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ROADS LESS TRAVELED: U.S. WORKPLACE DISCRIMINATION FROM THE 1890S TO THE PRESENT

Francine Banner*

LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (UNIVERSITY OF CHICAGO PRESS 2016). PP. 312. HARDCOVER \$90.00. PAPERBACK \$30.00.

SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (CAMBRIDGE UNIVERSITY PRESS 2014). PP. 428. HARDCOVER \$88.00. PAPERBACK \$30.99.

NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S* (PRINCETON UNIVERSITY PRESS 2015). PP. 352. PAPERBACK \$26.95.

INTRODUCTION

Today's employees frequently find themselves in situations characterized by a rise in part-time and contract employment, the anticipation of regular job changes, and a curtailed expectation of free time facilitated by the proliferation of low-wage jobs and the pervasive influence of technology. In this increasingly "flexible" employment landscape, workers'—particularly minority workers'—constitutional rights are narrowly circumscribed and recourse to administrative agencies is replete with roadblocks.¹ Employees are hamstrung by the absence of a national childcare policy or paid leave for incipient parents. For women and minorities, inequities are compounded by concentration in low-level jobs, lack of training programs, and shortages in networking opportunities. Membership in unions stands at approximately ten percent of the workforce.² When confronting workplace discrimination, U.S. workers go it alone.³

The three complementary, exhaustively-researched books reviewed here

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1. SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 257 (2014).

2. *Id.*

3. *Id.* at 3 (noting that only one in ten contemporary American workers belongs to a union).

collectively provide a genealogy of the contemporary condition—or, more accurately, plight—of the American worker. Each addresses what Lauren B. Edelman labels a “paradox” and Sophia Z. Lee, a “puzzle”—*Why, despite nearly a century of legal and political efforts, do discrimination and other inequities persist in the American workplace?*⁴ How is it that, after the promises of the U.S. civil rights movement, birth of federal agencies specifically instituted to ensure worker protections, and growth in popularity of collective bargaining in the post-New Deal era, precarity⁵ has become the norm for so many American employees?

While each arrive at similar, disheartening assessments of the constitutional rights and legislative protections afforded today’s employees, these outstanding books travel vastly different terrains across the legal past. Lauren B. Edelman’s monograph, based on voluminous social science research, provides a bird’s-eye view, situating the promise and limits of law in the workplace in theoretical, socio-legal context. Edelman applies what she labels “legal endogeneity theory,” the study of not only how law impacts the workplace, but also, more intriguingly, how workplace discourses have shaped judicial decisionmaking.⁶ She challenges the dialectic attribution of pro-employer decisions to conservative decisionmakers and pro-labor decisions to more liberal counterparts, exploring the ways in which employer-constructed discourse influences judicial decisionmaking across political boundaries. Nancy Woloch similarly complicates the perceived liberal and conservative divide in workplace law as she explores the flow and, ultimately, ebb of protections for women workers across the twentieth century.⁷ Although Woloch’s book proclaims to be about “women workers,” the text emphasizes the ways in which legal strategies pursued in regard to female workers ultimately impacted—or at times tragically failed to impact—workplace conditions for *all* American workers.⁸ Finally, Sophia Z. Lee analyzes in granular detail the contributions of particular legal decisions and decision-makers to the development of what she calls a “workplace constitution.”⁹ Of the three authors, it is Lee who perhaps most fully articulates the challenges that inhere in shaping a body of constitutional law; her book outlines the intriguing maze of failed strategies, wrong turns, and compromises that have shaped not only workplace law but U.S. civil rights law as a whole. It is also in Lee’s book that we find the most hope, the idea that a dormant workplace constitution has been created and is waiting to be reinvigorated.

Reading these texts together, each of which explore similar issues at different levels of abstraction, one is reminded of the iconic, American poem, Robert Frost’s *The Road Not Taken*. The poem is most often lauded as a paean to rugged individualism: “Two roads

4. LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS*, at ix (2016).

5. “Precarity,” as defined by Judith Butler, “designates that politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death.” JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* 25 (2009).

6. EDELMAN, *supra* note 4, at ix, 12.

7. NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S* (2015).

8. *Id.*

9. LEE, *supra* note 1, at 2.

diverged in a wood, and I—I took the one less traveled by, And that has made all the difference.”¹⁰ Rather than a celebration of the operose road less traveled, however, literary critic David Orr views the poem as a commentary on the deceptive, self-congratulatory power of hindsight.¹¹ Orr notes that, when one carefully reads Frost’s work, it is clear that, in reality, the narrator did not make an audacious choice to take a road less traveled but rather, randomly selected a path after being confronted by a fork in the road.¹² In close reading of the poem, Orr argues, one sees that the wood was comprised of two paths “just as fair” that “[h]ad worn . . . about the same.”¹³ One cannot always know at the outset what is around a bend. Revered as a hero, Frost’s narrator might as well have flipped a coin.

The law stories told here are not the tales of triumphant heroes on a linear march toward civil rights and workplace equality. Rather, the texts emphasize the ways in which law is shaped as much by failed arguments as by strategic achievements. Each author highlights the ways in which the path to contemporary workplace rights and oppressions has been complex and often contradictory, marked by successes, certainly, but, as often, by unintended consequences, thwarted agendas, strange bedfellows, and random chance. Crafting workplace law are labor leaders, progressive activists, attorneys, and corporate professionals who, as Lee describes, are not merely advocates but “social engineer[s]” whose decisions, strategic and accidental, build on one another to create the American workplace of today.¹⁴ In this vein, the review begins by delving more deeply into Edelman’s excellent text.

LEGAL ENDOGENEITY: LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS,
AND SYMBOLIC CIVIL RIGHTS

Lauren B. Edelman’s book, based on copious social science data collected via discourse analysis of primary documents, surveys, and interviews, provides a socio-legal framework in which to analyze why the promise of law in redressing workplace inequality has not been realized.¹⁵ To explain the infusion of—not only law into the workplace—but, importantly, the “workplace in law,” Edelman coins the term “legal endogeneity.”¹⁶ She offers the model of a feedback loop, in which legal decisions are “managerialized” within professional environments and then, in turn, how the “symbolic structures” created within workplaces come to be accepted by legal authorities as evidence of compliance with law.¹⁷

A natural entry point into the self-perpetuating loop of legal endogeneity is at the

10. Robert Frost, *The Road Not Taken*, POETRY FOUND., <https://www.poetryfoundation.org/poems/44272/the-road-not-taken> (last visited Oct. 13, 2017); David Orr, *The Most Misread Poem in America*, PARIS REV. (Sept. 11, 2015), <https://www.theparisreview.org/blog/2015/09/11/the-most-misread-poem-in-america>.

11. Orr, *supra* note 10.

12. *Id.*

13. *Id.*

14. LEE, *supra* note 1, at 11, 21.

15. EDELMAN, *supra* note 4, at 12, 16–18.

16. *Id.* at 19, 27–28.

