has little relevance to the 1970s, however. Instead, other legal, political, and institutional forces assume prominence, especially the rise of the New Right, an increasingly influential and broad-based conservative bloc within the Republican Party.

Race, Rights, and Post–New Deal Conservatism

Historians have produced a robust, complex history of conservatism in the past fifteen years, discovering how, during the 1940s and 1950s, suburban housewives helped it spread, religion fed its rise, business conservatives and free-market economists generated its intellectual infrastructure, and Barry Goldwater became its poster boy.¹¹ These historians wrote against an earlier literature that attributed conservatism to racial bigotry or paranoid anticommunism.¹² Many have instead downplayed race, arguing that, outside the South, racial backlash is an overly simplistic and often inaccurate explanation. At the same time, recent histories of the South's turn from solidly Democrat at midcentury to strictly Republican at its close put race at the center.¹³ Those who examine why working-class whites, long the backbone of the Democratic Party's New Deal coalition, gradually shifted their allegiance to the New Right during the 1970s also emphasize race, particularly white workers' anger over affirmative action and school bussing policies.¹⁴

This history of the workplace Constitution offers a fresh take on the Right's rise. Historians have not focused much on how conservatives, especially anti–New Deal conservatives, used the law, and in particular how they sought to shape the Constitution.¹⁵ The following chapters offer a novel legal history of conservatism. Beginning in the 1940s, conservatives who supported state right-to-work laws simultaneously claimed that workers had a constitutional right not to join or support a union. This book also provides a new twist on the role of race in post–New Deal conservatism. As early as the 1950s, some right-to-work advocates allied themselves *with* rather than against African Americans and their civil rights struggle, pioneering an approach

currently associated with late twentieth-century conservatives.¹⁶ These two insights show that the Right blunted its elite, ultraright image before the mid-1970s and 1980s. They also demonstrate that it did so with economic issues, not only with the better-known social issues such as abortion, feminism, and gay rights.¹⁷

Loosening Coalitions and Consensus

Historians have eroded the assumption that a stable liberal consensus reigned in the decades after the New Deal. They have shown that the alliance the New Deal produced between labor and civil rights advocates fractured long before the affirmative action and bussing debates of the late 1960s and 1970s.¹⁸ They have also challenged the view that American businesses reached a stable accord with labor by the 1950s.¹⁹ The account in these pages brings together these two conflicts – that between labor and management, on the one hand, and civil rights and labor, on the other – to reveal previously overlooked strains.²⁰ This history also brings to conservatism some of the tempering scholars have given liberalism. Current work on conservatism tends to depict the New Right as a juggernaut.²¹ Just as the New Deal order was far less stable than initial histories suggested, conservatism's ascendancy was also more fragile, fractured, and contingent than is often recognized. This book emphasizes conservatives' failures as well as their triumphs and, importantly, the losers as well as the winners created by the New Right order.

Terminology

The story that follows involves numerous moving parts; technical legal doctrines and complex regulatory statutes; an alphabet soup of agencies and organizations; and many previously obscure actors. To help readers navigate and to highlight the book's key arguments, I use several terms entirely of my own creation. Their expository benefits outweigh their potential pitfalls, but they bear definition and explanation up front.

In addition to the term the “workplace Constitution,” which I have defined, I distinguish between “liberal” and “conservative” workplace Constitutions. These are not ideological or partisan labels; rather, they refer to the political coalitions that particular claims were meant to

serve and in which they arose. Liberal refers broadly to claims made by those who accepted, even embraced, the New Deal labor regime. Conservative refers to claims by those who opposed the New Deal labor regime. Neither was perfectly identified with the Democratic or Republican Party, although there were often overlaps, nor were they always ideologically cohesive.

For the most part I use the actors' own language to tell this history, including Hollywood mogul Cecil B. DeMille's claim to a constitutional "right to work" in the 1940s and the simultaneous assertion by the National Association for the Advancement of Colored People (NAACP) that the "Fifth Amendment extends to . . . union's activities." But at times I use my terms to distinguish historical actors' varied claims or to highlight important and often unintended interconnections among them. Civil rights and right-to-work advocates could help each other through the constitutional arguments they made, the strategies they honed, and the precedents or policies they won. My terms also help underscore divisions within each coalition over the wisdom of a workplace Constitution and help gauge the fit between a coalition and its claims as the coalition shifted, grew, and splintered over time.

Structure

The book is divided into four chronological parts. Each contains thematic chapters that are generally titled to indicate whether they involve courts versus agencies or liberals' versus conservatives' claims. Part I covers the 1930s and 1940s, explaining why liberals and conservatives turned to the workplace Constitution despite substantial hurdles. Together, its chapters demonstrate that these claims were barely formulated by the end of the 1940s, which marked merely the beginning of the quest for a workplace Constitution. Part II focuses on the 1950s, an extremely busy period for the workplace Constitution, when liberals and conservatives advanced coordinated litigation campaigns akin to the NAACP's better-known assault on public school segregation. Part III covers the liberal workplace Constitution's triumph during the 1960s and 1970s, when federal agencies implemented it broadly and to notable effect. Part IV describes how new and lingering doubts within both coalitions complicated the workplace Constitution's journey. You will have to read on to find out how it all ended.