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

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

**Harry G. Hutchison\* ©**

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**INTRODUCTION**

One observer notes that the Employee Free Choice Act (EFCA) “is the most transformative piece of labor legislation to come before Congress since the enactment of the National Labor Relations Act of 1935 (NLRA).”<sup>1</sup> Placing the potential impact of the

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\*Professor of Law, George Mason University School of Law. For helpful comments on earlier drafts, I am grateful to Elizabeth McKay, David Bernstein, Allison Hayward and Ilya Somin. Excellent research assistance was provided by Farah Mourad. The usual caveat applies. Research support was provided by the Law and Economics Center at George Mason University School of Law. © Harry G. Hutchison.

EFCA in historical perspective, Richard Epstein contends that the “NLRA marked the culmination of a systematic effort of the Progressive movement that dominated so much of American intellectual life during the first third of the twentieth century.”<sup>2</sup> “As it was widely acknowledged at the time, the NLRA was revolutionary in its implications for American Labor Law.”<sup>3</sup> Less widely recognized were the adverse effects of this and other New Deal statutes on people of color. Readily available evidence shows that President Roosevelt’s insistence on raising the price of labor (1) increased unemployment and human suffering,<sup>4</sup> and (2) also widened the unemployment gap between blacks and whites.<sup>5</sup> Today, this unemployment gap remains in effect. Henry Louis Gates and Cornel West contend that the size of the black underclass has grown disproportionately in recent years.<sup>6</sup> During the period between December 2008 and May 2009, the unemployment rate for white workers ranged between 6.6 and 8.6 percent while the rate for blacks

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<sup>1</sup> RICHARD A. EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT* (forthcoming Hoover Press 2009), University of Chicago Working Paper, available at <http://ssrn.com/abstract=1337185> at 7 (January, 2009) [hereinafter, EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 8.

<sup>4</sup> Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?* 26 QLR 799, 825 (2008) [hereinafter, Hutchison, *What Workers Want*].

<sup>5</sup> RICHARD K. VEDDER & LOWELL E. GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA* 272-79 (1993) (showing that racial differences in terms of unemployment rates were essentially nonexistent between 1890-1930 but during the 1930s the federal government’s initiatives in the legislative and regulatory environment that were aimed at raising the wages for workers actually widened the unemployment gap between black and white workers and contributed to increased income inequality). The following table captures the widening gap. *See id.* at 272.

**Racial Differences in Unemployment Rates**

Year	White	Nonwhite
1890-1930 (average)	5.82 %	5.90%
1940	9.50%	10.89%
1950	4.9%	9.0%
1975	7.8%	13.8%
1990	4.7%	10.1%

<sup>6</sup> HENRY LOUIS GATES & CORNEL WEST, *THE FUTURE OF THE RACE* xii (1996).

ranged between 11.9 and 14.9 percent.<sup>7</sup> The consequences of the New Deal for African Americans persist as an important and under-examined issue. While subsequent amendments to the NLRA in 1947 made “it clear that NLRA respected employees’ collective choice on unionization, but did not put its thumb on the scale in favor of [unions],”<sup>8</sup> the NLRA nonetheless represents the progressive turn in American labor relations. It is likely that neither Progressive Era labor legislation nor contemporary efforts to further transform the labor markets operate in the best interest of African American citizens.

Labor law reform was advanced as part of a progressive agenda. Bernstein and Leonard show that the original progressives were simultaneously conservative and liberal.<sup>9</sup> The progressive turn in labor legislation, much like the progressive slant in modern liberal thought appears to be tarnished by contradiction. American Progressivism from which today’s liberalism descended<sup>10</sup> has contributed to the expansion of government and to the growth of authoritarianism, and has helped to spawn economic and social nationalism (statism) linked in part to the Romantic nationalism of Jean-Jacques Rousseau, which materialized as the French Revolution.<sup>11</sup> Historian David Andress argues that the dawning of a troubled modernity infecting the political life of democratic nations in our own era owes much of its force to the American and especially

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<sup>7</sup> Table A-4, Employment status of the civilian noninstitutional population by race, Hispanic or Latino ethnicity, sex, and age, BUREAU OF LABOR STATISTIC *available* at <http://www.bls.gov/cps/tables.htm#pnif> (accessed, June 11, 2009).

<sup>8</sup> EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_\_ at 7-8.

<sup>9</sup> David E. Bernstein and Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform* (unpublished manuscript on file with the author) 5 (2009).

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

<sup>11</sup> *Id.* at 38-43.

the French Revolutions.<sup>12</sup> Like most modern experiments in social engineering, American Progressivism and its progeny, the New Deal, call to mind earlier attempts by revolutionaries to instigate “totalitarian democracy”<sup>13</sup> fashioned by elites. Derived from the Age of Reason with its focus on humanitarianism,<sup>14</sup> the French Revolution illustrates the ironic possibilities that flow from the unconstrained pursuit of the natural and imprescriptible rights of man.<sup>15</sup> Verifying the promise of paradox, “at the time the Bastille was stormed, it contained fewer than ten inmates, [but] by the time the Terror had run its course, around half a million Frenchmen were incarcerated for political reasons, many of whom would perish in jail.”<sup>16</sup> A movement aimed at the destruction of hierarchy and propelled by a sense of social justice was powerless to free itself from its own hierarchical and tyrannical impulses and, accordingly marginalized the many for the benefit of the few, transforming the notion of justice into an attractive illusion.<sup>17</sup> This hopeless descent into darkness resulting in cruelty as a vehicle of societal transformation may reflect Søren Kierkegaard’s perception that “the specific character of despair is precisely this: it is unaware of being despair.”<sup>18</sup>

From a comparative perspective, the French Revolution and Lenin’s revolution had a common origin in the secular faith of the Enlightenment.<sup>19</sup> Correspondingly, both

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<sup>12</sup> DAVID ANDRESS, *THE TERROR: CIVIL WAR IN THE FRENCH REVOLUTION* 1 (2005).

<sup>13</sup> JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 194 (1993,1996).

<sup>14</sup> ANDRESS, *supra* note \_\_\_ at 1-2. *But see* GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_ at 41 (showing that the French revolution, which is often mistaken as the wellspring of rationalism was actually a romantic spiritual revolt, an attempt to replace the Christian God with a Jacobin one).

<sup>15</sup> ANDRESS, *supra* note \_\_\_ at 1.

<sup>16</sup> GRAY, *supra* note \_\_\_ at 194.

<sup>17</sup> ANDRESS, *supra* note \_\_\_ at 6 (showing those revolutionaries whom seem most imbued with human warmth such as George-Jacques Danton, and those who lived blameless lives of moral purity, such as Maximilien Robespierre, were most willing to consign the innocent to a traitor’s death and those who ended the Terror, were those who had most profited from it).

<sup>18</sup> SØREN KIERKEGAARD, *THE SICKNESS UNTO DEATH* (quoted in WALKER PERCY, *THE MOVIEGOER* \_\_ (1960, 1961, 1988, 1989, 1998, First Vintage Int’l ed.)).

<sup>19</sup> GRAY, *supra* note \_\_\_ at 195.

revolutions were incited by a sentimental religion of humanity that found expression in Marxism and liberalism conducing to a self-consciously planned society and a universal civilization grounded in scientific knowledge.<sup>20</sup> These incipient currents found later expression in New Deal efforts to remake the world, including the world of labor, through progressive values. Evidently, labor reformers viewed “the working poor and other economically marginal groups with great ambivalence.”<sup>21</sup> Progressive reformers “depicted the poor as victims in need of uplift but also as threats requiring social control. This fundamental tension was resolved by the appeal to hereditary fitness as a scientific basis for distinguishing workers worthy of aid from workers who should be regarded as threats to the health and wellbeing of the economy and of society.”<sup>22</sup> Though progressives supported labor initiative, they simultaneously depicted many groups of poor workers as undeserving of assistance, arguing that in the name of social control, the labor force should be rid of unfit workers including African Americans, women, immigrants and other so-called defectives.<sup>23</sup> Despite being defended by “liberal” principles, this move gave rise to a hierarchy that labeled African American workers as “unemployable.”<sup>24</sup> A similar attitude still disfavors blacks today.<sup>25</sup>

Roger Scruton intuits that American liberalism, often sacrifices liberty in order to impose equality.<sup>26</sup> Drawing parallels from the French Revolution, he shows how Robespierre fanatically promoted “the despotism of liberty” in order to ensure the goal of

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<sup>20</sup> *Id.*

<sup>21</sup> Bernstein and Leonard, *supra* note \_\_\_ at 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5-6

<sup>24</sup> Bernstein and Leonard, *supra* note\_\_\_ at 6.

<sup>25</sup> *See infra*, Part II.

<sup>26</sup> Roger Scruton, *Liberty and Equality*, THE AMERICAN SPECTATOR, June 2008, at p. 38, 38.

equality<sup>27</sup> by creating revolutionary tribunals in which the same individuals served as judge, jury, and prosecutor and the accused was deprived of the right of defense.<sup>28</sup> Evidently equality, mandated by centralized state power threatens the destruction of liberty.<sup>29</sup> Similarly, during the 1930s, following Woodrow Wilson's blueprint emphasizing power worship and the imposition of the President's will on the country,<sup>30</sup> New Deal labor statutes were strongly promoted as part of a putative effort to guarantee worker freedom, eliminate economic inequality and instantiate social justice and the common good.<sup>31</sup> Operating congruently with the iatrogenic probability—a disease caused by the modern process of incessant diagnosis and treatment<sup>32</sup>—the New Deal birthed a paradox: less freedom, equality and justice. This is not surprising because the record shows that President Roosevelt privately acknowledged that he and his administration were instituting similar policies to contemporary Russia and even some hearkened to Germany under Hitler.<sup>33</sup> In a similar vein, leading New Deal economists, Rexford Tugwell and Paul Douglas were awed by the Soviet experiment,<sup>34</sup> while many other progressives expressed admiration for Mussolini, Lenin and Stalin's capacity to transform corrupt and outdated societies.<sup>35</sup> Admiration led to New Deal enactments, impelled by vigorous support by labor unions, which inaugurated a legal regime that imposed devastating consequences on African Americans and others. As a 1930s civil

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> GOLDBERG, LIBERAL FASCISM, *supra* note \_\_\_ at 84.

<sup>31</sup> For a discussion of the New Deal labor law efforts, see Harry G. Hutchison, *Work, The Social Question, Progress and the Common Good?* 48 J. OF CATHOLIC L. STUDIES, 59, 98-111.

<sup>32</sup> CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT 199-201 (2006).

<sup>33</sup> Jonah Goldberg, *The Raw Deal*, (reviewing THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION, BY AMITY SHLAES), VIII THE CLAREMONT REV. OF BOOKS: A J. OF POLITICAL THOUGHT AND STATESMANSHIP, 17, 18 (Winter 2007/08) [hereinafter Goldberg, *The Raw Deal*].

<sup>34</sup> GOLDBERG, LIBERAL FASCISM, *supra* note \_\_\_ at 102.

<sup>35</sup> *Id.* at 103.

rights activist pointed out, “the NIRA [the National Industrial Recovery Act] served to redistribute employment and resources from blacks—the most destitute of Americans suffering from the Depression—to the white masses.”<sup>36</sup>

Over the past several years, politicians and union advocates have put forward a number of proposals ostensibly aimed at eliminating the presumed rise in employer hierarchy and arresting sharp declines in union density. The steep drop in contemporary labor union density rates,<sup>37</sup> particularly within the private employment sector, has reduced labor’s bargaining power and forecasts a correlative fall in labor’s political and social influence in the future.<sup>38</sup> Taken together this may diminish the likelihood that labor can reshape America as a collectivist enterprise bred by elite opinion.<sup>39</sup> Provoked by the assertion that labor faces a legal crisis and the claim that the statutory right to organize is a sham,<sup>40</sup> energized by the contention that the union movement ought to reinvent itself as a robust engine of collective insurgency against globalization, class-based injustice and asserted increasing disparities in income,<sup>41</sup> labor union advocates have offered a number of ideas that include the necessity of acting like a genuine rights movement,<sup>42</sup>

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<sup>36</sup> David E. Bernstein, *Roots of the ‘Underclass’: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 120 (1993) [hereinafter, Bernstein, *Roots of the ‘Underclass’*].

<sup>37</sup> Private sector density has fallen from around 35-to-36 percent in the early 1950s to about 7.4 percent in 2006. Bureau of Labor Statistics, United States Department of Labor, New Release, USDL 07-0113, available at <http://www.bls.gov/news.release/union2.nr0.htm> (accessed June 2, 2007).

<sup>38</sup> Harry G. Hutchison, *Compulsory Unionism as a Fraternal Conceit?* FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT WORK MOVEMENT, by George C. Leef, 125, 155 (2006) [hereinafter, Hutchison, *Compulsory Unionism as a Fraternal Conceit*].

<sup>39</sup> *Id.*

<sup>40</sup> See e.g., James Gray Pope, Peter Kellman and Ed Bruno, *The Employee Free Choice Act and A Long-Term Strategy for Winning Workers’ Rights*, Vol. 11 WORKINGUSA: THE JOURNAL OF LABOR AND SOCIETY 126, 126 (2008).

<sup>41</sup> Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 UNIV. OF MICH. J. OF LAW REFORM, 447, 448-9 (2000) [hereinafter, Hutchison, *Reclaiming the Labor Movement Through Union Dues?*] (inspecting this viewpoint).

<sup>42</sup> Pope, Kellman and Bruno, *supra* note \_\_\_ at 126.

encouraging open source unionism,<sup>43</sup> and creating alternative (nonunion) worker organizations.<sup>44</sup>

But if eminent French Revolution historian David Andress is correct, we should be wary of labor initiatives that are aimed at creating a new world order for labor relations, particularly when they are enforced by centralized state power. He shows that we live in a world attuned to the benefits of liberal civilization, a world that ended slavery, regulated the humane conduct of warfare and created genuine democracy.<sup>45</sup> Yet that same world is also the world of the tyrannies of colonial rule, of eugenic experimentation in the name of modernity, of the horrors of two world wars and the perversions of Darwinist science that spawned them.<sup>46</sup> Andress concludes that the new world order born from the end of Soviet Communism (itself a modernist project in equality) now seems no more than a morass of moral ambiguity and expediency.<sup>47</sup> It is possible that attempts to achieve a new world order in labor relations via the enactment of the Employee Free Choice Act will provide a similar opportunity for abuse and expediency.

Originally proposed in 2007<sup>48</sup> and reintroduced in March, 2009, the EFCA is one of the newest attempts to transform labor relations<sup>49</sup> by eliminating NLRA safeguards that protect workers from union intimidation and employers' economic interests. The first to disappear under the EFCA would be a system of union democracy whereby unions could only obtain the rights of exclusive representation for firms if they could prevail in a

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<sup>43</sup> RICHARD B. FREEMAN & JOEL ROGERS *WHAT WORKERS WANT* (updated edition), 193-205 (2006).

<sup>44</sup> Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 *NEW YORK L.S. L. REV.* 385-415 (2005-2006).

<sup>45</sup> ANDRESS, *supra* note \_\_ at 1.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> The Employee Free Choice Act, S. 1041 [H.R. 800], 110<sup>th</sup> Cong. (2007).

<sup>49</sup> The Employee Free Choice Act of 2009, H. R. 1409, [S. 560], 111<sup>th</sup> Cong. (2009) (proposed amendment to the National Labor Relations Act (29 U.S.C. 153-160)).

secret-ballot election.<sup>50</sup> Second, the EFCA would eliminate the necessity of a freely negotiated collective bargaining agreement between management and labor and instead substitute compulsory arbitration.<sup>51</sup> Although some labor union advocates contend that law ought to be seen as a vehicle to democratize the workplace by demolishing hierarchical command structures that entrench gender, race and class lines,<sup>52</sup> this proposal would likely expand labor hierarchy, labor market cartelization and diminish the employment prospects of racial minorities. As such, the EFCA is marked by contradiction. Rather than embracing freedom for workers, eliminating poverty and expanding opportunities for all, this proposal would likely invert such goals and instead operate consistently with the record of exclusion and subordination tied to American Progressivism and the labor movement.<sup>53</sup>

By increasing African American unemployment, widening existing disparities in income, and furthering exclusions along racial lines, the EFCA, if enacted, is likely to issue forth as another weapon of subordination that substantiates both the perils of majoritarianism<sup>54</sup> and W. E.B. Dubois's prophetic declaration that "instead of taking the part of the Negro and helping him toward physical and economic freedom, the American labor movement from the beginning has tried to achieve freedom at the expense of the

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<sup>50</sup> EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_ at 9.