17. *Id.* at 28.

stage of judicial decisions, which Edelman points out are often ambiguous, leaving enforcement strategies undiscussed and vital terms undefined. For example, Edelman observes that, while Title VII of the Civil Rights Act prohibits discrimination, the statute does not define the term.¹⁸ When, in the 2000s, a schism developed between conservative and liberal readings of the Equal Protection Clause, conservatives calling for “color blind” legislation and progressives interpreting the Clause to permit policies advantaging but not disadvantaging minority groups, the failure to define discrimination in Title VII was significant.¹⁹ Further confusing the issue were conflicting ideas about whether the Fourteenth Amendment protected only those who suffer intentional discrimination (disparate treatment) or also protected those affected by the disparate impact of seemingly neutral policies.²⁰ Edelman’s observations about the Fourteenth Amendment and Title VII have continuing resonance, as the Trump administration and Courts of Appeals continue to arrive at different conclusions regarding the protections the statute affords minority persons in the workplace.²¹

An indirect effect of ambiguous legal decisions, Edelman highlights, is that they need to be interpreted for the “lay persons” obligated to follow them. Edelman chronicles the evolution of “compliance professionals,” human resources experts, in-house counsel, management consultants, insurance officers, and copious other networked professionals whose jobs center around framing and translating legal decisions and policies for corporations.²² Peggy Levitt and Sally Engle Merry describe the processes of local “appropriation and . . . adoption” of human rights law in terms of “vernacularization.”²³ “[V]ernacularizers,” the intermediaries tasked with explaining human rights law to local stakeholders, “wrestle with the dilemma of presenting trans-national ideas in terms that resonate with local justice theories and at the same time are sufficiently different that they will challenge local inequalities and appeal to the imagining of the ‘new.’”²⁴ Necessarily, as “ideas connect with a locality, they take on some of the ideological and social attributes of the place, but also retain some of their original formulation.”²⁵ Edelman adopts the term “managerialization” of law to explain the ways in which judicial and legislative pronouncements regarding equal opportunity in the workplace are vernacularized in the

18. *Id.* at 43.

19. *Id.* at 43–44.

20. EDELMAN, *supra* note 4, at 50, 52.

21. Fred Barbash, *Trump Administration, Intervening in Major LGBT Case, Says Job Bias Law Does Not Cover Sexual Orientation*, WASH. POST (July 27, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/07/27/trump-administration-intervening-in-major-lgbt-case-says-job-bias-law-does-not-cover-sexual-orientation>; Ariane de Vogue, *Transgender Service Members Sue over Trump Military Ban*, CNN (Aug. 28, 2017), <http://www.cnn.com/2017/08/28/politics/transgender-service-members-military-ban/index.html> (noting that transgender service members argue that the president’s directive banning them from military service violates the Equal Protection and Due Process Clauses).

22. EDELMAN, *supra* note 4, at 81–82, 99. These professionals, Edelman notes, may take law seriously but also must justify their own existence, perpetuating market demand for compliance services.

23. Peggy Levitt & Sally Engle Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, 4 GLOB. NETWORKS 441, 446–47 (2009) (observing that “[v]ernacularizers take the ideas and practices of one group and present them in terms that another group will accept”).

24. *Id.* at 447.

25. *Id.* at 443.

workplace, mobilized by employment “architects” to ensure compliance and achieve corporate buy-in to legal requirements.²⁶

Phenomena similar to those identified by Levitt and Merry in the international human rights context are identified by Edelman in the workplace. For example, Levitt and Merry caution that, in local contexts, legal terms may be “hijack[ed]” or “appropriat[ed].”²⁷ Compliance professionals, Edelman explains, eschew the term “civil rights” in favor of more business-friendly lingo, such as diversity and inclusion. She describes the rampant promotion of the idea of diversity, a term which she argues suggests an organic appreciation of difference versus a top-down, legally-driven mandate.²⁸ After extensively reviewing literature disseminated by compliance professionals, Edelman concludes that, in managerial terms, diversifying the workplace is presented as a natural path to inclusion—a recognition of where good businesses already were headed—versus an artificial imposition of “top-down” rules that disrupt the status quo.²⁹ Non-discrimination is sold as way to improve productivity for not just the “right reason,” but also the “right business reason.”³⁰ Problematically, however, diversity is a much more broad term than civil rights, often including characteristics such as “thinking style” alongside gender, age, and race.³¹ In expanding the meaning of diversity, Edelman argues, a false equivalency is created in which actionable constitutional claims of discrimination are lumped into the category of interpersonal disputes.³²

One of the most significant observations Edelman makes is about framing; rather than civil rights being characterized as a positive good, she highlights how the law most frequently is described in terms of “risk” to employers.³³ Accompanying doomsday discourse in the compliance literature are often inflated or misstated statistics regarding the likelihood of litigation, large jury awards, and costs of lawsuits.³⁴ Of the documents Edelman reviewed, she notes that civil litigation often is characterized as easy for plaintiffs and very costly to companies.³⁵ Rather than a normative ideal to be achieved, for employers, then, law comes to represent an expensive barrier through which loopholes must be found. The overarching goal becomes to avoid legal disputes, resulting in the persistent characterization of otherwise legally cognizable claims of discrimination to

26. EDELMAN, *supra* note 4, at 82.

27. Levitt & Merry, *supra* note 23, at 451.

28. EDELMAN, *supra* note 4, at 144–45.

29. *Id.* at 223; Levitt & Merry, *supra* note 23, at 457–58 (“When organizations use human rights in ways that join readily with existing issues and strategies, they are more readily accepted but represent less of a challenge to the status quo.”).

30. EDELMAN, *supra* note 4, at 145.

31. *Id.* at 142.

32. Edelman’s work here reflects post-Marxist critiques by Hardt and Negri, who describe that, in the new project of “diversity management,” “the old modernist forms of racist and sexist theory are the explicit enemies of . . . new corporate culture.” MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 153 (2001). However, although capitalist organizations have adapted to appear more fluid and diverse, Hardt and Negri argue that the presence of diversity in and of itself does not eliminate the exploitation of labor. *Id.*

33. EDELMAN, *supra* note 4, at 81–82, 91 (using the terms “terrain of risk” and “legal landmines” to characterize the threat of litigation as “omnipresent”).

34. *Id.* at 89.

