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Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy

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EMPLOYEE FREE CHOICE OR EMPLOYEE FORGED CHOICE? RACE IN THE MIRROR OF EXCLUSIONARY HIERARCHY

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The Employee Free Choice Act (EFCA) is arguably the most transformative piece of labor legislation to come before Congress since the enactment of the National Labor Relations Act of 1935 (NLRA). Putting the potential impact of the EFCA in historical perspective, one commentator contends that the NLRA marked the culmination of a systematic effort of the Progressive movement that dominated so much of American intellectual life during the first third of the twentieth century. As it was widely acknowledged at the time, the NLRA was revolutionary in its implications for American Labor Law. Less widely recognized were the adverse effects of this and other New Deal statutes on people of color. Readily available evidence shows that President Roosevelt's insistence on raising the price of labor (1) increased unemployment and human suffering, and (2) also widened the unemployment gap between Blacks and Whites. Today, this wide, if not widening, unemployment gap remains in effect. Properly appreciated, the consequences of the New Deal for African Americans persist as an important and under-examined issue. It is likely that neither Progressive Era labor legislation nor contemporary efforts to further transform the labor market operate in the best interest of African American citizens. Provoked by the assertion that labor faces a legal crisis and the claim that the statutory right to organize is a sham, energized by the contention that the union movement ought to reinvent itself as a robust engine of collective insurgency against globalization, class-based injustice, and asserted increasing disparities in income, labor union advocates and hierarchs have offered a number of ideas that include the necessity of acting like a genuine rights movement, encouraging open source unionism, and creating alternative (nonunion) worker organizations.

One of the newest attempts to transform labor relations is the EFCA. The first to disappear under the EFCA would be a system of union democracy whereby unions could only obtain the rights of exclusive representation for firms if they could prevail in a secret-ballot election. Second, the EFCA would eliminate the necessity of a freely negotiated collective bargaining agreement between management and labor and instead substitute compulsory arbitration. While some labor union advocates contend that law ought to be conceived of as a vehicle to democratize the workplace by redistributing power in labor markets in favor of workers, while concurrently

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demolishing hierarchical command structures that entrench gender, race and class lines, this proposal would likely expand labor hierarchy, labor market cartelization and diminish the employment prospects of racial minorities. As such, the EFCA is marked by contradiction. This Article deploys Critical Race Reformist theory, economics and apartheid-era South African labor history in order to show that rather than embracing freedom for workers, eliminating poverty, and expanding opportunities for all, this proposal would likely invert such goals and instead operate consistently with the record of exclusion and subordination tied to American Progressivism and the labor movement.

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INTRODUCTION

Richard Epstein notes that the Employee Free Choice Act (EFCA) "is the most transformative piece of labor legislation to come before Congress since the enactment of the National Labor Relations Act of 1935 (NLRA)."[1] Placing the potential impact of EFCA in historical perspective, Epstein contends that the "NLRA marked the culmination of a systematic effort of the Progressive movement that dominated so much of American intellectual life during the first third of the twentieth century."[2]

1. RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 1 (2009) [hereinafter EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT].
2. *Id.*

Although the NLRA's revolutionary implications were widely acknowledged at the time,[3] the adverse effects of the NLRA and other New Deal labor statutes on people of color are not recognized today.

The NLRA represents a progressive turn in American labor relations.[4] However, it is likely that neither Progressive Era labor legislation nor contemporary efforts to further transform the labor markets operate in the best interest of African Americans. Evidence shows that President Roosevelt's insistence on raising the price of labor (1) increased unemployment and human suffering[5] and (2) widened the unemployment gap between Blacks and Whites.[6] This unemployment gap, which contributes to the economic isolation of African Americans, persists. The Black underclass has grown disproportionately in recent years.[7] Between December 2008 and May 2009, the unemployment rate for White workers ranged between 6.6% and 8.6% while the rate for Blacks ranged

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3. *Id.* at 4.

4. This remains true even though subsequent amendments to the NLRA in 1947 made "it clear that the NLRA respected employees' collective choice on unionization, but did not put its thumb on the scale in favor of [unions]." *See* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 2.

5. Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC LAW REVIEW 799, 825 (2007–2008) [hereinafter Hutchison, *What Workers Want*].

6. *See* RICHARD VEDDER & LOWELL GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA 272–79 (1993). Vedder and Gallaway show that racial differences in terms of unemployment rates were essentially nonexistent between 1890–1930; however, during the 1930s, federal government initiatives to raise wages actually widened the unemployment gap between Black and White workers and contributed to increased income inequality. The following table captures the widening gap:

RACIAL DIFFERENCES IN UNEMPLOYMENT RATES

YEAR	WHITE	NONWHITE
1890–1930 (average)	5.82 %	5.90%
1940	9.50%	10.89%
1950	4.9%	9.0%
1975	7.8%	13.8%
1990	4.7%	10.1%

See id. at 272.

7. HENRY LOUIS GATES, JR. & CORNEL WEST, THE FUTURE OF THE RACE xii (1996).

between 11.9% and 14.9%.[8] The consequences of the New Deal on African Americans remain an under-examined issue.

Historically, a number of individuals, including scholars, politicians, and unionists, advanced labor law reform as part of a Progressive agenda. The original progressives were simultaneously conservative and liberal.[9] Consistent with this observation, early reforms to labor legislation were tarnished by contradiction. American Progressivism, from which today's political Liberalism descends,[10] contributed to the expansion of both government[11] and authoritarianism, and has helped to spawn economic and social nationalism-statism.[12]

The modern political life of democratic nations owes much of its force to the American and the French Revolutions.[13] During the French Revolution, "the idea that truth was made rather than found began to take hold of the imagination of Europe."[14] Anticipating the concept of human progress, American Progressivism and the New Deal echo attempts by French revolutionaries to instigate "totalitarian democracy."[15] Derived from the Age of Reason,[16] the French Revolution demonstrated that the unconstrained pursuit of the "natural and imprescriptible rights of man"[17] gives rise to a paradox. The French Revolution aimed to destroy hierarchy but was powerless to free itself from its own hierarchical and

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8. BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY RACE, HISPANIC OR LATINO ETHNICITY, SEX, AND AGE (2009), ftp://ftp.bls.gov/pub/special.requests/lf/aa2008/pdf/cpsaat5.pdf.

9. David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform* 72 LAW & CONTEMP. PROBS. 177, 179 (2009).

10. JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING 15 (2007) [hereinafter GOLDBERG, LIBERAL FASCISM].

11. *See* Randall G. Holcombe, *The Growth of the Federal Government in the 1920s*, 16 CATO J. 725, *available* at http://www.cato.org/pubs/journal/cj16n2-2.html (showing relatively stable government spending through the nineteenth century and into the twentieth century except for periods of war, until the Progressive Era, during which government spending rose continuously).

12. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 38–43.

13. *See* DAVID ANDRESS, THE TERROR: CIVIL WAR IN THE FRENCH REVOLUTION 1 (2005).

14. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 3 (1989).

15. *See* JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 194 (1993).

16. ANDRESS, *supra* note 13, at 1–2. *But see* GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 41 (explaining that the French Revolution, which is often mistaken as the wellspring of rationalism, was actually a romantic spiritual revolt attempting to replace the Christian God with a Jacobin one).

17. *See* ANDRESS, *supra* note 13, at 1; GRAY, *supra* note 15, at 194.

tyrannical impulses.[18] Accordingly, the Revolution marginalized the many for the benefit of the few, transforming the notion of justice into an attractive illusion.[19] This hopeless descent into darkness led people to use cruelty as a vehicle of societal transformation.[20]

Both the French Revolution and Lenin's Russian Revolution originated with the Enlightenment.[21] Both revolutions were incited by a sentimental faith in humanity grounded in scientific knowledge.[22] The idea of a self-consciously planned society found later expression in New Deal efforts to remake the world through progressive values.[23]

Labor reformers viewed "the working poor and other economically marginal groups with great ambivalence."[24] Progressive reformers "depicted the poor as victims in need of uplift but also as threats requiring social control."[25] Though progressives supported labor initiatives, they simultaneously depicted many groups of poor workers as undeserving of assistance, "arguing that in the name of social control the labor force should be rid of unfit workers," including African Americans, women, immigrants and other so-called "defectives."[26] These ideas gave rise to a social hierarchy that deemed African American workers as "unemployable."[27] The negative effects of this marginalization continue to plague Blacks today.[28]

American liberalism, like French liberalism often sacrifices liberty in order to impose equality.[29] In France, Robespierre fanatically promoted "the despotism of liberty"[30] by creating revolutionary tribunals in which the same individuals served as judge, jury, and prosecutor and the accused was deprived of the right to a defense.[31] Similarly, New Deal labor statutes

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18. *See* ANDRESS, *supra* note 13, at 6 (explaining that revolutionaries "who lived blameless lives of moral purity, [such as Maximilien Robespierre], were most willing to consign the innocent to a traitor's death," and that "[t]hose who ended the Terror . . . were those who had most profited from it.").

19. *See id.*

20. *See id.* at 1–7.

21. GRAY, *supra* note 15, at 195.

22. *Id.*

23. For a discussion of New Deal efforts to remake the world through progressive values, *see* Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL.J. OF CORP. L. (2010) (forthcoming) *available* at http://ssrn.com/abstract=1547163.

24. Bernstein & Leonard, *supra* note 9, at 180.

25. *Id.*

26. *Id.*

27. *See id.*

28. *See, e.g.*, Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151, 155–56 (1990).

29. *See* Roger Scruton, *Liberty and Equality*, AM. SPECTATOR Jun. 2008, at 38.

30. *Id.*

31. *Id.*

were a putative effort to guarantee worker freedom, eliminate economic inequality, and symbolize social justice and the common good.[32] Unfortunately, the New Deal birthed a paradox: less freedom, equality, and justice.

In a similar vein, the Soviet experiment awed leading New Deal economists,[33] while many other progressives expressed admiration for the social movements instituted by Mussolini, Lenin, and Stalin.[34] Admiration of foreign regimes led to New Deal enactments, which, compelled by the vigorous support of labor unions, inaugurated a legal regime that imposed devastating consequences on African Americans and minorities. As a 1930s civil rights activist pointed out, "NIRA [National Industrial Recovery Act] redistributed employment and resources from Blacks—the most destitute of Americans suffering from the Depression—to the White masses."[35]

Over the past several years, politicians and union advocates have put forward a number of proposals aimed at eliminating employer hierarchy and increasing union membership. The steep drop in contemporary labor union density rates,[36] particularly within the private employment sector, has reduced labor's bargaining power and also forecasts a decline in labor's political and social influence.[37] Taken together, this diminishes the likelihood that labor can reshape America as a collectivist enterprise bred by elite opinion.[38]

Provoked by the claim that the statutory right to organize is a sham,[39] labor union advocates have offered a number of ideas that include acting like a genuine rights movement,[40] encouraging open source unionism,[41] and creating alternative nonunion worker organizations.[42] But if

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32. *See* Harry G. Hutchison, *Work, The Social Question, Progress and the Common Good?*, 48 J. CATH. LEG. STUD. 59, 98–111 (2009) [hereinafter, Hutchison, *Work, The Social Question*] (book review discussing New Deal labor law efforts).

33. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 102.

34. *Id.* at 103.

35. David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 120 (1993) [hereinafter Bernstein, *Roots of the "Underclass"*].

36. Private sector density fell from around 35% to 36% in the early 1950s to about 7.4% in 2006. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE NO. 07-0113 (2007), http://www.bls.gov/news.release/archives/union2_01252007.pdf.

37. Harry G. Hutchison, *Compulsory Unionism as a Fraternal Conceit? Free Choice for Workers: A History of the Right Work Movement*, 7 U.C. DAVIS BUS. L.J. 125, 155 (2006) [hereinafter Hutchison, *Compulsory Unionism as a Fraternal Conceit*].

38. *Id.*

39. *See, e.g.*, James Gray Pope, Peter Kellman & Ed Bruno, *The Employee Free Choice Act and a Long-Term Strategy for Winning Workers' Rights*, WORKINGUSA: J. LABOR & SOC'Y 125, 125 (2008).

40. *See id.* at 126.

41. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 193–205 (updated ed. 2006).

42. Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 385 (2005–2006).

Andress, a prominent French Revolution historian, is correct, we should be wary of labor initiatives aimed at creating a new world order for labor relations, particularly when they are enforced by centralized state power.[43] For example, the new world order born from the end of Soviet Communism, is now no more than a morass of moral ambiguity and expediency.[44] It is possible that attempts to achieve a new world order in labor relations via the Employee Free Choice Act (EFCA) will provide a similar opportunity for abuse and expediency.

