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Whitewashed Labor Law, Skinwalking Unions

Marion Crain

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ARTICLES

Whitewashed Labor Law, Skinwalking Unions

By Marion Crain†

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† Paul Eaton Professor of Law, University of North Carolina. B.S., 1980 Cornell University; J.D., 1983, UCLA Law School. I thank the University of North Carolina School of Law for research support, and Matthew Duchesne and Catherine Dyar for able research assistance. An earlier version of this Article was presented to the faculty at Case Western Reserve University Law School as part of the Rush McKnight Labor Law Scholar-in-Residence Program, and benefited greatly from the experience. I am grateful to Ken Matheny for his unending tolerance for discussion and debate over the ideas contained in this Article.
In Navajo culture, "skinwalkers" are human witches capable of shape-shifting to animal forms. They exist on the border between the worlds of humans and animals, wielding the power derived from their ability to transform themselves—to "skinwalk." Some critical race feminists have analogized skinwalking to the multiple-consciousness arising from our overlapping identities and our ability to shift between them, observing that the ability to cross-cut aspects of one's identity is a source of great energy and power, as well as pain.

1. Margaret K. Brady, "Some Kind of Power": Navajo Children’s Skinwalker Narratives 5, 19 (1984). Skinwalkers’ description derives from the fact that they wear a skin that “literally as well as symbolically transforms [them] from human to animal.” Id. at 24. Their power in Navajo myth stems from their ability to “threaten the highly valued order and balance of Navajo society with the inherent possibility of chaos.” Id. at 21. Their existence is described in this way:

Navajo skinwalkers constantly move between the worlds of humans and animals, throwing the two differing domains together, contrasting them and somehow almost making them equal to each other once again. It is a process fraught with danger and power. Because the skinwalker is never fully either human or animal, he remains essentially anomalous, wielding the power derived from his repeated transformations from one state to the other.

Id. at 23.


3. See Gloria Anzaldúa, Borderlands/La Frontera: The New Mestiza 79-80 (1987) (describing the creation of a “mestiza consciousness” blending Indian, Mexican, and Anglo cultures). Anzaldúa explains:

That focal point or fulcrum, that juncture where the mestiza stands, is where phenomena tend to collide. It is where the possibility of uniting all that is separate occurs. This assembly is not one where severed or separated pieces merely come together.... In attempting to work out a synthesis, the self has added a third element which is greater than the sum of its severed parts. That third element is a new consciousness—a mestiza consciousness—and though it is a source of intense pain, its energy comes from continual creative motion that keeps breaking down the unitary aspect
Motivated by the threat of extinction,\textsuperscript{4} organized labor has undertaken dramatic efforts to "skinwalk" in order to adapt to the racially and ethnically diverse postindustrial global labor market and to transform its historical weakness to strength. Historically, the labor movement served the interests of workers who were race- and gender-privileged.\textsuperscript{5} The American perception of class emerged as raced-white and gendered-male.\textsuperscript{6}

However, organized labor can no longer afford to ignore the differences between its historical membership base of blue-collar white males and the "new working class" that has become its target organizing population.\textsuperscript{7} Whites are projected to decline precipitously to 64% of the labor force in 2025, down from 74% in 1998 and 82% in 1980.\textsuperscript{8} Exciting new research indicates that this is good news for unions: people of color, particularly African-Americans, have the highest union organization rates.\textsuperscript{9} AFL-
CIO President John Sweeney’s “New Voice” platform recognizes these realities, targets income inequality as a moral wrong, and seeks to rejuvenate unionism through enhanced organizing efforts directed toward the increasingly diverse labor force.10

Organized labor’s efforts to transform itself are more than simply a pragmatic adaptation to demographic shifts in the labor force, however. Progressive unions seeking to organize the large numbers of immigrants and people of color locked at the bottom levels of the economic ladder have formed alliances with church groups and community organizations in which racial and ethnic identity are central.11 In recent years, the most successful union organizing initiatives of any size have recruited organizers with experience in and ties to the civil rights movement, the women’s movement, or community organizing programs.12 Through such alliances, it is possible to mobilize workers around their intersecting class, racial, and ethnic identities.13 As these bridges are built, unionism may be transformed from its post-World War II ideology of business unionism (featuring job protection and servicing of current members’ economic interests)14 to a more inclusive

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10. See Crain & Matheny, Labor’s Identity Crisis, supra note 6, at 1784-87 (describing New Voice platform and critiquing it); Special Report: Organizing, DAILY LAB. REP. (BNA) No. 159, Aug. 18, 1999, at C-1 (describing efforts of AFL-CIO to boost organizing implemented as a result of John Sweeney’s ascendancy to the presidency of the AFL-CIO); John J. Sweeney, America Needs A Raise, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA, at 13 (Steven Fraser & Joshua B. Freeman eds., 1997) (describing “New Voice” platform and enhanced focus on organizing).

11. For example, the Service Employees International Union’s successful Justice for Janitors campaign in Los Angeles traces its success in significant part to its ability to forge alliances with Black and Latino/a organizations and churches in the community. See Kelley, supra note 7, at 11.


13. Some groups combine elements of both workplace and community organizing in their philosophy and method. Black Workers For Justice (BWJF) is a community- and workplace-based group that originated as a subgroup in a labor organizing drive at Kmart in Rocky Mount, North Carolina. See Kim Diehl, Black Belt Justice, COLORLINES, Winter 2000/01, at 30. Led by African-American women, BWJF seeks to address the triple oppression along lines of race, gender and class suffered by Black women workers in the south. BWJF sees its goal as encouraging and supportive collective action in the workplace for Black workers, translating Civil Rights movement goals into a culture of labor organizing and laying the groundwork for the formation of unions. See id. at 31. Although whites can be a part of the effort—it is inclusive, not exclusionary—the all-Black leadership of BWJF emphasizes that white workers must “identify with the struggle against racism and unite with people who have been superexploited.” Id. at 31. BWJF has in fact extended assistance to white workers as well as to Black workers. See id. at 32. In response to the recent influx of Hispanic immigrants into North Carolina, BWJF has reached out to organizations representing the farm workers in the state, and formed the African-American/Latino Alliance. The Alliance seeks to promote proactive discussion on issues affecting workers in the Latino and African-American communities, seeking to forge coalitions around common themes in the way white supremacy has reasserted itself in response to immigration and to Black workers’ resistance against racism. See id. at 32.

14. See Crain & Matheny, Labor’s Identity Crisis, supra note 6, at 1779-80 (describing business unionism).
and militant social justice unionism that combines resistance to class oppression with resistance to racial and ethnic oppression.\textsuperscript{15}

Despite these promising innovations, unions have been frustrated by a legal regime that insists on an organizing methodology that whitewashes workers' experience of class oppression. This Article argues that the labor law blocks unions' ability to "skinwalk," thus preventing unions from transforming union ideology and forming alliances with civil rights and social justice organizations. I focus on the doctrine prohibiting inflammatory appeals to racial prejudice in union organizing campaigns, which encourages a "colorblind" organizing strategy. Initially well-intentioned, the inflammatory appeals doctrine ultimately undermined union efforts to mobilize workers of color, particularly those employed in the lowest-paid, racially segregated occupations. I propose race-conscious reforms that would permit unions to raise race in organizing campaigns and promote coalitions with civil rights and community groups dedicated to furthering the interests of people of color.\textsuperscript{16} Specifically, I argue that the law should refuse to intervene in organizing campaigns where racial or ethnic issues are injected into the campaign by either side, because race and ethnicity powerfully shape the experience of class oppression and thus are central to union organizing in a racially diverse postindustrial workforce.

Part II describes the legacy of slavery and the history of white racial privilege and outsider exclusion in unionism that divided the working class along racial lines. It explains how class solidarity came, ultimately, to mean white solidarity. Part III describes a competing form of unionism, dubbed civil rights unionism, which existed side by side with white unionism and sought to challenge it. Part IV analyzes the impact of law on the evolution of both, examining the labor law through the lens of the doctrine prohibiting inflammatory racial appeals during union organizing campaigns. Part IV assesses the costs of the law's imposition of its whitewashed vision of soli-

\textsuperscript{15} See id. at 1771-74 (describing social justice unionism of the Knights of Labor and the Industrial Workers of the World).

\textsuperscript{16} This Article focuses on the African-American experience of class. I chose the African-American experience of class both because it is illustrative of the dynamics by which a particular racial group becomes especially vulnerable to economic exploitation, and because slavery is the foundation of the American system of capitalism. Further, some believe that the racial identity of all groups has been politically and legally defined by the line between Blackness and whiteness. \textit{See, e.g., Treason to Whiteness Is Loyalty to Humanity: An Interview with Noel Ignatiev of Race Traitor Magazine, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 607, 611 (Richard Delgado & Jean Stefancic eds., 1997). Finally, Blacks have the highest propensity for union membership of any racial group. \textit{See BLS Reports, supra note 4, at AA4, E1 (noting that 13.1\% of whites, 17\% of Blacks, and 11.3\% of Hispanics are union members). Although understanding the specific ways in which the labor of a particular racial or ethnic group is exploited is central to organizing and mobilizing those workers, see \textit{infra} section V.C. (describing factors unique to immigrant exploitation and hence, to organizing immigrants), generalizations can be made about the common vulnerability of these groups to exploitation by employers and the labor movement’s likely strategic response.}
darity on unions. Part V, informed by critical race theory and the insights of new labor historians, advances a proposal for reform.

II. CLASS SOLIDARITY MEANS WHITE SOLIDARITY: "RACE-NEUTRAL" ORGANIZING

Theorists from many disciplines have studied the significance of race in the construction of class status. Initial study focused on the significance of non-whiteness; in these analyses, race connoted persons of color. The sad story of American unions’ hostility towards nonwhites and its history of exclusionary and discriminatory practices has been amply documented.\(^7\) In recent years, increasing emphasis has been placed on the meaning and significance of whiteness, particularly its relationship to privilege and subordination and its impact on individual and group identity.\(^8\) The work of “new labor” historians, such as David Roediger, Dana Frank, and Noel Ignatiev, suggests that the history of labor unionism and labor organizing was heavily influenced by whiteness as well as nonwhiteness.\(^9\) Race, ethnicity, and

\(^{17}\) See, e.g., William B. Gould, Black Workers in White Unions: Job Discrimination in the United States (1977); Philip S. Foner, Organized Labor and the Black Worker 1619-1973 (1974); Herbert Hill, Black Labor and the American Legal System (1977); see also David E. Bernstein, Only One Place of Redress: African-Americans, Labor Regulations, & the Courts from Reconstruction to the New Deal (2001) (arguing that the failure of Lochnerism and the triumph of the regulatory state—particularly the enactment of labor legislation in the early 1900s—strengthened racially exclusionary labor unions and disadvantaged Black workers).


\(^{19}\) See Dana Frank, Purchasing Power: Consumer Organizing, Gender, and the Seattle Labor Movement, 1919-1929 (1994) (discussing how the AFL unions in Seattle used whiteness as a basis for constructing solidarity, actively excluding African-, Japanese-, and Chinese-American workers from union shops); Noel Ignatiev, How the Irish Became White (1995) (describing the struggle engaged in by European immigrants to become white, a status associated with preferential treatment in the labor market); David Roediger, Towards the Abolition of Whiteness: Essays on Race, Politics, and Working Class History (1994) (describing public and psychological wage associated with whiteness). Labor historians are far from united in their analysis of organized labor’s role in furthering racial exclusion through union organizing and representation. Herbert Hill, Herbert Bloch, Philip Foner, Noel Ignatiev, David Roediger and others have focused on denouncing trade unions as racist, focusing on the ways in which they excluded Black, Asian and other minority workers and preserved white access to employment in the skilled trades, functioning as “white job trusts.” See Eric Arnesen, Up From Exclusion: Black and White Workers, Race, and the State of Labor History, REVIEWS IN AMERICAN HISTORY 146, 146-48 (March 1998). These scholars have criticized others who came before them—such as the famous labor historian Herbert Gutman—for pursuing a romanticized vision of unions as vehicles of interracial working class solidarity, denying the significance of race while clinging to a class-primary ethos expressed in Marxist theory. See, e.g., Herbert Hill, Myth-Making as Labor History: Herbert Gutman and the United Mine Workers of America, INT’L J. OF POLITICAL, CULTURE & SOC., Winter 1988, at 132, 133 (critiquing Gutman’s conclusion and characterizing it as a “a revived populist neo-Marxism that advanced the ideology of working class consciousness and solidarity against the social realities of race”); see also Ignatiev, supra, at 181. But cf. Arnesen, supra, at 148 (describ-
gender so thoroughly mold the experience of class in the United States that any discussion of class without reference to them overlooks central aspects of working class identification. This section examines the fruits of these authors’ work and shows how race influenced the development of the dominant union ideology and organizing strategies of the 1900s.