35. *Id.* at 95.

more benign characterizations of “poor management.”³⁶

This reframing of civil rights into “diversity” and coterminous shaping of what would otherwise be legally valid civil rights claims into personal disputes is accomplished by compliance professionals via the creation of what Edelman deems “symbolic structures.”³⁷ These might include the institution of visible grievance procedures or creation of diversity departments, sometimes accompanied by “routine” agreements requiring mandatory arbitration specifying employment at will.³⁸ Symbolic structures, she argues, serve a dual purpose. First, they demonstrate organizations’ “good faith” compliance with civil rights law to employees and the outside.³⁹ Second, and more insidiously, however, these symbolic structures provide a means for organizations to drag their feet in effecting actual compliance, pleasing elites who want to preserve the status quo and discouraging employees from pursuing legal remedies for rights violations.⁴⁰ As Edelman points out, such symbolic structures “help organizations to appear rational and legal yet coexist with widespread discrimination and inequality.”⁴¹

The discursive reframing of civil rights as “diversity” not only is more palatable for elites, but also operates to discourage employees from pursuing civil rights claims. A key challenge in civil rights law is that anti-discrimination laws “rely primarily on the victims to identify violations, report them to public authorities, and participate in enforcement proceedings.”⁴² In order to pursue a legal remedy, victims must develop a rights consciousness, acknowledging their claims are valid and their injury significant.⁴³ Employers’ categorization of discrimination as an interpersonal problem and creation of symbolic structures that appear to comply with equal opportunity requirements but may not provide substantive avenues for recourse discourage employees from viewing themselves as legitimate rights holders.⁴⁴ As Edelman notes, there are “always psychological factors and cost barriers” to pursuing civil rights claims; workplace norms further discourage individuals’ recognition of themselves as deserving legal claimants.⁴⁵

In the final stage of the loop of legal endogeneity described by Edelman, if workplace disputes do get to court, employees will face uphill battles across all fronts.

36. *Id.* at 128.

37. *Id.* at 32.

38. EDELMAN, *supra* note 4, at 131.

39. *Id.* at 107–08.

40. *Id.* at 102–03, 108. Edelman stresses that compliance professionals may believe they are acting in employers’ and employees’ best interests, and these processes and procedures may be premised on “genuine belief on the employer’s part that they are resolving a complaint.” *See id.* at 132–33.

41. *Id.* at 217.

42. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 3 (1988). *See generally* Michael McCann, *The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era*, 48 L. & SOC’Y REV. 245 (2014).

43. McCann, *supra* note 42, at 255–56. McCann critiques what he views as the “unbearable lightness of rights,” highlighting the challenge in fostering rights consciousness among those who suffer the most grievous violations. *Id.* As he emphasizes, it is not enough to simply state that there is a rights claim or that claimants have legal standing to pursue such claim: “Discursive reconstructions of rights must be supported by material organizational power that poses an instrumental counterweight to status quo institutionalized hierarchies.” *Id.*

44. EDELMAN, *supra* note 4, at 129 (noting that, if handled internally, remedies for complaints tend to be therapeutic or educational versus punitive).

45. *Id.* at 158–59, 161.

Edelman travels the terrain of other scholars, identifying the closing of the courthouse door that has been effected across a trajectory of recent judicial decisions.⁴⁶ The past twenty years have seen the weakening of disparate impact arguments in equal protection cases,⁴⁷ expansion of defenses available to employers accused of discrimination or sexual harassment,⁴⁸ approval of mandatory arbitration clauses, and imposition of procedural hurdles in pleading and class action certification.⁴⁹ Where Edelman's work stands out is not in merely identifying these trends, but in exploring the ways in which social theory can contribute to explaining increasingly pro-employer judicial decisions. Legal consciousness scholars long have identified that the "haves" tend to triumph over "have-nots" in the legal system.⁵⁰ Building on research by Marc Galanter and others, Edelman highlights the role of corporate behavior in fostering inequities in judicial decisionmaking.

Conservative judges may tend to be pro-employer, she hypothesizes, but the research she presents demonstrates that liberal judges also are reluctant to intervene in disputes when a company shows it has grievance procedures in place. Her comprehensive review of recent judicial decisions regarding workplace discrimination claims reveals that regardless of political affiliation, judges commonly accept the mere existence of seemingly compliant policies as evidence of non-discrimination. She explains how corporations, which tend to be repeat players experienced with the legal system, craft elaborate policies that appear to accomplish anti-discrimination goals.⁵¹ When judges see such policies, Edelman demonstrates, they tend to accept them as evidence that incidents of workplace discrimination are aberrations rather than the norm.⁵² She hypothesizes that, while conservative judges may adopt this point of view based on pro-employer leanings, liberal judges likely respect employer policies based on affinity for due process.⁵³ Across the political spectrum, corporations' creation of symbolic structures has influenced judicial decisionmakers to treat the mere presence of anti-discrimination policies as a proxy for their effectiveness in achieving civil rights goals.⁵⁴ Thus, courts have come to ask the wrong question—*Was there a policy?*—rather than interrogating whether policies are in

46. See generally Erwin Chemerinsky, *Closing the Courthouse Door*, 47 INT'L SOC'Y BARRISTERS Q. 3 (2017).

47. EDELMAN, *supra* note 4, at 56–57 (describing the hurdles to disparate impact arguments imposed by *Washington v. Davis*, 426 U.S. 229 (1976)).

48. *Id.* at 56–58 (noting how the defense of business necessity was altered to permit a defense of "business purpose," allowing the employer more range in justifying discriminatory practices and placing the burden on the plaintiff to provide examples of less discriminatory ways for the employer to accomplish its goals).

49. *Id.* at 64, 66 (describing courts' approvals of increased procedural hurdles, including mandatory arbitration clauses and upholding heightened plausibility standards in pleading). See also Brian S. Clarke, *Grossly Restricted Pleading: Twombly/Iqbal, Gross and Cannibalistic Facts in Compound Employment Discrimination Claims*, 2010 UTAH L. REV. 1101 (2011).

50. EDELMAN, *supra* note 4, at 71. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); William L.F. Feltsiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631 (1980).

51. EDELMAN, *supra* note 4, at ch. 7.

52. *Id.* at 171.

53. *Id.*

54. *Id.* at 217.

fact effective.⁵⁵

After cases such as *Wal-Mart v. Dukes*,⁵⁶ the trend among legal commentators is to classify equal employment opportunity and workplace constitutional law decisions along ideological lines. Edelman importantly highlights that, while one might be tempted to view judicial deference to employers as symptomatic of more conservative leanings of courts, in fact, in district and circuit courts, liberal judges are just as likely to defer to company policies.⁵⁷ The effect of legal endogeneity is that, regardless of political affiliation, judges are more likely to assess organizations with grievance or other procedures in place as fair than those without.⁵⁸

In 1931, Alfred Korzybski cautioned, “A map is not the territory it represents.”⁵⁹ Building on this statement, Jean Baudrillard famously wrote that a hallmark of postmodernity was that we had arrived at a place where models are often unmoored from reality: “The territory no longer precedes the map, nor does it survive it. It is nevertheless the map that precedes the territory—precession of simulacra—that engenders the territory.”⁶⁰ In asking whether grievance procedures exist rather than attempting to remedy systemic issues in pay, hiring, or advancement, the road Edelman travels is one in which workplace civil rights are simulacra, mere shadows of what they might have been. Courts sidestep vital questions of substantive rights violations in favor of praising the presence of policy and process. While employer-driven discourse leads both the judiciary and the general public to believe that legal structures and norms are protecting workers from workplace discrimination, the mere existence of policies or procedures does not mean that they are in fact functioning.⁶¹ Rather, the “symbolic structures” created in modern workplaces are an elaborate form of mimicry, which signal a willingness to comply with law but may or may not mean actual compliance.