Originally proposed in 2007[45] and reintroduced in March, 2009, EFCA is one of the newest attempts to transform labor relations[46] by eliminating NLRA safeguards that protect workers from union intimidation and employers' economic interests. The first safeguard to disappear under EFCA would be the use of a secret-ballot system as the means for unions to become the exclusive representatives of employees.[47] Second, EFCA would eliminate the requirement of free negotiation between management and labor and instead substitute compulsory arbitration as the means for obtaining collective bargaining agreements.[48] Although some labor union advocates contend that American labor law ought to democratize the workplace by destroying hierarchical command structures,[49] this proposal, by contrast, is likely to expand labor hierarchy and labor market cartelization[50] and diminish the employment prospects of racial minorities. As such, EFCA is marred by contradiction. Rather than embracing freedom for workers, eliminating poverty and expanding opportunities for all, this proposal would likely pervert such goals and instead operate consistently with the record of exclusion and subordination tied to American Progressivism and the labor movement.[51]

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43. *See* ANDRESS, *supra* note 13, at 1.

44. *Id.*

45. Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007) (proposed amendment to the National Labor Relations Act).

46. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009) (proposed amendment to the National Labor Relations Act).

47. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 9, 21–24.

48. *Id.* at 9, 54–67.

49. *See* Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 4–6 (1988).

50. A cartel is a device created to raise prices. *See, e.g.*, Andrew Dick, *Cartels and Tacit Collusion*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., 2002). It is made up of members of a particular group or groups. *See id.* Members of these groups advance collusive efforts to raise prices within the labor sector by excluding other groups and individuals. *See, e.g., id.*

51. *See* Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 118–126 (1997) [hereinafter, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*] (examining the exclusionary history of labor unions in the United States).

By increasing African American unemployment, widening existing disparities in income, and furthering exclusions along racial lines, EFCA, if enacted, is likely to issue forth as another weapon of subordination by the majority. EFCA would fulfill W.E.B. Dubois's prophetic declaration that "instead of taking the part of the Negro and helping him toward physical and economic freedom, the American labor movement from the beginning has tried to achieve freedom at the expense of the Negro."[52] While Dubois was a progressive himself,[53] his warning echoes in the comments of others who found the New Deal labor regime oppressive.[54]

This Article concentrates on the exclusionary effects of EFCA. Part I briefly introduces Critical Race Reformist Theory, which represents the combination of Critical Race Theory (CRT) and classical-Liberal (Reformist) approaches to racial discrimination. Critical Race Reformist Theory provides a useful tool of analysis for discovering harmful programs and legislation. Part II of this Article looks at the often racist history of American Progressivism. Part III examines the likely unemployment consequences of EFCA, relying substantially on information from Canada and analysis provided by economist Anne Layne-Farrar. Part IV examines American labor law through the lens of American history as well as Apartheid-era labor history of South Africa. Properly understood, the enactment of EFCA would vitiate the aspirations of African Americans and slow the rate of racial progress while reifying illusory claims offered by union hierarchs. Borrowing FDR's notion that an idea's worth should be measured by the results achieved,[55] I contend that a principled conception of the common good and social justice cannot be advanced by EFCA; accordingly, this scheme and similar labor proposals[56] ought to be rejected in order to advance the interest and welfare of individuals and groups that comprise the most marginalized among us.

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52. Bernstein, *supra* note 35, at 85 (quoting W.E.B. Dubois, *The Denial of Economic Justice to Negroes*, THE NEW LEADER, Feb. 9, 1929, at 43, 46).

53. *See, e.g.*, GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 102–103.

54. *See, e.g.*, JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 87–88 (1976) (noting the comments of economist Robert Weaver that the period of pro-labor legislation did not benefit all racial groups equally and that differentials based on race threatened to destroy not only the New Deal recovery program but any hope of an egalitarian labor movement in the United States).

55. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 132.

56. At this writing there is a move afoot in Congress to modify the EFCA proposal. *See* Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 17, 2009, at A1 (stating that a half-dozen senators friendly to labor have decided to drop the card-check provision).

I. TOWARD A CRITICAL RACE REFORMIST ANALYSIS OF EFCA

Throughout history, America's labor unions have generally treated minority workers badly.[57] For instance, craft unions often limited membership to White males.[58] Despite this history, union supporters contest the idea that unions intentionally support racist policies that impose discriminatory effects on members of minority groups. Such contentions, however heartfelt, seen from the perspective of African Americans, are not necessarily decisive. Professor Charles R. Lawrence explains why:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.[59]

Critical Race Theory (CRT) maintains that assessing policies on the basis of intent makes sense with truly grotesque forms of discrimination, but it is also important to consider the unconscious and incompletely articulated nature of racially discriminatory beliefs and ideas that influence behavior or policy choices.[60] Reformists, on the other hand, are neither focused on the unconscious nature nor the culpability of the discrimination at issue. Instead, reformists concentrate on the rate of racial progress.[61] "From a reformist perspective, responsibility should depend on the propriety of what is done rather than the blameworthiness of what was willed."[62] This means that knowledge of the discriminatory consequences of any labor policy ought to be sufficient to "prove the contention that the policy in question constitutes a form of racial oppression from a reformist vantage point,"[63] unless it can be adequately justified on other grounds. The paramount objective of the Reformist approach is expanding the economic and social progress of minorities, rather than searching for provable racist intent.

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57. Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 75–76 (2005).

58. *See, e.g., id.*

59. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

60. *See id.* (arguing that a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation).

61. Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 101.

62. *Id.* at 102.

63. *Id.*

A convergence of CRT and Reformist approaches calls for an investigation of socio-legal insights in order to assess the discriminatory effects of policy.[64] This combined approach grants greater deference to the concerns of minorities, who traditionally have been excluded from the nation's policy calculations. Even though policy makers may not have engaged in intentionally discriminatory behavior, the racially charged assumptions and the subordinating *consequences* associated with programs and policies that disfavor racial minorities cannot be remedied by simply protesting lack of bad intent.

The impact of a law can result in significant unintended consequences. For example, modern industrial nations have faced job security issues by enacting job security legislation.[65] "The obvious purpose of job security laws is to reduce unemployment, but that is very different from saying that this is their actual effect. Countries with such laws typically do not have lower unemployment rates, but instead have higher unemployment rates than countries without widespread job protection laws."[66] Given these acknowledged effects, and given the often progressive-regulatory assumptions that undergird such enactments[67] it is possible to conclude that support for job security legislation support—inadvertently or deliberately—expands the level of unemployment. This example can be applied by analogy to labor policies in the United States that may disproportionately disfavor members of racial minority groups and, accordingly, impede racial progress.

II. RACE AND AMERICAN PROGRESSIVISM

An accurate understanding of race, racism, and racialization is essential to identifying the intersection of race and American Progressivism. Professor Derrick Bell states the following:

> Race, racialization, and racism are largely modern-day concepts. The three concepts, although distinct in meaning, necessarily developed in tandem. Whereas the concept of 'race' implies 'the framework of ranked categories segmenting the

64. *Id.*

65. THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 208 (3rd ed. 2007) [hereinafter SOWELL, BASIC ECONOMICS].

66. *Id.*

67. *See, e.g.*, STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN L. L. LESTER, EMPLOYMENT LAW: CASES AND MATERIALS, 196–201 (4th ed. 2007) (briefly discussing statutory changes to the at-will doctrine and dismissal standards in other countries). *See also* Gail Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV., 167, 218 (describing the attempt by a labor union federation to improve job security through the imposition of just cause employment laws).

> human population,' racialization denotes the process by which individuals are assigned membership in those categories. Racism is a product of the two: the assignment of negative value to the traits commonly associated with a particular race and the subordinate ranking of that race on the social hierarchy.[68]

Bell explains that by the eighteenth century, "species classification became the dominant pursuit of the scientific community, and the obsession to classify and rank hierarchically the human species resulted in the institutionalization of physical appearance as social status."[69] The endeavor to conceive race primarily in biological terms fits within the science-based ideology of the Enlightenment. This scientific racism reached its apotheosis during the period between Charles Darwin's discoveries and the age of eugenics—a "science" that set the stage for the exclusion of so-called "unfit" workers from the workplace.[70] Reaching its apex during the Progressive Era, this ideology required the nation to cede control to elite revolutionaries and was premised on the inevitability of progress. Similarly, contemporary progressive ideas often reflect a hierarchy of class and race suggesting that the "masses" should cede their power to modern-day elites.

For purposes of analysis, I adopt three axioms about race and inequality in the United States.[71] The three postulates are (1) *Constructivism*: Race is a socially constructed mode of human categorization wherein people use marks on the bodies of others to divide the field of human subjects into subgroups we call "races" for which no deeper justification in biological taxonomy is to be had;[72] (2) *Anti-Essentialism*: The enduring social disadvantage of African Americans is not the result of any purportedly unequal innate human capacities of the races but rather a social artifact, which is a product of the peculiar history, culture, and political economy of American society;[73] and (3) *In-grained Racial Stigma*: An awareness of the racial "otherness" of Blacks is embedded in the social consciousness of the American nation due to the historical fact of slavery. This stigma continues to exert an inhibiting effect on the extent to which African Americans can realize their full human potential.[74]

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68. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 1–2 (4th ed. 2000).
69. *Id.*
70. *See generally* Bernstein & Leonard, *supra* note 9, at 177–204.
71. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 4–5 (2002).
72. *See id.* at 5.
73. *Id.*
74. *See id.*

A. *Grounds for Suspicion: Race as a Basis for Subordination?*

Understanding the link between race, progress, American Progressivism and EFCA requires a brief review of the history of the Progressive movement's fugleman, Woodrow Wilson. After winning election in 1912, he immediately set about to convert the Democratic Party into a progressive party and make it the engine for the transformation of America.[75] In 1913, he vowed to pick only progressives for his administration.[76] It is doubtful that these maneuvers, examined from a Critical Race Reformist perspective, were a positive development for African Americans.[77] In fact, Wilson did much to implement an agenda that created socially constructed racial categories, enforced racial disparity, and advanced racial stigma.

American Progressivism had its genesis in the pursuit of transformative action—best exemplified by President Wilson's exercise of the levers of government armed with a philosophical commitment to unchecked executive branch power. Before he was president, Wilson served as a leading member of the philosophic vanguard that was beginning to shepherd the nation through transformation. Writing an eclogue in 1908, Wilson could not see any reason to limit the coercive power of the state.[78] A nation captured by Wilson's chilling commitment to elite-led majoritarianism, personified by the "Big man" who exercises unrestrained power on behalf of the masses, is likely to threaten the present and the future of members of minority groups as well as all who are seen as incapable of self-government.[79]

President Wilson, the father of modern liberalism,[80] embarked on an attempt to create a progressive country shaped by an unconstrained ruler. He arrested or jailed more dissidents in a few years than Mussolini did during the entire 1920s and did more violence to civil liberties in his last three years in office than Mussolini did in his first twelve.[81]

Early progressives were social Darwinists who believed strongly in eugenics and presumed that the state could create a pure race, a society of

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75. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 104.

76. *Id.*

77. *See* Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 99–102. *See generally* Lawrence, *supra* note 59, at 317–88; Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787 (1994).

78. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 86.

79. *Id.*

80. *Id.*

81. *Id.* Wilson's suppression of civil liberties included the creation of a domestic spying program that enlisted citizens to listen in on their neighbors' phones, read their mail and assist the Army in extracting confessions from Black soldiers accused of assaulting White women. *Id.* at 114.

new men.[82] American Progressives concluded that government must submit to the Darwinian theory of organic life.[83] They viewed government as a living thing freighted by irresistible impulses and requiring ever-expanding power as part of the natural evolutionary process.[84] "Governmental 'experimentation,' the watchword of pragmatic liberals from Dewey and Wilson to FDR, was the social analogue to evolutionary adaptation."[85] Prominent among the themes that Wilson offered was the advocacy of progressive imperialism "in order to subjugate, and thereby elevate, lesser races."[86] He applauded the annexation of Puerto Rico and the Philippines,[87] while maintaining fervently that giving Blacks the right to vote was the foundation of every evil in this country.[88]

Unlike classical Liberalism, which necessitated limited government in order to protect individual rights and liberties, progressives believed in an ever-expanding government committed to the proposition that society was one indivisible whole that left no room for those who did not want to comply.[89] A progressive slant can be seen in the ideology of Margaret Sanger and proponents of selective breeding, who emphasized human perfection coupled with centralized power and restructured social and economic systems.[90] Using the premise that various races were at different stages of the evolutionary process,[91] Sanger and others led the fight for abortion rights and reproductive freedom from a perspective that recalls the hard racism normally associated with Goebbels or Himmler.[92] While this pseudo-scientific approach to race has been convincingly disputed by analysts showing that the concept of race is a socially constructed mode of human categorization,[93] it represents an ongoing attempt to bring evolution under human control.[94] Put another way, many progressives saw the contemporary social and economic position of Blacks as the irremediable, inevitable effect of Darwinism. This conclusion reinforced their commitment to crafting a link between economic reform, socialism, Prohibition, eugenics, and the other elements of the progressive agenda, in order to

82. *Id.*
83. *Id.* at 86.
84. *Id.*
85. *Id.*
86. *Id.* at 83.
87. *Id.*
88. *Id.* at 84.
89. *Id.* at 87–88.
90. *Id.* at 270–77.
91. *Id.* at 260.
92. *Id.* at 270–274.
93. *See, e.g.*, LOURY, *supra* note 71, at 5.
94. RICHARD JOHN NEUHAUS, AMERICAN BABYLON: NOTES OF A CHRISTIAN EXILE 236 (2009).

bring about the "New Jerusalem."[95] Recalling the French Revolution's attempt to replace the Judeo-Christian God with a Jacobin one,[96] the "New Jerusalem" represents a bizarre combination of pseudo-science that is premised on the evolution of the state.[97] President Wilson, who in his own words personified the triumph of science and reason in politics, embodied the pseudo-scientific methodology that would institute God's kingdom on Earth.[98]

B. *Exclusionary Hierarchy and the New Deal*

Where Wilson may have been an intentional totalitarian, Roosevelt became one by default.[99] It was while working as Assistant Secretary of the Navy under Josephus Daniels, a thoroughgoing racist deeply committed to progressive reforms, that Roosevelt developed his politics.[100] When FDR replaced Herbert Hoover in 1933, "three events were viewed as admirable experiments: the Bolshevik Revolution, the Fascist takeover in Italy, and the American 'experiment' in war socialism under Wilson."[101] Individualism in the 1920s had cut the experiment in war socialism short, so when FDR took office, the progressives seized the opportunity to remake the world.[102]

For some progressives, remaking the world required the liquidation of what was seen as America's Black and sinister polyglot population.[103] Typifying this view, H.G. Wells saw Roosevelt as the most effective instrument for creating a new world order.[104] A progressive understanding of the new world order materialized through the accumulation of power by the state. During the French Revolution, one revolutionary anticipating a future fashioned by such accumulated power, offered the following proposal: Let us be terrible so that the people will not have to be.[105] Emulating this approach, Wells fashioned the New Republic.