A. Slavery’s Legacy

Slavery holds the key to understanding barriers to interracial working class unity in the United States. Slaves were a cheap, efficient source of labor from whom a high rate of surplus was appropriated, and slavery provided southern businesses an obvious economic advantage over northern employers. Slaveholders convinced white workers that they had a vested interest in preserving the institution of slavery, making interracial organization of the south’s working class nearly impossible. White workers were told that by reserving the most menial and degrading tasks for slaves, employers could afford the high wages commanded by the white workers who held the best and most dignified jobs; in effect, employers persuaded white workers that their high wages were subsidized by the superprofits wrung from slaves. Southern slaveholders also cultivated a racist ideology in workers, which both justified slavery and generated a “spurious race pride” among white workers that dissipated labor militancy by focusing workers’ attention on race distinctions rather than on class distinctions. Meanwhile, a paternal, coerced alliance developed between southern business-owners and Blacks, in which business-owners had an economic incentive to teach slaves skills in order to displace higher-priced white workers.
Northern employers, on the other hand, saw slavery as an institution that hobbled their ability to exploit the entire labor force. Northern employers supported abolition because they could easily exploit free Blacks who, as recently freed slaves, still carried with them disabilities stemming from that status, including poverty, tractability, a dubious legal status when they moved to the north (where they were often suspected of being runaway slaves), and a dearth of any organization furnishing a power base. Northerners opposed abolition, fearing that southern Blacks would migrate north, increase competition for jobs, create a surplus of labor, and, consequently, reduce wages. Thus, while employers were divided on the desirability of slavery, the white working class was united in its effort to exclude Blacks from high-waged occupations, relegate them to the most menial and unskilled occupations, and deny them legal and political rights. Racism came "not just from the top down, but from the bottom up, creating a system of divide and rule often policed by white workers themselves." Manumission exacerbated the competition between Black and white workers, while simultaneously weakening the paternalistic bond between employers and Blacks. White workers who had anticipated undercutting and displacement by Black workers found their fears coming true. While slavery had undermined the material position of white workers, competition from free Blacks was worse. Though an alliance between white workers and Black workers would have prevented undercutting and improved the wage position of Blacks, Blacks were suspicious of white unions' motives, and white workers doubted Blacks' commitment to such an alliance given their history as strikebreakers. Because former slave owners no longer re-


27. Michael Honey, *Anti-Racism, Black Workers, and Southern Labor Organizing: Historical Notes on a Continuing Struggle*, 25 LAB. STUD. J. 10, 12 (Spring 2000) [hereinafter Honey, *Anti-Racism*]. Whites were enlisted to control the Black workforce at the worksite through supervisory responsibilities, and off site through the offer of bounties to whites for the capture of runaway slaves, or through the employment of whites as police officers or members of slave patrols. MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 46-47 (1997). In short, as Robin Kelley has written:

Interracial conflicts between workers were not simply diversions from some idealized definition of class struggle; while working-class racism was sometimes as much a barrier to African-American’s struggle for dignity and autonomy at the workplace as the corporate-defined racial division of labor.


29. *Id.* at 616.

tained as much control over their labor forces, or a strong interest in protecting their chattel (Black slaves), white workers’ antagonism toward competition from Black workers became less restrained. Nevertheless, employers resisted white workers’ efforts to exclude Blacks from markets altogether, and white workers and employers eventually compromised with the dual labor market—a caste system which permitted employers a cheap labor supply, yet simultaneously protected white workers from undercutting. White workers doubly benefited from the suppression of wages caused by the exclusion of Blacks from higher-paying factory jobs: many working class whites could now afford to employ Black domestic servants.

Once created, the dual labor market was self-perpetuating, fueled by race discrimination and patterns of employment recruitment by employers and job seeking by workers that reproduced a segregated workforce. Employer paternalism and the coercive implication that Blacks would be hired over whites only so long as they remained nonunion, encouraged Blacks to regard employers, rather than organized labor, as their allies. White supremacy combined with capitalism to produce a “racial zero sum game,” which blocked interracial union organizing. Some have concluded that white supremacy is the major source of a lack of class consciousness and activism in the U.S. today.

B. White Privilege

The New Deal, particularly the Wagner Act and the Fair Labor Standards Act theoretically legislated the dual labor market out of existence. Most employer efforts to undermine labor through strikebreaking, discrimination on the basis of union affiliation, and company unions were outlawed by the Wagner Act, and the Fair Labor Standards Act established a minimum price for labor that was race-neutral. Although the ideal was not realized in practice, erecting legal barriers to employers’ strategy of using

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32. Id. at 620.
33. Honey, Anti-Racism, supra note 27, at 12.
40. Bonacich, Advanced Capitalism, supra note 30, at 45.
Black labor to undercut white labor provided a fragile structure upon which an interracial working class alliance might have been constructed. That ideal, however, was not easily realized. As African-American scholar W.E.B. DuBois and labor historian David Roediger have demonstrated, one of the deepest legacies of slavery was the integration of beliefs in white racial superiority into working-class consciousness.\(^4\) The white working class learned to view whiteness as a source of privilege, a perception which muted white hostility towards capitalists, channeling it instead toward the Black working class.\(^4\) White workers constructed Black workers as the “other,” defining themselves in relation to and as superior to Blacks.\(^4\) Being white meant “build[ing] an identity based on what one isn’t and whom one can hold back.”\(^4\)

The American Federation of Labor’s (AFL) member unions excluded Blacks from membership or segregated them to Blacks-only local unions,\(^45\) since admitting Blacks into membership would have implied social equality.\(^46\) Exclusion from union membership kept Blacks out of union jobs, reducing the labor supply, and raising the (white) union wage.\(^47\) Michael Honey’s painstaking oral history research has provided detail and specificity, showing how segregation in the workplace reinforced the racial hierarchy and shored up white privilege.\(^48\) Jobs were segregated, with Blacks holding the lowest-paying, dirtiest, and most dangerous ones.\(^49\) Blacks were not permitted to park in the parking spaces closest to the plant gate; water coolers, rest rooms, cafeteria facilities, locker rooms, and even time clocks were segregated.\(^50\) Separate hiring halls, separate union meetings, and separate unions were commonplace.\(^51\)

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\(^43\) See id. at 14; see also Richard McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 (1992) (explaining that individuals seek to achieve material and intangible gains both in absolute terms and in relative terms; the attainment of relative superiority over others becomes an end in itself).

\(^44\) ROEDIGER, supra note 42, at 13.


\(^47\) See id.


\(^49\) See id. at 51-52, 79, 95.

\(^50\) See id. at 58, 69, 80-81, 152.

\(^51\) See id. at 53, 61, 78. George Holloway, a union organizer and representative working for the United Auto Workers (UAW), told painful stories of exclusion and subordination by other union leaders.
Racialization emerged as a vehicle by which employers could simultaneously exploit white workers and Black workers. Employers could pay whites lower wages because the additional public and psychological wages that they received (in the form of better schools, access to public facilities inside and outside the workplace, and entitlement to deference from Blacks) served to blunt white resistance.\textsuperscript{52} White workers chose white supremacy on the job and in the union even as they recognized its deleterious effects on class solidarity.\textsuperscript{53} Honey concludes, "Black workers always fought on two fronts, battling both white employers and white workers."\textsuperscript{54}

C. "Colorblind" Organizing Ideology

When the AFL began organizing nonwhites, it did so because unorganized Blacks threatened white workers' economic power, not because of any moral impetus to improve the situation of Blacks or other excluded groups. The AFL argued that Blacks' willingness to serve as strikebreakers in order to obtain union jobs made it foolhardy to continue to exclude them from union membership; their outside status left labor vulnerable to the capitalist tactic of using Blacks to undermine the power of strikes.\textsuperscript{55} Where white workers' resistance was too ingrained to allow admission of Blacks into local unions, the AFL supported organizing separate locals as a way of bringing Black workers into the Federation.\textsuperscript{56} Ultimately, however, the AFL yielded to southern racism, abandoned any requirement that member local unions admit Black workers into their ranks, and, instead, condoned a form of "Jim Crow" unionism that denied Blacks any voice in the decisionmaking processes of the Federation.\textsuperscript{57} In an effort to mediate between whites'

\begin{itemize}
\item HONEY, BLACK WORKERS REMEMBER, supra note 48.
\item Id.
\item Id.
\item Id. at 66. Many union members, especially those in the South who supported segregation, disagreed violently with AFL policy favoring racial integration. Since southern states had right to work laws, those who disagreed with racial policy could resign from union membership over this issue, depleting local unions' strength. ALAN DRAFER, CONFLICT OF INTERESTS: ORGANIZED LABOR AND THE CIVIL RIGHTS MOVEMENT IN THE SOUTH, 1954-1968, at 6, 39-40 (1994). To the extent that international unions continued to espouse a formal commitment to racial equality while local unions pursued segregationist policies, it is likely that white unionists divided their identities between the international and the local unions, relying upon the international union to protect their class position and the locals to protect their position of racial privilege. This would explain why international union commitments to racial equality were not realized in the locals, which tended either to be silent on issues of racial equality or to reflect the disapproval of the surrounding community. Id. at 166-67.
\item Id. at 71-76.
\end{itemize}
racism and pragmatic concerns about class solidarity, the AFL adopted an ideology of economism: an organizing and bargaining strategy focused on workplace issues, emphasizing the common class interests of workers and downplaying their divergent racial or ethnic identities.\(^{58}\) White workers thus allied themselves with Black workers only where it was economically advantageous in a direct and immediate way to do so. Overall, however, southern white workers remained unimpressed by the logic of the AFL’s class-based appeals, preferring to defend and protect their white privilege and favored positions in the workplace hierarchy instead.\(^{59}\)

The potential for interracial class solidarity was thus never fully realized. In the South, particularly, racism and white privilege proved to be “defining issues” in union organizing.\(^ {60}\) Southern employers fanned the flames of racial prejudice wherever they existed in the labor movement, making use of inflammatory racial propaganda to divide workers and block organizing. The tactic became even more prevalent after the Supreme Court’s 1954 ruling in favor of school desegregation.\(^ {61}\) Passions about racial equality ran deep, and organized labor attributed great power to employers’ use of inflammatory racial speech to block organizing efforts.\(^ {62}\) Some concluded that the power ascribed by labor to employers’ use of racial propaganda in organizing campaigns was overblown: while effective in some circumstances, it may not have been any more significant than other antiunion strategies and, certainly, “it was no magic elixir that immunized southern employers from unions.”\(^ {63}\) Nevertheless, unions ultimately sought to minimize the role of race in union organizing campaigns, hoping to avert employer efforts to defeat the union by dividing the workforce along racial lines.

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58. See Draper, supra note 56, at 5-6 (discussing economism).
59. Id. at 164.
60. Honey, supra note 27, at 10.
63. Id. at 165; see also John E. Drotning, Race Propaganda: The NLRB’s Impact on Employer Subtlety and the Effect of This Propaganda On Voting, 18 Lab. L.J. 172, 181-84 (1967) (finding that race hate propaganda was not significantly more effective than other forms of propaganda—such as the likelihood of strikes and consequent job loss if the union won the election—in defeating union organizing drives, although it may have a lingering impact on voting in rerun elections). In fact, unions were more successful in organizing in the south during the period of greatest racial turmoil (1953-1966) than they were in other parts of the country. Draper, supra note 56, at 165-66.
III. AN ALTERNATIVE IDEOLOGY: CIVIL RIGHTS UNIONISM

While unions in predominantly white or mixed race work groups sought to minimize the role of race, unions in predominantly Black workforces afforded race a central role in organizing. Organizing was often undertaken in partnership with Black churches or civil rights organizations. These unions sought to show how racial subordination was connected to class oppression. Perhaps the most compelling illustration of civil rights unionism was the 1968 Memphis sanitation workers’ strike that triggered Dr. Martin Luther King Jr.’s assassination. The 1300 striking Black sanitation workers marched wearing placards and carrying picket signs proclaiming “I am a Man.” 64 This slogan referred to white supervisors’ inhumane treatment of Black workers and “demanded a living wage and personal respect for people who had received neither during generations of Jim Crow.” 65 It explicitly connected Black poverty with racial, and gender, oppression. 66 Black ministers and community activists organized rallies, fund-raisers, and boycotts in support of the strike. 67 Ultimately, Dr. King traveled to Memphis, marched with the sanitation workers, and urged the civil rights movement to turn its efforts toward pressing for economic justice. 68 Dr. King was assassinated the day after a moving speech at a church rally in Memphis. 69

A number of unions integrated Dr. King’s dream of civil rights unionism in their efforts to organize predominantly Black workforces. Many made explicit use of his “I Have a Dream” speech in their organizing campaigns, seeking to link workers’ race and class subordination at the hands of

64. See HONEY, BLACK WORKERS REMEMBER, supra note 48, at 286-87.
65. See id. at 287. Honey explains that white supervisors referred to the sanitation workers as “boy,” treated them as servants, held wages down below the poverty level, and offered no benefits for one of the worst jobs in the city. See id. at 287-90.
66. See id. The slogan resonated in part because it was tied to Black men’s declining market position and consequent inability to function as family breadwinners, which translated into poverty for entire Black communities. See id. at 289. Similarly, when the United Electrical Radio and Machine Workers (UE) sought to organize and obtain a first contract on behalf of the predominantly African-American male workforce employed by a newly formed minority defense contractor in Milwaukee, Steeltech Manufacturing, it partnered with the Milwaukee chapter of the Coalition for Black Trade Unionists. The UE organizing drive was seen as a struggle for economic justice and “to define black manhood.” Katherine Sciacchitano, Finding the Community in the Union, and the Union in the Community: The First Contract Campaign at Steeltech, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 150, 153-54 (Kate Bronfenbrenner et. al., eds. 1998). By framing the campaign as a civil rights struggle and appealing to Milwaukee’s African-American community, the UE was successful in connecting the shopfloor struggle of the low-waged Steeltech workers with larger social justice concerns in the community, ultimately obtaining a very advantageous first contract. See Robert Bruno, Alternatives to the Strike as a Model of Resistance: Case Studies and Theory Building, 48 LAB. L.J. 449, 449-50, 452 (1997).
67. See HONEY, BLACK WORKERS REMEMBER, supra note 48.
68. See id. at 292-93.
69. See id. at 293.
white employers. The introduction of explicit analyses of race and its role in creating and maintaining income inequality dramatically altered the issues, allies, and strategies used by these unions. This Part canvasses a few examples of civil rights-style unionism and demonstrates the difference that this ideology makes.

A. Struggles for Racial/Economic Justice

Civil rights unionism seeks to alter the very hue of class solidarity. One such contemporary labor-civil rights/community alliance occurred in Greensboro, North Carolina in the mid-1990s. The mobilization effort promoted by the Union of Needletrades, Industrial and Textile Employees (UNITE) on behalf of Kmart workers in Greensboro drew much of its strength from the strong tradition of African-American community leadership, particularly in the churches, and capitalized on the role of racial inequality in driving workers' wages down. Particularly in the South, well known for its hostility toward unions, framing workers' struggles in terms of issues important to the community was vital in order to garner public support. What was initially perceived as "merely" a struggle between labor and management over economic issues was transformed into a moral issue commanding community attention and support for the workers and their plight.

70. See infra cases discussed in sections IV.B and V.A.


72. See Kelley, supra note 7, at 12-13.

73. See, e.g., Peter Krouse, Right to Work: North Carolina Is Among the States Least Friendly to Organized Labor, GREENSBORO NEWS & RECORD, June 16, 1996, reported at 1996 WL 5774534 (explaining that Scottish and Irish who immigrated to North Carolina were more independent than those of Eastern and Southern European descent who immigrated to the North, and less supportive of unionism).


