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Article begins on next page

Why is There No Socialism in the United States? Law and the Racial Divide in the American Working Class, 1676–1964

James Gray Pope^{*}

Introduction

The gap between rich and poor in the United States yawns wider than in any other first-wave industrialized country. Why? One influential explanation points to the failure of American workers to build a class-wide movement for economic redistribution and social welfare protections. While European working classes were developing durable socialist movements during the decades around the turn of the twentieth century, the American working class fractured into craft unions that focused on collective bargaining for the immediate self-interest of their members. In his pathbreaking book, *Law and the Shaping of the American Labor Movement*, William Forbath suggested that law contributed crucially to this failure.¹ American workers did launch struggles for broad objectives, but judges repeatedly and forcefully directed them toward more parochial concerns. For example, courts struck down hard-won reform legislation and selectively enjoined inclusive forms of labor organization like industry-wide (as opposed to craft) unions.²

My contribution to the Symposium explores the involvement of law and courts in constructing another related barrier to class-wide political and economic action. As Forbath recognized, “ethnic and racial cleavages will

^{*} Professor of Law and Sidney Reitman Scholar, Rutgers University School of Law. Many people generously shared their insights during this Article’s lengthy period of development. Peter Kellman provided essential advice on the overall approach. Jim Atleson, Elise Boddie, Bill Fletcher Jr., Eric Foner, Barry Friedman, Alan Hyde, John Leubsdorf, Ken Matheny, Richard Davies Parker, Richard H. Pildes, Lisa R. Pruitt, Dorothy E. Roberts, Ahmed White, Rick Vallery, and Rebecca Zietlow provided invaluable criticisms and suggestions on previous drafts. The Article also benefitted from critical comments at the second annual Alan Dawley Memorial Lecture at the College of New Jersey, the Cornell Law Faculty Colloquium, the Rutgers-Newark Law Faculty Colloquium, the West Virginia Law Faculty Colloquium, the Class Crits V Conference, the 2012 “How Class Works” Conference, the Lat Crit V Conference, the 2013 Law and Society Conference, and—of course—the *Texas Law Review* Symposium on the Constitution and Economic Inequality. Many thanks to the editors of the *Texas Law Review* for their splendid editing job on this unusually lengthy and source-intensive symposium contribution.

1. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 3 (1991).

2. *See id.* at 37–98.

surely remain central” to any full explanation for American working-class weakness.³ Herbert Hill, labor secretary of the National Association for the Advancement of Colored People (NAACP) during the contentious decades of the 1950s, 1960s, and 1970s, traced the root of this problem to “the historical development of working-class identity as racial identity.”⁴ Beginning in the early 1800s, when wage labor first emerged as a major component of the economy, white workers defined what it meant to be a “working man” by contrasting their own condition (citizenship) and perceived character traits (strength and independence) with those of women and workers of color (servitude, weakness, and dependence).⁵ The earliest workingmen’s associations commenced a tradition of excluding nonwhites that continued in the overwhelming majority of unions until the 1930s and, in unions organized on craft lines, for decades more.⁶ Although unions have officially reversed these policies, the old racialized conception of class identity persists. During the 2008 primary campaign, for example, Hillary Clinton claimed that she would be a stronger nominee than Barack Obama because of her advantage among “working, hard-working Americans, white Americans”⁷ As Clinton’s claim suggests, the “white working class” has become a swing, if not *the* swing, constituency in electoral politics. “Their loyalties shift the most from election to election and, in so doing,” observed political scientists Ruy Teixeira and Joel Rogers, “determine the winners in American politics.”⁸ In recent years, some legal scholars have suggested that white-working-class support will be essential to any

3. *Id.* at 23.

4. Herbert Hill, *The Problem of Race in American Labor History*, 24 REVIEWS IN AM. HIST. 189, 189 (1996); *see also* Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1320–23 (2002) (recounting the role of race in constructing working-class identity).

5. JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 153–55* (1990); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 55–57* (1991) [hereinafter ROEDIGER, WAGES].

6. *See generally* WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS* (1977); HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* (1977).

7. Kathy Kiely & Jill Lawrence, *Clinton Makes Case for Wide Appeal*, USA TODAY (May 7, 2008, 9:42 PM), http://usatoday30.usatoday.com/news/politics/election2008/2008-05-07-clintoninterview_N.htm [<http://perma.cc/G4AW-P4P5>]. *Cf.* ROEDIGER, WAGES, *supra* note 5, at 19 (observing that “[i]n popular usage, the very term *worker* often presumes whiteness (and maleness), as in conservative Democrats’ calls for abandoning ‘special interests’ and returning the party to policies appealing to the ‘average worker’”).

8. RUY TEIXEIRA & JOEL ROGERS, *AMERICA’S FORGOTTEN MAJORITY: WHY THE WHITE WORKING CLASS STILL MATTERS 15–16* (2000); *see also* Charlotte Garden & Nancy Leong, “*So Closely Intertwined*”: *Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1208–09 (2013) (reporting that in the 2012 general election “working class whites in union households provided key boosts for President Obama in the swing states of Ohio and Wisconsin”).

successful effort to reduce inequalities of race, gender, and class in the United States.⁹

My broad thesis is that law played a central role in dividing white workers from workers of color—before, during, and after the formation of the American working class. In particular, law reinforced racial divisions during certain crucial periods when political, economic, and military shocks disrupted elite control, creating possibilities for cross-racial laboring-class cooperation.¹⁰ I further suggest that the Supreme Court contributed importantly to this result, especially during and immediately following Reconstruction, when the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments created the greatest opportunity for cross-racial laboring class cooperation since the colonial era.¹¹

Scholars from a variety of disciplines have debated the relative importance of economic, cultural, and psychological factors in shaping and sustaining racism.¹² I do not propose law as an alternative explanation. I suggest only that law has served as a tool for dividing workers along racial lines, and that it has been highly effective at certain historical junctures. To omit the role of law is to invite distortion. There is a marked tendency in present-day academic and political discourse, for example, to depict white workers as uniquely prone to racism, and to blame them for the racial divide in the working class.¹³ Whatever the potency of racist attitudes and

9. See JOAN WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 211 (2011); Brian Mikulak, *Classism and Equal Opportunity: A Proposal for Affirmative Action in Education Based on Social Class*, 33 HOWARD L.J. 114, 136 (1990) (characterizing class inequality as a “problem of birthright undermining merit,” and suggesting that “the unfettering of the working-class holds the promise of dramatic progress in our time”); Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767, 776–78 (2011) (calling particular attention to rural working people).

10. On these moments and their dynamics see MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 29–30 (1997).

11. The account presented here thus tends to provide support for the thesis that the Supreme Court can alter political and constitutional outcomes. For an in-depth discussion of that view, see Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103.

12. For an illuminating and concise discussion of the theories, see *id.* at 9–16. See also MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2015) (summarizing and analyzing various theories about the development of racial consciousness and practices in the United States); AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010) (suggesting that racial divisions were shaped by the culture and ideology of settlerism).

13. See Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 809 (2003) (observing that “[f]or more privileged white Americans, racism often appears to be something that working class whites (particularly Southerners) do to African Americans and other people of color,” a perception that “tends to exonerate wealthier whites”); Lisa R. Pruitt, *Who’s Afraid of White Class Migrants? On Denial, Discrediting and Disdain (and Toward a Richer Conception of Diversity)*, 31 COLUM. J. GENDER L. 196, 234–35 (2015) (noting that lower class whites “are now viewed as uncouth, illiberal and—worst of all—racist” and suggesting that elite whites may be “particularly vigilant” in policing the class boundary between themselves and poor whites “lest they be mistaken for their low-rent cousins”); Ahmed A. White, *My Co-Worker My Enemy: Solidarity, Workplace Control, and the*

norms, however, they have not always sufficed to block white workers from joining with workers of color in economic and political action. Far from welcoming such cooperation, elites have reacted fearfully and turned to law (or, in the case of Reconstruction, the judicial suspension of law in the face of paramilitary insurgency) to tip the balance in favor of white racial solidarity.

In the field of constitutional law, Derrick Bell stands out for his close attention to the racial divide in the laboring classes. Bell posited that African-Americans can advance on issues of race only when whites also benefit.¹⁴ One way to secure this “interest convergence” is to ally with lower class whites “who, except for the disadvantages imposed on blacks because of color, are in the same economic and political boat.”¹⁵ Unfortunately, however, white workers have rarely acted on these shared interests, instead choosing repeatedly to ally with white elites against black workers.¹⁶ They stood with white planters against slave revolts, for example, “even though the existence of slavery condemned white workers to a life of economic privation,” and excluded black workers from their unions, thereby “allow[ing] plant owners to break strikes with black scab labor.”¹⁷ Over time, whites came to embrace their race-based privileges as a constitutionally protected property right.¹⁸ To Bell, such choices reflect a

Class Politics of Title VII, 63 BUFF. L. REV. 1061, 1117 (2015) (recounting that in the 1970s, “[i]n perfect alignment with the class biases of the liberal elites, whose own burgeoning endowments were increasingly beyond criticism, the beleaguered white working man became the very image of race and gender ‘privilege’”).

14. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980).

15. DERRICK BELL, AND WE ARE NOT SAVED 254 (1987) [hereinafter BELL, SAVED]. As Bell pointed out, the interests of lower class whites converged with those of African-Americans not only on issues of economic policy, but also in the civil rights movement’s attack on the notion that misfortune and poverty in our society results from failure in a meritocratic system. “The more that civil rights law threatened the ‘system’ of equality [of] opportunity, . . . the more it threatened to expose and delegitimize the relative situation of lower-class whites.” *Id.* at 232. For more on the shared interests of white and nonwhite workers, see Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1505 (2010) (suggesting that low-status white workers suffer “basic economic and dignitary harms” from minority-targeted employer discrimination, and analyzing those harms); see also Garden & Leong, *supra* note 8, at 1178–82 (describing common interests of white workers and workers of color).

16. BELL, SAVED, *supra* note 15, at 40–41, 247, 254; DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 8–9 (1992) [hereinafter BELL, FACES].

17. BELL, FACES, *supra* note 16, at 8. Marion Crain and Ken Matheny tell a similar but more optimistic story in which “the economic logic of interracial class unity did not triumph over white workers’ racial bias” in the past, but could in the future. Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CALIF. L. REV. 1767, 1776 (2001).

18. Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1602, 1608 (1989). See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (developing this idea into a full-fledged theory). American constitutional law permits government to ameliorate innumerable kinds of inequality, but current doctrine calls for strict judicial scrutiny of policies tailored to reduce racial inequalities, thus according whites a constitutional entitlement to enjoy both the accumulated benefits of historical discrimination as

form of racism so virulent and deeply rooted that it overrides economic rationality and blocks any hope of genuine racial equality.¹⁹ In apparent despair, Bell warns that black people face permanent and irrevocable subordination in the United States due, in “crucial” part, to “the unstated understanding by the mass of whites that they will accept large disparities in economic opportunity in respect to other whites as long as they have a priority over blacks and other people of color for access to the few opportunities available.”²⁰

I take as my starting point Bell’s compelling account of white workers repeatedly choosing racial over class solidarity. It is possible, however, that racial attitudes and culture do not provide a sufficient explanation for those choices. “White workers,” as Martha Mahoney has observed, “formed concepts of self-interest in a landscape which was not a vacuum but a set of substantial obstacles to solidarity.”²¹ Given the demonstrated tendency of human beings to develop group antagonisms along even random lines of cleavage without any encouragement at all, it would seem that official law, linked to preexisting prejudices and backed by the armed power of the state, could erect formidable obstacles to cooperation and solidarity.²² By attaching serious consequences to racial categories, law could make them “real” in an experiential and practical sense. When the history of cross-racial laboring-class cooperation is considered in light of the situational force of law, we may dissent from Bell’s conclusion that poor whites were “easily detoured into protecting their sense of entitlement vis-à-vis blacks for all things of value.”²³

To speak of white workers and black workers is to invite the question: what about Asian and Latino workers? Some of the most informative scholarship on working class racial polarization concerns Asian and Latino workers, who play ever-more important roles in our economy and polity

well as the competitive advantages of unprovable (and often unconscious) discrimination. Concerning those benefits and competitive advantages, see, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 134–36 (2004) (discussing the relationship between class mobility and race); THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 2–3 (2004) (discussing the compounding effects of racial inequality for lower class African-Americans in America); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1669–75 (1995) (discussing residential segregation and white privilege).

19. BELL, *FACES*, *supra* note 16, at 4–7; Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 903–04.

20. BELL, *FACES*, *supra* note 16, at 8–10.

21. Martha R. Mahoney, *What’s Left of Solidarity? Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515, 1518–19 (2009).

22. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1015–16 (1995) (citing psychological experiments involving individuals who had been randomly placed in groups).

23. BELL, *FACES*, *supra* note 16, at 7.

today.²⁴ The present Article, however, focuses on the origins and consolidation of racial polarization beginning in the colonial era and continuing to the mid-twentieth century. Throughout most of this period, the racial identities of laboring- and working-class Americans were shaped primarily by the binary opposition of black and white, especially in the East, Midwest, and South, home to the overwhelming majority of American workers.

The Article proceeds chronologically. Part I begins in 1670s colonial Virginia, where black and white bound laborers routinely engaged in common action. It briefly summarizes historical work indicating that this tradition of cooperation was terminated by race laws structured to expand and deepen the enslavement of black labor while elevating white laborers as a control stratum over both enslaved and free blacks. Part II recounts the lily-white birth of the American working class, in which the Supreme Court played a secondary, supporting role. Part III covers the key period of Reconstruction, a moment of extraordinary opportunity followed by brutal suppression. It suggests that the Justices of the Supreme Court cleared the way for white supremacist paramilitaries to crush black laboring class organization. Part IV recounts a series of aftershocks as the Knights of Labor, the Populist movement, and the American Federation of Labor each attempted to unite black and white workers in a class-based movement. Part V is a conclusion.

24. *See generally, e.g.*, MOON-KIE JUNG, *REWORKING RACE: THE MAKING OF HAWAII'S INTERRACIAL LABOR MOVEMENT* (2006); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1975); ZARAGOSA VARGAS, *LABOR RIGHTS ARE CIVIL RIGHTS: MEXICAN AMERICAN WORKERS IN TWENTIETH-CENTURY AMERICA* (2005).

I. Prologue: Bacon's Rebellion and the Origins of the Racial Divide

In colonial America, bond servants and slaves routinely cooperated in acts of resistance including slowdowns, strikes, and group escapes.²⁵ During Bacon's Rebellion of 1675–1676, Nathaniel Bacon offered freedom to servants and slaves if they would join his fight against the government of Virginia.²⁶ Many did, and Bacon's mixed-race, mostly laboring-class army took and burned Virginia's capital, Jamestown, reportedly after declaring liberty for all servants and slaves.²⁷ Although Bacon's enemies condemned him on many grounds, none mentioned race mixing—a charge that would soon become a standard feature of elite responses to racially integrated worker organization.²⁸ Apparently, the white gentry “took the cooperation of slaves and poor whites for granted.”²⁹

After the rebellion, however, the planters moved forcefully to end cross-racial resistance. “The answer to the problem,” according to historian Edmund Morgan, “was racism, to separate dangerous free whites from dangerous slave blacks by a screen of racial contempt.”³⁰ In bits and pieces,

25. See, e.g., THEODORE W. ALLEN, 2 *THE INVENTION OF THE WHITE RACE: THE ORIGIN OF RACIAL OPPRESSION IN ANGLO-AMERICA* 154–57 (1997) (describing instances of rebellion and discontent among “African-American bond-laborers” and “landless European-Americans”); JOSEPH DOUGLAS DEAL, *RACE AND CLASS IN COLONIAL VIRGINIA: INDIANS, ENGLISHMEN, AND AFRICANS ON THE EASTERN SHORE DURING THE SEVENTEENTH CENTURY* 179 (1993) (noting that in the late 1600s “[w]henver slaves were caught stealing food and drink, they usually had white confederates,” and when they ran away, “it was usually in the company of white servants”); PETER LINEBAUGH & MARCUS REDIKER, *THE MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC* 135–37 (2000) (relating Bacon's Rebellion and other resistance movements in which servants and slaves participated); EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 327 (1975) (suggesting that through the 1670s English servants and African slaves “saw each other as sharing the same predicament,” as evidenced by joint escape attempts, intimate social interaction, and cooperation in Bacon's Rebellion); RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 136, 167–77 (1946) (describing occasions where black slaves worked with bound servants to escape); CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, at 454 (2010) (identifying a Virginia law of 1660 that targeted the particular problem of English servants running away with black slaves).

26. MORGAN, *supra* note 25, at 268; WILCOMB E. WASHBURN, *THE GOVERNOR AND THE REBEL: A HISTORY OF BACON'S REBELLION IN VIRGINIA* 80 (1957); STEPHEN SAUNDERS WEBB, *1676: THE END OF AMERICAN INDEPENDENCE* 66 (1984).

27. ALLEN, *supra* note 25, at 213; LINEBAUGH & REDIKER, *supra* note 25, at 136–37; WASHBURN, *supra* note 26, at 209 n.23 (quoting Letter from Marvell to Sir Henry Thompson (Nov. 14, 1676)); SAMUEL WISEMAN'S *BOOK OF RECORD: THE OFFICIAL ACCOUNT OF BACON'S REBELLION IN VIRGINIA, 1676–77*, at 20–21 (Michael Leroy Oberg ed., 2005); *A TRUE NARRATIVE OF THE LATE REBELLION IN VIRGINIA, BY THE ROYAL COMMISSIONERS (1677)*, reprinted in *NARRATIVES OF THE INSURRECTIONS* 105, 130 (Charles M. Andrews ed., 1915).

28. GOLDFIELD, *supra* note 10, at 41.

29. PHILIP D. MORGAN, *SLAVE COUNTERPOINT* 308 (1998).

30. MORGAN, *supra* note 25, at 328; see also ALLEN, *supra* note 25, 248–49 (providing additional evidence for Morgan's point); KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES AND ANXIOUS PATRIARCHS: GENDER, RACE AND POWER IN COLONIAL VIRGINIA* 186 (1996)

the Virginia Assembly framed a social order in which the poorest white laborer occupied a more exalted position than the most prosperous black planter.³¹ Poor whites were invited to share the privilege, previously enjoyed only by masters, of beating slaves rendered defenseless by law.³² White bond servants now found themselves “psychologically on a par with masters” as they wielded lordly power over other men and women.³³ Beginning in the early 1700s, the role of poor whites in slave law enforcement was institutionalized in a system of slave patrols that, even after the Civil War and emancipation, would persist in the form of vigilante organizations like the Ku Klux Klan.³⁴ Landed planters, not poor white servants or freemen—who had been stripped of the vote by the restored loyalists—elected the burgesses who enacted these laws.³⁵

For the purposes of this Article, two aspects of these events are particularly important. First, the planters used law to constitute poor whites as an intermediate social control stratum between planters and slaves.³⁶ Second, the racial divide was of secondary importance to class before it was enacted into law. Color prejudice was widespread, but it did not prevent white servants from joining with black slaves and servants in the struggle for freedom.

II. The Supreme Court and the Lily-White Birth of the American Working Class

By the 1760s, generations of white Americans had grown to maturity under the race laws, learning through experience that the rights and responsibilities of citizenship hinged on race, and that African-Americans were excluded from both. But the escalating conflict between American colonists and the British government brought opportunities for change.

(concluding that Virginia “achieved a stability built on the division of white and black laborers, the recognition of all white men as potential patriarchs, and an incipient Anglo-Virginian identity that rested precariously upon the fragile bonds uniting white men”); Ira Berlin, *Time, Space, and the Evolution of Afro-American Society on British Mainland North America*, 85 AM. HIST. REV. 44, 72 (1980) (observing that “Chesapeake planters consolidated their class position by asserting white racial unity”).

31. ALLEN, *supra* note 25, at 249–51.

32. An act for preventing Negroes Insurrections, Act X (1680), 2 STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 481 (William Waller Hening ed., 1823) [hereinafter HENING] (providing that “any negroe or other slave [who] shall presume to lift up his hand in opposition against any christian” would be punished by “thirty lashes on his bare back well laid on”).

33. MORGAN, *supra* note 25, at 331.

34. SALLY E. HADDEN, SLAVE PATROLS: LAW’S VIOLENCE IN VIRGINIA AND THE CAROLINAS 211–16 (2003).

35. An act declaring all the acts, orders and proceedings of a grand assembly held att James Citty, in the month of June, 1676, voyd, null and repealed, Act IV (1677), HENING, *supra* note 32, at 380–81.

36. ALLEN, *supra* note 25, at 249.

White and black workers joined together to form the backbone of the anti-British protests that escalated into revolution.³⁷ Slaves organized a number of plots and revolts, including at least two with white participation.³⁸ After war broke out, some 5,000 African-Americans were enrolled in the American revolutionary forces.³⁹ Every Northern state took some concrete step toward emancipation, and a significant number of Southern slaveholders chose to emancipate their slaves.⁴⁰ “For a brief moment,” summarized Eric Foner, “the ‘contagion of liberty’ appeared to threaten the continued existence of slavery.”⁴¹

The outcome of this moment of opportunity is well known. Once the crisis of war had passed, political leaders moved decisively to protect slavery in the new nation’s Constitution. By the time the American working class began to form in the early 1800s, the Constitution and laws of the United States left no doubt that labor freedom, civil rights, and citizenship rested on whiteness.⁴² Chief Justice Roger Taney exaggerated only slightly when he observed famously in *Dred Scott v. Sandford*⁴³ that the founders of the United States regarded slaves and their descendants “whether they had become free or not” as “so far inferior[] that they had no rights which the white man was bound to respect.”⁴⁴ The popular culture mirrored the law; slaves were black, and black people were considered to be—by nature—slaves.⁴⁵ This conflation of race (blackness) with class position (slavery) was so complete that, from 1790 to 1810, the United States census placed each person into one of three categories: white, slave, or other.⁴⁶

Irish leaders and German-American radicals urged American workers to ally with black workers,⁴⁷ but the short- and middle-run incentives

37. LINEBAUGH & REDIKER, *supra* note 25, at 213, 228, 232; Jesse Lemisch, *Jack Tar in the Streets: Merchant Seamen in the Politics of Revolutionary America*, 25 WM. & MARY Q. 371, 387, 391–92, 399–400 (1968).

38. GOLDFIELD, *supra* note 10, at 58; LINEBAUGH & REDIKER, *supra* note 25, at 224–26.

39. MICHAEL LEE LANNING, *AFRICAN AMERICANS IN THE REVOLUTIONARY WAR* 177 (2000).

40. ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 35 (1998); GOLDFIELD, *supra* note 10, at 68; LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, at 6–15 (6th prt. 1970) [hereinafter LITWACK, NORTH].

41. FONER, *supra* note 40, at 35.

42. See LITWACK, NORTH, *supra* note 40, at 66–93 (surveying federal and state laws denying basic rights to black Americans).

43. 60 U.S. 393 (1856).

44. *Id.* at 407.

45. See ROEDIGER, *WAGES*, *supra* note 5, at 56–57.

46. Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 11 LA RAZA L.J. 17, 28 (1999). By 1830, the census divided “Negro” into slaves and free colored persons. *Id.*

47. E.g., ROEDIGER, *WAGES*, *supra* note 5, at 169 (quoting Marx: “Labour [in the United States] cannot emancipate itself in the white skin where in the black it is branded”).

pointed the other way. Nonblack workers could either seek the benefits of whiteness (which did not automatically accrue to pale skin, as Irish and other immigrants discovered)⁴⁸ or launch a radical egalitarian challenge to the constitutional order of the United States. Such a challenge would entail not only overcoming racial prejudice, deeply rooted in custom and reinforced by law, but also expending scarce resources on allies who, in the short run, could contribute little to the struggle. In sharp contrast to the early colonial era—when black and white servants and slaves engaged in the same forms of resistance and saw each other as potentially valuable allies—the vast majority of black workers were now, from all outward appearances, effectively subjugated.⁴⁹ Black slaves continued to engage in collective resistance, but it usually took subtle forms—like the slowdown—that could be hidden behind masks of servility.⁵⁰ Nonenslaved African-Americans were few in number, and even they were treated as presumptive slaves under federal law, deprived of virtually all of the rights and responsibilities of citizenship in the slave states (with the exception of Creoles in Louisiana), and excluded from voting, jury service, and court testimony in most Northern states.⁵¹ Far from valuable allies, black workers, free and slave, appeared to white workers as dangerous “anticitizens” prone to manipulation by elites.⁵² As for middle-class abolitionists, another possible source of allies, most took pains to deny any concern for the plight of wage laborers.⁵³ They were no more prepared to challenge simultaneously the power of Southern planters and Northern capitalists than were white workers.

48. See DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* 121 (2005).

49. See ROEDIGER, *WAGES*, *supra* note 5, at 56 (“In 1820, 86.8 percent of African-Americans were slaves—in 1860, 89 percent.”).

