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Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?

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I. INTRODUCTION

In the 2014 case of *Harris v. Quinn*,[1] five members of the U.S. Supreme Court issued an opinion which strongly implied, albeit in dicta, that a contract provision governing employment relations that two private parties voluntarily agreed to implicated state action sufficient to trigger constitutional rights. Were that not remarkable enough, the five justices who signed onto this opinion—Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas—

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1. 134 S. Ct. 2618 (2014).

were those normally identified as the Court's conservatives. Specifically, they seemed open to the idea that the First Amendment could apply to "union security" clauses in contracts negotiated by a union and an employer in the *private sector*. A union security clause is a provision in a union contract that requires employees in a union bargaining unit to pay at least some portion of normal dues to the union that represents them. Prior to *Harris*, one old Supreme Court case had found state action in such clauses,[2] and another old case had used the doctrine of constitutional avoidance in interpreting the relevant statute, indicating a concern that state action might be present.[3] But, more recent cases on the topic have dodged constitutional issues.[4]

Thus, *Harris* seemed to revive an extraordinarily broad theory of state action. Union security clauses in the private sector are negotiated between two entirely private entities, typically a union and a corporation. While the two private-sector labor law statutes—the National Labor Relations Act (NLRA), governing most private employment,[5] and the Railway Labor Act (RLA), governing the railroad and airline industries[6]—*permit* (and limit) such clauses, neither statute *requires* them, nor does either reward parties for adopting them. Further, such clauses would be entirely legal without the NLRA and RLA, and indeed, they existed prior to these statutes.[7]

This Article argues that the suggestion that private-sector union security clauses implicate the Constitution involves unconvincing and incoherent understandings of "state action" that the Court should explicitly reject. *Harris* indicated that a majority of the Supreme Court was willing to entertain a theory that would not only make all union security clauses in the private sector unconstitutional, but also would go well beyond the Court's broadest reading of state action in *Shelley v. Kraemer*.[8] *Shelley* found state action in private, racially restrictive covenants, but subsequent cases have left that precedent at best limited to its facts. While liberals pushed for this broad approach decades ago in an attempt to fight race discrimination by private parties before the era of antidiscrimination statutes, conservatives pushed for an analogous approach to state action specifically to attack unions as a form of government-forced association.[9] But in more recent decades, courts have hewed to a narrower view of state action. While the death of Justice Scalia prevented further exploration of this issue in an even

2. Ry. Emps.' Dep't v. Hanson, 351 U.S. 225 (1956).
3. Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).
4. See, for example, *Communications Workers v. Beck*, 487 U.S. 735 (1988), discussed *infra*.
5. 29 U.S.C. §§ 151–69 (2012).
6. 45 U.S.C. §§ 151–88 (2012).
7. *See infra* section II.A.
8. 334 U.S. 1 (1948).
9. *See infra* section II.F.

more recent case involving union security clauses,[10] *Harris* showed that four current justices are willing to revive and greatly expand older visions. With President Donald Trump now having appointed a conservative justice to fill the vacancy left by Justice Scalia's death, this issue may soon resurface. The law in such an important area should not be left unclear; instead, courts should clearly reject the argument that private-sector union security clauses implicate state action.

Harris arose as a case about union security clauses in the *public* sector.[11] It has been long settled that state action exists in public-sector labor and employment relations because the state is the employer.[12] The seminal case on public-sector union security clauses,

10. Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (mem.) (per curiam). This 4–4 memorandum decision, without any opinions, effectively upheld the lower court decision in this case and, thus, did not change the law. Prior to Justice Scalia's death, there had been considerable speculation that he would have been the fifth vote to hold that union security clauses, at least in the public sector, violated the Constitution. *See, e.g.*, Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4–4*, N.Y. TIMES, March 29, 2016, at A1, http://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html?_r=0 [https://perma.unl.edu/V5BC-LQ2P].

11. *Harris* was widely seen as an opportunity for the Supreme Court to limit or even bar the use of union security clauses in the public sector. *Harris* could have, and almost did, overturn *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* had held that that union security clauses in the public sector did not violate the First Amendment as long as they permitted members of union bargaining units to object to and "opt out of" paying that portion of their dues that went to activities unrelated to collective bargaining. Alternatively, *Harris* realistically could have adopted the dicta in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012) (suggesting that the First Amendment might not allow an "opt out" system but, at most, could allow an "opt in" system for paying for such activities). Instead, while the five-member majority in *Harris* spent considerable time criticizing *Abood* and union security clauses in general, *Harris* was decided on relatively narrow grounds: the workers involved, home healthcare aides, were, the majority held, merely "quasi-public" employees and not "employees" under the state public-sector labor statute. Thus, while the plaintiffs prevailed in *Harris*, the general rule of *Abood* remained intact for public employees generally; the holding in *Harris* was limited to the specific types of workers involved in that case.

12. The Supreme Court has held since the 1960s that certain restrictions on public employees by public employers are "unconstitutional conditions" of employment. *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (holding that drug-testing public employees without individualized suspicion implicates, and in some cases violates, the Fourth Amendment); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (holding that firing a public school teacher for writing a letter to a newspaper criticizing the school board's handling of a revenue measure and its allocation of funds violated the First Amendment); Garrity v. New Jersey, 385 U.S. 493 (1967) (holding that threatening to fire public employees if they invoked their Fifth Amendment right against self-incrimination violated employees' Fifth Amendment rights); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (holding that a regulation which required public college teachers to certify that they were

Abood v. Detroit Board of Education,[13] established that the First Amendment applied to these provisions. But *Harris*'s suggestion that such clauses in the *private* sector implicate the First Amendment is striking. *Harris* did not explain how state action, a requirement for First Amendment violations,[14] could exist in private-sector union contracts. Nor did the older cases *Harris* cited, *Railway Employees' Department v. Hanson*[15] and *International Ass'n of Machinists v. Street*,[16] give any plausible explanation of how such contracts involved state action, although *Hanson* found such state action, and *Street* asserted that a real constitutional issue existed and thus required use of the canon of constitutional avoidance.

Still, the *Harris* majority discussed private-sector labor law for several pages and suggested that a constitutional problem existed there.[17] First, *Harris* criticized *Hanson*, a 1956 case which held that union security clauses under the RLA implicated the First Amendment, for not actually finding a First Amendment violation. *Harris* asserted that *Hanson*'s failure to find a constitutional violation was inconsistent with other First Amendment doctrine.[18] The *Harris* majority stated that, in *Hanson*, "all that was held" was that the private-sector labor statute "was constitutional in its *bare authorization*" of union security agreements and nothing further.[19] The *Harris* majority also stressed that *Street*, another early RLA case, while decided on statutory grounds, "recognized that the case presented constitutional questions 'of the utmost gravity.'"[20] Further, the *Harris* majority quoted portions of Justice Black's dissent in *Street*, which argued that the union security clause in *Street did* violate the First Amendment.[21] While this was all dicta in *Harris*, it was striking, not just because it was entirely unnecessary to *Harris*'s holding, but also because it was exhuming and apparently endorsing an old, extremely broad, and highly questionable approach to state action.

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not Communists and report whether they ever had been Communists violated the First Amendment). For the constitutional rights of public employees in their employment generally, see MARTIN MALIN, ANN HODGES, JOSEPH SLATER & JEFFREY HIRSCH, PUBLIC SECTOR EMPLOYMENT 61–176 (3d ed. 2016).

13. 431 U.S. 209.

14. The state action requirement for all alleged constitutional violations, except the Thirteenth Amendment, was originally articulated in *United States v. Cruikshank,* 92 U.S. 542 (1875), and *The Civil Rights Cases*, 109 U.S. 3 (1883).

15. 351 U.S. 225 (1956).

16. 367 U.S. 740 (1961).

17. Harris v. Quinn, 134 S. Ct. 2618, 2627–30 (2014).

18. *Id.* at 2629 (calling the reasoning in Justice Douglas's majority opinion in *Hanson* "remarkable" and inconsistent with later opinions by Justice Douglas).

19. *Id.*

20. *Id.* at 2630 (quoting *Street*, 367 U.S. at 749).

21. *Id.*

This Article makes two basic points. First, union security clauses in the private sector do not implicate the First Amendment because there is no state action. The Article first describes union security clauses and examines the general principles and theories the Supreme Court has used to determine whether state action exists. It concludes that, under rules that have been well established in modern law, these clauses do not involve state action. While it may have been possible to construct a nonfrivolous argument for state action by extending a few theories from cases from the mid-twentieth century,[22] under consistent precedent dating back for several decades, private-sector union agreements do not constitute state action.[23]

The Article then examines other possible theories supporting state action: the *Hanson* opinion, arguments made by plaintiffs in private-sector cases urging that state action exists, and the analogy to mandatory state bar dues. It concludes that *Hanson*, the one case that actually found state action in private-sector union security clauses, is, on this point, thinly and poorly reasoned. *Hanson* asserted that the RLA involved state action essentially because, while the RLA does not require union security clauses, it preempts state "right to work" laws which would bar them.[24] But federal preemption of state laws, regarding voluntary provisions in employment or other private contracts, does not create state action. Further, union security clauses predate federal labor statutes and would exist without them. Under the default employment law rules that would govern in the absence of labor laws, employers could legally require employees to pay dues to almost any sort of organization as a condition of employment.

Next, the Article critiques the argument made by plaintiffs in these cases that state action should be found in labor law's "majority exclusive representation" model—the principle in the NLRA and RLA that, if a majority of employees in a bargaining unit properly select a union to represent them, the selected union exclusively represents all employees in the bargaining unit in matters of wages, hours, and working conditions. But labor statutes do not mandate the formation of unions[25] nor do they require union security clauses or reward parties for adopting them. If a union is formed, while both the NLRA and

22. *See* Symposium, *Individual Rights in Industrial Self-Government—A "State Action" Analysis*, 63 NW. U. L. REV. 4 (1968).

23. *See* Kenneth Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51, 111 (1990) ("There seems no serious question as to the constitutionality of agency shop agreements under the NLRA. . . . [T]he Court's conception of state action has since narrowed so that this is no longer a real possibility.").

24. *See infra* section II.C.

25. They are only permitted if they are supported by a majority of a relevant group of employees. *See* 29 U.S.C. § 159(a) (2012).

RLA require bargaining in good faith, neither requires the parties to enter into any contracts at all, much less to agree on any specific terms.[26] Also, corporate and agency law authorizes collective bodies to take actions that bind participants in the collective body, yet voluntary contracts entered into by such parties clearly do not trigger state action.