<sup>51</sup> *Id.*

<sup>52</sup> Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 4-5 (1988).

<sup>53</sup> *See infra*, Part IV. *See also*, Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy and Hierarchy*, 34 HARV. J. ON LEGISLATION 93, 118-126 (1997) [hereinafter, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*] (examining the exclusionary history of labor unions in the United States).

<sup>54</sup> *See infra*, Part IV. *See also*, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_ at 126.

Negro.”<sup>55</sup> While Dubois was a progressive himself,<sup>56</sup> his warning echoes in the comments of many others who found the New Deal labor regime oppressive.<sup>57</sup>

This essay concentrates on the exclusionary effects of the EFCA. Part I briefly introduces Critical Race Reformist theory, which represents the combination of Critical Race Theory (CRT) and classical-liberal (reformist) approaches to racial discrimination. Critical Race Reformist theory provides a useful tool of analysis for discovering harmful programs and legislation. Part II of this article looks at the often racist history of American progressivism. Relying substantially on information from Canada and analysis provided by economist Anne Layne-Farrar, Part III examines the likely consequences of the EFCA for the unemployment rate in the United States. Part IV offers analysis that considers the history, probable intent and continuing consequences of existing American labor law and draws a parallel with the apartheid-era labor history of South Africa. Properly understood, the enactment of the EFCA would vitiate the aspirations of African Americans and slow the rate of racial progress while reifying illusory claims offered by union hierarchs. Borrowing FDR’s claim that an idea’s worth should be measured by the results achieved,<sup>58</sup> I contend that a principled conception of the common good and social justice cannot be advanced by the EFCA; accordingly, this scheme and similar labor

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<sup>55</sup> Bernstein, *Roots of the ‘Underclass’*, *supra* note \_\_\_ at 85 (quoting W.E.B. Dubois, *The Denial of Economic Justice to Negroes*, NEW LEADER, Feb. 9, 1929, at 43,45).

<sup>56</sup> See e.g., GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_ at 102-103.

<sup>57</sup> JOHN HOPE FRANKLIN, *RACIAL EQUALITY IN AMERICA* 87-88 (1976) (noting the comments of Robert Weaver, indicating that the period of pro-union, pro-labor legislation did not benefit all racial groups equally and that differentials based on race threatened to destroy not only the New Deal recovery program but any hope of having a really egalitarian labor movement in the United States).

<sup>58</sup> GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_ at 132.

movement proposals<sup>59</sup> ought to yield to the interest and welfare of individuals and groups that comprise the most marginalized among us.

### I. TOWARD A CRITICAL RACE REFORMIST ANALYSIS OF THE EFCA

Throughout history, America's labor unions have treated minority workers badly.<sup>60</sup> For instance, craft unions have often limited membership to white males.<sup>61</sup> Despite this appalling record, presumably supporters of any labor proposal would contest any observation suggesting that they intentionally support racist policies that impose discriminatory effects on members of minority groups. Such contentions, however heartfelt, seen from the perspective of African Americans are not necessarily decisive. Professor Lawrence explains why:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.<sup>62</sup>

CRT maintains that assessing policies on the basis of intent makes sense with truly grotesque forms of discrimination, but it is also important to consider the unconscious and incompletely articulated nature of racially discriminatory beliefs and ideas that

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<sup>59</sup> At this writing there is a move afoot in Congress to modify the EFCA proposal. See Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, THE NEW YORK TIMES, July 24, 2009, available at [http://www.nytimes.com/2009/07/17/business/17union.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2009/07/17/business/17union.html?_r=1&pagewanted=print) (stating that a half-dozen senators friendly to labor have decided to drop the card-check provision).

<sup>60</sup> Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L. J. 69, 75-76.

<sup>61</sup> *Id.*

<sup>62</sup> Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

influence behavior or policy choices.<sup>63</sup> Reformists, on the other hand, are neither focused on the unconscious nature nor the culpability of the discrimination at issue. Instead reformists concentrate on the rate of racial progress.<sup>64</sup> “From a reformist perspective, responsibility should depend on the propriety of what is done rather than the blameworthiness of what was willed, meaning that knowledge of the discriminatory effects of any labor policy ought to be sufficient to prove the contention that the policy in question constitutes a form of racial oppression from a reformist vantage point;”<sup>65</sup> that is, unless adequately justified on other grounds. Expanding the economic and social progress of minorities, not the search for provable intent, remains a paramount objective of the Reformist approach.

A convergence of CRT and Reformist approaches calls for an intense investigation of sociolegal insights derived from economics, history and analogous international patterns in order to assess the level of supremacist attitudes and subordination tied to a policy.<sup>66</sup> Secondly, calibrated to root out discriminatory effects that are sheltered by claims of neutrality, this approach grants greater deference to the concerns of minorities who traditionally have been excluded from the nation’s policy calculus. Relying on historical, sociological or empirical data, Reformists argue, if it can be shown that the proponents of a given labor policy have knowledge or should have knowledge of any discriminatory effects, that evidence would undermine the defensibility of the policy from the vantage point of African Americans and members of other marginalized

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<sup>63</sup> *Id.*

<sup>64</sup> Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_\_\_ at 101.

<sup>65</sup> *Id.* at 102.

<sup>66</sup> *Id.*

groups.<sup>67</sup> Thus, if today's policy makers are captured by a contestable policy, it is possible to concede that they may not have engaged in intentionally discriminatory behavior, but it is doubtful that the racially charged *consequences* associated with programs and policies that disproportionately disfavor racial minorities can be eliminated by simply protesting innocence.

An analogy may clarify this point. The impact of law can result in significant unintended consequences. For example, many modern industrial nations have faced job security issues by enacting job security legislation.<sup>68</sup> “The putative purpose of job security laws is to reduce unemployment, but that is very different from saying that this is their actual effect. Countries with such laws typically do not have lower unemployment rates, but instead have higher unemployment rates than countries without widespread job protection laws.”<sup>69</sup> Thus, it is possible to conclude that support for job security legislation constitutes an inadvertent or deliberate support for expanding the level of unemployment. These and other examples can be applied by analogy to labor policies in the United States to assess and challenge the validity of legal efforts that may disproportionately disfavor members of racial minority groups and accordingly, impede racial progress.

## II. RACE AND AMERICAN PROGRESSIVISM

Professor Derrick Bell states,

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

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<sup>67</sup> *Id.* at 102-103.

<sup>68</sup> THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 208 (3<sup>rd</sup> ed., 2007) [hereinafter, SOWELL, BASIC ECONOMICS].

<sup>69</sup> *Id.*

ranked categories segmenting the human population,' racialization denotes the process by which individuals are assigned membership in those categories. Racism is product of the two: the assignment of negative value to the traits commonly associated with a particular race and the subordinate ranking of that race on the social hierarchy.<sup>70</sup>

Arguing that America's contemporary quest for hierarchy is largely a function of race consciousness,<sup>71</sup> Bell provides some history showing that by "the eighteenth century, species classification became the dominant pursuit of the scientific community, and the obsession to classify and rank hierarchically the human species resulted in the institutionalization of physical appearance as social status."<sup>72</sup> The endeavor to conceive race primarily in biological terms appears to fit nicely with modern societies' greater dependence on science. This move commenced during the mid-modern period<sup>73</sup> and reached its apotheosis during the period between Charles Darwin's discoveries and the capitulation of the intellectual class to pseudo-scientism that shaped the norms of eugenics and set the stage for the exclusion of so-called unfit workers from the workplace.<sup>74</sup> Reaching its apex during the Progressive Era, this move required the nation to cede control to elite revolutionaries premised on the inevitability of progress. Today, this phenomenon appears to echo strongly in contemporary expressions of progressive ideas that appear to reflect a hierarchy of class and race, enabling the masses to be directed and dominated by members of the vanguard.

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<sup>70</sup> DERRICK BELL, *RACE, RACISM AND AMERICAN LAW*, 1-2(4<sup>th</sup> ed., 2000).

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 2-5.

<sup>74</sup> *See generally*, Bernstein and Leonard, *supra* note \_\_ at 1-44.

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

Understanding the unavoidable connection between race, the possibilities of progress, American Progressivism and the EFCA requires a brief review of the history of the progressive movement's fugleman, Woodrow Wilson. After winning election in 1912, he immediately set about to convert the Democratic Party into a progressive party and make it the engine for the transformation of America.<sup>75</sup> In 1913, he vowed to pick only progressives for his administration.<sup>76</sup> It is doubtful that these maneuvers, examined from a Critical Race Reformist perspective were a positive development for African Americans.<sup>77</sup>

In the first place, the concept of progress itself is suspect. Nietzsche, one of the unintentional godfather's of the progressive movement, observes "[p]rogress' is merely a modern idea—that is to say, a false idea."<sup>78</sup> Solzhenitsyn contends that the West has been seduced by the hypothesis that man has become the master of this world and "bears no evil within himself . . . So all of the defects of life' are attributed [simply] to 'wrong social systems.'"<sup>79</sup> Whether the notion of progress is a false idea, or whether man can succeed as the master of this world, American Progressivism had its genesis in the pursuit of transformative action best exemplified by President Wilson's exercise of the levers of government armed with the will to power. Prior to taking office, Wilson served as a

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<sup>75</sup> GOLDBERG, LIBERAL FASCISM, *supra* note \_\_\_ at 104.

<sup>76</sup> *Id.*

<sup>77</sup> Race Critics endorse extensive sociolegal tradeoffs favoring people of color, including the deployment of a culturally informed intent test while classical-liberal reformists look at the effects of allegedly racist laws in order to find evidence of discrimination. See Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_\_ at 99-102. See generally, Lawrence, *supra* note \_\_\_ 317-388, and Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787 (1994).

<sup>78</sup> FRIEDRICH NIETZSCHE, THE ANTICHRIST: A CRITICISM OF CHRISTIANITY, 4 (Trans. Anthony M. Ludovici, 2006).

<sup>79</sup> Charles Colson, *Jeremiah at Harvard*, in CHRISTIANITY TODAY, (August, 2008) at page 64 (quoting Solzhenitsyn's Speech at Harvard).

leading member of the philosophic vanguard that was beginning to shepherd the nation through transformation. Writing an eclogue in 1908, Wilson could not see any reason to limit the coercive power of the state. Instead of accepting constraints, the President, acting as a Nietzschean uberman “‘is at liberty, both in law and in conscience to be as big a man as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the makers of the Constitution . . . but only because the President has the nation behind him and Congress [does] not.’”<sup>80</sup> A nation that is captured by Wilson’s chilling commitment to elite-led majoritarianism, personified by the “Great man,” who exercises unchecked power on behalf of the masses, is likely to threaten the present and the future of members of minority groups as well as all who are seen as incapable of self-government.<sup>81</sup> Influenced by German ideas dating back to Otto von Bismarck,<sup>82</sup> and operating without any false modesty, President Wilson, the father of modern liberalism,<sup>83</sup> embarked on an unapologetic attempt to create a progressive country shaped by authoritarianism. He arrested or jailed more dissidents in a few years than Mussolini did during the entire 1920s and did more violence to civil liberties in his last three years in office than Mussolini did in his first twelve.<sup>84</sup>

Jonah Goldberg shows the progressives were real social Darwinists who believed strongly in eugenics and presumed that the state could through planning and pressure create a pure race, a society of new men.<sup>85</sup> In a move that evokes the French Revolution’s “Unity and Indivisibility” festivals, a metaphor for the displacement of the regional

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<sup>80</sup> GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_ at 86.

<sup>81</sup> *Id.* at 91.

<sup>82</sup> *Id.* at 94-95.

<sup>83</sup> *Id.* at 81-82.

<sup>84</sup> *Id.* at 80.

<sup>85</sup> *Id.* at 81.

rivalries in favor of an organic conception of a national community that was reborn as an undivided whole,<sup>86</sup> American Progressives concluded that government must submit to the Darwinian theory of organic life.<sup>87</sup> As thus appreciated, government was seen as a living thing freighted by irresistible impulses requiring ever expanding power and size as part of natural evolutionary process embraced by the vast majority of progressive intellectuals.<sup>88</sup> “Governmental ‘experimentation,’ the watchword of pragmatic liberals from Dewey and Wilson to FDR, was the social analogue to evolutionary adaptation.”<sup>89</sup> Prominent among the themes that Wilson offered was the advocacy of progressive imperialism in order to subjugate and thereby elevate lesser races.<sup>90</sup> He applauded the annexation of Puerto Rico and the Philippines,<sup>91</sup> while maintaining fervently that giving blacks the right to vote was the foundation of every evil in this country.<sup>92</sup> Unlike classical liberalism, which necessitated limited government in order to protect individual rights and liberties, progressives believed in an ever-expanding government committed to the proposition that society was one indivisible whole that left no room for those who did not want to comply, let alone evolve.<sup>93</sup>

Falling within the latter category patrolled by progressive myths and presuppositions tied to white superiority, were blacks and other disfavored minorities. Progressivism correlates with what is often forgotten: the dominant and often racist views held by privileged elites driving the locomotive of public opinion. Coupled with the emphasis on human perfection closely linked to centralized power and restructured social

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<sup>86</sup> ANDRESS, *supra* note \_\_\_ at 200.

<sup>87</sup> GOLDBERG, LIBERAL FASCISM *supra* note \_\_\_ at 86.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 83.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 84.

<sup>93</sup> *Id.* at 87-88.

and economic systems, the progressive slant can be seen in the views of Margaret Sanger and others who longed for the presumed advantages of selective breeding.<sup>94</sup> Accepting the assertion that white supremacy was justified by the putatively-scientific observation that the various races were at different stages of the evolutionary process,<sup>95</sup> Sanger and others led the fight for abortion rights and reproductive freedom from a perspective that recalls the hard racism normally associated with Goebbels or Himmler.<sup>96</sup> While this pseudo-scientific approach to race has been convincingly disputed by analysts showing the concept of race is a socially constructed mode of human categorization,<sup>97</sup> this approach represents an ongoing attempt to bring evolution under human control and thereby, subject the future to the captivity of present.<sup>98</sup> Put another way, many progressives saw the contemporary social and economic position of blacks as irremediable, the inevitable effect of Dawinism. This conclusion reinforced their commitment to craft a link between economic reform, socialism, Prohibition, eugenics and the other elements of the progressive agenda in order to bring about the “New Jerusalem.”<sup>99</sup>

Recalling the romance of the French Revolution’s attempt to replace the Judeo-Christian God with a Jacobin one,<sup>100</sup> the “New Jerusalem” represents a bizarre combination of pseudo-scientism premised on an unfolding evolutionary process driven by the state joined with the efforts of modern clergy to enable God to work through the

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<sup>94</sup> *Id.* at 270-277.

<sup>95</sup> *Id.* at 260.

<sup>96</sup> *Id.* at 270-274.

<sup>97</sup> *See e.g.*, GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 5 (2002).

<sup>98</sup> RICHARD JOHN NEUHAUS, *AMERICAN BABYLON: NOTES OF A CHRISTIAN EXILE* 236 (2009).

<sup>99</sup> GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_\_ at 219.

<sup>100</sup> *Id.* at 41.

State in carrying out His purposes.<sup>101</sup> Brimming with sheer self-appreciation, President Wilson, who in his own words, personified the triumph of science and reason in politics, embodied the pseudo-scientific methodology that would institute God’s kingdom on earth.<sup>102</sup> Following a well-worn Jacobin pathway mandating compulsory enthusiasm and outlawing dissent as counterrevolutionary,<sup>103</sup> the triumph of science and reason in the United States culminated in the arrest of tens of thousands without cause<sup>104</sup> and the creation of quasi-official organizations such as the American Protective League.<sup>105</sup> This domestic spying program enlisted citizens to listen in on their neighbors’ phones and read their mail and assisted the Army in extracting confessions from black soldiers accused of assaulting white women.<sup>106</sup> At the same time World War I provided a convenient catalyst to impose corporatist doctrines,<sup>107</sup> (an outgrowth of “war socialism”) on America during the 1930s and to thereby transform the New Deal into a vehicle of subjugation.

### **B. Exclusionary Hierarchy and the New Deal**

While Wilson may have been an intentional totalitarian, Roosevelt became one by default.<sup>108</sup> Raised in an aristocratic family and educated by Swiss tutors, Roosevelt saw the benefits attached to both wealth and arrogance,<sup>109</sup> which served him well as president. It was while working as Assistant Secretary of the Navy under Josephus Daniels, a thoroughgoing racist deeply committed to progressive reforms that Roosevelt developed

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 219.

