I. INTRODUCTION

This nation's two hundred year legacy is an ongoing journey toward equality for its African-American citizens: from legal slavery to emancipation; from lawful racial segregation to illegal race discrimination; from the debates over equality of opportunity to the current debates over equality and affirmative action. The courts' role in this saga has been, until
recently, a disappointing one: *Dred Scott,*\(^1\) the 1876 Hayes-Tilden presidential election dispute,\(^2\) and *Plessy v. Ferguson,* a decision that relegated blacks to legalized second class status.\(^3\) Not until 1954 did the Supreme Court end public school segregation, and then only mandating integration "with all deliberate speed."\(^4\)

In a short but provocative book,\(^5\) Professor David Bernstein contends that, at the very least, between 1870 and 1950 African Americans would have fared well under a *Lochner*-oriented, freedom of contract regime.\(^6\)

While *Lochner* and its progeny (also characterized by the phrases,

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1. *Dred Scott v. Sanford,* 60 U.S. 393 (1857), precipitated the Civil War, which finally ended legalized slavery. In that infamous decision, Chief Justice Taney concluded for the 5-2 majority that blacks were not citizens of the United States and that the Constitution was made for the benefit of whites only. Slaves remained as property of the slaveholder no matter where the slaveholder traveled with them. *Id.* at 450-53.

2. Reconstruction ended as part of a Faustian bargain between southern Democrats and Republicans in the House of Representatives to resolve the election in Hayes's favor in exchange for the end of Reconstruction. Tilden was one electoral vote short of a majority; there also were 19 disputed electoral votes. Congress created a commission made up of five senators, five representatives (balanced evenly between Democrats and Republicans), and five Supreme Court justices, three Republicans and two Democrats. They voted along strict party lines (8-7) in favor of Hayes; thus the contest was decided by the Supreme Court. The commission's report was accepted by Congress. See John Anthony Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases,* 25 Rutgers L. Rev. 552, 565-68 (1971). See also *Bush v. Gore,* 531 U.S. 98 (2000) (effectively handing the Presidency to Republican candidate George W. Bush).

3. 163 U.S. 537 (1896) (Harlan, J., dissenting) (authorizing "separate but equal" facilities for blacks, thus legalizing segregation and effectively turning the clock back to 1866). Compare Brewer's racist majority opinion ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 551) with Harlan's eloquent dissent:

Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law... [Regrettably this court] has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. [T]he interests of both [races] require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate... than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? *Id.* at 559-60.). See also *The Civil Rights Cases,* 109 U.S. 3 (1883) (Harlan, J., dissenting) (invalidating federal guarantees of nondiscrimination on public accommodations).


“Lochnerism” and “Lochnerian jurisprudence”) are open to two different meanings, substantive due process and freedom of contract, Bernstein’s thesis is devoted only to the latter concept.7

Bernstein’s thesis rests on two assumptions. First, freedom of contract would have enabled African Americans not only to pursue self-employment in a variety of occupations and professions but also to obtain work from employers willing to hire them despite the discriminatory attitudes pervasive in American society. Second, labor and employment regulation, even where facially neutral, too often blocked these opportunities from taking place.8

Bernstein posits that New Deal government regulation, sometimes by intent and sometimes by effect, harmed African Americans. He argues that legislation restricting the free market empowered individuals who wanted to discriminate against minorities. Bernstein concludes that African Americans would have fared better if such legislation had been struck down by the courts under Lochnerian principles.

A central flaw in Bernstein’s argument is that he presents a false dichotomy: the choice was not necessarily between having no governmental regulation or having harmful governmental regulation. Instead, the courts might have construed the New Deal labor legislation in such a way to have advanced the interests of African Americans. In actuality, the choices included having beneficial regulation, no regulation, or harmful regulation. Viewed in this light, the analysis is not as straightforward as Bernstein would have one believe.

Even without such a judicial construction, the New Deal presented a complex and diverse picture. Although some African Americans clearly were harmed by government regulation emanating from the New Deal, most African Americans and most whites benefited in two ways. First, standards of living rose for most workers. Bernstein assumes that African Americans held a competitive advantage by working for less; however, this alleged competitive advantage only encouraged a wage race between whites and blacks to subsistence levels.9 Second, the New Deal legislation set the stage for the formation of the AFL-CIO which, in contrast to employers, lobbied for and helped elect to office public officials who later enacted the Civil Rights Act of 1964.10

The balance of this Essay contains six parts. In Part II, I discuss Lochner and its progeny and the modern judicial and scholarly reactions to the decision. Part III reviews Professor Bernstein’s book and examines his

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7. Bernstein, supra note 5, at 2 n*.
8. Bernstein, supra note 5, at 5-7.
9. See infra notes 110-119 and accompanying text.
10. See infra note 187 and accompanying text.
argument that individual African Americans would have benefited from a *Lochner* regulated regime, adopting the principle of freedom of contract. In Part IV, I examine railway labor unions and railway labor law, a major source of difficulties for African Americans. I also challenge the proposition that a *Lochnerian*, freedom of contract society is an ideal worth resurrecting. In Parts V and VI, I critique the Wagner Act and offer a competing vision of racial justice and labor law which explores the drive for unionization among American workers and its consequences for white and black workers in our society. Finally, in Part VII, I compare my vision of social justice with Bernstein’s vision of a society governed by *Lochnerian* doctrines. I conclude by discussing why my vision, if fully realized, would most likely have promoted social, racial, and economic justice in the contemporary United States.

II.  

**LOCHNER CHRONICLES**

*Lochner v. New York* exemplified the Court’s new approach to labor regulation. In *Lochner*, a closely divided Court overturned a New York labor law that limited the hours of bakery employees to no more than ten hours a day and sixty hours a week. An employer who violated the law was guilty of a misdemeanor. The majority viewed the statute as interfering with the employees’ liberty of contract rights protected under the Fourteenth Amendment and not as a valid exercise of a state’s police powers to protect the public health or welfare. Claiming that the law was enacted to benefit unionized German bakers at the expense of recent immigrants, Bernstein applauds the Court’s decision.

There were two dissenting opinions. Justice Harlan, speaking for three Justices, dissented on the ground that the number of hours a worker labored constituted a legitimate public health concern. Harlan cited several authorities on occupational health who considered the job of baker particularly hazardous. He also noted that most states and Congress viewed eight hours as an appropriate limit on an employee’s workday. Although Harlan acknowledged the importance of liberty of contract, he considered it subject to reasonable regulation.

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11. 198 U.S. 45 (1905).
12. *Id.* at 57-58, 64-65. The majority distinguished *Holden v. Hardy*, 169 U.S. 366 (1898), which had sustained a Utah law limiting the employment of workers in underground mines and in smelters to eight hours a day, except in emergencies. The statute before the *Lochner* Court had no such emergency clause that would excuse a violation in some circumstances. *Id.* at 55.
15. *Id.* at 65-68.
Justice Holmes’s scathing dissent may be the more renown:

This case is decided upon an economic theory which a large part of the country does not entertain. . . . I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics. 16

After citing recent Court precedent, Holmes continued:

[16] constitution is not intended to embody a particular economic theory, whether of paternalism...or of laissez faire. . . . [The] word “liberty” in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles . . . . [No] such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. [Other reasonable men] . . . would uphold it as a first installment of a general regulation of the hours of work. 17

Courts applied Lochnerian jurisprudence to strike down state legislation as violating individuals’ liberty of contract under the Fourteenth Amendment. Federal legislation was overturned as exceeding Congress’s limited commerce and taxing powers or under the Fifth Amendment. The philosophy that lay behind Lochner was an opposition to class-based, or special-interest, legislation. Class legislation laws were seen as benefiting politically powerful interest groups at the expense of the public at large. The regulation of the employment relationship was particularly vulnerable to attack on these grounds. 18

As a judicial doctrine, Lochnerism has been discredited in the courts. As Professor Cass Sunstein has summarized:

The received wisdom is that Lochner was wrong because it involved “judicial activism”: an illegitimate intrusion by the courts into the realm properly reserved to the political branches of government. . . . [T]he Court in many cases [has taken] the lesson of the Lochner period to be the need for judicial deference to legislative enactments. 19

As early as 1949, in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., the Court disparagingly referred to the “Allgeyer-Lochner-Adair-Coppage constitutional doctrine” as clearly repudiated. 20 That view has not changed; both conservative and liberal dissenting jurists have attacked court majorities for striking down legislation on constitutional

16. Id. at 75.
17. Id. at 75-76.
18. Bernstein, supra note 5, at 3-4.
20. 335 U.S. 525 (1949) (unanimously sustaining state “right to work” laws).
grounds. More recently, however, revisionist scholars have endeavored to resurrect Lochner. Thus, Bernstein has considerable company.