The Article then looks at *Keller v. State Bar of California*,[27] the only case in the past several decades that has stated, albeit in somewhat confusing dicta, that private-sector union security clauses are subject to the First Amendment. *Keller* involved mandatory dues to an integrated state bar association.[28] But a voluntary contract between private parties that a statute *permits* is quite different than the government literally *requiring* payments to a certain group as a condition of holding a state license.

The Article then explains that the broadest state action decisions of fifty to seventy years ago are best understood in the context of liberals straining to combat private race discrimination in the era before antidiscrimination statutes and conservatives simultaneously seeking to promote right-to-work rules to cripple unions. Even still, *Harris*'s suggestions go far beyond the broadest theories of state action courts have ever generally accepted.

The Article then argues that adopting the suggestions in *Harris* would have radical and undesirable consequences in labor law and beyond. Among other things, it would mean that *all* clauses in private-sector contracts would involve state action: e.g., drug-testing provisions in private-sector labor contracts would be subject to Fourth Amendment scrutiny, something no case has even suggested. Further, *Hanson*'s logic would expand state action well beyond even the broadest reading of *Shelley v. Kraemer*.[29] It would mean state action would be present where law merely *permits* a private collective institution—unions, employers, and others—to make contracts that bind participants in such institutions. Such an interpretation is especially surprising coming from conservatives—although, perhaps not in a case involving labor unions.

The Article concludes that courts should squarely reject the suggestion that union security clauses in the private sector implicate the First Amendment. It describes a theory of state action consistent with this result and existing precedent. In sum, this Article argues that the idea that union security clauses in the private sector constitute state

26. *See infra* section II.A.
27. 496 U.S. 1 (1990).
28. *Id.* at 11–14.
29. *See* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility* (pts. 1 & 2), 34 HOUS. L. REV. 333, 665, 697–98, 700–07 (1997).

action is indefensible under any theory of state action that courts do or should accept.

II. PRIVATE-SECTOR UNION SECURITY CLAUSES DO NOT INVOLVE "STATE ACTION"

A. What Private-Sector Union Security Clauses Are and Are Not

A union security clause is a part of a contract between an employer and a union providing that members of a union bargaining unit are required to pay a certain portion of union dues as a condition of employment. The traditional justification for such clauses is that, under the "duty of fair representation" doctrine,[30] unions have a legal duty to represent all members of a union bargaining unit fairly, and such representation has costs. While a union contract can bind employees in a union bargaining unit who do not support the union, under the majority exclusive representation model, only unions who enjoy majority support from the employees in the bargaining unit may enter into such contracts.

Crucially, union security clauses only exist when a union and an employer voluntarily agree to them. Neither the NLRA nor the RLA *require* unions and employers to agree to union security clauses. Indeed, neither statute requires the parties to enter into a labor contract at all. Section 8(d) of the NLRA states that while the unions and employers have a duty to "meet at reasonable times and confer in good faith . . . [,] such obligation does not compel either party to agree to a proposal or require the making of a concession."[31] Moreover, it is settled law that an employer's refusal to agree to a union security provision does not violate the duty to bargain in good faith or any other part of the NLRA.[32] Further, no part of the NLRA or RLA rewards the parties for agreeing to union security clauses or punishes them for not. Indeed, these statutes, and case law interpreting them, *limit* what types of union security clauses the parties can agree to by making some types of such clauses illegal.[33] Also, the NLRA permits individual states to choose the so-called right-to-work rule, meaning that any type of union security clause is illegal and unenforceable in that

30. *See infra* section II.D.

31. 29 U.S.C. § 158 (2012).

32. *See, e.g.*, Erie Brush & Mfg. Corp. v. NLRB, 700 F.3d 17 (D.C. Cir. 2012); NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457 (2d Cir. 1973).

33. The rules governing such clauses are mainly, but not exclusively, in National Labor Relations Act section 8(a)(3), 29 U.S.C. § 158(a)(3), and cases interpreting it, such as *Communications Workers v. Beck*, 487 U.S. 735 (1988).

state.[34] Approximately half the states in the United States have exercised that option.[35]

Notably, union security clauses existed in the private sector before the NLRA or RLA regulated them and often went beyond what those statutes currently permit. Prior to the RLA and the NLRA, unions sought, and employers sometimes agreed to, "closed shop" agreements—which required employers to hire only workers who were already union members—and "union shop" agreements—which required employees to join the union after being hired.[36] Current RLA and NLRA law are actually more restrictive in that neither Act permits either the closed or union shop agreements. The most that is permitted under either statute after *Street* and *Beck* is the "agency shop," under which objecting members of union bargaining units cannot be compelled to pay dues that go to activities related to collective bargaining.[37]

Finally, union security clauses, like all clauses in union contracts, apply only to the specific employers and unions who are parties to the contract. They do not extend to entire professions or industries.

B. Basic State Action Doctrine

The basic requirement that the Constitution limit the acts of the state but not acts of private parties, with the exception of the Thirteenth Amendment, was established in the nineteenth century.[38] Traditional theories of state action generally do not seem applicable to private-sector union security clauses. Of the many forms that claims of state action have taken over the years, exhaustively identified and

34. 29 U.S.C. § 164(b) (2012).

35. SETH D. HARRIS, JOSEPH E. SLATER, ANNE MARIE LOFASO & CHARLOTTE GARDEN, MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS 1142 (2d ed. 2016).

36. R. EMMETT MURRAY, THE LEXICON OF LABOR 39–40, 180 (1998) (noting that the earliest recorded closed shop agreement in the United States was from 1799); Dau-Schmidt, *supra* note 23, at 81–84. Around the turn of the twentieth century, when asked to rule on their legality, courts were split. For a case explicitly holding the closed shop legal before the RLA or NLRA, see *National Protective Ass'n of Steam Fitters v. Cumming*, 63 N.E. 369 (N.Y. 1902). *See generally* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM 92–95 (1995). But as Dau-Schmidt explains, "Once courts accepted that unions were not unlawful conspiracies, most jurisdictions held that union security agreements, including the closed, union, and agency shop, were lawful." Dau-Schmidt, *supra* note 23, at 82 & n.194 (collecting cases). Also, there is no question that today, in the absence of the RLA and NLRA, it would be legal under modern corporate and default "at will" employment law for employers to require employees to join various organizations as a condition of employment.

37. Nor can a union security clause require an employee to literally join the union, although it still may require dues payments. NLRB v. Gen. Motors Corp., 373 U.S. 734 (1963). *See generally* HARRIS ET AL., *supra* note 35, at 1147–83.

38. *See, e.g.*, Buchanan, *supra* note 29, at 340–44.

documented by Professor G. Sidney Buchanan, only two are arguably relevant to union security clauses.[39] The first is what Professor Buchanan calls the "State Nexus Issue." This includes pervasive government involvement through activites such as licensing.[40] As shown below, though, the licensing cases require significantly more state involvement than is present in private-sector union contracts. The second is the "state authorization" of certain conduct.[41] The question regarding state authorization is when, if ever, a law that simply *permits* a party to act in a certain way constitutes state action. While Buchanan labels this "the most conceptually intriguing" of his categories,[42] he also shows that little currently remains of this approach because of its potentially extremely broad sweep.[43] What does remain could not plausibly cover private-sector union contracts.

Beyond these categories, as Professor Terri Peretti explains, the concept of state action expanded somewhat from the 1940s through the 1970s but contracted in the decades after that.[44] Relevant here, Professor Peretti also notes that, while there is no explicit doctrinal rule to this effect, the Supreme Court is less likely to find state action in cases that do not involve race discrimination.[45] Section II.F, *infra*, discusses further the significance of race in state action theory gener-

39. Professor Buchanan identified a total of six types of state action cases, four of which clearly do not apply to private-sector union security clauses. First, Buchanan identifies the delegation of a traditional government function, such as operating a political primary. If the function is "predominantly, even uniquely governmental in nature," then a private actor's actions in performing the function may constitute state action. *Id.* at 345. Negotiating a labor contract is not traditionally or mainly a government function. The second type of state action case consists of those involving the "Beyond-State-Authority" situation, in which an admittedly governmental actor exceeds his or her actual authority. *Id.* at 348. Third, Buchanan identifies the "Projection-of-State-Authority Issue," where a private actor with no actual authority from the state pretends to be a state actor (e.g., falsely claiming to be a police officer). *Id.* at 350. Buchanan labels the fourth category as the "State Inaction Issue." For example, what if a state agency bars child abuse, is warned of a likely risk of child abuse, and does nothing when steps could be easily taken? *Id.* at 352. For the last three, obviously neither employers nor unions in the private sector are, or purport to be, governmental actors.

40. *Id.* at 346–47.

41. *Id.* at 351–52.

42. *Id.* at 352.

43. *Id.* at 709; *see infra* notes 56–59 and accompanying text.

44. Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273, 273–74 (2010).

45. *Id.* at 276. Famous cases involving state action and race discrimination include, but are not limited to, *Shelley v. Kraemer*, 334 U.S. 1 (1948), and the infamous "white primary" cases, in which the Supreme Court rejected attempts by Southern states to exclude black voters from Democratic primaries. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); *see also* Peretti, *supra* note 44, at 276 (discussing the "white primary" cases).

ally and as applied to unions. For now, obviously, modern union security clauses do not involve race discrimination.

Returning to Professor Buchanan's categories, first, the State Nexus or significant state involvement category is not nearly broad enough to cover anything analogous to the exclusive-representation and voluntary-contract-making model of the NLRA. For example, in *Jackson v. Metropolitan Edison Co.*,[46] the Supreme Court held that a private utility that was both licensed as a monopoly and heavily regulated by the state was nonetheless not a government actor since utility service was not an action traditionally "associated with sovereignty," as opposed to, say, eminent domain.[47] Creating a process for negotiating labor contracts is certainly not an action traditionally associated with sovereignty.[48] Even fairly extensive regulation by the state does not make the actions of an otherwise private party state action. *Blum v. Yaretsky*[49] found no state action by a private nursing home even though it was "extensively regulated" through the Medicaid program.[50] The union contract-making process is not "extensively regulated," as the duty to bargain in good faith leaves contract terms to the decisions and desires of private parties.

