ARTICLE

DUALISM AND OVERLOOKED CLASS CONSCIOUSNESS IN AMERICAN LABOR LAWS

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I. INTRODUCTION

Traditional American labor laws are generally understood as the product of political battles fought to settle the interests of labor and capital. Regulatory prescriptions are pitched as balancing devices that further national economic interests.[1] The contemporary labor movement is depicted as a liberal group that supports democratic causes and identifies with the interests of blacks.[2] However, the laws that govern the employer-employee relationship have been, and to some extent remain, different for black and white employees. Even more, labor laws have promoted a culture of division between black and white workers.

Long before blacks were allowed to freely dispose of their labor, white workers enjoyed contractual civil rights to bargain about their labor. While black workers were still revolting for freedom, white workers were striking for better wages. For example, by the turn of the nineteenth century, bootmakers were joining together to secure better wages.[3] A bootmaker's strike to raise their wages led to their arrest and prosecution for criminal conspiracy. The prosecutor argued, among other things, that

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1. For example, the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1994), which represented a radical shift in governmental policy toward unions, states, as public policy:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id. § 102.

2. *See, e.g.*, Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 288 (1995) (noting that unions played a critical role in the passage of the Civil Rights Act of 1964). *See also* Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935, 947 (1990) ("Labor is so identified with the Democratic Party that in most instances it can hardly threaten to alter its support or opposition for any senator on the basis of a Supreme Court confirmation vote."); DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996, at 138-39 (1997) (explaining that civil rights victories in the 1960s were partly due to the support of "liberal white students and elites who controlled vital institutions—the unions, the churches, the synagogues").

3. *See, e.g.*, 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 68-69 (John R. Commons et al. eds., 1958) (reporting on the 1806 Philadelphia Cordwainers' case).

bootmakers were journeymen with no permanent stake in the city; that they would destroy the industry, cause boot prices to rise, and otherwise negatively impact the community. Further, the prosecutor argued that the strike was a form of compulsion that would harm private manufacturing wealth, which represented employment opportunities and national power. The bootmakers were found guilty of criminal conspiracy to raise wages and fined eight dollars through the application of a common law rule that made it unlawful to combine for self-benefit or to harm others.[4] However, bootmakers later succeeded in receiving legal recognition of their associational strategy to better their lot.[5] In any event, prosecution for criminal conspiracy was not common, and by the middle of the nineteenth century "fell into disuse."[6]

The late 1800s were a particularly vibrant time for the labor movement,[7] and simultaneously, an especially important period for blacks who were legally emancipated, but badly in need of "reconstruction."[8] Black workers were typically targeted by both

4. *See* Edwin W. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 825-26 (1925-26) (collecting cases, including the Philadelphia Cordwainers' case, which "was followed by eighteen other prosecutions of working-men for conspiracy in the next three decades").

5. In *Commonwealth v. Hunt*, 4 Met. 111, 119 (Mass. 1842), the court ruled that bootmakers who formed a society and agreed that members would not work for employers employing nonsociety members did not engage in a criminal conspiracy. This attempt at a closed shop, whereby employers were notified to discharge non-society employees, was found to be a lawful attempt to induce membership even though it may harm others.

6. *See* ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 5 (12th ed. 1996). *See also* Witte, *supra* note 4, at 826. Witte observed that:

> One of the legal theories which played a role in the early [19th century] cases . . . was the theory that it was illegal for working-men to combine to raise wages. This doctrine had the support of numerous English precedents; but in this country it never attained the status of generally accepted law. In about one half of the early conspiracy cases, one of the counts in the indictment was to the effect that the defendants had combined to raise wages. In all of these cases, however, there were also charges of violence, picketing or closed shop rules and practices; and it was these charges which the prosecution emphasized, rather than the combination to raise wages.

Id.

7. The industrial revolution had spawned large corporations, and immigration and interstate migration had fueled the growth of urban centers with large populations that could be organized. Workers organized to increase both their security from employer abuses and black worker competition and their bargaining power regarding wages and other terms of employment. *See* Deborah A. Ballam, *Commentary: The Law as a Constitutive Force for Change: The Impact of the Judiciary on Labor Law History*, 32 AM. BUS. L.J. 125, 127-30 (1994) (detailing the early development of unions like the American Federation of Labor (AFL)).

8. *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 39 (1992) ("The period from the end of the Civil War to 1877 saw the basic rights of blacks to citizenship established in law, but precious little accomplished to ensure their

planters and white workers for separation and subordination, which produced devastating economic consequences among black workers.[9] As unionism grew in the late 1800s, the law was called upon to respond to activities designed to fortify the employment circumstances of union members. But because the law did not prohibit unions from excluding blacks as members,[10] and white workers and unions generally opposed the employment of blacks,[11] the law essentially ignored the growing division between black and white workers, focusing solely on the battles between labor and management.[12] Initially, the judiciary sided with employers by, among other things, approving criminal conspiracy prosecutions, issuing injunctions,[13] and allowing the application

political and economic rights. Without the latter, the former proved, then as so often today, all but worthless.").

Although formal equality had been bestowed on blacks through the Emancipation Proclamation, Jan. 1, 1863, *reprinted in* JAMES O. RICHARDSON, VII A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (1897), the Thirteenth Amendment prohibiting slavery, U.S. CONST. amend. XIII, the Fourteenth Amendment guaranteeing equal protection, U.S. CONST. amend. XIV, and the Fifteenth Amendment securing the right to vote, U.S. CONST. amend. XV, these measures did little to protect blacks from slavery-like working conditions.

9. *See, e.g.*, W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 700-01 (1973) (describing the plight of blacks after emancipation).

10. Throughout the first half of the twentieth century, unions openly excluded blacks from membership with express constitutional provisions. *See* Robert A. Levy, *An Equal Protection Analysis of the Davis-Bacon Act*, 1995 DET. C.L. REV. 973, 980 (1995); David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 91-93 (1993) (describing racism in American labor unions); *see also* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 427 n.2 (1986) (discussing the relegation of black workers to "membership in subordinate locals").

11. Strikes to secure the discharge of blacks, and violence to run blacks off their jobs, were common tactics employed. *See* JAMES B. ATLESON, LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II 170-76 (1998) (explaining that black workers were viewed as a threat to white social status and economic privilege, hence, hostile responses and hate strikes were common reactions to the hiring of black workers); *see also* Bernstein, *supra* note 10, at 94; Levy, *supra* note 10, at 980 (noting that such work stoppages continued into the 1960s).

12. *See* HERBERT HILL, 1 BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK AND THE LAW 26 (1977) ("Aside from such exceptional issues as public health, child labor, and minimum wage and hour requirements, national labor law was, until 1964, concerned almost exclusively with the regulation of relations between management and organized labor . . . .").

13. *See, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077, 1077-78 (Mass. 1896) (holding that employees picketing for better wages may be enjoined from patrolling in front of a factory, and that the picketing constituted a private nuisance and, therefore, was unlawful); *see also In re* Debs, 158 U.S. 564, 570, 600 (1895) (affirming the legality of a contempt decree issued against railway workers who violated an injunction against a strike found to be an obstruction of interstate commerce); Barr v. Essex Trades Council, 30 A. 881, 894 (N.J. 1894) (issuing an injunction against a newspaper boycott by the typographical union). Judge Holmes, dissenting in *Vegelahn*, found no express or implied threat of bodily or property harm in the picketers' actions, and concluded that the majority's injunction was overbroad in its

of antitrust laws[14] to stem organizational and other concerted activities.

However, such judicial "intervention" was short-lived as unions incrementally convinced the federal government and the courts that their activities deserved legal protection to guarantee their survival—if not success. By 1935, the political climate was decidedly pro-union as evidenced by the employer-specific prohibitions contained in the National Labor Relations Act.[15] Union lobbying efforts secured protective provisions in, among other things, the Clayton Act,[16] the Norris-LaGuardia Act,[17] the

prohibitions. *See Vegelahn*, 44 N.E. at 1079-82 (Holmes, J., dissenting).

14. *See* Loewe v. Lawlor, 208 U.S. 274, 301-03 (1908) (interpreting the Sherman Antitrust Act broadly and finding that the statute applied to every combination or conspiracy to restrain trade). The Sherman Act, therefore, prohibited union organizational efforts that consisted of threats and intimidation of employers and customers, boycotts of employers, the inducing of strikes at factories, and interference with employers' production and distribution. *See id*. at 306-09. *See also* Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310 (1925) (noting that the strike's purpose was to stop nonunion coal production and prevent its shipment interstate, and, therefore, violated the antitrust laws).

15. *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1001-02 (1984) (discussing the revolutionary way in which the NLRA allowed unions to cartelize the labor force). For competing discussions on how the law responded to or shaped unions, see generally Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971), and William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1235 (1989).

16. The Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27, 44 (1994)), contained important provisions that responded to the use of injunctions and antitrust laws in labor disputes. *See* ch. 323, §§ 6, 20, 38 Stat. 730, 731, 738 (1914). Unions had lobbied successfully for the inclusion of provisions that would legitimize their existence and goals, and prohibit judges from granting injunctions in labor disputes. *See id*. These provisions appear as Sections 6 and 20 of the Act. Section 6 provides in relevant part:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id. § 6.

Section 20 added:

> That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employees or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with

> particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney. And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Id. § 20.

Initially, Section 20's anti-injunction prescription was interpreted very narrowly as an exceptional privilege that did not extend to sympathy strikes. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 471-72 (1921). But the Norris-LaGuardia Act closed that interpretive loophole. *See* United States v. Hutcheson, 312 U.S. 219, 231 (1941) (stating that the Norris-LaGuardia Act had "removed the fetters" left unchanged by the Clayton Act); *see also* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1681 (1989) ("After the *Duplex* decision, federal court injunctions continued to frustrate organized labor's exercise of economic weapons, setting the stage for passage of the Norris-LaGuardia Act in 1932.") (footnotes omitted); Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 843-52 (1989) (citing as Congress's motive in passing the Clayton and Norris-LaGuardia Acts the desire to eliminate judicial restraints imposed on union activities).

