

ROOTS OF THE 'UNDERCLASS': THE DECLINE OF LAISSEZ-FAIRE JURISPRUDENCE AND THE RISE OF RACIST LABOR LEGISLATION

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"[A] colored worker who is denied the protection and the benefits of organized labor because they will not take him in, has only one place of redress in case his right of employment is assailed, and that is in our courts."

Harry E. Davis, Member, Ohio House of Representatives, 1928¹

"[I]nstead of taking the part of the Negro and helping him toward physical and economic freedom, the American labor movement from the beginning has tried to achieve freedom at the expense of the Negro."

W.E.B. Du Bois, 1929²

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1. *Limiting Scope of Injunctions in Labor Disputes: Hearings on S. 1482 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. 610 (1928) [hereinafter *Shipstead Hearings*] (statement of Harry E. Davis, Member, Ohio House of Representatives).

2. W. E. B. Du Bois, *The Denial of Economic Justice to Negroes*, THE NEW LEADER, Feb. 9, 1929, at 43, 46 [hereinafter Du Bois, *Denial of Justice*].

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INTRODUCTION

The demise of the laissez-faire jurisprudence of the *Lochner* era³ in the late 1930s and early 1940s came at a most inopportune time for

3. The *Lochner* era, named after the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), lasted from approximately 1897 to 1937. Compare *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (propounding expansive definition of Fourteenth Amendment's Due Process Clause in context of economic regulation) with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (abandoning *Lochner* scrutiny and upholding minimum wage legislation). During this period, the Supreme Court engaged in relatively strict scrutiny of the constitutionality of state and federal economic regulation.

The term "*Lochner* era" is a misnomer. Most of the important cases involving invalidation of federal regulation during this period revolved around issues of federalism and strict construction of the enumerated powers of Article I, Section 8 of the Constitution, not, as in *Lochner* and other cases involving state regulation, the issue of what constitutes a deprivation of liberty without due process.

black Americans. Federal labor law and policy of the 1930s cartelized the labor market on behalf of racist labor unions, while black workers remained unprotected by civil rights legislation. Lochnerian judicial intervention to protect free labor markets could have saved hundreds of thousands, perhaps millions of blacks from being permanently deprived of their livelihoods. After a short-lived struggle by the Old Court,⁴ however, no such intervention was forthcoming.⁵

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."⁶

During the *Lochner* era, courts had a particular antipathy to labor legislation that directly or indirectly benefited labor unions.⁷ Scholars have traced the roots of this hostility to abolitionist "free labor" ideology,⁸ as well as to the Jacksonian antimonopoly tradi-

4. The term "Old Court" refers to the New Deal Supreme Court before 1937.

5. The *Lochner* era collapsed in the 1930s. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding government regulation of grain raised for family consumption); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (upholding legislation that banned discrimination based on labor union affiliation); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (announcing dichotomy between fundamental civil liberties and economic rights); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (affirming regulation of labor practices through Commerce Clause power); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding milk price control regulations).

6. Michael Harrington coined this unfortunate term. See MICHAEL HARRINGTON, *THE OTHER AMERICA* 6-7 (1960) (describing underclass as neglected and forgotten members of society); see also *infra* notes 329-49 and accompanying text (discussing creation of underclass as result of New Deal legislation).

7. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923) (striking down minimum wage law for women); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38-44 (1922) (declaring tax on child labor invalid); *Coppage v. Kansas*, 236 U.S. 1, 26-27 (1915) (finding state law prohibiting employers from forbidding employees from joining labor unions violative of Fourteenth Amendment's Due Process Clause); *Adair v. United States*, 208 U.S. 161, 163 (1908) (striking down legislation forbidding employer discrimination against union members); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (determining that law limiting total work hours for bakers interfered with constitutionally protected liberty interest of freedom of contract between employer and employee); see also JOHN E. SEMONCHE, *CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920*, at 430-31 (1978) (noting Supreme Court's "hostility to union activity" and to "laws that encouraged unionism"); WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 121 (1988) (observing that Supreme Court and lower federal and state courts "distrusted labor organizations"). The *Lochner* era courts' bias against pro-union legislation was even more evident in the lower federal courts and the state courts. See William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1237-56 apps. A-C (1989) (listing legislative goals of labor movement and cases on those issues).

8. See, e.g., Daniel R. Ernst, *Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900*, 36 AM. J. LEGAL HIST. 19, 19 (1992) (stating that judges of *Lochner* era acted to "uphold a system of values which they termed the free labor system"); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 782-86 (noting courts' reliance on "free labor" ideology). The key to the ideology of antislavery activists was that a person should be allowed to sell his labor in a free market. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 67 (1988) [hereinafter FONER,

tion.⁹ Judges adhering to both intellectual traditions believed that labor unions were a threat to liberty because they attempted to monopolize the labor market for the benefit of their members and to the detriment of other workers.¹⁰

While the benign intentions of *Lochner* era judges are widely recognized today,¹¹ legal scholars such as Laurence Tribe and Cass

RECONSTRUCTION] (discussing broad debate over whether slaves should be permitted to enter free labor market). For a succinct judicial statement of this free labor ideology, see *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884) (Field, J., concurring) ("The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.").

9. Radical libertarian Jacksonians, known as loco-focos, abhorred "class legislation" that conferred special legal privileges on powerful interest groups. See generally WILLIAM LEGGETT, *DEMOCRATIC EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY* (Lawrence White ed., 1984) (presenting collection of essays by prominent loco-foco); GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA* 95, 103 (1959) (describing emergence of loco-focoism and its opposition to any form of monopoly). This strand of Jacksonianism contributed to the emergence of laissez-faire jurisprudence. See HOWARD GILLMAN, *THE CONSTITUTION BESEIGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS* 33-60 (1993) (discussing Jacksonian origins of laissez-faire jurisprudence); Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 297 (1985) (recognizing Jacksonian origins of doctrines of laissez-faire constitutionalism and describing Jacksonian influence on laissez-faire jurisprudence); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1367 (1990) (reviewing WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988)) (noting that framers of Civil War Amendments relied inconsistently on principles of natural law, Jacksonianism, states' rights, and federalism).

10. Both ideologies were also consistent with prevalent classical economic theory. Benedict, *supra* note 9, at 305-06 (explaining that classical economic theory complemented laissez-faire political and legal theory by disfavoring government economic regulation); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 269 (1989) (describing relationship between political and economic theory). See generally Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 380 (1988) (linking economic theory supporting right to contract and political view of individual liberties guaranteed under Due Process Clause).

For an example of the complexity of laissez-faire jurisprudential thought, see David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93 (1990) (describing intellectual development of leading nineteenth-century libertarian legal scholar).

11. See *supra* notes 8-10. Until recently, most legal scholars and historians incorrectly attributed the origins of laissez-faire jurisprudence to the influence of "Social Darwinism." See, e.g., DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 36 (2d ed. 1980); PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 228 (2d ed. 1983); RICHARD HOFSTADER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 5-6 (rev. ed. 1955); CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS E. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* 24 (1954); PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 5 (1990); ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, at 236 (1960); BENJAMIN TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* 154 (1942).

Social Darwinism actually had minimal influence on American laissez-faire liberal thought, inside or outside legal circles. See, e.g., ROBERT C. BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN THOUGHT* 58-60 (1979) (stating that few laissez-faire liberals based beliefs on Social Darwinism); THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 168-75 (1963) (asserting that liberals recognized need of man to survive by cooperating with his fellow man rather than through power struggles); DONALD K. PICKENS, *EUGENICS AND THE*

Sunstein continue to criticize them for allegedly adhering to old-fashioned ideologies that had little relevance to the problems facing an industrializing nation and its citizens.¹² According to critics, by preventing the government from aiding labor unions, the *Lochner* era courts implicitly sided with wealthy capital at the expense of helpless labor.¹³ Other scholars, such as Derrick Bell, add that black Americans were most in need of the labor protection that the courts denied to workers.¹⁴

PROGRESSIVES 18-22 (1968) (explaining that progressives were primary purveyors of Social Darwinist ideology); cf. JOHN GRAY, *LIBERALISMS: ESSAYS IN POLITICAL PHILOSOPHY* 115-17 (1989) (describing "liberal evolutionism" of Herbert Spencer as being perverted by progressives into Social Darwinism).

12. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 586 n.37 (2d ed. 1988) ("What was wrong was simply that, as a picture of freedom in industrial society, the one painted by the Justices badly distorted the character and needs of the human condition and the reality of the economic situation."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 916-19 (1987) (concluding that *Lochner* era courts saw rights as prepolitical, not recognizing that they are subject to changing social and political conditions); cf. SEMONCHE, *supra* note 7, at 431 (arguing that "the Justices lagged behind the people's representatives in adjusting the law to the realities of an industrialized society"); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 58 (stating that Justice Holmes' dissent in *Lochner* "raised the spirits of the faithful and kept them hoping for a better day and a court more attuned to contemporary realities").

This is not a new criticism. See, e.g., BLAINE F. MOORE, *THE SUPREME COURT AND UNCONSTITUTIONAL LEGISLATION* 125-27 (1913) (criticizing Supreme Court for paying too much attention in economic liberty cases to abstract theories of individual rights, rather than actual modern conditions).

13. See, e.g., ROBERT G. MCCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910*, at 84 (1951) [hereinafter MCCLOSKEY, *AMERICAN CONSERVATISM*] (accusing Court of "an unadorned endorsement of the strong and wealthy at the expense of the weak and poor"); TRIBE, *supra* note 12, at 589 (criticizing economic, social, and judicial philosophy espoused by *Lochner* Court); WIECEK, *supra* note 7, at 126 (claiming that "freedom of contract meant freedom of the rich to impose terms"); cf. Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 275 (depicting *Lochner* era jurisprudence as vulnerable "to the claim that [it] benefitted established economic interests at the expense of the relatively powerless"); Urofsky, *supra* note 12, at 58 (stating that decisions like *Lochner* "gave credence to charges that the bench had gone over completely to the service of big business in opposing humane reform legislation").

Such criticism has persisted for decades. See, e.g., Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEGAL REV. 155, 155 (1925) (arguing that process of meeting burden of proof in cases challenging labor legislation weighs in favor of big business); Albert M. Kales, "Due Process," *the Inarticulate Major Premise and the Adamson Act*, 26 YALE L.J. 519, 523 (1917) (setting forth premise that government promotion of unions and collective bargaining promotes "general welfare of employees").

14. BELL, *supra* note 11, at 36-37 (claiming that courts in aftermath of *Lochner* were "espousers of conservative sentiment," reducing rights of blacks and sustaining racial segregation for over 30 years); RAYFORD LOGAN, *THE BETRAYAL OF THE NEGRO* 17-18 (1965) (arguing that courts' failure to include positive economic rights under Civil War Amendments was result of enormous post-Civil War industrial growth and industrial profiteering); Malik Simba, *The Black Laborer, the Black Legal Experience and the United States Supreme Court with Emphasis on the Neo-Concept of Equal Employment* 323-27 (1977) (unpublished Ph.D. thesis, University of Minnesota) (noting Supreme Court's role in failing to secure civil rights and economic parity for blacks from Civil War to 1970s).

The irony of this criticism is that during the *Lochner* era labor unions generally excluded blacks—as well as women and immigrants—from their ranks.¹⁵ In fact, as former NAACP general counsel Herbert Hill demonstrates in his book, *Black Labor and the American Legal System*, the history of the rise of labor legislation in the United States from the turn of the century until the passage of the Civil Rights Act of 1964¹⁶ is in significant part the story of unions dominated by American-born white males using the legal system to monopolize the labor market at the expense of those excluded groups.¹⁷ Blacks, women, and immigrants were the silent third parties in cases between unions and business enterprises,¹⁸ and their interests almost always lay with the latter. Far from being ill-conceived and “old-fashioned,” decisions striking down legislation benefiting labor unions truly did protect millions of vulnerable workers from monopolistic legislation.

This Article focuses on the devastating effects of union-sponsored labor legislation on black workers. Part I discusses the historical animosity that existed between labor unions and blacks that resulted largely from the unions’ recalcitrant refusal to admit blacks into their ranks or to treat them fairly when admitted. Part II considers two examples of union-sponsored legislation that served to exclude black workers: laws regulating railroad labor and laws regulating the use of employees on public works projects. In both cases, the legislation originated mainly at the state level, where *Lochner* era courts often held it unconstitutional. Eventually, however, the unions persuaded Congress to pass national legislation just before the rise of the New

15. 3 PHILIP FONER, *HISTORY OF THE LABOR MOVEMENT OF THE UNITED STATES: THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900-1909*, at 219-32, 256-81 (1964) [hereinafter PHILIP FONER] (discussing union discrimination against women, African-Americans, and immigrants).

The discriminatory policies of unions against blacks, women, and immigrants were well recognized at the time and served as a propaganda point for business spokesmen. See, e.g., LEAGUE FOR INDUS. RIGHTS, *THE OPEN SHOP: A DEBATE* 16 (1921) (argument of Walter G. Merritt, Counsel, League for Industrial Rights) (attacking labor unions as elitist, discriminatory organizations).

16. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of 5, 28, and 42 U.S.C. (1988) & Supp. II 1992)).

17. HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 1-37 (1977) [hereinafter HILL, *BLACK LABOR*]; see also Herbert Hill, *Race, Ethnicity and Organized Labor: The Opposition to Affirmative Action*, NEW POL., Winter 1987, at 31, 33 [hereinafter Hill, *Race and Organized Labor*] (stating that labor unions “functioned primarily to advance the interests of white workers, to guarantee them privileges in the labor market”).

18. Cf. HILL, *BLACK LABOR*, *supra* note 17, at 26 (“[N]ational labor law was, until 1964, concerned almost exclusively with the regulation of relations between management and organized labor, leaving such ‘third parties’ as blacks and women unprotected from discriminatory employment practices.”).

Deal era.¹⁹ This legislation, some of which the courts proceeded to uphold,²⁰ was significantly strengthened by new amendments and regulations initiated during the early years of the Roosevelt administration.²¹ The result was the destruction of tens of thousands of the best paying jobs once held by blacks.

Part III discusses the even more devastating effects of New Deal labor legislation on black workers. As a direct result of the New Deal, and the courts' acquiescence to it, hundreds of thousands, perhaps millions, of jobs held by blacks were permanently destroyed, creating the roots of today's underclass.²² The demise of laissez-faire jurisprudence is thus directly responsible for one of the most pressing social problems and greatest human tragedies currently facing the United States.

The Article concludes by arguing that liberty of contract, rather than generally serving the interests of the elite at the expense of humble laborers, often served to protect the most disadvantaged, disenfranchised workers from monopolistic legislation sponsored by politically powerful discriminatory labor unions. This new understanding of the historical effects of laissez-faire jurisprudence should lead legal scholars and the courts to reconsider their overwhelming hostility to serious judicial review of economic regulation that grants monopoly power in the labor market.

I. THE RACIST HISTORY OF AMERICAN LABOR UNIONS

As early as 1871, Frederick Douglass recognized the danger posed to black workers by white-dominated, monopolistic labor organizations.²³ Until about the turn of the century, however, unions

19. See, e.g., Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151-188 (1988)); Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. §§ 276a to 276a-5 (1988)).

20. See *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930) (upholding Railway Labor Act).

21. See, e.g., Railway Labor Act, ch. 347, 44 Stat. 577 (1926), as amended ch. 691, 48 Stat. 1185 (1934); Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931), as amended ch. 825, § 1, 49 Stat. 1011 (1935).

22. See *infra* notes 329-49 and accompanying text (discussing rise of underclass as result of New Deal). For perspectives on the underclass, see KEN AULETTA, *THE UNDERCLASS* xiii-xviii (1984) (outlining concept of "underclass"); CHARLES MURRAY, *LOSING GROUND* 56-135 (1984) (describing life for poor individuals, including opportunities for employment, educational background, and family life); WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 144-54 (1978) [hereinafter *WILSON, DECLINING SIGNIFICANCE OF RACE*] (providing broad perspective of social change in America with specific focus on economic conditions of black population); WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* vii-xi (1988) (illustrating problems of urban underclass in America and discussing public policy approaches used to combat these problems).

23. Frederick Douglass, *The Tyranny, Folly, and Wickedness of Labor Unions*, *NEW NATIONAL ERA*, Mar. 23, 1871, cited in ROBERT L. FACTOR, *THE BLACK RESPONSE TO AMERICA* 45 (1970); see

generally did not pose a grave economic threat to black workers because of the small number of union members and the concentration of blacks in rural areas.²⁴ Between 1897 and 1904, however, the total membership of American trade unions rose from 447,000 to 2,072,700.²⁵ Meanwhile, increasing numbers of blacks migrated to urban areas where they competed with union members for jobs.

At this time, and throughout the *Lochner* era, American Federation of Labor (AFL) unions and the Railroad Brotherhoods were the primary American labor unions.²⁶ The AFL's member unions almost universally engaged in racial discrimination, ranging from complete exclusion of blacks to segregation into Jim Crow locals.²⁷ All of the Railroad Brotherhoods excluded blacks.²⁸

Because of unions' racist policies, black leaders across the political spectrum rallied to the anti-union cause.²⁹ Booker T. Washington, Douglass' successor as the nation's leading black spokesperson, frequently attacked labor unions.³⁰ J.E. Bruce, a regular contributor to *The Colored American*, wrote in 1902 that labor unions were "a greedy, grasping, ruthless, intolerant, overbearing, dictatorial combination of half-educated white men. . . . I am against them because they are against the Negro."³¹ In 1924, Professor (later Dean) Kelly Miller of Howard University advised blacks to "stand shoulder to shoulder with the captains of industry" in opposition to trade unions.³² Bishop Carey of Atlanta, a prominent black churchman, added that black interests lay with the strength of the American

FACTOR, *supra* (recognizing Douglass' critical assessment of political activity of white labor and its refusal to allow blacks into its unions).

24. Cf. STERLING D. SPERO & ABRAM L. HARRIS, *THE BLACK WORKER* 21 (1931) (recognizing that at this time national unions were "almost powerless").

25. PHILIP FONER, *supra* note 15, at 27.

26. PHILIP FONER, *supra* note 15, at 27.

27. See, e.g., PHILIP FONER, *supra* note 15, at 233-55; CHARLES WESLEY, *NEGRO LABOR IN THE UNITED STATES* ch. IX (1927); FRANK WOLFE, *ADMISSION TO AMERICAN TRADE UNIONS* ch. 6 (1912); cf. *Shipstead Hearings*, *supra* note 1, at 605 (statement of Charles W. Chestnutt, Member, Ohio Bar). Mr. Chestnutt pointed out:

The labor unions not only discriminate against colored men in admission to the unions, but in some unions to which they are admitted they are denied the full benefits of those unions. The locals decide the distribution of labor, but the colored member is usually the last to be supplied with a job, if at all.

