

***Do Private-Sector Labor Contracts Constitute “State Action”?* Harris v. Quinn
Revives a Puzzling Approach** — A half-baked idea by Joseph Slater

*Harris v. Quinn*¹ is best known for what it held about union security clauses² in the public sector.³ But the majority opinion in *Harris* also suggested that such clauses in the *private* sector raised questions under the First Amendment. This is puzzling, because clauses in private-sector labor contracts seem to lack a basic requirement of such a claim: state action.⁴ While the Supreme Court has held (uncontroversially) that labor contracts in the *public* sector involve state action because one of the parties to the contract is a government entity, union security clauses in the *private* sector are contractual agreements between two private parties. In its many cases on union security clauses, the Supreme Court has only once held that *private* sector union-security clauses implicate state action, in a case decided 58 years ago.⁵ As shown below, other cases involving union security clauses in the private sector have been resolved through statutory interpretation, not as a matter of Constitutional law.

Yet in *Harris*, a public-sector case that did not raise any private-sector issues, the majority (Justice Alito, writing for himself and four others) discussed private-sector law for several pages, focusing on potential Constitutional issues.⁶ First, the majority criticized *Railway Employees v. Hanson*⁷ for finding no First Amendment violation in a private-sector union security clause case, arguing that *Hanson*'s logic on this issue was inconsistent with other First Amendment doctrine.⁸ The *Harris* majority stressed that in *Hanson*, “all that was held”

¹ 134 S.Ct. 2618 (2014).

² A union security clause is a clause in a collective bargaining agreement that requires employees to pay at least some portion of normal dues to the union that represents them.

³ *Harris* was widely seen as an opportunity for the Supreme Court to greatly limit or even prohibit the use of union security clauses in the public sector. *Harris* could have, and almost did, overturn *Abood v. Detroit Bd. of Educ.*, 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 picked up on the *dicta* in *Knox v. Service Employees Int’l Union, Local 1000*, in which the majority indicated, in *dicta*, that the First Amendment might not allow an “opt out” system, but instead at most could allow an “opt in” system for paying for such activities. Instead, while the five-member majority in *Harris* spent a great deal of time criticizing *Abood* and union security clauses in general, *Harris* case was decided on relatively narrow grounds: the workers involved, home health-care aides were not, the majority held, “employees” under the state public-sector labor statute.

⁴ The “state action” requirement for most alleged Constitutional violations was originally articulated in *The Civil Rights Cases: United States v. Stanley*, 109 U.S. 3 (1883). There are only a few exceptions to this requirement: *e.g.* the 13th Amendment does not require state action; the “public functions” exception” (*see Marsh v. Alabama*, 326 U.S. 501 (1946), *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); and the “entanglement exception” most famously enunciated by *Shelley v. Kraemer*, 334 U.S. 1 (1948). Union security clauses obviously implicate neither the 13th Amendment nor the “public functions” exception. While neither *Harris* nor any other source of which I am aware has suggested that *Shelley* should be expanded to cover union security clauses, and I do not believe it could or should be, I will discuss *Shelley* further below.

⁵ *Railway Employees v. Hanson*, 351 U.S. 225 (1956), discussed in more detail, *infra*. Some of the other private-sector cases are also discussed *infra*.

⁶ 134 S.Ct. 2618, 2627-30.

⁷ 351 U.S. 225 (1956).

⁸ 134 S.Ct. at 2629, calling the reasoning in Justice Douglas’s majority opinion in *Hanson* “remarkable” and inconsistent with later opinions by Justice Douglas (who wrote the majority in *Hanson*) regarding mandatory membership in an integrated bar. This point is discussed further *infra*.

was that the private-sector labor statute “was constitutional in its *bare authorization*” of union-security agreements, and nothing further.⁹ The *Harris* majority also stressed that another early private-sector case, *International Association of Machinists v. Street*,¹⁰ while decided on statutory grounds, “recognized that the case presented constitutional questions ‘of the utmost gravity.’”¹¹ Further, the *Harris* majority quoted portions of Justice Black’s *dissent* in *Street*, which argued that the union security clause in that case *did* violate the First Amendment. While this was all *dicta* in *Harris*, it was striking not just because it was unnecessary to *Harris*’s holding, but also because it seemed to be exhuming an old, questionable, and potentially quite radical approach to state action.