FALSE PATERNALISM AND FALSE EQUALITY: NANCY WOLOCH, *A CLASS BY HERSELF*:
PROTECTIVE LAWS FOR WOMEN WORKERS, 1890S–1990S

Like Edelman’s *Working Law*, Nancy Woloch’s *A Class by Herself* explores the narratives that shaped the development of workplace anti-discrimination law. Where Edelman focuses on the ways symbolic structures have impacted the reasoning processes of elites—judges and corporate decisionmakers—Woloch injects politicians, activists, and lawyers into the narrative, traveling the winding path of single-sex protective labor laws from their inception in the late 1800s to their demise in the 1990s. Like Edelman, Woloch ultimately concludes not only that courts and legislatures may have arrived at wrong answers regarding progressive workplace policies, but that they—and we—have been asking the wrong questions.

Although Woloch’s text is richly historical, she presents detailed information in a

55. *Id.* at 176.

56. 564 U.S. 338 (2011).

57. EDELMAN, *supra* note 4, at 190.

58. *Id.* at 157.

59. ALFRED KORZYBSKI, *SCIENCE AND SANITY: AN INTRODUCTION TO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS* 58 (4th ed. 1995).

60. JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* 1 (1981).

61. EDELMAN, *supra* note 4, at 12.

fast-moving narrative comprised of secret strategies, last-minute decisions, and surprising alliances. One of the text's greatest contributions is in making visible the influence of little-discussed figures to the development of not only workplace law but the entire body of constitutional law. Felix Frankfurter and Louis Brandeis are here, of course, but so are persons less often recognized for lawcraft. One of the text's heroes—or anti-heroes, depending on one's point of view—is Florence Kelley, long-time progressive advocate and head of the National Consumers League (“NCL”). Woloch chronicles the efforts of Kelley and the primarily upper and middle-class NCL members to mobilize the power of the purse to better the conditions of those who labored to produce the products they consumed.

A prevalent theme in Woloch's book is pyrrhic victories, reinforcing the lesson that winning in the adversarial context of constitutional litigation may come at great cost. A key theme throughout the book is that of the “entering wedge,” the strategy, promoted early on by Kelley and later by other progressive advocates, that advancements in legislation favoring women workers eventually would lead to better workplace conditions for all workers.⁶² Pursuing the entering wedge as a tactic, it turns out, was a double-edged sword. Demonstrated in *Muller v. Oregon*,⁶³ and exemplified by the title of Woloch's book, “*A Class by Herself*,” the most successful arguments for convincing courts to uphold protective legislation for women workers were premised in difference feminism. *Muller*, the case in which the Supreme Court upheld a state statute limiting work hours for women laundry workers, is perhaps less notable for its holding than for the way the Court arrived at its decision. The case is (in)famous for the sociological arguments made in the lengthy “Brandeis brief” that women, as “mothers of the race,” warranted greater workplace protections than men based on their unique physical limitations and roles in reproduction.⁶⁴

Woloch details the ways in which, for Florence Kelley and the NCL, *Muller* represented a fork in the road to workers' equality. The book reveals the extent to which the arguments about women's frailty made so vehemently by Brandeis in his well-known brief, were premised more in political strategy than in any firmly held belief in women's structural inadequacies.⁶⁵ Woloch narrates how, having witnessed the court's approval of essentialist arguments about women in *Bradwell v. Illinois*,⁶⁶ the “mothers of the race” argument was likely viewed by Kelley and Brandeis as the ideal entering wedge, building on sympathies toward women workers as a way forward toward gaining protection for all workers. Woloch points out that, as much as it dealt with gender, the Brandeis brief also was a compromise between classes, intended to stake a middle ground between upper-class progressives' desire for protective legislation and lower and middle-class employers' need to maximize profits.⁶⁷ She emphasizes that, for the state of Oregon, the assertions

62. WOLOCH, *supra* note 7, at 60, 64–65.

63. 208 U.S. 412 (1908).

64. WOLOCH, *supra* note 7, at 60, 64–65.

65. *Id.* at 64–70 (describing the strategies inherent in preparing the “Brandeis brief”).

66. 83 U.S. 130 (1872).

67. WOLOCH, *supra* note 7, at 64–70.

put forward about women's status as "mothers of the race" need not have been true; the state's reliance on such "commonsense" ideas only had to be reasonable.⁶⁸

As Woloch points out the well-intentioned disingenuousness of legal strategists, she also provides copious examples of the "false protectionism" inhering in judicial decisions such as *Muller* itself. Despite the state law's promise to protect women workers from lengthy hours, Woloch notes, hour limitations were notoriously difficult to enforce in the numerous private workplaces across the United States. Despite the presence of protective laws, many women were coerced by employers not to complain or report workplace violations.⁶⁹ Others needing to support themselves and families or desiring to advance in jobs disregarded the law because they wanted to work longer hours.⁷⁰

In her detailed discussion of *Muller*, Woloch emphasizes the significance of roads not taken. Given that the Supreme Court's composition had shifted since *Lochner v. New York*,⁷¹ she argues, progressive advocates might have been able to win in *Muller* by directly challenging *Lochner*, arguing that freedom of contract was not in fact encompassed in Fourteenth Amendment protection of liberty. Instead, Brandeis elected to travel what might have seemed a less radical road, evoking "commonsense" views of the Court to distinguish the case based on the particular frailties of women workers. Had Brandeis succeeded in convincing a potentially sympathetic judiciary in overturning *Lochner*, it most certainly would have changed the course of history for women workers, now consigned to a century of fighting "commonsense" benevolent assumptions about maternal instincts, physical and emotional capacity, and roles in reproduction. In choosing to distinguish *Muller* from *Lochner* rather than to confront the holding of *Lochner* itself, Brandeis may have won a significant battle that presaged losing a greater war, setting up a position where the "special protections" afforded women in the workplace could be used as a proxy for excluding women from a host of jobs for which they were qualified.

The reliance of progressive advocates on sexist assumptions laid fruitful ground for the formation of unexpected alliances between women who were frustrated that their work hours and opportunities were being limited and business owners, who sought to work employees as much as possible. As a foil to progressive advocate Florence Kelley, Woloch presents the equally complicated figure of Alice Paul. Revered for her politics—she earned a Ph.D. in political science—here we see Paul the legal strategist. Today, the right to work movement tends to be associated primarily with political conservatism and, thus, anti-feminism.⁷² However, Woloch describes the ways in which feminist support for equal rights and conservative interests in preserving employer autonomy historically have been closely intertwined. In contrast to the NCL's position, which advocated for "special" policies for women, such as maximum work hours or night hour restrictions, feminist Paul and her cohort advocated women's rights to work at all hours and in all jobs occupied by

68. *Id.* at 69.

69. *Id.* at 81.

70. *Id.*

71. 198 U.S. 45 (1905).