Shipstead Hearings, *supra* note 1, at 605 (statement of Charles W. Chestnutt, Member, Ohio Bar).

28. SPERO & HARRIS, *supra* note 24, at 12.

29. Cf. AUGUST MEIER, *NEGRO THOUGHT IN AMERICA, 1880-1915*, at 168-69 (1969) (noting that most black leaders opposed unions).

30. See Booker T. Washington, *The Negro and the Labor Unions*, *ATLANTIC MONTHLY*, June 1913, at 753, 756.

31. Bruce Grit, *THE COLORED AMERICAN*, Oct. 18, 1902, at 3.

32. Kelly Miller, *The Negro as a Workingman*, 6 *AM. MERCURY* 310, 313 (1925).

economy and the white industrial leaders who controlled it, rather than with labor unions.³³

Marcus Garvey, a black nationalist and leader of the "Back to Africa" movement, urged black workers to undercut union wages until they could gain economic self-sufficiency.³⁴ He argued that "the only convenient friend the Negro worker or laborer has in America at the present time is the white capitalist."³⁵ W. E. B. Du Bois, a socialist, grew so frustrated with the labor movement's intransigent refusal to grant blacks equal rights that he wrote this paean to businessmen: "The white employers, North and South, literally gave the Negroes work when white men refused to work with him; when he 'scabbed' for bread and butter the employers defended him against mob violence of white laborers; they gave him educational institutions when white labor would have left him in ignorance."³⁶

Some scholars assert that the roots of labor union hostility toward blacks stemmed from the willingness of Southern blacks to work for lower wages than would whites in the same occupation.³⁷ This could not have been the main source of union hostility toward blacks, however, because the unions could have blunted this source of tension by inviting blacks to join. The vast majority of blacks would have willingly given up whatever privileges they had acquired through the "dual labor market" in exchange for the higher wages, better working conditions, and greater job security that came with union membership.³⁸ Moreover, the wage differential theory does not explain why unions in the North were at least as hostile to blacks as were Southern unions, despite the fact that racial wage differentials were rare in the North.³⁹

33. SPERO & HARRIS, *supra* note 24, at 135.

34. See SPERO & HARRIS, *supra* note 24, at 135.

35. SPERO & HARRIS, *supra* note 24, at 135 (quoting Marcus Garvey).

36. Du Bois, *Denial of Justice*, *supra* note 2, at 46.

37. See, e.g., WILSON, DECLINING SIGNIFICANCE OF RACE, *supra* note 22, at 150 (citing example of disproportionate pay among whites and blacks in railroad industry); Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547, 553 (1972) (arguing that conflict develops where workers of different ethnicity earn different wages for same work).

38. See Charles S. Johnson, *Negro Workers and the Unions*, THE SURVEY, Apr. 15, 1928, at 113, 114 ("When the trade unions have been open to them, Negroes have entered as freely as white workers.").

39. See SPERO & HARRIS, *supra* note 24, at 174 ("There is in the North, as a rule, no discrimination as to wage rates. With few exceptions when a Negro does the same work as a white man he receives the same rate of pay."); cf. *Shipstead Hearings*, *supra* note 1, at 610-13 (statement of Harry E. Davis, Member, Ohio House of Representatives) (describing case of violent union discrimination in Cleveland, Ohio).

Other historians have alleged that the disproportionate role blacks played in strikebreaking led to white workers' hostility.⁴⁰ This view overlooks the fact that blacks found strikebreaking expedient only because they were barred from many unionized industries; white workers successfully pressured their employers not to hire blacks.⁴¹ When white workers went on strike, employers felt free to ignore their employees' opposition to black co-workers, and blacks often took the opportunity to break into new industries.⁴²

White union members and leaders generally refused to consider the strategy of treating blacks as equals, despite the potential economic benefit to them.⁴³ Instead, they regularly organized (occasionally violent) strikes aimed at forcing their employers to pursue a whites-only hiring policy.⁴⁴ While these strikes rarely succeeded, they

40. *E.g.*, JOHN P. ROCHE, *THE QUEST FOR THE DREAM* 22 (1963) (noting that southerners viewed blacks as "perpetual strikebreakers" who interfered with whites' efforts to unionize); SPERO & HARRIS, *supra* note 24, at 128 (asserting that blacks' role in strikebreaking increased racial tension).

41. Robert J. Cottrol, Book Review, 67 *TUL. L. REV.* 1531, 1556 (1993) (discussing how restrictions on jobs for blacks were demanded by white workers); see JOHN G. VAN DEUSEN, *THE BLACK MAN IN WHITE AMERICA* 59 (1944) ("Even though the employer were unprejudiced, he dared not employ Negroes, for if he did so his white employees might leave."); WESLEY, *supra* note 27, at 236 ("It mattered not how unprejudiced the employer might be, his employees would refuse to work with Negroes on the same job.").

42. Johnson, *supra* note 38, at 114. Johnson writes:

[M]any of the greatest advances which Negroes have made in industry, many of their first opportunities, are due to strikes and their part in breaking them. They were used to break the stockyard strike, and they have been employed there ever since; they were largely responsible for the failure of the steel strike, and they have been employed there ever since; and they now make up 17 percent of the steel mill workers; they were used in the great railroad strike of 1922, and about 700 Negroes, mostly skilled, are still employed by one system alone. . . . The list could be continued indefinitely.

Id.; see also VAN DEUSEN, *supra* note 41, at 60 (describing black penetration into building trades after Chicago strike in 1900, meat packing industry following Chicago strike in 1921, steel industry after Pittsburgh strike in 1917, coal industry after Pennsylvania strike in 1922, railway shopmen in 1922, metal trades after Detroit strike in 1921, and brickmaking after New Jersey strike in 1923). As Van Deusen notes, "criticism of the Negro strikebreaker comes with poor grace from unionists who subscribe to a policy of excluding Negroes from their Union." VAN DEUSEN, *supra* note 41, at 59.

In this context, an important liberty-of-contract case was *Mathews v. People*, 67 N.E. 28 (Ill. 1903). In *Mathews*, the Illinois Supreme Court struck down a statute proscribing the state employment bureau from furnishing a list of unemployed laborers to any employer whose workmen were on strike. *Id.* at 36.

43. See Alexander Saxton, *Race and the House of Labor*, in *THE GREAT FEAR: RACE IN THE MIND OF AMERICA* 98, 118 (Gary B. Nash & Richard Weiss eds., 1970) (noting that NAACP actually proposed joint commission with AFL to seek ways of bringing blacks into labor unions in order to discourage strikebreaking, but that proposal was rejected by AFL).

44. See ROBERT HIGGS, *COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY, 1865-1914*, at 34-37 (1977) (noting that in last 20 years of nineteenth century, Labor Department recorded 50 strikes initiated to discourage employment of blacks, and that there were probably considerably more); HILL, *BLACK LABOR*, *supra* note 17, at 15 (describing incident in which 10 black railroad workers were killed after white labor union led strike to force displacement of black workers from their jobs).

did increase blacks' bitterness toward unions, encouraging them to break strikes and pursue other anti-union activities.

The unions excluded and segregated blacks for two major reasons. First, labor unions served not only the economic function of acting as bargaining proxies for workers, but also a social function, much like a lodge or private club.⁴⁵ Most white union workers simply refused to allow blacks into their unions because their own social status would decline if they associated with blacks, and because mixing with blacks would imply a degree of social equality that most whites belligerently refused to acknowledge.⁴⁶ The second reason for union discrimination was purely economic; if unions could exclude blacks, as well as women and immigrants, the supply of labor in their trades would decline significantly, leading to a significant rise in the price employers would pay for union labor.⁴⁷

Considering the discriminatory policies that unions pursued during the *Lochner* era together with the fact that blacks were largely disenfranchised,⁴⁸ it is not surprising that much pro-union legislation passed during that period harmed black workers. *Lochner*-era labor legislation was discriminatory for three different reasons. First, unions lobbied for some legislation primarily because it would have the direct and intended effect of restricting competition from black workers.⁴⁹ Second, some labor legislation was motivated by several interrelated considerations, only one of which was excluding blacks from the field.⁵⁰ Finally, the negative effects on blacks of some labor legislation were mostly incidental; legislators simply did not account for

45. See SPERO & HARRIS, *supra* note 24, at 287 (noting importance of social aspects of unions).

46. See W. E. B. DU BOIS, THE NEGRO ARTISAN 155 (1902) ("[T]he industrial up-building of the South has brought to the front a number of white mechanics, who from birth have regarded Negroes as inferiors and can with the greatest difficulty be brought to regard them as brothers in this battle for better conditions of labor.").

Herbert Northrup notes that most of the Railroad Brotherhoods were founded as fraternal and benevolent societies rather than as trade unions. HERBERT R. NORTHRUP, ORGANIZED LABOR AND THE NEGRO 50 (rev. ed. 1971). Members refused to admit blacks because that would be tantamount to admitting that blacks were the "social equal" of whites. *Id.*; cf. IRA D.A. REID, NEGRO MEMBERSHIP IN AMERICAN LABOR UNIONS 45 (1930) (discussing union's refusal to admit blacks because of refusal to accept social equality).

47. SPERO & HARRIS, *supra* note 24, at 56; cf. ABRAHAM EPSTEIN, THE NEGRO MIGRANT IN PITTSBURGH 41 (reprint ed. 1969) (explaining that blacks believed that unions opposed making them members out of fear that doing so would "flood the city with skilled Southern Negroes"); VAN DEUSEN, *supra* note 41, at 56 (illustrating union members' anger at decline in labor standards after blacks penetrated labor market by breaking strikes).

48. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ONE-PARTY SOUTH, 1888-1910, at 33 (1974) (detailing methods used to disenfranchise Southern blacks).

49. See, e.g., *infra* notes 81-83 and accompanying text (discussing railroad licensing legislation intended to reduce black employment).

50. See, e.g., *infra* notes 196-237 and accompanying text (discussing Davis-Bacon Act).

their interests.⁵¹ Such legislation should still be considered discriminatory, however, because its effect was to monopolize the labor market on behalf of white workers.⁵² Moreover, the unions vigorously contested any attempts to ameliorate the negative effects of such legislation on blacks through civil rights enforcement.⁵³

II. THE GROWTH OF NATIONAL LABOR LEGISLATION

Many scholars criticize *Lochner*-era courts for interfering with the sort of government activism that they claim could have been of great benefit to blacks.⁵⁴ They note, for example, that the courts were far more interested in protecting liberty of contract through the doctrines of substantive due process and strict construction of the enumerated powers of Congress than in protecting the civil rights of blacks.⁵⁵

Without apologizing for the general lack of courage and moral foresight exhibited by the courts on civil rights issues,⁵⁶ it should be noted that it was not primarily judicial attitudes that prevented civil rights enforcement by the Federal Government during the *Lochner* era. In the early twentieth century, racism in American society was at its highest point since the Civil War.⁵⁷ Congress and the executive

51. See, e.g., *infra* notes 243-87 and accompanying text (discussing labor provisions of National Industrial Recovery Act). See generally David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 30 SAN DIEGO L. REV. (forthcoming Fall 1993) (describing diverse origins of licensing legislation that discriminated against blacks).

52. See, e.g., *infra* notes 125-72 and accompanying text (discussing Railway Labor Act).

53. See, e.g., *infra* notes 291-316 and accompanying text (discussing union opposition to and ultimate defeat of civil rights clause in Wagner Act).

54. E.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 162 (1960) (concluding that rather than setting pace of social reform, *Lochner* era Court halted trend towards governmental intervention); Bertram Wyatt-Brown, *Introduction* to MOOREFIELD STOREY, CHARLES SUMNER (Arthur M. Schlesinger, Jr. ed., 1983) (contending that liberals, including liberal judges, distanced themselves from cause of black rights because of fear of class legislation and centralization of government power).

55. E.g., MCCLOSKEY, *AMERICAN CONSERVATISM*, *supra* note 13, at 116 ("Human rights must give way when they conflict with the rights of the property owner."); MCCLOSKEY, *SUPREME COURT*, *supra* note 54, at 101-35 (arguing that after Civil War, primary interest of Court was to guide America into economic greatness); Robert G. McCloskey, *Introduction* to *ESSAYS IN CONSTITUTIONAL LAW* 3, 6 (Robert G. McCloskey ed., 1957) (maintaining that Court's essential role was to keep government from interfering with business rather than to protect individual rights and liberties); David R. Pollack, *Emancipation and the Law: A Century of Progress, in 100 YEARS OF EMANCIPATION* 169 (Robert Goldwin ed., 1964) (charting evolution of Supreme Court's perspective on Fourteenth Amendment from protection of blacks to protection of business).

56. But see *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (striking down residential segregation law that prohibited blacks from acquiring property in predominantly white neighborhoods); cases cited *infra* note 357.

57. See 9 ALEXANDER BICKEL & BENNO SCHMIDT, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT* 736 (1984) ("During the Progressive era, racism took deeper roots in American society than at any time since the Civil

branch of the Federal Government were often extremely hostile to blacks. For example, the 1866 and 1871 federal Civil Rights Acts⁵⁸ remained on the books, but Congress and the President lacked interest in enforcing them.⁵⁹ The Wilson administration showed its commitment to civil rights by segregating the entire federal workforce.⁶⁰

Indeed, while blacks had an often unfulfilled strong interest in having the National Government actively protect them from state discrimination, they also had an interest in limiting economic regulation by the National Government. Given public opinion prevalent during the *Lochner* era, and the widespread disenfranchisement of potential black voters,⁶¹ any national economic legislation was likely to operate to blacks' disadvantage. The American system of federalism, which divided the United States into dozens of jurisdictions, allowed blacks to escape the areas where they suffered most from hostile economic regulation.⁶² Southern racists who desired a docile black labor force labored mightily, but largely unsuccessfully, to prevent such migration.⁶³

As the twentieth century progressed, the same federalist economic flexibility that helped blacks became the scourge of labor unions and their sympathizers. The unions objected that manufacturers could evade Northern and Midwestern States' economic regulations by

War."). This attitude was reflected in increased violence against blacks and the rise of *de jure* segregation. *Id.* at 746.

58. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985, 1986 (1988 & Supp. III 1991)); Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1981, 1987-1991 (1988 & Supp. III 1991)); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1982, 1987-1992 (1988 & Supp. III 1991)).

59. *Cf. McCloskey*, SUPREME COURT, *supra* note 54, at 120-21 (noting that "civil rights acts" which were designed to protect rights of blacks did nothing to curb state discrimination based on race).

60. *See Logan*, *supra* note 14, at 359-67 (discussing black leaders' responses to Wilson's candidacy and presidency); Nancy J. Weiss, *The Negro and the New Freedom: Fighting Wilsonian Segregation*, 84 POL. SCI. Q. 61, 61 (1969) (discussing segregation policy of Wilson administration).

61. *See Kousser*, *supra* note 48, at 33 (noting that large numbers of blacks were disfranchised by literacy and poll tax qualifications during *Lochner* era); *Giles v. Harris*, 189 U.S. 475, 482-84 (1903) (illustrating disfranchising provisions of Alabama law).

62. *See Price v. Fishback*, *Can Competition Among Employers Reduce Governmental Discrimination? Coal Companies and Segregated Schools in West Virginia in the Early 1900s*, 32 J.L. & ECON. 311, 324 (1989) ("Since blacks historically were disenfranchised, their ability to prevent [hostile economic legislation] was limited to voting with their feet across political jurisdictions.").

63. Leo Alilunas, *Statutory Means of Impeding Emigration of the Negro*, 22 J. NEGRO HIST. 148, 149 (1937) (describing laws aimed at reducing emigration). *See generally Williams v. Fears*, 179 U.S. 270, 278 (1900) (upholding emigrant agent laws, which served to restrict black mobility by inhibiting labor recruitment by Northern industry).

moving to the South.⁶⁴ Thus began the crusade to nationalize economic regulations, and to try to prevent the Supreme Court from standing in the way.⁶⁵

The next part of this Article explores two areas, railroad labor regulation and public works labor regulation, in which unions supported pre-New Deal labor legislation that threatened black workers' economic welfare. Blacks in the railroad and construction industries held many skilled positions, and the two industries accounted for a large percentage of black males employed in nonagricultural occupations.⁶⁶

This legislation originally was promulgated mainly at the state level, thus limiting the harm to blacks who could flee such legislation.⁶⁷ Just before the New Deal, however, the Federal Government stepped in and began to help racist railroad and construction unions dominate their labor markets.⁶⁸ Further regulation during the New Deal solidified the unions' monopolization of their labor markets, with disastrous consequences for excluded black workers.⁶⁹

A. Railroad Labor Legislation

1. Early discriminatory legislation

By the beginning of the *Lochner* era, tens of thousands of blacks had found relatively remunerative work on American railroads.⁷⁰ Nevertheless, the railroad industry was also the site of the most virulent forms of organized labor's racially discriminatory policies.

Unions in the railroad industry launched collective bargaining in the 1880s, and they developed into some of the strongest unions in

64. See Edward S. Corwin, *Social Planning Under the Constitution: A Study in Perspectives*, 26 AM. POL. SCI. REV. 1, 15, 22 (1932).

65. *Id.* (arguing that all businesses whose operations extend beyond state boundary should be subject to fair and reasonable regulation by Congress).

66. See SPERO & HARRIS, *supra* note 24, at 159 (illustrating graphically percentage of blacks in building crafts); *id.* at 285 (providing U.S. Department of Labor Statistics for number of blacks in railroad industry); see also Charles E. Hall, *The American Negro, His History and Literature*, in NEGROES IN THE UNITED STATES, 1920-1932, at 290, 292, 303 (William L. Katz ed., 1969) (providing U.S. Department of Commerce and Bureau of Census statistics for black occupational distribution).

67. See *infra* notes 81-89 and accompanying text (discussing state laws that discriminated against black railroad workers); *infra* notes 180-96 (discussing state regulation of construction labor).

68. See *infra* notes 125-29 and accompanying text (discussing Railway Labor Act of 1926); *infra* notes 208-18 and accompanying text (discussing Davis-Bacon Act).