There are three alternative ways to interpret Lochner. First, in what is now the conventional view, Lochner represented the Court’s acceptance of a pro-business tilt inherent in the existing distribution of wealth and economic power embodied in the notions of “liberty of contract” and “laissez-faire”, or free market, principles. The Court viewed as inherently suspect any government intervention to change this “natural” balance. The Court treated the struggle between labor and capital as if one side was upholding the correct social order and, therefore, supported capitalism against the onslaught of labor unions seeking to promote socialism and communism. This approach also conveniently reflected, whether by design or circumstance, the conservative political philosophy of the Court majority.

The second interpretive approach reflects the current revisionist perspective. Bernstein falls into this camp. Its advocates contend that the Lochner judges’ analytical processes were not an aberration but rather a continuation “of a long heritage of protection for liberty.” The Court, therefore, was not engaging in judicially imposed policy preferences but was instead searching for neutral principles.

Even a respectful view of the Lochner majority, however, recognizes that the Lochner judges chose the status quo at a time of intense class conflict and dramatic social and economic change in American society. Efforts to apply neutral principles—in the sense of being value free—only served to affirm the class bias inherent in the then-dominant ideological

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23. See e.g., Aviam Soifer, The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921, 5 LAW & HIST. REV. 249, 250-52 (1987); Sunstein, supra note 19, at 874. See also WILLIAM E. NELSON, THE LEGALIST REFORMATION 2-9 (2001) (chronicling a reform movement begun in New York in the late 1930’s whose goal was social change and inclusion of people previously treated as subordinate and whose legalist, progressive legacy is liberty, equality, human dignity, and opportunity).


25. See Daniel S. Farber, Book Review, 90 GEO. L.J. 985, 988-990 (2002); Lawrence O. Gostin, Public Health Theory and Practice in Constitutional Design, 11 HEALTH MATRIX 265, 288 (2001). This is also Holmes’s point in his Lochner dissent. See Lochner, 198 U.S. at 75 (Holmes, J., dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain.”).

26. See Rowe, supra note 22, at 233.
structures. The inevitable result was the constitutional revolution of 1937 and the triumph of the New Deal.

A third interpretive approach represents, in some ways, a middle ground, but not a melding of the first two approaches. The 

Lochner majority might have followed the first prong of Justice Harlan's two-fold approach to constitutional law. Harlan aggressively applied the Reconstruction era constitutional amendments to assert the equal rights of African Americans, while, at the same time, distinguishing between valid health measures and invalid labor laws under the 14th Amendment.

Understanding 

Lochner jurisprudence is imperative in understanding Bernstein's argument regarding the treatment of African Americans between 1870 and 1950. The next section discusses Bernstein's first two chapters, which examine various laws and practices that determined the jobs available to African-American workers.

III.

THE JIM CROW ERA

The abolition of slavery was an economic disaster for the Southern white plantation owners for two reasons. First, the emancipation eliminated a source of great wealth, and second, free African-American laborers were no longer necessarily a cheap, captive workforce. Professor Benno Schmidt and economist Jennifer Roback have analyzed various types of Southern legislation designed to repress African Americans and maintain a stable, dependent workforce. These laws included enticement and contract enforcement laws, vagrancy laws, emigrant-agent laws, and the convict lease system. Roback has concluded that the white agricultural employers attempted to enforce a labor market cartel through the combined effect of

28. Id. at 230-36.
29. Id. at 233-34. See also IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941 640-41, 646 (1970) [hereinafter BERNSTEIN, TURBULENT YEARS]; id. at 640-41 ("The Court faced a critical juncture: either acquiesce to the New Deal or assure passage of FDR's 'court packing plan.' In the end, the Court, or more precisely Justices Hughes and Roberts, chose to sustain the Wagner Act and avoid FDR's plan."); MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA 145 (1994) (citing the plan to reform the Court as one of three factors).
30. Compare Harlan's dissenting opinion in 

Lochner with his majority opinion in Adair v. United States, 208 U.S. 161 (1908) (overturning a federal law forbidding an employer from requiring employees to sign "yellow dog" contracts on interstate railroads).
31. BERNSTEIN, supra note 5, at 8.
these laws.\textsuperscript{34}

The enticement laws made it a crime for a (white) employer to hire a (black) laborer under contract with another (white) employer.\textsuperscript{35} These laws were designed to discourage white employers from competing with each other for black workers. The contract-enforcement laws, directed primarily at black farm laborers, imposed criminal sanctions for breach of an employment contract.\textsuperscript{36} The vagrancy laws made it a crime to be unemployed if without financial means to support oneself.\textsuperscript{37} Although typically a misdemeanor, the punishment was often a sentence to a state or county chain gang. The convict-lease system reimposed slavery upon black victims, even those convicted of only a misdemeanor.\textsuperscript{38} The state or county government "leased" individuals to private firms. As Roback notes, the effect of the convict-lease system was to further lower the price of free labor.\textsuperscript{39} Finally, the emigrant-agent laws attempted to hinder the activities of agents who recruited labor from one state to work in another state by imposing stiff taxes.

In Chapter One, Professor Bernstein focuses on the emigrant-agent laws. Bernstein tells an engaging story. He concentrates on "Peg-Leg" Williams, a colorful character, known in the South as "the king of labor agents."\textsuperscript{40} Williams claimed to have aided over eighty thousand African Americans in their exodus to another state with more favorable working conditions.\textsuperscript{41}

Williams's opposition to Georgia's restrictive emigrant-agent legislation prompted him to refuse to pay the exorbitant tax of $500 per county per year and to challenge the law in court.\textsuperscript{42} The case quickly reached the Supreme Court, and the Court, in Williams v. Fears, handed down a ruling rejecting his appeal.\textsuperscript{43}

The majority considered Williams's arguments based on the right to

\textsuperscript{34} Id. at 1162.
\textsuperscript{35} For an excellent treatment of the historical roots of both criminal and tortious interference with an employment contract by a third party, see Lea S. VanderVelde, The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity, 101 YALE L.J. 775, 792-793 (1992).
\textsuperscript{36} In Bailey v. Alabama, 219 U.S. 219 (1911), the Supreme Court invalidated that state's statute as a violation of the thirteenth amendment. See Schmidt, The Peonage Cases, supra note 32, for a detailed discussion of the history of the case.
\textsuperscript{37} See Roback, supra note 33, at 1168; Schmidt, The Peonage Cases, supra note 32, at 649.
\textsuperscript{38} Roback observes that the convict-lease system was worse than slavery because a firm had no economic interest in keeping a convict alive past the contract period, while a slaveholder obtained the full economic value of a slave's entire working life. Roback, supra note 33, at 1170.
\textsuperscript{39} Id. at 1180-1181.
\textsuperscript{40} Bernstein, supra note 5, at 14.
\textsuperscript{41} Bernstein, supra note 5, at 15.
\textsuperscript{42} Bernstein cites a source that calculates that the annual licensing fee to do business throughout Georgia totaled about $68,000. Bernstein, supra note 5, at 131 n. 93.
\textsuperscript{43} 179 U.S. 270 (1900).
interstate travel and personal liberty and on the right to contract and pursue a livelihood under the Fourteenth Amendment.44 None of these arguments prevailed. Furthermore, the Court did not think the law violated the commerce clause, viewing the interstate commerce aspects of an emigrant agent’s business as incidental.45 The Court also refused to conclude from the amount of the tax an intention to prohibit the business altogether. Moreover, the Court thought this business particularly appropriate to regulation to prevent fraud.46

Bernstein reasons that Williams discouraged many emigrant agents from continuing their work. Consequently, he correctly concludes that these laws “had particularly harsh affects on rural African Americans . . . [by raising] the economic and information costs of interstate migration.” Bernstein perceives the case as premature because the Supreme Court had not yet decided Lochner and thus was still reluctant to overturn state legislation on Fourteenth Amendment grounds.48 He argues that this case is an example “of how Lochnerian jurisprudence, when applied, aided African Americans, while judicial deference to government regulation harmed them.”