72. See, e.g., James Sherk, *Why Right-to-Work Works*, HERITAGE FOUND. (Oct. 31, 2014), <http://www.heritage.org/jobs-and-labor/commentary/why-right-work-works>.

men.⁷³

Woloch brings into relief the contrasting—and equally flawed and valid—strategies for achievement of women’s equality embraced by Kelley and Paul in her description of *Adkins v. Children’s Hospital*,⁷⁴ the pre-New Deal case in which the Supreme Court held that imposing a minimum wage restriction for women workers violated the Due Process Clause. While Kelley supported the plaintiff in the case, Paul joined with the attorneys for the hospital, arguing that “political equality” would best be achieved via “industrial equality.”⁷⁵ Frustrated by what she viewed as limitations uniquely imposed on the basis of sex, Alice Paul embraced *Lochner*-like arguments that maximum hour and minimum wage requirements were threats to women’s economic, social, and political freedoms. The NCL, on the other hand, argued that legislative and judicial victories for feminists seeking a “right to work” were premised on a “false equality”—that, without protective legislation, a right to work essentially was a “right to starve.”⁷⁶

While it is tempting to view the women’s movement as a victorious trajectory of emergence of women from hearth and home into the public sphere, Woloch’s thoroughly researched historical narrative reminds us that the path to equality is not shaped by one decision, or even a series of decisions, but is painstakingly forged across diverse and contradictory landscapes. In the late 1800s, just after the Supreme Court decided *Bradwell v. Illinois*,⁷⁷ upholding the state’s ban on bar admission for married female attorneys, the Illinois Supreme Court held in *Ritchie v. People*⁷⁸ that the Fourteenth Amendment prohibited eight-hour day restrictions for women laborers based on freedom of contract and equal protection principles.⁷⁹ Woloch evenhandedly explores the pros and cons of the tactics employed by Paul and Kelley, exploring how, just as decisions such as *Bradwell* and *Muller* were rooted in false paternalism, cases like *Ritchie* and *Adkins* elevated women’s status to one of “false equality.” Profit-seeking employers supported women working for less pay and longer hours not because they viewed women as political equals but because the presence of women workers enhanced the bottom line.⁸⁰

A unique aspect of Woloch’s book is her discussion not only of strategic decisions, such as Alice Paul’s alignment of feminists with proponents of laissez-faire policies, but also small and large miscalculations. One of the biggest mistakes made by the protectionist camp was in regard to overtime pay, which progressives anticipated would improve conditions by making it too costly for employers to overwork individual laborers.⁸¹ In promoting statutes requiring overtime, progressive advocates sought to encourage creation of additional shifts and hiring of supplementary workers; however, as it turned out, it was

73. WOLOCH, *supra* note 7, at 128–29.

74. 261 U.S. 525 (1923).

75. WOLOCH, *supra* note 7, at 114–15.

76. *Id.* at 128.

77. 83 U.S. 130 (1872).

78. 40 N.E. 454 (Ill. 1895).

79. WOLOCH, *supra* note 7, at 4, 39–43 (discussing the presaging *Lochner*, the judge in the case ruled in favor of the employer, condemning “purely arbitrary restrictions upon the fundamental rights of the citizen to control his or her own faculties”).

80. *Id.* at 117.

81. *Id.* at 263.

cheaper and more efficient for employers to pay more to existing employees than to hire new employees.⁸² Further, workers themselves liked the incentive of earning a windfall for working more hours.⁸³ Because women were constrained in many states by maximum hour laws, overtime became a sore point for feminists seeking political equality and for everyday female workers attempting to put food on the table. Another path that, in hindsight, turned out to be rockier for progressives than anticipated was promotion of limits on “night work” for female workers.⁸⁴ Based on benevolent sexist rhetoric like that accepted by the Court in *Muller*, judicial decisions upheld limitations on women working at night. This meant that entire categories of jobs, such as printers and pharmacists, by necessity excluded women, something anti-progressives, including employers, were able to seize on to recruit allies to their cause.⁸⁵

Of course, as progressive advocates at times miscalculated, so did laissez-faire feminists. In aligning themselves with profit-maximizing employers, those like Alice Paul who identified a road toward political equality for women via achievement of workplace equality, toed a dangerous line. Woloch identifies the culmination of this path in *International Union, UAW v. Johnson Controls*,⁸⁶ in which the Supreme Court held that an auto plant’s policy prohibiting women from working in potentially hazardous occupations violated the Pregnancy Discrimination Act and Title VII. On one hand, *Johnson Controls* vindicated women’s autonomy, emphasizing the ability of both sexes to make decisions about their employment unhampered by their unique reproductive capacities.⁸⁷ On the other, as Woloch warns, *Johnson Controls* may have enshrined the “right to starve” predicted by Florence Kelley and the NCL.⁸⁸ Rather than reforming the factory itself, the case proclaimed the equal right for women, as well as men, to choose to labor in a toxic workplace.

Woloch’s text is an enlightening read in the context of contemporary debates about identity politics, cultural appropriation, and co-option. She highlights throughout that a key problem with workplace civil rights laws, and, perhaps, with law itself, is that advocates often take too little notice of the views of those whom they seek to liberate. In the promotion of workplace gender equality, pro-ERA feminists risked loss of beneficial protections, such as occupational restrictions or minimum wage or maximum hour requirements. These protections unquestionably made life better for many women. At the same time, progressive labor laws had the effect of making women more expensive and troublesome to hire, resulting in exclusion of women from the workplace and denial of opportunities for overtime pay or promotions. That the NCL was comprised of largely upper class women seeking to improve conditions for those laboring to make the products they consumed is telling.⁸⁹ Like Edelman’s, Woloch’s text importantly highlights the limits of law and the power of law to exclude the voices of those most clearly impacted.

82. *Id.* at 265.

83. *Id.* at 264.

84. WOLOCH, *supra* note 7, at 93–97.

85. *Id.*

86. 499 U.S. 187 (1991).

87. WOLOCH, *supra* note 7, at 253.

88. *Id.* at 257.

89. *Id.* at 5–6.

The question of what individual workers might consider “rights” in the workplace remains unexamined in favor of dueling, transcendental conceptions of liberty.

A ROADMAP TO WORKPLACE CIVIL RIGHTS: SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT*

Questions regarding what constitutes liberty in the context of the U.S. workplace are at the heart of Sophia Z. Lee’s book, *The Workplace Constitution*. Particularly engaging the struggles of African American male workers for workplace equality throughout the twentieth century, the book highlights the ways in which lawyers and labor advocates painstakingly crafted a body of constitutional law dealing with not only workplace discrimination, but constitutional civil rights more broadly. Like Woloch’s and Edelman’s works, Lee’s text challenges contemporary conceptions of workplace civil rights as the product of a progressive, liberal civil rights agenda. Rather, the history Lee unearths is a complicated maze of unlikely alliances, failed strategies, and sometimes tragic compromises. While Woloch and Edelman focus primarily on employer-employee relationships, Lee adds the complicating and significant presence of the union, tracing the deep and complicated interplay between support for civil rights and anti-union sentiments.

