Race, Solidarity, and Commerce: Work Law as Privatized Public Law

Shirley Lin*

Theorizing work and its regulation has held enduring appeal for legal theorists. Yet intellectual movements that wish to theorize worker coercion within a broader critique of law often sidestep race. Since Lochner*, landmark opinions involving race, labor, or both, have served as showpieces for the legal liberal tenets underpinning work law's doctrines and institutions. Each iteration of the public/private divide instantiates an ideological—but avowedly race-neutral—structure for how we study, teach, and propose to reshape work law. Scholars, judges, and lawmakers typically cede this ground, perhaps because law itself is under right-wing attack.*

This Article asks: What if work law allowed us to understand racism as central to legal liberal frames, rather than ancillary or topical? Deploying history and political theory, I demonstrate how public/private dyads within work law have generated unworkable and often divisive understandings of race, solidarity, and commerce. The Article then theorizes the links between work law's capture by public/private divides and the harms they pose to our centuries-long pursuit of a thriving, multiracial democracy. Reexamining the development of labor and employment law in this light recovers a crucial

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point of synergy between Critical Race Theory and law and political economy (LPE) analysis.

Building on these insights, I describe work law's current state as privatized public law. *The term historicizes and, for the sake of argument, facilitates closer study of the link between legal liberal conceptions of commerce and the law's maintenance of racial subordination. Conversely, it allows us to recognize the small- and large-scale frame transformations ordinary people have achieved through mass social movements, with the goal of strengthening all labor movements from within.*

Centering race in a reassessment of work law opens up possibilities for unifying the field's development, charts alternatives to liberal tenets within political economic thought, and provides a starting point for unraveling similarly contested fields of law. We may then "see" how the countertheories that popular movements pose against legal liberalism not only bear epistemic, doctrinal, and political importance, but also foreground the law's normative distribution of power between public and private, racially solidaristic or radically individualistic. Work law's tension with popular movements on matters of race, solidarity, and commerce therefore suggests how we may break the theoretical impasse over how to build more just economic and political systems over time.

PROLOGUE

> *[Southerners] would rather have laborers who will work for nothing; but as they cannot get the negroes on these terms, they want Chinamen who, they hope, will work for next to nothing . . . .*
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> *I want a home here not only for the negro, the mulatto and the Latin races; but I want the Asiatic to find a home here in the United States, and feel at home here, both for his sake and for ours. Right wrongs no man . . . . We are not only bound to this position by our organic structure and by our revolutionary antecedents, but by the genius of our people.*
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> —Frederick Douglass, 1869 [1]

The ideas ordinary people hold about law create and redistribute power. Time and again, critical schools—from Critical Race Theory ("CRT") to movement lawyering and law and political economy ("LPE")—have urged legal academe to incorporate popular movements' understandings of law when we define "law."[2] As CRT has long maintained, inherent to any critique of law is a critique of racial formation.[3] U.S. law heavily relies upon legal liberal logics, yet most legal curricula decline to expressly acknowledge its existence. This Article asks: What if work law allowed us to understand

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1. RACISM, DISSENT, AND ASIAN AMERICANS FROM 1850 TO THE PRESENT 220–25 (Philip S. Foner & Daniel Rosenberg eds., 1993). Centering the experiences of Black communities and movements, as I do here, does not negate the importance of additional racialized communities; rather, this Article seeks to theorize interracial solidarity through social movements and law to make possible thriving and democratic multiracialism for all communities.

2. *See, e.g.*, Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014) (discussing the "overlooked impact" of social movements' "lawmaking potential"); *id.* at 2802, 2802 n.245 ("[A lesson from the] successes of conservative change agents is that legal as well as social changes take place on street corners and around kitchen tables, not just inside courthouses or legislatures."); Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 826–27 (2021) ("By looking to lived experience and structures of inequality, scholars in [] critical traditions have long complicated conventional accounts of law—what it does and for whom and how it can and should change—with an eye toward collective struggle and ideation."). Regarding the collective power of ordinary people in contesting mass criminalization and incarceration, *see* JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION (2023).

3. Jodi Melamed, *The Spirit of Neoliberalism: From Racial Liberalism to Neoliberal Multiculturalism*, 289 SOC. TEXT 1, 19–20 (Winter 2006). The CRT movement is a "collection of activists and scholars engaged in studying and transforming the relationship[s] among race, racism, and power," under a commitment to combat subordination arising from law and society. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3 (3d ed. 2017); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 336 (2006).

racism as central to legal liberal frames, rather than ancillary or topical? If work law is complicit in maintaining the law's much-maligned public/private divide, what does it portend for race and "commerce," and advocacy for economic egalitarianism today?

If we consider the state of the labor market and public accommodations, these new lines of inquiry reveal that work law generates far more racial ideology than current scholarship admits. By work law, I refer collectively to labor law, antidiscrimination law, and the ever-expanding statutory, regulatory, and common-law rules governing the workplace. Only in recent decades have some scholars urged that work law be treated as a unitary field.[4] Recent political-economy scholarship tends to identify employment with cross-cutting issues at the core of governance, including our material well-being;[5] the racial segregation of workplaces and institutions;[6] the relative power corporations wield;[7] public health;[8] and the ambition of our regulatory

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4. Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1540 (2006); *see also* MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS, at xix (4th ed. 2020). Work law is by no means accepted as a unitary field by some labor law and employment law scholars and advocates. *E.g.*, Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 584–93 (1992). The work law frame in this discussion is also purposive, since recent law and political economy ("LPE") and left scholarship primarily focus on labor law.

5. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 419–87 (2022); Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 664–83 (2021); Kate Andrias & Benjamin Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021); Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 YALE L.J.F. 685, 688–98 (2021); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5–12 (2016).

6. Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. 1826 (2021); Carmen G. Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127 (2022) (discussing racial stratification, racial segregation, and the creation of sacrifice zones as linked to the profit motives of racial capitalism); RUBEN J. GARCIA, CRITICAL WAGE THEORY: WHY WAGE JUSTICE IS RACIAL JUSTICE (forthcoming 2024) (arguing that low minimum wages and underenforcement of wage laws have been features of a racially stratified society) (manuscript on file with author). Socializing with coworkers remains a robust predictor of Americans reporting ties to other races. Xavier De Souza Briggs, *"Some of My Best Friends Are . . . ": Interracial Friendships*, *Class, and Segregation in America*, 6 CITY & CMTY. 263, 267 (2007) ("Most workplaces are somewhat racially mixed, more so than most K-12 public schools or residential neighborhoods." (citations omitted)).

7. BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION TECHNOLOGIES, LABOR LAW, AND THE NEW WORKING CLASS (2023); Veena Dubal, *Essentially Dispossessed*, 121 S. ATL. Q. 285 (2022); GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE (2021).

8. Lindsay F. Wiley & Samuel R. Bagenstos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 ARIZ. ST. L.J. 1235, 1244 (2020);

state.[9] Abolitionist Frederick Douglass's Reconstruction-era speech that opens this Article urges more faith in the insight of ordinary people, and that we center racial analysis to combat workplace coercion.

Modern legal liberal theory—as articulated by courts, policymakers, and many in legal academe—considers racial justice to be a matter of "public" law and commerce to be a matter of "private" law. In our everyday lives, we most likely encounter this public/private tension in the workplace. Many today consider opposing racism in the workplace to be a beneficial public good, if not a democratic necessity. But for the bulk of the past century, Court majorities have resisted popular views by applying private law theories to undercut workplace protections for solidarity and antidiscrimination. Over generations, work law *doctrines* have shaped how hundreds of millions of Americans experience labor and antidiscrimination law as liberal racial ideologies.[10] This Article takes the first step in a long-term endeavor, by demonstrating how seemingly definitional concepts in workplace solidarity—mutual aid, concertedness, self-interest, exclusivity of union representation, and associational discrimination, among others—are cabined through invocations of private law, and in particular, the market.[11] Centuries

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Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. BIOSCIS. 1 (2020).

9. K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2450–51 (2018).

10. *See infra* Parts II & III; *infra* note 48 and accompanying text; *cf.* FISHKIN & FORBATH, *supra* note 5, at 421, 453–56 (arguing that conservatives aimed, "*self-consciously*[,] to alter the nation's political economy through constitutional advocacy," including "reducing the power of public law" (emphasis added)); Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for "We the People*," 35 YALE L. & POL'Y REV. 271, 274 (2016). Steven Teles traces legal liberalism's development to progressives, moderates, and conservatives alike. After World War II, legal liberalism advanced an "exalted vision of the law . . . [with] faith in the federal courts" to enforce legal rights as epitomized by the Warren Court, despite legal realist and Critical Legal Studies movement ("CLS") critiques that law is "always an instrument of power." STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 22–24, 44–46 (2008). The "deep ambiguity built into legal liberalism" is "encoded with ideological content" that accordingly advances liberal norms. *Id.* at 24; *see infra* Section I.A & notes 59, 62, 242, 276, 363, 402 and accompanying text (describing liberal political theory, the public/private divide, and CLS and CRT critiques of liberal political theory and legal liberalism). As for *liberalism*'s evolution as a political theory, from the Progressive era to post-war cultural conservatism, Laura Weinrib's historic account is indispensable. *See* Laura Weinrib*, Against Intolerance-The Red Scare Roots of Legal Liberalism*, 18 J. GILDED AGE & PROG. ERA 7 (2019).

11. *See infra* Section I.A (relating origins of public/private distinction); *cf.* Angela P. Harris, *Criminal Justice and Slow Violence in* Keilee Fant v. City of Ferguson, Missouri, LPE PROJECT BLOG (May 2, 2018), https://lpeproject.org/blog/criminal-justice-and-slow-violence-in-keilee-fant-v-city-of-ferguson-missouri [https://perma.cc/H99L-SPGE] (observing that, in the course of co-authoring a casebook to reconceptualize economic justice, "[t]he infamous 'public-private

after the First Reconstruction, to claim a distinction exists between public and private continues to sow dissension and wrest power from popular jurisprudence in how we conceive of race, solidarity, and commerce.

By focusing on its cooptation within our current legal superstructure, I suggest a new way of theorizing work law to *reconstruct* it in line with our original vision of multiracial democracy and interracial solidarity.[12] As racial and economic crises continue to accelerate systemic inequality, worker campaigns that center racial justice have blazed their own paths to strengthen —and lead—labor movements. For all concerned, the elephant in the room is Amazon Labor Union ("ALU").[13]

* * *

> *My name is Chris Smalls, former Amazon employee, now the current President of the Amazon Labor Union: the first union in American history at Amazon.*
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> *In 2015, I got hired at the company. I started out as an entry-level worker. And I worked hard. I promoted up to assistant manager in New Jersey. Amazon was on the up and up, and especially back then. I learned four-and-a-half-years later, actually, that was completely wrong. I didn't realize the systemic racism within the company. Amazon employees—a majority are Black and brown workers that come from impoverished areas. I'm a product of that. And a majority of the management, about seventy-five percent in upper management, is either white or Asian. So there is a huge disconnect from the Black and brown workers inside of these facilities.*
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> *Besssemer, Alabama—the building that attempted to unionize before we did—[the sheer majority of] the workers are Black and*

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split' in legal doctrine reinforces the popular belief that market power represents freedom while government embodies coercion").

12. *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 760 (1993) (describing a CRT "jurisprudence of reconstruction" in which a "dual commitment to eliminating oppression and celebrating difference impels race-critics to live in the tension between modernism and postmodernism").

13. *See generally* Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79 (2002) (describing tensions within the labor movement that arise when racial and gender minority workers seek to prioritize discrimination). A labor colleague shared that upon forming a coalition of unionized worksites to combat racism within their industry, among other priorities, a pointed response from a current labor leader was: "Why do you want to dissolve our union?" To be clear, my commitments in this project are to restore and regenerate ideals that strengthen all movements from within.

> *brown [and] are black women. And Amazon spent twenty-five million dollars trying to stop that building from being unionized, and they were successful.*
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> *Even before COVID-19 came into play, I watched as they treated the Black and brown workers as numbers: disposable. My Black managers that were above me, we all got thrown to the wolves. You get put on the worst shift, where you have to work Thursday, Friday, Saturday night, twelve hours a day. So when the pandemic hit, it was a life-or-death situation. . . . The pandemic was affecting not just Black and brown workers at the company, but Black and brown people as a whole in communities, especially in New York City. We became the epicenter of the world. People were dying here every 15 minutes, and most of the people were Black and brown.*
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> *I can tell you now, the nurses and doctors from these hospitals right here in the City were on the front lines with us. And they were saying that "we're seeing Amazon workers," "we're seeing essential workers." They were seeing them every day in the hospital, and remember—this was before the vaccine. So taking a stance was a no-brainer for me. On March the thirtieth, I led a walkout that led to my firing.*
>
> —Chris Smalls, 2022 [14]

Before April 2021, a former assistant manager and outsider to the trade union movement would have seemed the person least likely to clinch a union victory, much less inside the second-largest employer in the nation. Smalls and fellow employees at Amazon's storied "JFK8" warehouse waged a radically different, race-critical campaign that went on to make labor history less than a year after the corporation routed intensive, national labor efforts to unionize the Bessemer warehouse.[15] By theorizing the source of their precarity from racial and structural exploitation, workers within the busiest warehouses in the nation leaned on each other for mutual advocacy and aid—solidarity—to protest the injustice of racist staffing practices, inhumane quotas, and ultimately, retaliation for seeking to unionize.[16]

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14. Transcript, Work Law as Privatized Public Law: On Critical Wage Theory, Brooklyn Law School (Nov. 16, 2022) (remarks of Chris Smalls, Amazon Labor Union, condensed for brevity and clarity) (on file with author).

15. *See infra* Section III.A.

16. Rachel M. Cohen, *Amazon Retaliated Against Chicago Workers Following Spring COVID-19 Protests, NLRB Finds*, INTERCEPT (Mar. 17, 2021, 7:00 AM),

Logistics workers were not alone in centering systemic racism. At this time, also at the risk of discipline and dismissal, Whole Foods clerks nationwide donned Black Lives Matter insignia to express solidarity for their Black coworkers and community members facing institutional racism—as well as oppose anti-Black violence by law enforcement.[17] Rather than simply tallying union election wins and contracts, which alone would offer workers profoundly rare sources of power, ALU and other twenty-first century movements counsel us to pay attention to what is different this time. When we center stories from organizers, particularly those that capture headlines for years on end, reality confounds liberal narratives.

In 2020, the outpouring of support for Black Lives Matter and onset of a global pandemic amplified anti-racist organizing to unprecedented heights.[18] Workplace activism and movement ideation intensified concerns about systemic racism, amplifying messages of racial solidarity.[19] Nevertheless, judges and lawmakers continue to marginalize concepts of collectivity and interracial solidarity, reflexively,[20] as if doctrine will naturally subdue any grassroots effort to imbue law with more expansive meaning. Commentators typically follow suit.[21]

Indeed, the ALU and Whole Foods workers linked their cause with broader social and racial justice movements, responding to but also

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https://theintercept.com/2021/03/17/amazon-covid-chicago-nlrb-strike [https://perma.cc/C66R-9BMT].

17. *See infra* Section III.A.

18. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

19. Jacob Bogage, *Thousands of U.S. Workers Walk Out in 'Strike for Black Lives': Organizers Say Economic Inequality and Systemic Racism Have Only Worsened Since the Pandemic*, WASH. POST (July 20, 2020, 6:02 PM), https://www.washingtonpost.com/business/2020/07/20/strike-for-black-lives [https://perma.cc/W5RJ-QK4C].

20. *See infra* Part III; *cf.* BILL FLETCHER, JR. & FERNANDO GAPASIN, SOLIDARITY DIVIDED: THE CRISIS IN ORGANIZED LABOR AND A NEW PATH TOWARD SOCIAL JUSTICE 9 (2008) ("[The U.S. trade movement] is engaged in a war for which it was entirely unprepared, having convinced itself that it had secured a permanent seat at the table of national authority because of its loyalty to the state during the Cold War and to the interests of U.S. capitalism."). Four decades ago, Karl Klare cautioned labor scholars that by focusing solely on doctrine and rules they "take[] as given and unquestioned the desirability of maintaining the basic institutional contours of the liberal capitalist social order." Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. RELS. L.J. 450, 451 (1981).

21. *See, e.g.*, Eric Levitz, *Unions Have Won the War of Ideas: Will That Win Them Power?*, N.Y. MAG.: INTELLIGENCER (Sept. 4, 2019), https://nymag.com/intelligencer/2019/09/democrats-unions-2020-labor.html [https://perma.cc/ZKJ6-MQGU]; *infra* note 23 and accompanying text. *But see* Akbar et al., *supra* note 2, at 826–27.

continuing to face obstacles from doctrinal, private-law rationales that had deradicalized creative and militant workplace organizing. Conflicts with employers reflect that we face injustices "at work" all at once, rather than through discrete subfields.[22] As I demonstrate below, however, the following arguments are still pessimistically labeled "novel" or rejected by courts outright as a matter of law: ALU's arguments that labor law, Title VII, and Section 1981 each, if not combined, clearly safeguard interracially solidarist organizing from retaliation; and the grocery workers' rallying cries of "Black Lives Matter" is protected "mutual aid" under labor law because racism concerns white and nonwhite colleagues alike.[23]

This new wave of race-conscious organizing also strains the ability of traditional frames to direct how we study, teach, and propose to reshape work law.[24] Legal liberal doctrines are replete with secret levers, trap doors, and

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22. *See, e.g.*, *infra* Section III.A; ERICA SMILEY & SARITA GUPTA, THE FUTURE WE NEED: ORGANIZING FOR A BETTER DEMOCRACY IN THE TWENTY-FIRST CENTURY 4–7 (2022); BERNICE YEUNG, IN A DAY'S WORK: THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA'S MOST VULNERABLE WORKERS 174–96 (2018) (describing efforts of Latina janitors to self-organize, convince unions to combat workplace sexual harassment and assault, and pass California bill to monitor industry); SUSAN L. MARQUIS, I AM NOT A TRACTOR! HOW FLORIDA FARMWORKERS TOOK ON THE FAST FOOD GIANTS AND WON 170–74 (2017) (describing Florida farmworkers' Fair Food campaign, including safety, trafficking, gun violence, and sexual assault concerns, resolving 1,700 complaints in less than one month and conducting trainings in English, Spanish, and Creole).

23. *See infra* Sections I.A, III.A.1–.2, and notes 317–22, 332–52 and accompanying text; Patrick Hoff, *NLRB Judge Says Kroger Unlawfully Banned BLM Buttons*, LAW360 (May 3, 2023, 9:04 PM), https://www.law360.com/articles/1604166/nlrb-judge-says-kroger-unlawfully-banned-blm-buttons (describing the position of NLRB General Counsel Jennifer Abruzzo that labor law protects political advocacy tied to workplace concerns a "novel interpretation") (discussing Decision, Fred Meyers Stores Inc. and United Food and Commercial Workers Local No. 21, No. 19-CA-272795; Quality Food Centers Inc. and United Food and Commercial Workers Local No. 21, No. 19-CA-272796 (NLRB Div. of Judges S.F. Branch Off. May 3, 2023)); National Labor Relations Act of 1935, Pub. L. 74-198, §§ 7, 8(a)(1), 49 Stat. 449, 449, 452 (1935) (codified at 29 U.S.C. §§ 157, 158(a)(1)).

24. Fisk, *supra* note 5, at 690–91 (noting the Norris-LaGuardia Act and NLRA "reduced outright repression of labor as a social movement, but they channeled union activism towards a state-preferred goal—collective bargaining—and away from more radical movement objectives"); SMILEY & GUPTA, *supra* note 22, at 4; *see, e.g.*, Donna Murch, *The Amazon Union Drive Showed Us the Future of US Labor*, GUARDIAN (Apr. 27, 2021), https://www.theguardian.com/commentisfree/2021/apr/27/amazon-union-drive-us-labor-future [https://perma.cc/8VQK-9D3C] (describing the recent surge in labor activism as movement that "skews black, brown and female"); Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 511 (2021) (drawing parallels between efforts to create separate class of labor rights for app-based drivers and racialized wage codes from New Deal). U.S. Bureau of Labor Statistics data reflect that non-whites will be the majority of the working class, as defined by those without a college degree, as of 2032. VALERIE WILSON, ECON. POL'Y INST., PEOPLE OF COLOR

minefields, as discussed below, particularly in the discursive terrain of work. Ordinary people's movements tell a different story about how work conceptually melds race, solidarity, and commerce. Moreover, campaigns today routinely contest work law's racial politics, and require advocacy, if not adept lawyers, who do not take legal tenets for granted.

This Article is the first to develop a racial critique of the public/private divide within work law and offer a comprehensive account of legal infrastructures that continue to undermine interracial solidarity. The public/private divide evolved from classical liberal theory into a judicial tool of racial control, yet it retains a gravitational force among law schools and in academic discourse.[25] Legal theorists have yet to account for the racial work of the public/private divide over time: particularly as of Reconstruction, the New Deal, the Civil Rights era, and the present day. Through each period, work law has sown public/private dyads across agency offices, courtrooms, lecture halls, and markets. Collectivity and solidarity remain central to our general conception of the "public," if only because the "private" (as even as the term has been fluid), never provided a conceptual home. Since critics of a public/private distinction must still refer to it in order to describe its harms, I argue that work law's current, transitional state is arguably that of *privatized public law*.[26]

This insight is not merely descriptive. Privatized public law critiques work law's status as vulnerable; rather than *publicized* private law, this term offers

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WILL BE A MAJORITY OF THE AMERICAN WORKING CLASS IN 2032, at 4 fig.A (2016), https://files.epi.org/pdf/108254.pdf [https://perma.cc/5ESG-6B7M].

25. *See* Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1201–06 (2022) (describing law schools' current efforts to "incorporate" race and slavery into courses, using archival history to uncover racial analysis within contracts and its "private law domain"). Indeed, the evergreen nature of the public/private distinction is reflected in important race-critical scholarship linking race to justice (or the lack thereof) within private law. *See generally, e.g.*, *id.*; Emily Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 PITT. L .REV. 455 (2005); Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674 (2022); Martha M. Ertman, *The New Private Law Thirty Years After*, 100 DENV. L. REV. 533 (2023).