<sup>103</sup> *See* ANDRESS, *supra* note \_\_\_ at 201.

<sup>104</sup> GOLDBERG, LIBERAL FASCISM, *supra* note \_\_\_ at 114.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 108.

<sup>108</sup> *Id.* at 123.

<sup>109</sup> *Id.* at 124-125.

his politics.<sup>110</sup> In 1933 when FDR replaced Herbert Hoover, “three events were viewed as admirable experiments: the Bolshevik Revolution, the Fascist takeover in Italy, and the American ‘experiment’ in war socialism under Wilson.”<sup>111</sup> Individualism in the 1920s had cut the experiment in war socialism short, so when FDR took office, the progressives seized the opportunity.<sup>112</sup>

While not all progressives shared this view, for some progressives, remaking the world required the liquidation of what was seen as America’s black and sinister polyglot population.<sup>113</sup> Typifying this view, H.G. Wells, saw Roosevelt as the most effective transmitting instrument for the coming new world order.<sup>114</sup> Attesting to the transformative power of hierarchy borne of racial supremacy and same kind of ruthlessness that led Georges-Jacques Danton to support the creation of the Revolutionary Tribunal catalyzing the Age of Terror, a progressive understanding of the new world order materialized through the accumulation of power by the state. Danton offered the following proposal: “Let us be terrible so that the people will not have to be.”<sup>115</sup> Emulating this approach, Wells’ fashioned the New Republic. “[How then should this] New Republic treat the inferior races? How will it deal with the black? . . . the yellow man? . . . the Jew? . . . those swarms of black, and brown, and dirty-white, and yellow people, who do not come into the new needs of efficiency? Well, the World is a world, and not a charitable institution, and I take it they will have to go . . .”<sup>116</sup>

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<sup>110</sup> *Id.* at 126.

<sup>111</sup> *Id.* at 132-133.

<sup>112</sup> *Id.* at 133.

<sup>113</sup> GOLDBERG, LIBERAL FASCISM, *supra* note \_\_\_\_ at 135.

<sup>114</sup> *Id.* (quoting H. G. Wells).

<sup>115</sup> ANDRESS, *supra* note \_\_\_\_ at 376.

<sup>116</sup> See e.g., Stephen M. Barr, *The Devil’s Chaplain Confounded*, FIRST THINGS MAGAZINE, (August/September 2004) at p. 25, 26 (quoting H.G. Wells, President Roosevelt’s admirer).

Driven to remake the world, Roosevelt, before his election, “promised to act in the name of ‘the forgotten man at the bottom of the economic pyramid.’”<sup>117</sup> Evidently, the success of this effort would depend on the response of the nation. Therefore, he called America to move as a trained and loyal army willing to sacrifice for the good of a common discipline.<sup>118</sup> Still, the desire to remake the world fails to account for a paradox: the probability that the unconstrained pursuit of social justice, progress and the common good may yield servitude.<sup>119</sup>

As part of America’s ironic pursuit of social justice, FDR nominated Hugo Black to the United States Supreme Court. Black’s ascendancy to the Court, together with his Klan membership is consistent with the observation that the Klan of the Progressive Era was rather cosmopolitan, thriving in cities like New York and Chicago, and its views were widely embraced by elite opinion formers.<sup>120</sup> Often seen as reformist and modern, the Klan had a close relationship with some progressive elements in the Democratic Party.<sup>121</sup> Aiding and abetting this transformative epiphenomenon were members of the academy representing a constellation of views such as E. A. Ross, who authored the race suicide thesis and shared Richard Ely and Woodrow Wilson’s conviction that social progress, “inevitable” as it was, had to take into account the “innate” differences in race.<sup>122</sup> The focus on “innate” racial differences, meant certain workers “owning to putative hereditary debility, earned less than what American reformers called a ‘living

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<sup>117</sup> AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION*, 12 (2007).

<sup>118</sup> William Schambra, *Debating the New Deal*, (reviewing *THE TWO FACES OF LIBERALISM: HOW THE HOOVER-ROOSEVELT DEBATE SHAPES THE 21<sup>ST</sup> CENTURY*, ed. Gordon Lloyd) Vol. VIII *THE CLAREMONT REV. OF BOOKS: A J. OF POLITICAL THOUGHT AND STATESMANSHIP*, 19, 19-20 (Winter 2007/08) (both Hoover and Roosevelt were animated by collectivist impulses).

<sup>119</sup> F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 253-54 (1960).

<sup>120</sup> GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_\_ at 258-262.

<sup>121</sup> *Id.* at 259-260.

<sup>122</sup> *Id.* at 260.

wage’”<sup>123</sup> and, therefore, were considered “unemployable.”<sup>124</sup> Consistent with this progressive ideology and consequent labor law reform objectives, throughout the period from the Great Depression to the end of World War II, the unemployment gap between blacks and whites rose, and FDR continued to disregard pleas from blacks to support anti-lynching laws and the cry for justice from blacks who endured “virtual slavery” in Florida.<sup>125</sup> Often, contemporary observers, committed to “nobility” of Progressivism and collectivism,<sup>126</sup> remember that FDR wanted to save capitalism from itself but frequently forget that he changed not only capitalism but constitutionalism, and the latter unambiguously for the worse.<sup>127</sup> Among the victims of Roosevelt’s questionable constitutionalism, are African Americans who endured deprivations at the hands of a selectively interventionist government.

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

#### **A. The EFCA**

Before considering the EFCA’s justification, economic consequences and potential for marginalization, this subsection briefly examines the language of the proposal. Introduced on March 10, 2009, the Employee Free Choice Act is identical to the bill introduced in 2007. The EFCA would amend the NLRA, first by allowing the National Labor Relations Board (Board) to certify a labor organization as the collective bargaining representative without ordering a secret ballot election if “no other individual or labor

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<sup>123</sup> Bernstein and Leonard, *supra* note \_\_ at 6.

<sup>124</sup> *Id.*

<sup>125</sup> See *infra* Part IV, B, 1.

<sup>126</sup> See e.g., Ellen Dannin, *At 70, Should the National Labor Relations Act Be Retired?; NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMPL. & LAB. L. 223, 225-226 & 274 (2005) (asserting the nobility of the NLRA and expressing support for the proposition that the collectivist values embedded in the NLRA should be imposed on the American workplace).

<sup>127</sup> Charles R. Kesler, *The New New Deal*, 9 CLAREMONT REV. OF BOOKS: A J. OF POLITICAL THOUGHT AND STATESMANSHIP, 3 (Spring, 2009).

organization is currently certified or recognized as the exclusive representative of any of the employees in the unit.”<sup>128</sup> The EFCA does not provide guidelines and procedures for the designation by employees of a bargaining representative, but orders the Board to do so.<sup>129</sup>

Second, the proposal provides a mechanism that addresses the fact that labor unions, after winning the right to represent workers have often failed to obtain initial contracts that advance their interest.<sup>130</sup> The EFCA, in effect, mandates a first contract by providing (1) a ten-day period for the employer and the union to commence negotiations; (2) a 90-day period beginning on the date on which bargaining is commenced, or an agreed upon additional period of time to reach an agreement—failure to reach a settlement enables either party to notify the Federal Mediation and Conciliation Service (Service) of the existence of a dispute and request mediation; (3) then, after the expiration of the 30-day period beginning on the date on which the request for mediation is made, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service and the arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years.<sup>131</sup> Worryingly, the EFCA does not provide courts with guidance on how to review the collective bargaining agreement resulting from the contemplated compulsory interest arbitration award.<sup>132</sup> Although the statute is inadequate to meet the needs of employers and unions who will be affected by its compulsory arbitration

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<sup>128</sup> The Employee Free Choice Act, H.R. 1409, [S. 560], 111<sup>th</sup> Cong., § 2.

<sup>129</sup> *Id.*

<sup>130</sup> EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_\_ at 16.

<sup>131</sup> The Employee Free Choice Act, H.R. 1409, [S. 560], 111<sup>th</sup> Cong., § 3.

<sup>132</sup> Andrew Lee Younkins, *Judicial Review Standards for Interest Arbitration Awards Under the Employee Free Choice Act*, 43 U.S. F. L. REV. 447, 448.

process,<sup>133</sup> the EFCA seems to encourage the parties to fall back on compulsory interest arbitration rather than attempting to bargain for a contract.<sup>134</sup>

Third, the EFCA would strengthen enforcement by providing: (1) injunctions against unfair labor practices during organizing drives, (2) enhanced back pay remedies and (3) civil penalties for employers who willfully or repeatedly commit unfair labor practices while employees of the employer are seeking representation by a labor organization.<sup>135</sup> The imposition of enhanced penalties responds to a tidal wave of opinion<sup>136</sup> reflecting the contention that the decline in unionization is simply the result of a flawed NLRB election process that encourages impermissible employer hostility to exert enormous influence during a Board-supervised campaign.<sup>137</sup> Given these and other claims, it makes sense to look at the empirical data surveyed, compiled and adduced, which forecast the impact of the EFCA on African Americans as a precursor to ascertaining whether the proposal is infused with antique echoes of past subordinating efforts.

## B. The Empirical Evidence

Before examining an empirical assessment of the EFCA, which illustrates the proposal's economic implications,<sup>138</sup> consider the principal arguments offered by

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> The Employee Free Choice Act, H.R. 1409, [S. 560], 111<sup>th</sup> Cong., § 4.

<sup>136</sup> Harry G. Hutchison, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values*, 39 SETON HALL L. REV. 101, 104 (2009) (forthcoming) [hereinafter, Hutchison, *Liberty, Liberalism and Neutrality*] (discussing this development).

<sup>137</sup> See e.g., James J. Brudney, *Neutrality Agreement and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 819, 832 & 877 (2005) (suggesting employer intimidation in connection with a flawed NLRB election process is no longer normatively justified because the election paradigm regularly permits conditions that preclude the attainment of employee choice). *But see*, Keith H. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 695-97 (2003) (disputing the employer hostility thesis).

<sup>138</sup> See Anne Layne-Farrar, *An Empirical Assessment of the Employee Free Choice Act: The Economic Implications*, available at <http://ssrn.com/abstract=1353305> at 1-45 (March, 2009).

supporters of the EFCA as well as some preliminary data showing the effects of an expansion in union density rates. EFCA supporters present three primary arguments for passing this proposal<sup>139</sup> that all imply that the EFCA would reverse the long-term decline in unionization. First, advocates assert that the NLRA is not working effectively, which requires amendments to make it easier for unions to organize workers, and the amendments, if successfully implemented, would reverse the long-term decline in unionization.<sup>140</sup> Second, they posit that the EFCA is needed to reduce employer coercion including “unfair labor practices (ULPs), which, according to EFCA’s proponents, are primarily responsible for the current low levels of private sector union representation.”<sup>141</sup> Lastly, “[p]roponents argue that, under EFCA, more union and nonunion workers will gain access to better health care, increased wages and a generally better standard of living, thus, improving social welfare.”<sup>142</sup> While unionization may expand under this proposal, the existing research—including some studies otherwise favored by unions—appears to contradict most of the above arguments in support of the EFCA.<sup>143</sup> This suggests that the focus on the plight of workers and employer hostility as justifications may conceal other reasons why union leaders and their allies support such legislation.

### 1. A Preliminary Analysis of the Effect of Unionization

There is no doubt that unions have suffered a long-term decline in unionization rates. Explaining this decline is complex. Though EFCA supporters contend that the steady reduction in unionized workers is the result of employer misconduct improperly permitted under U.S. labor law, this contention is fatally weakened by examining the

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<sup>139</sup> Layne-Farrar *supra* note \_\_\_\_ at 2.

<sup>140</sup> *Id.* at 4.

<sup>141</sup> *Id.* at 4-5.

<sup>142</sup> *Id.* at 5.

<sup>143</sup> *Id.*

empirical record of unionization elsewhere.<sup>144</sup> In fact, “the levels of unionized workers have declined everywhere in developed economies regardless of the labor law regime in effect.”<sup>145</sup> Jelle Visser “analyzed data from 14 developed countries and concludes that private sector unionization across all countries has been strongly declining since the 1970s.”<sup>146</sup> Other explanations rather than the alleged presence of employer hostility explain the decline in unionization in America. Indeed, in the absence of union intimidation, a successful union organizing campaign requires an underlying desire by employees to belong to a union, but ample evidence indicates that modern employees have found unions less attractive than past generations of workers.<sup>147</sup> In the United States, a recent Zogby poll found that only sixteen percent of non-unionized workers would definitely vote for a union,<sup>148</sup> which is consistent with the inference that the leading factor in the decline in private sector unionization is a lack of workers’ interest in and consequent demand for labor organizations.<sup>149</sup> In 1992, labor economists, Farber and Krueger reported that “demand-side factors” are almost wholly responsible for the entire decline in the union membership rate since 1977.<sup>150</sup> Supplementing Richard Epstein’s intuition that private sector unions continue to lose ground because they no longer

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<sup>144</sup> *Id.* at 6.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (quoting Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV., 38(Jan 2006).

<sup>147</sup> *Id.* at 6.

<sup>148</sup> Tim Kane, *The AFL-CIO’s Disintegration and its Possible Implications*, HERITAGE FOUNDATION, July 28, 2005, <http://www.heritage.org/Research/Labor/wm808.cfm>.

<sup>149</sup> Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause of labor’s Decline in Employee Representation*, in THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING 41, 42 (Samuel Estreicher ed., 1998) (“[S]hifts in general social attitudes respecting individualism have altered the predisposition of workers to consider collective solutions to workplace problems.”).

<sup>150</sup> Layne-Farrar, *supra* note \_\_ at 6 (quoting Henry Farber and Alan Krueger, *Union Membership in the United States: The Decline Continues* 32 NBER Working Paper No. W4216, (1992)).

provide their membership with benefits that exceed their costs,<sup>151</sup> in 2004, Bronfenbrenner & Hickey argued that American unions must shoulder a good portion of the blame for their failures to organize.<sup>152</sup> Against such evidence, insistent assertions that workers value compulsory unionization and that their preferences are hindered by employer coercion permitted by the NLRB are highly questionable. Indeed, given the survey evidence and the fact that only a minority of private-sector workers believe that unions are the best vehicles to advance their interest, reliance on the employer coercion hypothesis to explain union decline constitutes a capitulation to whimsy.<sup>153</sup>

That said, the data supports the conclusion that workers represented by a union can expect higher wages.<sup>154</sup> And yet, many neoclassical “[e]conomic studies find ‘most, if not all, of the gains of union labor are made at the expense of nonunionized workers.’”<sup>155</sup> Some studies indicate that union monopolies raise wages of union members in exchange for both market inefficiency and inequality.<sup>156</sup> Labor unions produce benefits for union hierarchs and few workers in the name of the many, and it is clear that not all members of the union benefit equally.<sup>157</sup> As I have shown elsewhere, the achievement of higher

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<sup>151</sup> Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation* 92 YALE L. J. 1357, 1407 (1983).

<sup>152</sup> Layne-Farrar, *supra* note \_\_ at 6-7.

<sup>153</sup> Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note \_\_ at 121 n. 146 and accompanying text (explaining this view).

<sup>154</sup> Layne-Farrar, *supra* note \_\_ at 9.

<sup>155</sup> STEVEN E. RHOADS, THE ECONOMIST’S VIEW OF THE WORLD: GOVERNMENT, MARKETS, AND PUBLIC POLICY 256 n. 55 (1985) (quoting Harry Johnson & Peter Mieszkowski, *The Effects of Unionization on the Distribution of Income: A General Equilibrium Approach*, 84 Q. J. ECON. 539, 560 (1970). This observation becomes more salient when one recognizes that “[f]or most workers, all or almost all their income is derived from the sale of their labor.” STEPHEN J. SPURR, ECONOMIC FOUNDATIONS OF LAW 18 (2006).

<sup>156</sup> RHOADS, *supra* note \_\_ at 256 n.55. *See also*, Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WILLIAM & MARY, BILL OF RIGHTS J. 1309, 1348-49 (2005) [hereinafter, Hutchison, *A Clearing in the Forest*] (explaining how unions affect equality and the economy).