75. See id. (describing the significance in garnering public support for the Kmart workers of the "Pulpit Forum," a group of African-American ministers who organized mass civil disobedience campaigns in which they were arrested).
The involvement of the African-American religious community was critical. Although the union had won an election in 1993, it was unable to obtain a first contract with Kmart until the African-American ministers in the community brought the concerns of the predominantly African-American workforce, most notably low pay, sexual harassment, racial slurs, and workplace safety issues, to the attention of the public.\textsuperscript{76} By forming a group known as the Pulpit Forum\textsuperscript{77} and subjecting themselves to arrest by praying in the Kmart parking lot, the ministers loaned their moral authority to the union's struggle.\textsuperscript{78} 

Eschewing an exclusive focus on either race discrimination or the class struggle between labor and management, UNITE and the Pulpit Forum sought to show how economic oppression in Greensboro was shaped by race. The company sought out Greensboro because wage rates were lower in the South due to its history of racial conflict and competition among workers. Once there, Kmart was able to pay the mostly African-American workers the prevailing market rate and profit from the suppressed wages in the region.\textsuperscript{79} The company was not vulnerable to a charge of race-discriminatory pay practices because its pay practices within the Greensboro facility were not discriminatory. The fact that pay was lower at the Greensboro facility than at other Kmart facilities was a result of slavery's powerful legacy in the South; the predominance of African-American workers was a legally irrelevant byproduct of "market" forces not caused by this particular employer.

When white and Black workers began to stand together against Kmart's practices, Kmart responded with strategies designed to exacerbate racial tensions and divide workers along racial and ethnic lines: it hired immigrant workers, including Hispanics and Asians.\textsuperscript{80} In an even more
confrontational strategy, Kmart contributed money to the NAACP’s school-
children tutoring programs, which was perceived as a direct attempt to di-
vide Black Kmart workers from the rest of the Black community.81 The
ministers responded by reaching out to the Hispanic and Asian communities
and appealing to their common economic interests in higher wages and im-
proved working conditions,82 and urged the NAACP to support Black
workers by refusing to accept the contribution.83
To the Black workers, “Kmart’s lack of respect for the humanity of
workers [was] grounded in its white management’s assumption of racial su-
periority.”84 The union’s campaign sought to make race visible to white
workers, in an attempt to educate them about racial privilege.85 Black
workers led the mobilization effort, although whites were intimately in-
volved as well.86 In order to garner community support, the union strove to
link the company’s racism and economic oppression of its workers to issues
affecting all citizens, including increased poverty, substance abuse and fam-
ily violence.87 Because the racial elements of the struggle resonated most
powerfully in the larger community—more powerfully than a narrow ap-
peal on behalf of the workers for better wages and against degrading treat-
ment—the union emphasized the role of racial oppression outside the
workplace as well.88 At the same time, because the workforce was racially
mixed (65% African-American and 35% white),89 the union downplayed
racial differences and divisions inside the workplace in an effort to unite
workers around shared workplace interests.90 Thus, intertwining appeals
about racial and class oppression required both the union and the Pulpit Fo-
rum to modify their traditional message and their accustomed forms of ac-
tivism; picket lines became prayer vigils and community/church meetings
became union rallies.91
The Greensboro coalition-building process is remarkable because it
successfully defined a labor dispute in the broadest terms possible, captur-

81. See Johnson, supra note 77, at 681.
82. See Hair, supra note 76, at 670.
83. In a show of solidarity with the workers, the NAACP returned the money Kmart had donated. See Johnson, supra note 77, at 681-82.
84. See Hair, supra note 76, at 667.
85. See id. at 671.
86. See id. at 669-70.
87. See id. at 671-72.
88. See Benjamin Hensler, Building A Coalition for Workers' Rights at Kmart, 2 U. PA. J. LAB. & EMP. L. 687, 693 (2000) (explaining that race provided a lens that highlighted the moral aspects of the struggle for the larger community). EEOC charges were filed, alleging that the company had discrimi-
nated on the basis of race. See id.
89. See Hair, supra note 76, at 661.
90. See Hensler, supra note 88, at 693.
91. See id. at 692.
ing the intersection of race and class oppression. Reverend Johnson described the complex nature of the struggle eloquently:

Because race discrimination and the low wage scale were alleged to be part of the problem at the Kmart distribution center, the question was often raised, 'is this a race struggle or an economic struggle?' Of course, inherent ... in that question was the notion that there is something defined as a 'pure race issue' unassociated with economic factors or that there was a 'pure economic issue' involving black and white people in this country without any elements of race or racism. I usually responded by saying: 'if you can tell us whether slavery was “just a race matter” or “just an economic matter” we will be able to help you understand the race/economic dimension of the Kmart struggle.' Obviously race and economics are inextricably linked in such a way that to seek some 'pure separation' does violence to reality and makes no sense. It was another invitation to fragmentation. A ‘pure race’ struggle would mean you are for blacks and minorities (implication against whites) and a ‘pure economics’ struggle would be interpreted to mean you are for whites (implication, denial of racial discrimination and therefore alienation of many blacks and other minorities). ... All of those ways of framing the situation axiomatically invite division and limit those who are involved in the struggle.92

The key, according to Reverend Johnson, was to preserve the “whole-ness” of the struggle by affirming the role of race and class oppression in triggering the struggle, and to prevent race and class interests from being aligned in opposition to one another.93 The contract settlement obtained by the workers with Kmart reflected the success of this strategy. By the end of the current union contract, warehouse workers will receive as much as a 50% increase over their 1996 pay levels, as well as benefits on a par with other Kmart distribution centers around the country.94 Whites at Kmart found it advantageous to highlight the role of race and the legacy of slavery in the employer’s pay practices, as that message was far more compelling in garnering public support than a narrow union appeal for higher wages would have been.

Fortunately, the Kmart workers were already organized, and emphasizing racial issues in the context of economic pressure strategies did not trigger violations of the labor law. Indeed, the coalitions with non-labor groups probably helped to afford the union more flexibility than it might otherwise have enjoyed in bringing its message to the public.95 As Part IV explains,

92. Johnson, supra note 77, at 677.
93. See id. at 678.
94. See Hensler, supra note 88, at 694.
had the Kmart struggle occurred in an organizing context, the incorporation of racial issues and appeals to promote racial justice in the community would have provided the basis for a challenge to the election.

B. Immigrant Organizing

Although organized labor historically pursued a policy of restrictionism and exclusion, under John Sweeney's leadership, it has abandoned its former policy and assumed a pro-immigrant stance, making clear that organizing new immigrants is a top priority. Under strong pressure from the international unions, many locals have dedicated significant resources to immigrant organizing, implementing innovative strategies that have been associated with higher win rates in organizing campaigns. These locals now deliberately frame organizing campaigns around the needs of immigrant workers and seek contracts protecting the particular interests of immigrants. They recruit bilingual organizers whose ethnic or racial background mirrors that of the target worker population and who typically have a background in community organizing with persons of color or immigrants. These organizers are able to focus on immigrant and ethnic issues in organizing campaigns by conducting meetings and creating flyers in the language(s) spoken by members and by utilizing ethnic/cultural themes in worker rallies. Where appropriate, they characterize employer actions as racist or discriminatory and organize protests around this theme, building on ethnic and racial solidarity and attracting support from non-labor community groups or politicians who care about immigrant or racial discrimination, yet may be indifferent to anti-unionism by employers.

Alternatively, where multiple ethnic and racial groups exist within a given workforce, the union may choose to mobilize workers around their common interests as workers, prioritizing class as the principle on which group formation is based, yet still incorporating appeals to racial or ethnic

96. See Ruth Milkman, Introduction, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 1, 1-2, 10-11 (Ruth Milkman ed. 2000); see also David Bacon, Immigrant Workers Ask Organized Labor "Which Side are You On?" WORKING USA, Jan./Feb. 2000, at 7, 15-18 (describing shift in AFL-CIO internal politics and response to INS enforcement programs directed at employers who hire undocumented workers).


99. See Sherman & Voss, supra note 97, at 81.

100. See Wells, supra note 98, at 90-91.

101. See id. at 91.
identity by "deploy[ing] ethnic symbolism eclectically as a means of signaling respect for and inclusion of the various groups." Such symbolism might include celebration of multiple ethnic holidays, such as Cinco de Mayo and the Chinese New Year, and developing chants and songs in the major languages spoken by workers. The organizing model also often incorporates substantive engagement with immigrant community groups such as churches, neighborhood organizations, and advocacy groups.

As promising as the organizing initiatives discussed in this Part sound, they are a poor fit with existing labor law doctrines, which adopt a color-blind vision of organizing. The law discourages appeals to racial or ethnic identity as a basis for organizing. By partnering with Black or Latina/or churches, community groups, or civil rights organizations, unions inject racial or ethnic interests into the core of an organizing campaign. Unions that choose such race- or ethnic-conscious strategies risk having union election victories overturned. Even if unions successfully resist these challenges, the delays inherent in the legal process and the uncertainty of the union’s status in the interim undermine worker support for the union. Ultimately, race-conscious organizing strategies may assist a union in winning an election, but the union could lose the larger struggle for status as majority representative for the workers as post-election appeals proliferate and the momentum of the organizing drive dissipates.

IV.

"COLORBLIND" ORGANIZING MANDATED BY LABOR LAW

The historically-dominant union ideology of economism, which equated class solidarity with white solidarity and marginalized racial and ethnic concerns, found its way into law with the enactment of the National Labor Relations Act (NLRA). The Act excluded from coverage workers employed in agriculture and domestic service, occupations dominated by Blacks. Further, although the Wagner Act as originally conceived included a clause prohibiting union discrimination against Blacks, strong AFL resistance caused Senator Wagner to eliminate the clause in order to secure organized labor’s support for the bill.

Black leaders at the NAACP

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102. See id. at 109, 122, 124.
103. See id. at 124.
104. See id. at 124. But see AFL-CIO Report on Immigrant Workers Suggests New Alliances Will Be Necessary, DAILY LAB. REP. (BNA) No. 166, Aug. 25, 2000, at A-15 (reporting that immigrant workers and community advocacy groups have criticized unions for not being reliable coalition partners, demonstrating a narrow self-interest in union organizing that does not transcend the organizing campaign).
105. See National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1998) (defining covered employees); Bernstein, supra note 46, at 120-121 (describing the impact of exclusion of these occupational categories under the National Industrial Recovery Act, predecessor to the NLRA).
106. Bernstein, supra note 46, at 127.
and the National Urban League considered the clause essential to further Black employment in unionized workplaces; since most union constitutions denied union membership to Blacks, implementation of the closed shop blocked access to Blacks.\textsuperscript{107} White leaders at the AFL prioritized job protection and racial privilege for white members, taking the position that they would prefer to see the entire statute defeated rather than suffer the inclusion of an anti-discrimination clause.\textsuperscript{108} The Act passed without the clause.

In the early years following enactment of the Wagner Act—and particularly prior to the enactment of Title VII in 1964\textsuperscript{109}—the National Labor Relations Board was presented with many cases in which an employer sought to divide employees against each other during an election campaign by appealing to their fears of racial integration, threatening whites with displacement by Blacks if a union favoring racial equality came in, threatening Blacks with displacement if a union favoring whites came in (or sometimes, if any union at all came in), and generally fanning the flames of racist sentiment.\textsuperscript{110} These cases were brought through one of two avenues: (1) as unfair labor practice charges under section 8(a)(1) of the Act, which makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,” among which are the right to join a union and the right not to do so,\textsuperscript{111} or (2) as challenges to the conduct of elections, which the Board has the power to regulate under section 9.\textsuperscript{112} Cases arising under section 8(a)(1) were brought only by unions against employers,\textsuperscript{113} and the remedy for a finding of a violation was limited initially to a requirement that the violator post a notice of fault and an injunction prohibiting it from future illegal action.\textsuperscript{114} Cases arising under section 9, on the other hand, could be brought by either the union or the employer and resulted in an order setting aside the election and ordering a rerun.\textsuperscript{115} Such cases were subjected to the “laboratory conditions” test, which
required the Board to ask whether the conduct objected to destroyed the laboratory conditions necessary for a free and fair election.\textsuperscript{116}

Unions argued that employer appeals to racial sentiments deserved special treatment under the Act. First, because they implicitly involved either a promise of benefit (a promise that the existing employee group appealed to would not be replaced by employees of the opposite race), or a threat (of the implementation of integrationist or discriminatory policies by the union which the employer would be unable to resist), they were coercive and, therefore, violated section 8(a)(1).\textsuperscript{117} Second, because views on racial issues are extraordinarily emotional—particularly in the South—it was said to be impossible to establish the laboratory conditions necessary for a fair election once the race issue had been raised in an organizing campaign.\textsuperscript{118} Finally, unions argued that it would be morally wrong to allow the employer to profit (by winning the election) from behavior inconsistent with the commitment to racial equality expressed in the Constitution.\textsuperscript{119}

\textit{A. The Sewell Doctrine}

Prior to 1962, the Board adopted a relatively laissez-faire position on the question of racial appeals in the union election context, treating such appeals no differently from other types of employer speech. Racial appeals were prohibited only when they were coercive and therefore amounted to a violation of section 8(a)(1), or where they involved fraud, misrepresentation or violence sufficient to destroy the laboratory conditions necessary for a fair election under section 9.\textsuperscript{120} A threat or promise of benefit containing racial overtones was treated as coercive and violative of section 8(a)(1) just as it would have been if it were a threat or a promise without racial over-
tones. However, statements by either the union or the employer which attempted to predict what would happen in the plant as a result of union demands and practices if the union won the election were permitted—even if the prediction related to an advantage or disadvantage resulting from an employee’s race. In section 9 cases, the Board preferred not to limit campaigning, instead relying upon “the good sense of the voters to evaluate the statements of the parties.” Thus, the mere mention or injection of a racial or religious issue into an election campaign was not grounds for setting aside an election under section 9.