Nor is state action created merely because a government grants an organization certain rights and privileges the organization would not have absent the government grant. For example, in *San Francisco Arts & Athletics v. United States Olympic Committee*,[51] the Supreme Court did not find that the U.S. Olympic Committee (USOC) was a state actor even though Congress chartered the USOC, gave it authority to seek Commerce Department grants, and gave it the exclusive right to use the term "Olympic" and Olympic emblems. Among other things, the Court explained that the "USOC's choice of how to enforce its exclusive right to use the word 'Olympic' simply is not a governmental decision."[52] Similarly, granting exclusive representation rights to a private-sector union is not sufficient to make it a government actor, and the decisions of private employers and unions as to what types of contract terms to adopt are not governmental decisions.

46. 419 U.S. 345 (1974).

47. *Id.* at 353; *see also* Peretti, *supra* note 44, at 277 (discussing *Jackson* as an example of the Court's unwillingness to extend the category of state action cases involving significant state involvement).

48. Indeed, collective bargaining in government employment came significantly later in the public sector in the United States than it did in the private sector. *See* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962, at 1–2 (2004).

49. 457 U.S. 991 (1982).

50. *Id.* at 1004, 1011.

51. 483 U.S. 522 (1987).

52. *Id.* at 547.

Nor is state action more likely to be found where a body receives some significant government support and has the ability to discharge an employee. In *Rendell-Baker v. Kohn*,[53] the Supreme Court found no state action when a private school fired some of its employees even though the school's operating budget came almost entirely (ninety percent) from public funds; the school was subject to extensive governmental regulation; it was performing a traditional "public function"; and the school had what the court called a "symbiotic relationship" with the government (in part because nearly all of the school's students came via referrals from the state).[54] In sum, private-sector union security clauses are not state action under the State Nexus approach.

Second, Buchanan explains that his state authorization model is quite narrow and may not even exist in any significant way today because of its potentially overbroad scope.[55] That is, finding state action in a government statute that merely permits or authorizes behavior by X that harms Y would make most actions, and resulting harms, by private parties state action. It certainly would make all contracts between private parties state action. Such an approach is simply not consistent with current law. Regarding contracts between private parties, *Flagg Bros. v. Brooks*[56] is instructive. In that case, the Supreme Court found that a private creditor selling a woman's property stored at its warehouse after she was evicted for failure to pay her storage fees did not constitute state action.[57] This was true even though a state actor, a sheriff, had arranged for this storage after her eviction. As Buchanan notes, *Flagg Bros.* could have found state action using the state authorization model, but the opinion did not even mention it.[58]

Buchanan cites two cases which used this model in a "somewhat subdued form": *Georgia v. McCollum*[59] and *Edmonson v. Leesville Concrete Co.*[60] Both involve facts quite different from union security clauses and private-sector contracts in general. These cases held, respectively, that a criminal defendant's and a civil litigant's intentional race discrimination in using peremptory challenges is unconstitutional.[61] Barring intentional racial animus in juries, which can only be created in official government fora (courts) and which perform quintessentially traditional public functions, is worlds away from per-

53. 457 U.S. 830 (1982).
54. *Id.* at 840–43.
55. Buchanan, *supra* note 29, at 709.
56. 436 U.S. 149 (1978).
57. *Id.* at 159–66.
58. Buchanan, *supra* note 29, at 360–62.
59. 505 U.S. 42, 53–55 (1992).
60. 500 U.S. 614, 621–28 (1991).
61. Buchanan, *supra* note 29, at 362 & n.168.

mitting but not requiring certain types of contract terms in private employment. Among other things, the *Edmonson* opinion relied on the fact that the injury occurs "within the courthouse itself."[62] Buchanan notes the importance to the Court of the harm taking place in an "official forum."[63] It is also worth noting the presence of race discrimination in these cases.

More generally, *Edmonson* set out three factors to examine in determining whether state action is present in Buchanan's state authorization model: "the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury is aggravated in a unique way by the incidents of governmental authority."[64]

Union security clauses in the private sector do not come close to constituting state action under this test. As to relying on government assistance, while labor law authorizes the exclusive-representation model and permits unions to negotiate a specific type of union security clause (while barring other types), again, the law neither requires nor rewards such clauses. Also, private-sector unions and employers are not funded in any direct or significant way by the government.

Moreover, neither the NLRA nor the RLA makes possible a contract that would be illegal in the absence of these statutes. Under state contract law and standard U.S. employment law, it would clearly be legal for a private employer to require, as a condition of employment, that its employees sign contracts obligating them to pay dues to a union. Indeed, absent a statute to the contrary, under common-law "employment at will" rules, a private employer could legally require, as a condition of employment, all its employees to join practically any organization, from a local zoo to the Republican or Democratic Parties.[65] In some cases, such acts might violate *statutory* rules. But the fact that, for example, some states have passed statutes barring private-sector employers from discriminating on the basis of political affiliation[66] shows that policymakers and advocates do not believe the *Constitution* already barred such discrimination.

As to the second factor, again, union contract negotiations are not a "traditional government function." Contrast *Edmonson*, where the Court explained that, while "the motive of a peremptory challenge

62. 500 U.S. at 628.
63. Buchanan, *supra* note 29, at 730 (quoting *Edmonson*, 500 U.S. at 628).
64. 500 U.S. at 621–22 (citations omitted).
65. Evidence exists that such threats and practices are growing. *See* Alexander Hertel-Fernandez, *Employer Political Coercion: A Growing Threat*, THE AMERICAN PROSPECT, Nov. 23, 2015, http://prospect.org/article/employer-political-coercion-growing-threat [https://perma.unl.edu/B7RY-BVMD].
66. For a discussion of such statutes, see Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).

may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body."[67] A jury is "a quintessential governmental body having no attributes of a private actor."[68] A union is nothing of the kind.

As to the third factor, whatever injuries private-sector union security clauses arguably cause, they are not "aggravated in a unique way by the incidents of government authority." Union contracts are not made in a courtroom or other official government forum. The government does not control or participate in private-sector union bargaining on substantive issues. Again, labor law merely requires a "duty to bargain in good faith," and it neither requires union security clauses nor rewards parties for agreeing or not agreeing to them. Contrast that with *Edmonson*, where the Court stressed that "[w]ithout the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose."[69]

Buchanan notes how limited the state authorization model is: certain activities "may not fairly be described as a public function."[70] These include "the wide range of private activities that the legal system permits to occur but with respect to which government participation does not extend significantly beyond the 'mere' act of permission."[71] Buchanan gives various examples of such activities, including "the making of contracts" and "engaging in business."[72] The Supreme Court has explained that even governmental "approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives."[73] Also, as *Jackson* held, the fact that a law authorizes a private party to employ a practice if the party so desires does *not* make the "exercise of the choice allowed by state law" into action of the state "where the initiative comes from the [private party] and not from the state."[74] *San Francisco Arts & Athletics* added that even government "approval" of such choices is not sufficient to create state action.[75] Given this definition, it is difficult to see how private-sector union contracts could be considered state action.

Beyond this, a pure state authorization theory, in which state action is created if a statute simply permitted the defendant to take actions that arguably harmed the plaintiff, at its high-water mark, led

67. 500 U.S. at 626.
68. *Id.* at 624.
69. *Id.*; *see* Buchanan, *supra* note 29, at 758.
70. Buchanan, *supra* note 29, at 762.
71. *Id.*
72. *Id.*
73. Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982).
74. Jackson v. Metro. Edison Co., 419 U.S. 345, 357 (1974).
75. S.F. Arts & Athletics v. U.S. Olympic Comm., 483 U.S. 522, 548 (1987).

to the famous (or perhaps infamous) case of *Shelley v. Kraemer*.[76] *Shelley* held that using courts to enforce a system of private racial covenants implicated state action.[77] In recent decades, though, *Shelley* at most survives as strictly limited to its facts, and courts have not adopted its general theoretical approach. Buchanan explains that *Evans v. Abney*[78] "tightly confined *Shelley* to its most narrow application. From that contraction, the state authorization model has never really recovered."[79] This is, at least partly, because of the potentially extraordinarily broad sweep of this theory. As Buchanan explains, "every action engaged in by a private person is either compelled, prohibited, or permitted, *i.e.*, authorized, by the legal system."[80] State acts of permission, potentially enforceable in court, routinely authorize private parties to affect the interests of others.[81] The "comprehensive scope" of this reality being sufficient to create state action implicating the Constitution was likely too much for the Court.[82] Thus, in subsequent cases in more recent decades, the Court repeatedly refused to use state authorization analysis.[83]

NCAA v. Tarkanian[84] generally indicates the high bar for finding state action under modern doctrine. In this case, a public university, the University of Nevada Las Vegas (UNLV), took disciplinary action against its basketball coach, Jerry Tarkanian, pursuant to the recommendations of the National Collegiate Athletic Association (NCAA).[85] The Court found no state action even though UNLV, a public university and thus clearly itself a state actor, suspended Tarkanian, a public employee, on the grounds that the suspension was required by the rules and rulings of the NCAA. Furthermore, the Court held, the NCAA was a private body—even though the NCAA itself had a significant number of public schools in its membership.[86]

76. 334 U.S. 1 (1948); *see also* Buchanan, *supra* note 29, at 704–707 (discussing the implications of *Shelley* on state action cases).

77. *Shelley*, 334 U.S. at 20–21.

78. 396 U.S. 435 (1970). This case also involved a racial restriction in land use. *See* Buchanan, *supra* note 29, at 716–18.

79. Buchanan, *supra* note 29, at 709. Buchanan titles a section of his detailed discussion of this topic as: "The 1970s and 1980s: State Authorization in the Doldrums." *Id.* at 723.

80. *Id.* at 724.

81. *Id.* at 724–25; *see also* Dau-Schmidt, *supra* note 23, at 130 ("[A]lmost every law involves some grant of authority to a private party which affects the individual freedom of the party or the people with whom it deals.").

82. Buchanan, *supra* note 29, at 725.

83. *Id.*

84. 488 U.S. 179 (1988).

85. *Id.* at 180–82.

86. *Id.* at 192–93, 196.