<sup>157</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_ at 1339-1342. The data also indicates that higher wages for union workers tend to compress the overall distribution of wages. Layne-Farrar, *supra* note \_\_ at

wages for organized workers typically means increasing the wages of members who keep their jobs while shifting some workers to lower-wage jobs in the nonunion sector or, alternatively, into the unemployment line.<sup>158</sup> This lowers the wage rate paid to individuals who were already employed in the nonunion sector.<sup>159</sup> Layne-Farrar explains this development by indicating that a firm deals with the higher cost per worker associated with its unionized workforce by reducing the number of unionized positions.<sup>160</sup> This process could arise by shifting work patterns within unionized firms or by having nonunionized firms achieve a higher market share.<sup>161</sup> In addition to increasing unemployment, unions also tend to slow the growth rate in employment itself. Anticipating Layne-Farrar's empirical results of card-check regimes, one study shows that a ten percent increase in the unionization rate may lead to a reduction in employment growth rates of up to 1.1 percent.<sup>162</sup> Union members also average fewer hours of work when compared to nonmembers.<sup>163</sup> Worryingly, Robert Lalonde estimates that during the second year after union elections, work hours decrease by 11% in plants where the union was successful.<sup>164</sup>

Turning to the effect of unions on the economy as a whole, the evidence substantiates Richard Freeman's claim that as union labor costs rise, firms substitute capital for labor, producing a rise in allocative inefficiencies that lowers national

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9. Thus, the presence of unions significantly reduces the wage differential between industries, between firms in the same industry and also between workers within a firm. Layne-Farrar, *supra* note \_\_\_ at 9-10.

<sup>158</sup> *Id.* at 1349.

<sup>159</sup> RONALD G. EHRENBURG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 453 (8<sup>th</sup> ed. 2003).

<sup>160</sup> Layne-Farrar, *supra* note \_\_\_ at 10.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (citing Stephen Bronars et al., *The Effects of Unions on Firms Behavior: An Empirical Analysis Using Firm-level Data*, 33 *INDUS. REL.* 426, 444 (1994)).

<sup>163</sup> H. GREG LEWIS, *UNION RELATIVE WAGE EFFECTS: A SURVEY* (1996) (quoted in Layne-Farrar, *supra* note \_\_\_ at 10) (showing that union members work about 1.8% fewer hours than their nonunionized counterparts).

<sup>164</sup> Layne-Farrar, *supra* note \_\_\_ at 10-11.

production.<sup>165</sup> This is consistent with the inference that unions contribute to both inequality and market inefficiency.<sup>166</sup> This deduction coincides with the perception that unions have a negative impact on the economy<sup>167</sup> and on social welfare,<sup>168</sup> which includes a rise in unemployment rates. Freeman and Medoff conclude that unions may contribute to a reduction in Gross Domestic Product (GDP) of 0.40%, which would translate into a loss of \$57 billion in national output.<sup>169</sup> In addition, the data shows that it is likely that unions slow the process of innovation and the overall level of capital investment.<sup>170</sup> Nonunion firms invest substantially more money on Research and Development (R&D) than unionized firms.<sup>171</sup>

International data confirms the deleterious effects of unions. Evidence drawn from Canada shows that unions by and large have a negative impact on general capital investment.<sup>172</sup> In Europe, the Organization for Economic Cooperation and Development (OECD) found that a 1 percentage point increase in bargaining coverage increased unemployment rates by 7.5%, while inflation and real earnings growth both corresponded with rising labor union representation rates.<sup>173</sup>

The overall picture painted by the literature is a mixed one,<sup>174</sup> which led economist, Layne-Farrar to conclude:

Unionization can raise worker wages, but may reduce unionized jobs and tends to lower GDP. Greater bargaining coverage maintains real

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<sup>165</sup> *Id.*

<sup>166</sup> RHOADS, *supra* note \_\_\_ at 256 n. 55.

<sup>167</sup> *Id.*

<sup>168</sup> EHRENBURG & SMITH, *supra* note \_\_\_ at 461-62.

<sup>169</sup> Layne-Farrar, *supra* note \_\_\_\_ at 11-12.

<sup>170</sup> *Id.* at 12.

<sup>171</sup> *Id.* at 12.

<sup>172</sup> *Id.* at 13.

<sup>173</sup> *Id.* at 13-14.

<sup>174</sup> *Id.* at 14.

earnings growth, but increases unemployment and inflation. . . . As a matter of basic economic theory, the studies in the literature . . . suggest, but in all likelihood underestimate, [the]negative unintended consequence from passing EFCA.<sup>175</sup>

As real earnings grow as a result of higher wages paid to union members, as the non-union workforce rises and wages fall and as unemployment increases and consequently reduces the income of laid-off workers, income disparity rises as well.

## 2. The Canadian Experience with Card Check

Fortuitously, Canada offers a rich field for evaluating the potential impact of the EFCA on the U.S. labor force for two reasons.<sup>176</sup> “First, for the last three decades union certification procedures in Canada have undergone significant changes over time and across provinces, driven by political considerations rather than economic ones.”<sup>177</sup> “Second, the similarities in industrial structure coupled with the economic integration between Canada and the U.S. allow [analysts] to use the Canadian experience as a natural experiment for the U.S. economy.”<sup>178</sup> While labor law is determined at the federal level in the United States, most employers in Canada are regulated by provincial labor legislation.<sup>179</sup> Evidently, until 1976 all provinces employed a card check regime for union certification, but after 1976, several Canadian provinces experimented with regimes that required unions to win secret ballot elections and British Columbia changed its union

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<sup>175</sup> *Id.* at 14-15.

<sup>176</sup> *Id.* at 15.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Employers subject to federal regulation in Canada include the federal government, airlines, inter-provincial transportation, banking, telecommunications, grain production, fisheries and uranium processing. *Id.*

certification procedures three times in the period 1976-2008.<sup>180</sup> As of 2006, half of the Canadian provinces use mandatory voting regimes, accounting for roughly 68% of the Canadian labor force, while the remaining provinces covering 32% of the labor force rely on card check systems.<sup>181</sup>

The effect of shifting between card check and mandatory voting regimes showed that a mandatory voting rule had a significant impact in terms of reducing the success rate associated with union certification efforts in comparison with a card check system. Supported by a number of empirical studies, it is clear that a card check system brings a higher success rate for unionization and thereby, results in higher levels of union density. On one account, between 17-24% of the difference in union density between the United States and Canada can be explained by virtue of the fact that mandatory secret ballot elections are more prevalent in the U.S. than in Canada.<sup>182</sup> In addition to “frequent changes in provincial certification procedures, the requirement of first contract arbitration has also varied by province over time. By 1994, seven provinces had introduced first agreement arbitration that applied to all negotiation efforts.”<sup>183</sup>

Developing her own economic model, Layne-Farrar constructs a data set of Canadian provinces over a 21 year period in order to study the impact of union density on a number of economic outcomes in Canada.<sup>184</sup> Among other things, Layne-Farrar examines the impact of higher union density resulting from moving to a card check and mandatory arbitration regime.<sup>185</sup> A union density increase of 10 percentage points, creates an

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<sup>180</sup> *Id.* at 15-16.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 16-17.

<sup>183</sup> *Id.* at 17.

<sup>184</sup> *Id.* at 20.

<sup>185</sup> *Id.* at 21.

increase in the unemployment rate of between 3.0 and 3.5 %.<sup>186</sup> This is a substantial negative effect,<sup>187</sup> which indicates that card check regimes have the capacity to significantly alter the workforce by encouraging exclusion in order to provide some economic benefits for workers who remain employed. This policy change may also provide union leaders and their ideological allies with access to more dues revenues, enabling them to achieve self-interested objectives.<sup>188</sup>

### 3. Projected Empirical Results for the United States

Layne-Farrar uses the Canadian results to evaluate how much the U.S. unemployment rate would rise with the passage of the EFCA. The first issue is to assess how much union density can be reasonably expected to rise in response to an embrace by the federal government of a new card check/compulsory arbitration regime. “Sheldon Friedman, research coordinator for the AFL-CIO, stated that [the] EFCA ‘could spur an increase in U.S. union density of nearly 5 percentage points and perhaps much more.’”<sup>189</sup> “Andy Stern, the president of the SEIU, estimates that the passage of EFCA will increase union membership by 1.5 million each year for the next 10-15 years.”<sup>190</sup> In response to these estimates, Layne-Farrar forecasts that if card checks and a mandatory contract arbitration system were to increase union density by 5 percentage points, the U.S. unemployment rate would rise during the following year by 1.49 percentage points over current levels, which amounts to an increase of 2.38 million unemployed workers.<sup>191</sup> If the passage of the EFCA were to increase union membership by 1.5 million each year for the next 10

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<sup>186</sup> *Id.* at 22-23.

<sup>187</sup> *Id.* at 23.

<sup>188</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1380-81 (showing that unions tend to consume up to 80 percent of union dues on what can be seen as indirect political, ideological and other challengeable purposes unrelated to collective bargaining and representational activities).

<sup>189</sup> Layne-Farrar, *supra* note \_\_ at 23 (footnote omitted).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 23.

years, as Andy Stern predicts, then unemployment is predicted to rise by between 5.3 million and 6.2 million people,<sup>192</sup> meaning that black unemployment would likely rise by almost one million workers.<sup>193</sup> As one might expect, in addition to an increase in unemployment, total overall employment for the nation as well as overall industry output would fall.<sup>194</sup> Taken together, these developments are likely to exacerbate African American unemployment and poverty rates because blacks are often the most vulnerable population during periods of rising economic dislocation.

#### IV. DECONSTRUCTING THE EFCA: A CRITICAL RACE REFORMIST VIEW

##### A. Prolegomena

Supported by commentators and doubtlessly fueled by union campaign contributions,<sup>195</sup> card-check initiatives have recently become politically viable. Plainly, the selection of the workers' exclusive bargaining representative through an uncontested card check procedure rather than a process involving a contested secret ballot election ought to be appealing to labor leaders. Traversing the card check process successfully will give rise to a new and potentially rich source of union dues, which can yield political

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<sup>192</sup> *Id.* at 24.

<sup>193</sup> As of May 2009 the unemployment rate for black workers in the U.S. was almost 15 percent and therefore 15 percent multiplied by the overall expected unemployment level of 6.2 million equals 930 thousand blacks who would be added to the ranks of the unemployed. *See supra* note 7.

<sup>194</sup> Layne-Farrar, *supra* note \_\_\_ at 24-26.

<sup>195</sup> Labor unions receive vast sums of money. According to the U.S. Department of Labor, labor unions receive upward of \$17 billion a year in revenues. *See* LINDA CHAVEZ & DANIEL GRAY, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS 12 (2004). Technically speaking, unions report that they spend no money on politics because political contributions would be taxable. CHAVEZ & GRAY, *supra* note \_\_\_ at 13. But since only a fraction, perhaps less than 20 percent of union dues revenues is spent on collective bargaining and related activities coupled with their unwillingness to provide basic information on how revenues are spent, it is possible infer that labor union political spending is very substantial. Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1316-1317. Persistent reports suggest a possible pattern of under-reporting of direct and indirect union political expenditures. *See, e.g., Beck Rights 2001: Are Workers Being Heard?: Hearing Before the Subcomm. On Workforce Protections of the H. Comm. on education and the Workforce*, 107<sup>th</sup> Cong. 29-35 (2002) (statement of Raymond J. LaJeunesse, Jr., Vice President & Staff Attorney, National Right to Work Legal Defense Foundation, Inc. (suggesting that union political action committees and issue advocacy amount to between \$300 million and \$500 million in a presidential election year)).

influence and economic and ideological benefits to leaders and their allies. Elections, on the other hand, carry the risk that the union organizing effort will fail because workers will be called upon to make open-minded decisions about union membership, which requires information concerning both the advantages and disadvantages.

Unsurprisingly, complications arise when interest groups, such as labor organizations attempt to increase their strength through the application of governmental power rather than relying on workers' informed choice. The principal purpose animating attempts to increase union power and influence has escaped sustained attention, but, consistent with the Progressive Era's collectivist assumptions, the acquisition of dues can assist labor organization in providing benefits for some workers, while fueling union efforts to achieve something far greater—societal transformation.<sup>196</sup> Societal transformation materializes in the form of the ever-expanding state, but the transformation from limited to expansive government produces direct and collateral effects that fail to supply uniform benefits for the members of the polity. After all, the “consequences in modern democracies of the erosion of civil society by an expansionist state has everywhere been the outbreak of a political war of redistribution.”<sup>197</sup> This redistributive war habitually favors hierarchy and seldom favors the marginalized.<sup>198</sup> “From being an umpire, who enforces the rules of the game of voluntary civil association, the state has become the most potent weapon in an incessant political conflict for resources.”<sup>199</sup> Though the drafters of the Constitution sought to entrench precautions such as the doctrine of federalism in order to constrain governmental power, President

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<sup>196</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_ at 1380.

<sup>197</sup> GRAY, *supra* note \_\_ at 12.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

Roosevelt became frustrated by such precautions. For instance, New Deal reformers, including FDR, quickly scrapped their earlier states' right views in favor of federal regulation of the labor market.<sup>200</sup> This move was predicated on the contestable view that Progressive social progress equated active government with good government.<sup>201</sup> Hence the Progressive theory of government generated a compatible constitutional theory that eviscerated any constitutional doctrine that stood in the way of comprehensive reform.<sup>202</sup> Unswerving from the organizing premises of the New Deal and the newly-ascendant zeitgeist favoring centralized power, FDR sought to avoid constitutional constraints on his powers by threatening to change the constitutional order to suit his preferences by packing the Supreme Court.<sup>203</sup> During the New Deal, the question of whether the constitutional order should be altered in order to give FDR's Progressives plenary regulatory power over the economy despite strong public opposition was "one of almost immeasurable importance. If political elites could go against majority opinion on such a fundamental far-reaching question, it is hard to conceive of a situation, whether in normal politics or otherwise, where they would be substantially less constrained than this."<sup>204</sup> Once the encroaching power of the state is unleashed, it is doubtful that progressives can discover a principled stopping point with regards to the state's power to create labor cartels, or other pro-union policies.

Maneuvers favoring the powerful were exemplified, in the past, by the South's enactment of Jim Crow legislation to enforce discrimination against black Americans and

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<sup>200</sup> DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* 94 (1995).

<sup>201</sup> RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*, 7 (2006) [hereinafter, EPSTEIN, *HOW PROGRESSIVE REWROTE THE CONSTITUTION*].

<sup>202</sup> *Id.*

<sup>203</sup> Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 *WILL. AND MARY L. REV.* 595, 660 (2003) (discussing FDR cynical attempt to pack the Supreme Court).

<sup>204</sup> *Id.* at 628.

the failure of the federal government to enact and enforce anti-lynching laws. Today such moves are epitomized by progressive values that subordinate authentic individuality and diversity to the tyranny of collectivism.<sup>205</sup> While contemporary labor union proponents issue poignant calls to breathe life into New Deal Progressivism premised on the need to attain equality, and economic and social justice,<sup>206</sup> progressivism accompanied by government coercion may provide the opposite. Because Americans, by and large, are not committed to the principles of collectivism and because the interests of unionists are frequently antagonistic to those of workers,<sup>207</sup> pro-union efforts must be, at times, enforced without strong popular support. Liberalism offers a top-down solution to this dilemma. Liberalism as the customary governance theory in democratic societies is imbued with two related possibilities: authoritarianism and capture by powerful factions. Because authoritarianism is an inherent structural tendency of democratic regimes,<sup>208</sup> once power has been captured, it can be deployed by hierarchs in order to control society. Once the levers of power are seized, political and ideological elites often mandate that the government take sides and impose their will without necessarily admitting it.<sup>209</sup> This approach allows government to placate narrow, well organized interest groups, placing

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<sup>205</sup> See e.g., Dannin, *supra* note \_\_ at 274 (Asserting the highly contestable view that “the war is between those who support collective values and well-being for all and those who support unbridled individualism; between those who value workplace and social democracy and those who promote workplace and governmental totalitarianism.”). Professor Dannin’s analysis clearly shows that today’s progressives remain captive to the mores of the Progressive Era, but the logic of her claim that individualism leads to government totalitarianism is highly dubious. In fact, government totalitarianism and “virtual slavery” appear to be an inevitable outcome of Progressivism made manifest by FDR’s and his acolytes. See *infra* Part IV B.

<sup>206</sup> Dannin, *supra* note \_\_ at 274.

<sup>207</sup> See e.g., W. H. HUTT, *THE THEORY OF COLLECTIVE BARGAINING: 1930-1975* 7-8 (1980, 1975).

<sup>208</sup> See e.g., Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes, in Out of and Into Authoritarianism*, 125-151 (Andras Sajo ed. 2002) available at [http://ssrn.com/abstract\\_id=373660](http://ssrn.com/abstract_id=373660) at 1.