> And how will the New Republic treat the inferior races? How will it deal with the black? . . . the yellow man? . . . the Jew? . . . those swarms of black, and brown, and dirty-White, and yellow people, who do not come into the new needs of efficiency?

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95. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 219.
96. *Id.* at 41.
97. *Id.*
98. *Id.* at 219.
99. *Id.* at 123.
100. *Id.* at 126.
101. *Id.* at 132–33.
102. *Id.* at 133.
103. *Id.* at 135.
104. *Id.*
105. ANDRESS, *supra* note 13, at 376.

> Well, the world is a world, and not a charitable institution, and I take it they will have to go.[106]

Driven to remake the world, Roosevelt, before his election, promised to "act in the name of 'the forgotten man at the bottom of the economic pyramid.' "[107] He called America to move as a trained and loyal army willing to sacrifice for the good of a common discipline.[108] Still, the desire to remake the world fails to account for a paradox: the probability that the unconstrained pursuit of social justice, progress, and the common good may yield servitude.[109]

As part of America's pursuit of social justice, FDR nominated Hugo Black to the United States Supreme Court. Black's ascendancy to the Court, together with his Klan membership, is consistent with the observation that the Klan of the Progressive Era was rather cosmopolitan, thriving in cities like New York and Chicago, and its views were widely embraced by elite opinion formers.[110] Often seen as reformist and modern, the Klan had a close relationship with some progressive elements in the Democratic Party.[111] Aiding this transformative epiphenomenon were members of the academy representing a constellation of views, including E. A. Ross, who shared Woodrow Wilson's conviction that social progress, "inevitable" as it was, had to take into account the "innate" differences in race.[112]

Consistent with this progressive ideology and consequent labor law reform objectives throughout the period from the Great Depression to the end of World War II, the unemployment gap between Blacks and Whites rose, and FDR continued to disregard pleas from Blacks to support anti-lynching laws and the cry for justice from Blacks who endured "virtual slavery" in Florida.[113] Scholars committed to the "nobility" of Progressivism and collectivism[114] remember that FDR wanted to save capitalism from itself but frequently "forget that he changed not only capitalism but constitutionalism, and the latter unambiguously for the

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106. Stephen M. Barr, The Devil's Chaplain, FIRST THINGS, Aug./Sept. 2004, at 25–26.

107. AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 12 (2007).

108. William Schambra, *Debating the New Deal*, CLAREMONT REV. BOOKS: J. POL. THOUGHT & STATESMANSHIP 16, 19–20, Winter 2007–08, (book review) (stating that both Hoover and Roosevelt were animated by collectivist impulses).

109. *See* F. A. HAYEK, THE CONSTITUTION OF LIBERTY 253–54 (1960).

110. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 259–61.

111. *Id.* at 259–60.

112. *Id.* at 260.

113. *See infra* Part IV.B.1.

114. *See, e.g.*, Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 225–26, 274 (2005).

worse."[115] Among the victims of Roosevelt's questionable constitutionalism, are African Americans who endured depredations at the hands of a selectively interventionist government.

III. THE EMPLOYEE FREE CHOICE ACT: PROGRESS OR MARGINALIZATION?

A. *EFCA*

This subsection briefly examines the language of the Employee Free Choice Act proposal. Introduced on March 10, 2009, EFCA is identical to a bill introduced in 2007. EFCA would amend the NLRA by allowing the National Labor Relations Board (Board) to certify a labor organization as the collective bargaining representative without ordering a secret ballot election if "no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit."[116] EFCA does not provide guidelines and procedures for the designation by employees of a bargaining representative, but orders the Board to do so.[117]

EFCA also provides a mechanism to remedy the fact that labor unions, after winning the right to represent workers, often fail to obtain initial contracts that advance their interests.[118] EFCA, in effect, mandates a first contract by providing (1) a ten-day period for the employer and the union to commence negotiations; (2) a ninety-day period beginning on the date on which bargaining is commenced, or an agreed-upon additional period of time to reach an agreement. Failure to reach a settlement enables either party to notify the Federal Mediation and Conciliation Service (Service) of the existence of a dispute and request mediation; and (3) that after the expiration of the thirty-day period beginning on the date on which the request for mediation is made, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service and the arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of two years.[119]

Disturbingly, EFCA does not provide courts with guidance on how to review the collective bargaining agreement resulting from the

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115. Charles R. Kesler, *The New New Deal*, CLAREMONT REV. BOOKS, Spring 2009, at 3.

116. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 2(a) (2009).

117. *Id.*

118. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 19.

119. H.R. 1409 § 3.

contemplated compulsory interest arbitration award.[120] Although the statute is inadequate to meet the needs of employers and unions who will be affected by its compulsory arbitration process,[121] EFCA seems to encourage the parties to fall back on compulsory interest arbitration rather than attempt to bargain for a contract.[122]

EFCA would strengthen enforcement of the NLRA by providing: (1) injunctions against unfair labor practices during organizing drives, (2) enhanced back-pay remedies, and (3) civil penalties for employers who willfully or repeatedly commit unfair labor practices while employees are seeking representation by a labor organization.[123] The imposition of enhanced penalties attempts to remedy a flawed election process that encourages impermissible employer hostility.[124] Given these and other claims, it makes sense to look at the empirical data surveyed, compiled, and adduced, which forecast the impact of EFCA on African Americans to ascertain whether the proposal echoes past subordinating efforts.

B. *The Empirical Evidence*

Before examining an empirical assessment of EFCA, which illustrates the proposal's economic implications,[125] consider the principal arguments offered by supporters of EFCA. EFCA supporters present three primary arguments that EFCA will reverse the long-term decline in unionization.[126] First, "advocates claim that the NLRA is not working effectively, which requires the enactment of EFCA to make it easier for unions to organize workers, and which ostensibly will reverse the long-term decline in unionization."[127] Second, supporters posit that EFCA will reduce employer coercion, including "unfair labor practices (ULPs), which, according to EFCA's proponents, are primarily responsible for the current low levels of private sector union representation."[128] Lastly,

120. Andrew Lee Younkins, *Judicial Review Standards for Interest Arbitration Awards Under the Employee Free Choice Act*, 43 U.S.F. L. REV. 447, 448 (2008).

121. *Id.*

122. *Id.*

123. H.R. 1409 § 4 (2009).

124. *See, e.g.*, James J. Brudney, *Neutrality Agreement and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 819, 832, 877 (2005) (suggesting that the NLRB election paradigm is no longer normatively justified because it regularly permits conditions, including employer intimidation, that preclude the attainment of employee choice.); *but see* Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE. L. REV. 685, 695–97 (2003) (disputing the employer hostility thesis).

125. *See* Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, 1, 1–45 (2009), available at http:/ssrn.com/abstract=1353305.

126. *Id.* at 4.

127. *Id.* at 4.

128. *Id.*

"[p]roponents argue that, under EFCA, more union and nonunion workers will gain access to better health care, increased wages and a generally better standard of living, thus improving social welfare."[129] While unionization may expand under this proposal, existing research—including some studies otherwise favored by unions—contradicts most arguments in support of EFCA.[130] This suggests that the focus on the plight of workers and employer hostility as justifications for EFCA may conceal other reasons why union leaders and their allies support such legislation.

1. A Preliminary Analysis of the Effect of Unionization

There is no doubt that unions have suffered a long-term decline in unionization rates. Explaining this decline is complex. Though EFCA supporters contend that the steady reduction in unionized workers is "the result of employer misconduct that has been improperly permitted under U.S. labor law,"[131] examining the empirical record of unionization elsewhere fatally weakens this contention.[132] In fact, "the levels of unionized workers have declined everywhere in developed economies, regardless of the labor law regime in effect."[133] Data from fourteen developed countries shows that "private sector unionization across all countries has been strongly declining since the 1970s."[134]

Factors other than employer hostility explain the decline in unionization in America. After all, in the absence of union intimidation, a successful union organizing campaign requires employees to have an underlying desire to belong to a union, and ample evidence indicates that modern employees find unions less attractive than past generations of workers.[135] In the United States, a recent Zogby poll found that only sixteen percent of non-unionized workers would definitely vote to unionize.[136] This supports the argument that the leading factor in the decline in private sector unionization is a lack of worker interest in and consequent demand for labor organizations.[137] In 1992, labor economists

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129. *Id.* at 5.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (quoting Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV., Jan. 2006, at 38.) .

135. *Id.*

136. Tim Kane, *The AFL-CIO's Disintegration and its Possible Implications*, HERITAGE FOUNDATION, Jul. 28, 2005, http://www.heritage.org/Research/Labor/wm808.cfm.

137. Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause of labor's Decline in Employee Representation*, *in* THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 41, 42 (Samuel Estreicher ed., 1998)

Farber and Krueger reported that "demand-side factors" are almost wholly responsible for the entire decline in the union membership rate since 1977.[138] American unions must shoulder a good portion of the blame for their failures.[139] Private sector unions continue to lose ground because they no longer provide their membership with benefits that exceed their costs.[140] Such evidence casts doubt on assertions that workers value compulsory unionization and that their preferences are hindered by employer coercion. Given the survey evidence and the fact that only a minority of private-sector workers believe that unions are the best vehicles to advance their interest, the employer coercion hypothesis is highly unlikely.[141]

Although data shows that workers represented by a union can expect higher wages,[142] many "[e]conomic studies find most, if not all, of the gains of union labor are made at the expense of nonunionized workers."[143] Some studies indicate that union monopolies raise wages of union members in exchange for both market inefficiency and inequality.[144] Labor unions produce benefits for union hierarchs and few workers in the name of the many; it is clear that not all members of the union benefit equally.[145] Achieving higher wages for organized workers typically means increasing the wages of members who keep their jobs while shifting some workers to lower-wage jobs in the nonunion sector or, alternatively, into

("[S]hifts in general social attitudes respecting individualism have altered the predisposition of workers to consider collective solutions to workplace problems.").

138. Layne-Farrar, *supra* note 125, at 6 (quoting Henry Farber and Alan Krueger, *Union Membership in the United States: The Decline Continues*, 32 (Nat'l Bureau of Econ. Research, Working Paper No. W4216, 1992)).

139. Layne-Farrar, *supra* note 125, at 6–7.

140. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1407 (1983).

141. Harry G. Hutchison, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values*, 39 SETON HALL L. REV. 779, 801 n. 146 (2009) [hereinafter Hutchison, *Liberty, Liberalism and Neutrality*].

142. Layne-Farrar, *supra* note 125, at 9.

143. STEVEN E. RHOADS, THE ECONOMIST'S VIEW OF THE WORLD: GOVERNMENT, MARKETS, AND PUBLIC POLICY 256 n. 55 (1985) (internal quotation removed). This observation becomes more salient when one recognizes that "[f]or most workers, all or almost all their income is derived from the sale of their labor." STEPHEN J. SPURR, ECONOMIC FOUNDATIONS OF LAW 18 (2006).

144. RHOADS, *supra* note 143, at 256 n. 55. *See also* Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WM. & MARY BILL RTS. J. 1309, 1348–49 (2005) [hereinafter Hutchison, *A Clearing in the Forest*] (explaining how unions affect equality and the economy).

145. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1339–42. The data also indicate that higher wages for union workers tend to compress the overall distribution of wages. Layne-Farrar, *supra* note 125, at 9. Thus, the presence of unions significantly reduces the wage differential between industries, between firms in the same industry, and also between workers within a firm. *Id.* at 9–10.

the unemployment line.[146] This lowers the wage rate paid to individuals who were already employed in the nonunion sector.[147] This is because a firm deals with the higher cost per worker associated with a unionized workforce by reducing the number of unionized positions.[148] This process could arise by shifting work patterns within unionized firms or by nonunionized firms achieving a higher market share.[149] In addition to increasing unemployment, unions also tend to slow the growth rate in employment itself. One study shows that a ten percent increase in the unionization rate may lead to a reduction in employment growth rates of up to 1.1%.[150] Union members also average fewer hours of work when compared to nonmembers.[151] Some estimate that during the second year after union elections, work hours decrease by eleven percent in plants where the union was successful.[152]

Turning to the effect of unions on the economy as a whole, as union labor costs rise, firms substitute capital for labor, producing a rise in allocative inefficiencies that lower national production.[153] This supports the argument that unions contribute to both inequality and market inefficiency.[154] This deduction also coincides with the perception that unions have a negative impact on the economy[155] and on social welfare.[156] Evidence shows that unions may contribute to a reduction in Gross Domestic Product (GDP) of 0.40%, which translates to a loss of $57 billion in national output.[157] In addition, data shows that unions likely slow the process of innovation and the overall level of capital investment.[158] For example, nonunion firms invest substantially more money on Research and Development than unionized firms.[159]

International data confirms the deleterious effects of unions. Evidence drawn from Canada shows that unions negatively impact capital investment.[160] In Europe, the Organization for Economic Cooperation

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146. *Id.* at 1349.

147. RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 453 (8th ed. 2003).

148. Layne-Farrar, *supra* note 125, at 10.

149. *Id.*

150. *Id.* (citing Stephen Bronars et al., *The Effects of Unions on Firm Behavior: An Empirical Analysis Using Firm-level Data*, 33 INDUS. REL. 426, 444 (1994)).

151. Layne-Farrar, *supra* note 125, at 10 (showing that union members work about 1.8% fewer hours than their nonunionized counterparts).

152. *Id.* at 10–11.

153. *Id.*

154. RHOADS, *supra* note 143, at 256 n. 55.

155. *Id.*

156. EHRENBERG & SMITH, *supra* note 147, at 461–62.

157. Layne-Farrar, *supra* note 125, at 11–12.

158. *Id.* at 12.

159. *Id.*

160. *Id.* at 12–13.

and Development found that a one percentage point increase in bargaining coverage increased unemployment rates by 7.5%, while inflation and real earnings growth both corresponded with rising labor union representation rates.[161]

The overall picture painted by the literature is a mixed one,[162] which led economist Layne-Farrar to conclude:

> Unionization can raise worker wages, but may reduce unionized jobs and tends to lower GDP. Greater bargaining coverage maintains real earnings growth, but increases unemployment and inflation.... As a matter of basic economic theory, the studies in the literature therefore suggest, but in all likelihood underestimate, negative unintended consequences from passing EFCA.[163]

As union members' real earnings grow as a result of higher wages the non-union workforce rises. This results in a decline in non-union, wages, an increase in unemployment, and a rise in income disparity.

2. The Canadian Experience with Card Check

Canada offers a rich field for evaluating the potential impact of EFCA on the U.S. labor force for two reasons.[164] "First, for the last three decades union certification procedures in Canada have undergone significant changes over time and across provinces, driven by political considerations rather than economic ones."[165] "Second, the similarities in industrial structure coupled with the economic integration between Canada and the U.S. allow [analysts] to use the Canadian experience as a natural experiment for the U.S. economy."[166] While labor law is determined at the federal level in the United States, most employers in Canada are regulated by provincial labor legislation.[167] Until 1976, all provinces employed a card check regime for union certification, but after 1976, several Canadian provinces experimented with regimes that required unions to win secret ballot elections.[168] "As of 2006, half of the Canadian provinces use mandatory voting regimes, accounting for roughly 68% of the

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161. *Id.* at 13–14.

162. *Id.* at 14.

163. *Id.* at 14–15.

164. *Id.* at 15.

165. *Id.*

166. *Id.*

167. *Id.* Employers subject to federal regulation in Canada include the federal government, airlines, inter-provincial transportation, banking, telecommunications, grain production, fisheries, and uranium processing. *Id.*

168. *Id.* at 15–16.

Canadian labor force, while the remaining provinces covering 32% of the labor force rely on card check systems."[169]

The effect of shifting between card check and mandatory voting regimes shows that a mandatory voting rule significantly reduced the success of union certification efforts in comparison with a card check system. A number of empirical studies make clear that a card check system[170] brings a higher success rate for unionization. On one account "between 17 and 24% of the difference in union density between the United States and Canada can be explained by virtue of the fact that mandatory voting is more prevalent in the U.S. than in Canada."[171]

In addition to "frequent changes in provincial certification procedures, the requirement of first contract arbitration has also varied by province over time. By 1994, seven provinces had introduced first agreement arbitration that applied to all negotiation efforts."[172] It is possible that first agreement arbitration also leads to increased unionization.

Developing her own economic model, Layne-Farrar constructed a data set of Canadian provinces over a twenty-two year period in order to study the impact of union density on a number of economic outcomes in Canada.[173] Among other things, she examined the impact of higher union density resulting from moving to a card check and mandatory arbitration regime.[174] A ten percent increase in union density creates a three percent increase in the unemployment rate.[175] This is a substantial effect,[176] which indicates that card check regimes have the capacity to significantly alter the workforce by encouraging the exclusion of some in order to provide economic benefits for workers who remain employed.

3. Projected Empirical Results for the United States

Layne-Farrar used the Canadian results to evaluate how much the U.S. unemployment rate would rise with the passage of EFCA. She initially assesses how much union density can be reasonably expected to rise in response to an embrace by the federal government of a new card check and compulsory arbitration regime. Sheldon Friedman, research coordinator for the AFL-CIO, has stated that "EFCA 'could spur an increase in U.S. union density of nearly five percentage points and perhaps much

169. *Id.* at 16.

170. A card check system enables workers to simply sign a card expressing a preference for a union. *Id.* at 2. If a majority of workers do so, the union becomes the representative of the workers in the bargaining unit. *Id.*

171. *Id.* at 16–17.

172. *Id.* at 17.

173. *Id.* at 20.

174. *Id.* at 21.

175. *See id.* at 22.

176. *Id.* at 23.

more.'"[177] Andy Stern, president of the SEIU, "estimates that the passage of EFCA will increase union membership by 1.5 million each year for the next 10–15 years."[178] In response to these estimates, Layne-Farrar forecasts that if card checks and a mandatory contract arbitration system were to increase union density by five percentage points, the U.S. unemployment rate would rise during the following year by 1.49 to 1.77% points over current levels, which amounts to an increase of 2.38 to 2.71 million unemployed workers.[179] If the passage of EFCA were to increase union membership by 1.5 million each year for the next ten years, then unemployment is predicted to rise by between 5.3 million and 6.2 million people,[180] meaning that Black unemployment would likely rise by almost one million workers.[181] As one might expect, in addition to an increase in the unemployment rate, the overall employment rate for the nation as well as overall industry output would fall.[182] Taken together, along with the fact that Blacks are often the most vulnerable population during periods of rising economic dislocation, these developments are likely to exacerbate African American unemployment and poverty rates.

IV. DECONSTRUCTING EFCA: A CRITICAL RACE REFORMIST VIEW

A. *Prolegomena*

Supported by commentators and doubtlessly fueled by union campaign contributions,[183] card-check initiatives have recently become

177. *Id.* (internal citation omitted).

178. *Id.*

179. *Id.* at 23.

180. *Id.* at 24.

181. As of May 2009, the unemployment rate for Black workers in the U.S. was almost fifteen percent. *See* Table *supra*, note 6. Fifteen percent multiplied by the overall expected unemployment level of 6.2 million equals 930,000 Blacks who will be added to the ranks of the unemployed. *See id.*

182. Layne-Farrar, *supra* note 125, at 24–26.

183. Labor unions receive vast sums of money. According to the U.S. Department of Labor, labor unions receive upward of $17 billion a year in revenues. *See* LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS 12 (2004). Technically speaking, unions report that they spend no money on politics because political contributions would be taxable. *Id.* at 13. But the lack of transparency in union spending allows for the possibility that labor union political spending is very substantial. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1316–17. Several reports suggest a possible pattern of under-reporting of direct and indirect union political expenditures. *See, e.g.*, *Beck Rights 2001: Are Workers Being Heard?: Hearing Before the Subcomm. On Workforce Protections of the H. Comm. on Education and the Workforce*, 107th Cong. 29–35 (2002) (statement of Raymond J. LaJeunesse, Jr., Vice President & Staff Attorney, National Right to Work Legal Defense Foundation, Inc.) (suggesting that union political action committees and issue advocacy amount to between $300 million and $500 million in a presidential election year).

politically viable. Plainly, the selection of the workers' exclusive bargaining representative through an uncontested card check procedure, rather than a contested secret ballot election, is appealing to labor leaders. If a union can traverse the card check process successfully, it will obtain a new and potentially rich source of union dues, which can yield political influence and economic and ideological benefits to leaders and their allies.[184] Elections, on the other hand, carry the risk that the union organizing effort will fail because workers are called upon to make open-minded decisions about union membership, which requires evaluating both the advantages and disadvantages. EFCA is an attempt on the part of labor organizations to increase their strength through the application of governmental power, rather than relying on workers' informed choice.

The principal purpose animating attempts to increase union power and influence has escaped sustained attention. Labor unions seek to acquire dues not only to provide benefits for some workers, but also to fuel union efforts to achieve something far greater—societal transformation.[185] Societal transformation materializes in the form of the ever–expanding state. This transformation from limited to expansive government produces direct and collateral effects that fail to supply uniform benefits for all members of the polity. After all, the "consequences in modern democracies of the erosion of civil society by an expansionist state has everywhere been the outbreak of a *political war of redistribution*."[186] This redistributive war habitually favors hierarchy and seldom favors the marginalized.[187] "From being an umpire [that] enforces the rules of the game of civil association, the state has become the most potent weapon in an incessant political conflict for resources."[188]

Consider the example of President Roosevelt. Though the drafters of the Constitution sought to entrench precautions such as the doctrine of federalism in order to constrain governmental power, President Roosevelt became frustrated by such precautions. For instance, New Deal reformers, including FDR, quickly scrapped their earlier states' right views in favor of federal regulation of the labor market.[189] They predicated this move on the view that progressive social progress "equated active government with good government."[190] Accordingly, the Progressive the-

184. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1380–81 (showing unions tend to consume up to eighty percent of union dues on indirect political, ideological, and other purposes unrelated to collective bargaining and representation).

185. *Id.* at 1380.

186. GRAY, *supra* note 15, at 12.

187. *See id.*

188. *Id.*

189. DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 94 (1995).

190. RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 7 (2006).

ory of government generated a compatible constitutional theory that eviscerated any constitutional doctrine that stood in the way of comprehensive reform.[191] Unswerving from the organizing premises of the New Deal and the newly-ascendant zeitgeist favoring centralized power, FDR sought to avoid constitutional constraints on his powers by threatening to change the constitutional order to suit his preferences by packing the Supreme Court.[192] During the New Deal, "[the] question of whether the constitutional order should be altered to give [FDR's Progressives] plenary regulatory power over the economy" despite strong public opposition was "one of almost immeasurable importance. If political elites could go against majority opinion on such a fundamental and far-reaching question, it is hard to conceive of a situation, whether in normal politics or otherwise, where they would be substantially less constrained than this."[193] Once the encroaching power of the state is unleashed, it is doubtful that progressives can discover a principled stopping point with regards to the state's power to create pro-union entities such as labor cartels.

History is rife with examples of political maneuvers favoring the powerful. Jim Crow legislation in the South and the federal government's failure to enact and enforce anti-lynching laws is one.[194] Today progressive values that subordinate authentic individuality and diversity to the tyranny of collectivism epitomize such moves.[195] While contemporary labor union proponents issue poignant calls to breathe life into New Deal Progressivism premised on the need to attain equality, as well as economic and social justice,[196] progressivism accompanied by government coercion may provide the opposite. Because Americans, by and large, are not committed to the principles of collectivism and because the interests of unionists are frequently antagonistic to those of workers,[197] government must, at times, enforce pro-union efforts without strong popular support. This is possible

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191. *Id.*

192. *See* Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 660 (2003) (discussing FDR's attempt to pack the Supreme Court).

193. *Id.* at 628.

194. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 255 (describing President Wilson's modern racism that gave rise to the resegregation of the federal government, support for anti-miscegenation laws and opposition to anti-lynching laws).

195. *See, e.g.*, Dannin, *supra* note 114, at 274 (asserting the view that "[t]he war is between those who support collective values and well-being for all and those who support unbridled individualism; between those who value workplace and social democracy and those who promote workplace and governmental totalitarianism."). Professor Dannin's analysis shows that today's progressives remain captive to the mores of the Progressive Era. *See id.*

196. *See* Dannin, *supra* note 114, at 274.