69. See *infra* notes 131-47 (discussing 1934 amendments to Railway Labor Act of 1926); *infra* notes 222-37 (discussing 1935 amendments to Davis-Bacon Act and subsequent regulations promulgated by Department of Labor).

70. See, e.g., SPERO & HARRIS, *supra* note 24, at 269 (noting that by 1918, blacks accounted for 20% of workforce on railroads).

the country.⁷¹ Nearly all of the railroad transportation unions banned blacks from membership by constitutional provision.⁷² Because blacks had never acquired many jobs as conductors or engineers,⁷³ it was not difficult to exclude them from those jobs. The Trainmen's and Firemen's Brotherhoods had more difficulty excluding blacks from their crafts because many blacks had entered those occupations at a time when the jobs were hot and dirty and therefore considered "Negro work."⁷⁴ As technological improvements made these jobs easier, they became attractive stepping stones to conductors' and engineers' positions, and they increasingly appealed to white workers.⁷⁵ As a result, the Brotherhood of Locomotive Firemen and the Brotherhood of Railroad Trainmen launched efforts to exclude blacks from their occupations.⁷⁶

One such effort consisted of strikes for a whites-only hiring policy. Such strikes often involved violence against black railroad workers.⁷⁷ In 1911, for example, a strike against the Cincinnati, New Orleans and Texas Pacific Railroad protesting the employment of blacks led to the murder of ten black firemen.⁷⁸ The strikers eventually reached an accord with the railroad that guaranteed that blacks would not be employed on the company's line north of Oakdale and

71. Walter E. Williams, *Freedom to Contract: Blacks and Labor Organizations*, GOV'T-UNION REV., Summer 1981, at 28, 31 (noting that railroad labor unions are among oldest and most powerful in nation).

72. SPERO & HARRIS, *supra* note 24, at 22 (noting that Brotherhood of Locomotive Engineers, Brotherhood of Railway Conductors, and Brotherhood of Locomotive Firemen and Enginemen were among unions that premised membership eligibility on race); RAY MARSHALL, *THE NEGRO AND ORGANIZED LABOR* 89-96 (1965) (describing union exclusion of blacks by constitutions of Brotherhood of Railway Clerks, Boilermakers, and International Association of Machinists); Ray Marshall, *The Negro in Southern Unions*, in *THE NEGRO AND THE AMERICAN LABOR MOVEMENT* 128, 134-35 (Julius Jacobson ed., 1968) [hereinafter Marshall, *The Negro in Southern Unions*] (stating that International Association of Machinists, Blacksmiths, Boilermakers, and Maintenance-of-Way Employees were among those unions to constitutionally bar black membership).

73. SPERO & HARRIS, *supra* note 24, at 284; cf. VAN DEUSEN, *supra* note 41, at 60 (indicating that blacks had only limited opportunities to advance beyond unskilled positions in railroad industry).

74. See SPERO & HARRIS, *supra* note 24, at 284 (explaining how at turn of century some Southern railroad companies employed firemen crews consisting of 85% to 90% black workers).

75. SPERO & HARRIS, *supra* note 24, at 315 (noting that technological advances made exclusively black rail jobs such as brakeman attractive to whites, but in addition these advances threatened jobs for both whites and blacks).

76. See Marshall, *The Negro in Southern Unions*, *supra* note 72, at 135-36 (noting that unions attempted to exclude blacks from railroad jobs by contractual agreements with employers).

77. See HILL, *BLACK LABOR*, *supra* note 17, at 15 (describing violent incidents in Texas and Georgia following all-white unions' petition to replace black railroad workers with whites); John M. Matthews, *The Georgia "Race Strike" of 1909*, 40 J. S. HIST. 613, 617-21 (1974) (describing violence during strike by Firemen and Enginemen's Union, and government's refusal to protect black workers).

78. HILL, *BLACK LABOR*, *supra* note 17, at 15; SPERO & HARRIS, *supra* note 24, at 291.

Chattanooga, Tennessee, and that the overall percentage of black firemen was not to exceed their percentage extant on January 1, 1911.⁷⁹ Workers soon reached a similar agreement with the Southern Railroad of Georgia.⁸⁰ In general, however, similar strikes were unsuccessful.

When the unions could not exclude blacks through the collective bargaining process, they turned to government in an attempt to monopolize the railroad labor force. During the infamous 1909 Georgia Race Strike, the Brotherhood of Locomotive Firemen submitted a licensing bill to the Georgia Legislature, explaining, "The justice which has been denied the white firemen of the Georgia Railroad may be secured, not only for them, but for every white fireman in the South, through legislation such as that now pending in the lawmaking body of the State of Georgia."⁸¹ The proposed bill fixed the limitations and powers of the five-member Board of Examiners, which was to be composed of firemen with not less than three years' experience.⁸² The union expected that the bill's enactment would "have the effect of reducing to a minimum the number of Negro firemen eligible to fill that position on locomotives [sic] in the state of Georgia."⁸³

Railroad unions also tried to persuade legislatures to pass "full crew" laws, which were operative in twenty-four states by 1939.⁸⁴ Such laws provided that a train crew must consist of an engineer, a fireman, a conductor, a brakeman, and a flagman.⁸⁵ While ostensibly passed for safety reasons, these laws were really make-work for union members.⁸⁶ The laws also served to exclude blacks across the country because state railroad officials, at the urging of the unions, interpreted the laws to hold that the many black porters who did trainmen's work were not trainmen for the purposes of the stat-

79. SPERO & HARRIS, *supra* note 24, at 291.

80. See SPERO & HARRIS, *supra* note 24, at 292 (noting that railroad refused to employ black firemen north of given point on rail line in order to evade strike).

81. See SPERO & HARRIS, *supra* note 24, at 482 (quoting LOCOMOTIVE FIREMEN'S AND ENGINEMEN'S MAG., Aug. 1909, at 278).

82. SPERO & HARRIS, *supra* note 24, at 482.

83. SPERO & HARRIS, *supra* note 24, at 482. A similar bill was introduced in 1912. See Edward A. Gaston, A History of the Negro Wage Earner in Georgia 240 (1957) (unpublished Ph.D. dissertation, Emory University) (describing bill requiring that all railway firemen be able to read train orders).

84. See NORTHROP, *supra* note 46, at 52 (noting that railroad unions used full crew laws to replace black workers with their white counterparts).

85. NORTHROP, *supra* note 46, at 52.

86. NORTHROP, *supra* note 46, at 52.

utes.⁸⁷ The porters thus had to be replaced by white trainmen in order to comply with the law.⁸⁸ The U.S. Supreme Court consistently upheld full crew laws.⁸⁹ Despite these and other efforts by the railroad unions to exclude blacks, there was no fundamental change in blacks' relatively favorable position on the railroads until World War I brought massive federal intervention in the railroad labor market.

2. *World War I and federal intervention on the railroads*

During World War I, labor shortages induced blacks to leave the Southern railroads for more lucrative jobs in the North.⁹⁰ The traditional pay differential between whites and blacks, which normally allowed blacks to compete successfully with exclusionary white unions for employment, instead encouraged them to seek greener pastures.⁹¹ In response, the Federal Government, which had taken over the railroads during the war, ordered that black workers be paid the same wages as whites for the jobs of fireman, switchman, and trainman.⁹²

Immediately after the war ended, the railroad unions renewed their efforts to force blacks out of the industry. They were aided in that effort both by the fact that government control of the industry during the war had greatly increased union power, and by the equal pay order, which in the postwar period reduced the railroads' incentive to employ blacks.⁹³ When racially motivated strikes failed, white trainmen once again took to terrorism, killing several black trainmen.⁹⁴

Finally, in order to pacify the Brotherhood of Railway Trainmen, which had threatened to disrupt all of the Southern lines, the Federal Railroad Administration agreed in 1919 to new regulations benefiting white trainmen at the expense of blacks.⁹⁵ One of the rules required

87. DAVID A. GERBER, *BLACK OHIO AND THE COLOR LINE, 1860-1915*, at 302-03 (1976); NORTHROP, *supra* note 46, at 52; August Meier & Elliott Rudwick, *Attitudes of Negroes Toward the American Labor Movement from the Civil War to World War I*, in *THE NEGRO IN THE AMERICAN LABOR MOVEMENT* 27, 46 (Julius Jacobson ed., 1968).

88. NORTHROP, *supra* note 46, at 52.

89. See *St. Louis, Iron Mountain & S. Ry. v. Arkansas*, 240 U.S. 518, 520-21 (1916); *Chicago, Rock Island & Pac. Ry. v. Arkansas*, 219 U.S. 453, 466 (1911).

90. See generally EMMETT J. SCOTT, *NEGRO MIGRATION DURING THE WAR* 3-12 (1920) (providing overview of exodus of blacks from South to urban markets in North).

91. SPERO & HARRIS, *supra* note 24, at 294.

92. See SPERO & HARRIS, *supra* note 24, at 295.

93. See HOWARD W. RISHER, *THE NEGRO IN THE RAILROAD INDUSTRY* 38 (1971).

94. SPERO & HARRIS, *supra* note 24, at 296-98 (describing situations in which black rail workers were kidnapped, beaten, threatened, and even killed for refusing to leave jobs).

95. SPERO & HARRIS, *supra* note 24, at 296-299.

that all new applicants for positions of brakeman, flagman, and switchman pass uniform written examinations.⁹⁶ Another rule provided that "Negroes are not to be used as conductors, flagmen, baggagemen, or yard conductors."⁹⁷ Blacks had customarily served as brakemen and whites as flagmen. Now, the position of brakeman was to be filled by seniority, a change that would allow white trainmen to displace blacks, while blacks were still banned from becoming flagmen.⁹⁸ Other provisions were designed to force blacks out of the occupation of porter and to prevent black porters from serving as trainmen.⁹⁹

3. *Railroad unions decline, black railroad workers benefit*

Government domination of the railroads, including federal labor rules, ended soon after the war. Approximately 136,000 blacks still worked in the railroad industry in 1924, many of them in relatively high-paying skilled and semiskilled positions.¹⁰⁰ While blacks still could not get jobs as conductors and engineers, as of 1920 blacks constituted about twenty-seven percent of the firemen, twenty-seven percent of the brakemen, and twelve percent of the switchmen in the Southern states.¹⁰¹

a. *Undercutting the union wage and strikebreaking*

The ability of blacks to retain their positions in the railroad industry in the face of union attempts to exclude them was in large part due to their continued willingness to undercut union wages. On the Gulf Coast Lines, for example, black firemen signed wage agreements fixing their wages at about \$0.50 to \$1.00 less per hundred miles than union rates.¹⁰² Blacks also benefited from their service as strikebreakers against racist unions.¹⁰³ Such railroad occupations as blacksmith, electrician, machinist, carman, and railway clerk were

96. SPERO & HARRIS, *supra* note 24, at 300.

97. SPERO & HARRIS, *supra* note 24, at 300.

98. See SPERO & HARRIS, *supra* note 24, at 301 (illustrating that regulations placed whites in position of seniority, leaving no room for promotion of black employees).

99. See NORTHRUP, *supra* note 46, at 51 (noting that reclassification of porters as porter-brakemen allowed older whites to claim these positions without providing new positions for displaced blacks).

100. SPERO & HARRIS, *supra* note 24, at 284-85.

101. SPERO & HARRIS, *supra* note 24, at 284.

102. SPERO & HARRIS, *supra* note 24, at 314.

103. Marshall, *The Negro in Southern Unions*, *supra* note 72, at 136. See generally *supra* notes 40-42 and accompanying text (discussing black workers' successful penetration of job market as strikebreakers).

opened to blacks when they broke strikes by unions that had excluded them from those positions.¹⁰⁴

*b. The labor injunction/yellow dog contract combination:
anathema to unions, a blessing for blacks*

Blacks also benefited from the weakening of the railroad unions in the South during the 1920s, which coincided with the overall decline of organized labor during that decade.¹⁰⁵ The decline of railroad union power was due primarily to the use of labor injunctions by federal judges. Such injunctions, often issued in response to violent strikes,¹⁰⁶ prohibited strike activity. Injunctions were used more widely against railroad unions than any other segment of organized labor.¹⁰⁷

One of the first great labor cases to reach the Supreme Court, *In re Debs*,¹⁰⁸ illustrates how the use of the labor injunction benefited black railroad workers. The case also presents an interesting example of the ironies that occur when legal scholars discuss labor history without acknowledging the depths of the historical antipathy between blacks and unions. The Court's decision in *Debs* upheld a federal injunction against Eugene V. Debs' whites-only American Railway Union, which threatened to monopolize the railroad labor market.¹⁰⁹ Derrick Bell points to *Debs* as an example of a case in which the Court "denied rights to labor" just as it was denying rights to blacks.¹¹⁰ Black railroad workers of the day, however, obviously thought differently. They formed an "Anti-Strikers Railroad Union" to help break the strike.¹¹¹

104. SPERO & HARRIS, *supra* note 24, at 287-90.

105. See Marshall, *The Negro in Southern Unions*, *supra* note 72, at 136.

106. Sylvester Petro, *Injunctions and Labor Disputes: 1880-1932*, 14 WAKE FOREST L. REV. 341, 345 (1978) (reporting that courts issued labor injunctions to stop union violence). The Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-115 (1988)), banned federal injunctions against strikes.

107. See Forbath, *supra* note 7, at 1152 ("Injunctions figured in virtually every railroad strike . . .").

108. 158 U.S. 564 (1895). For other early labor cases involving railroads, see *In re Higgins*, 27 F. 443, 445 (C.C.N.D. Tex. 1886) (asserting that labor union had no legal authority to require workers to strike following unlawful discharge of employee); *Farmers' Loan & Trust Co. v. Northern Pac. R.R.*, 60 F. 803, 822-24 (C.C.E.D. Wis. 1894) (condemning labor strike as destruction of "very fabric of our government" and enjoining labor unions from requiring railroad workers to strike).

109. *In re Debs*, 158 U.S. 564, 599-600 (1895); see also PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER 1619-1973, at 104-05 (1974) (discussing background and holding in *Debs*).

110. See BELL, *supra* note 11, at 37 & n.9.

111. WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR 41 (1982).

In the years after *Debs*, courts often issued injunctions to enforce "yellow dog" contracts, in which employees agreed not to join a union.¹¹² Because the workers had agreed not to join a union, their participation in strikes could be enjoined as violating their contracts.

In one of the first major examples of federal interference in labor relations, Congress, at the behest of the railroad unions and partly in response to the *Debs* decision, enacted a statute that banned interstate railroads from enforcing "yellow dog" contracts against their employees.¹¹³ By increasing the power of racist unions, the law had a deleterious effect on black railroad workers. In 1908, in *Adair v. United States*,¹¹⁴ the U.S. Supreme Court, relying heavily on *Lochner*, struck down the law as a violation of freedom of contract.¹¹⁵ The Court subsequently overturned a state ban on yellow dog contracts on intrastate railroads,¹¹⁶ thus limiting the railroad unions' ability to look to the states for help in monopolizing the railroad labor market.

The yellow dog/labor injunction combination, anathema to organized labor and its sympathizers,¹¹⁷ played a key role in helping to maintain black employment on the railroads.¹¹⁸ It is therefore no wonder that two prominent black leaders from Ohio testified against

112. See Forbath, *supra* note 7, at 1212 (defining yellow dog contract).

113. (Erdman) Act of June 1, 1898, ch. 370, § 10, 30 Stat. 424, 428 (1898); see John P. Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 LAB. HIST. 3, 11 (1963) (discussing congressional battle over Erdman Act and bill's final passage).

114. 208 U.S. 161 (1908).

115. *Adair v. United States*, 208 U.S. 161, 173-80 (1908). For an example of early criticism of *Adair*, see MOORE, *supra* note 12, at 116 (suggesting that *Adair* decision was "probably diametrically opposed to the spirit of the freedom supposed to be guaranteed by the first ten amendments, and the supporting argument [was] based on an ancient theory of individual rights rather than upon any consideration of actual conditions").

116. See *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (permitting employers to condition employment on entry into yellow dog contract); see also *Montgomery v. Pacific Elec. Ry.*, 293 F. 680, 689 (9th Cir. 1923) (holding California anti-yellow dog contract law unconstitutional and upholding injunction against railroad union), *cert. denied*, 264 U.S. 586 (1924).

117. See, e.g., FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 37-42, 146-50 (1930) (reviewing history of use of labor injunctions in United States); JOEL I. SEIDMAN, *The Yellow Dog Contract*, in *JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE* 11, 85 (1932) (analyzing development, use, and effect of yellow dog contracts as "most important source of labor injunction").

Ironically, the eventual prohibition of yellow dog contracts worked to the detriment of small businesses, which used the contracts most frequently, thus benefiting the large corporations that progressives claimed to loathe. Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917-1932*, 30 LAB. HIST. 251, 251-52 (1989).

118. This is not to say that the railroad unions desired to eliminate yellow dog contracts and labor injunctions for the specific purpose of harming blacks. But because of the unions' racism, their legislative agenda and the interests of black railroad workers were necessarily at odds. Similarly, the Supreme Court did not strike down anti-yellow-dog-contract laws out of concern for racial justice, but because of economic liberty concerns. *Coppage*, 236 U.S. at 13 (applying fundamental right to contract); *Adair*, 208 U.S. at 172-76 (relying on doctrine of liberty of contract). In this historical context, however, laissez-faire ideology and the interests of racial justice were in harmony.

the Shipstead anti-injunction bill before the Senate Judiciary Committee in 1928.¹¹⁹ "It logically follows," said Harry E. Davis, the leading black Republican politician in Ohio, "that a colored worker who is denied the protection and the benefits of organized labor because they will not take him in, has only one place of redress in case his right of employment is assailed, and that is in our courts . . ."¹²⁰ Davis added a compelling statement that tied freedom of contract to the enumerated rights of property and liberty:

The group I represent has not got very much physical or tangible property and their biggest asset is their right to a job, recognized as a contract, but an intangible right, and I maintain that if this bill becomes a law it would affect very materially their right to the biggest thing which they have, the right to earn a living.¹²¹

4. *National railroad labor legislation as the downfall of black railroad labor*

Throughout the 1920s and early 1930s, railroad unions continued their campaign against black workers, with marginal success.¹²² Otherwise frustrated, unions once again turned to violence in an attempt to exclude blacks from the industry. For example, white unionized trainmen launched terrorist campaigns against black trainmen in 1931,¹²³ and at least ten black firemen and trainmen were killed and twenty-one wounded in the lower Mississippi Valley between 1931 and 1934.¹²⁴ But it was not organized violence that eventually led to the steep decline of blacks in the railroad industry. Rather, it was federal intervention in the railroad labor market in support of the railroad unions.