An even more recent case, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,[87] put it this way: "[S]tate action may be found if, though only if, there is such a 'close nexus between State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[88] Union security clauses in the private sector—which, again, labor statutes do not require but are instead products of negotiations between two private parties and which would be entirely legal in the absence of labor statutes—cannot fairly be viewed as actions "of the State itself."[89]

Even where a statute creates a framework under which an act can be taken, no state action exists unless the party responsible for the action is a state actor. In *Lugar v. Edmondson Oil Co.*,[90] the Court set out a two-part test for determining when acts allegedly causing the deprivation of a right are attributable to the government: "First, the deprivation must be caused by the exercise of some right or privilege created by the State . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor."[91] While unions and business entities negotiate pursuant to rights created by labor law and the law of business associations, in the private sector, neither party is plausibly a state actor. As the Supreme Court noted in *San Francisco Arts & Athletics*, "[a]ll corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character."[92]

Thus, private-sector union security agreements are not state action under any currently existing conception of state action. It is revealing that the leading studies of state action theories discussed above, by Peretti and Buchanan, do not even mention union security clauses or *Hanson*.[93] *Hanson*, however, relies on a theory that Peretti and Buchanan do not recognize. Further, plaintiffs in private-sector cases also have made arguments as to why these clauses constitute state action. These approaches to state action are addressed below.

87. 531 U.S. 288 (2001).

88. *Id.* at 295 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

89. *Id.*

90. 457 U.S. 922 (1982).

91. *Id.* at 937; *see also* Buchanan, *supra* note 29, at 416–18 (discussing *Lugar* and the Court's inception of the two-part test).

92. 483 U.S. 522, 543–44 (1987).

93. Neither Peretti, *supra* note 44, nor Buchanan, *supra* note 29, even mentions *Hanson*. Other overviews of state action theory also fail to mention *Hanson*. *See, e.g.*, Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561 (2008).

C. *Hanson*'s Argument: Federal Preemption of State Contract Law is State Action?

The only Supreme Court decision actually holding that private-sector union security clauses involve state action, *Hanson*, is thinly reasoned and unconvincing. Even Justice Alito in *Harris* noted that in *Hanson*, "the First Amendment was barely mentioned."[94] Justice Douglas's opinion in *Hanson* asserted that the RLA involved state action because it preempts states' right-to-work laws—laws that bar any form of union security clause. "If private rights are being invaded," *Hanson* asserted, "it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."[95] Thus, *Hanson* concluded, the "enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction."[96] An agreement under the RLA "has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State."[97]

No subsequent case has attempted to flesh out or elaborate on this curious theory. None of the Supreme Court cases involving union security agreements since 1956 have held that the First Amendment applied in the private sector. They either refused the invitation to rule on the basis of the First Amendment and relied instead on statutory interpretation, or simply ignored the First Amendment.[98] No case, even in dicta, has given any further meat to the bare-bones assertions in *Hanson*.

Hanson's logic on this issue is puzzling. As shown above, before the RLA was enacted, under preexisting contract law, employees in union bargaining units had no right to be free of union security clauses, but unions and employers were not required or encouraged to impose them. The same is true under the RLA. Then, as now, union security clauses existed if, and only if, two private parties—a union and an employer—freely agreed to them. The RLA merely shifted the rele-

94. Harris v. Quinn, 134 S. Ct. 2618, 2627 (2014).
95. Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 232 (1956) (citations omitted).
96. *Id.*
97. *Id.* at 232 & n.2.
98. *See* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33 (1988) (NLRA case on union security clauses not mentioning the First Amendment); Commc'ns Workers v. Beck, 487 U.S. 735 (1988) (NLRA case expressly not considering the constitutional issue and deciding the case on statutory grounds); Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (RLA case expressly refusing to decide the case on constitutional grounds and, instead, deciding it via statutory interpretation, albeit as a matter of constitutional avoidance).

vant contract law to a federal statute. It is true that the RLA, unlike the NLRA, preempts state laws that ban union security clauses. But, this preemption does not constitute requiring, or even significantly encouraging, union security clauses, and in no other context has state action been found where a federal statute prevents a state from making illegal a contract term which the parties to the contract may still freely accept or reject.[99]

A theory under which state action is created merely by shifting the regulation of private conduct involving voluntary action from state law to federal law would have radical results, including upending much labor and employment law. Federal law routinely preempts state laws on labor and employment matters, including making various contract terms illegal. Private-sector labor law alone provides multiple examples. While the NLRA, unlike the RLA, allows states to choose to bar union security agreements, that is the *only* provision of the NLRA which states may modify. The NLRA bars, and preempts state laws permitting, covered unions and employers from entering into various types of contract provisions. For example, section 8(a)(3)[100] of the NLRA bars closed shop agreements, union security clauses in which the employer agrees to hire only union members; section 8(b)(6)[101] bars "featherbedding" clauses, contractual agreements to pay employees for services that are not to be performed; and section 8(e)[102] bars "hot cargo" provisions, contract clauses that give employees the right to refuse to handle "struck goods" from other employers. Beyond this, the NLRA preempts any state law purporting to expand or limit any rights under the NLRA.[103] Yet, aside from *Hanson*, no case has suggested that NLRA preemption of state law in these contexts creates state action implicating the Constitution.[104]

Federal employment laws, laws governing the relations of individual employees and their employers outside the union context, also preempt state employment laws in a variety of ways. Some set "floors"

99. *See* Dau-Schmidt, *supra* note 23, at 139.
100. 29 U.S.C. § 158(a)(3) (2012).
101. § 158(b)(6).
102. § 158(e).
103. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) (holding that activities barred by National Labor Relations Act section 8, 29 U.S.C. § 158, may not be permitted or regulated by the states).
104. In several cases involving various contexts, the Supreme Court has found that the NLRA preempts state laws in the same area, but aside from *Hanson*, the Court has never indicated that this preemption created state action. *See*, *e.g.*, Chamber of Commerce v. Brown, 554 U.S. 60 (2008) (holding that the NLRA preempts a state law barring employers that receive state funds from using the funds to assist or deter union organizing); Lodge 76, Int'l Ass'n of Machists v. Wis. Emp't Relations Comm'n, 427 U.S. 132 (1976) (holding that a state law used to challenge a concerted refusal to work overtime by employees was covered by the NLRA).

and preempt state laws that would purport to legalize contracts between employers and employees below the floor. For example, a state law could not make legal an employment contract term that provides for pay less than the minimum wage the Fair Labor Standards Act (FLSA) sets for parties the FLSA covers. A state law could not make legal employment contracts that permit discrimination Title VII prohibits. No case has suggested that because federal employment laws make certain specific contract terms illegal in employment, voluntary, nonmandated contract terms in private employment that avoid such illegal terms, or that include terms that the federal law permits but does not require, are a product of state action.[105]

It is hard to defend the theory that a contract entered into by two private parties somehow morphs into state action merely because the underlying contract law, which permits but does not require certain contract terms, is changed from state contract law to federal law. It would arguably be different if the law *required* a specific contract term, but that is not the case here. It is an especially odd argument here in that the "preemption" *Hanson* discussed actually allows *more* discretion to private parties: the RLA makes it illegal for states to *prevent* private parties from agreeing to union security clauses. As Professor Dau-Schmidt observes, it "seems curious that a decision *not* to regulate an area of private activity gives rise to a finding of state action."[106]

Finally, the "preemption" theory in *Hanson*, even if valid, would seem not to affect unions under the NLRA. Unlike the RLA, the NLRA permits states to make union security clauses of any type illegal.[107] Interestingly, the *Harris* majority, while musing broadly about the private sector and citing *Hanson*, did not cite any authority specific to the NLRA concerning union security clauses. Is the theory that the RLA constitutes state action but the NLRA does not? If so, *Harris* did not make that clear, and such a distinction is arguably inconsistent with some of the broad dicta in *Keller v. State Bar of California*,[108] discussed *infra*. At minimum this should be clarified, but since the theory that federal preemption of laws barring certain contract terms in private employment creates state action has no precedent outside *Hanson* and would go well beyond existing law in the realm of state action, this entire approach should be explicitly rejected.

105. *See* Dau-Schmidt, *supra* note 23, at 129 ("Although the state has sometimes passed laws regulating minimum wages, maximum hours, and working conditions, . . . [t]raditionally, the determination of private terms of employment has been left to the private parties.").

106. *Id.* at 138.

107. *See* National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (2012) (the so-called right-to-work clause).

108. 496 U.S. 1 (1990).

D. "Forced Association" Creating State Action?

While *Hanson* was the only Supreme Court case to find state action in a union security clause, the *Harris* majority also cited approvingly a dissent in *Street* which would have found a First Amendment violation in that case. The *Street* majority, using the doctrine of constitutional avoidance, relied on statutory interpretation to create the rule—now used for the NLRA and RLA—that the most a union security clause can require is that members of union bargaining units pay that portion of their dues that go to activities "related to collective bargaining."[109]

But the *Harris* majority seemed to side with Justice Black's dissent in *Street* and specifically the argument that any sort of union security clause under the RLA violated the First Amendment. Black centered his approach on the "exclusive majority representative" model the RLA and NLRA use. Under that model, if a majority of employees in an appropriate union bargaining unit vote to authorize union representation, that union represents all the employees in the bargaining unit, including those employees who do not wish to be represented by a union.[110]

The *Harris* majority summarized Black's critique of the majority's approach in *Street* and seemed to endorse the idea that private-sector union security clauses constitute some type of state action. The *Harris* majority wrote:

> That approach, [Justice Black] wrote, while "very lucrative to special masters, accountants and lawyers," would do little for "the individual workers whose First Amendment freedoms have been flagrantly violated." He concluded:
>
> > Unions composed of a voluntary membership, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they favor. But to the extent that Government steps in to force people to help espouse the particular causes of a group, that group—whether composed of railroad workers or lawyers—loses its status as a voluntary group.[111]

Even at the time of *Street*, however, other justices sharply disagreed with this view. In a separate dissent in *Street,* Justice Frankfurter, writing for himself and Justice Harlan, rebutted Justice

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109. Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (establishing this approach for the RLA though an interpretation of the RLA); *see also* Commc'ns Workers v. Beck, 487 U.S. 735 (1988) (establishing the same for the NLRA through an interpretation of the NLRA). In the public sector, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), adopted the same rule but established it as a matter of constitutional law.

110. *See* HARRIS ET AL., *supra* note 35, at 343–50.