50. See, e.g., Mary Turner, *Introduction*, in *FROM CHATTEL SLAVES TO WAGE SLAVES: THE DYNAMICS OF LABOR BARGAINING IN THE AMERICAS* 1, 7 (Mary Turner ed., 1995) (describing slaves' collective bargaining through “withdrawal of labour” in the face of flogging); Lorena S. Walsh, *Work and Resistance in the New Republic: The Case of the Chesapeake 1770–1820*, in *FROM CHATTEL SLAVES TO WAGE SLAVES*, *supra*, at 109 (“Slave field-hands resisted . . . attempts to speed up work by reverting to a slower pace when observers were absent.”); Robin D.G. Kelley, “*We Are Not What We Seem*”: *Rethinking Black Working-Class Opposition in the Jim Crow South*, 80 J. AM. HIST. 75, 93 (1993) (quoting Du Bois's argument that slow work by slaves “was the answer of any group of laborers forced down to the last ditch”). Enslaved women resisted exploitation not only in production, but also in reproduction. Pamela Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 27–29 (2001).

51. See, e.g., IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 108–10 (1974); LITWACK, *NORTH*, *supra* note 40, at 64–112.

52. ROEDIGER, *WAGES*, *supra* note 5, at 57.

53. See Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1491–92 (2012) (explaining abolitionists' “incentive to maintain a sharp divide between chattel slavery and other forms of economic injustice”).

As white wage workers began to organize trade unions and workingmen's political parties in the early 1800s, they failed to untie this knot of race and class. The numerous labor associations formed between the founding and the Civil War invariably excluded African-Americans from membership either by rule or custom.⁵⁴ And even as workers joined under the banner of universal suffrage to press for the abolition of property qualifications, most willingly accommodated opponents' concerns about the resulting increase in black voting by supporting new limitations on nonwhite suffrage.⁵⁵ Black-white labor unity was rarely advocated and almost never practiced between 1800 and the Civil War.⁵⁶ Although Northern white artisans and laborers contributed importantly to the abolitionist movement, they generally followed middle-class leadership and failed to link their abolitionism with the trade-union movement or notions of labor solidarity.⁵⁷

The Supreme Court did not play a leading role in these developments. It did, however, provide constitutional support for the presumption that, under the United States Constitution, black skin signified enslavement throughout the nation. In *Prigg v. Pennsylvania*⁵⁸ (1842), Edward Prigg and three other slave catchers abducted a Pennsylvania woman and her two children and transported them south for enslavement.⁵⁹ Prigg was convicted of violating Pennsylvania's Personal Liberty Law, which prohibited the kidnapping of any black person and required slave owners to utilize specified procedures—culminating in a regular trial before a county judge—to obtain the arrest and return of escaped slaves.⁶⁰ The Supreme Court struck down the Pennsylvania statute and overturned Prigg's conviction. Justice Joseph Story wrote the lead opinion. He held that the statute was preempted by the federal Fugitive Slave Act of 1793,⁶¹ which provided that a black person could be seized by any white claiming ownership, brought before a magistrate, and adjudged a slave on the spot with no opportunity to collect evidence or call witnesses.⁶² Pennsylvania had challenged the constitutionality of the Act, but Story held that it was a

54. PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER 1619-1973*, at 4–5 (1974) [hereinafter P. FONER, *ORGANIZED LABOR*].

55. See LITWACK, *NORTH*, *supra* note 40, at 75–76; ROEDIGER, *WAGES*, *supra* note 5, at 57.

56. See ROEDIGER, *WAGES*, *supra* note 5, at 168.

57. See, e.g., ROEDIGER, *WAGES*, *supra* note 5, at 86. On the contributions of white artisans and laborers to abolitionism, see, e.g., HERBERT APTHEKER, *ABOLITIONISM: A REVOLUTIONARY MOVEMENT* 35–49 (1989).

58. 41 U.S. 539 (1842).

59. *Id.* at 539; Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 *RUTGERS L.J.* 605, 609–10 (1993).

60. *Prigg*, 41 U.S. at 556–57; Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 *CORNELL L. REV.* 1086, 1088, 1120–21 (1993).

61. *Prigg*, 41 U.S. at 608, 612, 620–25.

62. Act of Feb. 12, 1793 (The Fugitive Slave Act of 1793), § 3, 1 Stat. 302, 302–03.

proper exercise of Congress's power to enact any law "necessary and proper" to enforce the Fugitive Slave Clause.⁶³ Prigg had not complied even with the Act's minimum procedures, but Story rendered that failure irrelevant by holding that the Fugitive Slave Clause of the Constitution endowed any person purporting to be a slave owner (or to act under the authority of one) with the constitutional right to enter a free state, seize a black person, and transport that person out of the state free from any interference—however minimal—from the state government.⁶⁴

From a jurisprudential point of view, Justice Story's opinion is noteworthy for its broad, purposive approach to national power, its concern for the effective exercise of the slave master's rights, and its relaxed treatment of due process. The Fugitive Slave Clause, which merely declared in the abstract that fugitives from labor "shall be delivered up" to their masters,⁶⁵ left Story with a wide range of choices. The clause said nothing about any congressional power of enforcement, and it was located outside Article I—where the powers of Congress are listed.⁶⁶ So Story turned to the purpose of the clause:

If by one mode of interpretation . . . [a constitutional] right must become shadowy and unsubstantial, and without any remedial power adequate to the end; and by another mode it will attain its just end and secure its manifest purpose; it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.⁶⁷

Story pumped up the slave owners' "absolute" and "unqualified" federal right to recover their slaves (such that merely to limit, delay, or postpone its exercise would amount to an unacceptable infringement), while downplaying state autonomy.⁶⁸ Although he was probably aware that slave catchers often kidnapped and enslaved Northern free blacks, Story did not deign to mention Pennsylvania's contention that its law merely protected the right of its free black residents not to be deprived of their liberty without due process of law.⁶⁹ This omission amounted to a holding that black

63. *Prigg*, 41 U.S. at 618–19, 625–26.

64. *Id.* at 612–16.

65. U.S. CONST. art. IV, § 2, cl. 3.

66. *See id.* ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due"); U.S. CONST. art. I, § 8 (enumerating legislative powers granted to Congress).

67. *Prigg*, 41 U.S. at 612.

68. *Id.* at 612–13. Story did write that states could not be compelled to enforce the clause, a significant concession to the free states. *Id.* at 615–16.

69. On the prevalence of kidnapping, see Holden-Smith, *supra* note 60, at 1087. *See generally* CAROL WILSON, FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780–1865 (1994).

persons accused of being fugitive slaves had no due process rights.⁷⁰ It seems particularly poignant in retrospect because, if given an opportunity, one or more of Prigg's three victims would likely have been able to prove their entitlement to freedom.⁷¹

In dissent, Justice McLean noted that the outcome hinged on elevating the presumption of slavery, "unsustained by any proof," over "[t]he presumption of the state that the coloured person is free."⁷² Prigg, who had forcibly abducted arguably free persons, found himself relieved of criminal liability under a federal constitutional right to seize "his slave . . . without any breach of the peace, or any illegal violence."⁷³ Under this logic, as Jamal Greene has written, "violence against blacks was 'legal' violence; 'illegal' violence was violence against whites."⁷⁴ In a sense, then, *Prigg* excluded Northern free blacks from membership in the emerging working class, relegating them instead to a twilight world of presumptive slavery.

To summarize, the American working class was born white. Following Bell, we might criticize white workers for failing to support the cause of black slaves and free blacks. Given the structure of short- and medium-run incentives, however, the criticism would be one of insufficient altruism, not of racism blocking the perception of common interests. It was the deliberate policy—devised by colonial planters and embedded in the new nation's Constitution and laws—of conflating race with class, blackness with slavery, and whiteness with citizenship, that shaped the incentives faced by white workers.

70. Finkelman, *supra* note 59, at 634. At least one state court had recognized and enforced the right of a black person not only to due process in general, but also to a jury trial in circumstances similar to those in *Prigg*. See Paul Finkelman, *State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law*, 23 RUTGERS L.J. 753, 754, 771 (1992) (analyzing the unpublished opinion of New Jersey Chief Justice Joseph C. Hornblower in *State v. The Sheriff of Burlington*, No. 36286 (N.J. 1836) (N.J. State Archives)).

71. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 428 (2011); Holden-Smith, *supra* note 60, at 1128.

72. *Prigg*, 41 U.S. at 672 (McLean, J., dissenting); see Finkelman, *supra* note 59, at 637 (observing that "[i]n the South, race was a presumption of slave status and by giving masters and slave-hunters a common-law right of recaption, Story nationalized this presumption"); Harris, *supra* note 18, at 1720–21 (describing and analyzing the presumption of freedom, arising from whiteness, and the presumption of slavery, arising from blackness).

73. *Prigg*, 41 U.S. at 613.

74. Greene, *supra* note 71, at 428.

III. Law and the Reconstruction of Laboring-Class Racial Polarization, 1865–1877

The Civil War destabilized racial norms and practices, presenting the first major opportunity for black–white cooperation since the American Revolution.⁷⁵ Taken together, the Reconstruction amendments propelled four million black workers into the hitherto nearly all-white class of citizen workers. Some of the amendments' leading proponents emphasized the interconnections between inequalities of race and class. “[W]e have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country,” explained Senator Henry Wilson, Radical leader and future Vice President.⁷⁶ “The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man.”⁷⁷

In contrast to moral abolitionists like William Garrison, who had loudly dissociated their cause from the plight of wage workers, leading Republicans envisioned emancipation serving the interests of all workers.⁷⁸ Some celebrated the Thirteenth Amendment as a charter of free labor aimed at ending “the degradation of labor, ‘both black and white,’” and subduing that spirit which “makes the laborer the mere tool of the capitalist.”⁷⁹ Wilson averred that he “never heard the term ‘laboring class’ here without the same sort of sensation which I used to have on hearing the word ‘slave,’” and urged that the law should never recognize “classes in this land of equality.”⁸⁰

75. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 104–12 (1935); GOLDFIELD, *supra* note 10, at 115–17; STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 99–102 (2003).

76. CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. Wilson); *see also* Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1703–04, 1717–19 (2012) (describing the opinions of another prominent Republican, Rep. James Ashley, who advocated for a broad, pro-labor interpretation of the Thirteenth Amendment).

77. *Id.*; Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 440 (1989).

78. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 773–76; VanderVelde, *supra* note 77, at 446–47. To many Republicans, “the man who worked for wages all his life was indeed almost as unfree as the southern slave.” ERIC FONER, *POLITICS AND THE IDEOLOGY IN THE AGE OF THE CIVIL WAR* 73 (1980).

79. VanderVelde, *supra* note 77, at 453, 471 (quoting Rep. Thomas Shannon, CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864)); *see also* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 9–10 (1995) (discussing the debates over the Thirteenth Amendment and the position of Senator Henry Wilson regarding labor equality).

80. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 484 (updated ed. 2014) [hereinafter E. FONER, *RECONSTRUCTION*] (quoting Sen. Wilson, CONG. GLOBE, 42nd Cong., 2nd Sess. 4018, 4040). For more on the views of Republican leaders, *see* Lea S. VanderVelde, *Henry Wilson: Cobbler of the Constitution, Strategist of the Thirteenth Amendment’s Free Labor Policy*, 14 GEO. J.L. & PUB. POL’Y (forthcoming 2016); Rebecca

In February 1866, two months after the ratification of the Thirteenth Amendment, President Andrew Johnson received a delegation of African-Americans from the Colored National Convention, then under way in Washington.⁸¹ During the ensuing discussion, Johnson and the delegates mapped out two conflicting scenarios for Reconstruction, each of which hinged on the relative salience of race and class as lines of cleavage. Delegation Chair George Downing opened by requesting that the Thirteenth Amendment be “enforced with appropriate legislation,” most importantly an extension of voting rights to African-Americans.⁸² The President objected that such a law would “commence a war of races.”⁸³ Why? Not because of any general antipathy between the races, but because of enmity between blacks and one class of whites, the “non-slaveholders,” or “poor white” men.⁸⁴ According to Johnson, slavery had enacted “a great monopoly, enabling those who controlled and owned it to constitute an aristocracy . . . [and] derive great profits and rule the many with an iron rod.”⁸⁵ The typical slave looked down on poor whites, claimed Johnson, because he compared his master’s prosperity to the condition of a nonslaveholding white man “who had a large family, struggling hard upon a poor piece of land.”⁸⁶ For his part, the poor white man “was opposed to the slave and his master; for the colored man and his master combined kept him in slavery, by depriving him of a fair participation in the labor and productions of the rich land of the country.”⁸⁷ To throw the ex-slave and the poor white “together at the ballot-box with this enmity and hate existing between them” would invite racial warfare.⁸⁸

In reply, Frederick Douglass did not dispute that the fate of black rights would hinge on the attitude of poor whites, but offered a more optimistic prediction of the outcome. Where Johnson insisted that black suffrage would heighten racial tensions, Douglass argued that it would serve “as a means of preventing the very thing which your excellency seems to apprehend—that is a conflict of races.”⁸⁹ If permitted to vote, Douglass urged, the Negro would “raise up a party in the Southern States among the poor, who will rally with him.”⁹⁰ In a subsequent written reply to the

Zietlow, *James Ashley, The Great Strategist of the Thirteenth Amendment*, 14 *GEO. J.L. & PUB. POL’Y* (forthcoming 2016).