The great blow to black railroad labor was the Railway Labor Act of 1926,¹²⁵ and, more precisely, the amendments to that Act passed in 1934.¹²⁶ The Act guaranteed the right of workers to choose their

119. *Shipstead Hearings*, *supra* note 1, at 603-09 (statement of Charles W. Chestnutt, Member, Ohio Bar); *id.* at 609-14 (statement of Harry E. Davis, Member, Ohio House of Representatives).

120. *Shipstead Hearings*, *supra* note 1, at 610 (statement of Harry E. Davis).

121. *Shipstead Hearings*, *supra* note 1, at 609 (statement of Harry E. Davis).

122. NORTHROP, *supra* note 46, at 50-51 (stating that white railroad unions renewed their efforts against blacks immediately after World War I in response to burgeoning success of blacks in railroad industry).

123. David Born, *Memphis Negro Workingmen and the NAACP*, 28 W. TENN. HIST. SOC'Y PAPERS 90, 100-01 (1974). While the unions were silent, the railroads offered rewards and investigative assistance that helped catch the perpetrators. *Id.*

124. NORTHROP, *supra* note 46, at 54-55.

125. Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (amended 1934).

126. Railway Labor Act of 1934, ch. 691, 48 Stat. 1185 (codified as amended at 45 U.S.C. §§ 151-188 (1988)). Once again, it should be emphasized that the primary motivation of the railroad unions in lobbying for this legislation was not to harm black workers. See NORTHROP, *supra* note 46, at 55 (stating that original intent of Act was to guarantee bargaining rights). Even

bargaining representatives.¹²⁷ The Supreme Court not only upheld this legislation in 1930, but interpreted it favorably for the unions, holding that a railroad must deal only with the representative chosen by a majority of employees,¹²⁸ despite the fact that white unions still excluded blacks.¹²⁹ Nevertheless, the Act's effects were minimal until 1934.¹³⁰

In 1934, Congress amended the Act to provide: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the class or craft"¹³¹ Despite the *Adair* precedent, the 1934 amendments also outlawed yellow dog contracts and the formation of company-financed unions.¹³² These amendments gave tremendous power to racist unions. By 1935, union membership on the railroads included 97.9% of engineers, 98.5% of firemen, 99.1% of brakemen, 94.7% of yard servicemen, 85.3% of telegraph operators, and 96% of signalmen.¹³³ The unions immediately tried to use collective bargaining "to gain a favored position for the white worker."¹³⁴ The white unions' quest to monopolize the railroad labor market was aided immensely by the 1934 Amendments'

if black railroad workers had not been a competitive threat, the unions still would have desired the monopoly power conferred upon them by the Act. *Id.* The unions wanted to exclude all nonunion workers from the railroads, not just blacks. The difference is that nonunion black workers, unlike other nonunion workers, did not choose to stay out of the unions, but were unable to join because of the unions' exclusionary policies. *Id.*

127. Railway Labor Act of 1926, § 2, 44 Stat. at 578 ("Representatives . . . shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.").

128. See *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 567-71 (1930).

129. See *To Amend the Railway Labor Act . . . Providing for Union Membership and Agreements for Deduction from Wages of Carrier Employees for Certain Purposes: Hearings Before a Subcomm. of the Comm. on Labor and Public Welfare on S. 3295*, 81st Cong., 2d Sess. 251 (1950) [hereinafter *Hearings on S. 3295*] (statement of Joseph C. Waddy, General Counsel, International Association of Railway Employees) ("All of these delegates and general chairmen share the opinion mutually with this committee, that the Negro is an undesirable in our particular vocation, therefore, should be supplanted by a white man in all instances.") (quoting proceedings of 32d convention of Brotherhood of Locomotive Firemen and Enginemen, 1932).

130. See *infra* notes 132-35 and accompanying text.

131. Railway Labor Act of 1934, ch. 691, 48 Stat. 1185, 1187 (1934) (codified at 45 U.S.C. §§ 151-188 (1988)); see *Virginia Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1937) (upholding Railway Labor Act as amended).

132. *Id.* § 2(a), 48 Stat. at 1187 ("[I]t shall be unlawful for any carrier . . . to use the funds of the carrier in maintaining or assisting or contributing to any labor organization"); see Williams, *supra* note 71, at 31 (stating that 1934 amendments contradicted *Adair* decision, which struck down legislation forbidding employer discrimination against union members, and further weakened bargaining power of black workers).

133. Clyde W. Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33, 50 n.114 (1947).

134. Note, *Judicial Regulation of the Railway Brotherhoods' Discriminatory Practices*, 1953 WIS. L. REV. 516, 517.

establishment of the National Mediation Board (NMB) and the National Railroad Adjustment Board (NRAB).¹³⁵

The NRAB had jurisdiction over disputes arising out of the interpretation of collective agreements in the railway industry.¹³⁶ It was composed of thirty-six members, half chosen by the unions, and half by the railroads.¹³⁷ National unions were eligible to participate in selecting the union representatives,¹³⁸ but this rule was applied discriminatorily to prevent black unions from participating.¹³⁹ Union dominance of the NRAB led the Board to promulgate rules that benefited white workers at the expense of blacks. For example, in 1942 the First Division of the NRAB held that railroads could not use porter-brakemen as brakemen, and that this decision should apply in all instances.¹⁴⁰ In practice, this decision required the railroads to replace black porter-brakemen with white brakemen.

The NMB determined, by secret ballot of the involved employees if necessary, which union would act as sole bargaining agent of any class or craft.¹⁴¹ This process almost always led to the designation of the discriminatory white Firemen's and Trainmen's unions as the sole bargaining agent for blacks in those jobs.¹⁴² Even in the rare occasions when most of the voters in a railroad union election were black, predominantly white unions managed to win the elections through fraud; black workers protested to no avail.¹⁴³ The lack of redress is not surprising given that many high-level members of the NMB believed that the certification process should be a whites-only affair.¹⁴⁴ The Firemen proceeded to negotiate a series of discrimi-

135. See Railway Labor Act of 1934, § 3(b), 48 Stat. at 1189-97 (establishing NRAB and NMB and delineating their authority); see also NORTHROP, *supra* note 46, at 55 (stating that under NMB and NRAB policy, blacks excluded from unions lost their bargaining power).

136. Railway Labor Act of 1934, § 3(i), 48 Stat. at 1191.

137. *Id.* § 3(a), 48 Stat. at 1189.

138. *Id.* § 3(c), 48 Stat. at 1189.

139. NORTHROP, *supra* note 46, at 66.

140. Brotherhood of R.R. Trainmen v. A.T. & Santa Fe Ry., N.R.A.B. Award No. 6640 (1st Div. 1942).

141. Railway Labor Act of 1934, § 2, 48 Stat. at 1188.

142. NORTHROP, *supra* note 46, at 55. Northrop asserts that NMB policy made collective bargaining "a mockery for the black minority on the roads when considered in the light of the almost universal exclusion practiced against them." *Id.*

143. NORTHROP, *supra* note 46, at 60-61 (citing example of election fraud and blaming NMB for failure to investigate unlikely election outcome).

144. NORTHROP, *supra* note 46, at 59 (citing NMB member's 1936 letter to Engineers' and Firemen's Unions stating that black bargaining power represented "menace to the present setup of railway labor organizations").

natory agreements with the railroads that severely reduced the employment of black firemen in the late 1930s and early 1940s.¹⁴⁵

Because blacks were not accepted for membership in most union locals, or were relegated to a low status, they attempted to form their own unions.¹⁴⁶ The NMB frustrated such attempts by ruling that these alternative unions could not represent black employees because the official unions already represented them.¹⁴⁷ The NMB thus bestowed de facto monopoly representation powers upon white labor unions that refused to extend equal membership rights to blacks.

The issue of the legality of an exclusionary union monopoly supported by the Government of the United States reached the courts in *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*.¹⁴⁸ The case involved forty-five black train porters from St. Paul, Minnesota who were ineligible for membership in the Clerks' Union because of their race.¹⁴⁹ They unanimously voted for the United Transport Service Employees of America (UTSEA) to be their bargaining agent.¹⁵⁰ The UTSEA applied to represent the black porters, but, as it always did in the many cases in which blacks sought to establish their own union,¹⁵¹ the NMB dismissed the application on the grounds that the porters did not constitute a separate class of employees.¹⁵² The Court of Appeals for the D.C. Circuit declared the dismissal order void, pointing out that the dismissal forced black employees to accept representation by an organization in which they had neither the right to membership nor the right to speak or be heard.¹⁵³ The Supreme Court, however, reversed the decision on

145. See NORTHROP, *supra* note 46, at 62-65 (citing attempts to curtail black employment through racist policymaking); cf. Locomotive Firemen and Enginemen, *Proceedings of the Thirty-Third Convention* 22, 584-85 (1937) (affirming plan to eliminate blacks in interest of "safety").

To effectuate the exclusion of blacks, the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) entered into agreements with several railroads, including the Gulf, Mobile, & Ohio Railroad, the Atlantic Coast Line Railroad, and Seaboard Air Line Railway, reserving jobs for "promotable" white workers. Brotherhood of Locomotive Firemen and Enginemen, *Officer's Reports*, 1941, at 553-54, cited in NORTHROP, *supra* note 46, at 62-65. This period was also marked by many "secret agreements" designed to undermine blacks. *Id.*

146. NORTHROP, *supra* note 46, at 66 (describing blacks' failed attempts to form viable unions).

147. National Mediation Board, Case No. R-621 (Apr. 30, 1940) (refusing to avail the provisions of Railway Labor Act to blacks and rejecting their attempt to form a union), cited in NORTHROP, *supra* note 46, at 66.

148. 137 F.2d 817 (D.C. Cir.), *rev'd*, 320 U.S. 715 (1943).

149. Brotherhood of Ry. & S.S. Clerks v. United Transp. Serv. Employees, 137 F.2d 817, 819 (D.C. Cir.), *rev'd*, 320 U.S. 715 (1943).

150. *Id.* at 820.

151. See *supra* notes 141-47 and accompanying text (discussing NMB refusals to recognize independent black representatives).

152. National Mediation Board, Case No. R-774 (Nov. 12, 1941), cited in Williams, *supra* note 71, at 31.

153. *Brotherhood of Ry. & S.S. Clerks*, 137 F.2d at 821.

the ground that the NMB's certifications were not subject to judicial review.¹⁵⁴ This decision paved the way for many future certification proceedings that granted discriminatory labor unions exclusive bargaining representation.¹⁵⁵

One year later, in the 1944 case of *Steele v. Louisville & Nashville Railroad*,¹⁵⁶ the Supreme Court held that the railroad unions' duty of fair representation under the Railway Labor Act required them to fairly represent all workers, including blacks.¹⁵⁷ Nevertheless, the ruling did not effectively reduce discrimination because the monopoly powers conferred on recalcitrant racist unions by the Railway Labor Act still existed. Also, *Steele* was not vigorously enforced by the relevant government agencies.¹⁵⁸

To take one example of the Railway Labor Act's negative effects on black workers, in 1940 the Brotherhood of Locomotive Firemen, the federally appointed exclusive bargaining agent for all railroad firemen, demanded that all future firemen hired by the Southeastern carriers be "promotable," i.e., white.¹⁵⁹ The carriers at first refused the union's demand, replying: "[T]hese people are citizens of the country; it is necessary that they make a living; colored people are patrons of the railroads, and, in our opinion, we should not by agreement entirely exclude them from employment in positions which they have occupied and filled over the years."¹⁶⁰

The Brotherhood then called in the NMB. With the NMB's encouragement, the railroad unions in 1941 signed a contract with the Southeastern carriers that contained a clause stipulating that the carriers would hire only "promotables" and reduce the number of non-promotables on each line to fifty percent.¹⁶¹ The test of "promotability" was designed to keep blacks out.¹⁶² Indeed, the agreement was eventually amended to state that "non-promotable"

154. *Brotherhood of Ry. & S.S. Clerks v. United Transp. Serv. Employees*, 320 U.S. 715, 719 (1943).

155. *Williams*, *supra* note 71, at 32.

156. 323 U.S. 192 (1944).

157. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944). The Court stated that because Congress did not intend to authorize race discrimination, union representatives may be enjoined from engaging in it. *Id.*; see also *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 211 (1944) (affirming duty of exclusive bargaining representative to fairly represent all workers without discriminating on basis of race).

158. See *Williams*, *supra* note 71, at 31 (describing *Steele* decision's lack of effect on discrimination).

159. *Brotherhood of Locomotive Firemen v. Tunstall*, 163 F.2d 289, 291 (4th Cir.) (noting union's explicit demand for racist policy), *cert. denied*, 332 U.S. 841 (1947).

160. *Id.* at 292.

161. *Id.*

162. See *id.* (discussing discriminatory intent of promotability standard).

meant "colored."¹⁶³ Despite *Steele*, this agreement remained in force until 1951.¹⁶⁴ By that time, the percentage of black firemen on that railroad line had been reduced substantially, from about eighty-five percent to about thirty-five percent.¹⁶⁵

The *Steele* decision did not help black railroad workers until the 1950s.¹⁶⁶ By then it was too late to save the bulk of black jobs on the railroads.¹⁶⁷ The percentage of black firemen had remained steady nationwide from 1910 to 1930, but dropped from 6.9% to 5.0% between 1930 and 1940.¹⁶⁸ The percentage of black firemen dropped from 41.4% in the South in 1920 to 33.1% in 1930 and 29.5% in 1940.¹⁶⁹ In the longer term, by 1960 only seven percent of Southern railroad firemen were black.¹⁷⁰ By the time the government tried to make up for its past wrongs through affirmative action policies in the 1970s, it was too late to help black workers significantly because of the severe decline in railroad employment.¹⁷¹ As labor historian Herbert Northrup concludes in his study of black workers and organized labor, "In no other industry has collective bargaining had such disastrous results for Negroes."¹⁷²

It should be added, however, that ubiquitous collective bargaining on the railroads through racist labor unions did not happen spontaneously. The Federal Government encouraged, and indeed commanded it. More precisely, then, in no other industry did the abandonment of liberty of contract and the establishment of federal intervention in the labor marketplace have such a disastrous effect on black labor.

163. *Id.* ("It is understood and agreed that the phrase 'non-promotable fireman' . . . refers only to colored fireman.")

164. *See Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 480 (4th Cir. 1951) (holding agreement discriminatory and void).

165. *Id.* at 476.

166. *See Williams, supra* note 71, at 33 (stating that *Steele* had little effect on entrenched discrimination). Indeed, as late as 1971, Herbert Northrup wrote: "If equal opportunity comes to the railroads, it will come thirty years too late." NORTHROP, *supra* note 46, at 34.

167. In anticipation of enforcement of the 1964 Civil Rights Act, the Brotherhood of Locomotive Firemen finally removed a black exclusion clause from its constitution in 1964. Williams, *supra* note 71, at 34 (discussing ineffectiveness of attempts to reform racist unions). By then it was apparent that few, if any, additional firemen would ever be hired on American railroads. Herbert Hill, *The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger*, 10 J. INTERGROUP REL. 5, 20 (1982) [hereinafter Hill, *The AFL-CIO and the Black Worker*] (discussing crippling effect of decades of discrimination on black firemen).

168. NORTHROP, *supra* note 46, at 53 (tbl. IIa).

169. NORTHROP, *supra* note 46, at 53 (tbl. IIa).

170. NORTHROP, *supra* note 46, at 53 (tbl. IIa).

171. *See NORTHROP, supra* note 46, at xc.

172. NORTHROP, *supra* note 46, at 100; *see id.* at 93-94 (stating that in addition to blatantly pro-union legislation, federal minimum wage law also had dire consequences for black railroad laborers because it encouraged mechanization).

B. *Public Works Labor Legislation*

By the beginning of the *Lochner* era, construction craft unions affiliated with the AFL were among the most powerful unions in the United States. They excluded blacks completely from most of their unions, while carpenters and bricklayers, faced with large numbers of potential black competitors, relegated black workers to second-class segregated locals.¹⁷³ Despite this discrimination, blacks constituted a significant percentage of skilled construction labor in the South.¹⁷⁴

Blacks also retained their antebellum strength in the trowel trades—bricklaying, plastering, and cement finishing¹⁷⁵—composing sixty-one percent of the South's bricklayers and forty-four percent of plasterers and cement finishers.¹⁷⁶ Blacks were numerous enough in those fields to create their own informal training programs and to allow their employers to withstand labor boycotts by white unionists seeking revenge for the "crime" of hiring black labor.¹⁷⁷ Indeed, blacks so dominated these fields that their large numbers sometimes forced the unions to offer them equal status.¹⁷⁸

1. *Early state laws*

By the 1890s, construction unions began to lobby successfully for state laws regulating labor on public works projects.¹⁷⁹ These laws usually required either that contractors hired by state or city governments pay workers the "prevailing," i.e. union, wage or that they hire only union workers.¹⁸⁰ Northern and Western states passed most of the laws, and they were directed mainly against immigrants; their limited effect on blacks was more incidental than intentional.¹⁸¹

173. See Johnson, *supra* note 38, at 114 (stating that black workers excluded from construction unions were perceived as threat to white labor).

174. NORTHROP, *supra* note 46, at 18-19.

175. See NORTHROP, *supra* note 46, at 7 (stating that trowel trade unions endeavored to enforce economic equality and condemned discrimination against blacks).

176. Mark Kruman, *Quotas for Blacks: The Public Works Administration and the Black Construction Worker*, LAB. HIST., Winter 1975, at 37, 38.

177. Marshall, *The Negro in Southern Unions*, *supra* note 72, at 145.

178. NORTHROP, *supra* note 46, at 7, 44 (stating that because black support was needed by unions to organize South, unions offered blacks "equal status"). Northrup apparently exaggerates the extent to which trowel trade unions actually granted blacks equal status. The Plasterers Union, for example, had fewer than 100 black members out of 30,000 union members. Johnson, *supra* note 38, at 114.

179. One law, banning the hiring of aliens on public works projects in New York, was passed as early as 1870. 1870 N.Y. Laws 385.