17. Pub. L. No. 65, § 1, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-115 (1994)). This comprehensive anti-injunction statute effectively eliminated politically motivated awards of injunction in labor disputes, and this anti-injunction policy remains a fundamental underpinning of American labor law. *See* International Ass'n of Machinists & Aerospace Workers v. Tennessee Valley Auth., 976 F. Supp. 1114, 1114-16 (M.D. Tenn. 1997) (denying an injunction to one union against other unions and employers to prevent their bargaining without plaintiffs' participation, as within the anti-injunction provisions of the Norris-LaGuardia Act); Cleveland Area Local, Am. Postal Workers Union v. United States Postal Serv., 968 F. Supp. 1199, 1200, 1204 (N.D. Ohio 1997) (holding that the Norris-LaGuardia Act barred a federal court from having the jurisdiction to enter an injunction for the alleged violation of a collective bargaining agreement); 325 E. 53rd St. Corp. v. Local 46 Metallic Lathers & Reinforcing Iron Workers Union, No. 96 Civ. 7103 (SAS), 1996 WL 563345, at *2 (S.D.N.Y. Oct. 3, 1996) (denying the extension of a state court-issued temporary restraining order against picketers on the grounds it was a case growing out of a labor dispute, and thus falling squarely within the Norris-LaGuardia Act's prohibitions on injunctions). *But see* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 253-55 (1970) (allowing a narrow exception to the general ban on federal court injunctions in labor disputes where a collective bargaining agreement contains a mandatory grievance adjustment or arbitration provision).

Railway Labor Act,[18] and the National Labor Relations Act.[19] These statutory accomplishments effectively gave unions significant control over the labor market.

By the mid-1930s, unions were federally empowered to determine the fate of millions of workers because of statutory authority as exclusive representative and statutory promotion of collective bargaining.[20] Unions used these statutory powers to negotiate closed shop agreements, which required membership as a condition of employment, while continuing the practice of excluding blacks from membership. Unions also used their bargaining power to destroy black workers' jobs or to advance the interests of their white membership at the expense of black workers.[21] While unions experienced a tremendous increase in strength with the assistance of federal regulation, commentators consistently noted that the American labor movement was lacking in class-consciousness.[22] It has been suggested that the

18. Pub. L. No. 69-257, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-88 (1994)). In particular, Section 152, Fourth, provided for majority rule and collective bargaining, thereby giving unions exclusive control over workers' terms and conditions of employment. *See id.* § 152, Fourth. In addition, Section 152, Fifth, outlawed yellow-dog contracts, which had been sanctioned by the Supreme Court in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). *See id.* § 152, Fifth. In *Hitchman Coal*, the Court ruled that enticing employees to join a union, when they promised not to in their employment contract, constituted interference and subversion of existing contractual relations. *See Hitchman Coal*, 245 U.S. at 260-62.

19. Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1994)). This statute was a boon for unions. Section 157 outlined the employees' bill of rights "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157. Section 158 of the Act made it unlawful for employers to interfere or control employees' exercise of their bill of rights. *See id.* § 158.

20. *See, e.g.*, Kenneth G. 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, 81-83 (1990).

21. *See, e.g.*, Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 120-21 (1997); Bernstein, *supra* note 10, at 120-25 (discussing similar effects on black workers given the unions' power under the National Industrial Recovery Act, Section 7a); *see also* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 912 (1998). Klarman explained that:

> While the color line was becoming more formal and pervasive in the South during the first decades of the twentieth century, economic opportunities for skilled black laborers were disappearing. As in the North, occupations that had been traditionally designated "black"—such as barbers, masons, and train firemen—were being repossessed by whites . . . . [T]he growing power of racially exclusionary labor unions was a partial cause.

Id. (footnotes omitted).

22. *See* SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT 154-69 (1949)

many forces of industrial democracy prevented workers from organizing along class lines and launching a more effective class-wide campaign against capital.[23] This generalization about lack of worker solidarity overlooks and dismisses an important element of the American labor force—black workers.

This article will show that the class-consciousness, so obviously missing when responding to the practices of capital, was ever present when responding to the activities of black workers. From slavery days to the present, white working-class consciousness and ideology have been molded to separate black and white workers, and to accommodate practices designed to subjugate black workers. This article will demonstrate how federal regulations reinforced white working-class consciousness by improving white worker status through unionism and permitting unions to wield their statutory powers as a sword against black workers, thereby perpetuating the racial division of workers.[24]

Federal intervention in the field of labor consciously accommodated the racially hostile sentiments white workers harbored. This regulatory toleration of racist attitudes further assisted in anchoring white working-class consciousness and solidarity in policies that were harmful to black workers.

This article does not contest the conclusion that, at the labor/capital level, an absence of working-class consciousness seems to be a defining feature. Rather, this article focuses on the false assumption that working-class solidarity generally was absent from the American labor movement.[25] Proceeding from the

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(observing that the American labor movement's fragility came from American labor's "lack of class cohesiveness"); *see also* Bok, *supra* note 15, at 1400-01 (noting that both national and international observers have identified a distinctive difference in the American labor movement—the absence of "class consciousness" or "solidarity" among working people in this country); WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR 24-25 (1982):

> The grave misfortune for U.S. workers in the Reconstruction years and after is that [cooperation] was rare, and black and white workers never came to recognize their common interests. In fact, deep antagonism marked the relations between black and white workers, and white workers became a bulwark of American racism. This was particularly true of organized labor, where blacks and whites never created firm working-class consciousness.

Id.

23. *See* PERLMAN, *supra* note 22, at 162-69 (identifying employment mobility, competitive unionism, and nonclass-based voting rights as some uniquely American factors that undermined the potential for class consciousness).

24. *See* Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1057 (1984) (forwarding the view that promoting worker solidarity was a laudable goal of our labor laws).

25. *See* HARRIS, *supra* note 22, at 24-25 (claiming that the postbellum white worker lacked working-class consciousness); Bok, *supra* note 15, at 1401 ("In the

premise that race and class are intertwined and enduring in American life,[26] this article accounts for white working-class solidarity from slavery times to the present.

II. BACKGROUND

The laws and the institution of slavery initially separated black and white workers into discrete classes. Each class had its own identity, character, and status.[27] Because black workers occupied the undesirable slots in the labor force, their emancipation and assimilation represented an ever-present competitive threat to the standing of working-class whites in the form of status dilution.[28] The prospect of blacks doing "white work" represented a universal threat that required race-wide solidarity, including and transcending whole classes of white workers.[29] White workers identified more closely with elite whites

first place, workers in America have never displayed a persistent, widespread antagonism toward existing institutions or other groups in society."). Bok posits that "the lack of solidarity in this country" is suggestive of a pervasive resistance by workers to perceive themselves as members of a particular class. *Id.* (internal quotations omitted).

26. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 10 (1992) ("Consider: In this last decade of the twentieth century, color determines the social and economic status of all African Americans, both those who have been highly successful and their poverty-bound brethren whose lives are grounded in misery and despair."); Barry Goldberg, *Slavery, Race and the Language of Class: "Wage Slaves" and White "Niggers,"* NEW POL. 64, 69 (1991), *reprinted in* CRITICAL RACE THEORY: ESSAYS ON THE SOCIAL CONSTRUCTION AND REPRODUCTION OF "RACE" 96, 101 (E. Nathaniel Gates ed., 1997) ("[I]n the United States you cannot talk about class without talking about race.").

27. *See generally* Goldberg, *supra* note 26. *See also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1741-42 (1993) (explaining that from slavery times whiteness has been a galvanizing force for working class whites who knew that their labor was assigned a higher value because they could not be enslaved).

28. *See* Harris, *supra* note 27, at 1742 (stating that "white workers could accept their lower class position in the hierarchy by fashioning identities as not slaves and as not Blacks") (internal quotation marks omitted). *See also* ATLESON, *supra* note 11, at 175 ("Veteran shipyard craftsmen accepted black laborers and helpers as necessary—but subordinate—participants in the workplace regime, while newcomers from rural areas of the deep South were more likely to see the very presence of black workers as a threat to their social status and economic leverage.") (footnote omitted); JACQUELINE JONES, THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT 44 (1992) ("Until 1865 poor whites were as free as their social superiors, but after emancipation they became as vulnerable as the former slaves to the worldwide demand for cotton—a demand that had no respect for skin color or former condition of servitude or freedom.").

29. *See* Harris, *supra* note 27, at 1742 ("The material benefits of racial exclusion and subjugation functioned, in the labor context, to stifle class tensions among whites. White workers perceived that they had more in common with the bourgeoisie than with fellow workers who were Black.").

who confirmed their preferential status through, among other things, higher wages than those paid to blacks.[30]

Although exploited by the growing forces of industry, white workers directed their collective energies at wrestling employment opportunities from blacks even if greater economic possibilities grounded in "universal solidarity" were being sacrificed.[31] White workers displayed their solidarity, in part, by separating themselves from black workers,[32] and by combining to force the discharge of black workers who threatened their class standing.[33] Politicians, union leaders, and sociologists, among others, advanced white class-consciousness by promoting a rhetoric of racial difference that galvanized white workers as a group.[34]

Because race and work constituted status and class, government intervention that protected the interests of white workers while ignoring black worker concerns added legitimacy to white working-class togetherness that endures to the present.[35] Congressional indifference to black worker concerns, since emancipation and through the first half of the twentieth century, added legitimacy to the racially hostile workplace sentiments and practices of white workers. This regulatory accommodation added legitimacy and solidarity to a ubiquitous class consciousness that would later threaten more democratic regulations,[36] and which continues to impede worker solidarity across racial lines.

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30. *See id*. at 1741-42 (explaining that even when white workers did not collect increased pay as part of their white privilege, whiteness still yielded a "public and psychological wage," such as the right to be freely admitted with all classes of white people to public functions, public parks, and white schools, which were the best in the community, conspicuously placed, and cost anywhere from twice to ten times as much per capita as the "colored" schools).

31. *See* HARRIS, *supra* note 22, at 16; *see also* Harris, *supra* note 27, at 1714 (asserting that white worker preoccupation with race consciousness makes unsurprising the absence of class consciousness to combat growing industrial and corporate strength).

32. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 98 (1966) (opining that most employment segregation occurred "without the aid of the statute").

33. *See* JONES, *supra* note 28, at 43-44 (describing the belief white workers maintained that "the 'elevation of the blacks' necessitated their own 'degradation'").

34. *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 454 (1982) (describing the early 1900s as a time of bitter class conflicts with Southern politicians and writers calling for racial separation and white solidarity grounded in concepts of black inferiority).