81. 1 *PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865–1900*, at 214 (Philip S. Foner & George E. Walker eds., 1986) [hereinafter *BLACK CONVENTIONS*].

82. *Id.* at 217.

83. *Id.*

84. *Id.* at 216.

85. *Id.* at 215.

86. *Id.* at 216.

87. *Id.*

88. *Id.* at 216–17.

89. *Id.* at 218.

90. *Id.*

President, the colored delegation acknowledged that the former slaves and poor whites were divided by racial hostility, but some members—prefiguring historians like Edmund Morgan and Theodore Allen—blamed it on “the cunning of the slave masters,” who had “divided both to conquer each.”⁹¹ Naturally, the blacks hated the poor whites “for it was from this class that their masters received their slave-catchers, slave-drivers, and overseers.”⁹² Now that slavery had been abolished, however, and “the cause of this hatred removed, the effect must be removed also.”⁹³ Just as the Virginia planters of the seventeenth century fostered racial solidarity to solve their problem of class, Douglass and the delegation proposed to forge class solidarity as a solution to their problem of race.

One year later, Congress dissolved the Southern state governments and called upon the full Southern male electorate, black and white, to elect delegates to state constitutional conventions.⁹⁴ The clashing predictions of Johnson and the delegation would soon be tested.

A. *The Interests of the Labor Cause*

The early signs appeared to vindicate Douglass. For the first time since the American Revolution, black and white workers and farmers crossed race lines to form political and economic alliances. Talk of the need for black–white labor unity, virtually unheard in the antebellum era, suddenly became common. Top national labor leaders like William Sylvis and A.C. Cameron of the National Labor Union (NLU) (the leading federation of labor organizations at the time) called for cross-racial, working class unity.⁹⁵ Unions should “inculcate the great, ennobling idea that the interests of labor are one,” declared Cameron, “that there should be no distinction of race or nationality . . . that there is but one dividing line—that which separates mankind into two great classes, the class that labors and the class that lives by others’ labors.”⁹⁶ Less than a decade after the bloody, antiblack New York draft riots of 1863, white crowds cheered heartily for black workers marching in the city’s eight-hour parade.⁹⁷ In the upcountry regions of the South, where there had been considerable wartime resistance to the Confederacy, many poor white farmers and laborers now supported black suffrage and the Republican Party despite Democratic

91. *Id.* at 219; see ALLEN, *supra* note 25, at 248–49; MORGAN, *supra* note 25, at 328.

92. BLACK CONVENTIONS, *supra* note 81, at 219.

93. *Id.*

94. Act of March 2, 1867, ch. 153, §§ 1, 5, 14 Stat. 428, 428–29.

95. P. FONER, ORGANIZED LABOR, *supra* note 54, at 19–23; PAUL D. MORENO, BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY 24–25 (2006).

96. MORENO, *supra* note 95, at 24–25.

97. ROEDIGER, WAGES, *supra* note 5, at 168.

appeals to white solidarity.⁹⁸ Most remarkably, a few lodges of the Union League, a wartime loyalist association that had become the main Republican organizing center in the South, operated on an integrated basis.⁹⁹ In the North Carolina foothill county of Surry, for example, a lodge composed of poor white farmers and laborers opened its doors to former slaves who met their standard of “character.”¹⁰⁰ Within months, African-Americans composed more than one-third of the lodge’s three hundred or so members, and two served as lodge officers.¹⁰¹

In the parlance of present-day constitutional theory, the Reconstruction Amendments facilitated a convergence of poor-white and poor-black interests.¹⁰² “It was only when they saw the Negro with a vote in his hand, backed by the power and money of the nation,” reflected W.E.B. Du Bois, “that the poor whites . . . began to conceive of an economic solidarity between white and black workers.”¹⁰³ Upcountry yeoman farmers supported black suffrage out of self-interest. Most importantly, they hoped that a cross-racial alliance would enable them to achieve their own political and economic objectives, disfranchising ex-Confederates and winning debt relief.¹⁰⁴ Similarly, the National Labor Union appealed to the self-interest of white workers. William Sylvis and other NLU leaders warned that if the white-labor movement continued to exclude black laborers, they would exercise their newly recognized rights to undercut union standards, break strikes, and cast their votes against white labor.¹⁰⁵ As one NLU publication put it, ex-slaves would either become “an element of strength or an element of weakness” in the movement and, accordingly, the “interests of the labor cause demand that all workingmen be included within its ranks, without regard to race or nationality.”¹⁰⁶

White racial solidarity had, however, been learned from direct experience shaped by law over a period of centuries. Institutions and mores

98. E. FONER, RECONSTRUCTION, *supra* note 80, at 300; Michael W. Fitzgerald, *Radical Republicanism and the White Yeomanry During Alabama Reconstruction, 1865–1868*, 54 J.S. HIST. 565, 565–66, 577–79 (1988).

99. MICHAEL W. FITZGERALD, THE UNION LEAGUE MOVEMENT IN THE DEEP SOUTH: POLITICS AND AGRICULTURAL CHANGE DURING RECONSTRUCTION 23, 42–43 (1989); E. FONER, RECONSTRUCTION, *supra* note 80, at 283–84; HAHN, *supra* note 75, at 187–88.

100. HAHN, *supra* note 75, at 188.

101. *Id.* at 188–89.

102. On the theory of interest convergence, see *supra* notes 14, 15 and accompanying text.

103. DU BOIS, *supra* note 75, at 131.

104. FITZGERALD, *supra* note 99, at 18–23; E. FONER, RECONSTRUCTION, *supra* note 80, at 301–03; PETER KOLCHIN, FIRST FREEDOM: THE RESPONSES OF ALABAMA’S BLACKS TO EMANCIPATION AND RECONSTRUCTION 167–68 (1972).

105. P. FONER, ORGANIZED LABOR, *supra* note 54, at 20–21; JONATHAN P. GROSSMAN, WILLIAM SYLVIS, PIONEER OF AMERICAN LABOR 231–32 (1945).

106. ANDREW C. CAMERON, ADDRESS OF THE NATIONAL LABOR CONGRESS TO THE WORKINGMEN OF THE UNITED STATES (1867), *reprinted in IX A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 141, 158–60 (John R. Commons et al. ed., 1910).

in all spheres of life—religious, sexual, and civic, as well as economic and political—had grown up around the principle of white supremacy.¹⁰⁷ Reasoned arguments alone could not overcome either sexualized racist fear—even Sylvis inveighed against whites with daughters “who entertain young negro gentlemen in their parlors”¹⁰⁸—or the human tendency to focus first on the pain of one’s closest associates—Sylvis, for example, condemned the Freedmen’s Bureau for spending Northern workers’ tax money on ex-slaves when the former had been “suffering all the pinchings of poverty and starvation, with no bureau to go to.”¹⁰⁹ Moreover, many unions served social as well as economic purposes.¹¹⁰ As indicated by the use of the name “Brotherhood,” some functioned as much as fraternal associations as labor unions.¹¹¹ To admit African-Americans to such an organization would have implicitly acknowledged their social equality with whites, a notion that few white workers were ready to accept.¹¹² Although the NLU opened its own meetings to black delegates, few affiliates followed suit, and some worked actively to exclude black workers from jobs.¹¹³ And when the Union League set out to organize newly liberated African-Americans, many white loyalists dropped out while others operated segregated councils.¹¹⁴

Like Frederick Douglass, Sylvis and Cameron envisioned black workers inducing whites to abandon the policy of exclusion, albeit in a different way. Where Douglass called for blacks to organize a multiracial party of the poor, Sylvis and Cameron expected them to teach white workers, through experience, the costs of racist exclusion and the benefits of cross-racial cooperation. Either way, the outcome would hinge on the willingness and practical ability of black workers to organize.

107. See generally WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812* (1977); ROEDIGER, *WAGES*, *supra* note 5.

108. ROEDIGER, *WAGES*, *supra* note 5, at 168. For an analysis of the role of sexual desire and anxiety in shaping race, see generally ELISE LEMIRE, “MISCEGENATION”: MAKING RACE IN AMERICA 1–10 (2002).

109. See William H. Sylvis, Address Delivered at Sunbury, Penna. (Sept. 16, 1868), in *THE LIFE, SPEECHES, LABORS AND ESSAYS OF WILLIAM H. SYLVIS* 231, 234–35 (James C. Sylvis ed., 1872).

110. See FRANCINE A. MOCCIO, *LIVE WIRE: WOMEN AND BROTHERHOOD IN THE ELECTRICAL INDUSTRY* 22–23 (2009) (recounting origins of trade unions in fraternal associations, and describing their continuing social functions).

111. ERIC ARNESEN, *BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY* 129 (2001) [hereinafter ARNESEN, *BROTHERHOODS*].

112. See P. FONER, *ORGANIZED LABOR*, *supra* note 54, at 20–21, 24 (noting how only one union at the National Labor Union convention admitted blacks, and characterizing the National Labor Union’s push to admit blacks into unions as a “development in the history of black working class”).

113. *Id.* at 26–27; E. FONER, *RECONSTRUCTION*, *supra* note 80, at 479–80.

114. FITZGERALD, *supra* note 99, at 25–26; HAHN, *supra* note 75, at 177, 187.

B. The Greatest Opportunity for a Real National Labor Movement

The great African-American leader Booker T. Washington would later proclaim that the black worker was, by disposition, “not inclined to trade unionism,” that he was “almost a stranger to strife, lock-outs and labor wars,” and that he offered employers “law-abiding, peaceable, teachable . . . labor that has never been tempted to follow the red flag of anarchy.”¹¹⁵ Following Washington, David Bernstein and Ken Kersch have argued that black workers embraced individualism and opposed labor organization.¹¹⁶ According to Kersch, “this pervasive black individualism, which predominated among African Americans from emancipation until about the time of the New Deal” flowed naturally from the “individualist-oriented free labor ideology” of the antislavery cause.¹¹⁷ Few black workers, claims historian Paul Moreno, wanted anything more than the individual right to quit their jobs and move elsewhere.¹¹⁸

The former slaves were committed, however, not to individualism but to effective freedom from planter control.¹¹⁹ They sought, first and foremost, government redistribution of farm land, with many claiming a “right” to a share in their former owners’ fields, earned by unpaid labor under slavery.¹²⁰ When land was not forthcoming, they organized. Collective resistance, hidden behind masks of servility during centuries of slavery, now emerged into the light of day.¹²¹ Across the South, black field laborers staged strikes and slowdowns to raise wages, establish labor standards, and gain a measure of control over the timing, pace, and methods of work.¹²² Whites expressed wonderment at their ability to form extensive

115. P. FONER, ORGANIZED LABOR, *supra* note 54, at 79.

116. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 92 (2001); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 22, 188–91 (2004).

117. KERSCH, *supra* note 116, at 188.

118. MORENO, *supra* note 95, at 23.

119. FITZGERALD, *supra* note 99, at 113–14, 117, 149; E. FONER, RECONSTRUCTION, *supra* note 80, at 104–06; KOLCHIN, *supra* note 104, at 45–46; *see also* SUSAN EVA O’DONOVAN, BECOMING FREE IN THE COTTON SOUTH 214 (2007).

120. Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 870–71 (1987); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 U. MICH. L. REV. 1, 32–34 (1999) [hereinafter Forbath, *Caste*]; *see also* HAHN, *supra* note 75, at 79–82, 128–37, 194–96, 211–12; LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 400–03 (1979) [hereinafter LITWACK, STORM].

121. *See supra* note 50 and accompanying text (discussing resistance under slavery).