180. See, e.g., 1897 N.Y. Laws 415, amended by 1899 N.Y. Laws 192, 567.

181. The laws sometimes specifically prohibited aliens from laboring on public works. E.g., *City of Chicago v. Hulbert*, 68 N.E. 786, 787 (Ill. 1903); *People v. Coler*, 59 N.E. 716, 717 (N.Y. 1901); *People v. Warren*, 34 N.Y.S. 942, 943 (Sup. Ct. 1895). Some state provisions targeted specific ethnic groups. E.g., *Ex parte Kuback*, 24 P. 737, 739 (Cal. 1890) (striking down law banning use of Chinese workers on public works projects).

State courts generally struck down these laws as violating liberty of contract and creating illicit labor monopolies.¹⁸² In 1897, for example, New York passed a law that required cities to pay prevailing wages on public works contracts.¹⁸³ The law also gave preference to state citizens, thus discriminating against large numbers of immigrants and out-of-state residents, including black migrants from the South.¹⁸⁴ The New York Court of Appeals, taking what Roscoe Pound called a "most extreme" view of liberty of contract,¹⁸⁵ declared the law to be unconstitutional.¹⁸⁶ The court pointed out that the law discriminated against immigrants and those who could not command the prevailing wage.¹⁸⁷ Of course, the law also discriminated against other disfavored workers, such as blacks, who were able to gain employment only by underbidding union wages.

In 1903, however, the U.S. Supreme Court in *Atkin v. Kansas*¹⁸⁸ held that regulations of labor on public works projects did not violate contractors' freedom of contract because contractors were free to refuse work in the first instance.¹⁸⁹ While the scope of *Atkin's* impact was not immediately clear,¹⁹⁰ it soon became apparent that the opinion destroyed any potential freedom-of-contract challenge to public-work labor regulation. In 1904, for example, the New York Court of Appeals reversed its previous position and held constitutional a city ordinance requiring payment of prevailing rates on public works projects.¹⁹¹

Most state courts, however, continued to overturn public works laws that benefited union members by requiring payment of prevailing wages or by requiring the hiring of union labor on public works projects. The laws were struck down as wastes of taxpayers' money,¹⁹² as "class legislation,"¹⁹³ as legislation creating illicit monop-

182. See, e.g., *Kuback*, 24 P. at 739 (stating public works law improperly limits contractual freedom); *Coler*, 59 N.E. at 718 (holding wage scale unfairly discriminates against immigrants); *Warren*, 34 N.Y.S. at 943 (stating law creates illegal monopoly for state citizens).

183. See 1897 N.Y. Laws 415, amended by 1899 N.Y. Laws 192, 567.

184. *Coler*, 59 N.E. at 718.

185. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 477 (1909).

186. *Coler*, 59 N.E. at 718.

187. *Id.* at 716-17.

188. 191 U.S. 207 (1903).

189. *Atkin v. Kansas*, 191 U.S. 207, 210 (1903).

190. See, e.g., *People ex rel. Cossey v. Grout*, 72 N.E. 464, 469-70 (N.Y. 1904) (O'Brien, J., concurring) (stating that *Atkin* applies only to criminal cases).

191. *Ryan v. City of New York*, 69 N.E. 599, 602 (N.Y. 1904); see also *Grout*, 72 N.E. at 466 (holding that *Atkin* had affirmed prevailing wage legislation's constitutionality).

192. E.g., *Fiske v. People*, 58 N.E. 985, 986 (Ill. 1900) (rejecting mandatory union employment as unconstitutional and economically unsound); *Lewis v. Board of Educ.*, 102 N.W. 756, 757 (Mich. 1905) (describing union wage rate as artificially high); *Wright v. Hootor*, 145 N.W. 704, 708-09 (Neb. 1914) (rejecting union wage rate as cost ineffective); *People v. Edgcomb*,

lies,¹⁹⁴ as improper delegations of legislative authority to unions,¹⁹⁵ and as unfair exclusions of unskilled laborers from public construction work.¹⁹⁶ These decisions benefited all of those who, like blacks, were excluded from the politically powerful building-trade unions.

2. *The Davis-Bacon Act: conceived in bigotry*

As of the late 1920s, most construction unions continued to exclude blacks, while the rest discriminated against them.¹⁹⁷ The exclusionary unions included the Electrical Workers Union, which counted practically none of the 1343 black electricians among its 142,000 members; the Plumbers and Steam Fitters, which included none of the 3600 black plumbers among its 35,000 members; the Plasterers Union, which had fewer than 100 blacks among its 30,000 members, despite 6000 blacks in the trade; and the Sheet Metal Workers, which included no blacks among its 25,000-man membership.¹⁹⁸

In the absence of favorable legislation, however, construction unions were not able to create a labor cartel strong enough to exclude blacks from the industry. As of 1930, the construction industry provided Southern blacks with more jobs than any industry except agriculture and domestic service.¹⁹⁹ Because the effects of union and vocational-school discrimination did not reach unskilled construction work,²⁰⁰ blacks performed most of that work. In at least six Southern cities, blacks composed more than eighty percent of the unskilled construction labor force.²⁰¹

98 N.Y.S. 965, 968-69 (App. Div. 1906) (stating that benefits of union wage rate are outweighed by burden on taxpayer); *Malette v. City of Spokane*, 123 P. 1005, 1007 (Wash. 1912) (describing union wage rate as unduly burdensome), *rev'd*, 137 P. 496 (Wash. 1913).

193. *E.g., Fiske*, 58 N.E. at 986 (holding ordinance requiring use of union labor to be unconstitutional because it unduly benefited single class of labor); *Wright*, 145 N.W. at 706 (describing mandatory union wage scale as discriminatory).

194. *E.g., Holden v. City of Alton*, 53 N.E. 556, 556 (Ill. 1899) (holding that when bidding is restricted, an illegal monopoly is created); *Adams v. Brennan*, 52 N.E. 314, 316 (Ill. 1898) (stating that by excluding a class of persons, legislation unfairly limits competition).

195. *E.g., Adams*, 52 N.E. at 317 (finding prevailing wage legislation to be beyond scope of legislature's delegative power).

196. *E.g., Wright*, 145 N.W. at 706 (stating that legislation may not give union power to exclude persons from labor pool).

197. See *NORTHROP*, *supra* note 46, at 6 (stating that craft unions that did not explicitly exclude black workers still sanctioned discrimination by organizing black workers into separate union locals). While these black unions were officially conferred status equal to that of white unions, they remained at a "distinct disadvantage." *Id.*

198. *Johnson*, *supra* note 38, at 114.

199. *Kruman*, *supra* note 176, at 38.

200. See *Johnson*, *supra* note 38, at 114 (detailing strength of black participation in unskilled construction market).

201. *Kruman*, *supra* note 176, at 38-39.

By the mid-1920s, New York was one of the few states to still have a public works law in effect.²⁰² In 1927, Representative Robert Bacon of Long Island, New York, proposed H.R. 17,069, "A Bill to Require Contractors and Subcontractors Engaged on Public Works of the United States to Comply with State Laws Relating to Hours of Labor and Wages of Employees on State Public Works."²⁰³ Bacon's action was spurred by an out-of-state contractor's successful bid to build a Veteran's Bureau hospital in his district.²⁰⁴ The contractor, Algernon Blair of Alabama, used nonunion black workers to build the hospital.²⁰⁵ In response to Representative Bacon's complaints, Representative William Upshaw of Georgia stated, "You will not think that a southern man is more than human if he smiles over the fact of your reaction to that real problem you are confronted with in any community with a superabundance or large aggregation of negro labor."²⁰⁶

In the years after he submitted his first prevailing wage bill, Bacon and others introduced thirteen more bills to regulate labor on federal public works projects.²⁰⁷ Finally, a bill sponsored by Bacon and Senator James J. Davis and supported by the AFL²⁰⁸ passed in 1931.²⁰⁹ The measure, commonly referred to as the Davis-Bacon

202. N.Y. LAB. LAW § 220 (Consol. 1905); see also *Campbell v. City of New York*, 155 N.E. 628, 630 (N.Y. 1927) (upholding public works law). Judge Benjamin Cardozo, speaking for the court, argued that the New York law prevented the "merciless exploitation of the indigent or the idle." *Campbell*, 155 N.E. at 631.

203. H.R. 17,069, 69th Cong., 2d Sess. (1927).

204. See *Hearings on H.R. 7995 and H.R. 9232 Before the House Comm. on Labor*, 71st Cong., 2d Sess. 17 (1930) [hereinafter *Hearings on H.R. 7995 and H.R. 9232*] (letter of Ethelbert Stewart, Commissioner of Labor Statistics) ("A contractor from a Southern State secured a contract to build a Government marine hospital, as I remember it, on Long Island; that he brought with him an entire outfit of Negro laborers from the South . . .").

205. *Hours of Labor and Wages on Public Works: Hearings on H.R. 17069 Before the House Comm. on Labor*, 69th Cong., 2d Sess. 3 (1927) [hereinafter *Hearings on H.R. 17,069*]; see also *Hearings on H.R. 7995 and H.R. 9232*, *supra* note 204, at 17 (discussing intent behind wage bill).

206. *Hearings on H.R. 17,069*, *supra* note 205, at 3.

207. Stuart Schulman, *The Case Against the Davis-Bacon Act*, GOV'T-UNION REV., Winter 1983, at 23, 28.

208. See 74 CONG. REC. 6517 (1931) (remarks of Rep. McCormick) ("This type of legislation has been agitated and urged for many years and has the united support of all elements of organized labor, and particularly that great, progressive, and constructive labor organization, the American Federation of Labor.").

209. Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. §§ 276a to 276a-5 (1988)). The law provided:

That every contract in excess of \$5,000 in amount, to which the United States or the District of Columbia is a party which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings . . . shall contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division [in which the work is taking place].

Act, finally passed because congressmen saw the bill as a way of protecting local unionized²¹⁰ white workers' salaries in the fierce labor market of the Depression.²¹¹ According to a contemporary source, black migration to the North "create[d] an oversupply of certain types of building labor and . . . depress[ed] established standards, even though no attempt was made to undercut prevailing rates."²¹²

Indeed, the remarks of various Representatives demonstrate that Davis-Bacon gained support as a protective measure for white labor. In hearings on labor and public works in 1930, Representative John J. Cochran of Missouri said, "I have received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South."²¹³ Representative Clayton Allgood, supporting the Davis-Bacon Act on the floor of the House, complained of "a contractor from Alabama who went to New York with bootleg labor."²¹⁴ According to Allgood, "That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that it is in competition with white labor throughout the country."²¹⁵ Similar discriminatory sentiments were expressed to the Senate. AFL President William Green, testifying in support of the Davis-Bacon bill before the Senate Committee on Manufactures, emphasized that "[c]olored labor is being brought in to demoralize wage rates."²¹⁶

The Davis-Bacon Act, which passed on March 3, 1931,²¹⁷ severely harmed black workers.²¹⁸ Within a few years of the Act's passage, the Federal Government would embark on an ambitious public works

Id. § 2(a), 46 Stat. at 1494.

210. See ARMAND J. THIEBLOT, JR., *THE DAVIS-BACON ACT* 8 (1975) [hereinafter THIEBLOT, DAVIS-BACON ACT] (stating that bill was intended to help union labor).

211. See *id.* at 8-10 (noting that mounting economic hardships of Depression created climate in which this type of legislation could succeed); ROBERT C. WEAVER, *NEGRO LABOR: A NATIONAL PROBLEM* 10 (1947) ("There was extreme competition for any and all jobs in construction. . .").

212. SPERO & HARRIS, *supra* note 24, at 178.

213. *Hearings on H.R. 7995 and H.R. 9232*, *supra* note 204, at 26-27.

214. 74 CONG. REC. 6513 (1931) (remarks of Rep. Allgood).

215. *Id.*

216. *Wages of Laborers and Mechanics on Public Buildings: Hearings on S. 5904 Before the Senate Comm. on Manufactures*, 71st Cong., 3d Sess. 10 (1931). For more evidence of the discriminatory origins of the Davis-Bacon Act, see David E. Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 14 NAT'L BLACK L.J. (forthcoming 1993).

217. Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931).

218. See THIEBLOT, DAVIS-BACON ACT, *supra* note 210 at 8-11 (stating that Davis-Bacon Act wage scale barred blacks from gaining employment by underbidding whites).

program in an effort to create jobs in the depths of the Depression.²¹⁹ In fact, the Federal Government would soon account for half of all money spent on construction work.²²⁰ As discussed below, a disproportionate share of federal construction jobs created by this spending went to whites because of the Davis-Bacon Act.

The Act set a standard "prevailing" wage on federal construction jobs.²²¹ The only recourse blacks had in a labor market dominated by exclusionary unions was their willingness to work for less money than whites. The Act prohibited black workers from exercising that advantage by setting a universal wage.

Moreover, the Act hurt blacks by encouraging contractors to hire union labor. In 1935, Congress amended the Davis-Bacon Act to reduce the minimum contract amount covered to \$2000 and to provide for predetermination of wages by the Department of Labor.²²² In response, the Department of Labor promulgated regulations that remained largely unchanged until 1983.²²³ Under these regulations, in any area in which labor was at least thirty percent unionized, wages had to be paid at union scale.²²⁴ According to Davis-Bacon expert Armand Thieblot, Jr., this rule guaranteed that almost all Davis-Bacon wages would be set according to union wages.²²⁵ Because the union wage rule eliminated the economic benefit of hiring nonunion labor, it made economic sense for contractors to hire white union workers, who generally were more highly skilled, directly through AFL local "hiring halls."²²⁶

Even contractors eligible to hire less expensive nonunion labor often could not do so because of political pressures. If a contractor did not hire union labor, well-organized union locals had the power

219. See THIEBLOT, DAVIS-BACON ACT, *supra* note 210, at 11 (citing federal attempts to inject life into depressed labor market).

220. See THIEBLOT, DAVIS-BACON ACT, *supra* note 210, at 13 (detailing massive federal intervention in construction market).

221. See THIEBLOT, DAVIS-BACON ACT, *supra* note 210, at 14 (describing how prevailing wage rate was set by reference to place where work was performed).

222. Act of Aug. 30, 1935, ch. 825, sec. 1, 49 Stat. 1011 (1935).

223. ARMAND J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION 40-43 (1986) [hereinafter THIEBLOT, PREVAILING WAGE LEGISLATION] (discussing Department of Labor's response to 1935 Davis-Bacon amendment). The Secretary of Labor established a structure for selecting a rate from those collected by survey of the existing workforce. *Id.* at 40-41. This method was the Secretary's own creation, and a regulatory rather than a statutory provision. *Id.* at 41. It remained informal until it was codified in 1952. See Procedures for Predetermination of Wage Rates, 29 C.F.R. §§ 1.1-1.9 (1985).

224. *Wage Rates*, 29 C.F.R. at § 1.1; see also THIEBLOT, PREVAILING WAGE LEGISLATION, *supra* note 223, at 41 (detailing impact of Department of Labor's 30% rule).

225. THIEBLOT, DAVIS-BACON ACT, *supra* note 210, at 37-39; THIEBLOT, PREVAILING WAGE LEGISLATION, *supra* note 223, at 40-43.

226. See WEAVER, *supra* note 211, at 12 (describing how union-wage rule excluded black workers).

to pressure the Department of Labor to "investigate" that contractor's labor practices, a costly diversion even for a law-abiding contractor.²²⁷ Local political pressure was exerted in favor of white union labor as well.²²⁸

For these reasons, the vast majority of Davis-Bacon contractors opted for union labor. Because the craft unions would not admit blacks, those contractors rarely hired blacks for skilled or semiskilled positions.²²⁹ To compound matters, already-weak black AFL local unions, which could have provided at least a few unionized skilled construction jobs for blacks, did not survive the economic downturn; many of them had simply ceased to exist.²³⁰ Ironically, considering that Congress supposedly passed the Act to protect local workers, unions insisted that employers bring in nonlocal union labor rather than hire local nonunion blacks.

In perhaps the most devastating blow to black construction workers, Davis-Bacon Act regulations promulgated by the Department of Labor never recognized categories of unskilled workers in training for skilled positions other than apprentices, even in the rare instances when such categories were sanctioned by local craft union rules. Unions of unskilled construction workers sometimes admitted blacks, but job categories and wage levels mandated by Davis-Bacon both discouraged contractors from hiring unskilled workers who were not in union apprenticeship programs, and prevented them from getting trained if hired.²³¹ Because union-sponsored apprenticeship programs that did provide training almost never admitted blacks, black construction workers were, at best, relegated to unskilled jobs on Davis-Bacon projects.²³²

The Davis-Bacon Act had immediate and vicious discriminatory effects on black construction workers that persist, albeit in milder

227. See WEAVER, *supra* note 211, at 12 (describing political pressure to exclude black workers).

228. See WEAVER, *supra* note 211, at 12 (detailing widespread discriminatory influence of white union lobby).

229. Historically, even unbiased employers would often be forced to hire only whites because of craft union hostility toward blacks. See WESLEY, *supra* note 27, at 236 (describing how violent community pressures to hire whites exacerbated black exclusion from craft trades).

230. See NORTHROP, *supra* note 46, at 32.

231. THIEBLT, DAVIS-BACON ACT, *supra* note 210, at 46-47; see THIEBLT, PREVAILING WAGE LEGISLATION, *supra* note 223, at 59 (stating that failure to implement "helper" classification forced contractors to pay their helpers the "journeyman" rate in accordance with union craft rules).

232. NORTHROP, *supra* note 46, at 38. Moreover, because of discrimination in union and public vocational school training programs, blacks generally acquired skills through unskilled employment and on-the-job training. *Id.* As noted above, the Davis-Bacon regulations greatly limited such opportunities.

form, today.²³³ The Act provides another example of how the rise of pre-New Deal federal economic regulation, combined with judicial restraint in economic matters, severely harmed blacks economically. No legal challenge was ever brought against the Act, probably because *Atkin*²³⁴ and an earlier case upholding a federal maximum hours law²³⁵ made the possibility of a successful challenge on economic liberty grounds by contractors seem remote. The NAACP, which could have filed a civil rights challenge to the Act on behalf of black construction workers, had made an ideological decision not to challenge labor legislation in the courts.²³⁶ In addition, at least some black leaders thought that the major significance of the Act was not its exclusion of black workers from public works projects, but the fact that the few blacks who were able to obtain jobs on public works projects were paid the same wages as whites, thus weakening the racial wage differential in the South.²³⁷

C. *A Taste of Things to Come*

As discussed above, when courts enforced laissez-faire labor policies in the railroad and construction industries, they protected blacks from the threat of monopolization by racist labor unions. With the decline of laissez-faire jurisprudence came the rise of discriminatory labor legislation that drove blacks out of the railroad industry and marginalized them in the construction industry. Legislation passed during the New Deal dealt the decisive blows to blacks in those occupations.