35. *See* HILL, *supra* note 12, at 13 (explaining that the government did little to ensure equal treatment, "thus reinforcing the notion of racial inferiority").

36. *See, e.g.*, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 242 (1964).

III. CULTIVATING WHITE WORKER SOLIDARITY BEFORE FEDERAL INTERVENTION

White workers have been complaining about and organizing against competition from black workers since slavery times. As early as 1686, legislators were compelled to appease white workers by statutorily excluding blacks from certain occupations.[37] Well before blacks were emancipated, a sentiment was nurtured that equal civil rights for blacks represented an economic and social threat to working class whites.[38] This ideology has persisted over the years, and has engulfed both male and female white workers.[39] Even after emancipation and the birth of black civil rights, the forces and policies of capital remained an equally great threat to black worker security.[40]

The evolution of white workers' rights was a unitary experience to the extent that white workers only had to fend off the judicial forces of economic liberty. As the nineteenth century came to a close, the Court announced very broad liberty of contract principles. Early in the twentieth century, white workers had to contend with a rendering of constitutional law that was decidedly biased in favor of capital. The Supreme Court repeatedly rejected, as unconstitutional and violative of economic liberty, state laws that limited employers' methods of operation or their terms for contracting labor. To the benefit of employers, the Court struck down minimum wage laws while upholding yellow dog contracts as proper constitutional ordering of labor and economic relations.[41]

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37. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 118 (1978) (citing a New York statute that disallowed blacks from working as porters or driving cars).

38. *See id.* at 147; *see also* PHILIP S. FONER & RONALD L. LEWIS, INTRODUCTION TO BLACK WORKERS: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 1, 2-3 (Philip S. Foner & Ronald L. Lewis eds., 1989) (noting that through the 1840s, blacks were barred from most professions in the North, and that white workers often struck when blacks were hired); JONES, *supra* note 28, at 44 (working class whites saw the elevation of blacks as their degradation).

39. *See* ATLESON, *supra* note 11, at 175-76 (1998) (noting that white women opposed the hiring of black women on the premise that black workers constituted a threat to the social and economic standing of whites); *see also* HARRIS, *supra* note 22, at 24-25, 65 (explaining that the post-civil war white worker became the pillar of racism and that white women were sometimes more opposed to working with blacks than were white men).

40. Refer to text accompanying notes 61-71 *infra*.

41. *See* Allgeyer v. Louisiana, 165 U.S. 578, 591-92 (1897). The Court subsequently constitutionalized management prerogatives on economic liberty grounds. *See also* (in chronological order) Lochner v. New York, 198 U.S. 45, 52-54 (1905) (holding that state law cannot limit the number of hours an employer requires its employees to work); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (holding unconstitutional a state law that outlawed employment contracts requiring

However, the experience of black workers has been binary with two forces operating against them: liberty of contract principles and racism. In formulating rules that established a balance between labor and capital, Congress approached its work in a race-dependent way.[42] As a result, the free black worker encountered legislative indifference during the most vibrant regulatory years in the early twentieth century. The codification of white worker interests and attitudes helped to perpetuate existing racial tensions and workplace disunity.

Although white workers always enjoyed the civil right to freely dispose of their labor,[43] attempts to consolidate power initially triggered harsh institutional responses.[44] White workers had to contend with the application of criminal conspiracy theories, antitrust laws, and liberty of contract principles before they achieved positive legal recognition of their organizational activities.[45] But political ordering of the marketplace to restrain white workers was often short-lived because restrictions either were unpopular[46] or government regulation contained them.[47] Like white workers, black workers also had to struggle for fair treatment. Black workers, however, had to fight more sinister forces and for much longer periods. For example, slave codes functioned as an absolute bar to free labor, and Jim Crow laws

employees to forgo unionism); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 260-62 (1917) (allowing an injunction against a union trying to organize employees with "yellow dog" contracts in order to prevent the subversion of existing contractual relations); Adkins v. Childrens' Hosp., 261 U.S. 525, 561-62 (1923) (finding that a District of Columbia law setting a minimum wage for women and children arbitrarily interferes with freedom of contract).

42. Refer to notes 100-36 *infra* and accompanying text.

43. *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 299-301 (1982) ("In their nineteenth-century sense, civil rights were primarily factors of a person's state and community."). The authors further observe that in the 1800s, most Americans viewed civil rights as distinct from civil liberties. *See id*. at 299. Civil rights were typically defined by lawyers in economic terms that, nevertheless, encompassed "the full magnitude of life and labor." *Id*. White Americans were free to enter into a wide variety of civil relationships, and the right to profit or lose from these relationships was valued as a "precious right." *Id*. at 301.

44. *See generally* Bok, *supra* note 15.

45. *See id*. at 1422-23; *see also* Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27, 44 (1994)).

46. Criminal conspiracy prosecutions, for example, never became a widely accepted mechanism for controlling workers. Refer to notes 5-6 *supra* and accompanying text.

47. Statutory empowerment of unions early in the twentieth century led to the demise of the application of antitrust laws to unions, and the eradication of yellow dog contracts. *See, e.g.*, Railway Labor Act, 45 U.S.C. § 152 Fifth (1994) and § 3 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1994) (outlawing yellow dog contracts).

caused the free black body's reversion to a working status that approximated slavery.[48]

The advent of federal intervention provided substantive gains for white workers in the form of positive legal recognition of their organizational strategies and goals.[49] Federal law even promoted white worker empowerment through unionism[50] as liberty of contract rules lost appeal.[51] However, early civil rights laws proved substantively empty for black workers.[52] At the turn of the twentieth century, members of Congress knew or should have known that black workers had better employment prospects in an unregulated market where blacks did not have to confront union racism.[53] Congress responded, however, with pro-union regulations that consciously avoided reckoning with the abuses black workers would likely suffer as a result of statutorily empowering white workers. Such conscious regulatory disregard helped perpetuate division and black worker disempowerment well past the middle of the twentieth century.

By the time the federal government turned its attention to race-based workplace abuses, worker solidarity across racial lines was beyond reach because prior federal regulations had exacerbated race-specific enmities.[54] Unsurprisingly, Congress's attempt to empower black workers with civil rights laws in 1964

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48. *See* DANIEL JACOBY, LABORING FOR FREEDOM 56 (1998) (discussing actions by southern states to enact "black codes" mandating different treatment of black workers).

49. *See, e.g.*, Clayton Act § 6.

50. Refer to notes 98-104 *infra* and accompanying text.

51. *See* Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 344 (1995) (noting that by 1937, an era of liberal jurisprudence had begun).

52. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1342-43 (1952) (noting that after the Court narrowly interpreted early civil rights legislation, civil rights protection reverted to the states where racial abuses abounded). In fact, the Supreme Court simultaneously destroyed the Fourteenth Amendment's utility as a tool for racial justice as it facilitated its use as a tool of economic liberty. *See also* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1310-12 (1991) (opining that the Fourteenth Amendment has been applied most often in areas unrelated to racial segregation); Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1924-29 (1987) (discussing a young woman's decision to return to a life of slavery).

53. *See* FONER & LEWIS, *supra* note 38, at 14 (stating that Congress was keenly aware of the problems black workers faced because, as early as 1882, black workers testified before a Senate committee examining the relationship between labor and capital).

54. By 1964, when Title VII was enacted, white workers had a fully developed feeling of entitlement to all desirable job opportunities, grounded in part, on the historical exclusion of black workers as a source of competition. Refer to note 56 *infra*.

was compromised by the dual forces of business interests[55] and white worker resentment.[56] It was therefore inevitable that our labor laws would retain "us" and "them" hues, with the black-oriented Title VII being a sore spot for business interests and white workers. As a result, protective schemes that create employment opportunities for black workers consistently face court challenges.[57]

IV. EARLY LAWS REGULATING BLACK LABOR

The emancipation of blacks created a tremendous labor problem for Southern employers who were essentially planters operating in an agricultural economy.[58] Planters needed to secure a labor force to tend the fields and related structures, and the most obvious source of that labor was their former slaves.

55. *See, e.g.*, 109 CONG. REC. A4438 (daily ed. July 16, 1963) (appendix of statement of Atlanta Junior Chamber of Commerce); 109 CONG. REC. A3992 (daily ed. June 24, 1963) (appendix of editorial from the DALLAS MORNING NEWS, June 21, 1963); 109 CONG. REC. A7047 (daily ed. Nov. 13, 1963) (appendix of article from AMERICA entitled *Mrs. Murphy's Private Rights*); 109 CONG. REC. A5741 (daily ed. Sept. 11, 1963) (appendix of editorial from TIMES PRESS, Sept. 5, 1963).

56. In defining the parameters of statutory protection for black workers, Congress was influenced by white workers' desire to prevent encroachment on their existing workplace rights, even if those rights were the product of discrimination. *See, e.g.*, 110 CONG. REC. S7207 (daily ed. Apr. 8, 1964) (statement of Sen. Clark):

> Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.

Id.

57. *See, e.g.*, Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997) (granting certiorari to decide whether a white teacher may be laid off to retain an equally qualified and equally senior black teacher in order to promote diversity). *See also* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 565-67 (1984) (challenging a consent decree, which favored black employees, over a contractual seniority system, which favored white employees); United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979) (challenging an affirmative action plan that benefited black workers).

58. *See* REPORT OF THE COMM'RS OF THE BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, H.R. EXEC. DOC. NO. 11, at 32 (1866). The report of Secretary of War Edwin M. Stanton reads, in part:

> On the part of the property-holders, great complaint is made of want of security of labor, the majority seeking some compulsory process—that is, some substitute for slavery. There are so many examples of complete success of free labor that I bring them as an answer to such complaints; and I believe that the causes of complaint are due as much to the prejudice of the employer, and want of practical knowledge of any other system than the one under which he has been brought up, as to the ignorance and suspicion of the laborer.

Id.

Because emancipation and constitutionalized freedom[59] gave blacks the ability to freely migrate out of the localities in which they had been stuck, planters needed rules to ensure the availability of a black labor force.[60] With government assistance, planters created a variety of devices to impede black workers' movement and secure their labor cheaply.[61]

The use of black labor was regulated by, among other things, contract,[62] vagrancy,[63] enticement,[64] emigrant-agent,[65] and convict

59. *See* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). *See generally* Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471 (1993) (discussing freedom from slavery both as a war measure and as a constitutional prescription, and crediting slaves with the achievement of liberation).