<sup>209</sup> Hutchison, *Liberty, Liberalism, and Neutrality*, *supra* note \_\_ at 130.

policymaking into the hands of an autonomous progressive elite<sup>210</sup> that is exemplified by Woodrow Wilson’s “great man” thesis wherein the leader’s conception of the state as an organic whole legitimates undemocratic action and unchecked power.

Given the rich possibilities associated with capture, John Gray shows that trade unions, and other largely autonomous institutions, which populate the West, have an incentive to give up their independence in order to become tools of political advantage for various interests.<sup>211</sup> Mounting evidence indicates that the mission of the modern state is “to satisfy the private preferences of collusive interest groups,”<sup>212</sup> “whether or not the pursuit of such aims is cloaked in language implying some pure public purpose or alternatively infused with the language of market failure.”<sup>213</sup> Insofar as it is possible to achieve private aims and objectives through government processes more efficiently than by relying on market processes,<sup>214</sup> many groups and oligarchs have an incentive to capture government in order to attain private gain at the expense of the marginalized. This agenda is often hidden by invoking the language of social justice, but it would explain why American unions spend such a small amount of their dues revenues on collective bargaining and related activities, while expenditures for political and related purposes have continued to rise on a per member basis.<sup>215</sup> Rising union political expenditures<sup>216</sup> are consistent with public choice theory’s deduction that government

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<sup>210</sup> Somin, *supra* note \_\_ at 657-58 (discussing the Roosevelt Administration’s push to enact the NLRA in spite of the absence of strong public support).

<sup>211</sup> GRAY, *supra* note \_\_ at 12.

<sup>212</sup> GRAY, *supra* note \_\_ at 11-12.

<sup>213</sup> Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note \_\_ at 144 (footnote omitted).

<sup>214</sup> WILLIAM C. MITCHELL & RANDY T. SIMONS, *BEYOND POLITICS: MARKET, WELFARE AND THE FAILURE OF BUREAUCRACY* 108 (1994).

<sup>215</sup> Hutchison, *The Market for Union Representation*, *supra* note \_\_ at 16.

<sup>216</sup> Hutchison, *Compulsory Unionism as a Fraternal Conceit?* *supra* note \_\_ at 126-127 (citing evidence of the continued growth in total receipts by several major unions, which make up the AFL-CIO while membership levels have declined).

intervention on behalf of labor provides disproportionate benefits to members of the labor union hierarchy and their political and ideological allies, fewer benefits to members of the rank and file and bitter experience to workers displaced by enforced unionism.<sup>217</sup>

Because African Americans and members of other marginalized groups make up a disproportionate share of the latter category,<sup>218</sup> Critical Race Reformists argue their concerns ought to take center stage when the nation considers new labor market legislation. The urgent necessity of concentrating on marginalized individuals and groups is reinforced by noting the continuing paradox of the Progressive Era. For example, the contemporary evidence shows that the Fair Labor Standards Act enacted during the New Deal purportedly as a vehicle to advance the interest of marginalized workers currently disfavors the poor by increasing the number and percentage of unemployed workers coming from lower-class families, while disproportionately supplying benefits (higher wages) to young people living in middle-to-upper-class families.<sup>219</sup> This inversion emphasizes the continuing effect of exclusionary labor policies.<sup>220</sup>

### **B. Race in the Mirror of Hierarchy**

While it has been argued that the EFCA levels the playing field between employees and employers, prevents stonewalling by managers, makes it easier for employees to

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<sup>217</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_\_ at 1339-1342. (explaining how groups including labor unions produce benefits for the few in the name of the many and disputing the claim that all members of the group benefit equally).

<sup>218</sup> See *e.g.*, *supra* Part I. See also, DOUGLASS NORTH & ROGER MILLER, *THE ECONOMICS OF PUBLIC ISSUES* 125 (1983) (noting that when the minimum wage was increased by 33.3%, non-white teenage employment increased by close to 45%); and Donald Deere et al., *Sense and Nonsense on the Minimum Wage*, 1 REGULATION 47, 51 (1995) (showing African American teenagers were disproportionately unemployed as a result of rise in the minimum wage).

<sup>219</sup> STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR., & GILLIAN L. L. LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS*, 577 (2007) (showing that although the minimum wage continues to enjoy wide-spread support, only 17% of low-wage workers in the United States were living in poor households in 2003, and thus, the people who are generally favored by this type of intervention in the market are not poor).

<sup>220</sup> See *infra* Part IV, B, 1.

reach a collective bargaining agreement<sup>221</sup> and counteracts the decline in wages by ensuring fair wages and fair benefits,<sup>222</sup> it is important to note that labor unions and their ideological allies are among the most committed supporters of this proposal. An examination of America’s labor history reveals the true motivation behind such advocacy.

### 1. America’s Labor History

Scholars David Bernstein and Thomas Leonard document that “the original progressive architects, and some New Deal renovators, were partisans of human inequality. The labor legislation they pioneered was, in important respects, designed to exclude immigrants, women and African Americans.”<sup>223</sup> Many progressives were enthusiastic “biologizers” and most were elitist.<sup>224</sup> “American labor reformers judged an impressive array of human groups—male Anglo-Saxon heads of household excepted—to be unworthy of work, or ‘unemployable.’”<sup>225</sup> Premised, at least in part, on the claim that “‘low-wage races’ were hereditarily predisposed to low standards of living,”<sup>226</sup> which, accordingly placed superior races at risk,<sup>227</sup> American labor law history largely commenced during President Hoover’s administration with the passage of the Davis-Bacon Act. This development was followed by President Roosevelt’s creation of the National Recovery Administration (NRA) as part of his pursuit of a new world order for labor. Brimming with social justice claims, the NRA manifested itself in bureaucratic managerialism. This approach issues forth as a quasi-scientific process in which the terms

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<sup>221</sup> Remarks of Congressman, Fortney Pete Stark, 155 Cong. Rec. E620.

<sup>222</sup> Remarks of Senator Edward Kennedy, 155 Cong. Rec. S2976.

<sup>223</sup> Bernstein and Leonard, *supra* note \_\_\_ at 1.

<sup>224</sup> *Id.* at 5.

<sup>225</sup> *Id.* at 6.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

of employment as well as the conditions under which labor unions materialize are regulated by a hierarchy that is justified by the contention that government possesses resources that rank and file citizens and workers lack.<sup>228</sup> Enforced by threats and violence, this program granted new collective bargaining powers to unions including the power to lock blacks out of the labor force.<sup>229</sup> Despite criticism from members of the black press, labor unions were delighted to take advantage of this new found power.<sup>230</sup>

In reality the NRA, an institutional outgrowth of the National Industrial Recovery Act (NIRA),<sup>231</sup> was simply one of many pro-union programs implemented during the Hoover and Roosevelt administrations that created labor cartels, and then prolonged and worsened the Great Depression.<sup>232</sup> Wrongly blaming high unemployment levels on low wages and low prices, the government engaged in a disastrous effort to raise wages and prices.<sup>233</sup> It is difficult to snub the statements of Rexford Tugwell, a principal actor in Roosevelt's New Deal program. Several years' worth of sustained government planning, he said, had merely created a depression within a Depression.<sup>234</sup> Though both big business and labor union leaders saw the early Depression period as an opportunity to implement cartelization schemes for product prices and labor markets,<sup>235</sup> the NIRA, the flagship program of the New Deal, was a mammoth public policy disaster.<sup>236</sup> Professor

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<sup>228</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE* 85 (1984) (Suggesting that as the government becomes more scientific and accepts that it can manipulate human action, government itself becomes a hierarchy of bureaucratic managers, and the major justification advanced for the intervention of government in society is that government has resources of competence which most citizens do not possess).

<sup>229</sup> GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_ at 155-156.

<sup>230</sup> *Id.* at 156.

<sup>231</sup> Act of June 16, 1933 (Ch. 90, 48 Stat. 195, formerly codified at 15 U.S.C. sec. 703).

<sup>232</sup> VEDDER & GALLAWAY, *supra* note \_\_\_ at 130-43.

<sup>233</sup> *See, e.g., id.* at 112-13, 130-43 (noting that rapidly rising money wages tied to banking policies and New Deal wage-raising legislation represented a continuation of the underconsumptionist, high-wage policy initiated by Hoover and further developed by Roosevelt).

<sup>234</sup> SHLAES, *supra* note \_\_\_ at 3.

<sup>235</sup> Somin, *supra* note \_\_\_ at 651.

<sup>236</sup> *Id.* at 650.

Ilya Somin demonstrates that FDR's attempt to supply centrally-planned price controls and production limits apparently caused a "massive six to eleven percent decline in the United States' Gross National Product (GNP) in an already depressed economy."<sup>237</sup>

While unions thrive when the government invades the marketplace through bureaucratic laws and regulation,<sup>238</sup> this invasion imposes costs on the overall economy and disproportionately disfavors members of marginalized groups. As we have previously seen, even, Professor Richard Freeman, a staunch labor union defender, acknowledges that "unions raise wages in ways that misallocate labor and reduce social output . . ."<sup>239</sup> Consistent with these observations, "[t]o the extent that unions are successful, they redistribute income toward their members, who are predominantly white, male and well paid, at the expense of consumers as a whole, taxpayers, non-union workers, the poor, and the unemployed."<sup>240</sup>

This disheartening picture comes into sharper focus when members of minority groups become the hub of our consideration because the American labor movement has been linked inescapably to intentional racist oppression.<sup>241</sup> While this remarkable achievement is not unique to the United States, the American labor movement since the founding of the American Federation of Labor (AFL) in the nineteenth century, during the Great Depression, and during subsequent periods, engaged in an often brutal campaign of racial exclusion. For the purposes of self advancement, labor unions have strongly supported the passage of legislation enhancing their power to exclude. Reliably

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<sup>237</sup> *Id.*

<sup>238</sup> Hutchison, *What Workers Want*, *supra* note \_\_\_ at 826.

<sup>239</sup> Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad or Irrelevant?* in UNIONS AND ECONOMICS COMPETITIVENESS 143, 144 (Lawrence Mishel & Paula B. Voos eds., 1992).

<sup>240</sup> MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COSTS OF LABOR LAW* 29 (1987).

<sup>241</sup> Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_\_ at 118-129.

with this conclusion, Congress enacted the NIRA, with significant labor union support.<sup>242</sup> Taking advantage of the monopoly power granted by the NIRA, trade unions were able to displace disfavored workers and reify economic and social stratification. Enacted in 1933, the NIRA codified wage differentials in such a way that even when a black employee performed more important tasks than a white employee, he would frequently have a lower job classification and hence a lower wage than his white counterpart.<sup>243</sup> According to one estimate the minimum wage provisions of the NIRA destroyed the jobs of half a million blacks.<sup>244</sup> Building on this grim record, the Fair Labor Standards Act, passed in 1938, mirrored results from a similarly disastrous policy in apartheid-era South Africa.<sup>245</sup> According to the U.S. Labor Department, enforcement of the minimum wage provisions of the Fair Labor Standards Act (FLSA) caused between 30,000 and 50,000 workers, mostly Southern blacks to lose their jobs within two weeks.<sup>246</sup> Evidence surfaces showing that the architects of both the NIRA and the FLSA knew the laws would create disproportionate unemployment among southern African Americans.<sup>247</sup> “But most advocates of these laws saw the resulting unemployment, at worst, as an unfortunate necessity, and in many cases as a positive feature.”<sup>248</sup> Since minimum wage laws reduce the cost of discrimination to employers,<sup>249</sup> and since the NIRA was enforced in blatantly discriminatory ways, it is possible to infer that some of supporters of wage

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<sup>242</sup> *Id.* at 123.

<sup>243</sup> Bernstein, *Roots of the ‘Underclass’ supra* note \_\_\_\_ at 120-21.

<sup>244</sup> David T. Beito, *Review of Only One Place of Redress*, 10 GEO. MASON L. REV. 293, 296 (2001).

<sup>245</sup> Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes, supra* note \_\_\_\_ at 126-128. *See also*, SOWELL, BASIC ECONOMICS, *supra* note \_\_\_\_ at 215-219 (explaining the continuing disaster of minimum wages on blacks in Africa, and how the South African government’s increase in minimum wages has contributed to a rise in employment in largely nonblack Poland).

<sup>246</sup> Bernstein, *Roots of the ‘Underclass’ supra* note \_\_\_\_ at 130 (quoting, William A. Keyes, *The Minimum Wage and the Davis-Bacon Act: Employment Effects on Minorities and Youth*, 3 J. LAB. RES. 399, 401 (1982)).

<sup>247</sup> Bernstein and Leonard, *supra* note \_\_\_\_ at 2.

<sup>248</sup> *Id.*

<sup>249</sup> SOWELL, BASIC ECONOMICS, *supra* note \_\_\_\_ at 201.

minimums and other New Deal initiatives were driven by racial animus. In any case, the FLSA along with other New Deal legislation<sup>250</sup> contributed to a persistent increase in African American unemployment because democratic governments give the greatest benefits to those who are the best organized, have the most influence and are the least disenfranchised<sup>251</sup>—categories that include few blacks. Such results are consistent with the thesis that labor unions are frequently interested in benefiting the few and subjugating the many by protecting “superior” races from competition from “inferior” ones. An early architect of the Progressive Era, prominent labor economist John R. Commons supplied legitimacy to this thesis by suggesting that race, not productivity determined living standards and accordingly, African Americans were seen as “indolent and fickle,” which explained why slavery was defensible and necessary.<sup>252</sup> Far from being a countermajoritarian force for inclusive social change, labor union minimum wage advocacy both in the United States and South Africa during the apartheid-era is inseparable from an ideology that decisively conceives of blacks and other minorities as inferior outsiders.<sup>253</sup> The South African experience illustrates that one of the most effective vehicles for excluding non-whites are statutes or industrial agreements that impose minimum wages.<sup>254</sup> This type of market interference, whether motivated by racist rhetoric and whether promulgated in the United States or South Africa, is particularly attractive to those who are offended when an employer employs blacks instead of

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<sup>250</sup> BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note \_\_\_\_ at 103 (showing, for example, that the Agricultural Adjustment Acts reimbursed white planters for taking land out of production, causing many owners to evict African American tenant farmers from their land).

<sup>251</sup> *Id.*

<sup>252</sup> Bernstein and Leonard, *supra* note \_\_\_\_ at 7 (quoting from Commons’s book, *RACES AND IMMIGRANTS*).

<sup>253</sup> Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_\_\_ 130.

<sup>254</sup> *Id.* at 131.

whites.<sup>255</sup> Often labor market intervention and its exclusionary consequences are sheltered by claims of fairness but can be seen more accurately as a putatively-neutral analog to intentional discrimination.

Coherent with that probability, it is not a surprise that “[d]epression-era legislation, though officially colorblind, was often highly discriminatory. A case in point was the Davis-Bacon Act, which required construction firms with federal contracts to pay ‘prevailing wages.’ As defined by the Department of Labor, the prevailing wage usually equaled the union wage, thus freezing low-skilled black workers out of many projects.”<sup>256</sup> While some supporters of progressive reform justified labor initiatives on ground that protecting “deserving” workers necessitated the exclusion of “unfit” workers from the workplace,<sup>257</sup> many backers of the Davis-Bacon Act saw no need to “hide their racist goals. At the hearings for the bill, William Green, the president of the American Federation of Labor, in his testimony praised the proposed law because it would make it more difficult contractors to ‘demoralize’ wage rates through use of low-wage colored labor.”<sup>258</sup> Passed during the Hoover administration,<sup>259</sup> and impelled, in part, by the same logic that encouraged the Pre-Mandela South African government to adopt policies favoring whites at the expense of black workers,<sup>260</sup> the Davis-Bacon Act was catalyzed by the same progressive forces that later gave us the NIRA and the NLRA.

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<sup>255</sup> *Id.*

<sup>256</sup> Beito, *supra* note \_\_\_ at 296.

<sup>257</sup> Bernstein and Leonard, *supra* note \_\_\_ at 2.

<sup>258</sup> Beito, *supra* note \_\_\_ at 296.

<sup>259</sup> See, Walter Williams, *Congress’ insidious discrimination*, JEWISH WORLD REVIEW, March 12, 2003, available at <http://www.jewishworldreview.com/cols/williams031203.asp> (accessed June 6, 2009) (showing that the Davis-Bacon Act was designed to reduce employment competition from black laborers and favor white laborers).