Lee begins her book with the story of C.W. Rice, who, in the 1920s established the Texas Negro Business and Laboring Men’s Association and published the *Negro Labor News*.⁹⁰ She describes Rice as a “puzzle.”⁹¹ On one hand, he was pro-labor, desiring to assist African American men in obtaining the best possible jobs. On the other hand, however, Rice sided with employers to promote “open shops,” workplaces that did not require union membership as a condition of employment.⁹² Just as Nancy Woloch describes Alice Paul’s promotion of equal rights for women as inspiring her eschewing workplace protections, Lee explores how, throughout the early twentieth century, alliances were forged between conservative politicians and African American labor leaders. She explains how each, for very different reasons, was attempting to break down barriers to employing African American men across workplaces and positions.

Like that of the White women chronicled by Woloch, the situation in which Rice and other pro-labor African Americans often found themselves was shaped by compromise and contradiction. As Lee describes, the industrial and railroad workers of the early and mid-1900s were confronted with two, coercive governing bodies, that of the employer and, as importantly, that of the union. Unions, Lee notes, which bound members to exclusive representation by collective bargaining, systematically protected White male members, excluding African Americans from lucrative or highly skilled positions and often wholly excluding African Americans from the workplace itself.⁹³ When African Americans were permitted to join large unions like the AFL or CIO, as a small, minority group they often found themselves mandated to contribute dues but rarely if ever having their interests

90. LEE, *supra* note 1, at 1.

91. *Id.* at 2.

92. *Id.*

93. *Id.* at 11.

protected as part of collective bargaining agreements.⁹⁴ If one were truly pro-labor, some argued, one should keep faith in unions. Adopting a “wedge theory” approach, these advocates argued that representation for some laborers was better than no representation at all.⁹⁵ On the other hand, advocates like Rice joined with employers, arguing that independent, all-Black unions or open shops provided the best opportunities for African Americans to advance in a discriminatory workplace.⁹⁶ A quote by Charles Hamilton Houston elucidates the paradox in which African American labor advocates found themselves for much of the twentieth century: “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.”⁹⁷

Lee’s aim is not to critique the contemporary status of workplace civil rights but to retrace the complex journey to contemporary workplace law so that we might engage the lessons of the past as a roadmap toward the future. The workplace constitution constructed by Lee is one crafted by both conservative and liberal activists and by judicial and non-court actors. Like those of the other authors reviewed here, Lee’s narrative is one in which lip service frequently is given to equality in the name of larger goals. For example, she highlights how employers historically promoted anti-discrimination arguments as a vehicle for eliminating unions, which usually were segregated.⁹⁸ She describes that, during the 1950s through the 1970s, conservative support for desegregation of unions grew, in the hope that unions might be decertified due to civil rights violations.⁹⁹

In Lee’s narrative, civil rights and anti-discrimination law is a chess game in which workers are pawns at the hands of both pro and anti-union players. For example, Lee offers the description of a surreal case in which an employer seemingly took the side of labor, arguing that a union was liable for sex discrimination because it represented only male stationary engineers.¹⁰⁰ The employer’s brief neglected to mention, however, that the reason the union was all male was because the employer refused to hire women stationary engineers.¹⁰¹ In a case of similarly strange bedfellows, she observes how National Labor Relations Board policies regarding race often entwined with those of right to work advocates, both entities desiring to bar the use of union dues for political purposes and to penalize racially discriminatory unions, but for distinctly different reasons.¹⁰²

There is a tendency today to view labor issues as polarized along political lines, liberal political views associated with promotion of progressive policies, such as the minimum wage, and conservative views associated with the “right to work” movement. Lee challenges this binary, describing how, across the past hundred years, both liberals

94. See, e.g., LEE, *supra* note 1, at 36 (discussing how the Tobacco Workers Union suggested the interests of African American workers might be better served in segregated unions).

95. *Id.*

96. *Id.*

97. *Id.* at 21.

98. *Id.* at 214–15.

99. LEE, *supra* note 1, at 104–05.

100. *Id.* at 215.

101. *Id.*

102. *Id.* at 177.

and conservatives have found themselves aligned with pro and anti-union positions and in favor of and against imposition of workplace anti-discrimination laws.¹⁰³ For example, Lee describes how, in the 1960s and 1970s, the U.S. Chamber of Commerce and other pro-business organizations were aided in attacking unions by federal antidiscrimination policies,¹⁰⁴ and, during that time, the right to work movement courted African American and women workers, who were likely to face discrimination in unions or be disadvantaged or underrepresented in primarily white, male unions.¹⁰⁵ She highlights the inherent contradictions: “By the 1960s, opposing employment discrimination was a mainstream business position. So was blaming such discrimination on unions.”¹⁰⁶

Like the other texts reviewed here, Lee’s monograph is concerned not only with the diffusion of constitutional principles into the workplace but, more interestingly, how the workplace has served as an estuary for the development of constitutional law. For litigators, the most significant aspect of Lee’s work may be her identification of the ways in which hidden “rights” decisions frequently are couched in threshold judgments about state action or standing.¹⁰⁷ For example, Lee traces the role workplace disputes have played in the development of state action theory. The question of infringement on civil rights is important, Lee observes, but, prior to Title VII, cases more often were decided by the gatekeeping question of whether state action existed.¹⁰⁸ Lee points out that the Court would not have been able to invalidate the racist restrictive covenant in *Shelley v. Kraemer*¹⁰⁹ had the Court not first accepted lawyers’ arguments that judicial decisionmaking could constitute state action.¹¹⁰ Similarly, in order for the National Labor Relations Board to take action regarding discriminatory union practices, it was first necessary to convince the Court that the state action requirement was satisfied.¹¹¹ Providing a handbook for would-be constitutional litigators, Lee carefully maps the diverse and creative strategies crafted by both pro and anti-union advocates as they encouraged and discouraged courts to find state action.¹¹² She situates seemingly dry, doctrinaire discussions of threshold legal issues—standing, state action—at the heart of the development of civil rights.

Like Edelman and Woloch, the overarching message of Lee’s book also may be to be careful what we wish for. She carefully traces the inception and judicial acceptance of state action theories, exploring how at different historical moments expansion and contraction of such theories have served both liberal and conservative ends. Initially, she

103. *Id.* at 178 (describing President Nixon’s changing course from promoting a “right to work” to being pro-union in order to court a “silent majority” of voters).

104. LEE, *supra* note 1, at 187–88.

105. *Id.* at 236–37.

106. *Id.* at 177.

107. *Id.* at 259.

108. *Id.* at 202–07.

109. 334 U.S. 1 (1948).

110. LEE, *supra* note 1, at 88–95.

111. *Id.* at 100–02.