In 1962, the Board changed course, adopting a rule specially directed toward inflammatory appeals to racial prejudice made during union election campaigns. In Sewell Mfg. Co., the Georgia-based employer appealed to the racial privilege of its white workers in an effort to defeat the union organizing drive. The employer circulated pictures of a white woman dancing with an unidentified Black man and of a white man identified by an accompanying caption as the union president dancing with a Black woman. The pictures were accompanied by suggestions that the union would seek to racially integrate the workforce, an idea that many southern whites found alarming. As evidence of its assertions, the employer pointed to the fact that the union had donated funds to the NAACP and the Congress of Racial Equality, groups that advocated for integration. Finding that the employer’s conduct constituted a “deliberate, sustained appeal to racial preju-

121. See The Fred A. Snow Co., 41 N.L.R.B. 1288, 1292-93, 1295 (1942) (finding 8(a)(1) violation where company owner warned an employee that if the union were to win the election, he would turn the predominantly Black shop over to his racist son’s management; this amounted to a threat to Black workers’ job security); see also Petroleum Canner Corp., 126 N.L.R.B. 1031, 1035 (1960) (finding an 8(a)(1) violation where the assistant manager of the company told union adherents that if the union won the election, “he would work anybody he could, ‘nigger, cajun, wop, or whanot.’”).

122. See Westinghouse Elec. Corp., 119 N.L.R.B. 117, 118-19 (1957) (Leedom, concurring). Chairman Leedom’s concurrence nevertheless foreshadowed the Board’s eventual adoption of the Sewell standard. While acknowledging the ease with which the Board can deal with threats of job loss based on race as conduct violating section 8(a)(1), Leedom noted the “more subtle problem” of speech forecasting what would happen if the union were voted in and its racial politics controlled its agenda, observing that “[t]he consequence of injecting the racial issue where racial prejudices are likely to exist is to pit race against race and thereby distort a clear expression of choice on the issue of unionism.” See id. Similarly, dissenting Member Beam urged an inquiry that would move beyond whether the speech at issue constituted a threat or a promise, asking whether the employer “deliberately attempt[ed] to provoke and inflame the employees to racial prejudice as a technique for clouding the issue of the imminent election.” See id. at 121 (Beam, dissenting).

123. Sharnay Hosiery Mills, 120 N.L.R.B. at 751.

124. See Chock Full O’ Nuts, 120 N.L.R.B. 1296, 1298-99 (1958) (finding no violation where a Black company vice president suggested that the union was being brought in because the white employees were jealous of his position with the company); Paula Shoe Co., 121 N.L.R.B. 673, 675-76 (1958) (finding that a union handbill referring in a derogatory way to a company vice president as a Jew contained a “mere mention” of a religious issue that did not justify setting aside the election).


126. See id. at 70.
which made impossible a reasoned choice of a bargaining representative," the Board set aside the election pursuant to its power under section 9.127

The Board was concerned with the emotional power of the employer's appeal to racial prejudice. It reasoned that "a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty" and announced that it would not "tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election."128 In Sewell, the Board seemed particularly disturbed by the implication of the employer-distributed photos and letters that "unionism is a foreign, Communist concept with the end objective of racial intermarriage."129 The Board made clear its view that such appeals to racial prejudice were irrelevant to the issues on which the union election turned (for example, wages, hours, and working conditions) and tended only to interfere with the sober exercise of the vote. The Board did, however, insert a caveat:

[As long as] a party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to over-stress and exacerbate racial feelings by irrelevant and inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.130

In a case decided the same day as Sewell, Allen-Morrison Sign Co., Inc., the Board applied the Sewell principles and rejected the union's section 9 challenge.131 The Board reasoned that employer letters describing the national union's position on racial integration, its financial support of the NAACP, and its willingness to sanction local unions who engaged in segregationist practices were "temperate in tone" and dealt with matters "indisputably germane to the election."132 Accordingly, it refused to set aside the

127. Id.
128. Id. at 70-72.
129. See id. at 72 n.18.
130. Id. at 71-72 (emphasis in original). On the same day, the Board declined to overturn an election in a case where the employer had sent a five-page letter to its employees detailing the problem of racial segregation in the South, the union's stance on integration, and opining that "[O]ur purpose in pointing these matters out to you is not to tell you how you ought to feel on integration and segregation, but to let you know how the unions ... have tried to force it down the throats of the people living in the South." The Board characterized the employer's letter as "temperate in tone," and found that it was related to the choice before the voters. Allen-Morrison Sign Co., 138 N.L.R.B. 73, 73-75 (1962).
132. Id. at 73, 75. One of the letters included a news clipping from the same publication, "Militant Truth," that had furnished part of the employer's message in Sewell. See Allen-Morrison, 138 N.L.R.B. at 74. "Militant Truth" was a publication that advocated against socialism, communism, and labor un-

\textbf{B. Sewell’s Progeny}

The enactment of Title VII in 1964 diminished the moral justification for the Board’s \textit{Sewell} rule. The Board struggled to develop a coherent rationale for setting aside elections under section 9, and continued the attempt begun in \textit{Sewell} and \textit{Allen-Morrison} to distinguish between campaigns involving reasoned arguments designed to prompt “consideration of economic and social conditions and circumstances and of possible actions in response to them,” which did not warrant setting aside an election, and “inflammatory, gratuitous and irrelevant” efforts to provoke emotional responses in the context of an election campaign, which did.\footnote{See, e.g., Zartic, 315 N.L.R.B. 495, 498, 500 (1994) (setting aside election where Hispanic union organizer attempting to organize a predominantly Hispanic workforce played an audiotape at a pre-election meeting in which one plant manager quotes another plant manager as referring to the Hispanic workers as “the closest thing to animals they could be,” and advising him to treat them as such; distributed leaflets containing newspaper articles alleging that the employer paid the Ku Klux Klan to participate in a 1981 labor dispute, and suggested that the 1981 murder of an Hispanic employee was attributable to the Ku Klux Klan).} These cases presented the Board with an opportunity to draw a meaningful distinction between appeals that sought to divide employees (typically made by the employer) and appeals that sought to unite them (typically made by the union). Such a distinction might have been justified as promoting workplace harmony and binding workers together, rather than pushing them apart.\footnote{See JULIUS GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 72 (2d ed. 1999).}

Initially, the Board seized the opportunity and suggested that these groups’ dedication to racial equality and integration was harmful to American values. See \textit{Sewell}, 138 N.L.R.B. at 67-68.
In one of the earliest cases raising this issue, *Archer Laundry Co.*, the campaign for union representation had been initiated by Black workers who approached a local Black minister with complaints about working conditions at the company, which employed a predominantly Black workforce. After discussing the complaints with other Black leaders, the minister contacted the AFL-CIO. The Black community remained very involved in the organizing campaign and most of the campaign literature equated the fight for unionization with the struggle for civil rights. The company sought to set aside the election on the grounds that the campaign incited racial passion and hatred, and subordinated the issues of wages, hours and working conditions to the theme of racial equality.

The Board upheld the election result, adopting the findings of the Regional Director, who had concluded in an unusually clear and insightful opinion that the case was distinguishable from *Sewell* because it was an appeal to racial pride rather than to racial bigotry, and that its major theme, economic betterment, was a legitimate campaign issue. The Regional Director described the *Archer Laundry* campaign in this way:

The point was made that Negroes have, in the past, received lower wages and were subject to poorer working conditions than white workers, primarily because they were Negroes. They were urged to join a union, which is not an act against the white race, to permit concerted action which could bring Negroes to equality with whites. The central theme of the campaign [was]... 'It is a simple fact that colored workers who belong to unions are far better off than those who don't.'

The Director distinguished *Sewell*:

not ban all racial speech, but only condemns that which "serve[s] as nothing more than appeals to animosity, setting race against race," while protecting those that are "designed to encourage solidarity among racial minorities."); enforced, 516 F.2d 436, 442 (5th Cir. 1975) (finding union campaign not objectionable since as a matter of common sense, given the racial makeup of the workforce—57% white, 43% Black—the union was not attempting to divide the workforce along racial lines, but could only successfully organize it by "forging a harmonious racial amalgam."); Englewood Hosp., 318 N.L.R.B. 806, 807 (1995) (finding employer speech linking the union to an anonymous letter containing an anti-Semitic threat protected, since the remarks "did not seek to pit race against race."); Coca-Cola Bottling Co., 273 N.L.R.B. 444, 444 (1984) (protecting union’s racial speech since it was "not designed to inflame hatred or engender conflict among black and white workers"); see also Vitek Elecs., 268 N.L.R.B. 522, 527 (1984) (suggesting that because all parties to the racially inflammatory speech were Black, there could not be an inflammation of racial feeling that would warrant setting aside the election).


139. See id. at 1430.

140. See id. at 1430-31.

141. See id. at 1429.

142. Id. at 1432; see also The Baltimore Luggage Co., 162 N.L.R.B. 1230, 1233-34, enforced, 387 F.2d 744 (4th Cir. 1967) (containing strikingly similar statements, and noting that "[t]he choice of racial basis for concerted action has been made, not by the victims who organize to seek redress, but by those who use race as a basis to impose the disadvantage.").
A vote for the Union is represented as a vote for better working conditions, not a vote against the white race. In *Sewell*, a vote against the Union was represented as a vote against the Negro.\(^{143}\)

Finally, the Director implicitly rejected the distinction between appeals to emotion and appeals to reason, pointing out that

[a] union election is often an emotional proceeding. Campaign literature usually appeals to some type of emotion. . . . [A]n appeal to racial self-consciousness may produce a variety of emotions, depending upon the context. In some cases, such appeals may result in vicious race hatred. In another circumstance, such appeals may promote reasoned and admirable ambition in an unfortunate race of people.\(^{144}\)

The *Archer Laundry* standard distinguishing between appeals to racial pride and appeals to racial bigotry proved asymmetrical in its application. Because unions typically appealed to racial or ethnic concerns in an effort to unite workers and white employers utilized such appeals to divide them and defeat the union, the *Archer Laundry* standard tended to protect union speech and to curb employer speech on racial issues.\(^{145}\)

C. The Courts' Treatment of the Issue

The federal circuit courts proved considerably less receptive than the Board to an asymmetrical application of *Sewell*.\(^{146}\) Although one early survey found that the application of *Sewell* had resulted in few elections being

\(^{143}\) *Archer Laundry*, 150 N.L.R.B. at 1433.

\(^{144}\) Id. at 1433-34.


The distinction between appeals to racial prejudice and appeals to racial pride tracks historical uses of racial difference as a political weapon. Appeals to racial prejudice have long been used by the relatively powerful to claim racial superiority over another group for the specific purpose of either enforcing a less desirable form of labor upon them, or for those who performed the same types of jobs, to distance and elevate themselves from the targeted group. See Jacqueline Jones, *American Work: Four Centuries of Black and White Labor* 15 (1998). Alternatively, racial ideologies focusing on difference but not inferiority—like appeals to racial pride—have been used by subordinated groups as strategies of liberation, serving as “a source of strength and collective resistance to injustice.” See id.

\(^{146}\) See *GETMAN*, supra note 136, at 72. See generally Nicholas A. Beadles & Christopher M. Lowery, *Union Elections Involving Racial Propaganda: The Sewell and Bancroft Standards*, 42 LAB. L.J. 418 (1991) (surveying Board and court decisions). The federal courts have also been more willing than has the Board to set aside elections where the campaigns include anti-Semitic commentary, typically—though not exclusively—initiated by union organizers or sanctioned by the union, and leveled against management. See John W. Teeter, Jr. & Christopher Burnett, *Representation Elections, Anti-Semitism and the National Labor Relations Board*, 5 VA. J. SOC. POL'Y & L. 341, 343 (1998) (summarizing and discussing cases, and concluding that “the federal courts . . . frequently have refused to enforce Board orders that trivialize anti-Semitism.”).
set aside by the circuit courts, those courts' analyses made it irrelevant whether the appeal to racial passions was made by the employer with the goal of dividing the workforce, or by the union with the goal of enhancing solidarity. More recently, the federal courts have set aside a number of elections in the increasingly prevalent context of union victories following election campaigns involving appeals to racial or ethnic solidarity. Cases relying on Sewell and setting aside union election victories typically contain language to the effect that racial commentary has no "legitimate place" in a union election campaign, or that the union raised issues that were "not germane to any campaign issue," or otherwise "exceed[ed] the bounds of 'legitimate discussion' of potential problems arising from an employer's treatment of employees based upon racial differences." 

During the early years of the Sewell doctrine, the courts were far more focused than the Board on ensuring a "racially neutral" organizing campaign. Sometimes one or two statements invoking racial feeling were sufficient to warrant setting aside an election. Courts that did tolerate unions' efforts to connect racial issues to economic issues in campaigns often did so grudgingly, primarily out of deference to the Board.

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147. See John P. Campbell, A Survey: NLRB Limits on Appeals to Racial Prejudices of Employees, 32 MERCER L. REV. 589, 595, 599-600, 603-04 (1981) (explaining that in the years between 1962 and 1981, only two reported court decisions set aside elections under Sewell: one involving an employer's election victory—where the court enforced a Board ruling; and the other involving a union's election victory—where the court refused to enforce the Board ruling).

148. See, e.g., KI (USA) Corp. v. NLRB, 35 F.3d 256, 260 (6th Cir. 1994) (setting aside election where union distributed letter to the editor by a Japanese businessman that expressed insulting views about American workers, implying that the Japanese company shared these views, and quoting Board member Raudabaugh's dissent in the Board opinion below); see also KI (USA) Corp., 309 N.L.R.B. 1063, 1067 (1992) (Raudabaugh, dissenting) ("[B]latant appeals to racial prejudice invariably distract the voters from an objective and dispassionate consideration of the legitimate issues involved in a union organizational campaign and, therefore, have no place in the campaigns which precede Board-conducted elections"); enforcement denied, 35 F.3d 256 (6th Cir. 1994); M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567, 1574 (11th Cir. 1987) ("Although feelings of racial and religious bias may, unfortunately, be harbored personally, an appeal to such feelings has no place in . . . a union election . . . .").