<sup>260</sup> Abedian & B. Standish, *Poor Whites and the Role of the State: The Evidence*, 53 S. AFR. J. ECON. 141, 141-64 (1985).

Proceeding along a pathway blazed by white South African craft unionists who demanded the segregation of blacks and their total exclusion from industrial work,<sup>261</sup> American labor unions assumed control of exclusionary efforts in the United States. At times, such efforts were grounded in the ideology of white supremacy, leading to the conclusion that intentional discrimination was afoot. At other times, union efforts were driven by the economic consequences of exclusion, which may provide evidence of unconscious racism. Evidence of the former approach can be found in connection with the NIRA. “Seeking to avail itself of the powers granted under Section 7A of the [NIRA], union labor strategy seems to be to form a union in a given plant, strike to obtain the right to bargain with the employer as the sole representative of labor and then to close the union to black workers, effectively cutting them off from employment.”<sup>262</sup> After the NIRA was invalidated by the Supreme Court, Congress passed the NLRA, which permanently enshrined many of the NIRA’s exclusionary features.<sup>263</sup> Premised on progressive themes, the NLRA was advanced as an affirmative vehicle for social and economic progress that would provide freedom and dignity for workers.<sup>264</sup> Still, the NLRA “significantly expanded the closed union shop, which, as future NAACP head Roy Wilkins stated, was all too often a white union shop.”<sup>265</sup>

Premised on certain assumptions, New Deal exclusion continued into the 1940s and labor union subordination continued at least through the 1980s.<sup>266</sup> Evidently, the New Deal was based on the prevailing collectivist and eugenic thought that underlay the

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<sup>261</sup> WALTER E. WILLIAMS, *SOUTH AFRICA’S WAR AGAINST CAPITALISM* 49 (1989).

<sup>262</sup> Beito, *supra* note \_\_ at 297.

<sup>263</sup> *Id.*

<sup>264</sup> *THE DEVELOPING LABOR LAW*, 28 (John E. Higgins ed., 2006) (quoting Senator Wagner).

<sup>265</sup> Beito, *supra* note \_\_ at 297.

<sup>266</sup> Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_ at 125.

Progressive Era. Congruent with this observation, David Bernstein convincingly disputes Bruce Ackerman who portrays federal interventionism during the New Deal as part of an encouraging pursuit of social equality that set the stage for later civil rights measures.<sup>267</sup> The record shows that the purported search for social equality during the 1930s, operated consistently with the paradoxes embedded in progressivism, resulting in government behavior that produced more inequality. Ackerman's assertion is further disputed by Bernstein's exposition of the New Deal government's underlying attitude favoring supremacists. Bernstein notes, "the Roosevelt administration expressed little interest in civil rights during the 1930s and seemed even less concerned than previous administrations about the need for anti-lynching legislation."<sup>268</sup>

Though it is clear that facts drawn from the 1930s provide direct evidence proving an intimate connection between supremacist intent and labor legislation, some observers may surrender to the claim that Progressive Era labor initiatives can be explained in benign terms that excuse its racially-charged consequences. But even assuming the original purpose was benign, African Americans and other oppressed populations can be forgiven for suspecting more invidious forces at work. Far from delivering social justice, the ostensible instantiation of the "common good" during the New Deal was riven with instances of flagrant injustice.<sup>269</sup> New Deal programs strengthened American labor unions' commitment to the norms of separation and white supremacy.<sup>270</sup> This fact makes it impossible to take seriously claims that the New Deal and the labor movement were

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<sup>267</sup> DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICAN, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 106 (2001) [hereinafter, BERNSTEIN, *ONLY ONE PLACE OF REDRESS*].

<sup>268</sup> Beito, *supra* note \_\_\_\_ at 298.

<sup>269</sup> Hutchison, *Work, the Social Question, supra* note \_\_\_\_ at 104.

<sup>270</sup> Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes, supra* note \_\_\_\_ at 120.

participants in a benign program that was occasionally hijacked by bad actors. For example, the Railway Brotherhood, armed with legislation creating a labor cartel, regularly organized strikes that were occasionally violent and aimed at forcing employers to pursue whites-only hiring policies.<sup>271</sup> Other railroad unions persuaded legislatures to pass “full crew” laws, which by 1939 were operative in twenty-four states.<sup>272</sup> Though the stated purpose of these laws was to improve “safety,” the unions insisted that state railroad officials apply them by disallowing black porters to do trainmen’s work, eventually leading to their displacement.<sup>273</sup> To be fair, segregationist and white supremacist policies, correctly appreciated as a pathological form of economic and social rent-seeking, were not limited to railroad unions. Many unions functioning as lodges or private clubs adhered to a pernicious racial hierarchy in order to further their social and economic goals.<sup>274</sup> Progressive labor law, by carving the labor market into cartels, furthered labor’s exclusionary objectives. Just like the pattern that emerged during South Africa’s exclusionary epoch, many white union members’ loyalty to their unions transcended “narrow pecuniary self-interest.”<sup>275</sup> The coercive force of New Deal labor law, strengthened white members who wanted to exclude blacks from their unions because they believed that their “own social status would decline if they associated with blacks.”<sup>276</sup>

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<sup>271</sup> *Id.* at 120.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 120-121.

<sup>274</sup> *Id.* at 121.

<sup>275</sup> Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1084 (1995) (footnote omitted).

<sup>276</sup> Bernstein, *Roots of the ‘Underclass’*, *supra* note \_\_\_ at 95 (footnote omitted).

Historically, exclusionary practices in the United States were most prevalent where the unions controlled access to work.<sup>277</sup> Though in 1944 the Supreme Court softened the force of labor union exclusion in *Steele v. Louisville & Nashville Railroad*, by imposing a duty of fair representation on labor unions, its decision, consistent with the principle of “separate but equal” as well as the prejudices percolating throughout the Progressive era, declined to require the union to admit African Americans despite the union’s status as an exclusive bargaining agent.<sup>278</sup> In more recent cases, all-white or largely white labor unions claimed that a policy that excluded workers not related to current members by blood or marriage was nondiscriminatory.<sup>279</sup> Ominously, discriminatory effects do not always depend on evidence of prejudice. Thomas Sowell shows black artisans were *more* prevalent in the American South where more prejudice but *less* discrimination existed largely because of insistent labor union control in the Northern part of the United States.<sup>280</sup> This observation attests to the capacious power of the labor unions to exclude.

Not all blacks were excluded from employment. Indeed, during the 1940s the United States Employment Service, a federal agency, enticed hundreds of young African American men with offers of “free” travel from cities across the South to enjoy Florida sunshine and work in the sugar fields during World War II.<sup>281</sup> Instead of enjoying sunshine, warm weather and free travel, they learned that their transportation actually amounted to at least a week’s worth of wages, and they were shunted to labor camps

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<sup>277</sup> See Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L. J. 649, 652 (1983) (footnotes omitted) [hereinafter, Michael Goldberg]. See also *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).

<sup>278</sup> See *Steele v. Louisville*, 323 U.S. 192 (1944).

<sup>279</sup> See e.g., *Local 53 of the International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5<sup>th</sup> Cir. 1969).

<sup>280</sup> See THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* 31 (1990) (hereinafter, SOWELL, *PREFERENTIAL POLICIES*).

<sup>281</sup> RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 1 (2007). See also, Hutchison, *Work, the Social Question*, *supra* note \_\_\_ at 103-104.

replete with guards who killed men for asking for their wages or for trying to leave.<sup>282</sup> Facing long days of brutal work pervaded by fear and punctuated by violence, these workers determined that escape was the only option.<sup>283</sup> At the same time, despite the abortive commitment of most modern liberal states since the French Revolution to end slavery,<sup>284</sup> Roosevelt’s Justice Department ignored requests to stop the “virtual slavery” in Florida’s sugar camps.<sup>285</sup> Far from being an isolated instance of government complicity in subordination, the United States Employment Service, which acted as a liaison between hiring employers and would-be workers, learned to accommodate racial discrimination and vindicate racial oppression as part of its assistance program after being federalized by the Roosevelt administration.<sup>286</sup> This oppressive history continued virtually unabated into the 1950s and 1960s.<sup>287</sup> In the late 1950s, this record prompted A. Phillip Randolph, the only black member of the twenty-seven member executive council of the AFL-CIO to complain.<sup>288</sup> AFL-CIO President George Meany, doubtlessly a product of the Progressive Era ridiculed him: “Who the hell appointed you as the guardian of all the Negroes in America?”<sup>289</sup>

Exclusion of blacks and dominance by whites continued to infect the labor union movement into the 1970s and 1980s prompting one observer to conclude that the “history of race . . . discrimination has left its mark on the present composition of the [entire] labor movement, particularly on the limited number of minorities . . . who hold leadership

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<sup>282</sup> GOLUBOFF *supra* note \_\_\_\_ at 2.

<sup>283</sup> *Id.*

<sup>284</sup> ANDRESS, *supra* note \_\_\_\_ at 1.

<sup>285</sup> GOLUBOFF *supra* note \_\_\_\_ at 2.

<sup>286</sup> *Id.* at 3 & 85.

<sup>287</sup> Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_ at 124.

<sup>288</sup> *Id.*

<sup>289</sup> ROBERT H. ZEIGER, *AMERICAN WORKERS, AMERICAN UNIONS* 174 (2<sup>nd</sup> ed. 1994).

positions in unions.”<sup>290</sup> During the 1970s, the Supreme Court permitted the discharge of black workers who had engaged in concerted activity for the purpose of negotiating with their employer over discriminatory working conditions.<sup>291</sup> Discharge was permissible because the employees’ conduct was seen as inimical to the fundamental purpose of the NLRA, granting the labor union complete power to negotiate such issues as the exclusive bargaining representative.<sup>292</sup> Whether the *Emporium Capwell* case was decided correctly or not, it appears to be part of dismal record of labor relations that originated during the onset of the Progressive Era.

Despite the superficial trope of official neutrality, the move to cartelize labor through centralized government often reflects an incandescent commitment to the norms of white supremacy and indifference, if not enmity, toward African Americans. Bernstein shows that “[f]ew of the Progressives who dominated left-wing politics before the New Deal evinced sympathy for civil rights, and many were hostile to African Americans. Indeed, many of the same regulatory impulses that inspired the New Deal motivated supporters of segregation laws earlier in the century.”<sup>293</sup> Moreover, “the most statist post-bellum presidential administration before FDR’s, Woodrow Wilson’s [administration] was extremely hostile to African Americans. The Hoover administration, dominated by Progressive Republicans, including Hoover himself, also treated African Americans poorly.”<sup>294</sup> Based on bi-partisan enthusiasm for progressive values and the exclusionary consequences of the New Deal in 1936, T. Arnold Hill of the National Urban League

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<sup>290</sup> Michael Goldberg, *supra* note \_\_\_\_ at 653.

<sup>291</sup> *Emporium Capwell Co. v. W. Addition Cmty. Org.* 420 U.S. 50 (1975). *See also*, THE DEVELOPING LABOR LAW, 87 (John E. Higgins ed., 2006).

<sup>292</sup> *See id.*

<sup>293</sup> BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note \_\_\_\_ at 106.

<sup>294</sup> *Id* at 106.

wrote that “[i]f the present trend continues, there is slight question that the Negro will be gradually forced into a condition of economic peonage, every bit as devastating as plantation slavery ever was.”<sup>295</sup> This perspective corroborates Bernstein’s contention that New Deal government regulation, sometimes by intent and sometimes by effect, harmed African Americans, and thus, they would have fared better if such legislation had been invalidated by the courts under Lochnerian principles.<sup>296</sup>

Still, Professor Kropp asserts that Bernstein has fallen prey to a false dichotomy because the choice was not necessarily between having no governmental regulation and having harmful governmental regulation.<sup>297</sup> Instead, Kropp argues the courts *might* have construed the New Deal labor legislation in such a way to have advanced the interests of African Americans.<sup>298</sup> Kropp’s analysis is unconvincing for two reasons. First, failing to grapple with T.S. Elliot’s sparkling intuition showing, “[w]hat might have been is an abstraction remaining a perpetual possibility only in a world of speculation,”<sup>299</sup> Kropp’s critique fails to adequately deal with the probability that judges, as leading members of the privileged elite, were influenced by eugenics and hence their failure to rescue blacks from labor oppression was both unfortunate and foreseeable. Second, it is doubtful that any regulation, beneficial to blacks, could have been fashioned during the 1930s as long as members of the Roosevelt administration and judges nominated by FDR, were willing to abandon their independence in order to maintain Progressive Era myths premised on

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<sup>295</sup> *Id.* at 107.

<sup>296</sup> *Id.* at 1-7 (introducing this thesis).

<sup>297</sup> See e.g., Steven H. Kropp, *Deconstructing Racism in American Society—The Role Labor Law Might Have Played (But Did Not) In Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369, 371 (2002).

<sup>298</sup> *Id.*

<sup>299</sup> T. S. Elliot, *Four Quartets 1: Burnt Norton*.

innate racial differences. This process may be best exemplified by Hugo Black's elevation to the Supreme Court during the New Deal.

Provoked by this insufferable record, African American writer Zora Neale Hurston commented on America's war effort. She thought it was exceptionally ironic that the same "people who claim that it is a noble thing to die for freedom and democracy . . . wax frothy if anyone points out the inconsistency of their morals . . . [Roosevelt] can call names across an ocean' for his four freedoms, but he did not have 'the courage to speak even softly at home.'"<sup>300</sup> A careful examination of the evidence reveals that the effort to expand union power, whether impelled by support from academics or union leaders has blatantly disfavored African Americans. Bernstein and Leonard show that "American labor reformers promoted an ideology that advocated excluding from the workplace those they regarded as undesirable, undeserving or defective."<sup>301</sup> "Undesirable workers were those who were deemed unable, for genetic, social or other reasons, to command what the reformers considered sufficiently high wages. Not coincidentally, the set of these undesirable workers overlapped considerably with members of groups deemed defective in some way or inferior to the norm, defined as native white male workers."<sup>302</sup> Labor reform based on such venomous principles has consequences for African Americans and others. Despite maintaining a patina of legitimacy and neutrality that apparently misleads many contemporary commentators, federal interventionism during the New Deal

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<sup>300</sup> David T. Beito and Linda Royster Beito, *Isabel Paterson, Rose Wilder Lane, and Zora Neal Hurston on War, Race, the State, and Liberty*, Vol. XII THE INDEPENDENT REVIEW 553,562 (2008) (quoting Zora Neale Hurston in the original draft of DUST TRACKS ON A ROAD).

<sup>301</sup> Bernstein and Leonard, *supra* note \_\_ at 42.

<sup>302</sup> *Id.*

worsened conditions for African Americans and generated subordinating effects that continue today.<sup>303</sup>

Consistent with this intuition, Jonah Goldberg explains how the eugenic ghosts of the Progressive Era continue to disenfranchise African American workers. He states:

[The] relevant repercussions of Progressive Era ideas have escaped the light of scrutiny. The architects of the New, the Fair Deal, and the Great Society all inherited and built upon the progressive welfare state. And they did this in explicit terms, citing such prominent race builders as Theodore Roosevelt and Woodrow Wilson as their inspirations. Obviously, the deliberate racist intent in many of these policies was not shared by subsequent generations of liberals. But that didn't erase the racial content of the policies themselves. The Davis-Bacon Act still hurts low-wage blacks, for example. FDR's labor and agricultural policies threw millions of blacks out of work and off their land. The great migration of African Americans to northern cities was in no small part a result of the *success* of progressive policies [that threw them out of unions and jobs in the South]. Black leaders didn't call the National Recovery Administration, or NRA, the 'Negro Run Around' for nothing.<sup>304</sup>

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<sup>303</sup> For example, the minimum wage, a New Deal program enacted in the Fair Labor Standards Act continues to disproportionately disfavor African American and other outsider groups. *See generally*, Hutchison, *Toward A Critical Race Reformist Conception of Minimum Wage Regimes*, *supra* note \_\_\_\_ at 93-134.

<sup>304</sup> GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_\_ at 268-69.

Hence, one can accept Paul Krugman's assertion that Franklin Roosevelt's policies successfully reduced inequality during the New Deal and in subsequent periods<sup>305</sup> only by ignoring the substantial suffering, widespread unemployment and the plight of African Americans and others, whose present and future prospects have been diminished by progressive policies. If the welfare of African Americans is factored into America's economic calculus, Krugman's claim is irremediably incoherent. Properly appreciated, the portrayal by defenders of the New Deal as a program committed to social justice is no more than sentimentality.