122. *See, e.g.*, FITZGERALD, *supra* note 99, at 6, 166–72 (strikes and boycotts in Alabama and Mississippi); ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 91–106 (1983) [hereinafter E. FONER, NOTHING BUT FREEDOM] (large-scale strikes by plantation workers in South Carolina); HAHN, *supra* note 75, at 173–76 (collective bargaining and strikes combined with military drilling in various states); GERALD DAVID JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862–1882, at 116–20, 207–08, 277 (1986) (slowdowns and strikes in various states); KOLCHIN, *supra* note 104, at 38–39

combinations and win, as one *New York Times* correspondent put it, “redress of grievances by lawful means.”¹²³ Meanwhile, black workers in Southern cities staged strikes, organized labor unions, and cooperated with white workers in economic action.¹²⁴ Black domestic workers assembled, legislated pay scales, and refused to work below scale.¹²⁵ Beginning in 1869, the Colored National Labor Union (CNLU) encouraged black workers to develop trade unions and labor associations in a number of states and localities.¹²⁶ In Georgia and Alabama, black labor conventions established statewide unions to seek higher wages and raise money for the poor.¹²⁷

In terms of durable organization, however, multipurpose associations predominated. In addition to campaigning for the Republican Party and drilling for armed self-defense, Union Leagues and similar organizations served as organizing centers for labor bargaining and protests.¹²⁸ Founded

(strikes at contract time in Alabama); LITWACK, STORM, *supra* note 120, at 437–45 (strikes and lockouts in several states); O’DONOVAN, *supra* note 119, at 230–32 (strikes for higher wages and “for rights” in southwestern Georgia); JULIE SAVILLE, *THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 1860–1870*, at 61–62, 113–14, 140–41, 147 (1996) (collectively rejecting supervision, independently organizing work routines, preventing the use of strikebreakers, and staging strikes to shape contract terms in South Carolina); GILLES VANDAL, *RETHINKING SOUTHERN VIOLENCE: HOMICIDES IN POST-CIVIL WAR LOUISIANA, 1866–1884*, at 151 tbl.6.2 (2000) (thirty rural strikes in Louisiana); ROBERT H. ZIEGER, *FOR JOBS AND FREEDOM: RACE AND LABOR IN AMERICA SINCE 1865*, at 35–36 (2007) (organization for better rates and conditions by black cotton farmers in eastern Arkansas); Jerrell H. Shofner, *Militant Negro Laborers in Reconstruction Florida*, 39 J.S. HIST. 397, 400–01 (1973) (collective action by Florida tenant farmers).

123. JAYNES, *supra* note 122, at 117.

124. For examples of union organization and action, see ERIC ARNESEN, *WATERFRONT WORKERS OF NEW ORLEANS: RACE, CLASS, AND POLITICS, 1863–1923*, at 50–56, 92–95, 100–01 (1991) [hereinafter ARNESEN, *WATERFRONT*] (New Orleans); FITZGERALD, *supra* note 99, at 180–82 (Mobile); MICHAEL K. HONEY, *SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS 15* (1993) (Memphis); ERNEST OBADELE-STARKS, *BLACK UNIONISM IN THE INDUSTRIAL SOUTH 39–47* (2000) (Galveston and other Texas Gulf Coast ports); PAUL ORTIZ, *EMANCIPATION BETRAYED: THE HIDDEN HISTORY OF BLACK ORGANIZING AND WHITE VIOLENCE IN FLORIDA FROM RECONSTRUCTION TO THE BLOODY ELECTION OF 1920 46–53* (2005) (Pensacola, Apalachicola, Jacksonville, and Key West); ROBERT E. PERDUE, *THE NEGRO IN SAVANNAH, 1865–1900*, at 116 (1973) (Savannah); PETER J. RACHLEFF, *BLACK LABOR IN THE SOUTH: RICHMOND, VIRGINIA 1865–1890*, at 42–44, 56–61, 73–74, 80–82, 146–50 (1984) (Richmond); GEORGE BROWN TINDALL, *SOUTH CAROLINA NEGROES 1877–1900*, at 137–40 (1952) (Charleston); Shofner, *supra* note 122, at 401, 408 (Pensacola, Jacksonville, and Fernandina). See generally William C. Hine, *Black Organized Labor in Reconstruction Charleston*, 25 LAB. HIST. 504 (1984) (Charleston).

125. TERA W. HUNTER, *TO ‘JOY MY FREEDOM: SOUTHERN BLACK WOMEN’S LIVES AND LABORS AFTER THE CIVIL WAR 74–81, 88–97* (1997).

126. P. FONER, *ORGANIZED LABOR*, *supra* note 54, at 39–42; 2 *THE BLACK WORKER: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 10–13* (Philip S. Foner & Ronald L. Lewis eds., 1978) [hereinafter *DOCUMENTARY HISTORY*].

127. E. FONER, *RECONSTRUCTION*, *supra* note 80, at 378.

128. GOLDFIELD, *supra* note 10, at 121–22; see also FITZGERALD, *supra* note 99, at 166–72; HAHN, *supra* note 75, at 186; SAVILLE, *supra* note 122, at 179–86. As Richard Valeyly explained,

initially by white Republican organizers and freeborn, relatively prosperous blacks, many Union Leagues quickly developed into class organizations of propertyless laborers.¹²⁹ By the end of 1867, most black voters in the South had enrolled.¹³⁰ Given that the overwhelming majority of black Americans were laborers, an association of voters was also, as a practical matter, an association of workers. Local lodges fostered black assertiveness in employer relations through legal assistance, education, and coordination of collective action.¹³¹ Union Leagues and similar organizations often held meetings during work time so that, even when engaged in political or paramilitary activities, they asserted the autonomy of workers on the job.¹³² “In fact,” notes historian David Montgomery, “it can be said that the distinction between economic and political questions, which was then so finely drawn by white trade unionists, made no sense in African-American organizations.”¹³³

Where blacks were able to exercise their new rights over a substantial period of time, whites could learn to cooperate. In New Orleans, for example, race relations in employment “ran counter to the dominant trend of black subordination, exclusion, and segregation” until after the turn of the century.¹³⁴ How did this come about? According to the leading history, “the strength of black unions was central in limiting white workers’ ability to impose a racially exclusionist solution on the problems of competition and unemployment.”¹³⁵ By exercising the freedoms of speech, labor, and assembly, black unions exerted strategic pressure on white unions, punishing racist practices with organized “scabbing” and rewarding cross-

the struggle for black rights hinged on the creation of a “parallel politics” consisting of mutually reinforcing political, labor, and religious movements. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 36–38 (2004).

129. HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901*, at 42–55 (2001); FITZGERALD, *supra* note 99, at 65–66.

130. E. FONER, *RECONSTRUCTION*, *supra* note 80, at 283.

131. FITZGERALD, *supra* note 99, at 100, 105–09, 128–29, 148–51, 154, 160–63, 166; HAHN, *supra* note 75, at 186; O’DONOVAN, *supra* note 119, at 226–30; SAVILLE, *supra* note 122, at 178–79, 186, 194–95.

132. *See* FITZGERALD, *supra* note 99, at 38, 165; RICHARDSON, *supra* note 129, at 62; SAVILLE, *supra* note 122, at 180–83.

133. DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* 124 (1993); *see also* FITZGERALD, *supra* note 99, at 116–17 (discussing “the interconnection between political insurgency and labor concerns”); SAVILLE, *supra* note 122, at 4 (explaining that agricultural laborers in South Carolina understood that political and economic rights were inseparable and intertwined).

134. ARNESEN WATERFRONT, *supra* note 124, at ix.

135. *Id.*

racial solidarity with antiscab enforcement and affirmative support.¹³⁶ These unions were able to function because the local political machine, which depended on white working-class votes, “avoided breaking strikes at critical moments and ignored workers’ violations of the hardening racial codes.”¹³⁷ New Orleans, the most thoroughly organized city in the South, was also the most fluid racially, and observers gave unions much of the credit.¹³⁸ Black and white workers allied in other Southern cities, especially ports, where black workers organized unions, some of which included whites.¹³⁹ In Baltimore, black shipyard workers responded to exclusionary strikes by forming their own union and, with assistance from a white capitalist, opening a cooperative, integrated shipyard.¹⁴⁰

Organization, then, made it possible for black workers to demonstrate practically what both black leaders and progressive white unionists were saying about class solidarity, namely that workers of all colors would stand or fall together. Solidarity would be rewarded with solidarity, while racial chauvinism would be punished with organized scabbing. By contrast, unorganized black workers served as pawns for employers, many of whom hired them when needed to break a strike and then discarded or demoted them afterward.¹⁴¹ DuBois was not wrong when, looking back from 1935, he commented that “[t]he South, after the war, presented the greatest opportunity for a real national labor movement which the nation ever saw.”¹⁴²

C. *Ye White Men Who Stick to Black, Soulless Beasts*

While black workers taught the benefits of cross-racial working-class cooperation, white planters moved to reestablish control over black labor.¹⁴³ To this end, they formed employer cartels, obtained legal restrictions on black labor, and discharged and evicted laborers who engaged in Republican political activities.¹⁴⁴ In the political sphere, however, the

136. See *id.* at viii–ix (describing how the necessity for racial cooperation arose from the fact that employers could defeat calls for higher wages and improved conditions by manipulating racial divisions and by employing strikebreakers).

137. *Id.* at ix.

138. *Id.* at 83, 92–93.

139. See *supra* note 124.

140. P. FONER, ORGANIZED LABOR, *supra* note 54, at 21–22.

141. See, e.g., STERLING D. SPERO & ABRAM L. HARRIS, THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT 265–68 (1931) (recounting the hiring of blacks to break a stockyard strike and their discharge at the strike’s conclusion).

142. DU BOIS, *supra* note 75, at 353.

143. See LITWACK, STORM, *supra* note 120, at 393–99.

144. On employer cartels and restrictive labor laws, see JAMES D. SCHMIDT, FREE TO WORK: LABOR LAW, EMANCIPATION, AND RECONSTRUCTION, 1815–1880, at 99 (1998); Darrell A.H. Miller, *Racial Cartels and the Thirteenth Amendment Enforcement Power*, 100 KY. L.J. 23, 27–36 (2011–2012); Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or*

planters faced disadvantages that could not be overcome through such mild methods. Not only did black voters constitute a majority of the electorate in three states and large minorities in several others, but, under peaceful conditions, black voter turnout typically exceeded 80%.¹⁴⁵ If allowed to exercise their newly recognized rights, African-Americans would control three states and a host of counties and localities across the South.

The planters' solution to this problem was racist terror. Four years of military solidarity, forged in battle, had muted class antagonisms among whites, sharpened the race line, and accustomed poor whites to leadership from the mostly planter-class Confederate officer corps.¹⁴⁶ "Out of that ordeal by fire the masses had brought, not only a great body of memories in common with the master class," observed Wilbur Cash, "but a deep affection for these captains, a profound trust in them, a pride which was inextricably intertwined with the commoners' pride in themselves."¹⁴⁷ Veterans organized themselves into secret societies (for example, the KKK and, later, the White Leagues and rifle clubs) which modeled their structures and activities on the old slave-patrol system.¹⁴⁸ Like the patrols, the societies fostered cross-class white solidarity and punished cross-racial class cooperation.¹⁴⁹ "Ye white men who stick to black, soulless beasts . . .

Competitive?, 51 U. CHI. L. REV. 1161, 1161–62 (1984); VanderVelde, *supra* note 77, at 488–94. On employer use of economic power to control black voting, see FITZGERALD, *supra* note 99, at 106, 151, 163; E. FONER, RECONSTRUCTION, *supra* note 80, at 341; HAHN, *supra* note 75, at 203–06, 224; LITWACK, STORM, *supra* note 120, at 555; GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 88–90 (1984); SAVILLE, *supra* note 122, at 179–80; ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION, at xli, 24, 130, 193 (1971); LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, at 15 (1996).

145. CENSUS OFFICE, U.S. DEP'T OF THE INTERIOR, 1 NINTH CENSUS: THE STATISTICS OF THE POPULATION OF THE UNITED STATES, at xvii tbl (1872); E. FONER, RECONSTRUCTION, *supra* note 80, at 291, 314; HAHN, *supra* note 75, at 198, 205.

146. The Confederate Army had permitted soldiers to elect their company commanders, forcing members of the planter elite to prove themselves worthy of command. EMORY M. THOMAS, THE CONFEDERACY AS A REVOLUTIONARY EXPERIENCE 108–10 (1971). Meanwhile, in the dimension of race, the Confederate practice of summarily executing captured black soldiers left veterans with few qualms about deploying murder in the struggle to restore white supremacy. See JAMES K. HOGUE, UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION 49–52 (2006).

