A Less Perilous Path?:
Administering Equal Protection Rights at Work

Abstract

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Scholars have long recognized that the Constitution has been, in Cynthia Estlund’s words, “a double-edged sword in the domain of labor law.” Historically, the Constitution has brought both benefits and perils to workers’ collective action. Some legal historians of labor conclude that the perils began outweighing the benefits as early as the 1930s, others date the tip in the balance to the 1960s; nevertheless, most if not all find that for a good while, the Constitution has done unions more harm than good. There is much support for this conclusion; however these scholars’ assessments have focused on Supreme Court doctrine. Building on previous work on what I have termed administrative constitutionalism, administrators’ interpretation and implementation of the Constitution, I will argue that assessing about the constitutionalization of labor and employment law requires asking not only whether to constitutionalize the workplace, but also where to do so. The paper will use the history of administrative agencies’ recognition of equal protection rights in the traditionally private workplace to demonstrate that the balance of benefits and perils is quite different depending on institutional context. From the perspective of unions, pursuing equal protection rights in administrative agencies has proven a far less perilous path than doing so in the courts.