197. *See, e.g.*, W. H. HUTT, THE THEORY OF COLLECTIVE BARGAINING: 1930–1975 8–9 (2d ed. 1975) (1930).

because liberalism, the customary governance theory in democratic societies,[198] provides two related possibilities: authoritarianism and capture by powerful factions.[199] Once an organization captures power, it can be deployed by hierarchs in order to control society. Accordingly, as soon as the levers of power are seized, political and ideological elites often force the government to take sides and impose their will.[200] This approach placates narrow, well organized interest groups and places policymaking into the hands of an autonomous progressive elite.[201]

Trade unions, as well as other largely autonomous institutions that populate the West, have an incentive to give up their independence to become tools of political advantage for various interests.[202] Mounting evidence indicates that the mission of the modern state is "to satisfy the private preferences of collusive interest groups."[203] Insofar as it is possible to achieve private aims and objectives through government processes more efficiently than by relying on market processes,[204] many groups and oligarchs have an incentive to capture government to attain private gain at the expense of the marginalized. American unions are one of these types of groups. This is evidenced by the fact that they spend only a small amount of their dues revenues on collective bargaining and related activities, while expenditures for political and related purposes continue to rise on a per member basis.[205] Rising union political expenditures[206] supports the contention that government intervention

198. *See, e.g.*, Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, *in* OUT OF AND INTO AUTHORITARIAN LAW 125–149 (Andras Sajo ed., 2002) ("Authoritarianism is an inherent structural tendency of democratic regimes.").

199. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1339–42 (discussing capture).

200. *See* Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note 141, at 810.

201. Somin, *supra* note 192, at 657–58 (discussing the Roosevelt Administration's push to enact the NLRA in spite of the absence of strong public support). Woodrow Wilson's "Big Man" thesis explains how this occurs: the leader's conception of the state as an organic whole legitimates undemocratic action and unchecked power. See GOLDBERG, *supra* note 10, at 86 (discussing Wilson's commitment to the "Big Man" thesis and his support for the notion that government must conform to the Darwinian theory of organic life).

202. GRAY, *supra* note 15, at 12.

203. *Id.* at 11–12. This is so "whether or not the pursuit of such aims is cloaked in language implying some pure public purpose or alternatively infused with the language of market failure." Hutchison, *Liberty, Liberalism, and Neutrality*, *supra* note 141, at 825 (internal citation omitted).

204. WILLIAM C. MITCHELL & RANDY T. SIMONS, BEYOND POLITICS: MARKETS, WELFARE AND THE FAILURE OF BUREAUCRACY 109 (1994).

205. Harry G. Hutchison, *The Market for Union Representation: An Information Deficit or Rational Behavior*, 94 VA. L. REV. 15, 16 (2008).

206. Hutchison, *Compulsory Unionism as a Fraternal Conceit?*, *supra* note 37, at 126–27 (citing evidence of the continued growth in total receipts by several major unions that make up the AFL-CIO while membership levels have declined).

on behalf of labor provides disproportionate benefits to members of the labor union hierarchy and their political and ideological allies, fewer benefits to members of the rank and file, and nothing but bitter experience to workers displaced by enforced unionism.[207]

Because African Americans and members of other marginalized groups make up a disproportionate share of the latter category,[208] and because Critical Race Reformists challenge the social vision that reinforces and contributes to the enervation of people of color, it is time for the concerns of outsiders to take center stage when the nation considers new labor market legislation. The suppression of marginalized individuals and groups is the most recent in a line of Progressive Era paradoxes. For example, contemporary evidence shows that Congress enacted the Fair Labor Standards Act during the New Deal purportedly as a vehicle to advance the interest of marginalized workers.[209] However, it currently disfavors the poor by increasing the number and percentage of unemployed workers coming from lower-class families, while disproportionately supplying benefits in the form of higher wages to young people living in middle-to-upper-class families.[210] This inversion emphasizes the continuing effect of exclusionary labor policies.[211]

B. *Race in the Mirror of Hierarchy*

While proponents argue that EFCA makes it easier for employees to obtain collective bargaining agreements by leveling the playing field between employees and employers and prevents stonewalling by managers, as well as[212] counteracting wage declines by ensuring fair wages and fair

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207. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1339–42 (explaining how labor unions produce benefits for the few in the name of the many and disputing the claim that all members of the group benefit equally).

208. *See, e.g.*, *supra* Part I. *See also*, DOUGLASS NORTH & ROGER MILLER, THE ECONOMICS OF PUBLIC ISSUES 125 (1983) (noting that when the minimum wage was increased by 33.3%, non-White teenage unemployment increased from 13% to more than 24%); Donald Deere et al., *Sense and Nonsense on the Minimum Wage*, 1 REGULATION 47, 51 (1995) (showing African American teenagers were disproportionately unemployed as a result of rise in the minimum wage).

209. Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 104–06.

210. *See* STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN L. L. LESTER, EMPLOYMENT LAW: CASES AND MATERIALS, 577 (4th ed. 2007) (showing that although the minimum wage continues to enjoy wide-spread support, only seventeen percent of low-wage workers in the United States were living in poor households in 2003, and thus, the people who are generally favored by this type of intervention in the market are not poor).

211. *See infra* Part IV.B.1.

212. *See* 155 CONG. REC. E620 (daily ed. Mar. 10, 2009) (remarks of Rep. Stark).

benefits,[213] it is important to note that labor unions and their ideological allies—rather than workers—are the most committed supporters of this proposal. An examination of America's labor history reveals the true motivation behind this advocacy.

1. America's Labor History

It is clear that "the original progressive architects, and some New Deal renovators, were partisans of human inequality. For example, the labor legislation they pioneered was designed to exclude immigrants, women and African Americans."[214] Additionally, progressives were enthusiastic "biologizers."[215] Biologizers believed that biology—i.e. race—determined human worth. "American labor reformers judged an impressive array of human groups—male Anglo-Saxon heads of household excepted—to be unworthy of work, or 'unemployable.' "[216] These reformers premised their judgements, at least in part, on the claim that low-wage races were hereditarily predisposed to low standards of living,[217] which, accordingly, placed superior races at risk.[218] American labor law largely commenced during President Hoover's administration with the passage of the Davis-Bacon Act, followed by President Roosevelt's creation of the National Recovery Administration (NRA). Brimming with claims that it would advance social justice, the NRA in fact led to bureaucratic managerialism, a quasi-scientific process in which government regulated the terms of employment as well as the conditions under which labor unions materialized. Supporters justified this structure by contending that government possessed resources that rank and file citizens and workers lacked.[219] Enforced by threats and violence, this program granted new collective bargaining powers to unions, including the power to lock Blacks out of the labor force.[220] Despite criticism from members of the Black press, labor unions were delighted to take advantage of this new found power.[221]

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213. *See* 155 CONG. REC. S2967 (daily ed. Mar. 10, 2009) (statement of Sen. Kennedy).

214. Bernstein & Leonard, *supra* note 9, at 177.

215. *Id.* at 179.

216. *Id.* at 180.

217. *Id.* at 180–81 n.7.

218. *See id.* at 181.

219. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 85 (2nd ed. 1984) (suggesting that as the government accepts that it can manipulate human action, it becomes a hierarchy of bureaucratic managers and explaining that the major justification advanced for the intervention of government in society is that government has resources of competence, which most citizens do not possess).

220. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 155–56.

221. *See id.* at 156.

The NRA, an institutional outgrowth of the National Industrial Recovery Act (NIRA),[222] was only one of many pro-union programs implemented during the Hoover and Roosevelt administrations. These programs, which essentially created labor cartels, prolonged and worsened the Great Depression.[223] Wrongly blaming high unemployment levels on low wages and low prices, the government engaged in a disastrous effort to raise wages and prices.[224] It is difficult to ignore the evidence that several years' worth of sustained government planning merely created a depression within a Depression.[225] As such, NIRA, the flagship program of the New Deal, was a mammoth public policy failure.[226] FDR's attempt to supply centrally-planned price controls and production limits caused a "massive six to eleven percent decline in the United States' Gross National Product (GNP) in an already depressed economy."[227] While unions thrive when the government invades the marketplace through bureaucratic laws and regulation,[228] this invasion imposes costs on the overall economy and disproportionately disfavors members of marginalized groups. As previously noted, even staunch labor union defender Professor Richard Freeman acknowledges that "unions raise wages in ways that misallocate labor and reduce social output."[229] Consistent with these observations, "[t]o the extent that unions are successful, they redistribute income toward their members, who are predominantly White, male and well paid, at the expense of consumers as a whole, taxpayers, non-union workers, the poor, and the unemployed."[230]

This disheartening picture comes into sharper focus when considering members of minority groups. The American labor movement is inescapably linked to intentional racist oppression.[231] While this problem is not unique to the United States, the American labor movement notably

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222. Act of Jun. 16, 1933, ch. 90, 48 Stat. 195 (formerly codified at 15 U.S.C. § 703).

223. *See* VEDDER & GALLAWAY, *supra* note 6, at 130–43.

224. *See, e.g., id.* at 112–13, 130–43 (noting that rapidly rising money wages tied to banking policies and New Deal wage-raising legislation represented a continuation of the high-wage policy initiated by Hoover and further developed by Roosevelt).

225. SHLAES, *supra* note 107, at 2–3.

226. Somin, *supra* note 192, at 650. This is in spite of the fact that it gave both big business and labor union leaders the opportunity to implement cartelization schemes for product prices and labor markets. *Id.* at 651.

227. *Id.*

228. Hutchison, *What Workers Want*, *supra* note 5, at 826.

229. Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant? in* UNIONS AND ECONOMIC COMPETITIVENESS 143, 144 (Lawrence Mishel & Paula B. Voos eds., 1992).

230. MORGAN O. REYNOLDS, MAKING AMERICA POORER: THE COSTS OF LABOR LAW 29 (1987).

231. Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 118–29.

engaged in an often brutal campaign of racial exclusion from the founding of the American Federation of Labor (AFL) in the nineteenth century to the Great Depression and subsequent periods.[232] For the purposes of self advancement, labor unions historically strongly supported legislation enhancing their power to exclude.[233] Taking advantage of the monopoly power granted by the NIRA, trade unions displaced disfavored workers and reified economic and social stratification. NIRA codified wage differentials in such a way that even when a Black employee performed more important tasks than a White employee, he would frequently have a lower job classification and hence a lower wage than his White counterpart.[234] According to one estimate, NIRA's minimum wage provisions destroyed the jobs of half a million Blacks.[235]

Building on this grim record, the 1938 Fair Labor Standards Act, (FLSA) led to results comparable to the disastrous policies in Apartheid-era South Africa.[236] According to the U.S. Labor Department, enforcement of FLSA's minimum wage provisions caused between 30,000 and 50,000 workers, mostly southern Blacks, to lose their jobs within two weeks.[237] Evidence shows that the architects of both NIRA and the FLSA knew the laws would create disproportionate unemployment among southern African Americans.[238] "[M]ost advocates of these laws saw the resulting unemployment, at worst, as an unfortunate necessity, and in many cases as a positive feature."[239]

Given that minimum wage laws reduce the cost of discrimination to employers,[240] and that the government enforced NIRA in blatantly discriminatory ways, it is probable that racial animus motivated some of the supporters of wage minimums and other New Deal initiatives. Even if

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232. *See, e.g.*, *id.* at 118–26 (documenting labor union participation in the creation of outsiders in America).

233. For example, Congress enacted NIRA, with significant labor union support. *Id.* at 123. *See also id.* at 118–26 (showing union support for legislation and policies that enhanced their ability to exclude).

234. Bernstein, *Roots of the 'Underclass'*, *supra* note 35, at 120–21.

235. David T. Beito, *Review of Only One Place of Redress*, 10 GEO. MASON L. REV. 293, 296 (2001).

236. Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 126–28. See also, SOWELL, BASIC ECONOMICS, supra note 65, at 215–19 (explaining the disaster minimum wages continue to work on Blacks in Africa and how South Africa's increase in minimum wages has contributed to a rise in employment in largely non-Black Poland).

237. Bernstein, *Roots of the 'Underclass'*, *supra* note 35, at 130 (quoting William A. Keyes, *The Minimum Wage and the Davis-Beacon Act: Employment Effects on Minorities and Youth*, 3 J. LAB. RES. 399, 401 (1982)).

238. Bernstein & Leonard, *supra* note 9, at 178.

239. *Id.*

240. SOWELL, BASIC ECONOMICS, *supra* note 65, at 201.

this is not true, the FLSA, along with other New Deal legislation,[241] contributed to a persistent increase in African American unemployment. This is because democratic governments tend to give the greatest benefits to those who are the best organized and have the most influence[242]—categories that include few Blacks. Such results are consistent with the thesis that labor unions benefit the few and subjugate the many by protecting "superior" races from competition with "inferior" ones. An early architect of the Progressive Era, prominent labor economist John R. Commons, supplied legitimacy to this thesis by suggesting that race, not productivity, determined living standards and that, accordingly, Whites saw African Americans as "indolent and fickle," a view that allowed them to defend slavery as necessary.[243] Far from being a countermajoritarian force for inclusive social change, labor union minimum wage advocacy in the United States, like in Apartheid-era South Africa, spread an ideology that depicts Blacks and other minorities as inferior outsiders.[244]

The South African experience illustrates that one of the most effective vehicles for excluding non-Whites are statutes or industrial agreements that impose minimum wages.[245] This type of market interference, whether motivated by racist rhetoric or not, is particularly attractive to those who are offended when an employer employs Blacks instead of Whites.[246] Accordingly, it is not a surprise that

> [d]epression-era legislation, though officially colorblind, was often highly discriminatory. A case in point was the Davis-Bacon Act, which required construction firms with federal contracts to pay "prevailing wages." As defined by the Department of Labor, the prevailing wage usually equaled the union wage, thus freezing low-skilled Black workers out of many projects.[247]

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241. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 103 (2001) [hereinafter, BERNSTEIN, ONLY ONE PLACE OF REDRESS] (showing that the Agricultural Adjustment Acts reimbursed White planters for taking land out of production, causing many owners to evict African American tenant farmers from their land).