60. *See* FONER & LEWIS, *supra* note 38, at 13-14 (relating that, in fact, migration was driven, in part, by the fear that compensation for labor would not be reasonable); *see also* HARRIS, *supra* note 22, at 30, 50 (discussing how some black workers simply viewed the North as a land of opportunity).

61. Refer to notes 62-81 *infra* and accompanying text.

62. *See, e.g.*, An Act in Relation to Contracts of Persons of Color, ch. 1470, § 2, 1865 Fla. Laws 32-33 (allowing an employer's claim for breach of contract against a black worker to result in arrest and criminal trial).

63. For example, in 1905, North Carolina defined "vagrants" as:

> Persons wandering or strolling about in idleness who are able to work and have no property to support them[,] [p]ersons leading an idle, immoral or profligate life who have no property to support them and who are able to work and do not work[,] [a]ll persons able to work having no property to support them and who have not some visible and known means of a fair, honest and reputable livelihood[,] [p]ersons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property[,] [p]rofessional gamblers living in idleness, [a]ll able-bodied men who have no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor child or children, except male child or children over eighteen years of age. That the punishment for vagrancy as defined in this act shall not exceed fifty dollars fine or thirty days' imprisonment.

Act of Mar. 4, 1905, ch. 391, §§ 3-4, 1905 N.C. Sess. Laws 412.

64. *See* ch. 1470, § 5, 1865 Fla. Laws 33 (repealed 1943) (making it a misdemeanor to entice black workers away from other contractually-bound employment); *see also* 1866 N.C. Sess. Laws 80-81. "'[A]ntienticement' laws made it a criminal offense to offer employment to an individual already under contract, or to leave a job before a contract had expired." *Cf.* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 593 (1988). Planters also experimented with importing white immigrant labor:

> But [i]t does not seem likely that any large number of workers under contract were actually imported, [although] interest in such projects was . . . great . . . . [T]he [Virginia] legislature passed acts to legalize labor contracts made abroad and to provide penalties for immigrants [mostly Chinese and European] who failed to fulfill their contracts. Alabama and South Carolina had similar laws to encourage and regulate the importation of white laborers.

Id. THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 45 (1965)

lease[66] laws. Because these laws were specifically targeted at blacks, the laws governing the dispensing of black labor were, from the outset, distinctly different from those regulating white workers.[67]

One of the many devices constructed to achieve a slavery-like employment relationship was the year-long contract.[68] These contracts were unconscionable to the extent that they were made with workers who had little or no bargaining power, were uneducated, and could neither read nor write.[69] Such contracts

("Though experiments with white labor continued here and there for years, most of the people of the South came to realize that Southern agriculture required the services of the freedmen.").

65. *See, e.g.*, Act of Feb. 16, 1876 Ga. Laws 17 (defining an emigrant agent as "any person engaged in hiring laborers in this state, to be employed beyond the limits of the same," requiring a license to be obtained at a cost of one-hundred dollars per year in each county in which the agent operated, and making the hiring of laborers without a license a misdemeanor); Act of Jan. 30, 1877 Ala. Acts 225; VA. CODE ANN. § 55 (1873) (establishing a license tax on labor agents equal to twenty-five dollars). *See also* 1891 N.C. Sess. Laws 75 (requiring a "license which shall be good for one year, upon payment . . . of one thousand dollars, in each county in which he operates or solicits emigrants, for each year so engaged," and penalizing unlicensed agents with a fine of five hundred to five thousand dollars or imprisonment).

66. *See* JONES, *supra* note 28, at 91, 93, 148-52 (revealing that black prisoners were used to depress the wages of free workers and were sought after for those jobs for which it was most difficult to secure and retain labor).

67. Refer to notes 68-81 *infra* and accompanying text.

68. *See* DAVID DELANEY, RACE, PLACE, AND THE LAW 1836-1948, at 48 (1998) (suggesting that post-slavery contracts tied blacks to the land in ways similar to their former slave status); *see also* Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 (1865) (establishing a "Bureau for the Relief of Freedmen and Refugees" to deal with the physical displacement of humans caused by war, and to facilitate Southerners' adjustment to blacks as free persons); H.R. EXEC. DOC. NO. 11, at 31 (1865) (noting the reliance on contracts as a means of dismantling the refugee camps run by the government):

> My instructions to Colonel Thomas have been to induce the freedmen to enter into contracts with the planters as rapidly as possible for the coming year . . . .
>
> . . . .
>
> General Fiske reports that he has met with great success in breaking up the camps and in supplying the freedmen with work at good wages, and that he has done so mainly by associating the planters and freedmen with his sub-agents in commissions organized for the purpose of settling local disputes, making labor contracts, and removing from the military courts questions that otherwise would have to be adjudicated by military officers.

Id. The states and planters supported these contracts because they effectively prevented blacks from leaving their employers at times of labor shortages. *See* James D. Schmidt, *Free Labor Still Lives: African-American Uses of Labor Law in the Reconstruction South, 1864-1868*, 3 J.L. HIST. 37, 43 (1994); *see also* FONER, *supra* note 64, at 164-67 (discussing how the contract system established by the Freedmen's Bureau in some ways violated the principle of free labor).

69. *See* Soifer, *supra* note 52, at 1944 (noting that unequal bargaining prevailed and that the year-long contract was akin to neoslavery).

were written broadly, making the worker responsible for tasks well beyond what was anticipated at the time of contracting.[70] The duration of the contract tied the employee to the employer for one year. The broad responsibilities or tasks outlined in year-long contracts secured for the employer the greatest performance for the lowest pay.[71]

Although planters had great bargaining strength and obtained very favorable contract terms, they routinely breached their agreements, leaving black workers little recourse.[72] Breach by a black worker, however, was considered a major offense.[73] Through contract-enforcement laws, employers were effectively guaranteed performance because breach by the worker was a criminal offense.[74]

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70. *See* FONER, *supra* note 64, at 172 (discussing a variety of arrangements, all benefiting the employer, used in the field of agriculture).

71. *See id*. (relating that one method exploited by planters was postponement of payment to the end of the year, which represented an interest-free extension of credit from employee to employer, as well as a shifting of part of the risk of farming to the freedmen). The practice not only left share workers penniless in the event of a poor crop, but offered numerous opportunities for fraud on the part of the planters, some of whom deducted excessive fines for poor work or other infractions, or presented freedmen with bills for rations that more than equaled the wages due them. *Id*.

72. *See* H.R. EXEC. DOC. NO. 329, at 7 (1868) (disclosing that planters seldom honored their employment contracts and routinely used the agreements to cheat and defraud black workers). The Freedmen's Bureau reported that one of the chief causes of black workers' fleeing to larger towns was employer abuse. *See id*.

> The sub-assistant commissioners report that this [fleeing] arises from the ill-usage they [blacks] have received, since their emancipation, from their employers in various ways, chiefly from being cheated and defrauded out of their portion of the crops, oftentimes being driven off without receiving remuneration of any kind for their labor.

Id.; *see also* Schmidt, *supra* note 68, at 48 (stating that freedmen filed thousands of contract abuse complaints).

73. *See, e.g.*, H.R. EXEC. DOC. NO. 123, at 19 (1866) ("Freedmen who violate their contracts by leaving their employers without good cause will be arrested, tried and punished by fines, imprisonment or involuntary labor upon the public roads, and in workhouses for correction, where such are established.").

74. *See, e.g.*, Florida's Act in Relation to Contracts of Persons of Color, ch. 1470, § 2, 1865 Fla. Laws 32:

> It is essential to the welfare and prosperity of the entire population of the State that the agricultural interest be sustained and placed upon a permanent basis: It is therefore enacted, That when any person of color shall enter into a contract as aforesaid, to serve as a laborer for a year, or any other specified term, on any farm or plantation in this State, if he shall refuse or neglect to perform the stipulations of his contract by willful disobedience of orders, wanton impudence, or disrespect to his employer or his authorized agent, failure or refusal to perform the work assigned to him, idleness, or abandonment of the premises or the employment of the party with whom the contract was made, he or she shall be liable, upon the complaint of his employer, . . . to be arrested and tried before the criminal court of the county, and upon conviction shall be subject to all the pains and

The black worker's services were also guaranteed by enticement laws, which made it illegal for another employer to solicit the services of an employee who was under contract to another.[75] The availability of cheap black labor was further secured by emigrant-agent laws that imposed fees and criminal penalties[76] on the agents of out-of-state employers recruiting black workers to leave the state for employment opportunities elsewhere. Further control over the supply and cost of black labor

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> penalties prescribed for the punishment of vagrancy: Provided, That it shall be optional with the employer to require that such laborer be remanded to his service, instead of being subjected to the punishment aforesaid.

Id.; *see also* ALA. CODE § 3812 (1887) (making a breach of the employment contract equivalent to stealing money from the employer).

75. *See, e.g.*, ch. 1470, § 5, 1865 Fla. Laws 32, 33 (repealed 1943). The statute provided:

> If any person shall entice, induce, or otherwise persuade any laborer or employee to quit the services of another to which he was bound by contract, before the expiration of the term of service stipulated in said contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined in a sum not exceeding one thousand dollars, or shall stand in the pillory not more than three hours, or be whipped not more than thirty-nine stripes on the bare back, at the discretion of the jury.

Id. *See also* Act approved Nov. 1, 1866, 11th Leg., R.S., ch. 82, § 1, 1866 Tex. Gen. Laws 80, 80, *reprinted in* 5 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 921, 998 (Austin, Gammel Book Co. 1898). This act stated:

> [A]ny person who shall persuade, or entice away from the service of an employer, any person who is under a contract of labor to such employer . . . shall be liable in damages to the employer or master, and shall, upon conviction, be punished by fine, in a sum not exceeding five hundred dollars, nor less than ten dollars, or by imprisonment . . . for not more than six months, or by both fine and imprisonment.

Id. *See also* Act of Nov. 2, 1866, N.C. Sess. Laws 81-82. This statute provided:

> Any person who shall persuade, or entice away from the service of an employer, any person who is under a contract of labor to such employer, or any apprentice, who is bound as such, from the service of his master, or who shall feed, harbor, or secrete, any such person under contract, or apprentice who has left the employment of employer or master, without the permission of such employer or master, the person or persons so offending shall be liable in damages to the employer or master, and shall be punished by fine or imprisonment.