This paper makes two points. First, while the suggestion in *Harris* about private-sector union contracts is *dicta*, it is important. It is important because other, albeit older, Supreme Court opinions have suggested that a First Amendment issue exists in this area, and the *Harris* majority seems to want to go further down this path. Also, this approach, if adopted into constitutional law would have truly significant consequences, and not just for union security clauses. For example, if private-sector labor contracts implicate state action, *other* clauses in such contracts would seemingly involve state action: *e.g.*, drug-testing provisions in private-sector labor contracts would be subject to Fourth Amendment scrutiny. Further, it could have potentially broad-ranging theoretical and practical consequences for many other areas of law. In short, the broad logic in *Hanson* was that state action exists if a federal law that permits private parties to enter into certain contractual terms preempts state laws that would ban such terms. If that logic is adopted, it would expand “state action” well beyond the broadest reading of *Shelley v. Kraemer*.

Second, this paper argues that union security clauses in the private sector do not implicate the First Amendment because there is no state action. Union security clauses are a result of bargaining between two private parties. Private sector labor law, under the National Labor Relations Act (NLRA)¹² and Railway Labor Act (RLA)¹³ (which governs the railroad and airline industries) does not require such clauses. Both statutes require bargaining in good faith, but neither one requires the parties to enter into any contracts at all, much less to agree on certain terms of employment. Further, neither the NLRA nor the RLA make legal contract clauses that would be illegal in the NLRA’s absence. Under the default employment law rules that would govern in the absence of the NLRA, employers could legally require employees to pay dues to almost any sort of organization as a condition of employment. *Hanson*’s conclusion that private-sector union security clauses involve state action is thinly-reasoned and unconvincing. *Hanson* asserted that the RLA involved state action essentially because, while the RLA does not require private parties to enter into union security agreements, the RLA preempts state “right to work” laws (laws that bar any form of union security clause). But federal pre-emption of state laws, regarding the formulation of employment contracts or otherwise, does not create “state action” in any other context I am aware of. The only other modern case that has stated (albeit again, in *dicta*) that private-sector union security clauses are subject to the First Amendment involved

⁹ 134 S.Ct. at 2629 (emphasis in original).

¹⁰ 367 U.S. 740 (1961).

¹¹ 134 S.Ct. at 2630.

¹² 29 U.S.C. §§ 151-69.

¹³ 45 U.S.C. §§ 151-88.

dues to an integrated state bar association.¹⁴ But a voluntary contract between private parties is quite different than a state licensing requirement. **This is the point I would like the most help on.**

A. Private-sector Union Security Clauses Are Not “State Action.”

1. Federal Pre-emption of State Law as State Action?

The only Supreme Court decision that explicitly held that private-sector union security clauses did involve state action, *Hanson*, is thinly-reasoned¹⁵ and unconvincing. Justice Douglas’s opinion asserted that the RLA involved state action because it preempts state “right to work” laws (laws that bar any form of union security clause). “If private rights are being invaded,” the majority reasoned, “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.”¹⁶ Thus, the majority 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.”¹⁷ 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.”¹⁸ None of the (many) Supreme Court cases involving union-security agreements since 1956 has held that the First Amendment applied in the private sector (several explicitly refused the invitation to rule on the basis of the First Amendment and relied instead on statutory interpretation; others simply ignored the First Amendment).¹⁹

The logic in *Hanson* on this issue is puzzling. Federal law routinely preempts state laws on labor and employment matters, including making various sorts of contracts 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 covered unions and employers from entering into various sorts of contract provisions: *e.g.*, NLRA Section 8(a)(3) bars contracts which permit the “closed shop” (union security clauses in which the employer agrees to hire only union members); Section 8(b)(6) bars contracts which permit “featherbedding” (agreements to pay employees for services that are not to be performed); and Section 8(e) bars “hot cargo” provisions (contract clauses that give employees the right to refuse to handle “struck goods” from other employers). The NLRA clearly preempts any state law purporting to permit any of these contract clauses. *San Diego*

¹⁴ *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

¹⁵ Even Justice Alito in *Harris* noted that in *Hanson*, “the First Amendment was hardly mentioned.” 134 S.Ct. at 2627.