But the Railway Labor Act and the Davis-Bacon Act were mere previews of things to come. While those laws affected only a small segment of black labor, labor legislation that originated in the National Industrial Recovery Act of the New Deal was to have disastrous consequences of a far greater magnitude on black workers. Eventual judicial acquiescence to this legislation was substantially responsible for a persistent increase in black unemployment that has continued to this day.

233. For a study of the long-term effects of Davis-Bacon, see Bernstein, *supra* note 216.

234. See *supra* notes 188-89 and accompanying text (discussing *Atkin v. Kansas*).

235. *United States v. Garbish*, 222 U.S. 257, 261 (1911) (upholding federal eight-hour workday rule).

236. RAYMOND WOLTERS, *NEGROES AND THE GREAT DEPRESSION* 122-23 (1971) [hereinafter WOLTERS, *NEGROES AND THE DEPRESSION*].

237. See WEAVER, *supra* note 211, at 14 (examining union wage scale and opining that standard wages could be catalyst for racial equality).

III. NEW DEAL LABOR LEGISLATION AS A CAUSE OF PERSISTENT BLACK UNEMPLOYMENT

Legal scholars generally agree that the New Deal's shift from limited National Government to the current regime had favorable effects on black welfare. Owen Fiss, for example, credits the New Deal's triumph over the Old Court with planting the seeds of the "Second Reconstruction."²³⁸ Historians generally concur, at least with regard to the post-1935 "Second New Deal."²³⁹ One author applauds the New Deal as the cause of the emergence of civil rights as a national issue.²⁴⁰

Scholars who share this enthusiasm neglect some pertinent facts. Civil rights emerged as a national issue during the New Deal not because the New Dealers had particular sympathy for blacks' aspirations, but because for the first time since the abolition of slavery, blacks were confronted with broad-based discriminatory labor legislation enforced by the Federal Government.²⁴¹ Not only did New Deal labor laws fail to take account of the interests of blacks, they were enforced in a discriminatory manner and did not contain any civil rights provisions to help blacks overcome the discriminatory effects of the Government's cartelization of the labor market in favor of white workers. Only the Supreme Court's willingness to enforce the Constitution's restraints on federal power could have prevented the tragic results. But by 1937 the Court had acquiesced to the New Deal and had left blacks at the mercy of the political winds.²⁴²

Fortunately for blacks, the political winds shifted in the ensuing thirty years sufficiently to permit them to salvage the tremendous civil rights victories of the 1950s and 1960s. Nonetheless, as will be

238. Owen M. Fiss, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Why the State*, 100 HARV. L. REV. 781, 781 (1987) (arguing that hands-off government policy perpetuates entrenched racial bias). This is also a major theme of Volume I of RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

239. See, e.g., 1 HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* 58, 330-35 (1978) (citing New Deal as impetus behind civil rights movement).

240. *Id.* at 1-2 (characterizing New Deal as promoting civil rights).

241. Cf. James S. Olsen, *Race, Class, and Progress*, in *BLACK LABOR IN AMERICA* 153, 153-55 (Milton Cantor ed., 1970) (detailing how New Deal legislation maintained racial barriers).

242. In *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), the Court suggested that it would be willing to protect "discrete and insular minorities" if Congress passed legislation that prejudiced the political process for minorities. *Id.* The Roosevelt Court thus hinted that it would not withdraw entirely from judicial review of the constitutionality of legislation because of the danger minorities faced from a strong interventionist government. *Id.* at 152-53 n.4. Unlike *laissez-faire* jurisprudence, however, application of the *Carolene Products* dictum could not protect blacks from New Deal labor legislation that had subtle discriminatory intent and indirect discriminatory effects.

demonstrated below, the discriminatory effects of the New Deal linger on.

A. *The National Industrial Recovery Act*

The National Industrial Recovery Act (NRA),²⁴³ passed during the famous first hundred days of the Roosevelt administration, had the potential to permanently cripple black labor. As a 1930s civil rights activist pointed out, the NRA served to redistribute employment and resources from blacks—the most destitute of Americans suffering from the Depression—to the white masses.²⁴⁴ Had the Supreme Court not declared it unconstitutional in 1935,²⁴⁵ the NRA might have consigned blacks to permanent second-class legal and economic status.

1. *The discriminatory effects of NRA wage provisions*

The NRA established a system of wage codes that required businesses to pay certain categories of workers a set wage.²⁴⁶ The Act also established price codes designed to compensate for the higher wages.²⁴⁷ The codes were determined by joint labor-business panels, with labor generally represented by exclusionary unions.²⁴⁸

The NRA wage provisions discriminated against blacks in a variety of ways. First, blacks were excluded from the wage and hours benefits of the NRA because of their concentration in agriculture and domestic service, two areas in which codes were not established.²⁴⁹ Blacks' wages remained the same while the NRA forced prices up. Second, even within an industry generally covered by NRA, some codes provided that certain jobs in an industry would be covered by NRA while others would not.²⁵⁰ Not surprisingly, the occupational classifications frequently were arranged so that minimum wage scales

243. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The Supreme Court would later declare the NRA unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

244. John P. Davis, *NRA Codifies Wage Slavery*, 41 THE CRISIS 298, 301-02 (1934).

245. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

246. National Industrial Recovery Act, ch. 90, 48 Stat. at 195; see also WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 124-25 (detailing wage code provisions).

247. See WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 124-25 (detailing price code provisions).

248. Davis, *supra* note 244, at 298; see also VAN DEUSEN, *supra* note 41, at 82 (noting that union predominance tended to diminish black workers' bargaining power).

249. SITKOFF, *supra* note 239, at 54; see WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 149-51 (describing NRA exclusion of large percentage of black labor force).

250. See WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 125 (stating that codes were drafted to specifically benefit white-dominated occupations).

only covered work generally performed by whites.²⁵¹ When a black employee performed the same task as a white employee, and even when he performed more important tasks, he would often have a lower job classification for NRA purposes.²⁵² Thus, the NRA codified wage differentials between white and black workers.²⁵³

The NRA also contained grandfather clauses providing that minimum wage scales for some classes of labor should be based on wages received as of a certain date in the past.²⁵⁴ Many black leaders believed that the Government implemented the rule in such a way as to discriminate against unskilled black workers.²⁵⁵

Even when blacks received equal treatment under the NRA, they often suffered. The Act forced white employers to pay blacks and whites an equal wage, but it did not force employers to hire blacks. Some employers who had hired black labor because it was cheaper simply dismissed their black workers rather than pay NRA code wages,²⁵⁶ replacing them with whites.²⁵⁷ Still other employers, including some that employed blacks exclusively, could not afford to pay NRA wages.²⁵⁸ They therefore eliminated menial jobs often held by blacks, especially young blacks, such as office boy and grocery deliverer.²⁵⁹ Industrial firms that employed blacks but that used obsolete machinery either closed or bought modern machinery to replace black labor.²⁶⁰ White employers also faced the possibility of

251. SITKOFF, *supra* note 239, at 54 (stating that widespread manipulation of job classifications created gap between white and black wages); WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 124-25 (discussing gerrymandering of work classifications).

252. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 125 (describing invidious use of NRA wage scales); see also Davis, *supra* note 244 (criticizing Southern wage differential). But see Gustav Peck, *The Negro Worker and the NRA*, 41 THE CRISIS 279, 282 (1934) (defending Southern wage differential).

253. Davis, *supra* note 244, at 301-02.

254. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 130-31 (detailing how grandfather clauses froze future wages at past wage rates, holding black wage rates at level historically lower than white wage rates).

255. See WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 130-31.

256. See SITKOFF, *supra* note 239, at 54 (describing how black labor was unable to compete if forced to accept employment at prevailing rate).

257. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 117-18 (stating minimum wage left black labor vulnerable to discrimination); Gaston, *supra* note 83, at 404, 407 (describing effect of NRA on blacks in Georgia); Arthur F. Raper, *The Southern Negro and the NRA*, 64 GA. HIST. Q. 128, 135 (1980) (stating many black workers were displaced by whites, or "thrown out of work by the discontinuation of marginal businesses").

258. See WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 118 (describing how budget restrictions caused some employers to cut workforce); Gaston, *supra* note 83, at 406-12 (noting that NRA caused much black unemployment in Georgia). In some instances, the code wages in Georgia brought about a five-fold increase in black wages. *Id.*

259. Raper, *supra* note 257, at 138.

260. SITKOFF, *supra* note 239, at 54; WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 118.

private, anonymous violence if they hired blacks,²⁶¹ and the minimum wage laws gave them one less reason to take the risk.

Concerned members of the black community and others quickly recognized the harmful effects of NRA-imposed minimum wages on black workers.²⁶² Southern industrialists called for the Government to set a reduced minimum wage for blacks in order to preserve their companies' competitiveness and their workers' jobs;²⁶³ with some merit, they accused Northern industrialists of purposely supporting a relatively high, uniform wage scale in order to retard the flight of low-wage industries to the South.²⁶⁴ While most black leaders opposed wage differential schemes,²⁶⁵ growing numbers of blacks endorsed wage differentials in order to stem the rising tide of black unemployment as the disemployment effects of the NRA became apparent.²⁶⁶ A critic of wage differentials summed up their appeal: "Negroes have lost jobs as a result of the NRA, and a lower wage for

261. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 119 (describing climate of fear created by white workers in an attempt to exclude black competition).

262. Davis, *supra* note 244, at 303 (discussing black criticism of NRA wage scale); Julian Harris, *Whites Oust Negro Under N.R.A. in South*, N.Y. TIMES, Aug. 27, 1933, at E6 (stating that NRA wage scales harmed blacks because "whites would gradually usurp the places held by Negroes"); T. Arnold Hill, *The Emergency Is On!*, 11 OPPORTUNITY 280, 284 (1933) (warning that NRA wage scales amounted to "economic slavery"); Robert C. Weaver, *A Wage Differential Based on Race*, 41 THE CRISIS 236, 242-43 (1934) [hereinafter Weaver, *Wage Differential*] ("The minimum wage regulations of the NRA . . . resulted in wholesale discharges [of black workers] in certain areas.").

The minimum wage provisions of the NRA originally had earned broad support among black leaders. *Opportunity*, the Journal of the National Urban League, declared that "a minimum wage . . . and maximum hours of work . . . will be of immeasurable benefit to . . . Black workers who are unskilled and confined to the lowest paid jobs in the industrial system." Robert Bell, *Minimum Wage and the Black Worker*, 11 OPPORTUNITY 199, 202 (1933). This attitude was "widely held" in the black community. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 94.

263. See Gaston, *supra* note 83, at 405-06 (recalling Georgia employers' push for separate minimum wage for black workers); cf. Ira D. A. Reid, *Black Wages for Black Workers*, 12 OPPORTUNITY 72, 73-74 (1934) (stating that NRA wage scale destroyed economic incentive to hire blacks).

264. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 147 (citing criticism of discriminatory motives underlying high uniform wage scales).

265. E.g., Weaver, *Wage Differential*, *supra* note 262, at 236-44 (appraising wage differentials as institutionalized discrimination). Black leaders opposed race-based wage differentials either because they did not want the government to institutionalize discrimination or because they thought it would inhibit solidarity between white and black workers. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 103-04 (citing opposition to wage differential schemes). Black organizations formed the Joint Committee for Economic Recovery to monitor and protest discrimination in the NRA. Largely because of its pressure, no explicit racial wage differentials were ever implemented. See *id.* at 112-13 (detailing anticipatory measures against wage differentials).

266. Gaston, *supra* note 83, at 406. Blacks taking this position were referred to as "Black Judas." *Id.* For example, black representatives from the Tuskegee Institute petitioned the National Recovery Administration to allow a plant that shut down because of its inability to pay code wages to reopen and pay subcode wages. WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 121-22 (describing how harsh economic realities forced some blacks to advocate racial schemes).

them would counteract this tendency. It would assure Negroes of retaining their old jobs and perhaps it would lead to a few additional ones."²⁶⁷ Despite the fact that the NRA existed for only about two years, an architect of the law estimated that its minimum wage provisions put 500,000 additional blacks out of work.²⁶⁸ The only respite blacks got from the law was the incompetence of the Government in enforcing it.²⁶⁹

2. *The discriminatory effects of NRA union provisions*

The NRA granted exclusive bargaining power to discriminatory unions by certifying them as exclusive bargaining agents. Section 7a of the NRA provided:

(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . ;

(2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; . . .²⁷⁰

In 1933, before passage of the NRA, American unions could claim a membership of only two and a quarter million, of which only seventy thousand were black.²⁷¹ Section 7a and its successor, the

267. Weaver, *Wage Differential*, *supra* note 262, at 238; see also WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 102-03 (criticizing acceptance of wage differentials as short-sighted and destructive to pursuit of economic equality). Many black intellectuals argued that it was better for blacks to be fired than to accept lower wages than whites. *E.g.*, Hill, *supra* note 262, at 284; Weaver, *Wage Differential*, *supra* note 262, at 238.

268. CHARLES F. ROOS, NRA ECONOMIC PLANNING 173 (1937). Others consider such estimates excessive because the NRA lasted only two years and was widely circumvented. *E.g.*, WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 214 (taking conservative view of NRA effect on black labor).

269. *Cf.* WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 147 (stating that blacks "benefitted from the NRA's inability and unwillingness to enforce its wage and hour provisions"). Blacks retained jobs covered by NRA codes by illicitly accepting wages below code rates or by officially becoming independent contractors, which excluded them from NRA coverage. See Raper, *supra* note 257, at 134, 139-41 (describing attempts to circumvent NRA codes). Ironically, many blacks in Georgia enthusiastically supported the codes and took part in the effort to convince the public to only patronize establishments that obeyed the code. It should be noted, however, that these blacks often added an additional stipulation: "Don't buy where you can't work." Gaston, *supra* note 83, at 302-05.

270. National Industrial Recovery Act, ch. 90, § 7, 48 Stat. 195, 198-99 (1933).

271. Julius Jacobson, *Union Conservatism: A Barrier to Racial Equality*, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT 1, 4 (Julius Jacobson ed., 1968); see also Marc Karson & Ronald Radosh, *The American Federation of Labor and the Negro Worker, 1894-1949*, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT, *supra*, at 155, 162 (noting that racial barriers kept blacks out of labor unions).

Wagner Act,²⁷² rescued the unions from further decline and ultimate irrelevance. In a two-month period after the passage of the NRA, AFL membership rose from a little over two million to almost four million.²⁷³

This growth in union strength led to widespread displacement of black workers as racist labor unions took advantage of the monopoly power granted to them by the NRA. A 1934 editorial in the NAACP's journal *The Crisis* noted:

Daily the problem of what to do about union labor or even about a chance to work, confronts the Negro workers of the country. . . . Seeking to avail itself of the powers granted under section 7A of the NRA, union labor strategy seems to be to form a union in a given plant, strike to obtain the right to bargain with the employers as the sole representative of labor, and then to close the union to black workers, effectively cutting them off from employment.²⁷⁴

Roy Wilkins of the NAACP asserted that the AFL's strategy was to use section 7a "to organize a union for all the workers, and to either agree with the employers to push Negroes out of the industry or, having effected an agreement with the employer, to proceed to make the union lily-white."²⁷⁵ Not surprisingly, spokesmen for the black community "vigorously opposed" section 7a.²⁷⁶ W.E.B. Du Bois, for example, argued that the NRA reinforced the "sinister power" of the AFL.²⁷⁷

Despite complaints directed to the National Labor Relations Board, the Federal Government declined to intervene on behalf of blacks.²⁷⁸ The only relief that blacks received from section 7a was that many employers used it to encourage the organization of company unions in place of independent AFL unions.²⁷⁹ Because company unions generally did not discriminate on the basis of race,

272. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

273. HORACE R. CAYTON & GEORGE S. MITCHELL, *BLACK WORKERS AND THE NEW UNIONS* 123 (1939).

274. *Union Labor Again*, *THE CRISIS*, Nov. 1934, at 300.

275. Raymond Wolters, *Section 7a and the Black Worker*, 10 LAB. HIST. 459, 466 (1969) [hereinafter Wolters, *Section 7a*] (quoting Roy Wilkins).

276. HILL, *BLACK LABOR*, *supra* note 17, at 101 (noting that NAACP, National Urban League, and other black organizations were strongly opposed to Section 7a); Wolters, *Section 7a*, *supra* note 275, at 471 (recounting opposition of T. Arnold Hill, Dean Kelly Miller, Roy Wilkins, and Harry E. Davis).

277. WOLTERS, *NEGROES AND THE DEPRESSION*, *supra* note 236, at 176 (quoting W.E.B. Du Bois).

278. See, e.g., JESSE T. MOORE, JR., *A SEARCH FOR EQUALITY: THE NATIONAL URBAN LEAGUE, 1910-1961*, at 82 (1981) (noting that strike by AFL, that was conducted so that blacks would be expelled from Wehr Steel Foundry, met with ambivalence on part of NLRB).

279. Wolters, *Section 7a*, *supra* note 275, at 469.

the average black worker had a far more favorable attitude than the average white toward such unions.²⁸⁰ Many black leaders shared this favorable attitude, at least until the mid-1930s when the seemingly racially progressive Congress of Industrial Organizations (CIO) came into being.²⁸¹

3. NRA: "Negroes Ruined Again?!"

Because of the negative effects of the NRA on blacks, the NRA was very unpopular among them. The black press referred to the NRA as "Negro Run Around," "Negroes Ruined Again," "Negroes Rarely Allowed," "Negro Removal Act," "Negroes Robbed Again," and "No Roosevelt Again."²⁸² A contemporary newspaper noted that for blacks the symbolic NRA Blue Eagle "may be . . . a predatory bird instead of a feathered messenger of happiness."²⁸³ As one historian has observed, "[F]ew blacks gained much more than a raise in their cost of living from the NRA."²⁸⁴ Professor Herbert Hill notes that "[t]he legislation intended to be the keystone of President Roosevelt's program to protect and uplift the working class had . . . become a millstone around the Black worker's neck."²⁸⁵

Roosevelt administration spokesmen tried to defend the NRA to blacks by pointing out that it led to the acceptance of the forty-hour work week, the enactment of minimum wage legislation, the swifter end of child labor, and the promotion of collective bargaining.²⁸⁶ While the New Dealers may have had the best of humanitarian motives, none of these interferences in the labor market helped the average black worker, and altogether their primary effect was to increase the level of unemployment among blacks.²⁸⁷

B. *The Demise and Resurrection of the NRA*

Fortunately for blacks, the Supreme Court declared the NRA to be unconstitutional on May 27, 1935, in *A.L.A. Schechter Poultry Corp. v. United States*.²⁸⁸ While New Deal circles mourned this day as "Black

280. Wolters, *Section 7a*, *supra* note 275, at 469.

281. CAYTON & MITCHELL, *supra* note 273, at 62.

282. SITKOFF, *supra* note 239, at 55.

283. Leslie H. Fishel, Jr., *The Negro in the New Deal Era*, in *THE NEGRO IN DEPRESSION AND WAR* 7, 11 (Bernard Sternsler ed., 1969).