In Chapter Two, Bernstein considers occupational licensing laws. These laws required an individual to obtain a state license to pursue a particular vocation. The requirements for a license, typically issued by a regulatory board, might include some combination of formal education, an apprenticeship, and a written or oral examination. Bernstein argues that state licensing laws “often served [a] discriminatory [purpose by preventing] African Americans from competing with established white workers in a variety of occupations.” After a brief discussion of the legal precedent, Bernstein concentrates on examining the impact on African Americans of licensing laws in three occupations: plumbers, barbers, and physicians. Bernstein emphasizes the racial animus that motivated the white members of these occupations to push for licensing examinations.

44. Id. at 274.
45. Id.
46. Id. at 275.
47. BERNSTEIN, supra note 5, at 25.
48. BERNSTEIN, supra note 5, at 23.
49. BERNSTEIN, supra note 5, at 27. Earlier, two state supreme courts had struck down similar statutes on liberty of contract grounds. See State v. Moore, 18 S.E. 342 (N.C. 1893); Joseph v. Randolph, 71 Ala. 499 (1882).
50. See Dent v. West Virginia, 129 U.S. 114 (1889) (holding that persons practicing medicine who were not legally qualified were not deprived of any vested right when punished for unauthorized practice); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (ruling that a state may not prohibit its citizens from pursuing a trade out of state); Douglas v. Noble, 261 U.S. 165 (1923) (holding that a state may delegate to an administrative board the authority to determine the appropriate qualifications to practice a profession).
Bernstein contends that an application of *Lochner*’s principles would have protected African Americans’ job opportunities, “[had] the courts been more willing to scrutinize closely the purpose and effect of these laws to ensure that they did not interfere with the right to [work].”

Even under *Lochner*, however, judicial deference to legitimate concerns about public health existed. Medical doctors seeking licensing statutes, for example, had a very strong case for this reason; barbers and plumbers had a less compelling case. Professor Lawrence Friedman’s work suggests the Supreme Court distinguished between professions that could be regulated through licensing and ordinary trades that could not.

No doubt racial prejudice played a large part, particularly in the South, in the restrictions on entering many occupations. During slavery in the South, large numbers of slaves served as skilled artisans in a variety of trades. By the time of the Civil War, however, many southern cities had already begun to impose restrictions to prevent blacks from competing with white skilled workers. Only after 1890 did a class of African Americans skilled in the trades and professions emerge, and those individuals rarely lived in the rural South where most African Americans resided.

One conclusion that can be drawn is that the South consigned African Americans to a system of forced agricultural labor that denied them the exercise of their freedom and liberty. Under such a regime, even if *Lochner* principles reigned, as applied by racist lower courts, they probably would have been immaterial. Indeed, a strong case can be made that the

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52. Free market economist Milton Friedman has been a persistent critic of occupational licensing, particularly in the medical profession, because of its monopolistic characteristics. See, e.g., Milton Friedman, *Capitalism and Freedom*, 137-60 (1962).
53. Because barbering required the touching of a person’s skin, sanitation conditions were important. See Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 519 (1965). Plumbers had responsibilities for maintaining sanitary sewerage systems. Id. at 520-22.
57. Id. at 474-75.
58. This was accomplished initially through the Black Codes and later through the terror of the Ku Klux Klan and the abandonment of Reconstruction protections coupled with the repressive labor legislation discussed earlier. Professor Schmidt concludes that Progressive Southerners opposed the peonage-type laws because “white[s], as well as black[s] were deterred by the threat of involuntary servitude from remaining in or coming to the South to work.” Schmidt, *The Peonage Cases*, *supra* note 32, at 657.
59. *See id.* at 716 (“In the end, . . . it was the wave of black migration northwards and to the cities and the increasing demand for factory labor, both intensified by the manpower and material needs of World War I, that broke the wheel of black servitude in the South.”).
Jim Crow South was determined to maintain a system of racial apartheid. Without condoning racial prejudice, however, there is an equally compelling economic explanation, albeit not wholly unrelated to racism. Principles of supply and demand recognize that if, over time, the supply of a good, including the supply of labor, remains fixed or shrinks and the demand for that good rises over time, then the price of that good, wages in the case of labor, will also rise. Moreover, African Americans frequently worked for lower wages. The economic incentives to restrict labor competition to increase wages, then, are a powerful factor.

African Americans were not the only target, probably not even the chief target, of some of these licensing regulations. For example, medical doctors often were able to exclude women who practiced as midwives from continuing their occupation, as well as homeopaths, osteopaths, and chiropractors. Unless the competing group had enough political force to obtain its own licensing statute, the group was doomed to occupational extinction.

In sum, Bernstein’s first two chapters focus on the effects of Jim Crow laws, a topic that arose prior to and is largely unrelated to the New Deal. These two chapters are the strongest and most persuasively written in this book.

IV. RAILWAY LABOR RELATIONS

In Chapter Three, Bernstein transitions from an examination of Jim Crow laws to the railway labor acts and the origins of the relationship between the railway labor unions, the Brotherhoods, and the exclusion of African Americans. Bernstein raises an important and valid point.


62. In the Appendix, Bernstein provides a comprehensive list of sources, including a bibliography of over seventeen pages of books and articles relating to the topic of labor and race. This collection of resources is one of the strongest aspects of his book. See Bernstein, supra note 5, at 163-182.

63. This chapter draws heavily upon Herbert R. Northrup’s study. See Herbert R. Northrup, Organized Labor and the Negro (rev. ed. 1971).
Throughout the 1900’s, the railroad craft unions practiced virulent racism. They frequently engaged in blatant forms of discrimination, often seeking to exclude African Americans from employment altogether.

The early history of railway union race relations was more promising, however. William Sylvis, the foremost labor leader of the 1860’s, argued for Negro-labor solidarity and the inclusion of African Americans into existing trade unions. He urged the National Labor Union to admit African Americans on equal terms. The Knights of Labor, formed in 1869, sought to organize “men and women of every craft, creed, and color.” Their successful strikes against financier Jay Gould’s railroad system propelled their membership to over 700,000 by 1886. On May 4, 1886, the Haymarket Square incident occurred, in which a bomb exploded during a political rally in Chicago for the eight-hour workday. This incident provoked a strong public reaction against strikes and labor unions, precipitating a rapid and dramatic decline in the Knights’ membership numbers. These reformist unions believed in racial equality. Bernstein omits this background from his discussion of unions.

In 1893 as the economy entered a depression, Eugene Debs led the formation of the American Railway Union (ARU), an industrial union. The union’s constitution, over Debs’ opposition, excluded African Americans, although they were eligible to join segregated affiliates. Although these early reformist unions were unsuccessful, they did point the way to racial and gender solidarity among trade unionists.