¹⁶ 315 U.S. 225, 232 (citations omitted).

¹⁷ *Id.*

¹⁸ *Id.*, note 2.

¹⁹ See *International Association of Machinists v. Street*, *supra*, (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); *Communications Workers v. Beck*, 487 U.S. 735 (1988) (NLRA case, expressly not considering the Constitutional issue and deciding the case on statutory grounds); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1988) (NLRA case not mentioning the First Amendment).

*Building Trades Council v. Garmon*²⁰ (activities barred by NLRA Section 8 may not be permitted or regulated by the states). Yet, beyond *Hanson*, I have never heard it argued that NLRA preemption of state law in these or other contexts creates state action sufficient to implicate the constitution.²¹

Further, federal employment laws preempt state employment laws in a variety of ways. Some set “floors” and preempt state laws below the floor. For example, a state law could not make legal an employment contract that provides for pay less than the minimum wage (for parties the Fair Labor Standards Act covers). A state could not make legal employment contracts that permitted discrimination that Title VII prohibits. I know of no suggestion that such preemption creates state action.

It is worth repeating that neither the NLRA nor the RLA *require* unions and employers to agree to union security clauses. Indeed, neither requires the parties to enter into a labor contract at all. NLRA Section 8(d) 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.” Cases have specifically held that an employer refusing to agree to a union security provision does not violate the duty to bargain in good faith (or any other part of the NLRA).²² In short, while the RLA and NLRA (and case law interpreting those statutes) specify what types of union security clauses are legal and what types are not (for the NLRA, mainly but not exclusively in Section 8(a)(3)), it is hard to see how that alone creates state action.

Nor does the NLRA or RLA make possible a contract that would be illegal in the absence of these statutes. In the absence of these statutes, it would clearly be legal for an employer to make its employees sign contracts obligating them to pay dues to a union. Absent a state statute to the contrary, under basic “employment-at-will” rules, a private-sector 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 Party. The fact that some states have passed *statutes* barring private-sector employers from discriminating on the basis of political affiliation²³ is some evidence that policymakers and advocates do not believe the *Constitution* already barred such discrimination.

Finally, the “preemption” theory in *Hanson*, even if valid, would seem not to affect unions under the NLRA. Unlike the RLA, the NLRA’s “right to work” clause (Sec. 14(b)) permits states to make union security clauses of any type illegal. Interestingly, the Harris

²⁰ 359 U.S. 236 (1959).

²¹ In a several cases involving various contexts, the Supreme Court has found that the NLRA broadly preempts state laws in the same area, but, aside from *Hanson*, has never indicated that this preemption created state action. *See, e.g., Lodge 76, IAM v. Wisc. Employment Rel. Bd.*, 427 U.S. 132 (1976) (state law be used to challenge a concerted refusal to work overtime by employees covered by the NLRA); *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (NLRA preempts state law barring employers that receive state funds from using the funds to assist or deter union organizing).

²² *See, e.g., Erie Brush & Mfg. Corp.*, 700 F.3d 17 (D.C. Cir. 2012); *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457 (2d Cir. 1973).

²³ 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).

majority does not cite any NLRA cases or statutory language on the issue of union security clauses. Is the theory that the RLA constitutes state action but the NLRA does not? If so, that may be inconsistent with some of the broad *dicta* in *Keller*, discussed *supra*. On the other hand, the NLRA does preempt state law on a wide swath of issues regarding what union contracts can contain. Can *Hanson's* theory possibly be that preemption of laws barring union security uniquely creates state action?