111. Harris v. Quinn, 134 S. Ct. 2618, 2630 (2014) (quoting *Street*, 367 U.S. at 796 (Black, J., dissenting)).

Black's concerns on this point, explaining that even given a union security clause:

> No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues. . . . Congress has not commanded that the railroads shall employ only those workers who are members of authorized unions. Congress has only given leave to a bargaining representative, democratically elected by a majority of workers, to enter into a particular contractual provision arrived at under the give-and-take of duly safeguarded bargaining procedures. . . . When we speak of the Government 'acting' in permitting the union shop, the scope and force of what Congress has done must be heeded. There is not a trace of compulsion involved . . . .[112]

While no other opinion in any other case on private-sector union security clauses between *Street* and *Harris* directly argued that the First Amendment applied and was violated, the issue remained somewhat muddled. A few cases suggested that such clauses might implicate the Constitution, but without addressing the state action question. For example, another RLA case, *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,[113] began by citing the admonition in *Street* that the Court should avoid deciding constitutional issues if the statute could be construed to avoid constitutional difficulty.[114] *Ellis* then applied the rules and test from *Street*—which, again, were arrived at through statutory interpretation—to a variety of union activities to determine if they were "related to collective bargaining" or not. In so doing, *Ellis* referred to the First Amendment in a few places, e.g., "The First Amendment concerns with regard to publications and conventions are more serious."[115] But *Ellis* did not even mention state action, much less attempt to show how it could exist.

Plaintiffs in the leading case on union security clauses in the private-sector, *Communications Workers v. Beck*,[116] also relied on the exclusive-representation model to urge the Court to find state action sufficient to trigger the First Amendment.[117] While *Beck* declined the plaintiffs' invitation to decide the case on constitutional grounds,[118] those arguments deserve a response here. They have some superficial appeal. First, the plaintiffs did not rely on *Hanson*'s reasoning.[119]

112. *Street*, 367 U.S. at 806–07.
113. 466 U.S. 435 (1984).
114. *Id.* at 444.
115. *Id.* at 456.
116. 487 U.S. 735 (1988).
117. Brief for the Respondents at 7–11, *Beck*, 487 U.S. 735 (No. 86-637).
118. In *Beck*, both the majority and dissenting opinions declined to reach, and indeed did not even discuss, the alleged constitutional issue and instead relied on statutory grounds. *Beck*, 487 U.S. at 761 ("We need not decide [the state action issue]."); *id.* at 763 n.1 (Blackmun, J., dissenting).
119. Of course, *Hanson*'s logic centering on the RLA's preemption of state right-to-work laws was inapplicable, as the NLRA, the statute *Beck* concerned, permits states to choose right-to-work rules. But, even beyond that, plaintiffs seemed

Rather, the plaintiffs argued that, but for the system of exclusive representation labor law authorizes (unions bargained for exclusive representation prior to the NLRA or RLA, but labor statutes make it the sole model where unions are selected as representatives),[120] their union would not bargain on their behalf, and it is at least arguably less likely that their employer would agree to a union security clause, under which they could lose their jobs if they refuse to pay certain dues to a union that they do not personally support. Whatever one thinks of this argument as a policy matter, though, these factors separately and together do not constitute state action.

More specifically, the plaintiffs in *Beck* argued that the labor contract in question was "hardly 'private,' because CWA [the union involved] *is and must be a statutory Section 9(a) exclusive representative*, exercising special legal powers and privileges as against both the employer and the Employees."[121] While the plaintiffs granted that private employers remain free to agree or not agree to a union security clause, they stressed that if an employer did agree, they, as individual employees, would be bound to such a clause as a condition of employment.[122] Thus, the plaintiffs insisted that, under the NLRA's exclusive-representation model based in section 9(a) of the NLRA, all employees "must accept as an inflexible condition of employment CWA's unilateral choices regarding 8(a)(3) [union security]-agreements and all other subjects of bargaining. Thus, the coercion material to 'governmental-action' analysis derives from CWA's 9(a) status."[123]

While the plaintiffs relied on none of the standard cases on state action discussed above, they did rely heavily on one Supreme Court case from 1944, *Steele v. Louisville & N.R. Co.*[124] Steele, an RLA case, did not involve union security clauses. Rather, it was one of the early cases that helped create the doctrine of the union's duty of fair representation (DFR). The DFR is a court-created rule used under both the NLRA and RLA. In short, while the duty is not in the text of either statute, courts have inferred that unions have a duty to act with a certain level of competence, fairness, and good faith when representing any and all members of their bargaining units, as a necessary co-

unimpressed with *Hanson*, stating: "Explication of *Hanson*'s shadowy verbiage is not worthwhile." Brief for the Respondents, *supra* note 117, at 11 n.42.

120. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 197–98 (2015) [hereinafter Estlund, *Unions*] (discussing how unions bargained for exclusive representation prior to the NLRA or RLA, but now labor statutes make it the sole model where unions are selected as representatives).

121. Brief for the Respondents, *supra* note 117, at 7.

122. *Id.*

123. *Id.* at 7–8.

124. 323 U.S. 192 (1944); Brief for the Respondents, *supra* note 117, at 9–10.

rollary to the union's right of exclusive representation.[125] The majority in *Steele* did not find state action or a constitutional violation, but rather asserted, with little explanation, that if the RLA did *not* contain something like a DFR rule, racial discrimination by unions could implicate state action. But, the majority then explained, the RLA should be read to provide a DFR rule, so there was no constitutional violation or need to further consider constitutional issues.[126]

In *Beck*, the plaintiffs relied not on the majority opinion in *Steele* but, rather, on part of Justice Murphy's concurring opinion in *Steele*. Justice Murphy wrote:

> The constitutional problem inherent in this instance is clear. Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress.[127]

As shown above, though, all these arguments go far beyond all other Supreme Court cases on what constitutes state action. Tellingly, the only Supreme Court decision the plaintiffs in *Beck* relied on for the state action issue was *Steele*—a case that is now over seventy years old, is not even mentioned in leading discussions of state action,[128] has not been followed by any modern case, and whose majority opinion does not actually find state action.

The theory from *Steele*'s concurrence is essentially arguing the indefensible position that where state action merely *permits* private parties to enter into contracts, such contracts constitute state action. It adds an unconvincing twist: a claim that if state action sets up a type of collective institution whose decisions can bind individuals who participate in that collective institution, that alone constitutes state ac-

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125. *See* HARRIS ET AL., *supra* note 35, at 1102–40.

126. The *Steele* majority opinion explained:

> If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.
>
> But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

323 U.S. at 198–99. Plaintiffs' brief did not quote the second paragraph above, the paragraph which makes it clear that the Court did not, in fact, find state action in this case. Brief for the Respondents, *supra* note 117, at 10.

127. *Steele*, 323 U.S. at 208; *accord* Brief for the Respondents, *supra* note 117, at 10 (quoting *Steele*, 323 U.S. at 208).

128. Neither Buchanan, *supra* note 29, nor Peretti, *supra* note 44, even mentions *Steele*.

tion. It should be stressed here that when Justice Murphy refers to "the entire craft or class," this does not mean all railroad workers or all railroad workers of a certain type in the profession as a whole. It means a discrete set of employees covered by a contract voluntarily entered into by a specific railroad employer and the union representing the specific group of that particular railroad's employees who have authorized union representation.

The *Steele* concurrence would go far beyond current law. As discussed further below, it would not only make all parts of union collective bargaining agreements subject to the Constitution, it would do the same for all contracts entered into by any kind of business association or other collective group that provides binding obligations to members of such association. Labor law grants certain rights and responsibilities to labor unions as collective entities, but this does not create state action in the voluntary actions of the collective entity. After all, as with unions, the rights, responsibilities, and levels of liabilities of business associations are set by statutes, and there has been no suggestion from the *Beck* plaintiffs or others that contract formation by business associations, outside the union context, therefore constitutes state action.

Further, while the NLRA does give "exclusive" or "monopoly"-type power to unions to negotiate terms and conditions of employment—where a majority of relevant employees have chosen a union, and for those employees only—again, per *Jackson*, a government grant of monopoly powers to an otherwise private party does not make that party into a state actor even if the government also heavily regulates that party. Moreover, a union lacks the power of a true monopoly: the NLRA gives unions the power to make contract proposals and requires employers to bargain in good faith over them, but unions do not have the power to unilaterally implement their proposals or to require the employer to adopt any of their proposals.[129] This is simply not state action as the Supreme Court has defined it. As *San Francisco Arts & Athletics*[130] explained, quoting two other Supreme Court cases, "[A] government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the [government].'"[131]

It is worth underscoring here that not only do labor laws not require union security clauses, such laws contain no "significant encour-

129. In addition to the discussion of the duty to bargain, see Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 849 (2012).

130. S.F. Arts & Athletics v. U.S. Olympic Comm., 483 U.S. 522 (1987).

131. *Id.* at 586 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982)).

agement" either. A black-letter "fundamental premise" of labor law is "freedom of collective bargaining . . . 'without any official compulsion over the actual terms of the contract.'"[132] Actual terms are set by the (private) parties. Section 1 of the NLRA does speak of "encouraging . . . collective bargaining," but this refers entirely to the process, not to any substantive result.[133] As Professor Dau-Schmidt notes, the government "encourages" a wide variety of economic activity—through, e.g., the law of business associations, tax law, loans and grants, and more—without any of the behavior by private parties taken pursuant to such encouragement being considered state action.[134]

In the end, *Beck* declined the plaintiffs' invitation to hold that the Constitution applied, and *Beck* did not rule, or even opine on, the issue of state action. In so doing, however, the *Beck* majority provided two citations that indicated that state action was *not* present. The Court stated:

> We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action. [Compare] *Steelworkers v. Sadlowski* (union's decision to adopt an internal rule governing its elections does not involve state action) [and] *Steelworkers v. Weber* (negotiation of collective-bargaining agreement's affirmative-action plan does not involve state action).[135]

It is hard to imagine how a union security clause in a private-sector labor contract could implicate the Constitution if an affirmative-action clause in a private-sector labor contract does not. While some scholars have wondered if constitutional concerns were present implicitly, as *Beck* relied on *Street*'s interpretation of similar statutory language, and *Street* spoke of constitutional concerns,[136] these cites indicate otherwise. In any case, after *Beck*, the fate of private-sector union security clauses seemed to have been resolved without any reference to the First Amendment.

The short response to *Beck*'s plaintiffs' argument, therefore, is as follows: there is no state action when governments grant monopoly powers to institutions. Indeed, a private utility is arguably granted a *stronger* monopoly than a union. For example, those the utility serves have no vote on who runs the utility nor any direct vote on whether to establish or disestablish the utility as members of union bargaining

132. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, 254–55 (1974) (quoting H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970)).