Id. Persons employing those under contract to another were similarly punished. *See* Act of Nov. 2, 1866, N.C. Sess. Laws 81-82. Employers who terminated laborers before the expiration of the contract term were also punished. However, the fine for such breach was only up to one hundred dollars, whereas the fines for enticement and employing breaching laborers were up to five hundred dollars, allowed damages, and included imprisonment. *See* Act of Nov. 2, 1866, N.C. Sess. Laws 81-82.

76. Refer to note 65 *supra* (comparing states' statutes regarding emigrant-agent laws). *See also* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 820 n.288 (1998) (describing a case wherein an emigrant-agent was fined $1000 and sentenced to six months imprisonment for violating Georgia's licensing statute).

was achieved through vagrancy laws[77] and the "criminal-surety" racket.[78]

Black workers were extremely vulnerable to broadly defined vagrancy laws because of their previous condition of servitude. Owning no land or home, and having no independent means of support, black workers were forced to be associated with an employer at all times or risk imprisonment.[79] Mere unemployment may have constituted vagrancy, the penalty for which could be assignment to a chain gang.[80] Rules were also

77. *See* Act of Mar. 4, 1905, ch. 391, 1905 N.C. Sess. Laws 412. Refer to note 63 *supra*. The 1865 South Carolina Black Code contained:

> [N]ine sections [that] were concerned with vagrancy and idleness, which the law stated 'are public grievances, and must be punished as crimes.' The definition of vagrancy was extremely broad and was subject to various interpretations. Penalty for the offense was imprisonment and/or hard labor for as much as twelve months.

Id.; *see also* WILSON, *supra* note 64, at 75 (detailing several 1865 South Carolina laws applying only to blacks, including the vagrancy and idleness provisions).

78. *See* Klarman, *supra* note 21, at 923 (citing to *United States v. Reynolds*, 235 U.S. 133 (1914), and describing a breach of a surety contract as "itself a criminal offense, which would usually lead to another surety contract of longer duration"). "Those performing labor under such surety agreements often had first been convicted of vagrancy or some other misdemeanor such as petty larceny." *Id.* (footnote omitted). The United States Supreme Court invalidated such a statute in 1914 under the Thirteenth Amendment and the 1867 Peonage Act. *See* United States v. Reynolds, 235 U.S. 133, 150 (1914); *see also* Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1175-76 (1984) (concluding that criminal-surety peonage was an abusive system); Benno C. Schmidt, Jr., *supra* note 34, at 646, 651-53 (discussing many of the post-emancipation laws enacted to create an environment that approximated slavery).

79. *See* DELANEY, *supra* note 68, at 48 (contending that many black workers ended up working for their old masters, who had received executive pardons and restoration of title to their lands, working the land they had recently occupied and planted on as freedmen).

80. *See* FONER, *supra* note 64, at 593 ("Broad new vagrancy laws allowed the arrest of virtually any person without a job."); *see also* WILSON, *supra* note 64, at 75 ("If sentenced to hard labor, a vagrant might be hired out to a private individual for the length of his sentence."). See also An Act to Punish Vagrants and Vagabonds, ch. 1467, § 1, 1865 Fla. Laws 28-29, stating:

> [E]very able-bodied person who has no visible means of living, and shall not be employed at some labor to support himself or herself, or shall be leading an idle, immoral or profligate course of life, shall be deemed to be a vagrant, and may be arrested . . ., and bound in sufficient surety for his or her good behavior and future industry for one year, and upon his or her refusing or failing to give such security, he or she may be held or committed for trial before the Criminal Court of the county, and if convicted before said Court, shall be punished by being sentenced to labor or imprisonment for a term not exceeding twelve months, or by whipping not exceeding thirty nine stripes, or being put in the pillory not exceeding one hour, or by whipping and being put in the pillory, at the discretion of the jury; and if any such person shall be sentenced to labor, the Sheriff or other officer of said Court shall hire out such person for the term to which he or she shall be

prescribed for the leasing of black convicts as a source of cheap labor for employers.[81]

The promulgation of rules and practices that marginalized black workers helped to crystallize the white workers' sense of preference and superiority. It telegraphed and reinforced a message that distancing oneself from black workers was desirable because black labor commanded little value. So, instead of viewing free blacks as a source of additional strength in numbers, white workers reinforced their opinions about the benefits of racial separation. The feeling that white worker security and status were correlated to their distance from black workers manifested itself in demonstrations of solidarity when blacks were introduced in the labor force or when unions were formed.[82] Amid the disagreements about how to respond to the

sentenced, . . . and the proceeds of such hiring shall be paid into the county Treasury.

81. *See* JONES, *supra* note 28, at 91-93, 150-52. See also FONER, *supra* note 64, at 205, recounting that:

> In much of the South, the courts of Presidential Reconstruction appeared more interested in disciplining the black population and forcing it to labor than in dispensing justice. . . . If employers could no longer subject blacks to corporal punishment, courts could mandate whipping as a punishment for vagrancy or petty theft. If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms, force them to labor without compensation on public works, or bind them out to white employers who would pay their fines. The convict lease system, moreover, which had originated on a small scale before the war, was expanded so as to provide employers with a supply of cheap labor.

"[T]he legal system of Presidential Reconstruction had profound consequences, limiting the options open to blacks, reinforcing whites privileged access to economic resources, shielding planters from the full implications of emancipation, and inhibiting the development of a free market in land and labor." *Id.* at 210.

To further coerce blacks into the plantation labor force:

> Southern lawmakers moved to limit blacks' independent access to economic resources. Rights such as hunting, fishing, and the free grazing of livestock, which whites took for granted and many blacks had enjoyed as slaves, were now, in some areas, transformed into crimes. Planters resented hunting as a way blacks could obtain subsistence while avoiding plantation labor; it also often involved trespass, thus flouting whites property rights. Several states now made it illegal for blacks to own weapons, or imposed taxes on their dogs and guns. Georgia in 1866 outlawed hunting on Sundays in counties with large black populations, and forbade the taking of timber, berries, fruit, or anything 'of any value whatever' from private property. . . . The entire complex of labor regulations and criminal laws was enforced by a police apparatus and judicial system in which blacks enjoyed virtually no voice whatever.

Id. at 203.

82. Refer to notes 10-11 *supra*.

growing influence of capital,[83] white workers found security in their uniformity of response to black labor.

V. THE FREE MARKET

With the advent of a "free market,"[84] black workers did make marginal progress in a few narrow occupations.[85] At the turn of the twentieth century, blacks made limited progress in the workforce as courts sided with employers who sought cheap labor.[86] Free market jurisprudence allowed black workers to contract for skilled and unskilled jobs, albeit at wages lower than what white workers would readily accept.[87] Black workers were able to gain strong representation in a few fields of employment

83. *See generally* David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268 (1988) (discussing the conflicting approaches to achieving bargaining strength and worker protection); SELIG PERLMAN & PHILIP TAFT, HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, VOL. IV: LABOR MOVEMENTS (1960).

84. The United States Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), marked the beginning of the free market "*Lochner* era," during which the Court invalidated progressive legislation that it held violated employers' and workers' constitutional rights to freely contract for labor. *See id.* at 53. The *Lochner* era is generally regarded as having lasted from 1897 to 1937, when *Lochner* was overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937), although other beginning and ending years have been suggested. *See, e.g.*, Michael J. Phillips, *How Many Times was* Lochner*-Era Substantive Due Process Effective*?, 48 MERCER L. REV. 1049, 1089-90 (1997) (listing several recent works about the period). For a useful discussion of "the opposing philosophies of traditional jurisprudence [Lochnerian laissez-fare] and sociological jurisprudence[,]" see David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 804-20, 821 (1998) ("After *Lochner*, opponents of segregation hoped that Jim Crow laws, at least as applied to the private sector, could be successfully challenged on liberty of contract grounds.").

85. *See* ATLESON, *supra* note 11, at 169 (noting that even in the auto industry where blacks were hired, they were under-represented and were concentrated in only a few plants doing the worst jobs); *see also* HARRIS, *supra* note 22, at 59-60 ("The first northern employer that hired large numbers of blacks and helped to stimulate migration to the North was the Pullman Company . . . ."). Although Pullman eventually employed some 12,000 blacks, they all held service jobs with no chance for advancement. *Id.*

86. *See* Bernstein, *supra* note 10, at 102-03 (discussing the contracts black workers made with railroad employers).

87. *See id.*; *see also* Herbert Hill, *Myth-Making as Labor History: Herbert Gutman and The United Mine Workers of America*, 2 INT'L J. POL. CULTURE & SOC'Y 132, 134-36 (1988) (observing that blacks were allowed into unions but were relegated to only unskilled positions so as not to "threate[n] seriously the position of the white workers"); William A. Sundstrom, *Explaining the Racial Unemployment Gap: Race, Region, and the Employment Status of Men, 1940*, 50 INDUS. & LAB. REL. REV. 460, 462-63 (1997) (opining that New Deal minimum wage codes "would have had a disproportionate impact on the employment of the less skilled and, by creating excess supply, might also have permitted employers to indulge their preference for white workers").

during this free-market period in spite of union racism because they were willing to accept oppressive working conditions and low wages that whites found unacceptable.[88]

Opportunities for black workers expanded primarily because employers were able to maximize their exploitation of this labor force.[89] Employers sending emigrant-agents to recruit black workers for construction projects and other work were definitely motivated by the lower operating costs associated with black labor.[90] Railroad employers who hired large groups of blacks for certain categories of work imposed onerous hours and other working conditions on them.[91] Although having work was arguably better than unemployment, black workers were locked into an oppressive employment relationship that had long been unacceptable to whites. There is little, if any, indication that, without regulation, employers would have been willing to modify this "caste system" of employment that placed and kept black workers at the bottom of the ladder.

Twentieth century labor regulation, originally pitched as worker-oriented devices, held great potential for promoting black/white worker solidarity. However, conscious avoidance of black worker concerns in the legislative process perpetuated rather than changed negative white worker attitudes. This

88. For example, the Pullman Company, the largest employer of blacks, required black porters to work 400 hours per month with no guarantee of sleep. Additionally, Pullman porters had to purchase their own uniforms and shoe polish to shine customers' shoes. *See* HARRIS, *supra* note 22, at 78-79. See also Klarman, *supra* note 21, at 909, reporting that:

> While industrial opportunities for northern blacks had always been scarce (except as strikebreakers), particular skilled jobs had been open, and indeed occasionally had become special black preserves—such as the occupations of barber, waiter, coachman, and chef. As immigration from eastern and southern Europe exploded in the late nineteenth and early twentieth centuries, however, many of these jobs began going to white immigrants.