The Pullman Company, a maker of sleeping cars used by the railroad companies, ran a company town. Partly as a result of the 1893 depression, company profits declined slightly. The company, however, proceeded both to cut wages substantially and to raise rents on company housing. In response, workers, although not unionized, decided to strike and sought

64. Bernstein, supra note 5, at 54.
65. Richard O. Boyer & Herbert M. Morais, Labor’s Untold Story 30-35 (3d ed. 1955). Its 1869 convention adopted the following resolution:
   The National Labor Union knows no North, no South, no East, no West, neither color nor sex on
   the question of the rights of labor, and urges our colored fellow members to form organizations in
   all legitimate ways, and send their delegates from every state in the Union to the next Congress.
   Id. at 35. The union had only a brief existence, converting into a political party in the 1870’s. Id. at 36.
   See also Raymond L. Hogler, Labor and Employment Relations 20 (1995).
67. Id.
69. An industrial union represents all employees, skilled and unskilled. The AFL-affiliated unions
   and the railroad brotherhoods admitted only skilled craft workers.
70. Bernstein, supra note 5, at 46, 61, 64.
72. Id at 127.
help from the ARU.73 The strike against the Pullman Company soon spread directly to the railroads. The ARU urged a national boycott of sleeping cars, and many railroad workers responded. The AFL and the railroad craft unions, however, opposed a sympathy strike.74

Twenty-four railroad corporations had earlier formed an association to minimize competition and develop a compliant non-union workforce. Attorney General Richard Olney, a corporate lawyer and board member of several rail lines, became the chief strategist for the industry.75 Despite Debs’s repeated admonitions to strikers against interference with the U.S. mail, strikers were charged with that violation, a federal offense. When the federal government intervened on behalf of the railroads, an injunction was issued against Debs and other trade unionists.76 After Debs’s prison sentence ended, he turned to politics, running as a socialist candidate for president.77

Bernstein argues that African Americans vigorously opposed the strike, fearing for their jobs.78 There was, however, never any danger to African-American workers because the ARU was not seeking to organize the railroads.79 Ironically, African Americans would have been better served by a successful ARU, with its policy of segregation but not exclusion,80 rather than the all white, racially exclusionary brotherhoods.81

Bernstein also suggests that African Americans benefited by serving as strikebreakers.82 While African Americans might have benefited, white workers also benefited. This claim gets to the heart of the complex relationship between employers, whites, and blacks in this era.83 In contrast to the railroad craft unions, autoworkers, longshoremen and miners

73. Id.
74. Id.
75. Id. at 131.
76. See In re Debs, 158 U.S. 564 (1895).
77. SALVATORE, supra note 74.
78. BERNSTEIN, supra note 5, at 54.
79. SALVATORE, supra note 71, at 130-31.
80. Additionally, its leadership might have persuaded members to end racial barriers.
81. The railroad brotherhoods not only excluded African Americans but also excluded, from the 1880’s through the 1920’s, Asians and southern and eastern European immigrants. Eric Amesen, “Like Banquo’s Ghost, It Will Not Down”: The Race Question and the American Railroad Brotherhoods, 1880-1920, AM. HIST. REV. 1601, 1612 (1994).
82. See BERNSTEIN, supra note 5, at 54.
83. Bernstein views this era as one in which blacks and whites competed for work, and Bernstein believes that blacks could only benefit at the expense of whites. Employers frequently pitted one race against the other, increasing racial tension in society but benefiting neither black nor white workers. Playing on racial fears promoted the Klan, race riots, and the perpetuation of stereotypes, to the detriment of all workers, especially African Americans. See generally Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: The Heyday of Jim Crow, 82 COLUM. L. REV. 444 (1982).
succeeded in bridging the racial divide between white and black workers, despite the latter's reputation for strikebreaking. Before World War I, African-Americans received lower pay and often worked longer hours than whites in the same position. Sometimes this distinction was partly disguised by different job titles. Thus, for southern railroads, African Americans were "a convenient tool with which to fight unionism and depress wages." This tool prevented southern, white workers from improving their status, and often required white firemen and brakemen to serve, like blacks, as personal servants to managers, conductors, and engineers. The tenor of Bernstein's discussion almost suggests that African Americans enjoyed performing these subservient services. The evidence, however, proves otherwise. During World War I, African-American firemen "lodged angry complaints with the U.S. Railroad Administration" to put a halt to these practices.

Bernstein claims that Debs later believed the Pullman strike was lost because of the racial politics of the ARU. It does not appear that Debs actually held that view in 1895, in the aftermath of the strike, and historian Nick Salvatore concludes that Debs understood that the alliance between the railroads and the federal government was too strong to overcome economically. Instead, Debs turned to American politics for a democratic solution.

Traditionally opposed to strikes, the major railroad brotherhoods, the operating craft unions of conductors, firemen, engineers, and trainmen banded together for passage of federal legislation and to flex some economic muscle. As the United States entered World War I, the railroads increasingly came under government control. Government control of

84. See Arnesen, supra note 81, at 1626-67; Bernstein, Turbulent Years, supra note 29, at 454.
85. NORTHRUP, supra note 63, at 48-9; Arnesen, supra note 81, at 1621-22.
86. NORTHRUP, supra note 63, at 49.
87. Arnesen, supra note 81, at 1618-21.
88. BERNSTEIN, supra note 5, at 48 "[W]hite engineers preferred to work with African American firemen; African American firemen were more willing than whites to serve as the engineers' valets....]
89. Arnesen, supra note 81, at 1621.
91. SALVATORE, supra note 71, at 148 & 154; see also William E. Forbath, The Shaping Of The American Labor Movement, 102 HARV. L. REV. 1111, 1161-63 (1989). After the collapse of the Pullman strike, the conservative railroad unions and the AFL mistakenly concluded that racial equality in unions was a formula for failure. See Arnesen, supra note 81, at 1627-28.
92. For example, they succeeded in persuading Congress to make it a crime for a railroad to discharge an employee because he joined a union. In Adair v. United States, 208 U.S. 161 (1907), however, the Court struck the law down.
railroads produced two convergent trends. First, under General Order 27, the wages of white and black workers (and male and female workers) who performed the same work were equalized. Second, the role of labor unions vis-à-vis the railroads was significantly strengthened.

With the conclusion of World War I, federal oversight of the railroad industry soon came to an end, as did the labor shortages imposed by the war. Additionally, the railroad industry's employment needs contracted in the 1920's and thereafter, due to technological advances and competing modes of transport. Bernstein contends that *Lochnerian* principles would have aided African-American railroad workers if the Court had only applied them to block the 1926 Railway Labor Act and its 1934 Amendments (RLA) from taking effect.

This contention is misleading. First, railway employers developed and maintained the practice of excluding African-American railroad workers from the jobs of conductor and engineer. These were the two most prestigious and highest paying positions in the industry. Second, agreements between various railroads and the operating unions, which dislodged African Americans, were struck prior to the enactment of the Railway Labor Act in 1926. For example, many southern railroads operated dual seniority lists and racial quotas which subordinated black workers in the same craft to their white counterparts. Under *Lochnerian* principles, advocated by Bernstein, such racially discriminatory agreements and arrangements were perfectly valid.

After years of political lobbying by the railroad unions, Congress enacted the 1926 Railway Labor Act. The Act preserved the right of railroads to recognize company unions or deal with minority unions. Such unions, dominated by the companies, theoretically could have protected African Americans if they so chose. The Thirties, however, brought both the Depression, which reduced the need for workers, and the

95. BERNSTEIN, *supra* note 5, at 57; Zackson, *supra* note 93, at 346.
98. Arnesen, *supra* note 81, at 1608, 1611-12; NORTHRUP, *supra* note 60, at 49; *contra* BERNSTEIN, *supra* note 5, at 47 (stating that “In 1910, only about three percent of southern engineers and southern conductors were African Americans.”).
100. For an analysis of the political forces that brought about the 1926 Railway Labor Act, the 1934 Amendments, and the Wagner Act, see generally RUTH O'BRIEN, WORKERS' PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886-1935 (1998).
1934 Amendments, which increased the rights of railroad unions. Both Bernstein and economist Herbert Northrup note the unsavory role played by the administrative agencies, i.e., the National Mediation Board (NMB) and the National Railroad Adjustment Board (NRAB), under the RLA with regard to racial matters that further contributed to the decline of African-American workers in the industry. Those agencies “aided and abetted” in the brotherhoods’ pattern of racism. Both Bernstein and economist Herbert Northrup note the unsavory role played by the administrative agencies, i.e., the National Mediation Board (NMB) and the National Railroad Adjustment Board (NRAB), under the RLA with regard to racial matters that further contributed to the decline of African-American workers in the industry. Those agencies “aided and abetted” in the brotherhoods’ pattern of racism. There is no doubt that the NMB and the NRAB significantly contributed to the precarious situation African-American railroad workers confronted after 1934. The appropriate solution, however, was not the application of Lochner principles, but government action that struck at the source of union racism. Bernstein characterizes the railroad industry as a major source of relatively well paying employment for African Americans, continuously jeopardized by racism. He describes the conservative railroad operating unions, the brotherhoods, as racist. This description is accurate. The railroad brotherhoods, at least through 1950, had terrible records on racial issues. However, Bernstein’s criticisms often seem inconsistent. For example, Bernstein criticizes the World War I governmental orders requiring that African Americans (and women) be paid equal pay for performing the same work as white workers. Bernstein contends that this order undercut the advantage African Americans (and women) be paid equal pay for performing the same work as white workers. Bernstein contends that this order undercut the advantage African Americans held over whites—the right to serve as cheap labor. During World War I, however, there was a critical labor shortage and an increased demand for rail services, insuring African-American employment. This is a recurring theme for Bernstein: that federal laws prevented African Americans from working for less. In effect, Bernstein relegates African Americans to permanent underclass status.