284. SITKOFF, *supra* note 239, at 54-55; *see also* Gaston, *supra* note 83, at 404 (noting that contemporary black leaders claimed that rise in cost of living outweighed any gains they may have received in wages from NRA).

285. HILL, *BLACK LABOR*, *supra* note 17, at 100.

286. WOLTERS, *NEGROES AND THE DEPRESSION*, *supra* note 236, at 154.

287. *See supra* note 268 and accompanying text (discussing rise in black unemployment).

288. 295 U.S. 495 (1935).

Monday,"²⁸⁹ the black community celebrated.²⁹⁰ The two most harmful parts of the NRA resurfaced, however, in subsequent legislation that left hundreds of thousands of blacks permanently unemployed.

1. *The National Labor Relations Act*

Section 7a of the NRA became section 9 of the National Labor Relations Act of 1935, popularly known as the Wagner Act.²⁹¹ The Wagner Act established labor unions as exclusive collective bargaining agents through a process of governmental certification by the National Labor Relations Board (NLRB).²⁹² Like section 7a, section 9 gave organized labor legitimacy within the legal structure and increased its power enormously—total union membership rose to over eight million by 1941.²⁹³ The Wagner Act also banned company unions, making it even more harmful to blacks than section 7a had been.²⁹⁴

Section 9 of the Wagner Act provided: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit."²⁹⁵ This meant that if the majority of workers in a unit desired union representation, the Wagner Act gave a single union exclusive power to make agreements regarding their wages, hours, and working conditions. The union would then often establish a "closed shop," excluding non-union members from employment.

As originally proposed, the Wagner Act had contained a clause prohibiting unions from discriminating against blacks or excluding them from unions.²⁹⁶ Black leaders believed this clause to be of

289. MELVIN I. UROFSKY, *THE MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 671 (1988).

290. HILL, *BLACK LABOR*, *supra* note 17, at 100.

291. National Labor Relations (Wagner) Act, ch. 372, § 9, 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

292. *See id.* ("Representatives designated . . . for . . . collective bargaining . . . shall be the exclusive representatives of all the employees in such unit . . .").

293. Edna Bonacich, *Advanced Capitalism and Black/White Race Relations in the United States: A Split Labor Market Interpretation*, 41 AM. SOC. REV. 34, 46 (1976) [hereinafter Bonacich, *Advanced Capitalism*].

294. National Labor Relations (Wagner) Act, § 9, 49 Stat. at 453; *see* Wolters, *Section 7a, supra* note 275, at 469 (noting that company unions were least harmful to blacks because they generally did not discriminate).

295. § 9, 49 Stat. at 453.

296. Raymond Wolters, *Closed Shop and White Shop: The Negro Response to Collective Bargaining, 1933-1935*, in *BLACK LABOR IN AMERICA* 137, 149 (Milton Cantor ed., 1969).

critical importance.²⁹⁷ For example, Dean Kelly Miller of Howard University predicted "the doom of the Negro in American industry" if the Wagner Act did not contain a clause protecting blacks.²⁹⁸ But Senator Wagner succumbed to AFL pressure and dropped the clause in order to retain union support and secure the bill's passage.²⁹⁹

Blacks initially viewed the Wagner Act with considerable hostility because it gave government sanction to racially biased labor agreements negotiated under it.³⁰⁰ The closed union shop, noted one critic, is really the white union shop.³⁰¹ Moreover, to the extent that the Wagner Act succeeded in raising wages and labor standards beyond market levels, it had the same effect as a minimum wage law in eliminating marginal black jobs.³⁰² In a memorandum to President Roosevelt, the National Urban League warned that the Wagner Act was a "serious threat to the job security of Negro workers."³⁰³

The Act led to the unionization of previously unorganized industrial workers in CIO unions. Much to the relief of black leaders, few CIO unions explicitly discriminated against blacks. Many did, however, discriminate in more subtle ways, particularly by keeping blacks out of apprenticeship programs that led to skilled jobs.³⁰⁴

To the extent that it was enforced, the CIO's general non-discrimination policy did little to protect black workers, and in some ways it hurt them. Unlike the craft trades, where AFL unions served as their own employment agents, industrial employers were solely responsible for hiring unionized industrial workers.³⁰⁵ CIO leaders supported equal pay for all similarly situated workers in order to serve their own

297. See *id.* (noting that without clause, many blacks would lose their jobs and be shut out of unions controlled by whites).

298. *Id.*

299. PHILIP FONER, *supra* note 15, at 215 (noting that without union support, bill would not have passed); cf. SITKOFF, *supra* note 239, at 52 (noting that "[t]he great majority of New Dealers accepted discrimination against blacks as an inevitable cost of economic recovery").

300. HILL, BLACK LABOR, *supra* note 17, at 100.

301. Wolters, *Section 7a*, *supra* note 275, at 41 (quoting Roy Wilkins).

302. GUNNAR MYRDAL, AN AMERICAN DILEMMA 398 (1944).

303. NANCY J. WEISS, THE NATIONAL URBAN LEAGUE, 1910-1940, at 273 (1974) (quoting National Urban League memorandum).

304. WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 21, 263, 371-72 (1977); HILL, BLACK LABOR, *supra* note 17, at 190 (observing that blacks were left with unskilled jobs and no training to improve status); see also Hill, *The AFL-CIO and the Black Worker*, *supra* note 167, at 14 (noting history of union discrimination against blacks); Sumner M. Rosen, *The CIO Era, 1935-1955, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT* 188, 200-02 (Julius Jacobsen ed., 1968) (noting discrimination in CIO unions). See generally Herbert Hill, *Myth-Making as Labor History: Herbert Gutman and the United Mine Workers of America*, 2 INT'L J. OF 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 "threaten[] seriously the position of the white workers").

305. Rosen, *supra* note 304, at 200-01.

interest: that is, to prevent blacks from undercutting union wages.³⁰⁶ Few CIO unions expended any energy in preventing their employers from discriminating in hiring.³⁰⁷ In the absence of pressure on employers from either the Government or the unions to institute a nondiscriminatory hiring policy, the CIO's equal wage policy encouraged employers to favor whites for employment.³⁰⁸ Blacks who were able to secure CIO jobs were perhaps better off in that they received equal pay,³⁰⁹ but many others were left unemployed.

The newly restrained New Deal Court upheld the Wagner Act in 1937,³¹⁰ even though it was widely thought to be unconstitutional at the time of its passage.³¹¹ Despite a 1944 decision requiring unions

306. See Rosen, *supra* note 304, at 200-01 (noting that blacks would otherwise fill jobs and work for market wages rather than artificially high union wages).

307. NORTHRUP, *supra* note 46, at 232-33 (listing tobacco, textile, clothing, laundry, longshoremen, and other unions as admitting workers without regard to race, but permitting employers complete freedom in job assignments).

308. WEAVER, *supra* note 211, at 139. Weaver explained:

[E]mployers have historically been willing to hire Negroes in preference to whites because of racial wage differentials and because Negroes were considered to be safeguards against unionism. The great transformation wrought by the New Deal, the CIO, and the Second World War eliminated this factor, however, because it virtually abolished racial wage differentials and changed the anti-union attitudes of important Negro leaders.

Id.

In the late 1930s, even a nonprejudiced employer may have had incentives for maintaining an all-white workforce if she had to pay all workers the same wage. For example, a homogenous workforce would limit potentially costly racial strife at the workplace and would encourage prejudiced whites to seek employment there. Some observers have also argued that blacks were paid less because of lower vocational skills, rather than discrimination. For example, a 1938 U.S. Bureau of Labor Statistics study found that blacks earned less than whites in the iron and steel industries not because of discrimination, but because of lower skills. Robert Higgs, *Black Progress and the Persistence of Racial Economic Inequalities, 1865-1940*, in *THE QUESTION OF DISCRIMINATION* 9, 18 (William Darity, Jr. & Steven Shulman eds., 1989) ("A very careful examination of the reports for plants employing both whites and Negroes revealed that whenever whites and Negroes were found in the same occupations in any given plant, both were receiving the same basic rate."). The objectivity of that report, of course, is open to question.

309. It is also possible that many of these workers were worse off. For example, assume that in a certain factory, workers in unskilled categories received \$1.00 an hour, while those hired for intermediate skills categories received \$1.50. Because an employer had to pay whites and blacks equally, he would hire only white workers for both positions if the skills of available black and white workers were equal. See *supra* note 308. He would, however, be willing to hire black workers with intermediate skills as unskilled workers at \$1.00 an hour. Black workers in a situation such as this would have been better off if they were paid, for example, \$1.35 an hour in the absence of an equal pay rule. This hypothetical illustrates the perverse effect that equal-pay rules would have on racial distribution in an average workforce in the absence of a civil rights mandate, and may help explain why New Deal labor legislation led to the perpetuation, indeed the ossification, of racial job categories. Cf. HILL, *BLACK LABOR*, *supra* note 17, at 96 n.*. ("The Federal Government's failure to enforce public policy declarations of nondiscrimination in employment at the beginning of the period of vast government involvement in the national economy has been a major factor in the perpetuation of racial job patterns.")

310. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

311. MORGAN O. REYNOLDS, *POWER AND PRIVILEGE* 125 (1984).

granted exclusive bargaining rights under the Wagner Act to represent all workers in the bargaining group,³¹² blacks would have to wait until the civil rights era (and beyond) before they could get fair treatment from unions that benefited from privileges granted by government.

Blacks also had to wait until the 1960s for the NLRB to invalidate unfair union practices. The NLRB did rule as early as 1945 that the statutory bargaining agent must represent all employees without discrimination.³¹³ Nevertheless, the Board added that segregation and exclusion of blacks from membership did not constitute unfair representation.³¹⁴ It was not until 1962 that the NLRB granted relief to a claimant based on a union's failure to meet its duty of fair representation.³¹⁵ In 1964, the Board finally held that racial discrimination is an unfair labor practice under the Wagner Act.³¹⁶

2. *The Fair Labor Standards Act*

While section 7a of the NRA reappeared as the Wagner Act, the minimum wage provisions of the NRA were reincarnated as the Fair Labor Standards Act of 1938 (FLSA).³¹⁷ Like the NRA minimum wage, the FLSA had two negative effects on blacks. First, it was intentionally applied unevenly, so that it failed to cover many black workers.³¹⁸ Second, the FLSA created massive unemployment for blacks when it was applied to them.

The minimum wage law created black unemployment in part because it prevented unskilled black workers from underbidding their

312. *J. I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).

313. *Larus & Brother Co.*, 62 N.L.R.B. 1075, 1083 (1945) (holding that "there is a duty on the statutory bargaining agent to represent all members of the unit equally and without discrimination, on the basis of race, color or creed"); see also *Veneer Prods., Inc.*, 81 N.L.R.B. 492, 494 (1948) (holding that equal representation must be afforded to all members of unit regardless of race). See generally Michael Jordan, *The NLRB Racial Discrimination Decisions, 1935-1964: The Empiric Process of Administration and the Inner Eye of Racism*, 24 CONN. L. REV. 55 (1991) (reviewing decisions of NLRB and concluding that administration of Wagner Act and Taft-Hartley Act served to institutionalize racism).

314. See *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973, 975 (1945) (holding that segregation of blacks and whites into separate "locals" is not a per se form of racial discrimination).

315. *Miranda Fuel Co.*, 140 N.L.R.B. 181, 190 (1962) (holding that discrimination unrelated to union membership is nonetheless sufficient to support finding of unfair labor practices by employer and union), *enforcement denied*, *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963).

316. *Independent Metal Workers Union, Local No.1*, 147 N.L.R.B. 1573, 1594 (1964); see also Jordan, *supra* note 313, at 95 (asserting that *Independent Metal Workers* only "acknowledge[d] . . . what blacks had known for decades").

317. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1988)).

318. MYRDAL, *supra* note 302, at 398; Gaston, *supra* note 83, at 413; Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987).

white competitors.³¹⁹ It also reduced the general incentive of employers to hire unskilled workers, who were disproportionately black, as the price differential between skilled and unskilled labor declined.³²⁰ Most important, the FLSA led to the elimination of many jobs held by blacks that paid less than the statutory minimum.

The harshest disemployment effects of the FLSA were felt by blacks in the South because they were most likely to work in jobs that paid less than the government-imposed minimum wage.³²¹ The Labor Department reported in 1938 that "between 30,000 and 50,000 workers [mostly southern blacks] lost their jobs because of the minimum wage within *two weeks* of the Fair Labor Standards Act's imposition."³²² The law did not have as dramatic an effect as it might have had in the medium term. By 1939, the Public Works Administration provided temporary employment to about one million blacks,³²³ and by the time the Supreme Court upheld the FLSA in 1941,³²⁴ the Depression-era labor surplus was replaced with a wartime labor shortage.³²⁵

By 1943, however, economist Gunnar Myrdal, in his famous study of black Americans, was able to predict the negative effects that the

319. As economist Harold Demsetz explains:

A minimum wage law prevents a non-preferred person from offering his services for a lower wage than is received by his preferred (but equally productive) fellow worker. A lower request by, or a lower market-wage for, the non-preferred job applicant offers wealth compensation to discriminating employers that will reduce their consumption of discrimination.

Harold Demsetz, *Minorities in the Marketplace*, 43 N.C. L. REV. 271, 276 (1965).

320. The following hypothetical explains this concept. Assume that an employer must choose between hiring one skilled worker and two unskilled workers, or hiring two skilled workers. The productivity of either combination of workers will be the same. Without the minimum wage law, the unskilled workers would each earn twenty-five cents an hour, the skilled workers sixty cents an hour. The profit-maximizing employer would obviously choose the first option, which would save it ten cents an hour. But if the minimum wage were increased to thirty-five cents, the employer would save ten cents an hour by choosing the second option. This result explains why organized labor, even though it represents few unskilled workers who earn wages close to the statutory minimum, continues to support minimum wage laws—skilled union workers become more economical.

321. MYRDAL, *supra* note 302, at 398; see also NORTHRUP, *supra* note 46, at 93-94 (explaining that minimum wage hurt blacks in Southern railroad industry). The AFL took credit for the failure of the FLSA to provide for a lower minimum wage in the South. Elizabeth Brandeis, *Organized Labor and Protective Labor Legislation*, in *LABOR AND THE NEW DEAL* 195, 228 (Milton Derber & Edwin Young eds., 1957).

322. William A. Keyes, *The Minimum Wage and the Davis-Bacon Act: Employment Effects on Minorities and Youth*, 3 J. LAB. RES. 399, 401 (1982).

323. ELI GINZBERG & ALFRED S. EICHNER, *THE TROUBLESOME PRESENCE: AMERICAN DEMOCRACY AND THE NEGRO* 297 (1964).

324. *United States v. Darby*, 312 U.S. 100, 111 (1941).

325. Blacks also benefited from the wartime Fair Employment Practices Commission, which enforced civil rights norms in war industries. LOUIS RUCHAMES, *RACE, JOBS, AND POLITICS: THE STORY OF THE FEPC* 22, 45 (1953).

FLSA was to have on postwar black employment, particularly in the South:

As low wages and sub-standard labor conditions are most prevalent in the South, this danger [of unemployment] is mainly restricted to Negro labor in that region. When the jobs are made better, the employer becomes less eager to hire Negroes, and white workers become more eager to take the jobs from the Negroes. There is, in addition, the possibility that the policy of setting minimum standards might cause some jobs to disappear altogether or to become greatly decreased. What has earlier been replaced by mechanization has often been cheap labor. If labor gets more expensive, it is more likely to be economized and substituted for by machines. Also inefficient industries, which have hitherto existed solely by the exploitation of labor, may be put out of business when the government sets minimum standards.³²⁶

Moreover, as Myrdal noted, the main selling point of the South in its attempt to lure industry was its cheap labor.³²⁷ The FLSA partially ruined this advantage, resulting in fewer opportunities for blacks in Southern industry.³²⁸

C. *The New Deal and the Creation of the "Underclass"*

By the 1940s, it was apparent that despite New Deal relief measures that benefited blacks disproportionately, the overall effect of the New Deal on black workers was overwhelmingly negative.³²⁹ Most significant, New Deal labor policies helped cause a persistent increase in black unemployment and thus contributed to the rise of the urban underclass.³³⁰

As late as 1934, proportionately more black workers than white workers were employed.³³¹ Never again would such a situation exist. Significant disparities in white and black unemployment rates occurred for the first time in the 1930s.³³² In 1930, the ratio of

326. MYRDAL, *supra* note 302, at 397, 398.

327. MYRDAL, *supra* note 302, at 398.

328. MYRDAL, *supra* note 302, at 398. The harm done to Southern industry by minimum wage laws has actually been a prime motivation for increases in the minimum wage. In a 1954 article, then-Senator John F. Kennedy supported the minimum wage law as a way of protecting businesses in New England from Southern competition. John F. Kennedy, *New England and the South: The Struggle for Industry*, ATLANTIC MONTHLY, Jan. 1954, at 32, 33 (noting that South has many natural advantages over North and that minimum wage balances these advantages).

329. See VAN DEUSEN, *supra* note 41, at 117 ("The New Deal Program, affecting interest in those who are 'ill-fed, ill-clothed, and ill-housed,' has done little to aid [the black] population. Indeed, the Negro has actually lost under most of the New Deal measures.").