89. *See id*. at 909; *see also* HILL, *supra* note 12, at 17 (suggesting that employers exploited black workers through cooperation with the unions, who excluded blacks from membership); 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1035 (Brief of Wm. E. Taylor, Chairman Legislative Comm., Dist. Branch, NAACP before the Senate Comm. on Educ. & Labor, Apr. 9, 1934) [hereinafter Brief of Wm. E. Taylor] (revealing that the labor organizations which did admit black workers often denied them the right to skilled and semi-skilled positions).

90. *See* Bernstein, *supra* note 76, at 821-22 (describing how emigrant agent laws raised the costs of migration, thus limiting migration rates and employer profitability); *see also* Edna Bonacich, *Abolition, the Extension of Slavery, and the Position of Free Blacks: A Study of Split Labor Markets in the United States, 1830-1863*, 81 AM. J. SOC. 601, 601-08 (1975) (advancing the split labor market theory, which states that "when the price of labor for the same work differs by ethnic group, a three-way conflict develops among business, higher-priced labor, and cheaper labor which may result in extreme ethnic antagonism").

91. Refer to notes 85-88 *supra*.

resulted in continuing racial division and little improvement in the job prospects or working conditions of blacks. Early twentieth century labor laws accommodated many of the earlier attitudes and practices that were effective in depriving black workers of employment opportunities.[92] As a result, the regulatory scheme set the stage for a "white worker consciousness" tailored solely to the interests of white workers.

Some writers have argued that this cartelizing of the labor force and the destruction of Lochnerian judicial decisionmaking were key factors that helped destroy the employment and economic prospects of black workers.[93] These writers contend that in an unregulated market where blacks could underbid white workers, particularly those workers who belonged to unions that blacks could not join, the employment prospects for blacks were much greater.[94] Some writers have even called for the abolition of private-sector employment laws altogether, suggesting that black workers would have a better stake in a free market.[95]

In speculating about blacks' prospects for success in free or regulated markets, commentators have incidentally documented

92. Refer to notes 98-116 *infra*. *See also* Klarman, *supra* note 21, at 912 ("A good deal of the South's most oppressive labor legislation—emigrant agent laws, vagrancy laws, anti-enticement laws, and contract enforcement laws—was enacted or reenacted during the first decade of the twentieth century.").

93. *See* Bernstein, *supra* note 10, at 86-88 ("The long-term effects of judicial acquiescence to New Deal labor legislation linger today in the form of persistently high rates of black unemployment and the emergence of a marginalized 'underclass.'"); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 125 (1992) (advocating that the mere existence of the minimum wage law increases the incentive for employers to discriminate against blacks); Bernstein, *supra* note 76, at 827-29 (noting that the *Lochner* decision gave rise to hopes on the part of anti-segregationists that Jim Crow laws could be defeated on freedom of contract grounds); *see also* HILL, *supra* note 12, at 16 (observing that "the emergence of the organized labor movement in the post-Reconstruction period was an important factor in the process of racial occupational eviction").

94. Refer to note 93 *supra*.

95. *See, e.g.*, EPSTEIN, *supra* note 93, at 413-14 (opining that Title VII should be repealed for all private employment relationships because freedom of contract and voluntary market transactions constitute greater interests). Although Professor Epstein insists that black workers' prospects for success are greater in a free market, he concedes that competitive markets will not get rid of all the harmful effects of discrimination. *See* Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 1-2 (1994); *see also* Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1491-95 (1996) (describing "Free Marketeers" as those who believe that government intervention is only proper in a minimal role—in enforcing contracts, protecting private property, and specifying the foundational rules for the marketplace—with a strong presumption against government regulation); Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 607-609 (1990) (reviewing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990)).

that both markets were hostile to black workers.[96] But regulation had implications beyond forcing blacks out of the labor force.

VI. LEGISLATING FOR WHITE WORKERS

During the first quarter of the twentieth century, the bargaining strength of workers was seriously curtailed by freedom of contract principles, which had been elevated to a constitutional plane.[97] As the powers and prerogatives of capital flourished during this unregulated period, governmental concern developed for the plight of the average worker's bargaining strength in such an environment. In response to growing corporate strength, the federal government sought to equalize the playing field by increasing workers' bargaining power through the promotion of collective worker action.[98] However, regulators were indifferent to the reality that collectivism had historically meant racial solidarity and the suppression of black workers.[99]

In 1914, Congress moved to eliminate the taint of illegality that plagued collective worker action by passing the Clayton Act.[100] Congress also attempted, in the Clayton Act, to prohibit the judiciary, with its pro-business bias, from intervening in labor disputes.[101] In addition to congressional intervention, the executive branch joined in promoting unionism as the catalyst for economic development and the antidote for industrial strife. President Woodrow Wilson established a War Labor Board, which was grounded in and promoted a strong national policy of recognition of workers' rights to organize and bargain collectively.[102]

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96. *See* Epstein, *supra* note 95, at 1-2 (conceding that racial discrimination will survive in competitive markets).

97. *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that the state cannot prohibit or interfere with an employee and employer's right to contract without violating the Federal Constitution).

98. Both the RLA and the NLRA prioritize collective bargaining as an important responsibility of the parties. *See* Railway Labor Act (RLA), 45 U.S.C. § 152 (1994); National Labor Relations Act (NLRA), 29 U.S.C. § 157 (2000) ("Employees shall have the right to organize and bargain collectively . . . .").

99. *See* Brief of Wm. E. Taylor, *supra* note 89, at 1035 (describing the discrimination that was present in organized labor).

100. Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. §§ 12-27, 44 (1994)) (legalizing labor unions).

101. *See id*. § 20 (providing generally that courts could not issue restraining orders or injunctions for labor disputes).

102. *See* Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 818-19 (1992) (detailing President Wilson's establishment of the National War Labor Board); *see also* Richard B. Gregg, *The National War Labor Board*, 33 HARV. L. REV. 39, 42 (1920) (providing that one

The articulation by Congress and the President of a national policy in favor of unions and collective bargaining did not measurably transform the turbulent relationship between labor and capital. Strikes remained an integral aspect of dispute management, judicial intervention in labor disputes continued, and companies fashioned mechanisms to avoid collective bargaining, such as sweetheart or company unions.[103] Moreover, it did not effectively remove courts from intervening in labor disputes.[104] These realities led to a push for greater governmental involvement in the form of more favorable and facially neutral worker-oriented regulations.

A. The Railway Labor Act

The bargaining strength of workers got a major boost in 1926 when Congress passed the Railway Labor Act (RLA).[105] This statute advanced the national policy of absolute freedom of association for workers,[106] prohibited "yellow dog" contracts,[107] provided for control of the workplace by a majority of workers,[108] and prioritized collective bargaining as the preeminent method of contracting with employers.[109] Congress placed no checks on freedom of association principles despite abundant evidence that white workers did not want to associate with black workers. Past white-worker solidarity as a response to black labor provided a strong basis for predicting that white workers might convert the RLA into an instrument of workplace racial division and exclusion.

With the RLA's tolerance for closed shops[110] and its provisions for exclusivity,[111] majority rule,[112] and collective

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of the principles by which the National War Labor Board was governed was recognition of the worker's right to organize and collectively bargain).

103. *See generally* STUART D. BRANDES, AMERICAN WELFARE CAPITALISM, 1880-1940, at 132-34 (1976) (describing the turbulent early history of union organizing).

104. *See, e.g.*, Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478-79 (1921) (interpreting very narrowly the anti-injunction provision of the Clayton Act as an exceptional privilege).

105. Pub L. No. 69-257, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1994)) (providing freedom of association for employees and dispute management measures).

106. *See id.* § 151a(2) (listing as one of its purposes, the "forbid[ding of] any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization").

107. *See id.* § 152, Fifth.

108. *See id.* § 152, Fourth.

109. *See id.*

110. Congress abolished the closed shop and union shops under the Railway Labor Act in 1934. *See* 48 Stat. 1187-88 (1934) (current version at 45 U.S.C. § 152).

bargaining,[113] white workers had no incentive to join forces with black workers. As a result, black workers were left to the mercy of union officials they, as a minority, could not oust.[114] Laws requiring collective bargaining prevented black workers from negotiating individual contracts with employers to underbid white employees. Specifically, the Supreme Court interpreted the RLA as outlawing individual contracts, reasoning that such contracts were a potential impediment to collective action.[115] Black workers were then saddled with a statute that further empowered unions and their white members who did not want to work beside blacks, or worse, desired their jobs. Consistent with principles of majority rule, unions proceeded to cannibalize black jobs and acquiesce to racist employer decisionmaking in order to advance the interests of white union members.[116] This anti-black,

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The union (or agency) shop became legal again in 1952. *See* 64 Stat. 1238 (1951) (current version at 45 U.S.C. § 152 (1994)); *see also* THE RAILWAY LABOR ACT 190-96 (Douglas L. Leslie et al. eds., 1999) (providing a historical discussion of union security agreements and the RLA).

111. *See* 42 U.S.C. § 152, Second (mandating that all carrier employer/employee disputes be decided between representatives of the carrier and the employees). This resulted in a situation whereby black workers, who were invariably a numerical minority in the workforce, could not choose their own representatives or individually bargain directly with the employer. *See* Order of R.R. Tel. v. Railway Express Agency, 321 U.S. 342, 347 (1944) (finding an employer's efforts to modify its terms through individual agreements to be of no legal effect).

112. *See* 42 U.S.C. § 152, Fourth (providing in relevant part: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Chapter.").

113. *See id*.

114. *See* EPSTEIN, *supra* note 93, at 124 (discussing that blacks were more vulnerable to racial abuse under the RLA than in a free market, in part, because the white majority remained free to choose leaders who were hostile to blacks).

115. *See Order of R.R. Tel*., 321 U.S. at 342, 347 (upholding collective agreements and finding individual agreements ineffective); *see also* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (discussing how collective agreements supersede individual agreements).