Why did racism exist? Bernstein posits the following explanation as to the railroad unions:

Admitting African Americans into the brotherhoods would have meant implicitly acknowledging that African Americans were the ‘social equals’ of whites, something few white workers were willing to do. This would have required whites either to lower their self-image or to raise their view of the competency of African American workers.

It is legitimate for Bernstein to point toward the failure of some unions

102. Bernstein, supra note 5, at 59-60.
103. See infra Part VI.
104. Bernstein, supra note 5, at 46.
105. This point, however, is not new. Numerous scholars have reached this conclusion. See, e.g., Northrup, supra note 60, at 48-101; Arnesen, supra note 81, at passim.
106. Bernstein, supra note 5, at 51-52.
107. Zackson, supra note 83, at 399.
108. Bernstein, supra note 5, at 47.
and unionized workers to combat racial bias. The failure of these individuals and institutions to protect African-American workers reflected the views of the broader American society. Historically, race discrimination's substantial negative consequences have permeated throughout society. There were alternative voices, however, including the leading unionist figures of their day, such as William Sylvis and Gene Debs, but they did not prevail.\textsuperscript{109}

In Chapter Four, Bernstein begins his attack on a number of wage and hour laws.\textsuperscript{110} Bernstein is a vociferous opponent of the New Deal's wage and hour legislation, which the Supreme Court had previously held unconstitutional under \textit{Lochner} freedom of contract theories. He criticizes the Fair Labor Standards Act, which set restrictions on an employer's freedom to set the terms of employment by requiring a minimum hourly wage and providing for a maximum number of weekly hours worked.\textsuperscript{111}

Bernstein's argument is double-barreled. First, the legislation excluded the occupations that were principally filled by African Americans, agricultural employees and domestic workers.\textsuperscript{112} Second, Bernstein contends that the advantage African-American employees had over their white competitors was that the former were paid less.\textsuperscript{113} Bernstein offers as a justification for the lower pay that African Americans were less productive than white workers.\textsuperscript{114} Bernstein attributes this lower productivity to the lower human capital African Americans possessed because of discrimination in education.\textsuperscript{115}

Bernstein contends that minimum wage legislation encouraged southern employers to replace low wage African-American workers with machinery.\textsuperscript{116} Economists refer to this replacement as the capital labor substitution effect.\textsuperscript{117} Whether this replacement affected workers at the

\begin{footnotes}
\textsuperscript{109} By the 1920's and 30's, however, many unions took positive stands on racial equality, especially the CIO unions, such as the UAW, and the Jewish, socialist-influenced garment unions (the ACWU and the ILGWU). \textit{See also} Marion Crain & Ken Matheny, \textit{Labor's Identity Crisis}, 89 CAL. L. REV. 1767, 1771-1777, 1846 (2001) (distinguishing the conservative craft unions and the AFL from the Knights of Labor and the IWW for the latter's racial, gender, and ethnic inclusion and describing an ideal of a modern labor movement invigorated by the imperative for racial, ethnic, and gender justice).

\textsuperscript{110} Chapter Four focuses primarily on the Davis Bacon Act, which required that contractors pay workers on federal construction projects the "prevailing wage," as set by the Secretary of Labor.


\textsuperscript{112} \textit{BERNSTEIN, supra} note 5, at 86, 101.

\textsuperscript{113} \textit{BERNSTEIN, supra} note 5, at 91.

\textsuperscript{114} "Some employers, for racist reasons, were disinclined to hire African Americans, but even a nonprejudiced employer had incentives to prefer white workers [at the same wage]." \textit{BERNSTEIN, supra} note 5, at 97.

\textsuperscript{115} \textit{Id}.

\textsuperscript{116} \textit{BERNSTEIN, supra} note 5, at 102.

\end{footnotes}
minimum wage level in the 1930's and 40's is less clear.\footnote{118}

By extension of his \textit{Lochnerian} theory, presumably Bernstein objects to legislation outlawing child labor, providing unemployment benefits, the social security (pension) system, and laws outlawing the payment of wages in scrip or kind instead of cash. Indeed, the \textit{Lochner} Court regularly held many protective labor laws unconstitutional as a violation of employee and employer freedom of contract.\footnote{119} These and related social benefits are standard in today's more progressive post-industrialized society and derive from legislative lobbying by labor unions and their allies. Bernstein's contempt for government regulation is a view that serves neither black nor white workers well.

\section*{V. THE NEW DEAL}

Chapter Five sets out to describe the New Deal labor legislation. The focus of the chapter is the negative effect of collective bargaining on African-American workers.

The Wagner Act's theoretical framework embraced two key principles.\footnote{120} First, industrial democracy was necessary for the continuation of political democracy, and unions were required to effectuate industrial democracy.\footnote{121} Furthermore, the expected outcome of the collective bargaining process was increased wages and improved fringe benefits for employees.\footnote{122}

Second, collective bargaining would substantially reduce and


\footnote{119} See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (Congress cannot outlaw the interstate shipment of child-made goods); Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922) (federal tax on products made by child labor unconstitutional); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (statute providing for the fixing of minimum wages for women and children in the District of Columbia by a board found unconstitutional); Morehead v. New York, 298 U.S. 587 (1936) (New York minimum wage law for women and minors violated employers' 14th Amendment freedom of contract).


appropriately channel the economic strife inherent in contemporary employment relationships in an industrialized capitalist society. Collective bargaining was required because inequality of bargaining power existed between the individual worker and his corporate employer, making individualized bargaining one-sided. Workers' organizing and bargaining collectively countervailed the power of a corporate employer. Finally, the federal government structures the collective bargaining process through the administrative agencies (NLRB, NRAB, NMB) created to enforce the enacted statutes.

The practical consequences flowing from these basic assumptions are several. The union and employer act as co-equal planners of the employment relationship. Through their union, employees assume "shared authority" with the employer, jointly setting the terms and conditions of the workplace in the broad area of employment relations. Through the collective bargaining process, formalized rules develop based on the contract and a set of "common rules of the shop." These formalized rules provide individual employees with procedural and substantive due process. Unionization also results in a leveling and uniformity of treatment among workers. Fundamentally, unionization and collective bargaining redistribute decision-making power to otherwise voiceless workers. In sum, collective bargaining establishes a legally sanctioned, shared authority system with the range of sharing determined by the scope of bargaining the law permits.

Bernstein's assessment of the Wagner Act is that while it may have benefited white workers, it certainly harmed African-American workers. Bernstein's arguments are of the "damned if you do, damned if you don't"
variety. Congress of Industrial Organizations (CIO) unions are criticized both for their commitment to racial equality and for their (alleged) lessening of that commitment over time. By contrast, economist Herbert Northrup concluded in 1944 that "thousands of Negro workers have benefited from increased wages, improved working conditions, and job security as a result of collective agreements... [U]nionism will continue to affect the welfare of Negroes favorably."

Contrary to Bernstein's assertions in his Conclusion, increases in unionization rates favorably affect all employees in two indirect ways. First, simply to persuade their employees not to unionize non-union employers are strongly inclined to match, or even exceed, the economic benefits that unionization has brought to their competitors' employees or to other employees in the region. Second, unions lobby Congress and state legislatures for legislation that benefits all workers.

The next section of this Essay offers an alternative approach to Bernstein's Lochnerian jurisprudence. Bernstein criticizes the Railway Labor Act and the Wagner Act, both of which promoted collective bargaining as a statutory right. Bernstein argues that these statutes enabled unions to negotiate contracts that discriminated against African Americans and further claims that the safeguards eventually erected by the courts proved inadequate to protect African-American workers in unionized industries. Consequently, he endorses the exercise of Lochner principles to strike down those laws. This wide ranging exercise in judicial activism, however, cannot be cabined. The goal of guaranteeing African Americans racial equality in the unionized workplace could best be achieved by explicitly prohibiting racism by unions. This limited exercise in judicial activism avoids striking down legislation that benefited most white and black workers.