150. See, e.g., NLRB v. Bancroft Mfg. Co., 516 F.2d 436, 439 (5th Cir. 1975); NLRB v. Sumter Plywood Corp, 535 F.2d 917, 931-32 (5th Cir. 1976). These two cases are illustrative. In Bancroft Manufacturing, a Black union organizer encouraged Black workers in a workforce that was 43% Black to "stick together" and vote in the union, pointing out that the union was their best protection against layoffs. See 516 F.2d at 440. Although the court intimated that it might have decided the case differently had the case come before the court as an original matter, the court deferred to the Board's expertise, and enforced the order to bargain with the union. See id. at 439. The court noted with some distaste that the Board had approved campaigns that stress "black racial pride, the past history of discrimination against blacks in American society or the present disadvantaged status of blacks as a class . . . . on the theory that . . . economic issues, even racially-oriented ones, properly form the core content of representation contests." Id. at 441.

Similarly, in Sumter Plywood, the court noted that the case before it "was by no means an easy case," and expressed concern about the "intellectually perilous duty of drawing lines," but ultimately
More recently, *Carrington South Health Care Center v. NLRB*\(^\text{151}\) exemplifies the courts’ willingness to second-guess the Board’s assessment of what is impermissible campaign speech. In *Carrington*, the union published handbills containing cartoons in which a white man was shown flipping a coin and saying, “I’ll take a dozen,” while a group of Black workers looked on; a group of people were depicted laboring to pull a wagon, with a man at the front of the wagon brandishing a whip and saying, “You are employed at my Will!”; and a white boss was shown gesturing a nervous-looking Black worker to an electric chair, saying, “You don’t need your union rep. Just have a seat and we’ll discuss your grievance like two rational human beings.”\(^\text{152}\) The union also distributed a handbill containing a quote from a famous speech by Dr. Martin Luther King, Jr.\(^\text{153}\) The NLRB’s Regional Director rejected the employer’s objections to the conduct of the election, and the Board refused to review the Director’s decision. The employer refused to bargain with the union, the Board ordered the employer to bargain, and the employer appealed.\(^\text{154}\)

The Sixth Circuit applied the *Sewell* test and sought to distinguish between appeals “made to racial prejudice in a manner unrelated to any legitimate campaign theme,”\(^\text{155}\) and those involving “[a union’s attribution of deferred to the Board’s judgment and with evident reluctance enforced the order to bargain with the union. See *535 F.2d* at 919-20, 931-32. In this case, the union had distributed to the predominantly Black workforce cartoons depicting an “Uncle Tom” as a barrier to unionization and a Black man being kicked out of a welfare office, evinced only minimal interest in the white voters, and encouraged employees in a “Black power” salute. *Id.* at 926-27. The court reasoned that the union organizer’s statements and rhetoric “represented an attempt to equate black economic betterment with unionism, but could not be construed as an effort to set blacks against whites or to suggest that blacks were entitled to greater rights than whites.” *Id.* at 927 (footnote omitted). The Black power salutes and bumper stickers, according to the court, evidenced only that “supporters of the Union identified betterment of the conditions of blacks with a victory of the Union in the election. They do not indicate that the Union campaign was grounded on black versus white emotionalism.” *Id.* (footnote omitted). Straining to distinguish cases setting aside elections because of inflammatory appeals to racial prejudice, the court acknowledged the Board’s asymmetrical standard permitting union appeals to Black pride and solidarity but disallowing employer efforts to trigger white bigotry, explaining:

This decision and *Bancroft* apply the neutral principle that some degree of ‘consciousness-raising’ will be permitted in union organizing campaigns among ethnic groups which have historically been economically disadvantaged, as long as the ethnic message becomes neither the core of the campaign nor inflammatory. For such groups, the call to ethnic pride and unity has a strong claim to congruence with the Union’s traditional call to economic betterment. This cannot be said of appeals to the ‘ethnic pride’ of historically advantaged groups.

*Id.* at 929 (footnote omitted).

\(^{151}\) 76 F.3d 802 (6th Cir. 1996).

\(^{152}\) See *id.* at 803-804.

\(^{153}\) See *id.* at 803-04.

\(^{154}\) See *id.* at 803.

\(^{155}\) See *id.* at 805-06. The court noted that such cases typically involve a prejudicial remark directed toward a specific person or group. *Id.* (citing NLRB v. Eurodrive, 724 F.2d 556 (6th Cir. 1984)) (requiring Board hearing on employer’s allegation of inflammatory racial commentary where union organizer pointed to the company’s sole Black employee and stated that white employees needed the union to pro-
race] discrimination to the employer, or in which there appears an isolated racial slur." The court concluded that the themes of the cartoons could be interpreted as "glaring, graphic appeals to racial prejudice," because "[e]ach cartoon uses obvious images of bondage or violence visited upon racial minorities by a white majority." Further, the cartoons "could... be construed as a deliberate exacerbation of racial feelings by irrelevant and inflammatory appeals," and the excerpt from the King speech, while not inflammatory, was irrelevant to "legitimate concern[s]" of labor such as wages, benefits, and working conditions. Accordingly, the court denied enforcement of the Board's original order upholding the election and remanded the case for a hearing on the employer's objection to the cartoons.

A few courts have been more willing to explicitly endorse the Board's reasoning, acknowledging that the intersection of racial exploitation and class exploitation could form the core of a union campaign—at least where the workforce was predominantly Black or minority. In *NLRB v. Baltimore Luggage Co.*, the company objected to the union's distribution of a letter from the president of the Baltimore branch of the NAACP that linked the struggle for civil rights with unionization by asserting that freedom, civil rights, and economic opportunity are bound together. The employer also pointed to speeches made by NAACP representatives (one of whom was the pastor of a local church) advocating unionization as a way to achieve economic opportunity and personal dignity and including references to the deaths of two civil rights martyrs. The Fourth Circuit enforced the Board's order to bargain, noting that in a union campaign dealing with an electorate that was over 90% Black, the letter and speeches "temperately addressed themselves to the economic and social self-interest of the workers," rather than tending to inflame racial feelings. The court took judicial notice of the severe economic disadvantage suffered by Blacks and the history of hostility between the Black community and organized labor, concluding that "[f]ar from diminishing the sobriety of the election, this propa-

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156. 76 F.3d at 805-06.
157. Id. at 807.
158. Id. at 807-08.
159. The case apparently settled, however, and never returned to the Board.
160. 387 F.2d 744 (4th Cir. 1967).
161. See id. at 745-46, 750-51.
162. Id. at 747.
ganda material may have substantially increased the possibility of a rational, well-informed electorate.

Similarly, in State Bank of India v. NLRB, the court enforced the Board’s order requiring the company to bargain with a union whose election campaign included distribution of a letter accusing the employer of maintaining depressed wages and working conditions for its employees because a majority were of Indian descent or were members of other minority groups. The Regional Director found that the letter was a permissible appeal to racial pride designed to encourage concerted action by minority groups to improve wages and working conditions, and the Board adopted this recommendation. The court ruled that the union’s action was not an inflammatory appeal to race hatred, but rather a claim that management discriminated against the employees based upon race, an issue relevant to the union’s goal of improving wages and working conditions.

Other courts found alternative grounds on which to uphold election results involving progressive union organizing campaigns. Common bases for denying employer challenges included findings that the alleged racial remarks were not sufficiently pervasive, were not attributable to the un-

163. Id. at 749.
164. 808 F.2d 526 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).
165. See id. at 528-29.
166. See id. at 542. The court also found the statements “isolated,” rather than pervasive, so that the second prong of the Sewell analysis was not satisfied either. See id.; infra note 166 and accompanying text. See also Family Service Agency San Francisco v. NLRB, 163 F.3d 1369 (D.C. Cir. 1999) (finding that union focus on English-only language policy during an organizing campaign was not “calculated to spark racial prejudice,” and was instead simply an allegation of racial discrimination by the employer against the majority Latina workforce, a permissible campaign issue rather than an inflammatory and irrelevant matter); Case Farms of North Carolina, Inc. v. NLRB, 128 F.3d 841, 843, 846-47 (4th Cir. 1997) (rejecting employer challenge to election campaign where union leaflets urged the primarily Latino workforce to vote for the union in order to protect its jobs, and alleged that the employer had deliberately sought out Latino workers and replaced its Amish workforce with them “[b]ecause they could pay Latinos less and treat them worse;” because the leaflet did not attempt to inflame the Latino workers against another ethnic group (the Amish), but was at most an appeal to ethnic solidarity of the Latino workers, it was permissible).
167. For example, in NLRB v. Heartshare Human Services of New York, Inc., 108 F.3d 467 (2d Cir. 1997), the Second Circuit enforced a Board order requiring the employer to bargain, rejecting the employer’s argument that union certification was improper because the union had interfered with the election by distributing a handbill containing racially inflammatory statements. See id. at 473. The handbill contained the following statement: “Heartshare wants to control you as if you were still slaves in the cotton field . . . . Their apartheid has been seriously shaken to its very core and you have the power by voting the union in to crumble their corrupt racist empire.” Id. The court found that the statements were neither sufficiently pervasive nor sufficiently inflammatory to justify setting aside the election. Three sentences in a single publication out of many distributed over a five month election period were not a “sustained” appeal to racial prejudice, but rather more akin to “an isolated racial slur,” particularly in the absence of a history of racial tension. Id. (quoting Carrington S. Health Care Ctr., Inc. v. NLRB, 76 F.3d 802, 806 (6th Cir. 1996)).

Further, rather than an appeal to racial prejudice, the union’s statements were simply a contention that the employer was “taking advantage of their inability to protect their own interest because of their minority status.” See id. (quoting State Bank of India v. NLRB, 808 F.2d 526, 541 (7th Cir. 1986)); see
ion, or did not affect the election’s outcome.

D. Pressure for Doctrinal Reform

A number of commentators have urged reform of the inflammatory appeals doctrine, arguing that it is incoherent, produces unpredictable out-

also Arlington Hotel Co. v. NLRB, 712 F.2d 333, 338 (8th Cir. 1983) (finding that reference to employer’s hotel operation as a “slave ship” was an isolated remark rather than the central theme of the union’s campaign); Peerless of America, Inc. v. NLRB, 576 F.2d 119, 125 (7th Cir. 1978) (finding that isolated racially or sexually inflammatory statements did not form the core or theme of the campaign); NLRB v. Sumter Plywood Corp., 535 F.2d 917, 926-27 (5th Cir. 1976) (finding appeal to Black power and cartoons connecting racial and economic oppression neither “central” to the campaign nor inflammatory); NLRB v. Bancroft Mfg. Co., 516 F.2d 436, 442-43 (5th Cir. 1975) (finding that racial remarks were simply “asides addressed to a particular group of employees in the context of a campaign aimed at securing the adherence of all employees to the Union,” rather than lying at the core or theme of the union’s campaign); Coca-Cola Bottling Co., 273 N.L.R.B. 444, 444 (1984) (finding union literature and campaign comments that fostered analogies of the company to a plantation not designed to inflame racial hatred or to engender racial conflict, but instead similar to other types of campaign assertions about an employer’s treatment of employees; they were merely “designed to express the view that blacks had not been treated fairly by their employer and that they needed to join forces to do something about it.”).

Both the courts and the Board apply a less rigorous “third party” standard where the union cannot be connected to the racial commentary made by third parties—even if the third parties are employees who are central to the organizing campaign. See NLRB v. Flambeau Airmold Corp., 178 F.3d 705, 706 (4th Cir. 1999) (upholding union election victory where inflammatory racial rumor that originated on the day before the election to the effect that a white manager had referred to the workers as “a bunch of niggers” could not be connected to the union, despite the fact that the union had frequently invoked civil rights and race-based messages throughout its campaign to organize a North Carolina plant in which two-thirds of the workforce was African-American); Defenbaugh Industries, Inc. v. NLRB, 122 F.3d 582, 587 (8th Cir. 1997) (enforcing Board rejection of employer’s election challenge based on a rumor that the union would call in the INS if it lost the election, where employer was unable to show that the union was responsible for the rumors, that the rumors caused significant concern among the employees, or that the election outcome was impacted in any way); DID Building Services v. NLRB, 915 F.2d 490, 497 (9th Cir. 1990) (enforcing a Board order finding that isolated appeals to prejudice by employees who are not union agents do not justify setting aside election won by the union); NLRB v. Herbert Halperin Distrib. Co., 826 F.2d 287 (4th Cir. 1987) (applying third party standard where statements accusing white employees who refused to wear a union button of being “white sons-of-bitches” who were “all the same . . . scared to take a stand” were made by employees who were not viewed by other employees as union representatives authorized to act for the union); see also Crosse Pointe Paper Corp., 330 N.L.R.B. No. 101, 2000 WL 223864 (2000) (rejecting employer’s challenge to the election on ground that employer could not establish union’s connection to allegedly racially inflammatory remark to the effect that the “f-ing Mexicans” would determine the outcome of the union election); S. Lichtenberg & Co., 296 N.L.R.B. 1302, 1302 n.4, 1314-15 (1989) (finding that employees who were in-plant organizers were not agents of the union, so that their words and acts could not be attributed to the union).

For example, in Clearwater Transport, Inc. v. NLRB, 133 F.3d 1004 (7th Cir. 1998), the Seventh Circuit enforced a Board order requiring the employer to bargain, upholding the union’s certification despite an employee’s reference to the manager as a “Jewish son of a bitch” at a management-sponsored safety meeting. Id. at 1007. The Board reasoned that the comment was both isolated, failing to satisfy the pervasiveness component of the Sewell standard, and not attributable to the union’s organizational campaign, since not made by the union, its agent, or at its behest. See id. at 1008. Although critical of the Board’s analysis, the court upheld the result because the employer had not presented evidence that the isolated remark had an effect on any of the employees or on the election itself. See id. at 1012.
comes, and infringes on free speech. Beyond these considerations, the continuing vitality of the doctrine creates the basis for delay and the risk of loss of momentum in union organizing drives, thus prejudicing unions who inject racial issues into a campaign, while not appreciably disadvantaging employers (since the typical remedy issued against an employer doing so would be an election re-run). Even where the Board upholds the union election victory and its decision is ultimately enforced by the court, the potential availability of a legal challenge under the vague Sewell doctrine has undermined many union election victories. Employers who are so inclined may raise a challenge under Sewell, delaying bargaining over a period of years through the post-election appellate process prescribed by the Act.

Because the majority of such cases now involve union appeals to racial consciousness, and because unions tend to utilize such appeals only where a majority of the workers are of the same race, the Sewell doctrine has functioned most powerfully to undermine union election victories in racially segregated workplaces, which usually contain the most oppressed workers.