116. Indeed, as the facts of *Steele v. Louisville & Nashville R.R. Co*., 323 U.S. 192 (1994), demonstrate, unions were successful during this period in negotiating racially discriminatory collective bargaining agreements or forcing employers to discriminate. *See id*. at 194-96. Black workers recognized that this pattern of destruction of black employment opportunity would occur, and already existed during debates over the NLRA, as reflected in the NLRA's legislative history. *See, e.g.*, Brief of Wm. E. Taylor, *supra* note 89, at 1035. Similarly, in *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 211-12 (1944), a companion case to *Steele*, Tunstall, a firemen who, like Steele, suffered because of the Brotherhood's amendment to the collective bargaining agreement, was deprived of his seniority rights, removed from his job as a fireman, given more difficult work at a lower wage, and replaced as a firemen by a white member of the brotherhood. *See also* J. Clay Smith, Jr. & E. Desmond Hogan, *Remembered Hero, Forgotten Contribution: Charles Hamilton Houston, Legal Realism, and Labor Law*, 14 HARV. BLACKLETTER J. 1, 6-7

white-worker consciousness surfaced as, among other things, union policies that favored the white membership to the detriment of black workers.

Discriminatory union practices were sufficiently pervasive and egregious that they ultimately commanded the Supreme Court's attention.[117] In *Steele v. Louisville & Nashville Rail Road Co.*, the union made an agreement with the employer to deprive blacks of work opportunities by placing a quota on black firemen and siphoning their work to white workers, with the ultimate goal of eliminating the black workers entirely.[118] The agreement also relegated black workers to harder, less desirable jobs that paid lower wages, and elevated less senior and less competent white employees to the jobs previously held by blacks.[119] Because of congressional failure to limit union discretion, the Alabama Supreme Court conveniently ruled that there was no legal prohibition against such union behavior.[120]

Fortunately, the United States Supreme Court ruled that the enormous powers conferred by statute, in the form of majority rule and exclusive representation status for unions, imposed upon them a duty of fair representation.[121] The Court

(1998) (discussing the themes employed in the *Tunstall* and *Steele* briefs before the Supreme Court, and noting that the collective bargaining agreement had a deleterious effect on the black workers).

117. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944) (prohibiting unions from discriminating).

118. *See id*. at 195.

119. *See id*. at 196.

120. *See id*. at 197-98. In discussing the Alabama Supreme Court's reasoning, the United States Supreme Court stated:

> It pointed out that the Act places a mandatory duty on the Railroad to [deal] with the Brotherhood [the union representing Steele] as the exclusive representative of the employees in a craft . . . . It thought that the Brotherhood was empowered by the statute to enter into the agreement . . . and that by virtue of the statute the Brotherhood has power by agreement with the Railroad both to create the seniority rights of petitioner and his fellow Negro employees and to destroy them. It construed the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to [deal] with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them.

Id. (citations omitted). The Alabama court interpreted the bargaining agreement as conferring upon the union the right to bargain with the Railroad without concern for the rights of minorities. *See id.*

121. *See id*. at 202-03:

> We think that the [RLA] imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the

interpreted the Railway Labor Act as imposing a duty on unions to make decisions based on relevant considerations and to represent all employees fairly, impartially, and in good faith.[122] Because this conclusion was not reached until 1944, almost half of the twentieth century had passed before unions were informed that they had some limited accountability to black workers.[123]

B. The National Labor Relations Act

During the Lochner era, black workers were being attacked from all sides. White workers were pressuring employers not to hire blacks, and pressuring unions to exclude blacks from membership or the benefits of representation. With the advent of further regulation and increasing union power, it became clear that black workers would fare poorly if left to the unfettered discretion of employers or unions.[124] Employers were willing to hire large numbers of black workers in some jobs, but only if employer control over wages and working conditions was absolute. On the other side, unions wanted a monopoly over which workers would gain employment and wanted control over the terms of employment agreements.[125] Because unions adopted and formalized the racially hostile attitudes of their members, the power play between unions and employers left blacks scrambling for the few extremely undesirable jobs that union members did not want. It became imperative to black workers

> members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. . . . We hold that the . . . Act . . . expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

Id. (citations omitted).

122. *See id.* at 203-04 (explaining that Congress did not intend unions to act in a discriminatory manner).

123. *See* Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 127-28 (1992) (describing how the duty of fair representation was created as an employment civil rights remedy for black workers who were powerless against unions that statutorily controlled the bargaining and grievance processes); *see also* Gary L. Tidwell, *Major Issues in the Duty of Fair Representation Cases Since 1977*, 62 U. DET. L. REV. 383, 387-88 (1985) (explaining that the *Steele* Court focused exclusively on racial discrimination when it created the duty of fair representation).

124. *See* Bernstein, *supra* note 10, at 90-95 (pointing out the irony that unions, which were fighting for better working conditions during the *Lochner* era, were excluding blacks, women and immigrants from their ranks); *see also* Klarman, *supra* note 21, at 909-10 and nn.142-52 ("Blacks . . . suffered from the rising power of labor unions, which generally excluded them from membership and sought to secure jobs for their white members that previously had been unofficially designated as black.").

125. *See* Bernstein, *supra* note 10, at 91.

that any subsequent labor legislation, such as the National Labor Relations Act (NLRA), counteract negative white consciousness and provide protection to black workers from unions, as well as from employers.

Faced with continuing racial separation in the workplace, rampant union abuses of black workers, and recognizing the potential for job security that the NLRA presented, black leaders made a concerted effort to include in the NLRA provisions prohibiting racial discrimination.[126] The National Urban League, for example, noted its objections to the Wagner Bill because of its failure to deal with union exclusion of black workers and discrimination against them. Besides recommending provisions prohibiting discrimination against blacks and requiring equal treatment of black workers, the Urban League sought protection for black workers whose employment opportunities were often limited to that of strikebreakers.[127] Such proposals had the potential to begin the process of gently coercing white workers to accept black worker presence and to recognize the benefits of worker cooperation and solidarity across racial lines. However, proposals for antidiscrimination provisions met with stiff resistance from unions and were regarded by a sponsor of the bill

126. *See* HARRIS, *supra* note 22, at 109-10 (describing how blacks lobbied for legislation that would prohibit racially discriminatory unionism). The NAACP recommended that the Act include a provision prohibiting discrimination "on account of race, color, or creed." Brief of Wm. E. Taylor, *supra* note 89, at 1036. The NAACP sought additional protection for black workers by proposing the following language:

> That no employer shall by this act be required to recognize and/or deal with, or to make and/or maintain any agreements with the representatives of any labor organization which denies the right of membership therein to or discriminates against any person on account of race, color, or creed, or which refuses to admit members thereto for any reasons not applicable alike to all persons without regard to race, color, or creed.
>
> . . . .
>
> That no labor organization which denies the right of membership therein to or discriminates against any person on account of race, color, or creed, or which refuses to admit members thereto for any reasons not applicable alike to all persons without regard to race, color, or creed, shall be entitled to the benefits of the provisions of this act.

Id.

127. *See* Legislative History of the National Labor Relations Act, 1935: Hearings on S. 2926 (Brief of T. Arnold Hill) at 1058-59. The Urban League proposed that:

> The term 'employee' shall not include an individual who has replaced a striking employee, except when the labor organization either by direct constitutional or ritualistic regulation and/or by practices traceable to discriminatory policies bars an individual from joining such labor organization or restricts rights, privileges, and practices usually accorded members of such labor organizations.

Id. at 1059.

as a legislation-killing measure.[128] With full knowledge that racial discrimination by unions was widespread, and that black workers needed statutory protection from such abuses, Congress again proceeded to prioritize the interests of white workers and ignore the needs of blacks.[129]

Congressional failure to respond to the basic needs of black workers when enacting the NLRA helped perpetuate race-based, white-worker consciousness and accommodated openly racist union constitutions and practices. With the powers of the federal government behind them, unions began negotiating contracts that gave them complete control over who was hired and in which jobs they were placed.[130]

With no statutory provision prohibiting discrimination, unions and companies also converted the NLRA into an instrument of racial division. Employers who readily accepted black workers under the free market system now freely acquiesced to or contracted for their subjugation once the NLRA facilitated the acquisition of better employment terms for all workers. This response helped confirm that the appeal of black workers was inextricably linked to their potential for and susceptibility to abuse in the workplace.[131]

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128. *See* HILL, *supra* note 12, at 104-06 (chronicling the development and negotiations surrounding the passage of the Wagner Act).

129. *See* Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 788 (1985) ("Civil rights organizations openly campaigned for inclusion of a non-discrimination provision . . . ."). Senator Wagner, under pressure from the AFL, proposed drafts that did not include such provisions, for fear that he could not otherwise obtain passage of a bill. *Id.*; *see also* Jeffrey M. Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547, 551 (1963) (remarking on the absence of discussion of a non-discrimination provision during the Wagner Act congressional debates).

During Senate committee hearings on the Wagner Act, a representative of the NAACP testified that, without a non-discrimination provision, black workers could not support the law: "[W]e are convinced that this bill conceals more danger to the future welfare of the colored citizens of this country than any bill seriously considered by Congress in the last 75 years." *Id.*

130. *See* Robert A. Levy, *An Equal Protection Analysis of the Davis-Bacon Act*, 1995 DET. C.L. REV. 973, 981 (1995) ("Unions could have blunted wage differentials as a source of tension simply by inviting blacks to join. The large majority of blacks would gladly have opted for higher wages, improved working conditions, and job security that accompanied union membership."); David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276, 289 (1994) (describing how unions, adamantly opposed to employers hiring local nonunion blacks, forced employers to import union labor from distant cities); WILSON, *supra* note 64, at 150 (discussing racial inequality during the pre-industrial and industrial economic eras in the U.S.).

131. *See* HARRIS, *supra* note 22, at 131 (chronicling that before and after the *Lochner* era and the enactment of the NLRA, employers treated blacks as "surplus labor").