26. *See infra* Section I.A (relating origins of public/private distinction); Lin, *supra* note 6, 1837 n.42, 1879 (discussing "privatized public law" as critique of work law so as to identify collectively beneficial workplace organization and antidiscrimination obligations that reconceptualize "commerce"). As defined here, the privatized public law framework is distinct from John Braithwaite's corporate analysis of "privatization of the public" and "publicization of the private" with respect to reforms for regulatory capitalism. JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 7 (2008) (citing Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285–91 (2003)).

a narrative shorthand for our historic struggles over work law's explanatory power, one that a century of social movements have shifted to a "public" default, as I argue below.[27] How we explain the open hostility of the judiciary, high-profile intellectuals, and policymakers toward its superstatutes—the National Labor Relation Act and Title VII—requires us to fully engage with racial and labor history, political theory, and critical methodologies.[28] This privatization does not follow a clean, steady trajectory, but the term privatized public law reflects how claims over the divide can substantively harm the lives of American workers today.

Once we center the treatment of race in the Court's last Term, the stakes become clear. In *Students for Fair Admissions v. Harvard*, six Justices declared that considering race as an unalloyed factor in college admissions violates the Fourteenth Amendment,[29] upending decades of law supporting such modest remediation of past discrimination. To some, concessions to legal *formalism* paved the way for this betrayal of history and precedent. But even as the majority insisted that racial segregation is unlawful,[30] doing so did not prevent the majority from undermining schools as a democratically vital source of interracial contact.

CRT critiques of liberalism as subversive to racial justice[31] has, in recent decades, gradually quieted in support of the expressive power of rights

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27. *See infra* Part III. I thank Sophia Lee for highlighting this potential inversion and its implications. And while describing work law as a public/private law "hybrid," Aditi Bagchi observes that most employment lawyers and work law scholars "locate their field in public law." Aditi Bagchi, *Non-Domination and the Ambitions of Employment Law*, 24 THEORETICAL INQUIRIES L. 1, 3, 17, 19 (2023) ("Critical theorists were right that private law exacerbates social hierarchies in some basic ways."). It bears noting, however, that public law is also capable of advancing racism through governmental conduct.

28. *See infra* Parts I–II. *Compare* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, CULTURAL ECONOMICS: MARKETS AND CULTURE 83 (2006) ("The assumptions of conventional economic theory largely ignore questions of race, class, or other variables that affect individual identity."), *with* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1758 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) and calling for greater engagement with law and economics by CRT scholars). Although exploration of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, is beyond the scope of this Article, the non-discrimination obligations of public and private entities that contract with the federal government are implicated in this discussion.

29. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2159–61 (2023).

30. *Id.*

31. Kimberlé W. Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door*,*"* 49 UCLA L. REV. 1343, 1343 (2002) (describing how CRT co-founders Gary Peller, Neil Gotanda, and Kendall Thomas understood their intellectual movement to be "a dialectical engagement with liberal race discourse and with [CLS]"). Even earlier, Derrick Bell

enforcement, or focused on the specific threat of neoliberalism.[32] When we reassess work law as a whole, however, we may observe that courts and corporations rely private-law rationales to treat workers as market subjects even more brazenly today than when Karl Klare raised an alarm four decades ago.[33] By conceding law to frames that impose narrow conceptions of the economy, we allow courts and policymakers to undermine interracial solidarity precisely when we are most in need of alternative visions.

Deeper histories relate how work law constructs and reconstructs society and should not omit the painful, unsettled accounts of racism.[34] Indeed, labor's identification with hierarchy and oppression at the nation's inception[35] only gestures at why, today, the workplace is rarely theorized as a site of racial solidarity.[36] Burgeoning research that revives the theory of racial capitalism—as a feature inherent to capitalism—is a major corollary in

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forewarned liberal and legal liberal audiences about resting on a judicial declaration of equality when the liberal *political* ideal could not be further from the truth, as in the case of affirmative action: "on a positivistic level—how the world *is*—it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites." Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

32. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1075 (1978) (arguing that developing a theory of antidiscrimination law that does not disturb "substantial disproportionate burdens borne by one race" or material inequality, as did *Brown v. Board of Education*, maintains racial status quo); Harris, *supra* note 12 at 750–51 (describing an early rift between CLS and CRT scholars based upon the "efficacy of 'rights talk'" during the 1980s); Frank Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 42 CONN. L. REV. 1513 (2021) (urging a materialist approach in CRT scholarship to address neoliberalism).

33. *See infra* notes 41, 46, 52–56 and accompanying discussion. *See generally* Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017); Lin, *supra* note 6.

34. Among those whose work on the history of race and labor revive these histories are W.E.B. Du Bois, Paul Frymer, Juan F. Perea, Mae Ngai, Peter Kwong, Maria L. Ontiveros, Reuel Schiller, Sophia Z. Lee, Ruben G. Garcia, Trina Jones, Marion Crain, David R. Roediger, Timothy Minchin, Catherine Fisk, and Bill Fletcher.

35. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 125–26 (1994) (relating the strict division of labor in pre-Revolution colonies, enforced by civil and criminal law).

36. On the importance of racial solidarity among coworkers, see Garcia, *supra* note 13; Charlotte Garden & Nancy Leong, *"So Closely Intertwined": Labor Interests and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1138 (2013); Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605 (2016).

bridging the theoretical insights of critical race and LPE scholars.[37] Drawing upon older critical and movement-law priorities,[38] I build upon my previous investigation into how our boldest collectivist remediation—the disability accommodations mandate[39]—was undermined at the start by those who seek to privatize work law.[40] Only a handful of scholars have continued to foretell crisis in the politicization of work law: Sam Bagenstos in tracing the Roberts Court's neo-Lochnerian attacks on collective action and religious exercise in *Epic Systems*, *Janus*, and *Hobby Lobby*; Deborah Dinner as to how neoliberal political approaches have substantially undercut Title VII; and more recently, Niko Bowie as to the Court's manipulation of property doctrine to penalize union organizers who wish to reach workers on farms in *Cedar Point Nursery*.[41] By inviting scholars to theorize work law over a longer arc, centering racial justice as contemporary movements do, I hope to recover a bridge between the largely independent intellectual movements of CRT and LPE.

This Article proceeds in three parts. Part I begins by briefly reviewing the permutations of public/private concepts within liberal political theory. It then demonstrates how such concepts interacted with legal liberal ideologies regarding race and work at the time, from the antebellum period through the

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37. *See, e.g.*, Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 128 (2022); HISTORIES OF RACIAL CAPITALISM (Destin Jenkins & Justin Leroy eds., 2021).

38. Critical work law and movement law scholars include Karl Klare, Kimberlé Crenshaw, Angela Onwuachi-Willig, Leticia Saucedo, Marion Crain, Frank Valdes, Athena Mutua, Sameer Ashar, D. Wendy Greene, Veena Dubal, Ana Avendaño, e. christi cunningham, and many of the historians discussed *supra* note 34. Indeed, key figures in CLS foreground its critique of the public/private divide and private law, *e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977), and one predicted the ideological crises that would befall labor law and civil rights law alike, *see* Klare, *supra* note 33.

39. *See generally* Lin, *supra* note 6. As to Title VII and the NLRA, the foundational critiques of economic thought in the design and interpretation of their frameworks are Dinner, *supra* note 33; Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689 (1986).

40. *See* Lin, *supra* note 6, at 1857–63, 1862 nn.180 & 1854 (demonstrating that even statutory duty of good faith in contractualist approach to employment fails to ensure disability accommodations for most employees, particularly workers of color with disabilities).

41. In the 1980s, Klare further described liberal collective bargaining law as ideological: a "powerfully integrated structure of thought, deeply resonant with other aspects of the hegemonic political culture and closely articulated with important collateral developments in intellectual history . . . [it] is itself a form of political domination." Klare, *supra* note 20, at 452. For more recent commentary see Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409 (2020); Dinner, *supra* note 33; Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160 (2021).

First Reconstruction and the Gilded Age. Private law's facilitation of wealth denied economic benefits to non-whites, first through explicit ideologies of inferiority, then through constitutional reasoning that shielded racist abuse said to occur in "private." Populist counterpoints to private liberty of contract during this time, however, include the Knights of Labor's multiracial cooperative movement and trade movements' collectivist claims upon law on behalf of the "public."

Part II contextualizes how subsequent movements, from the New Deal through the Second Reconstruction have challenged judicial suppression of law—Reconstruction-era law—under the Fourteenth Amendment and Commerce Clause. The failure to include race discrimination in the NLRA's ultimately private framing by lawmakers and elite labor advocates re-entrenched the public/private divide and would provide congruent cover for subordination, indifference, or deterrence of racial solidarity in work law. The rise of conservative and neoliberal opposition to a robust regulatory state followed in recoil, largely through efforts to revert to a private law-dominant system over the past few decades.[42]

Part III provides an original account of the new vanguard in race-conscious, working-class organizing today. It begins with case studies of two highly visible, race-centered campaigns as a means of studying the dynamics between movement strategy and work law: Amazon Labor Union's JFK8 campaign, and Whole Foods workers' organizing around Black Lives Matter. The legal reception of their arguments about interracial solidarity demonstrate how public/private dyads continues to suppress work law's ability to protect racial solidarism in worker movements. Just as importantly, how these colleagues conceive of their racial identity and "self-interest" at work raises novel questions about the sociolegal construction of racial ideology in social movements. This Article concludes by noting some of the core implications of this project, including: reassessing how we teach work law's implications for on-the-ground strategies, especially as to movements for racial justice; and focusing on the importance of alternative models for the state, legal architecture, and economic systems.

Popular movements' insistence on centering race going forward reflect understandings that contradict mainstream legal and political thought.[43] In turn, they pose epistemological challenges for work law. For the moment,

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42. *See* KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY 204–11 (2019); *infra* note 46.

43. *See infra* Section I.A; JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 36–40 (2006); Klare, *supra* note 20; Klare, *supra* note 39, at 1362–63.

uncovering the successes ordinary people have achieved in spite of the law reminds us of the need to incorporate principles of solidarity not blind to race.

I. RACE IN WORK LAW'S PUBLIC/PRIVATE DISTINCTIONS

> *[S]olidarity is not just an option; it is crucial to workers' ability to resist the constant degradation of their living standards. . . . Solidarity is standing in unity with people even when you have not personally experienced their particular oppression.*
>
> —Keeanga-Yamahtta Taylor, 2016 [44]

Our nation again faces a crisis of unity and stability. Opinions about race, the economy, and government have hyperpolarized at all levels of society, from neighborhoods and counties to legal institutions. Most often, the deterioration is attributed to a widening chasm in partisan policy preferences of American voters. Whether or not this explanation is complete, repair is complicated by the ability of legal liberal tenets to justify itself without seeming to do so.[45] Moreover, polarization within a duality crowds out the possibility of alternatives. As our most powerful institutions—from our major political parties to the Supreme Court[46]—have recommitted to the "private" in the liberal public/private divide,[47] it is telling that voter studies of the 2016 presidential election reflect that racial attitudes, rather than

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44. KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 215 (2016).

45. Touting his pro-corporation *bona fides* as the former senator of Delaware, President Biden framed his recent executive order *curtailing* non-compete agreements between employers and workers as a matter of private law:

> The heart of American capitalism is a simple idea: open and fair competition—that means that if your companies want to win your business, they have to go out and they have to up their game; better prices and services; new ideas and products. That competition keeps the economy moving and keeps it growing. Fair competition is why capitalism has been the world's greatest force for prosperity and growth.

Joe Biden, Remarks at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021) (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy [https://perma.cc/R2DR-PP2W]).

46. *See* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 15–19 (2022); Bagenstos, *supra* note 41, at 452–53.

47. I provide a framework for tracking the terminology of "public" and "private" *infra* in Section I.A. *See also* FORRESTER, *supra* note 42, at 204–38.

attitudes about the economy, determined how voters "understood economic outcomes."[48]

This Part demonstrates how work has always been a staging ground for values, assumptions, and doctrines around race and solidarity.[49] The activism of ordinary Americans propelled, time and again, work law's startling transformations through two distinct but intertwined processes: democratic mass movements against racial and economic oppression, and their resistance to work law doctrines undermining solidarity through private law theories. The Court's landmark opinions in the field, among them *Lochner*,[50] *Heart of Atlanta Motel*,[51] *Epic Systems*,[52] *Janus*,[53] and *Cedar Point*,[54] stand as showpieces for private law's capacity to discipline workers who resist subordination and social coercion.[55]

While the private realm may protect personal from state overreach, the public/provide divide legitimizes the Court's current retreat from antisubordination interpretations of equal protection. The corrosion of *Heart of Atlanta Motel*'s public accommodations obligation is discernable in another about-face last Term. In *303 Creative LLC v. Elenis*, a majority opined that the obligation of public-facing businesses to provide services to all, without discrimination, can give way to religious belief if nondiscrimination would "coerc[e]" speech.[56] Whether a hotel, restaurant, or

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48. STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR 207 (2019); *see also* JOHN SIDES ET AL., IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA 175 (2018) (describing phenomenon of "racialized economics").

49. *See also* Catherine L. Fisk, *"People Crushed by Law Have No Hopes but from Power": Free Speech and Protest in the 1940s*, 39 L. & HIST. REV. 173, 178–79 (2021) (analyzing the post-WWII repression of labor and racial justice through the lens of Hughes v. Superior Court, 339 U.S, 460 (1950), despite recent protection of civil rights picketing through protections for labor activism under Norris-LaGuardia Act of 1932).

50. Lochner v. New York, 198 U.S. 45 (1905).

51. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

52. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

53. Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018). For excellent commentary on the neo-Lochnerian jurisprudence in *Epic Systems* and *Janus*, see generally Bagenstos, *supra* note 41.

54. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021). For the leading commentary on private law and work in *Cedar Point Nursery v. Hassid*, see generally Bowie, *supra* note 41.

55. *See Lochner*, 198 U.S. 45; *Heart of Atlanta Motel*, 379 U.S. 241; *Epic Sys. Corp.*, 138 S. Ct. 1612; *Janus*, 138 S. Ct. 2448; *Cedar Point Nursery*, 141 S. Ct. 2063. On how the state furthers the public/private divide through neoliberal infrastructure and carceral immigration policy within the care economy, see Shirley Lin, *"And Ain't I a Woman?": Feminism, Immigrant Caregivers, and New Frontiers for Equality*, 39 HARV. J. L. & GENDER 67, 79 (2016).

56. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321–22 (2023); *id.* at 2322 (Sotomayor, J., dissenting) ("[F]or the first time in its history, [the Court] grants a business open

web company, commercial spaces remain a proxy for redistribution, which makes every workplace ideologically fraught.

Drawing from historical evidence, this Part reexamines work law as a crucial site of political and legal theorizing over race and power, broadening analysis of critiques often focused on the *Lochner* era's attacks on economic egalitarianism.[57] It traces work law's origins in private law through the liberal dyad's permutations, as a precursor to the claim in Part II that work law acquired a public default, its present one, as of the Civil Rights era. This accounting sets the stage for its current state as *privatized public law*.

A. Methodology, Description, and Critique

In the United States, the public/private distinction developed in tandem with the market economy. But where the divide is drawn continuously shifts and evolves, deterring close study of its role in liberal principles and assumptions today.[58] When employing terms such as *public* and *private law* here, I refer to the meanings attributed in a certain discourse under the dynamics and transitions it experiences in each moment in the time discussed. Wherever there is an accretion of prior meanings, I strive to make note of it. Under this diachronic view, power struggles over race and the economy together mold the specific claims stakeholders assert over what is *public* and what is *private*.

Efforts to distinguish public from private—first as two distinct realms, later as bodies of "public law" and "private law"—directly determine the degree to which the state may regulate the dynamics between capital and labor, employers and workers. Even as scholars ritualistically disclaim relying on the public/private distinction as substantive, in the sense that it is coherent or real work law doctrines exemplify the very real stakes elite legal stakeholders have built up around its alleged contours.[59]

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to the public a constitutional right to refuse to serve members of a protected class."); *see also infra* Section I.B.

57. The *Lochner* era refers to the two decades of judicial hostility toward protective labor legislation, invalidating the laws, with *Lochner* as its apotheosis. JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES 290 (2022).

58. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982).

59. Consider, for instance, the aberrational U.S. doctrine of employment at will: the idea of a perfectly symmetrical right held by an employer and worker to end the relationship presumed in every worker's employment. Scholars have devoted a great deal of attention to the decades when state courts developed the tort of wrongful termination in violation of public policy as an exception to the at-will rule. *E.g.,* Klare*, supra* note 39, at 1; Helen Hershkoff, *"Just Words":*

What I refer to as public, private, and *privatized public law* are terms that are descriptive and normative. As used here, privatized public law describes the transitional nature of work law by situating it within a trajectory and critiques present efforts to privatize public goods and undermine collectivities and solidarities.[60] At crucial moments in U.S. history, the public/private legalisms undermined efforts to forge a multiracial democracy and economic experimentation, neither of which were able to take root in our oldest common-law holdings, methods, and values. Each public/private distinction is best described as an ideological process, i.e., publicization or privatization of the extant concept, rather than stable categories in a duality.

Privatized public law further denotes liberalism's legal and theoretical history, particularly in instrumentalizing the workplace. Rather than simply claiming that work law is being "privatized," referring to the dialectical framing requires discussants to articulate their conceptions of public law before proceeding. *Public law* may refer to any of its various, substantially overlapping definitions in contemporary discourse, chief among them: (1) if the state is an actor; (2) if the law governs a vertical relationship with the state; (3) based upon the field of law primarily in issue, traditionally, but not limited to, constitutional law, criminal law, and administrative law; or (4) based upon the law's normative goal, e.g., that it pursues redistributive, social welfarist, or other solidarist ends.[61] More so than the confusing terms "liberal" and "liberalism,"[62] the terms "public" and "private" today invoke the relationship between collectivity and the public before we turn to debating policy. Anchoring these historic and institutional contingencies will strengthen democratic discourse across political views.

Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 STAN. L. REV. 1521, 1559–63 (2010); Sophia Z. Lee, *The History of Job (In)Security: Why Private Law Theory May Not Save Work Law*, 24 THEORETICAL INQUIRIES L. 147, 155–77 (2023). This explicit instance of public/private hybridity has typically led scholars to note the fickle tit-for-tat politics of courts seeking to temper the harshness of the employment at will doctrine through common law and the constitutional policy choices that became subject to ideological backlash.

60. *See also generally id.* at 162, 162–64 (noting "some claims that meet [modern private-law theorists'] criteria for private law were at least influenced by statutes that served the distributive purposes that NPL theorists ascribe to public law").

61. For Lee's careful taxonomy of factors applied in distinguishing public law from private law today, see *id.* at 148–49.

62. *See* SHANE D. COURTLAND ET AL., STANFORD ENCYCLOPEDIA OF PHILOSOPHY, LIBERALISM, (Edward N. Zalta ed., Spring ed. 2022), https://plato.stanford.edu/entries/liberalism/#ClaLib [https://perma.cc/PD9Y-QZJX]; Weinrib, *supra* note 10, at 18. In teaching across four law schools, most of my students could not define liberalism in the sense employed in this Article as a political theory, but mainly understand it to be the antithesis of conservativism.

Privatized public law as a description would allow lay constituencies would more easily recognize background manipulation of terminology that has evolved since *Lochner*'s liberty-of-contract frame constitutionalized private law theory, most recently: commerce power regulation of interstate activity; the Dormant Commerce Clause; and whole-cloth interpretations through private law concepts, as seen in the NLRA,[63] Title VII,[64] the Americans with Disabilities Act,[65] and the First Amendment.[66]

The challenge here lies in abstracting beyond work law doctrines oriented toward specific problems. Practice and political theory tend to persist in the face of social reality.[67]

B. Work Law's "Private" Law Origin Story

A venerable refrain in work law is that the employment relationship is founded in contract, and thus private law.[68] This seemingly innocuous claim, however, would have legal ramifications for the development of racial ideology and justifications for who would wield greater power in relationships.[69] What if work law's theorization were instead reconstructive? We could then consider work law to originate outside of liberal dyads, from the bedrock principles of Emancipation and Reconstruction as the pursuit of *justice* (racial *as* economic), neither "private" nor "public."

The public/private distinction arose from classical political theory in Europe to provide a counterweight to concepts of sovereignty, at a time when nation-states began to emerge.[70] In its earliest form, political elites asserted the existence of a distinct private sphere in an effort to resist the growing power of monarchs and legislative bodies, under Morton Horwitz's generally accepted account.[71] Early liberal theorists therefore equated the "private"

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63. *See generally* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

64. *See generally* Dinner, *supra* note 33.

65. *See generally* Lin, *supra* note 6.

66. *See generally* 303 Creative LLC v. Elenis, 143 U.S. 2307 (2023); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

67. Klare, *supra* note 20, at 456, 465 (paraphrased here).

68. *See, e.g.*, MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 46–47 (1989).

69. NELSON, *supra* note 35, at 125–26 (relating far harsher executory contract doctrine employers enforced against employees departing before completion of term, with additional deterrence through criminal punishment, to "secure" labor force); LEVY, *supra* note 57, at 290 (discussing hostile legal environment toward government workplace regulation in *Lochner* era).

70. Horwitz, *supra* note 58, at 1423.

71. *Id.*

with a vital preserve of freedom in politics and law, but the relationship only became central to American systems of thought as of the nineteenth century.[72] At this time, the now-familiar sorting of constitutional, criminal, and regulatory law as "public law," and torts, contracts, property, and commercial law as "private law" took hold amid a growing conception of the market as a stabilizing social and political institution.[73]

Another claim that has proven resilient over centuries maintains that because private law largely operates through common law and its generally accepted methods, it is "neutral," "prepolitical," or "apolitical," enjoying a legitimacy preferable for most purposes than the alternatives of public law and public policy.[74] For American lawmakers and jurists, the received wisdom of classical liberal theory singled out private law as the guarantor of personal freedom.[75] Thus, under current accounts of political theory at the Founding, individual liberty was derived from private property[76] and served as "the guardian of every other right."[77] Traditional beliefs that the market is rational justified the assumption that private property is the building block of the economy.[78]

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72. *Id.* at 1424. Horwitz notes that earlier republican philosophy identified private virtue with the public interest. *Id.* (citing GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 53–65, 608–10 (1969)).