B. Forced Association Creating State Action?

Again, *Hanson* was the only Supreme Court case to find state action in a union security clause. Beyond *Hanson*, though, the *Harris* majority cited approvingly a *dissent* in *Street* which would have found a First Amendment violation in that case. Again, the majority in *Street* relied on statutory interpretation to create the rule — now used for the NLRA, RLA, and public sector — 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.”²⁴ The *Harris* majority seemed to side with Justice Black’s dissent and criticism of this rule, which Justice Alito summarized as follows:

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.” *Harris* at 2630 (internal citations omitted).

In a separate dissent in *Street*, Justice Frankfurter, writing for himself and Justice Harlan, addressed Justice Black’s concerns.

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. . . . 367 U.S. at 806-09.

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²⁴ *Street* established this approach for the RLA though an interpretation of the RLA; *Abood* established it for the public sector as a matter of Constitutional law; and then *Beck* established it for the NLRA through an interpretation of the NLRA.

Yet the law remains muddled, as other cases have suggested that union security clauses in the private sector may implicate the Constitution, while never explaining precisely why there is state action. For example, another RLA case, *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*²⁵ begins by citing the admonition in *Street* that the Court should avoid deciding Constitutional issues if it can be construed to avoid constitutional difficulty.²⁶ It then applies the rules and test from *Street* (again, decided on a statutory basis) to a variety of union activities (to determine if they are “related to collective bargaining” or not). But in so doing, it mentions the First Amendment in several places, e.g., “[t]he First Amendment concerns with regards to publications and conventions are more serious.”²⁷ But there is no discussion of state action.

Perhaps the strongest argument for finding something like state action in private-sector labor relations comes from *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). *Keller* found a First Amendment right to object to a state bar using mandatory fees from attorneys for ideological purposes. In *Keller*, the state had created an “integrated bar” to govern the legal profession, and lawyers were required to pay dues. *Keller* reasoned that the state bar was not really a government agency, but was analogous to a labor union. Indeed, at one point the *Keller* majority concluded 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.”²⁸ Along those lines, while *Keller* relies in part on *Abood* and other public-sector labor cases,²⁹ it also cited *Hanson* and *Ellis* (although it does note that *Ellis* was “construing the RLA”).³⁰

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 workers in the *Harris*.³¹ 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.

One could, however, distinguish a state bar association from a union on various grounds: one does not have to be a union member to practice in any given profession (this is especially true in the private sector, where total union density is now under 7 percent)³²; unions may only represent employees where a majority of relevant employees support the union, and unions can be “voted out”; the government has significantly more involvement in setting substantive rules for attorneys than it does in setting terms of labor relations; private-sector labor law does not

²⁵ 466 U.S. 435 (1984).

²⁶ *Ellis* at 444.

²⁷ *Ellis* at 456.

²⁸ *Keller* at 2235.

²⁹ E.g., *Keller* quoted *Abood* quoting Thomas Jefferson: “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” *Keller* at 10.

³⁰ *Keller* at 14. Somewhat confusingly though, the *Keller* stated that “the principles of *Abood* apply equally to employees in the private sector.” *Keller* at 10. This apparently means that statutory analysis in the private sector leads to the same sorts of rules on union security clauses as Constitutional analysis yields in the private sector, but the discussion is less than clear.

³¹ *Harris* at 2644.

³² U.S. Department of Labor, Bureau of Labor Statistics, *Union Member Study*, USDL-14-0095 (Jan. 24, 2014) available at: <http://www.bls.gov/news.release/union2.nr0.htm>

require union security agreements and they exist only as a product of negotiation of private parties; and **THIS IS WHERE I COULD USE HELP THE MOST**

B The Radical Implications of Finding that Private-Sector Union Security Agreements Constitute State Action

Beyond the above, finding that private-sector union security clauses constitute state action would be radical theoretically and would have sweeping and disturbing practical implications. As to theory, beyond what is discussed above, two other approaches could conceivably be used to find state action. *Harris* mentioned neither, and both seem fairly implausible.