I. Gould's Reform Proposal

Professor and former NLRB Chairman William Gould, an authority on

170. See LeMoyne, supra note 145, at 98, 107 (arguing that the Board's doctrine has produced inconsistent results and established a standard whose vagueness impermissibly chills the exercise of First Amendment rights); Pollitt, supra note 110, at 400-08 (predicting that application of the Sewell doctrine, particularly as it places the burden of proof upon the speaker, will violate the First Amendment, and arguing that the answer to the dilemma is less regulation and more speech); see also Tammy L. DeCastro, Note, Discrimination and Unionization Elections: A Common Sense Approach to Sewell, 52 Rutgers L. Rev. 1161, 1192 (2000) (arguing for a return to the core of Sewell and application of a rigorous materiality standard to justify Board intervention in cases of race hate speech).

171. The convoluted procedural backgrounds of the cases discussed in section IV.C are typical. The Board's rulings under section 9 are not final orders, therefore are not reviewable by the circuit courts. See American Fed'n of Labor v. NLRB, 308 U.S. 401, 409-11 (1940) (holding that Board certification decisions are not directly reviewable in court). Accordingly, in order to obtain review the employer deliberately commits the unfair labor practice of refusing to bargain, raising as its defense the argument that the election was improperly conducted under section 9. The union files an unfair labor practice charge under section 8(a)(5) alleging a failure to bargain, the Board finds the employer in violation of section 8(a)(5) and directs the employer to bargain, the employer again refuses, and the Board applies to the circuit court for enforcement of its order pursuant to the provisions of section 10(e), 29 U.S.C. § 160(e). Alternatively, the employer challenges the Board's finding of an 8(a)(5) violation by appealing its decision on the 8(a)(5) issue, a final order directly reviewable by the courts under section 10(f), 29 U.S.C. § 160(f).

172. See LeMoyne, supra note 145, at 98 (observing that majority of cases brought subsequent to Sewell involve complaints by employers against unions charging the use of racially prejudicial comments during election campaigns); see also Glenn Burkins, Union Recruiting Wars: In Switch, Employers Accuse Labor Unions of Playing Race Card, WALL ST. J., May 28, 1996, at A-1 (noting that in the 18 months preceding Carrington, the Board had received 22 employer complaints that union organizers were playing the race card to recruit new members).
race discrimination in the union context and a staunch defender of progressive union organizing, offered one of the most thoughtful analyses of how the Sewell doctrine might be reformed in a concurring opinion written during his term as Chair of the NLRB. In *Shepherd Tissue, Inc.*,\(^{173}\) the Board adopted the hearing officer’s decision to overrule employer objections to an election on the ground that the union had made an inflammatory appeal to racial prejudice by injecting racial issues into the organizing campaign. The employer challenged the union’s distribution of a handbill discussing the alleged sexual harassment of a Black woman by a white male employee and also mentioning another Black employee’s comment to the white Director of Human Resources that “‘Black folk have been wrongly touched by whites for over 300 years.’”\(^{174}\) The commenting employee was terminated for interfering with a sexual harassment investigation. He was subsequently hired by the union and played a pivotal role in the union organizing campaign.\(^{175}\) In its challenge, the employer argued that the union had specifically targeted the Black employees in its organizing drive, that it had sought the support of a local organization of Black ministers, and that the union met with Black politicians and sought their support in the campaign, thereby destroying the opportunity for a free and fair election.\(^{176}\) The hearing officer found this unpersuasive, concluding instead that the employee’s remarks simply placed the issues in historical context, and that the remainder of the union’s conduct either had little demonstrated effect on how employees cast their votes, or was tangential to legitimate campaign issues such as “wages and benefits, worker safety, and the impact the selection of a union will have on the employees.”\(^{177}\)

Chairman Gould’s concurring opinion argued that the Sewell doctrine was a product of its historical context and recommended that Sewell be limited both in order to give full effect to First Amendment considerations and because explicit consideration of race in a union organizing campaign is “part of the reality of the workplace” and “germane to the solidarity and the working conditions of a racial group during an organizing campaign.”\(^{178}\) Gould advocated modifying Sewell to place the burden of proof on the party seeking to set aside the election (rather than upon the party making use of a racial message), to eliminate the requirement that the appeal be “truthful,” and, explicitly, to eliminate the “inappropriate symmetry between unions and employers assumed by those cases and their progeny.”\(^{179}\) He explained:

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174. See id. at 373.
175. See id.
176. See id.
177. See id. at 374.
178. See id. at 369-70 (Gould, concurring).
179. See id. at 371.
Racial protests and grievances—and those about sexual discrimination and other forms of alleged arbitrary treatment—are properly promoted, not smothered and suppressed, by the statutory scheme which we administer . . . . Because the employer controls the employment relationship and, in almost all circumstances, possesses more economic power than does the individual employee, the Board’s concerns about racial appeals expressed in Sewell and Allen-Morrison have peculiar applicability to remarks of employers as opposed to those of unions and their representatives. In cases involving employers, like Sewell and Allen-Morrison, it is to be recalled, employers attempted to divide workers on the basis of racial appeals unrelated to working conditions and the workplace and to frustrate the possibility of effective concerted activity . . . . But, generally speaking, union organizational efforts aimed at blacks and other racial minorities and women must necessarily focus, in part, upon grievances peculiar and unique to such groups, i.e., employment conditions which are attributable to racial inequities . . . and other forms of arbitrary treatment . . . . While I agree that racial discrimination and sexual harassment are complex problems, the answer is not to discourage open debate where these issues concern employees’ working conditions. These issues were not injected into the campaign by the Petitioner, but reflected an existing workplace concern.180

In short, employees’ economic dependence on employers creates a susceptibility to intimidation by employer speech that does not exist with regard to union speech, justifying asymmetrical regulation of employer speech in the campaign context. At the same time, employer policies that perpetuate racial, ethnic or gender discrimination should be the subject of fair comment and open dialogue during union organizing campaigns.

2. Assessing Gould’s Proposal

Chairman Gould correctly noted that the Sewell doctrine should be understood as a product of its historical context. The Board’s fear that employers would rely on appeals to racial prejudice to divide workers and undermine union solidarity was well-founded and realistic in a pre-Title VII era. The doctrine was effective to promote a limited, “race-neutral” solidarity in the short-term. The continuing vitality of the Sewell doctrine in the modern era, however, serves only to constrain unions from making race-conscious appeals. Employers today are unlikely to make overt use of appeals to racial prejudice for fear of Title VII liability.181 Accordingly, it is unions who are penalized most heavily by the vagueness of the doctrine under section 9. If there is any basis for a challenge to the election, it is to the employer’s advantage to raise it and refuse to bargain in the hope that the

180. Id. at 371-72.
181. See GETMAN, supra note 136, at 72.
union's support will dissipate.\textsuperscript{182} In short, the \textit{Sewell} doctrine creates a strong incentive for unions to conduct colorblind organizing campaigns and to avoid forming coalitions with civil rights groups or community groups focused on workers' racial or ethnic identity, lest they establish the ground for post-election challenges which could delay bargaining for years even if the union is initially victorious.

Finally, in the absence of an anti-race-discrimination provision in the Act, there is little justification for continuing to subject speech touching on racial matters to a higher level of scrutiny than that to which other campaign speech is subjected—even the less rigorous standard suggested by Professor Gould. Other campaign speech continues to be evaluated under the laissez-faire standard articulated in \textit{Midland National Life Insurance Co.}: the Board will not inquire into the truth or falsity of campaign statements unless they are made in a deceptive manner that renders it impossible for voters to recognize the statements as propaganda.\textsuperscript{183} This standard would avert a large number of post-election challenges. Professor Gould's standard, while attractive as an effort to mediate between the goals of limiting/restricting appeals to bigotry and immunizing union election victories against challenge, still assumes some role for the Board in censoring campaign speech pertaining to racial issues, thus furnishing the basis for post-election challenges.

V.
THE DAMAGE DONE BY THE LAW'S WHITEWASHED VISION OF CLASS SOLIDARITY

Although the impulse by courts and Board members to refuse to countenance campaign tactics designed to fan the flames of racist feeling is understandable in many cases,\textsuperscript{184} the legal doctrine produced by \textit{Sewell} and its

\textsuperscript{182} See, e.g., Mount Sinai-St. Francis Nursing & Rehab. Ctr. v. SEIU 1199, NLRB Case No. 12-RC-8749, hearing officer's report 5/17/02, reported in Daily Lab. Rep. (BNA) No. 100, at A12 (May 23, 2002) (describing employer challenge to union election based on allegations that union supporters used "voodoo" rituals and threats-including pennies arranged on the floor in patterns, and half-filled glasses of water—to intimidate the Haitian and Jamaican workers into voting for the union).

\textsuperscript{183} See \textit{Midland National Life Insurance Co.}, 263 N.L.R.B. 127, 133 (1982) (announcing Board policy of refusing to inquire into the substance of pre-election campaign statements by the parties, and refusing to set aside elections except where the manner of the misrepresentation is deceptive, such as the use of forged documents); see also Trencor, Inc. v. NLRB, 110 F.3d 268, 276 (5th Cir. 1997) (affirming Board's application of \textit{Midland} rule and recognizing that "employees must generally be trusted to sort through election propaganda and posturing in deciding how to vote"); NLRB v. Utell Intern., Inc., 750 F.2d 177, 179 (2nd Cir. 1984) (stating that false but non-inflammatory statements involving race are reviewed according to the usual test for misrepresentations).

\textsuperscript{184} See, e.g., M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567, 1569 (11th Cir. 1987) (denying enforcement of order requiring company to bargain with the union where employee comments were calculated to inflame racist feelings of Black employees against Jewish employer; "The damn Jews who run this Company are all alike. They pay us pennies out here in the warehouse, and take all their money
progeny forcibly separates race and class in situations where the employees
themselves experience them as intertwined, frustrating union efforts to
point out the ways in which racial exploitation intersects with economic ex-
ploration. Moreover, Sewell separates racial issues from class issues only
for nonwhites; whites' experience of class oppression continues to be the
implicit norm. The result is that the most organizable and oppressed popu-
lations—racially and ethnically homogenous groups of workers of color
segregated in caste-like employment structures—must be organized as if
their experience of class oppression was the white experience.

The consequences of this whitewashing of the experience of class op-
pression are threefold: first, it does violence to the workers' understanding
of the issues at stake in labor disputes, undermining the efficacy of union
organizing; second, it affects public support for union organizing and labor
unionism by stripping unions of their most powerful emotional appeals and
defining them as illegitimate and uncharacteristic of workers who deserve
protection under the Act; and, third, it impacts where organizing is done
and affects the formation of coalitions with other social justice or religious
groups.

A. Doing Violence to Workers' Own Experience

Even where the Board or courts stretch the law to create space for un-
ion organizing that seeks to link class and racial subordination, the very rea-
soning employed reveals the fallacy of trying to keep the two issues sepa-
rate. A poignant illustration of the violence done to the workers' experience of class and to the union's organizing effort by application of the

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185. Such appeals are particularly powerful in union organizing conducted in the South. For ex-
ample, the International Union of Operating Engineers prevailed in an election among workers at a pri-
ivate resort on South Carolina's Daufuskie Island, and was able to obtain a contract with significant con-
tract concessions from the employer, including wage increases averaging 13% over two years. See Kevin Sack,
Union Is Losing Battle with an Island Resort, N.Y. TIMES, Feb. 24, 1997, at A10. During the
contract battle, the union emphasized the disparity of wealth between the workers (predominantly
poor and Black) and the wealthy resort owners, likening it to a modern day plantation arrangement in
which the descendants of slaves—who live off the resort and must commute to work by ferry daily—
earn meager wages by trimming the lawns and making beds for the rich. See id. Ultimately, the em-
ployer sold the resort and fired all the workers, leaving the union to start at ground zero again in its or-
ganizing. See id.
Sewell doctrine appears in *S. Lichtenberg & Co.*, where the Board rejected an employer’s challenge to a union election victory on the basis of inflammatory racial campaigning.\(^{186}\) The employer claimed that the union had taken advantage of an alleged remark by a supervisor that she opposed the union “because a bunch of niggers would be running the plant” and suggesting that they should be sent “back to the cotton fields.”\(^{187}\) The employer also alleged that the union had injected issues of race discrimination as an “irrelevant appeal to galvanize support among black employees,” noting the distribution of letters signed by Coretta Scott King and Rev. Jesse Jackson urging the employees to support the union.\(^ {188}\) The Board adopted the Administrative Law Judge’s (ALJ) ruling, finding the references to racial subordination “isolated,” and not chargeable to the union.\(^ {189}\) The ALJ’s opinion, while acknowledging that the issue of race discrimination was of concern to some employees from the start,\(^ {190}\) minimized the role of race in the campaign and characterized the union’s appeal as “overwhelmingly of the nature traditionally utilized in all union campaigns... neither race, nor racial discrimination, nor racial solidarity, nor racism served as a major campaign issue by the Union.”\(^ {191}\) The ALJ explained that the Scott King and Jackson letters emphasized “economic power, not race” and were “racially neutral.”\(^ {192}\)

By contrast, Professor Robert Bussel’s empirical study of the election campaign at S. Lichtenberg reveals that it was successful primarily because the union appealed to gender and racial identity issues shared by the African-American female workforce. The union made use of community networks, bonds created and sustained through religious faith, a gender-based awareness triggered by employer policies forcing single mothers to choose between their families and their jobs, and historical memory of racial subordination which placed the organizing drive in a larger context.\(^ {193}\) Moreover, the union made explicit use of race discrimination issues by filing a

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187. Id. at 1303.
188. Id. at 1305.
189. Id. at 1302-03.
190. Ninety-five percent of the employees were Black, and employee conversations evidenced racial consciousness, such as remarks that “blacks have to stick together.” Id. at 1306.
191. Id. at 1307.
192. Id. at 1313.
193. See Robert Bussell, *Southern Organizing in the Post-Civil Rights Era: The Case of S. Lichtenberg*, 52 INDUS. & LAB. REL. REV. 528, 533, 535 (1999). Bussel suggests that one of the key reasons why this campaign succeeded where others before it had failed in the same workforce was the shift in the racial and gender composition of the workforce, from white males to African-American females. See id. Collective memory of the civil rights struggle, particularly poignant in the South, and strong community support from Black churches (many of which offered their buildings as meeting places and joined the union in urging a “yes” vote), combined to place the workers in a far more powerful position than their predecessors had been.
comparable worth action charging that the company discriminated on the basis of race by paying white supervisors more than amounts paid to Black drape-makers for jobs which required similar skills.\textsuperscript{194}

\textit{S. Lichtenberg} is noteworthy for its denial of the significance of race (and gender) in the economic exploitation against which employees organized, in the face of overwhelming evidence to the contrary.\textsuperscript{195} However, it is not unique. The violence done to the workers’ experience by this characterization is manifest. The workers’ experience of class oppression was “whitewashed” by the Board in an effort to place it beyond the parameters of the \textit{Sewell} doctrine and immunize the union’s election victory from challenge. In the process, the history of racial discrimination, the connection to the civil rights movement, and the power of the union’s intersectional appeal to race, gender, and class were simultaneously erased.