73. *Id.*; NELSON, *supra* note 35, at 4–7 (describing nineteenth-century society as characteristically "materialistic and competitive" due to "desire for economic growth").

74. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 257 (1990). In this Article, I refer to "common law" in accord with its traditional understanding, i.e., law "derived from judicial decisions instead of from statutes," as well as its U.S. denotation in which "courts originally fashioned common law rules based on English common law until the American legal system was sufficiently mature to create common law rules either from direct precedent or by analogy to comparable areas of decided law." *Common Law*, CORNELL L. SCH. LEGAL INF. INST., https://www.law.cornell.edu/wex/common_law [https://perma.cc/3CCP-VBTQ].

75. *See* Horwitz, *supra* note 58, at 1424; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 10–11 (1992) (noting "the distinction between public and private law was in part a culmination of more long-standing efforts of conservative legal thinkers to separate the public and private realms in American political and legal thought") [hereinafter HORWITZ, 1870–1960].

76. Gerald F. Gaus, *Property, Rights, and Freedom*, 11 SOC. PHIL. & POL'Y 209, 209 (1994). The above describes the "older . . . spectrum" of views that classical liberal theory denotes. Shane D. Courtland et al., *Liberalism*, STAN. ENCYCL. OF PHIL. (Feb. 22, 2022), https://plato.stanford.edu/entries/liberalism/#ClaLib [https://perma.cc/KH27-3PYW].

77. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (Kermit L. Hall ed., 3d ed. 2007).

78. *Cf.* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1709 (1993) (theorizing white racialization, i.e., whiteness, as both source and process of deriving capital as property, and vice-versa, before and after slavery); Margaret Somers, *Legal Predistribution, Market Justice, and Dedemocratization: Polanyi and Piketty on Law and Political Economy*, 3

The common law of "master-servant" furnished the earliest form of U.S. work law, governing hierarchical relationships such as domestic servants, farm workers, and apprentices.[79] Prior to industrialization, the nature of one's work was determined through status designations.[80] Employment relationships migrated to a system of contract once industrial capitalism accelerated over the course of the late 1800s.[81]

Private law presumed that both parties to a contract wield perfectly symmetrical legal freedom—choice—at all phases of the arrangement.[82] The rise of at-will employment further legitimized the doctrinal connection between contract and free labor. Extending the contractualist view, courts began to rule that an employment relationship could be terminable by either party at will "for no cause . . . without being thereby guilty of legal wrong."[83] Free will was presumed, regardless of even vastly unequal circumstances between parties.[84] In idealizing such transactions, the at-will doctrine disadvantaged laborers who would have resisted racially inequitable or other unjust terms.[85]

By law, 4.4 million people whom plantation owners forced into bondage were denied such choices.[86] Slavery's parallel system of unfree labor would be lawful until 1865, at least formally, once Black people waged (in the words of W.E.B. DuBois) a "general strike" to abolish slavery's racial economy and its legal institution.[87] Yet, before and after abolition, free Northerners and

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J.L. & POL. ECON. 225, 248 (2022) (describing Polanyi's critique of labor contracts as valuable because of its commodification of human life, "derive[d] from the vast amount of unpaid reproductive work extracted from families, communities, schools, indeed, the entire social environment that makes humans possible—none of which is returned to the commons after its value has been appropriated").

79. Clyde W. Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMP. RTS. & EMP. POL'Y J. 453, 453–54 (2001); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 8–10 (1998).

80. Summers, *supra* note 79, at 453.

81. *Id.*

82. *Id.*

83. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518–20 (1884) (providing classic articulation of employment at-will doctrine).

84. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 164 (2d ed. 2014); *see* Danielle Kie Hart, *Contract Law & Racial Inequality: A Primer*, 95 ST. JOHN'S L. REV. 449, 479 (2021).

85. Hart, *supra* note 84, at 472–73.

86. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, at 3 (Oxford Univ. Press 2007) (1935); Harris, *supra* note 78, at 1716.

87. U.S. CONST. amend. XIII; DU BOIS, *supra* note 86, at 55–83; *see infra* notes 107, 109 and accompanying discussion.

Southerners alike saw enslavement as the antithesis of "liberty of contract," which further legitimized it as quintessential to freedom within public discourse.[88] The market insured egalitarianism, it was argued, because social mobility would break up the ruling classes over time.[89] Americans ultimately sympathetic to the cause of abolition had options to foster a multiracial, emancipatory economy. But as Northern pro-labor activists condemned industrial "wage slavery"—even from within the abolitionist movement[90]—lay and elites alike shared in the belief that freedom could only be achieved by contract.[91]

More often omitted from structural critiques of the liberal divide is our circular equation of race with economic "self"-interest.[92] Employers gleaned the strategic importance of pitting poor whites against non-white peers to secure their loyalty to elites despite their subordination.[93] Under the private-law frame of market competition, whites who expressed solidarity with any non-whites were said to act against their material self-interest.[94] This deep-seated ideology of racial "self"-interest did more than just institutionalize, for the long term, systems of income or intergenerational poverty along racial lines.[95] Centuries later, it has proven to erode our ability to debate affirmative

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88. ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 100–05 (Oxford Univ. Press 1980); DRU STANLEY, *supra* note 79, at 35–44, 56.

89. DRU STANLEY, supra note 79, at 8–14 (discussing "labor theory of property"); FONER, *supra* note 88, at 104–05.

90. *See* FONER, *supra* note 88, at 68–89 (relating advocacy of Nathaniel P. Rogers, abolitionist editor in New Hampshire, toward "a grand alliance of the producing classes of North and South, free and [formerly enslaved], against all exploiters of labor").

91. Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 Y.B.: S. CT. HIST. SOC'Y 20, 29 (1984). More historic research on this point is warranted as the example of abolitionist John Brown would hardly appear in isolation. Brown drafted a provisional constitution that would have provided "all property captured from the enemy or produced by the labor of his associates would be held 'as the property of the whole' and used 'for the common benefit.'" FONER, *supra* note 88, at 68.

92. Harris, *supra* note 78, at 1713.

93. Harris, *supra* note 78, at 1759. As Cheryl Harris observed: "The wages of whiteness are available to all whites regardless of class position, even to those whites who are without power, money, or influence. . . . It is the relative political advantages extended to whites, rather than actual economic gains, that are crucial to white workers." *Id.*; *see also* DU BOIS, *supra* note 86, at 700 (introducing the concept of whiteness "compensat[ing]" white laborers as "a sort of public and psychological wage"); *cf.* Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Costs*, 33 VILL. L. REV. 767, 773 (1988) ("Slavery also provided mainly propertyless whites with a property in their whiteness.").

94. David R. Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class*, *in* CLASS: THE ANTHOLOGY 41, 41–42 (Stanley Aronowitz & Michael J. Roberts eds., 2018) (citing DU BOIS, *supra* note 86, at 727).

95. *See generally* MEIZHU LUI ET AL., THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE (The New Press 2006).

action and avoid the excesses of formalism through group classification, as under Title VII and Section 1981.[96]

Possessive self-interest[97] fueled Americans' conflation of race with biology and taxonomy, such that whites openly doubted the humanity of Black people and other non-whites. For example, during the 1858 presidential debates, candidate Stephen Douglas insisted that positions on slavery on economic and moral grounds (and not, apparently on anti-racist grounds) ought not be integrated into politics, at least nationally.[98] Abraham Lincoln, as he needed, rebutted Douglas's originalist arguments from *Dred Scott v. Sandford*: that Black people were not among "the people" included in the Declaration of Independence or Constitution.[99] Cheryl Harris's influential observation that race and property are mutually constitutive conveys the inferiority and exploitability Americans imputed to non-white workers long after the Civil War.[100]

That political and legal elites firmly anchored conceptions of liberty to the market explains the precipitously narrowed chances of transforming either racial freedom or the economy during the First Reconstruction.[101] It also complicates existing justifications for legal distinctions premised on the public/private divide, exacerbating our ability to achieve intersectional racial justice. Labor production and social reproduction accordingly struggle against liberal, often judge-made constraints upon what is labeled as a private domain with private rights.

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96. *See, e.g.*, *infra* Part II; Bell, *supra* note 93, at 776 (noting continued resistance to affirmative action can largely be attributed to perception that "black gains" threaten white status); Shirley Lin, *Dehumanization 'Because of Sex': The Multiaxial Approach to the Title VII Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 747–59, 763–69 (2020) (describing anti-classification approaches to Title VII, at expense of anti-subordination theories, as means of state control over disfavored social traits); *cf.* Corrine Blalock, The Privatization of Protection: The Neoliberal Fourteenth Amendment (2019) (Ph.D. dissertation, Duke University) (on file with author).

97. Adam Smith imputed self-interested individualism in the liberal market, declaring: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 16 (1981).

98. FONER, *supra* note 88, at 45–47.

99. *Id.* at 47. *See generally* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (*enslaved party*), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

100. *See generally* Harris, *supra* note 78. Other critical scholars have raised critiques of related aspects of race and the market economy. *See generally* Carbado & Gulati, *supra* note 28; NANCY LEONG, IDENTITY CAPITALISTS (2021); Ruben Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L.J. 479 (2018).

101. *See* FONER, *supra* note 84, at 155.

Fears that the abolition of slavery would set off cataclysmic economic repercussions gripped most whites in both the former Union and Confederacy, however.[102] Despite the revolutionary changes abolition sought, the states instead federated in the service of private industry rather than a racially integrated society.[103] While it is impossible to plumb Chief Justice Taney's motives for eviscerating the citizenship of Dred Scott and all Black people (by prohibiting the federal government from regulating slavery in later-acquired territories), its corollary effect was the preservation of the slavery *economy*, as evidenced in an immediate rise in the asset prices of enslaved workers in anticipation of slavery's expansion.[104] If property denotes race, so does one's labor.

C. Reconstruction: "Free Labor" Is Colorblind

Our failure to challenge claims to private power—even to end abuses over which we had just waged civil war—sealed Reconstruction's fate.[105] As a matter of national policy, "free labor" would stand in for colorblind access to social freedom.[106] Emancipation and the brutally contentious process of Reconstruction required the force of law to secure political equality for all who had been enslaved. But white supremacy and violent reprisals—particularly from white plantation—ensured that a repressive economy would continue to undermine non-white aspirations for citizenship.[107]

Many advocated for abolition before the war *because* it would usher in a racially integrated democracy. But after Lincoln's assassination, Reconstruction policies under his successor were reluctant and only at best

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102. Ashley Jardina & Robert Mickey, *White Racial Solidarity and Opposition to American Democracy*, 699 ANNALS AM. ACAD. 79, 82–83 (Jan. 2022).

103. FONER, *supra* note 84, at 460–99.

104. *Sandford*, 60 U.S. (19 How.) at 490; LEVY, *supra* note 57, at 183; *cf.* DERRICK BELL, RACE, RACISM & AMERICAN LAW 588 (2010) (noting that Americans' desires to exclude or otherwise discriminate are "obviously deeply ingrained, widespread, and incapable of easy analysis on grounds of racial animus or economic advantage").

105. *See infra* note 111 and accompanying text.

106. FONER, *supra* note 88, at 100 (relating to President Lincoln's elaborate definition of free labor). To many, the phrase also denoted artisans, small farmers, and other self-sufficient producers. *See also supra* note 69 and accompanying text.

107. *See, e.g.*, MOON-HO JUNG, COOLIES AND CANE: RACE, LABOR, AND SUGAR IN THE AGE OF EMANCIPATION 105–06 (2006) (describing plantation owners' resort to migrant workers, particularly thousands of Chinese "coolies" from the Caribbean, China and California to labor alongside formerly enslaved Blacks during Reconstruction).

contractualist.[108] Southern litigants, the Court, and President Johnson would hijack Reconstruction's "multiracial and egalitarian project" through economic suppression to fortify physical and political abuse of Black communities.[109]

The devastation of the Civil War could have created opportunities for Americans to experiment with different economic systems, among the emancipated or other producer constituencies alike. Even in the North, no alternative vision of the economy emerged to rival the "free labor" system.[110] The formerly enslaved might have avoided having to rely on employment for their security and dignity had the Bureau of Refugees, Freedmen, and Abandoned Lands secured land for each them as a minimum in reparation.[111] Instead, the Freedmen's Bureau's principal strategy for economic security consisted of brokering contracts with the former plantation owners and—loosely—enforcing them in service of reviving the national economy.[112]

Congress passed the Civil Rights Act ("CRA") of 1866 to provide legal safeguards for equal civil and political rights, specifically relying upon contracts as a means to racially reconstruct the market.[113] Under Section 1981, transactions were to be rid of racism, including contracts for employment.[114]

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108. FONER, *supra* note 88, at 78–79 (noting "great numbers" of Northerners opposed slavery through "moral appeals of abolitionists, fear of the southern Slave Power, or apprehension that extension of slavery into the newly acquired territories would exclude free northern settlers" but, as of 1840s, the anti-slavery movement had to delink its platform from political and social equality to spur its growth). W.E.B. Du Bois chided historians' Reconstruction narrative that an unbroken commitment to racial justice mainly motivated Northerners to support abolition, when many instead saw abolition as a means to financially break the South. DU BOIS, *supra* note 86, at 716.

109. Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 313–25 (2017) (describing Reconstruction's profusion of political and social achievements for Black communities before Southern Redemption).

110. ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 40, 54 (1983).

111. *See* FONER, *supra* note 84, at 70–71 (relating, in gathering of Savannah's Black community leaders before end of the war, Garrison Frazier defined freedom to General William T. Sherman as "placing us where we could reap the fruit of our own labor," best accomplished by "hav[ing] land, and turn[ing] and till[ing] it by our own labor"); *id.* at 460–67 (noting that between 1862 and 1872, while the government awarded more than 100 million acres and millions in aid toward railroad construction, including transcontinental lines, formerly enslaved "could not help noting the contrast between such largesse and the failure to provide the freedmen with land").

112. McCurdy, *supra* note 91, at 27 (noting that the precarious court system within the Freedmen's Bureau, when faced with contract disputes arising from instances of abuse, appeared to lack substantial regulations on employment conditions and failed to adequately scrutinize exploitative agreements, thus presenting itself as an inefficient framework, simply to bolster economic activity); FONER, *supra* note 88, at 101.

113. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82).

114. 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

The realm of contract law, however, traditionally fell within the states' purview. Apprehending a weak federal government, local governments maneuvered to assert their sovereignty under the banner of private law.[115] It would not be until 1968 when the Court would credit the idea that anti-racism obligations reached private (non-governmental) parties and that Congress could reiterate that by statute.[116]

The 1866 CRA failed to invalidate the Black Codes that supremacist localities quickly enacted. These typically consisted of vagrancy laws requiring Blacks remain employed, criminal penalties if they terminated a contract, and restraints upon property ownership.[117] Since the Thirteenth Amendment prohibited plantation owners from forcing Black former slaves back into servitude themselves, local governments would.[118] Reconstruction Republicans drafted the Fourteenth Amendment, providing the constitutional authority for civil rights legislation.[119] Party leaders secured the necessary supermajorities for amendment only by making it a condition of former Confederate states' reentry into the Union.[120]

Courts responded to the Reconstruction Amendments and their anti-subordination aims with interpretive sabotage. Prohibitions against racial discrimination in public accommodations under the Civil Rights Act of 1875 were nullified once the Court opined that the enforcement provision of the Fourteenth Amendment, like its substantive provisions, reached only "state action."[121] Within a decade of its ratification, the *Civil Rights Cases* held that "private" conduct could now shield owners' racism even in places of "public" accommodation, including railroad cars, inns, hotels, and theaters.[122] With a

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evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."). While some view the language of Section 1981 as a constitutional inscription of legal formalism, in the vein of racial liberalism, this discussion advances the historic understanding of contracts as "civil rights" supporting substantive equality for freedpeople. *See, e.g.*, Penningroth, *supra* note 25, at 1216, 1222.

115. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 10–29 (1991).

116. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443–44 (1968).

117. FONER, *supra* note 88, at 103–04.

118. *Id.*

119. RICHARD JOHNSON, THE END OF THE SECOND RECONSTRUCTION 23 (2020).

120. LEVY, *supra* note 57, at 211; Neil Gotanda, *A Critique of "Our Constitution is Colorblind*,*"* 44 STAN. L. REV. 1, 12 (1991) (noting reproduction and reinforcement of the public/private divide through the racial state-action doctrine).

121. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

122. *Id.*

swoop of a pen, the Court eliminated the ability of workers to challenge racism—even in its most blatant forms—in the marketplace.

The state-action requirement would deprive nonwhites of the transformative jurisprudence of anti-racism at the cusp of emancipation and white resistance; courts instead interpreted what remained of the Fourteenth Amendment to safeguard liberty for corporations.[123] Business and legal elites vigorously opposed "class legislation," which referred (then) to any law privileging factions among market players, rather than eradicating racial caste.[124] The entities such laws favored could stand to reap vast fortunes depending upon how a state exercised its police powers—including the nearly 1,000 butchers harmed by the monopoly in the *Slaughter-House Cases*.[125] Not until the Second Reconstruction, a century later, would equal protection reach "private" discrimination.

Legal and political elites lay claim to a constitutional liberty of contract as early as 1867, when their op-eds assailed the idea of protective labor laws nearly four decades before the *Lochner* majority would do so.[126] For the time being, the public/private distinction provided them an escape route from putting the rhetoric of racial unity into action or stanching the drastic disparities in wealth that marked the first Gilded Age.

To defy an amended Constitution and its new charter for civil rights, courts chose to rehabilitate an economy of racial caste, manipulating the public/private line to remove a means of arguing that they had insulated *de facto* slavery from legal challenge.[127] Arguably, because a court can step in and curb "negative" behaviors at any time, all contracts could be called public.[128] The justices of the Reconstruction had, in fact, demonstrated that

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123. The Slaughter-House Cases, 83 U.S. 36, 43 (1872). Between 1871 and 1907, corporations began to shed their publicly oriented charters and gain national private powers. CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 23–24 (1985); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1464 (2012).

124. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 61–63 (1993).

125. *Id.* at 64 (noting displaced butchers would have lost business worth $245 million over the life of the charter).

126. *See* McCurdy, *supra* note 91, at 29–30 (relating Thurlow Weed and James McClatchey's op-eds making constitutional claims against labor laws, arguing rather than politicians' opposition to protective labor legislation, the failure of labor reformers to overcome the "free labor" ideal undermined such legislation); FISHKIN & FORBATH, *supra* note 5, at 251 (noting "Lochnerism's classical liberal precepts").

127. *See* Pope, *infra* note 188, at 98–100.

128. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1001, 1006 (1985) (stating "all contracts are public").

despite a rapidly developing economy they were capable of identifying a "public interest" through party conduct—rather than under an increasingly unworkable categorical approach.[129] Coining the phrase, a business "affected with a public interest," the Court upheld Illinois's regulation of the rates charged by grain elevators as legitimate state regulation.[130]

As a key player in the downfall of Reconstruction, judicial invocation of a public/private divide became embedded in liberalism's inability to resolve the tension between the self and "the *Other*,"[131] i.e., a white-knuckled fear of racial intimacy. To be clear, such an observation does not impute racial motives for liberalism today; it underscores the cascading repercussions for national unity and the legal architecture of work law and other politically valuable doctrines in subsequent eras. Insistence on a public/private divide no longer simply provided a refuge from the sovereign.[132]

Claims to common-law norms would continue to block public law in the form of policy-oriented changes to the market. From work to basic amenities, claims that commercial arenas were essentially "purely" private spaces rationalized the failure of Reconstruction to transform racial dynamics in law, society, or the economy. Such areas could develop, but only in forms acceptable to private law principles.

D. Realist and CLS Critiques of Lochner

Once legislatures sought to remediate systemic inequality, legal elites and the judiciary railed against state regulation as an unnatural intervention.[133] At

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129. *See generally* Munn v. Illinois, 94 U.S. 113 (1876).

130. Quoting Justice Hale from more than 200 years prior, Justice Waite reasoned:

> Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control.

Id. at 126.

131. *Cf.* I. India Thusi, *Feminist Scripts for Punishment*, 134 HARV. L. REV. 2449, 2449 & 2449 n.5 (2021) (book review) (discussing carceral feminism, applying Edward Said's concept of "the Other" to identify women who face subordination because of their gender identity and because of factors in addition to, and in interaction with, their gender identity, including Black, Indigenous, Latinx, Asian, poor, disabled, and queer women).

132. *See supra* note 70 and accompanying text.

133. *See* FORBATH, *supra* note 115, at 10 (comparing American working class "exceptionalism" attributed by many to "the unusual pervasiveness of liberalism . . . in American

the turn of the century, political discourse constitutionalizing "liberty of contract" conferred a sheen of timeless, colorblind protection.[134] By advancing a definition of freedom based upon "free labor," abolitionists had distanced themselves from Northern labor activists who protested the "wage slavery" that industrial work came to represent.[135]

During the Gilded Age, however, concentrations of private power within the economy spurred unprecedented levels of interclass solidarity. Americans flocked to the most powerful union of the 1880s, one that professed an agentic, pro-Black and pro-immigrant view of the economy and producer classes.[136] The Knights of Labor fervently supported economic gender parity, as possibly the first group to coin the phrase "equal pay for equal work."[137] At its height, the Knights boasted one million members: "no other voluntary institution in America, except churches, touched the lives of as many people[.]"[138] Remarkably, the Knights' expansive reach included factory workers and coal miners alongside independent (middle-class) artisans and businessowners.[139]

In 1883, the Knights' racially solidaristic, collaborative economic model had the potential to flourish, and caught the attention of U.S. senators.[140] Not only did the organization vigorously advocate for worker welfare legislation (e.g., minimum wage and maximum hours laws), it officially promoted "cooperative industry" and the nationalization of monopolies to combat "corporate tyranny."[141] So testified via Robert D. Layton: a laborer, student

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life, to America's tenacious two-party system, and to its distinctly 'weak' and fragmented liberal state").