1. Radical in Theory

First, the theory that contracts between private parties may implicate state action is most famously associated with *Shelley v. Kramer, supra*. *Shelley* found that a court attempting to enforce a racially-restrictive covenant constituted state action sufficient for a Constitutional violation (the court found that the state was sufficiently “entangled” in the discriminatory act). Union security clauses are distinguishable at minimum in that they generally do not involve court enforcement. Union security clauses, like other clauses in labor contracts, are enforced primarily through a system of private arbitration, created and designed by the private parties to the labor contract, and administered by private arbitrators.³³ Holding that this constituted state action would be a huge expansion of *Shelley*.³⁴ Moreover, *Shelley* has been criticized and at best has been confined to its facts; arguably it has been broadly, if implicitly, rejected. Professor Mark Rosen has argued that *Shelley* “has proven to be a very difficult case to rationalize”³⁵ and further that it has not been followed. “Courts routinely enforce contracts whose substantive provisions could not have been constitutionally enacted by government,” e.g. settlement agreements that limit a party’s ability to speak publically about the settlement.³⁶ It also seems unlikely that the Justices in the *Harris* majority want to reinvigorate this doctrine.

Other exceptions to the traditional state action doctrine seem inapplicable as well. Does the fact that unions receive some protections and benefits from federal labor statutes create state action in union contracts? In *Moose Lodge No. 107 v. Irvis*³⁷ the 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 if it is subject to state regulation in any degree whatever.”³⁸

³³ See, e.g., SETH HARRIS, JOSEPH SLATER, ANNE LOFASO, AND DAVID GREGORY, MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS, 989-1003.

³⁴ A good comparison, in terms of private enforcement of private contracts, is *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978), in which the Supreme Court found that a private creditor (a warehouse) selling a woman’s property stored at the warehouse after she was evicted (because she could not pay storage fees) did not constitute state action. This was true even though a state actor, a sheriff, had arranged for this storage after her eviction.

³⁵ Mark D. Rosen, *Was Shelley v. Kramer Incorrectly Decided? Some New Answers*, 95 Cal. L. Rev. 451, 453 (2007).

³⁶ *Id.*, 453-54.

³⁷ 407 U.S. 163 (1972)

³⁸ **Pin cite.**

The state must have “significantly involved itself with invidious discrimination.”³⁹ Indeed, even fairly extensive regulation by the state does not make the actions of an otherwise private party “state action.” *Blum v. Yaretsky*⁴⁰ found no state action by a private nursing home even though it was “extensively regulated” by the Medicaid program.

A more recent case, *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*,⁴¹ put it this way: “state action may be found if, but 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.’”⁴² It is difficult to maintain that a union security clause in the private sector — which, again labor statutes do not require, that are instead products of negotiations between two private parties, and which would be entirely legal in the absence of labor statutes — could fairly be viewed as an action of the state itself.

Beyond *Shelley*, Critical Legal Studies (CLS) could offer a somewhat more modern theoretical justification for a broad vision of “state action.” Certainly some CLS authors argued that the public/private distinction was incoherent in principle.⁴³ Courts, however, have not adopted this approach, and it seems highly unlikely that Justice Alito and the other Justices in the *Harris* majority would look to CLS as a guide in the area of state action or otherwise.

2. Radical in Effect

Deciding that private-sector labor contracts are a product of state action would have radical practical consequences, including but not limited to private-sector labor contracts beyond union security clauses.⁴⁴ This approach would seem to require that *all* clauses in private-sector contracts would be a product of state action. How could other clauses be distinguished? Again, the NLRA preempts state laws which purport to limit employee’s rights under NLRA Section 7 (including the right to bargain for contracts). *Garmon, supra*. Thus, *e.g.*, a drug-testing provision in a private-sector labor contract would be subject to Fourth Amendment restrictions, as they are in the public sector.⁴⁵ Fifth Amendment protections would apply to contract clauses covering discipline if the employer was investigating potentially criminal activity.⁴⁶ Contractual

³⁹ **Pin cite.** Justice Douglas dissented in *Moose Lodge*, **pin cite**, perhaps indicating that he has long had an exceptionally broad view of what should constitute state action.