133. The "fundamental premise" on which the NLRA is based is "private bargaining under government supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co.*, 397 U.S. at 108.

134. Dau-Schmidt, *supra* note 23, at 137–83.

135. Commc'ns Workers v. Beck, 487 U.S. 735, 761 (1988) (first citing Steelworkers v. Sadlowski, 457 U.S. 102, 121 n.16 (1982); and then citing Steelworkers v. Weber, 443 U.S. 193 (1979)).

136. *See* Sachs, *supra* note 129*,* at 816–17, 817 n.94.

units do with unions.[137] There is no state action when a private party, including a private party whose collective form is authorized by statute, is given the power to discharge an employee. Under long-existing corporate and employment law, private companies may legally discharge employees for joining or refusing to join any organization, or for explicit political speech, without implicating the Constitution. Even if labor statutes make the limited forms of union security clauses they permit somewhat more common than such clauses would be without labor statutes, the statutes do so *solely* by modestly increasing the bargaining power of the union that a majority of relevant employees chose, not by requiring such clauses or rewarding parties for voluntarily choosing them.[138] This is not state action.

E. *Keller*, the First Amendment, and the State Bar Comparison

The only other Supreme Court case suggesting that state action exists in private-sector labor contracts is *Keller v. State Bar of California*,[139] although *Keller*'s discussion of union issues is in somewhat muddled dicta. *Keller* found a First Amendment right for attorneys to object to a state bar using mandatory fees for ideological purposes. In *Keller*, the state had created an "integrated bar" to govern the legal profession, and lawyers were required to pay dues to this bar in order to practice law in the state. Relevant here, *Keller* reasoned in part that the state bar was not really a government agency but was analogous to a labor union. But exactly how, and to what kind of union, was unclear. At one point *Keller* stated that the state bar was "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees."[140] Confusingly though, while *Keller* relied in part on *Abood* and other public-sector labor cases[141] which clearly involve state action, *Keller* also

137. *See* Dau-Schmidt, *supra* note 23, at 128.

138. Dau-Schmidt, *supra* note 23, at 134, offers a counter to the suggestion that labor law encourages union security clauses. Since such clauses can only be the result of voluntary bargaining, he notes, they could be traded off for other benefits or rights. Thus, whether a union security clause is included in a contract "will depend on whether it is an 'efficient' contract term, in that its benefits to the employees outweigh its costs to the employer, and not on the respective bargaining power of the parties." *Id.* In other words, the greater bargaining power that labor law provides to unions can result in workers receiving a greater share of an employer's profits, but that bargaining power does not determine what specific terms are most desirable to the union or employer or what will be included in a contract.

139. 496 U.S. 1 (1990).

140. *Id.* at 13.

141. *E.g., id.* at 10 ("[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1997))).

cited *Hanson* and *Ellis*, while correctly noting that *Ellis* was "construing the RLA"[142]—as opposed to having been decided on constitutional grounds. Also confusingly, *Keller* stated that "the principles of *Abood* apply equally to employees in the private sector."[143] Did that merely mean that the substantive *rule* (i.e., union security clauses cannot compel dissenting employees to pay that portion of their union dues not related to collective bargaining) is the same in the private sector and public sector? If so, that is uncontroversially true: *Beck* and subsequent private-sector precedent, while decided on statutory grounds, use the rule *Abood* and subsequent public-sector precedent found that the First Amendment required. But did *Keller* mean that the *source* of the rule was the same in the public and private sectors? If so, that statement would be at least mostly false. Again, while the source of the rule in the *public* sector is the Constitution, in the *private* sector, under the RLA, only *Hanson* seems to have found state action, with later cases avoiding constitutional issues, and no case under the NLRA has found state action.[144]

Intriguingly, while the *Harris* majority briefly discussed *Keller*, it did not use this case to bolster its suggestion that private-sector labor relations may implicate state action. Rather, the *Harris* majority merely argued that *Keller* was consistent with *Harris*'s refusal to extend *Abood* to cover the particular workers in the *Harris* litigation.[145] Still, *Keller* stated, albeit in brief dicta, that *private*-sector unions are covered by a "constitutional rule" with regard to mandatory dues, and this is similar to the *Harris* majority's suggestions.[146]

State bar associations, however, are quite different than unions, distinguishable in several significant ways. First, in *Keller*, the government itself affirmatively required both membership in the state bar and payment of mandatory dues to an organization as a condition of practicing law.[147] Under labor law, the state does not require an employee to be a member of a union bargaining unit to practice in any given profession. This is especially true as a practical matter in the private sector, where total union density is now under seven percent.[148] Unions may only represent employees where a majority of relevant employees support the union, and unions can be "voted out"

142. *Id.* at 14.

143. *Id.* at 10.

144. *See* HARRIS ET AL., *supra* note 35, at 1153–82.

145. Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014).

146. *Keller*, 496 U.S. at 14

147. *Id.* at 5.

148. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2016 (Jan. 26, 2017), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.unl.edu/3YV2-XNW8] (stating that private-sector union density in 2016 was 6.4%).

through decertification proceedings.[149] Also, again, the government neither requires union security clauses nor rewards parties for having them. Further, the government has significant involvement in setting substantive rules for attorneys practicing law, including, but not limited to, requiring a law license and setting requirements for how such licenses may be obtained, whereas it has little to no involvement in setting the terms of labor contracts.[150] Beyond the explicit bars on a handful of types of contract clauses in the NLRA and RLA, again, the general principle in labor law is that the government, both agencies and courts, should avoid as much as possible any input on the substantive terms of labor contracts.

In terms of comparing lawyers to unions, a more analogous case would be *Polk County v. Dodson*,[151] which held a public defender does not act under the color of state law when representing criminal defendants even though the state funded such criminal defenses.[152] And again, the government does not even fund unions.

In sum, the most that the NLRA and RLA do is authorize, when a majority of a specific group of employees at a specific employer desire, a collective institution to be the agent for a contract that is binding on individual members of that group regarding their employment at that employer. The government sets no terms of the contracts and requires no payments from individuals as a condition of any particular job, much less profession. Again, labor law is no different than corporate and agency law, which authorizes entities composed of a group of people to enter into contracts that bind individual members of that entity, and which specifies who may negotiate and enter into such contracts. No case has suggested that the mere fact that corporate law authorizes corporate agents to enter into contracts, employment or otherwise, that bind individual employees, managers, or owners of the corporation creates state action. Yet, there have been undercurrents in U.S. law that suggest that somehow unions are different.

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149. For rules on certification and decertification, see PAUL M. SECUNDA, ANNE M. LOFASO, JOSEPH E. SLATER & JEFFREY M. HIRSCH, MASTERING LABOR LAW 119–25 (2014).

150. As Professor Cynthia Estlund points out:

> Lawyers have no individual or collective right to refrain from bar oversight; submission to regulation by the bar is mandatory for all lawyers, and they do not get to choose among competing bar associations or to form their own. By contrast, . . . workers may choose among existing unions, form their own union, or have none at all, based on majority rule in particular workplaces.

Estlund, *Unions*, *supra* note 120, at 192.

151. 454 U.S. 312 (1981).

152. Although *Dodson* reserved the right to distinguish between the concepts of "state action" and "under the color of law," the Court has never done so. Buchanan, *supra* note 29, at 672.

F. Unions as a Special Case and Race

In debates on this issue, one senses that for some, unions are simply a special case to which normal rules that apply to other private organizations, especially businesses, do not apply.[153] Corporate law permits businesses to set a wide range of rules for those who participate in, or even interact with, the business without courts finding or suggesting this creates state action. Relevant here, these include the power of corporate management to set rules for employment in the corporation such as conditions for discharge, and the discretion of corporate managers to use corporate profits and income from shareholders for political purposes. Professor Benjamin Sachs has stressed that there is no more state action in private-sector union security clauses than in acts by private corporations in general. While the NLRA arguably encourages unions and collective bargaining, corporate law similarly encourages the formation and growth of corporations and corporate investment.[154] Both unions and corporations are associations that engage in both economic and political activity.[155] In sum, "it is difficult to justify a conclusion that state action defines the union setting but not the corporate one."[156] Other scholars have come to similar conclusions.[157]

To understand the otherwise puzzling argument that private-sector union security clauses involve state action, one must understand the impact on the legal theory of the mid-twentieth century of the sometimes connected, but sometimes oddly paralleled, opposition of liberals to race discrimination and conservatives to unions. As noted above, Professor Peretti shows that the Supreme Court was, at least in the period before the 1970s, before modern antidiscrimination statutes, most willing to expand state action doctrine in cases involving race discrimination. It is the thread that connects *Shelley* to *Steele*.

153. Plaintiffs in *Communications Workers v. Beck*, 487 U.S. 735 (1988), addressed cases such as *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987), by stressing that they arose "outside the peculiar area of labor relations." Brief for the Respondents, *supra* note 117, at 15.

154. Sachs, *supra* note 129, at 846–47 (noting that corporate law grants legal personality to corporations to have the same powers as individuals to do what is necessary or convenient to carry out its business and grants them "perpetual life" so that they can survive across changes in shareholders and management).

155. *Id.* at 853–54.

156. *Id.* at 848.

157. *See, e.g.*, Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 100, 98 CORNELL L. REV. 1023 (2013); Charlotte Garden, Citizens United *and the First Amendment of Labor Law*, 43 STETSON L. REV. 571 (2014); Sachs, *supra* note 129 (all arguing, among other things, that union-security-clause doctrine is inconsistent with analogous First Amendment doctrine governing, e.g., corporations, after *Citizens United v. FEC,* 558 U.S. 310 (2010)).

The desire to expand the limits of state action doctrine on the liberal side came in large part from frustrations with the lack of legal tools to combat private race discrimination in the era before antidiscrimination statutes. Meanwhile, some on the conservative side were eager to use a similar broad view of state action specifically as a way to attack unions. While modern state action theory has abandoned these approaches, the reality of five conservative Supreme Court justices in *Harris* expressing sympathy to the old anti-union arguments cannot be explained without understanding this history.