VI.
THE ANTI-DISCRIMINATION PRINCIPLE IN FEDERAL LABOR LAW

The centerpiece of the New Deal was the Wagner Act. The Wagner Act empowered industrial workers and transformed the industrial relations landscape. The situation for African-American workers, however, became much more challenging. Employers remained free to discriminate on the

130. Bernstein, supra note 5, at 95-7.
131. Northrup, supra note 63, at 255.
134. Bernstein, supra note 5, at 64-5, 98.
basis of race, but whether unions were also free to discriminate was unclear. If unions were free to discriminate, what obligations, if any, were imposed upon them? Several possibilities existed: unions could have been allowed to remain free to engage in race discrimination, or, on the positive side, they could have been obligated to accept African-American workers as full and equal members. It is instructive to note that African Americans continually fought, albeit often without success, to be included as full members in their unions. Initially, the Supreme Court developed a standard, "the duty of fair representation," that seemed roughly akin to "separate but equal." Unions were not required to admit African-American workers as members, the "separate" part, but were required to represent them fairly, the "equal" part. Unfortunately for African Americans, the separate but equal doctrine provided plenty of separate treatment but little equal treatment.

This section examines the legal struggles of African Americans against job discrimination. Three different bases existed under which the Supreme Court should have demanded that labor unions that represent employees in collective bargaining negotiations and grievance adjustment include all employees as members, irrespective of race: common law agency principles, statutory grounds, and the Constitution. These are addressed seriatim.

Agency is a fiduciary relationship that arises when one person (the principal) manifests consent to another person (the agent) who acts on the principal's behalf and subject to the principal's control. Here there are two sets of principals, the white workforce and the black workforce, both represented by the union. Under the basic principles of agency law, the labor union owes fiduciary duties to both principals. It cannot sacrifice the rights of black workers in order to further the interests of white workers. Moreover, there is no inherent conflict of interest between black and white workers, excepting racial bigotry, which is a wholly irrational value. As a purely private social organization, a union is free to

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136. See, e.g., Rolax v. Atlantic Coast Line R. Co., 91 F. Supp. 585, 591 (1950) (denying counsel's request that "the colored firemen...be accorded membership in the Brotherhood.").
139. Restatement 2d Agency §1.
decide who is eligible for membership.\textsuperscript{142} Once a union purports to represent a class of employees for purposes of contract negotiations, however, it is obligated to represent all employees in the class, black and white equally, because all are principals. Therefore, the union breaches its common-law duty as an agent to a group of principals if it negotiates racially discriminatory contractual provisions.\textsuperscript{143}

In \textit{Graham v. Southern Ry Co.},\textsuperscript{144} the federal district court applied the foregoing principles. In that case, African-American firemen brought a class action suit against their union and two southern railroads seeking an injunction against enforcement of a negotiated labor contract that discriminated against them by denying them their seniority rights, thereby jeopardizing their employment altogether. In granting a preliminary injunction, the district court applied agency principles:

No one is compelled or required to undertake an agency, but one who voluntarily assumes the task owes the duty of acting in the utmost good faith toward his principal. An agent is a fiduciary. If the principal is a group of individuals, this obligation extends to each member of the group. The agent is bound to represent the interest of each member of the group fairly and with equal zeal. He may not neglect some of the members, prefer some as against others, or discriminate among them. . . .

[J]he Brotherhood was under no obligation to become a bargaining agent for the employees within its craft. Having sought to do so, the Brotherhood is in duty bound to represent fairly not only its own membership, but all the employees in whose behalf it has authority to bargain. The Brotherhood must advance equally and in good faith the interests of every individual fireman whom they represent, without preference or discrimination among them.\textsuperscript{145}

Taking the common law analogy one step further is appropriate here. The respective administrative agencies and the courts should have revoked the certification of any union which discriminated in its representation of African-American employees. The National Labor Relations Board (NLRB or Board) initially took the position that a union’s failure to admit African-American employees into membership was grounds to revoke a union’s certification as exclusive representative, either under §8(3) (now §8(a)(3)) of the Wagner Act or under Executive Orders issued by President Roosevelt

\textsuperscript{142} As Professor Clyde Summers aptly stated: “To exclude a man from a club may be to deny him pleasant dinner companionship, but to exclude a worker from a union may be to deny him the right to eat.” Clyde Summers, \textit{The Right to Join a Union}, 47 \textit{COLUM. L. REV.} 33, 42 (1947).

\textsuperscript{143} \textit{But see} United Steelworkers v. Weber, 443 U.S. 193 (1979) (holding that union with white majority can negotiate affirmative action provisions that benefit African-American minority at expense of white majority).

\textsuperscript{144} 74 F. Supp. 663, 664 (D.D.C. 1947).

\textsuperscript{145} \textit{Id.} at 664-65.
forbidding race discrimination in war industries. The NLRB vacillated over enforcing this principle for twenty years, before finally acting upon it. The record of the National Mediation Board and the National Railroad Adjustment Board was far worse. Neither agency showed the least bit of concern for the plight of African-American railroad employees.

From an employee perspective, the Wagner Act provides a framework for industrial democracy and the opportunity to improve wages and working conditions through collective bargaining. If that industrial democracy is to have legitimacy, the union cannot exclude its African-American constituents from participating in the union’s affairs as full and equal voting members, the core of a democracy. Granted, as the contours of worker rights were debated during the 1920’s and 1930’s in the United States, many African Americans were excluded from voting in local, state and federal elections by poll taxes and literacy tests particularly in the South, despite the Constitution.

Both the NAACP and the Urban League unsuccessfully urged Senator Wagner to adopt various amendments to his bill to include African Americans in the processes of collective bargaining. The NAACP recommended defining a labor organization as a union that does not exclude any employee from membership or equal participation based on race, creed, or color. The Urban League proposed to make race discrimination an unfair labor practice and to allow strikebreakers to retain employment if the striking union engaged in discrimination. As enacted, the Wagner Act

146. See Bethlehem-Alameda Shipyard, 53 N.L.R.B. 999, 1015-17 (1943); id. at 1016 ("We entertain grave doubt whether a union which discriminatorily denies membership on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race."); Carter Mfg. Co., 59 N.L.R.B. 804, 806 (1944) (implying that a union that discriminatorily denies membership on the basis of race, color, creed, or national origin will not be certified as a bargaining agent). But see Atlanta Oak Flooring Co., 62 N.L.R.B. 973, 975 (1945) ("[S]egregation into separate locals is [not], per se, a form of racial discrimination in violation of the National policy and of the Fifth Amendment.").

147. See Pioneer Bus Co., 140 N.L.R.B. 54 (1962) (holding racially discriminatory contracts cannot serve as a bar to an election); Independent Metal Workers Union, 147 N.L.R.B. 1573 (1964) (overruling Atlanta Oak Flooring Co., and decertifying union that discriminated on the basis of race in determining eligibility for membership). A decade later, however, the Board abandoned its position and again refused to decertify unions based on discriminatory conduct. Handy Andy, Inc., 228 N.L.R.B. 447 (1977) (Jenkins, Member, dissenting).


149. The 15th Amendment guaranteed the right of citizens to vote without regard to race or color. But see Williams v. Mississippi, 170 U.S. 213 (1898) (upholding literacy and property requirements intended to exclude African Americans from voting lists used in jury selection); Breedlove v. Suttles, 302 U.S. 277 (1937) (state poll tax not violate 14th Amendment); Giles v. Harris, 189 U.S. 475 (1903) (upholding discriminatory voter registration scheme). The 24th Amendment, ratified in 1964, barred poll taxes in federal elections.

150. See BERNSTEIN, TURBULENT YEARS, supra note 29, at 189-190.
contained none of these prescriptions. Nevertheless, their absence from the statute did not preclude the courts from construing the Act to require unions to act without racial prejudice in the performance of their legal obligations.