134. This was a fundamental contribution from the founders of Critical Race Theory, as race was not integral to CLS analyses. *See, e.g.*, Gotanda, *supra* note 120, at 7–13. On CRT's motivation to establish an offshoot from CLS, see generally Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987).

135. FISHKIN & FORBATH, *supra* note 5, at 105–07 (contrasting Lincoln's description of freedom in terms of economic independence with abolitions' description in terms of self-ownership); *see also* McCurdy, *supra* note 91, at 27.

136. The Knights, however, virulently and infamously opposed Chinese immigrant labor and lobbied for the nation's first explicitly racist immigration bar. LEVY, *supra* note 57, at 275.

137. *Id.* at 274.

138. FORBATH, *supra* note 115, at 12 n.8 (quoting David Montgomery, *Labor in the Industrial Era*, *in* A HISTORY OF THE AMERICAN WORKER 79, 107–08 (R. Morris ed., 1983)).

139. FORBATH, *supra* note 115, at 13; ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY 2 (2015).

140. *See generally The Relations Between Labor and Capital: Hearing Before the S. Comm. on Educ. and Lab.*, 48th Cong. (Feb. 5, 1883) (statement of Robert D. Layton, Secretary, Knights of Labor).

141. FORBATH, *supra* note 115, at 13.

of the political economy, and Knights executive.[142] After noting that telegraph companies had just halved the income of their operators while more than doubling their workload (netting at least seven million in profits annually), the Knights sought Congressional support to back a collectivist commercial entity not unlike the cooperatives their movement had already fostered:

> [So tell the operators:] "We will take your labor and skill, which we know you possess, as sufficient security—as sufficient basis for credit, and we will advance you the necessary capital to carry on the business." . . . Because it is upon the labor of the employés of capital that the capitalist obtains his credit now, and why should not the same system be extended by the Government to such an organization of workingmen[.][143]

The Knights actively exchanged ideas toward a vision of a racially integrated, publicly subsidized economy in lieu of firms; they established thousands of cooperatives nationwide, as provided for in its constitution and Declaration of Principles,[144] and ran their own political candidates in thirty-four out of the thirty-five states in existence at the time.[145]

Among elites, the egalitarian ideal of free labor remained uncomplicated by the downward social mobility many workers faced and feared would accelerate. Courts proved willing to fortify the public/private distinction by elevating the presumption of "consent" to oppressive conditions in the process.[146] This period—the *Lochner* era—was defined by clashes over protective labor legislation as antagonistic to "private" law. Workers themselves recognized employers could avail themselves of a divide-and-conquer approach to undercut workers' activism toward minimum wages and standards, particularly through immigrant workers.[147]

At this stage of liberalism, courts tended to frame public/private debates, at least as to work law and civil rights, under a zero-sum assumption that cast state regulation and collectivist arguments as unnatural. Legal and economic elites ensured that the courts would provide a check on the state and its

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142. *The Relations Between Labor and Capital*, *supra* note 140, at 210–16.

143. *Id.* at 215.

144. GOUREVITCH, *supra* note 139, at 6, 6 n.23 (estimating Knights founded 500 producer cooperatives and thousands of consumer cooperatives).

145. FORBATH, *supra* note 115, at 12–13.

146. *Cf.* CHARLES W. MILLS, THE RACIAL CONTRACT 89 (1997) ("The ultimate triumph of this education [including racial deference to white citizens] is that it eventually becomes possible to characterize the Racial Contract as 'consensual' and 'voluntaristic' even for nonwhites.").

147. *See, e.g.*, *infra* note 148 and accompanying text; Jane Francis Nowell, *Lochner as Literature: Weighing the Paternalism of Progressivism*, 43 CAMPBELL L. REV. 115, 119–20 (2021).

potentially "arbitrary" favoritism.[148] Over the next four decades, judges invalidated more than 200 minimum standards laws intended to alleviate unhealthy working conditions.[149] In 1905, a Court majority nullified a state law that would have capped working hours for bakery workers, in *Lochner v. New York*.[150] It claimed to do so on grounds that employers' and employees' "liberty" of contract could not be abridged by public welfare legislation unless the court believed the legislature genuinely established a need to protect the safety, morals, welfare, or the interest of the public.[151]

The Bakers' Progressive Union, an affiliate of the Knights of Labor, had mobilized in favor of the legislation.[152] It invoked the public interest the Court insisted was absent in the legislation, arguing for a limit on the market to protect democracy itself:

> A community knows that families cannot be supported at less than two dollars per day, while a few unprincipled men, or starving men, or worse still imported coolies are willing to contract to do this work for one dollar per day. The press, the clergy, the statesmen, the professional business men of the country say they must be allowed to do so because their labor is their own property and the right of contract must be respected. *The individual has no right to contract for that which will be a public calamity.* When he places his labor in that position the public good demands that his privilege to sell shall be abridged[.][153]

To workers and others who backed a cap on hours, the state had a non-negotiable *duty* to act as a check on private law. Protective labor law was a collective and public good, one that only the state was able to provide.

Theorists of the Legal Realist movement condemned *Lochner* as constitutionally groundless and judges as political instrumentalists, and

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148. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

149. *See* KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 29 (3d ed. 2019).

150. 198 U.S. at 56–57 (1905) (identifying "liberty of contract" as protected under the due process clause).

151. *Id.* at 57, 59 ("[W]e think there are no[] [occupations] which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health.").

152. Matthew S. Bewig, *Lochner v. the Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and the Constitution—A Case Study in the Social History of Legal Thought*, 38 AM. J. LEGAL HIST. 413, 430 (1994).

153. *Id.* at 450 (quoting *Bakers' Journal*).

gained momentum throughout the first half of the twentieth century.[154] Limits on commerce imposed in the bakers' hours law, they argued, could not be distinguished from those in private law that already publicly regulate—or through courts coerce—the flow of wealth and leverage between parties like employers and employees.[155] Therefore, they reasoned, contract and property rights should be more accurately considered delegated public powers, and subject to public scrutiny.[156]

Critical Legal Studies ("CLS") scholars revived these critiques decades later, arguing that the public/private distinction that drives our liberal legal system produces contradictory categories, ripe for manipulation by whomever was privileged to draw the line.[157] The CLS movement was most critical of the claim that the law is self-contained, when in fact, law is inherently indeterminate:[158] by 1982, Duncan Kennedy predicted that the distinction was in "decline" or "dead," but "rules us from the grave."[159] But was the public/private divide then simply a matter of heuristics, an early postmodern puzzle with only intersubjectivities and no normative content? Both the Realists and Crits emphasized the illusionary and political nature of the public/private distinction.[160] Neither incorporated race as integral to their theorization.

In this recounting, I focus on key constants in legal design, and how those structures allocate the power to constrain or transform. A constitutional political economy that claims that private law trumps the public is self-perpetuating: invoking private law and private power, no matter how well-intentioned, predestines the U.S. legal system toward juristocracy.[161] And as

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154. Bagenstos, *supra* note 46, at 410.

155. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–79 (1923).

156. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927).

157. Klare, *supra* note 20, at 456, 456 n.19 ("The 'public/private problem' is that, on the one hand the distinction between public and private is *ideologically necessary* to liberal thought and, on the other hand, the rise of the regulatory state constantly erodes the *meaningfulness* of this distinction."); Horwitz, *supra* note 58, at 1426; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354–55 (1982) (observing a "loopification" of concepts imbued with both public or private valances based upon their function for the purpose of an analysis, but rarely distinguished as purely public or private).

158. *E.g.*, Klare, *supra* note 39, at 1361.

159. Kennedy, *supra* note 157, at 1353.

160. ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 26–27, 85–86 (1983).

161. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 127–28 (2004) (arguing that constitutionalization will not provide meaningful protection of the poor in a capitalistic society); Bagchi, *supra* note 27, at 14 ("The

this Part demonstrated, the possessive individualism of private law renders concepts of collectivity and solidarity incompatible with law and commercially-infused spaces such as work—including values of racial anti-subordination.[162]

In the following Part, despite popular resistance to private law claims during the New Deal, workers struggled against a deepening bifurcation of race and commerce, despite a Court pronouncement constitutionalizing solidarity.

II. WORK LAW'S PRIVATE AND PUBLIC TURNS: COLLECTIVITY, THEN RACIAL SOLIDARITY

> *There is scarce a child in the street that cannot tell you that the whole effort [of Reconstruction] was a hideous mistake and an unfortunate incident, based on ignorance, revenge and the perverse determination to attempt the impossible. . . .We have been cajoling and flattering the South and slurring the North, because the South is determined to re-write the history of slavery and the North is not interested in history but in wealth.*
>
> —W.E.B. DuBois, 1935 [163]

Labor and civil rights movements continued to press for collectivity and racial solidarity in the economy, in the law, and later, in the state's growing administrative apparatus. They ultimately succeeded in developing a language of solidarity to legitimize collective public goals, and later for racial justice, advancing appeals to *interracial* solidarity by invoking public law arguments. These popular movements resisted the private law framing of work law, and urged holistic frames beyond liberal "rights" that invariably would trigger rivalrous counter-rights.[164]

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indifference of private law to the justice of the entitlements it protects is indeed a significant political-moral defect.").

162. *Cf.* JEREMY WALDRON, POLITICAL POLITICAL THEORY 242–44 (2016) (observing that "judicial review cannot do anything for the rights of the minority if there is no support at all in the society for minority rights," but the argument for judicial review is weaker when "sympathy is stronger among ordinary people" than among political elites, as in the case of passage of the Civil Rights Act of 1964).

163. DU BOIS, *supra* note 86, at 620, 625.

164. As Bill Nelson observed in his study of the colonies' transition to Independence:

> [W]hile the concepts of private property and liberty may have been closely allied, the postrevolutionary rules allocating property did not result in increased individual liberty; they merely identified the individuals who would enjoy it. For every person who gained liberty by obtaining protection of a

Work law would prove its importance to movements set on finishing the project of Reconstruction and changing American racial attitudes. The workplace became a *de facto* commons, increasingly diverse in all respects, and its regulation would reject possessive individualism; time and again, it centered collectivity and anti-subordination in political and legal thought. Still, whether the state could be trusted to carry the water was in great doubt after the *Lochner* era. In this Part, I highlight how—on the balance—the successful incorporation of collectivity and interracial solidarity as core values of work law shifted its default to *public* law. That workers organizing and agitating for recognition of these values en masse would make it so in the eyes of most Americans, and in how liberalism has been historicized since the Civil Rights era.

First, in response to widespread strikes and other labor unrest, the "right" of workers to collectively bargain, and with it, Congress's authority to facilitate it, would be developed through Progressive-era and New Deal reforms.[165] By the 1930s, scofflaw states had to accept federalism and its power over interstate commerce in an inevitably networked national economy.[166] But the omission of protections against race discrimination by employers and labor organizations in its seminal labor laws would have corrosive effects on race relations in public consciousness. A democratic deficit, it set back efforts to eliminate of virulent racism against non-whites; interracial solidarity on the factory floor; and common grounds for interracial coalitions within social organizations and movements.[167]

Racial justice movements at home and abroad after the start of World War II reminded the nation of the promises of political, economic, and social equality that went unfulfilled after the First Reconstruction.[168] Legislation outlawing discrimination in purportedly private spaces—work and public accommodation—would not be secured until the "Second" Reconstruction

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> property right, some other person usually lost at least an equivalent amount of liberty.

NELSON, *supra* note 35, at 126.

165. *See* Hiba Hafiz, *On Quantifying Employer Power and Its Harms*, J.L. & POL. ECON. (forthcoming) (manuscript on file with author) (discussing Congress's conceptualization of workers' collective rights, and institution of national wage-setting boards against "liberty of contract," during Progressive Era); National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169; Ballam, *infra* note 182, at 456.

166. TOMLINS, *supra* note 123, at 22.

167. REUEL SCHILLER, FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM 18–47 (2015).

168. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 36 (2007).

saw passage of the Civil Rights Act of 1964.[169] Over the following decades, work law originated transformative doctrines that elevated collective, structural legal design: disparate impact[170] and disability accommodations.[171] Civil rights movements demanded a political economy capable of creating frameworks for solidaristic responsibility, both in preventing and remediating harm. The wave would peak with the passage of the Americans with Disabilities Act ("ADA") and Family and Medical Leave Act in the 1990s.[172] Movement discourse and organizing during the Second Reconstruction achieved a large-scale frame transformation, shifting work law to its current public default.

Conservatives and neoliberals opposed ever more sophisticated regulatory state,[173] and undertook pro-business efforts to revert government to a private law-dominant system.[174] How these efforts to privatize and create a business-friendly environment through law and the state clashed with solidarist forms of law and economy will be a core issue addressed in Part III.

A. Commerce's Temporary "Public" Default

The demise of the First Reconstruction suggested that conceptualization of rights in the political and legal thought would remain highly individualistic.[175] After decades of financial turmoil, however, popular resistance in the form of endemic strikes and peaceful protest led the public to reconceive of legal rights as collectivist and solidaristic.[176]

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169. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

170. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); 42 U.S.C. § 2000e-2(a)(2).

171. *See* K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 101–02 (K. Anthony Appiah & Amy Gutmann eds., 1996) (discussing the ADA as a prime example of society recognizing harms and taking "collective responsibility").

172. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611 *et seq.*

173. *See* FORRESTER, *supra* note 42, at 11.

174. *See* FORRESTER, *supra* note 42 and accompanying text.

175. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 127 (1976).

176. RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 45–47 (1989) (relating American workers' widespread demonstrations and deployment of resistance tactics during the New Deal); Pope, *infra* note 188, at 1 (arguing the Court upheld the NLRA "not because of the lawyers' Commerce Clause arguments, but because workers staged a series of sit-down strikes that confronted swing justices with a choice between industrial peace or war"). Hiba Hafiz's forthcoming research traces workers' collective rights to the Progressive Era, as implemented through the Clayton Act and Norris-LaGuardia Act's exemptions for collective labor actions. *See* Hafiz, *supra* note 165

But in the way law creates epistemology, conceptualizing labor "solidarity" within an industrial (market) framework and intentionally omitting race, as the NLRA ultimately did, threatened the democratic project. Would a colorblind approach to workplace solidarity still promote antiracism through public law?[177] By omitting racism as a source of economic insecurity and other forms of social coercion, labor activism did not see an obligation to address status-quo failures in workplace democracy. Would it matter if liberty were defined solely along the lines of class, rather than race? The constitutional crisis of the New Deal would offer important lessons.

When the Great Depression placed our ability to survive in a *laissez faire* economy in grave doubt, capitalism faced a crisis of confidence. After the First World War, employer groups and the U.S. Chamber of Commerce attacked interracial working class solidarity through tactics including anti-union ("open shop") drives, in which employer associations partnered with the Ku Klux Klan in efforts to stoke racial resentment among white workers then fearing unemployment.[178] Stronger regulation of employers gained widespread support in the political branches, albeit through a coalition of common interests.

After Progressive-era reform movements sought to de-commodify labor through Congressional policy, the NLRA set out to protect workers' ability to organize and bargain for better wages, conditions, and to seek transparency in decision-making in the form of a collective bargaining agreement, seen by many as a private "workplace constitution."[179] Union leadership in the American Federation of Labor ("AFL") professed the "whole gospel" of the labor movement was "freedom of contract," reflecting a well-placed mistrust in government and courts' injunctions of collective action: workplace strikes.[180] By contrast, Lee Pressman, counsel for the Congress of Industrial Organizations ("CIO"), testified in favor of the Act's protections for worker

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(quoting Clayton Act, 15 U.S.C. § 17 (1914) ("The labor of a human being is not a commodity or article of commerce.")).

177. *See supra* notes 56, 66 (discussing *303 Creative LLC*).

178. FANTASIA, *supra* note 176, at 42 (including the American Legion and National Security League in the open-shop campaigns).

179. *See* Hafiz, *supra* note 165; 29 U.S.C. §§ 151–69. The Court held the NLRA's predecessor, the National Industrial Recovery Act of 1933, to be unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935).

180. FORBATH, *supra* note 115, at 131–32.

organizing and collective bargaining as not only a means to secure industrial stability but "*a desirable end in itself* [that] should be protected as such."[181]

The NLRA ("the Act") is considered one of the most radical pieces of legislation in U.S. history to emerge from the New Deal.[182] Its watershed status in political theory commands all the more attention to its failure to include a duty of racial nondiscrimination, however.[183] In fact, the law first introduced "discrimination" into the work law lexicon, but failed to include other anti-discrimination provisions so that vulnerable or poor workers most in need of solidarity were to achieve it without prohibitions against racism.

For years, the NAACP, National Urban League, and ACLU lobbied intensively for the NLRA to bar unions from racially discriminating against its members.[184] The final statutory language instead simply barred retaliation, i.e., "discrimination" by employer against anyone who engages in solidaristic labor activism in the workplace.[185] At passage, the Act ultimately catered to the racism of Southern politicians to ensure passage by carving out agricultural and domestic workers; years later, so did the Fair Labor Standards Act of 1938, for minimum wage, overtime, and anti-retaliation protections.[186] In a devastating concession toward the slavery economy,

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181. *National Labor Relations Act and Proposed Amendments*: *Hearings Before the Comm. on Educ. and Lab.*, 76th Cong. 4215 (1939) [hereinafter *Pressman NLRA Statement*] (emphasis added) (statement of Lee Pressman, General Counsel, Cong. of Indus. Orgs.).

182. Deborah A. Ballam, *The Law as a Constitutive Force for Change, Part II: The Impact of the National Labor Relations Act on the U.S. Labor Movement*, 32 AM. BUS. L.J. 447, 453 (1995); National Labor Relations Act of 1935, 29 U.S.C. §§ 151–69. The NLRA's predecessor, the National Industrial Recovery Act of 1933, was declared unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. at 541–42.

183. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 23 (2014).

184. *Id.*; PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 38 (2007). The NLRA repeated the racist exclusion of farm workers and domestic workers, who were largely Black, from the Fair Labor Standards Act in its definition of those protected in their labor organizing. *See* 29 U.S.C. § 152(3) (defining "employee" to exclude "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act").

185. 29 U.S.C. § 158(a), (a)(3), (a)(4) ("It shall be an unfair labor practice for an employer . . . by discrimination in regard to hir[ing] or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . [or] to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter[.]").

186. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96, 117 (2011); Lin, *supra* note 55, at 75–76.

workers in these predominantly Black occupations were re-racialized by official intent to deny them federal protections even based upon labor activism and wage guarantees alone.

Legal justification for the NLRA reveals much about the political economic discourse at the time, even amid sustained, working-class uprisings. The Thirteenth Amendment at the time rested upon a broad array of meanings for "slavery," spanning subordinate relationships and material deprivation beyond coercion, to include being "subject to domination and to the arbitrary will of another person."[187] Labor leaders' view that the NLRA should be grounded in the amendment's more progressive anti-slavery obligations ultimately gave way to liberal elite advocates' insistence that Congress stake its legitimacy on the Commerce Clause alone.[188]

Collective human agency, a positivist norm predating "liberty of contract," became the countervailing liberty that featured prominently in two landmark work law opinions: *West Coast Hotel Co. v. Parrish*[189] and *NLRB v. Jones & Laughlin Steel Corporation*.[190] The year 1937 marked the moment in which Roosevelt-era populism chastened the judiciary in its hostility toward laws that advance collective welfare.[191] A view of the collective as inherently tied to agency, and reliant upon group solidarity, was an affront to private law argumentation.

In *West Coast Hotel,* the Court upheld a state law establishing minimum wages and workplace health standards against a hotel's substantive due process challenge.[192] In a discussion reminiscent of the journeymen bakers' public appeal in *Lochner*, the Court addressed the employers' freedom of contract argument:

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But *the liberty safeguarded [by the challenged minimum-wage law] is liberty in a social organization which requires the protection of*

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187. Balkin & Levinson, *supra* note 123, at 1484.

188. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 94–98 (2002).

189. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

190. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

191. *See* GILLMAN, *supra* note 124, at 3 (referring to 1937 as "constitutional revolution" and "abandonment of 'liberty of contract'").

192. *West Coast Hotel*, 300 U.S. at 400 (rejecting employer's Fourteenth Amendment due process argument and overruling Adkins v. Child.'s Hosp., 261 U.S. 525 (1923)).

> *law against the evils which menace the health, safety, morals and welfare of the people*. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted *in the interests of the community* is due process.[193]

In one paragraph, Justice Hughes stood substantive due process discourse on its head. Freedom of contract was not a legal principle that could block legislatures from redistributing power or providing for public welfare in the workplace. The "unequal position" of workers collectively rendered them "relatively defenceless [sic] against the denial of a living wage."[194] Instead, "history and connotation" anchored liberty as a right that belongs to the public, such that workplace group agency—"social organization"—and community interests are inherent to Fourteenth Amendment due process.[195] By democratic necessity, the workplace was a domain of public interest, and its regulation, public law. An absolutist focus on two parties' theoretical self-interests was not an interpretation required by the Constitution nor any other source of law.

If it was not already clear that most Americans deemed the marketplace a matter of public concern, solidarity actions through hundreds of labor sit-down strikes signaled ordinary people's views of commerce.[196] The NLRA, and the National Labor Relations Board it established, proscribed employer intimidation and coercion of workers who undertook self-organization. Two weeks after *West Coast Hotel*, the Court upheld the Board's authority to regulate labor nationally.[197] Between 1935 and 1939, the Board resolved 2,000 strikes, "averted" another 800, and held 2,500 union elections.[198] In *Jones & Laughlin Steel*, the Court found the Act to be a valid exercise of the commerce power, rejecting a steelmaker's argument that such expansive labor regulation within a state did not affect interstate commerce.[199] Section 7 of the Act protected employees engaged in collective action so that they could together negotiate better terms and working conditions without the

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193. *Id.* at 391 (emphasis added).