242. *Id.*

243. Bernstein & Leonard, *supra* note 9, at 181.

244. Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 130.

245. *Id.* at 131.

246. *Id.*

247. Beito, *supra* note 235, at 296.

Passed during the Hoover administration,[248] and impelled, in part, by the same logic that encouraged the pre-Mandela South African government to adopt policies favoring Whites at the expense of Black workers, the same progressive forces that later gave rise to NIRA and the NLRA catalyzed the Davis-Bacon Act. While some supporters of progressive reform justified labor initiatives on ground that protecting "deserving" workers necessitated the exclusion of "unfit" workers from the workplace, many backers of the Davis-Bacon Act saw no need to "hide their racist goals. At the hearings for the bill, William Green, the president of the American Federation of Labor, in his testimony praised the proposed law because it would make it more difficult for contractors to 'demoralize' wage rates through use of low-wage colored labor."[249]

Proceeding along a pathway blazed by White South African craft unionists who demanded the segregation of Blacks and their total exclusion from industrial work,[250] American labor unions assumed control of exclusionary efforts in the United States. At times, such efforts were grounded in the ideology of White supremacy. At other times, the economic consequences of exclusion drove union efforts. Evidence of the former tendency can be found in connection with NIRA:

> Seeking to avail itself of the powers granted under Section 7A of the [NIRA], union labor strategy seems to be to form a union in a given plant, strike to obtain the right to bargain with the employer as the sole representative of labor and then the close the union to black workers, effectively cutting them off from employment.[251]

After the Supreme Court invalidated NIRA, Congress passed the NLRA, which permanently enshrined many of NIRA's exclusionary features.[252] Premised on progressive themes, supporters of the NLRA advanced it as an affirmative vehicle for social and economic progress that would provide freedom and dignity for workers.[253] Still, the NLRA "significantly expanded the closed union shop, which, as future NAACP head Roy Wilkins stated, was all too often a White union shop."[254] Nevertheless,

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248. *See* Walter Williams, *Congress' Insidious Discrimination*, JEWISH WORLD REVIEW, Mar. 12, 2003, *available at* http://www.jewishworldreview.com/cols/williams031203.asp (accessed Jun. 6, 2009) (showing that the Davis-Bacon Act was designed to reduce employment competition from Black laborers and favor White laborers).

249. Beito, *supra* note 235, at 296.

250. WALTER E. WILLIAMS, SOUTH AFRICA'S WAR AGAINST CAPITALISM 49 (1989).

251. Beito, *supra* note 235, at 297.

252. SOMIN, *supra* note 192, at 657–58 (discussing the Roosevelt Administration's push to enact the NLRA in spite of the absence of strong public support).

253. THE DEVELOPING LABOR LAW 28 (John E. Higgins et al. eds., 2006).

254. Beito, *supra* note 235, at 297.

New Deal exclusion continued into the 1940s and labor union subordination continued at least through the 1980s.[255]

Many portray federal interventionism during the New Deal as part of an encouraging pursuit of social equality that set the stage for later civil rights measures.[256] However, as discussed, the record shows that the purported search for social equality during the 1930s operated consistently with the paradoxes embedded in progressivism, resulting in government behavior that produced more inequality. The New Deal government's underlying attitude favoring supremacists is highlighted by noting that the "Roosevelt administration expressed little interest in civil rights during the 1930s and seemed even less concerned than previous administrations about the need for anti-lynching legislation."[257]

Though it is clear that facts drawn from the 1930s are direct evidence of an intimate connection between racially supremacist intent and labor legislation, some observers may surrender to the claim that Progressive Era labor initiatives can be explained in benign terms that excuse its racially-charged consequences. But even assuming a benign original purpose, African Americans and other oppressed populations should be forgiven for suspecting more invidious forces at work. Far from delivering social justice, the implementation of the "common good" during the New Deal led to instances of flagrant injustice.[258] New Deal programs strengthened American labor unions' commitment to the norms of separation and White supremacy.[259] This fact makes it impossible to take seriously claims that the New Deal and the labor movement participated in a benign program that was occasionally hijacked by bad actors. For example, the Railway Brotherhood, armed with the Railway Labor Act, regularly organized strikes aimed at forcing employers to pursue Whites-only hiring policies.[260] Other railroad unions persuaded legislatures to pass "full crew" laws.[261] Though these laws purported to improve safety, the unions insisted that state railroad officials apply them by disallowing Black porters to do trainmen's work, which eventually led to their displacement by White workers.[262] Railroad unions were not alone in supporting segregationist and White supremacist policies. Many unions, often functioning as lodges or private clubs, adhered to a pernicious racial hierarchy to

255. Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 125.

256. BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note 241, at 106 (disputing this view).

257. Beito, *supra* note 235, at 298.

258. Hutchison, *Work, The Social Question*, *supra* note 32, at 104.

259. Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 77, at 120.

260. *Id.*

261. *Id.*

262. By 1939 these laws were operative in twenty-four states. *Id.* at 120–121.

further their social and economic goals.[263] Progressive labor law, by carving the labor market into cartels, furthered unions' exclusionary objectives. Just like the pattern that emerged during South Africa's exclusionary epoch, many White union members' loyalty to their unions transcended "narrow pecuniary self-interest."[264] The coercive force of New Deal labor law strengthened White members who wanted to exclude Blacks from their unions because they believed that their own social status would decline if they associated with Blacks.[265]

Historically, exclusionary practices in the United States prevailed where unions controlled access to work.[266] Although the Supreme Court softened the force of labor union exclusion by imposing a duty of fair representation on labor unions, the Justices declined to require the union to admit African Americans despite the union's status as an exclusive bargaining agent.[267] In more recent cases, all-White or largely White labor unions claimed that a policy that excluded workers not related to current members by blood or marriage was nondiscrimatory.[268] Ominously, discriminatory effects do not always depend on evidence of prejudice. For instance, Thomas Sowell shows Black artisans were *more* prevalent in the American South—where more prejudice but *less* discrimination existed—than in the North, where labor unions controlled.[269] This observation attests to the capacious power of the labor unions to exclude.

Instances where governmental labor programs opted not to exclude Blacks from employment were even more deplorable. During the 1940s the United States Employment Service, a federal agency, enticed hundreds of young African American men with offers of "free" travel from cities across the South to enjoy Florida sunshine and work in the sugar fields during World War II.[270] Instead of enjoying sunshine, warm weather, and free travel, they ended up paying at least a week's worth of wages for their transportation and were then shunted to labor camps replete with guards who killed men for asking for their wages or for trying to leave.[271] Facing

263. *Id.* at 121.

264. Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1084 (1995) (footnote omitted).

265. Bernstein, *Roots of the 'Underclass'*, *supra* note 35, at 95.

266. *See* Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649, 652 n. 26 (1983) [hereinafter, Michael Goldberg]. *See also* Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

267. *Steele*, 323 U.S. at 199 (1944) (the Court accepts that African Americans "are not members of the Brotherhood or eligible for membership").

268. *See, e.g., Local 53 of the Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 407 F. 2d 1047, 1053 (5th Cir. 1969).

269. *See* THOMAS SOWELL, PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE 31 (1990).

270. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 1 (2007). *See also* Hutchison, *Work, The Social Question*, *supra* note 32, at 103–104.

271. GOLUBOFF, *supra* note 271, at 2.

long days of brutal work pervaded by fear and punctuated by violence, these workers determined that escape was the only option.[272] At the same time, despite the abortive commitment of most modern liberal states since the French Revolution to end slavery,[273] Roosevelt's Justice Department ignored requests to stop the "virtual slavery" in Florida's sugar camps.[274] Far from being an isolated instance of government complicity in subordination, the United States Employment Service, which acted as a liaison between hiring employers and would-be workers, accommodated racial discrimination.[275] This oppressive history continued virtually unabated into the 1950s and 1960s.[276] In the late 1950s, this record prompted A. Phillip Randolph, the only Black member of the twenty-seven member executive council of the AFL-CIO, to complain.[277] AFL-CIO President George Meany ridiculed him: "Who the hell appointed you as the guardian of all the Negroes in America?"[278]

Exclusion of Blacks and dominance by Whites continued to infect the labor union movement into the 1970s and 1980s, prompting one observer to conclude that the "history of race . . . discrimination has left its mark on the present composition of the [entire] labor movement, particularly on the limited number of minorities . . . who hold leadership positions in unions."[279] The *Emporium Capwell* case is part of this dismal record of labor relations that originated during the onset of the Progressive Era. In this case, the Supreme Court permitted the discharge of Black workers who had engaged in concerted activity for the purpose of negotiating with their employer over discriminatory working conditions.[280] The Court permitted discharge because it saw the employees' conduct as inimical to the fundamental purpose of the NLRA.[281] This granted the labor union complete power to negotiate such issues as the exclusive bargaining representative.[282]

Despite the superficial trope of official neutrality, the move to cartelize labor through centralized government reflects an incandescent

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272. *Id.*

273. ANDRESS, *supra* note 13, at 1.

274. GOLUBOFF, *supra* note 271, at 2.

275. *Id.* at 3, 85–86.

276. Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 124.

277. *Id.*

278. ROBERT H. ZEIGER, AMERICAN WORKERS, AMERICAN UNIONS 174 (Stanley I. Kutler ed., 2nd ed. 1994).

279. Michael Goldberg, *supra* note 266, at 653.

280. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 71 (1975). *See also*, COMM. ON THE DEV. OF THE LAW UNDER THE NAT'L LABOR RELATIONS ACT, LABOR AND EMPLOYMENT LAW AM. BAR ASS'N, THE DEVELOPING LABOR LAW, 87 (John E. Higgins Jr. et al. eds., 5th ed. 2006).

281. *See Emporium Capwell*, 420 U.S. at 70–73

282. *Id.*

commitment to the norms of White supremacy and indifference, if not enmity, toward African Americans. "Few of the Progressives who dominated left-wing politics before the New Deal evinced sympathy for civil rights, and many were hostile to African Americans. Indeed, many of the same regulatory impulses that inspired the New Deal motivated supporters of segregation laws earlier in the century."[283] Moreover, "the most statist post-bellum presidential administration before FDR's, Woodrow Wilson's [administration] was extremely hostile to African Americans. The Hoover administration, dominated by Progressive Republicans, including Hoover himself, also treated African Americans poorly."[284] Responding to bipartisan enthusiasm for progressive values and the exclusionary consequences of the New Deal in 1936, T. Arnold Hill of the National Urban League wrote that "'[i]f the present trend continues, there is slight question that the Negro will be gradually forced into a condition of economic peonage, every bit as devastating as plantation slavery ever was.'"[285] This perspective corroborates the contention that New Deal government regulation harmed African Americans.[286]

One can accept assertions that Franklin Roosevelt's policies successfully reduced inequality during and subsequent to the New Deal[287] only by ignoring the substantial suffering, widespread unemployment and the plight of African Americans and others, whose present and future prospects were diminished by progressive policies. The ghosts of the Progressive Era continue to disenfranchise African American workers:

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283. BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note 241, at 106.

284. *Id.*

285. *Id.* at 107.

286. *Id.* at 1–7 (contending that African Americans would have fared better if courts had invalidated such legislation using Lochnerian principles). To be sure, contrasting perspectives are available. For instance Professor Kropp asserts that Bernstein falls prey to a "false dichotomy: the choice was not necessarily between having no governmental regulation and having harmful governmental regulation." *See, e.g.*, Steven H. Kropp, *Deconstructing Racism in American Society—The Role Labor Law Might Have Played (But Did Not) In Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369, 371 (2002). Instead, Kropp argues, "the courts might have construed the New Deal labor legislation in such a way that advanced the interests of African Americans." *Id.* Kropp's analysis is unconvincing for two reasons. First, "[w]hat might have been is an abstraction remaining a perpetual possibility only in a world of speculation." T. S. ELLIOT, *Burnt Norton*, *in* FOUR QUARTETS 13, 13 (Harvest/HBJ Book 1971) (1943), *available at* http://www.artofeurope.com/eliot/eli5.htm. Kropp's critique fails to adequately deal with the probability that judges, as leading members of the privileged elite, were influenced by eugenics. Hence, their failure to rescue Blacks from labor oppression was unfortunate but foreseeable. Second, it is doubtful that the government could have fashioned any regulation beneficial to Blacks during the 1930s, as long as members of the Roosevelt administration and judges nominated by FDR maintained Progressive Era myths premised on innate racial differences.

287. Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, § 6, at 62, *reprinted in* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, BEYOND RATIONAL CHOICE: ALTERNATIVE PERSPECTIVES ON ECONOMICS 397 (2005).

> [The] relevant repercussions of Progressive Era ideas have escaped the light of scrutiny. The architects of the New, the Fair Deal, and the Great Society all inherited and built upon the progressive welfare state. And they did this in explicit terms, citing such prominent race builders as Theodore Roosevelt and Woodrow Wilson as their inspirations. Obviously, the deliberate racist intent in many of these polices was not shared by subsequent generations of liberals. But that didn't erase the racial content of the policies themselves. The Davis-Bacon Act still hurts low-wage Blacks, for example. FDR's labor and agricultural policies threw millions of Blacks out of work and off their land. The great migration of African Americans to northern cities was in no small part a result of the *success* of progressive policies [that threw them out of unions and jobs in the South]. Black leaders didn't call the National Recovery Administration, or NRA, the 'Negro Run Around' for nothing.[288]

If the welfare of African Americans is factored into America's economic calculus, defenses of the New Deal are irremediably incoherent.

Insofar as labor union oligarchy may now be considered the norm,[289] policies that America's current labor leadership and their contemporary ideological allies support fail to fully reflect the interest of a majority of the represented workforce. Given this configuration, it is doubtful that the interest of African Americans and other minorities can successfully capture the focus of America's entrenched, autocratic, and possibly corrupt labor leadership.[290] The fact that unions exclude minorities from union leadership positions bolsters doubt and gives credence to the argument that unions cannot fully represent their minority members.[291] Rather than delivering freedom and justice for all, labor unions, augmented by the coercive power of the state, are persistent and effective vehicles of racial oppression. This gives rise to a forecast: when and if the government deploys power on behalf of unions in the future, oppression and exclusion, whether deliberate or inadvertent, will likely follow.

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288. GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 268–69.

289. Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 371. *See also*, Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 843 (1984).

290. Schwab, *supra* note 289, at 368 ("Even staunch union supporters blanche over the autocracy, entrenchment, and corruption of some union leaders.").

291. Michael Goldberg, *supra* note 267, at 653.

2. EFCA: Extending Hierarchy?

While I have not uncovered any direct evidence showing that proponents defend EFCA on the basis of racial superiority, it is doubtful that EFCA can be completely separated from the rest of existing labor law. The previous section of this Article argues that the current labor law system is rooted in racism. At the outset, the objective of this transformative process depended heavily upon notions of racial superiority. Today, the focus on societal transformation, collective insurgency, and class-based justice led by union oligarchs provides space that enables society to ignore the elephant in the room: the persistent and widening racial gap in unemployment[292] and the labor movement's prominent role in this development.

Evidence shows that American labor law inhibits job opportunities for African American workers, while improving the social and economic status of Whites. For example, the duty of fair representation, imposed after the passage of the New Deal labor legislation, was designed to ensure fair treatment of all union members by union leaders, particularly African American union workers.[293] However, when the Supreme Court determined that a union has a duty to represent all workers covered by a collective bargaining agreement fairly, it ruled that unions need not admit African American members.[294] New Deal legislation signaled that the federal government decided to take sides in the political war that afflicts most modern liberal democracies, favoring labor union hierarchy and disfavoring the marginalized. With this pivotal maneuver, the government, deliberately or inadvertently, excluded African American workers under the guise of progress and social justice for all. These developments, taken together, give rise to a paramount question: Can new labor law initiatives, such as EFCA, that are shaped by the New Deal's exclusionary premises, escape either the union movement's or the Progressive Era's record of diminishing equality?

The answer lies in the fact that EFCA is the most dramatic alteration in labor laws since 1935 and the Progressive Era.[295] While that alone does not prove discriminatory intent, Richard Epstein shows that EFCA will likely retard the formation of small businesses, increase the likelihood of multiple union arbitrations covering different locations, send jobs offshore, and increase industrial strife, in addition to subjecting workers to union intimidation.[296] Similarly, Judge Richard Posner asserts that if EFCA

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292. BELL, *supra* note 68, at 735–38.

293. *Id.* at 753.

294. *Id.* at 753–54.

295. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 1.

296. *Id.* at 6–7.

is enacted, it will reduce efficiency by increasing employers' labor costs, which will raise unemployment.[297] Marginalized Americans are unlikely to benefit from these developments.

On the other hand, one of the principal sponsors of EFCA, the late Senator Kennedy, insisted that EFCA will equip workers with the "freedom to choose a union without fear of threats or intimidation"[298] and assist labor organizations in their efforts to "provide greater security and greater promise of fair treatment."[299] Kennedy failed to supply plausible evidence verifying the truthfulness of his claims and makes no attempt to show how EFCA will benefit African Americans and other outsiders in the face of labor law's tendency to increase unemployment for America's most vulnerable populations.[300]

Other legislators rebut Senator Kennedy's arguments about EFCA's fairness. Representative Pitts states that the secret ballot is

> a fundamental principle of American democracy. If individuals want to join a union, they are entitled to that right. They can show their support with their vote. But if workers do not want to pay union dollars to be used to advance a political agenda they disagree with, they should also be afforded the right to cast their vote free of coercion and intimidation in a secret ballot election.[301]

The EFCA's alternative to the secret ballot is the card check. It should be noted that "[p]rofound doubts over a card check have been voiced by labor's natural allies."[302] Recently, former Democratic senator and presidential nominee George McGovern condemned EFCA because of its failure to take into account the obvious: "There are many documented cases where workers have been pressured, harassed, tricked and intimidated into signing cards that have led to mandatory payment of dues."[303]

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297. RICHARD A. POSNER, A FAILURE OF CAPITALISM 225 (2009).

298. 155 CONG. REC. S2967 (daily ed. Mar. 10, 2009) (statement of Sen. Edward Kennedy).

299. *See id.*

300. His comments mirror the claims of his brother, then-Senator John Kennedy, who supported minimum wage laws as a way of protecting New England businesses from southern—and largely African American—competition, thereby offsetting the South's advantage in labor costs. Bernstein, *Roots of the "Underclass," supra* note 35, at 131 n.328.

301. 155 CONG. REC. H3111 (daily ed. Mar. 10, 2009) (statement of Rep. Pitts).

302. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 46.

303. George McGovern, *My Party Should Respect Secret Union Ballots*, WALL ST. J., Aug. 8, 2008, *available at* http://online.wsj.com/article/SB121815502467222555.html. See also, Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the Use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 364–65 (1998) (describing how employees who take on union leaders find the process marked by insults, coercion, and threats to life and family).

EFCA's proponents continue to advance the card check on the basis of dubious claims. For instance, many leading Democratic members of Congress, "have advised workers in developing countries such as Mexico to insist on the secret ballot when voting as to whether or not their workplaces should have a union,"[304] even while arguing to dispense with this desirable protection for workers in the U.S.[305] Similarly, while most nonunion workers surveyed appear to reject unionization as a desirable objective, defenders of EFCA claim that "more than half of all non-union workers—nearly 60 million men and women—say they would join a union if they could."[306] Claiming that the current system is rigged against workers because of employer hostility,[307] Senator Kennedy ignored widely available information showing that such contentions are inaccurate.[308]

Defenders of EFCA in Congress, perhaps animated by the prospect of future campaign contributions,[309] argue that employer pressure prevents workers who want to join labor organizations from doing so. These same politicians appear deaf to reports of union intimidation and coercion.[310] They also disregard substantial independent evidence confirming worker indifference toward union representation and worker preferences favoring either a company funded or jointly run organization.[311] Against this background, even leading union proponents concede that employer hostility and unfair labor practices have little to no effect on a union's ability to prevail in an election campaign under the NLRA.[312] In truth, the failure

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304. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 46 (quoting Sen. McGovern).

305. *Id.*

306. 155 Cong. Rec. S2967 (daily ed. Mar. 10, 2009) (statement of Sen. Kennedy).

307. *See id.*

308. *See* Hylton, *supra* note 124, at 695–97 (eviscerating the employer hostility thesis). *See also* Hutchison, *What Workers Want*, *supra* note 5, at 820–23.

309. Jill Lawrence, *Democrats Ponder Labor Split's Political Effect*, USA TODAY, Jul. 27, 2005, at 4A (showing that labor unions occupy seven of the top ten spots on a recent list of America's leading contributors to political parties).

310. *See, e.g.*, Knollenberg, *supra* note 303, at 364–65 (describing evidence of union coercion). *See also*, Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions*, 10 U. PA. J. OF BUS. AND EMPL. L. 663, 711–12 (2008) [hereinafter, Hutchison, *Reclaiming the First Amendment*].

311. Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW 117, 118 n.2 (1996) (citing PRINCETON SURVEY RESEARCH ASSOCIATES, WORKER REPRESENTATION AND PARTICIPATION SURVEY: REPORT ON THE FINDINGS 49 (1994) ("By an overwhelming 86% to 9% margin, workers want an organization run jointly by employers and management rather than an independent, employee-run organization. By a smaller, but still sizable margin of 52% to 34%, workers want an organization to be staffed and funded by the company, rather than independently through employee contributions.")).

312. Eugene Scalia, The Federalist Society Online Debate Series: The Employee Free Choice Act (Jun. 1, 2009), http://www.fed-soc.org/debates/dbtid.28,css.print/default.asp (quoting Thomas Kochan and John-Paul Ferguson suggesting that unfair labor

of union organizing efforts reflects emerging worker hostility to labor unions.[313] More to the point, data shows that African American workers have uncovered the incapacity of collective bargaining regimes to represent people of color, leading some to conclude that unions do not, and cannot represent their interests.[314] This evidence implies that the reason unions do not support secret ballot elections is because they allow workers to more freely reject unions.[315]

Professor Hayward, a leading commentator on the legitimacy of various voting regimes, persuasively unmasks partisanship in an organizing context. She shows that grievances—even legitimate grievances about the fairness of union organizing elections employer labor practices—do not justify discarding the secret ballot's protection from fraud and coercion.[316] She states "that if an election is to serve the welfare of a large group, deserve respect, and keep the peace and order, voting procedures in such contexts should insulate voters from outsider influence at the time of voting."[317] Under a card check system for selecting the workers' bargaining representative, union representatives can put vulnerable workers in coercive situations when asking them to sign cards in favor of union representation. Furthermore, because card check efforts need not be publicized, nor the identities of union supporters released, there is no way for a worker whose name has been fraudulently added to the union's card

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practices have no effect on election outcomes). *See also* John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 17 (Oct. 2008).

313. Seymour Martin Lipset & Marcella Ridlen Ray, *Technology, Work, and Social Change*, 27 J. OF LAB. RES. 613, 617 (1996) (stating that Americans "perceive unions to be overly involved in politics . . . [and] more intent on fighting change than in helping to bring it about").

314. Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1351 (1997).

315. Hutchison, *What Workers Want*, *supra* note 5, at 815–17 (showing that workers are likely to reject labor unions as a vehicle to voice their views). *See also* Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note 141, at 783. Taken as a whole, legislators' persistent attempts to defend EFCA may show one of two things. If they are ignoring contradictory information, they show hypocrisy. *Id.* Equally possible, if they willingly screen themselves from information that contradicts their claims, they show that they are "predisposed to favor one side or another in the contest for political power and then mask their partisanship by deploying the elastic rhetoric of neutrality." Richard W. Hurd, *Industrial Relations Theory*, 58 INDUS. & LAB. REL. REV. 305, 305–06 (2005) (reviewing LEO TROY, THE TWILIGHT OF THE OLD UNIONISM (2004)). *See also*, CHAVEZ & GRAY, *supra* note 183, at 17–21 (cataloguing labor's move to the left). *See also* Hutchison, *Reclaiming the First Amendment*, *supra* note 309, at 712. Labor unions enhance this predisposition by "direct[ing] their attention to political solutions," as their "fortunes [fade] in the marketplace." Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote* 1, 2 (2009) (unpublished manuscript on file with the author).

316. Hayward, *supra* note 315, at 25.

317. *Id.* at 34.

check list to detect the fraud.[318] Dispensing with secret ballot elections[319] magnifies the probability that workers will capitulate to fraudulent or belligerent union requests to sign cards.[320] The proposed law also does not provide a mechanism permitting workers to update their preferences with respect to unionization, which means that if some workers change their minds about unionization, the remaining fraction of workers favoring the union will be able to force representation on the majority.[321]

Eviscerating the secret ballot corresponds with labor advocates' "desire to accelerate 'social progress' created by building a transformative 'social movement' that does not 'rely ... on workers' ability to freely choose or reject [unions].'"[322] Recalling the romantic revolutionary sentiments that preceded the rise of the Age of Terror, and the ideals of progressive New Deal reformers who saw themselves as members of the philosophical vanguard during the 1930s, contemporary labor advocates today rely on centralized government power to promote unionization, based on the presumption that their preferences reflect the actual desires of workers.[323] The willingness of elites to impose their preferences favoring collectivism instantiates one scholar's worst fears: an imposed ethos divined by prophetic avatars that is "never checked against actual opinions, least of all those of the most disadvantaged ... people."[324] Reflecting the legitimacy of such fears, emerging evidence shows that many see union dues primarily as a vehicle to rescue unions from their currently moribund state.[325] These people also see dues as a predicate to the voluntary or involuntary enlistment of additional workers in an ideological attempt to achieve radical class consciousness and societal transformation.[326]

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318. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 67–73.