330. See *supra* note 17 and accompanying text (discussing rise of underclass).

331. Karson & Radosh, *supra* note 271, at 163.

332. HILL, BLACK LABOR, *supra* note 17, at 96.

black to white unemployment was 92:100; in 1940, it was 118:100; in 1949, it was 160:100; by 1954, it was 2:1³³³ and has remained that way.³³⁴

A variety of factors caused this decline in black employment, most of which are related to New Deal legislation. The Agricultural Adjustment Acts (AAAs)³³⁵ accelerated the mechanization of farms, throwing hundreds of thousands of unskilled black farm workers into the labor market.³³⁶ The Fair Labor Standards Act had the negative effects Myrdal predicted,³³⁷ creating unemployment and making it particularly difficult for black farmers left unemployed by the AAAs to find unskilled work.³³⁸ In 1940, before the effects of minimum wage laws were felt fully, white unemployment was 1.1 times as high as black unemployment in the South.³³⁹ By 1950, it was fifty-nine percent as high, and it remained that way in 1960.³⁴⁰ Similar effects occurred in other regions of the country.³⁴¹ Employment of black teenagers, a prime indicator of their future access to the economic mainstream, dropped from sixty percent in 1956 to thirty percent in 1977 because of increased minimum wage rates and coverage.³⁴² Meanwhile, the unemployment rate for white teens remained stable.³⁴³

The Wagner Act harmed blacks economically not only by granting monopoly power to racist unions,³⁴⁴ but also by making it illegal for employers to use blacks as strike-breakers or "strike insurance" and by taking away blacks' ability to underbid white union labor.³⁴⁵ Moreover, in response to above-market wages demanded by unions,

333. RICHARD K. VEDDER & LOWELL E. GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH CENTURY AMERICA* 8 (tbl. 1.3) (1993); Bonacich, *Advanced Capitalism*, *supra* note 293, at 34.

334. James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 282 (1990).

335. *E.g.*, Agricultural Adjustment Act, 7 U.S.C. §§ 601-626 (1988).

336. RALPH J. BUNCHE, *THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR* 610 (1973) (noting that Agriculture Adjustment Act (AAA) was particularly disastrous for black sharecroppers); *see also* HARRIS, *supra* note 111, at 100-01; SITKOFF, *supra* note 239, at 52-54; WOLTERS, *NEGROES AND THE DEPRESSION*, *supra* note 236, at 33-34.

337. *See supra* text accompanying notes 326-28.

338. Bunche, *supra* note 336, at 610.

339. Demsetz, *supra* note 319, at 288.

340. Demsetz, *supra* note 319, at 288.

341. Demsetz, *supra* note 319, at 288.

342. REYNOLDS, *supra* note 311, at 143; *see* Keyes, *supra* note 322, at 402 (observing that before minimum wage increased dramatically in 1961, black youths had lower unemployment rate than white youths in same age bracket, but after wage increase, "the black youth unemployment rate . . . increased to the extent that it is now a multiple of the white youth unemployment rate").

343. REYNOLDS, *supra* note 311, at 143.

344. *See supra* notes 291-95 and accompanying text.

345. Bonacich, *Advanced Capitalism*, *supra* note 293, at 45.

employers relocated part of the industrial process overseas and mechanized, thereby eliminating unskilled labor jobs often held by blacks.³⁴⁶ The unions expended their resources mainly in protecting skilled, predominantly white workers from these trends.³⁴⁷ In other words, the Act equalized white and black wages for the same job but also drove up the price of black labor. Consequently, black industrial workers were replaced by machines and cheaper foreign labor, thus creating a class of perennial unemployed in the inner city.³⁴⁸ In sum, New Deal labor legislation contributed to a significant, persistent increase in black unemployment, which is identified by William Julius Wilson and other sociologists as the leading cause of the hopelessness, despair, family breakdown, and isolation from mainstream society that defines the underclass.³⁴⁹

D. *Apologies for the New Deal*

Given the facts noted above, the celebratory tone used in describing the relationship between New Deal jurisprudence and black welfare³⁵⁰ seems unjustified. It is true that in some sense the acquiescence of the Supreme Court to the New Deal paved the way for the federal civil rights legislation of the 1960s by significantly increasing federal power. Several problems, however, deserve further attention.

First, the ultimate use of federal power on behalf of blacks resulted from an accident of history. Viewed from a 1930s perspective, it was far more likely that federal power would have been used against blacks than in their favor.³⁵¹ The intervention of World War II, the

346. Bonacich, *Advanced Capitalism*, *supra* note 293, at 47; Keyes, *supra* note 322, at 400.

347. Ralph K. Winter, Jr., *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817, 850 (1967). Even the United Mine Workers, one of the most racially progressive unions, followed this policy. NORTHROP, *supra* note 46, at 159-71.

348. Herbert R. Northrup, *Equal Opportunity and Equal Pay*, in THE NEGRO AND EMPLOYMENT OPPORTUNITY 85, 87 (Herbert R. Northrup & Richard L. Rowan eds., 1965); see Bonacich, *Advanced Capitalism*, *supra* note 293, at 49 (noting that artificially high minimum wage laws led to mechanization that ultimately led to unemployment for relatively unprotected black workers).

349. See WILLIAM J. WILSON, THE TRULY DISADVANTAGED 1-5 (blaming rise of underclass on disappearance of unskilled jobs from urban areas); *supra* note 22 (discussing rise of underclass); cf. Hill, *Race and Organized Labor*, *supra* note 17 (blaming racial practices of organized labor for "permanent condition of poverty and social disorganization" in black community). But cf. MYRON MAGNET, THE DREAM AND THE NIGHTMARE: THE SIXTIES' LEGACY TO THE UNDERCLASS (1993) (blaming rise of underclass on cultural factors).

350. See, e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 486-515 (1989) (praising "creative" way New Dealers were able to change traditional preservationism in Supreme Court).

351. See, e.g., *supra* notes 203-16 and accompanying text (discussing racist legislative history of Davis-Bacon Act). See generally ROCHE, *supra* note 40, at 85-87 (noting that black political organizations, such as NAACP, still had few resources); WOLTERS, NEGROES AND THE DEPRESSION, *supra* note 236, at 169-93 (noting that while blacks had made some political progress by late

Cold War, and the great migration of blacks to Northern cities, the most important events leading to the triumph of the civil rights movement,³⁵² could not have been anticipated by the justices of the 1937 Supreme Court. Without those factors, the rise of an activist Federal Government could have led to political disaster for blacks, instead of the victories of the civil rights movement.

Second, assuming *arguendo* that the New Deal was a "but-for" cause of the successes of the civil rights movement, the continuing negative repercussions of the New Deal on the black community should not be neglected. As has been shown, New Deal labor legislation took away many traditional advantages that black workers held in the labor market while giving them little civil rights protection.³⁵³ While many blacks have benefited significantly from civil rights employment laws, particularly those pertaining to state and quasi-state action,³⁵⁴ such laws have done little to help the class of permanently unemployed black men that the New Deal created.³⁵⁵

Third, while a strengthened Federal Government may have been a prerequisite to the establishment of strong civil rights legislation, such a government could have arisen in the 1930s without the Federal Government cartelizing the labor movement at the expense of blacks. Simply because the New Deal had some unintended long-run positive

1930s, and had some friends in Roosevelt administration, their general lack of political power is demonstrated by their inability to have much influence on course of New Deal legislation); Demsetz, *supra* note 319, at 202 (asserting that until early 1960s all major legislation that interfered with free market and proved to be politically palatable worsened economic well-being of blacks).

352. The European campaign of World War II was fought, at least rhetorically, in response to the racism of Nazi Germany, which made domestic racism seem like an anomaly. The war also created an egalitarian spirit across the country. J. R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 256 (1978). The Cold War, and the accompanying competition for the hearts and minds of new Third World nations, made the end of officially sanctioned racism in the United States a foreign policy imperative. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988). Perhaps most important, the migration of blacks from the South to cities in large industrial states created an electoral power whose votes were of crucial importance, particularly in the critical and close presidential election of 1960. See 'God's Southern Gentleman', NEWSWEEK, Nov. 26, 1984, at 48, 48 (noting importance of black vote to Kennedy's election in 1960).

353. See *supra* notes 243-87 and accompanying text (discussing deleterious effects of New Deal labor legislation); see also HILL, *BLACK LABOR*, *supra* note 17, at 96-97 (noting that while blacks were losing jobs because of racial bias in New Deal programs, they were also being excluded from programs seeking to stabilize economy).

354. See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* (1992) (opposing civil rights laws as applied to private employers but acknowledging importance of, and need for, legal restraints on discriminatory behavior of government and private businesses granted monopoly powers by government).

355. Winter, *supra* note 347; cf. Richard A. Epstein, *The Paradox of Civil Rights*, 8 YALE L. & POL'Y REV. 299, 312 (1990) (arguing that title VII, as applied to private employers, has left blacks in worse condition by driving firms out of black communities and into white areas to prevent suits alleging discrimination in employment).

effects is no reason to absolve its creators from responsibility for its negative effects.

Finally, the celebration of the rise of the civil rights/welfare state depends on a particular normative view of the proper role of government in ensuring individual rights, and, indeed, of what constitutes a "right" that should be enforced by government. As Professor Bruce Ackerman notes, the *Lochner* era Supreme Court was rapidly moving to a synthesis in which it guaranteed liberty of contract to all, regardless of race or gender.³⁵⁶ Moreover, the Court was clearly moving in the direction of a more general equal protection jurisprudence.³⁵⁷ It is possible to imagine that but for the interruption of the Great Depression and the New Deal, entirely different forms of civil rights protections would have arisen—a *laissez-faire* combination of equal protection of the law, liberty of contract, and freedom of association, instead of the more statist combination of interest group liberalism, the welfare state, and government enforcement of nondiscrimination norms against private parties. While this Article is not the place to defend or reject either system, it should be noted that the *laissez-faire* version of civil rights was essentially the philosophy of the Radical Republicans during Reconstruction,³⁵⁸ and still has many forceful advocates today.³⁵⁹

Apologists for the New Deal can thus be challenged on a variety of grounds. But however one ultimately weighs the New Deal Revolution's effects on black welfare, those effects certainly were not as uniformly positive as Panglossian scholars would have it.

356. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 101 (1991) ("[B]lack no less than whites, women no less than men, had been granted equal rights of property and control.") As examples, Ackerman cites *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down discriminatory minimum wage law for women) and *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating state-imposed housing segregation).

357. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (reversing conviction of "Scottsboro Boys"); *Nixon v. Condon*, 286 U.S. 73, 88-89 (1932) (declaring whites-only primary election unconstitutional); *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (invalidating whites-only primary election); *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927) (striking down law banning private schools run for benefit of Japanese immigrants); *Pierce v. Society of Sisters*, 268 U.S. 510, 533-36 (1925) (finding that law inspired by prejudice against Catholics requiring every parent to send children to public school is "an unreasonable interference with . . . liberty" and hence unconstitutional).

358. For two works that describe the ideology of the Radical Republicans, see FONER, *RECONSTRUCTION* *supra* note 8, and DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS* 1862-72 (1967).

359. See, e.g., CLINT D. BOLICK, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* 3-32 (1988); EPSTEIN, *supra* note 354, at 221-47; Roger Pilon, *Uncivil Rights*, REG., Summer 1991, at 9; Jennifer Roback, *The Separation of Race and State*, 14 HARV. J.L. & PUB. POL'Y 58 (1991).

CONCLUSION

The growth of "progressive" national labor legislation in the 1930s had devastating consequences for black Americans. Tens of thousands of blacks lost relatively well-paying positions in the railroad and construction industries, and hundreds of thousands of others lost unskilled positions permanently. It was no coincidence that the growth of labor legislation harmed black workers. Interest groups, be they organized labor or organized business, attempt to use the law to obtain monopoly advantages at the expense of those with less political power, and powerless minority groups are often victims of "rent-seeking"³⁶⁰ behavior by politicians and interest groups.³⁶¹ Disenfranchised, politically vulnerable blacks were no match for racist labor unions and their political sponsors in the 1930s.

The free hand that the judiciary gave to Congress and state legislatures to enact laws regulating the labor market in the 1930s continues to allow established businesses and workers to create government-sponsored monopolies at the expense of unorganized, politically powerless potential new entrants to the labor market, who disproportionately are poor immigrants or persons of color. The Davis-Bacon Act, for example, continues to discriminate against unskilled workers, particularly blacks, while also inhibiting the ability of small, often minority-owned contracting companies to obtain government construction contracts.³⁶² The taxicab industry, which once provided tens of thousands of opportunities for small-scale entrepreneurs, is now dominated by large-scale enterprises holding exclusive government franchises.³⁶³ Licensing laws allow organized groups of workers to restrict new entrants, while often contributing little to public health and safety.³⁶⁴

360. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 70 (1990) (defining "rent seeking" as "the dissipation of wealth through efforts to redistribute resources by way of politics"). See generally Robert Tollison, *Rent Seeking: A Survey*, 35 *KYKLOS* 575, 575-80 (1982) (providing survey of literature on rent-seeking).

361. See generally Jennifer Roback, *Plural but Equal: Group Identity and Voluntary Integration*, 8 *SOC. PHIL. & POL'Y* 60 (1991) (likening integration to market good that people may choose or reject and proposing that ethnic groups abandon struggle to control government and instead adopt race neutral laws for common good); Jennifer Roback, *Racism as Rent Seeking*, 27 *ECON. INQUIRY* 661, 671-73 (1989) (describing political incentive to redistribute wealth from vulnerable minority groups).

362. Bernstein, *supra* note 216.

363. See WALTER E. WILLIAMS, *THE STATE AGAINST BLACKS* 75-87 (1982) (noting that in effort to limit number of taxicabs, government only issues limited number of licenses, causing price of licenses to increase such that people with limited means were priced out of market).

364. WALTER GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENT RESTRAINT* 105-51 (1968). For several discussions of the negative effects of licensing laws on minority achievement, see

Because of these and other continuing abuses, liberal scholars such as Laurence Tribe and Leonard Levy, as well as conservatives such as Justice Clarence Thomas, favor stricter judicial scrutiny of laws restricting economic opportunity.³⁶⁵ The Supreme Court has even noted, albeit in a footnote, that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of . . . personal freedom."³⁶⁶ Broad resistance to stricter review of economic regulation continues, however, because of memories of the alleged excesses of the *Lochner* era. In particular, it is still alleged that past judicial review of occupational regulation "benefitted established economic interests at the expense of the relatively powerless."³⁶⁷

The facts presented in this Article demonstrate that this criticism reflects the fact that the history of the *Lochner* era has been written mainly by scholars who fail to recognize that during that era, native white male workers were themselves an established economic interest group who sought to use the power of the state to monopolize the labor market at the expense of relatively powerless blacks and others.³⁶⁸ Labor legislation, not its invalidation, was the major tool

CENTER FOR PUBLIC REPRESENTATION, REGULATING OCCUPATIONS: LEGAL CHALLENGES TO LICENSING EXAMINATIONS IN WISCONSIN 9, 17 (1988); Stuart Dorsey, *Occupational Licensing and Minorities*, 7 L. & HUM. BEHAV. 171, 171-72 (1983); Stuart Dorsey, *The Occupational Licensing Queue*, 15 J. HUM. RESOURCES 424, 424-33 (1980).

365. See TRIBE, *supra* note 12, at 1373-74 (observing importance of preserving economic choices); *id.* at 1378 (noting that government should "not take away without clear and focused justification . . . a fair opportunity for an individual to realize her identity in a chosen vocation"); Leonard W. Levy, *Property as a Human Right*, 5 CONST. COMMENTARY 169, 169 (1988) (criticizing Supreme Court's ruling in *New Orleans v. Dukes*, 427 U.S. 297 (1976), as limiting one's ability to secure livelihood); Clarence Thomas, Address at the Pacific Forum of the Pacific Research Institute (Aug. 10, 1987) (calling for return to principles of natural law, including right to earn from one's labor).

366. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.23 (1976) (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

367. Michael J. Phillips, *Another Look At Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 275.

368. See David E. Bernstein, Note, *The Supreme Court and "Civil Rights," 1886-1908*, 100 YALE L.J. 725, 733-42 (1990) (describing role of labor legislation in harming economic interests of blacks, women, and immigrants).

It will be argued that white workers nevertheless possessed less bargaining power than their employers. In a free labor market, however, wages will tend to rise to marginal productivity. While labor legislation can raise wages, even in a regulated labor market an employer will not pay an employee more than that employee produces. The major effect of labor legislation, therefore, is to reduce the supply of labor, increasing the wages for some at the expense of unemployment for others. LUDWIG VON MISES, *HUMAN ACTION* 617 (3d ed. 1963); *cf.* VEDDER & GALLAWAY, *supra* note 333, at 285 (applying this principle to rise in unemployment in United States). Certain workers (generally those whose organizations had a voice in creating the legislation) gain, while others lose. See, e.g., Charles Brown et al., *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. ECON. LITERATURE 487, 489-508 (1982) (discussing distributive effects of minimum wage law). In the case of the labor legislation discussed in this Article, many white workers gained, while most black workers lost.

of oppression of workers during the *Lochner* era.

That is not to say that every economic regulation passed during the *Lochner* era, or extant today, cannot pass constitutional muster. Judicial activism on behalf of occupational liberty, like any other form of judicial activism, undoubtedly has its potential pitfalls, including potential judicial overreaching. But many of those pitfalls can be avoided if courts would focus on opposing monopolistic legislation. Indeed, a return to *Lochner* and substantive due process is not necessarily required in order for occupational liberty to be judicially protected.³⁶⁹

At least some reassessment of the near-total judicial abandonment of its obligation to protect occupational liberty is in order. The right to pursue an occupation free from unwarranted government interference on behalf of special interest groups is an important traditional American liberty,³⁷⁰ an important human right,³⁷¹ and, as the historical example of blacks during the New Deal era shows, an imperative if those without a strong voice in the political system are to be given an opportunity to pursue the "American Dream."

While the *Lochner* era Supreme Court struck down legislation benefiting unionized labor at the expense of nonunion labor, it did not strike down legislation that merely redistributed income from rich to poor. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1362-63 n.17 (1983); see also SEMONCHE, *supra* note 7, at 430-31 (noting that Court upheld "remedial" labor legislation, but not legislation benefiting unions).

369. The Supreme Court could, for example, rethink its 1943 holding that federal antitrust regulation cannot be applied to state-created monopolies. See *Parker v. Brown*, 317 U.S. 341, 351 (1943) (holding that Sherman Act was not intended to restrain state action).

370. Cf. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-house Cases Re-examined*, 31 EMORY L.J. 785, 789 (1982) (discussing traditional right to be free from government-sponsored monopoly).

371. Levy, *supra* note 365, at 183 ("With the exception of freedom of religion, nothing is more important than work and a chance at a career or a decent living.").