194. *Id.* at 399.

195. *Id.* at 391, 399 (holding that "exploitation" is detrimental to health and wellbeing and burdens the community for their support).

196. *See* FANTASIA, *supra* note 176.

197. *See* U.S. CONST. art. I, § 8 ("The Congress shall have the power . . . [t]o regulate Commerce with foreign nations and among the several States, and with the Indian Tribes.").

198. TOMLINS, *supra* note 123, at 156.

199. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31–32 (1937).

threat of retaliatory discharge.[200] It thus sought to level the bargaining power between firms and employees by blunting the presumption of at-will employment. The new regulatory apparatus ushered in a tripartite regime: workers, employers, and—via the Board's investigative and adjudicatory functions—the state.[201]

In response to the steel company's claim that the Act violated substantive due process, the Court declared that the "right to organize" is a "*fundamental* right."[202] The *Jones* dissent had invoked that the "right to contract is fundamental" and believed outlawing retaliatory dismissals would disturb the "equality of [this] right" at work.[203] The 1937 opinions spurned Lochnerian freedom of contract in revolutionizing (by existing standards) the heuristic of the "public," which legal elites and business interests had—until then—artificially compressed. In so doing, however, the New Deal Court re-entrenched liberal theory by resting the legitimacy of any public regulation on the presence of significant commercial consequence.[204]

The confluence in populist advocacy platforms among the electorate, the presidency, and Congress triggered a one-two, whipsaw effect. From

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200. 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

201. TOMLINS, *supra* note 123, at 148–57.

202. *Jones & Laughlin Steel*, 301 U.S. at 33 (emphasis added); *see also* Alstate Maint., LLC, 367 NLRB No. 68, at 1 (2019) ("The right to engage in protected concerted activity is one of the most fundamental rights guaranteed by Section 7 of the NLRA."). Two years later, when the Senate took testimony on amendments to the Act, a Jones & Laughlin Steel worker testified to adjusting to residing in the company town of Aliquippa, Pennsylvania along with other workers recruited from the Midwest:

> After getting settled we could all see that something was wrong in Aliquippa. We didn't know what it was . . . but it was more or less like a ghost hanging over the town.
>
> People were in a state of mind where they didn't seem to notice anything or care about anything; they were more like—well, in my words, "captured animals." . . .
>
> Shortly after arriving in the town, and getting situated, [the recruits] carried on their social activities the same as they had done in the past . . . . That was against the policies of the corporation, evidently.

National Labor Relations Act and Proposed Amendments: *Hearings Before the Comm. on Educ. Lab.*, 76th Cong. 4177 (1939) (statement of Clifford J. Shorts, Steel Worker, Jones & Laughlin Steel Corp.).

203. *Jones & Laughlin Steel*, 301 U.S. at 102–03 (McReynolds, J., dissenting).

204. CLS theorists have previously emphasized this point in particular. *E.g.*, Klare, *supra* note 20, at 456, 456 n.19.

assertions of purely private workplaces and doctrines through the Gilded Age, pent-up demand for public scrutiny of the economy buoyed President Roosevelt's efforts to publicize both the "private" and the "public" by staffing regulation of the employment relationship with administrative agencies and expanding state infrastructure. History, statutory policy, constitutional values, laypeople—all were now normatively aligned, ostensibly for good. Within decades, the double edge of liberalism would threaten to reverse course.

B. The Second Reconstruction: Toward Racial Solidarity in Work Law

Even those sympathetic to worker organizing may be tempted to write off the New Deal as an outlier in populist nation-building, and the NRLA, an off-the-shelf exhibit in early bureaucracy. Its agenda was a true watershed for redeeming trust in the state for public ends, one that could justify a unitary national policy of disciplining private-law claims to wealth.[205]

The NLRB's newly minted apparatus was "one of the broadest grants of power and discretion that Congress had ever entrusted to an administrative agency[.]"[206] Over the course of World War II and the Civil Rights era, the number and strength of administrative agencies would vastly expand. But as Klare observed, mainstream labor movements had not sought to reconstitute the market as public during the New Deal, a result they were hard pressed to avoid as corporations' and conservative theorist lashed back against labor post-war.[207] Accordingly, courts viewed work law with increasing hostility and inclination toward cabining its publicity.[208]

The values of the First Reconstruction could not diffuse into nor transform society, even in a century's time, as long as there remained a right to privately discriminate. Struggles for racial justice reasserted public law claims to the dignity of full citizenship. By default, the guarantees of multiracial democracy would not come from private law, which remained largely untransformed. The Second Reconstruction would again argue that racism

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205. *Id.*

206. TOMLINS, *supra* note 123, at 156.

207. *See* Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 18–19 (1988).

208. *See* LEE, *supra* note 183, at 51–52.

threatened to undermine human agency in a democracy, akin to a public menace rather than a private right.[209]

De facto systems of Jim Crow, in communities and in unions the NLRB certified at jobsites, also belied claims of workplace democracy. The racism of whites-only unions and segregated locals was pervasive within organized labor, was not deemed unlawful under the NLRA until 1944, and persisted thereafter.[210] During this time, of the major federations, only the CIO—with its eye on underskilled workers and whole-industry organizing—genuinely embraced a platform of racial inclusion, but it was hard-pressed to enforce its policy at the local level.[211]

The New Deal's failure to address interpersonal and structural racism, and its explicit carve-out of Black and other minority workers from labor protections,[212] made clear that a racially just economy could not be achieved without also addressing employment alongside the denial of voting rights, education, and public accommodations.[213] The public/private divide again dogged legal elites, as President Kennedy fretted over the Civil Rights Act's public accommodations provisions and chose to rely on a "narrow definition of state action."[214]

As for legal academe, presenting work law as a bifurcated labor/employment framework risks erasing the movements' painstaking efforts to unify work law and avoid unproductive debates over the primacy of race versus class. Historicizing work law and its challenges with race is a necessary step in overcoming liberal tenets inscribed as "law."[215] Behind the scenes, and at the behest of groups such as the NAACP, NLRB leaders strove to reinterpret labor law consistent with Equal Protection principles years

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209. *See* JOHNSON, *supra* note 119, at 77 (noting that the Second Reconstruction was driven by "sustained grassroots activism, international pressures, and mobilization of millions of ordinary African Americans, often in the face of violence").

210. *See* LEE, *supra* note 183, at 47, 51, 82; Steele v. Louisville & Nashville R.R. Co., 232 U.S. 192 (1944) (prohibiting unions from excluding Black workers from membership or discriminating against them in contract negotiations). Race discrimination by private employers would remain legal until the enactment of Title VII.

211. LEE, *supra* note 183, at 14–16. The AFL (which did include the majority-Black Brotherhood of Sleeping Car Porters among its members) would later join the CIO in doing so before lobbying for passage of Title VII as an official position.

212. *See* Perea, *supra* note 186, at 117 and accompanying text.

213. GOLUBOFF, *supra* note 168, at 263–68; JOHNSON, *supra* note 119, at 100–02. Initially, the 1964 CRA did not contain a title that prohibited workplace discrimination.

214. LEE, *supra* note 183, at 150.

215. *See generally* SCHILLER, *supra* note 167; LEE, *supra* note 183.

before Title VII anti-discrimination became law.[216] As recounted in Sophia Lee's bold historiography of these tensions, the NLRB would become the first office among any of the federal branches to articulate a racially unified view of work law.[217]

Eight years after *Brown v. Board of Education*,[218] Ivory Davis—the leader of an all-Black metal workers' local—challenged a segregationist collective bargaining agreement reached between his employer and the all-white local.[219] The NLRB's first Black member of the Board, Howard Jenkins, and general counsel Stuart Rothman believed that the government could not sanction a union's solidarist practices if the union engaged in racism, under the constitution, by permitting the Board to certify the union as the worksite's representative.[220] Through its 1964 decision in *Hughes Tool Company*, the Board acknowledged that the conception of solidarity that emerged from the New Deal was incomplete and thus unstable. "Racial segregation in membership . . . cannot be countenanced by a Federal agency," *Hughes Tool* declared; under *Shelley* and *Brown*, the government could not ratify discrimination.[221] The Board decertified the racist union, and required *all* unions that had discriminatory contracts to renegotiate them.[222] In other words, the state, its expanding administrative structure, and public law were one and agreed that interracial unity was a determinant of state legitimacy.

Political balkanization would make similar attempts to harmonize labor law with employment law more difficult. Over time, Board members' views would become more polarized.[223] For example, on the question of whether one worker seeking to report discrimination could be considered "concerted"

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216. *See generally* SCHILLER, *supra* note 167; LEE, *supra* note 183; Lin, *supra* note 55. Before passage of the 1986 Immigration Reform and Control Act, civil rights groups representing the Latino and Asian American communities would oppose its creation of a legal/illegal work status for immigrants and, most importantly, its carceral approach to social control: the criminalization of any work performed by undocumented workers.

217. *See* LEE, *supra* note 183, at 148–49, 153–54 (discussing ongoing efforts of NLRB to rely on a broad state-action theory after *Shelley v. Kraemer*).

218. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

219. LEE, *supra* note 183, at 135–38 (discussing Hughes Tool Co., 147 N.L.R.B. 1573 (1964)).

220. *Id.* at 137–38, 148–49.

221. *Hughes Tool Co.*, 147 N.L.R.B. at 1574; *see* LEE, *supra* note 183, at 153 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).

222. *Hughes Tool Co.*, 147 N.L.R.B. at 1578.

223. *See generally* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985). The Court, too, cabined the Reconstructions' expansion through the Administrative State, ostensibly through the formality of lawmaking. NAACP v. Fed. Power Comm'n, 425 U.S. 662, 671 (1976) (ruling that an agency must implement anti-discrimination law only if "related" to its statutory mission).

protected conduct, i.e., seeking a public good, rather than engaged in a "selfish" or "personal" act, it would be a half-century after *Hughes Tool* before the Board answered in the affirmative.[224] Section 1981's Reconstruction-era law would similarly become susceptible to political football, as the Court would limit it to the formation stage and excise protections during *performance* of the contract.[225] (Congress swiftly responded with the 1991 CRA, by adding subsections to Section 1981 for post-formation misconduct.[226])

The need to resurrect our Reconstruction-era legal principles, first by overruling the *Civil Rights Cases*, returned to the fore as freedom movements resisted its contradictions publicly and physically: through sustained boycotts, marches, and sit-ins.[227] The struggle over segregation came to a head with the greater imbrication of daily life with the administrative state. Civil rights activists and interracial coalitions organized mass actions, calling for racially desegregated resources, spaces, and institutions; meanwhile, prominent legal scholars and jurists warned against incursions on freedom of association and personal discretion over who must be invited to one's own "tea party."[228]

By demanding Congressional and presidential action, the dignitary right of non-discrimination by "private" parties came to be understood by a critical mass within the public as constitutionally required.[229] Had not *economic* meaning been amended, too, during the First Reconstruction?[230] To proponents of liberal racialism, questions of historical accuracy would have been rhetorical as hopes that racial integration—and the expressive benefits of a hard-edged legal prohibition against discrimination—will break down societal transmissions of racism.[231] To be sure, studies of social movements

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224. Fresh & Easy Neighborhood Mkt., Inc., 361 N.L.R.B. 151, 154 (2014).

225. Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989).

226. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (adding 42 U.S.C. § 1981(b)–(c)).

227. GOLUBOFF, *supra* note 168, at 36.

228. LEE, *supra* note 183, at 89, 91.

229. *Id.* at 266 n.4.

230. *Cf.* Cooper Davis et al., *supra* note 109, at 313 (noting that under the "People's narrative," Reconstruction constitutional reform and legislation were to establish a "national charter of the People's rights").

231. *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 76–77 (1996) (advocating for law to invest in a project of cultural transformation to change attitudes that sustain social inequality). This transformation is distinct from, but may parallel, the concept of a "moral economy," whereby "social and legal norms structur[e] economic relationships" and alleviate economic inequality. César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting Through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409, 409

since have documented that frame transformation—the process by which an individual's interpretive authority is replaced with another through experience—is associated with at least two key microstructural and social relational factors.[232] The first factor: network linkages, or "the development of affective ties to other members"; the second: learning through intensive interaction.[233] Both component are indispensable to developing interracial solidarity in the workplace; and both can be discouraged through doctrine.

Recall that Congress asserted its authority to enact the NLRA solely through the Commerce Clause, which the Court upheld in *Jones & Laughlin* so as to protect the "fundamental" right to organize.[234] By 1964, out of an abundance of caution, President Kennedy and lawmakers chose to anchor the Civil Rights Act to both the Fourteenth Amendment and the Commerce Clause. This choice arguably reflects concerns about the liberal promise of the administrative state. The Labor Board's *Hughes Tool* decision had concluded that equal protection was implied in labor law, because the state always occupied an intermediary role; the agency released *Hughes Tool* on the same day President Johnson signed the CRA.

Would the 1964 CRA resolve once and for all that equal protection required racially unified workplaces? Like *Jones & Laughlin*, a head-on challenge to private discrimination—here, racist business owners—raised an existential question for liberalism as to the meaning of commerce. Is it a sphere of presumed privacy or an instrumentality that risks malign conduct? White-segregationist plaintiffs immediately sued to invalidate the law under the state-action doctrine, and the Court foundered over the question.[235] A majority of the Court answered in the affirmative: Congress validly exercised its power based upon race discrimination's adverse impact on interstate commerce, and the fact that racism's anti-commercial nature was also a "social and moral wrong" could not preclude such a result.[236]

(citing Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514 (2011)).

232. DAVID A. SNOW & SARAH A. SOULE, A PRIMER ON SOCIAL MOVEMENTS 141 (2010) (citing studies); NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 2 (2008); Sophia Z. Lee, *A Signal or a Silo? Title VII's Unexpected Hegemony*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50, at 235 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015).

233. SNOW & SOULE, *supra* note 232, at 141.

234. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

235. *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

236. *Id.* at 257–58.

As had been undoubtedly true of the multistate operations of Jones & Laughlin Steel,[237] the motels and restaurants challenged in *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung* could not help but have an impact on interstate commerce.[238] The majority's narrower justification would uphold the CRA solely under the Commerce Clause, leaving the Fourteenth Amendment question unresolved.[239] In a concurrence, Justice Douglas argued equal protection alone would have provided sufficient authority, as exclusion from the market was a cudgel against Black communities, suppressing their prosperity by denying movement across states and the dignity of equal accommodation.[240] Joined on this point by Justice Goldberg, who believed both grounds to be sufficient, upholding the CRA under the Fourteenth Amendment was obvious.[241]

Widespread opposition to racism appeared to have some effect: *Heart of Atlanta* publicized the private pedigree of the market, even if the political capital of the concurring justices and mainstream history were not sufficiently persuasive. Were we to momentarily step outside the Court's liberal frame, it would be possible to find meaning within *Heart of Atlanta's* majority from the standpoint of collective power. If collectivity and solidarity were constitutional features of the economy during the New Deal, equal protection would overlap to the extent that solidarity, as of the Second Reconstruction, must always be interracial to be meaningful. Under classical liberal theory, the split between *Heart of Atlanta*'s majority and the concurrence was simply the same discursive split between the economic and political.[242]

Unfortunately, *Heart of Atlanta*'s commercial frame may only become further embedded with the rise of law-and-economics concepts and First

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237. RICHARD C. CORTNER, THE JONES & LAUGHLIN CASE 86 (1970) (noting the company had more than 22,000 employees and was a completely integrated manufacturer with mineral properties in four states and railroad and barge subsidiaries).

238. For a companion case concluding that discrimination by restaurants had a cumulative impact on interstate commerce, see generally Katzenbach v. McClung, 379 U.S. 294 (1964).

239. *Heart of Atlanta Motel*, 379 U.S. at 261–62.

240. *Id.* at 280–85 (Douglas, J., concurring).

241. *Id.* at 292–93 (Goldberg, J., concurring).

242. A particularly relevant insight from Joseph Fishkin and William Forbath's recent work on the constitutional political economy attributes this to liberal folly:

> Liberals lost, among many other things, their forebears' understanding that economic policies function as inputs to politics, distributing social and political power and helping to define the political-economic landscape that drives future politics and moves the boundaries of what is possible in politics. . . . Conservatives never accepted either the autonomy of constitutional law from politics or the autonomy of economics from politics.

FISHKIN & FORBATH, *supra* note 5, at 420–21.

Amendment claims for religious exemptions in political theory.[243] In its trajectory since the Progressive Era, work law stacked public role after role upon the state, and they have only grown in number and complexity. These roles have come to include policer of private law;[244] high-road (constitutional) actor;[245] market actor;[246] investigator;[247] adjudicator;[248] litigator,[249] and expert.[250] Some of these functions are materially distributive and others also redistribute power, all of which are vulnerable to ideological backlash.[251] Thus, increasingly, some of these functions are susceptible to doing neither.

C. Juristocracy: Privatizing the Public Law of Work

Modern efforts to privatize work law appeared in the 1970s, coinciding with the rise of legal formalism in adjudication. The latter advanced theories of equivalency of the utmost abstraction, stripping context from adjudication

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243. Bagenstos, *supra* note 41, at 452–53 (discussing the constitutional significance granted to private at-will employment in several *Lochner* Era decisions); 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2334 (2023) (Sotomayor, J., dissenting) ("The First Amendment does not entitle petitioners to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners' speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination.").

244. K. Sabeel Rahman & Kathleen Thelen, *The Role of the Law in the American Political Economy*, *in* THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 76, 76–78 (Jacob S. Hacker et al. eds., 2021).

245. Apart from its status as the state, federal government compliance with civil rights and constitutional law is typically characterized by proactive compliance with law. Since the Civil Rights era, it has affirmatively recruited women, the disabled, and veterans, in addition to others who have faced discrimination historically. In this capacity, the state is redistributive, modeling the practices of a well-resourced, sophisticated employer.

246. A quarter of the U.S. workforce is employed by companies that, altogether, transact $500 billion in business with the federal government. Celine McNicholas & Heidi Shierholz, *Republicans Are Poised To Repeal Important Worker Protections, Starting with the Requirement that Federal Contractors Play Fair*, ECON. POL'Y INST. (Jan. 30, 2017), https://files.epi.org/pdf/120911.pdf [https://perma.cc/K4CQ-4K75].

247. The NLRB and the EEOC conduct investigations as a precursor to enforcement prosecution and remediation, to different degrees.

248. Labor and employment statutes require aggrieved workers to channel their claims first through agencies, centralizing all disputes through the government for enforcement. Under Title VII, an aggrieved worker cannot file in court without first exhausting administrative remedies. For NLRA unfair labor practices, charges with merit are heard by an administrative law judge and, upon review, the Board.

249. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1420–21 (2000).

250. WILLIAM D. ARAIZA, REBUILDING EXPERTISE: CREATING EFFECTIVE AND TRUSTWORTHY REGULATION IN AN AGE OF DOUBT 6 (2022).

251. LEE, *supra* note 183, at 23–28.

as much as possible.[252] Under our present system of legal liberal theory, private law empowers the U.S. judiciary above all as the ultimate arbiter of "law."[253] For decades wide swathes of society, from progressive activists and impact litigators to conservative interests, invested heavily in the state's ability to dispense justice, particularly through courts. Control of America's modern liberal state could thus be wrested through elites' claims to public/private distinctions having normative, determinative meaning.

The antidiscrimination protections movements sought in the Second Reconstruction were mediated through liberal rights frameworks by the time bills were introduced and debated in Congress. As of World War II, mistrust of unions as simply another special interest group and potentially corruptible institution, gained ground in political discourse.[254] Conservatives opponents of labor deduced that it would be effective, in the long term, to join civil rights advocates in criticizing racism within labor organizations; doing so legitimized critics and conservatives' own standing, while delegitimizing unions.[255]

As for antidiscrimination law, the decision not to link the 1964 CRA's framework to combat race and other forms of discrimination with NLRA "discrimination" based upon a workers' solidarist activism was emblematic of rightward shifts in the political economy. As Dinner has shown, neoliberalism and Title VII (or at least much of it) share values in common: "the ideal of efficient markets, the notion that the fundamental subject of law is the individual rather than the collective, and the primacy of negative rights enforced by the judiciary."[256]

Rather than integrating anti-discrimination into the workplace organizing model and the NLRB, lawmakers could only agree to establish and fund a more modest agency, the Equal Employment Opportunity Commission.[257] The agency could investigate claims, but under this new division of labor, Congress expected most discriminatees to individually litigate.[258] This new

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252. UNGER, *supra* note 160, at 7.

253. *See* HIRSCHL, *supra* note 161, at 20.

254. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 111–12 (William Chafe et al. eds., 2013).

255. *See* LEE, *supra* note 183, at 229–30.

256. Dinner, *supra* note 33, at 1062.

257. *See* LEE, *supra* note 183, at 183.

258. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 620 (2019) (noting in contrast to collective activity protected under labor law, under employment law workers can be individually entitled to rights, but "does little to redress systemic inequality"); Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1927 (2020) (advocating for an organization-wide view of antidiscrimination law in place of a private attorneys-general model).

rights architecture shifted the sheer bulk of enforcement costs and resources required onto private individuals and businesses.[259] A *pro se* worker with a complement of work law claims would theoretically have to seek the help of multiple agencies rather than one: the Department of Labor for non-payment of minimum wages and overtime; the NLRB for retaliation against concerted activity; and the EEOC for discrimination based on protected social traits.

Pressed by a militant disability rights movement and bipartisan political coalitions, Congress added a positive-law protection to the anti-discrimination canon: the ADA's accommodations mandate.[260] Movement visions of universal inclusion and collective responsibility, however, were largely undermined by the Reagan EEOC's rulemaking: by issuing a regulation that deregulated.[261] Relying upon individuated bargaining and market logic to remedy structural subordination in the workplace, the EEOC's accommodations rule prescribed private processes that ignored the power disparities inherent to this task.[262] Despite the market efficiency in doing so, Congress and the executive have largely declined to directly involve the state in dismantling ableism in private workplaces.[263]

At this stage, the normative influence of history, statutory policy, constitutional values, and popular will—emerging from the mid-1960s aligned— was in danger of unraveling at all four levels. Our transition from classic to modern liberalism introduced ideological doubts about a virtuous state, particularly after the advent of the Great Society's social safety net—i.e., public goods—would be racialized by the right wing, denigrated as the "welfare state."