In 1938, in the midst of the Depression and changing American political attitudes towards labor and business, the United States Supreme Court finally began to take notice of the often desperate plight faced by African Americans.151 By 1938 most of the New Deal legislation was firmly set in place, and the Court also had signaled its willingness to affirm the constitutionality of those laws.152 Increasingly populated by appointments of President Roosevelt, the Supreme Court confronted the important question of explicit race discrimination by labor unions. This union discrimination involved excluding African Americans from membership and negotiating with employers collective bargaining agreements that called for the outright dismissal of African Americans from their jobs or other blatant forms of employment discrimination.

In *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*,153 the National Mediation Board, without an election by the affected employees, certified the Brotherhood as the exclusive bargaining representative for the 45 employees occupying the job of station porter ("red-caps") at the St. Paul Union Depot Company.154 Under its constitution, the Brotherhood refused to admit African Americans into its membership.155 The porters, on the other hand, unanimously designated as their representative the United Transport Employees, a national labor union of station porters at many railroad companies.156

The status of exclusive bargaining representative was a relatively new concept.157 The Mediation Board previously ruled that a category of

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151. See United States v. Carolene Prods. Co., 304 U.S. 144, 153 n. 4 (1938) (The now famous footnote 4 suggested that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

152. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (The 5-4 decision upholding the Wagner Act included a majority consisting of Chief Justice Hughes, and Justices Roberts, Stone, Cardozo, and Brandeis. In dissent were Justices Sutherland, McReynolds, Van Devanter, and Butler.); West Coast Hotel Co. v. Parish, 300 U.S. 379 (1937) (upholding state minimum wage laws, a precursor to the federal Fair Labor Standards Act of 1938); Seward Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding the Social Security Act).


154. *Id.* at 818, 821. See also *In re Representation of Employees of the St. Paul Union Depot Co.*, Case No. R-635, 1 N.M.B. 181 (1940).

155. *Id.* at 821 (Groner, C.J., concurring).

156. *Id.* at 819, 821.

157. This identical concept of exclusive representation based upon majority rule under the Wagner Act (National Labor Relations Act or NLRA) was affirmed by the Court in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). See generally George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975) (proposing a model for collective bargaining without exclusive representation), Russell A. Smith, *The
employees may not be divided into separate bargaining units on the basis of race.\textsuperscript{158} The D.C. Circuit reversed the Mediation Board on the grounds that the porters were not custodians, and thus the porters were not part of the Brotherhood’s existing unit. Therefore, the circuit court ordered the United Transport certified as the porters’ bargaining agent.

The concurring opinion by Chief Justice Groner went further. Groner reasoned that the Board’s decision to designate the Brotherhood, an organization that did not admit African-American employees as members, as the bargaining agent for the porters was “‘untenable and arbitrary’” and “‘analogous to ‘taxation without representation.’”\textsuperscript{159}

In a one sentence per curiam opinion, the Supreme Court reversed the D.C. Circuit.\textsuperscript{160} The Court did not address the race discrimination issues, however, and thus the Court did not necessarily reject the D.C. Circuit’s views. Rather, the Court simply followed its newly announced precedent and concluded that decisions of the National Mediation Board as to the appropriate bargaining unit for an election were not subject to judicial review.\textsuperscript{161}

In \textit{Steele v. Louisville & N.R. Co.}, the United States Supreme Court directly confronted the Brotherhood of Locomotive Firemen’s efforts to force the outright dismissal of all African Americans from their jobs as firemen at a series of 21 southeastern railroad companies.\textsuperscript{162} Through a series of agreements negotiated during 1940 and 1941, the Brotherhood and the southern railroads signed contracts that required the gradual elimination of all “nonpromotable” employees. By railroad custom, African Americans were ineligible for promotion to the job of engineer. Only whites were employed as engineers.

In dismissing Steele’s complaint, the Alabama Supreme Court held that the Brotherhood, as the exclusive representative, was empowered under the statute to create and destroy seniority rights of Negro employees and to enter into contracts with employers discriminating against Negro employees.\textsuperscript{163}

The United States Supreme Court stated the “question is whether the

\textsuperscript{158} Steele, 323 U.S. at n.4.
\textsuperscript{159} 137 F.2d at 821-22.
\textsuperscript{160} 320 U.S. 715 (1943).
\textsuperscript{162} 323 U.S. 192 (1944).
\textsuperscript{163} 16 So.2d 416 (Ala. 1944).
Railway Labor Act... imposes on a labor organization... the duty to represent all the employees in the craft without discrimination because of their race, and if so, whether the courts have jurisdiction to... [remedy the violation]." 164 In a unanimous decision, the Court reversed the state court. The majority opinion read the statute to avoid any constitutional questions, 165 and held that Congress "did not intend to confer plenary power upon the union" to sacrifice the interests of the Negro minority solely to benefit the white majority. 166 The Court observed that the Negro firemen could not secure separate representation for collective bargaining purposes. 167 The Court construed the Railway Labor Act to obligate the union, as exclusive representative, to negotiate on behalf of all employees.

In a concurring opinion, Justice Murphy was more emphatic:

The economic discrimination against Negroes practiced by the Brotherhood and the railroad under color of Congressional authority raises a grave constitutional issue that should be squarely faced. The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation.

...[I]t cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise, the Act would bear the stigma of unconstitutionality under the Fifth Amendment. ...

... The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements that discriminate against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. ... Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.

The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in light of a Constitution that adhors [sic] it, to expose and condemn it wherever it appears in the course of a statutory interpretation. 168

164. Steele, 323 U.S. at 193-94.
165. Id. at 198-99.
166. Id. at 199.
167. Id. at 206.
168. Id. at 208-210. But compare Archibald Cox, The Role of Law in Preserving Union Democracy, 72 HARV. L. REV. 609, 620-21 (1959) (criticizing constitutional approach and favoring
Although perhaps well intentioned, the majority's opinion proved to be totally ineffectual. As a practical matter, African-American employees were in a poor position to enforce their right to be fairly represented. African-American workers could only secure for themselves fair and equal treatment if they had the power to cast votes for or against the leadership of the union, to vote on the proposed contracts negotiated by that leadership, and to seek offices in the union themselves. At the very least, securing these rights would alert African-American employees when legal action was necessary to prevent illicit race discrimination by union-employer complicity.

The Court's own experience, after Steele, suggested the difficulty with its statutory approach. In Graham v. Brotherhood of Locomotive Firemen, an exasperated Supreme Court gave the following admonition: "If, in spite of the Virginian, Steele, and Tunstall cases, there remains any illusion that... the federal courts are powerless to enforce these rights [to nondiscriminatory representation], we dispel it now." The Court's approach, moreover, resulted in federal courts permitting the exclusion of African-American employees from membership in railroad unions as late as 1958.

Bernstein's reaction to the Steele decision is somewhat surprising. Describing the Court majority's analysis as "legal gymnastics," Bernstein contends that Congress, when enacting the Railway Labor Act amendments in 1934, had no objection to racial exclusion by unions. He opines that the Court was "disingenuous" in creating a duty of fair representation. Bernstein, however, never addresses Justice Murphy's concurrence.

The Court had the opportunity to have radically changed American society by applying Justice Murphy's perspective. Unions that refused to

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169. Wellington, supra note 168, at 373-4 (Continued race discrimination occurs because "an employee who is not a union member has no voice in the political processes of the union.").

170. For a discussion of the remarkable role Dean Houston and the NAACP Legal Defense and Education Fund played in litigating these cases on behalf of minority railroad workers, see J. Clay Smith, Jr. & E. Desmond Hogan, Remembered Hero, Forgotten Contribution: Charles Hamilton Houston, Legal Realism, and Labor Law, 14 HARV. BLACKLETTER L.J. 1 (1998).

171. 338 U.S. 232, 240 (1949). See also Eberlein, supra note 140, at 523 (The Railway Brotherhoods "have never fully accepted these principles and have forced the Negro to go to court time after time to protect his interests.").


173. BERNSTEIN, supra note 5, at 62-4.

174. BERNSTEIN, supra note 5, at 63.

175. Id.
admit African-American employees deserved to be denied the right to be the exclusive representative of any bargaining unit. For the railroad unions, their choice would have been simple: abandon racism or face competition from the CIO and other unions eager to compete on a nondiscriminatory basis.