147. W. J. CASH, THE MIND OF THE SOUTH 111 (1941).

148. E. FONER, RECONSTRUCTION, *supra* note 80, at 431–34; HAHN, *supra* note 75, at 268–69; CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 39–40 (2008); TRELEASE, *supra* note 144, at xlv, xlvii; see also *supra* note 34 and accompanying text. For an illuminating discussion of the distinction between class and cross-class racial solidarity in the context of a struggle to develop cross-racial working-class solidarity, see Martha R. Mahoney, *Constructing Solidarity: Interest and White Workers*, 2 U. PA. J. LAB. & EMP. L. 747, 753–57 (2000).

149. RABLE, *supra* note 144, at 94–95.

[and y]e niggers who stick to low White,” commanded one Klan broadside, “Begone, Begone, Begone!”¹⁵⁰

Between 1868 and 1871, the societies launched a ruthless campaign of terror, assaulting, flogging, and killing black leaders and their supporters with the aim of destroying all manifestations of black political and economic organization.¹⁵¹ At the CNLU’s final convention in 1871, outgoing President Isaac Myers reported that “in some localities, it is impossible to reach the colored laborers except you are steel-plated against the Ku-Klux bullets” and despaired of organizing black workers under this “fearful reign of terror.”¹⁵² Although blacks bore the brunt, their white Republican allies also suffered.¹⁵³

Congress responded with the Enforcement Acts of 1870 and 1871, which criminalized conspiracies to interfere with federal rights.¹⁵⁴ The Justice Department sagaciously targeted the Klan’s base among southern elites, opening space for the reemergence of class divisions among whites. “The higher the social standing and character of the convicted party,” the Department urged federal attorneys, “the more important is a vigorous prosecution and prompt execution of judgment.”¹⁵⁵ Typically, such people had the wealth and connections to flee the country, leaving their less prosperous followers to face prosecution.¹⁵⁶ Thus abandoned, many poor Klansmen evinced little commitment to the Klan or to the cause of white supremacy.¹⁵⁷ A number surrendered voluntarily and provided useful information on their compatriots’ depredations.¹⁵⁸ During the South Carolina prosecutions of 1871–1872, Klansman after Klansman claimed that he had been coerced into participation or deferred to the (poor)

150. TRELEASE, *supra* note 144, at 54. This objective could also be pursued through law. For example, Mississippi’s 1865 black code punished as vagrants whites and blacks who intermingled “on terms of equality.” William M. Wiecek, *Emancipation and Civic Status: The American Experience, 1865–1915*, in *THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT* 84 (Alexander Tsesis ed., 2010).

151. See E. FONER, *RECONSTRUCTION*, *supra* note 80, at 425–44; P. FONER, *ORGANIZED LABOR*, *supra* note 54, at 42; HAHN, *supra* note 75, at 275–80. In some areas, Union Leagues and Republican clubs were strong enough to resist, and Republican governors in South Carolina, Tennessee, Arkansas, and Texas responded effectively with militias composed mostly of African-Americans and white loyalists. In most of the South, however, violence went unchecked. *Id.* at 280–86.

152. P. FONER, *ORGANIZED LABOR*, *supra* note 54, at 38.

153. See TRELEASE, *supra* note 144, at 149, 201–02, 252, 262, 269, 277, 287, 289–90, 303–04 (recounting instances of white violence against Republicans).

154. Act of May 31, 1870 (Enforcement Act of 1870), ch. 114, 16 Stat. 140; Act of April 20, 1871 (Enforcement Act of 1871), ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

155. WILLIAMS, *supra* note 144, at 114.

156. *Id.* at 47.

157. See, e.g., *id.*

158. EVERETTE SWINNEY, *SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870–1877*, at 231–32 (1987); TRELEASE, *supra* note 144, at 404; WILLIAMS, *supra* note 144, at 47.

judgment of his social betters.¹⁵⁹ After hearing numerous defendants and witnesses over a period of months, Circuit Judge Hugh Bond was moved to declare that there “ought to be another proclamation of emancipation” to liberate poor whites from the influence of their wealthy neighbors.¹⁶⁰ Although self-serving excuses and informing cannot be counted as evidence of genuine regret, they did demonstrate the contingency of nonelite support for terrorism. By 1872, Frederick Douglass could observe with satisfaction that the “scourging and slaughter of our people have so far ceased.”¹⁶¹

D. The Supreme Court and the Destruction of Black Organization, 1874–1876

At this juncture, however, the United States Supreme Court intervened. The decisive case, *United States v. Cruikshank*,¹⁶² grew out of a pitched battle between black Republicans and white Democrats at Grant Parish, Louisiana.¹⁶³ After a four-hour struggle, the far-better-armed and more numerous Democrats prevailed and took a number of prisoners.¹⁶⁴ Hours later, a contingent of whites led by William Cruikshank, a prominent local planter, murdered most of the prisoners.¹⁶⁵ U.S. Attorney James Beckwith brought charges under the Enforcement Act of 1870, and the mostly white jury convicted Cruikshank and two other whites of conspiracy to interfere with the rights of two black Republicans to vote, to bear arms, and to assemble peaceably.¹⁶⁶

The *Cruikshank* case presented the Supreme Court with facts that squarely implicated what the Court had called the “one pervading purpose” of the Reconstruction amendments, namely “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”¹⁶⁷ Moreover, it arose in

159. See, e.g., Transcript of Cross-Examination by Mr. Stanbery, U.S. v. Robert Hayes Mitchell, 26 F. Cas. 1283 (C.C.D.S.C. 1871) (No. 15,790), in PROCEEDINGS IN THE KU KLUX TRIALS AT COLUMBIA, S.C., IN THE UNITED STATES CIRCUIT COURT, NOVEMBER TERM, 1871, at 188, 210–11 (Negro Universities Press 1969) (1872) (illustrating how one white man was told he would be killed unless he joined the Klan). For the confessions of several Klansmen, see PROCEEDINGS IN THE KU KLUX TRIALS, *supra*, at 764–66, 770–79, 781–84, 786; TRELEASE, *supra* note 144, at 405–06; WILLIAMS, *supra* note 144, at 93–94, 114–15.

160. WILLIAMS, *supra* note 144, at 114.

161. LANE, *supra* note 148, at 5.

162. 92 U.S. 542 (1875).

163. E. FONER, RECONSTRUCTION, *supra* note 80, at 437, 530–31.

164. LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 101–03 (2008); LANE, *supra* note 148, at 96–103, 111.

165. LANE, *supra* note 148, at 105–07.

166. *United States v. Cruikshank*, 92 U.S. 542, 548, 551, 553, 555 (1875); LANE, *supra* note 148, at 194.

167. Slaughter-House Cases, 83 U.S. 36, 71 (1872).

the context of a bloody challenge to the rule of law, including the murder of United States citizens, armed attacks on government officials, and threats and assaults directed at witnesses and others involved in the legal process itself.¹⁶⁸ As one Southern newspaper summarized, the Fourteenth and Fifteenth Amendments “may stand forever; but we intend . . . to make them dead letters on the statute-book.”¹⁶⁹

Nevertheless, the Supreme Court unanimously overturned the convictions, issuing landmark rulings on incorporation, state action, and the requirement of proving racial motivation under the Fourteenth and Fifteenth Amendments. Indeed, *Cruikshank*—not the now-canonical *Slaughter-House Cases*,¹⁷⁰ *Civil Rights Cases*,¹⁷¹ and *Washington v. Davis*¹⁷²—first announced the basic principles currently applied by courts on those central issues. The Court held for the first time that rights guaranteed in the Bill of Rights—here, the right to assemble peaceably and to bear arms—were not among the privileges and immunities of national citizenship and thus could not be reached by Congress.¹⁷³ Nor could the indictments be grounded on the Equal Protection or Due Process Clauses, because the Fourteenth Amendment “add[ed] nothing to the rights of one citizen as against another” (the Court’s first statement on the issue of state action).¹⁷⁴ Moreover, the indictments failed to specify racial intent, thus placing them outside the reach of the Fifteenth Amendment, as well as the Equal Protection Clause.¹⁷⁵ “We may suspect that race was the cause of the hostility; but it is not so averred.”¹⁷⁶ None of these results were compelled by the constitutional text and each departed from the prevailing trend in the Circuit Court decisions.¹⁷⁷

Jurisprudentially, Chief Justice Waite’s opinion for the Court presented a negative image of Story’s in *Prigg*. Where Story had

168. LANE, *supra* note 148, at 136, 147–53, 188; KEITH, *supra* note 164, at 114–15, 119, 124–25, 128–31, 138.

169. E. FONER, RECONSTRUCTION, *supra* note 80, at 590; see HAHN, *supra* note 75, at 305–07 (detailing the paramilitary attack on the predominantly black town of Hamburg, after which a white assailant taunted that “the Constitution is played out, and every man can do just as he pleases”).

170. 83 U.S. 36 (1872).

171. 109 U.S. 3 (1883).

172. 426 U.S. 229 (1976).

173. *United States v. Cruikshank*, 92 U.S. 542, 550–54 (1875).

174. *Id.* at 554; PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 1–2 (2011).

175. *Cruikshank*, 92 U.S. at 554, 556; BRANDWEIN, *supra* note 174, at 120.

176. *Cruikshank*, 92 U.S. at 556.

177. See *United States v. Hall*, 26 F. Cas. 79, 81–82 (C.C.S.D. Ala. 1871) (No. 15,282); *United States v. Crosby*, 25 F. Cas. 701, 701, 704–05 (C.C.D. S.C. 1871) (No. 14,893); James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 403–04 (2014).

highlighted the purpose of the Fugitive Slave Clause,¹⁷⁸ Waite failed even to mention the purpose of the Reconstruction Amendments.¹⁷⁹ Where Story had shown great solicitude for the practical ability of slaveholders to exercise their right of recaption,¹⁸⁰ Waite ignored altogether the impact of his ruling on the rights of black Southerners and their allies.¹⁸¹ Where Story had trumpeted the importance of effective national government,¹⁸² Waite expounded upon state autonomy, neglecting to mention that, in the case at bar, as well as most other terror cases, the federal government had intervened to assist the officially constituted state government against paramilitary insurgents.¹⁸³ Where Story had given no consideration to the due process rights of Northern free blacks,¹⁸⁴ Waite insisted upon meticulous protection for the due process rights of white paramilitaries.¹⁸⁵

Cruikshank exerted a devastating impact on black organization in the South. The Circuit Court opinion, authored by Justice Bradley, had terminated the period of relative peace and unleashed a new wave of terrorism.¹⁸⁶ Eschewing the disguises and night riding that characterized the failed first wave, the Democrats formed White League “regiments” and modeled their paramilitary actions on the daylight-pitched battle that gave rise to *Cruikshank*.¹⁸⁷ Federal prosecutors cut back drastically on enforcement.¹⁸⁸ After a series of armed assaults on Republican-controlled towns and cities across the South, hard-line Democrats regained control of Alabama (47% black) in 1874 and Mississippi (more than 50% black) in

178. *Prigg v. Pennsylvania*, 41 U.S. 539, 608, 612 (1842).

179. *See generally Cruikshank*, 92 U.S. 542.

180. *Prigg*, 41 U.S. at 612–13.

181. *See generally Cruikshank*, 92 U.S. 542.

182. *Prigg*, 41 U.S. at 615–16.

183. *Cruikshank*, 92 U.S. at 549–51; LANE, *supra* note 148, at 142–43.

184. Finkelman, *supra* note 59, at 630, 633.

185. *See Cruikshank*, 92 U.S. at 556 (holding that the indictment’s failure to mention that the defendants were motivated by race rendered it defective notwithstanding that “[w]e may suspect that race was the cause of the hostility,” certainly an understatement given the facts of the massacre).

186. HOGUE, *supra* note 146, at 115–16; LANE, *supra* note 148, at 212–13; VALELLY, *supra* note 128, at 114–15. For a detailed discussion, see Pope, *supra* note 177, at 412–14, 435; *see also* ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 155 (1985) (noting that the Circuit Court decision in *Cruikshank* prevented the federal government from enforcing the Reconstruction amendments. *But see* BRANDWEIN, *supra* note 174, at 112 (contending that the new wave of terror was triggered by the financial panic of 1873). *See generally* U.S. v. *Cruikshank*, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897).

187. HOGUE, *supra* note 146, at 115–16. On the distinctiveness of the new phase of violence, *see* MICHAEL PERMAN, *THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869–1879*, at 170 (1984).