⁴⁰ 457 U.S. 991 (1982).

⁴¹ 531 U.S. 288 (2001).

⁴² 531 U.S. 288, **pin cite**.

⁴³ *See, e.g.*, Morton Horowitz, *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)

⁴⁴ Ironically, at least for now, such a holding would not change the law for private-sector union security clauses. Although, as shown above, private-sector union security clauses have been resolved through statutory interpretation, the rules the Supreme Court has developed for the private sector are essentially identical to the rules the Supreme Court has developed in the public sector under the First Amendment. *See HARRIS, SLATER, LOFASO, AND GREGORY, supra*, 1093-1139. Of course, *Harris* indicated that several justices would like to see more restrictive rules in the public sector, which raises the question of whether such rules would necessarily be applied to the private sector, and whether such application would require a finding of state action in the private sector.

⁴⁵ *See NTEU v. Von Raab*, 489 U.S. 656 (1989) (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).

⁴⁶ *See Garrity v. New Jersey*, 385 U.S. 493 (1967) (public employees have certain Fifth Amendment rights against self-incrimination in employer investigations into alleged workplace misdeeds that would also be crimes).

disciplinary procedures, including grievance and arbitration clauses, would have to comply with constitutional Due Process rules.⁴⁷

Indeed, finding state action in other private-sector labor contract provisions would be inconsistent with at least one point the majority made in *Beck, supra*. *Beck* found limits on private-sector union security clauses under the NLRA, but via statutory, not constitutional, interpretation. In so doing, the *Beck* majority made a point of observing that *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) 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. If the NLRA creates state action, then why wouldn't the Federal Arbitration Act (FAA)⁴⁸? Note that the FAA actually permits employment contracts that, in some cases, would *not* be legal absent the federal statute. For example, *Circuit City Stores v. Adams*⁴⁹ upheld the right of employers to require employees, as a condition of employment, to arbitrate any employment law dispute (as opposed to taking it to court), holding that the FAA preempts any state law attempting to bar such agreements. Further, the Supreme Court has indicated that, under the FAA individual agreements to arbitrate may bar class actions, preempting any state law to the contrary.⁵⁰ The FAA, of course, also governs arbitration agreements outside the employment context, *e.g.*, in commercial purchases. I have not heard it suggested that arbitration agreements authorized by the FAA in private employment or in private commercial transactions constitute state action that implicates the Constitution, even though the FAA preempts contrary state law.

In conclusion, some labor law scholars have argued that First Amendment doctrine as applied to private-sector labor unions has been broadly inconsistent with First Amendment doctrine in other, analogous contexts.⁵¹ Were the majority in *Harris* to follow-up on its surprisingly strong suggestion that private-sector union security clauses implicate the First Amendment, this would be by far the most radical and troubling example of this phenomenon.

⁴⁷ See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (setting out due process requirements for public employees with a property interest in public employment – note that private-sector union employees would almost always have such an interest through the standard “just cause” discipline requirements in union contracts.

⁴⁸ 9 U.S.C. §§ 1-16 (1994).

⁴⁹ 532 U.S. 105 (2001).

⁵⁰ *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740 (2010).

⁵¹ Most relevant here, see Catherine Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after Knox v. SEIU, Local 100*, 98 CORNELL L. REV. 1023 (2013) (arguing that union security clause doctrine is inconsistent with analogous First Amendment doctrine governing, *e.g.*, corporations after *Citizens United v. FEC*, 130 S.Ct. 736 (2010)); Benjamin Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012) (same). Scholars have also argued that prohibitions on certain “secondary” activity by unions under NLRA Sec. 8(b)(4) violate the First Amendment and are inconsistent with how the Supreme Court treats other institutions under that Amendment. See, *e.g.*, James Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984).