The constitutional approach favored by Justice Murphy, a noted champion of both labor and civil rights, was clearly preferable to the majority's approach. In 1944, the Court was not yet prepared to read the Fifth Amendment, unlike its counterpart the Fourteenth Amendment, as containing a clause providing for the equal protection of the law.

Justice Murphy's concurrence had a positive impact in at least one jurisdiction. In Betts v. Easley, the Brotherhood of Railway Carmen was chosen by secret ballot as the collective bargaining agent for the railway carmen employees at the Santa Fe Railway's Kansas City operations. The Brotherhood did not admit African-American employees as participating members, although they paid dues. Instead, it relegated them to segregated lodges under the jurisdiction of a white local. African-American workers were denied the right to attend any meetings, to vote for the election of any officers, or to participate in any local or national union business. Six African-American employees, on behalf of over a hundred fellow employees, sued the union and the company. They sought to enjoin the union from acting as bargaining agent until all the African-American employees were given full membership with equality of privileges and to enjoin the company from recognizing the union so long as it engaged in acts of race discrimination.

The plaintiffs claimed that the denial of equal membership violated their rights under the Fifth Amendment, and the Kansas Supreme Court agreed. The court stated that the union's power to segregate its members on the basis of race as to local activities (as a private association) was a separate question from its behavior as the bargaining agent under the Railway Labor Act in engaging in racial segregation. The court held that the union violated the minority employees' Fifth Amendment rights by denying them full and equal membership on the same terms as white employees.

As support for its decision, the court cited the Steele decision and quoted from the majority opinion in Steele. The Steele court, however, explicitly declined to reach such constitutional questions. The court also

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177. Id. at 249.
178. 169 P.2d 831, 834 (Kan. 1946).
179. Id. at 839, 843.
quoted extensively from Justice Murphy’s concurrence, including his reference to the Fifth Amendment.\textsuperscript{180}

The implications for the greater society of requiring unions to admit African Americans as members cannot be overstated. The entire unionized sector of the work world would have become one of racial equality, as opposed to only the mass production industries unionized by the CIO (e.g., auto, steel, and coal). Such an approach might well have paved the way for a far earlier, less turbulent, and more successful integration of our society. The integration of unions and the workplaces that they represented, followed by President Truman’s 1948 Executive Order integrating the armed forces,\textsuperscript{181} would have improved the economic lot of African Americans, prepared the nation for public school desegregation, and led to respect for African Americans as equal citizens in our republic.

VII.
CONCLUSION

Bernstein concedes that the “classical liberal version of civil rights admittedly holds little utopian promise. It does not obligate the state to eradicate discrimination, or to guarantee ‘equal opportunity.’”\textsuperscript{182} Instead, Bernstein justifies his approach because it “does not depend on granting the government massive regulatory powers . . . [that will be] grossly abused.”\textsuperscript{183}

Bernstein’s vision, then, is a frail one as compared to the problems of racism it purports to address. For over a century after Reconstruction ended, racial prejudice has dominated American life and society. In abjuring government regulation of the workplace to eradicate racial discrimination, Bernstein, instead, advocates private ordering through the marketplace. The market system operates on a theory of private contracts between employers and employees. The essence of contract is its voluntary nature. Freedom of contract thus includes freedom not to contract.\textsuperscript{184} Effectively combating race discrimination in employment required a federal labor law agenda.\textsuperscript{185} The New Deal legislation might potentially have

\begin{footnotes}
\footnotetext[180]{Id. at 841-42.}
\footnotetext[181]{Exec. Order No. 9981, 13 FR 4313.}
\footnotetext[182]{BERNSTEIN, supra note 5, at 110.}
\footnotetext[183]{Id.}
\footnotetext[184]{JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 12 (4th Ed. 1998) (“contract law starts with the premise that free individuals are at liberty to give or withhold their consent to proposed contracts”).}
\footnotetext[185]{Professor Cox, writing in 1957, observed: “No federal law prohibits racial discrimination by employers . . . There must be thousands of mines, mills and factories in which employers have unilaterally adopted practices which discriminate against minority groups in hiring, layoff or promotion. When there is no bargaining representative, the victims have no legal redress.” Archibald Cox, The Duty of Fair Representation, 2 VILLANOVA L. REV. 151, 156 (1957).}
\end{footnotes}
accomplished that feat, benefiting whites and blacks equally. Honoring the promise to fully include African Americans, however, required waiting until the passage of the 1964 Civil Rights Act. Justice Murphy pointed out an alternative path. Had that path been taken, the process of integrating our society as well as providing racial equality in the work world would have occurred twenty years earlier and perhaps with less upheaval.

There remains a further consideration. History tells us how the story has unfolded. In 1955 the AFL and the CIO merged, and by 1960, the AFL-CIO represented approximately 18 million workers in the civilian labor force. The narrow 1960 presidential election victory of the Democratic ticket of Kennedy-Johnson can be attributed to many factors. Vigorous union support for the Democratic ticket, galvanizing union members to vote Democratic, was one major factor. The evidence that organized labor's political potency could be employed on behalf of progressive race relations was demonstrated in the ultimate success: enacting the cornerstone of civil rights law reform, the 1964 Civil Rights Act. Granted, labor's pro-civil rights rhetoric did not always match the various local labor unions' practices. Nevertheless, the Act did bar private employers and unions from discrimination.

Thus, Professor Bernstein and I both explore whether alternative legal frameworks might have challenged, or at least ameliorated, the century of racial prejudice following the Civil War. We simply do not share the same values. His anti-union exhortations aside, Bernstein's libertarian paradigm does not produce racial equality. Bernstein claims that a Lochner ideology might have created new models of civil rights protections, but he offers no concrete examples of what such a civil rights regime would look like.

Bernstein's vision of racial equality does not contain a coherent anti-discrimination principle. Although Bernstein appropriately condemns race discrimination when practiced or aided by state and federal governments, he voices no objection to private individuals engaging in discriminatory

186. For trenchant commentary on Brown and post-Brown school segregation, see Jack M. Balkin, Brown v. Board of Education A Critical Introduction, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 6-8 (Jack M. Balkin ed., 2001). Nearly fifty years later it is easy to forget that Brown, the single most honored Supreme Court opinion, was widely vilified throughout the nation when initially handed down in 1954. Id. at 3-5.


188. BERNSTEIN, supra note 5, at 116. Bernstein identifies the following assumption: "[L]abor unions, abetted by government, were responsible for wage increases received by white workers; without unions 'inequalities in bargaining power' purportedly would have ensured that workers received wages just above starvation levels. This is a powerful myth..." Id.

189. BERNSTEIN, supra note 5, at 108-9.
behavior through market transactions. Thus, free competition enabled employers to pit white workers against black workers, which promoted an economic race to the bottom. Bernstein opposes statutory collective bargaining rights for unions irrespective of the benefits accruing to white and black workers. It is difficult to envision how this philosophy advances the civil rights of African Americans.

My vision, on the other hand, recognizes that racial equality and economic justice for white and black workers are integrally connected. Justice Murphy shared this vision, and he pointed out the moral and constitutional obligations of labor unions to admit to membership African-American workers on the same terms as their white counterparts. Unfortunately, the Court did not follow his lead. Consequently, the performance of labor unions (and employers) during the 1930’s, 40’s, and 50’s was uneven. Even so, the AFL-CIO vigorously supported congressional efforts to promote racial equality. Without their critical support, it is unclear when, if ever, civil rights legislation would have been enacted into law.

Collective bargaining greatly improved the employment conditions of both white and black unionized workers. Income levels of rank and file workers increased substantially, unions lobbied Congress to expand employee fringe benefits, and the distribution of wealth in America became less concentrated. Moreover, unionization offered workers a voice in the workplace and a modicum of job security. Finally, because indirectly unionization rates affected all employees, the rise in unionization had substantial positive economic consequences throughout society.

That racial equality in our society still has far to go does not diminish how far we have come. Federal government legislation, spurred on by civil rights demonstrations, enabled the courts to truly become a place of last redress.

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190. See the Reverend Martin Luther King, Jr.’s celebrated “I have a dream” speech addressed to the civil rights marchers on Washington delivered at the Lincoln Memorial on August 28, 1963.