112. Lee traces throughout how workplace disputes were foundational in creating numerous theories of state action, including the nexus theory, encouragement theory, sufficiency-of-contacts theory, enforcement theory, and others.

explains, generous interpretations of state action enabled courts to reach the workplace to enforce civil rights for non-White workers.¹¹³ She situates desegregation of unions in the context of civil rights decisions such as *Brown v. Board of Education*,¹¹⁴ describing how, throughout the 1950s, unions became recognized by judicial decisions as constitutional actors holding “governmentally-derived power.”¹¹⁵ Later, however, expansive theories of state action enabled more conservative courts to enforce the “color blind” Constitution in the employment context.¹¹⁶ As Title VII standards were divorced from equal protection analysis, more liberal justices moved away from finding state action so that the more progressive interpretation of discrimination in Title VII could apply.¹¹⁷ Lee’s detailed discussions introduce the workplace as a locus of incubation for U.S. constitutional law. She provides a nuanced account of constitutional legal history not as written by the victors but carefully constructed out of failed arguments, losses, and dissents.

Margot Lee Shetterly describes the ways in which, in the field of mathematics, “[w]omen . . . had to wield their intellects like a scythe, hacking away against the stubborn underbrush of low expectations.”¹¹⁸ Lee explores, similarly, how outsiders—those excluded from the workplace—have been responsible for innovatively engaging constitutional principles to achieve equality and civil rights. She explains that, initially, workers faced with exclusion from a union or with a lack of representation within a union would have challenged the practice based on contract or common law, citing obligations of good faith in the context of the principal-agent relationship.¹¹⁹ It is Charles Hamilton Houston, in seeking access for African American workers to the railroad fireman’s union in the 1940s, who path-breakingly challenged exclusion from the union on constitutional grounds, citing *Carter v. Carter Coal Company*¹²⁰ to argue based on the Fifth Amendment that the denial of the right to work was a denial of personal liberty.¹²¹ Houston did not win on this basis, but his engagement of constitutional law began to set the stage for a workplace constitution.

CONCLUSION: THE MINER, OR THE CANARY?

In a notable sound byte during the election, then-candidate Donald Trump signaled support for American workers by announcing that his administration would “open[] a big coal mine . . . [and] put[] the miners back to work.”¹²² That the coal miner was singled out

113. LEE, *supra* note 1, at 243.

114. 347 U.S. 483 (1954).

115. LEE, *supra* note 1, at 93.

116. *Id.* at 244.

117. *Id.* at 219–21, 244 (describing how, in *Washington v. Davis*, 426 U.S. 229 (1976), the analysis of discrimination ultimately was divorced from the equal protection analysis).

118. MARGOT LEE SHETTERLY, *HIDDEN FIGURES: THE AMERICAN DREAM AND THE UNTOLD STORY OF THE BLACK WOMEN MATHEMATICIANS WHO HELPED WIN THE SPACE RACE* 83 (2016).

119. LEE, *supra* note 1, at 11.

120. 298 U.S. 238 (1936).

121. LEE, *supra* note 1, at 27–28.

122. Matt Egan, *Trump’s Right: A Coal Mine Is Opening Soon. It Will Create 70 Jobs*, CNN (June 1, 2017), <http://money.cnn.com/2017/06/01/investing/coal-mine-trump-paris-speech/index.html>; Matt Egan, *Trump Rejects Cry for Help from Coal Execs*, CNN (Aug. 22, 2017), <http://money.cnn.com/2017/08/22/investing/coal->

as the exemplary worker is significant. In 1898, the Supreme Court decided *Holden v. Hardy*,¹²³ upholding a state law setting a maximum eight-hour workday for miners. Just seven years later, the Court decided *Lochner v. New York*,¹²⁴ striking down a similar state statute regulating workers in the baking industry. The Court was able to distinguish *Lochner* from *Holden* because bakers were not miners; the dangers inherent in and long-term effects of mining meant that miners had few peers in terms of toxicity in the American workplace.

In reality, candidate Trump's promise that miners should "get ready" to "work[] [their] asses off" was a paper tiger, directly impacting very few U.S. employees. Nonetheless, that the candidate spoke to all American laborers by invoking the miner is notable. In offering hope to U.S. workers via extending the privilege for them to work themselves to the bone in the most hazardous of work environments, these words highlight the extent to which progressive labor and civil rights reforms thus far have failed to protect individual rights in the American workplace. The figure of the miner illustrates how, today, the bodies of all workers are being shaped by repetitive stress, the increasingly demanding presence of technology, and physical and environmental consequences, such as chronic disease and climate change.¹²⁵

As the Trump administration rhetorically promotes the expansion of workers' "rights" to work more and in more dangerous conditions, the executive branch actively is working to narrow the definition of discrimination under Title VII, scale back affirmative action, eliminate the minimum wage, and reduce the availability of options for women workers in controlling their reproductive lives.¹²⁶ In the midst of socio-legal engineering by elites, the discursive message is one of success premised on independent action and free choice.¹²⁷

To date, the bulwark against the changing tide of rights has been employers themselves.¹²⁸ However, these three authors remind us that in courts, offices, educational

[rescue-trump-murray-energy/index.html](#).

123. 169 U.S. 366 (1898). *See also* *Williams v. Paine*, 169 U.S. 55 (1898) (upholding a Utah statute limiting the employment of workmen in all underground mines to eight hours per day "except in cases of emergency, where life or property is in imminent danger" as a valid exercise of the police power of the state).

124. 198 U.S. 45 (1905).

125. LEE, *supra* note 1, at 257 (describing the conditions of the contemporary American workplace); HARDT & NEGRI, *supra* note 32, at 30 (describing the corporeal and somatic effects of contemporary employer policies).

126. Emma Green, *Trump's Battle over LGBT Discrimination Is Just Beginning*, ATLANTIC (July 28, 2017), <https://www.theatlantic.com/politics/archive/2017/07/title-vii/535182>; Jeremy Diamond, *Trump Signs Directive Banning Transgender Military Recruits*, CNN (Aug. 25, 2017), <http://www.cnn.com/2017/08/25/politics/trump-transgender-military/index.html>; Richard Wolf, *Trump Administration Reversing Obamacare's Birth Control Mandate*, USA TODAY (May 31, 2017), <https://www.usatoday.com/story/news/politics/2017/05/31/trump-administration-reversing-obamacares-birth-control-mandate/102346078>. *See generally* Helaine Olen, *The Rollback of Pro-Worker Policies Since Trump Took Office Is Staggering*, NATION (Sept. 1, 2017), <https://www.thenation.com/article/the-rollback-of-pro-worker-policies-since-trump-took-office-is-staggering>.

127. EDELMAN, *supra* note 4, at 216 (describing how we now live in a "symbolic civil rights society"); LEE, *supra* note 1, at 258 (noting that, despite the lack of vibrancy of the workplace constitution, workers themselves believe they are entitled to numerous rights and freedoms); WOLOCH, *supra* note 7, at 270–71 (describing the lack of success of the progressive movement in achieving workplace equality for women workers).