Moreover, in a further effort to avoid an application of the \textit{Sewell} doctrine that would undermine the election results, the Board artificially separated the union from the workers. Invoking the less rigorous third-party review standard,\textsuperscript{196} the Board found that to the extent race discrimination was raised as an issue by members of the in-plant organizing committee, who were rank-and-file employees, it was not attributable to the union since the employees were not agents of the union.\textsuperscript{197} In characterizing the situation this way, the Board strengthened a classic antiunion strategy used by employers who portray unions as third parties or outsiders to the employment relationship who have no business dictating the terms of the employment.\textsuperscript{198} Yet the workers are the union, and the most effective unions enjoy extensive rank-and-file involvement.\textsuperscript{199}

Finally, despite the union’s election victory and the employer’s ultimate defeat at the Board hearing, the company was able to delay bargaining with the union for one and a half years while the Board resolved its \textit{Sewell} challenge to the election, destroying the momentum of the organizing campaign.\textsuperscript{200} Similarly, \textit{Case Farms of North Carolina, Inc. v. NLRB}\textsuperscript{201} illus-

\textsuperscript{194} See \textit{id.} at 535.
\textsuperscript{195} Robert Bussell specifically concludes that “In the case of Lichtenberg, race and gender identity combined to legitimate the workers’ cause. For many union activists, racial identity evoked the historical memory that allowed them to place organizing in a larger context. Gender identity enabled this mostly female work force to portray their actions as a defense of family and community.” \textit{id.} at 536.
\textsuperscript{196} See \textit{supra} note 168 and accompanying text.
\textsuperscript{197} See 296 N.L.R.B. at 1302-03 n.4.
\textsuperscript{198} See \textit{GETMAN}, supra note 136, at 44.
\textsuperscript{199} See Bronfenbrenner & Juravich, \textit{supra} note 9, at 20, 24, 35 (reporting and confirming earlier findings that the most effective union election and first contract campaigns utilize "an aggressive grassroots rank-and-file strategy" in which rank-and-file volunteers play a central role in organizing).
\textsuperscript{200} See Bussell, \textit{supra} note 193, at 530; S. Lichtenberg & Co., 296 N.L.R.B. 1302, 1303 (1989) (noting that the union won the election in April 1988; the Board’s decision was rendered October 1989).
\textsuperscript{201} 128 F.3d 841 (4th Cir. 1997).
trates the injustice of continuing to apply the *Sewell* doctrine and the opportunities it affords employers to delay or defeat organizing while economically exploiting racial and ethnic minorities. The company’s labor strategy involved the deliberate targeting of Guatemalan immigrants: ninety percent of its workers were Latino and the vast majority of these were Guatemalan. Observers suggested that company executives decided to recruit Guatemalans because they were perceived as “hardworking and docile—unlikely to complain, join an union or balk at the messy task of butchering chickens.” Many were undocumented and spoke no English, rendering them especially vulnerable to coercion and threats of deportation.

Ironically, the same bonds of solidarity and kinship that made the workers easy to recruit were turned against the company in an organizing effort. Workers, who shared close ties of kin, religious faith, and community, organized themselves and initiated a strike in response to the abusive working conditions and safety hazards at Case Farm. The workers understood the main issues to involve human dignity and ethnic prejudice. As one worker put it: “We may be Guatemalans and Mexicans, but we are humans, too, and we deserve respect.” The Laborers’ International Union of North America (LIUNA) sent organizers to the scene and found the workers “ready to run,” and a union election held two months later resulted in union victory by a vote of 238 to 183. The company was nevertheless able to delay bargaining for two years by utilizing a *Sewell* challenge to the

202. See Craig Whitlock, *Labor Unions Test Case*, RALEIGH NEWS & OBSERVER, Nov. 30, 1996, at 1A. Case Farms sent a recruiter to Florida and paid him $50 for each worker he brought back. See id. at 18A. That this strategy was not unique to Case Farms has been amply documented in criminal charges currently pending against Tyson Foods. Executives and managers at Tyson Foods have been charged with conspiring to smuggle undocumented workers across the southwest border into the U.S. to labor in Tyson’s poultry processing plants. The grand jury indictment charges Tyson with “cultivating a corporate culture in which the hiring of illegal alien workers was condoned to meet production goals, cut costs, and maximize profits.” *Tyson Foods’ Executives Charged With Conspiring to Hire Alien Workers*, DAILY LAB. REP. (BNA) No. 244, Dec. 21, 2001, at A-9.

203. Id. at 1A, 18A

204. See Barry Yeoman, *Spiritual Union: Guatemalan laborers at Case Farms keep the faith through church and community*, INDEP. WKLY., Dec. 3-9, 1997, at 23, 24-25 (noting that the company sent recruiters to churches in areas where they were aware that Guatemalans were being assisted with asylum applications); Whitlock, *supra* note 202, at 18A.

205. See Yeoman, *supra* note 204, at 23, 25 (describing how Guatemalan workers at Case Farms recreated in Morganton, North Carolina the social institutions and religious community they were familiar with in Guatemala).

206. The objectionable working conditions included forty-five degree temperatures in the plant, limited bathroom breaks, requiring workers to pay for working attire (gloves, hairnets, and rubber boots), and safety hazards presented by rapidly moving knives and hooks. See Whitlock, *supra* note 202, at 18A.

207. Id. Another worker explained the impetus to organize in this way: “I was scared and I was angry, because they were treating people of my race with so much disrespect.” See Yeoman, *supra* note 204, at 25.

208. Whitlock, *supra* note 202, at 18A.
election and pursuing the appeals process to the Fourth Circuit. The company argued that union leaflets were inflammatory appeals to racial prejudice, since they urged the Latino and Guatemalan workers to vote for the union and noted that the employer had deliberately sought out Latino workers because it could "pay Latinos less and treat them worse" than its previous Amish workforce. 209

The court rejected the employer's challenge, agreeing with the Board that the union leaflets did not constitute an inflammatory appeal to race or ethnicity. 210 The flyers did not seek to polarize groups of workers against one another along a racial or ethnic divide, nor did they portray Case Farms as bigoted or prejudiced, either of which might have risen to the level of an inflammatory appeal. Instead, they were at most an indirect appeal to employee solidarity to prevent job loss and mistreatment, a permissible topic of campaign discussions. 211 Ignoring the fact that the employer had deliberately targeted Latinos and Guatemalans because of their undocumented status, perceived docility and unfamiliarity with the English language, the court saw only an economic message, not a racial or ethnic message. Accordingly, it applied the more permissive Midland National Life standard applicable to non-racial, non-ethnic campaign propaganda, 212 and sustained the election results.

B. Severing Reason from Emotion, White Issues from Black Issues

Another disturbing consequence of Sewell is the doctrine’s replication of the worst racial stereotypes in its demarcation of legitimate versus illegitimate appeals to union voters. The distinction drawn in Sewell between appeals to "the reasoning faculty" about economic concerns (legitimate) and "inflammatory" appeals to the irrational about racial issues (illegitimate) mirrors the distinction historically drawn between whites and Blacks, between humans and those exploited and enslaved on the basis that they were subhuman, even animalistic. Subordinated groups—particularly Blacks and women—have been associated with un-reason, with nature, and with emotion. 213 Such an association has been used historically to justify exploiting women and enslaving Blacks, Latinos, Native Americans and

210. Id. at 846.
211. Id. at 846-49.
212. Id. at 845-46, 849.
Asians on the basis that they are subhuman. Marked as sub-human and inferior to white men, women and people of color have been expected to tolerate conditions that “authentic” workers would find unacceptable. The Sewell doctrine compounds the injustice of racial and ethnic exploitation by prescribing subjects of concern to subordinated groups (such as race discrimination, racial and sexual harassment, and language barriers) as off-limits on precisely the basis that defines and justifies the subordination of such groups in the first place. The topics—like those to whom they are addressed most effectively—are associated with unreasoning, emotional responses, and delegitimized. The Sewell doctrine perpetuates the dichotomy between whiteness and non-whiteness, between reason and emotion, requiring that workers seeking protection under the labor laws behave as if their experience of class oppression were the white experience.

C. Race and the Situs of Union Organizing

The Sewell doctrine’s assumption that class is a racially neutral identity around which persons can be organized without reference to race or ethnicity presupposes a white experience of both class oppression and class solidarity. Organizing forms and strategies that reflect a whitewashed vision of class consciousness may fail to reach those whose experience of class oppression is other than the white experience, or those who experience the workplace as alienating and build communities elsewhere. For example, most traditional union organizing strategies focus on the workplace as the site for raising worker consciousness about class. Yet, while white workers may have constructed their sense of community at work “from sunup to sundown,” Blacks have traditionally created their community “from sundown to sunup,” outside of work, where they have historically lacked autonomy.

In focusing on the workplace as the primary site for union organizing,


215. See KATHRYN MARIE DUDLEY, THE END OF THE LINE: LOST JOBS, NEW LIVES IN POSTINDUSTRIAL AMERICA 106 (1994); see, e.g., Ellen Neuborne, Sex Harassment Suits Soar; Complaints High from Women in Blue-Collar Jobs, USA TODAY, May 3, 1996, at 1A (describing class action suit brought against Nabisco and Teamsters Union on job channeling theory; while men were channeled to machine work and forklift jobs where they could take restroom breaks at will, women were steered to assembly line jobs where they were not permitted to take restroom breaks and were forced to wear diapers and urinate in their pants, or avoid drinking liquids altogether); Jack Anderson & Jan Moller, Egg Farm Fried for Filthy Work Conditions, THE STATE JOURNAL-REGISTER (Springfield, Ill.), July 29, 1996, at 4 (describing penalties assessed by Department of Labor against DeCoster Egg Farms, the world’s largest brown egg producer, which forced workers to work ten-hour shifts while paying them for 3.5 hours, housed workers in filthy, unsanitary conditions, delayed medical treatment to workers seriously injured on the job, and referred to its predominantly Hispanic immigrant workforce as “animals”).

unions are responding to the labor law's narrow focus on economistic concerns; the Sewell doctrine is one among many that ignores workers' identities as they are constituted in relation to communities and support networks formed outside the workplace. The Sewell doctrine is especially harmful because it undermines progressive unions' efforts to reach highly organizable populations of the most oppressed workers. Studies of relative class consciousness across demographic groups have found that Blacks are significantly more class conscious (and consequently pro-union) than are whites. African-Americans are the strongest union supporters of any racial or ethnic group, an empirical finding that holds true even when controlling for their disproportionate location in jobs at the lower end of the labor market (a factor which itself is often associated with union propensity). Racial consciousness affects both vocational choices and workplace behavior. Shaped by their experiences with racism, African-Americans are more likely to possess a collective orientation than an individual orientation and to display values that are supportive and interdependent rather than

217. See Crain & Matheny, Labor's Identity Crisis, supra note 6, at 1788-1802 (discussing labor law doctrines that circumscribe union identity and direct organized labor's focus away from social justice issues and towards economic, worksite-specific organization and representation); see also WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 2-3, 7 (1991) (describing how courts have utilized legal doctrine to restrict labor's activism); George Feldman, Unions, Solidarity, and Class: The Limits of Liberal Labor Law, 15 BERKELEY J. EMP. & LAB. L. 187, 201 (1994) (discussing how labor law circumscribes and cabins organized labor's efforts to raise larger issues of class conflict).

218. See Michael D. Shulman, Rhonda Zingraff & Linda Reif, Race, Gender, Class Consciousness and Union Support: An Analysis of Southern Textile Workers, 26 SOCIOLOGICAL Q. 187, 189-90, 199 (1985) (noting that the results confirmed those of earlier studies that found that minorities manifest a stronger sense of social injustice and greater relative deprivation, as well as higher class consciousness and pro-union views); Manning Marable, Black Leadership and the Labor Movement, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 206-07 (Steven Fraser & Joshua B. Freeman eds., 1997) (reporting results of a 1989 survey revealing that 56% of Blacks and 46% of Hispanics, as compared with only 35% of whites, responded positively to the question "Would you join a union at your place of work?"). Blacks also gain more from unionization than do whites. Id. at 207 (reporting that in 1987, Black union members earned an average of $387 per week as compared with Black nonunion workers, who averaged $255 per week). Some also suggest that the wage standardizing and grievance procedures in unionized workplaces tend to reduce discrimination, explaining why Blacks find unions so attractive. See Roger Waldinger & Claudia Der-Martirosian, Immigrant Workers and American Labor: Challenge or Disaster?, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 49, 58 (Ruth Milkman ed. 2000).

219. Honey, Anti-Racism, supra note 27, at 21; Waldinger & Martirosian, supra note 218, at 57. For the year 2000, the Labor Department's Bureau of Labor Statistics reports that union membership rates were 17.1% for Blacks, 13% for whites and 11.4% for Hispanics. Union Members Decline to 16.3 Million as Share of Employed Slips to 13.5 Percent, DAILY LAB. REP. (BNA) No. 13, Jan. 19, 2001, at D-16.

competitive factors which help to explain their receptivity to unionization.