Ahistorical textualism, Congressional gridlock, juristocracy, and societal polarization laid the groundwork for the Rehnquist and Roberts Courts to undermine collectivity and solidarism in the workplace. In particular, the pro-business outcomes in *Janus* and *Epic Systems* were astonishing.[264] As Sam Bagenstos observed, the Roberts Court began a reversion toward Lochnerism under the veil of other constitutional doctrines.[265] Laws intended to facilitate the right to organize are at risk of being interpreted to further deter activism

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259. Dinner, *supra* note 33, at 1087–88.

260. 42 U.S.C. § 12112(b)(5)(A); Shirley Lin, *The Law & Political Economy of Disability Accommodations*, LPE PROJ. BLOG (Apr. 5, 2021), https://lpeproject.org/blog/the-law-political-economy-of-disability-accommodations [https://perma.cc/V4NF-A8RW].

261. *See generally* Lin, *supra* note 6.

262. *Id.*

263. *Id.*

264. *See generally* Bagenstos, *supra* note 41.

265. *Id.* at 409–10.

through work law. In the meantime, organizing continues to draw power from outside the law and institutional structures.[266]

III. RACIAL SOLIDARITY: CURRENT AND FUTURE IMPLICATIONS

> *Amazon-owned Whole Foods Reportedly Told Managers that Workers Couldn't Wear Black Lives Matter Signage at Work Because it was 'Opening the Door for Union Activity.'*
>
> —Aug. 2022 NLRB Whole Foods Trial (quoting internal company email) [267]

Social movements generate new and creative possibilities; the law tends to eliminate them.[268] Although commentators frequently attribute the current upsurge in independent worker organizing to "young" workers coming of age, a fuller examination reveals experimentation with new forms of organizing, leadership, and instrumentalization of our public law legacies among workers of color.[269] The youth hypothesis bears true if one focuses on workers with cultural capital—journalists, tech workers, video game designers, and café baristas.[270] This Part seeks to broaden the historical and legal account, providing snapshots of contemporary race-conscious organizing before turning to racially solidaristic economic practices and other implications for this project.

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266. SNOW & SOULE, *supra* note 232, at 16–17 (defining "interest groups" as "embedded within the political system" and regarded as legitimate actors, and "social movements" as "positioned outside the authority structure in question" that "may sometimes operate squarely within the institutional arena, but their "action repertoire is generally skewed in the direction of extra-institutional . . . activity").

267. Katie Canales, *Amazon-Owned Whole Foods Reportedly Told Managers that Workers Couldn't Wear Black Lives Matter Signage at Work Because it was 'Opening the Door for Union Activity*,' BUS. INSIDER (Aug. 15, 2022, 9:38 AM), https://www.businessinsider.com/amazon-whole-foods-black-lives-matter-union-activity-report-2022-8 [https://perma.cc/TJ5Y-HY5D].

268. For critiques of traditional and current legal pedagogy, see generally GERALD LOPEZ, REBELLIOUS LAWYERING (1992).

269. *See* Richard Fry & Kim Parker, *Early Benchmarks Show 'Post-Millennials' on Track To Be Most Diverse, Best-Educated Generation Yet*, PEW RSCH. CTR. (Nov. 15, 2018), https://www.pewresearch.org/social-trends/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet [https://perma.cc/Z3PD-BVYC] (reporting the "post-Millennial generation" became most racially and ethnically diverse generation, as nearly half of 6- to 21-year-olds (48%) are not white); *e.g.,* Steven Greenhouse, *Young Workers Are Organizing. Can Their Fervor Save Unions*?, WASH. POST (Sept. 2, 2022, 1:57 PM), https://www.washingtonpost.com/outlook/2022/09/02/young-workers-unions-starbucks-amazon [https://perma.cc/W96U-UEC8].

270. Levitz, *supra* note 21.

In light of the radical alteration of constitutional power since the 1980s, it is possible that workers' bolder "extrajudicial" visions and resistance could never effect an inexorable pull upon law or the corporations employing them; decades of post-war scholarship have chronicled these concerns.[271] The labor movement has made important strides toward solidaristic community partnerships once again, from ending its stance against immigrant reform by 2000 (officially partnering with immigrant-led workers centers) to engaging in more organic "improvisational unionism" among a minority of workers on the job, invoking issues not centered around forming a majority union or besting a majority faction in elections over union leadership *per se*.[272]

Intersectional visions move to the foreground today as keenly relevant to most workplaces.[273] Race has remained the third rail of legal analysis,[274] even as its emphasis in work law scholarship has flagged. In a watershed 1988 lecture, Derrick Bell located a through-line between white supremacist interpretations of Reconstruction Amendments in support of economic exploitation of Black communities, and poor whites' maintenance of Jim Crow unions; and Kimberlé Crenshaw coined the term intersectionality the year CRT officially launched as a school of thought, in her pioneering critique of formalist, white-normed judicial readings of Title VII.[275] In their responses to legal liberalism, CRT scholars identified salience *and* erasure of race when workplace litigation yielded manipulated outcomes. Later CRT scholarship highlighted the disconnect between doctrine and the experiences

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271. *E.g.*, *id.*; *see also* Akbar et al., *supra* note 2, at 852–53.

272. Michael M. Oswalt, *Improvisational Unionism*, 104 CAL. L. REV. 597, 602 (2016) (describing minority work-site actions supported indirectly by unions "a product of a new sort of organizing. . . . [where] there was no simple way for campaign strategists to exercise the usual top-down, in-person control"); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 783–91 (2017) (proposing a reform for minority union bargaining that would permit more than one set of interests to represent those of the rank-and-file); Josh Eidelson, *Walmart Workers Model 'Minority Unionism*,' THE NATION (Dec. 11, 2012), https://www.thenation.com/article/archive/walmart-workers-model-minority-unionism/ [https://perma.cc/HW7D-T2HK].

273. *See* Murch, *supra* note 24; Greenhouse, *supra* note 269 ("Support for a union in their workplace rises to 74% for workers aged 18 to 24, 75% for Hispanic workers, 80% for Black workers, and 82% for Black women workers (the highest of any race and gender group).").

274. Bell, *supra* note 93, at 767–75; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139, 148 (1989). Emma DeGraffenreid and four of her colleagues sought to represent the first class of black women autoworkers, in a Title VII race discrimination action against General Motors and the United Auto Workers. Their efforts elicited the formalist evidentiary procedures courts layered onto Title VII as of the 1980s, as the district court insisted that non-discrimination operated only on a single axis of identity.

275. *See generally* Crenshaw, *supra* note 274.

of workers at "the bottom"—particularly, racial minorities and those whose social identities are shaped by repressive conditions[276]—and Congress's racist excision of farmworkers and domestic workers from the New Deal.[277]

Workplace jurisprudence from this period not only disempowered entire communities, but racially gerrymandered their redistributive effects. In *Degraffenreid*, the court did so to preserve formalism's logic of one-dimensional class comparators, with the effect that white women were presumed to stand in for all women raising Title VII claims. In the New Deal labor carve-outs of agricultural and domestic workers, the South reaped pecuniary benefits and maintained an oppressively racialized economy and openly flouted reforms that would have empowered opponents of the Southern elite.[278] And since the 1960s, legal liberals (including the "race-conscious left") have struggled with conceptualizing racial justice, primarily preoccupied with integration, assimilation, difference, and colorblindness.[279] These differences, in power, in experience, in representation, are suppressed along lines including race under the NRLA's ultimate model focusing on industrial bargaining.

We cannot acquiesce to theorizing the workplace as a commercial, private sphere. Doing so shielded and hastened subordinating projects in political and legal theory. Among low-income workers, resisting the privatization of boundaries for organizing makes more sense than solely relying upon a rights system that has failed to reform institutions.

A. Twenty-First Century Worker Organizing

Popular movements cultivate, safeguard, and regenerate vital democracy-building skills of resilience and adaptation.[280] Group solidarity derives from the collective's analysis of power; the power analysis, in turn, turn informs tactics to redistribute power. As movements and a new wave of working organizing unfold—and related litigation winds its way through the courts

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276. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (defining "[l]ooking to the bottom" as "adopting the perspective of those who have seen and felt the falsity of the liberal promise").

277. Perea, *supra* note 186, at 127.

278. LICHTENSTEIN, *supra* note 254, at 109–13.

279. Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE 38, 42 (Wendy Brown & Janet Halley eds., 2002) (writing in the 2000s, noting the "politics of difference" as the dominant approach).

280. *See* SCOTT L. CUMMINGS, BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA'S PORT 185 (2018); DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 28, 143–48 (2020).

and the Board—I examine their implications for the interplay among collectivity, solidarity, and work law.[281]

Organizing and expression of solidarity need not necessarily result in a formal group or organization. The term traditionally encompasses the organization of purposive activities, and the formation of connective structures and networks.[282] Worker strategies have acquired existential importance to organizing as union membership nationally has hit a historic low[283] and are the backdrop to racially solidarist campaigns that strain against the liberal labor model.

Complicating the tensions between labor and civil rights movements were *Hughes Tool* and Title VII. Once it addressed the most serious forms of racism and bias within unions, the law fell silent as to competing conceptions of solidaristic organizing. Workers' organizing efforts in recent years have elevated forms of solidarity linking issues involving their employers with issues affecting workers' communities—respectively, a pandemic-level health crisis that pervaded both work and home, and the notion that Black lives matter. A pivotal case from the twentieth century, *Emporium Capwell*, solidified an industrial model of bargaining over minority member voices.

A half century ago, a department store retaliated against workers who organized high-pressure but lawful protests against racist staffing practices.[284] But labor law arguably contemplated only two scenarios: one inclusive, the other exclusive.[285] In the first, workers in a union could apply spontaneous tactics to secure concessions from the employer over their concerns, independently of their union.[286] In the second, the workers were bound to their union's exclusive representation—and wide discretion—in negotiating with the employer over those concerns, including structural racism.[287]

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281. Future research will study alongside, and engage directly with, organizers undertaking interracial organizing.

282. SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 123–24 (3d ed. 2011).

283. Press Release, U.S. Bureau of Labor Stats., U.S. Dep't of Labor, UNION MEMBERS — 2022 (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/225Z-VAQE] (reflecting private-sector unionization rate of 6.0 percent and public-sector rate of 33.1 percent).

284. *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 55–56 (1975).

285. By "inclusive," I do not mean racially inclusive such that "exclusive" is not so, but I refer to its inclusion of the residual tactical options hypothetically available.

286. Absent competing representation of the workers, these are activities protected by Section 7 of the NLRA. *See* 29 U.S.C. § 157 (protecting "concerted activities").

287. *Id.* § 159(a) (mandating that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

The workers had notified their local union of racial discrimination against its Black, Asian American, and Latinx workers, denying them "promotions and respect," including access to more-coveted jobs with high commissions.[288] The grievants' leaders—two of which were Black[289]—disagreed with the white union leader's strategy of channeling these concerns through an individualized grievance system, opting for the more collectivist tactics of a community protest and boycott highlighting their concerns about institutional racism.[290] The Court's resolution of *Emporium Capwell* embodied liberalism's ability to extinguish alternative, experimental, or dissident forms of solidarity.[291] The justices chose to interpret the NRLA's exclusive representation principle strictly: union members could not undertake freeform solidarity tactics and actions, even if such a limitation bound minorities to the will of the workplace majority.[292] The liberal appeal of an equal opportunity to organize under this interpretation of the Act left labor law an inapt tool for redressing racial barriers in the very institutions the law sought to consolidate—and dominate—workplace activism.

Racism alleged against a company is "public" in the sense of our original intent that Title VII should further Reconstruction constitutionalism. When racism affects workplace and society simultaneously, the public/private distinction could render it a grievance that rarely finds a home in the current political economy of work law.[293]

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shall be the exclusive representatives of all the employees in such unit" as to their terms and conditions of employment).

288. SCHILLER, *supra* note 167, at 193, 196.

289. Spearheading the efforts were Walter Johnson, Tom Hawkins, and Jim Hollins. *Id.* at 195–97.

290. *Id.* at 196–99.

291. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 71–73 (1975); *cf.* Lin, *supra* note 6, at 1889–94 (arguing that the doctrine and practice of work law disincentivizes pursuit of disability accommodations for some members as a public good, rather than "selfish").

292. *Emporium Capwell*, 420 U.S. at 71–73. In other words, the Court held that "dissatisfied employees who object to the union's position on matters of collective bargaining and arbitration are unprotected." Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1326 (2002). Employees seeking racially just demands and strategies omitted from the New Deal labor law paradigm may be openly ignored, marginalized, or subject to retaliation.

293. TOMLINS, *supra* note 123, at 318 (1985) ("Even before the Taft-Hartley debates, it had become clear that such institutional legitimacy as unions could expect to enjoy in the post-war industrial relations system would be limited to activities which seemed to contribute to the well-being of the corporate political economy.").

1. Amazon Labor Union's Race-Centered Analysis

Amid a wave of unionizing at big retailers, warehouse workers mustered the first elected union within Amazon against the odds. Their efforts focused on reallocating the balance of power within the warehouses, and up through the management hierarchy to address systemic racism.[294] Rather than rely on traditional union models, organizing among current and former employees prioritized interracial solidarity and an independent power analysis of racial hierarchy.[295]

Amazon's warehouses are notoriously grueling operations hubs within the second largest employer in the United States.[296] Their workers face every trial imaginable: racially segregated hiring and promotion practices, inadequate pay, inhumane quotas, understaffing, high injury rates, safety hazards, and lack of pandemic protections in close quarters—i.e., paid sick leave, respect for disability requests, and protective equipment.[297] In the run-up to the April 2021 NLRB election, workers at Amazon's majority-Black Bessemer, Alabama location faced threats, surveillance, and retaliation from supervisors and, not surprisingly, did not succeed.[298]

Nonetheless, each Amazon warehouse hub reflected its own community dynamic and needs. "Amazonians United is spanking Amazon with the NLRB," according to a dispatch from Amazonians United Chicagoland that

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294. Josefa Velasquez, *Meet Christian Smalls and Derrick Palmer, the DIY Duo Behind the Amazon Labor Union's Guerilla Bid To Make History*, THE CITY (Mar. 24, 2022, 5:53 PM), https://www.thecity.nyc/staten-island/2022/3/24/22995196/amazon-workers-staten-island-union-vote [https://perma.cc/B3WF-JLMA].

295. Amazonians United Chicagoland, *Amazonians United Is Spanking Amazon with the NLRB*, AMAZONIANS UNITED CHICAGOLAND BLOG (May 25, 2021), https://auchicagoland.medium.com/amazonians-united-is-spanking-amazon-with-the-nlrb-fe289d9b2fb9 [https://perma.cc/QQR7-S49K] ("Think of the law and the NLRB as a weak shield that we can sometimes use to buy us time and space to grow our union and fight against retaliation, but never solely depend on the NLRB or the law."); *see, e.g.*, Velasquez, *supra* note 294 (quoting Amazon Labor Union President Christian Smalls: "[Traditional unions] like to organize differently than what we're doing. We're more out there. You're not going to find another union president that camps out for 10 months.").

296. April Glaser, *Amazon Now Employs Almost 1 Million People in the U.S. — or 1 in Every 169 Workers*, NBC NEWS, (July 30, 2021, 1:23 PM), https://www.nbcnews.com/business/business-news/amazon-now-employs-almost-1-million-people-u-s-or-n1275539 [https://perma.cc/TF9G-CGBG].

297. Jodi Kantor et al., *The Amazon that Customers Don't See*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html; Noam Scheiber & Karen Weise, *Amazon Labor Union, with Renewed Momentum, Faces Next Test*, N.Y. TIMES (Oct. 11, 2022), https://www.nytimes.com/2022/10/11/business/economy/amazon-labor-union.html; *see* Velasquez, *supra* note 294.

298. *See* Kantor et al., *supra* note 297.

same month.[299] And within a year after Bessemer, Amazon Labor Union beat the odds of a victorious union election at the company's 8,000-person Staten Island warehouse.[300]

The COVID-19 crisis exacerbated the racialized nature of low-paying logistical and service work—industries that have grown in support of the on-demand economy.[301] Black, Latinx,[302] and Asian American[303] workers occupied the most physically grueling positions, with high turnover encouraged by Amazon.[304] The company refers to those who collect the items to be placed onto conveyor belts and packed into boxes as "pickers," without any hint of irony.[305] At the Staten Island warehouse (known as "JFK8"), the grassroots effort was Black-led, and its membership mainly Black and Latinx.[306]

During the pandemic, the tightly interconnected nature of the warehouse's racial hierarchy, economic extraction, dehumanizing levels of physical risk, and disablement[307] led ALU's organizing to center race in its analysis.[308] Christian Smalls—who is Black—reluctantly launched himself as a leader of COVID safety protests in 2020 for JFK8's workforce.[309] As Smalls shared earlier:

> It was a life-or-death situation . . . . The pandemic was affecting not just Black and brown workers at the company, but Black and brown people as a whole in communities, especially in New York City. We

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299. Amazonians United Chicagoland, *supra* note 295.

300. Scheiber & Weise, *supra* note 297; Velasquez, *supra* note 294.

301. *See, e.g.*, Kantor et al., *supra* note 297.

302. Velasquez, *supra* note 294 (describing JFK8 employees as "largely young, Black, Latino, working class, and urban [sic]" and that "the vast majority of employees" are "people of color").

303. Kantor et al., *supra* note 297 (referencing data from graphic titled "Workers of Color Fuel Amazon's Operations").

304. *Id.*

305. Sarina Trangle, *A Look Inside Amazon's Staten Island Fulfillment Center, Run with Help from Robots*, AMNY (Apr. 14, 2019), https://www.amny.com/real-estate/amazon-staten-island-fulfillment-center-1-29807439 [https://perma.cc/NQ79-GAFH] (describing duties of picker and packer).

306. *See* Velasquez, *supra* note 294 (ALU campaign photographs on file with author.).

307. *See generally* Lin, *supra* note 6.

308. *Critical Wage Theory Panel Examines Race's Role in Labor Movements*, BROOKLYN L. SCH. (Dec. 7, 2022), https://www.brooklaw.edu/News-and-Events/News/2022/12/Critical-Wage-Theory-Seminar-Examines-Races-Role-in-Labor-Movements [https://perma.cc/WM48-NUVF]; *see also* Kantor et al., *supra* note 297.

309. Velasquez, *supra* note 294.

> became the epicenter of the world. People were dying here every 15 minutes, and most of the people were Black and brown.[310]

In response to the protests, a memo circulated to Amazon executives—including Jeff Bezos—discussing plans to portray Smalls as "not smart or articulate" and outlined plans to make him "the face" of the entire union/organizing movement.[311] Smalls, who had been denied promotions to higher management despite dozens of applications, set out to build power among his former warehouse coworkers upon hearing about the memo. He camped out at the bus stop outside of the warehouse for more than 300 days and with colleagues "talk[ed] to workers, signing them up" as part of "an independent multiracial, Black-worker-led effort."[312] ALU built interracial solidarity over these eleven months through friendships, building community at the bus stop, and providing mutual aid and sustenance to struggling coworkers in the forms of food, music, and communal heat in the cold.[313]

Groups engaged in mutual aid cultivated broad, multidimensional solidarity "because their members' lives are cross-cut by many different experiences of vulnerability," as Dean Spade notes.[314] The sphere of one's solidarity expands through "contact with the complex realities of injustice."[315] Rather than minimizing the complexity of the workers' concerns, ALU embraced it and explicitly related calls for solidarity under a theory of institutional racism. In 2020, Smalls volunteered to represent a Section 1981 class of Black, Latino, and immigrant JFK8 workers on the theory that safety policies were substandard compared with white workers' during COVID, constituting racial discrimination.[316]

ALU blazed an alternate path, and stands as a race-conscious experiment for the modern labor movement, because its maverick status ostensibly avoided an *Emporium Capwell* problem: to preserve their ability to direct strategy and tactics, Smalls and fellow warehouse workers sought to form a

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310. Transcript, *supra* note 14.

311. *Id.*

312. *Id.*

313. Velasquez, *supra* note 294; *see also Critical Wage Theory Panel Examines Race's Role in Labor Movements*, *supra* note 308 ("And we continue to build our relationship to earn the trust of the workers. We show the workers every day that we care for one another.").

314. SPADE, *supra* note 280, at 15; *see also* FINE, *supra* note 43, at 39 (noting that in institutional and political vacuum, workers' centers that generally attract marginalized workers combine commitment to mutual aid and identify with and participate in antiracist movements).

315. SPADE, *supra* note 280, at 15.

316. First Amended Complaint at 9, Smalls v. Amazon.com Servs. LLC, 20-cv-05492-RPK-RLM ¶¶ 1–40 (E.D.N.Y. Dec. 16, 2020).

union independent of organized labor.[317] The leaders were aware that organizing the JFK8 workforce called for a power analysis centering structural racism head-on, a course rarely pursued by unions.[318] Existing law and, as a result, labor organizing under the traditional industrial model, would not have considered Smalls a viable organizer or union president. Nor, under the NLRA, would he have been eligible to represent a bargaining unit or be protected from retaliation as a supervisor: Smalls was an (in-warehouse) "management associate" during the 2020 safety protests until Amazon terminated his employment.[319]

A trial court believed that the same principle applied to antidiscrimination law, where doctrine requires proof of *similarly* situated workers treated differently because of race. Reaching the merits, the court questioned Smalls' ability to compare Amazon's inferior COVID protocols for its mostly-minority warehouse workers to the preferential treatment Amazon's mostly-white supervisors received—as evidence of discrimination, *because* workers and supervisors are not similarly situated.[320]

Smalls's Section 1981 claim, at least, should have provided him the means to speak out against racialized disablement and hierarchy at Amazon, irrespective of the NLRA's carve-out of supervisors.[321] But even two levels of federal courts were not convinced. Evidently, his pleadings foregrounded disparities in COVID practices and racially disparate compositions between the entry-level and upper-level managerial workforce, but—even with the Amazon memo to CEO Jeff Bezos savaging Smalls's intelligence—raised nothing intentionally, dispositively "racial"; ironically, the NLRB had taken trial testimony in parallel proceedings and recently ruled that, through its anti-

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317. Jodi Kantor & Karen Weise, *How Two Best Friends Beat Amazon*, N.Y. TIMES (Apr. 14, 2022), https://www.nytimes.com/2022/04/02/business/amazon-union-christian-smalls.html [https://perma.cc/BD4Q-LM9J].