Insofar as labor union oligarchy may now be the norm<sup>306</sup> because the law has failed "to require let alone enforce democratic collective bargaining [and] has left union members subject to manipulation of union leaders . . . with interest sharply different from theirs,"<sup>307</sup> it is possible to conclude policies supported by America's current labor leadership and their contemporary ideological allies fail to fully reflect the interest of a majority of the represented workforce. Given this configuration, it is doubtful that the interest of African Americans and other minorities can successfully capture the focus of America's entrenched, autocratic and possibly corrupt labor leadership.<sup>308</sup> Doubts are bolstered by the fact that minorities have been excluded from union leadership positions, which gives credence to Michael Goldberg's conclusion that unions cannot fully represent their minority members,<sup>309</sup> let alone, minority interest. Rather than delivering freedom and justice for all, labor unions, augmented by the coercive power of the state,

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<sup>305</sup> EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *BEYOND RATIONAL CHOICE: ALTERNATIVE PERSPECTIVES ON ECONOMICS* 397 (2005) (quoting Paul Krugman).

<sup>306</sup> Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 371.

<sup>307</sup> Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L. J. 793, 843 (1984).

<sup>308</sup> Schwab, *supra* note \_\_\_ at 368 (Even staunch union supporters blanch over the autocracy, entrenchment and corruption of some union leaders.).

<sup>309</sup> Michael Goldberg, *supra* note \_\_\_ at 653.

have become persistent and effective vehicles of racial oppression. This gives rise to a forecast: when and if government power is deployed on behalf of unions in the future, oppression and exclusion whether deliberate or inadvertent is likely to follow.

## 2. The EFCA: Extending Hierarchy?

While I have not uncovered any direct evidence that sustains the conclusion that the EFCA has been defended on the basis of racial superiority, it is doubtful that the EFCA can be completely separated from an ongoing labor law trend beginning in the 1930s that emphasizes the need for control and experimentation in order to ensure societal transformation. At the outset, the objective of this transformative process depended heavily and inescapably on the notion of racial superiority. Today, the focus on societal transformation, collective insurgency and class-based justice led by union oligarchs provides space that enables society to ignore the elephant in the room: the persistent and widening racial gap in unemployment<sup>310</sup> as well as the labor movement's prominent role in this development.

Although many advocates of racial progress have been deeply concerned about the enforcement of fair employment laws against employers, another front in the battle for justice has largely escaped attention: the probability that American labor law inhibits job opportunities for African American workers, while improving the social and economic status of whites. For example, Derrick Bell notices that the duty of fair representation, imposed after the passage of New Deal labor legislation was designed to ensure fair treatment by unions of all of their members, but particularly their African American workers.<sup>311</sup> Though the Supreme Court has determined that a union has a duty to

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<sup>310</sup> BELL, *supra* note \_\_ at 735-738.

<sup>311</sup> *Id.* at 753.

represent all workers covered by a collective bargaining agreement fairly, its decision reflects a great deal of weakness when African Americans become the focus of the conversation<sup>312</sup> because the Court also ruled that unions need not admit African American members. The capacity of New Deal labor law to hinder the rate of African American progress should surprise no one since in its origins, intent, and effects, New Deal legislation signaled that the federal government had decided to take sides in the political war that afflicts most modern liberal democracies. Favoring labor union hierarchy and disfavoring the marginalized, this pivotal maneuver implied that government, deliberately or inadvertently had imposed exclusion on African American workers while sheltering this move with the promise of progress and social justice for all. These developments, taken together, give rise to a paramount question: Can new labor law initiatives, such as the EFCA, that are shaped by the New Deal's exclusionary premises escape either the union movement's or the Progressive era' record of diminishing equality?

One answer can be seen in the fact the EFCA is the most dramatic alteration in labor laws since 1935 and the Progressive Era.<sup>313</sup> While that alone does not prove discriminatory intent, Richard Epstein shows that the EFCA, in addition to subjecting workers to union intimidation, will likely retard the formation of small businesses, increase the likelihood of multiple union arbitrations covering different locations, send jobs offshore and contribute to increased industrial strife tied to a pattern of union threats and maneuvers.<sup>314</sup> Similarly, Judge Richard Posner asserts that if the EFCA is enacted, it will reduce efficiency by creating an unambiguously negative effect on output by

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<sup>312</sup> *Id.* at 753-754.

<sup>313</sup> EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_\_\_ at 7.

<sup>314</sup> *Id.* at 10-11.

increasing employers' labor costs, which will lead to rise in unemployment.<sup>315</sup>

Marginalized Americans are unlikely to benefit from these developments. On the other hand, one of the principal sponsor's of the EFCA, Senator Kennedy insists that the EFCA would equip workers with the "freedom to choose a union without fear of threats or intimidation"<sup>316</sup> and assist labor organizations in their efforts to "provide greater security and greater promise of fair treatment."<sup>317</sup> He fails to supply plausible evidence verifying the truthfulness of such claims and makes no attempt to show why, the EFCA will benefit African Americans and other outsiders despite the unmistakable connection between labor law initiatives and increasing levels of unemployment experienced by America's most vulnerable populations. His comments mirror the claims of his brother, then Senator John Kennedy, who supported minimum wage laws as a way of protecting New England businesses from southern and largely African American competition, thereby offsetting the South's advantages in labor costs.<sup>318</sup>

Against Senator Edward Kennedy's claims of fairness, one observer states that the "secret ballot is a fundamental principle of American democracy. If individuals want to join a union, they are entitled to that right. They can show their support with their vote. But if workers do not want to pay union dollars to be used to advance a political agenda they disagree with, they should also be afforded the same right to cast their vote free of coercion and intimidation in a secret ballot election."<sup>319</sup> Because the EFCA provides more scope for union coercion, it should be also noted that "[p]rofound doubts over a card check have been voiced by labor's natural allies. Recently, former Democratic

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<sup>315</sup> POSNER, *supra* note \_\_ at 225.

<sup>316</sup> Remarks of Senator Edward Kennedy, 155 Cong. Rec. S2967.

<sup>317</sup> *Id.*

<sup>318</sup> Bernstein, *Roots of the "Underclass," supra* note \_\_\_ at 131 n. 328.

<sup>319</sup> Remarks of Congressman Joe Pitts, 155 Cong. Rec. H3111.

senator and presidential nominee George McGovern condemned the EFCA because of its failure to take into account the obvious: “There are many documented cases where workers have been pressured, harassed, tricked and intimidated into signing cards that have led to mandatory payment of dues.”<sup>320</sup>

Nevertheless, the EFCA will continue to be advanced on the basis of dubious claims. For instance, many leading Democratic members of Congress “have advised workers in developing countries such as Mexico to insist on the secret ballot when voting as to whether or not their workplaces should have a union,”<sup>321</sup> but are inclined dispense with such a desirable protection for American workers here.<sup>322</sup> Similarly, while most nonunion workers surveyed appear to reject unionization as a desirable objective, Senator Kennedy and others defend the EFCA on grounds that “more than half of all non-union workers—nearly 60 million men and women—say they would join a union if they could.”<sup>323</sup> Claiming that the current system is rigged against workers because of employer hostility,<sup>324</sup> Senator Edward Kennedy manages to ignore richly available contrary information showing that such contentions are inaccurate.<sup>325</sup> Legislative defenders of the EFCA, perhaps animated by the prospect of future campaign contributions,<sup>326</sup> argue that workers who want to join labor organizations are prevented

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<sup>320</sup> George McGovern, *My Party Should Respect Secret Union Ballots*, THE WALL STREET JOURNAL, August 3, 2008 available at <http://online.wsj.com/article/SB121815502467222555.html>. See also, Joe Knollenberg, *The Changing of the Guard: Republicans Take on Labor and the use of Mandatory Dues or Fees for Political Purposes*, 35 HARV. J. ON LEGIS. 347, 364-65 (describing how employees who take on union leaders find the process marked by threats to life, family, insults and coercion).

<sup>321</sup> EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_\_ at 31.

<sup>322</sup> *Id.* (quoting Senator McGovern).

<sup>323</sup> Remarks of Senator Edward Kennedy, 155 Cong. Rec. S2967.

<sup>324</sup> *Id.*

<sup>325</sup> See e.g., Hylton, *supra* note \_\_\_ at 695-697 (eviscerating the employer hostility thesis). See also, *supra* Part III, B, 1 and Hutchison, *What Workers Want*, *supra* note \_\_\_ at 820-823.

<sup>326</sup> Jill Lawrence, *Democrats Ponder Labor Split's Political Effect*, USA TODAY, July 27, 2005, at 4A. (showing that labor unions occupy seven of the top ten spots on a recent list of America's leading contributors to political parties). See also, Harry G. Hutchison, RECLAIMING THE FIRST AMENDMENT

from doing so by employer pressure, but these same politicians appear deaf to reports of union intimidation and coercion.<sup>327</sup> They also disregard substantial independent evidence confirming worker indifference toward union representation and worker preferences favoring either a company funded or a jointly-run employee organization.<sup>328</sup> Such evidence, when taken together, implies that unions refrain from supporting secret ballot elections because workers are more likely to freely reject unions.<sup>329</sup> Against this background, even leading union proponents concede that employer hostility and unfair labor practices have little or no effect on a union's ability to prevail in an election campaign under the NLRA.<sup>330</sup> In truth, the failure of union organizing efforts reflects emerging worker hostility to labor unions.<sup>331</sup> More to the point, data surfaces indicating that African American workers have uncovered the ill fit between collective bargaining regimes and the identities of people of color, leading some to conclude that unions did not, and cannot represent their interests.<sup>332</sup>

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THROUGH UNION DUES RESTRICTIONS, 10 U. PA. J. OF BUS. AND EMPL. L. 663, 711-712 (2008) [hereinafter, Hutchison, *Reclaiming the First Amendment*].

<sup>327</sup> See e.g., Knollenberg, *supra* \_\_\_\_ at 364-365 (describing evidence of union coercion).

<sup>328</sup> Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW 117, 118 n.2 (1996) (citing PRINCETON SURVEY RESEARCH ASSOCIATES, WORKER REPRESENTATION AND PARTICIPATION SURVEY: REPORT ON THE FINDINGS 49 (1994) (“By an overwhelming 86% to 9% margin, workers want an organization run jointly by employers and management rather than an independent, employee-run organization. By a smaller, but still sizable margin of 52% to 34%, workers want an organization to be staffed and funded by the company, rather than independently through employee contributions.”)).

<sup>329</sup> Hutchison, *What Workers Want*, *supra* note \_\_\_\_ at 815-817 (showing that workers are likely to reject the necessity of labor unions as a vehicle to voice their views).

<sup>330</sup> Eugene Scalia, THE FEDERALIST SOCIETY ONLINE DEBATE SERIES: THE EMPLOYEE FREE CHOICE ACT, June 1, 2009 at 7 available at <http://www.fed-soc.org/debates/dbtid.29.css..print/default.asp> (quoting Thomas Kochan and John-Paul Ferguson suggesting that unfair labor practices have no effect on election outcomes). See also, John-Paul Ferguson, *The Eye of Needle*, IND. & LAB. REL. REV. 17 (Oct. 2008).

<sup>331</sup> Seymour Martin Lipset & Marcela Ridlen Ray, *Technology, Work and Social Change*, 27 J. OF LABOR RESEARCH 613, 617 (1996) (Evidently, Americans “perceive unions to be overly involved in politics (70 percent), more intent on fighting change than in helping to bring it about (65 percent), and stifling of individual initiative (59 percent).”).

<sup>332</sup> Molly S. McUsic and Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1351 (1997).

Taken as a whole, the persistent attempt by legislators to defend the EFCA, while ignoring contradictory information, may represent a commitment to sophistry as well as an isomorphic shift towards hypocrisy by many of the nation's elected ethnarchs.<sup>333</sup> Equally possible, the willingness of officials to screen themselves from information that contradicts their claims implies that such officials are predisposed to favor one side or another in the contest for political power while masking their partisanship by deploying the elastic rhetoric of fairness.<sup>334</sup> This conclusion is intensified by noting that as labor unions' "fortunes have faded in the marketplace, unions have directed their attention to political solutions."<sup>335</sup>

Professor Hayward, a leading commentator on the legitimacy of various voting regimes, persuasively unmask partisanship in an organizing context. She shows that grievances, even legitimate grievances about the fairness of union organizing elections and concerns about whether employers engage in unfair labor practices, offer no justification for discarding the protection from fraud and coercion secured through a secret ballot.<sup>336</sup> She enlists Condorcet's argument stating "that if an election is to serve the welfare of a large group, deserve respect, and keep the peace and order, voting procedures in such contexts should insulate voters from outsider influence at the time of voting."<sup>337</sup> On the other hand, under a card check system for selecting the workers' bargaining representative, vulnerable workers are asked to sign cards favoring union

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<sup>333</sup> Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note \_\_ at 105.

<sup>334</sup> *Id.*

<sup>335</sup> Richard W. Hurd, *Industrial Relations Theory*, 58 *INDUS. & LAB. REL. REV.* 305, 305-306 (2005) (reviewing LEO TROY, *THE TWILIGHT OF THE OLD UNIONISM* (2004)) (discussing Leo Troy's view). *See also*, CHAVEZ & GRAY, *supra* note 31, at 17-21 (cataloguing labor's move to the left). *See also*, Hutchison, *Reclaiming the First Amendment*, *supra* note \_\_ at 712.

<sup>336</sup> Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote* 1, 2 (2009) (unpublished manuscript on file with the author).

<sup>337</sup> *Id.* at 5.

representation in situations that are unprotected from union coercion. Furthermore, because card check efforts need not be publicized, nor the identities of union supporters released, there is no way for a worker whose name has been fraudulently added to the union's card check list to detect the fraud.<sup>338</sup> Dispensing with secret ballot elections as well as the existing NLRB approach that strives to rule out the possibility of abuse<sup>339</sup> will magnify the probability that workers will capitulate to fraudulent or belligerent union requests to sign cards, which gives rise to employee forged choice.<sup>340</sup> Augmenting this outcome, the proposed law does not provide a mechanism permitting workers to update their preferences with respect to unionization, which means that a fraction of workers favoring the union will enforce representation on the majority.<sup>341</sup> Properly understood, the EFCA is justified in part by feeble arguments tied to employer hostility, which paradoxically, allow union coercion and fraud to facilitate unionization under a card check scheme.

Eviscerating the secret ballot corresponds with the desire of labor advocates to accelerate "social progress" by building a transformative "social movement,"<sup>342</sup> that refuses to rely on workers' ability to freely choose or reject unions.<sup>343</sup> Recalling the romantic revolutionary sentiments that preceded the rise of the Age of Terror, and the ideals of progressive New Deal reformers who saw themselves as members of the

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<sup>338</sup> *Id.* at 34.

<sup>339</sup> EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_\_\_ at 44.

<sup>340</sup> For a discussion of this possibility, *see* EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT, *supra* note \_\_ at 47-48 (questioning whether signatures obtained through a process that is largely controlled by labor unions gives rise to valid results).

<sup>341</sup> *Id.* at 43 (showing that existing law treats union authorization cards as irrevocable, and the proposed law does not allow workers to update their preference before cards are submitted meaning that if a worker at any time signs the card then she is bound for the duration of the period and accordingly there could be a successful card authorization program even though the requisite number of workers do not support the program at the time the cards are submitted for purposes of imposing representation on workers).

<sup>342</sup> *See e.g.*, Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N. Y. L. SCH. L. REV. 515, 530-34 (2006).

<sup>343</sup> Hutchison, *Liberty, Liberalism and Neutrality*, *supra* note \_\_ at 114.

philosophical vanguard during the 1930s, contemporary labor advocates today, rely on centralized government power to promote unionization based on the presumption that their preferences reflects or ought to reflect the actual desires of workers.<sup>344</sup> The willingness of elites to impose their preferences favoring collectivism instantiates Judith Shklar's worst fears: an imposed ethos divined by prophetic avatars that is "never checked against actual opinions, least of all those of the most disadvantaged . . . people."<sup>345</sup> Reflecting the legitimacy of such fears, evidence emerges showing that union dues are seen as a primary vehicle to rescue unions from their currently moribund state<sup>346</sup> and a necessary predicate to the voluntary or involuntary enlistment of additional workers in a plainly ideological attempt to achieve radical class consciousness and societal transformation<sup>347</sup> that often yields few benefits for rank and file members.