188. LANE, *supra* note 148, at 243; *see* KACZOROWSKI, *supra* note 186, at 158. *But see*, BRANDWEIN, *supra* note 174, at 8–9, 54 (contending that the decline in enforcement resulted from pressure to reduce federal spending after the financial panic of 1873). For a detailed discussion, *see* Pope, *supra* note 177, at 414–15, 434–35.

1875.¹⁸⁹ Two years later, the full Court's ruling terminated day-to-day civil rights enforcement in the South.¹⁹⁰ Thus encouraged, the Democrats extended their offensive to South Carolina (nearly 60% black), where organized attacks on Republican-controlled towns helped to suppress the vote sufficiently for the Democrats to prevail in the 1876 election tally.¹⁹¹ After President Rutherford B. Hayes withdrew federal troops from the Louisiana and South Carolina state houses, the Democrats staged bloodless coups and completed the establishment of a one-party system throughout the Deep South.¹⁹² Although the national Republican Party would continue to reap black votes for a time, the campaign to reconstruct the South had come to an end.¹⁹³

E. Race, Class, and Cruikshank

Over the past several decades, a growing number of historians have concluded that the struggle over Reconstruction was decided at the intersection of race and class.¹⁹⁴ "It is impossible to separate the question of color from the question of labor," explained one contemporary newspaper highlighted by Eric Foner, "for the reason that the majority of the laborers . . . throughout the Southern States are colored people, and nearly all the colored people are at present laborers."¹⁹⁵ Not only had the Thirteenth Amendment liberated a race, but it had also, as Justice Noah Swayne put it, "destroyed the most important relation between capital and labor in all the states where slavery existed."¹⁹⁶ Before his appointment to the Court, Justice Bradley had similarly noted the overlap of race and class: "It must be remembered that the lands all belong to the whites, and they alone have the capital to improve them and put up buildings and sugar mills on them—and that the labor [is] all performed by the negroes."¹⁹⁷

At the time of *Cruikshank*, Bradley was widely recognized as the Court's intellectual leader.¹⁹⁸ His Circuit Court opinion was so highly

189. CENSUS OFFICE, *supra* note 145; RABLE, *supra* note 144, at 114–18; SWINNEY, *supra* note 158, at 319.

190. Pope, *supra* note 177, at 414, 440–41.

191. CENSUS OFFICE, *supra* note 145; E. FONER, RECONSTRUCTION, *supra* note 80, at 570–75; RABLE, *supra* note 144, at 166–76.

192. HOGUE, *supra* note 146, at 175–76.

193. See Pope, *supra* note 177, at 438–41.

194. See, e.g., E. FONER, RECONSTRUCTION, *supra* note 80, at xxiii–xxiv; HAHN, *supra* note 75, at 9–10.

195. E. FONER, RECONSTRUCTION, *supra* note 80, at xxiv.

196. U.S. v. Rhodes, 27 F. Cas. 785, 788 (C.C.D. Ky. 1866) (No. 16,151).

197. Letter from Joseph P. Bradley, J., U.S., to Carry Bradley 5 (Apr. 30, 1867) (on file with the New Jersey Historical Society).

198. JOHN BRAEMAN, BEFORE THE CIVIL RIGHTS REVOLUTION: THE OLD COURT AND INDIVIDUAL RIGHTS 64 (1988); BRANDWEIN, *supra* note 174, at 6–7; C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 299 (1963).

regarded that, even after the Court announced its own ruling in 1876, his would sometimes be cited in preference.¹⁹⁹ Bradley had long viewed black labor from the perspective of the employing classes. Before the war he argued that any compromise between North and South must include protection for the human property rights of slaveholders, reasoning that “[n]o business man can say that these are not the dictates of justice, as between the parties.”²⁰⁰ Even after Lincoln’s Emancipation Proclamation, Bradley opposed immediate abolition and insisted that the implementation of gradual emancipation “must be left to the Southern people themselves,” a body from which black Southerners were clearly excluded.²⁰¹ In sharp contrast to most congressional Republicans, Bradley saw emancipation from the viewpoint of Southern planters. “You can easily see how the equilibrium of labor on the plantations is destroyed,” he wrote in an 1867 letter.²⁰² “Negroes that never had the right of going where they chose, find themselves invested with that right; and off they go—to see the cities or other parishes—their vagrancy only limited by their means of locomotion.”²⁰³ Instead of celebrating this new freedom, Bradley wondered how the former slave masters could regain control over black laborers. “How shall the planter keep them on the plantation? How shall he secure their services at times when a few days inattention to the crop results in the loss of it?”²⁰⁴ The obvious solution would have been to offer fair wages and fair treatment, but Bradley considered this to be the “ready answer of the little informed.”²⁰⁵ Instead, he embraced the planters’ view that the freed people could not be induced to work for reasonable wages. “This is the great question of the day,” he concluded, “how to restore the labor of the Southern States to a normal condition.”²⁰⁶ As we have seen, the planters answered with a paramilitary insurrection and, in *Cruikshank*, Bradley cleared the way.²⁰⁷

199. BRANDWEIN, *supra* note 174, at 93.

200. Joseph P. Bradley, NEWARK DAILY ADVERTISER, Dec. 3, 1860, *reprinted in* MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY (Charles Bradley ed., 1902).

201. Letter from Joseph P. Bradley, J., U.S., to “Gentlemen” of the Ger. Comm. 3 (Oct. 24, 1862) (on file with the New Jersey Historical Society). For more on Bradley’s views about slavery, see LANE, *supra* note 148, at 191–92 (describing Bradley’s willingness to let the South maintain its institutions after the Civil War); POPE, *supra* note 177, at 418–19 (describing Bradley’s view of black labor from the point of view of the planter-business class).

202. Letter from Joseph P. Bradley, J., U.S., to Carry Bradley, *supra* note 197, at 5.

203. *Id.* at 5–6.

204. *Id.* at 6.

205. *Id.*

206. *Id.* at 7.

207. *But see* BRANDWEIN, *supra* note 174, at 119–20 (maintaining that Bradley’s opinion was “comprehensible within a doctrinal framework” and not “a way of disallowing punishment for a massacre”). This possibility is discussed in POPE, *supra* note 177, at 415–17.

IV. The Supreme Court and Cross-Racial Class Movements, 1876–1906

The long-range impact of *Cruikshank* on the prospects for cooperation between poor whites and poor blacks became clear during the three decades following the decision. The Knights of Labor, the Southern agrarian populist movement, and the American Federation of Labor each attempted to unite whites with blacks in a working-class movement. Each of these efforts succumbed, however, to forces unleashed by *Cruikshank*. Far from subsiding in salience, as Douglass and white labor leaders had predicted, white racial solidarity continued to eclipse working-class solidarity.

A. *The Knights of Labor and Cruikshank*

The Knights of Labor, a nationwide labor federation with an official policy of welcoming “into one fold all branches of honorable toil, without regard to nationality, sex, creed or color,” made a serious effort to recruit Southern workers during the 1880s.²⁰⁸ Seizing on their first opportunity to organize since Reconstruction, black workers poured into the Knights, accounting for between one-third and one-half of the Knights’ membership in the South.²⁰⁹ In the countryside, where most black Knights resided, planters and their allies responded with violent suppression. “Vigilantes and lynch mobs joined officers of the law in intimidating and murdering organizers and Knights,” summarized historian Rayford W. Logan, “breaking up meetings, and forcing the discharge of union workers.”²¹⁰

The decisive confrontation came in the sugarcane fields of Louisiana. In October 1887, nine thousand black and one thousand white Knights of Labor struck for higher wages and union recognition.²¹¹ Louisiana Governor Samuel McEnery committed eleven companies of the now all-white state militia, which had been created by transforming White League units into militia units.²¹² The planters railed against the strikers’ violation of the color line drawn by “God Almighty,” and the strike collapsed after two leaders were lynched and seventy black laborers shot dead by militia

208. Kenneth Kann, *The Knights of Labor and the Southern Black Worker*, 18 LAB. HIST. 49, 53–55 (1977); Constitution for the Local Assemblies of the Order of the Knights of Labor of America, *Preamble*, in 3 DOCUMENTARY HISTORY, *supra* note 126, at 72.

209. P. FONER, ORGANIZED LABOR, *supra* note 54, at 48–49; Kann, *supra* note 208, at 68–69.

210. RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 150 (1970); *see, e.g.*, P. FONER, ORGANIZED LABOR, *supra* note 54, at 58–59; MELTON ALONZA MCLAURIN, THE KNIGHTS OF LABOR IN THE SOUTH 140–41 (1978); TINDALL, *supra* note 124, at 140; Kann, *supra* note 208, at 64–66; Thomas W. Kremm & Diane Neal, *Clandestine Black Labor Societies and White Fear: Hiram F. Hoover and the “Cooperative Workers of America” in the South*, 19 LAB. HIST. 226, 228 (1978).

211. Rebecca J. Scott, *Fault Lines, Color Lines, and Party Lines: Race, Labor, and Collective Action in Louisiana and Cuba, 1862–1912*, in BEYOND SLAVERY: EXPLORATIONS OF RACE, LABOR, CITIZENSHIP IN POSTEMANCIPATION SOCIETIES 61, 76–77 (Frederick Cooper et al. eds., 2000).

212. HOGUE, *supra* note 146, at 187, 191.

and planter-led paramilitaries.²¹³ The massacres triggered a wave of terrorism, enabling the sugar planters to consolidate their control over the labor force.²¹⁴ “I think this will settle the question of who is to rule the nigger or the white man,” gloated the daughter of one prominent planter, “for the next 50 years.”²¹⁵ Her characterization of the strike as a race war reflected the white elite’s “marking” of all strikers as black, regardless of physical appearance or self-identification.²¹⁶ Elsewhere, efforts to organize Southern black farm workers and lumber workers met similarly deadly suppression.²¹⁷ With Redeemers in control of the state governments and federal law effectively nullified, concerted activity by rural laborers had become “all but impossible.”²¹⁸

B. *The Populist Movement and Giles v. Harris*

During the early 1890s, black farmers and sharecroppers allied with whites in a nationwide populist movement. White populists rarely evinced more than a grudging tolerance of their black allies, but the alliance did open space for African-Americans to advance their interests in many parts

213. P. FONER, ORGANIZED LABOR, *supra* note 54, at 60; HOGUE, *supra* note 146, at 191–92; Scott, *supra* note 211, 77–81. Sources conflict on the number of black laborers killed in this event. See P. FONER, ORGANIZED LABOR, *supra* note 54, at 60 (indicating four dead); MCLAURIN, *supra* note 210, at 141 (declaring at least thirty, but up to sixty, dead); Kann, *supra* note 208, at 66–67 (indicating at least thirty dead).

214. Jeffrey Gould, *Sugar War: The Strike of 1887: Louisiana*, S. EXPOSURE, Nov.–Dec. 1984, at 45, 53–54.

215. Scott, *supra* note 211, at 80.

216. *Id.* at 80–81.

217. See, e.g., DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 320–21 (2008) (lynchings of striking black and white coal miners in 1908); 3 DOCUMENTARY HISTORY, *supra* note 126, at 352–64 (lynchings of cotton strikers in Arkansas in 1891); E. FONER, NOTHING BUT FREEDOM, *supra* note 122, at 106 (strikes by South Carolina workers “suppressed with ruthless brutality” in 1876); JACQUELINE JONES, THE DISPOSSED: AMERICA’S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT 129 (1992) (collapse of strike by black and white Florida phosphate workers after five killings in 1919); ROBIN D.G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 38–42 (1990) (violence against sharecropper unions in Alabama during the early 1930s including numerous killings); Kieran Taylor, “*We Have Just Begun*”: *Black Organizing and White Response in the Arkansas Delta, 1919*, in AMERICAN LABOR STRUGGLES AND LAW HISTORIES 113, 113–14, 14 n.3 (Kenneth M. Casebeer ed., 2011) (massacre of between 25 and 100 sharecroppers at Elaine, Arkansas in 1919 and its fatal effect on a union of black agricultural workers); Jerold S. Auerbach, *Southern Tenant Farmers: Socialist Critics of the New Deal*, 27 ARK. HIST. Q. 113, 118–31 (1968) (violence and threats of lynching in Elaine, Arkansas, causing the decline of the integrated local of the Southern Tenant Farmers Union); Merl E. Reed, *Lumberjacks and Longshoremen: The I.W.W. in Louisiana*, 13 LAB. HIST. 41, 44–53 (1972) (fatal shootings causing the demise of an integrated timber workers’ union in 1913).