Sophia Lee's excellent book, *The Workplace Constitution*,[158] traces the evolution of these ideas. Explicit race discrimination in employment was common before the Title VII era, and unionized employment was no exception. The model of exclusive representation coupled with earlier forms of union security agreements such as the closed shop created serious problems for black workers, especially in cases where the unions themselves discriminated on the basis of race.[159] Not surprisingly, in the years before the NLRA, black leaders were divided on whether the labor movement posed a threat or an opportunity. Although by the later New Deal many prominent black voices embraced the latter view, the NLRA did not ban race discrimination, nor did any other contemporary law bar race discrimination in private employment.[160] Yet, race discrimination in employment, and society in general, was increasingly perceived as a problem, an especially vexing one for liberals in the decade leading up to *Brown v. Board of Education*.[161]

It is in that time period and context that cases such as *Steele* and *Shelley* arose: cases which, frankly, bent state action theory beyond any bounds that were previously recognized or would be recognized later, in an attempt to address the fundamental evil of racism in private economic transactions before statutes barred such discrimination.[162] Yet, while *Shelley* was a brief high-water mark for this approach, even at the time, courts shied away from its broadest implications, leading to confusing decisions such as *Steele*. As Lee puts it, "Whether the Constitution created unions' duty [of fair representation], compelled the Court's interpretation of the act, or merely hap-

158. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (Sarah Barrnger Gordon et al. eds., 2014). Also consider the insightful review essay discussing this book in light of *Harris*, Cynthia Estlund, *How the Workplace Constitution Ties Liberals and Conservatives in Knots, The Workplace Constitution From the New Deal to the New Right, by Sophia Z. Lee*, 93 TEX. L. REV. 1137 (2015) [hereinafter Estlund, *Workplace Constitution*], and further discussion in Estlund, *Unions*, *supra* note 120, at 179–84.

159. LEE, *supra* note 158, at 14–16.

160. *Id.* at 11–21.

161. 347 U.S. 483 (1954).

162. LEE, *supra* note 158, at 11–34 (discussing *Steele* and related issues).

pened to coincide with it, was unclear."[163] Thereafter, the DFR doctrine that *Steele* helped create was refined in a series of NLRA and RLA cases, several more of which involved, at least alleged, union discrimination against black employees but which did not invoke the Constitution.[164]

Liberal attempts to use a fairly all-encompassing theory of state action to combat race discrimination in this period existed at various levels. Frank Bloom, a chief trial examiner at the National Labor Relations Board (NLRB),[165] promoted the theory "that government's mere tolerance of discrimination constituted impermissible state action."[166] This theory, which goes beyond even *Shelley*, which at least required government active enforcement of private agreements that discriminated, was never adopted.[167] The NLRB then later invoked the concept of state action in another way to try and combat race discrimination. In 1946, the year before Taft–Hartley made the closed shop illegal, the NLRB adopted a policy such that, if a union negotiated a closed shop, it could not engage in racial discrimination in membership.[168] Did the Constitution actually require that? The NLRB explained that this policy came from interpreting the NLRA's term "representative" in light of the NLRA's purposes, as well as "the national policy against discrimination" as "expressed in the Fifth Amendment . . . and in the President's Executive Orders."[169] While promoting a good cause, this all represents an incoherent hash regarding state action theory that, not surprisingly, fell to the wayside after the Civil Rights Act of 1964—including, but not limited to, Title VII—and other statutes that barred employment and certain other types of racial discrimination by private parties.

Still, concerns about racial discrimination were central in theories of state action in the years leading up to those antidiscrimination statutes. Revealingly, Justice Douglas, author of the *Hanson* decision, was generally an advocate for a broad view of state action in order to combat racial discrimination. Just before Title VII was enacted, the Supreme Court issued a fractured set of opinions in *Bell v. Maryland*,[170] which involved trespass convictions of civil rights activists at a segregated restaurant. *Bell* raised the issue of whether the Constitution barred state enforcement of discrimination in private accommodations. While the majority opinion by Justice Brennan avoided state

163. *Id.* at 33.
164. HARRIS ET AL., *supra* note 35, at 1102–03.
165. The NLRB is the agency tasked with deciding most cases of alleged violations of the NLRA in the first instance.
166. LEE, *supra* note 158, at 47.
167. *Id.* at 45–47.
168. *Id.* at 54.
169. *Id.*
170. 378 U.S. 226 (1964).

action issues, Justice Douglas, in conference and in a concurring opinion, argued to the contrary. The state had licensed the restaurant, which made it "an instrumentality of the state," which could not run "on the basis of *apartheid*."[171] In his concurrence, Douglas wrote that the "whole Nation" must "face the issue . . . at the root of demonstrations, unrest, riots, and violence in various areas."[172] While the Court never adopted the view that the government's licensing of businesses makes the decisions of those businesses state action, the source of Douglas's concerns is revealing.

This had a real effect on state action theory. As Professor Cynthia Estlund put it, "[T]he Supreme Court did expand the meaning of state action in order to strike down some entrenched Jim Crow practices."[173] But, she adds, "[I]t never went far enough in its state action jurisprudence to impose constitutional constraints on ordinary private employers' hiring, firing, and disciplinary practices."[174]

Unions were a more difficult issue for some because they had gained some of their power from the NLRA, as opposed to employers who held their powers over employment from the common law.[175] Yet, on closer inspection, it should make no difference to the state action issue whether a private employer's power to agree to permit contract terms comes from state common law or federal statutory law. Here, Lee's discussion of the parallel thread of the legal argument—conservatives using broad state action to attack unions—is key.

While liberals were experimenting with broad theories of state action in order to combat racism, some on the political right were using similar theories specifically to attack unions. With famous movie director Cecil B. DeMille as a lead plaintiff, the post-New Deal, newly christened right-to-work movement adopted the sort of state action arguments that *Steele* suggested—although, Lee writes, conservatives used the analogy between right-to-work and black civil rights to bolster their anti-union movement, not to support the civil rights movement. Their goal was to weaken unions.[176] Their legal theory was, explicitly, that state action exists when courts *permit* private entities to harm other private entities.[177]

Conservatives pushed constitutional objections to union security clauses in both the public and private sector. In the public sector, with

171. LEE, *supra* note 158, at 151 & n.42.
172. *Bell*, 378 U.S. at 243 (Douglas, J., concurring).
173. Estlund, *Workplace Constitution*, *supra* note 158, at 1147.
174. *Id.*
175. *Id.*
176. LEE, *supra* note 158, at 56–69.
177. *Id.* at 77 (quoting Petition for Writ of Certiorari, 15, De Mille v. Am. Fed'n of Radio Artists, 333 U.S. 876 (1948) (No. 679)). There was never a decision in this case that addressed the state action issue. LEE, *supra* note 158, at 75; *see* Estlund, *Workplace Constitution*, *supra* note 158, at 1152.

Abood, they succeeded in establishing a First Amendment right for members of union bargaining units to refuse to pay dues pursuant to a union security clause for activities not related to collective bargaining. They would continue to make the argument that the First Amendment did not allow *any* form of union security clause in the public sector in a series of cases, coming the closest, but not quite succeeding, in *Harris*. Conservatives pushed this constitutional argument in the private sector as well, but aside from *Hanson,* no court found a constitutional violation. While dicta in *Street* arguably kept this argument alive from the mid-1950s through the mid-1980s, likely because it was decided as a matter of constitutional avoidance, no subsequent case felt it necessary to squarely address the issue. In 1988, *Beck* was decided on statutory, not constitutional, grounds. In the decades between *Beck* and *Harris*, the theory that private-sector union security clauses constituted state action was effectively dormant.

Meanwhile, the enactment of various antidiscrimination statutes seemed to quell the desire of liberal justices to expand state action to try to address race discrimination by ostensibly private actors. Modern state action theory does not contain the arguably implicit special rules for race discrimination that cases from an earlier era did. For example, in *Moose Lodge No. 107 v. Irvis*,[178] the Supreme Court found no state action in a state's granting of a liquor license to a private club which discriminated on the basis of race. State action, the Court explained, is not created "if the private entity receives any sort of benefit or service at all from the state, or it if it is subject to state regulation in any degree whatever."[179] The state must have "significantly involved itself with invidious discrimination."[180]

Still, some anti-union conservatives never gave up on their argument that a broad theory of state action should apply to unions. As Professor Estlund explains, while *Beck* was a partial victory for right-to-work in that it created a substantive statutory right under the NLRA for a dissenting member of a union bargaining unit to refuse to pay dues that go to activities not related to collective bargaining:

> [T]he ultimate goal of the right-to-work advocates—embraced by Justice Black's dissent in *Street*—was uncompromising and unchanged. In their view, the Constitution compels an open shop, or a right-to-work regime across the board, and is contravened by any contractual or statutory provision requiring individuals to pay a fee of any kind to a union . . . .[181]

Harris brought this argument back from its apparent grave. Yet, courts have never accepted this argument. That is in large part be-

178. 407 U.S. 163 (1972).
179. *Id.* at 173.
180. *Id.* Justice Douglas dissented in *Moose Lodge*, perhaps demonstrating that he has long had an exceptionally broad view of what should constitute state action. *Id.* at 179–83.
181. Estlund, *Workplace Constitution*, *supra* note 158, at 1155.

cause accepting it would revolutionize state action theory, making it so broad as to be truly incoherent.

III. THE IMPLICATIONS OF FINDING THAT PRIVATE-SECTOR UNION SECURITY AGREEMENTS CONSTITUTE STATE ACTION

Finding that private-sector union security clauses constitute state action would be incoherently broad theoretically and would be unbounded and unworkable in practice. As to theory, adopting the argument right-to-work advocates have pushed comes down to accepting a theory that state action is present where the law merely *permits* a private entity to, arguably, harm another.[182] This approach would essentially obliterate the meaning and, therefore, the requirement of state action. In practice, applied in a principled manner, any theory supporting the *Harris* dicta would have extraordinary and undesirable effects in all areas of law. Applied just to unions, this theory would be deeply unprincipled.

A. Incoherently Broad in Theory

The theory that contracts between private parties may implicate state action when enforced by a court is most famously associated with *Shelley v. Kraemer*.[183] *Shelley* found that a court attempting to enforce racially restrictive covenants constituted state action sufficient for a constitutional violation, explaining that the state was sufficiently "entangled" in the discriminatory act. Union security clauses are arguably distinguishable because, like other clauses in labor contracts, they are enforced primarily through a system of private arbitration, designed by the private parties to the labor contract and administered by private arbitrators, and are not usually enforced by courts or government agencies.[184] But, more importantly, courts have at best limited *Shelley* to its facts because of its potential extraordinary breadth.[185] For example, in *Evans v. Abney*,[186] the Supreme Court

182. *Id.* at 1153–53 (correctly characterizing the right-to-work argument in this fashion and pointing out some of the radical implications, including reversing the traditional "at will" employment rule).