It is highly doubtful the progressive viewpoint corresponds to the views of most Americans or most workers.<sup>348</sup> Moreover, though some union proponents support the EFCA and other prounion efforts on grounds that it might arrest the decline in workers' income, the strength of this claim is undermined by its weakness.<sup>349</sup> Though unions frequently raise wages for covered workers, they tend to diminish income for African Americans and other individuals who have often been displaced through the creation of labor cartels. And, the displacement effect of labor cartels is amplified by the enactment

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<sup>344</sup> *Id* (describing this move).

<sup>345</sup> JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 115 (1990).

<sup>346</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1371.

<sup>347</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1375.

<sup>348</sup> *See e.g.*, Margalioth, *supra* note \_\_\_ at 41-49 (showing that American workers have been increasingly attracted to expressive individualism, which concentrates on subjective self-realization and are less likely to find attractive any collective action that requires individual interest to yield to group interest and solidarity).

<sup>349</sup> *See e.g.*, EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT*, *supra* note \_\_\_ at 12-13 (showing that data from the period occurring between 1947 to 2007 supports the inference that income is largely related to productivity as opposed to unionization).

of prevailing wage<sup>350</sup> and minimum wage legislation.<sup>351</sup> Since it “is hard to imagine any process that is less democratic in either intention or execution than the card-check rule under the EFCA,”<sup>352</sup> hierarchy contaminates this proposal, and it is hard to believe that the subordinating effects of past labor policy can be excluded from this new policy. While only a fraction of workers are likely to receive pecuniary benefits from the EFCA through increased wages, the “only clear winners of this skewed and expedited process are members of the union leadership, who gain in dues and power through a successful certification campaign.”<sup>353</sup> Neither evidence of an intent to discriminate, nor a commitment to racial advancement is necessary to understand the exclusionary impact of the EFCA. While labor’s history is richly infused with evidence that the intent to discriminate has repeatedly supplied the impetus for labor law reform, the EFCA’s exclusionary force is related simply to the statute’s capacity to exclude and maintain the labor movement’s remarkable pattern of subordination even if direct evidence of discriminatory intent has not yet been found.

Recall Professor Lawrence’s insight explaining why traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional nor unintentional.<sup>354</sup> Whether a particular outcome is sought, whether outcomes are uninfluenced by the decision-maker’s conscious beliefs and whether blameworthy discriminatory intent can be found, the EFCA is directed toward or at the very least tied to three related goals. First, the proposal

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<sup>350</sup> See e.g., Christopher Dodds, *Unions use a racist law on projects: Prevailing-wage measures discriminate against minorities and increase costs*, PHILLY.COM, April 23, 2009 available at <http://www.printhis.clickability.com/pt/cpt?action=cpt&title=Unions+use+a+racist+law+...>

<sup>351</sup> See generally, Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wages*, *supra* note \_\_\_ at 93-134.

<sup>352</sup> EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT*, *supra* note \_\_\_ at 44.

<sup>353</sup> *Id.*

<sup>354</sup> Lawrence, *supra* note \_\_\_ at 322.

aims to increase the power of union leaders over the lives of workers, while diminishing the power of employers and vitiating the freedom of worker to choose or reject unionization. Second, the statutes would serve to expand the number of union members. And third, the proposal would increase union dues revenues and consequently expand labor's political influence by funding legislation, preferred political candidates and advocacy. Taken as a whole this process would yield self-interested benefits for the few (union oligarchs) at the expense of the many.<sup>355</sup>

The EFCA permits unions to avoid secret ballot elections, gives labor organizers' unchecked power to intimidate workers and provides compulsory interest arbitration, but it is doubtful that many African American workers will experience benefits from such a scheme. The EFCA might be defended on grounds that it represents conscious action by modern progressives committed to promoting social justice. But just like the theories offered by Enlightenment thinkers during the French Revolution, this line of analysis has the same ironic unintended consequence of blinding them to the unintended consequences.<sup>356</sup> Risking repetition, the record shows that African Americans disproportionately make-up America's unemployed, unions have contributed to the widening unemployment gap between black and white workers and African Americans

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<sup>355</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1391 (discussing the pursuit by labor unions of abortion rights and marijuana decriminalization and arguing that the pursuit of such goods provides special interest benefits to the few). Union support for abortion rights can be readily seen as contestable from an African American perspective because in its origins abortion was part of a eugenic racial project. GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_ at 270—277. The eugenic perspective is best exemplified in contemporary times by Nicholas Von Hoffman's argument, "Free cheap abortion is a policy of social defense. To save ourselves from being murdered in our beds and raped on the streets, we should do everything possible to encourage pregnant women . . . to rid of thing before its turns into a monster." See GOLDBERG, *LIBERAL FASCISM*, *supra* note \_\_\_ at 275 (quoting Von Hoffman). Evidence is available showing that Planned Parenthood, the nation's largest abortion provider is willing to accept financial donations target specifically toward the destruction of unborn African American babies. Bob Unruh, *Planned Parenthood: Wanting fewer blacks 'understandable,'* *WORLDNETDAILY* available at <http://www.wnd.com/index.php?fa=PAGE.printable&pageId=57526>. It is doubtful that all African American workers support union financed advocacy for such policies.

<sup>356</sup> ANDRESS, *supra* note \_\_\_ at 126.

have been largely excluded from labor union leadership. Thus, direct and consequential evidence is available showing that the EFCA, whether intentionally or unintentionally, is likely to reify a pre-existing pattern of economic and social exclusion that lengthens the confinement of African Americans to the bottom rung in America's social hierarchy. This effect can be neither defended nor avoided by gormlessly asserting, as many EFCA supporters are likely to do, that their advocacy is not connected to racially discriminatory intent.

Consider one contemporary example illustrating this point. Since construction began on the Philadelphia Convention Center, the city's black construction workers have protested the lack of opportunity for minority workers on public construction projects.<sup>357</sup> Unwilling to risk losing political support from unions by challenging their discriminatory hiring practices, Mayor Nutter chose instead to issue a report on minority hiring goals.<sup>358</sup> Fashioned after the federal Davis-Bacon Act, Pennsylvania's prevailing wage law passed in 1961, is currently the root cause behind the limited number of black workers on city funded projects.<sup>359</sup> Pennsylvania prevailing wage law honors the legacy of Robert Bacon, co-author of the Davis-Bacon Act, who denied anti-African American animus, but made clear his discomfort with "defective" workers taking jobs that "belonged" to white union men.<sup>360</sup> Pennsylvania's statute was initially designed to limit opportunities for out-of-state black workers,<sup>361</sup> but this process has now been inverted. Instead of preventing black workers in other states from taking construction jobs in Philadelphia, this law

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<sup>357</sup> Dodds, *supra* note \_\_\_ at 1.

<sup>358</sup> *Id.* (showing that Mayor suggested that minorities should attain 32 percent of the jobs on large construction projects).

<sup>359</sup> *Id.*

<sup>360</sup> Bernstein and Leonard, *supra* note \_\_ at 25.

<sup>361</sup> Dodds, *supra* note \_\_\_ at 1.

allows unions to ship mostly white workers from other states to the city in order to prevent Pennsylvania's black laborers from working on prevailing wage projects.<sup>362</sup> Because this paradigm conceives of blacks as "undeserving" workers who "wrongly" lower the wages and employment prospects of members of racially superior groups,<sup>363</sup> this type of intentional or collateral damage is a grotesque form of discrimination. But even if a trustworthy judge could strip the prevailing wage policy of its racist heritage, its exclusionary effects remain intact. As Reformists have already shown, the degree of blameworthiness does not necessarily limit the capacity of a policy to stifle the rate of black progress. Pennsylvania's prevailing wage enhances the economic returns and social status that accrue to white workers and vitiates the returns and contributes to the dislocation of African Americans. Perhaps unwilling to risk sustained opposition from politically powerful trade unionists,<sup>364</sup> the Mayor might attempt to shelter the city's inaction by asserting that the statute, at issue, is neutral and progressive. Whether the prevailing wage law can be protected as a neutral enactment and whether the local building trades union, an affiliate of the AFL-CIO, can be seen as a progressive instrument for societal transformation, Critical Race Reformist analysis finds racism and exclusion already there.

Following Professor Budziszewski, it is possible to understand that "[a]n acorn is not essentially something small with a point at one end and cap at the other; it is something aimed at being an oak."<sup>365</sup> Reliably with this metaphor,

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<sup>362</sup> *Id.*

<sup>363</sup> Bernstein and Leonard, *supra* note \_\_ at 2.

<sup>364</sup> See e.g., Matthew Teague, *Philadelphia: the Last Union Town*, January 27, 2008 at p. 9 online version, available at [http://www.phillymag.com/scripts/print/article.php?asset\\_idx=219005](http://www.phillymag.com/scripts/print/article.php?asset_idx=219005) (suggesting that a majority of the Philadelphia City Council was elected with the help of the building trades).

<sup>365</sup> J. BUDZISZEWSKI, *WHAT WE CAN'T NOT KNOW: A GUIDE* 23 (2003).

“John Sweeney, president of the AFL-CIO, proclaimed that labor unions would tie their organizing to politics. This intertwining of organizing capacity and political power seems to operate consistently with Gary Becker’s conclusion that “[p]olitical influence is not fixed by the political process but can be expanded by expenditures of time and money on campaign contributions, political advertising, and in other ways that exert political pressure.”<sup>366</sup>

Coherent with Becker’s observation, “individual human beings are not animated simply by pecuniary gain. They are also animated by ideological and social objectives that provide self-interested . . . benefits.”<sup>367</sup> At times economic, social, and political concerns intertwine, suggesting that labor union action in Pennsylvania, which maintains exclusion via prevailing wage legislation, reflects the triumph of a progressive conception of social Darwinism that has often provided a convenient defense of the subjugation of blacks in American life.<sup>368</sup> If this analysis is correct, union organizing efforts are the acorn that is directed toward a sharp expansion in union dues revenues in order to achieve an oak: contestable political influence<sup>369</sup> that can be transmuted into economic benefits or other self-interested gains that are consistent with the leader or the majority’s proliferating preferences.<sup>370</sup> Satisfying elite preferences such as radical class consciousness<sup>371</sup> and

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<sup>366</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1317-18.

<sup>367</sup> *Id.* at 1318.

<sup>368</sup> FRANKLIN, *supra* note \_\_\_ at 63 (explaining this move).

<sup>369</sup> On this possibility, *see id.* at 1318.

<sup>370</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1391.

<sup>371</sup> For a description of the move toward radical class consciousness within the labor movement, see Harry G. Hutchison, *Toward a Robust Conception of “Independent Judgment”: Back to the Future?*, 36 U.S.F.L. REV. 335, 335-38, 353-58.

workplace democracy<sup>372</sup> or, alternatively, the cravings of a majority of the rank and file for exclusion is unlikely to further the interests of members of marginalized groups. On the contrary, it fortifies the deduction that there is an ill fit between unions and people of color.<sup>373</sup>

The EFCA ought to provide ample ground for suspicion because this proposal is advanced by poignant claims of achieving fairness and raising wages and benefits for all workers, but such contentions are belied by the contemporary expansion in union objectives unrelated to collective bargaining.<sup>374</sup> Rather than being a gift to workers, the EFCA constitutes an endowment for union oligarchs. Following a familiar pathway found in most liberal democracies, unions and union leaders have become “special-interest” adjuncts to political allies while often failing to serve the actual interests of their members.<sup>375</sup> Instead of serving the interests of all members or inventing measures designed to reduce racial exclusion, union autocrats have commenced a process to capture additional union dues revenues to finance more political influence in order to achieve a particular way of life for the nation that is bounded by the rhetoric of transformation and social justice. Frustrated by the unwillingness of workers to permit unions to speak for them and fearing looming political irrelevancy,<sup>376</sup> labor union leaders have placed considerable resources in the fight to exchange the existing secret ballot for a card check policy. But neither frustration nor fear of political irrelevancy constitutes a principled basis to enact the EFCA.

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<sup>372</sup> Among the goals that unions and union advocates seek is some version of workplace democracy. For a description of workplace democracy, see Klare, *supra* note \_\_\_ at 12.

<sup>373</sup> McUsic & Selmi, *supra* note \_\_ at 1351.

<sup>374</sup> See e.g., CHAVEZ & GRAY, *supra* note \_\_\_ at 18 (discussing the various social causes that labor unions support).

<sup>375</sup> Michael McMenamin, *Labor Lost, Why the AFL-CIO's Cynical Survival Strategy is Doomed*, REASON, Nov. 2000, at 47, 48.

<sup>376</sup> Hutchison, *A Clearing in the Forest*, *supra* note \_\_\_ at 1317.

The EFCA's true purpose has little to do with a principle. The focus on suspect claims such as social justice coupled with the refusal by legislators and advocates to consider the proposal's adverse effects on members of disadvantaged communities marks the EFCA with contradiction. Rather than delivering social justice and equality, the EFCA is likely to deliver the opposite. Critical Race Reformist analysis shows that the EFCA is tied to labor's history of conscious and unconscious racism and the empirical evidence indicates that this proposal will impede the rate of racial progress for African Americans. All Americans should beware of accepting the EFCA, which in essence is what the Germans refer to as *Ein Danaergeschenk*, a "fatal gift" that brings misfortune and causes problems.<sup>377</sup>

## V. CONCLUSION

The liberal-legalist order . . . will be founded on self-interested, rights-bearing, adversarial individuals and this will not be sustainable. This type of social order is likely to aggravate precisely those points of tension in society which any vibrant political process should aim at alleviating. The ultimate danger is that liberal-legalism may, paradoxically, bring about the precise end—despotism—which it is designed to avoid.<sup>378</sup>

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<sup>377</sup> German Idioms: Greeks Bearing Gifts, ABOUT.COM.: GERMAN LANGUAGE available at [http://german.about.com/library/blidioms\\_greeks.htm](http://german.about.com/library/blidioms_greeks.htm).

<sup>378</sup> MARTIN LOUGHLIN, *SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS* 5 (2000).

Stanley Crouch has suggested that the blues is “music about human will and human frailty, just as the brilliance of the Constitution is that it recognizes grand human possibility with the same clarity that it does human frailty, which is why . . . it has a tragic base.”<sup>379</sup> Maintaining that nothing is innately good, and that nothing is lasting other than the perpetual danger of abused power,<sup>380</sup> a combination of Crouch and McLaughlin’s analyses establish an excellent framework for understanding the EFCA. No matter how many statements of support are mustered and no matter how frequently the rhetoric of social justice and societal transformation is invoked by progressive elites, it is possible to understand the EFCA as a legislative proposal that sustains racial and economic disadvantage just as similar laws did in the United States during the 1930s and in South Africa during its pre-Mandela configuration. This is consistent with the deduction that the exclusion of certain workers through government-sponsored unionization creates an aristocracy for others.<sup>381</sup> Much of the impetus behind legislative behavior is calculated to induce forced exchange—to take from some people more than they get in exchange in order to provide benefits to those who control the levers of political power.<sup>382</sup> Shimmering with contradiction and following a pattern initiated by the Progressives during the New Deal, labor legislation has followed an abusive pathway leading to exclusion premised on the demands of a racial hierarchy that has inflicted itself on America’s marginalized. Today, no advocates of racial hierarchy have stepped forward to support the EFCA. Instead, the proposal can be tied to the consequences of the

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<sup>379</sup> STANLEY CROUCH, *THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF THE RACE: THE LONG AND THE SHORT OF IT*, 1990-94 10(1995).

<sup>380</sup> *Id.*

<sup>381</sup> HUTT, *supra* note \_\_\_\_ at 8-9.

<sup>382</sup> Richard A. Epstein, *Judicial Review: Reckoning On Two Kinds of Error*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 39, 41 (ed. James A. Dorn & Henry G. Manne, 1987).

labor movement's history emphasizing either social control of "unemployables" or blatantly racist behavior. And, since the EFCA's negative effects are likely to prolong adversity, this proposal comes into view as another way to suppress the rate of progress of African Americans. If enacted, the EFCA will validate John Stuart Mill's commitment to social Darwinism that excludes an "inferior class of labourers"<sup>383</sup> and verify his observation that modern liberal democracy—operating consistently with the goals of exclusion—is insufficient to protect disfavored subgroups and individuals from the coercive power that is authorized by a majority<sup>384</sup> or the majority's hierarchs.

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<sup>383</sup> HUTT, *supra* note \_\_\_\_ at 10.

<sup>384</sup> See PHILLIP E. JOHNSON, *THE RIGHT QUESTIONS: TRUTH, MEANING & PUBLIC DEBATE* 149 (2002) (discussing John Stuart Mill).