With no legislative check on discriminatory workplace practices, the NLRA also proved useless for black workers from its inception in 1935 until 1944, when the Supreme Court decided the *Steele* case. Although *Steele* was a RLA case, its holding was a general signal to unions that they were obliged to use their tremendous statutory powers in a democratic manner.[132] However, *Steele* had little effect in stemming racist union practices.[133] In 1947, Congress attempted to halt some union abuses by amending the NLRA to outlaw the closed shop.[134] Congress did not amend the statute to prohibit race discrimination, however. This congressional failure in 1947 further signaled to white workers that the interests of black workers in securing equal employment was not a national priority. It is, therefore, no surprise that subsequent administrative and judicial attempts to graft racial discrimination onto the statute have not been effective.[135]

With no textual prohibition of racial discrimination in the NLRA, the National Labor Relations Board settled for the "bootstrap" approach of regarding race-motivated breaches of the duty of fair representation as a violation of the Act.[136] This approach provides some protection to black workers, but unions still retain broad discretion via the duty of fair representation. It took a civil rights upheaval before the interests of black workers were given serious attention.

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132. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202-03 (1944). The Court soon reiterated the *Steele* principles in NLRA cases such as *Wallace Corp. v. NLRB*, 323 U.S. 248, 255-256 (1944), and *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

133. *See* EPSTEIN, *supra* note 93, at 124 (relating that the duty of fair representation had little impact on the white union leadership's ability to continue to discriminate against blacks).

134. Congress abolished closed shops in 1947 with the Taft-Hartley amendments, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 158(a)(3) (1988)). *See also* Pattern Makers' League of North Am., AFL-CIO v. NLRB, 473 U.S. 95, 106 (1985) ("Because of mounting objections to the closed shop, in 1947 . . . Congress enacted the Taft-Hartley Act. The union security agreements . . . require employees to pay dues, but an employee cannot be discharged for failing to abide by union rules or policies with which he disagrees.").

135. *See generally* Jonathan G. Axelrod & Howard J. Kaufman, Mansion House—Bekins—Handy Andy*: The National Labor Relations Board's Role in Racial Discrimination Cases*, 45 GEO. WASH. L. REV. 675 (1977).

136. For a discussion of how the NLRB and courts have handled union decisionmaking grounded in race, see Michael I. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962). *See also* Michael C. Harper & Ira C. Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1211, 1216 (1985) (proposing an equal protection model for the duty of fair representation).

VII. LEGISLATING FOR BLACKS: TITLE VII

Once the Court signaled in 1944 that unions must be somewhat accountable to black workers, subtle methods of subordination were increasingly substituted for overt racist practices. Race-based white worker consciousness had become so entrenched that white workers sought to avoid their limited responsibility of fair treatment. Partnering with black workers, therefore, was still not possible. Instead of express constitutional provisions excluding blacks from membership or negotiating patently discriminatory contract provisions, unions and employers colluded and utilized facially neutral systems that rendered the *Steele* doctrine ineffective.[137]

What employers and unions could not explicitly pursue because of the law, they achieved by contract. Employers joined with unions in negotiating contracts that included seniority systems, which ensured the subordinate status of black workers.[138] Whereas, before *Steele*, the contract detailed the undesirable jobs blacks could occupy and the limitations on their advancement, after *Steele*, the contract avoided such references. The racial policies and practices remained intact, however. Through aptitude tests, educational requirements, and other non-job-related schemes, employers did their part to ensure that most jobs, particularly the desirable ones, were reserved for white employees.[139] White employees were then perpetuated in their jobs through seniority structures that locked blacks into bottom-tier jobs where they were vulnerable to discharge under seniority systems requiring that the last hired be fired first in the event of layoffs.[140]

Seniority systems, therefore, became another race-conscious mechanism for separating workers while increasing white worker security. White workers solidly stood behind this mutation of racial oppression and staunchly defended it in 1964, when Congress sought to eliminate some of the continuing oppression blacks experienced in the workplace. The status of seniority systems was an obvious source of concern for civil rights

137. *See, e.g.*, EPSTEIN, *supra* note 93, at 124 (noting that after *Steele*, white craft unions remained hostile and closed to blacks); *see generally* Sovern, *supra* note 136.

138. *See* Alfred W. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 273-76 (1968). Both management and unions ignored *Steele*'s fair representation pronouncement, with management hiring blacks for subordinate jobs, then negotiating seniority rules with the union to keep them there. *See id.*

139. *See id.* at 277.

140. *See id.* at 278.

advocates because such systems were tailored to accommodate and perpetuate workplace inequality.[141] But white workers and their representatives stood unified in their support of seniority structures that preserved their separation from and advantage over black employees.[142]

Notwithstanding the reality that seniority systems would retard the goal of equal employment opportunity, Congress was overrun by demands that existing seniority practices not be touched.[143] The net result was that discriminatory seniority systems were carved out for special textual protection.[144] This treatment of a contractually created right contrasted sharply with congressional response in 1935 to calls for protection of the civil right not to be discriminated against on the basis of race.

Unsurprisingly, seniority systems have proved to be another galvanizing force for white workers and a substantial barrier to black worker advancement. Several United States Supreme Court cases highlight the versatility of seniority systems in achieving and perpetuating discriminatory results and how

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141. *See* Beth Wain Brandon, Note, *The Seniority System Exemption to Title VII of The Civil Rights Acts: The Impact of a New Barrier to Title VII Litigants*, 32 CLEV. ST. L. REV. 607, 617 (1983-84) (noting that seniority systems had helped create a stratified job environment—a sort of racial apartheid in the workplace with segregated job classifications that ensured the best jobs for whites and no competition from black workers).

142. *See* George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1604-05 (1969) (noting that seniority was always a union and not a management priority, and arguing that white workers have only an "expectancy interest" in accrued seniority that could be altered or eliminated by contract).

143. *See, e.g.*, 110 CONG. REC. 7207, 7217 (1964) (containing responsive testimony to numerous objections from labor groups about the possible loss of seniority systems under Title VII).

144. *See* 42 U.S.C. § 2000e-2(h) (1994); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)). Section 703(h) provides in relevant part:

> Notwithstanding any other provision of this Subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Id.

Congress secreted these harmful systems from judicial abrogation.[145]

Before Title VII was enacted, the workplace was racially stratified with segregated job classifications. This model, which often included segregated job departments, effectively ensured that the highest paid black employee made less than the lowest paid white employee. Eventually, in *Griggs v. Duke Power Co.*,[146] the Court ruled that practices freezing the status quo of past discriminatory practices violate Title VII.[147] As such, a facially neutral practice that facilitates racially discriminatory consequences cannot survive under the statute.

However, when confronted with a seniority system in *International Brotherhood of Teamsters v. United States*[148] that perpetuated past discriminatory practices, the Court ruled that express statutory provisions barred it from finding such a system illegal.[149]

In *Teamsters*, the company and union negotiated a seniority system that utilized employment dates for some benefits and job classification dates for others.[150] If an employee transferred from one job category to another, he lost his seniority in the old job category and went to the bottom of the seniority list for the new job.[151] The company hired minority employees only for the less desirable and lower paying jobs and locked them in those jobs through the seniority system.[152]

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145. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 577-79 (1984) (finding that a seniority system protected white firefighters from any burden-sharing necessary to implement a consent decree which established hiring and promotion goals for black firefighters); California Brewers Ass'n v. Bryant, 444 U.S. 598, 610-11 (1980) (broadly defining seniority to include a 45 week rule which had the effect of depriving black workers of jobs, job benefits and seniority); International Bhd. of Teamsters v. United States, 431 U.S. 324, 352-54 (1977) (noting that Congress specifically immunized seniority systems with full knowledge that they protected benefits accrued to white workers because of race discrimination).

146. 401 U.S. 424 (1971).

147. *See id*. at 430 ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

148. 431 U.S. 324, 356 (1977).

149. *See id*. (holding the seniority system was protected by § 703(h) of Title VII).

150. *See id*. at 343-44.

151. *See id*.

152. *See id*. at 344.

> The linchpin of the [alleged] theory . . . was that a discriminatee who must forfeit his competitive seniority in order finally to obtain a line-driver job will never be able to "catch up" to the seniority level of his contemporary who was not subject to discrimination. Accordingly, this continued, built-in disadvantage to the prior discriminatee who transfers to a line-driver job

The Court held that the company's perpetuation of pre-Act discrimination through the seniority system was not sufficient to impugn the integrity of the seniority system.[153] The Court noted that Congress chose to immunize seniority systems with full knowledge that such systems would protect benefits, which are the product of discrimination, for white workers.[154] Hence, although this system freezes the status quo, Congress did not guarantee that such abuse would end by making it unlawful.

Armed with strong legislative and judicial protection for seniority systems, unions have often wielded these protections against black workers seeking redress for employment discrimination.[155] Because Congress and the judiciary have put seniority systems on a pedestal, they have ensured continuing class distinctions between senior white employees and junior black workers.

As a result, white worker consciousness and solidarity against black workers remain accommodated by our existing scheme of labor regulation. Anti-black consciousness, which developed under the rules and practices of slavery, was consistently accommodated and reinforced by later regulatory prescriptions, at both the state and federal levels. Hence, instead of gradually cajoling bi-racial worker consciousness and cooperation, regulatory prescriptions consistently served to advance worker consciousness and division along racial lines.

VIII. CONCLUSION

The legal rules governing the disposition of black labor assigned a negative status to the black worker from the outset. At the same time, these rules activated white consciousness, not only about their preferred status in the workforce, but also about the negligible value assigned to black work. Consistent attention

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> was held [by the lower courts] to constitute a continuing violation of Title VII . . . .

Id. (footnote omitted).

153. *See id*. at 355-56. The Court noted that:

> It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.

Id. at 356.

154. *See id*. at 350-55 (relating that the legislative history supported a finding that Congress intended to have no impact on seniority rights).

155. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (finding a lower court's injunction unjustified despite its purpose of minimizing the disparate impact of seniority-based layoffs on black firefighters).

to white worker concerns, along with repeated indifference to black workers, helped refine and reinforce white worker consciousness. This consciousness often manifested itself in acts of solidarity that promoted racial division.

Federal labor regulations further facilitated white working-class consciousness by prioritizing the interests of white workers, while neglecting black worker concerns. As a result, federal laws helped formalize existing racial divisions as a workplace norm. White workers, already armed with a strong sense of entitlement and preference, therefore, had no incentive to partner with blacks whose labor was assigned little value in the marketplace.

By the time Congress intervened in 1964 to protect black workers, racial workplace ordering, tied to white working class solidarity, was a firmly embedded mode of industrial relations. It was, therefore, unsurprising that liberal interpretations of Title VII were inevitably challenged as undemocratic, and as an infringement on white worker entitlements.