128. For example, corporations and other institutions launched large-scale opposition to recent executive orders altering immigration policies and are advocating in defense of the rights of gay and transgender employees. *See, e.g.*, Adam Chandler, *Cars, Shoes, Tech: An Array of Corporations Protest the Immigration Ban*, ATLANTIC

institutions, and factories throughout the U.S., workplace civil rights too often are dependent on “symbolic structures” engaging rhetoric of “false equality” and “false privilege.”¹²⁹ Edelman, Woloch, and Lee all emphasize that we must learn from the vital lessons of history; although they might engage an appealing rhetoric of rights, employers will support anti-discrimination principles only to the extent that such ideals further profit-seeking goals. A century of promotion of “right to work” discourse has convinced American workers that they are entitled to freedom of choice in the workplace, when in reality rights are exercised only at their employers’ discretion.

In August 2017, the United Auto Workers made a bid to unionize at a primarily African American Nissan manufacturing plant in Mississippi.¹³⁰ The measure was soundly defeated by a sixty percent majority vote.¹³¹ Although the employer had faced complaints of racial discrimination in allotting job assignments and promotions, by and large, the primarily African American workers expressed gratitude to the company for providing them with benefits such as paid vacation and providing a wage well above that offered by the other employers in the region.¹³² For most, being passed over for promotion or paid less than White counterparts seemed a reasonable price to pay for the ability to live above the poverty line. The books reviewed here provide a comprehensive exploration of how we have arrived at a point where tolerating workplace discrimination is an acceptable sacrifice for the privilege of employment.

At work in decisions like the recent vote to exclude unions from the Nissan plant are the discursive and tangible effects of legal endogeneity, whereby industry’s promotion of inclusion promotes a false legal consciousness among employees and, ultimately, within the judiciary. Keep your workers just happy enough, Edelman pragmatically offers, and they will be disincentivized to agitate for more. In decisions like that at Nissan, it is clear that the bargaining power of unions significantly has been undermined by rhetoric about the evils of “big labor,” and the likelihood of succeeding in individual anti-discrimination claims curtailed in an era marked by judicial resistance to class actions and widespread tort reform.

These texts remind us, however, that, even in an environment in which the exercise of rights is severely constrained, there are opportunities for agency. Over the past one hundred years, a workplace constitution was created from nothing, crafted by brilliant outsiders making strategic decisions that they hoped might carve a path toward workplace civil rights. When Charles Hamilton Houston cited *Carter v. Carter Coal Company* to support recognition of the freedom of African American men to choose their profession,¹³³ his use of this precedent was not the result of false consciousness but the tactics of a shrewd

(Jan. 31, 2017), <https://www.theatlantic.com/business/archive/2017/01/corporations-protest-immigration-ban/515076>; James Surowiecki, *Unlikely Alliances*, NEW YORKER (Apr. 15, 2016), <http://www.newyorker.com/magazine/2016/04/25/the-corporate-fight-for-social-justice>.

129. WOLOCH, *supra* note 7, at 11; EDELMAN, *supra* note 4, at 3–4; LEE, *supra* note 1, at 258.

130. Noam Scheiber, *Nissan Workers in Mississippi Reject Union Bid by U.A.W.*, N.Y. TIMES (Aug. 5, 2017), <https://www.nytimes.com/2017/08/05/business/nissan-united-auto-workers-union.html>.

131. *Id.*

132. *Id.* See also Noam Scheiber, *Racially Charged Nissan Vote Is a Test for U.A.W. in the South*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/business/economy/nissan-united-auto-workers-mississippi.html>.

133. See *supra* note 120 and accompanying text.

legal architect. While recent scholarship tends to dissociate the economic “freedoms” of the *Lochner* era from more noble freedoms associated with civil rights, the histories traced by these authors highlight the ways in which the achievement of a right to work is meaningful for minority groups who have struggled to control their own economic destinies in the face of overwhelming structural oppressions. In decisions like the recent one at the Nissan plant, one sees the results of a century of rhetorical promotion of the value of individualism by the right to work movement, but one also may identify agentic, pragmatic choices made by primarily African American employees frustrated by decades of under-representation by union leadership, judicial recognition of “reverse discrimination,” and enshrinement of a “color blind” Constitution.

These books are important not only for the detailed research and nuanced theoretical perspectives they present, but in their emphasis on the leading roles played by White female and African American male labor activists and attorneys in the development not only of workplace constitutional law but civil rights law as a whole. While the texts serve the important function of adding new voices to the history of the development of workplace anti-discrimination law, it is important to observe that voices still remain excluded from the narrative. First and foremost, as Nancy Woloch points out, unlike male counterparts who labored in factories and on railways, African American women largely were relegated to domestic work, serving as maids, housekeepers, and nannies. Domestic work was carved out of protective legislation and removed from the impact of judicial decisions until well into the 1970s.¹³⁴ Subjected to working longer hours for less pay than other disenfranchised groups, the absence of Black women’s narratives from these books highlights how a group of people deliberately and politically was carved out of the non-domestic workforce and thus, systematically denied a voice in the political sphere.¹³⁵ Edelman in particular problematizes the ways in which Black women’s unique, intersectional status continues to impact their ability to advance in the workplace.¹³⁶

In fact, it is not only the voices of African American women workers but all workers who largely are absent from these legal narratives. These books tell “law stories,” meaning that they largely describe strategic decisions made by elites on behalf of often poor, uneducated workers. In each text, for the relatively privileged advocates and activists laboring on their behalf, the “worker” is often a straw person, whose needs are sacrificed to achieve greater political goals. Woloch ends her book with a statement from a colleague of Florence Kelley’s after the *Muller* decision was handed down in 1906. She quotes Clara Bewick Colby on protective legislation, “The whole subject . . . had better be left to woman’s own judgment [about] what is necessary and desirable.”¹³⁷ In ending with this admonition, Woloch issues a challenge to future scholars to inject more of the voices of workers, and particularly Black women domestic workers, into the narrative of constitutional law.

Until the 1980s, canaries were sent into the mines to test whether toxic gases harmful

134. WOLOCH, *supra* note 7, at 164–65.

135. *Id.* at 45.

136. EDELMAN, *supra* note 4, at 7–9.

137. WOLOCH, *supra* note 7, at 272.

to humans were present before workers would enter. As Lani Guinier and Gerald Torres warn, just as canaries signal a toxic environment in the mines, our tolerance of systematic inequalities in society ultimately negatively affects us all.¹³⁸ The American worker, exemplified by the miner, has become the canary, willing to enter toxic workplaces at great personal cost. These texts offer a challenge to us all to be active agents of reform in the workplace rather than passively permitting the workplace to shape our destinies. Ultimately, although they chronicle as many failures as successes in terms of civil rights, the detailed research of each of these authors gives hope, situating the contemporary workplace as a stop along an often unpredictable and complex journey to equality rather than a bleak destination. Although at this juncture it is being deployed in the name of “color blindness” and “reverse discrimination,” these books each remind us that a workplace constitution has been created. Dormant now, it is waiting to be reinvigorated by a new generation of social engineers.

138. LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).