218. E. FONER, RECONSTRUCTION, *supra* note 80, at 595.

of the South.²¹⁹ Georgia Congressman Tom Watson, who formulated the Populist Party's policy on race, steered clear of "social equality," but called for full political equality and an end to lynch law.²²⁰ Like William Sylvis and other national labor leaders, Watson argued for black and white unity in terms of economic self-interest; by combining as producers, farmers could free themselves from the tyranny of financial speculators.²²¹ Watson nominated a black farmer to the Georgia populist executive committee and, in one celebrated incident, gathered two thousand armed farmers at his home to protect a black populist preacher who had been threatened with lynching.²²²

Without effective black organization in the countryside, however, there was nothing to prevent the Democratic Party from miscounting and otherwise manipulating the black vote in majority-black areas. The Democrats took full advantage of the situation, piling up, in the words of historian C. Vann Woodward, "huge majorities of Negro votes for the cause of white supremacy": "Time after time the Populists would discover that after they had carried the white counties, fraudulent returns from the Black Belt counties padded with ballots the Negro did or did not cast were used to overwhelm them."²²³ When election fraud did not suffice, the Democrats fell back on the old white-supremacist standby of political violence.²²⁴ Before long, the Democrats' manipulation of black votes led Watson to perform a complete about-face, calling for black disfranchisement as the only means of defeating the Democrats.²²⁵

In *Giles v. Harris*,²²⁶ the Supreme Court sanctioned this strategy, rejecting a black voter's challenge to Alabama's racially exclusionary voter qualification laws and administrative practices on the ground that the intensity of white opposition to black suffrage would make it impossible for the Court to grant effective relief.²²⁷ In a rare moment of candor, the Court acknowledged that, as a practical matter, Southern whites had acquired the

219. LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA* 294–99 (1976); HAHN, *supra* note 75, at 432–40; MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 40–41 (1995).

220. C. VANN WOODWARD, *TOM WATSON: AGRARIAN REBEL* 220–21 (1938).

221. *See id.* at 217–21.

222. *Id.* at 221, 239–40.

223. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 79–80 (commemorative ed. 2002).

224. *See* GOODWYN, *supra* note 219, at 299.

225. *See id.* at 296 (relating that "Tom Watson's successive defeats through the Democratic custom of fraudulent voting of blacks" altered his stance on black political and economic rights); WOODWARD, *supra* note 220, at 370–71 (noting that Watson declared that "[t]hey [the Democrats] need the Negro to beat us with" and that he proposed disfranchising the Negro).

226. 189 U.S. 475 (1903).

227. *Id.* at 488. For a detailed treatment of *Giles*, along with a compelling argument that the decision should be included in our constitutional canon, see generally Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

power to nullify the constitutional rights of black Americans. “[T]he great mass of the white population intends to keep the blacks from voting,” sighed Oliver Wendell Holmes, writing for the Court.²²⁸ “Unless we are prepared to supervise the voting in that State by officers of the court, . . . all that the plaintiff could get from equity would be an empty form.” Accordingly, the now-voteless African-Americans were advised, without a trace of irony, to seek relief from “the legislative and political department of the government of the United States.”²²⁹ To this day, however, the Court has not confessed that its own ruling in *Cruikshank* made it possible for “the great mass of the white population”²³⁰ to seize this power of nullification. With the destruction of black political, labor, and paramilitary organization, no agency retained the practical ability to challenge the extralegal order of white supremacy.

C. *The American Federation of Labor and Hodges v. United States*

The American Federation of Labor (AFL), established in 1886, also set out initially to forge a cross-racial movement. The AFL required any union seeking affiliation to pledge “never to discriminate against a fellow-worker on account of color, creed or nationality.”²³¹ When the machinists and boilermakers unions refused to repudiate their whites-only rules, the AFL not only withheld affiliation and assistance, but also chartered rival unions with inclusive membership policies.²³² Given the AFL’s commitment to union autonomy as well as its desperate need for members, these actions appeared to reflect a serious commitment to inclusion. Further contributing to this impression, AFL President Samuel Gompers celebrated the New Orleans General Strike of 1892 as “a very bright ray of hope” for the labor movement: “Never in the history of the world was such an exhibition, where with all the prejudices existing against the black man, when the white

228. *Giles*, 189 U.S. at 488.

229. *Id.* The Court speedily abandoned the policy of honest confession, returning to formalist obfuscation in *Giles v. Teasley*. *Giles v. Teasley*, 193 U.S. 146, 164–67 (1904) (finding no federal question in *Giles*’s challenge to Alabama’s state-constitutional disfranchisement of blacks because the challenged provisions were either valid, in which case *Giles*’s rights had not been infringed, or invalid, in which case *Giles* retained his federal rights); VALELLY, *supra* note 128, at 140.

230. As described by Justice Holmes. *Giles*, 189 U.S. at 488.

231. PROCEEDINGS OF THE AMERICAN FEDERATION OF LABOR, 1881–1888, at 15–16 (1906); Booker T. Washington, *The Negro and the Labor Unions*, in BLACK WORKERS: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 289–90 (Philip S. Foner & Ronald L. Lewis eds., 1989); *An Open Letter to Ministers of the Gospel*, THE SHOE WORKERS’ J., May 7, 1907, at 9, 11.

232. P. FONER, ORGANIZED LABOR, *supra* note 54, at 64–65; MORENO, *supra* note 95, at 77–78.

wage-workers of New Orleans would sacrifice their means of livelihood to defend and protect their colored fellow workers.”²³³

As we have seen, however, black–white cooperation in New Orleans hinged on the organization of black workers.²³⁴ And, after *Cruikshank* and the collapse of Reconstruction, it was virtually impossible for black workers to organize—by themselves or in combination with whites—except, with great difficulty, in some cities and coalfields.²³⁵ For a time, Southern craft unionists nevertheless continued to waver between racial cooperation and exclusion.²³⁶ By the early 1890s, however, the federal government had ceased all efforts to enforce the right of black Americans to vote, removing the incentive for whites to ally with them.²³⁷ Southern white workers in the skilled trades now coalesced into a solid constituency for racial over class solidarity in the labor movement. In the machinists union, the storm center of the conflict, President James O’Connell joined Gompers in urging the union to drop its color bar.²³⁸ But the national leadership could not overcome the resistance from Southern members. Douglas Wilson, editor of the *Machinists Monthly Journal*, warned Gompers that the “Southern delegation will get up on its hind legs, and swear, ‘that if you take out that “word,” [white,] accept my resignation right now.’”²³⁹ When the issue came to a vote, Wilson’s warning proved prescient.²⁴⁰ Similar dynamics played out elsewhere, as the Southern tail wagged the Northern dog.²⁴¹ By 1902, when W.E.B. Du Bois published his landmark study, *The Negro*

233. P. FONER, *ORGANIZED LABOR*, *supra* note 54, at 68–69; MORENO, *supra* note 95, at 76–77.

234. *See supra* text accompanying notes 134–40.

235. *See* ARNESEN, *WATERFRONT*, *supra* note 124, at 74–75 (describing the success of the New Orleans waterfront labor movement whereby employers “reluctantly accepted the biracial unions as an unpleasant fact of life”); DANIEL L. LETWIN, *THE CHALLENGE OF INTERRACIAL UNIONISM: ALABAMA COAL MINERS, 1878–1921*, at 89–90 (1998) (explaining that during the late nineteenth century, black and white miners organized together because of “a continued sense of shared experience as miners, coupled with an awareness that the color line functioned . . . at their expense”).

236. *See* C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913*, at 229 (1951) (noting that Southern labor wavered between conflicting policies concerning black workers by either excluding them or taking them as organized workers).

237. The redeemers, who had previously relied upon fraud and intimidation to suppress the black vote, now began enacting literacy requirements and poll taxes to eliminate it altogether. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 86–89 (rev. ed., 2009).

238. *See* MORENO, *supra* note 95, at 77.

239. Letter from Douglas Wilson to Samuel Gompers (Apr. 14, 1893), in 4 *DOCUMENTARY HISTORY*, *supra* note 126, at 51.

240. MARK PERLMAN, *THE MACHINISTS: A NEW STUDY IN AMERICAN TRADE UNIONISM* 16 (1961).

241. *See, e.g.*, Letter from H.W. Sherman, Grand Secretary, Int’l Brotherhood of Electrical Workers, to Samuel Gompers (Nov. 7, 1900), in 4 *DOCUMENTARY HISTORY*, *supra* note 126, at 9 (claiming that “all the locals below the Mason & Dixon Line threaten[ed] to withdraw” if a black local’s charter was not revoked).

Artisan, forty-three AFL affiliates reported zero black members, twenty-seven acknowledged a token number, and a scant fifteen claimed more than that.²⁴²

In 1906, the Supreme Court put its imprimatur on the strategy of exclusion. In *Hodges v. United States*,²⁴³ the Court held that Congress lacked the power to outlaw private white combinations to drive black workers from their jobs.²⁴⁴ The government had attempted to circumvent *Cruikshank*'s state action requirement by relying upon the Thirteenth Amendment,²⁴⁵ which—then, as now—was understood to prohibit slavery and involuntary servitude whether imposed by government or private parties.²⁴⁶ This claim gave the Court an opportunity to extend its solicitude for the constitutional “right of free contract,” declared one year before in *Lochner v. New York*,²⁴⁷ to a case involving the freedom of black workers to make labor contracts—a core concern of the Amendment.²⁴⁸ As in *Cruikshank*, however, hypothetical threats to state autonomy loomed larger than actual threats to the constitutional rights of black laborers. From the majority's point of view, there was no way to protect black workers' freedom of labor without sliding down a slippery slope toward the federal takeover of all criminal law.²⁴⁹ Moreover, such federal protection would “commit [the black] race to the care of the Nation” and reduce blacks to “wards of the Nation.”²⁵⁰ From 1906 until 1964, when the Supreme Court upheld the Civil Rights Act of that year, *Hodges* would protect the privilege of white unions and employers to exclude workers of color from jobs.²⁵¹

242. THE NEGRO ARTISAN 158 tbl.54, 164 tbl.55, 167 (W.E. Burghardt Du Bois ed., 1902).

243. 203 U.S. 1 (1906).

244. *Id.* at 18–20.

245. *Id.* at 15–20.

246. *United States v. Kozminski*, 487 U.S. 931, 942 (1988); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

247. 198 U.S. 45 (1905).

248. See Pamela S. Karlan, *Contracting the Thirteenth Amendment: Hodges v. United States*, 85 B.U. L. REV. 783, 783–84 (2005) (noting the irony in the Court's refusal to protect black workers' ability to carry out their employment contracts only one year after *Lochner*).

249. *Hodges*, 203 U.S. at 17–18. In answer to the government's argument that denial of the power to make contracts was one of the indicia of slavery, the Court stated: “But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled.” *Id.* Hence, freedom from bodily assault and trespass would also be guaranteed. *Id.*

250. *Id.* at 16, 20.

251. See Mahoney, *supra* note 21, at 1535–36; *Katzenbach v. McClung*, 379 U.S. 294 (1974); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

V. Conclusion

There is a tendency to blame white workers for the racial divide in the American working class. So racist are white workers, it is said, that they have repeatedly chosen to forego the economic benefits of cross-racial working-class solidarity in order to enjoy the psychological satisfaction of lording it over workers of color. If the account presented here holds true, however, white workers did not make their choices on neutral terrain. Elites used law to disrupt and discourage cross-racial cooperation. Colonial planters initially divided white from black laborers by enacting a series of laws constituting white laborers as a control stratum over enslaved and free blacks. After the American Revolution, constitutional and statutory law—interpreted liberally by the Supreme Court—established a nationwide presumption that even “free” black laborers belonged to the class of chattel slaves. From the viewpoint of white workers, there was little to be gained by allying either with black slaves, who could neither vote nor strike, or with the comparatively tiny cohort of black wage laborers, nearly all of whom lacked the right to vote. Then, between 1865 and 1870, the Thirteenth, Fourteenth, and Fifteenth Amendments terminated slavery and created the greatest opportunity for cross-racial laboring-class cooperation since the Colonial Era. White supremacists responded with organized terror, but the Reconstruction state governments, backed by the federal government, moved to restore law and order. At that crucial juncture, the Supreme Court blocked federal prosecutors and courts from assisting the states, clearing the way for planter-led paramilitaries to suppress black rights and terminate Reconstruction. With the restoration of one-party, white-supremacist rule in the South, it became effectively impossible to organize on a cross-racial basis. The Knights of Labor, the agrarian populist movement, and the American Federation of Labor all made serious attempts, but fell short. During the late nineteenth and early twentieth centuries, when the working classes of Europe were building durable and resilient socialist movements, the American working class was hopelessly split along racial lines.