318. *See* John Logan, *Amazon, Starbucks and the Sparking of a New American Union Movement*, THE CONVERSATION (Apr. 4, 2022, 8:29 AM), https://theconversation.com/amazon-starbucks-and-the-sparking-of-a-new-american-union-movement-180293 [https://perma.cc/V27S-THS4].

319. 29 U.S.C. § 152(3) (1994) (noting definition of employee "shall not include . . . any individual employed as a supervisor"); First Amended Complaint, *supra* note 316.

320. Smalls v. Amazon.com Servs. LLC, 2022 U.S. Dist. LEXIS 21422, at *18–19 (E.D.N.Y. Feb. 7, 2022); Patrick Dorrian, *Second Circuit Skeptical About Amazon Covid-Based Race Bias Suit*, BLOOMBERG L. (Nov. 29, 2022, 2:31 PM), https://news.bloomberglaw.com/daily-labor-report/second-circuit-skeptical-about-amazon-covid-based-race-bias-suit [https://perma.cc/7CWZ-A835]. The panel ultimately affirmed dismissal of the claims in a non-precedential summary order. Smalls v. Amazon.com Servs., 2022 U.S. App. LEXIS 33762, at *1 (2d Cir. Dec. 8, 2022) (summary order).

321. Lin, *supra* note 6, at 1858–66.

union consultant, Amazon also referred to ALU organizers as "thugs," and "not a serious union drive" but "a Black Lives Matter protest about social injustice" in what it deemed an unlawful "appeal to racial prejudice and derogatory racial stereotyping" during a coercive interrogation in 2021.[322] Work law has come far, but not far enough since Reconstruction.

2. Black Lives Matter as Mutual Aid at Whole Foods

The public/private distinctions that courts, lawmakers, and commentators attribute to work law complicates, and thus actively dissuades, broad and intersectional solidarity in conceptualizing a sphere that protects organizing. In another wave of *sui generis* organizing, non-unionized Whole Foods workers protested racial violence in the hands of law enforcement by wearing insignia stating "Black Lives Matter" at work, linking their concerns to racialized working conditions but also—as the company argues—to "political" concerns outside corporate walls.[323]

After the May 25, 2020 murder of George Floyd by Minneapolis police officers, Whole Foods workers across the country moved quickly to express solidarity for each other and the Black Lives Matter movement.[324] Instead of the alignment of white/non-white identification and racial concern or "self"-interest typical of the late twentieth century, as proved to be the case in *Emporium Capwell*, grocery workers of all racial backgrounds expressed solidarity with Black communities.[325] They wore and shared BLM face masks, T-shirts, and sneakers "in a show of solidarity" with the movement, "to protest racism and police violence against Blacks[,] and to show support for Black employees."[326]

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322. *See generally* Smalls v. Amazon.com Servs. LLC, 2022 U.S. Dist. LEXIS 21422 (E.D.N.Y. Feb. 7, 2022), *aff'd*, Smalls v. Amazon.com Servs. LLC, 2022 U.S. App. LEXIS 33762 (2d Cir. Dec. 8, 2022) (summary order); Decision, Amazon.com Servs. Inc. and Amazon Labor Union et al., Case Nos. 29-CA-277198, 29-CA-278982, 29-CA-277598, 29-CA-278701, 29-CA-285445, 29-CA-286272 9–11, 43–44 (NLRB Div. of Judges N.Y. Branch Off. Nov. 21, 2023).

323. Josh Eidelson, *Whole Foods' Black Lives Matter Case Tests Speech Rights at Work*, BLOOMBERG L. (Aug. 15, 2022, 1:00 AM), https://news.bloomberglaw.com/esg/biden-lawyer-battles-whole-foods-over-black-lives-matter-masks.

324. *Id.*

325. In addition to Frith and Kinzer, potential national class action representatives were Cedrick Juarez, Faith Walsh, Mackenzie Shanahan, Corey Samuel, Abdulai Barry, Lindsay Vuong, Samantha Berimbau, and Camille Tucker Tolbert, Ana Belén del Rio-Ramirez, Lylah Styles, Kayla Greene, and Sharie Robinson. *See* Complaint, Frith v. Whole Foods Mkt., Inc., 1:20-cv-11358, at ¶¶ 6–21 (D. Mass., July 20, 2020).

326. Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 267–68, 268 n.1 (1st Cir. 2022).

Suverino Frith, a Black Whole Foods associate in Cambridge, Massachusetts, began wearing a BLM mask the day after Floyd's death.[327] A few weeks later, his white coworker Savannah Kinzer told him that Whole Foods workers in New Hampshire had been sent home for wearing the masks, and that she would organize coworkers to wear them in support of the employees,[328] as well as "Black co-workers, Black customers, [and] Black community members."[329] By late June 2020, at least thirteen employees at the store began wearing masks displaying "Black Lives Matter" regularly.[330] On June 24, 2020, Cambridge store managers told them they had violated a uniform policy—one unenforced until that moment—assigned them disciplinary penalty "points," and sent workers home without pay when they refused to take off their masks.[331]

"Until we see [racism] as a white person's problem and not a Black issue that white people have to empathize with, racism will persist," Kinzer told reporters the following day.[332] Daily thereafter the store sent several workers home without pay if they refused to remove their BLM mask—from the workers' perspective, a "walkout"—and assigned them disciplinary points each time until they reached a fireable level.[333] This response prompted further activism as the Cambridge workers' demands by July 2020 included: "freedom for all Whole Foods employees to specifically support black and marginalized lives; back pay for the lost time for protests; the revoking of all demerits for wearing the BLM masks; reinstating [COVID-19] hazard pay[;] . . . the ability to raise such issues at work without repercussion; and to make the racial demographics of Whole Foods employment accessible to the public and to make management more diverse."[334]

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327. Thomas Catenacci, *'That Isn't A Political Thing': Employees Suing Whole Foods, Amazon Over Black Lives Matter Masks Nearly Doubles*, DAILY CALLER (Aug. 26, 2020, 4:26 PM), https://dailycaller.com/2020/08/26/whole-foods-amazon-sued-employees-remove-black-lives-matter-masks [https://perma.cc/9U7B-ZL7J].

328. *Id.*

329. Kinzer v. Whole Foods Mkt., Inc., No. 20-cv-11358-ADB, 2023 WL 363586, at *8 (D. Mass. Jan. 23, 2023).

330. Catenacci, *supra* note 327.

331. *Frith*, 38 F.4th at 267–68.

332. Jordan Valinsky, *Whole Foods Workers Sent Home for Wearing Black Lives Matter Masks*, CNN BUSINESS (June 26, 2020, 1:46 PM), https://www.cnn.com/2020/06/26/business/whole-foods-black-lives-matters-employees-trnd/index.html [https://perma.cc/27CX-PBHC].

333. Jean Cummings, *Whole Foods Black Lives Matter Protests Grow as Workers Calling Out Hypocrisy Near Dismissal*, CAMBRIDGE DAY (July 12, 2020), https://www.cambridgeday.com/2020/07/12/whole-foods-black-lives-matter-protests-grow-as-workers-calling-out-hypocrisy-near-dismissal [https://perma.cc/BP3B-69CW].

334. *Id.*

Together, Kinzer, Suverino, and thirty-five others from stores across several states filed charges with the EEOC and NLRB, challenging the company's selective enforcement of the mask policy as race discrimination; retaliation for raising a good-faith Title VII claim; and retaliation for engaging in mutual aid and concerted activity.[335] Whole Foods fired Kinzer on July 18, 2020, a mere two hours after she informed her supervisor that she had filed her charges against the company.[336]

The NLRB general counsel took personal note of the precedential potential of these developments. In December 2021, the Board issued a complaint consolidating charges from several dozen Whole Foods workers across ten states.[337] At the administrative hearings the following summer, an internal Whole Foods email surfaced in which managers were told that workers could not wear BLM insignia at work because it would "open[] the door for union activity."[338] The administrative law judge heard weeks of testimony from solidarist workers in cities including Philadelphia, San Francisco, and Washington.[339] Although a ruling is pending, the manager's email reflects how *companies*, not simply workers, see past the dogmatism of public/private rules to focus instead on their permeability.

As Whole Foods pressed the argument that it viewed BLM as "political" and "controversial" speech unrelated to workplace conditions,[340] its email revealed their true concern that talks about opposing racism *in se*, and perhaps in particular, opposing anti-Black racism, would *foster* unionization through solidarist efforts. Was its concern the inverse of *Capwell Emporium*, in that a racially *unified* workforce is the most powerful in pressing their demands, economically and morally? Or was it a matter of statistics?

Support for a union is highest—at eighty percent—among Black workers (eighty-two percent for Black women workers), seventy-five percent for

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335. *See also* Order Consolidating Cases, Consol. Compl. and Notice of Hr'g., Whole Foods Mkt. Servs., Inc. and Kinzer et al., Cases 01-CA-263079, et al. (NLRB Reg. 20, Dec. 3, 2021). *See generally* Complaint., Frith v. Whole Foods Mkt., Inc., 1:20-cv-11358 (D. Mass. July 20, 2020).

336. Kinzer v. Whole Foods Mkt., Inc., No. 20-cv-11358-ADB, 2023 WL 363586, at *5 (D. Mass. Jan. 23, 2023).

337. Order Consolidating Cases, Consol. Compl. and Notice of Hr'g, Whole Foods Mkt. Servs., Inc., *supra* note 335; *see also Region 20- San Francisco Issues Consolidated Complaint Against Whole Foods for Unlawfully Disciplining Workers in Response to Wearing Black Lives Matter Apparel*, NLRB (Dec. 6, 2021), https://www.nlrb.gov/news-outreach/region-20-san-francisco/region-20-san-francisco-issues-consolidated-complaint-against [https://perma.cc/88UQ-JCLL].

338. Canales, *supra* note 267.

339. Eidelson, *supra* note 323.

340. *Id.*

Hispanic workers, and seventy-four percent for workers aged eighteen to twenty-four,[341] in line with historically higher interest among workers of color as compared with white workers. As it is, there are no figures available reflecting what portion of the aggrieved workers were white, Black, or Latinx.[342] Publicly, however, Whole Foods defended its policy based on legal precedent, arguing a 1978 standard: that the employees must have voiced concerns relating to their status "as employees" in order for the Act to protect them.[343]

The Court in *Eastex, Inc. v. NLRB* had introduced this standard as broad, however.[344] Union members distributed material supporting a federal minimum wage hike and opposing a potential state right-to-work amendment, materials that were indeed "political," but that alone did not preclude the activity from protection.[345] Workers need only show the concern is "self-serving" or "for themselves" on some level, as *Eastex* has been interpreted by the Board and courts.[346] From Kinzer's point of view, BLM was an expression of solidarity in the face of institutional racism and racial disunity, much like the pride flags that Whole Foods had permitted.[347] Her statement as a white person that "[racism is] a white person's problem" arguably sounds like self-interest, but the workers also protested the onerous racial effects of company practices. While the NLRB ruling on BLM solidarity at Whole Foods remains pending, Title VII did not offer additional protection, however—at least, on these facts.

Affirming dismissal of all race and retaliation claims, the First Circuit applied a textualist argument: punishment for wearing a "Black Lives Matter" mask was not prohibited race discrimination because Title VII limits

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341. Greenhouse, *supra* note 269.

342. *Id.* ALJ Mara Louise Anzalone found that workers from five stores in Washington state were acting in concert when they wore insignia in support of BLM in 2020 and that the NLRA protected their actions. Decision, Fred Meyers Stores Inc. and United Food and Commercial Workers Local No. 21, No. 19-CA-272795; Quality Food Centers Inc. and United Food and Commercial Workers Local No. 21, 19-CA-272796 (NLRB Div. of Judges S.F. Branch Off. May 3, 2023). At these stores, Black workers represented "a markedly small portion of the work force" and were "notably absent in the management ranks." *Id.* at *13. Judge Anzalone recommended that the stores be ordered to rescind any rules barring messages not approved by management, provide back pay to workers sent home without pay, and expunge their disciplinary records. *Id.* at *40–45.

343. Eastex, Inc. v. NLRB, 437 U.S. 556, 569, 574–77 (1978) (interpreting 29 U.S.C. § 157).

344. *Id.*

345. *Id.* at 564.

346. Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 96–97 (2019).

347. Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 267 (1st Cir. 2022).

protection to adversity "because of . . . such individual's race" and the workers, including Kinzer, had not pled facts adequately supporting selective enforcement.[348] The court below was far more skeptical, opining that Title VII "does not protect one's right to associate with a given cause, even a race-related one, in the workplace."[349]

The First Circuit instead left the door open to a Title VII associational theory, in which an employer cannot "disapprove[] of interracial association" as it could be "because of the employee's *own* race."[350] The panel cited *Holcomb v. Iona College*, in which a white man who alleged he was fired because of his marriage to a black woman was able to tie the discrimination to *his* race.[351] In a Pyrrhic victory, *Frith v. Whole Foods Market* convinced the First Circuit to join six other courts of appeal in recognizing a theory that analogizes racial animosity toward interracial solidary akin to punishing a race traitor.[352]

The strategies and racial frames of the Amazon and Whole Foods workers' organizing efforts did not cater to existing protections under liberalist precedent, in which workplaces are presumptively a subset of the private marketplace. If Smalls, Kinzer, and their colleagues were to have conformed strategy around work law's minefields, it would have amounted to the law exerting social control through disincentives. These dynamics became clear once litigation began to protect their advocacy, nonetheless. We turn next to the implications of their experiences as privatized public law.

B. Implications for Race, Solidarity, and Commerce

As detailed case studies, ALU and Whole Foods offered two richly detailed instances of how our workplace—and work law—can deeply shape our ideas regarding racial identity and self-interest. Within existing scholarship, they raise novel questions regarding the sociolegal construction of racial ideology in social movements.[353]

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348. *Id.* at 272–77 (interpreting 42 U.S.C. § 2000e-2(a)(1)).

349. Kinzer v. Whole Foods Mkt., Inc., 517 F. Supp. 3d 60, 75 (D. Mass. 2021).

350. *Frith*, 38 F.4th at 272.

351. *Id.* (citing Holcomb v. Iona Coll., 521 F.3d 130, 139–40 (2d Cir. 2008)).

352. Frith v. Whole Foods Mkt., Inc., 38 F.4th 263, 271–72 (1st Cir. 2022).

353. *Cf.* Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (describing, for the first time, the concept of racial identity performance as a workplace institutional phenomenon, and as a form of labor, not reflected in antidiscrimination doctrine); Gonzalez & Mutua, supra note 6, at 160 (citing MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2015)) (discussing the interaction of exploitation,

As race-conscious worker organizing breathes new life into the labor movement, we must be explicit in discussing how the law conceptualizes race, solidarity, and commerce in ways that are unworkable or unresponsive to their original purpose. Over the twentieth century, we witnessed modest increases in Americans' commitments to equality through law and government institutions, albeit without drastically altering private ordering. New Deal and Great Society programs advanced collective social welfare, along with civil rights activism in the Second Reconstruction, demonstrating that the state could—in some forms—be a source of public good, rather than violence and coercion.

After nearly a century of experience with modern work law, we intuit its daily presence in our lives, assured that it is within reach if we or someone we know experiences wage theft, discrimination, retaliation, or other unfairness that violates the expressive norms of public law. Years of headlines trained on warehouse workers, retail workers, and baristas advocating on a wide array of issues has further shaped an understanding that labor organizing is a protectible public interest.[354] In 2022, support for labor unions, i.e., collective advocacy at work, reached a sixty-nine-year high, at seventy-one percent.[355] Sizeable majorities now believe that the U.S. government does not provide enough help for poor people (sixty-two percent) and the middle class (sixty-one percent).[356] Only twenty-nine percent believe that the current economic system is generally fair to most Americans.[357]

Put another way, the instability and coercive potential of the market is concerning to most Americans. They perceive liberty and general welfare to begin with the state, if not other collectivities. And on the balance, they believe the workplace is of public concern and vests workers with

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stigma, and law as "race-making" through racial stratification, racial segregation, and the creation of sacrifice zones under capitalism).

354. Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/5LGG-TDPA] (reporting seventy-one percent of Americans approve of labor unions, highest on record since 1965 and comparable to high-watermark of seventy-five percent in 1953).

355. *Id.*

356. PEW RSCH. CTR., MAJORITIES SAY GOVERNMENT DOES TOO LITTLE FOR OLDER PEOPLE, THE POOR AND THE MIDDLE CLASS 3 (2018), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2018/01/01-30-18-groups-release.pdf [https://perma.cc/ZK94-SYFQ].

357. PEW RSCH. CTR., IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS 43 (2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/12/PP_2019.12.17_Political-Values_FINAL.pdf [https://perma.cc/MHN8-VL7R].

constitutional (public law) rights.[358] If even today, the legal basis for *Lochner* has been superseded by the four public norms explored above—history, statutory policy, regulation, and popular experience—then we must approach with humility the power dynamics that have failed to stem current move to privatize the public law of work.

Beyond legal frames, ordinary people conceive of solidarity as necessarily inclusive of racial solidarity, making no exception for commercial activities. I close with some modest, preliminary implications for race, solidarity, and commerce, related to popular discourse on race and solidarity, pluralistic economies, an interim role for private law, and structures beyond liberalism.

1. Discourses of Interracial Collectivity and Solidarity

The foregoing history and case studies illustrate the public/private divide's hold over the development of work law, not only in redistributing power—the Lochnerian move—but specifically where it seeks to improve race relations and address racial subordination.[359] By centering racist and intersectional subordinations, this mode of labor activism might render the race-versus-class debate academic.

Law born of the Second Reconstruction has nonetheless left its mark on society: today, most workplaces reflect levels of racial diversity that exceed that of most K-12 public schools or residential neighborhoods.[360] Interacting with coworkers is one of the most important predictors of having positive ties to "other races," for all racial groups.[361] Yet the background principle that whether a conflict is allegedly industrial or communal still casts a long shadow over the law's protections for solidarist activity.[362] The unspoken deterrence value of such a distinction, acculturated by some as a legitimate one, should prompt us to renew CRT scholars' critiques of legal liberalism and liberal political theory.[363]

Social scientists continue theorize racial formation under the twin processes of inclusion, i.e., "reflecting . . . members' recognition of each

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358. LEE, *supra* note 183, at 266 n.4 (describing study in which most of 200 adults surveyed believed that the Constitution "protected employees' freedoms of speech, privacy, and association at work," regardless of employment in the public or private sector).

359. *See, e.g.*, De Souza Briggs, *supra* note 6, at 267.

360. *Id.*

361. *Id.* at 263, 285.

362. *See* Pope, *supra* note 188, at 60.

363. *E.g.*, Bell, Jr., *supra* note 31, at 518–19, 523–25; Gotanda, *supra* note 120, at 8–16; Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510–11 (2009).

other as belonging together"; and exclusion, i.e., "reflecting the way the more powerful section of the population defines a less powerful social category as consisting of people to be set apart."[364] Earlier, we examined non-unionized settings in which interracial solidarity and workplace demands developed largely unencumbered by existing law and institutional campaign practices. ALU and Whole Foods workers centered racial solidarity in their strategies, devising their own frameworks to define and provide mutual aid amid the crises of COVID-19 and the violent racism Black Lives Matter resists.[365] Such harms were manifest in their employment, included whites' "self"-interests raised, and led them to risk reprimand or termination for one another, irrespective of what lawyers would have counseled and how courts would interpret the NLRA and Title VII. The irony is that campaigns' *express* interracial solidarity would break down the prevailing processes of inclusion and exclusion alike, so as to promote integration and belonging.

Resisting vastly resourced corporations, these workers located power in solidarity as the point and that it, echoing New Deal unionists, "should be protected as such."[366] Warehouse and grocery workers conceived of the crises of inhumane pandemic policies, racist violence, and institutional racism in the workplace as interconnected disempowerment when public/private distinctions would place them in isolation. As of 2022, more than half of nonunion workers respond that they would join a union if they had the option,[367] at a time when the U.S. workforce becomes increasingly comprised of racial minorities.[368] Our two case studies reflect mere thousands of the hundreds of thousands of workers engaged in resistance actions and organizing in the past year.[369] As cultures of solidarity continue to spread across workplaces and social networks nationally, we must give due credit to everyday workers demanding racial and economic justice altogether.

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364. MICHAEL BANTON, THE IDEA OF RACE 147 (Westview Press 1978); *see also* MICHAEL BANTON, RACIAL THEORIES 197–99 (2d ed. 1998) (noting that "social inclusion and exclusion" are processes are most significant to supersede the imprecision of racial group identity formation in studying social relations).

365. Eidelson, *supra* note 323; Kantor et al., *supra* note 297. Future work will develop the relationship between racial formation theory and workplace activism that expressly advances interracial solidarity.

366. *See Pressman NLRA Statement*, *supra* note 181.

367. Greenhouse, *supra* note 269.

368. Fry & Parker, *supra* note 269.

369. JOHNNIE KALLAS ET AL., LABOR ACTION TRACKER: ANNUAL REPORT 2022, at 3 (2023).

2. Pluralistic Economies and the Commerce Clause

In these glimmers of a new political economy—one that rejects the sovereignty of commerce and colorblindness, that values respect through reciprocity and collective responsibility rather than *quid pro quo*—race, solidarity, and commerce are intertwined. Political economists in the mainstream have been hostile toward acknowledgements of diversity in economic thought,[370] but a candid account acknowledges that foundational, even celebrated, areas of law resist the illusory separation of legal rights from collective power.[371] American commerce is pluralistic, even if courts have not yet retired *Lochner* from the desk drawer. Where contemporary legal and political discourse generally convey that there are no alternatives to the current economic system, workers themselves strategize and implement alternatives together.