319. For a discussion of this possibility, *see id.* (questioning whether signatures obtained through a process that is largely controlled by labor unions gives rise to valid results).

320. *Id.* at 69–73. Epstein shows that existing law treats union authorization cards as irrevocable and proposed law does not allow workers to update their preference before cards are submitted. If a worker at any time signs a card, then she is bound for the duration of the period. Accordingly, there could be a successful card authorization program even though the requisite number of workers does not support the program at the time the cards are submitted.

321. Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note 141, at 793.

322. *Id.*

323. *Id.*

324. JUDITH N. SHKLAR, THE FACES OF INJUSTICE 115 (1990).

325. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1371 (discussing such views).

326. *Id.* at 1375.

It is highly doubtful that the progressive viewpoint corresponds to the views of most Americans or most workers.[327] As noted, a societal transformation of the type sought after by the labor movement is unlikely to yields benefits for rank and file members. Moreover, though some union proponents support EFCA and other pro-union efforts on grounds that it might arrest income declines,[328] the fact that unions diminish wages for African Americans undermines this claim. Though unions frequently raise wages for covered workers, they tend to diminish income for African Americans and other displaced individuals. Wage legislation amplifies the displacement effect of labor cartels.[329] Since it "is hard to imagine any process that is less democratic in either intention or execution than the card-check rule under EFCA,"[330] it is hard to believe that this new policy will be free of the subordinating effects of past labor policy. While only a fraction of workers are likely to receive pecuniary benefits from EFCA through increased wages, the "only clear winners of this skewed and expedited process are members of the union leadership, who gain in dues and power through a successful certification campaign."[331]

Evidence of intent to discriminate is not necessary to understand the exclusionary impact of EFCA. While labor's history is richly infused with evidence that the intent to discriminate repeatedly supplied the impetus for labor law reform, EFCA's exclusionary force stems simply from the statute's capacity to exclude and maintain the labor movement's remarkable pattern of subordination. Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional nor unintentional.[332] Whether a decisionmaker consciously seeks a particular outcome, whether an outcome manifests her unconscious beliefs that are attached to exclusionary attitudes, or whether it reflects blameworthy discriminatory intent, EFCA is tied to three related goals. First, the proposal

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327. *See, e.g.*, Margalioth, *supra* note 137, at 41–49 (showing that American workers are increasingly attracted to expressive individualism, which concentrates on subjective self-realization, and are less likely to be attracted to collective action that requires individual interest to yield to group interest and solidarity).

328. *See, e.g.*, EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 10–13 (showing that data from the period occurring between 1947 to 2007 supports the inference that income is largely related to productivity as opposed to unionization).

329. *See, e.g.*, Christopher Dodds, *Unions Use a Racist Law on Projects: Prevailing-wage Measures Discriminate Against Minorities and Increase Costs*, PHILLY.COM, Apr. 23, 2009, *available at* http://www.printhis.clickability.com/pt/cpt?action=cpt&title=Unions+use+a+racist+law+; *see also* Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note 51, at 93–134.

330. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note 1, at 73.

331. *Id.*

332. Lawrence, *supra* note 59, at 322.

aims to increase the power of union leaders over the lives of workers, while diminishing the power of employers and vitiating the freedom of workers to choose or reject unionization. Second, the statute seeks to expand the number of union members. And third, the proposal would increase union dues revenues and consequently expand labor's political influence by funding legislation, preferred political candidates, and union advocacy. Taken as a whole this process would yield benefits for the self-interested few at the expense of the many.[333]

Consider one contemporary example illustrating this point. Since construction began on the Philadelphia Convention Center, the city's Black construction workers have protested the lack of opportunity for minority workers on public construction projects.[334] Pennsylvania's prevailing wage law, passed in 1961 and fashioned after the federal Davis-Bacon Act, is the root cause behind the limited number of Black workers on city funded projects.[335] Unwilling to risk losing political support from unions by challenging their discriminatory hiring practices, Mayor Nutter chose instead to issue a report on minority hiring goals.[336] As written and applied, Pennsylvania's wage law honors the legacy of Robert Bacon, co-author of the Davis-Bacon Act. Bacon denied anti-African American animus, but made clear his discomfort with "defective" workers taking jobs that "belonged" to White union men.[337] Drafters of Pennsylvania's statute initially designed it to limit opportunities for out-of-state Black workers,[338] but this process has now been inverted. Instead of preventing Black workers in other states from taking construction jobs in Philadelphia, this law allows unions to ship mostly White workers from other states to the city in order to prevent Pennsylvania's Black laborers from working on prevailing wage projects.[339] Even if a trustworthy judge could strip the prevailing wage policy of its racist heritage, its exclusionary effect remains intact. As Critical Race Reformists show, the degree of blameworthiness does not necessarily limit the capacity of a policy to stifle Black progress. Pennsylvania's wage law enhances the economic returns

333. *See* Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1391. Union support for abortion rights can be readily seen as problematic from an African American perspective because abortion was originally part of a eugenic racial project. *See* GOLDBERG, LIBERAL FASCISM, *supra* note 10, at 270–77. Evidence shows that Planned Parenthood, the nation's largest abortion provider, accepts financial donations targeted specifically toward the destruction of unborn African American babies. Bob Unruh, *Planned Parenthood: Wanting fewer Blacks 'understandable,'* WORLDNETDAILY, Mar. 10, 2010, *available at* http://www.wnd.com/index.php?fa=PAGE.printable&pageId=57526.

334. Dodds, *supra* note 329, at 1.

335. *Id.*

336. *Id.* (showing that Mayor suggested that minorities should attain thirty-two percent of the jobs on large construction projects).

337. Bernstein & Leonard, *supra* note 9, at 192.

338. Dodds, *supra* note 329, at 1.

339. *Id.*

and social status that accrue to White workers and dislocates Black workers, thereby eviscerating their economic and social status.[340] Even if prevailing wage law appears neutral and progressive to the local building trades union, Critical Race Reformist analysis shows that racism and exclusion persist.

"An acorn is not essentially something small with a point at one end and cap at the other; it is something aimed at being an oak."[341] Labor unions that make political contributions function similarly. John Sweeney, while serving as president of the AFL-CIO, proclaimed that labor unions would tie their organizing to politics. This intertwining of organizing capacity and political power is consistent with Gary Becker's conclusion that "[p]olitical influence is not fixed by the political process but can be expanded by expenditures of time and money on campaign contributions, political advertising, and in other ways that exert political pressure.' "[342] It is important to note that "individual human beings are not animated simply by pecuniary gain. They are also animated by ideological and social objectives that provide self-interested ... benefits."[343] At times economic, social, and political concerns intertwine, suggesting that labor union action in Pennsylvania, which maintains exclusion via prevailing wage legislation, reflects the triumph of a progressive conception of social Darwinism that provides a convenient defense of the subjugation of Blacks in America.[344] Union organizing efforts are the acorn that is directed toward a sharp expansion in union dues revenues in order to achieve an oak: contestable political influence[345] that can be transmuted into economic benefits or other self-interested gains for union leaders and the majority of workers.[346] Satisfying elite preferences such as radical class consciousness[347] and workplace democracy[348] or, alternatively, the cravings of a majority of the rank and file for exclusion, will not further the interests of

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340. *See, e.g.*, Matthew Teague, *Philadelphia: The Last Union Town*, PHILADELPHIA MAG., Jan. 27, 2008, at 9, *available at* http://www.phillymag.com/scripts/print/article.php?asset_idx=219005 (suggesting that a majority of the Philadelphia City Council was elected with the help of the building trades).

341. J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW: A GUIDE 23 (2003).

342. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1317–18 (internal citation removed).

343. *Id.* at 1318.

344. FRANKLIN, *supra* note 54, at 63 (explaining this move).

345. On this possibility, *see* Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1318.

346. *Id.* at 1391.

347. For a description of the move toward radical class consciousness within the labor movement, *see Harry G. Hutchison, Toward a Robust Conception of "Independent Judgment": Back to the Future?*, 36 U.S.F. L. REV. 335, 335–38, 353–58 (2002).

348. Among the goals that unions and union advocates seek is some version of workplace democracy. For a description of workplace democracy, *see* Klare, *supra* note 49, at 12.

members of marginalized groups. On the contrary, it fortifies the conclusion that the relationship between unions and people of color is an ill fit.[349]

EFCA ought to raise suspicion because it is advanced by poignant claims of achieving fairness and raising wages and benefits for all workers, despite a contemporary expansion in union objectives unrelated to collective bargaining.[350] Rather than a gift to workers, EFCA is an endowment for union oligarchs. Following a familiar pathway found in most liberal democracies, unions and union leaders have become "special-interest" adjuncts to political allies, while often failing to serve the actual interests of their members.[351] Instead of serving the interests of all members or inventing measures designed to reduce racial exclusion, union autocrats have commenced a process to capture additional union dues revenues to finance more political influence in order to achieve a particular way of life for the nation that is bounded by the rhetoric of transformation and social justice. Frustrated by the unwillingness of workers to permit unions to speak for them and fearing looming political irrelevancy,[352] labor union leaders have placed considerable resources in the fight to exchange the existing secret ballot for a card check policy. But frustration and fear of political irrelevancy are not principled bases to enact EFCA.

EFCA's true purpose has little to do with a principle. The focus on suspect claims such as social justice coupled with the refusal by legislators and advocates to consider the proposal's adverse effects on members of disadvantaged communities marks EFCA with contradiction. Rather than delivering social justice and equality, EFCA is likely to deliver the opposite. Critical Race Reformist analysis shows that EFCA is tied to labor's history of conscious and unconscious racism and the empirical evidence indicates that this proposal will impede the rate of racial progress for African Americans. Americans should beware of accepting EFCA, which in essence is what the Germans refer to as *Ein Danaergeschenk*—a "fatal gift" that brings misfortune.[353]

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349. McUsic & Selmi, *supra* note 314, at 1351.

350. *See, e.g.*, CHAVEZ & GRAY, *supra* note 183, at 18 (discussing the various social causes that labor unions support).

351. Michael McMenamin, *Labor Lost: Why the AFL-CIO's Cynical Survival Strategy is Doomed*, REASON, Nov. 2000, at 48.

352. Hutchison, *A Clearing in the Forest*, *supra* note 144, at 1317.

353. About.com, German Idioms: Greeks Bearing Gifts, http://german.about.com/library/blidioms_greeks.htm (last visited Feb. 20, 2010).

CONCLUSION

> The liberal-legalist order ... will be founded on self-interested, rights-bearing, adversarial individuals and this will not be sustainable. This type of social order is likely to aggravate precisely those points of tension in society which any vibrant political process should aim at alleviating. The ultimate danger is that liberal-legalism may, paradoxically, bring about the precise end—despotism—which it is designed to avoid.[354]

Stanley Crouch, commenting on the Constitution, said the blues is "music about human will and human frailty, just as the brilliance of the Constitution is that it recognizes grand human possibility with the same clarity that it does human frailty, which is why ... it has a tragic base."[355] He maintains that nothing is innately good, and that nothing is lasting other than the perpetual danger of abused power.[356] This offers an excellent framework for understanding EFCA. No matter how many statements of support proponents muster and no matter how frequently progressive elites invoke the rhetoric of social justice and societal transformation, EFCA is a legislative proposal that sustains racial and economic disadvantage, just as similar laws did in the New Deal United States and in pre-Mandela South Africa. The exclusion of certain workers through government-sponsored unionization creates an aristocracy for others.[357] The purpose of these legislative behaviors is to force a specific exchange—"to take from some people more than they get in exchange, in order to provide benefits to those who control the levers of political power."[358] Shimmering with contradiction and following a pattern initiated by the Progressives during the New Deal, labor legislation reifies a racial hierarchy that inflicts itself on America's marginalized. Today, no advocates of racial hierarchy step forward to support EFCA. However, the proposal can be tied to the consequences of the labor movement's history emphasizing social control of "unemployables" and other blatantly racist behavior. This proposal is yet another way to suppress the rate of progress of African Americans. If enacted, EFCA will validate the brand of social Darwinism that excludes an "inferior class of

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354. MARTIN LOUGHLIN, SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS 5 (2000).

355. STANLEY CROUCH, *The All-American Skin Game, or, the Decoy of the Race* 10 (1995).

356. *Id.*

357. HUTT, *supra* note 197, at 8–9.

358. Richard A. Epstein, *Judicial Review: Reckoning On Two Kinds of Error, in Economic Liberties and the Judiciary* 39, 41 (James A. Dorn & Henry G. Manne ed., 1987).

labourers"[359] and verify that modern liberal democracy is insufficient to protect disfavored subgroups and individuals from the coercive power authorized by the majority and its hierarchs.[360]

359. HUTT, *supra* note 197, at 10.

360. *See* PHILLIP E. JOHNSON, THE RIGHT QUESTIONS: TRUTH, MEANING & PUBLIC DEBATE 149 (2002) (discussing John Stuart Mill).