When progressive unions began to organize people of color, trade unionists initially assumed that they were “organizing the unorganized,” missing the fact that communities of color were highly organized outside the workplace and receptive to mobilization efforts there. Scholar and activist Robin Kelley points to churches, neighborhood organizations, mutual benefit associations and other groups that have served as sources of support and collective power for Black communities, particularly in the South. Those unions that failed to comprehend the significance of important community institutions such as schools, churches, and networks of family and kin were unable to link the personal and the political in an effective way. To the extent that modern labor unions have internalized the law’s message that class solidarity equals white solidarity, it should not surprise us that unions would be slow to rely on community organizations or non-workplace groups as sources of connection and solidarity, particularly for workers of color.

Workers’ organizations that are not affiliated with organized labor and are not governed by labor law have not limited themselves to an economistic vision of class. They have, therefore, been more effective in reaching populations traditionally thought to be difficult to organize because of their

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221. Id. at 146.
222. Robin Kelley, Building Bridges: The Challenge of Organized Labor in Communities of Color, 5 NEW LAB. F. 42, 44 (Fall/Winter 1999). For example, labor activist and scholar Stanley Aronowitz has suggested that the white working class gained ground at the expense of the unorganized because the unorganized were not agents of history capable of resisting exploitation—they displayed a “chronic incapacity for self-organization, especially at the political level.” STANLEY ARONOWITZ, THE POLITICS OF IDENTITY: CLASS, CULTURE, SOCIAL MOVEMENTS 20 (1992).
223. Kelley, supra note 220, at 44.

The connection between Black churches and Black activism as it took shape under Dr. King’s leadership during the civil rights movement has sometimes confounded those committed to an integrationist ideology because of the church’s association with irrationality. Gary Peller, Race Consciousness, 1990 DUKE L.J. 758, 814 n.115. Integrationists who were committed to promoting racial justice “through reason, by mastering the elite discourse of the white power structure in order to integrate that power structure” could explain the churches’ involvement in the struggle only as “a functional result of the lack of other organized black institutions.” Id. Despite his commitment to nonviolence, King’s strategy was one of direct action to force social change by harnessing the power of the African-American community through small and large challenges designed “to disrupt the business-as-usual aspect of settled racial domination,” and “to demonstrate the power of African-Americans to reclaim and transform streets, institutions, and communities.” Id. at 814-16. One locus of such power was African-American spiritualism, through which King’s program made explicit use of racial consciousness and identity. Id. at 814 n.115.
225. See generally Crain & Matheny, Labor’s Identity Crisis, supra note 6, at 1788-92 (discussing the impact of the NLRA’s narrow definition of labor unionism on union ideology, alliances with social justice groups beyond the workplace, and de-politicization of the labor movement).
vulnerability to employer exploitation. The hyper-exploitability of immigrant workers provided the impetus for the creation of The Workplace Project, a workers’ center dedicated to organizing Latino immigrant workers across occupations within their communities. It is one of a number of such centers around the country. The Project’s goals are to train and equip Latino immigrant workers to represent themselves in the workplace through providing information about workers’ rights and to build a grassroots, democratically run organization to mobilize workers to advocate for structural change.

The Workplace Project cross-cuts occupations because most immigrants in its area typically work in a variety of trades and for multiple employers within a year’s time. It is centered instead in the cultural/ethnic and geographic/residential community which bonds the workers together. In this way, the Project’s organizers hope to sustain focus on the structural barriers contributing to the exploitation of immigrant workers, which affect workers across occupations and workplaces (for example, lax enforcement of employment and labor laws, anti-immigration policies, and employer sanctions).

Similarly, the immigrant Asian women who work in the low-waged garment industry in the San Francisco area are difficult to organize through traditional workplace-centered strategies because they are mothers and heads of households living in communities characterized by inferior services, transportation, schools, and other resources, and many struggle with childcare or after-school care issues. Such workers may be undocumented, may not speak English, and don’t earn wages sufficient to support their families or to resolve their child care dilemmas. Their needs as workers cannot be separated from their needs as women, mothers, and immigrants. Language, cultural and religious traditions, as well as fear of deportation or governmental retaliation, shape their reactions to unions. Organizing campaigns directed at these workers must focus on their homes and communi-

227. Others include the Asian Immigrant Women’s Advocates and Korean Immigrant Worker Advocates in California; the Southwest Florida Farmworker Project in Florida; La Mujer Obrera (The Woman Worker) Project in Texas; the Immigrant Workers’ Resource Center in Massachusetts; the Chinese Staff and Workers’ Association, The Latino Workers Center and SAKHI (for South Asian women) in New York; the Center for Women’s Economic Alternatives in North Carolina; and Appalachian Women Empowered in Virginia. See id. at 429 n.72.
228. See id. at 433-36.
229. See id. at 430-31.
230. See id. at 447-48. Ultimately, the Project seeks to construct workplace committees in each industry, which could then collaborate on an industry-wide basis. See id. at 449.
231. See id. at 449.
ties as much as on their workplaces.\textsuperscript{233} Community-based organizations such as the Asian Immigrant Women Advocates (AIWA) have thus far proved more effective in reaching these workers than traditional unions. AIWA assists workers in enforcing rights to minimum wages, in collecting back wages, and in improving inhumane working conditions through pressuring the Wage and Hour Division of the Department of Labor and the manufacturers via collective action and media campaigns.\textsuperscript{234}

AIWA and the Workplace Project are typical of the community-based organizations that focus on improving workers' working conditions and wages in a particular geographical sector, but are not limited by the occupation-specific or worksite-specific traditions of unionism or by the labor laws.\textsuperscript{235} Community-based worker advocacy organizations focus on educating workers about their legal rights, empowering them through collective action, and building leadership skills.\textsuperscript{236} They do not seek to replace unions, but instead to support workers at an intermediate level in organizing, and to draw workers into the process of organizing themselves.\textsuperscript{237} Like unions, community-based organizations are dedicated to empowering workers through self-organization.\textsuperscript{238} Unlike unions, their legal status outside the purview of labor law has enabled them to develop organizing models that respond to the needs and concerns of workers whose ethnic, racial and/or immigrant backgrounds shape their experience of class oppression. Rather than worrying that race and ethnicity would distract from class unity, community-based organizations have emphasized them and showed the connections between racial, ethnic and class subordination. Unions, hobbled by a checkered history of exclusion of outsider groups, have been ambivalent about the value of ethnically-defined organizations.\textsuperscript{239}

In short, the segregated nature of residential living arrangements and

\textsuperscript{233} See id. at 47.
\textsuperscript{234} See Needleman, supra note 232, at 47-48.
\textsuperscript{235} For example, when AIWA assisted seamstresses employed by Lucky Sewing Company to do piecework for dresses produced under the Jessica McClintock label in filing claims and seeking payment of back wages owed them, McClintock filed unfair labor practice charges with the NLRB. McClintock argued that AIWA was a labor organization subject to the picketing restrictions imposed by the NLRA. Needleman, supra note 232, at 49-50. The Board ruled that AIWA was not a labor organization, and the charges were dismissed. Id. at 50.
\textsuperscript{236} Id. at 45, 49 & n.2.
\textsuperscript{237} See Gordon, supra note 226, at 437-38.
\textsuperscript{238} Id. at 447.
\textsuperscript{239} See id. at 423-24, 426-27; Ruth Needleman, Union Coalition-Building and the Role of Black Organizations: A Study in Steel, 25 LAB. STUD. J. 79, 80 (Spring 2000). See also AFL-CIO Report on Immigrant Workers Suggests New Alliances Will be Necessary, DAILY LAB. REP. (BNA) No. 166, at A15 (August 25, 2000) (discussing AFL-CIO report summarizing testimony gathered at forums on immigrant workers' rights, which suggested that "unions need to be more involved in immigrant community groups;" migrant advocacy groups criticized unions for "not always being a reliable coalition partner.").
the close family bonds between immigrant workers afford opportunities for union organizing. At the same time, ethnic identification may also pose potential barriers to organizing. For immigrants, identification with an ethnic group may be a by-product of the migration process itself, stimulated by conflict with those who occupy the dominant group (whites):

Immigrants do not arrive as ‘ethnics’ but rather become ethnics. On the one hand, categorization as ‘other’—by dominants, competitors, and members of one’s putative group—alters self-understanding; and on the other hand, shared experience with similarly situated others imparts a sense of solidarity and an awareness of common interest. Most important, stigmatization and exclusion produce a reactive ethnicity, in which membership in a group is defined by virtue of opposition to dominants.

Unions who ignore the ethnicization process do so at their peril. If ethnic ties prove more powerful than union loyalties, employers may utilize ethnicization to pit one faction of immigrants against another during a strike. It is essential, then, that unions build coalitions and forge ties with community-based racial- and ethnic-identified organizations. The Sewell doctrine plays an important role in blocking such alliances.

VI.
A PROPOSAL FOR REFORM

While mobilizing around a white racial identity and suppressing racial "otherness" produced positive short-term benefits for class solidarity in the labor movement, as well as immediate benefits for white workers who sought to gain racial privilege, its long-term effect was to block interracial class solidarity. Despite the fact that African-Americans and other ethnic minorities are highly organized in residential communities, churches, and other community organizations, unions have had difficulty responding to their organizability. Suppression of racialized aspects of workplace disadvantage in union organizing philosophy has meant that unions have overlooked off-site organizing opportunities and the potential for coalition-building.

Intersectionality theory, a strain of critical race theory, advocates mak-


241. See Waldinger & Der-Martirosian, supra note 218, at 58.


243. ROEDIGER, supra note 42, at 63-64 (discussing material benefits and psychological gains that workers experienced through identification as white and rejection of racial other-ness).
ing room for the overlaps between identities in law.\textsuperscript{244} Intersectionality theory has been profitably applied to other areas of work law, including Title VII and anti-discrimination analysis.\textsuperscript{245} Applying intersectionality theory to labor organizing for economic justice in a racially diverse workforce would produce a law that promoted—or at the very least, did not block—organizing around multiple aspects of the workers’ identities. However, the labor laws limit themselves to worksite economic issues, which may be most central to white workers’ identity, but not necessarily to the identity of historically excluded, “inauthentic” workers.\textsuperscript{246} Made in the interests of whites, the laws reflect whites’ experience of class.

My proposal is simple: at least in the absence of statutory reform, the Board and courts should get out of the business of censoring campaign speech for inflammatory racial messages.\textsuperscript{247} Such a reform would satisfy proponents of arguments for change addressed to coherence, predictability, and free speech concerns. It would apply equally to both unions and em-

\textsuperscript{244} See Trina Grillo, \textit{Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House}, 10 BERKELEY WOMEN’S L.J. 16, 17 (1995). Intersectionality refers to the perspective of those who stand at the intersection between two or more legally cognizable categories of analysis, whose subordination is erased in law because although they share a common basis of subordination with others who occupy a particular category of legal analysis (e.g., Black women share racial subordination with Black men where race discrimination is alleged and sexual subordination with white women where sex discrimination is alleged), they lack the characteristic that confers privilege on others in that group (maleness vis-a-vis Black men, whiteness vis-a-vis white women). \textit{id.} at 18.

\textsuperscript{245} For example, even though Black women suffer discrimination stemming from both gender and race, their experience is not legally cognizable as race discrimination if Black men have not suffered discrimination and is not legally cognizable as sex discrimination if white women have not suffered discrimination. See Kimberle Crenshaw, \textit{Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics}, 1989 U. CHI. LEGAL F. 139, 141-43 (arguing for the adoption of an intersectional analytical framework in preference to the single-axis framework favored by current law).

\textsuperscript{246} See Vicki Schultz, \textit{Life’s Work}, 100 COLUM. L. REV. 1881, 1892-93 (2000) (explaining that those who have not historically been considered “authentic” workers may define themselves other than by reference to occupation)

\textsuperscript{247} In a recent Article, Ken Matheny and I argued that the NLRA should be amended to add an antidiscrimination provision that would put the Board into the business of enforcing antidiscrimination norms and administering antidiscrimination claims. See Crain & Matheny, \textit{Labor’s Identity Crisis}, supra note 6. Although on its face that proposal might appear to be at odds with the suggestion here that the Board stay out of reviewing election campaign speech with a racial message, the two are fundamentally and philosophically consistent. First, the proposal in \textit{Labor’s Identity Crisis} was addressed to the legislature, not to the Board; statutory amendment would be required to implement it. Second, the proposal in \textit{Labor’s Identity Crisis} was targeted toward the context of bargaining, contract administration, and grievance processing, rather than to the organizing context. Critical to its success is that workers be permitted to organize and mobilize on the basis of common interests, particularly shared racial and ethnic interests—or at minimum, that workers be afforded separate representation where racial interests conflict within the workforce represented by the union. Thus, I consider doctrinal reforms like the proposal offered here or the argument advanced in \textit{Colorblind Unionism}, supra note 6 (arguing for Board consideration of race and ethnicity as factors in bargaining unit determination), essential groundwork for such statutory reform. Alternatively, in the absence of statutory reform—which seems particularly unlikely in the labor law arena—these doctrinal reforms remain desirable and achievable goals, and can stand on their own.
ployers, providing incentive for unions to act proactively to address racial and ethnic identities in organizing so as to defeat employer divide-and-conquer strategies. More importantly, it would further organizing by progressive unions seeking to transform themselves and to shift our understanding of class from a whitewashed vision to a many-hued rainbow vision. Unions should be given space for "skinwalking" through and around the intersections between race, ethnicity and class oppression.

VII.
CONCLUSION

The experience of class oppression is inevitably racialized and ethnicized. Thus, mobilizing workers who are subjected to racialized and ethnicized forms of class oppression will require demonstrating the connections between racial, ethnic and class exploitation. Yet, existing law privileges the white experience of class oppression and thwarts progressive union organizing initiatives designed to connect race and class and to build bridges between unions and the sites of organizing for the most disadvantaged workers—civil rights organizations, churches, and community groups. Organizing conducted within the straitjacket of a "colorblind" organizing model that privileges whiteness and suppresses racial "otherness" does violence to workers' lived experience of class disadvantage. I have argued for a return to a noninterventionist standard in Board doctrine that would leave room for unions to transform themselves into creatures whose vision of class consciousness and justice resonates more powerfully with the public at a moral level, merging issues of "social" justice and economic justice.

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248. Although employer use of divide-and-conquer strategies remains a risk (as the Greensboro example illustrates—see supra note 80 and accompanying text), this rule will function primarily to alleviate legal restrictions on union organizing. See supra note 172 and accompanying text.