Work law also developed our understanding of the commerce power since the late nineteenth century,[372] and commerce remains the constitutional anchor for the NLRA and Civil Rights Act of 1964. It provided tools previously denied the federal government to reshape the market and reallocate resources and racial power. The largely unsuccessful challenges to the Affordable Care Act spurred extensive research into the Commerce Clause that elicited histories of economic activity very different from the Roberts Court's view. These insights would serve us well in reminding the Supreme Court if it were tempted to revisit the *Heart of Atlanta* precedent to build a "firewall" between commerce and racial discrimination.

For example, eighteenth-century understandings of commerce attributed deeper purpose and meaning to "commerce" beyond a mere trade or exchange, connoting a "broader sense of 'intercourse'" that "includes ideas of sociality, intermixture, [and] integration" of relationships.[373] In the nineteenth century, the Court invented a theory of trade in part "to maintain distinctions between local and national power," distinctions based upon conditions that no longer exist.[374] When definitions become impenetrably

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370. Julie Matthaei, *Thinking Beyond Capitalism: Social Movements, Revolution, and the Solidarity Economy*, *in* A RESEARCH AGENDA FOR CRITICAL POLITICAL ECONOMY 209, 209 (Bill Dunn ed., 2020).

371. NEDELSKY, *supra* note 74, at 255.

372. U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

373. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 38 (2010).

374. *Id.* at 21.

circular, as in commerce consists of commercial activity, it bears repeating that markets are not self-defining.[375]

Work law continually shapes and contests ordinary people's economic views, preferences, and practices. The intense suspicion with which businesses and the state viewed alternative economic models has a longer pedigree than *Lochner*. The Knights of Labor's racial and gender inclusivity, while not immune to xenophobia, was predicated on an economic movement that advanced human agency. Jointly owned cooperatives and collaborative economic systems would certainly expand meaningful alternative forms of economic egalitarianism. When pressed by a senator to say whether there was a "general desire . . . among the laborers of the country to destroy capital[,]" the Knights of Labor's Layton replied: "Only through co-operative effort on the part of themselves to become, in turn, what may be called small capitalists; that is, to engage in co-operative industry and do away with the necessity of capital as it exists at present."[376]

Ironically, the path forward may come from *Lochner*, or at least its dissent. Justice Holmes, "duty"-bound, reproached his fellow justices for imposing an economic orthodoxy within constitutional law:

> This case is decided upon an economic theory which a large part of the country does not entertain. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment[.][377]

Resisting current systems and practices as unsustainable, workers raise moral claims that have previously mobilized public support. Throughout history, American workers have experimented with cooperatives, collaborative capitalism, solidarity economies, and other alternatives.[378]

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375. David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 16 (2013). This admonition is a close companion to the Legal Realist observation that markets are not self-regulating.

376. *The Relations Between Labor and Capital: Hearing Before the S. Comm. on Educ. and Lab.*, *supra* note 140, at 217–18.

377. Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (emphases added).

378. *See generally* RASHMI DYAL-CHAND, COLLABORATIVE CAPITALISM IN AMERICAN CITIES: REFORMING URBAN MARKET REGULATIONS 5–7 (2018) (defining capitalism as a "spectrum" and collaborative capitalism as a system in which businesses share key resources amongst other businesses that are engaged and involved within a given collaborative network); Matthaei, *supra* note 370, at 210.

Much as workers today, they sought to free themselves from inequality and dependence by creating systems of solidarity, without mandating any specific practice because of the contingent nature of each community.[379] Alternative economic frameworks can be found within economic practices and institutions that have taken shape within the mainstream economy, and can emerge and integrate over time.[380]

In the instance of solidarity economy movements that emerged in the 1990s in Europe and Latin America, defining values include "cooperation, equity in all dimensions, participatory political and economic democracy, sustainability, and diversity [or] pluralism."[381] At the most local level, immigrant and low-paid workers have resisted the traditional form of business organization that depresses wages—the corporation and its shareholder structure—to form their own worker-owned cooperatives that establish equitable ownership and governance.[382] The largest such worker-owned cooperative is Cooperative Home Care Associates, and its Philadelphia affiliate.[383] Supportive networks and knowledge-sharing include the pioneering New York City Network of Worker Cooperatives and Green Worker Cooperatives.[384] In addition, cooperatives of workers, consumers, and producers and efforts to promote sustainable consumption practices are variations on an economy that elevates community.

Americans experience the institution of work as a subset of the economy, despite the technocratic turn in liberal economic thought that, for decades, has disempowered ordinary people in decisions regarding economic policy choices.[385] The solidaristic principles that led to past reckonings within work law, and in turn, further shifted in societal attitudes about the possible, perhaps point us to a different future.

3. Beyond Liberalism, and an Interim Role for Private Law

In law and politics, if stability rests on what has been done before, they will marginalize and reject what has not yet been tried. Thus, this discussion has furthered the view that "[p]eople's narrative[s]" hold a more powerful

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379. Matthaei, *supra* note 370, at 214.

380. *Id.*

381. *Id.*

382. Carmen Huertas-Noble, *Worker-Owned and Unionized Worker-Owned Cooperatives: Two Tools To Address Income Inequality*, 22 CLINICAL L. REV. 325, 328–50 (2016).

383. DYAL-CHAND, *supra* note 378, at 7.

384. Huertas-Noble, *supra* note 382, at 350–52.

385. *See* BERMAN, *supra* note 46, at 19–22.

and dynamic place in the political economy than elite theory.[386] Both social and legal discourse heavily rely upon narratives to "translate abstract ideas into familiar and socially resonant concepts."[387]

The narrative that our nation was founded on purely selfish conceptions of democracy stokes a self-fulfilling prophecy, one that must respond to contradictory historic facts. But for its white supremacist ideation, republican theory in 1776 rested upon an anti-subordination principle, under which the "liberties of private individuals depended upon their collective public liberty."[388] As the historian Gordon Wood noted, in the late eighteenth century "the solution to . . . American politics seemed to rest not so much in emphasizing the private rights of individuals against the general will as it did in stressing the public rights of the collective people against the supposed privileged interests of their rulers."[389]

Classic liberal theory offered a contradiction-closing narrative that would protect property, slavery, and white supremacy against republican theory. Republicanism took root in U.S. political theory at the time *The Wealth of Nations* published, in 1776, that "people are selfish, [and] it is possible to channel that selfishness to produce publicly beneficial effects."[390] The latter narrative offered relatively more convenient cover for early American institutions and legal structures to sustain a racially stratified economy.[391] The advent of the administrative state undermined the distinction,[392] without fully erasing it.

At present, a new contradiction-closing narrative may be taking shape in the emergence of scholarship under the banner of New Private Law ("NPL") theory.[393] These scholars endeavor to respond to CLS and CRT theorists as well as serve as a moderating influence upon law-and-economics movement within law, asserting an "intrinsic interpersonal . . . core" to private law (as NPL's members variously define the private).[394] As Lee observes, some within NPL believe "common law precepts also shore up the legitimacy of

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386. *See* Cooper Davis et al., *supra* note 109, at 307–08.

387. *Id.* at 308.

388. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 61 (2d ed. 1998).

389. *Id.*

390. CHRIS BENNER & MANUEL PASTOR, SOLIDARITY ECONOMICS: WHY MUTUALITY AND MOVEMENTS MATTER 1 (2021).

391. Klare, *supra* note 20, at 456 n.19.

392. *Id.*

393. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397–98 (2016); STEFAN GRUNDMANN ET AL., NEW PRIVATE LAW THEORY: A PLURALIST APPROACH 1–5 (2021).

394. Lee, *supra* note 59, at 148.

employment law statues by colonizing them from within."[395] Indeed, attempts to preserve a public/private distinction without disturbing liberal or capitalist tenets does not bode well for eliminating racial subordination through law. Private law theorists would be invaluable in persuading courts to retire historically myopic and abstracted views of interpersonal relationships[396] in pursuit of a common-law commitments to antisubordination.[397] But claims that work law belongs in private law with "public values" would be self-fulfilling if we continue to place our faith in courts[398]—and disregard any deep political divisions over shrinking welfare regulation in favor of personal responsibility. NPL thus far avoids questions of racial inequality in doctrine and legal structures, by calling discrimination "intuitively wrong" from an abstracted, interpersonal view.[399]

What we are left with, then, is an intricately interdependent public/private distinction in U.S. political economy.[400] While private law theory makes claims to realizing possible benefits for other parties, one at a time, most contracts still rely upon the state to enforce them.[401] Private law and its methods are predisposed to displacing ultimate decision-making and accountability from the populace to courts under its juristocratic nature,[402] or as courts in recent decades have done, displacing them to closed-door, private arbitration under private-law theories.[403]

As Americans of all political stripes now openly acknowledge, the law-making taking place within courts, and most visibly, the Supreme Court, is

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395. *Id.* at 150.

396. *See* Bagchi, *supra* note 33, at 15 (noting the common critique that "private law theory . . . could be read to assert the primacy or even the exhaustiveness of the individual perspective").

397. *E.g.*, *id.* at 11, 17 (arguing that private law "finds a space in which domination recognized as a potential bilateral wrong" and explains why *individual* injustice requires compensation and redress).

398. *See* Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24 THEORETICAL INQUIRIES L. 49, 50 (2023).

399. *Id.* at 58. At present, NPL does not speak to private law theory outside of existing legal liberal models or address heterodox economic systems outside of capitalist economies. *See also* HENRY MATHER, CONTRACT LAW AND MORALITY 26 (1999) (arguing that contract law is not a successful means of securing economic equality in a capitalist market).

400. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 565 (2000).

401. *Cf.* FONER, *supra* note 84, at 164–68 (describing absence of trust between plantation owners and freedmen after Civil War).

402. *See supra* Parts I, II.C.

403. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1019–22 (1996) (noting the increasingly privileged status of arbitration agreements before the Court "ma[d]e private arbitration the central and distinctive feature of our collective bargaining system").

normative. Ideology is a form of political power, and work law scholars share a responsibility to acknowledge the field's role in maintaining racial subordination and support "new conceptions of social relationships and of community," as Klare once urged.[404] By understanding work law's fraught development today as *privatized public law*, it (1) retains its unique ability to forge our individual, intimate relationship with our economy, a matter of public default; and (2) identifies private law as a residual tool as we pursue economic and racially just alternatives to an individualized "rights"-based system. For their personal and collective welfare, generations of workers have actively resisted the liberalism paradigms then prevalent, not only as to public/private law, but also as to the sociolegal concept of the private sphere.[405]

Work law's gravitation toward public law is perhaps clearest in yet another nationally prominent movement: feminist and MeToo activists who have adopted *de-privatization* of the private sphere, as well as the private-law paradigm of contract to combat systemic workplace sexual harassment and assault, both community- and job-related.[406] In 2021 and 2022, the activism of the MeToo movement generated enormous political and moral pressure on Congress to deal the first two major blows to mandatory arbitration of work law claims involving gender abuse, arguing that private, confidential proceedings and the proliferation of non-disclosure agreements undermined public regulation against such conduct.[407] If these pathbreaking laws are not interpreted to reach intersectional or sex-plus claims, particularly those that simultaneously involve race,[408] reflects a general instinct that we need to de-privatize sexism, particularly misogyny or structural sexism. This Article

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404. Klare, *supra* note 38, at 200.

405. Gotanda, *supra* note 120, at 12 (observing that doctrines "distinguishing public from private [relations and actors are] continually evolving; consequently, the dividing line is a moving target for those who seek to use them as openings for racial social change").

406. *See* Tarana Burke, *Tarana Burke: What 'Me Too' Made Possible*, TIME (Oct. 12, 2022), https://time.com/6221110/tarana-burke-me-too-anniversary [https://perma.cc/DR97-2NUR] (describing, as the founder of the MeToo movement, its commitments to "dismantling rape culture and undermining the violence it creates[,] . . . tak[ing] responsibility for creating a world without sexual violence[,] and . . . respond[ing] to the needs of the survivors who are already here"); Lin, *supra* note 6, at 1878–901.

407. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117–90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.); Speak Out Act, 42 U.S.C.A. §§ 1940104 (2022). Originally, the legislation sought to include all discrimination claims, but Congress excised the language in the final bills.

408. Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1803 n.19 (2021) (noting that Asian American and Black women in science reported that the harassment they faced based on their gender was difficult to separate from the bias they experienced due to race).

begins to explain how we have yet to sharply demand the de-privatization of racism. Nonetheless, the MeToo movement's success in legislatively carving out such claims from privatizing such abuses *is* an instance of popular resistance to privatized public law.[409]

As this project is ongoing, and could not possibly address all of its implications for race, solidarity, and commerce in a single article, a *privatized public law* critique implicitly challenges us to explore alternative models for the state, legal theory, and economic systems. Since scholarly consensus generally rejects the public/private divide on the notion that private law is never truly independent of the public.[410] Private law methods that concretely exist, however, provide a level of detail and norms that may facilitate choices for a society in social and economic transition. Accepting such arrangements as legitimate within public consciousness could be achieved through "information gathering, participatory consultation, facilitation and ultimately consent,"[411] and move us toward more open-ended, "transformative notions of self-understandings, interpersonal relations, and political and economic systems simultaneously."[412] When society perceives a need to break from the past, law has the ability to reshape the language people need to see what had been invisible, and with that history, meaningfully describe alternatives.[413]

Analyzing work law's current vulnerable state as *privatized public law* historicized and facilitated discussion of the link between legal liberal conceptions of commerce and the law's maintenance of racial subordination. Conversely, it allowed us to recognize the small- and large-scale frame transformations ordinary people have achieved through mass social movements, with the goal of strengthening all labor movements from within.

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409. *Id.* at 1820–21.

410. *See supra* notes 128, 401, and accompanying text.

411. Edward J. Janger, *Towards a Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOK. J. CORP. FIN. & COM. L. 39, 49 (2017) (describing a "legitimacy loop" in fiscal restructuring of municipalities).

412. Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 511, 223 (2022) (describing non-commodified goals of contemporary transformative justice efforts).

413. Cooper Davis et al., *supra* note 109, at 308–09 (describing the persistence of the Confederate narrative of states' rights in Court jurisprudence).

CONCLUSION

> *[T]here is something illusory about thinking of rights as distinct from collective power (which makes very complicated their capacity to serve as protection from collective power).*
>
> —Jennifer Nedelsky, 1990 [414]

We are in the midst of ambitious efforts to usher in racial and economic change, and link them in public thought. This Article has elicited histories, both mainstream and inconvenient, to reveal work law's potential as a site of transhistorical economic change and racially solidaristic power. Rather than legitimizing the worst aspects of private law theory and liberalism, as the Roberts Court has, I have sought to make visible such efforts to privatize work law as deliberate and calculated, thoroughly informed by racial politics. This project also brings to the fore the ability of ordinary people to reconstruct law in line with our original pursuit of interracial solidarity and the collective good. At this juncture, my case studies of ALU and Whole Foods workers' organizing are simply two among a multitude of race-centered campaigns that require both explicit support and new approaches from scholars within CRT and LPE to interpret. From this standpoint, such endeavors may be more optimistic than pessimistic.

We began by observing that inherent to every critique of law is a critique of racial formation.[415] Because race and law are co-constitutive, work law requires a theory of a public/private designation's effect on anti-subordination principles. This Article has shown how contemporary worker movements that center racial justice must already navigate around conventional strategies, legal analysis, and institutions in areas central to strengthening those movements from within.

At the same time, the expectation that law schools graduate practice-ready advocates means that work law courses should address the on-the-ground impact of doctrines—such as *Emporium Capwell*'s rule of tyranny of the majority (union) as bargained-for, *Eastex*'s assertion of "employees as employees" as purportedly commercial limits upon protected organizing, and the Title VII theory of associational discrimination—upon labor movements and broader society.

Uncovering the increasingly sophisticated public/private divides in work law allows us to deprogram negative narratives, strategies, tactics, messaging, and outcomes with respect to interracial solidarity. The field

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414. NEDELSKY, *supra* note 74, at 255.

415. *See* Melamed, *supra* note 3, at 19–20.

requires bold theoretical moves to remain relevant to a majority-minority workforce, on the heels of today's Black- and minority-led, so-called "DIY" labor insurgency. It is past time to revive the race-critical connections that animated labor and employment scholarship in earlier decades. This discussion has begun to sketch some core implications of these insights, including: urging scholars to reassess how we teach work law's implications for on-the-ground strategies, particularly as to movements for racial justice; alternative models for the state; reconsidering the emphasis of legal theories within legal education; and highlighting the importance of pluralist roles for economic systems and private law.

That the public/private law allocation within law school curricula endures—centuries after their initial sorting[416]—yields further insight for restoring antisubordination principles within work law, as well as other fields. Racial disunity, violence, and other forms of repression have become *a priori* concepts in scholarship examining "traditional" public law areas of criminal and constitutional law.[417] In no small part is this development attributable to the understanding of ordinary people that public misconduct by the state, including anti-Blackness in the criminal system,[418] or suppression of minorities' voting power,[419] is illegitimate, and therefore signals intrinsically oppressive systems of law.

This project does not aim to deny the state's ability to provide means of survival in other forms, or its importance in doing so as we cultivate alternatives.[420] It is offered with the intent to invite scholars to further the

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416. Horwitz, *supra* note 58; HORWITZ, 1870–1960, *supra* note 75, at 10–11 (locating the trend of a sharp public law/private law distinction in the late-nineteenth century).

417. *E.g.*, Jamelia N. Morgan*, Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1401 (2021); India Thusi, *Policing Is Not a Good*, 110 GEO. L.J. 226, 233 (2022).

418. *E.g.*, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 408 (2018).

419. *E.g.*, Atiba R. Ellis, *The Voting Rights Paradox: Ideology and Incompleteness of American Democratic Practice*, 55 GA. L. REV. 1553, 1559 (2021).

420. There exist divergent working definitions of "the state" as understood by the U.S. public. Ahmed White notes the major functions of the modern capitalist state: "to perform functions that are essential to the maintenance of capitalist production." Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 778 (2005). On pluralist approaches to the role of the state in emancipatory demands from law, see generally ANDREA J. RITCHIE & MARIAME KABA, ABOLITION & THE STATE: A DISCUSSION TOOL 24 (2022), https://www.interruptingcriminalization.com/abolition-and-the-state [https://perma.cc/PPU7-4SEC]; Andrew Elmore, *Labor Redemption in Work Law*, 11 U.C. IRVINE L. REV. 287, 290 (2020) (examining state employment law protections for formerly incarcerated people without imposing legal obligations on private employers, within broader

critique of *privatized public law* in linkages to other contested areas, such as tort law,[421] family law,[422] health law,[423] corporations law,[424] international law,[425] bankruptcy law,[426] consumer law,[427] and securities law.[428]

While liberal legal logics such as the public/private divide, a zero-sum frame of rights enforcement, and a juristocratic system of law are major, if not idealized, vectors of agreement on the law among the Left, moderates, and the Right, I do not presume that what we call the "public" today ought to be called the "public" tomorrow. Nor do I presume that collectivity and interracial solidarity should always be conceived as "public" at our true Founding, when abolitionists achieved passage of the Reconstruction Amendments after a civil war fought over a racialized economy dependent upon slavery. Inasmuch as CRT and LPE scholarship also grapple with the roles of the state in social change and, implicitly, economic change, future

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framework advancing state redemptionist moves against discrimination in housing, credit history, past unemployment history or eviction, and receipt of public assistance).

421. *E.g.*, Gregory C. Keating, *Is Tort Law "Private"?*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 351, 351 (Paul B. Miller & John Oberdiek eds., 2020).

422. *E.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 14 (2002); Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939 (2023); Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CAL. L. REV. 1315, 1318–19 (2022).

423. *E.g.*, Wiley et al., *supra* note 8, at 1235–36.

424. *E.g.*, Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 413–30, 454–64 (2002) (discussing the privatization of previously public-identified sectors of hospitals and K-12 education, and role of public benefit corporations, and states' constituency statutes in expanding norms of corporate governance beyond the shareholder primacy model); Fenner L. Stewart, *The Corporation, New Governance, and the Power of the Publicization Narrative*, 21 IND. J. GLOB. LEGAL STUD. 513, 515–16 (2014).

425. *E.g.*, E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1532, 1538, 1543 (2019).

426. *See generally, e.g.*, Janger, *supra* note 409.

427. *E.g.,* Duncan Kennedy, *The Bitter Ironies of* Williams v. Walker-Thomas Furniture Co. *in the First Year Law School Curriculum*, 71 BUFF. L. REV. 225, 225–37, 237 n.26 (2023); Vijay Raghavan, *Inframarginalism & Economism*, *in* THE INFRAMARGINAL REVOLUTION: MARKETS AS WEALTH DISTRIBUTORS (R. Woodcock ed., 2023) (forthcoming, manuscript on file with author) (observing that mid-twentieth-century consumer financial regulation was pluralistic, and thus able to provide some protection).

428. *E.g.*, Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 745, 750 (2022); Antonio Marcacci, *Perspectives Around Transnational Securities Regulation*, *in* TRANSNATIONAL SECURITIES REGULATION: HOW IT WORKS, WHO SHAPES IT 481, 481 (2022); George S. Georgiev, *The Breakdown of the Public-Private Divide in Securities Law: Causes, Consequences, and Reforms*, 18 N.Y.U. J.L. & BUS. 221 (2021).

scholarship in work law must contend with the risks of delegating to the state any decisive power over racial formation.[429]

A new path forward becomes necessary in light of how the public/private divide guides—or forecloses—how we relate to one another meaningfully. As predicted here, workers will also lead the way.

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429. My thanks to Willy Forbath for noting this possibility in a recent conversation.