183. 334 U.S. 1 (1948).

184. *See, e.g.*, HARRIS ET AL., *supra* note 35, at 1033–87. It is true that if parties refuse to abide by the arbitrator's decision, an objecting party may seek court enforcement. But the standard of review courts use in labor arbitrations is so deferential that this rarely, in fact, happens. It is also true that an employee could, in theory, file a type of DFR claim that the NLRB or court could hear if the employee claimed that a certain contract clause was actually illegal, but this too is uncommon. The standard way in which labor contracts are enforced is through private arbitrators. *Id.*

185. *See supra* notes 76–83 and accompanying text. *Shelley v. Kraemer* "has proven to be a very difficult case to rationalize." Mark D. Rosen, *Was* Shelley v. Kraemer

found no unconstitutional state action even though *Evans* also involved court enforcement of racially based property restrictions.[187] Professor Rosen adds that "[c]ourts routinely enforce contracts whose substantive provisions could not have been constitutionally enacted by government,"[188] for example, settlement agreements that limit a party's ability to speak publicly about the settlement.

Of course, legal theorists of the past and present have argued that the public/private distinction at its very core was incoherent in principle.[189] In this tradition, Professor Mark Tushnet has suggested that the "background rules" of state common law doctrines of property, contract, and tort are a form of public regulation.[190] This Article is not meant to suggest that the critiques of the very concept of a public/private distinction, or arguments that state action literally always exists,[191] do not have at least some provocative force. Courts, however, have not come remotely close to adopting this approach, and it seems highly unlikely that the justices in the *Harris* majority, or other Supreme Court justices, intended to. To do so would profoundly transform private law.

In general, conservative Justices have favored narrower constructions of state action.[192] It is understandable that the conservative litigants in *Beck* and related cases would advocate a theory of state action broad enough to essentially make the state action requirement meaningless; their goal was and is to make all union security clauses unconstitutional, and they could choose to ignore the implications of their theories in other contexts. But, any principled application of the

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Incorrectly Decided? Some New Answers, 95 CAL. L. REV. 451, 453 (2007). Professor Peretti labels *Shelley* "anomalous" and quotes Professor Michael Klarman that "*Shelley* would have been a 'truly revolutionary' decision, had subsequent decisions taken it seriously, which they never did." Peretti, *supra* note 44, at 281.

186. 396 U.S. 435 (1970).

187. Peretti, *supra* note 44, at 278. *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978), also involved private enforcement of a private contract, and even though there was some involvement of a state actor, the court found no state action.

188. *Evans*, 396 U.S. at 453–54.

189. *See, e.g.*, Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

190. *See* Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., 2006).

191. Cass R. Sunstein, *State Action is Always Present*, 3 CHI. J. INT'L L. 465 (2002); *see also* Charles L. Black, Jr., *The Supreme Court 1966 Term: Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (arguing that state action is "a conceptual disaster area.").

192. While the story of the narrowing of the state action doctrine is more complex than simply liberal judges expanding the doctrine and conservative judges limiting it, this ideological division is, as Professor Peretti put it, "certainly part of the story." Peretti, *supra* note 44, at 274.

suggestions in *Harris* by courts would have sweepingly unbounded and undesirable effects.

B. Unbounded and Unworkable in Practice

Deciding that private-sector labor contracts are a product of state action would have extreme and troubling practical consequences, including, but not limited to, union security clauses and labor law generally. To start with labor law, this approach would do at least the following. First, it would make all union security clauses in the private sector, as well as the public sector, unconstitutional. While that is not the rule the Court has worked out for the public-sector under the First Amendment per *Abood* nor is it the rule this author would endorse for situations in which state action is present,[193] *Harris* and *Friedrichs* indicated that there are at least four votes on the current Supreme Court to reverse *Abood* and hold that the First Amendment does not permit any type of union security clause. As shown above, the *Harris* majority severely criticized *Abood* and the idea that union security clauses of any kind were constitutional; it only avoided overturning *Abood* because, the *Harris* majority found, the workers at issue were merely "quasi-public," not fully public, employees. *Friedrichs*, however, unambiguously involved fully public employees (public school teachers in California), and the Court, even without Justice Scalia, still had four votes against upholding the lower court decision that had simply applied *Abood*. Thus, *Friedrichs* indicates that there are at least four justices currently on the Supreme Court who believe that where state action exists, the First Amendment bars any sort of union security clause.[194] And again, dicta in *Harris* seems to indicate that at least four current justices may be willing to apply that constitutional analysis to the private sector. Mandating right-to-work rules in the private sector would have a crushing effect on unions.[195]

193. *See, e.g.*, Estlund, *Unions*, *supra* note 120, at 215–20 (arguing that even where the First Amendment applies, union security clauses are not a constitutional violation).

194. *See* Charlotte Garden, Friedrichs v. California Teachers' Association *& Why We Need Nine*, AM. CONST. SOC'Y: ACSBLOG (March 30, 2016), https://www.acslaw.org/acsblog/friedrichs-v-california-teachers-association-why-we-need-nine [https://perma.unl.edu/YF8Q-ZLSP].

195. This is true in part because right-to-work rules combined with DFR rules create a major "free rider" problem for unions. In right-to-work jurisdictions, members of a union bargaining unit may not be required to pay any dues, and thus may not be required to pay any of the costs the union incurs representing them. On the other hand, it is black-letter DFR law that unions may not refuse to represent members of their bargaining units, e.g., in contract negotiations or in grievance and arbitration procedures, because they refuse to pay dues. *See* HARRIS ET AL., *supra* note 35, at 1129–30.

Second, this approach would seem to require that *all* clauses in private-sector union contracts would be a product of state action. How could other clauses be distinguished? Surely not through *Hanson*'s suggestion that the RLA preempting state laws which barred union security clauses creates state action. Because, as shown above, federal labor laws preempt state statutes both specifically and generally. The NLRA preempts state laws that purport to limit or expand employee rights under section 7 of the NLRA, including, but not limited to, the right to bargain collectively.[196] Alternatively, labor laws use the exclusive-representative model for negotiating all terms of labor contracts, not just union security clauses. Yet, no court has ever suggested that, for example, a private-sector labor contract clause that allowed drug testing is subject to the Fourth Amendment restrictions, as such clauses are in the public sector under the Constitution.[197] Would Fifth Amendment protections apply to private-sector contract clauses covering discipline if the employer was investigating potentially criminal activity, as they do in public-sector labor contracts?[198] Would contractual disciplinary procedures, including grievance and arbitration clauses, in the private sector have to comply with constitutional due process rules?[199] Again, no court has ever suggested this, but this would be the logical extension of the arguments that union security clauses in the private sector constitute state action.

Indeed, finding state action in other private-sector labor contract provisions would not only be inconsistent with current practice, it would also be inconsistent with at least one significant Supreme Court decision that *Beck* cited favorably. As noted above, the *Beck* majority made a point of observing that *Steelworkers v. Weber*[200] had held that an affirmative action clause in a private-sector labor contract did *not* implicate state action.

Moreover, the implications would go far beyond union contracts or even employment contracts. Under *Hanson*'s reasoning, if the NLRA creates state action, then why wouldn't the Federal Arbitration Act

196. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959).

197. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (holding that the Fourth Amendment places certain limits on drug testing in public employment; e.g., employees whose work does not implicate special safety concerns may not be tested without reasonable, individualized suspicion).

198. *See* Garrity v. New Jersey, 385 U.S. 493 (1967) (holding that public employees have certain Fifth Amendment rights against self-incrimination in employer investigations into alleged workplace misdeeds that would also be crimes).

199. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (setting out due process requirements for public employees with a property interest in public employment). Note that under *Loudermill*, private-sector union employees would almost always have a propriety interest in public employment through the standard "just cause" discipline requirements in union contracts.

200. 443 U.S. 193, 200 (1979).

(FAA)?[201] The FAA goes further than the NLRA and RLA in that the FAA permits employment and other contracts that would not be legal absent the federal statute, as well as preempts state laws that purport to bar such agreements. *Circuit City Stores v. Adams*[202] upheld the right of employers under the FAA to require employees, as a condition of employment, to arbitrate any employment law dispute, as opposed to litigating in court. Furthermore, it held that the FAA preempts any state law attempting to bar such agreements, which some did. Subsequently, the Supreme Court has held that, under the FAA, individual agreements to arbitrate may legally bar class actions, preempting any state law making that term illegal.[203]

The FAA, of course, also governs arbitration agreements outside the employment context, such as in commercial purchases. No case has suggested that arbitration agreements authorized by the FAA in private employment or in private commercial transactions constitute state action that implicates the Constitution, yet under the reasoning of *Hanson,* they should.

Beyond this, if applied in a principled manner, the theories used to argue that private-sector union security clauses constitute state action—that federal contract law preempts private contract law, that federal contract law authorizes a type of collective entity and permits it to form voluntary contracts that are binding, or both—would have too many obvious and bizarre consequences to list. At minimum, all actions taken by any and all previously private collective entities authorized by law, be it a union or corporation, would constitute state action.

IV. CONCLUSION: A BETTER APPROACH TO STATE ACTION

Were the justices in *Harris* to follow up on their surprisingly strong suggestion that private-sector union security clauses implicate the First Amendment, it would create an incoherently broad and practically problematic theory of state action. The Court should clarify that it is not going down this path and explain why. The following briefly summarizes the basic principles that should govern in this area.

If a law literally *requires* any particular employer and group of employees to be subject to a union security clause, that would likely be state action. In part, that is why public-sector contracts involve state action: the government employer is, through being a party to the contract, requiring certain terms in the text of a contract.

201. 9 U.S.C. §§ 1–16 (2012).
202. 532 U.S. 105 (2001).
203. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

If a law specifically requires parties to pay dues to a union, or other institution, as a condition of practicing any particular profession, and that profession was otherwise highly regulated and constrained by the state, that could constitute state action. This is essentially *Keller* without the confusing dicta about unions.

If, however, the law merely authorizes parties to enter into contracts generally, and it does not dictate or require terms, that is not state action. It does not become state action merely because the law authorizes the creation of certain collective entities that may take part in the negotiations and bind participants in the organization, be they private business organizations or unions. It does not become state action because the relevant law is federal law that preempts state law in the area. And, it does not become state action merely because deeming it so could allow judges to impose their policy preferences, about unions or other matters, as a matter of constitutional law.